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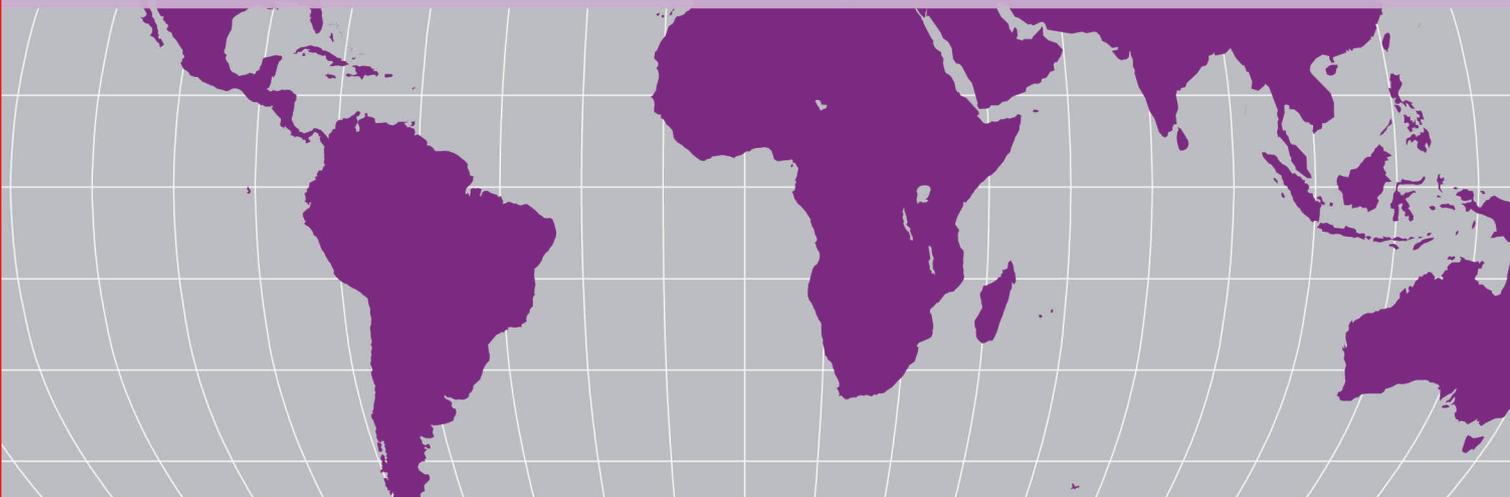


Forum for  
International Criminal  
and Humanitarian Law

**Publication Series**

## **Distributive Justice in Transitions**

Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz and  
Maria Paula Saffon (editors)





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**Morten Bergsmo, César Rodríguez-Garavito,  
Pablo Kalmanovitz and Maria Paula Saffon (editors)**

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## PREFACE

The Forum for International Criminal and Humanitarian Law seeks to contribute to scholarship and practice. To this end, we not only organize and co-organize seminars and other activities, but also promote seminar findings and other publications through this Publication Series. Most papers contained in this volume were presented at an expert seminar held in Bogotá, Colombia in June 2009 entitled *Land reform and distributive justice in the settlement of internal armed conflicts*.

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## **Introduction\***

**Morten Bergsmo, César Rodríguez-Garavito,  
Pablo Kalmanovitz, and Maria Paula Saffon**

In transitions from armed conflict or oppressive dictatorship to peace greater emphasis has perhaps been placed on corrective justice than on distributive justice in some countries. This emphasis can be explained by the fact that one of transitional justice's main concerns is to address human rights violations committed in the past. Transitional justice's foremost mechanisms are correspondingly retributive justice against perpetrators, truth-telling processes, and reparations to victims. It is generally believed that rectifying wrongs is good in itself, and also that if serious wrongs are not adequately addressed, sustainable peace will be difficult, even impossible to achieve. Lack of acknowledgment and amendment of past wrongs may perpetuate a culture of impunity towards human rights violations, foster grievances and resentment, and facilitate the denial of the threat of, and lay the groundwork for, future atrocities.

Arguably, by considering mainly specific past atrocities and their direct effects, transitional justice has been narrowly focused on the past. As a result, its discourse and practice have tended not to pay much attention to the role of principles of distributive justice and of considerations of economic efficiency in transitions from armed conflict to peace. But there are good reasons for relevant actors to care about distributive justice and economic efficiency in the specific circumstances of transition from armed conflict to peace.

First, a singular emphasis on narrow questions of accountability would foreclose consideration of wider, far-reaching social structural factors that are both causally related to armed conflict and in violation of principles of social justice. The distribution of wealth in society, and

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of land in particular, has arguably been at the root of many internal armed conflicts. Moreover, economic growth is a key factor for a sustainable peace, and as such must be part of the full implementation of the transitional justice principles of non-repetition and truth elucidation.

Second, an exclusive focus on past atrocities may undermine the potential of transitional circumstances to overcome social injustices and to promote democratic transformations. Transitions have often been transformative constitutional moments for political communities. As such they are an occasion for publicly addressing fundamental issues such as poverty alleviation, wealth distribution, land reform, and the paths to economic growth.

When considerations of distributive justice and economic efficiency are factored in, there exists a wider perspective on justice in transitions, and new and difficult questions emerge. Armed conflicts often cause devastating effects on political communities, massive destruction of physical and social capital, and the impoverishment of large sectors of the population. From a distributive justice perspective, it is not clear why priority should be given to past wrongs over present needs. From an economic efficiency perspective, it would seem that, in the aftermath of war, goods – and land in particular – should be given to those most capable of exploiting them efficiently, and considerations of corrective and distributive justice should be shelved until the economy has improved. Clearly, when claims for reparations are made in the aftermath of armed conflict, the demands of transitional justice, distributive justice, and efficiency can be in tension with each other. They must therefore be balanced against each other.

The chapters in this book explore, from different disciplinary perspectives, the relationship between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts. They specifically discuss the role of *land reform* as an instrument of these goals, and examine how the balance between different perspectives has been attempted (or not) in selected cases of internal armed conflict, and how it should be attempted in principle. Although most chapters closely examine the Colombian case, some provide a comparative perspective that includes countries in Latin Amer-

ica, Africa, and Eastern Europe, while others examine some of the more general, theoretical issues involved.

The book is divided into two main parts: the first contains the comparative and theoretical chapters, and the second contains the chapters devoted mainly or exclusively to the Colombian case. There are two reasons why a majority of chapters look at Colombia. The first, pragmatic reason is that the chapters here collected were originally presented in a seminar on *Land reform and distributive justice in the settlement of internal armed conflicts*, held in Bogotá, Colombia, on 5-6 June 2009, co-organized by the Program on Global Justice and Human Rights of the University of the Andes Law School and the Forum for International Criminal and Humanitarian Law ([www.fichl.org](http://www.fichl.org)). The second, substantive reason is that the issue of the relation between transitional justice, distributive justice, and economic efficiency in the settlement of internal armed conflicts is particularly relevant in Colombia today. Many experts on the Colombian conflicts have seen the inequitable distribution of land as a key factor in the conflicts' origin and continuation. Over the last decade, as several of the following chapters discuss in detail, the illegal seizure of land has been a systematic practice of armed actors in Colombia, which has caused the displacement, dispossession, and serious impoverishment of millions of people. Thus, in addition to having a practical relevance to a grave situation of armed conflict that includes an ongoing transitional justice process, the analysis of the Colombian conflicts lays bare with particular clarity the theoretical, empirical, legal, and policy challenges that are common to national contexts in which different approaches to land distribution in transition overlap and clash.

The first part of the book begins with a chapter by Jon Elster, which explores the concepts of transitional justice and distributive justice and the relation between them in the aftermath of internal armed conflicts where economic injustice was a root cause of the conflict. In order to ensure a stable peace in such cases, Elster argues, it is necessary to address both the injustice that caused the war, by means of distributive justice, as well as addressing injustice caused by the war, through measures of transitional justice. According to Elster, land reform may be a means of promoting both kinds of justice, for example in the form of truncated restitution of property, where the new regime

imposes an upper limit on the size of restituted land plots to victims. In conclusion, Elster's chapter raises some important general questions regarding land reform in the aftermath of internal armed conflicts: Why focus on land dispossession and other forms of material suffering in transitional justice, rather than personal suffering, such as time spent in prison or deprivation of opportunities for education? Who should bear the burden of proof for claims if a long time has passed since the dispossession or if armed conflict has destroyed records and archives? Should land reform amend the injustices of the past, address the present needs of the population, or should facilitation of economic efficiency and development take priority?

Albert Berry makes a general case for the economic merits of land reform in the aftermath of internal armed conflicts. It is a stylized fact of development, he explains, that in agrarian societies with surplus labor supply, small farms are more productive than large ones. The predominance of small farms, moreover, tends to improve labor conditions because it tends to increase wages across the board; in addition, smallholders are self-employed and may enjoy higher levels of well-being and independence. It follows that, with respect to land reform in developing countries, the objectives of distributive justice and economic efficiency may often overlap. But while the economic and social benefits of small farms are in many cases beyond dispute, the real difficulty is political: the will to carry out widespread and effective land reform is often lacking, particularly when large landholders have strong political clout and influence. Berry offers a comparative analysis of Colombia, El Salvador, and Zimbabwe to illustrate some of the difficulties intrinsic to the political economy of land reform in conflict and post-conflict situations.

Regarding the current situation in Colombia, Berry notes that, while the country is now predominantly urbanized, the massive dispossession and displacement of smallholders in the recent stages of the armed conflict has in effect created a premature and involuntary rural urban migration. Given that for the forcefully displaced population agricultural employment may be more feasible and preferable to employment in urban informal sectors, and given the high rate of unemployment in the country, a policy of land restitution would have great economic merits. However, whether or not the political conditions ex-

ist for land restitution, or even for a more ambitious program of land reform, is another matter. Several chapters, particularly those by Salinas and Gutiérrez, seem to indicate that there is little room for hope, as things currently stand.

Pablo Kalmanovitz's chapter focuses on the relationship between corrective and distributive justice. Its main thesis is that, in the aftermath of massively destructive armed conflicts, rights and obligations of social justice should take priority over those of corrective justice. Rights of social justice include those to social minima such as shelter, nutrition, health, and education, and rights of corrective justice are those associated with reparations and remedies for past wrongs. Based on the work of John Rawls and Robert Goodin, Kalmanovitz submits that when armed conflicts affect over half of the population in a given country, reconstruction efforts should primarily focus on securing social minima for the surviving population, rather than on compensating for past losses. In conditions of scarcity, social justice may exhaust all available resources.

With regard to the Colombian case, Kalmanovitz argues that his argument has only limited relevance since the protracted and mostly low-intensity Colombian internal armed conflicts cannot be seen as massively destructive wars. Moreover, given that the displaced population in Colombia is also poor and in dire need of social minima, for them the aims of corrective and social justice overlap. It is clear that in Colombia restitution of taken land would be an instrument for advancing distributive justice in the country.

Monika Nalepa's chapter discusses some aspects of one of the most complex historical cases of corrective justice, namely, that of the Central and Eastern European countries. Focusing on the former Czechoslovakia, Hungary, and Poland, Nalepa traces the history of several "layers of claimants" with different sorts of claim, which accumulated from the inter-war period through the fall of Communism. Claims from descendants of Jews who suffered expropriation under Aryanization laws; claims from ethnic Germans expropriated in the aftermath of World War II; and claims from small farmers expropriated during the Communist collectivization projects may overlap in a single good. Nalepa draws a helpful parallel between the problem of

allocating multiple claims over the same good and the rules of bankruptcy, in which claims of debt surpass the total amount of available assets, offering some formal criteria with which to treat the problem. For Nalepa, the problem of land allocation is eminently one of local justice, which as such is highly constrained by local institutions and history.

Elisabeth Wood examines the transition to democracy in El Salvador via a negotiated settlement to internal armed conflict. In contrast to the highly unequal distribution of property rights on the eve of the civil war, post-war land distribution was significantly more equal as a result of various processes. Those processes included the agrarian reform carried out as part of counterinsurgency policies imposed by the United States, the wartime occupation (and post-war titling) of other properties by poor rural residents, and the deep transformation of the country's political economy away from its long dependence on export agriculture. Wood contends that the negotiated settlement that brought an end to the internal armed conflict was a classic democratic bargain in which both parties gained something valued by their adherents: insurgent forces achieved political inclusion, agreeing to politics by democratic means and consolidating a significant redistribution of land, while economic elites protected their control of assets through constitutional provisions that (in a liberal world economy) diminish any prospect for significant economic redistribution.

Wood notes that the transformations wrought by internal armed conflict in El Salvador stand in sharp contrast to those in Colombia to date. Instead of a transformation of the economic interests of locally powerful elites away from the agrarian sector, in Colombia those interests have deepened with the intensified production of illicit drug crops, particularly coca, and the expansion of commercial crops such as African palm. Similarly, the Salvadoran internal armed conflict brought a fragmentation of landholding and a more egalitarian distribution of agrarian property rights, while Colombia has seen a concentration of landholding rather than its fragmentation. Wood argues that while the Salvadoran internal armed conflict ended via a liberal, capitalist, and democratizing pact, such an outcome is unlikely in Colombia. While coercive practices are widespread in the Colombian countryside, particularly in the form of forced displacement of rural families by armed

actors, they do not take the form of labor repressive agriculture that so shaped the Salvadoran political economy and regime.

The second part of the book opens with a chapter by Knut Andreas Lid which seeks to situate the right to restitution of land as one component of a larger transitional justice framework, based on the Colombian experience. Lid deems the restitution of land to be the most important factor if any sustainable solution to the Colombian conflicts is to be achieved. The chapter begins with a discussion of the concept of restitution in transitional justice processes. Lid then presents a brief account of the historical context and the significance of land in the Colombian conflict, followed by a section on the scale of the displacement in contemporary Colombia, and how the right to restitution of land has been included in the current process. The third part of the chapter focuses on domestic strategies to implement the right to restitution within the transitional justice framework in Colombia. The author identifies three strategies developed to attend to the right of the internally displaced population to restitution: judicial restitution, negotiated restitution, and restitution by confiscation. Finally, Lid concludes with a few remarks on how restitution of land in transitional justice can be a catalyst for peace, but only if the process is holistically envisioned and recognizes the many limits imposed by the context of armed conflict.

Francisco Gutiérrez Sanín examines why there exists such persistent and acute inequality in the distribution of land in Colombia. He finds such inequality puzzling, given the existence of genuine democratic competition and a working judiciary in the country, as well as strong international incentives to solve the problem and thereby gain legitimacy. Gutiérrez contends that the policies of the two administrations of president Álvaro Uribe have helped to maintain extreme levels of inequality and criminalization in the countryside due to the convergence of three factors. According to Gutiérrez, each factor must be taken into account to provide a good explanation of unequal land distribution, and to differentiate between new problems and those that result from historical inertia.

The first factor is that the political economy of the internal armed conflict generated a highly criminalized and ever more powerful

“agrarian special interests block”, actively engaged in pro-landowner lobby, and increasingly connected with the core of the political system. The second is that a new institutional landscape, constructed by the first Uribe administration, used as building blocks concepts and ideas buttressed by the language and values of the international community. While the new agrarian institutions held the promise of promotion of transparency, market principles, and participation of civil society, the true dynamics have been much more complex, and unfavorable to redistribution/restitution. Problems of institutional inertia have hindered the efficacious implementation of new policies; further, the disproportionate power of rural elites in agencies in charge of agrarian issues and the capture of state agencies by paramilitary group have allowed the well-connected rural rich to obtain privileged access to the few redistribution efforts made by agrarian institutions. The third and final factor consists in key technical issues that remain unresolved. These issues have to do with the regulation of land property rights, on the one hand, and with the failure of the attempt to use land expropriated from criminals for redistributive purposes, on the other.

Luis Jorge Garay and Fernando Barberi, members of the Follow-up Commission set up by mandate of the Constitutional Court to oversee governmental policies on displacement in Colombia, offer a staggering quantitative estimate of the magnitude of internal displacement in Colombia over the last decade. Their estimate is based on the Second National Verification Survey, which was conducted in 2008 on a sample of the displaced population. Even though their estimates are conservative, the numbers are stunning: 5.5 million hectares, which amount to 10.8% of the land apt for agriculture in the country, have been seized or coercively abandoned; 1.1 million hectares have ceased to be cultivated due to forced displacement, which amounts to 25% of the country’s formerly cultivated area; 51% of the population displaced were poor before displacement, 97% are poor after displacement; if Colombia were to honor its international obligation to redress serious violations of human rights, the aggregated costs of corrective justice applied to the internally displaced would be equivalent to 11.6% of the 2007 GDP. Garay and Barberi, like Berry and Ibañez and Muñoz, point to the important fact that the skills and capabilities of the displaced population are eminently agricultural, and hence it is impossible

for them to recover their previous level of wealth and well-being if they remain in urban settings.

Quantitative diagnosis is also the focus of the chapter by Ana María Ibañez and Juan Carloz Muñoz, which seeks to measure the effect that the Colombian internal armed conflict has had during the last decade on the country's distribution of land. Their main finding is that, in the period between 2000 and 2009, land concentration became even more pronounced, reaching a Gini coefficient of 0.86 in 2009, which is one of the highest in the world. They find statistical correlation between higher land concentration and armed actions, but they are hesitant to attribute a causal relationship: it may be that the conflict creates higher inequality by displacing smallholders and facilitating the accumulation of plots in a few hands, but it may also be that areas with highly concentrated land tend to be particularly attractive to armed actors. A second important finding in their analysis is that past land concentration is the main predictor of current concentration. Path-dependency, then, is crucial for explaining current levels of inequality. As they show in the first section of their chapter, a highly unequal distribution of land already existed in colonial times, and tended to increase during the first century of the independent republic. Despite a few attempted land reforms in the twentieth century, unequal distribution has never been seriously transformed.

Yamile Salinas' chapter deals with an important aspect of Colombia's legal corrective obligations regarding its internally displaced population. By virtue of the American Convention on Human Rights, which Colombia ratified in 1973, Colombia must create and support norms that develop respect for human rights, and suppress norms that undermine it. Salinas provides an overview of relevant Colombian legislation, most of which was adopted during and on the initiative of Uribe's presidency, which seriously undermines attempts to restore the land and property of displaced groups. The Constitutional Court has declared some of this legislation unconstitutional, but some remains standing.

Salinas considers the model of development recently set forth in Colombian legislation, which favors competitiveness and productivity over the obligation to protect and guarantee the rights of the rural

populations in general, and those of victims in particular. She contends that, in addition to ignoring the victims, failure to undertake such analysis prevents understanding the functional relationship between the government's model of development, displacement, and its legitimization. Salinas concludes that this analysis is fundamental to any effort to harmonize Colombian norms and policies with international standards on human rights. Such effort would imply revoking legislation that is opposed to those standards, and abstaining from adopting new legislation detrimental to the rights to property and possessions, and to integral reparations.

Maria Paula Saffon and Rodrigo Uprimny contend that a purely restorative focus of reparations appears limited in "highly disordered" societies like Colombia – that is, societies that have confronted profound political and humanitarian crises, which were already unequal before the crisis occurred, and where the processes of victimization commonly affect poor and excluded populations disproportionately. A purely restorative focus seeks to restore victims to a situation of vulnerability and deprivation. Therefore, it does not address the structural factors of conflict, whose transformation is essential both to guarantee the non-recurrence of atrocities and to overcome situations of unjust distribution. The authors argue that this point is obvious with regard to land reparations in Colombia, where the restitution of land would not necessarily deal with the problem of inequitable distribution of land – which, without a doubt, constitutes one of the structural causes of conflict. At best, such restitution would return victims of land seizures to a situation of economic precariousness, with lack of protection of their rights over land.

As an alternative to the restorative approach, the authors develop a notion of "transformative reparations", which conceives of reparations not only as a form of corrective justice that seeks to deal with the suffering caused by atrocities, but also as an opportunity to effect democratic transformation of societies. While Saffon and Uprimny acknowledge that the transformative perspective departs from dominant approaches, they demonstrate that it remains in accord with Colombian and international legal human rights standards. Moreover, the authors explain that this vision of transformative reparations neither implies a weakening of the duty to repair nor a confusion between reparation

programs and the state's general and special social policies aimed at satisfying social rights, as well as measures of humanitarian aid. Finally, the authors set forth the elements on the basis of which this approach should be advanced in the Colombian case to deal with the problem of massive and systematic seizure of land.

Shifting from economic inquiry to socio-legal analysis, the chapter by César Rodríguez-Garavito on land dispossession of, and reparations to, ethnic groups has three aims. First, from a theoretical perspective, it makes a case for a broader typology of criteria for land distribution which includes a fourth approach – which he calls “collective ethnic justice” – alongside the three criteria that are examined in other chapters in the book (that is, distributive justice, corrective justice and efficiency). The author examines the analytical and practical differences and similarities among the four approaches and, on that basis, substantiates the analytical distinctiveness of collective ethnic justice. Second, from an empirical viewpoint, Rodríguez-Garavito documents the extent to which collective ethnic justice has, in practice, informed massive programs of land distribution, namely in Colombia, where collective titles have been granted to indigenous peoples and Afro-descendent communities. Finally, from a legal perspective, the author fleshes out the content of collective ethnic justice as it has been established in international law and jurisprudence, as well as in Colombian law and court decisions. Based on such combination of conceptual analysis, empirical evidence, and existing legal rules, the chapter concludes by offering a list of standards that must guide reparations to ethnic minorities that have been victims of violence, displacement and land dispossession.

In his concluding remarks, Stephen Holmes suggests that land seizure has been, by far, the most important form of political action in human history. While praising the authors' contributions, Holmes seeks to provoke further – and critical – consideration of the issues at hand. He notes that, paradoxically, while all historically known systems of private property are normatively based on the principle that what is stolen must be returned, they are simultaneously based on the refusal to return what was historically stolen. He then reminds readers about the inadequacy of focusing exclusively on justice or efficiency, and proceeds to focus on the *politics* of land reform, and the ways in

which the asymmetries of political power in society influence the shape and feasibility of land reform proposals. He concludes by urging the book contributors to be mindful of political realism, that is, to understand that, in order to change a prevailing system of power, groups in a position to obstruct reform must be bought off, or their visceral opposition blunted in some way.

**PART I:**  
**THEORETICAL AND COMPARATIVE APPROACHES**



## Land, Justice and Peace

Jon Elster\*

### 1.1. Introduction

In this chapter I consider land reform for the purpose of promoting justice and peace. The context is that of civil war or, more generally, political violence. Although I shall draw on a number of historical and contemporary conflicts, the Colombian situation is constantly present in the background and sometimes in the foreground of the discussion. Whether Colombia has experienced a full-scale civil war, and whether the high levels of violence have been politically rather than financially motivated, are partly semantic questions, partly factual ones. Does the FARC, for instance, remain a social movement grounded in claims for social justice, or has it degenerated into a mafia? I shall remain agnostic on that issue, since nothing I shall say turns upon it. For convenience, I shall use the term “civil war” to cover all the cases I shall discuss, including the Colombian one.

Let me begin by considering the *root causes* of civil wars. I shall limit myself to cases in which the war occurs because part of the population has a grievance against the government, because of a perceived injustice (the civil war that arose around the secession of Katanga would not, for instance, fall in this category). In many important cases the grievance is that of an *economically oppressed majority*, whether the injustice takes the form of unequal distribution of land or of huge income disparities. Colombia exemplifies this case. In another important set of cases, the grievance is that of a *politically oppressed minority*, whether the injustice takes the form of the minority being denied access to public office, the right to worship in its own religion, or the

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right to use its own language. The French wars of religion in the 16<sup>th</sup> century and the recent conflict in Sri Lanka exemplify this case. Finally, in rare cases a *minority* that believes itself to be *economically oppressed* may be at the origin of a civil war. An example is provided by the Athenian oligarchs who initiated the civil wars of 411 BC and 403 BC, two episodes that have surprising potential even today for illuminating the dynamics of civil wars.

When the majority is not politically oppressed, that is, not excluded from the suffrage, why would it remain economically oppressed? Why does it not use its electoral power to produce economic redistribution instead of using extra-legal means? We must assume that some of the channels of representation are distorted or blocked. To mention only one of the many ways this can happen, the Colombian secret ballot is sometimes undermined by the practice of voters using their cell phones to take and send a photograph of their act of voting, so that they can make a credible promise to vote for this or that candidate. Thus even if the ultimate goal of insurgents is economic redistribution, their proximate goal may be to remove blocks to political influence.

In the aftermath of civil war, there is usually a need to alleviate or rectify both the *injustices that caused the war* and the *injustices caused by the war*. At the end of each of the eight French wars of religion, for instance, an edict was issued that tried to address both questions. Yet because the measures proposed to address the root causes were mostly insufficient, the wars started up again after a few months or years. They came to an end only when the edict of Nantes definitely established the right of the Calvinists to live in their own fortified towns. In the following, I focus on civil wars where the root cause was economic injustice. To ensure a stable peace, the injustice that caused the war will have to be alleviated by measures of *distributive justice*, especially redistribution of land or income. At the same time, one may want to address injustice caused by the war through measures of *transitional justice*. The relation between these two is the main topic of this

chapter.<sup>1</sup> Although I emphasize land reform as a measure that can serve both ends, I shall also discuss other initiatives.

## **1.2. Transitional Justice**

Consider first measures of transitional justice, notably retribution, reparation, purges and truth commissions. These are intertwined in complex ways. Some forms of reparation can also serve as punishment, and vice versa. In the land reform in the former Czechoslovakia after 1989, the government preferred restitution to former owners over financial compensation or voucher schemes. The latter solutions would probably have led to a more efficient use of the land, but were rejected because it was feared that the land would have ended up as the property of former Communists. Indirectly, therefore, the compensation scheme served to punish the latter. When Colombia adopted the Law of Justice and Peace, confiscation of the property of paramilitary leaders was intended to serve the purposes both of punishment and of creating reparation funds for victims. Truth commissions have often contributed to the process of reparation by identifying victims, and to some extent also to the process of retribution by identifying wrongdoers. Their most important effect, however, has been to stabilize the new regime by making it impossible to deny the extent of wrongdoing under the previous one.

Punishment of wrongdoers and reparations to victims are easily justified on intrinsic grounds. The former deserve punishment, the latter deserve reparation. Instrumental arguments for punishment and compensation are more difficult to assess. One argument that is widely used in the human rights community is that severe punishment of present wrongdoers is needed to deter future wrongdoers (“sending a signal to the future”). As I don’t believe in that claim, and because in any case I want to limit myself to the here and now, I shall disregard it.

A different instrumental argument is that both retribution and reparation are needed to stabilize the post-transitional society. If wrongdoers are not punished and victims not compensated, the gov-

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<sup>1</sup> From a perspective different from (albeit compatible with) the one adopted here, this issue is also raised in the chapter by Pablo Kalmanovitz.

ernment will lose legitimacy and extremist movements may flourish. It is hard to evaluate the empirical validity of this argument. Historically, I do not know of any post-transition regimes that have failed because of insufficient retribution or reparation. Yet perhaps it is too early to tell – South Africa might prove to be a case. The bulk of the black community in that country got neither justice nor land, only (some) truth. The very high level of individual violence in South Africa could one day crystallize into collective violence, although the likelihood of that happening is steadily decreasing.

Even if valid, the instrumental argument for retribution might be limited by an instrumental counterargument. *The transition itself* could be in danger if wrongdoers know they will be harshly punished when they step down. The question then is whether punishments can be fine-tuned to as to be sufficiently severe to satisfy the demands of the population for retribution, but sufficiently lenient to persuade the wrongdoers to step down. This was of course the intention behind the Law of Justice and Peace in Colombia.

On a more uncontroversial note, purges in the bureaucracy and in the military may be needed to ensure the loyalty and efficiency of the new administration. The failure of the first French restoration in 1814 was in large part due to the insufficient purge of officials and officers who remained loyal to Napoleon. It offers, therefore, a uniquely clear case in which insufficient transitional justice caused the collapse of the post-transitional regime. Fear of sabotage or blackmail by members of the former elite was a major reason behind the lustration process in Eastern Europe, which Monika Nalepa discusses in chapter 4 of this volume.

Land reform in transitional justice often comes up against the problem of *dual ownership*. Sometimes property is confiscated by the state in the pre-transitional regime and then distributed or sold to new owners. This took place in Athens in 403 BC, in England in 1648, and in France in 1793. This was also the case for Jewish property in France during World War II and for Communist Europe after 1945, except for Poland, where farmers were allowed to retain their individual plots. In other cases, original owners have been forcibly dispossessed of their property or possession by war or civil war, and others have taken their

place. This also includes the very important and common case of forcible sale of property at artificially low prices. After the transition, the property may then be returned to the original owner without compensation to the new one (France 1945), returned with compensation (as sometimes happened in England after 1660), retained by the new owners with compensation for the original ones (France 1815), or retained without compensation (German properties confiscated by the Soviet Union between 1945 and 1949). The choice among these solutions seem to depend, first, on the time between the dispossession of the original owners and the regime transition, and second, on the good or bad faith in which the subsequent owners acquired the property.

Sometimes, property has been returned to the original owners only if it remained the property of the state after confiscation (France after 1815, Bulgaria in 1990). In these cases, there were no new owners who could assert their legitimate expectations to retain it. Owners of confiscated property may not receive the identical plot of land, but land of comparable size and location; also, as noted earlier, there may be an upper limit on the size of the plots they receive. One may allocate land to demobilized soldiers, either as payment for services or to prevent them from taking up arms again. Finally, one may allocate vouchers to the original owners, which they can use to bid for land purchase (Hungary after 1990).

### **1.3. Distributive Justice**

Let me now turn to measures of distributive justice in transitions, and more specifically to the redistribution of land. In some cases, this process can go hand in hand with transitional justice. As a dual-purpose measure, the new regime can impose an upper limit on the size of restituted plots. This policy was followed in Hungary in 1945 and in Romania in 1991. In Colombia, property confiscated from the paramilitaries might have been used to enact a general redistribution of land, and not only to compensate victims. In general, however, the two processes are unconnected. When they compete over the same scarce resource, land, the political system has to decide how much to allocate to the one and how much to the other.

For my purposes it will be useful to understand the idea of distributive justice in a broad sense, which also takes into account the *efficiency* of the measures taken. The reason for this is that an increase in the size of the “pie” makes it easier to share it more fairly, whatever principle of distributive justice one subscribes to (as observed in the Czechoslovak land reform, transitional justice may occur at the expense of efficiency). Thus measures of land reform may be defended on grounds of equity, on grounds of efficiency, or both. Let me briefly canvas some policies that have been used or proposed.

On grounds of efficiency, one can impose a property tax on uncultivated land so that the need to pay the tax will induce the owners to cultivate it or to sell it. On grounds of equity, the state might subsidize the purchase price. One might also expropriate large estates with “full” or “adequate” compensation paid by the new owners or by the state, to break them up into smaller units. In some cases, smaller units are more efficient as well as desirable on grounds of equity. In other cases, one might consolidate many small plots into large estates to be used for highly mechanized production. Although inequitable, this policy is also sometimes recommended on grounds of efficiency.<sup>2</sup> Often, equity may require the transformation of *de facto* possession into formal ownership. To encourage small land-holdings, the state may subsidize the cultivation of new land at the agricultural frontier or subsidize peasants who negotiate land purchases with owners.

#### **1.4. Conclusion**

Land reform in the aftermath of civil war or political violence poses several general questions to which there are no easy answers. I have already discussed one of them, the problem of *dual ownership* of land. I now consider three others that strike me as particularly important and difficult.

*Why privilege land?* Generally speaking, civil wars and autocratic regimes cause many kinds of sufferings. Material suffering in the form of confiscated or destroyed property is only one of them. In addi-

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<sup>2</sup> The comparative efficiency of small scale and large scale land cultivation is discussed by Albert Berry in chapter 2 of this volume.

tion, personal suffering in the form of time served in prison, forced labor, or forced displacement, and intangible sufferings in the form of deprivation of opportunities for education, travel, *et cetera* can be just as important. There are no *a priori* principled reasons to give priority to material suffering. Of course, there are bureaucratic reasons for doing so, because land is easy to measure, and to evaluate. Putting a price on time spent in prison or on time spent on doing forced labor is obviously difficult. How to put a price on the lack of opportunity to get higher education? For instance, when Jews in Hungary in 1938 were forbidden to take a law degree, how should one compensate them for that loss of opportunity? Since it is hard to assess the magnitude of that loss, it is tempting to give priority to what is operationally simple to do. In doing so, however, one might impose substantive injustice to those who experienced other forms of suffering. For instance in Eastern Europe after 1989, there was almost an obsession in some countries on full restitution for loss of property. Even people who had emigrated to the United States got their property back, and Václav Havel got his family palace back. However, there was no emphasis on the fact that millions of people for generations had been prevented from selling their labor power, which for many of them was their only property, because capitalism was not allowed. The emphasis on material property seems arbitrary.

*Who shall have the burden of proof?* If a long time has passed since dispossession, or if war and conflict have destroyed records and archives, the dispossessed may have difficulties in establishing their claims. Traditionally, of course, claimants are required to establish legal pedigree that they have claim to the piece of land in question. That is the traditional assumption of any court. In some cases of transitional justice, however, the burden of proof on the claimants has been replaced by a presumption of possession based on various criteria. For Jews in France after 1945 and also in the more case of Swiss bank accounts, the mere membership of an ethnic group was sufficient to establish some kind of a presumption. In Colombia, the fact that the claimant lived in a region torn by conflict and dispossessions might create presumptions. Finally, of course, if the property was sold below market prices, that would also create a presumption for possession.

*Past, present, or future.* The final question, and probably the deepest one, is whether policies should be guided by the past, by the present, or by the future. First, one may allocate land and scarce resources more generally according to *entitlements* created by past holding or past sufferings. Second, one may allocate them according to present *needs*, whether or not caused by the armed conflict. Finally, one may allocate them to their most *efficient* use, to alleviate resource scarcity in the future.

If we focus on needs, distributive justice takes precedence over transitional justice. A focus on entitlement implies the opposite priority. A focus on efficiency is neutral, in the sense that the division of the larger pie may be guided by either transitional or distributive justice. In the choice between these two principles, a *truncated restitution of property* can be a compromise. In addition to the restitution principles adopted by Hungary and Romania (cited above), the policies adopted in Norway and France after 1945 also conform to this idea. The French law of 28 October 1946 did not indemnify the loss of ‘sumptuary’ elements. In a time of extreme penury in a France where after four years of occupation and generalized looting, allied bombardments and destructions due to the struggles of the Liberation, everything had to be rebuilt, the sumptuary was thus opposed to the necessary. For instance, neither jewelry nor works of art were indemnified. In Norway, too, the principle of regressive compensation for war damages was well established. The purpose of the legislation was to assist survivors for purposes of reconstruction, not to recreate pre-war fortunes. There was a general feeling that the whole country had suffered, and a certain reluctance to compare sufferings.

In Colombia today, displaced individuals who were forced by guerrillas or paramilitaries to give up their property are entitled to get it back or to receive land of equivalent value. Other displaced individuals fled their land because they feared, perhaps on the basis of false rumors, that they would be forced to give up their properties. Although their need is just as great, they do not have the same legal entitlement. In this case, it is far from clear that restitutive justice should take absolute precedence over distributive justice. From the pool of available land, some might be allocated to the immediate victims of violence and some to what we might call collateral victims. Finally,

some resources could be allocated to individuals who are neither direct nor collateral sense victims of war, but who simply need land to make a decent living.

Of course, the more we widen the circle of beneficiaries of land reform, the more land will have to be made available. Given the large landholdings of many members of parliament in Colombia, the political obstacles to land reform will be enormous. Limiting redistribution to the direct victims of violence might, therefore, be more acceptable from the political point of view. Yet while transitional justice may be more feasible in the short run, distributive justice may be needed for a stable and durable peace.



## **The Economics of Land Reform and of Small Farms in Developing Countries: Implications for Post-Conflict Situations**

**Albert Berry\***

### **2.1. Introduction**

Much is known about the actual and potential performance of small farms in developing country settings. Less, but still a lot, is known about the impacts of various types of land reform. Since many land reforms have taken place in post-conflict settings, some things can be said about how small farms perform in these settings, although possibilities and outcomes naturally vary greatly with the sort of conflict involved, as well as with how and the degree to which it has been resolved. Many conflicts over the centuries have had land as a central cause, and in many others it has been a factor at work; in still others, although it may not have contributed much if at all to the conflict, it has the potential to contribute to a positive solution.

I outline below the general case for the creation of small farms as an objective of social and economic policy in a developing country, and also describe the conditions that are likely to determine the degree of success of such a policy. I then review briefly two post-conflict land reforms, those of Zimbabwe and El Salvador and conclude with some possible lessons for Colombia.

### **2.2. What is Good About Small Farms?**

The merits of small farms as contrasted with large ones depend on a society's goals. I assume that two of those goals are a high average income in the population and a reasonably egalitarian distribution of that income. This latter goal overlaps so much in practical terms with

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adequate employment creation, that for present purposes they can be treated as the same goal. Economists, and the people they advise, have sometimes confronted the dilemma that of two alternative policy options, one appears superior in terms of total output (GDP) growth and the other in terms of equality. In fact it has become clearer over time that such “trade-offs” are not very frequent, especially over the medium and longer run. This is reflected, for example, in the now well-established conclusion that inegalitarian countries do not grow faster than egalitarian ones; if there is a statistical association between level of inequality and growth rate, it goes in the other direction. This does not mean that trade-offs never arise, but rather that with wise policy choices they can usually be avoided. In the context of agrarian policy, trade-offs are especially rare, and especially so over the longer run.

The basic economic argument for small farms – that they typically constitute the best way a country can achieve both high total output (or fast growth, if one thinks in terms of change rather than level) and an egalitarian society is consistent with the general point just made. This optimistic assessment stems from what has for some time been considered a ‘stylized fact of development’ – that land productivity is systematically higher on small farms than on large ones.<sup>1</sup> Logic dictates that, given the wide range of circumstances across countries, there may be some exceptions to this rule but, if so, they are rare.<sup>2</sup> As

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<sup>1</sup> ‘Land productivity’ refers to the value of the total output of a farm divided by the amount of land. Output may be defined in gross terms or in value added terms (e.g., net of purchased inputs). Land may be defined in simple area terms or in quality adjusted terms. Output includes everything that is ‘agricultural’ – e.g., the value of all crops and all livestock products. It includes both what is sold and what is consumed by the family. It excludes non-agricultural items that may also be produced on the farm.

<sup>2</sup> The inverse relationship between farm size and land productivity has been observed for over a century and widely recognized since about the 1960s. Two earlier reviews incorporating evidence from a number of developing countries are Peter Dorner and Don Kanel, 1971, “The Economic Case for Land Reform”, in *Land Reform in Latin America*, Peter Dorner (ed.), Madison, WI: Land Economics for the Land Tenure Center at the University of Wisconsin-Madison, and R. Albert Berry and William C. Cline, 1979, *Agrarian Structure and Productivity in Developing Countries*, Johns Hopkins University Press. The relationship is also discussed and explained in Hans P. Binswanger, Klaus Deininger, and Gershon Feder, 1995, “Power, Distortions, Revolt, and Reform in Agricultural Land Rela-

with any other universally or almost universally observed stylized fact, there must be some underlying economic logic for the same outcome to appear with such regularity. Before turning to that logic, it is worth noting that when economists compare farms by size in developing countries,<sup>3</sup> they see not just:

- i) The aforementioned tendency of land productivity to fall with farm size, but also

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tions”, in *Handbook of Development Economics* 3b, Jere Behrman and T. N. Srinivasan (eds.), Elsevier: 2659-2772. Recent, comprehensive discussions of farm size and land productivity and overall economic performance include Keith B. Griffin, Aziz R. Khan, and Amy Ickowitz, 2002, “Poverty and Distribution of Land”, *Journal of Agrarian Change* 2: 279-330, who argue for broad-ranging redistributive reforms, and a set of studies (including J. Sender and D. Johnston, 2002, “Searching For a Weapon of Mass Production in Rural Africa: Unconvincing Arguments for Land Reform”, *Journal of Agrarian Change* 4: 142-64) that question the proposition that smaller farms are more efficient than larger ones in sub-Saharan Africa. In connection with the latter dissenting voices, it warrants repeating that: (a) the inverse relationship by itself does not imply greater total factor productivity (TFP) on the part of small farms – it rather leaves this an open question; (b) economic efficiency in the narrow sense of TFP is not the right criterion on which to make policy when employment and income distribution considerations are relevant, and when those considerations are taken account of, small farms always come out better; and (c) if there are settings in which large commercial farms are likely to outperform smaller ones on a range of criteria, logical candidates would be many of the former colonies of Africa, where the policy bias against small farmers was the most extreme, to the point where at times small African farmers were simply prohibited from growing the profitable crops the Europeans strove to monopolize. At the other extreme, the relative inefficiency of large farms has been widely commented upon in the context of the former Soviet Bloc countries. Jonah Van Zyl, Andrew N. Parker, and Bill R. Miller, 2000, “The Myth of Large Farm Superiority: Lessons From Agricultural Transition in Poland”, *Journal of Policy Reform* 3: 353-72. The authors report that large farms have been actively promoted and favored in Poland, based on the belief in economies of scale. Despite the policy bias in their favor, these authors find that large farms are no more efficient (in terms of TFP) than are small ones and that, as is universally the case, they are less labor intensive. It is intriguing that, in spite of the striking inefficiency of the large state farms in the former Soviet bloc countries, the belief in the dominance of economies of scale was able to persist.

<sup>3</sup> This discussion necessarily skips over many relevant distinctions and facets of small farm economics.

- ii) a contrasting tendency for labor productivity to rise with farm size; and
- iii) a relation between farm size and ‘total factor productivity’ (the economist’s most common term for efficiency and what I refer to below as ‘narrow economic efficiency’) which varies from case to case and about which no generalization is possible. Under certain conditions, correctly measured total factor productivity (the economist’s most common term for efficiency) falls with farm size.<sup>4</sup>

From (i) and (ii) it follows that the ratio of labor to land falls with size. In fact it tends often to fall very sharply and it is in part the result of the fact that large farms are more mechanized than small ones and that machinery is labour-saving (labor-displacing).

### **2.2.1. The Narrow Economic Efficiency Advantage of Small Farms**

When small farms do have an economic efficiency advantage over larger ones, this advantage has its roots in their higher land productivity so it is crucial to understand what underlies that outcome. Factors at work vary with the case but the most prevalent ones are:<sup>5</sup>

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<sup>4</sup> Total factor productivity essentially measures whether and to what extent the existence of an economic unit contributes to total GDP; its contribution is positive when the value to society of what it produces exceeds the value to society of the resources it uses up in that production. Note that this net contribution to GDP bears no simple (or even complicated) relationship to the market value of goods the unit produces (the numerator of the TFP ratio when product markets are working well). Although often used as an indicator of a unit’s contribution to the economy, this latter is never reliable and, in the extreme, can be quite misleading. For further elaboration, see Appendix A.

<sup>5</sup> One aspect of the higher land productivity typically found on smaller farms is that the composition of output favors higher value crops or livestock that require or can absorb a high level of labor input. Frequently the yield for some specific crops rises with farm size but because the larger farms allocate more land to low value crops, the overall land productivity still falls with size. Small farms also tend to produce many small animals and, where climate permits, tend to produce as many crops per year as possible.

- i) The abundance of labor means that these farms use that factor quite intensively. An absolute or extreme ‘abundance’ means, in effect, inability to get remunerative jobs in other activities, which in turn means that the (social opportunity) cost of this input is zero; if it is not used on the farm it will not be used at all. This situation invites intensive labor use. Relative abundance of labor implies that its social cost, while not zero, is nevertheless low.
- ii) Small farm operators typically earn low incomes, a fact that puts pressure on them to achieve high productivity, within the constraints under which they work.
- iii) Farm operators are sometimes argued to have greater incentives than do hired workers, unless the latter are on piece rate, and this can be another (minor) reason for the higher land productivity on small farms with few or no non-family workers.
- iv) Often, but not always, small farmers know the technologies they use quite well, a product of learning from parents, and high motivation to know what they are doing.

A number of factors work in the other direction to limit the land productivity advantage of smaller farms; in fact some of these are sufficiently prevalent and obvious that they contribute to the fact, of much political importance especially outside the heavily populated Asian countries, that few if any people in decision-making roles know that small farms are or may be more efficient than larger ones.<sup>6</sup> Small farmers are inevitably poorer, less educated and less well-connected than large ones. Usually new technologies are less accessible to them, especially in the short run. Often government policy is biased against

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<sup>6</sup> Of all of the “stylized facts of development” this may be the least generally recognized outside the small group of researchers familiar with the numbers. One reason is a general tendency, even among economists, to confuse labor productivity with TFP and thus to downplay the importance of land productivity as an indicator of efficiency. This error reflects an incomplete grasp of microeconomics, understandable among non-economists, but by no means limited to them. Also at work is a general tendency to accept that economies of scale are important, even when, as is normally the case, the evidence suggests that such economies are infrequent in developing country agriculture, especially when labor is still in surplus supply.

them. Because they typically live near subsistence it is extremely important to them that they not have a ‘bad year’, a fact that makes them cautious about adopting new and sometimes more productive technologies because those technologies are initially riskier.<sup>7</sup> These negative factors notwithstanding, the small farmer typically comes out ahead in terms of land productivity, partly because the positive factors noted above are stronger and partly because the negative ones can be and sometimes are substantially alleviated by market mechanisms or by good public policy.<sup>8</sup>

The relationships among variables discussed above may be summarized and visualized graphically. In Figure 1 below, farm size is measured on the horizontal axis and the various types of productivity on the vertical one. LL’ portrays the typical negative association between farm size and land productivity, while  $L_bL_b'$  shows the positive association with labor productivity. The labor/land ratio is given by RR’ and falls sharply with farm size; its position and slope can be deduced from the two previously-cited curves. There is no general prediction as to how narrowly-defined economic efficiency as measured by total factor productivity (TFP) will be associated with size; one can safely say that the slope of the total factor productivity curve is unlikely to be as strongly negative as is the land productivity curve or as strongly positive as the labor productivity curve. Unlike the other two curves, it may not be monotonically related to farm size, that is, it may go down over part of the size range and up over another part of it. And whereas the other curves often show enormous differentials of up to 10:1 or even higher between the smallest and the biggest farms, this one appears seldom to differ by more than 2:1 or so, when correctly calculated (which, as noted above, sometimes involves the use of shadow prices). To exemplify from calculations for Colombia, value added per hectare was estimated to be about eight times as high on units of fewer than five hectares as on those of over 500 hectares in

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<sup>7</sup> Michael Lipton, 1968, “The Theory of the Optimising Peasant”, *Journal of Development Studies* 4: 327-51.

<sup>8</sup> Thus, when conditions make the use of machines profitable (as labor abundance wanes) a rental market for those machines can offset the problem of the operator of a farm too small to make it worthwhile owning them. Risks can be spread by crop insurance, share-cropping and many other mechanisms.

1960 and value added per effective hectare (allowing for differences in land quality) was a little over twice as high.<sup>9</sup>

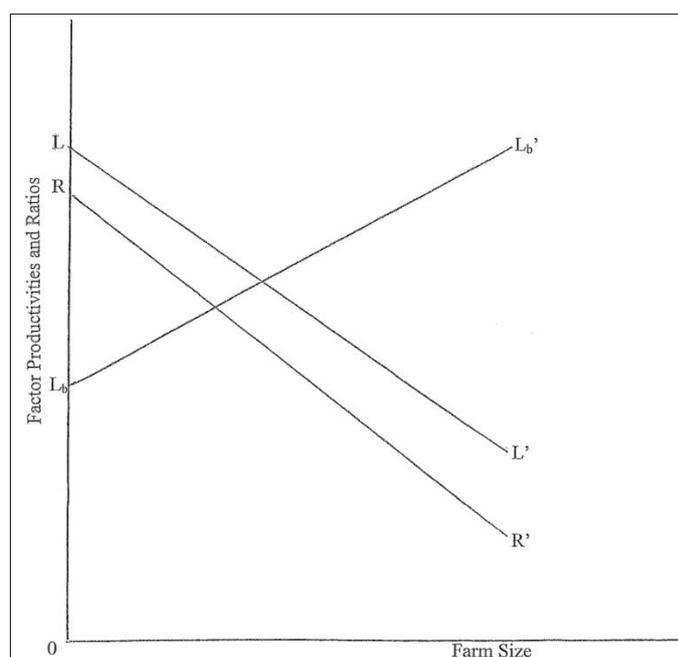


Figure 1.

The economic efficiency advantage of small farms often diminishes as a country develops. One generic reason is that the land productivity advantage is in part reflective of the conditions of labor surplus, low incomes and pressure to maximize output and income. Successful development changes these conditions. When labor is no longer a resource in excess supply, it should be priced accordingly – and eventually at or close to market values, in calculations of total factor productivity. As the labor surplus wanes and the supply of good off-farm employment options rises, the intensity of production on small farms diminishes. Sometimes the relative productivity of small farms falls for other reasons, among which a notable factor is a frequent bias against

<sup>9</sup> R. Albert Berry, 1972, "Farm Size Distribution, Income Distribution and the Efficiency of Agricultural Production: Colombia", *American Economic Review* 406.

that group in the agricultural support system, including the generation and diffusion of improved technologies. In principle there is no technological imperative underlying this pattern, where it emerges, but rather a series of policy choices that mainly reflect the political economy of the country. Falling machinery prices can also eat into the productivity advantages of smaller farms. Still, though no recent comprehensive comparative study appears to have been undertaken with respect to farm size and factor productivity, there is no reason to doubt that the traditional inverse relationship between farm size and land productivity holds true in most developing countries.

**2.2.2. The Broad Socioeconomic Advantages of Small Farms:  
Adding Income Distribution/ Employment, Environmental,  
and Linkage/Spillover Advantages**

No serious person believes that narrowly defined economic efficiency is the only consideration that should be borne in mind in thinking about the merits of different agrarian systems, or in designing economic policy in general. Such a belief would be synonymous with the view that the only objective of policy should be the maximization of GDP regardless of its distribution, the employment created or not created, or the direct and indirect welfare effects that different economic systems can have on a population (the pleasure of being one's own boss, of being in charge of producing things, etc.).<sup>10</sup> Following that pattern, I will limit myself mainly to a consideration of how farm size structure affects income inequality and employment options.

With respect to employment/income distribution effects, the analysis is more straightforward than that involving narrowly defined economic efficiency. It follows from the systematic and often very negative relationship between size of farm and labor intensity that the higher the share of a country's land that is found in small farms the greater, *ceteris paribus*, will be the demand for labor and hence the equilibrium wage rate. With both the level of employment and the

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<sup>10</sup> Until recently very few economists have tried to integrate these latter types of welfare effects into their analysis; though there is now an increasing recognition that this 'should' be done, it remains mainly in the hands of others – among them sociologists, psychologists, and philosophers.

wage rate greater than they would be in a system of mainly large farms, it follows that total labor income will be greater and the distribution of income more equal. The classic example is Taiwan, which, soon after World War II implemented a far-reaching land reform that helped to launch its trajectory as one of the fastest growing and also the most egalitarian of all developing market economies. Not only was inequality low after the land reform, but it has stayed low, suggesting that the initial equality had a lasting effect long into the period when the country was no longer a primarily agricultural one. But, while Taiwan may be the exemplar of growth with equity, the experience of most of Asia exemplifies the merits of a small-farm focused development strategy as the best and fastest way to pull people out of poverty. This has been the route taken in South Asian countries<sup>11</sup> and, dramatically, in such East Asian countries as Indonesia,<sup>12</sup> Malaysia,<sup>13</sup> and now Vietnam.<sup>14</sup> Success on the distribution front is tied to success on the employment creation front.

The import of the fact that small farms have a strong advantage over larger ones on the employment/distribution front means that, from a broader perspective than that of GDP maximization, they would be the obvious preferred choice even if they had no narrow efficiency advantage over large farms or perhaps a modest efficiency disadvantage. The sort of analysis needed to facilitate an intelligent policy choice requires appropriate allowance for the income distribution advantages of smaller farms via some sort of weighting system wherein a given peso of income generated is weighted more heavily when it ac-

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<sup>11</sup> Inderjit Singh, 1990, *The Great Ascent: The Rural Poor in South Asia*, Johns Hopkins University Press for the World Bank.

<sup>12</sup> C. Peter Timmer, 1998, "The Role of Agriculture in Indonesia's Development" in *International Agricultural Development (Third Edition)*, in Carl K. Eicher and John M. Staatz (eds.), Johns Hopkins University Press: 539-49.

<sup>13</sup> Henry Bruton and Associates, 1992, *The Political Economy of Poverty, Equity, and Growth: Sri Lanka and Malaysia*, Oxford University Press for the World Bank.

<sup>14</sup> Wim Pelupessy, 2000, "Institutional Constraints and Internal Dynamics of Land Reform in El Salvador and Taiwan" in *Agrarian Policies in Central America*, Wim Pelupessy and Ruerd Ruben (eds.), Macmillan Press and St. Martin's Press.

crues to lower income people (as in the case of smaller farms).<sup>15</sup> Where the small farms are at a major efficiency disadvantage, the society faces a difficult policy choice.

Several additional advantages of small farms do not show up in their land productivity superiority. One relates to the fact that they tend to specialize in staple foods, partly for own consumption on the farm and partly for sale of any surplus available. Even when they do not specialize heavily in staples, they routinely dedicate part of their land to them. Production for home consumption is a risk-averting and nutrition-guaranteeing practice from the farmer's own point of view. It has the positive spillover effect of providing a sort of food protection to others as well, in the first instance those living in the same region and on the buying end of the sales of these small farmers, and secondly at the national level. Under globalization and the falling transport costs that come with it, this last benefit is less important and less evident, but both the former ones remain salient.

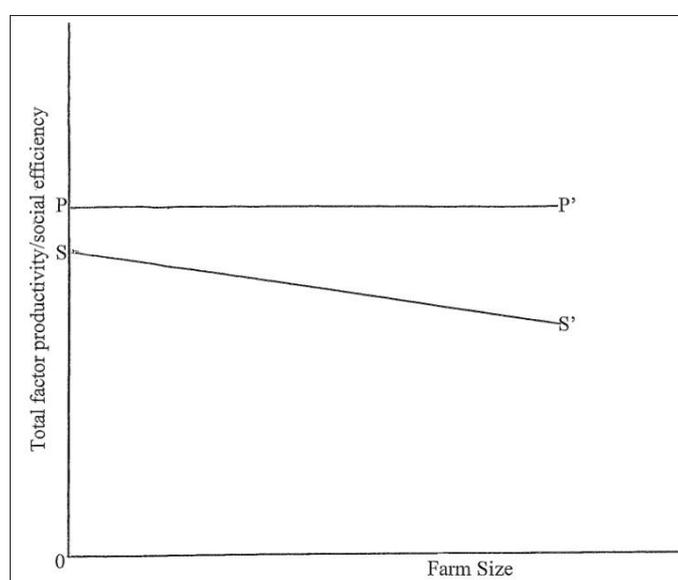
Another important benefit from small farms that does not show up in their higher land productivity is the continued provision of the environmental service of *in situ* conservation of crop genetic diversity.<sup>16</sup> Large farms with their penchant for monoculture tend to sow a single variety over a large area, whereas individual small farms are more likely to cultivate several varieties of the same crop, and different small farmers are also more likely to cultivate different varieties of the same crop. Although there are artificial ways of maintaining crop genetic diversity, these are for various reasons a quite untenable substitute for their preservation in the field. Seed banks are not fully secure as a depository of varieties. Further, part of the useful knowledge about a variety is only manifested when it is actually being grown. In short, efforts to preserve such diversity must go hand in hand with efforts to support small farms around the world.

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<sup>15</sup> Such a system was proposed by Hollis B. Chenery, Montek S. Ahluwhalia, Clive L.G. Bell, John H. Duloy, and Richard Jolly (1974) in their well-known *Redistribution with Growth*, Oxford: Oxford University Press.

<sup>16</sup> James K. Boyce, 2006, "A Future for Small Farms? Biodiversity and Sustainable Agriculture" in *Human Development in an Era of Globalization*, James K. Boyce, Stephen Cullenberg, Prasanta K Pattanaik, and Robert Pollin (eds.), 99.

The most general economic benefit from a successful small farm approach to agricultural development takes the form of a range of positive spillovers and employment multipliers that heighten its growth-promoting and poverty reducing impacts. Higher agricultural incomes tend to be spent locally, thereby fostering the growth of rural non-agricultural activities. The resource transfer from agriculture to other sectors occurs in a particularly efficient way when much of it stays within the same household or the same community.<sup>17</sup>



**Figure 2.**

Expressed in the terms of Figure 2, if TFP is assumed to be constant across farm sizes, as portrayed by curve  $PP'$ , then social efficiency will fall with farm size, along the lines of curve  $SS'$ , since this curve will always have a steeper negative slope (as in this case) or a smaller positive slope than will curve  $PP'$ . This reflects the fact that small farms score better on the employment/distribution fronts than on the efficiency front because of their greater labor intensity and the higher share of income generated that goes to lower income people.

<sup>17</sup> John Mellor, 2001, "Faster, More Equitable Growth – Agriculture, Employment Multipliers and Poverty Reduction", Paper prepared for USADD/G/EGAD.

### **2.3. The Dynamics of Small Farms and the Pivotal Role of the Public Sector**

All farms need to continuously raise productivity in order to contribute to economic growth, and since agriculture is initially the largest sector in almost all economies, such productivity increases are extremely important to overall growth. The factors contributing to output growth are investment in physical and human capital, TFP increases, improvements in the allocation of resources among producing units in the sector and (sometimes) increases in the rate of input utilization. In some cases land expansion is also important, but its role decreases over time as the country's endowment of that factor becomes fully utilized; such expansion eventually becomes counterproductive due to the environmental damage associated with incursion onto marginal lands, the felling of environmentally valuable forests, the lowering of the water table, and other negative effects. In broad terms, the sources of productivity growth are the same for smaller as for larger farms: better varieties of crops and breeds of animals based on research, development and diffusion; better cultivation practices; effective multiple cropping; irrigation; access to markets and to credit; and public and sometimes private investment in infrastructure. When it takes place land reform that breaks larger units into smaller ones typically contributes to overall growth through the more intensive farming that characterizes smaller farms through a combination of an improvement in the allocation of resources within the sector and an increase in utilization of resources.<sup>18</sup>

For the existing small farmer the keys to output and income growth are three: improvements in technology, public investment, and private (own) investment. These three sources of growth are all com-

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<sup>18</sup> Berry and Cline (1979) present estimates of the expected increase in output that would result from an equalizing land reform in a selection of countries, including Colombia. Post land-reform growth of agricultural output has been rapid in such countries as Japan, Taiwan, Korea, Bolivia's highlands and other countries (Albert Berry, 1984, "Land Reform and the Adequacy of World Food Production", in *International Dimensions of Land Reform*, John D. Montgomery (ed.), Westview Press: 63-87) bearing out the general validity of the expectation that reform will lead to a one-shot increase in output and/or a faster growth rate over a period of time.

plementary to each other, and the public sector is central to what is usually the most important of the three contributing factors – research, development and diffusion of new technologies. The generation of new technologies is essentially a ‘public good’ in the economic sense of this term; because one person’s getting a new technology does not *per se* decrease the supply to others and because it is usually not feasible to charge for it, economic theory dictates that the public sector must take charge if its provision is to be anywhere near the socially efficient level. The same principle holds for those types of infrastructure that have this ‘public good’ character. And the great success stories of small farming, including the United States, Canada and other industrial countries historically and many developing countries more recently have been built around efficient state support in these areas.

The role of the state in the success stories of East Asia has been widely noted. But in India also, the success of the Green Revolution saw a major public sector role that included research and development (R&D), extension, improved seeds, fertilizer, credit, storage and marketing, price stabilization and subsidies for key inputs. Recent research shows that these interventions played a key role in the launching of the Green Revolution.<sup>19</sup> IFPRI calculations show that most of the interventions had favorable B/C ratios in the early years;<sup>20</sup> unfortunately the net benefits declined over time and, once institutionalized, the programs could not easily be removed, with the result that India now spends about 10 billion USD per year on agriculturally related subsidies that are basically unproductive.

The single biggest problem for the small farms of many developing countries over the last several decades has been the failure of governments to provide the appropriate ‘public goods’, especially the key one, R&D.<sup>21</sup> During the neo-liberal push of the 1980s and 1990s the

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<sup>19</sup> Peter Hazell, 2007, “Transformations in Agriculture and their Implications for Rural Development”, *Journal of Agricultural and Development Economics* 4: 55.

<sup>20</sup> A. Dorward, S. Fan, J. Kydd, H. Lofgren, J. Morrison, C. Poutlton, N. Rao, L. Smith, H. Tchale, S. Thorat, I Urey, and P. Wobst, 2004, “Institutions and Economic Policies for Pro-poor Agricultural Growth”, International Food Policy Research Institute, Discussion Paper No. 15.

<sup>21</sup> Robert Tripp, 2002, “Can the Public Sector Meet the Challenge of Private Research? Commentary on ‘Falcon and Fowler’ and ‘Pinglai and Traxler’”, *Food*

distinction between inherently public goods like this one and inherently private ones was largely forgotten, leading to the downsizing of R&D establishments in the public sector. Their partial replacement by private sector activities turned out to be a poor second best in general and particularly injurious to smaller farms.<sup>22</sup> Private sector R&D focuses on the needs of large commercial farmers, high value commodities and technologies over which it can assert priority rights. Given its *modus operandi* the private sector will never fill the vacuum left by shrunken public support systems.<sup>23</sup> The resulting problems are especially difficult for small farmers living in more remote areas with poor infrastructure and market access.<sup>24</sup>

The economic argument for a strong public sector involvement in R&D and in certain types of infrastructure is overwhelming.<sup>25</sup> Perhaps the second most obvious area for public involvement is price sta-

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*Policy 27:* 239-46. There is a wealth of empirical evidence to the effect that R&D, as well as availability of credit and extension contacts, raise productivity on small farms everywhere in the world.

<sup>22</sup> Hazell, *supra* n. 19: 50.

<sup>23</sup> As Hazell (*id.*, 57) notes, there are no successful examples of rapid progress in productivity of food staples through an approach relying on the private sector and producers organizations instead of public sector involvement in the key areas noted above.

<sup>24</sup> An additional problem, common to developing country producers of certain products, whatever their size, is the enormous subsidies provided by industrial countries to their producers. World Bank, 2002, *World Development Report*. The World Bank estimates that the producer subsidy equivalent of the agricultural protectionist policies in the OECD countries as of 2000 was 330 billion USD, equal to Africa's GDP for that year.

<sup>25</sup> It is true that a better understanding of those aspects of public interventions that really worked well in Asia and other countries and those that did not is needed. In the case of India, see: Shenggen Fan, Ashok Gulati, and Sukhadeo Thorat, 2008, "Investment, Subsidies and Pro-poor Growth in Rural India", *Agricultural Economics* 39: 163-70. The authors conclude that, whereas subsidies for credit, fertilizer and irrigation were crucial to induce small farmers to adopt new green revolution technologies in the late 1960s and 1970s, now the keys are agricultural research, education and rural roads. No doubt this same conclusion holds in a number of other countries, although in those of Africa where the process is several decades behind that in Asia, the 'first round' interventions may still be very important.

bilization, whose removal has exposed many small farms to greater risk, sometimes more than they could bear. Finally the case for provision of subsidies depends on the specific situation, since the items subsidized (fertilizers, other inputs, credit) are not ‘public goods’ in the theoretical sense. Such subsidies can, nonetheless, be important if they facilitate small farmers’ learning how to use new inputs, or if local prices are above world levels. However, the removal of such subsidies once their positive impact has been achieved is often a difficult and unpopular policy choice to make, even when the argument for retaining them is weak. Clearly, greater effort has to be expended on how to achieve self-terminating programs within a given political economic setting.

What of the other source of output growth, private investment? It has often been argued that even if small farmers are more efficient in the short run they may, by virtue of their low incomes, be unable to save and invest enough to raise productivity and output as fast as can large farmers. This argument, while not as obviously contradicted by the data as the argument that small farms cannot achieve productivity levels comparable to large ones, is also by and large untrue. It has long since been observed that, under some circumstances small farmers achieve high savings rates, but it is now clear that, in the absence of formal financial institutions, this is designed mainly for purposes of smoothing consumption given high seasonal and across year variations in income.<sup>26</sup> Savings targeted to investment depend primarily on the availability of profitable investment opportunities rather than on the income level of the household.<sup>27</sup> There is no reason to expect investment to fall in the wake of a land reform; more likely it would rise, especially when own housing and non-farm rural activities are taken into account – the experience after the redistributive reforms in Taiwan and China.<sup>28</sup>

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<sup>26</sup> Mark R. Rosenzweig, 2001, “Savings Behaviour in Low–Income Countries”, *Oxford Review of Economic Policy* 17: 40-54.

<sup>27</sup> Keith Griffin and Amy Ickowitz, 2000, “The Distribution of Wealth and the Pace of Development”, in *Studies in Development Strategy and Systemic Transformation*, Keith Griffin (ed.), Macmillan.

<sup>28</sup> *Id.*, 320.

## **2.4. Conditions and Design Elements Favorable to Successful Land Reform**

### **2.4.1. Conditions**

It is one thing to note the impressive advantages of the small farms that are an established component of a country's agrarian structure and another to chart an effective transition from large to small farms or from a predominantly large farm system to a predominantly small farm system. Knowing that established small farms are performing well is certainly reassuring, but it does not guarantee that newly created ones will function as well. Analysis of the aftermath of many land reforms is also reassuring, especially those of East Asia (Japan, Taiwan, and Korea, China, and Vietnam). The record elsewhere is more mixed. Still, one point is clear; the dominant obstacle to successful land reform is political – reflecting the fact that land must be shifted from large politically powerful farmers to smaller ones.

Serious land reform thus becomes feasible when the political economy of land acquisition for transfer is manageable. This in turn requires that the power of the pre-existing agricultural elite be trimmed or that considerable land transfer can occur without having to confiscate much land from that group. The great land reforms of the twentieth century met this condition, all occurring either after agrarian revolutions (Mexico, Bolivia and China) or wars (Japan, Korea and Taiwan). In all cases the previous landed oligarchy had been defeated and in some (Korea, Taiwan) a significant amount of land had been in the hands of outsiders (Japan) so its transfer had low political cost internally. While Colombia's current situation differs greatly in detail from all of the above cases, it shares a crucial feature, the weakened position of what one might call the traditional agricultural elite, which has over recent decades given ground to and/or morphed into a pressure group in which the drug industry and the paramilitaries are important if not dominant. In one sense, therefore, the large amount of 'criminalized' land in Colombia creates an ideal setting for land transfer, since relatively little land can be claimed to be free of the taint of having been

acquired through illicit or violent means.<sup>29</sup> The other side of this coin, in a sense, is that few countries have embarked on land reforms in a context as rife with corruption and violence as Colombia's and accordingly so in need of wholesale institutional reform if success is to be achieved. Even this disadvantage does have the associated advantage that there should be no debate as to whether certain institutions need just to be tweaked or instead require top to bottom reform. When the latter occurs it can be faster, more effective, and less open to sabotage than the gradual reform of institutions.

Although in most situations politics is the only real obstacle to at least modest success (judged by the achievement of considerable one shot income gains by a significant share of the agricultural population) economic factors also play a role, making some situations a better bet than others. It is also relevant to consider the structural settings in which the potential benefits of land reform are the greatest. A few central aspects on the economic side are the following.

- i) Success is easier when the new small farmers have prior experience in the sector. In all of the East Asian cases this was the general pattern. Although land was very unequally distributed by ownership prior to the reforms, the concentration by farm operator was much less, since the large farmers rented out or share-cropped much or most of their land. Both before and after the reforms the main technologies were labor intensive and most of the farm operators stayed on the same land as before. In these cases, although demand for labor did rise, much of the improvement in income distribution was due to the transferral of land rents from the former large owners to the new small ones. In Taiwan, for example, the rent-reduction program by itself constituted a considerable redistribution of agricultural income; it also brought down the market price of land, with the effect of making its purchase much more within reach for small farmers.<sup>30</sup>

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<sup>29</sup> Francisco Gutiérrez Sanín, 2010, "Extreme Inequality: A Political Consideration. Rural Policies in Colombia, 2002-2009", chapter 7 below.

<sup>30</sup> Griffin and Ickowitz, *supra* n. 27, contrast the cases of Taiwan and Korea, where land value to rental ratios were brought down to 2.5:1 and 1.5:1 respectively, with

- ii) Related to the previous point, success is easier when there are few available capital-intensive technologies, especially ones incorporating significant economies of scale. The spread of mechanization has changed this somewhat, and has given large farmers an option that does not involve the use of any significant amount of labor.
- iii) Success is much easier when the system of research, development and diffusion of new technologies and provision of infrastructure is not biased against the small farmer. In most countries the way this system works reflects the existing and past agrarian structure, so when that structure is dominated by large farms the system tends to work for them. When R&D is handled by the state it is more likely to produce improvements that reach the small farmer. As noted above, the privatization and shrinkage of agricultural research and diffusion over recent decades has been a major negative factor in this regard.
- iv) A special feature of Colombia's conflict is the production of illegal drugs. Many small farmers in certain regions of the country have been involved in this activity, induced by some combination of threat and a higher actual or potential return than to alternative products. Whereas a typical challenge to small farm systems is to keep productivity rising at a rate adequate to assure good income growth (say 2% per year or so), a much bigger challenge confronts the policy-maker whose objective is to come up with other crops or activities that can out-compete illicit drugs, when these often start with an advantage of several fold over traditional products.

On these four counts, essentially economic in character, Colombia and countries similarly placed are at a disadvantage *vis-à-vis* the great historical successes of land reform. This does not make the task impossible, but it requires that it be designed and implemented in a relatively effective way. Being able to draw on an understanding of those past reform experiences eases the task somewhat.

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that of a very land scarce country, Bangladesh, where the corresponding ratio was recently estimated at 17:1.

One major economic factor works clearly in the opposite, positive, direction. Whereas the reforms of Korea and Taiwan took place in still mainly agrarian countries, Colombia is a much less agrarian and more urbanized society. To the extent that major new expenditures will be needed to achieve the needed impact on Colombia's employment and welfare, they will still be a modest share of GDP simply because agriculture is no longer the dominant sector of the economy. The real resource costs will be even less.

A final consideration relates not so much to the factors that determine the likelihood of success in a reform but to the socioeconomic importance of that success. Countries like Colombia that have suffered severe rural conflict face a special employment challenge for the displaced and often traumatized victims of that conflict. Apart from the human and welfare aspects of this tragedy, there is a simple economic fact: for many of these people agricultural employment may be both more feasible and more desirable than employment in urban informal activities, the main alternative. This is the economic side of the problem of premature, involuntary rural to urban migration in the wake of violence. Colombia suffered this scourge in the 1950s and is now suffering it again. It raises the stakes around land reform policies.

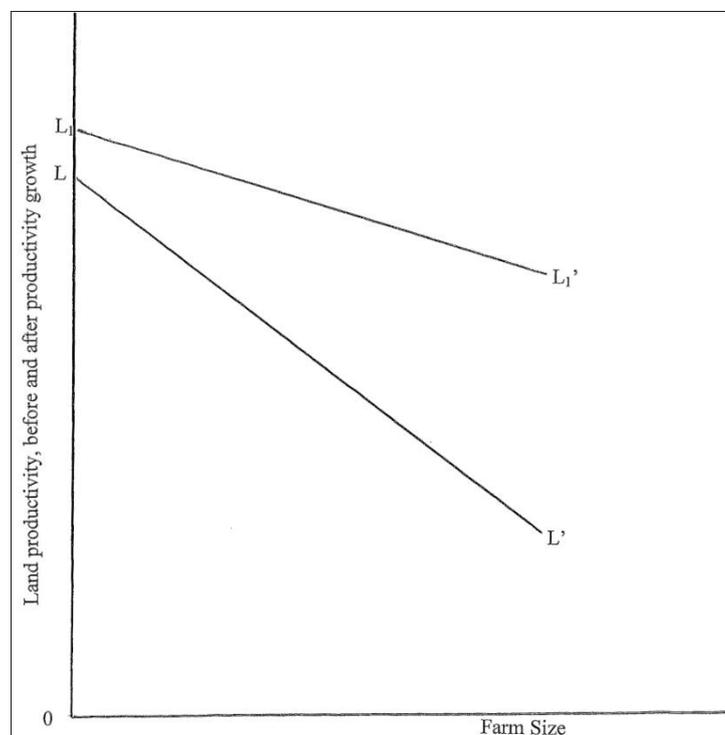
These latter points may also be expressed graphically. At any point of time in any country there is a currently observed set of relationships between farm size and the various productivities, as exemplified in Figure 1. These relationships reflect not only the differing characteristics of farm operations at different sizes but also the many features of the setting, which are exogenous to the farm unit itself. These include the infrastructure that helps to determine how successfully agricultural products can be produced and marketed, the educational system that helps to determine the skills of the farmers, and the research and development system of previous years, which helps to determine the technologies currently available to the various groups of farmers. Thus, if the actual farm size land productivity relationship  $LL'$  is that shown in Figure 1 (reproduced in Figure 3 below), one can safely say that the curve would have been steeper had past policy in these various domains been more pro small farm and flatter had it been more pro large farm. The way this curve's position changes over time reflects these and other considerations. In many countries, policy in recent

decades has been strongly biased in favour of larger farms; as a result, while the LL' curve has tended to shift upward for all farm sizes (due to improvements in infrastructure and in varieties available, etc.) this upward shift is often greater for the larger farms, as shown in the shift from LL' to L<sub>1</sub>L<sub>1</sub>'. In theory, should this process continue long enough, the traditional inverse relationship between farm size and land productivity could be reversed, though I have not yet seen data showing that result for any country.<sup>31</sup> The setting in which the inverse relationship would most likely be reversed is that of some countries of colonial Africa where the policy bias in favor of large (non-African) commercial farms relative to small (African) farms has been the greatest.<sup>32</sup>

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<sup>31</sup> Paraguay as of the early years of this decade comes close, according to the calculations undertaken by Ricardo Toledo, 2009, "Farm Size-Productivity Relationships in Paraguay's Agricultural Sector", in *Losing Ground in the Employment Challenge: The Case of Paraguay*, Albert Berry and Associates (eds.), New Brunswick, New Jersey: Transaction Press: 96. This is a case in which the support system has been very strongly biased in favor of large farms and in which those farms produce a lot of a relatively high value (albeit environmentally damaging) crop, soybeans. As a result the farms of 100 hectares and up (excluding those whose owner lives in an urban area, and whose productivity is much lower) achieve average land productivity only about 25% below that on the farms of 2 to 5 hectares and actually above those in the middle of the size range (5 to 100 hectares).

<sup>32</sup> Thus Bill H. Kinsey, 2004, "Zimbabwe's Land Reform Program: Underinvestment in Post-Conflict Transformation", *World Development* 32: 1673) suspects that, though no such calculation has been undertaken for Zimbabwe, it is unlikely that the inverse relationship would be discovered there "because large scale farms have always benefited from vastly superior access to inputs and technical services".



**Figure 3.**

I have not seen recent estimates of the farm size land productivity relationship in Colombia (if indeed any exist).<sup>33</sup> It would be reasonable to guess that the  $LL'$  curve is less steep now than it was several decades ago. Two major factors working in that direction have been a pattern of public policy that has shifted in favor of larger units since the 1960s–1970s, due in part to the relative decline of the public component of the provision of services to agriculture, especially of the R&D component of those services. Around the developing world the privatization of such services has been prejudicial to the relative position of smaller farmers. In Colombia an additional factor at work, at least in some regions, has been rural insecurity itself. Small farmers

<sup>33</sup> The ongoing agricultural census should once again make it possible to generate such numbers, which have been absent for several decades due to data deficiencies, in turn partly due to the insecurity in much of the country that has rendered data collection difficult, though also partly due to lack of political will or interest in having such figures.

necessarily live on or very near their farms, while large farmers often do not need to. At the limit the owners of corporate farms live in cities and if they ever visit their farms, do so infrequently and in some cases by helicopter. A post-conflict land reform would hopefully imply that this second factor would gradually become less problematic for smaller farmers; correcting the former defect would take much longer and require a dramatic policy shift. Even there, however, one could be reasonably optimistic that, were the policy shift forthcoming, some quick productivity gains would be possible simply through the fact that some recent technological gains achieved in Colombia or ecologically similar countries could be disseminated rapidly, even as other gains would have to await the prior research that generates them. In addition, of course, there would be quick output gains where the conflict has led to the near or complete abandonment of land. As is widely recognized, agricultural output growth has been hampered in Colombia by the effects of the insecurity and violence.

## **2.4.2. Implementation Options**

### **2.4.2.1. A Minimum Size?**

It has often been argued that, even though small farms achieve high land productivity, they may be too small to generate a minimum acceptable level of income (say enough to push the family above the poverty line) and are hence not a desirable (or perhaps even feasible) option for agrarian policy. This argument is at worst fallacious and at best questionable. It is true that a family's total agricultural income does typically rise with farm size; even though income per hectare falls with farm size, this decline is more than offset by the increase in the number of hectares. Thus any rational farmer will, *ceteris paribus*, prefer more land to less. But this does not mean that policy should favor farms of above the size that generates a minimum 'acceptable' income. In the first place, the real world alternative to distributing land more or less equally (even if the amount each beneficiary receives is small) is to have a smaller number of farms whose size is above the designated cut-off line, at the expense of pushing everyone else farther below it than they would be under an equal distribution regime; assuming they do not have decent off-farm options that would also push

them farther below the poverty line. Distributing the land equally among all aspirants guarantees the highest total farm output and income (given the negative relationship between farm size and land productivity), even though everyone may be left somewhat below the poverty line (or any other 'minimum income' line).

The real world options are: (i) favoring a smaller number and relegating the others to possibly severe poverty (depending on the situation) and (ii) distributing the minimum achievable amount of poverty across everyone. Whether it is ever acceptable to save some at the expense of others is at bottom a moral question, which will not be addressed here. The main point is that there are no third options. Many proponents of the minimum farm size idea fantasize about an option in which those without land survive adequately outside the agricultural sector. But this usually flies in the face of the evidence; if acceptable options were available elsewhere they would normally have already been taken up. And it is of course possible to create more such options over time through good policy, but the best solution is still to distribute land equally even if in very small units and then let normal market processes induce small farmers to leave when those non-farm options become available.

A second reason to reject the minimum farm size approach to land reform lies in the fact that in some cases the most strongly negative effect of farm size on land productivity occurs among the smallest farms, that is, the curve LL' of the figures presented above has its steepest negative slope at quite small sizes. This implies that the output lost by adopting a minimum farm size criterion could be high if that minimum size happens to be just above the steepest segment of the LL' curve.

Finally, the perhaps most potent argument against a minimum farm size criterion lies in the fact that one of the strengths of many very small farms is their ability to combine farm and non-farm income in such a way that, even though the farm income by itself leaves them below the poverty line, when coupled with their non-farm income they can rise above that line. Just as the incentive to achieve very high land productivity is highest on the smallest farms and is a major reason for their very high land productivity, so the incentive to achieve high off-

farm income is also high and induces families to search out the options very carefully. Combining the two sources of income creates a variety of positive synergies; it also constitutes a risk-reducing business strategy. One of the most striking features of post land-reform development in Taiwan was that, even as land productivity rose rapidly over time (as new technologies become available), off farm income of the small farmers rose even faster; with the two sources of rising income both in full flower, the average incomes of these initially poor farm families appear to have risen at dramatic rates of up to 10% per year, the fruit of strong synergies between high farm incomes and a rapidly rising demand for locally produced non-agricultural goods, some of which could be produced by the farm families themselves.<sup>34</sup> While the Taiwanese experience defines the limits of the potential, it is generally observed that non-agricultural incomes can and often do rise rapidly in small farm communities.<sup>35</sup>

#### **2.4.2.2. Pattern of Current Land Use**

Another issue involves whether and how existing use of land should be taken into account in deciding how much should be left with the existing owner or claimant. Sometimes those engaged in active mechanized farming are favored over those arguably more passive owners who rented or share-cropped their land. But since one objective of the reform is employment creation through labor intensity, this is usually counterproductive, since mechanized operations typically create few jobs. A bias against share-cropping has often been present, on the grounds that this tenure system is archaic, inefficient or otherwise undesirable, but there is no serious evidence to support this view.<sup>36</sup> If there is to be a single criterion on the basis of which current claimants are allowed to keep more land, that condition should be job creation. A plantation that is very labor intensive should arguably be the first category of large farms to be left intact. In those cases where the technol-

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<sup>34</sup> See Shirley W. Y. Kuo, 1983, *The Taiwan Economy in Transition*, Westview Press: Table 6.1.

<sup>35</sup> For a good review of what one might call the 'Taiwan-type model', see Michael Lipton, 1989, *New Seeds and Poor People*, Unwin Hyman.

<sup>36</sup> Griffin, *supra* n. 27.

ogy allows production of a given crop either on a large scale or a small one, large units that undertake to subcontract production to small ones, to share-crop or to engage in whatever arrangement maintains high labor inputs should be given preference. Where these large firms now know the technology well, they may act as effective transmitters of that technology to the smaller farmers.

### **2.4.2.3. Speed and Scope of the Reform**

Possible trade-offs in the implementation of land reform have to be recognized and respected in any given setting, perhaps especially under such conditions of insecurity and tension as characterize rural Colombia. Some involve the scope and the pace of implementation of the reform. They need to be confronted in recognition of the fact that the greatest success stories have all been large reforms undertaken quickly. Among the many reasons that may underlie this pattern, a few are worth noting here.

A key point with respect to scope is that if only a small share of all land comes under the reform the resulting economic and social change cannot be transformational. If the objective is to contribute seriously to an egalitarian agrarian structure and society, marginal change is not what is needed. Further, the likelihood of reconcentration is higher when the initial push is a small one, and the history of land reforms, from antiquity on, makes it clear that such reversion is a major threat, sooner or later. One of the advantages of the combination of wide scope and quickly executed reforms coupled with a low size ceiling, as practiced in the East Asian cases (Japan, Korea, and Taiwan, as well as China and Vietnam in their second reforms, which moved them in the direction of individual units) is that reversion is very unlikely to occur in the foreseeable future; it would require a major policy change and would be almost impossible without the acquiescence of the farm population itself. On the other hand, the revolution-based twentieth century reforms of Mexico and Bolivia did not produce egalitarian societies, but rather left the door open for future governments to recreate a large-scale agriculture which became the recipient of major government support, and to disregard or mismanage the reform sector in terms of provision of public services, orientation of R&D expenditures,

etc. Being left with an agricultural sector made up essentially of small farms can be guaranteed to clear the mind of the support bureaucracy and the politicians who would otherwise never learn about and respond to the potential efficiency of such farms.

A speedily effected reform has the obvious advantage of not allowing opposition forces to gather steam. But excessive speed in the presence of limited resources for implementation can increase the likelihood of injustices. What is a reasonable compromise in such settings? Clearly, and especially in cases involving past and present violence, some regions will be natural candidates for earlier treatment than others. But since delay invites strengthened opposition, a credible announcement that signals what will be done and more or less when it will be done can help to allow a greater degree of gradualism in practice. For example, if a specific set of land ceilings for retained properties is established in a credible way, much of the effort that would otherwise be expended by opponents in contestation of the land above that ceiling may be avoided. It is important in fact, and can be important in the perception of actors, that who gains access to a piece of land during the reform and who loses that access will not be prejudicial to an efficient and fair process over the longer run. When current occupiers believe that current possession is 90% of the way to an ultimately successful claim, it is difficult to persuade them to give up the land. If it is expected that, whatever claims one has will be fairly dealt with in the future and that possession will not be a factor, this problem will be alleviated. Most successful processes have been able to take advantage of extensive participation by the beneficiaries and other local residents.

## **2.5. International Evidence on Land Reform and on Small Farm Performance in the Wake of Conflict**

While there is a wealth of evidence confirming the potential of small farms to achieve high land productivity and good total factor productivity under normal conditions, there is understandably much less evidence on how such farms perform in post-conflict situations, especially in immediate post-conflict. Data collection is hard at such times, and even anecdotal evidence is difficult to interpret, given that the pace and process of change can vary a lot from locality to locality and that many

informants will not be reliable. Still, policy-makers could no doubt benefit from a knowledge of what has worked or not worked in difficult and dangerous settings bearing some similarities of setting to Colombia's, including El Salvador, Guatemala, Rwanda, the Congo, Mozambique, post-revolutionary Mexico, and a number of others. Such *ex post* observation could then be interpreted jointly with what we know in general about how small farms work and what forms of support they need, and about Colombia's own prior history of mini-land reforms and of attempts to better support small farms such as the 'Integrated Rural Development' program of the 1970s.<sup>37</sup>

One case with a number of interesting parallels is Zimbabwe. Useful studies have addressed the land reform processes in the years following the conflict accompanying the 'Bush War', which wrested control of the country from its white minority. Land reform was a promise of the liberation movement; a successful program was quickly begun when the new government took power in 1980 and ratcheted up to peak speed by the mid-1980s, after which it then declined to a trickle.<sup>38</sup> Still, almost one in ten communal area households was benefited and the absolute benefits were substantial, with resettled farmers producing 2 to 2.5 times as much income as their communal area counterparts, even controlling for differences in initial conditions and in access to credit and agricultural services;<sup>39</sup> the internal rate of return on investments in the reform process was estimated at over 20% by some analysts and lower but still satisfactory by others.<sup>40</sup> Beneficiaries were not selected according to wealth or to power within the communal areas; among other things, the better off among that population were not

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<sup>37</sup> Albert Berry, 2006, "Has Colombia Finally Found an Agrarian Reform that Works", in *Human Development in the Era of Globalization: Essays in Honor of Keith B. Griffin*, James K. Boyce, Stephen Cullenberg, Prasanta K. Pattanaik, and Robert Pollin (eds.), 126-52.

<sup>38</sup> Kinsey, *supra* n. 32: 1671.

<sup>39</sup> Klaus Deininger, H. Hoogeveen, and Bill H. Kinsey, 2000, "Productivity and Equity Impacts of Land Reform: The Case of Zimbabwe". Paper presented at the Mini Symposium on Improving Land Access and Asset Ownership by the Poor Through Land Reform: Empirical Evidence and Policy Implications, at the XXIV International Conference of Agricultural Economists, Berlin, 13-18.

<sup>40</sup> Kinsey, *supra* n. 32: 1682.

interested in working the five hectare plot assigned to each family, a fact which made it easier for the program to create opportunities for those who really were disadvantaged. Had the political will not flagged, this program would almost certainly have gone on to be the most successful such experience in Africa. Instead, the ‘Golden Age’ of resettlement came to an end and was replaced since early 2000 by the distribution of land to a wealthy political elite, a process that has been both cause and effect of Zimbabwe’s descent into violence and failure as a state. Although much of the change of course has its roots in the dictatorial and vicious nature of the regime, some blame goes to unduly negative evaluations of the land reform as it unfolded in the 1980s,<sup>41</sup> and to an inadequate body of information on which to judge what in retrospect looks like a major success.

The combination of land concentration among a new illegitimate elite and violence is the final chapter (thus far) in this drama of unfilled potential. A further sobering note is that the country’s overall macro-economic failure, also engendered by the nature of the regime, has greatly limited the employment opportunities outside agriculture and has in fact led to some ‘reverse flow’ migration from urban back to rural settings. This, together with population growth has led to a quick erosion of the initial per capita income gains from the 1980s resettlement program, as household size increases rapidly due to the lack of alternatives for extended family members.

The parallels between this Zimbabwean story and Colombia’s include the initial land reform and rural support measures of various types in Colombia that up until the 1980s could be seen as somewhat similar to the unfolding story in Zimbabwe, albeit never as large relative to the needs and demands and certainly not as positively selective or generally successful in raising incomes.<sup>42</sup> The really worrisome parallel, though, relates to the descent into anti-reform, contributing to violence and suffering. A major element of non-comparability between Zimbabwe and Colombia lies in the fact that after the ‘Bush War’ that ended white minority rule in Zimbabwe, the land reform was under-

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<sup>41</sup> *Id.*, 1672.

<sup>42</sup> Carlos Felipe Jaramillo, 1998, *Liberalization, Crisis and Change in Colombian Agriculture*, Westview Press.

taken in a generally peaceful and positive setting, which lasted for some years. The setting in Colombia is much more difficult in this sense, a fact that makes Salvador and Guatemala closer comparators. We review the former in somewhat greater detail.

Like Zimbabwe's, the land reform experience of El Salvador is, in retrospect, seen at least partly as a failure. As of the early 1980s, however, there appeared to be some grounds for optimism that a reform could both reduce political conflict and unrest and help to jumpstart a stagnating economy. Increasing land concentration with attendant landlessness, a progressive peasant organization that emerged in spite of legal proscription, and the political upheavals in other Central America countries together with the U.S. response to them paved the way for a U.S. backed coup by young military officers, which deposed the landlord-dominated government and then gave way to a mildly reformist administration with some autonomy from the landlord class.<sup>43</sup> The land reform was thus both anti-landlord and anti-Communist, an interesting parallel to Taiwan's of the 1950s, in which the U.S., not coincidentally, also played a fundamental role. The U.S. concern, as it had been in parts of Latin America during the 1960s, was to keep the lid on social unrest and prevent the spread of revolutionary movements like the Sandinistas in Nicaragua. Unlike Taiwan, however, El Salvador had a powerful land-owning elite that, together with a military whose repressive and thuggish wing remained too strong to permit the process going very quickly or very well. The story of ultimate failure to resolve the country's socioeconomic problems, even though a significant number of families did receive land, provides a set of cautionary lessons on what can derail such an attempt.

Nonetheless both the more optimistic plans and the final ex-post numbers make it clear that this was a significant 'reform' experience. Cuellar et al refer to over 120,000 families and just over 400,000 hectares involved, around 18% of all farmland;<sup>44</sup> Thiesenhusen<sup>45</sup> cites a

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<sup>43</sup> Pelupessy, *supra* n. 14: 24.

<sup>44</sup> Nelson Cuellar, Silvia de Larios, and Herman Rosa, 2004, *Cambio económico, empleo y pobreza rural en El Salvador. Programa Salvadoreño de Investigación Sobre Desarrollo y Medio Ambiente (PRISMA): Documento de Trabajo*: 23.

figure of nearly 500,000 beneficiaries (individuals) or about 21% of the economically active population.<sup>46</sup> In any case, it has been judged the largest non-socialist reform ever undertaken in Latin America in relation to the country's size.<sup>47</sup>

Given that a significant amount of land was involved, this reform would be expected to have an important effect on the country's agrarian structure. Seligson concludes that it did, based on a comparison between data from a large rural survey undertaken in 1991-1992 and the 1961 and 1971 population and agricultural censuses; he finds that the share of families who were land poor (having under 1 hectare or 0.7 hectare, depending on the year) fell by a few percent, as did the share of temporary farm workers, while the 'landed' (those with above the just cited cut-off) rose from 14.4% of the agricultural labor force to somewhere probably around 20%.<sup>48</sup> Judged, then, in terms of how much land structure changed, this reform could not be deemed a failure; it was not one of the more common 'token' reforms of Latin America during the post WWII period. Yet it did fail *vis-à-vis* some of its important objectives: it did not adequately resolve the land scarcity

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<sup>45</sup> William C. Thiesenhusen, 1995, *Broken Promises: Agrarian Reform and the Latin American Campesino*, Westview Press: 154.

<sup>46</sup> T. David Mason, 2004, *Caught in the Crossfire*, Rowman and Littlefield Publishers: 215.

<sup>47</sup> Merilee Grindle, 2000, *State and Countryside*, Johns Hopkins University Press: 134. Pelupessy (*supra* n. 14: 32) concludes that whereas in Taiwan 50% of rural families were beneficiaries of that country's reform, in El Salvador 24% benefited from the 1980s reform phases, or 35% when the 1992 accord steps are added in.

<sup>48</sup> Mitchell S. Seligson, 1995, "Thirty Years of Transformation in the Agrarian Structure of El Salvador, 1961-1991", *Latin American Research Review* 30: 49. In the 1991-1992 figure that he provides, 23.4% corresponds to the farms with above 0.7 hectares, so the share with 1 hectare or more would be somewhat less. Seligson (*id.*, 45) also notes the wide range of contemporary views on the country's agrarian structure and the changes it underwent, and how poorly they were substantiated. Different sources used different categories to define the population they felt was in need of help, and some of the influential studies appeared to have been done carelessly. As for assessing the amount of change occurring, there were simply no reasonably comparable sources available until the appearance of the 1991-1992 source he employs and even it presented some problems, such as the exclusion of a few regions of the country where insecurity prevented surveying of the population.

problem, much less the economic stagnation problem, and it did not bring social peace; instead it left a legacy of 75,000 lives lost, a still violent society, millions of dollars worth of infrastructure destroyed, and an enormous number of emigrants forced or induced to leave the country. Though rural inequality probably did fall, it remained severe.<sup>49</sup> Income data reported by Seligson<sup>50</sup> show a still close relationship between access to land and both total income and farm income, with an income ratio of about 3:1 between cooperative members and temporary day laborers, and 2:1 between ‘farmers’ (those without employees) but not land poor (for example, having above 0.7 hectares) and temporary day laborers. In Seligson’s words: “it may be that as the peace comes to El Salvador, the legacy of human suffering caused by land scarcity and overpopulation will remain an enduring feature of the landscape for decades to come”.<sup>51</sup>

The final chapter (thus far) of El Salvador’s experiment with ‘land reform’ has not been as tragic as Zimbabwe’s, but the process itself was far more costly; this is, from both a technical and a social perspective, a story of sadly unfulfilled potential. The 1960s and 1970s had seen a sharp increase in the use of modern seeds and inputs; average sectoral growth over 1970-1979 was 3.3%. During the civil war

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<sup>49</sup> According to Pelupessy (*supra* n. 14: 39, quoting Aquiles Montoya) “*El Agro Salvadoreño Antes y Después de la Reforma Agraria*”, *Cuadernos de Investigación*, 1991, San Salvador: Centro de Investigaciones Tecnológicas y Científicas (CENITEC) the reported Gini coefficient of rural income fell significantly from 0.54 in 1978 to 0.44 in 1985. In both years the rich agricultural families are excluded as are the unemployed. These figures must be interpreted carefully, since it would be surprising if they did not suffer from fairly serious weaknesses, including some degree of non-comparability. The cited figure for 1978 is extremely high for the rural part of a country, even more so given the de facto exclusion of the rich agricultural families (often the case in such figures, since this group lives mainly in towns or cities). Even the 1985 figure would leave Salvador’s rural areas among the world’s most inegalitarian. The possibility that a significant decline occurred is quite a real one, however, given that a degree of land redistribution did occur and that many of the landed elite left agriculture entirely. A more pertinent question, in this case, would be what the impact was on overall inequality at the national level.

<sup>50</sup> Seligson, *supra* n. 48: 67.

<sup>51</sup> *Id.*, 71.

years 1980-1989 there was negative growth in agriculture and stagnation in livestock,<sup>52</sup> together with a dramatic fall of GDP by 23% between 1979 and 1984. Under-utilization persisted in both large private estates and in the reform cooperatives. Sectoral output stabilized by the late 1980s and then began to rise modestly; but as late as 2004 it had not yet recovered the peak of 1979. With falling output and agricultural productivity in the 1980s came a decade of sharp declines in the real income of rural families (by 30% over 1980-1984)<sup>53</sup> which have been only partially reversed since then. The breakdown in rural livelihoods accelerated environmental degradation.<sup>54</sup> The agrarian conflict in El Salvador has thus left a very heavy negative economic, social, and environmental legacy.

At least five proximate difficulties or weaknesses were at play, interacting with each other. Violence was endemic, especially in the early years of the reform process; the process was designed to consist of several phases and, for this and other reasons, was slow; the reforms suffered from relatively serious design defects, leading to a less-than-optimal allocation of the land that did get transferred; management was top-down and non-participatory, too often lacking in coherence and in competent implementation; and there was little or no support system in place to help those who needed it among the reform beneficiaries and other small farmers. All of these features owed much, directly or indirectly, to the powerful forces that opposed reform, which included not only, most obviously, the large landholders and the wing of the military who had thrown in their lot with this group, but also the guerrillas who saw land reform without social revolution as an undesirable outcome. How much better things could have unfolded given the political conditions is a matter for debate. In the event the struggle between contending forces created a setting in which both the agricultural sec-

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<sup>52</sup> In stark contrast to the robust sectoral post-reform growth in Taiwan of 4.8% during the comparable period.

<sup>53</sup> Pelupessy, *supra* n. 14: 39.

<sup>54</sup> Carlos Acevedo, Deborah Barry, and Herman Rosa, 1995, "El Salvador's Agricultural Sector: Macroeconomic Policy, Agrarian Change and the Environment", *World Development* 23: 2153.

tor and the economy as a whole crashed, and the associated human suffering was enormous.

Putting it positively, one can ask how the process would have had to go in order to generate a really positive outcome. Had the civil war been avoided, the setting would obviously have been much more conducive to agricultural and overall growth. Had the land transfer been more pro-poor, based more on need for land and less on status as a worker on a large estate or an ex-combatant in the war, its social and economic impacts would have been more positive. Had the support system for small farmers been more positive, their initial income increase from access to more land would have been complemented by continuous income growth as productivity rose. Instead of shrinking under the influence of civil war the economy would have grown, partly through the positive output effects of the redistribution of land.<sup>55</sup> Adequate economic growth, together with the falling rate of population growth would eventually have reduced the pressure on land through a natural process of rural-urban migration, rather than through the involuntary departure forced by the war and the economic decline to which it contributed. Given the density of El Salvador's population, this overall economic growth would have been especially important since otherwise, in the absence of international emigration on a large scale, the initial income gains from an agrarian reform would have been lost to population growth and its negative impact on farm size (as occurred in Zimbabwe). There appears to be no technical or economic reason why this reform could not have been both the largest non-socialist land reform in Latin American history but also the most successful, not only in the achievement of the normal direct benefits from a good reform, but also in helping a very land scarce country to escape the vicious-circle impacts of over-population and the associated land scarcity, by fostering overall growth and the associated transfer of resources from agriculture to other sectors.

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<sup>55</sup> I have not seen a detailed analysis of the relationship between farm size and land productivity, but Seligson's (*supra* n. 48: 69) figures on agricultural income by farm size suggest that as of 1991-1992 land productivity was about three times higher on the smallest units of under 0.5 hectares than on the largest of above 10 hectares.

To identify the ultimate sources of the relative failure of this land reform, one must pinpoint the causes underlying the proximate mechanisms just cited. The underlying seeds of violence were, no doubt, the long history of an extremely unequal land tenure system and the associated social, political and economic injustices, bearing some similarities to the Colombian history, including the 1932 massacre of peasants at about the same time as the United Fruit massacre in Colombia (1929) and a history of displacement of the weak when land became attractive to the strong. Land scarcity and inequality had been worsening sharply over the 1960s judging by census data,<sup>56</sup> as peasants continued to lose their land. By the late 1960s a new factor had been added to the mix. The Christian Base Communities (*Comunidades Eclesiales de Base* CEBs), which took off after 1968 with the rise of Liberation Theology, helped to change the dynamic of peasant resistance. They overcame collective action problems, gave peasants a greater sense of empowerment, and induced them to be more proactive. Initially the link with the church provided peasant activists with a degree of immunity from repression. The communities and their members first took up community projects and then, empowered by that experience, became increasingly involved in peasant associations, unions and other groups, as both leadership skills and more general willingness to participate grew. The impact on voting patterns forced the military to steal the 1972 election.<sup>57</sup> Non-violent opposition was now met with repression, and eventually some peasants felt that such repression, especially when family or friends were among the victims, justified violence on their own part. The state then responded with escalated repression of union leaders, peasant associations, CEBs, etc. culminating in the murder of a number of priests and, finally, the famous assassination of Archbishop Romero in 1980. Repression reached a crescendo in 1981, the first year of the land reform. With the death squads no longer able to count on immunity as before, and the creation of the Farabundo

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<sup>56</sup> Seligson, *supra* n. 48: 62-3.

<sup>57</sup> Mason, *supra* n. 46: 210.

Marti Liberation Front (FMLN) coalition, the repressive violence degenerated into civil war.<sup>58</sup>

In this extremely negative setting, the agrarian reform did not end or even greatly diminish revolutionary opposition, as the centrists (including USAID) had hoped. The failure of the reform to bring quick benefits to many land aspirants was presumably a factor, but probably less important than the political currents at play. At this time there was a further escalation of violence by the far right segment of the military. Meanwhile the guerrilla leaders of the FMLN also wanted the reform to fail. The peasantry was caught in the crossfire of this Kafkaesque drama. Mason argues that failure to get land does not push the typically risk-averse peasant into the arms of the guerrillas.<sup>59</sup> But state counterinsurgency violence can create the conditions where it is rational for peasants to support the guerrillas even if they have been land reform beneficiaries, let alone if they have not. With support for the regime undermined by the high levels of repressive violence, indiscriminately targeted, the insurgents could offer the peasant more overall security than anyone else. Although joining an insurgency carries extreme risks that most peasants will not take, proactive violence by the state, targeted on actual or suspected supporters of opposition organizations – whose main purpose is to seek relief for their members from the effects of inequality – narrows the range of choices available to peasants by precluding both non-violent collective action and non-involvement. Loyalty of all groups erodes when they cannot be certain of immunity from state violence.

The 1984 election victory by centrist José Napoleón Duarte might have signalled a let-up of the struggle but for the fact that the military remained largely independent, partly because U.S. funds went

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<sup>58</sup> In Taiwan, by contrast, the state was behind the reform and made it clear to all that the reform was going to happen, but also provided positive incentives to all groups. The rent reduction program (see below) was implemented in part to show the landlords that the government was serious about redistributing land, but it was complemented by care to make sure that the landlords were given reasonable compensation. One objective was to stimulate involvement of landlords in industrialization and in the privatization of state corporations.

<sup>59</sup> Mason, *supra* n. 46: 199.

directly to its high command rather than through the government.<sup>60</sup> The number of deaths did fall as the military shifted its strategy towards air strikes, but these brought such a heavy toll of civilian deaths and injuries that they accelerated the flight of people to rebel-held areas. By 1985, 500,000 had been displaced but were still in the country. The stalemate continued, between a never completely unified and overly dogmatic FMLN and a rigid, repressive military. By the end of the 1980s, it was clear that neither side could win. Land reform and other factors had eroded the power of the agro-export elite and many of this group had left the country, replaced by a new commercial elite with less interest in the war. This group became the strongest force in the right-wing party ARENA, which won the elections of 1988 (legislative) and 1989 (presidential). The conditions had been established for the Peace Accords of 1992.

The partnership between the right wing of the military and the large landholders, in a context of rising opposition, had thus produced the setting of violence. Meanwhile the resistance to reform produced delays (some built into the phase by phase approach) and contributed to the bureaucratic hold-ups that plagued the program throughout. In the first phase only the largest properties (over 500 hectares) were to be expropriated and converted into cooperatives. Bureaucratic incompetence and delays were endemic, registries were not available, the relevant institutions were understaffed with insufficiently trained personnel, and sabotage plagued each step.<sup>61</sup> Delaying tactics were combined with violent repression; the reform was accompanied by military operations as the civil war continued through the decade. The army take-over of the large haciendas in the first phase was accompanied by the expulsion of members of peasant organizations; more generally, participation by the beneficiaries was almost non-existent. The agrarian cooperatives created were closely monitored and controlled by the

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<sup>60</sup> *Id.*, 222.

<sup>61</sup> Taiwan provides an extreme contrast. There the Sino-American Joint Commission on Rural Reconstruction provided technical assistance and financial support during the 15 months of registration and classification prior to the transfer process. During this period 32,000 promoters and assistants were mobilized at the national and local levels to execute these tasks, involving 2.1 million plots and 800,000 families (Pelupessy, *supra* n. 14: 30).

Institute for Agrarian Transformation (ISTA), with technical and financial assistance from USAID.<sup>62</sup> Broadly speaking, the civil war created a cover for the opponents of reform to partially subvert it through violence.

The next phase of the reform was to involve properties of 100-500 hectares, which included the most profitable export-crop estates; it was blocked by the largeholders and later replaced by the ‘law of voluntary land sale’ which did not involve expropriation and which was on a smaller scale than that originally contemplated. Phase III, strongly supported by U.S. advisors, was a ‘land to the tiller’ component designed to enable small tenants to obtain up to seven hectares through a hire-purchase system. Large and medium landowners who feared they would be affected used death squads and other paramilitary gangs to expel tenants who might qualify for purchase. Because of the way these programs were designed/applied they were opposed by the popular organizations as well.<sup>63</sup>

The fourth and last phase, the result of the 1992 peace settlement between the government and the FLMN was a combination of the law of voluntary sale and Phase III. It has also been plagued by delays, sometimes blamed on financial constraints but usually ultimately due to political factors. Thus the purge of army officers guilty of human rights abuses occurred only after long delays and under strong international pressure. The land transfers were seen mainly as a way of reincorporating the ex-combatants and supporters of the FMLN back into the productive life of the country, but it quickly fell far behind schedule. As Boyce notes, the recipients of land transfers were typically saddled with debts that they were unlikely to be able to repay.<sup>64</sup> Debt forgiveness became a major item in the ongoing politics of land reform in the 1990s. The electoral victory in 1994 of the right-wing ARENA party signalled a relatively hard line on this issue, which, however,

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<sup>62</sup> This institution spent 800 million USD over the decade on land reform, though much of this went to repair infrastructure and to compensate the large holders.

<sup>63</sup> Pelupessy, *supra* n. 14: 28.

<sup>64</sup> James K. Boyce, “Adjustment Toward Peace: An Introduction”, *World Development* 23: 2074.

remained a key one as the peace process remained “laden with the politics of land”.<sup>65</sup>

The reform process did not benefit the most marginalized members of the population, the landless. In the first phase, cooperative rules allowed the members to keep others out, a source of continuing inequality. At the same time, many members were unhappy with the cooperatives’ equal pay provision that encouraged free riding.<sup>66</sup> Many devoted their time to their own plots and eventually most cooperatives began ceding or renting larger portions of their land to individual members to operate as smallholders. The focus in Phase III on ‘land to the tiller’ as opposed to ‘land to those most in need’ also contributed to the limited poverty reduction impact of the reform, as did the focus on providing ex-combatants with land.<sup>67</sup> Its design also reflected ignorance or insensitivity to the variety of tenure arrangements found there; thus poor peasants who happened to rent out were subject to expropriation.<sup>68</sup> This sort of problem reflected the fact that the Salvadorian authorities knew little about rural social structure.<sup>69</sup> Many renters never applied for land because of intimidation and other reasons; 25,000 potential beneficiaries of Phase III were evicted before they could apply, though three quarters of these were eventually reinstated.<sup>70</sup>

Strikingly absent, albeit quite understandable under the circumstances, was any positive push to improve the support system for small farmers. They remained at the mercy of fluctuating markets, weak macroeconomic performance and other contextual dangers. In the early 1990s the agricultural sector as a whole was suffering, with the small-

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<sup>65</sup> Ariane de Bremond, 2007, “The Politics of Peace and Resettlement through El Salvador’s Land Transfer Programme; Caught Between the State and the Market”, *Third World Quarterly* 28: 1554.

<sup>66</sup> Thiesenhusen, *supra* n. 45: 152.

<sup>67</sup> None of this is to say that these choices were silly ones in the context within which the reform was playing itself out, but rather that they guaranteed that its impacts would be less positive than they might otherwise have been.

<sup>68</sup> Mason, *supra* n. 46: 216.

<sup>69</sup> Pelupessy, *supra* n. 14: 41.

<sup>70</sup> John Strasma, 1989, “Unfinished Business: Consolidating Land Reform in El Salvador”, in *Searching for Agrarian Reform in Latin America*, William C. Thiesenhusen (ed.), Boston: Unwin Hyman: 410-11.

holder sector facing ever more serious barriers to its viability and with government policies for agriculture virtually non-existent. By 1994 a new agricultural policy had begun to develop, largely in connection with two projected World Bank loans.<sup>71</sup> The elements of the policy matrix proposed in connection with these loans all had some plausibility but policy consensus had not been reached; the Bank's earlier support for loan extensions by the Agricultural Development Bank at commercial rates was controversial, as was its alleged bias in favor of 'parallelization' as opposed to more collective forms of tenure. In the event, the loan in question proceeded to focus almost exclusively on land administration issues.<sup>72</sup> By the 1990s some of the earlier missteps in this area were at least partially corrected. Thus community participation in many aspects of the parcelization and titling and social consensus on aspects of the program became a feature of the PTT (*Programa de Transferencia de Tierras*) of the 1990s,<sup>73</sup> and helped to avoid renewed conflict. In the new system of titling, NGOs conducted most of the outreach but government channels were also built into the process, which allowed direct access to appropriate legal channels. Complementary community support initiatives, favored by progressive NGOs and the FMLN were tried in two communities but then removed, due to lack of funding, according to a USAID official.<sup>74</sup>

While the progress achieved was doubtless important, the basic need for a strong agricultural support system remained unfulfilled. The experience with small farms around the world is that the single main key to progress is a good system for research, development and dissemination of new varieties and agricultural practices. It was inevitable that what did still exist of a support system with positive impact on small farmers would be hamstrung during the violence and would, in the best of cases, take some time to bring up to speed thereafter. But such systems had in any case been downgraded.<sup>75</sup> Even were its impor-

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<sup>71</sup> de Bremond, *supra* n. 66: 1549.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, 1552.

<sup>74</sup> *Id.*, 1553.

<sup>75</sup> Deborah Barry and Nelson Cuellar, 1997, "*Las transformaciones del agro salvadoreño y la efectividad de las políticas sectoriales*", PRISMA: 7.

tance now recognized, there would be less political support for remounting a support system since the size of the poor rural population has shrunk due to the combination of violence, stagnation and the opportunity to emigrate from the country so that the political parties now have less incentive to serve that constituency.<sup>76</sup>

### **2.5.1. Lessons for Colombia from El Salvador.**

Many lessons of relevance to Colombia can be drawn from the Salvadorean experience on the economic and related fronts. The experience of trying to implement a reform in the presence of ongoing conflict and of a landlord power group willing to use extreme measures to terrorize or eradicate potential claimants bespeaks an obvious route that things could take in Colombia, or at least parts of it.

The experience in El Salvador shows that a land reform, even when it does redistribute a significant amount of land is neither a guarantee of peace – this was undermined by the repressive state tactics and the already established strength of the guerrillas – nor does it automatically create the conditions for the new small farms to become a driving force for equitable growth, as occurred for example in Taiwan. In spite of the continuing violence and the lack of policy support there is no doubt that many families' incomes were eventually raised by the reform after the political setting moved back towards normalcy; but there is equally little doubt that many more families could have benefited. Zimbabwe too shows the potential effect of a land reform that gives small farmers more land than before even in the absence (one presumes) of anything like a strong support system, but it also exemplifies the failed opportunity to be a major motor of growth.

For Colombia to achieve a socially successful reform it would have to do better than did Salvador in the control of repression and violence, in the effective administration of a program that got land into the right hands, and in the development or redevelopment of a decent support system. Leftist guerrillas opposing a settlement of the agrarian problem within a capitalistic structure are a much smaller problem in Colombia, whereas the opposition from the combination of landlords,

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<sup>76</sup> Seligson, *supra* n. 48: 71.

paramilitaries and narcoterrorists is possibly a bigger one. Colombia could not expect to relieve its rural tensions by the combination of emigration and remittances, which became one of the main legacies of the war in Salvador.<sup>77</sup> Colombia's support system for small farmers has shrunk over recent decades, as had that of El Salvador. Success requires a feasible package of steps that will raise small farmer incomes, with better access to land not usually enough by itself. Thus in Taiwan one of the important elements that made the land reform so successful and assured that the number of beneficiaries be so large was the rent reduction program, which greatly increased the purchasing power of poor tenants.<sup>78</sup> Where, as in Colombia, such a program could not have nearly as great an effect (because of the much smaller role of tenancy), some substitutes must be found. In El Salvador much debate revolved around the use of subsidized credit; economists typically distrust this practice, but it or something like it may have been the best option available in this case.

## **2.6. Land Reform in the Broader Context of Employment and Income Distribution Outcomes in Colombia**

Viewed from a national perspective, the potential contribution of a successful post-conflict land reform depends both on the role and dimensions of the agricultural sector in the national economy and on the severity or not of problems on the employment and income distribution fronts. The setting in which land reform would be most important is

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<sup>77</sup> The final impact of El Salvador's agrarian, economic, and political history since the 1970s has been affected in an important way by the massive exodus of nationals, largely to the U.S. but also to other countries, probably 1.5 to 2 million, compared to a resident population of a little over 6 million. Thus as many as a quarter of the population may have left, providing a huge safety valve, albeit not one without problems. This is an escape valve that is not available to larger countries, including Colombia, especially as the world economy enters a possibly serious recession.

<sup>78</sup> The rent reduction program redistributed 18% of the 1948 rice production and raised tenants' net family income by 40% (Pelupessy, *supra* n. 14: 32). This greatly increased their capacity to buy land. In El Salvador, although the civil war brought land prices down, small farmers and the landless could not benefit from this.

that of a still mainly agricultural country which has a particularly severe challenge of creating enough remunerative jobs to achieve some poverty reduction. Against these criteria Colombia is in a less difficult situation than it would be were the share of the labor force in agriculture double what it is now, but in a very demanding situation given the huge overhang of displaced people and others already in the urban labor market but not able to get such remunerative jobs. The displaced population constitutes a large part of that supply-side overhang in the labor market. Taking these aspects of the situation into account suggests that the importance of success in the land reform area is greater even than might at first glance appear, even though that first glance throws up enormous numbers of human rights abuses and of dispossessed people. The role of reform-based small farms must thus be seen not only in terms of the direct benefits, but also as an important determinant of whether the country will deal effectively with its overall employment challenge.

Colombia's current labor force structure is reasonably typical of middle income countries of the region in that a significant share of employment is found in smaller farms and a very large component of non-agricultural employment in the informal sector, along with the quantitatively less important small and medium firm (SME) sector. In the aggregate, the employment found in the public sector and the large scale (100 workers and up) private firms is probably only about a third of urban employment and about a quarter of total employment (as of the early years of this decade), a figure that appears not to have risen in recent decades even though it had done earlier in the last century. Though large private firms and the public sector should eventually regain their capacity to generate a rising share of all jobs, it remains unclear when that will happen. In the meantime, the task of job creation rests perforce with small agriculture and the MSME sector outside agriculture. For total labor demand to rise fast enough to create a reasonable chance that the labor market will produce a socially adequate outcome, it is almost certain that over the next decade or so both small agriculture and MSMEs must both make significant contributions on the labor demand side, since neither by itself has the capacity to meet the labor demand challenge. Supportive policy can help each of these two sectors to achieve greater output and employment growth than in

its absence, but the evidence suggests that it is easier to apply policy to that effect in small agriculture than in the MSME sector. In the former the recipe is well established, involving R&D in the sorts of crops and livestock in which small farms specialize, the diffusion of that information, investment in infrastructure, etc.; any competent government can pull it off if the appropriate will and the modest resources required are applied. In the MSME sector the recipe for success is much less obvious and probably considerably more difficult to apply with comparable payoff to that in small agriculture. This fact makes a policy that relies excessively on the creation of decent jobs in the MSME sector very risky and, at the extreme, guaranteed to fail in the short run if not in the medium run as well.

As noted above, Colombia's recent history provides one more reason to believe that small-farm policy will be crucial to success. That fact follows from the huge flow of involuntary migration out of agriculture in Colombia. Voluntary migration from agriculture is an inevitable and desirable part of a healthy development process. Most of the migrants are young and more educated than the previous generation or the non-migrants; their adjustment to urban life and the urban labor market is normally quite successful. But when many of those involved are involuntary migrants, who have been pushed out of agricultural lives by violence and insecurity, not being adequately prepared for urban life or urban jobs and in some cases also having experienced traumatic experiences, one has a recipe for the failure of rural-urban migration, and an additional argument for striving to resolve the employment needs of many of these people in the setting with which they are familiar: small-scale agriculture.

## **2.7. Conclusions**

The central points of the above discussion are the following:

1. The typical economic advantages of smaller farms over large ones – in higher land productivity, the production of staple food crops, employment generation and maintenance of a healthy environment and genetic diversity, provide a positive setting for land reform in a country like Colombia. There are no serious grounds for believing that there will be a trade-off between right-

- ing past wrongs and keeping agricultural production high. On the contrary, land reform properly executed will both right those past wrongs, and in the process improve employment and income distribution in ways that include not only the wronged and the dispossessed but also others as well, and will raise total agricultural output.
2. While confronting many special challenges as discussed above, a successful land reform could bring greater benefits in Colombia than in almost any other country in the world today, because the land that would be expropriated has to such a high degree been appropriated illegitimately in the past – through drug-related violence, through forced evictions, etc. Many land reforms confront tricky ethical dilemmas because the large holders have not done anything particularly wrong and do have legitimate claims to their land. In Colombia the ethics of a reform are unusually straightforward.
  3. The natural advantages of small farms in Colombia have probably been eroded over time by a support system skewed in favor of larger farms, probably increasingly so over time, and by a setting of extreme insecurity prejudicial to small farmers as much as or more than to others. This creates a bigger challenge to the quick development of an effective small farm support system than would otherwise be the case. But evidence from elsewhere indicates that it is a manageable challenge as long as the political will is there. Quick benefits may be reaped where better security is all that is needed to bring land back to its potential productivity.
  4. Land reform as part of a process of re-energizing the small farm sector in Colombia and its employment generating capacity is pivotal to an overall successful performance of the economy, especially on the employment and inequality fronts. Without this sector it will be much harder for the economic system to generate enough decent jobs over the next decade or so, especially in a context of world recession and of the Dutch disease threat implicit in a relatively high dependence on mineral and other capital intensive exports. The effects of failure would thus be felt not

only in the continued travails of the dispossessed and others previously dependent on small scale agriculture but in a generally poor set of labor market outcomes (wage trends, underemployment, etc.).

### **Appendix**

Total factor productivity is given by the ratio of the value to society of outputs achieved by a given economic unit (farm, firm, group of firms) to the value of inputs used up. The societal cost of an input used up is the output foregone in some other use from the fact that this input is employed in this use. Since both outputs and inputs are numerous we need a way to aggregate them into a single numerator and a single denominator. Whenever we think the relevant markets are working ‘well’ (for example, not too distorted by monopolies, regulations without social logic, etc.) we tend to accept market prices as the way to aggregate the different items produced in the numerator, and labor, capital, land and other inputs in the denominator into single ‘values’. However, markets tend not to work well in developing countries, at least in the sense relevant to this discussion. Often the wage rate of labor overstates the social opportunity cost of that factor, which may in fact be zero when an economy is suffering from a ‘labor surplus’. Capital is often underpriced to favored recipients, those with good bank connections etc (including many large farmers). These factor market ‘imperfections’ mean that market prices are not always the correct way to calculate total factor productivity. Assume, for example, a ‘labor surplus’ economy in which capital and land are the scarce resources, while much labor is unutilized or underutilized. In this case (assuming also that capital is distributed across farm size very much the same way as land is), the relative efficiency of different farm sizes is given by the output per unit of land (land productivity), since land (with accompanying capital) is the only scarce resource. In those cases, the small farms’ normal advantage in land productivity translates directly into an advantage in economic efficiency (contribution to GDP). When labor is not scarce this equality does not hold and one must therefore do a more complicated calculation to know whether small farms are more efficient from a GDP-maximizing point of view; the results come out differently according to the case, as noted above.



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## Corrective Justice versus Social Justice in the Aftermath of War

Pablo Kalmanovitz\*

### 3.1. Introduction

The right to receive reparations or compensation for harms suffered during war has progressively consolidated as part of the standard repertoire of transitional justice mechanisms. In tandem with this progression, the duty to repair for serious violations of human rights and International Humanitarian Law has gained increasing recognition and force in international law.<sup>1</sup> In an important recent step in this development, the UN General Assembly adopted and proclaimed at the end of 2005 a set of basic principles and guidelines on the “right to a remedy and reparation”, among which were a state obligation to “provide reparation to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law or serious violations of international humanitarian law” (§15).<sup>2</sup> Given that the state can be presumed in general to be responsible for the protection of its citizens’ human rights, the scope of the attribution of omission, and hence of the duty to repair, is in principle very wide. Moreover, the principles and guidelines include a broad right to compensation, which provides for “any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case”, including in particular lost opportunities

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<sup>1</sup> See generally Dinah Shelton, 1999, *Remedies in International Human Rights Law*, Oxford: Oxford University Press; Steven R. Ratner and Jason S. Abrams, 2001, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. Oxford: Oxford University Press; Pablo De Greiff, 2006, *The Handbook of Reparations*, New York: Oxford University Press.

<sup>2</sup> UN General Assembly Resolution 60/147 of December 2005.

and losses of earning potential (§20). Even though these principles and guidelines are not strictly binding on states, they are indicative of the growing expectations of international and domestic NGOs, of victim organizations, and of civil society in general, that wide programs of reparations or compensation be funded and implemented by the state in the aftermath of armed conflicts.

In this chapter I would like to probe into the justification of rights and duties associated with compensation programs and assess critically standard transitional justice and human rights discourse. I want to examine in particular the normative force of the right to be repaired for harms suffered during war from the standpoint of a liberal conception of corrective justice. This conception, to be developed below in sections 3.2. and 3.3., is part of a broader theory of justice that aims to protect human autonomy and its material bases. The claim I will defend is that if we adhere to this liberal understanding of justice, then in the aftermath of a massively destructive war we should give priority to rights and obligations of *social* justice over those of corrective justice. Paradoxical as it sounds, I want to argue that the more widespread and extensive the destruction caused by a war, the weaker the rights to receive reparations. In the limiting case of a war that affects directly a large majority of the population (for example, Mozambique), rights and obligations of social justice should trump all rights of corrective justice.

Before moving on to my main argument, I would like to raise two preliminary doubts about the normative force of the right to reparation in the aftermath of war, with the aim of giving some intuitive motivation to my theoretical approach. Generally speaking, duties to repair look into the past with the aim to restore, as far as possible, the *status quo ante*. But in war cases, if the *status quo ante bellum* led to a war, why should we want to restore it? Should we not rather avoid the *status quo ante bellum* and invest resources in a more forward-looking way, so that we create conditions that are more likely to sustain peace and future justice? Cases of war fought in order to redistribute resources – for example, land, oil, diamonds – make this plain. In Nicaragua, for example, the Sandinista revolution in the early 1980s expropriated Somoza and his allies, whose assets amounted to 25% of the

country's industrial capacity and 20% of the farmland.<sup>3</sup> Strict observance of the right to reparation would require the devolution of these assets to their original owners. It would be very hard to argue that devolution would be just, or even prudent, since arguably the unequal distribution of wealth contributed to social unrest and ultimately to the war in Nicaragua. If the distribution of goods in a country is highly unequal, corrective rights and obligations seem to lose much of their intuitive appeal, particularly if a skewed distribution can be plausibly seen as a factor contributing to social unrest and violence.

The proper definition of the baseline of corrective justice raises the second doubt. If we are mandated to restore the status quo *ante bellum*, how far back do we need to go?<sup>4</sup> Often, countries that have suffered from war have had a long history of violence and conflict, and it may be impossible to identify uncontroversially a time in history where corrective rights and obligations should be grounded. Illustrations abound, but to name just a few: in post-1990 Eastern Europe, should there be reparations for losses suffered during the First World War, or for anti-Semite expropriations in the *inter bellum* period, or for the losses suffered during the Second World War, or for the massive expropriations at the end of the War (1945-1950), or for later Communist nationalizations (1950-1970)?<sup>5</sup> In East Timor, should reparations be made to those who held property during Portuguese colonial rule and lost it during the Indonesian occupation, or to those who got property during Indonesian occupation and lost it during the wanton and massive destruction of 1999?<sup>6</sup> If reparations had been on the agenda at

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<sup>3</sup> Valpy Fitzgerald and Arturo Grigsby, 2001, "Nicaragua: The Political Economy of Social Reform and Armed Conflict", in *War and Underdevelopment*, Frances Stewart and E. V. K. Fitzgerald (eds.), Oxford: Oxford University Press: 124.

<sup>4</sup> For a thorough treatment of this question, which leads to conclusions similar to my own, see Tyler Cowen, 2006, "How Far Back Should We Go? Why Restitution Should Be Small", in *Retribution and Reparation in the Transition to Democracy*, Jon Elster (ed.), New York: Cambridge University Press.

<sup>5</sup> On the immense complexity of corrective justice in Eastern Europe see generally Istvan S. Pogany, 1997, *Righting Wrongs in Eastern Europe*, Manchester: Manchester University Press. See also chapter four in this volume by Monika Nalepa.

<sup>6</sup> Daniel Fitzpatrick, 2002, *Land Claims in East Timor*, Canberra: Asia Pacific Press.

the end of the Contras War in Nicaragua, in 1990, should it have aimed at conditions during the Somoza period, repairing losses endured during the Sandinista revolution (1979), or should it have aimed at conditions during early Sandinista rule, repairing for losses during the Contras War (1984-1990)? In each of these cases, there is no obvious, uncontroversial focal point on which to anchor reparation claims. Moreover, suggesting any date as a baseline may be divisive politically and potentially conflictive: in each case, questions of legitimacy were at the heart of the complex history of violence, and the selection of a baseline would imply by necessity favoring some claims of reparation over others on controversial grounds.

The argument in this chapter may be added to these two skeptical considerations to make the case for a re-conception of the right to reparation after war. In addition, my argument will offer positive reasons for giving priority to social justice over corrective justice in the aftermath of massively destructive wars. The argument proceeds as follows. Section 3.2. defines more precisely the concepts of corrective and social justice, and section 3.3. sketches summarily the liberal conception of corrective justice that will serve as the basis of my critique of current transitional justice discourse. Section 3.4. makes the critique explicit and discusses some illustrations and limits. Section 3.5. addresses the objection that giving priority to social justice undermines the accountability of wrongdoers after war, and section 3.6. concludes.

### **3.2. Corrective Justice and Social Justice**

The basic principle of *corrective justice* (henceforth CJ) holds that an individual who has been harmed by another's act or omission has a right to be repaired or to receive compensation for the losses thereby incurred.<sup>7</sup> If possible, reparation should provide the harmed individual

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<sup>7</sup> According to standard usage, the term 'reparation' is reserved to cases in which it is possible to completely make up for the loss, for example returning a stolen good or giving an identical version of a destroyed good, and the term 'compensation' is reserved to describe monetary payments made instead of the lost good, for example when the good cannot possibly be replaced or when the harm is immaterial. My argument makes no use of this distinction so I will use the two terms interchangeably.

with a “full and perfect equivalent” of the thing lost.<sup>8</sup> The standard construction of the right to be repaired assigns the corresponding duty to the agent of the harm on grounds of individual responsibility.<sup>9</sup> But in cases of serious violations of human rights and international humanitarian law, the state has been made liable on grounds of responsibility for omission, and has acted as subsidiary compensator when the actual agent of harm was not identified or was unable to compensate.<sup>10</sup> Whatever the source of compensation, one of the core aims of CJ is to *bring people back to where they were* before the harm suffered, not just to make them better off.<sup>11</sup>

A doctrine of CJ must articulate defensible grounds for rights to be repaired and duties to repair. In the following section we will examine one appealing doctrine, but first I would like to make some conceptual remarks relative to corrective rights and duties. First, CJ is *individualistic* in the sense that its rights and obligations arise from interpersonal transactions and individually suffered wrongs or losses. As is often put, CJ creates “agent-relative reasons for action”, that is, reasons that apply only to particular agents in virtue of their particular harmful acts or omissions; causing harm creates a duty to repair in the responsible agent and suffering harm creates a right to be repaired.<sup>12</sup> Second, CJ is *backward-looking* in the sense that it addresses and seeks to remedy wrongful acts or omissions that occurred in the past. In consequence, any pursuit of CJ must necessarily involve *some* investigation of past wrongful acts, perhaps not under the strictures of tort law but at least in the form of a more loosely defined truth-elucidation commission with the power to make compensation awards. Third, CJ necessarily involves a *transfer of assets* to a wronged party. Purely symbolic

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<sup>8</sup> The phrase comes from the U.S. Supreme Court landmark case *Monongahela Navigation v. U.S.*, 148 U.S. 312 (1893), cited in Robert Goodin, 1991, “Theories of Compensation”, in *Liability and Responsibility: Essays in Law and Morals*, R. G. Frey and Christopher W. Morris (eds.), Cambridge: Cambridge University Press: 262.

<sup>9</sup> See generally Jules L. Coleman, 2002, *Risks and Wrongs*, Oxford: Oxford University Press.

<sup>10</sup> Ratner and Abrams, *supra* n. 1.

<sup>11</sup> Goodin, *supra* n. 8: 276-77.

<sup>12</sup> Coleman, *supra* n. 9: 311-15.

reparations, for example public apologies or acts of atonement, commemorative days, or the creation of museums, are not part of corrective justice as here understood. Finally, note that CJ is *different from retributive justice*. The aim of CJ is not to punish the agent who caused harm by forcing him to pay reparations (as in punitive damages) but mainly to bring back the sufferer of harm to the position he was before the harm. It may be argued that it is equally important for corrective justice that the agent responsible for the harm be the source of the reparation, regardless of whether he is blameful or not, but, for reasons that will be clear in section 3.5., my analysis will focus largely on the right of victims of harm.

I shall understand *social justice* (henceforth SJ) as a set of principles that allow us to identify certain distributions of goods and opportunities in society as preferable to or more justified than others. The concept of SJ on which I rely is broadly Rawlsian, but I will simplify much and concentrate on two principles, neglecting a great deal of the subtlety and theoretical complexity of Rawls and Rawlsian commentators. The first principle is that all citizens must have access to certain basic goods that are necessary for their subsistence and free agency, and that securing such access is always an urgent task of government. In Rawls's theory these basic goods appear as "primary social goods", and are characterized as goods that "every rational man is presumed to want" because they are means for advancing one's ends, "whatever these ends may be". The bundle of Rawlsian primary social goods consists in certain basic political and civil rights and liberties, together with the guarantees of the rule of law, sufficient income and wealth, and security in the holding of private property.<sup>13</sup> The free use of these goods allows each member of society to bring his own self-chosen plans to fruition, given reasonably favorable circumstances. The specific contents of the bundle of basic goods may vary across societies according to historical circumstances, but it includes minimally provi-

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<sup>13</sup> See John Rawls, 1999, *A Theory of Justice*, Rev. ed. Cambridge: Belknap Press of Harvard University Press: xiv-xvi, 53-56, 242; John Rawls, 2001, *Justice as Fairness: A Restatement*, Cambridge: Harvard University Press: 168-77.

sion of basic health, sufficient nutrition and education, and basic material goods.<sup>14</sup>

The second principle of social justice I will refer to is that of equal opportunity. According to this principle, equal access to primary social goods, to wealth and positions of influence in society, should be secured for all, so that “in all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed”.<sup>15</sup> This principle reinforces the egalitarian vocation of SJ.

In contrast to corrective justice, SJ thus conceived is not individualistic but *institutional*, in the sense that it creates not agent-relative but general reasons for action, central among which is that of upholding and supporting just social institutions with enough power to generate society-wide incentives and to direct and transfer resources justly. Secondly, SJ is not backward-looking but *present- and forward-looking*. Its driving concerns are current and future access to primary goods, not past endowments or rectification of historical wrongs. Finally, SJ is driven by the maximization of the access to primary goods, to which all people are assumed to be *equally entitled*. Unlike CJ, which prescribes material transfers in proportion to an *ex ante* loss or harm, SJ is egalitarian and in principle independent of considerations of merit or desert.<sup>16</sup>

Now, clearly CJ and SJ will often pull in opposite directions. While CJ is meant to protect rich and poor alike, for SJ the unequal

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<sup>14</sup> Rawls, 1999, *supra* n. 13: 244-45; Rawls, 2001, *supra* n. 13: 172. Amartya Sen and Martha Nussbaum’s capability approach can provide a helpful alternative framework for articulating principles of social and corrective justice, and to assess their force in the aftermath of armed conflict. In their approach, the task of government is not to provide or secure some primary goods but rather to enable and sustain certain basic capabilities for functioning among the members of society. The definition of these modes of functioning is partly up for each society to decide, partly a natural matter. This is not the approach I will follow here, but for commentary and applications to cases of transitional justice see David A. Crocker, 2008, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy*, New York: Cambridge University Press.

<sup>15</sup> Rawls, 1999, *supra* n. 13: 63.

<sup>16</sup> *Id.*, 88-89.

enjoyment of primary goods is a *prima facie* reason to redistribute. This tension between CJ and SJ is not irreconcilable, but it suggests the distinction of four social groups in the aftermath of war. Let us say that someone has SJ-priority when his enjoyment of primary goods is below a certain minimum threshold, and that he is CJ-entitled when he has suffered a harm that validates a reparation claim.<sup>17</sup> We then have four possible groups, which may be represented in the following table:

	<i>SJ-priority</i>	<i>No SJ-priority</i>
<i>CJ-entitled</i>	Poor victims (I)	Well-off victims (II)
<i>Not CJ-entitled</i>	Poor (III)	Well-off (IV)

**Table 1:** Types of justice entitlements.

Given the often massive and widespread harmful impact of wars, one may expect to have in their aftermath a significant number of people in groups (I) and (II). Wars also often cause widespread poverty, so even those who were not harmed directly may be poor. Moreover, wars often take place in already poor countries, and hence one may expect having a significant number of people who were poor also before the war (group III).

With the aid of this four-fold classification, I can now articulate more precisely my central claim. I will argue in section 3.4. that, in cases of massively destructive wars, groups (I) and (III) should have priority in the post-war allocation of resources, and that the only valid grounds for giving priority to (I) over (III) should be present- or forward-looking. This claim follows naturally from what may be called a Rawlsian construction of the relationship between CJ and SJ, to which I now turn.

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<sup>17</sup> The terms “minimum threshold” is left deliberately vague to allow for variations among different cases. As noted above, however, basic health and nutrition and basic education should be included in the minimum. For Rawls’s take on the minimum threshold, see *id.*, 244-45.

### 3.3. Liberalism and Corrective Justice

I can only give a rough sketch of the theoretical construction of CJ and SJ that I will use for my argument. I hope to say enough to give a sense of its plausibility and appeal, but for a full defense the sources cited should be consulted. The construction has two main steps: one is based on the value of individual autonomy and the other on the definition of a sphere of legitimate expectations. This two-fold construction interlocks the rights and obligations of CJ with broader principles of SJ.

We stipulated above that CJ seeks not merely to make people better off but also to put them in the very same situation they were before suffering the harm. So why should people have a right to return to how they were before suffering some particular harm? A powerful answer is that the interest in protecting individual autonomy justifies the right. Harms of the kind for which we think reparations are due are unwelcome and disruptive, if not always altogether unexpected, and their reparation aims to restore, as far as possible, the original course of the harmed agent's life. Restoring that original course of life, in turn, is a way of securing and sustaining the plans and projects that were upset by the harm. In the interest of protecting the plans and projects which arise in the exercise of individual autonomy, it is desirable to make the agent of harm, or some other suitable agent, liable to pay for reestablishing these projects as completely, fast, and surely as possible. Robert Goodin unpacks this justification into three steps:

1. People reasonably rely upon a settled state of affairs persisting (or, anyway, not being interrupted in the ways against which compensation protects them) when framing their life plans.
2. That people should be able to plan their lives is morally desirable.
3. Compensation, if sufficiently swift, full, and certain, would restore the conditions that people were relying

upon when framing their plans, and so allow them to carry on with their plans with minimal interruption.<sup>18</sup>

CJ, then, aims to secure the background conditions against which the exercise of individual autonomy takes place. If people are to go on as they intended before suffering the harm, then they should be compensated as completely as possible for that harm. Moreover, delays in the payment of compensation can create damaging interruptions to ongoing projects and should therefore be avoided. Certainty in the payment of compensation amounts to increased security in the completion of one's plans, which is intrinsically valuable. On this view of CJ, then, "what is sacrosanct is not the preexisting distribution but rather preexisting expectations and the plans and projects that people have built around them".<sup>19</sup> The right to compensation protects our legitimate expectation that our projects will come to fruition if we are reasonably cautious and invested in them.

This conception of CJ leaves open two crucial questions: which plans, projects, or expectations are worth preserving, and from which kinds of harm should these expectations be protected? To answer them, we need an account of the proper sphere of individual freedom, and of the sort of harmful disruptions that merit corrective action. Some disruptions may be seen as intrinsic to the activity in which they arise, and for this reason make no third-party liable to compensate – someone who loses in sports has no claim to compensation; moreover, some expectations should not be upheld – a thief may expect someone riding public transportation to leave his belongings unattended at some point, but this is merely a probabilistic, not a legitimate expectation. I want to suggest, in a Rawlsian vein, that CJ serves to preserve the integrity of the rights and procedures defined by the just background institutions of society, within which the exercise of autonomy takes place. These rights and procedures importantly include the preservation of life,

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<sup>18</sup> Robert Goodin, 1991, "Compensation and Redistribution", in *Compensatory Justice*, John William Chapman (ed.), *Nomos 33*. New York: New York University Press: 152.

<sup>19</sup> *Id.*, 157.

health, and bodily integrity, and the protection of property rights and of entitlements derived from valid contracts.

Rawls himself said very little explicitly about CJ, or “compensatory justice” as he called it.<sup>20</sup> However, we can get to CJ through the role of the legal system in his theory of justice. According to Rawls, the background institutions of society are created and defined in the law. When legal rules are just and fairly applied, which is to say that the institutions they create are just, they “constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled”.<sup>21</sup> We may conceive of CJ as having the task of identifying which rightful objections to unfulfilled expectations can give rise to a duty in others to pay reparations. Legitimate expectations in turn are defined by the system of rights, liberties, and procedures that are defined and adjudicated by background legal institutions, and which include in particular entitlements to primary goods, security in private property, and conditions of equal opportunity. A scheme of compensation is meant to uphold and secure effectively the enjoyment of these goods and opportunities, so that if their enjoyment is harmfully impaired, compensation is due.

Thus seen, the connection between CJ and SJ becomes fairly straightforward: CJ is a necessary component of the procedural setup of SJ.<sup>22</sup> Duties to compensate are triggered by illegitimate “moves” (that is, harms) in the practice of social cooperation, as defined by the general principles of justice and as implemented by their guardian institutions, procedures, and organs, the legal system being central among them. Compensation serves the two-fold purpose of eliminating, as far as possible, the losses incurred by faulty moves, and of motivating people to take responsibility and observe rules and procedures in the future. While justice aims generally to secure basic rights, liber-

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<sup>20</sup> Rawls, 1999, *supra* n. 13: 309. Compare Rawls’s remarks on punishment in 1999, *supra* n. 13: 210-13.

<sup>21</sup> *Id.*, 207.

<sup>22</sup> I am in fact simplifying much. For a thorough treatment of this connection, to which I am indebted, see Stephen R. Perry, 2000, “On the Relationship Between Corrective and Distributive Justice”, in *Oxford Essays in Jurisprudence: Fourth Series*, Jeremy Horder (ed.), Oxford: Oxford University Press.

ties, and resources for as large an exercise of freedom as would be compatible with everyone else's exercise, CJ is meant to protect the boundaries of this exercise in each particular agent. SJ and CJ are then *complementary* in the sense that both support, at different levels, the exercise of people's autonomy. While the general principles of justice apply to the basic institutions of society and define, among other things, the liberties and goods that should be generally secured and protected, CJ governs directly the interaction among individuals and aims to secure the enjoyment of liberties and goods via the stipulation of remedial action for harmful transactions.<sup>23</sup>

### 3.4. The Circumstances of War

The liberal account of the relationship between CJ and SJ operates under some implicit empirical assumptions. CJ can protect the value of individual autonomy by restoring the *status quo ante* only if most things, the harm aside, run on an orderly, predictable, and regular course. Indeed, the exercise of individual freedom and autonomy, which forms the basis of CJ, presupposes a sufficiently large degree of predictability and stability in the world. There is stability and predictability when the basic legal and political institutions of society effectively govern transactions and also, more broadly, the system of social cooperation and economic production. Among other things, the sources of stability and predictability are a well-functioning legal system, which runs in keeping with the principles of the rule of law, well-functioning and predictable governmental institutions, and well-regulated and functional markets.

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<sup>23</sup> A key Rawlsian concept here is that of an "institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions". Rawls says that, "[i]f this division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made", John Rawls, 1993, *Political Liberalism*, New York: Columbia University Press: 268-69. This is the reason why CJ may operate independently of SJ, and apply equally to the rich and the poor. The egalitarian work of redistributing resources is not CJ's but SJ's task.

Now, these background conditions for the proper exercise of autonomy are often missing in war and its aftermath. There is, of course, variation in the way wars impact social life and the background conditions for the exercise of freedom and autonomy in particular. But it is often the case that wars upset these background conditions to a sufficient degree that we may reasonably doubt the validity or force of rights and obligations of CJ. This, at any rate, is what I would like to argue.

Consider the following ideal-typical picture of the circumstances of massively destructive wars. Real-life wars may approach this type to greater or lesser degrees, and how much they approach it may be quantified and measured to some extent. In massively destructive wars:

- i. *Harm is the rule rather than the exception.* Massively destructive wars cause harm directly on over half of the population of a country. Forms of harm include loss of life or bodily integrity, losses in social capital (social networks are damaged or destroyed), and material losses in immovable property, movable goods, etc.
- ii. There is *generalized uncertainty*. There is no reliable source of information available to make plans or create well-founded expectations during war. This uncertainty can affect both the micro-world of one's private activities and the macro-world of institutional decision-making. As Tilman Brück has put it in a study on the economic effects of the massively destructive civil war in Mozambique, “[w]ar uncertainty operates at both micro- and macro-levels of the economy. Capital, for instance, may be exposed to war destruction and dislocation at the micro level, through theft and violence (micro-war uncertainty) and, at the macro-level, through the abuse of state power in a partisan way (macro-war uncertainty). In addition, macro war uncertainty includes the use of the government fiscal machinery and economic regulation for war-related purposes, which inevitably reduces transaction efficiency”<sup>24</sup>.

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<sup>24</sup> Tilman Brück, 2001, “Mozambique: The Economic Effects of the War”, in *War and Underdevelopment*, Frances Stewart and E. V. K. Fitzgerald (eds.), Oxford: Oxford University Press: 61.

- iii. State *institutions collapse* and basic state functions unravel. Crucially for my argument, the state is no longer able to secure property rights, for example because it has no capacity to adjudicate rights, as in Rwanda, where 95% of lawyers and judges were killed, imprisoned, or exiled,<sup>25</sup> or because the cadastral registry is destroyed, as in East Timor, where the cadastral registry was a deliberate target of pro-Indonesian militia in 1999.<sup>26</sup>
- iv. *Productive sectors collapse*. Economic infrastructure is destroyed; there is shortage of skilled labor; social capital is lost by massive population displacement.<sup>27</sup> There is a nationwide breakdown of markets and reduced ability in firms to operate efficiently and with sufficient levels of certainty.

Massively destructive wars thus cause losses so extensive and widespread that it becomes impossible to reestablish the conditions of the *status quo ante bellum*, in particular the *ante bellum* plans and projects of particular individuals. A story may convey the relevant differences between just conditions in peacetime and in the aftermath of war. Take an individual whose house was seriously damaged by fire. If the fire occurred in peacetime, it is likely that his house was the only one in the street to burn, and that restoring the house would allow him to recover his previous way of life. After the house is repaired he may, for example, bike again every morning to his office, which is conveniently close; visit his friends, who live nearby and with whom he shares the enjoyment of this particular area of the city; he can again shop and visit museums and parks in the city, catch up with acquaintances he has made throughout the years he has lived in the neighborhood, etc.

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<sup>25</sup> At the end of the genocide, the Ministry of Justice had seven attorneys and their staff to define the situation of 115,000 Rwandans held in prison; see Shelton, *supra* n. 1: 320.

<sup>26</sup> Daniel Fitzpatrick, 2002, "Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor", *New Issues in Refugee Research*, Working Paper No. 58: 8.

<sup>27</sup> As it has happened in Colombia, see Ana María Ibáñez Londoño, 2008, *El Desplazamiento Forzoso En Colombia: Un Camino Sin Retorno a La Pobreza*, Bogotá: Universidad de los Andes.

Now imagine that his house burned in war during a bomb raid. Along with his house, a majority of the houses in the street is likely to have burned too. During the war, most shops in the area closed because there were severe shortages of goods and clients, and some suffered severe physical damage. His office, moreover, had to close due to the economy's shrinking. Now, even if his house were repaired after the war, that would not come close to restoring his earlier plans and projects: his social network has dissolved, the places he used to have around have been damaged or destroyed, and his office no longer runs. Destruction in war has been so massive that token reparations would no longer suffice to restore individual plans and projects, and the cost of repairing everything necessary for reestablishing these plans and projects are impossible to meet.

The point of this story is that *corrective rights and duties make sense only if harmful disruptions are the exception rather than the rule*. The more widespread and extensive war destruction is, and the longer the war lasts, the harder to recover past plan and projects, and so the weaker the rights of CJ. If most things go on as usual, in predictable and stable patterns, then there is hope of recovering *ex ante* plans and projects through compensatory measures. But if a large number of things have been disrupted more or less simultaneously, then CJ loses force, and other interests and needs should consequently gain priority. After war, those in direst need must be given top consideration, but aside from these, it seems that rights and principles of SJ should trump corrective claims. Those who are below the minimum threshold of primary goods at the end of the war should have priority access to public resources. This would seem to apply equally to those who were put below the threshold directly by the war and to those who were not, because excluding the latter on the sole basis of the particular history of their condition seems arbitrary (I qualify this point below). The following rule of thumb for the allocation of resources in the aftermath of massively destructive wars may be seen as a corollary of this argument: *for people below a suitable SJ threshold, SJ-priority trumps competing CJ-entitlements; reparation is due to those above the SJ threshold only if no one is below that threshold*.

While the aim of CJ is to uphold the value of autonomy, it seems that in the aftermath of massively destructive wars, securing that value

is done best not through CJ but through SJ. When transitional authorities (re)establish effective background social institutions, they redefine and make stable the sphere for the exercise of autonomy, and once this is accomplished to a sufficient degree – and only then – CJ procedures can again resume. In order to reestablish legitimate expectations, it appears more important to define titles quickly and equitably than accurately or in proportion to earlier endowments, and so, instead of establishing conditions for resuming earlier ways of living, resources should be invested in securing fair conditions for a new life. This involves in particular reallocating fairly the burdens of loss suffered during war, which tend to affect civilians unevenly. A progressive reconstruction tax can be instrumental in this task, which should at any rate preserve the equal opportunity of all to reconstruct and resume their lives as they see fit after war.<sup>28</sup>

In the following section I will discuss an important objection to this argument, but first I would like to clarify the argument's overall nature and scope. A first important point to note is that its practical relevance may be limited due to the fact that in war often those who are most harmed also have highest SJ-priority, and vice versa. To use the language of Table 1, the more the groups of the “poor” (III) and the “poor victims” (I) overlap at the end of war, and the more the group “well-off victims” (II) shrinks, the less practical relevance my argument has.<sup>29</sup> Nonetheless, in war there can often be groups with SJ-priority which were not directly affected by armed actions, and hence

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<sup>28</sup> I discuss in depth the question of fair allocation of burdens in Pablo Kalmanovitz. Forthcoming. “Sharing Burdens after War: A Lockean Approach”, *Journal of Political Philosophy*.

<sup>29</sup> This is the case in East Timor, judging from the following passage from the final report of the East Timorese Commission for Reception, Truth and Reconciliation (CAVR): “All East Timorese people have been touched and victimized by the conflict in one way or another. However, in the course of its contact with many communities the Commission became acutely aware of those among us who still suffer daily from the consequences of the conflict and whose children will inherit the disadvantages their parents face as a consequence of their victimization. They include those who live in extreme poverty, are disabled, or, who – due to misunderstandings – are shunned or discriminated against by their communities [...] We must acknowledge this reality and lend a hand to those who are most vulnerable” (§12.1).

have no CJ-entitlements; more rarely, there can also be people who suffered directly from the war but stay relatively well-off. For these groups, the argument has significant practical implications.

A second point to note is that there is a good reason for giving priority to members of the group of poor victims (I) over that of the poor (III), namely, rehabilitation. Often people harmed during war may need special assistance to develop the same level of functioning and capacity of enjoyment as those unharmed who are below the SJ threshold. In the interest of allowing them to be as functional as those who were not crippled by the war, special investment in rehabilitation programs is necessary.<sup>30</sup> This rehabilitation is often classed together with reparations and compensation as part of a CJ package, but it is really distinct: its purpose is to maximize the capacity to use and enjoy primary goods in the present and future, and therefore its justification belongs more to SJ than to CJ. Reaching a given level of use and enjoyment of primary goods may require higher public investment in the case of victims of harm during war than in the case of unharmed but materially deprived groups.

A third important point to note is that the argument for the priority of SJ is not just about logistical feasibility. An argument from logistical feasibility has often been made to the effect that, even though corrective rights and duties are valid and have legitimate standing at the end of war, post-war institutions are often so dysfunctional and underfunded that these rights and duties cannot possibly be adjudicated and enforced.<sup>31</sup> Ideally, they should be adjudicated and enforced, but it is unrealistic to hope that this can be done fully. My argument submits that the reasons to hope that CJ should be adjudicated and enforced in

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<sup>30</sup> Crippling harm need not be physical. In the Colombian case, internally displaced people are forced to move from rural to urban settings, but their skills are not attractive in urban labor markets, and for this reason they can be seen as *economically crippled* by the armed conflict (see Barberi and Garay's contribution to this volume, and more extensively Ibáñez Londoño, *supra* n. 27). As a consequence, displaced populations would need either additional investment in training in new skills, if they stay in cities, or public investment in relocation in rural settings. Ideally, the choices between these options should be theirs.

<sup>31</sup> For a forceful version of the argument, see Pablo De Greiff, 2006, "Justice and Reparations", in De Greiff, *supra* n. 1.

the aftermath of massively destructive wars are weak and defeasible. In particular, I would qualify a suggestion sometimes made in tandem with the argument from logistical impossibility, that instead of full CJ a diluted version of CJ should be undertaken. Since the logistical and material costs of full CJ are prohibitively high, this suggestion goes, one should instead try more limited CJ programs, which for example avoid the strictures of tort law and do not try to reflect past losses accurately or even proportionally but follow administrative procedures and award lump sums. From my argument it follows that such programs of diluted CJ should also be subject to a SJ test, so that if the program's beneficiaries do not have SJ-priority and there are non-beneficiaries who have SJ-priority, then the program should not be undertaken before the latter have guaranteed access to sufficient primary goods. SJ-priority trumps CJ-entitlements also in diluted CJ programs.

A last important point is that there can be room for reasonable disagreement about whether an actual war is massively destructive or not. A continuum of cases may be defined, from peacetime in a well-ordered society on one end to massively destructive wars on the other. World War II in the Eastern and Central European Countries (ECEC) was clearly a massively destructive war, and this history illustrates, to some extent, the potential of a war aftermath to create conditions for extensive redistributions of wealth. Indeed, as Istvan Pogany has shown, in the aftermath of World War II the accumulated dislocation and poverty of two world wars had radicalized peasants and landless laborers in the ECEC. He notes how this radicalized peasantry, who “represented a genuine and spontaneous product of the dislocatory effects of war, and an inevitable reaction to the gross economic inequalities and chronic rural poverty characteristic of the inter-war period”, had also some urban supporters.<sup>32</sup> These very particular historical circumstances created the conditions for an unprecedented program of land reform, to which the massive – and arguably unjust – expulsion of ethnic Germans from the area contributed a great deal. Poland implemented the most far-reaching measures. Some 9.3 million hectares

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<sup>32</sup> Istvan S. Pogany, 1997, *Righting Wrongs in Eastern Europe, Europe in Change*, Manchester: Manchester University Press: 41.

were taken into public ownership, of which 6 million were redistributed to peasants. By 1949, 5 million families had received land that formerly belonged to ethnic Germans. Interestingly from a distributive justice perspective, there was a cap on holdings of 100 hectares per family, of which no more than 50 could be cultivated. The cap was enforced, large estates were confiscated, which led to the elimination of the class of landowning gentry “at a stroke”.<sup>33</sup>

More recent cases of massively destructive wars have not undertaken redistributive programs on the scale of the ECEC in the aftermath of World War II. The civil war in Mozambique (1981-1992) caused massive destruction of economic infrastructure, particularly in the agricultural sector. Nearly half of all irrigation systems, dams, and seed production centers were destroyed. About 40% of the main categories of immobile capital were totally destroyed.<sup>34</sup> Of the total population, 25% was internally displaced, 10% became refugees, and 20% of those who stayed had their livelihood destroyed; the life of at least half of the total population was thus radically transformed by the war.<sup>35</sup> Notwithstanding the size of destruction, reconstruction in Mozambique has focused mainly on rebuilding pre-war, even colonial institutions and infrastructure, even though superior alternatives (for example, incorporating egalitarian provisos, criteria of sustainable development, and more efficient production systems) are possible. In Brück’s opinion, with which I fully concur, “it is not so much the total war-related loss of capital, but its unequal destruction and the increasing inequality of distribution which may prevent sustainable and equitable post-war economic development. Income inequality in Mozambique could thus be seen as one of the most enduring legacies of the war”.<sup>36</sup> This is regrettable, particularly given the known positive impact of endowing peasants with enough land.<sup>37</sup> A large portion of the population in Mozambique depends wholly on subsistence farming,

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<sup>33</sup> *Id.*, 46-47. See also Nalepa’s contribution to this volume.

<sup>34</sup> Brück, *supra* n. 25: 65.

<sup>35</sup> *Id.*, 67.

<sup>36</sup> *Id.*, 87.

<sup>37</sup> See Berry’s contribution to this volume.

with econometric studies estimating that a 10% increase in cultivated land would lead to almost 3% increase in consumption per capita.<sup>38</sup>

In clear-cut cases, the argument for the priority of SJ has most force, but there is also a grey area of cases in which its applicability may elicit reasonable disagreement. In a country, some circumscribed areas may have suffered acute levels of destruction, while other areas remain under relatively normal and stable conditions. One might consider suspending claims of CJ and giving central place to SJ in those affected areas; alternatively, one may consider diluted programs of CJ, which would be justified both by the practical impossibility of applying CJ fully and by SJ reasons that weaken CJ reasons. The Colombian case provides an illustration. It has been estimated that in Colombia the total number of hectares seized or abandoned in the context of the armed conflict up to year 2008 amounts to 10.8% of the national total cultivated area.<sup>39</sup> Even though far lower than 50%, these seizure and losses have been concentrated on some regions of the country, particularly on the eastern and northern colonization periphery, where *de facto* changes in tenancy may indeed involve a majority of the land.<sup>40</sup> If the effect of the massive losses in these areas amounts to the dissolution of earlier social structures and ways of living – in the likes of Mozambique – then it follows that claims of recovery would lose some of their force. These areas might provide resources for an ambitious land reform program, which could benefit both former landholders in that region and landless farmers from other regions. If the quality of land is good enough to allow landless farmers to put their skills into productive work, a policy of relocation would be just.

It should be noted, however, that this goes nowhere to justify or favor the legalization of the emerging big landowning elites in these regions. On the contrary, my argument is first and foremost about social justice and equal opportunity, which is to say that only egalitarian redistributive programs, not the forceful accumulation of armed power

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<sup>38</sup> Carlos Bozzoli and Tilman Brück, 2009, “Agriculture, Poverty, and Post-war Reconstruction: Micro-Level Evidence from Northern Mozambique”, *Journal of Peace Research* 46, 3: 388.

<sup>39</sup> See Barberi and Garay’s contribution to this volume.

<sup>40</sup> See Ibañez’s contribution to this volume.

and resources by a few, can defeat corrective rights and duties. If there is an exclusive choice in this case between upholding the CJ claims of former smallholders and validating the titles of new big landowning elites who have appropriated land by force or buying at deflated prices, then clearly the former is to be preferred *on SJ grounds*. Nonetheless, a superior option would be a land reform that addressed the situation of both peasants displaced from these areas and of peasants from other areas who are below the minimum threshold of SJ.<sup>41</sup>

### 3.5. The Problem of Accountability Deficit

The Colombian case serves to illustrate the objection I would like to consider in this section. Does the argument for giving priority to SJ over CJ in the aftermath of massively destructive wars undermine accountability for wrongdoing during war? Current transitional justice and international legal discourse tends to emphasize accountability as a justificatory basis for CJ. So far, I have said virtually nothing about *duties* of corrective justice, that is, about the justice of making those who are responsible for the harm liable to pay compensations. Here it is crucial to note that my main argument is not about what should be done to wrongdoers on account of their wrongful deeds but rather about how to allocate resources in the aftermath of war. I have considered in particular the force of CJ entitlements relative to those from SJ priority. My focus on this aspect of CJ is partly motivated by the fact that current discourses about compensation tend to leave out the fact that resources for post-war reconstruction are scarce, and that funds for compensation have to compete with funds for providing social minima. Once we take the latter into account, it may be easier to see how the right to compensation may be defeated in cases of competing poverty. Nonetheless, since the supply side of corrective justice is also important, something must be said about it.

Wrongdoers should indeed be made liable to pay for the wrongful losses they have caused. In transitional cases, however, this liability is complicated by prudential and practical considerations. The pruden-

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<sup>41</sup> This option is superior from the standpoint of justice but it may be suboptimal from the standpoint of political feasibility. For an elaboration of this contrast, see Uprimny and Saffon's contribution to this volume.

tial consideration is familiar in the context of retributive justice: the threat of forcing large compensatory payments, like that of imprisonment, may undermine the incentives of belligerents to enter peace negotiations and stop the violence.<sup>42</sup> As with retributive justice, the good of making wrongdoers fully accountable in corrective justice may have to be sacrificed in some cases for the sake of future peace, a sacrifice which is in effect a choice of the lesser evil. The practical consideration is that even if wrongdoers were effectively made liable for the losses they caused during war, destruction can often be so extensive that the assets of wrongdoers are insufficient to cover fully the costs of reconstruction. Consequently, the question of how to distribute the burdens of loss may remain standing even after perpetrators have been made fully liable in their private assets.<sup>43</sup> Moreover, it is not obvious that the perpetrators' compensation payments should be invested in restoring the pre-war lives of their direct victims. The argument for the priority of SJ suggests a different approach: all compensatory payments should be pooled in a collective reconstruction fund, which should be used according to broader principles of justice. In addition to compensatory payments, this fund can receive international humanitarian assistance funds and local reconstruction taxes, and should be used in more forward-looking ways.<sup>44</sup>

A third response to the objection from accountability is that corrective justice is not the only way to deliver it. Other mechanisms of transitional justice can contribute to making perpetrators accountable, foremost of which is of course punishment, but also truth-elucidation

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<sup>42</sup> For discussion of the transitional dilemmas of retributive justice, see, e.g., Luc Huyse, 1995, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law and Social Inquiry* 20, 1; Jack Snyder and Leslie Vinjamuri, 2003, "Trials and Errors", *International Security* 28, 3; Jon Elster, 2004, *Closing the Books: Transitional Justice in Historical Perspective*, New York: Cambridge University Press: 188-98.

<sup>43</sup> Garay and Barberi estimate that the full compensation of internally displaced people in Colombia may amount to over 10% of GDP.

<sup>44</sup> For further discussion of the reconstruction fund, see Kalmanovitz, *supra* n. 29.

procedures, professional or political debarment, etc.<sup>45</sup> Moreover, if the point of accountability is to hold wrongdoers responsible for their deeds in order to restore civil trust, solidarity, and human dignity, then corrective justice is unlikely to be sufficient, and it may not be necessary. In the aftermath of war, it is no doubt crucial to vindicate the moral standing of victims, and to create new public normative understandings of the value of autonomy and the dignity of human agency, but in this enterprise social justice may be as important as corrective justice. In Rawls's theory, having "a sense of one's own worth" figures as a basic primary good, which the background institutions of society must constantly strive to protect and secure.<sup>46</sup> The expectation that one-shot compensation payments can accomplish profound normative transformations in society seems illusory; investment in social justice may in fact be a more enduring and robust bet.

All this said, there may be lingering issues regarding lack of accountability via CJ. One important issue is the "problem of demoralization". Will the public be convinced that the perpetrators of wrongdoing did not profit easily from their wrongs if we fail to undertake accountability measures via CJ?<sup>47</sup> This question refers ultimately to the perceived legitimacy of giving priority to SJ at the expense of CJ in the aftermath of a war. If giving priority to SJ ends up weakening the liability of perpetrators to return their war booty and pay for their wrongs, then there is indeed a problem of legitimacy. Upholding in the law the duties of CJ and giving victims the right to recover their own losses may be the best way of making wrongdoers liable, because it creates incentives in the victims to coordinate their actions and litigate against wrongdoers, in domestic and international legal fora. Two things may be said in response. The first is that organizations of victims may be an efficient way of making wrongdoers liable, but they are not the only way. Civil society conceived more broadly and the state

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<sup>45</sup> On accountability via truth commissions, see generally Mark Freeman, 2006, *Truth Commissions and Procedural Fairness*, 1st ed. New York: Cambridge University Press.

<sup>46</sup> Rawls, 1999, *supra* n. 13: 79.

<sup>47</sup> Bruce A. Ackerman, 1992, *The Future of Liberal Revolution*, New Haven: Yale University Press: 76.

judicial organs can (and should) take action too. The second is that an ambitious program of land reform or of social justice broadly conceived may alleviate the problem of legitimacy. By undertaking the effective provision of social minima, post-war authorities may come to be seen as legitimate with time.<sup>48</sup> The key question here seems to be whether the public perception that wrongdoers can get away with their wrongs will delegitimize transitional authorities to a degree that undermines their ability to effectively give priority to SJ measures in the aftermath of war. As Elster has put it in a related context, if transitional authorities have enough legitimacy, “people will be motivated to endure the costs of transition and the extensive trial-and-error procedures that may be required before a viable implementation is found”.<sup>49</sup> Whether or not the public perception of lack of accountability after war would undermine this motivation is an important open question in each particular case.

### 3.6. Conclusion

In this chapter my discussion of reparations and compensations focused exclusively on the theory of justice, and in particular in the theoretical relationship between corrective and social justice. This focus neglected alternative arguments that may favor certain reparation programs in the aftermath of war. One important argument for reparation of land is that land can create *special attachments* that should be upheld and protected. These attachments are most plausible in the case of groups whose traditions, history, or religion involve strong ties to a particular geographical area. Unlike movable goods, land can virtually always be returned, so the question of reparation, as opposed to mone-

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<sup>48</sup> In Nicaragua, the Sandinista policy of giving land to peasants, especially in the Northeast region, was motivated by the interest of stopping recruitment to the Contras. It has been argued that the unfulfilled expectation that the Sandinista government would give them land fueled grievances and motivated their involvement in the Contras insurgency. See Fitzgerald and Grigsby, *supra* n. 3: 127.

<sup>49</sup> Jon Elster, 1988, “Arguments for Constitutional Choice: Reflections on the Transition to Socialism”, in *Constitutionalism and Democracy*, Jon Elster and Rune Slagstad (eds.), Cambridge: Cambridge University Press, *Maison des Sciences de l’Homme*: 319-20.

tary compensation, can virtually always be raised.<sup>50</sup> In cases of ancestral ties to land, one may need to weigh the collective life of the affected groups with that of current residents of the land, if there are any. While a strong traditional attachment may weigh heavily on the balance, it cannot override completely the claims of those who have lived for years in a particular area.<sup>51</sup> This may be seen as a situation of competing claims of autonomy, which may have to be resolved by division or sharing. At any rate, it is indeed a case in which claims of land reparation may be strong enough to trump the application of SJ principles.

Also excluded from my analysis were arguments from economic development and efficiency. This omission, of course, in no way implies that efficiency is not important, or that it may not in some cases justify compensatory payments in ways that are immune to the argument for the priority of SJ. This further discussion, however, must be left for another occasion.

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<sup>50</sup> I say virtually because land mines or otherwise causing irreparable environmental damage during war may leave land beyond repair. Note, moreover, that access to land and the productivity of land may be affected destruction of infrastructure during war, e.g. roads, railway systems, water supply and irrigation systems, livestock, etc.

<sup>51</sup> See Elster, *supra* n. 43: 172.



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## The Origins of Competing Claims to Land in East Central Europe. In-Kind Restitution as a Problem of Fair Division\*

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### 4.1. Introduction

Nations that transition from authoritarian regimes to democracy or emerge after years of protracted civil war often engage in various methods of transitional justice to address wrongs committed in the pre-transition periods. One such transitional justice mechanism that has been variously considered and implemented in these circumstances is the restitution of property, specifically, land. The countries of East Central Europe have presented notorious case studies in this context; they have either avoided property restitution altogether, or they have reallocated property in blatantly unfair ways. But simple solutions or ready-made formulas for property restitution are not, of course, readily available, and each scheme must address the historical, practical, and equitable concerns applicable to the lands and people involved.

The impediment to fair restitution on which I focus here is the challenge of historical “layering of claims”. Generally, this “layering” phenomenon arises when the same piece of land is expropriated by an authoritarian regime or occupant and transferred to a new owner. From this owner, the land is then expropriated again – usually by a different autocrat or occupant. But instead of returning the land to its original

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owner, the property is conveyed to yet another new beneficiary, typically one who is aligned with the authorities effecting the expropriation. This process can be iterated several times, and each stage generates a new class of claimants to the same piece of land.

Hungary's experience poses an excellent illustration of such layering of competing claims. Prior to World War II, in May 1939, farmland was expropriated from Hungary's Jews. The land was transferred to Hungarians who were potential sympathizers with Nazi Germany. After World War II, the Socialist coalition that came to power expropriated the farms from the Fascist sympathizers. But instead of returning the property to the original Jewish owners or their heirs, the lands were transferred to landless peasants in compliance with land reform legislation. As the Communists became more and more confident of their ability to rule, they further embarked on a project of full-scale collectivization.

Historical layering of claims increases the demand for restitution in ways that exceed the capacity of newly transitioning states. Hungary had a succession of three compensation acts to deal with the complex layers of claimants.<sup>1</sup> Therefore, it is important to explore the mechanism behind the layering of claims. In the countries of East Central Europe, I explain how two factors contribute to the layering of claims. The first is the absence of land reform during the interwar period; the second is the popular support for Communist rule in the aftermath of WWII. First, in countries that did not carry out land reform in the interim world war period, after WWII, the new governments did not return lands to their original landowners because the need for land redistributions to landless peasants. These new governments used land redistribution policies as means of boosting their popularity. Second, the

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<sup>1</sup> Act XXV of 1991 on Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Cause by the State in the Properties of Citizens, is referred throughout this article as Compensation Act I; Act XXIV of 1992, on Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Cause by the State in the Properties of Citizens through the enforcement of Legal Rules Framed from 1 May 1939 to 8 June 1949 is referred throughout this article as Compensation Act II; Act XXXII of 1992 on the Compensation of Persons unlawfully Deprived of their Lives or Liberty for Political Reasons is referred to as Compensation Act III.

new Communist governments that came to power with the backing of the Soviet Union lacked legitimacy in the eyes of many social and ethnic groups. This varied in degree within the region. For example, in Poland, where the Communists had to fight a civil war before they could assume power, the Communists were perceived as less legitimate than in Bulgaria or Czechoslovakia, where the Communists and Soviets were viewed as liberators from German occupation. In countries where Communists enjoyed popular backing, particularly if land reform had already been implemented before WWII, Communists could reverse its effects by embarking on full-scale collectivization. Where Communists lacked popularity, land redistribution became the Communists' strategy of appeasement. This helps account for variation in the extent of collectivization carried out across Communist Europe. Where Communists eventually acquired legitimacy, as in Hungary, the recently land-endowed peasants were expropriated anew. In other countries, such as Poland, Communist authorities risked too much by pursuing large-scale collectivization.

Different patterns of land reform and collectivization translate into different numbers and types of claimants. For instance, in Hungary, the total number of claimants to the same piece of property could be as high as four:

- 1) The Jewish owner expropriated by the Nazis;
- 2) the Arian benefactor, awarded the Jewish land by the Nazis and then expropriated by the Communists;
- 3) the landless peasant, first endowed by the Communists to be later expropriated by collectivization; and
- 4) the farm worker who used the land during the Communist period and is in possession of it at the time of transition.

Furthermore, territorial changes and population transfers between states following WWII were responsible for creating different categories of claimants based on citizenship. One can distinguish at least four such groups: First, there are claimants who were citizens of the country where expropriations took place both at the time they were carried out and at the time when claims were made (that is, after the fall of Communism). Second, there are claimants who were citizens of the country where the expropriations took place at the time they oc-

curred, but fled the country following the expropriation and are no longer its citizens at the time they are making claims. Third, there are those who were not citizens at the time of the expropriation, but are citizens at the time they are making claims; and finally, those, that were not citizens in either period.<sup>2</sup>

The subject of this chapter is the mechanism behind the historical layering of claims, how the consequences of these successive expropriations lead to an allocation problem (a problem with overlapping endowments to the same piece of property), and the possible institutions for resolving such problems. It is organized as follows. The next section deals with the ways in which international conflicts contributed to the historical layering of claims in ECE; it focuses especially on the territorial changes and population transfers that resulted from WWII. The redrawing of borders in the WWII aftermath resulted in population transfers and forced expropriations. Victims of earlier expropriations, joining the class of landless peasants, frequently became the grateful benefactors of post-war land confiscations. In section 4.3., I present the impact of the two factors responsible for the “layering of claimants”: the lack of land reform prior to WWII and the popularity of Communists in the WWII’s aftermath. Since differences in the acuteness of demand for land redistribution and popularity of Communist regimes

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<sup>2</sup> Obviously, this typology can be further expanded by distinguishing whether or not the country where the expropriations took place authorized or took advantage of the expropriations. Due to citizenship restrictions attached to restitution laws, these groups of claimants enjoy different levels of recognition for their claims. Countries implementing reprivatization are most likely to recognize property rights of persons holding citizenship on both occasions. However, one could make the argument that this is precisely the group that suffered least, as demonstrated by the fact that the expropriated citizens preferred to remain in the country that confiscated their goods over leaving following expropriation. Istvan Poganyi argues that property loss is one of the smallest wrongs suffered by the victims of the succession of Fascist and Communist authoritarianisms in Central Europe. Nevertheless, since claimants in the first category (citizens at the time of expropriation and at the time claims are made) are the most influential constituency that politicians must cater to in order to be reelected, it is easy to understand why their property claims would be the first to be recognized. Yet, this recognition is hardly associated with any normative considerations and more with the fact that it is citizens who are in a position to reward or to punish politicians for property restitution proposals with their votes.

at the time of their takeover vary from one Communist country to the next, I discuss these factors in a comparative framework for three Central European states: Poland, Hungary and the Czechoslovakia. What unites these cases is geographical proximity, dependence on the Soviet Union and 50+ years of Communist rule that ended in 1989 with democratic transitions. Among all Post-Communist countries, I chose these three countries because each exemplifies a unique combination of factors contributing to the layering claims.

Next, in section 4.4., I show how the layering of claimants translates into difficulties with implementing reprivatization. In order to do this, I reconstruct the problem of land restitution as a “claims problem” in the sense of cooperative game theory. Cooperative game theory uses axioms to characterize allocation rules. While some of these axioms are technical, others specify normatively desirable properties of allocation rules, such as equity, impartiality and efficiency. I use the compensation acts implemented in Hungary in the aftermath of transition to democracy to illustrate the practical significance of these axioms. Section 4.6. concludes.

## **4.2. International Factors in the Historical Layering of Claims**

This section explains how international conflict led to redefining borders in a way that affected the strength of some ethnic groups *vis-à-vis* others. While disempowered groups suffered expropriations, those whose status was elevated benefited at their expense.<sup>3</sup>

The first set of claimants to land restitution was generated by the wave of expropriations that preceded World War II. Countries sympathizing with Nazi Germany, implemented the infamous “Arianization laws” For instance, in Slovakia, a March 1939 decree confiscated all land belonging to Jews. Similar laws were implemented in Hungary. Referred to as the “Second Jewish laws”, the May 1939 Act sanctioned the expropriation of Jewish-owned agricultural land. When the Hungarian Government started to cooperate with Nazi Germany in earnest,

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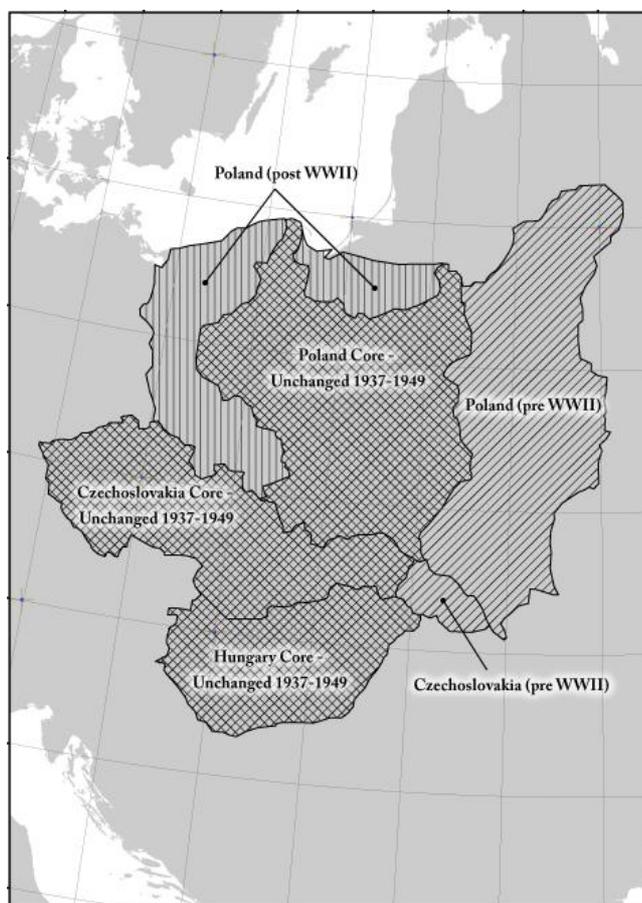
<sup>3</sup> For a book length discussion of how structural changes of modernization, wars, and occupation affected relationships between ethnicities in the Baltics see R. D. Petersen, 2002, *Understanding Ethnic Violence: Fear, Hatred, and Resentment in Twentieth-Century Eastern Europe*, New York: Cambridge University Press.

a 1942 bill sharpened this enabling measure making confiscations of Jewish land mandatory starting from September that year.<sup>4</sup> Expropriations continued throughout World War II and its aftermath. They extended to other countries in East Central Europe. While the beneficiaries of the pre-war expropriations were predominantly Arian sympathizers of the pro-Nazi government, the expropriations that followed the commencement of WWII awarded the confiscated property to landless peasants and Communist sympathizers.

The political and military storms that swept through the continent left few countries with their borders intact. However, a comparison of the territorial gains and losses of the three Central European countries I focus on in this chapter indicates sharp contrasts between Poland, Hungary, and the Czech Republic. Figure 1 was created using pre and post-war GIS-based maps of Europe. Table 1 presents numerical results.

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<sup>4</sup> Act XV/1942, cited after Istvan Poganyi, 1997, *Righting Wrongs in Eastern Europe*, Manchester and New York: Manchester University Press



**Figure 1:** Poland, Hungary, and Czechoslovakia Before and After WWII. Source: C. Scott Walker, Digital Cartography Specialist Harvard Map Collection Harvard College Library; prepared using IEG-MAPS, *Compiler:* Andreas Kunz, *Cartography:* Joachim Robert Moeschl, *Editor:* Andreas Kunz.

	<b>Poland</b>	<b>Czechoslovakia</b>	<b>Hungary</b>
Pre-war	383,573	143,594	93,581
Post-war	302,612	129,738	93,581
Unchanged core	198,950		
% unchanged	51.8%	90.3%	100%
new area post WWII	103,662		
% new area	52.1%		

**Table 1.**

While Hungary reverted almost completely to its 1938 borders, Poland over the course of the war lost close to half of its territory in the east but gained an equivalent territory in the west. (As a result, the bulk of land that was to be redistributed to landless peasants and Polish citizens-refugees from the East had belonged to ethnic Germans before the war.)

Territorially, Czechoslovakia did not change as much as Poland did, but the war had a very dramatic effect on the country's ethnic composition. I elaborate on the role of redrawing of borders and subsequent population transfers in generating successive layers of landowners using illustrations from Poland and Czechoslovakia.

#### **4.2.1. Poland**

The most recent movie by celebrated Polish dissident director, Andrzej Wajda, starts with a scene on a bridge over the river Bug in the late summer of 1939. In the scene, refugees entering the bridge from the west are fleeing Nazi aggression that began 1 September. On the opposite end of the bridge, they see another group of refugees – escaping the Soviet invasion that began 17 September 1939. A man from the first group cries out “People! Where are you going? You are heading the wrong way! Turn back!”. As the confused crowds intersect, some refugees turn around, while others pursue their initial route.<sup>5</sup>

The Soviet invasion was sanctioned by German and Soviet ministers of international affairs – Joachim von Ribbentrop and Vyacheslav Molotov – in an agreement also known as the Hitler-Stalin pact. The pact signed on 23 August 1939 stipulated that:

In case of the political transformation of the Polish state, the spheres of influence of Germany and the Soviet Union will become separated by the border marked by the three rivers: Narew, Wisla and San [...] The question whether or not it would be in the interest of both to maintain an independent Polish state will be determined in the near future and will depend on subsequent political developments.

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<sup>5</sup> Andrzej Wajda, 2007, “Katyn”, Akson Studio.

Both sides commit to resolving the question on the basis of a friendly agreement.<sup>6</sup>

The territories of Poland that became occupied as a result of the pact's implementation are illustrated in Figure 2 below.

The refugees who fled from the West to the East ended up trapped in the Soviet Union. They could not receive passports to return home, where they had left behind their families, homes, and often farmland. Following WWII, a civil war broke out in Poland between the Communist partisans who had been fighting on the Eastern front with Stalin's Red Army and members of the Polish resistance that formed around the Polish Government in exile, known as *Armia Krajowa* (National Army), AK.<sup>7</sup> The Communists emerged victorious in the civil war and confiscated the land of the refugees trapped behind the Soviet border. Pooling it with land confiscated from ethnic Germans and from large estate holders, the Communists used it to carry out land reform benefiting landless and smallholding peasants. Further expropriations were performed by the Soviets, who following the provisions of the Yalta peace conference took over territories occupied in 1939. In compensation for land losses in the East, Poland received German inhabited territories in the West. Communist authorities euphemistically called these territories the "Recovered Lands", neglecting the fact that the road to "recovery" led through forceful transfers of German nationals living in these territories. The Germans' land and all unmovable property were confiscated.

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<sup>6</sup> Translated from Polish text of agreement provided by Polish Radio. Available online at: <http://www.polskieradio.pl/historia/peryskop/artykul110455.html>.

<sup>7</sup> The subsequent section covers the Polish civil war in more detail.



**Figure 2:** Ribbentrop-Molotov Pact.

The consequences of the Ribbentrop-Molotov Pact extended to the Baltics and even Romania. And not only Poles, but also Belarussians and Ukrainians were left behind the Soviet Border following the Red Army's invasion of 1939. However, in 1945, it was mostly Polish refugees who tried to leave the Soviet Union – many of them hungry for land and tempted by the promises of land redistribution that the Communists had made prior to the war.<sup>8</sup>

In summary, while Poland lost sizable amounts of land in the East, it also gained sizable areas in the West. Hence, it received enough land to redistribute to landless and, so-called, dwarf-holding peasants.<sup>9</sup> More than three quarters of the land redistributed after the war had previously belonged to Germans.<sup>10</sup>

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<sup>8</sup> K. Kersten, 1986, *Narodziny systemu wladzy, Polska 1943-1948*, Paris: Libella.

<sup>9</sup> Dwarf-holdings were characterized by properties under 2 hectares.

<sup>10</sup> Poganyi, *supra* n. 3.

#### 4.2.2. Czechoslovakia

Czechoslovakia's territory did not change as a result of WWII as much as Poland's. However, its ethnic composition underwent considerable changes. Although prior to the WWII, Czechs and Slovaks made up only 65% of Czechoslovakia's population, after the war they made up 94%. A 1930 census carried out in Czechoslovakia put the ethnic Germans at 3,305,000. Only 250,000 survived the forced transfers initiated by President Edvard Benes in 1946.<sup>11</sup> The number of Hungarians living in Czechoslovakia also fell dramatically, dropping from 585,434 in 1930 to 354,532 in 1950.<sup>12</sup> From an extremely diverse federation, that incorporated Sudeten Germans, Carpathian Ruthenians, and Hungarians, it became almost homogenously Czech and Slovak.

Many scholars have attributed Czechoslovakia's success in maintaining democratic institutions up to the very beginning of WWII to its pluralistic constitution, originally designed to accommodate the plurality of ethnic and religious minorities living there.<sup>13</sup> The end of ethnic pluralism went hand in hand with the demise of constitutional protections of the rights of the few ethnic minorities that remained.

Article XIII of the Potsdam Conference Peace Treatise held in August 1945 between the three allies sanctioned the removal of German minorities from Central European countries. The conference did not stipulate what would happen to the property left behind by these minorities, but President Benes in a preamble to his decree for implementing the Potsdam provisions, explained why owners of immobile property, the bulk of which was land, would not be compensated for their losses:

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<sup>11</sup> According to Poganyi, *supra* n. 3, 600,000 Sudeten Germans evacuated with the German forces before the decrees went into effect.

<sup>12</sup> Z. A. B. Zeman, 1991, *The Making and Breaking of Communist Europe*, Cambridge: B. Blackwell.

<sup>13</sup> For a book length discussion of how states use strategies of assimilation, accommodation and, elimination with regard to their minorities, see Harris Mylonas, 2009, "The Politics of Nation-Building: The Making of Co-Nationals, Refugees, and Minorities", Doctoral Dissertation: Yale University. For an alternative view expressing the concerns of some of the members of these minorities see (1978) "Seeds of Conflict: Minorities in Czechoslovakia", KTO Press: v. 2-3.

Following the demand of the landless Czechs and Slovaks for an effective implementation of the land reform, and led by the desire once and for all to take the Czech and Slovak soil out of the hands of traitors of the Republic, and to give it into the hands of the Czech and Slovak farmers and persons without land, I decree, upon proposition of the government as follows: With the immediate effect and without compensation is confiscated, for purposes of the land reform, agricultural property owned by all persons of German and Hungarian origin.<sup>14</sup>

Minorities associated with Nazi occupiers – however loosely defined – were expropriated of 1.8 million hectares of agricultural land followed by another 1.3 million hectares of forests. Some 71% of land redistributed in Czechoslovakia after the war had belonged to members of the German minority.<sup>15</sup>

#### **4.3. Domestic Determinants of the Historical Layering of Claims**

The Teheran, Potsdam, and most notably Yalta conferences, solidified the fate of East-Central Europe. Falling on the wrong side of the iron curtain spelled the end of democracy, as elections were structured so as to consistently produce Communist victors that enjoyed the support of Soviet allies. However, backing from the Soviet Union, ironically, did not ensure domestic support for Communist rule. The opportunity to carry out land reform (if it had not been already implemented in the interim world war period), however, gave the Communist authorities an opportunity to appease vast masses of landless and small-holding peasants by either transferring to them land taken over from the Fascists and their co-ethnics (land that was formerly owned by the Jewish population in Hungary) or land coming from expropriating German (in Poland and Czechoslovakia) and Hungarian (in Slovakia) minorities.

With the exception of Hungary, most countries emerged from WWII with territories different from those that belonged to them before the war. Furthermore, vast areas of land controlled by Germany and its allies were placed under control of Communist governments.

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<sup>14</sup> Poganyi, *supra* n. 3: 40

<sup>15</sup> Paganyi, *supra* n. 3: 41.

The 1947 Paris Peace Treaty required that that Slovak and Hungarian governments return Jewish property to its rightful owners. The Communist governments however, blatantly ignored the treaty's provisions. In Poland and Czechoslovakia they carried out a series of expropriations on the ethnic Hungarian and German minorities of their own. Instead of returning Nazi expropriated land to their rightful owners in 1945, the Communists were able to add the confiscated land into the pool of assets to be redistributed among landless peasants to boost their popularity.

In Communism, the ultimately just allocation of land is complete collectivization, that is, the creation of state or collective farms, owned jointly by individual users of the land, who had previously surrendered their farm assets to the collective. However, embarking on the project of complete collectivization was not prudent for all Communist governments across ECE, particularly those that lacked popularity with domestic audiences or those that faced severe demands for land redistribution. First, because Communist governments faced different degrees of pressure for redistribution: where Communist governments had to appease their critics or satisfy demands of landless and displaced persons, collectivization projects were placed on the backburner. I discuss the two considerations in sections 4.3.1. and 4.3.2. below. First, however, I present schematically, the logic of my argument. Below, Figures 3a and 3b below contain the dynamic mechanism I propose to explain the layering of claimants in ECE. An important assumption in this mechanism is that Communist rule in ECE was not a subject of matter of choice for East Europeans. Rather, all countries that fell on the wrong side of the iron curtain had to accept Communist rule as sanctioned by the Yalta Peace Conference. However, even though Communists had power fall into their laps undeservedly, they still had to put considerable effort into keeping it. It is these circumstances they faced and the strategic choices they made that explain the resulting layers of claimants to the same piece of property.

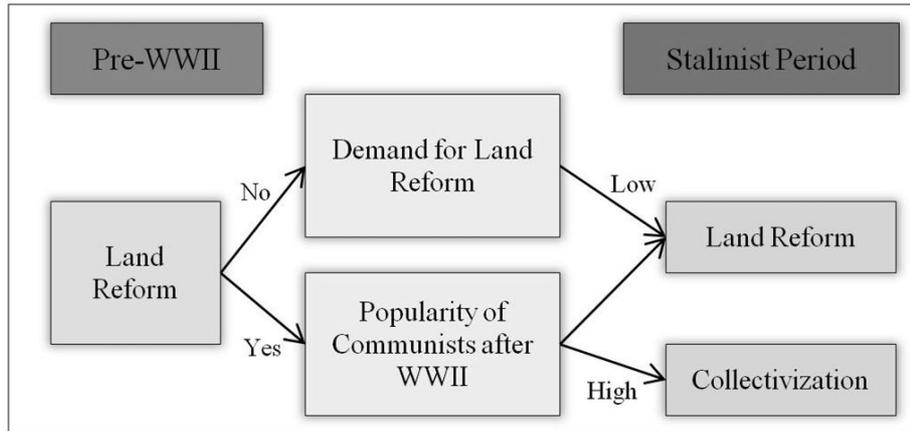


Figure 3a.

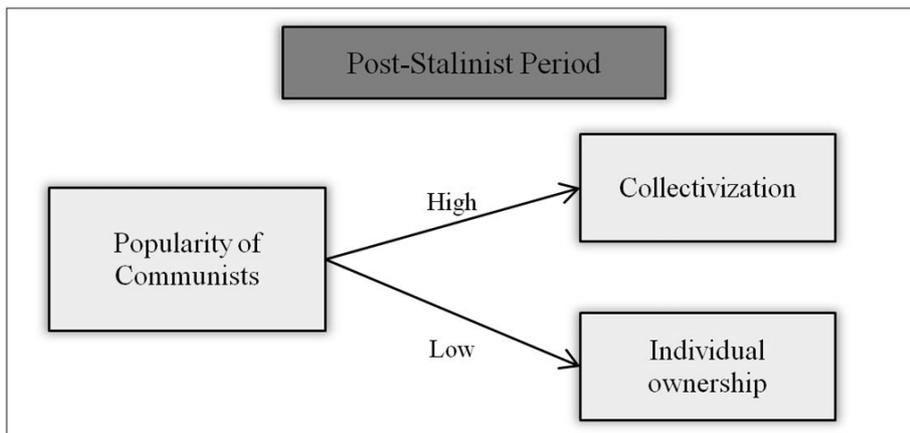


Figure 3b.

There are two parts in the mechanism presented here. Figure 3a represents the determinant prior to the war – the presence or absence of land reform. If land reform had been successfully implemented before WWII, the demand for land redistribution was relatively low, paving the way for Communists to embark on a full scale collectivization project, provided they were sufficiently popular, a topic covered by the second part of the mechanism. If land reform had not been successfully implemented, or was lacking altogether, Communists were forced to redistribute land to landless and smallholding farmers or – as in the case of Poland – to refugees who had lost their land following the So-

viet invasion. In states without land reform in the interim war period, whether or not Communist governments were able to eventually collectivize depended on how popular their rule was with the general public. The second part of the mechanism behind the historical layering of claims is presented in Figure 3b. It takes place after land reform in the Stalinist and post-Stalinist periods. Where Communists did not have to work hard at gaining popularity or where they had been successful with their strategy of appeasement and land redistribution, they could move forward with the collectivization project. But in places where they continued to lack popular backing, the collectivization project was delayed.

#### **4.3.1. Urgency of Land Reform After WWII**

In this subsection, I argue that whether and how many land titles were redistributed from large estates to landless peasants in the pre-WWII period determines the urgency of demand for land reform in the post-WWII period.

##### **4.3.1.1. Poland**

According to the 1931 census, prior to WWII, 61% of the population of Poland worked in agriculture, even though prior to the war, merely 17.1% of the rural population could support itself off the land they owned. Interim Polish governments had made attempts at implementing land reform: the pre-war government created 734,100 new peasant farms and increased the size of 859,000 existing ones.<sup>16</sup> However, the speed of the reforms could not keep up with natural growth rates in rural areas. Istvan Pogany reports that “while 133,000 hectares of agricultural land were redistributed each year, the rural population grew 250,000 annually”.<sup>17</sup> According to the 1931 census, more than half of the farms prior to WWII were still smaller than 5 hectares and a third of the rural population remained landless.<sup>18</sup> The transitional

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<sup>16</sup> Poland Census, 1931, *Głowne Stosunki Zawodowe w Rolnictwie, Główny Urząd Statystyczny*.

<sup>17</sup> Poganyi, *supra* n. 4: 46

<sup>18</sup> Poland Census, *supra* n. 13.

Communist government, the Polish Committee for National Liberation (PKWN) appointed in July 1944 dealt with the acute demand for land in one of its first decisions. A November 1945 decree combined legislation redistributing large estates to landless and small-holding farmers with legislation expropriating two categories of war victims:

- 1) Polish citizens (both Poles and minorities) who were forcefully detained behind the Soviet Borders after the invasion of 17 September 1939.
- 2) Members of the German minority forcefully repatriated in 1946.

This led to the taking of 9.3 million hectares, of which 6 million were redistributed. Five million families who had moved to the “Recovered Territories” had by 1949 received land taken over from the Germans. The decree from November 1945 combining redistribution with nationalization in one stroke put an end to landless peasantry in Poland.<sup>19</sup> But in the same stroke, it expropriated hundreds of thousands of former landowners without compensation.

Awarding land to landless peasants in this way could well have been just from the distributive justice point of view. The Communist bill, however, had tacked on legislation nationalizing land belonging to refugees – both Polish and German citizens. It is these latter expropriations that should be addressed by transitional justice mechanisms. Unfortunately, as the Polish land reform act of 1944 illustrates, the two types of land reallocations were often regulated by one and the same act, making the unwinding of it all the more difficult.

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<sup>19</sup> Technically, the November decree supplemented an original September 1944 ordinance. Upon its implementation, six million hectares were redistributed, creating 814,000 new farms and expanding a further 254,000. Unfortunately, the average size of small farms was increased by less than 2 hectares. Agrarian sociologists in Poland claim that, instead of resolving the agrarian dilemma, this solution merely scratched the surface, L. Kocik, 1996, “The Privatisation and Market Transformation of Polish Agriculture: New Conflicts and Divisions”, in *After Socialism: Land Reform and Social Change in Eastern Europe*, R. G. Abrahams (ed.), Providence: Berghahn Books.

#### 4.3.1.2. Hungary

Hungary also failed to enact land reform in the interim war period. But this was not due to extraordinarily high growth rates, but because politics were dominated by the aristocratic, large landowning classes. According to Poganyi, the Hungarian reforms were the most limited in Eastern Europe, covering only 6% of the arable land and requiring endowed peasants to indemnify former owners. Because the mandated indemnities exceeded the market price of the land to be redistributed, peasants “awarded” the land could not afford to invest in the technology required to properly utilize it.

Upon coming to power, the Communists seized upon the opportunity to use the acute demand for land redistribution to their advantage. The Szeged antifascist front, created in 1944, decreed in March of that year that medium and large estates in areas controlled by the Arrow Cross (the Hungarian allies of Nazi Germany) and by Germans would be confiscated. The goal of the measure was to win over civilian peasants to collaborate with the resistance. This behavior of Communist partisans in Hungary is one example of a broader set of strategies of combatants used in civil wars to convert passive civilians into active collaborators.<sup>20</sup> Although the land redistribution decree worked as the Communists had intended, it could hardly quench the demand for large-scale reform. This demand was so acute that the Smallholders party was able to win an absolute majority in the 1945 elections campaigning almost exclusively on promises of land redistribution. By the time the Communists had solidified their rule in 1948, 35% of the territory of Hungary had been redistributed, with more than 60% of it redistributed to “natural persons”. Some 90% of the benefactors had been either landless or “dwarf-holders” prior to the reform. The reform clearly privileged the peasant class. A regressive compensation rule was implemented, according to which larger holdings were compen-

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<sup>20</sup> See Kalyvas, 2006, *The Logic of Violence in Civil War*, New York: Cambridge University Press for an example of such combatant activity from the civil war in Greece; See J. Elster, 2006, “Redemption for Wrongdoing: The Fate of Collaborators after 1945”, *Journal of Conflict Resolution* 50, 3: 324-38 for examples from France on using transitional justice-like mechanisms in WWII France to boost support for anti-Vichy resistance.

sated in smaller amounts. Any surplus in excess of 100 hectares was not compensated at all, unless the holder was of “peasant origin”, (from a family whose vocation was “agricultural production”), in which case up to 200 hectares would be compensated, or unless the holder had “made an outstanding contribution to the armed resistance against German occupation”, in which case up to 300 hectares would be compensated. The reform reduced the percentage of landless peasants working in agriculture from 46% (in 1941) to only 17% in 1945.<sup>21</sup>

#### 4.3.1.3. Czechoslovakia

Czechoslovakia was the only country in our set of East Central European cases, where land reform was successfully carried out in the interim world war period. Five acts were passed between 1919 and 1920.<sup>22</sup> The 1919 “Confiscation Act” restricted the size of agricultural land holdings to 150 hectares. Indeed, it was so radical that it could not be fully implemented.<sup>23</sup>

The demand for continued redistribution returned in the aftermath of WWII. Initial confiscations of minority land had been sanctioned by the Allies at the Potsdam Peace conference. Long before the Communists became a force to be reckoned with in Czechoslovakia, President Edvard Benes, who was in charge of the government in exile, issued decrees expropriating Sudeten Germans. However, once the Communists came to power in 1948, the process of land reform, collectivization, and minority expropriations went hand in hand. As the Communist influence grew, the nationalization of all privately owned property, including land, became more and more imminent. A July 1947 law extended the 1919 land reform act so that somewhere be-

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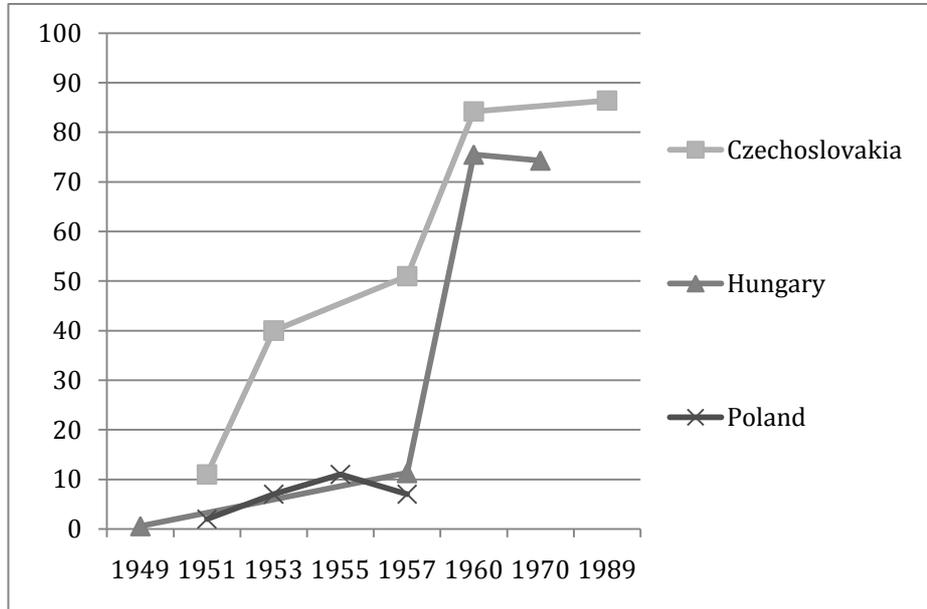
<sup>21</sup> Poganyi, *supra* n. 3.

<sup>22</sup> Some of the ethnic minorities living in Czechoslovakia – most notably the Hungarians who held the largest landed estates that were subjected to redistribution – complained about being unjustly treated in the reforms. According to a political pamphlet published by representatives of the Hungarian minority, Hungarians were over-represented as suppliers of land submitted for redistribution, and under-represented in the group of peasants awarded land.

<sup>23</sup> According to Poganyi, *supra* n. 3: 43, about 2,300 “residuary estates” could not be covered by the 1919 Act.

tween 700,000 and 800,000 additional hectares of land were confiscated. The maximum size of land plots was reduced from 150 to just 50 hectares, yielding an additional 700,000 hectares ready to be redistributed. Of the total 2.2 million hectares of land, the Communist government redistributed 1.7 million to 350,000, mostly landless, families. It retained only 0.5 million hectares to create collective farms. Very soon, however, after the Communists had consolidated their rule, they extended the collectivization project to cover land previously allocated through land reform. Using a combination of threats, blackmail, and petty rewards, they induced landowners to “voluntarily” surrender their newly acquired land for the creation of collective farms. By 1960, over 84% of agricultural land in Czechoslovakia belonged to collective farms.

Why was the collectivization project so much more successful in Czechoslovakia than in Poland and Hungary? I argue that in countries where their domestic legitimacy was particularly low, urgency of land reform delayed the Communists’ collectivization project. It was delayed even more by the presence of social and ethnic groups in need of appeasement. The three countries considered here present cases of interesting variation in this regard. Figure 4 below compares the extent to which Communists in Poland, Hungary and Czechoslovakia were successful in creating collective farms.



**Figure 4:** The progression of collectivization in East Central Europe under Communist rule. Source: author's compilation on the basis of Poganyi (1997) and Kocik.

We see, for instance, that in Poland, the collectivization process had barely begun before it was reversed. This is consistent with the struggle of Communists to contain domestic opposition described by Grzegorz Ekiert.<sup>24</sup> The Communists could not secure enough social support from the rural population to pursue the creation of collective farms. In addition, as described by agrarian sociologists, the few collective farms that were created were far less efficient than the less technically sophisticated individual farms. The next section discusses the relationship between Communists' popularity and their success in implementing collectivization in more detail.

<sup>24</sup> G. Ekiert, 1996, *The State Against Society: Political Crises and their Aftermath in East Central Europe*, Princeton: Princeton University Press.

### **4.3.2. Popularity of Communists in the Post-War Period**

This section is devoted to the second factor responsible for the historical layering of claims in ECE: the domestic support for Communist rule following WWII.<sup>25</sup>

#### **4.3.2.1. Poland**

The Yalta Peace conference of 1945, assigning Poland to the sphere of influence of the Soviet Union sealed its fate for the 45 years to follow. This fact was welcomed by one part of the anti-Fascist resistance but despised by another. Soviet domination was welcomed by the Polish Committee of National Liberation (PKWN), the self-proclaimed government of Red Army-liberated Poland. However, Armia Krajowa (AK), the military wing of the Polish Government in exile, associated with Allied forces in the West regarded the aggressor-turned-liberator as an enemy of Poland and the PKWN as traitors. Civil war broke out between the two groups.<sup>26</sup> The Communists won, but were far from popular. They also had to work particularly hard on appeasing hundreds of thousands of displaced Poles.

The process of land redistribution continued into the late 1940s. Eventually, 40% of Poles from territories taken over by the Soviets had been resettled. Ironically, the same persons who had been the victims of an earlier confiscation conducted by WWII winners – the Soviet Union – became the benefactors of land confiscations carried out on nationals of the WWII losers – Nazi Germany.

This complex process of land redistribution produced at least two layers of claimants. A final potential layer that would have been ob-

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<sup>25</sup> The origins of domestic support for Communists deserve systematic treatment going beyond anecdotal evidence cited below for Poland. One could, for instance, compare the relative vote share of Communist and social democratic parties in the interim war period and argue that they were more popular in countries where they did not have to compete for votes with social democratic parties. Note that for landless or disadvantaged peasants, social democrats offered an attractive alternative to the Communists: they promised redistribution without the subsequent threat of collectivization.

<sup>26</sup> Another movie by Andrzej Wajda – one of his first – (“Popiol i Diament”, 1958, Akson Studio) – vividly shows the drama of Poles caught in the civil war.

tained through collectivization was avoided, as illustrated in Figure 4, because the Polish Communists never became popular enough to convince recently endowed peasants and refugees to surrender their assets to collective farms.

Nevertheless, fast forwarding to 1989, Poland became the case of a transitioning democracy that has to assume responsibility for the expropriations carried out by its own former authoritarian regime, as well as expropriations committed by neighboring authoritarian regimes that refuse to take responsibility for their past wrongdoing. In the end, the amount of compensation Poland could afford to award to the victims of expropriations would have been spread so thinly that reprivatization was judged not worth implementing at all.<sup>27</sup>

#### **4.3.2.2. Hungary and Czechoslovakia**

Stalin gave Hungary and Czechoslovakia more leeway to establish Communist rule of their own variety. In the immediate WWII aftermath, both countries had one set of democratic elections each, in which Communists, falling shy of winning absolute majorities, secured non-trivial representation in their respective parliaments. In Czechoslovakia, Communists held 6 out of 26 cabinet seats in the National Front government. With another five portfolios allocated to their sympathizers, Communists were able to take control over the Czechoslovak government in February 1948. With so much support, the Communists could swiftly carry out collectivization. This is consistent with the data in Figure 3.

The Hungarian Communists won 17% of seats in the legislature in the November 1945 elections. If land reform had been carried out prior to WWII, the backing of the Soviet Union would have allowed them to carry out collectivization almost as easily as the Czech Communists had.<sup>28</sup> Two factors impeded their efforts. The first was associ-

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<sup>27</sup> Nevertheless, other countries facing similar problems to Poland went ahead with restituting property rights. See Lynn M. Fisher and Austin J. Jaffe, 2003, "Restitution in Transition Countries", *Journal of Housing and the Built Environment* 15, 3: 233-48.

<sup>28</sup> Note, however, that Hungary, unlike Czechoslovakia described in section 4.2.2., did not have at its disposal land belonging an ethnic minority ready to be expro-

ated with the Smallholders' victory in the 1945 election, in which Smallholders secured 57% of the vote. The Smallholders immediately embarked on land redistribution reform described in subsection 4.3.1. In 1947, the Communists took over power from the Smallholders, but inducing the newly endowed landowners to turn over their acquisitions to collective farms was close to impossible. The recently endowed peasants hardly had been given a chance to enjoy their recently appropriated estates. The second impediment to swift collectivization dated back to the Bela Kun revolution of 1919, a failed Communist turnover that generated considerable hostility to the idea of land communes. As a result, the collectivization process did not commence until pacification of the Budapest uprising brought to power Janos Kadar. The Soviet installed leader, after crushing what remained of the revolutionary institutions reverted to mild Khrushchevite policies, in line with his belief that "in order for society to be crushed it also had to be bribed".<sup>29</sup> The Hungarian regime was open to reform, increasing the wealth of Hungarians and even allowing them to travel abroad. It earned itself the label of "Goulash Communism". This allowed Hungarian Communists to gradually reintroduce collectivization and toward the 1980s we see increasing proportions of land being collectivized, culminating in 78% in 1989.

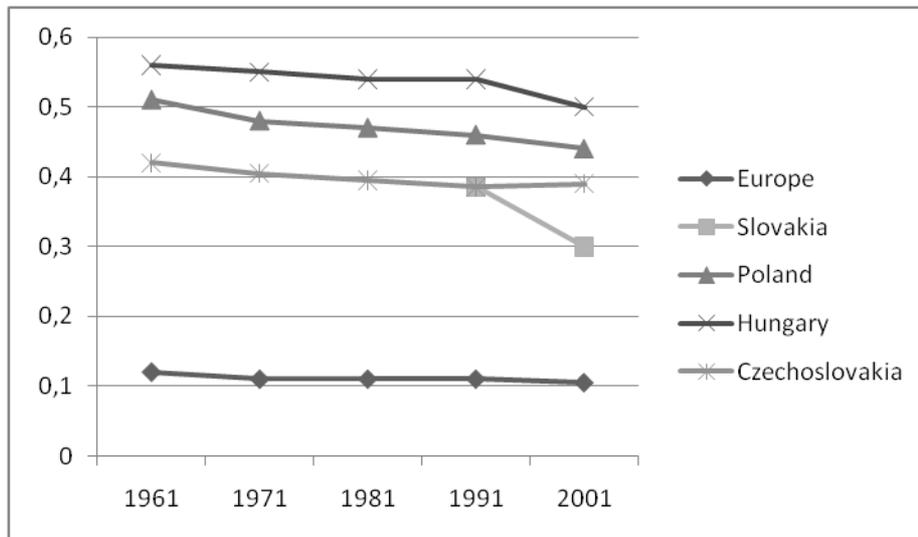
These sections conclude the historical part of the chapter. I have reconstructed the diverse sets of factors leading to the historical layering of claims in Poland, Hungary and Czechoslovakia. Table 2 in the annex to this chapter, summarizes the contribution of international (lost and gained territories and changes in ethnic composition as a result of Allied arrangements) and next, domestic factors (existence of land reform before WWII and popular support for Communist rule in WWII aftermath) responsible for the layering of claims. As I show in the remainder of this chapter, taken together, these factors are responsible for generating lists of claimants to the same piece of land and determine how easy or difficult it is to carry out reprivatization.

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priated as punishment for supporting Nazi Germany. Hence, land reform had to be conducted relying entirely on resources of currently in the hands of ethnic Hungarians.

<sup>29</sup> Ekiert, *supra* n. 24

Before I move on to the post-transition problem of reprivatization, I consider briefly an alternative explanation for the implementation of collectivization in Poland, Hungary, and Czechoslovakia. This explanation rests on non-political factors affecting the quality of land. Suppose that the structure of arable land in the three countries was sufficiently different to warrant early collectivization in Czechoslovakia, delayed collectivization in Hungary, and no collectivization at all in Poland. One might for instance argue that if Poland had more arable land than Hungary and Czechoslovakia, collectivization there would be more difficult there than in the two latter countries. I obtained data on the size of arable land as a percentage of total territory and present the figures for years 1961-2001 in Figure 5.



**Figure 5:** Arable land as percentage of total land in Poland, Hungary, Czechoslovakia and Czech and Slovak Republics, relative to all of Europe 1961-2001.

As we see, even though differences in the size of arable land relative to total state territory exist between the three countries, these differences are minor, when compared to the rest of Europe. Furthermore, contrary to expectation, the country with the largest arable land relative to its total size is not Poland, but Hungary.

Indeed, Poland is different from Hungary and Czechoslovakia in many important ways. Alone, these characteristics do not translate into

failure of collectivization in any direct way. However, demographic growth in a sizable population of landless peasants, population transfers, coupled with high demand for land reform can shed light on why Communists who were still struggling for popularity could not risk replacing land reform with collectivization.

#### 4.4. Reprivatization as a Claims Problem

Reprivatization refers to transitional justice mechanisms that deal with returning immobile assets – be they land, real estate, or factories – to their rightful owners after an occupying force or authoritarian regime has ceased to be in control of these assets. The aim of reprivatization procedures is to solve the tragedy of the commons problem that would arise among agents with competing claims if each were to pursue independently the return of his or her own property. With overlapping claims to the same piece of property there is not enough to satisfy everyone and priority goes to whoever brings his claim first. Reprivatization, in this sense is similar to bankruptcy proceedings in which the total amount of a firm's due debts exceeds the total amount of its assets. When the debtor cannot pay all his creditors, individual execution could lead to a first come, first served distribution. Creditors who knew of the risky condition of the estate would be unfairly privileged. Moreover, a series of independent executions considerably exceeds the cost of handling similar cases in one overarching decision.

In the case of reprivatization, unequal access to legal resources and to information about the condition of the asset to be restituted could prioritize former owners with larger claims or better financial and legal resources, leaving small claim holders empty-handed. Allocation based on such principles is hard to justify, because who gets to be the first is in Dworkin's terminology a matter of *brute*, not *option* luck.<sup>30</sup>

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<sup>30</sup> Ronald Dworkin, 1981, "What is Equality? Part 1: Equality of Welfare", *Philosophy and Public Affairs* 10: 185-247.

#### 4.4.1. Evaluating Reprivatization Laws

Reprivatization is a problem of local justice, and therefore, can be studied both from the normative and empirical perspective.<sup>31</sup> First, one might ask what should be the properties of restitution laws. Second, we might look into the real-world institutions dealing with past expropriations and to see what properties are satisfied.

One can evaluate restitution laws from two normative perspectives. First, restitution laws may be designed for the sake of maintaining equity among former owners. I refer to this as *horizontal* fairness as opposed to *vertical* fairness, which evaluates restitution laws from a retributive perspective. The latter stems from the Kantian premise: no matter what the consequences, property must be returned to rightful owners.

Cooperative game theorists<sup>32</sup> have formalized a number of appealing properties that one may want allocation rules to adhere to and have identified rules that satisfy different combinations of these properties. This has allowed them to use these properties (referred to as “axioms”) to characterize allocation rules in the form of “the only method that satisfies properties x, y, and z”. Thomson refers to this way of analyzing allocation rules as the axiomatic method.<sup>33</sup>

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<sup>31</sup> Jon Elster, 1992, *Local Justice. How Institutions Allocate Scarce Goods and Necessary Burdens*, New York: Russell Sage Foundation.

<sup>32</sup> R. Aumann and M. Maschler, 1985, “Game Theoretic Analysis of a Bankruptcy Problem from the Talmud”, *Journal of Economic Theory* 36: 195-213; R. J. Aumann, M. Maschler, *et al.*, 1995, *Repeated Games with Incomplete Information*, Cambridge: MIT Press; E-Y Gura and M. Maschler, 2008, *Insights into Game Theory: An Alternative Mathematical Experience*, New York: Cambridge University Press; H. Moulin, 2003, *Fair Division and Collective Welfare*, Cambridge: MIT Press; Barry O’Neil, 1982, “A Problem of Rights Arbitration from the Talmud”, *Mathematical Social Sciences* 2: 345-71; W. Thomson, 2003, “Axiomatic and Game-Theoretic Analysis of Bankruptcy and Taxation Problems: A Survey”, *Mathematical Social Sciences* 45: 249-97; Peyton Young, 1987, “On Dividing an Amount According to Individual Claims and Liabilities”, *Mathematics of Operations Research* 12: 398-414. Peyton Young, 1994, “Claims and Liabilities”, in *Equity in Theory and Practice*, Princeton: Princeton University Press: 90-99.

<sup>33</sup> Thomson, *supra* n. 30.

An axiomatic approach in normative analysis of restitution laws is justified here, because they are a perfect example of *pluralism* in principles of justice characterizing real-world institutions. First of all, reprivatization integrates corrective and distributive principles. The corrective aspect consists in preventing the wrongful beneficiary from profiting from the unjustly acquired asset. This deprivation can be interpreted as a form of punishment. The distributive aspect refers to dividing what is left of the property among the claimants. Thus, despite the traditional sharp division between the principles of corrective and distributive justice, dating back to Aristotle, the answer to the concern of both is provided by the same institution. Reprivatization displays a variety of distributive principles. Lexicographic, proportional, egalitarian and Rawlsian elements appear together.

#### 4.4.2. Formal Framework

The analysis below relies heavily on Young, Ein-Ya Gura and Machler.<sup>34</sup> I begin with the single-claims model for studying criteria for allocating a homogenous, divisible good equitably among a group of claimants.<sup>35</sup> Land, even though not perfectly homogeneous and at times, not that easily divisible fits this description quite well.

Let  $N = \{1, \dots, n\}$  be the set of claimants. Claimants are described by numerical claims against a piece of property  $t$ . The numerical claim of claimant  $i$  characterizes his *type*, which is expressed as a positive number  $x_i$ . A *restitution problem* arises when the total amount of claims exceeds the available amount of the good. Formally, a claims problem  $(x, t)$  consists of a list of claims  $x = (x_1, \dots, x_n)$ , where  $x_i > 0$ , for  $i = 1, \dots, n$ , against a quantity  $t$ , where  $0 < t < \sum_i x_i$ . No claimant should receive a negative allotment or more than his claim. Thus, a *solution* to a claims problem  $(x, t)$  is a vector  $y = (y_1, \dots, y_n) \in R^n$ , such that  $\sum_i x_i > t$  and  $0 < y_i < x_i$ , for all  $i \in N$ . A rule determines the relevant allocation for every claims problem. Formally, an *allocation rule* is a function  $F: R^n \times R \rightarrow R^n$ .  $F$  associates a unique solution  $y = F(x, t)$  with every claims problem and is defined for any number of claimants,  $n$ . For

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<sup>34</sup> Ein-Ya Gura and Machler, *supra* n. 30. Young and Moulin, *supra* n. 30

<sup>35</sup> Young, *supra* n. 30: 190

every  $i \in N$ ,  $y_i = F_i(x, t)$  defines the portion assigned to agent  $i$  by the allocation rule  $F$ .

#### 4.4.2.1. Equity of Allocations

The best way to understand equity of allocations is via the concept of the *standard of comparison*. A standard of comparison determines the priority of claimants to various portions of the good. Let  $X = \{(x_i, y_i) : x_i > 0 \text{ and } 0 < y_i < x_i\}$ .  $X$  is a set of *situations*. A situation is a pair consisting of a single claim and a possible allotment. A *standard of comparison* is a weak ordering  $P$  on  $X$  such that  $0 < y_i < y_j < x_i$ , implies  $(x_i, y_i) P (x_j, y_j)$ . Informally, for two former owners with identical claims, the owner with a smaller allotment ( $y_i$ ) has a *priority* to receive the next portion of the good before the owner with a larger allotment ( $y_j$ ).<sup>36</sup> This priority may also be interpreted as being *more deserving* to receive further portions of the good.<sup>37</sup> Note that the definition of a standard says nothing about priorities among claimants with different claims. Equity is always defined with respect to a standard of comparison and different standards may handle such priorities differently.

Before formally defining equity with respect to a standard of comparison, I describe the intuition conveyed by the formal definition.

From a normative perspective, maintaining a situation of unsatisfied priorities is undesirable. A *transfer*  $\varepsilon$  from person  $i$  to  $j$  is *justified* if the priority of  $i$  after the transfer is strictly lower than the priority of  $j$  before the transfer:  $(x_j, y_j) P (x_i, y_i - \varepsilon)$ . An allocation is called *equitable* when no transfer is justified, that is when for all  $i, j \in N$ , and for all sufficiently small  $\varepsilon$ ,  $(x_i, y_i - \varepsilon) P (x_j, y_j)$ . Informally, equity holds when a transfer of the good from the claimant with lower priority (with a larger allotment relative to his claim) to the person with higher priority (with a smaller allotment relative to his claim) would reverse the order of priorities. In other words, a situation is equitable with respect to a given standard of comparison if every transfer from a less deserving

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<sup>36</sup> Aristotle's rule of proportional distribution may serve as an example of a rule based on a standard of comparison. The standard in this case is the rate of loss suffered by each claimant, Aristotle, *Nicomachean Ethics*, Indianapolis: Bobbs-Merrill, 1962.

<sup>37</sup> Young, *supra* n. 30

claimant,  $i$ , to a more deserving claimant,  $j$ , makes  $i$  at least as deserving after the transfer as  $j$  was before the transfer.<sup>38</sup>

Equity may be viewed as a desirable property for allocation rules. Other desirable properties of allocation rules discussed here are: impartiality, monotonicity, consistency, and continuity. I consider each of these additional properties below.

*Impartiality.* We will call an allocation rule  $F$  *impartial*, if it depends only on the individual claims and the total amount to be distributed. This means that any properties of claimants that are relevant for determining how much of the good they are awarded have to be expressed as part of the claims vector. In the single claims model, each agent's entitlement to the good in dispute must be represented by a scalar.

*Monotonicity.* An allocation rule  $F$  is *monotonic* if for every vector of claims  $x > 0$  and every two amounts of the good,

$$0 < t < t^* \Rightarrow F_i(x, t) < F_i(x, t^*), \text{ for every claimant } i.$$

Monotonicity requires that when the amount of good to be divided increases, the portions received by the claimants do not decrease.

*Pairwise consistency* An allocation rule  $F$  is *pairwise consistent* if for every  $n$ -person claims problem  $(x, t)$ ,  $(y_1, \dots, y_n) = F(x, t)$  implies that  $(y_i, y_j) = F[(x_i, x_j), y_i + y_j]$  for every  $i \neq j$ . Pairwise consistency requires that the claims of third parties are irrelevant to the way the good is divided between any two claimants. Suppose two claimants in a larger problem involving more claimants were to pool together the allotments assigned to them in the larger problem, and to allocate them again using the same allocation rule. Pairwise consistency says their portions should be exactly the same.

*Continuity.* An allocation rule  $F$  is *continuous*, if whenever a sequence of claims problems  $(x^k, t^k)$  converges to a claims problem  $(x, t)$ , then  $F(x^k, t^k)$  converges to  $F(x, t)$ .

These axioms represent normatively desirable properties of allocation rules. From a practical point of view, a desirable property of allocation rules is the ability to associate with it a standard of compari-

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<sup>38</sup> *Id.*

son. This is especially true for reprivatization. Before I describe what is formally necessary for such a standard of comparison to exist, I define one more formal concept, following Young – that of a *numerical standard of comparison*.<sup>39</sup> A standard of comparison  $P$  is numerical when there exists a real valued function  $r: X \rightarrow \mathbb{R}$ , such that  $r(x_i, y_i) \geq r(x_j, y_j)$  if and only if  $(x_i, y_i) P (x_j, y_j)$ . The existence of numerical standards of comparison allows us to express the priority of a claimant holding a certain allotment to further amounts of the good as a real number, so that claimants with higher numbers have a priority before claimants with lower priorities.<sup>40</sup> In short, the relation of “being greater or equal than” between real numbers represents priority between claimants. This is a very useful property of allocation rules, as it allows us to rank order claimants from most deserving to least deserving with respect to any portion of the good to be divided. A natural question to ask is: when does a standard of comparison exist for a given allocation rule? The general answer is provided by Peyton Young’s Theorem 2: *If a claims rule is impartial, pairwise consistent, and continuous, then it is equitable relative to a numerical standard of comparison and it is monotonic.*<sup>41</sup>

In Young’s model the information about an agent is limited to the numeric worth of his claim. Effectively, real world reprivatization laws resemble priority systems generated by standards of comparison, though no standard is defined formally. Although statutes do not specify the priorities of claimants to every possible amount of the reprivatized good, based on their claims only, claims are divided into general categories and subcategories, based on citizenship and depending on the period in which the expropriation took place. The standard of comparison could be a very useful tool for handling reprivatization of land. In cases where there are historical overlapping claims to an estate that has been transformed into a collective farm, successive pieces of land are only gradually available for restitution. Without a standard of comparison, the compensation of former owners cannot take place until the entire estate is ready to be returned, which could take months if not

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

years, particularly in the case of large terrains that were formerly collective farms. If there existed a standard of comparison for a given reprivatization rule, the procedure for satisfying claims could be efficiently enhanced, because claimants could be paid gradually as plots of the reprivatized collective estate become available. The priority would be determined by the claimant's claim and the portion he has already acquired, as reflected in the standard of comparison.

#### **4.4.2.2. Are Reprivatization Rules Equitable?**

We are now in a position to examine actual property restitution laws that were considered and implemented in East Central Europe for their compatibility with the axioms of continuity, impartiality and consistency. The compatibility with these axioms translates into the existence of a numeric standard of comparison, which – in turn – is equivalent to specifying a complete list of priorities of each claimant to any possible amount of the reprivatized estate. This means that the reprivatized land could be gradually distributed to claimants, without waiting until the entire estate is ready to be handed over.

#### **4.5. Restitution Laws Applied to Land in Hungary and Poland**

The axioms presented above, apart from formalizing normatively appealing properties of allocations, indicate which rules can be simplified and have their process of implementation shortened. This is important in light of how flooded post-Communist economies have become with claims merely upon announcing their intentions to reprivatize confiscated property. This section outlines for illustrative purposes the bills that have been proposed and/or implemented in Poland and Hungary.

##### **4.5.1. Hungary**

In April 1991, Hungary passed a compensation law extending to landed property nationalized after June 1949. Through the end of November, 386,000 people had submitted compensation claims for a total of 1,360,000 items of property – with 1,227,000 claims for land, 100,000 for real estate and 32,000 for businesses. The National Office for Compensations and Restitution expected the number to reach 500,000 by 16 December 1991. Eventually, the deadline for submitting

the compensation claims was extended for a couple of more years. The average entitlement under the bill was 52,000 forints per claim,<sup>42</sup> forcing the government to issue 30 billion forints' (384 million USD) worth of compensation certificates.<sup>43</sup>

In section 4.3., I explained how multiple layers of claimants to the same piece of property had accumulated in Hungary. This, from a practical point of view, made in-kind restitution difficult. But the alternative option – monetary compensation – was politically challenging for the following reason. One of the main parties that formed the first post-Communist governing coalition was the historical Smallholders' Party. It distinguished itself from competitors by promising in-kind restitution favoring landowners a big part of its electoral campaign program. The Smallholders sought restitution in the very specific and limited sense of reversing to the property relations in agriculture from 1947. Pogany writes: “for the Smallholders, restitution was seen as a means of reconstituting a ... social order characterized by a pronounced emphasis on the agrarian sector and by a comparatively egalitarian and homogenous peasant-oriented culture”.<sup>44</sup>

Resisting pressures from the Smallholders, the first post-Communist government coalition after transition to democracy, decided to resolve the allocation problem by refraining from in-kind restitution in favor of monetary compensation. This first law “indemnified” former owners using a sliding scale resembling regressive taxation. Damages were to be paid in indemnification vouchers, which could be used for the purchase of property, stock and business shares sold over the course of privatizing state property as well as for acquisition of arable landed property. Victims of property losses were compensated in the full amount of the damage suffered if it was below 200,000 f. Damages suffered between 200,000 f and 300,000 f were to be compensated 200,000 f plus 50% of the amount above 200,000 f, damages between 300,000 f and 500,000 f in 250,000 f plus 30% of the amount above 300,000 f, and damages over 500,000 f were to be

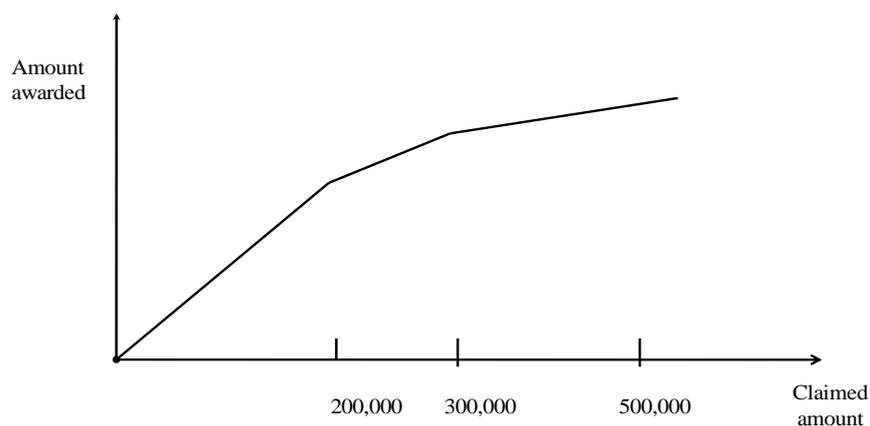
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<sup>42</sup> Yet under the sliding scale outlined in the bill, only a few hundred people getting more than 1 million forints (12,800 USD).

<sup>43</sup> *MTI Hungarian News Agency*, 4 December 1991.

<sup>44</sup> Poganyi, *supra* n. 3: 156

compensated in 310,000 f and 10% of the amount over and above 500,000 f. Figure 6 represents graphically the compensation sliding scale.



**Figure 6:** Hungarian Compensation Law.

Such a sliding scale was especially hurtful to former landowners, particularly after the court began recognizing the property rights of workers of cooperatives.

Thus, in Compensation Act II, an exemption to this rule was made in the case of arable land held by cooperatives and the state. It was sold in auctions restricting participation to:

- 1) Persons whose expropriated arable land was presently owned or used by the cooperative
- 2) Members of the cooperative as of January 1991 who continue to hold such membership at the time of the auction
- 3) Permanent residents as of June 1991 of the municipality or city in which the cooperatives arable land is located.

Apart from this, the right to purchase could be exercised only by a person committing herself to use the land for agricultural purposes

and not to withdraw the land from agricultural purposes for a period of five years.<sup>45</sup>

This last measure was adopted in response to a Constitutional Court decision.<sup>46</sup> The leading party in the post-Communist coalition, the Hungarian Democratic Forum (MDF), had sent the new bill for constitutional review, unhappy with the fact that it favored landowners. Herman Schwartz writes about the court's decisions in the following words:

In response, the Court ruled that special benefits for a group are presumed unconstitutional and violate the equal protection provisions of the constitution. If such benefits are to be granted, declared the Court, there must be a specific cost-benefit analysis showing how they would promote general welfare.<sup>47</sup>

The court believed that taking agricultural land belonging to the cooperatives, in order to implement the proposed scheme of partial restitution to Smallholders required the cooperatives to be paid 'full, unconditional compensation' in accordance with the Constitution's provisions for eminent domain indemnification. The defense of members of cooperatives who were current holders of agricultural property was consistent with the Court's insistence in the first compensation case that former property owners "do not enjoy priority over former non-owners in the distribution of state - owned assets".<sup>48</sup>

However, Poganyi noted that in the third of the compensation cases considered by the Court, the justices affirmed the constitutional-

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<sup>45</sup> N. J. Kritz, 1995, Hungary: Compensation Laws. Law No. 25 (26 June 1991), Law No. 24 (7 April 1992). *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Laws, Ruling and Reports*, Washington, D.C.: United States Institute of Peace Press, III: 748-50.

<sup>46</sup> Kritz, 1995, Hungary: Constitutional Court Decision on the Statute of Limitations, *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. Laws, Ruling and Reports*, Washington, D.C.: United States Institute of Peace Press, III: 629-40.

<sup>47</sup> Cited after H. Schwartz, 2000, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago: University of Chicago Press: 105.

<sup>48</sup> L. Solyom and G. Brunner, 2000, *Constitutional Judiciary in a New Democracy, The Hungarian Constitutional Court*, Ann Arbor: University of Michigan Press.

ity of the principle of compensating former owners, while non-owners were excluded, as long as distinctions between former owners and former non-owners which were based on ‘rational reason’.<sup>49</sup> It also reaffirmed the constitutionality of smallholders’ rights to repurchase (for compensation vouchers) their land from the state and from cooperatives. The Court did question, however, the cut-off date of 8 June 1949 as limiting from below which expropriations would be compensated. And it also questioned the fact that landowners would be compensated in full, while others only by a fraction of their property’s worth.<sup>50</sup> To comply with the Constitutional Court’s decision, Hungary had to adopt two more compensation acts. The Compensation Act II of June 1991 corrected the effect of partial indemnifications to farmers, by creating financial assistance, in the form of a general subsidy, available to “those purchasing agricultural land where the ordinary level of compensation would not enable them to purchase smallholdings equivalent in value to those they had lost”. This part of the law was, however, struck down by the Constitutional Court that declared that such subsidies for former Smallholders amounted to positive discrimination in favor of one category of former owners over others”.<sup>51</sup> Finally, the II Compensation Act also extended indemnification to persons expropriated on the basis of the Jewish Laws of 1939. To summarize, Smallholders wanted to restitute agricultural property to ethnic Hungarians. However, the Constitutional Court recognized as identically valid claims of those affected by government takings before the Communist takeover, that is, Jews and Germans. The social and political objectives which the Independent Smallholders’ Party wished to bring about through selective restitution of smallholdings were frustrated by the Constitutional Court ruling.<sup>52</sup> By the end of 1998, one third of all farmland and one-fifth of former state property had been transferred to new owners.<sup>53</sup>

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<sup>49</sup> Poganyi, *supra* n. 3: 160-61

<sup>50</sup> K. Okolicsanyi, 1992, “Hungarian Compensation Law Proposal Covering the 1939-1949 Period”, *Survey of East European Law* 3, 1: 5, 8, 11, 12.

<sup>51</sup> Poganyi, *supra* n. 3: 162

<sup>52</sup> Poganyi, *supra* n. 3: 169

<sup>53</sup> *MTI Hungarian News Agency*, 3 March 1998.

#### 4.5.2. Poland

A major challenge to property restitution was whether to extend Poland's responsibility for expropriations that took place outside of post-WWII borders. The first restitution law was proposed, in 1991, by the Minister of Ownership Transformations (in short: privatization), Janusz Lewandowski. Lewandowski outlined a plan for limited reprivatization, which would substitute restitution in kind with a form of partial monetary compensation. This form, he believed, would be least likely to collide with an ambitious privatization program. For Lewandowski and his Gdansk-based party of neo-liberals, privatization and not reprivatization was the main tool for reversing the effects of 40+ years of Communist nationalization. Unfortunately, his proposal came on the heels of one of the first divisions within Solidarity (the divisions were known as the "war on the top between President Lech Walesa and Mazowiecki's – and subsequently Bielecki's – cabinet). Literally one day after Lewandowski's proposal, President Lech Walesa proposed a draft law pushing for in-kind restitution. The President's plan included a populist provision reserving 20% of the shares of privatized companies to their employees. This sparked a campaign among former Warsaw property owners, who began to demand the restitution of forty five hundred buildings nationalized in 1945 via a special Decree concerning land in Warsaw.

While in 1990, claims for restitution of property all over Poland amounted to 70,000, by 1991 that number had doubled. The Ministry of Ownership Transformations estimated the value of property under dispute at between 12.5-15 billion zlotys.

Meantime, work on a privatization bill in Parliament came to a halt with the premature termination of the legislative term (the termination was due to a transitional justice measure that is described below). Following the elections, the *Sejm* was dominated by post-Communist parties. The new proposal offered some 80,000 former owners bonds for purchasing shares in privatized companies instead of the original property they had lost. It was defied by former owners who now organized in the Polish Union of Property Owners and demonstrated in Warsaw demanding immediate restitution of property in kind. The government's response was that restitution at a level de-

manded by the former owners would bankrupt the state. Instead, it proposed to set aside 5% of the profits from selling stocks of privatized companies to directly compensate former owners for loss of property. Unconvinced, the ex-owners continued to demand restitution in kind and threatened to take their grievances abroad. They were joined over the course of the following year by international Jewish organizations and lobby groups.

In April 1995, eight influential Congressmen wrote to U.S. Secretary of State, Warren Christopher, accusing 13 Eastern European countries of deliberately obstructing the process of property restitution and making it difficult for Jews to recover properties they lost during World War II. The politicians, who included both Republicans and Democrats, threatened Eastern Europe that its relations with the U.S. would severe unless these countries passed laws guaranteeing restitution and compensation for real estate seized by the Nazis and nationalized by the Communists. The Polish government responded to these challenges by promising that the terms of awarding compensation to former Jewish owners would be no more favorable than those used with regard to other nationalities.<sup>54</sup> Under pressure from international and domestic organizations, the government withdrew its proposal from consideration by the *Sejm* and continued to fine-tune its details to ensure passage. When eventually, in June 1995, the *Sejm* approved a scheme to use reprivatization bonds to compensate former owners of properties illegally seized by the Communists, the leader of the Polish Union of Property Owners – Janusz Szczypkowski – lodged a protest with the European Council over delays in compensating the ex-owners. Szczypkowski threatened to ask the Brussels-based World Union of Real Estate Owners to file a protest on his behalf with the United Nations. His argument was that a “basic human right of property ownership is violated in Poland”.<sup>55</sup> The bill provided for returning property to nine Jewish communities. A year later, the restrictions led the World Congress of Jewish Organizations to question the admission of Poland, Romania, and the Czech Republic to NATO. The reprivatization scheme that was passed in the *Sejm* required a statute specifying the

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<sup>54</sup> *Gazeta Wyborcza* No. 90, 15-17 April 1995: 1.

<sup>55</sup> *United Press International*, BC Cycle, 3 April 1996.

categories of restitution, both in terms of citizens and property to be returned. These specifics were not settled until September 1999, when the Solidarity coalition led cabinet and two post-Communist parliamentary parties submitted their proposals.

The cabinet bill included Poles who lost property in what was Polish territory that had been taken over by the Soviet Union after the war (about 90,000 claims). Those seeking compensation for property lost between 1944 and 1962 could get 50% worth of their claims, either the property itself or in the so-called reprivatization bonds. It stipulated that Poland could face up to 170,000 claims from 2.5 million people, totaling \$ 27 billion to \$ 32 billion (110-130 billion zlotys), about the same amount as Poland's annual government budget. The State Treasury committed to earmark 15% of revenues from privatization to satisfy restitution claims. The draft was heavily criticized by the Polish Union of Property Owners, who demanded that it also include confiscations carried out in the years 1939-1962. Yet, the cabinet's proposal was still quite generous to former owners. The bills proposed by the post-Communist parties were considerably less far-reaching. A special parliamentary committee was appointed to resolve differences between the three proposals. The committee passed a special amendment restricting receiving compensation for property seized by Communist authorities after World War II to Polish citizens residing currently in Poland. Predictably, this further severed relationships with the World Jewish Organization. Most notably, Elan Steinberg, director of the Jewish Congress, pointed out that any restitution bill that fails to extend back to 1939 rewards property to someone who was given Jewish property by the Nazis and subsequently lost it to the Communists, giving this person a stronger legal claim than the pre-war owner.<sup>56</sup> The committee then passed another amendment to the cabinet bill – committing the descendants of former property owners in Poland to paying an inheritance tax upon being compensated for land and buildings confiscated under the Communist regime.

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<sup>56</sup> P. Finn, "Poles May Bar Payments for Post-war Acts; Panel Narrows Definition Of Who May Be Compensated", Washington D.C.: *The Washington Post*, 8 January 2000.

Descendants of former property owners were believed to make up about 80% of all property restitution claimants in Poland.<sup>57</sup> Although by June 2000, the initial expectation of 170,000 restitution claims was downgraded to 110,000 (about 34% of those who lost their property under the Communist regime were not able to document it), in March 2001, post-Communist President Aleksander Kwasniewski decided to veto the bill. Kwasniewski justified his decision by pointing out that, according to the associations of former owners, the number of applications may reach 250,000 bringing the total cost of compensation due to almost 69 billion zlotys. It is very plausible that he did not want to antagonize the international community by openly excluding Jewish organizations (representing descendants of the victims) from the reprivatization scheme. The principle of compensating everyone who was expropriated or no one was easier to defend than arbitrarily restricting compensation to Polish citizens living with Poland's borders at the time.

Thus, despite many perturbations, no restitution law was implemented in Poland. A law that would placate the demands of international organizations would bankrupt the state. At the same time, a law that Poland could afford was too exclusionary of influential international groups. The most recent attempt, while successfully passed through the legislature, was yet again vetoed by President Kwasniewski in 2004 who claimed that because it is impossible to estimate potential number of claimants, a reprivatization law would have bankrupted the state.

#### **4.5.3. Compliance of Reprivatization Acts With Symmetry, Impartiality, Continuity and Pairwise Consistency**

This section applies our model of allocation to reprivatization laws passed in Hungary. Its goal is to illustrate how one verifies whether a numeric standard of comparison for a given reprivatization exists. In order to apply the findings of our model, all parameters in the allocation problem must be defined. This includes (a) a well-defined value of

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<sup>57</sup> *Polska Agencja Prasowa News Agency*, 29 February 2000.

the estate (b) well-defined types of claimants, and a (c) well-defined rule for allocating the estate.

We can treat the landed estate as the good to be divided,  $t$ ; claimants and their claims as the vector  $\mathbf{x} = (x_1, x_2, \dots, x_k, \dots, x_n)$ , and the distribution of land as the allocation rule  $F$ . First note that for land restitution to be a problem at all, the total amount of the claim must exceed the value of the good to be distributed. This is more likely to be the case in countries that experienced the historical layering of claimants. Checking whether the axioms of Theorem 2 are satisfied (so that there exists a numerical standard of comparison), requires noting where the empirical institutions diverge from the model.

One of the first things we ought to do is to establish if the set of claims is objectively given or defined formally by the law. By “objectively given”, I mean that it includes all property owners who have been unfairly expropriated by one authoritarian regime or another, be it Fascist or Communist. Alternatively, we may accept as admissible claims only those that are stipulated as admissible by the law. For instance, the Compensation Act I limited the set of valid claims to persons expropriated after June 1949. If we treat claims as objectively given, it is immediately obvious that the Compensation Act I was not *impartial*, as other factors than the agent’s claim mattered for determining if his allotment were 0 or some positive amount. These factors not captured by the claims vector included citizenship at the time of expropriation and at the time of restitution, intent to farm the land in question, and all sorts of other factors that might enter into the consideration of the land commission.

According to the model, no claimant should receive a negative allotment. For every  $i \in N$ ,  $y_i > 0$ . This case may easily be violated when a *claimant* is *in possession* of the property to be restituted. Note that countries that had collectivized farms prior to the transition and include in the set of claimants persons occupying the land among fail to satisfy this property, because that last claimant, once the land taken, even if he is later compensated, will suffer a net loss.

The extent to which the situations described above spoil the usefulness of applying the rationing model to reprivatization laws depends on how often they arise. Let us assume, for now, that the described

situations of negative allotment and impartiality are extra-ordinary, that is, let us suppose that the set of claimants has been adjusted to match the expropriations that have objectively been carried out. I will explain below, how reprivatization rules satisfy continuity, and consistency.

To see when reprivatization rules are *continuous*, we have to ask what happens to the agent's allotment when the amount of the good to be distributed rises. Note that in the Compensation Act I, claims are divided into a series of categories depending on their size. Within each category, the good is distributed according to a fixed proportion. However, the proportions are not constant across claimants, but change as the size of the claim reaches a size category. This is illustrated in Figure 6 in section 4.5.

A rule is continuous when there are no "gaps" in the relationship between the claim amount and the allotment awarded to an agent.

By the same token, the rules are *pairwise consistent*. Recall, that pairwise consistency requires that if two agents divide between themselves the good they received in a larger rationing problem, they arrive at the same allotments. In the Hungarian compensation law, agents with smaller claims receive larger proportions of their claims. But the extent to which their claims get satisfied does not depend on other agents' claims. This is not so with Compensation Act II granting allocation powers to land committees. In these cases, the presence of third claimants was critical to the way in which land was divided between any pair of claimants.<sup>58</sup>

It follows from the above analysis, that the Compensation Act I is equitable relative to a numeric standard of comparison, provided the set of claimants is not constrained by citizenship. This means that for a given list of claimants, there exists a precise ordering of priorities among them to any possible amount of the good that can be apportioned. The restitution laws are also *monotone* in the amount of the good (if more of the land appears for redistribution, each claimant should receive a larger portion).

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<sup>58</sup> Young, *supra* n. 3 shows that thanks to the property of consistency, Aristotle's proportional rule is collusion-proof.

Note that the existence of a standard of comparison, by which a rule can be equitable does not yet ensure that all other normatively desirable properties are satisfied.

As has been noted earlier, the Compensation Act I of June 1991 is not proportional. It also fails to be collusion proof, a normative property that we did not specify above. Specifically, if a number of agents were to divide the size of a claim amongst each other they could ensure themselves more compensation than if they pooled their claims and had them represented jointly. To see this take two victims  $X$  and  $Y$ , with identical claims worth 400,000f. Suppose  $X$  is deceased, but has left two children each of whom is bequeathed half of his property, leaving the two claimants  $X_1$  and  $X_2$  with a claim of 200,000 forints each. Note that although initially the landed property was exactly the same, the descendants of  $X$  get compensated the total 400,000f worth of the land, while  $Y$  gets only 280,000.

There is also a rather arbitrary restriction on compensating descendants of victims. If one of them is no longer alive, his portion may not be split between the remaining descendants. It seems paradoxical that compensation claims of the same value, made by heirs should depend on the number of their deceased siblings.<sup>59</sup>

#### 4.6. Conclusion

I conclude this chapter noting some broader policy implications and the international ramifications of reprivatization decisions. Throughout the 1990s and well into 2000s, the Commission for Security and Cooperation in Europe held a series of hearings before Congress about dealing with successive Fascist and Communist expropriations suffered by U.S. citizens in East Central Europe. The title (“Property restitution, compensation, and preservation: competing claims in post-communist Europe”) of the hearing held on 18 July 1996 recognized the overlapping claims problem. The proceedings of the commission focused on claims of persons holding current U.S. citizenship. First, the commis-

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<sup>59</sup> The easiest way to see this paradox is to take any two, no longer living, victims  $X$  and  $Y$ , who lost property of the same value.  $X$  had 2 children,  $Y$  had 3, but one of them died; each of the descendants of  $X$  get  $1/6$  more than each of the descendants of  $Y$ .

sioners noted that in many countries, citizenship rules constrain who is entitled to having his or her property restituted. Holding citizenship at the time the expropriation took place is typical, but some states also required citizenship at the time restitution was supposed to take place. Meanwhile, U.S. citizens are unable to have their claims represented by the U.S. Claims Settlement Commission, if they were not U.S. citizens at the time of expropriation. This, however, is quite common, as Jewish refugees fleeing Europe from Nazis or Communists frequently had to wait many years for the naturalization process to be completed. After identifying these problems, the commissioners complained about the diversity in approaches to property restitution across East Central European countries. Chairman Christopher H. Smith went as far as to propose the establishment of a common international standard akin to international trade standards established by the WTO.

This chapter has shown that such ideas make no sense given the diversity of expropriation patterns. Whether or not land reform was carried out by the interim WWII governments, and how popular were the post-war Communist governments were factors affecting whether or not land was collectivized (as in Czechoslovakia), redistributed to individuals (as in Poland) or first redistributed and then collectivized (as in Hungary). These domestic factors, along with international factors associated with ending WWII and peace building in its aftermath contributed to the historical layering of claimants. Formal analysis of property restitution as a claims problem shows that such increases in the total number and the types of claimants make property restitution, and the reprivatization of land in particular, hard – in the sense of violating desirable properties of restitution laws. Understanding the variation in factors contributing to the “layering” of claimants can help understand variation in type of reprivatization laws that have been adopted in Eastern Europe and their success

**Annex**

	WWII expropriations		Post-WWII expropriations				Number of claims
	Fascist	Soviet	Communist legitimacy after WW2	Demands for Land Reform	Expropriations of ethnic minorities	Collectivization	
<b>Poland</b>	No	Yes	Very low (civil war)	Extremely Urgent	Yes	No	2-3
<b>Hungary</b>	Yes	No	Low	urgent	No	Yes, but inconsistent	4
<b>Czech R</b>	No	No	Relatively High	Not so urgent	Yes	Yes, consistently	3
<b>Slovakia</b>	Yes	Yes	Moderate	Not so urgent	Yes	Yes, consistently	3

**Table 2:** Layering of claims in ECE and pressures for land redistribution

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## **Agrarian Reform, Land Occupation, and the Transition to Democracy in El Salvador\***

**Elisabeth Wood\*\***

What accounts for the transition to democracy in El Salvador via a negotiated settlement to civil war? In light of the country's long history of authoritarian rule, political exclusion, and economic inequality, the outcome did not appear likely on the eve of the civil war. In polities such as El Salvador, victory by insurgents is highly unlikely given the cohesiveness of economic and regime elites, in contrast to countries with personalist regimes such as Nicaragua under Somoza. Though it did not succeed in capturing the state, insurgent mobilization culminated in a negotiated transition to democracy. El Salvador is an unusual case in which a transition to democracy was forged from below.

The outcome is particularly puzzling given the long history of violent opposition by elites – particularly agrarian elites – to political and economic change. In Central America and most of Latin America, the distribution of agrarian property rights was rarely the product of the decentralized coordination of markets whereby voluntary exchange results in efficient outcomes. Rather, historical patterns of property rights distribution reflect the exercise of coercion on the part of social actors, sometimes by private means but often with the collusion of state forces. In the extreme case of El Salvador, the oligarchic alliance

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\* This paper draws on previously published works, especially: Elisabeth J. Wood, 1996, "The Peace Accords and Post-war Reconstruction", in *Economic Policy for Building Peace* James Boyce (ed.), Boulder: Lynne Rienner; Elisabeth Wood, 2000, *Forging Democracy from Below: Insurgent Transitions in South Africa and El Salvador*, Cambridge University Press; Elisabeth Jean Wood, 2003, *Insurgent Collective Action and Civil War in El Salvador*, New York: Cambridge University Press. Thanks to María Paula Saffon, Kai Thaler, and Tess Lerner-Byars for research assistance.

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between agrarian elites and the military over decades protected and even deepened a highly unequal distribution of land and opportunity. The alliance was both local and national: landlords called on local security forces to repress nascent attempts to organize agrarian labor, military officers ruled the polity with little political competition, and elite representatives controlled economic policy. While reformist elements of the military occasionally attempted to modernize agrarian social relations, renewed coalitions of hardline military officers and economic elites repeatedly defeated those efforts, if necessary by carrying out coups.

When the Salvadoran regime responded to rising rural and urban mobilization with increasing repression in the late 1970s, the result was civil war as many activists joined the hitherto weak guerrilla forces (which united in 1980 as the Frente Farabundo Martí para la Liberación Nacional, the FMLN). Despite a period of intense state violence, the insurgency was not defeated but nor could it win, as evident in the military failure of its 1989 offensive in San Salvador.

Nonetheless, the processes of insurgency – and counterinsurgency – laid the structural basis for eventual compromise, namely, the decline of export agriculture, which in El Salvador was associated with coercive labor relations. The political basis for compromise reflected not only the military stalemate but also political learning by formerly recalcitrant social actors, particularly economic elites who founded a political party that competed successfully in elections. In contrast to the highly unequal distribution of property rights on the eve the civil war, post-war land distribution was significantly more equal as a result of various processes, including the agrarian reform carried out as part of counterinsurgency policies imposed by the United States, the wartime occupation (and post-war titling) of other properties by poor rural residents, and the deep transformation of the country's political economy away from its long dependence on export agriculture.

I analyze these processes both at the national level and in the department of Usulután. The analysis draws on field research in El Salvador between 1987 and 1996, particularly in several municipalities of the department of Usulután, including interviews with representatives of armed groups, political parties, state agencies and non-governmental

organizations, as well as primary documents from various agencies, property rights data banks, and maps drawn by *campesino* leaders.

### 5.1. Origins of the War

Democracy's difficult birth in El Salvador may be traced to the peculiarity of its economy over the preceding century, a long-standing pattern of state enforcement of coercive agrarian labor relations and an extremely rigid class structure, which had been forged in the late nineteenth and early twentieth centuries as coffee cultivation rapidly expanded in areas of dense indigenous settlement, a pattern unique in Latin America.<sup>1</sup> In El Salvador the factors of production for the expansion of coffee were secured not in land or labor markets but by a deliberate redefinition of property rights by coercion.<sup>2</sup> Though driven by divergent interests on some issues, the oligarchic alliance of agrarian elites and the military agreed on the bottom line: the maintenance of the country's rigid class structure and exclusionary political regime. Military officers ruled, usually through a veneer of tightly controlled elections always won by the official party, while economic elites controlled key economic ministries. The majority of Salvadorans labored for little pay with little access to education or medical services. When challenged, the regime responded with savage repression, as in 1932 (*La Matanza*) when state agents killed approximately 17,000 people (largely indigenous) after a brief uprising. The development of cotton, sugar, and cattle production after World War II did little to diversify economic elites who controlled cultivation and processing of the new crops as of the old. On occasion, moderate military officers attempted to carry out significant reform, but they were regularly defeated by

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<sup>1</sup> William Roseberry, 1991, "La Falta de Brazos: Land and Labor in the Coffee Economies of Nineteenth-Century Latin America", *Theory and Society* 20: 351, 359.

<sup>2</sup> Hector Lindo-Fuentes, 1990, *Weak Foundations: The Economy of El Salvador in the Nineteenth Century*, Berkeley: University of California Press; Robert G. Williams, 1994, *States and Social Evolution: Coffee and the Rise of National Governments in Central America*, Chapel Hill: University of North Carolina Press; William Stanley, 1996, *The Protection Racket State: Elite Politics, Military Extortion, and Civil War in El Salvador*, Philadelphia: Temple University Press.

renewed coalitions of economic elites and hardline military officers that overrode efforts at reform.<sup>3</sup>

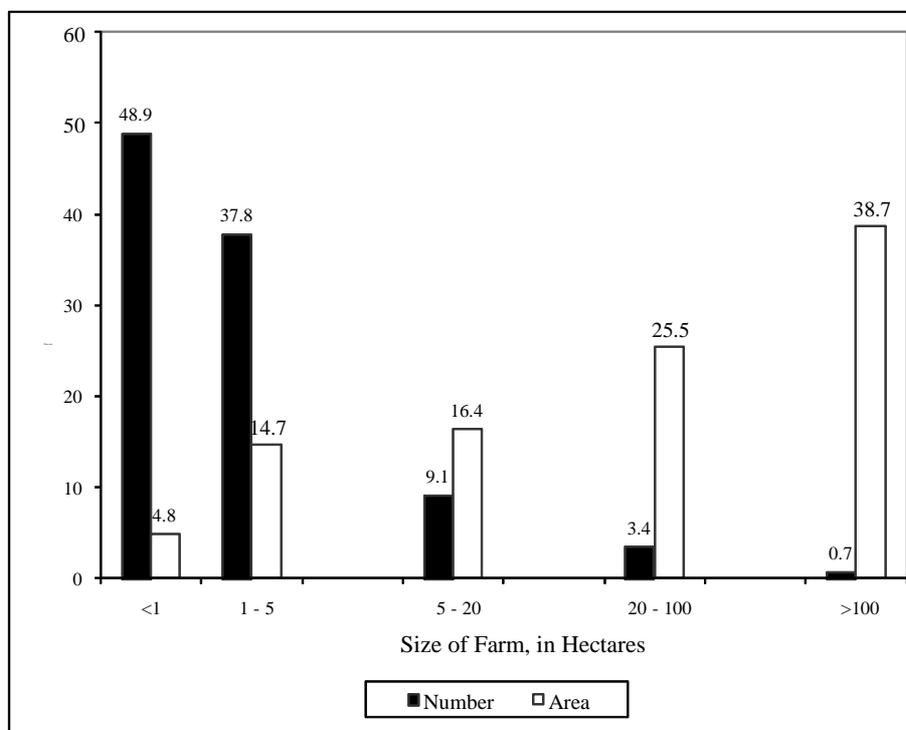
The result was a highly unequal distribution of land.<sup>4</sup> Farms of more than 200 hectares constituted less than 0.5% of all farms, but they held over one-third of the land; while half of the farms were smaller than 1 hectare but together comprised just 4% of the land. Poverty and landlessness intensified in the decades preceding the civil war. The fraction of the economically active rural population with access to more than 1 hectare of land declined in relative terms from 28.5% to 14.4% between 1961 and 1971, while the landless population increased from 40.0% to 51.5%.<sup>5</sup>

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<sup>3</sup> Stanley, *supra* n. 2.

<sup>4</sup> Figure 1, which shows data from the 1971 census, the last before the war; 1974; Dirección General de Estadística y Censos (DGEC), 1974, *Tercer Censo Nacional Agropecuario*, Volumes 1 and 2, El Salvador; William Durham, 1979, *Scarcity and Survival in Central America: The Ecological Origins of the Soccer War*, Stanford: Stanford University Press.

<sup>5</sup> Mitchell Seligson, 1995, "Thirty Years of Transformation in the Agrarian Structure of El Salvador", *Latin American Research Review* 30: 43. Based on data from the 1961 and 1971 agricultural censuses.



**Figure 1:** Farmland Distribution, 1971. Source: DGEC 1974, Tables II and III, pp. xxx-xxxi.

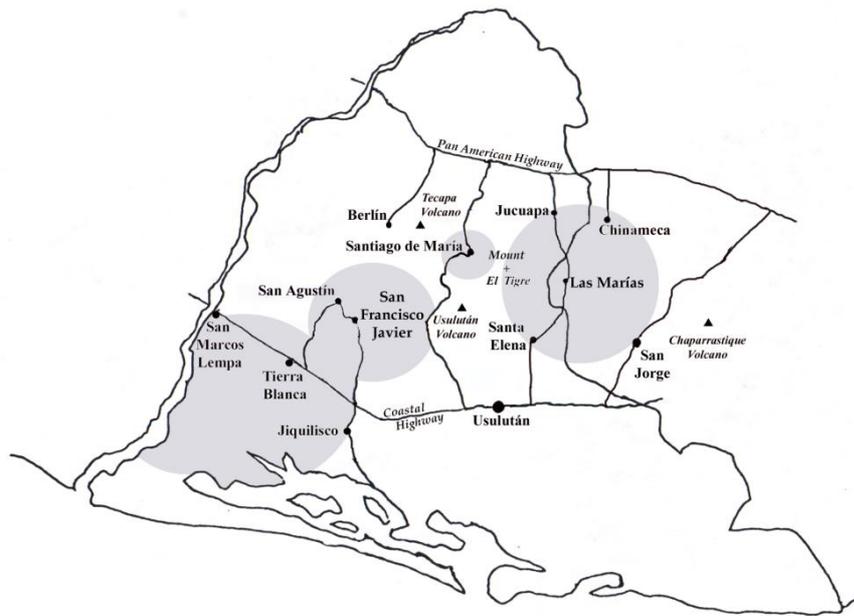
Before the war, Usulután was one of the most productive departments of El Salvador, supplying 34% of the nation's cotton and 10% of the coffee as well as a substantial fraction of basic grains.<sup>6</sup> Extensive cotton and cattle farms dominated the fertile coastal plain, while coffee estates covered the mountainous highlands. Sandwiched between the coastal plain and the coffee highlands was a belt of small family farms. Labor relations and general living conditions in Usulután also reflected those of El Salvador generally.

Some *campesinos*, particularly in the coffee area, lived on the estates, providing labor and guarding property in exchange for access to a simple house and permission to plant a cornfield. But most were landless or nearly so, living along railways and roadsides, as well as in

<sup>6</sup> Figures 2 and 3.

village settlements scattered throughout the department. Reflecting the importance of export agriculture in the department, the distribution of farmland in Usulután was even more concentrated than in El Salvador generally. In 1971, farms of more than 100 hectares cultivated 38.7% of farmland in El Salvador; while in Usulután, such farms cultivated 46.9% of farmland.<sup>7</sup>

This unequal distribution of land, income, and opportunity was maintained by coercive labor practices. Figure 3 – one of the maps drawn for me by local residents – shows the Hacienda La Normandía, a very large property (1,500 hectares) on the Usulután coast, extending from the coastal highway to the mangrove forests along the Bay of Jiquilisco. Before the war, the farm was owned by the Del’Pech family, a major coffee-producing family.<sup>8</sup>



**Figure 2.**

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<sup>7</sup> Dirección General de Estadística y Censos (DGEC), 1974, *Tercer Censo Nacional Agropecuario*, Volumes 1 and 2, El Salvador.

<sup>8</sup> Jeffrey M. Paige, 1987, “Coffee and Politics in Central America”, in *Crises in the Caribbean Basin*, Richard Tardanico (ed.), Newbury Park: Sage Publishers: 141, 178.

Except for corn raised to feed the cattle that grazed the salt marshes along the southern border, cotton was the only crop (indicated by the lollipop symbol). Toward the upper left hand corner, the authors show the barracks of National Guard troops that were stationed on the farm as well as the airstrip for planes dropping pesticides on the crop. As elsewhere in areas of major export production, the presence of the National Guard was complemented by village patrols and networks of military reservists that reported suspicious activity.

One result was a political culture among *campesinos* of apparent quiescence in which resistance was extremely muted. Scholars such as Segundo Montes<sup>9</sup> and Ignacio Martín-Baro<sup>10</sup> noted pervasive attitudes of self-deprecation, fatalism, and conformism among *campesinos*. Given the immediate repression of attempts to organize workers in the countryside, *campesinos* had little reason to expect any change in life circumstances; fatalism and conformism reinforced each other.

Schooling provided little opportunity for social mobility as few attended school past the first or second grade (as indicated by the 63% illiteracy rate in 1971).<sup>11</sup>

### 5.1.1. From Mobilization to Insurgency

Nonetheless, new pastoral practices informed by liberation theology overcame peasant quiescence in many areas of the countryside, impelling a wave of popular mobilization.<sup>12</sup> By the mid 1970s, networks of rural Catholic catequists, Christian Democratic Party members, and

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<sup>9</sup> Segundo Montes, 1986, *El Agro Salvadoreño (1973-1980)*, Colección: Estructuras Y Procesos.

<sup>10</sup> Ignacio Martín Baro, 1973, "Psicología del campesino salvadoreño", *ECA (Estudios Centroamericanos)* 28, 297-98: 476.

<sup>11</sup> Montes, *supra* n. 9: 98. Citing the 1971 population census.

<sup>12</sup> Carlos Rafael Cabarrús, 1983, *Génesis de una revolución*, Mexico: Ediciones de la casa, Centro de Investigaciones y Estudios Superiors en Antropología Social; Rodolfo Cardenal, 1985, *Historia de una esperanza: vida de Rutilio Grande*, San Salvador: UCA Editores; Sara Gordon Rapoport, 1989, *Crisis Política y Guerra en El Salvador*, Mexico, D.F.: Siglo Vientiuno Editores; Tommie Sue Montgomery, 1995, *Revolution in El Salvador: From Civil Strife to Civil Peace*, 2nd ed., Boulder: Westview Press; Jenny Pearce, 1986, "Promised Land: Peasant Rebellion in Chalatenango, El Salvador", London: Latin American Review.

covert members of the guerrilla organizations provided the political coordination for massive demonstrations and marches in the streets of San Salvador.

In response to the increasing demands for land reform on the part of the Catholic Church and new social organizations of *campesinos*, landlords of the coastal plain united in a bitter campaign against a limited agrarian reform decreed by a moderate military president in 1976. Targeting the highly concentrated cotton sector, the reform declared a ceiling on farm size of 35 hectares in an area of nearly 60,000 hectares in Usulután and the neighboring province San Miguel.<sup>13</sup> Despite assurances of compensation from USAID and Sweden, landlords together with the national business associations unleashed a campaign that combined vitriolic rhetoric with intimidation of prospective beneficiaries along the coast.<sup>14</sup> The government soon backed down, to the later regret of at least one leading Usulután landlord who mused, in a 1992 interview, that a willingness to compromise then might have averted the civil war.

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<sup>13</sup> Montes, *supra* n. 9: 148.

<sup>14</sup> Charles D. Brockett, 1988, *Land, Power, and Poverty: Agrarian Transformation and Political Conflict in Central America*, Boston: Unwin Hyman.

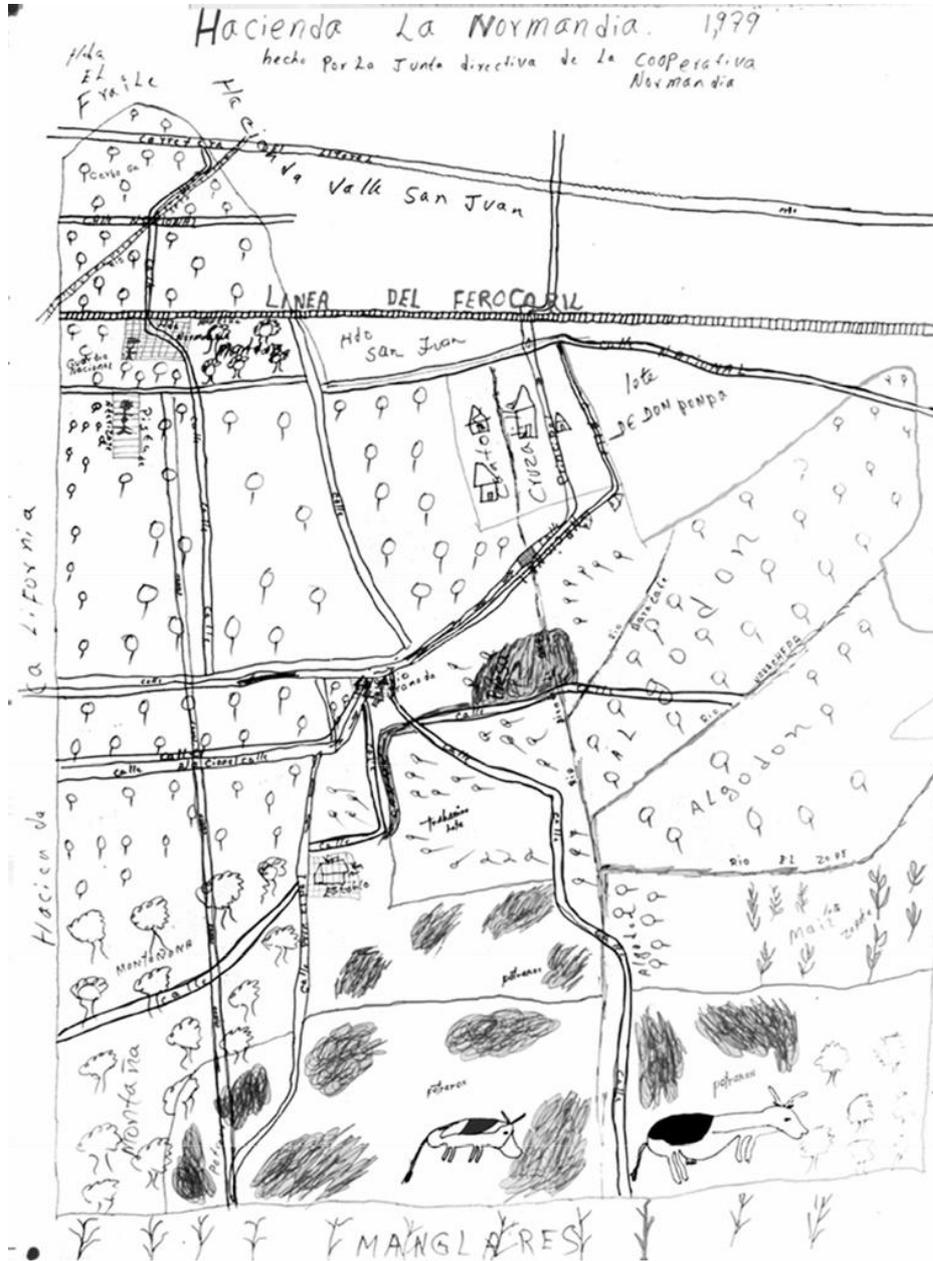


Figure 3: Hacienda La Normandia, 1979.

The failure of such efforts at reform led not to acquiescence but to further mobilization by peasants, workers, and students in the late 1970s. The response of the Salvadoran state was brutal. In 1980 alone, state forces killed about 20,000 civilians amidst a wave of state violence that included the assassination of Monseñor Oscar Romero. As a result, many hitherto non-violent activists decided to support the previously inconsequential Salvadoran guerrilla forces. Some were driven by moral outrage at the violence, some judged violence a legitimate means toward the realization of social justice in the circumstances of extreme state violence, some grasped the opportunity to defy oppressive social authority, and some sought vengeance.<sup>15</sup> Drawing on unprecedented networks of such insurgent campesinos, the FMLN maintained a significant presence in widespread areas and developed a rural intelligence capacity that outperformed – by far – that of the government during the civil war.<sup>16</sup> By the mid 1980s, insurgent mobilization had forged a military stalemate and had comprised the FMLN as an insurgent counter-elite whose agreement to a negotiated settlement or whose military victory would be key to any resolution of the war.<sup>17</sup>

## **5.2. The Structural Origins of Compromise: The Wartime Transformation of Agrarian Property Rights**

### **5.2.1. Agrarian Reform as Counterinsurgency**

The threat posed by mobilization and repression to the military as an institution led to a coup by reformist officers in late 1979. The reformists were soon displaced by hardline officers, but the latter agreed to carry out land reform to secure the support of the Christian Democratic Party (PDC) and the United States.<sup>18</sup> The land reform carried out by this counterinsurgency alliance in 1980 resulted in the expropriation of about one-quarter of the country's farmland, including 38% of the land

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<sup>15</sup> Wood, 2003, *supra* biographix footnote on page 157.

<sup>16</sup> A. J. Bacevich, James D. Hallums, Richard H. White, and Thomas F. Young, 1988, "American Military Policy in Small Wars: The Case of El Salvador", Paper presented at John F. Kennedy School of Government, Harvard University.

<sup>17</sup> Wood, 2000, *supra* biographic footnote on page 157.

<sup>18</sup> Stanley, *supra* n. 2.

planted in coffee on large farms (greater than 100 hectares in area), 28% of all land planted in cotton, and 11% of that in sugar.<sup>19</sup> Under Phase I of the reform, which focused on the largest farms, approximately 15% of the nation's agriculture land (that held in estates over 500 hectares) was transferred to cooperatives formed of former workers.

Usulután was among the areas most affected by the Phase I reform,<sup>20</sup> based on a tracing I made of a map on the wall in an office of the agrarian reform agency. An example of a Phase I cooperative is the Cooperative La Normandía, depicted in Figure 5, a map showing Hacienda Normandía after the war drawn for me by cooperative members over the course of two days in 1992. The permanent workers lived in the *cantón* La Cruzadilla. At the close of the war, the approximately 175 cooperative members cultivated individual plots of corn, sesame and, near the old farmhouse, chile; many cooperative members raised a few head of cattle as well. Notably, the National Guard post was gone. For cooperative members, this was a way of life far different from their lives as permanent employees before the war.

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<sup>19</sup> Calculated from Tables VI, V, and VI of Wise (1986) and from the 1971 agricultural census.

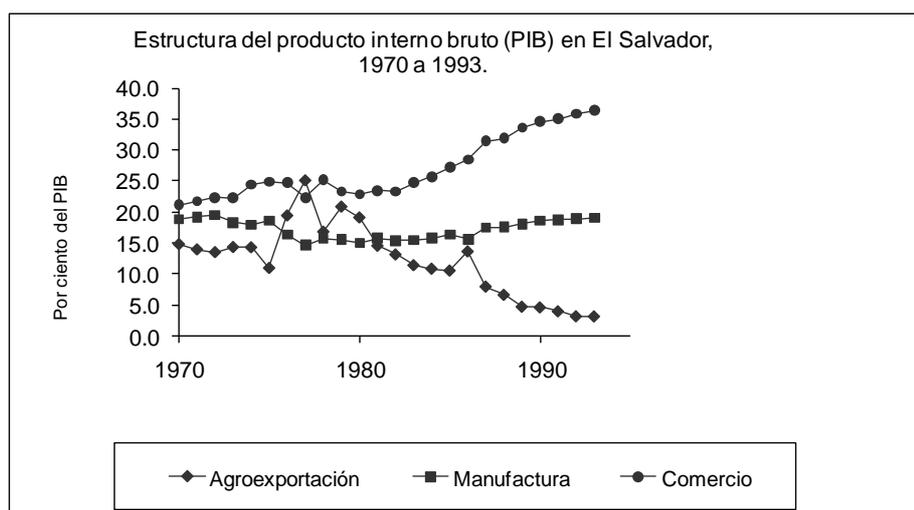
<sup>20</sup> Figure 5.



**Figure 4:** Agrarian Reform Phase I Cooperatives, Usulután. Map by Carolyn Resnicke, SFI.



conflict deepened, agricultural profitability declined for several reasons.<sup>21</sup> The agrarian reform, including the prospects of the Phase II (which was repeatedly postponed), reinforced elite insecurity concerning the future profitability of their estates. The guerrilla forces targeted export crops for sabotage and extracted “war tax” payments that eroded profits. As a result, many economic elites exported significant fractions of their capital; some moved their families and operations to Costa Rica, Guatemala, Mexico, or Miami. Moreover, in a classic instance of “Dutch disease”, an extraordinary inflow of dollars (both official U.S. transfers and a growing flood of remittances from Salvadorans who had relocated to the U.S. to avoid the war) caused the price of non-tradables to soar compared to those of tradables, further undermining the export sector and increasing the value of other sectors.



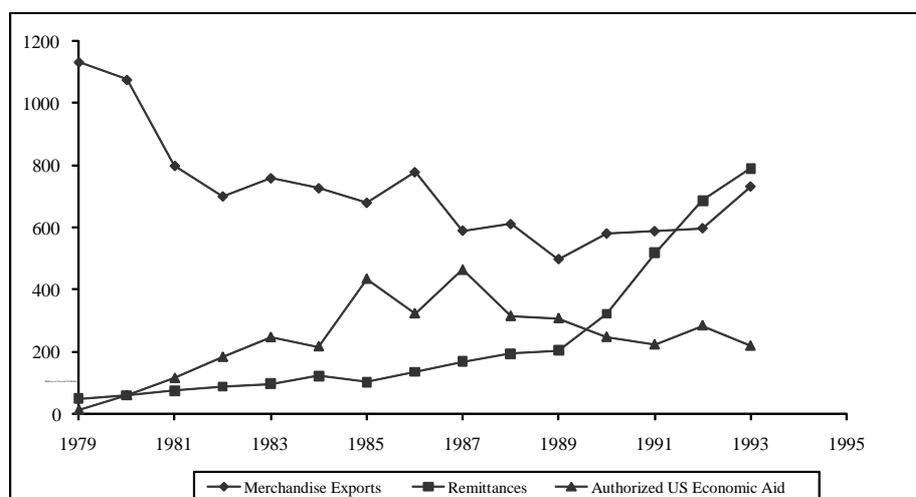
**Figure 6:** Structural underpinnings of compromise.

As a result of these wartime processes, there was a very significant shift in the relative contributions of the composition of El Salvador’s economy: as a share of domestic product, export agriculture declined sharply, while the commercial and service sectors surged.<sup>22</sup> The

<sup>21</sup> Wood, 2000, *supra* biographical footnote on page 143.

<sup>22</sup> Figure 7.

decline in agro-export profits would have been even greater had it not been for the labor policies maintained throughout the war: real wages for agricultural workers declined by 63% between 1980 and 1991.<sup>23</sup> By the late 1980s, economic elites in El Salvador drew much more of their income from the commercial and service sectors fueled by the boom in remittances sent from the United States<sup>24</sup> than from the traditional export agricultural production and processes.



**Figure 7:** Inflows of Foreign Exchange to El Salvador, 1979-1993. Millions of current US Dollars.

### 5.2.2. Insurgent Land Occupations Under the Shadow of Civil War

Despite the government's counterinsurgent efforts, significant numbers of rural residents collaborated with the insurgents, providing a steady flow of high-quality information. Even some agrarian reform beneficiaries continued to support the insurgents covertly; this was true, for example, of many members of agrarian reform cooperatives located on the coastal plain of the municipality of Jiquilisco, Usulután, including Cooperativa La Normandía. The FMLN responded to the govern-

<sup>23</sup> Wood, 1996, *supra* biographical footnote on page 143: Table A.12.

<sup>24</sup> Figure 8.

ment's counterinsurgency policies with a new strategy, dispersing guerrilla forces in smaller, more mobile units to strengthen or develop civilian organizations. As a result of the FMLN's continued military capacity, government forces were unable to maintain a continuous presence in many areas, and landlords retreated from the conflicted areas of Usulután.

In the absence of both landlords and state authorities, local *campesinos* planted corn on the unsupervised properties, and those who could afford to do so grazed cattle as well. Beginning in 1984, the FMLN urged local supporters to occupy such properties. Initially, they refused to do so, judging it too dangerous; but after 1986, many organized self-constituted cooperatives, formally notified landlords of their occupation of land, and eventually claimed those properties at the close of the war under the terms of the peace agreement.<sup>25</sup> These cooperatives founded or joined federations of cooperatives that pressed for legalization of cooperatives, sought credit from sympathetic international NGOs, and provided a degree of protection, as harassment of one cooperative could be answered by the mobilization of all.

An example of land occupation by such a cooperative is shown in Figure 8. The *cantón* Los Arenales, which lies along the southern edge of Usulután's coffee growing region, between the towns of Santa Elena and Jucuapa, is typical of the area. The largest coffee farm in the immediate vicinity was the Finca Leonor, a small but well-capitalized farm of 38.5 hectares (55 *manzanas*), which may be seen in the map's center. The farm had a well-developed infrastructure of water tanks, store-houses and patios for drying coffee, as I was able to confirm when I visited the now-dilapidated property in 1992. Other properties high above the main road were also planted in coffee, as indicated on the map by the branch with fairly straight leaves and red berries close to the branch. In the lower altitudes other crops were cultivated, including oranges and maguey.

The mapmakers, all members of an insurgent cooperative, numbered each plot and listed the corresponding owners down the lower left-hand margin of the map. The workers mostly lived in the village of

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<sup>25</sup> Wood, 2003, *supra* biographical footnote on page 143.

Los Arenales, to the right of the main road; before the war, a few had lived as *colonos*.<sup>26</sup>

As shown by the cornstalks drawn on the post-war map of the area (righthand side), during the war residents cultivated corn on the properties closest to the roadway. The crosses mark the sites where two *campesinos* died at the hand of the Atonal Battalion in 1983 and where Comandante “Miriam” of the armed wing of the Communist Party (shown by its acronym AFAL) died in 1984, as can be seen with the legend in the lower left hand corner, which includes the names of the dead. In 1987, local residents founded the Cooperativa San Pedro Los Arenales, as indicated by the map title midway down the lefthand side of the map (the inclusion of the formal name of the cooperative emphasizes the cooperative’s legal claim). The cooperative gradually occupied ten local estates, including the Finca Leonor, which are listed by landlord and area on the left hand legend. Not all the properties in the area were occupied; a few are visible within the cooperative boundary. Cooperative members stated that they only occupied abandoned farms or those with “uncooperative” owners.

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<sup>26</sup> While the *colono* form of labor had been legally abolished in 1965, the practice continued in many areas.



Figure 8: Map of Los Arenales.

In contrast to the occupation of property, the emergence of cooperatives, and the founding of new organizations in contested areas of Usulután, continuity rather than change characterized the evolution of social relations in Santiago de María, a town high in the coffee highlands referred to by *campesinos* as the *cuña de la oligarchía*. Before the war, the politics and economy of the town and the surrounding area were dominated by a handful of elite families that held highly productive coffee estates and built modern mills, including one of the biggest and most modern in the country. Some landlords of properties outside Santiago were forced to pay “war taxes” to the FMLN during some years of the war, according to interviews with FMLN commanders. But property rights in the town and the immediately surrounding area were relatively untouched by the war (with the exception of the formation of a few agrarian reform cooperatives in the area). Even though several wealthy families of the area owned more than the 500-hectare threshold for expropriation under Phase I of the agrarian reform, their various farms were legally held by different family members and so were not expropriated.

Another reason for the continuity of agrarian property rights in Santiago was the presence of a local death squad. In the late 1970s, Hector Antonio Regalado, a landlord and dentist in the town began to recruit young men for what appeared to be a Boy Scout troop. The group, which on one account may have numbered as many as a hundred “scouts”, wore uniforms in marches through town. Rather than the usual scouting activities, Regalado’s troop killed dozens of activists and suspected activists, including teachers, unionists, cooperativists, and students, not only in Santiago but also in neighboring cities and towns. In interviews at the end of the war, townspeople told stories of cadavers appearing at the edge of town, of a decapitated head found in a ditch, and other public displays of extreme violence to intimidate those involved in the opposition organizations. Like others throughout El Salvador, the death squad operated with the cooperation of elements of the Salvadoran military: the scouts were sometimes ferried around eastern El Salvador in Army helicopters, for example.<sup>27</sup> In the after-

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<sup>27</sup> Regalado was in close touch with Roberto D’Aubuisson, the director of death squad operations in San Salvador, and after D’Aubuisson’s election to the Consti-

math of the death squad killings, local activists either left the area or abandoned their overt political engagement. Santiago remained relatively calm throughout the war, as fighting rarely came close to the town itself. The landlords of Santiago continued to grow coffee in the nearby estates. During the harvest (when coffee wealth was most vulnerable to sabotage and theft) and when necessary during the rest of the year, the town was occupied by the Sixth Brigade, which moved into the area from their base in the nearby city of Usulután.

With the exception of Santiago, by the end of the civil war, new patterns of land tenure, land use, social organization, and rural authority had been forged throughout the contested municipalities of Usulután. Scores of self-constituted cooperatives like Cooperativa San Pedro Los Arenales first occupied land and then claimed it under the terms of the peace agreement. Some cooperatives formed during the agrarian reform were, by the war's end, affiliated with opposition federations of cooperatives. While most families remained desperately poor – indeed, with the collapse of education and health services and a sustained fall in real wages, their situation was arguably worse at war's end despite increased access to land – social relations in the case-study areas were nevertheless transformed in two dramatic and obvious ways.

The first was the *de facto* transfer of agrarian property rights as *campesinos* took advantage of the landlords' retreat and the absence of consistent enforcement of property rights to farm properties in the area. Such properties were largely planted in corn, reflecting both the poverty of the residents and symbolizing their reclaiming of land previously given over to agro-export crops. By the war's end, such furtive squatting had become a formal occupation as peasants organized cooperatives and occupied tens of thousands of hectares of prime agricultural land.

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tuent Assembly, Regalado served as head of security for the subsequent Legislative Assembly, directing death squads from that office until a group of businessmen complained to D'Aubuisson that he might be killing "too many people". See Tom Gibb and Douglas Farah, 1989, "Magazine Story on Death Squads in EL Salvador", Typescript; Wood, 2003, *supra* biographical footnote on page 143, and the sources cited there.

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The second was the emergence of a dense network of *campesino* political organizations, a profound change in political organization and authority from before the war. *Campesinos* and their collaborators – sometimes the FMLN, sometimes national *campesino* organizations of varying political ties, sometimes with no assistance at all – built dozens of organizations, including the self-constituted cooperatives, in which local interests were articulated and strategies for the assertion of property rights negotiated. In sharp contrast to the pre-war domination of rural social relations by a small elite and their allied security forces, *campesinos* came to lead as well as participate in *campesino* organizations, political parties and cooperatives, establishing an unprecedented degree of representation of and participation by a previously excluded sector. In none of the case-study areas had any such organizations existed before the civil war; yet by that war's end, they comprised a vibrant local civil society.

Thus in some areas (among some residents – about one-third in the contested areas of Usulután), more than a decade of political mobilization left behind a legacy of political participation, a network of civic organizations, and a new political culture based on values of citizenship, entitlement, and a rejection of deference toward rural elites.<sup>28</sup> In interviews in the contested areas of Usulután, for example, civilian activists and supporters of the FMLN expressed pride in their collective achievements during the war and asserted an unprecedented claim to political equality.<sup>29</sup> Several erstwhile landlords of properties in Usulután recognized this transformation of rural culture, expressing concern that should they return to their properties after the war, they would face assertive and well-organized workers supported by a panoply of new organizations.

The consequences for political authority and legitimacy in the case-study areas even, surprisingly, in Santiago de María, were pro-

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<sup>28</sup> Mario Lungo Uclés, 1996, *El Salvador in the Eighties: Counterinsurgency and Revolution*, Philadelphia: Temple University Press; John L. Hammond, 1998, *Fighting to Learn: Popular Education and Guerrilla War in El Salvador*, New Brunswick: Rutgers University Press; Wood, 2003, *supra* biographical footnote on page 143.

<sup>29</sup> Wood, 2003, *supra* biographical footnote on page 143.

found: the local alliance of landlord and security forces that had dominated these areas no longer existed after the war, and popular organizations contested the authority and legitimacy of those landlords and government authorities that did remain. Moreover, many organizations had political allies in San Salvador and in some cases the U.S. or Europe; this unprecedented accountability was another result of the civil war and contributed to the impossibility of any return to the uncontested exercise of authority and power by landlords and security force officials.

### **5.3. The Political Origins of Compromise**

Of course a transformation of elite economic interests and military stalemate does not in itself lead to political compromise: elite political actors must emerge who recognize that in the country's new situation, they would be better off with peace than continued war. Ironically, an organization that came to recognize this change emerged from origins in the profound political violence of the early years of the war. In the late 1970s and early 1980s, rightist hardliners led by Roberto D'Aubuisson with the financial help of wealthy Salvadoran exiles in Miami developed death squads to deter political mobilization through intimidation and violence. Most such squads were not private groups, but members of state security and intelligence forces. The rightists also founded the National Republican Alliance party (ARENA) to contest power in elections rather than relying on the military – a new development in El Salvador. However, the subsequent limited electoral competition under conditions of civil war had unintended outcomes for the chief sponsor of counterinsurgency efforts, the United States. ARENA, rather than the Christian Democratic Party (PDC), won the 1982 constitutional assembly elections – a win for precisely those hardline elements that the liberal reforms were designed to undermine. After the United States made clear its strong opposition to D'Aubuisson's nomination as interim president, a compromise was reached whereby ARENA gave up the presidency but took control of the Ministry of Agriculture and the agrarian reform institutions, effectively ending agrarian reform.

No longer able to rely on military allies to govern, ARENA leaders sought to broaden the electoral base of the party by appealing to new constituencies, including middle-class voters and small businessmen. A significant step in this process occurred in September 1985 when Alfredo Cristiani replaced D'Aubuisson as party president, signaling a shift within the party away from the hardliners of the Miami group. Cristiani's faction with its diversified economic interests was more tolerant of democratic norms and aspirations than were those members of the elite with interests narrowly based on coffee cultivation, as documented by Paige<sup>30</sup> in his extensive interviews with Salvadoran elites. For these moderate elites, the decline of export agriculture lessened their reliance on coercive labor practices.

With the help of a U.S.-funded think tank, the Cristiani faction developed and proposed a set of neoliberal policies.<sup>31</sup> Neoliberalism was attractive to these elites for several reasons: its emphasis on private sector innovation could justify re-privatizing the nationalized sectors, its agenda of neoliberal reforms would render the state incapable of threatening elite economic interests even if a party hostile to elite interests later governed, and liberalization of capital flows would discipline the state against redistributive measures.<sup>32</sup> In the 1989 presidential elections, the revamped ARENA party appealed to voters more than the PDC or the social democratic alternatives, and Cristiani was elected president.

Thus, a fundamental change wrought by the civil war was the emergence of Salvadoran elites who agreed that renewed war should be avoided even if uncomfortable compromises might have to be made in the implementation of a negotiated settlement. The unprecedented acceptance of electoral competition by many actors on the right reflected not only the structural changes in the political economy, but also the process of political learning during the course of the war. By

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<sup>30</sup> Jeffrey Paige, 1997, *Coffee and Power: Revolution and the Rise of Democracy in Central America*, Cambridge, Massachusetts and London: Harvard University Press.

<sup>31</sup> Kenneth Johnson, 1993, "Between Revolution and Democracy: Business Elites and the State in El Salvador during the 1980s", Ph.D. Thesis: Tulane University.

<sup>32</sup> Wood, 2000, *supra* biographical footnote on page 143: 244-46.

the early 1990s, ARENA had built a formidable party base and had proved very successful in competing on the new electoral terrain. Involvement with liberal international actors, initially as a result of U.S. insistence on liberalizing the political regime and promoting neoliberal policies in the 1980s, and later as a result of UN mediation and peace-building, was essential to this increasing acceptance of liberal political norms.<sup>33</sup>

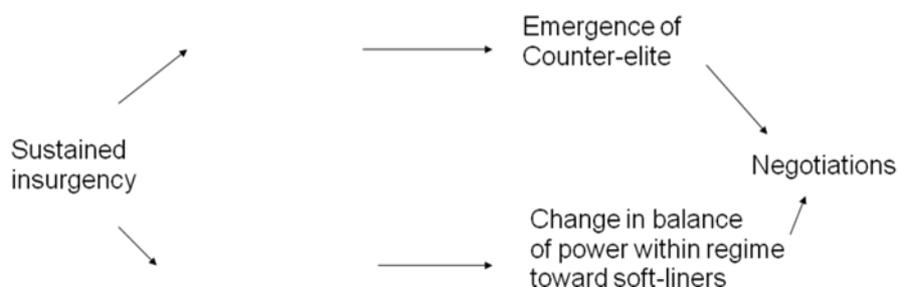
Elite compromise occurred not only as a result of the military stalemate and the constitution of the FMLN as an insurgent counter-elite but also because the changes in the political economy of the country lessened elite dependence on coercive labor institutions and because elite political leaders had learned they could compete well in elections.<sup>34</sup> Of course other factors also contributed. The regional peace process provided additional impetus for compromise. The killing of the six Jesuit priests by the government's Atlacatl Battalion during the FMLN's 1989 offensive resulted in renewed congressional opposition to U.S. funding of the Salvadoran military.<sup>35</sup> Because (thanks to the insurgent threat) the military was dependent on U.S. funding, a shift in U.S. policy toward negotiation ensured the military's compliance. As the military stalemate dragged on, FMLN moderates willing to compromise gained influence. The end of the Cold War reinforced the domestic dynamics pushing the parties toward compromise.

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<sup>33</sup> Mark Peceny and William Stanley, 2001, "Liberal Social Reconstruction and the Resolution of Civil Wars in Central America," *International Observation* 55, 1: 149.

<sup>34</sup> Figure 10.

<sup>35</sup> Teresa Whitfield, 1994, *Paying the Price: Ignacio Ellacuria and the Murdered Jesuits of El Salvador*, Philadelphia: Temple University Press.



**Figure 9:** Logic of compromise.

#### 5.4. The Peace Agreement and its Implementation

The core of the peace agreement consisted of reforms intended to create a transition to a democratic political regime. The FMLN would lay down its arms and pursue its political agenda as a political party in competitive elections (and some combatants would join the new civilian police force), while the government agreed to carry out reforms of the military, judicial, and electoral institutions that would make political competition possible. The peace agreement (and preliminary agreements) defined constitutional reforms to the mission and prerogatives of the military as well as to the judicial and electoral systems, including the founding of a human rights office, the Procuraduría Nacional para La Defensa de los Derechos Humanos (National Ombudsman for the Defense of Human Rights), the strengthening of the election supervisory body toward broader political party representation and increased autonomy from the executive, and the strengthening of the autonomy of the National Judicial Council. The peace agreement also mandated the founding of a new, civilian police force (PNC) and a new police academy, as well as the dissolution of two infamous security forces. The parties also agreed that two extraordinary commissions would assess human rights violations during the course of the war. As a result, the “ad-hoc” commission recommended that more than a hundred officers be purged from the ranks of the military. The Truth

Commission documented the pattern of human rights violations by all parties and recommended further reforms to judicial institutions.<sup>36</sup>

Through an extended process of ongoing negotiations involving pressure on government officials (and to a lesser extent on the FMLN) on the part of the United Nations in its role as observer and verifier of the peace agreement and donor countries in their capacity as funders of reforms, these provisions were generally carried out.<sup>37</sup> Despite the difficult legacies of the past – principally the ongoing weakness of police forces and judicial officials that together with high unemployment and the presence of many guns and ex-combatants fueled a crime wave – peace has endured and competitive elections now decide who governs.

A key provision of the peace agreement was that ex-combatants of both sides and civilian supporters of the FMLN occupying properties in the contested areas, that is, the *tenedores*, would be entitled to land, which they would purchase over a long period at subsidized interest rates from government agencies. Because the peace agreement was vague on key points, a long process of negotiations mediated by the United Nations between government and FMLN representations eventually defined the scope and terms of the land transfer. The process was difficult, occasioning in several instances the suspension of the FMLN's staggered demobilization of forces and eventually precipitating the intervention of the Secretary General to settle the outstanding issues.

The best measure of the extent of occupation by cooperatives at the end of the war comes from that negotiating process over land transfer.<sup>38</sup> An interim accord (the New York Accord, signed in September

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<sup>36</sup> Truth Commission, 1993, "From Madness to Hope: The 12 Year War in El Salvador", in *Report of the Commission on the Truth for El Salvador*, New York and San Salvador: United Nations.

<sup>37</sup> On the implementation of the peace agreement, see: Montgomery, *supra* n. 12; Margaret Popkin, 2000, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador*, University Park: Pennsylvania State Press; Elisabeth J. Wood, 1995, "Agrarian Social Relations and Democratization: the Negotiated Resolution of the Civil War in El Salvador", Ph.D. Dissertation: Stanford University; and various reports by *Hemisphere Initiatives*.

<sup>38</sup> Because the peace process was one of log-rolling compromises across various other issues, the June 1992 inventory is not an ideal measure of occupation. How-

1991) stated that ex-combatants of both sides and civilian supports of the FMLN occupying land in conflicted zones would win title to land, not unconditionally but on subsidized terms. Central to the negotiating process was the FMLN's inventory of occupied private properties, which was much debated until the government and the multi-party agrarian commission appointed by the National Peace Commission accepted the one presented by the FMLN in June 1992.

According to that inventory, Usulután was the leading department in terms of area occupied, more than double other departments,<sup>39</sup> and the average size of occupied properties was significantly greater there as well. Cooperatives in Usulután representing approximately 10,000 people claimed 482 properties comprising approximately 66,500 hectares, which was approximately 32% of the surface area of Usulután. In the municipality of Jiquilisco alone, 89 insurgent cooperatives claimed properties amounting to 19,000 hectares. Land claims by cooperatives were also very high in Jucuapa, San Agustín and San Francisco Javier.

The post-war land transfer depended on landlords' willingness to sell. Confronted with this unprecedented degree of organization, together with the declining returns to agricultural investments throughout El Salvador as a result of the varied processes of the civil war, many landlords agreed to sell their properties. Some Las Marías landlords eager to sell bargained directly with FMLN officers in an attempt to force government officials to approve a fast transfer.

I have elsewhere analyzed the bargaining over the terms of the land transfer.<sup>40</sup> While negotiations were made significantly more feasible by the willingness of international organizations to provide funding to buy out the landlords, the process ran aground repeatedly for various reasons. One was the linkage in the peace process's complicated chronology of mutual compromise between land transfer and the implementation of other terms of the peace agreement, such as the dissolution of particular security forces. Another was technical difficulties of

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ever, my interviews and observations in several of the municipalities suggest that it is in fact a fair estimate of land occupied at the end of the war.

<sup>39</sup> Figure 11.

<sup>40</sup> Wood, 1995, *supra* n. 37; Wood, 1996, *supra* biographical footnote on page 143.

implementation, particularly given the inadequacies of the Salvadoran land registry. Another was the post-war mobility of potential beneficiaries that complicated the definition of lists of cooperative members. It was also in part due to foot dragging by those government officials with close ties to the governing party who feared a rapid transfer would bolster the FMLN's standing in post-war elections. Later in the process, delays and problems arose as the inadequacies of the demobilization benefits (various packages of training and credit) became evident.

Department	Number of Properties (% of inventory)	Area (% of inventory)
Usulután	10.3	25.3
San Salvador	3.4	5.8
Chalatenango	21.2	17.0
La Paz	1.4	2.6
Morazán	5.8	6.4
Cuscatlán	10.7	8.0
San Vicente	5.4	11.7
La Unión	0.2	1.8
Cabañas	5.7	3.3
Santa Ana	0.6	4.3
San Miguel	7.2	11.3
La Libertad	0.4	1.8
<b>Human Settlements</b>		
Chalatenango	20.9	0.3
Morazán	6.9	0.5
<b>TOTALS</b>	4666 properties	268,451 hectares

**Figure 10:** The FMLN's inventory of private property (CEA-COPAZ version), by department.

As a result, the eventual land transfer was significantly less than the claims summarized in Figure 10. Nonetheless, insurgent cooperatives and the FMLN forced a transfer of approximately 10% of the nation's farmland, compared with the 15% of Phase I of the agrarian reform and 5% of Phase III (the "land to the tiller" component). Land was transferred to nearly 35,000 beneficiaries, of which 27,000 were FMLN combatants and supporters. Although the transfer of land was much less than claimed in Usulután as well, approximately one-third of FMLN-affiliated beneficiaries acquired land in Usulután, and just over

one-quarter of land transferred under the program lay in the department. The process in Usulután benefited from a European Union initiative that targeted ex-combatants of both sides in the department and that made available more training and credit than was available in most other areas. (USAID funded the transfer to civilians in Usulután in a parallel but not as well-funded program). Figure 11 shows the land eventually transferred to the FMLN and its supporters (as well as a few properties to ex-soldiers). In the department as a whole, about 6% of surface area was transferred. The number of beneficiaries settled on the plots transferred made it unlikely that any substantial fraction of them could make anything but a marginal living farming the land.



**Figure 11:** Land transfer under the peace agreement.

Post-war political mobilization eased the terms of transfer for both civilians and ex-combatants alike. Between 1995 and 1997, peasant organizations carried out further land occupations and mass

marches; this sustained pressure on the government eventually led to a substantial easing of the debt carried by most cooperatives and of other neoliberal conditions originally attached by government agencies.<sup>41</sup> However, little progress was made in implementing Phase II of the 1980 agrarian reform.

In the aftermath of the war, Salvadoran *campesinos* were still poor and the distribution of wealth and opportunity remained unequal but significantly less so than before the war. The fraction of the economically active agricultural adult population that had land increased from 14.4% in 1971 to 23.3% in 1998, while the fraction that had no land decreased from 38.1 to 27.4%.<sup>42</sup> Land distribution had also improved, with the fraction of farms over 100 hectares falling from 0.8% in 1971 to 0.5% in 1998, and the area held by such large farms falling significantly, from 38.7 to 23.1% of farmland.<sup>43</sup> The land held in small farms (between 0 and 20 hectares) increased from 35.9 to 45.7% of farmland.

### 5.5. Post-war El Salvador

Thus the changes wrought by the civil war made possible a transition to democracy despite the country's long history of authoritarian rule. The two principal achievements of the peace process were the withdrawal of the military from politics and the inclusion of the political left in democratic political competition for electoral offices – both unprecedented and essential prerequisites for a democratic political regime.

While the military retains a high degree of institutional autonomy,<sup>44</sup> both the military as an institution and individual military offi-

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<sup>41</sup> M. Foley, G.R. Vickers and G. Thale, 1997, *Land, Peace, and Participation: The Development of Post-War Agricultural Policy in El Salvador and the Role of the World Bank*, Washington DC: Washington Office on Latin America.

<sup>42</sup> V. J. McElhinny, 2006, *Post-war Decentralization and Development in El Salvador, 1992-2000*, PhD Dissertation, University of Pittsburgh: 431.

<sup>43</sup> McElhinny, *supra* n. 42: 433; Seligson, *supra* n. 5.

<sup>44</sup> Stanley, *supra* n. 2; K. Walter and P. J. Williams, 1993, "The Military and Democratization in El Salvador", *Journal of Interamerican Studies and World Affairs* 35: 39.

cers appear to have little influence on government policy or within the main political parties. Since 1992, the military has accepted an unprecedented civilian purging of its officer corps, a limited degree of civilian input into military training, and a significant reduction in size, budget, and mandate. This sea change in Salvadoran politics is in sharp contrast to the continuing role of the military in Guatemalan politics in the post-war period where although the military is smaller than during its civil war, officers continue to exert power over civilian governments and to enjoy unusual prerogatives. One exception to the declining role of the military was its participation in internal security in the form of patrolling areas against crime, usually jointly with the PNC, a practice justified in the eyes of many elites and civilians by the country's high crime rate.

Political inclusion and competition, the *sine qua non* of democracy, is the second principal achievement of the past decade. Several presidential elections have been held and democracy seems to be the "only game in town".<sup>45</sup> Few influential voices at national or local levels call for any abrogation or lessening of elections as the principle of governance: ARENA accepted the results of elections that sharply reduced its control of the legislature and most social mobilization is channeled through democratic institutions via strikingly ordinary processes of coalition building and lobbying, as in the campaign for the forgiveness of agrarian debt. Democratic values such as political tolerance and support for the (democratic) system increased strongly between 1991 and 1999.<sup>46</sup> Moreover, irrespective of political party membership, Salvadorans polled in 1997 strongly agreed with the statement that even if people do not vote intelligently everyone should be allowed to vote.<sup>47</sup>

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<sup>45</sup> Adam Przeworski, 1991, *Democracy and the Market*, New York: Cambridge University Press.

<sup>46</sup> Mitchell Seligson, José Miguel Cruz, and Ricardo Córdova Macías, 2000, *Auditoria de la Democracia: El Salvador 1999*, San Salvador: IUDOP/UCA, University of Pittsburgh and FUNDAUNGO: 58-61, 78-86.

<sup>47</sup> Instituto Universitario de Opinión Pública (IUDOP), 1997, "La opinión pública sobre las elecciones de 1997", *Estudios Centroamericanos* 52: 581-83; Table 5.

Not only is the left now pursuing political power via elections, the degree of electoral competition is increasing at both the national (in legislative though not in presidential elections) and the municipal levels. In coalition with other parties, the FMLN made a respectable showing in the 1994 presidential elections, forcing the presidential election into a runoff round (which it lost to ARENA by a wide margin). On its own, the FMLN won 21 of the 84 seats in the legislature.

Despite some splits within the party,<sup>48</sup> the FMLN made a surprisingly effective transition from a guerrilla organization to a political party, increasing or retaining its share of votes (except in presidential races), legislative seats, and municipalities from election to election.<sup>49</sup> In 1997, the FMLN won 27 seats in the legislature, only one less than ARENA's 28 seats. The party performed poorly in the 1999 presidential election, failing even to force a second round, perhaps because of the well-publicized conflict between the two party factions in choosing a candidate. After the March 2000 elections, however, it was the leading party in the national legislature, holding 31 seats to ARENA's 29. However, this lead position did not translate proportionally into power over policy as other parties voted with ARENA. In 2003, the FMLN retained its 31 seats, and then increased its seats to 32 in 2006 and 35 in 2009. The transition from guerrilla organization culminated in the FMLN's victory in the 2009 presidential elections, taking 51.3% of the vote to ARENA's 48.7%.

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<sup>48</sup> The FMLN split soon after the elections, when the leadership of one guerrilla faction (the *Ejército Revolucionario del Pueblo* [Revolutionary Army of the People]) together with some leaders of a second faction (the *Resistencia Nacional* [National Resistance]) dramatically broke with the FMLN in the inaugural session of the new legislature. The group subsequently founded a new party, a severe miscalculation as most supporters remained with the FMLN. A second split occurred in 2002, when Facundo Guardado led his *renovador* faction out of the FMLN, with similarly poor results in the subsequent election.

<sup>49</sup> Figure 13.

Presidential (% of vote)	1994	1999	2004	2009
ARENA	68.3	52.0	57.5	48.7
FMLN	31.7	29.0	35.7	51.3

Legislative seats	1994	1997	2000	2003	2006	2009
ARENA	39	28	29	28	34	32
FMLN	21	27	31	31	32	35
Mayoral elections won						
ARENA	207	160	132	117	147	122
FMLN**	13	48	71	67	52	75

**Figure 12:** Elections in El Salvador. \*\* Does not include alcaldias won in coalition with other parties.

Particularly striking is the FMLN's increasing ability to compete in municipal elections. The number of municipalities the party governed (either solely or in coalition) increased steadily from 13 in 1994 to 75 in 2009, a pattern of increasing support stronger still in Usulután (El Salvador's 265 municipalities encompass the entire country and constitute the sole form of local government). There appear to be two underlying patterns to the FMLN's growth at the municipal level. The party has broad appeal in urban areas:<sup>50</sup> for example, in coalition with other parties it governed San Salvador for most of the post-war period. The party won the 2000 municipal elections in 13 of the 15 largest municipalities while ARENA did not win in *any*. And the party has increasing appeal in some (but not all) former contested zones.

Despite these achievements, post-war El Salvador faces several difficult challenges – low and declining rates of voting, institutional weaknesses that appear to undermine the value of democracy to ordinary people, extraordinarily high rates of crime and (non-political) violence, and continuing poverty and social exclusion.<sup>51</sup> The persistence of poverty appears to be a principal reason for democratic disenchantment among Salvadoran citizens. It is important, however, to note

<sup>50</sup> Rubén R. Zamora, 1998, *El Salvador: Heridas que no Cierran. Los Partidos Políticos en el Post-Guerra*, San Salvador: FLACSO: 265-7.

<sup>51</sup> Wood, 2005, *supra* n. biographical footnote on page 143.

that poverty rates have declined since the end of the war. Official poverty rates show a decline in total poverty (combining relative and extreme poverty rates) from 58.7% in 1992 to 44.6% in 1998 to 37% in 2002, and in extreme poverty (household income less than the cost of a single basket) from 27.7% to 18.9% to 15%.<sup>52</sup> The under-five mortality rate (per 1000 live births) fell from 162 in 1970 to 39 in 2001.<sup>53</sup> The decline in poverty and infant mortality reflect both the ongoing influx of remittances and reasonably high post-war growth rates that have kept urban unemployment rates fairly low, especially for women.

Despite this decline in urban poverty, rural poverty rates fell much less, from 65% in 1992 to 58.6% in 1998 to 49.8% for total poverty, and from 34% to 25.6% to 24.5%, respectively, for extreme poverty.<sup>54</sup> Significant disparities exist between urban and rural life expectancy and adult literacy rates, which in 1996 varied between 70.4 years and 90.1%, respectively, in San Salvador to 64.8 years and 55.4% in Morazán. According to Conning, Olinto and Trigueros,<sup>55</sup> the human development index rankings for San Salvador are comparable to Cuba, Perú, and Jordan, while those of the three poorest departments are similar to Kenya and Pakistan (a difference in the HDI of 50 points). The ongoing decline in rural wages – the real minimum wage for coffee and sugar harvests fell 12.1% and 11% respectively between 1993 and 1998 – and worsening terms of trade for agricultural goods also contributed to enduring rural poverty.<sup>56</sup> Rural landlessness remained

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<sup>52</sup> Jonathan Conning, Pedro Olinto, and Alvarado Trigueros, 2000, “Land and Labor Adjustment Strategies during an Economic Downturn in Rural El Salvador”, University of Wisconsin Land Tenure Center, Broadening Access and Strengthening Input Market Systems Program: Unpublished Paper: Table 2; World Bank, 2005, Report No. 29594-SV, *El Salvador. Poverty Assessment. Strengthening Social Policy* (Poverty Reduction and Economic Management and Human Development Sector Management Units Latin America and the Caribbean Region) (for 2002 data).

<sup>53</sup> United Nations Development Programme, 2003, “Human Development Indicators: El Salvador”, Available online at: [www.undp.org/hdr2003/indicator/cty\\_f\\_SLVUNDP2003](http://www.undp.org/hdr2003/indicator/cty_f_SLVUNDP2003); Table 8.

<sup>54</sup> Conning, Olinto, and Trigueros, *supra* n. 52: Table 2; World Bank, *supra* n. 52.

<sup>55</sup> Conning, Olinto, and Trigueros, *supra* n. 52: 10.

<sup>56</sup> *Id.*, 9.

high after the war as we saw above, despite the improved distribution of land from the 1980 agrarian reform and the land transfer program after the peace agreement.

## **5.6. Conclusion**

A principal legacy of El Salvador's agrarian insurgency was the significant redistribution of land forged by agrarian insurgency, state counterinsurgency, and their ensuing political and economic consequences (not all of them anticipated). This redistribution was consolidated through post-war political mobilization that took advantage of the fundamental legacy of the civil war, the constitutional reforms that brought a profound redistribution of political power. Those reforms were in part made possible through the wartime transformation of the Salvadoran political economy that dramatically reduced the importance for economic elites of export agriculture, as well as the political learning by elites formerly profoundly opposed to any redistribution of political power.

The negotiated settlement that brought an end to the civil war was a classic democratic bargain in which both parties gained something valued by their adherents: insurgent forces achieved political inclusion, agreeing to politics by democratic means and consolidating a significant redistribution of land, while economic elites protected their control of assets through constitutional provisions that (in a liberal world economy) diminish any prospect for significant economic redistribution when the erstwhile insurgents, now a political party, won the presidential election in 2009.

The transformations wrought by civil war in El Salvador stand in sharp contrast to those in Colombia to date. Instead of a transformation of the economic interests of locally powerful elites away from the agrarian sector, in Colombia those interests have deepened with the intensified production of illicit drug crops, particularly coca, and the expansion of commercial crops such as African palm. Relatedly, the Salvadoran civil war brought a fragmentation of landholding and a more egalitarian distribution of agrarian property rights, while Colombia has seen a concentration of landholding rather than its fragmentation.

While the Salvadoran civil war ended via a liberal, capitalist, and democratizing pact, such an outcome is unlikely in Colombia. While coercive practices are widespread in the Colombian countryside, particularly in the form of forced displacement of rural families by armed actors, they do not take the form of labor repressive agriculture that so shaped the Salvadoran political economy and regime. Although leftist political parties such as the Unión Patriótica suffered terrible violence in the late 1980s and 1990s and democratic practices have been profoundly corrupted by the *parapolitica* alliance between many local politicians and the paramilitaries, Colombia's political regime is significantly more democratic than that of El Salvador before and during the civil war. The degree of local political competitiveness varies dramatically across Colombia, however, with local agrarian elites dominating political power in many municipalities over long periods with little opening to democratic opposition.

**PART II:**  
**THE COLOMBIAN CASE**



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## Land Restitution in Transitional Justice: Challenges and Experiences – the Case of Colombia\*

Knut Andreas O. Lid\*\*

### 6.1. Introduction

Transitional Justice (TJ) was arguably introduced to Colombia in 2005 when Congress passed law 975\05: the Justice and Peace Law. This law regulates the demobilisation of members of ‘Armed Organizations at the Margins of Law’ (AOML), and establishes a set of obligations for the *postulados* as these are referred to after entering the process. Legal benefits such as reduced sentences can be obtained if, and only if, the perpetrator is prepared to rectify the damage done to their victims; restitution is to be an integral part of such reparation. The inclusion of property restitution in the TJ process is one of several strategies to achieve sustainable peace in Colombia. The victims and the perpetrators are bound by the same legal framework. Whereas the victims of conflict benefit from the restitution of their land rights, the *postulados* benefit from lenient sentences and are enabled to reintegrate into civilian life as ordinary citizens.

The focus on the rights of the internally displaced people (IDPs), who will be the beneficiaries of the policies of land restitution, was chosen because of the significance land has in the internal conflict. A saying in Colombia expresses this idea: ‘it is not the civil war that causes displacement; rather the civil war is being fought to produce displacement’. Different estimates of the size of the displaced popula-

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tion range between 2.9 and 4.6 million people<sup>1</sup>, leaving behind 1.2-10 million hectares of land<sup>2</sup>.

The purpose of this chapter is to establish the right to restitution of land in TJ processes, and is based on the experiences made in the case of Colombia. To understand that restitution of land is but one component of a larger TJ framework, it is important to note that even in the most successful cases of restitution the outcome need not be cessation of violence. However, this chapter focuses on what is deemed to be the most important factor if any sustainable solution to the Colombian conflict is to be achieved: the restitution of land.

The chapter begins with a discussion on the concept of restitution in TJ processes. A brief account of the historical context and the significance of land in the Colombian conflict is then presented, followed by a section on the scale of the displacement in contemporary Colombia, and how the right to restitution of land has been included in the current process. The third part of the chapter focuses on the domestically developed strategies to implement the right to restitution within the TJ framework in Colombia. The chapter identifies three strategies developed to support the IDPs' right to restitution, here denominated *judicial restitution*, *negotiated restitution*, and *restitution by confiscation*. Finally, the chapter will conclude with a few remarks on the how restitution of land in transitional justice can be a catalyst for peace, but only if the process is holistically envisioned and recognizes the many limits imposed by the context of war.

### **6.1.1. Defining Restitution of Land in Transitional Justice**

Defining the terms restitution and TJ precisely is difficult as they are applied to widely different contexts and consist of many different components. Jon Elster holds that “[t]ransitional justice is made up of the processes, trials, purges and reparations that take place after the

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<sup>1</sup> 2.9 million is the number used by the Colombian Government, while 4.6 is used by the Colombian civil society organization Consultoría para los Derechos Humanos y el Desplazamiento (CODHES).

<sup>2</sup> The difference in the number of hectares stems from the different sources. The high number is claimed by the victims' organization MOVICE. Several other sources use numbers that lie in between these two extremes.

*transition from one political regime to another*".<sup>3</sup> A similar definition holds that TJ is

the conception of justice associated with periods of political change, characterized by legal responses to confront past wrongdoing of processes predecessor regimes.<sup>4</sup>

A third and broader definition determine TJ to be

that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.<sup>5</sup>

Neither Teitel's nor Elster's definition would include the case of Colombia because no political transition has occurred. It is difficult to speak of a predecessor regime. Roth-Arriaza also includes armed civil strife and does not limit the definition to past conflicts, rather past violations. Transitions of political regimes are different from transitions from conflict, especially in civil conflicts with multiple actors where it can be problematic to determine when the transition to peace has occurred. Changes in the political regimes are easily perceptible, but conflicts tend to be more diffuse. If some, but not all, of the actors in the conflict submit themselves to a process involving the administration of justice, truth and reparations, can we still speak of a transition? Can TJ, in addition to mending past suffering after the conflict has ended, be an array of institutional tools designed to bring about an end to conflict? In Colombia this is being tested as we observe that trials, purges and reparations are taking place, yet there has been no end to the conflict. In spite of differences in definitions all such processes aim to create something new by correcting actions taken in the past.

While TJ is a relative new concept that has been used to describe the transitions in Latin America in the 1980s and in Eastern Europe

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<sup>3</sup> Jon Elster, 2004, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge University Press.

<sup>4</sup> Ruti G. Teitel, 2000, *Transitional Justice*, Oxford University Press.

<sup>5</sup> Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), 2000, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press.

after the end of the Cold War, even though as Elster (2004) argues it has been practised since 411 BC, the concept of restitution has been an actively used and recognized legal term. But the concept has evolved. While first applying to situations where states sought compensation from the aggressors of interstate-war, it now has become of relevance to individuals as well.<sup>6</sup> The right to restitution can be defined as the right to an equitable remedy that restore a person to the position they were or would have been in if not for the improper action of another – that is, restoring the *status quo ante*.<sup>7</sup> The right to restitution of land after internal displacement is the “legally enforceable right to return to, to recover, repossess, re-assert control and reside in the homes and lands they had earlier fled or from which they had been displaced”.<sup>8</sup>

International standards have traditionally confirmed restitution to be the favoured mechanism of reparation in the aftermath of violent conflict<sup>9</sup>. Restitution of goods that have been stolen or damaged is an obvious choice that involves tangible results that are easily recognisable for the victims of conflict, if we limit ourselves to restitution of material goods. In cases where the objects cannot be restored one can also more easily measure the value of the goods, and provide the victims with alternatives to restitution, such as compensation. It is important to note the sequencing as compensation is not simply an equal alternative to restitution but can be invoked only when restitution is not feasible.

The right to restitution has been affirmed by several international bodies, yet the potency of the principle is weak as all references are found in ‘soft law’ and the definitions used are multifaceted. This is reflected by the fact that none of the international human rights conventions give full guarantees of property.<sup>10</sup> The United Nations Princi-

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<sup>6</sup> Rhodri C. Williams, 2007, “The Contemporary Right to Property Restitution in the Context of Transitional Justice”, *International Center for Transitional Justice Occasional Paper Series*.

<sup>7</sup> M. C Bassiouni (ed.), 2002, *Post-Conflict Justice*, Transnational Publishers.

<sup>8</sup> Scott Leckie, 2003, *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, Transnational Publishers.

<sup>9</sup> *Id.*

<sup>10</sup> Walter Kaelin, 2006, “Internal Displacement and the Protection of Property”, in *Realizing Property Rights*, De Soto and Cheneval (eds.), Ruffer and Rub.

ples on Housing and Property Restitution for Refugees and Displaced Persons that was adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005<sup>11</sup> holds restitution to be the preferred method of reparation for IDPs (Article 2.2). The same year, another set of principles were adopted by the UN General Assembly, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights and Serious Violations of International Humanitarian Law (UN Basic Principles),<sup>12</sup> which to some extent alters the notion of preferred methods of reparation as restitution is defined as only one of several and equally desirable modalities of reparations. The concept of restitution has also been somewhat altered. Restitution has traditionally concerned property, but in Article 19 in the UN Basic Principles the concept has been expanded to include restoration of liberty, employment, identity and the enjoyment of human rights etc.

There are several problems associated with restitution as a remedy. In many cases alternative methods of reparation are necessary. First, restitution is not always feasible. Restitution of life is simply not possible; compensation for life lost will be a natural alternative. In the case of land this may also hold true. The issue of third parties, multiple displacements, precarious security situations, and the impossibility of timely settlements can at times only be solved by measures other than restitution. One can also question if restitution is desirable. If the pre-existing conditions provoked or assisted the displacement in the first place, why should one seek to restore such conditions? Problems such as these will also be exacerbated if much time has passed since the violation. Consequently the task of defining who the victims are, and which of these have accompanying rights when designing a restitution programme is problematic. How many generations can pass after the violation is done? What kind of connections to the land is sufficient to invoke a right to restitution of the given land? Do occupants, tenants and formal owners have equal rights? What kind of evidence should be considered in determining the right to the land and the right to cultivate the land? Problems of identification of both individuals and the land

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<sup>11</sup> E/CN.4/SUB.2/2005/17; the '*Pinheiro Principles*'.

<sup>12</sup> UN General Assembly Resolution, A/RES/60/147; the '*UN Basic Principles*'.

are likely to be considerable where few public records are kept, making it difficult to determine if  $x$  has more rights to the land than  $y$ . In light of these issues one may argue that other alternative measures, that have a comparatively better chance of being implemented at a reasonable cost, are preferable to restitution.

However, restitution of land has several advantages over other forms of reparations. Restitution of property as part of TJ does not burden the government with additional costs. Budgetary restraint is a commonly cited reason for a state's reluctance to fully comply with the obligation to repair; often a very valid reason as the states in question do have strained resources because of the conflict one is trying to solve. Williams (2007) states:

[b]ecause it involves the return of existing property to its rightful users, its costs are often calculated primarily in terms of the political capital required to carry out unpopular evictions, rather than in terms of the mobilization of financial resources that often acts as a constraint on compensations-based programs.

The return of land does not impose any financial burdens on the state as it is the usurpers that will bear the cost. The cost of a program of restitution of land after conflict will be in terms of the massive judicial and administrative task of clarifying claims to land, a burden that would be significantly reduced if the usurpers reveal the truth and contribute to a process of returning the land to its rightful owners.

Another advantage of restitution is the consequent re-framing of the economic and political makeup of society. By restoring the victims to their former conditions in their place of origin one can restore their collective power to decide the future for their communities, regulate the activities which have been introduced in their absence, and on an individual level one will return the people to conditions that they are familiar with and have a realistic prospects of mastering and improving. The majority of the victims displaced in Colombia are subsistence farmers who have been forced to live in cities; an unfamiliar environment in which their expertise in agricultural activities is irrelevant. While important to note that many of the victims have no immediate

interest in returning<sup>13</sup>, the right to restitution of land is not dependent on actual return. Restoration of legal rights to the land provides the opportunity to decide what they want to do with their lands; whether that means returning, renting out, or selling the plot of land. In addition if we see the right to restitution of land as one part of an overall reparation scheme, one could argue for the possible transformative effects of restitution in creating a social fabric more conducive of prolonged stable conditions.<sup>14</sup>

## 6.2. The Context

This section attempts to introduce the reader to the complexities related to the distribution of land and the displacement from land in Colombia. In order to create a legal framework for restitution of land, it is vital to consider the actions of the past. The patterns observed in past actions of displacements are significant determinants in the design of new solutions.

The history of violence in Colombia is multifaceted, and explanations ranging from ideological or, political, to economic determinants have been forwarded. It is not the purpose of this chapter to define the determinants of the war, but rather to confirm the centrality of the land issue in the internal conflict. There is general agreement among scholars in Colombia that the issue of land is the central feature of the conflict.<sup>15</sup> Throughout its history numerous wars have been

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<sup>13</sup> There are several reasons for this. Many of the victims were living in precarious condition prior to the displacement and do not wish to resume a life of misery; many have resettled in cities and prefer to continue their new lives; but most are concerned with the security situation and will not return until credible guarantees have been offered (Garay, Uprimny *et al.*, 2008, *Comision de Seguimiento a la Politica Publica sobre el Desplazamiento Forzado VI Informe a la Corte Constitucional*).

<sup>14</sup> Saffon and Uprimny, 2008, *El potencial transformador de reparaciones. Propuesta de una perspectiva alternativa de reparaci3n para la poblaci3n desplazada*, Dejusticia.

<sup>15</sup> Alejandro Reyes, 1998, "Conflictos agrarios y luchas armadas el la Colombia Contemporanea", *Analisis Politico*, 5: 6-27. Absal3n Machado, 1998, *La cuesti3n agraria en Colombia a fines del milenio*, El 3ncora Editores. Sanchez and

fought locally, regionally and even nationally. Though with different dynamics and in different scales, these wars have been related to land either in terms of direct physical control of the land and/or the struggle to control the political and administrative institutions in a given territory.<sup>16</sup> Colombia is today a modern country which has well established democratic institutions, yet still we can observe some of the same traditional characteristics found a century ago. The differences between urban and rural realities are quite stark. Whereas the urban areas are modernized and controlled by the state, the rural areas are still dependent on a feudal tradition in which certain actors define the conditions.<sup>17</sup> Semantically the use of the word ‘*patron*’ is widespread, and the dependence on these patrons is also very real. Statistically we see a strengthening of the position of these patrons during the last decades as the displacements and struggles over land contribute to an increase in the concentration of land into fewer hands. This trend has been described as the criminalization of the rural elite, as the links between the illegal armed groups, the traditional landowners and the drugs-cartels became increasingly intertwined in the 1990s.<sup>18</sup> This constellation of actors have become empowered in times of war, and have amassed high levels of economic and political power, making their inclusion in any process concerning the rural Colombian makeup paramount.

### 6.2.1. The Significance of Land

The relationship between forced displacement and the usurpation of land is not uniform. Several different explanations can be offered for the act of displacement in times of war. Displacement can take place as a result of military strategies in areas where the antagonists engage in direct struggles. It can be politically motivated as well, and serve to

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Chacón, “Conflict, State and Decentralization. From Social Progress to Armed Dispute for Local Control 1974 – 2002”, Crisis State Programme, 2005.

<sup>16</sup> Gustavo Duncan, 2006, *Los señores de la Guerra. De Paramilitares, Mafiosos y Autodefensas en Colombia*, Planeta Colombiana.

<sup>17</sup> Jonathan Hartlyn, 1993, *La Política del Regimen de Coalición; La Experiencia del Frente Nacional en Colombia*, Tercer mundo Editores, Ediciones Uniandes.

<sup>18</sup> Francisco Gutiérrez Sanín, *Extreme Inequality: A Political Consideration. Rural Policies in Colombia 2002-2009*, chapter 7 in this book.

create a friendly population which lends political support to the actor(s) controlling the given region. Thirdly the displacement can be economically motivated; the distribution of land becomes concentrated in fewer hands. Displacement as a strategy of war incorporates all of these aspects.

In the following, the chapter takes a closer look at these three aspects, which are deemed important to understand the dynamic between forced displacement and the usurpation of land.

### **6.2.1.1. The Military Significance of Land**

Unlike other South American states, Colombia has never developed a strong central state capable of controlling its own territory, and in the absence of the state several semi-legal and illegal groups have been created to provide security in these territories. From a military perspective control over territory and its inhabitants is vital. Control over territory means the presence of safe-zones in which the actors can regroup, train, rest and plan future actions, and importantly gives the opportunity to form ties with the local population who can serve as informants or possibly be subjects for recruitment. The AOML<sup>19</sup> do interact with the civilian population in the areas where they operate, and are indeed dependent on these for their survival. In order to have access to provisions, the armed groups need to be situated in populated areas. Consequently, one military tactic used by the paramilitaries has been to ‘drain the sea to catch the fish’. The logic is that by displacing the logistical network, the enemies will be starved into submission as no provisions can be bought or stolen. Much of the displacement in Colombia occurs from such rural areas, in which small farmers are forcefully displaced from their land to the urbanized zones where the official armed forces and the paramilitaries exert higher levels of control. Displacements resulting from military strategies are relatively easily reversed as they depend wholly on the level of hostilities. As high levels of tension are for the most part temporary as one of the actors

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<sup>19</sup> The concept ‘Armed Organizations at the Margins of Law’ (AOML) is used in the Justice and Peace Law, and includes both former paramilitaries and former guerrillas. In the following, the terms will predominantly be referring to paramilitary organizations.

achieves victory, the displaced populations can return within a reasonable timeframe. Once military operations have ended, one could expect the civilian population to return to their place of origin if the displacements were a side effect of hostile actions that placed them in the line of fire. That the levels of return in Colombia are very low gives us an indication that the military objectives are not the principal cause of displacements.

### **6.2.1.2. The Economic Significance of Land**

The forced displacement in Colombia is centred in semi-developed regions with moderate poverty and in which the resources are manifold.<sup>20</sup> These regions are rich in the sense that they are suited to agricultural activities such as cattle ranching, rice-, cotton-, sugar- and fruit-production, and more recently the cultivation of agricultural crops destined for bio-combustibles. Other economic activities related to the production of energy (coal, oil and hydro-electrics) are also prominent. In addition the exploration of precious commodities such as metal and minerals are prevalent in the areas of displacement. Another important factor is the production of illicit crops, coca in particular.<sup>21</sup> Coca cultivation is widespread in areas located far from the political and administrative centre and not easily accessible. Hence, these crops are easily controllable for the AOMLs who have come to control the whole production line, from cultivation of the coca-leaves, processing the cocaine, and smuggling to the international markets. Given the economic importance of this trade ferocious battles have been fought with the aim of controlling territories in which these crops are cultivated.

Large-scale projects make irreparable changes to the areas where they are developed. Transformation of the use of land, from subsistence farming to vast monocultures, makes the reversal practically impossible for ecological and economical reasons. For example; reversal of hydro-electrical projects that involve damming or other infractions

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<sup>20</sup> Marta Bello, 2003, “*El desplazamiento forzado en Colombia: acumulación de capital y exclusión social*”, in *Revista Aportes Andinos: Globalización, migración y derechos humanos* ( N° 7).

<sup>21</sup> Alejandro Reyes cited from the FICHL seminar on *Land reform and distributive justice in the settlement of internal armed conflicts*, Bogotá, 5-6 June 2009.

to the physical realities on the ground are not easily reversible. Uprooting entire plantations of bananas, rice, African palm, cotton, sugar etc. may not be feasible due to the cost of such operations or economically desirable for the original owners of or current stakeholders in this land. If such land is to provide acceptable social-economic conditions for the Colombia's displaced population, a mere restitution may not be sufficient. The economic significance of the land usurped is above questioning. Control over the resources in and on the land is still of central value for the illegal armed actors as this provides them with revenue needed to survive as an operative organization. Thus, considering their interest in the land is important when trying to skew this control back to the rightful owners of the land.

### **6.2.1.3. The Political Significance of Land**

In the late 1980s and early 1990s, Colombia went through a process of democratisation in which a new political regime was created and consecrated in the Constitution of 1991. The political system was opened up and gave effective access to new political constellations, many of which had ties to guerrilla organizations that were demobilised in the peace-process in the early 1990s. Most important for the subsequent developments, however, was the process of decentralization that was introduced. Greater political and fiscal autonomy was ceded from the central state to the local and regional authorities. While this is a very sound policy in many cases, it backfired in the politically turbulent Colombia. In the context of armed conflict political freedoms are severely restricted, particularly in areas far from the centre. In the new decentralised regime the local communities became of value for the illegal armed organisations, both due to the revenue they received from the central state, and as a path of influence into regional and national political networks.<sup>22</sup>

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<sup>22</sup> Kent Eaton, 2005, "The Unintended Consequences of Decentralization: Armed Clientelism in Colombia", Paper presented at the Annual Meeting of the American Political Science Association. Knut Andreas O. Lid, 2007, *Peace Designed? A Case Study of the Consociational Regime in Colombia*, Master's Thesis: Institute for Political Science, University of Oslo.

Through the process of decentralisation the local population on the land becomes important. By controlling their political voice the armed actors could control the political representation locally, regionally and nationally and have access to most of the administrative institutions of the state. Such control could be exerted by directing elections, and administering punishments on populations that did not do as they were told. The absence of an efficient meritocracy and the extensive use of political appointments to administrative positions will present a grave problem in any restitution process in Colombia as the implementing institutions on local level are still controlled by associates of those actors that perpetrated the displacements in the first place. Drastic changes of the political composition in the municipalities of Colombia can only be achieved in the long term. The armed organizations are not outside society, but are a part of it. Physically removing them is not a viable option, and how to adjust to the political realities on the ground is one of the great challenges when implementing a program of land restitution.

### **6.2.2. Internal Displacement in Contemporary Colombia**

Given the magnitude of the problem of forced displacement in Colombia, the state faces an overwhelming challenge. Estimates on the size of the IDP universe vary according to the sources. In all indicators the numbers are staggering. By 2008, the governmental agency Acción Social which operates a registry for the IDPs identified 2.8 million victims of displacement. The civil society organization CODHES estimates the number to be 4.6 million, or close to 10% of the total population of Colombia.<sup>23</sup> The differences found are explained by various factors. While CODHES has been counting victims since 1985, the government initiated its registration in 1995. In addition the definitions of victims of displacement vary, as some of the individuals included by CODHES are perceived as economic migrants by the state. These are predominantly found in regions of coca production, and as the state has clamped down on these activities the population has fled. However, the government holds that these are migrant workers and have simply

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<sup>23</sup> Internal Displacement Monitoring Centre (IDMC). Available online at: [www.internal-displacement.org/](http://www.internal-displacement.org/).

moved to other areas in search of work, and are not to be considered victims of displacement.

The problem in defining the IDPs is also relevant for determining (in)eligibility for the right to restitution of land as not all IDPs have the same connection to land. In the case of migrant workers one could argue that they do not have any connection at all to a specified piece of land, but the majority, 60 to 70% of the displaced do have some form of tenure. A significant portion of this percentage, one out of two, had legal ownership to these lands, 31.7% had collective titles, 4.9% were occupants, 7.2% were rented, and the remaining 8.2% were in possession of the land.<sup>24</sup>

In terms of the physical scale of the usurpation of land, the data is not easily available. Estimates vary greatly from 1.2 to 10 million hectares of land; that is, land used for agricultural purposes. Around 75% of these are concentrated in ten of Colombia's thirty-two departments: Antioquia, Caquetá, Chocó, Bolívar, Cesar, Magdalena, Guaviríe, Meta, Córdoba, and Norte de Santander. These departments also have the highest number of displacements, and are departments in which activities such as mining and agro-industries are prominent.<sup>25</sup> Land has been increasingly concentrated in fewer hands as the following data show. In 1984, 0.4% of the Colombian population owned 32.7% of the agricultural land. By 2001, 0.4% controlled 61% (IGAC-CORPOICA 2001). Concentration of land and displacement from land occurred in the same period, and it is therefore natural to assume that there exists some kind of relationship between these two phenomena. Studies show that the intensity of the displacements is significantly higher in regions where conflicts over land tenure are prominent.<sup>26</sup>

To comprehend the task that awaits it is vital to get an understanding of the modalities used by the displacers. Land was obviously taken by physical force, but equally important to consider were the

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<sup>24</sup> Salinas, Gonzáles, and González, 2008, *Tierra, Oro y Conflictos*. Instituto de Estudios para el Desarrollo y la Paz (INDEPAZ).

<sup>25</sup> *Id.*

<sup>26</sup> Gallón and Díaz (eds.), 2006, *Revertir el destierro forzado: Protección y restitución de los territorios usurpados a la población desplazada en Colombia*. Comisión Colombiana de Juristas.

legal strategies employed by the perpetrators. The Colombian Ministry of Agriculture initiated a program in April 2008 called '*Programa de Consultas en Recuperación de Tierras*' (CONRET) that, through a survey of 800 displaced persons identified five methods that were commonly used by the paramilitaries to remove the original population and to take over their land: (1) The land was bought under undue pressure for ludicrously low prices, and/or paid by void checks. (2) In exchange for ones' own life; owners of the land had the option of selling or dying. (3) Transference of rights, where people without titles to the land were forced to sign a document in which they ceded their rights to the land. (4) Irregular possession of the land in cases where occupants were forced out in order for others to move in. (5) Falsification of signatures so that the land was sold without the consent of its owner.<sup>27</sup> The accumulated effect of these strategies was the usurpation of millions of hectares of land. The perpetrators went to great lengths to legalize their claim to the land. Strategies differed according to the type of tenure the original resident held, and was facilitated by the high levels of informality in ownership in Colombia. In cases where the ownership to the land was determined through titles, legal strategies were applied during the displacement in order to make the land grabs legally valid; a rather effortless task given the direct control enjoyed over the administrative and political institutions in the area of operation.

### **6.3. Restitution of Land in Colombian Transitional Justice**

The main perpetrators of the forced displacement<sup>28</sup> in the 1980s and 1990s were the paramilitaries that in 1997 converged into the organization Autodefensas Unidas de Colombia (AUC). The AUC entered exploratory peace-negotiations in 2002 and started demobilizing already by 2003, even before the terms of the demobilizations had been clari-

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<sup>27</sup> El Tiempo, *Detectan cinco modalidades usadas por los grupos armados para quitarles la tierra a campesinos*, 19 November 2008.

<sup>28</sup> This is not to say that the paramilitaries were the only ones responsible. Indeed, the different guerrillas operating in Colombia, most prominently the FARC, are also responsible for a significant portion of the forced displacement. The Colombian scholar Alejandro Reyes claims that close to 50% of the displaced have been displaced by the guerrillas.

fied. Two years after the first demobilizations, the Justice and Peace Law, which determines the rights and obligations of the perpetrators, was passed by Congress. It is this law that introduces TJ language to Colombia. It was the result of a failed attempt to secure an amnesty for the members of the AUC.<sup>29</sup> While most of the 31,000 demobilised members were given amnesties, the ones that had committed the most serious crimes, some 10% of the combatants, were to be subject to the special proceedings outlined in this law. In order for these to enjoy the legal benefits of reduced penalties, defined to range between five and eight years of confinement, these *postulados* are obliged to make reparation to their victims. This includes the obligation to return the land stolen and restore the conditions that existed before the violations were committed, in other words the obligation to provide restitution. In implementing the reparations the lines of responsibility lies first with the individual perpetrator, second with his military squadron or '*bloque*', third with the national organization, and then finally, and only as a subsidiary, the state (Article 42). That is, the responsibility of the state presents itself as an act of solidarity with the victims of conflict only when the perpetrators are unable to fulfil their obligations.<sup>30</sup>

Restitution is explicitly included in the law which states that restitution as reparation is defined as the restoration of status quo ante, and includes the specific measures of *a return to liberty, a return to one's place of origin, and the return of the property stolen, if possible* (Article 46).<sup>31</sup> Restitution as part of a victim's reparation program is conceptually different from state guarantees to prevent displacement, assist the displaced and provide them with stable socioeconomic condi-

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<sup>29</sup> During the peace talks a different law was circulating in Congress – the law on Alternative Penalties – but was widely criticised by domestic and international organizations who called it a law of impunity. Consequently the law was retracted before voted on, and a new proposal was developed, the Justice and Peace Law (Rafael Pardo, *Rueda Fin del Paramilitarismo: Es Posible su Desmonte?* Ediciones B, 2007).

<sup>30</sup> During an interview with President E. Pizarro Leongómez of the CNRR in October 2007 it was expressed that only 5 to 10% of the funds needed for reparation is expected to come from the *postulados*, while the remainder would need to be funded by the state or international donors.

<sup>31</sup> Author's translation.

tions. The processes are different in the sense that it concerns different populations. In the TJ process the displaced peoples are but one group of victims, and not all displaced peoples have a place in an eventual process of restitution of land. For example, in order to seek reparations for harm suffered, victims must be registered at the Victims Registry operated by the Justice and Peace Unit at the Prosecutor General's office; a list compiled of close to 230,500 people who claim to be victims of guerrilla or paramilitary violence.<sup>32</sup> Thus, according to the TJ framework in Colombia only those who have registered at the Prosecutor's office can seek measures of reparation. That is, of an estimated population of between 2.8 and 4.6 million displaced only a small fraction has the right to restitution of land within the parameters of the TJ process.<sup>33</sup> Worth noting is that these numbers describe a very large universe of victims that is continuously increasing as more victims denounce the crimes committed against them and seek inclusion in the TJ process. However, considering the estimated 2.8 to 4.6 million victims who endured forced displacement, the registry suffers from a large backlog of cases that have yet to be denounced.

In spite of this, the law is inclusive considering that all victims of displacement since 1964 are eligible, and the definition of who holds the right to restitution is quite encompassing. Four kinds of tenancy are recognised and hold a right to restitution: *Owners* with legal titles to the land; *possessionists* who have bought and utilised land, but have yet to formalize the claim by registering the sale before a public entity. *Tenants* are those who work on another person's land but have a written or oral contract in which the right to the use of land is paid in a percentage of the produce; and finally *occupants* who have cultivated virgin land and settled but have no formal title to the land. How the right to restitution will be operationalised depends on these different

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<sup>32</sup> Fundación Ideas para la Paz, 2009, “*Un balance de la aplicación de la Ley de Justicia y Paz*”, *Siguiendo el conflicto: hechos y análisis*, 56.

<sup>33</sup> This number includes all types of violations and is not restricted to internal displacement alone. The author has not been able to determine how many of these 230,500 were registered as victims of forced displacement.

connections to the land, but according to Colombian law all have the right to restitution.<sup>34</sup>

### 6.3.1. Institutional Framework

The process of reparation of the victims of conflict has unfortunately stagnated due to several problems; one being the slow procedures in the courts, particularly as reparations are intimately connected to other elements of the TJ process. The right to truth and justice are central to the process and the sequencing in the Colombian process has given primacy to these. The process is as follows: The perpetrators included in the process are first obliged to render ‘free versions’ of all their crimes, and tell the whole truth about what happened and why it happened. This stage is followed by an investigative stage which culminates in prosecution and punishment according to ordinary law. The sentences are subsequently lowered to 5- 8 years if the appointed judge finds the *postulado* to have complied with the conditions set forth in the Justice and Peace Law. After the judicial responsibility for a crime has been determined, the victims can subsequently seek reparations from the individual *postulado* who is then obliged to make reparation to his/her victims with all resources illegally and legally obtained if necessary.<sup>35</sup> At present date<sup>36</sup> only one *postulado* has been sentenced,<sup>37</sup> a sentence which also stipulated how reparations are to be made to the victims.<sup>38</sup> None of the other 3,000 or so *postulados* have reached this point of the process as of yet, four years after the law was passed.

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<sup>34</sup> Acción Social, 2007, *Nuestros Derechos Sobre la Tierra Como Población Desplazada*, Proyecto Protección de tierras y Patrimonio de la Población Desplazada.

<sup>35</sup> Colombia’s Constitutional Court revised the law and in its sentence defined how some of the articles of the law were to be interpreted if the law was to be considered constitutionally valid (Sentence C-370/2006).

<sup>36</sup> 15 September 2009.

<sup>37</sup> The first sentence was handed down in 2009 in which a low level paramilitary, Wilson Salazar Carrascal, alias El Loro, was convicted (*Tribunal Superior de Bogotá. Sala de Justicia y Paz, Case Number Rad. 11001600253200680526 Rad. Interno 0197 Wilson Salazar Carrascal*).

<sup>38</sup> The reparation was based on the funds ceded by the *postulado* to the Victims reparations fund. The victims have appealed the decision based on the lack of

As the TJ process became operational, the executive branch found it necessary to regulate certain aspects of the Justice and Peace Law, and this was first done in Decree 3391 of 2006. The decree regulates several aspects of the law, of which the theme of victims' reparation is prominent.<sup>39</sup> In terms of restitution of land in particular, article 14 is of importance and can be interpreted as an obstacle to the process of restitution of land. It introduces the '*principle of opportunity*'; a legal principle which in this context means that the prosecutor is not to pursue those cases in which a 'third party' has taken control over the property usurped.<sup>40</sup> As we saw in the section of the different modalities of displacement one would expect the majority of the holders of the land to be others than the paramilitaries themselves. Some do so in good faith, but even if this is not the case it will be virtually impossible to legally prove so in a court of law. Difficulties can be expected to rise not only because of the efforts to legalize the claim to the land, but also the strategy used to co-opt local administrative and political institutions; including the judiciary.

In light of the slow judicial processes the Colombian government created a new legal mechanism in order to make reparation to the victims of the conflict. Decree 1290 of 2008 paved the way for administrative reparations in which the state, based on the principle of solidarity, obliged itself to take charge in the process of reparation.<sup>41</sup> The decree thereby by-passed the judicial processes being forwarded against the individual perpetrators, and pledged to make reparation to the victims by monetary compensation for the suffering endured. This decree has been heavily criticised by civil society due to its template form of reparation, restricted reparation at best, and also because it relieves the

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proportionality between the harm suffered and the defined reparations (CNRR *Defensa de las víctimas apelaron sentencia contra "El Loro"*, Bogotá: 2009).

<sup>39</sup> Decree 3391, *Por el cual se reglamenta parcialmente la ley 975 de 2005*. Issued by President Álvaro Uribe Vélez in 2006.

<sup>40</sup> Gonzales, Perdomo, and Mariño, 2009, *Reparación judicial, principio de oportunidad e infancia en la Ley de Justicia y Paz*, Deutsche Gesellschaft für Technische Zusammenarbeit GmbH (GTZ).

<sup>41</sup> Decree 1290, *Por el cual se crea el programa de reparación individual por vía administrativa para las víctimas de los grupos armados organizados al margen de la ley*, issued by President Alvaro Uribe Velez in 2008.

perpetrators of the burden of directly make reparation to their victims while simultaneously rejecting that the state had any responsibility for the crimes committed.<sup>42</sup> Nevertheless, the administrative reparations programme is as of the moment the only legal mechanism which creates any form of reparation available within an acceptable timeframe. By providing reparations administratively the evidential standards are lowered, more victims are given real opportunities to exercise their right to reparation, and the possible threats to physical integrity that could result from direct reparations are mitigated. The administrative reparations programme explicitly includes the crime of forced displacement in its Article 5, a crime defined to be worth twenty-seven monthly minimum salaries. Important to note is that the decree does not exclude other modes of reparation such as restitution, even though it holds that no one can be compensated on more than one occasion. Victims of displacement can receive administrative monetary compensation for the suffering of being forcefully displaced, but this reparation does not prevent the victims from forwarding claims of restitution of their land or any of the other modalities of reparation as defined in the Justice and Peace Law.

The year 2008 proved to be an important year for the process of restitution of land in Colombia, and a number of developments have taken place of which the issuing of Decree 176 on 24 January 2008 is of great importance. The Decree aims to regulate the *Comisiones Regionales para la Restitución de Bienes* (CRRB) that the law of Justice and Peace has called for in its Article 52 (Presidencia 2008).<sup>43</sup> These commissions intend to give recommendations to the Comisión Nacional de Reparación y Reconciliación (CNRR) on how to develop a program of restitution, and will have a coordinating role when implementing such programs.<sup>44</sup> Supplementing these commissions with

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<sup>42</sup> MOVICE *Sobre el Proyecto de Ley del Senado*, 2008. Available online at: [http://www.movimientodevictimas.org/index.php?option=com\\_contentandtask=view&id=43&Itemid=41](http://www.movimientodevictimas.org/index.php?option=com_contentandtask=view&id=43&Itemid=41).

<sup>43</sup> Decree 176, *Por el cual se reglamentan los artículos 51, numeral. 52.7; 52 Y 53 de la Ley 975*. Issued by H. Sardi in 2008.

<sup>44</sup> The first of these commissions was inaugurated on 10 July 2009 in the department of Antioquia (CNRR, *Se instala primera Comisión Regional de Restitución de Bienes*, 7 July 2009).

technical experience is ensured by the establishment of a national *Comité Técnico Especializado* (CTE) that has several regionally based committees capable of identifying the local and regional challenges. The composition of the committees is interesting as it consists of many of the same governmental institutions that are responsible for the implementation of national policy obligations towards the displaced peoples. Decree 176 is the first tangible step taken by any Colombian government to explicitly spur forward a process of restitution of land.

On 12 March 2008, the government issued the Decree 768. The Decree regulates Article 127 of Law 1152 of 2007 and establishes a registry of abandoned land '*Registro Unico de Predios y Territorios Abandonados*' (RUPTA).<sup>45</sup> This Decree does to some extent reflect the wishes of the victims to create an alternative cadastral record of the land usurped, at least the technical part of their '*catastro alternativo*',<sup>46</sup> yet it is still too early to say how effective it will be. Nevertheless, it is a positive development as this is the first concerted effort to identify the land from which people have been displaced.<sup>47</sup>

#### **6.4. Domestic Strategies for Restitution of Land**

The process of restitution of land in Colombia is part of a TJ process that is relatively new, was introduced in harsh conditions, and has

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<sup>45</sup> Decree 768, *Por el cual se reglamenta el artículo 127 de la Ley 1152 de 2007*. Issued by President Álvaro Uribe Vélez in 2008.

<sup>46</sup> MOVICE, 2006, *Catastro Alternativo del Despojo: Una Alternativa de las Víctimas para Ejercer el Derecho a la Restitución del Patrimonio de los desplazados*. Available online at:  
<http://www.movimientodevictimas.org/images/stories/pdfs/PLEGABLECATASTROALTERNATIVO.pdf>.

<sup>47</sup> The presidential decrees issued signify an advance in the partial enjoyment of the victims' right to reparation, but as a decree they are legally weak. This in combination with the perceived shortcomings of the decrees impelled opposition legislators to forward law – Proposal 157 of 2007 known as *Ley de Víctimas*. However, due to disagreements over the responsibility of the state for the violations committed, the proposal was turned down in Congress. Even though the law was not passed I chose to mention it as Chapter I of the law concerns the right to restitution; a chapter that was not widely criticised in the congressional discussions. There seems to be certain degree of agreement on the principle of a right to restitution.

proven to be notoriously slow with regards to the victims' right to reparations. Developing policies on land restitution and implementing these policies are two quite different things. Over time numerous positive initiatives have been introduced in Colombia, yet as of date no definitive results can be observed. Indeed, not even the crime of forceful displacement is being stalled; a fact painfully experienced by some 380,000 individuals in 2008 alone. Other strategies are definitely needed. Arguably the TJ processes can contribute to a sustainable solution through the realization of the right to restitution of land. Inevitably, this may imply significant concessions on the part of the victims, the perpetrators, and the state alike. Recognizing that the principal problem in Colombia is the lack of security, restitution of land without the compliance of the armed actors who have the ability to impede the peace process will be difficult to implement.<sup>48</sup>

Three mechanisms developed domestically in the context of the TJ process to address the displaced persons' right to restitution of land have been identified. The following sub-section will begin with a discussion of restitution as dictated in the Justice and Peace Law, referred to as *judicial restitution* of land. The second part of the analysis is dedicated to an *ad hoc* arrangement that has been developed within the TJ process; an arrangement called *negotiated restitution*. Lastly, a mechanism denominated *restitution by confiscation* is explored.

#### **6.4.1. Judicial Restitution as Reparation in Transitional Justice**

By 'judicial restitution', this chapter refers to the institutionalized process contemplated in the Justice and Peace Law that binds the perpetrator and the victims into the same legal framework. Judicial restitution as reparation in the Colombian TJ scheme involves a guided but friendly settlement between the victim and the perpetrator from which a judicially determined sentence on reparation results. This strategy is the only fully institutionalised process for restitution of land in the transitional justice process found in contemporary Colombia.

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<sup>48</sup> Uprimny and Lasso, 2004, *Verdad, reparación y justicia para Colombia: algunas reflexiones y recomendaciones*. Available online at: [http://www.derechoshumanosypaz.org/pdf/Reflexiones\\_VJR.pdf](http://www.derechoshumanosypaz.org/pdf/Reflexiones_VJR.pdf).

Once the *postulado* has confessed and acknowledged his or her responsibility for the crime of displacement, and any other crime committed, he/she is sentenced according to the parameters of the ordinary penal code. These sentences are subsequently reduced, if and only if the *postulado* fulfil their obligations, as dictated in the Justice and Peace Law. These include, among others, the obligation to tell the whole truth and to provide reparations to one's victims through an array of concrete actions. During this process, the victims can seek reparation from the individuals implicated in the specific crimes, including the restitution of usurped land. Under the auspices of an appointed judge the reparation is then defined. Its costs are covered by the goods ceded to the Victims Reparation Fund, and ideally accepted by both the victim and the perpetrator. In terms of restitution of land, the final outcome is thus that the victims will be able to enjoy their right to the restitution of land, and the perpetrator will receive the legal benefits derived from the same law.

The three main challenges regarding judicial restitution of land as part of the TJ process in Colombia are: (1) It is only applicable to a restricted number of victims; (2) it is excessively time-consuming due to its sequencing; and (3) it is wholly dependent on the success of other aspects of the process.

With regards to the first challenge, the design of the process will allow only a miniscule percentage of victims to be included in the institutionalized process of restitution of land when compared to the total number of IDPs. The reason for this is a technical feature in the law that effectively restricts the victims' inclusion thereby reducing the universe by utilizing a parallel registry for the identification and recognition of victims as explained in section 6.3. To be included in the TJ process victims must formally denounce the crime committed against them before the specialized unit of the Prosecutor General's Office, the Justice and Peace Unit. As of date, the numbers of victims of the internal conflict in Colombia that have made such denouncements do not exceed 235,000.<sup>49</sup> Considering that the estimates of internally displaced people range from 2.8 to 4.6 million victims, it is obvious that restitution of land in TJ as contemplated in Colombia will

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<sup>49</sup> It is important to note as well that not all of these are displaced.

not reach the majority of the victims of forced displacement. The challenge of converging universes of victims has yet to be overcome as the institutional dispersion is considerable and there appears to be poor communication between the different public entities responsible. Efforts have been made to create overlapping rather than separate registries, but the author was not aware of any concrete actions taken in this regard when this chapter was written. Also, in the contemporary context, the act of denouncing the crime of displacement is not without risk. An increasing number of victims who have done so have been assassinated.

Nevertheless, as the process continues, we can hope there will be a convergence of the registries as governmental efforts to streamline the institutions come into effect, more and more victims of displacement become aware of their rights as victims of the internal conflict, and the risk associated with inclusion in the process will be reduced as the state assumes an independent and assertive role in regaining control of public institutions.

The second challenge is also institutional as it concerns how the process is designed to be implemented, that is, the sequencing of the institutionalised process. Because the process is designed to follow the judicial proceedings, the obligation to make reparations, at least materially, becomes relevant only after the judicial responsibility for the crime has been established. As mentioned, only one individual has been convicted, and due to the sequencing only one sentence containing a ruling on reparation has been given. Thus, only the group of victims associated with the crimes committed by this *postulado* have been offered a specified reparation, a reparation that did not include restitution of land. The victims subsequently challenged the court decision, and appealed it on the grounds that the reparation did not fulfil the criteria of proportionality as set forth in international standards and also the Justice and Peace Law.<sup>50</sup> On 19 August 2009, the Supreme Court of Colombia declared the sentence invalid. The Court explained the

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<sup>50</sup> See footnote 39.

decision with the Prosecutor's failure to include crimes central to the paramilitary project, making the judicial process incomplete.<sup>51</sup>

The sequencing has had adverse effects not only in terms of reparation, but also for achieving the ultimate goal of creating stable political conditions free from violence. More than four years have passed since the enactment of the Justice and Peace Law and results are still very much pending, especially in terms of restitution of land. The prolonged process has created uncertainty both for victims and perpetrators. This uncertainty is problematic as the different actors involved in the process respond to this by hedging. Many of the assets controlled by the *postulados* that were destined to the Victims' Reparation Fund, have not been ceded. One reason for this may be that the perpetrator wishes to retain some leverage in the process; a strategy enabled by the absence of an exact timeframe as to when one must cede ones' assets to this fund. Consequently, most of the *postulados* have not given up their assets and the funds destined for reparation are few. The incentives to cede ones' assets have also diminished as the lenient sentences seem not to be implemented. Another worrisome trend is the multiple assassinations among the *postulados* themselves, and the numerous threats made due to their active participation in the judicial process. The problem is thus twofold: the incentives to participate are diminishing, and the costs are increasing as former powerful actors are being assassinated and are receiving threats for their cooperation in the TJ process. This trend is reinforced by the emergence of new 'paramilitary' structures who according to some observers count 10,000 men, some 5,000 of whom are demobilised members of the former paramilitary organizations.<sup>52</sup>

The sequencing has not allowed even one victim to benefit from judicial reparation from their perpetrator, and it is still unclear when the first process of judicial reparation will commence. In the only case a sentence has been reached, both the *postulado* and the victims were

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<sup>51</sup> El Tiempo, *Corte tumbó la única condena contra un paramilitar en Justicia y Paz; se trata de alias 'El Loro'*, 19 August 2009.

<sup>52</sup> Numbers published by Corporacion Nuevo Arco Isis. Cited from El Tiempo, *Narcotráfico, extorsión, sicariato y robo de tierras tendrían afectados a 25 departamentos*, 18 August 2009.

not satisfied with the process. The former for reasons of procedure and the uncertainly regarding the obligations needed to be fulfilled, and the victims because of the reparations defined in the sentence.<sup>53</sup> Also, as mentioned earlier, this sentence was also declared void by the Supreme Court of Colombia.

The third challenge identified is closely related to the former. While it is finally up to a judge to decide if and how the restitution is to take place, the incentives to participate actively in the process are important. The benefits of restitution of land do not only befall the internally displaced. The perpetrator also benefits in the form of a reduced sentence and a return from clandestine to civilian life. The *postulados* have given up their freedom on conditions that were later altered, thereby producing uncertain future prospects, and this can be one factor that explains in part why the paramilitaries have not been willing to contribute more substantially to the process of reparations. This is an interpretation endorsed by the paramilitaries themselves, conveyed both personally and through their lawyers.<sup>54</sup> Nearly all of the top commanders have been extradited to the U.S. on charges related to drug-trafficking and are expected to receive punishments in excess of 20 years in jail. Their place in the TJ process remains unclear as they technically still are part of the process, yet have been deprived of the most important incentive to adhere to the totality of it: the reduced penalties. Compliance has become less attractive and much more costly than initially expected, and has given rise to doubts over the viability of the alternative sentences.

The demobilised members of these illegal organisations are not stagnant actors, but rather they are actors that are both proactive and reactive to the political and judicial processes. Even though the AUC has demobilised militarily, the leaders of the organization still enjoy much power in the economic and the political arena. Control over land is the most important factor in retaining this power. When deprived of

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<sup>53</sup> C. Vieira, *Arrepentimiento paramilitar*, 9 February 2008, *Cartagena de Indias, Colombia*; available online at: [www.ipsnoticias.net](http://www.ipsnoticias.net).

<sup>54</sup> *Revista Cambio*, *Abogado defensor de Salvatore Mancuso y Rodrigo Tovar escribe para CAMBIO*, 11 March 2009. *Declaración de Salvatore Mancuso*, 26 June 2009; available online at: [www.verdadabierta.com](http://www.verdadabierta.com).

their freedom and without the military capacity they once enjoyed, these aspects become even more important, and can consequently impede the process of restitution. Even the extradited paramilitary leaders assert control as their second in command, their families, their friends and their allies are today controlling the economic and political assets these leaders accumulated during times of war. These networks are substantial and reach from the local to the national arena. The networks are long established and represent a continuation of a tradition of clientelism, rather than a rupture. Due to the power still retained by the actors involved, the TJ process very much hinge on the voluntary participation of the perpetrators, and one should not understate the importance of this. The paramilitaries went to great lengths to legalise their claims to the land, and their success makes restitution through judicial mechanisms unbearably time- and resource-consuming if the *postulados* choose not to participate and clarify the different claims to land. Both legal and illegal political and administrative efforts to impede the victims' right to restitution have been observed. Several tactics are being used, ranging from the direct threats to life and the assassination of victims forwarding claims against the perpetrators, to more subtle institutional strategies involving undue influence in decision-making processes, impeding the registration of claims, and systematic efforts to obstruct the judicial processes. By 2008, approximately 20 victims who fought for the right to their land had been assassinated, and attempts to obscure and legalize the massive transfers of land are taking place.<sup>55</sup> The links between the current holders of the land and the paramilitaries is not entirely straightforward, and a process of restitution of land will be affected by this relationship. In order to create a comprehensive process that gives guarantees to the victims, one needs the voluntary participation of the paramilitaries to clarify who is in control of the land, how it came to be, and what are the obstacles of restoring the land to its original holders.

#### **6.4.2. Negotiated Restitution in Transitional Justice**

Judicial restitution of land as outlined above follows the sequence of the domestic transitional process codified in the Justice and Peace

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<sup>55</sup> Interview with Marco Romero, President of CODHES, 24 October 2008.

Law. *Negotiated restitution* on the other hand bypasses the specialized courts, and is settled directly between the victims and the perpetrator with the assistance of several governmental agencies. To better illustrate this process the chapter resorts to an example of a relatively successful act of restitution of land that followed this path. The case embodies many of the complexities surrounding the processes of restitution of land in Colombia.

In the department of Córdoba, a two-hour drive outside the regional capital Montería, some 87 families were successfully returned to their lands in 2008 in a process which was spearheaded by the regional office of the CNRR. The lands in question were two farms of about 2,153 hectares in total from which the owners had been displaced in the late 1990s by the Castaño brothers<sup>56</sup> and their ACCU, and were returned to their rightful owners by the paramilitary commander Salvatore Mancuso. Originally these lands had belonged to a company controlled by the wife of Mancuso, but were sold and redistributed as part of a government project to assist displaced and disenfranchised rural families. Thus, some eighty families were given rights and titles to the land by the government institution INCORA.<sup>57</sup> These families lived a short while on these lands before the ACCU and the Castaño brothers showed up and displaced most of them. In the 1990s, these very same lands were sold back to the Mancuso family, through a ‘*testaferro*’, who by the time of the initiation of the TJ process were controlling and working the land. In 2008, the regional office of the CNRR was contacted by two groups of displaced farmers who presented the titles to the land, explained their situation and sought restitution of their land from the current owner, Salvatore Mancuso.<sup>58</sup>

However, the region was very unstable and a safe return still not possible, even though the paramilitary leader himself had been extradited to the U.S. Mancuso was contacted and confronted with these claims, but he denied any responsibility for the displacement as it was

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<sup>56</sup> Fidel and Carlos Castaño; paramilitary leaders who led the organization Autodefensas Campesinas de Córdoba y Urabá.

<sup>57</sup> *Instituto Colombiano de la Reforma Agraria*.

<sup>58</sup> Interview with Eduardo Porras Mendoza, Coordinator CNRR Regional office in Sincelejo, November 2008.

not him, but the Castaño brothers who had carried out the forced displacement. He did, however, recognise his obligation to repair the victims of conflict and the families' rightful claim to the land, and agreed to provide them a meaningful restitution of the lands. Thus, the families were able to return to their lands and continue the life they were forced to leave behind almost 20 years earlier. Most importantly they were able to return as part of a process which gave them guarantees of security from a paramilitary leader who arguably still exert significant influence in the region.<sup>59</sup>

Until recently, this was the only known case of restitution of land in Colombia as part of the TJ process. In July 2009, another similar case was settled with the paramilitary leader Manuel de Jesús Pirabán, and some 1,817 hectares in the department of Meta are to be returned to the original owners.<sup>60</sup>

The examples demonstrate the challenges faced in Colombia. They show the success of one TJ mechanism (albeit *ad hoc*), and the apparent failure of the government-led initiative of land redistribution. Land reforms and other redistribution policies in Colombia have proved unsuccessful because the state was not able to protect its subjects on the land designated to them. In Colombia this is a very real problem as the central state never has had the monopoly of the use of force. In the absence of the state, private armed actors reign and install their own kind of justice. Most rural Colombians live with these challenges on a daily basis, and have done so all their lives. As such, even the best intentions of the state are confronted with the harsh realities on the ground, something which results in failure and re-victimization when trying to fulfil its obligation to its citizens. Negotiated restitution avoids this problem by connecting an individual perpetrator to a specific piece of land. It is a strategy that provides security and predict-

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<sup>59</sup> El Espectador.com, *La contrición de Mancuso*. Redacción Judicial, 21 July 2008 (<http://www.elespectador.com/impreso/judicial/articuloimpreso-contricion-de-mancuso>). El Tiempo, *Finca favorita de Mancuso vuelve a sus dueños*, 27 June 2008.

<sup>60</sup> El Tiempo, *En el Meta, Primera restitucion de bienes de paramilitar desmovilizado en Justicia y Paz*, 9 July 2009.

ability by making the perpetrators acknowledge their direct responsibility for the displacement and the future security of the victims.

When including the real power players in the process, one binds these by their word and by law. The direct relationship between the victims and the perpetrator is important, as it serves to measure out justice, to bring forth the truth and as a means to sustainable reparation. Although he could probably not prevent the return of these individuals to the land, Mancuso could easily reach and displace them once again. Most likely he could do so with no real legal consequence. Even though the act of forcefully displacing a population is a crime in both the civil and military penal code,<sup>61</sup> it is important to note that only very few perpetrators have been sentenced for committing this crime. Negotiated restitution is not implemented by an agreement between the victims and the perpetrators alone, but also entails an institutional element by the supporting role of several governmental agencies including the Justice and Peace Unit at the Prosecutor General's Office, the National Ombudsman, the National Police, the CNRR and the Armed Forces, and is monitored by the MAPP-OEA. The role taken by these agencies in these processes of negotiated restitution is, however, not institutionalised.

This approach to land restitution can also help resolve two of the challenges identified with regards to the judicial restitution. First, it does not follow the sequencing prescribed by the law of Justice and Peace. Instead of first determining the truth, then achieving a conviction which established the legal responsibility, we can observe that the act of reparation has been moved up and is being implemented in parallel. The time needed for the effective implementation of this method is consequently sharply reduced, and can ensure more timely reparation of the victims.

Second, this method provides a solution that is embedded in the local communities by the clear authenticity of the claims and the security provided by the acceptance and recognition of these claims by the usurpers.

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<sup>61</sup> Law 522/99, 1999, *Por medio de la cual se expide el Código Penal Militar*. Law 599/00, 2000, *Por la cual se expide el Código Penal Civil*.

Nevertheless some problems are likely to persist. Not all of the rightful owners of these lands were displaced. Many were forced to leave, while some stayed behind and continued to work the land on behalf of their 'new owners'. Upon return, tensions can rise as the people who stayed came into conflict with those who left. These tensions are likely to come to the fore in many parts of the country as the processes proceed. Similar problems with other third parties are also likely to materialize. Third parties who, in good faith or not, have established themselves on usurped lands and have invested heavily in large scale projects will also resist a process in which they stand to lose their investments. Accommodating the displaced population and the current users of the land is a difficult challenge that can be overcome if negotiations are conducted between these and the victims directly.

A somewhat different challenge is how power relations on the ground have changed over the last four years. In the case of Mancuso, it is not clear how much influence he has and if he is capable of giving guarantees of non-repetition.<sup>62</sup> In August 2008, one of the leaders who benefited from the arrangement detailed above was assassinated.<sup>63</sup> In the second case concerning the lands usurped by Manuel de Jesús Pirabán the region is currently thought to be controlled by another paramilitary leader who is not party to the agreement made between the victims and their perpetrator.<sup>64</sup> As the different strategies for land restitution have commenced, the changing nature of power relations have become visible. Disturbingly high numbers of *postulados* and their

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<sup>62</sup> Non-repetition is one of the modalities of reparation defined in the Justice and Peace Law and entails the obligation of not committing new crimes and to prevent a re-victimization of victims.

<sup>63</sup> El Tiempo, *Asesinan a líder de desplazados que reclamó tierras arrebatadas por Mancuso*, 29 July 2009.

<sup>64</sup> The paramilitary leader Pedro Oliveiro Guerrero and his 'bloque' Heroes de Guaviare' demobilized in 2006, but subsequently withdrew his participation as the conditions of confinement changed. Today he leads a new paramilitary group called Ejército Revolucionario Antiterrorista de Colombia (Erpac). El Tiempo, *En el Meta, Primera restitucion de bienes de paramilitar desmovilizado en Justicia y Paz*, 9 July 2009.

families have been assassinated, and the re-emergence of new paramilitary structures makes such restitutions less viable.<sup>65</sup>

The CNRR is also in the process of developing some pilot projects in Turbo, Antioquia; Chengue, Sucre and Mampujá, Bolívar that follow much the logic of negotiated restitutions. Implementations of these have yet to be initiated, but the diagnostics of the cases as well as agreements with the paramilitaries in these regions are being actively sought. In cooperation with partner institution, several displaced communities have been identified and talks with the new actors in the region have been initiated. These talks<sup>66</sup> have revealed the methods used by the paramilitaries, information that facilitates the identification of individual victims, and the verification of the corresponding claims to lands. The projects are envisioned as a solution that can rebuild the communities displaced on their own lands by including them into the new conditions created on the ground in their absence, conditions that it can be impossible and also undesirable to reverse.<sup>67</sup>

#### **6.4.3. Restitution by Way of Confiscation**

Restitution by way of confiscation is the third strategy identified for securing the victims of displacements their right to restitution of land. Land usurped by the demobilised members has by large not been turned over as proscribed by law. As of early 2010, only some 6,600 hectares out of an estimated 1.2 to 10 million hectares have been included in the Victims Reparation Fund. There are at least three reasons for this: non-compliance on part of the *postulados*, unclear rules on when to turn over assets, and finally the legal status of the land. The governmental agency Acción Social that controls the Fund has not accepted much of the land that has been offered by the paramilitaries because the lands have not been legally sanitized. The lines of owner-

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<sup>65</sup> Semana.com, *Los 'paras' silenciados*, 13 August 2009.

<sup>66</sup> President E. Pizarro. Pizarro informed the author of these talks, and highlighted recent talks with the paramilitary leader Raúl Hasbún operating in the region of Urabá (interview with President Pizarro of the CNRR on 11 June 2009).

<sup>67</sup> Interviews with President Pizarro at the CNRR in 2008 and at the CNRR in June 2009.

ship have not been clarified and the land is legally disputed.<sup>68</sup> Whereas the latter two reasons are significant, non-compliance seems the most important reason for the lack of land available for restitution. In response to this the central government has developed a scheme to confiscate the land controlled by the *postulados* for the purpose of restitution of land.

Restitution by confiscation entails several challenges for the TJ process. The land that is to be confiscated currently belongs to actors who exert significant economic and political influence in the local communities, and without their compliance it is doubtful that guarantees of non-repetition will be viable. Second, it will be difficult to identify the lands controlled by the *postulados* given that the lands are located in distant regions where the victims of displacement continue to be threatened by the usurpers or the new ‘owners’ of the land. Third, even if the lands are identified, these are registered in the names of third parties. Lawyers have advised the perpetrators well on how to hide one’s assets and judicial processes of confiscation will consequently be extremely time-consuming.

According to international legal standards and norms, confirmed in both the Pinheiro Principles and the UN Basic Principles, compliance on the part of the perpetrators is not formally required. It is the state that is the ultimate duty-bearer of rights and must abide by the obligation to remedy the victims of conflict, regardless of whether it is framed as responsibility or solidarity. But although all states have obligations to their citizens, not all governments have actual ability to comply with these.

Two experiences provide us with an indication of the problems faced when pursuing a strategy of restitution by confiscation. The first example treats the sustainability of redistribution of land. The second concerns the procedural costs of expropriating land for the purpose of redistribution or restitution. The first experience is the agrarian reforms that have been introduced previously in Colombia on several occa-

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<sup>68</sup> Semana.com, *Asesinan campesinos que buscan sus tierras*, 16 March 2009.

sions.<sup>69</sup> They have all failed to achieve the goal of a more just distribution of the land as land suited for agricultural purposes has been increasingly concentrated in fewer hands. Indeed, the most effective ‘reforms’ have been the counter-agrarian reforms that have been observed in the wake of the massive forced displacements, including from lands that were redistributed in the aforementioned agrarian reforms. While policies have indeed been articulated, they have been written by legislators and are implemented by functionaries with strong connections to the traditional landowners.<sup>70</sup> Consequently the reforms have failed to be satisfactorily implemented. A counter-reform of increased concentration of land has been the result.<sup>71</sup>

Secondly, one can also draw from another experience of land redistribution in Colombia which has used the strategy of confiscation. In the 1980s and 1990s, the narco-cartels invested heavily in the rural regions; the land subsequently sought confiscated by the state. These lands have in turn been used to relocate the displaced population along with other vulnerable groups in society.<sup>72</sup> As of early 2010, these policies of restitution by confiscation of land for the purpose of restoration and/or relocation of the displaced hardly represent an all-encompassing strategy. According to figures from Acción Social and INCODER from 2002 to 2007, some 54,565 hectares of land was given to 4,653 families. While not discarding these efforts, as they are of huge importance to those who benefit, they represent only 0.9% of the families

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<sup>69</sup> The legal framework for these policies can be found in the following laws: 200 of 1936, 100 of 1944, 135 of 1961, 1<sup>a</sup> of 1968, 4<sup>a</sup> of 1973, 5<sup>a</sup> of 1973, 6<sup>a</sup> of 1975, 35 of 1982, 30 of 1988, and 160 of 1994.

<sup>70</sup> *Colombia Hoy. Perspectivas hacia el siglo XXI*, Jorge O. Melo (ed.), Tercer Mundo Editores, 1995.

<sup>71</sup> Absalón Machado, “Reforma Agraria: Una ilusión que resultó un fracaso”, *Revista Credencial Historia* número 119, 1999.

<sup>72</sup> Law 333 of 1996 and its regulatory Decree 1458 of 1997 makes available 50% of the assets confiscated from narco-traffickers to the displaced population through the *Fondo Nacional para la Atención a la Población Desplazada por la Violencia*.

displaced between 1997 and 2007.<sup>73</sup> More importantly, even though the state has confiscated the land, it controls the land only in the legal sense. Returning to locations where the conflict over land has not been resolved can expose the beneficiaries to great risks. It is a bold strategy that could render immediate results, but it is also a risky strategy that could prove unsustainable and lead to re-victimizations, something that has already been observed.<sup>74</sup>

The main problem of restitution by way of confiscation is the non-compliance of the *postulados*; a problem which is extremely difficult to solve due to the practice of using third parties to hide assets; in Colombia known as the '*testaferrato*'. Of the third parties several actors can be identified. Poor rural people without titles to land make up part of the equation as these were given the right to use land by the armed actors who controlled it. Distribution of land was to a great extent privileging members of the organization as well as constituting a security strategy for the paramilitaries. Other actors who have come to control the usurped land are multinational companies, national companies, agricultural investors which all have an interest in keeping what now is theirs.<sup>75</sup> To understand this latter constellation of actors, who arguably constitute the largest group of these third parties, it is imperative to keep in mind the political objectives of the paramilitary groups. Their goal, according to their assertion, was not to destroy but rather to build and create a new Colombia free from insurgent forces; something that implied the need for economic progress. The paramilitaries were established in areas where the state was absent, and the objective was to bring the state to these areas so that infrastructure would be built and socioeconomic conditions would be improved. To achieve this goal they had to do two things: first remove or co-opt adversary actors in the area, that is, the guerrillas and their allies; and secondly, to initiate

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<sup>73</sup> These figures only include those displaced between 1997 and 2007. The coverage of these policies will thus be even more trifling when including all those displaced before 1997.

<sup>74</sup> ACNUR, *ONU pide investigar asesinato de líder desplazado y requiere protección para otros*, 14 May 2008.

<sup>75</sup> Dario Fajardo, "*El desplazamiento Forzado: una lectura desde la economía política*"; paper presented at *Academia Colombiana de Ciencias Economicas* in Bogotá, 2 November 2005.

viable economic projects that would attract the interest of the state. Now, with regards to the latter it was needed to remove the original holders of the land to make space for progressive large-scale projects.<sup>76</sup> These projects were often ‘legitimate’ and some were even partly subsidized by the state. More often than not, the paramilitaries neither managed nor directly owned these companies, but rather used the aforementioned practice ‘*testaferrato*’ and were able to benefit both personally, organizationally, economically and politically.

The use of *testaferrato* and the considerable efforts made to ‘legalize’ the claims to land can significantly complicate the process of land restitution, as it will be difficult to identify the real holders of rights to the land in the wealth of legal documents that have been produced. Without the compliance of the actors responsible for the displacement, the judicial system will be swamped by claims and counter-claims to the lands in question. In a state where the judicial system is already stretched to its limits, one would expect a very slow progress in determining who has the right to the land. Even if the processes are completed the risk of re-victimization continues to persist, challenging the viability and sustainability of any process of restitution by confiscation.

### **6.5. Concluding Remarks: An Opportunity About to Be Missed?**

Colombia is a country at war. Respecting the right to restitution in such a context represents a momentous challenge. Internal displacements have shaped Colombian society and continue to do so. Several hundred people are being displaced on a daily basis. In the wake of these crimes new political and economic structures have been created and become embedded. The act of displacing a population in Colombia bears generally no costs for the displacer. In order for the perpetrators to assume costs related to the restitution of land, there must also be incentives for them to do so. Accordingly, the only improvement observed in terms of a reduction in the number of displacements took place from 2003 to 2005, at a time when negotiations with the paramilitaries led to demobilization on the promise of legal and social benefits – benefits condi-

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<sup>76</sup> Mauricio Aranguren, 2001, *Carlos Castaño: Mi confesión*, La Oveja Negra Ltda.

tioned on providing reparation to victims, including restitution. The two strategies identified as judicial and negotiated restitution resulted from this process; both depending on voluntary participation and reciprocity. However, as the benefits promised during peace-negotiations became increasingly distant, the demobilised paramilitaries reacted by not fulfilling the conditions imposed on them. Consequently, the CNRR expects that restitution by confiscation will be the norm rather than the exception due to the lack of cooperation on part of the paramilitaries.

Transitional Justice implies a process that differs from ordinary justice, yet the process in Colombia has come to resemble more ordinary judicial processes rather than extraordinary processes. The legal framework has evolved and stands today closer to the international standards established in the Pinheiro and UN Basic Principles. While it is impossible to determine what would have happened if the original TJ framework had been preserved, we can today observe that the process is failing and that all the costs connected to the changes have been covered by the *postulados*. Arguably the increased legal symmetry with international standards seems to be impeding the process as a whole. Indeed, in a state where impunity is the rule rather than the exception, the cost of being outside of the process has become lower than being a part of it. Consequently, paramilitary forces have re-engaged and are again active in most of their former strongholds. Failed peace-processes imply a continuance of conflict which effectively means that victims of conflict will not receive reparations. The numbers of victims will continue to grow, and a re-victimisation of victims is likely to take place. Neither the victims nor the perpetrators stand to benefit. The people most affected by this development are the victims of conflict, in particular the victims of forced displacement. Whereas the perpetrators can return to illegal activities and enjoy the wealth accumulated during war without great risks of being held legally accountable, the victims are deprived of their rights to truth, justice and reparation. Framed in this way, the problem is not whether enough justice and sufficient measures of reparation are being included in the process; but rather that a failure of the process will result in no justice and no reparation for the millions of victims of the Colombian conflict.

## **Extreme Inequality: A Political Consideration. Rural Policies in Colombia, 2002-2009\***

**Francisco Gutiérrez Sanín\*\***

### **7.1. Introduction: A Social Problem and a Puzzle**

Colombia has historically had an extremely serious problem of land inequality. This problem was identified by political elites at least in the early 1930s, but weaknesses in the reformist proposal (Le Grand, 1986) and a posterior internal confrontation known as *La Violencia* maintained over decades the old distribution patterns basically untouched. Pacification allowed new reformist intents in the 1960s. While these intents certainly should not be tagged as eyewash, they failed to produce the proverbial qualitative leap. Over the last three decades – when the country entered into a new wave of internal conflict – the situation worsened dramatically, as the displacement of peasants and the usurpation of their land became both an outcome of confrontation and a strategy of some armed actors. This displacement and usurpation more than reversed the modifications of the status quo produced by the rather shy intents of progressive redistribution initiated in the 1960s. According to one author,

[w]hile from 1980 to 1995 the official land reform institution – INCORA – processed a million hectares for distribution to the peasantry, the expansion of drug lands reversed this trend. Drug traffickers bought up between 3 and 4 million hectares, some 12% of land suitable for agriculture. The cumulative effect from 1980 to 1995 was an agrarian counter-reform. But an even bigger change was

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to come in the next five years: by 2001, the top 3% owned nearly 76% of the land. The concentration rate is even higher if the very biggest property holdings, those over 500 hectares, are reckoned with: in 1984 this 0.4% of landowners held 32.5% of land; in 2001 the top 0.4% held 61.2% of all registered land.<sup>1</sup>

Colombia's state control agencies concur with many aspects of this evaluation. According to a General Comptroller Office report,<sup>2</sup> in the last twenty years, the country has witnessed a "perverse land concentration, equivalent to a gigantic agrarian counter-reform", which has allowed narcotraffickers to take over one million hectares.<sup>3</sup> This figure amounts to 3% of the national territory and 5% of its usable land. According to the *Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado*,<sup>4</sup> this figure is probably a lower estimate.

The human costs of such counter-reform are enormous, as highlighted by the *Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado*.<sup>5</sup> Colombia has one of the highest number of internally displaced people (IDP) in the world. Although there is a large variance in the figures offered by different sources with respect

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<sup>1</sup> Andy Higginbottom, 2005, "Globalization, Violence and the Return of the Enclave to Colombia", in *Development* 48: 121, 123.

<sup>2</sup> Contraloría General de la Nación, "La gestión de la reforma agraria y el proceso de incautación y extinción de bienes rurales", Paper presented at the forum "La extinción de la Propiedad Rural Ilícita. ¿Una vía para la Reforma Agraria?", Bogotá: 7 October 2004.

<sup>3</sup> El Tiempo, "El narcotráfico tiene más de un millón de hectáreas de tierra", 10 June 2005A.

<sup>4</sup> Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado (Garay Luis Jorge, Barberi Fernando, Prada Gladys, Ramírez Clara, Misas Juan Diego), 2008C, "La restitución como parte de la reparación integral de las víctimas de desplazamiento en Colombia. Diagnóstico y propuesta de líneas de acción", *Sexto informe a la Corte Constitucional*.

<sup>5</sup> *Id.*; Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado, 2008A, "Proceso nacional de verificación de los derechos de la población desplazada", *Primer informe a la Corte Constitucional*; Comisión de Seguimiento a la Política Pública de Desplazamiento Forzado, 2008B, "Proceso nacional de verificación de los derechos de la población desplazada. Comentarios a la batería integral de indicadores de goce efectivo de derechos presentada por el gobierno nacional", *Segundo informe a la Corte Constitucional*.

to the magnitude of this problem, it is enormous by any standard: between one and three million people, depending on the count criteria.<sup>6</sup> Furthermore, displacement is one of the few offences whose frequency, according to the main available databases, has not radically decreased in the last years. Indeed, according to some it has actually increased.<sup>7</sup> There is a very strong statistical correlation between land concentration and the displacement of farmers.<sup>8</sup> This correlation is not surprising since nearly 80% of IDPs were land tenants before being evicted.<sup>9</sup> Ibáñez and Querubín also conclude that the presence of non-state armies promotes forced displacement, but that strong institutions and a broad menu of state services mitigate it.

In addition, despite the fact that the country has a working judiciary – which is *not* inconsequential, as will be demonstrated below – the arm of the law has not fully reached the niches where the problem occurs. Only 5% of the cases of forced displacement had been taken to courts by 2005,<sup>10</sup> and only one was eventually adjudicated.<sup>11</sup> As will

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<sup>6</sup> The reasons for this disparity in accounting standards are easy to explain: the government and the main non-governmental source, CODHES, use significantly different methodologies. There have been several debates about the issue (El Espectador, “*Desplazados y Estadística*”, 4 October 2008; Ana María Ibáñez and Andrea Velásquez, 2006, “*El proceso de identificación de víctimas de los conflictos civiles: una evaluación para la población desplazada en Colombia*”, Documento CEDE, 2006-36.) Colombia has 44 million inhabitants, of which 25% (approximately 11 million) live in rural settings. This means that, by the most conservative standards, 9% of the state’s rural population has been displaced.

<sup>7</sup> El Tiempo, “*Desplazados: Un millón más*”, 6 July 2002B; El Tiempo, 2007D, “*Por los desplazados*”, 28 May 2002B; High Commissioner for Human Rights, 2006, “*Annual Report on the Situation of Human Rights in Colombia*”, available online at: <http://www.hchr.org.co/documentoseinformes/documentos/informe2006/documentos.php3?cat=70>.

<sup>8</sup> Ana María Ibáñez and Pablo Querubín, 2004, “*Acceso a tierras y desplazamiento forzado en Colombia*”, Documento CEDE, 2004-23.

<sup>9</sup> Ana María Ibáñez, 2008, *El Desplazamiento Forzoso en Colombia: Un camino sin retorno hacia la pobreza*, Bogotá: Uniandes: 77.

<sup>10</sup> Contraloría General de la Nación, 2005, “*La política pública sobre desplazamiento forzado en Colombia: ¿solo buenas intenciones?*” in *Revista Economía Colombiana* 307: 54-55.

be shown in section 7.4., laws related to forced displacement and land distribution have several imperfections and legal gaps, which have allowed narco-traffickers and paramilitaries, and their cronies and allies, to maintain or even expand their properties.<sup>12</sup> Governmental action has been also extremely modest. Since the late 1980s, one of the most important expectations within Colombian policymaking circles was that the expropriation of criminals would allow the state to redistribute land among the peasants. As will be shown in section 7.3., the state is currently much farther away from that ideal than it was twenty years ago. Additionally, programs to foster the devolution of the land to IDP's in the context of reparation efforts are small. While – as seen above – petty land tenants may have lost at least one million hectares – which with the utmost probability is an underestimate, as it does not take into account selling under threat, the use of figureheads by narcos and paramilitaries, and other phenomena that according to qualitative accounts occurred massively<sup>13</sup> – the restitution plan of the 2002-2006 administration planned to give back one hundred and fifty thousand hectares,<sup>14</sup> a target that was achieved in 2007.<sup>15</sup> This outcome is very modest, even by Colombian standards; until the late 1980s average

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<sup>11</sup> Comisión Colombiana de Juristas, 2006, *Revertir el desplazamiento forzado: Protección y restitución de los territorios usurpados*, Bogotá: Coljuristas.

<sup>12</sup> According to several reports, narco-traffickers and paramilitaries and their cronies and allies hold almost half of the usable land (El Tiempo, “*Narco-traficantes, los dueños del 48% de las tierras productivas*”, 2 September 2003).

<sup>13</sup> Other such phenomena includes the deadweight losses of eviction from the time it occurred until the IDPs are eventually restituted.

<sup>14</sup> El Tiempo, “*Extinción De Dominio Para 150 Mil Hectáreas*”, 8 September 2004A.

<sup>15</sup> To reestablish the status quo ante it would be necessary to retribute between 1.5 and 6.8 million hectares, depending on the estimates (Procuraduría General de la Nación, 2006, *Seguimiento a Políticas Públicas en Materia de Desmovilización y Reinserción, Tomo I*, Manuscript, Bogotá: 185; PMA (Programa Mundial de Alimentos), 2001, *Estudio de caso de las necesidades alimentarias de la población desplazada en Colombia*, Bogotá: CODHES; Conferencia Episcopal de Colombia, 2006, *Desafíos para construir Nación: el país ante el desplazamiento, el conflicto armado y la crisis humanitaria 1995-2005*, Bogotá.)

redistribution was much higher.<sup>16</sup> In other words, restitution during four years compensated for approximately one-eighth of the counter-reform produced by displacement, without touching either the historical redistribution lag or the deterioration caused by other factors different from displacement – and actually lagged behind the already very problematic results of the country in previous years.<sup>17</sup> The situation is quite dramatic in the very terms of the governmental proposal, even if there were no problems with implementation.<sup>18</sup>

Period	Land reallocation	Titulation	Indigenous reserves	Total
1962-1967	98,522	1,560,084	12,615	1,671,221
1968-1972	276,716	1,802,023	61,525	2,140,254
1973-1982	112,529	2,863,960	5,904,267	8,880,756
1983-1987	135,848	1,610,845	3,948,837	5,695,530
1988-1994	574,316	3,460,100	17,661,239	21,695,655
1995-1999	287,655	3,861,503	2,863,971	7,013,129
1962-1999	1,485,586	15,158,515	30,452,454	47,096,555

**Table 1:** Colombia: INCORA results by period (Hectares). Source: Balcázar *et al.*, 2001: 26.

As a result, Colombia is a very unequal country,<sup>19</sup> and its rural sector is even more so.<sup>20</sup> Colombia's rural Gini is 0.84<sup>21</sup> – but once again this may be an underestimation, as there are hundreds if not thousands of figureheads of big properties, and the country's cadastral

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<sup>16</sup> Álvaro Balcázar, Nelson López, Martha Lucía Orozco, and Margarita Vega, 2001, “Colombia: alcances y lecciones de su experiencia con la reforma agraria”, *Red de Desarrollo Agropecuario – CEPAL*, Santiago de Chile.

<sup>17</sup> Table 1.

<sup>18</sup> This is not the case. For official data on government achievements, see SIGOB, available online at: <http://www.sigob.gov.co>.

<sup>19</sup> Mauricio Cárdenas and Luis Javier Buitrago, 2009, *Introducción a la Economía Colombiana*, Bogotá: Alfaomega.

<sup>20</sup> The countryside is dramatically poorer as well (*Departamento Nacional de Planeación, Documento Conpes 3426*, 12 June 2006. Available online at: [www.minagricultura.gov.co/archivos/3426\\_Jun2006.pdf](http://www.minagricultura.gov.co/archivos/3426_Jun2006.pdf)).

<sup>21</sup> In contrast, Japan's is 0.38.

records are extremely inadequate. Certainly, these factors undermine the intent of re-evaluation of Colombia's rural inequality by some studies. For example, Castaño-Mesa argues, based on cadastral records, that Colombia's real agrarian Gini is 0.6.<sup>22</sup> However, his methodology does not hold. One of the main forms of evasion of taxes in Colombia has been registering the property at a fraction of its real value – which can be as small as a tenth – a fact that was already publicly known in the 1950s and that inspired many of the non-expropriatory agrarian redistribution proposals of that decade.<sup>23</sup> And a re-estimation by the World Bank based on the same type of information<sup>24</sup> devolves to the basic figure of 0.85. The real figure must be somewhat nearer to 1; it is hardly possible to go above it. As an illustration of the concrete implications, in a parliamentary debate it was claimed that while eleven thousand landowners accumulated more than 62% of the land, the rest – eleven million – had 38%.<sup>25</sup>

Throughout all this, Colombia has been a democracy. This tag may be challenged for one reason or another,<sup>26</sup> but the competitive nature of its polity cannot. In Colombia, politicians must gather votes, and thus to respond to specific constituencies. Why haven't the 11 million electorally overwhelmed the 11,000? Several additional sticky questions must be considered. Despite the fact that, once again, classifying Colombia as a state where the rule of law has been institutionalized may be more than problematic, the existence of a working judici-

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<sup>22</sup> L. M. Castaño Mesa, 1999, "*La distribución de la tierra rural en Colombia y su relación con el crecimiento y la violencia*", Master's Dissertation: Universidad de los Andes.

<sup>23</sup> The proposed policies would have allowed the state to buy land at its cadastral value. This threat would force landowners to register true values.

<sup>24</sup> World Bank, 2004, "*Colombia: Una política de tierras en transición*", Documento CEDE, 2004-29.

<sup>25</sup> Cámara de Representantes, 2004. And, of course, the top quality land was mainly in the hands of the 11 thousand.

<sup>26</sup> Martín Jiménez and Andrea Carolina, 2008, *Democracia y liberalismo. Convergencias y divergencias en la construcción de la carta política colombiana de 1991*, Bogotá: La Carreta Editores; Jorge Pablo Osterling, 1989, *Democracy in Colombia: Clientelist Politics and Guerrilla Warfare*, Brunswick: Transaction Publishers.

ary cannot be denied. In the period from 2002-2008, the judiciary has taken some crucial decisions, both with respect to IDP's and to land distribution (see section 7.4.). Congress has served as a forum for debate and conflict (see below), and as one of the institutional niches where the paramilitary offensive was more successful, but also as a place where political control has been exercised, in some cases quite effectively. Last but not least, if the international legitimacy of the Colombian state has been permanently questioned in the last decades – due mainly, but not only, to the influence of criminals<sup>27</sup> – an ideal way to recuperate it would be through large-scale anti-criminal and pro-poor reform.<sup>28</sup> Indeed, such reform could have an enormous stabilizing and state-strengthening effect.<sup>29</sup> These potential benefits explain why the idea has produced so much talk – but they do not explain why such talk has produced no decisions (or decisions that actually go in the wrong direction).

In sum, there is genuine competition in Colombian politics – there are true checks and balances, and real incentives that favor the emergence of political forces and trends favoring a redistributive approach. Why then is the outcome so utterly deplorable? This is the main question that I address in this chapter.

However, before starting, I must preempt two potential objections that would indeed weaken the relevance of the question. According to the first one, the answer is obvious. The political class – coalesced around president Álvaro Uribe – not only is substantially linked to the large landowner class, but also has strong regional alliances with paramilitary groups. Less dramatically, it tries to help and protect the

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<sup>27</sup> Tatiana Matthiessen, 2000, *“El arte político de conciliar: El tema de las drogas en las relaciones entre Colombia y Estados Unidos, 1986-1994”*, Bogotá: FES-COL.

<sup>28</sup> Alejandro Reyes, 2009, *Guerreros y Campesinos: El despojo de la tierra en Colombia*, Bogotá: Editorial Norma.

<sup>29</sup> Moreover, such reform would probably be ideal in social and developmental terms. But apart from the normative implications, and thinking only as a self-regarding, rationalistic politician, the benefits of adumbrating such change would not be small either.

rural rich that comprise part of the governing coalition.<sup>30</sup> Thus, the rural policy of the present government demonstrates the capture of key institutions by venal or at least strongly biased politicians. There is more than a grain of truth in this argument, as will be seen below. But the proposition is not fully explanatory. In Colombia and elsewhere, national politicians have many audiences and constituencies, but they sometimes decide to sacrifice the interests of some – even if they are powerful, as has happened in some of the few cases of genuine agrarian reform in the world. Therefore, initiators can be rather unlikely figures (see the cases of El Salvador and Korea).<sup>31</sup> In Colombia, it is clear that the deficit of international legitimacy is a severe burden for the governmental coalition, and that an improvement in this front is passionately desired. Why hasn't there been a bargain between the pressures of a backward and inefficient constituency and the demands of the international community for more transparency? In a more positive light, why haven't the signals of the international community been read adequately? Furthermore, there is an important national system of incentives that might favor a less inert attitude with respect to the agrarian status quo. Politicians can be punished by both judges and voters – and the media – if they go too far in their pro-landowner, and very especially pro-criminal, bias. Why should they take the risk of ignoring these signals? Why, if they do it, aren't they out-competed by other politicians?

The second potential objection is that the agrarian policy of the Uribe administration cannot be described in the terms used above. For example, it might be argued – and correctly so – that investment in the agrarian economy in the last years has been anything but miserly.<sup>32</sup> However, as seen above, the general outcome is not good: not only has restitution not taken place, but actual redistributive action is below the historical average, when between one and three million peasants had

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<sup>30</sup> This includes president Uribe himself. See Mauricio Romero (ed.), 2007, *Parapolítica: La ruta de la expansión paramilitar y los acuerdos políticos*, Bogotá: CEREC – Corporación Nuevo Arcoíris.

<sup>31</sup> Also, unless one incurs in anachronism, Perú.

<sup>32</sup> For example, 1.142 billion pesos were invested in land issues in 2008, which represents almost half of what was invested in national security and defense (the crown's jewel of the Uribe government).

not yet been displaced. Certainly, *adversaries* of the present government might concur with a variation of the theme. Uribe represents nothing new; he simply incarnates a very old trend of complacency of the Colombian state with the agrarian rich. But this is a simplification. As suggested above, there is a new set of crucial factors that characterize the present agrarian situation: a dramatic increase in inequality and criminalization, a loss of redistributive muscle of already weak agrarian policies, the incapacity of the state to neutralize displacement (in contrast with its ability to address other crimes), among other things. The agrarian institutional designs have been substantially changed as well. The two Uribe administrations (2002-2006 and 2006-2010) have exhibited very strong activism in this regard, and also the capacity to push forward important changes.<sup>33</sup> The current situation does not represent business as usual, although of course there is dynamic tension between change and continuity.<sup>34</sup>

The question is, thus, relevant and deserves to be answered. The policies of the two administrations of president Álvaro Uribe have helped maintain extreme levels of inequality and criminalization in the countryside. Why? I suggest the following answer, which constitutes the main proposition of the chapter: three factors converge to preserve extreme inequality in the Colombian countryside.

- (1) The first factor is a political economy: the very conditions of the armed internal conflict have generated a highly criminalized pro-landowner lobby, increasingly connected with the core of the political system.
- (2) The second factor consists of a new institutional landscape, constructed by the first Uribe administration, which used as building blocks concepts and ideas buttressed by the language and values of the international community. The new agrarian institutions

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<sup>33</sup> Carlos Julio Pineda, 2006, “*Apuntes críticos*”, Vision 2019, Bogotá: DNP; Ricardo Sanchez, 2005, *Bonapartismo presidencial en Colombia. El gobierno de Álvaro Uribe Vélez*, Bogotá: Uniediciones.

<sup>34</sup> And business as always was not equivalent to the full capture of the state by agrarian elites, as is implied in many recounts. I drop the issue, as it goes well beyond the limits of the theme of this paper.

created by Uribe held the promise of promotion of transparency, market principles, and participation of civil society. But the true dynamics have been much more complex, and unfavorable to redistribution/restitution.

- (3) Finally, there are key technical issues that remain unresolved. If – be it by weakness or by cunning – they are not brought to the forefront, no positive change in rural affairs is to be expected, even assuming that (1) and (2) did not exist.

In summary, a specific array of institutions, and a set of technical problems, are necessary conditions to explain the present situation of preservation and deepening of extreme agrarian inequality. All three should be taken into account to provide a working explanation of such inequality, and to differentiate between new problems and those that result from historical inertia.

This chapter is organized in the following manner. The first section sketches some basic contextual information about Colombia and the trajectory of the main institutional solutions developed to face the problem of very high levels of agrarian inequality (and inefficiency). The second is dedicated to the political economy of the big landowner lobby. The third discusses the institutional reforms pushed forward by Uribe, their orienting principles, and the way that they have worked. The fourth and last focuses on some of the main technical issues: cadastral records, legal problems, and subnational governments.

## **7.2. The Context**

Colombia has an extremely lengthy history of coexistence between genuinely competitive politics and political violence. In the twentieth century, it only had two rather short-lived military coups (Rafael Reyes, 1905-1910 and Gustavo Rojas Pinilla, 1953-1957). Not only were elections the main method for rotating elites in power, but some basic principles of democratic governance – like the separation of the different branches of government – were fastidiously preserved. Indeed, the country was one of the first to formally introduce constitutional control, and the notion of the crucial role of checks and balances was interiorized very early by the political elites. Colombia, thus, may be a pioneer of the phenomenon of having *simultaneously* high levels

of legalism *and* violent practices, which according to certain accounts have enjoyed fast propagation in recent years.<sup>35</sup> Explosions of violence, some of them related to agrarian issues, surfaced in the early 1930s. President Alfonso López Pumarejo (1934-1938) attempted major reform, and there are different evaluations of its motivations, policies, and outcomes.<sup>36</sup> Furthermore, its political consequences (an increase in the polarization between Liberals and Conservatives) are still understudied. In 1948, a “non declared civil war” that pitted the two main political parties – Liberal and Conservatives – against each other was in full course. It is known in Colombian historiography as *La Violencia*; according to Hobsbawm it constituted the largest peasant mobilization in the western hemisphere in the twentieth century. During *La Violencia*, thousands of peasants were killed and displaced. By 1953, the country had become unmanageable, and General Rojas took over power, promising peace and tranquility. Previous Conservative presidents, and Rojas himself, toyed with the idea of promoting equality via taxes, but the proposals came to nothing.<sup>37</sup>

After the defeat of Rojas’ dictatorship and in the context of a stabilization experiment called National Front (1958-1974), two agrarian reform proposals were pushed forward (in 1961 and 1968). Together, these proposals founded the institutional landscape that would be radically transformed by president Uribe. The 1961 reform (Law 135) was inspired by a set of ideas, tools, and solutions, of which I sketch here the main ones. First, there was an excess of land concentration in the country, which produced both inequality and inefficiency. Second, the real alternative that society faced was not whether to reform, but whether to reform or to wait for a revolution.<sup>38</sup> Third, the state should

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<sup>35</sup> Luis Jorge Garay, 2008, *La captura y reconfiguración cooptada del Estado en Colombia*, Bogotá: Grupo Método.

<sup>36</sup> See, for example, Catherine LeGrand, 1986, *Frontier expansion and peasant protest in Colombia, 1850-1936*, Albuquerque: University of New Mexico Press; Albert O. Hirschman, 1962, *The Problem of Land Tenure and Land Reform in Colombia*, New York: Manuscript.

<sup>37</sup> *Id.*

<sup>38</sup> Jesús Antonio Bejarano, 1987, *Ensayos de historia agraria colombiana*, Bogotá: Cerec.

produce an institutionalization that included the main rural actors. Finally, expropriation was a tool that should be used only in extreme cases. The standard tool for redistribution was the purchase of land by the state. Law 135 created an autonomous agency (INCORA, Instituto Colombiano de Reforma Agraria), which had several attributes, but was primarily focused on spotting inefficient use of the land and negotiating with its owners and eventually with peasant organizations.<sup>39</sup> Both peasant and landowner organizations participated in the INCORA's board.<sup>40</sup>

Despite the large expectations triggered by the Law 135,<sup>41</sup> it did not produce significant change. This prompted the 1966-1970 Carlos Lleras<sup>42</sup> administration to unleash yet another reformist wave. Based on the belief that pressure from above must be combined with pressure from below, Lleras promoted a new peasant organization, the Asociación Nacional de Usuarios Campesinos (ANUC).<sup>43</sup> However, foot-dragging by politicians, and intense landowner pressure, which included violent methods,<sup>44</sup> *inter alia*, stalled Lleras' reformist impulse. In 1972, the new administration signed with the landowners the Chicoral Pact, which in practice meant the termination of the experiment. In the meantime, some downsides of INCORA's activity had surfaced. First, there was corruption by bureaucrats. In exchange for a bribe, INCORA could offer: (a) to expropriate lands and purchase them at above-market prices; or (b) not to expropriate lands. Second,

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<sup>39</sup> INCORA, 1966, "Five Years of Agrarian Reform: Report of Activities in 1966", Bogotá.

<sup>40</sup> Among others: SAC (Sociedad de Agricultores de Colombia), Fedegan (Federación Colombiana de Ganaderos), de la Anuc (Asociación Nacional de Usuarios Campesinos), Anmucic (Asociación Nacional de Mujeres Campesinas e Indígenas de Colombia), Fanal (Federación Agraria nacional), Onic (Organización Nacional Indígena de Colombia).

<sup>41</sup> Hirschman, *supra* n. 36.

<sup>42</sup> Lleras had been the *eminence grise* of Law 135 and other redistributive proposals.

<sup>43</sup> For an excellent historical study of the ANUC, see Leon Zamosc, 1986, *The Agrarian Question and the Peasant Movement in Colombia: Struggles of the National Peasant Association 1967-1981*, Cambridge: Cambridge University Press.

<sup>44</sup> Cristina Escobar, 1983, *Trayectoria de la ANUC*, Bogotá: JC Impresiones.

there was inefficiency. Finally, the reform was unable to make a breakthrough.

Subsequent administrations attempted to implement different models of agrarian development, but the idea of redistribution never again returned to the central position it had had in the 1960s. President Barco (1986-1990) brought the theme back to the political agenda, but in a new manner typical of the period: land expropriation was now conceived of in terms of the fight against criminality. Actually, Barco took a bold step in this direction, issuing a 1989 decree that reversed the burden of the proof for people linked to organized crime by demanding they demonstrate that they had acquired their land legally.<sup>45</sup> However, the Supreme Court declared the decree unconstitutional, and the government – harassed by a very brutal war against narcotraffickers – shelved the issue.

All in all, the reform efforts had produced little. One expert arrives at the following conclusion:

In fact, particularly during the last forty years of attempts of land redistribution, there was not even a marginal change in the property structure nor in the poverty and rural marginality. But the country spent 3.500 million dollars attempting some effect through the actions executed by the INCORA. In almost forty years of agrarian reform the following results were achieved: by acquisition, and almost marginally by expropriation, 1.5 million hectares have been redistributed; almost 102 thousand families were benefited; a bit more than 430 thousand families gained property rights over wastelands; and more than 65 thousand families in indigenous communities profited from the demarcation of indigenous reserves. ... In average, the cost of each benefited family was higher than 35 thousand dollars, and each redistributed hectare cost 2.450 dollars.<sup>46</sup>

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<sup>45</sup> Decree 1893/89; I return to the point in section 7.4.

<sup>46</sup> Balcázar *et al.*, *supra* n. 16.

Thus, by the 1990s, the “old model” – born under the aegis of the CEPAL and the Alliance for Progress – had run out of gas. A significant shift took place with Law 35 of 1982 and Law 30 of 1988, when it was decided that administrative action – say, an INCORA decision – would be replaced by market mechanisms. In 1994, the latter acquired concrete form: peasants would be given subsidies to buy land.<sup>47</sup> However, this market mechanism did not work very well, and new institutional reforms were introduced to reinforce citizen participation in the reform process.<sup>48</sup> A national system of agrarian reform and the national council of agrarian reform were created; these mimicked an institutional solution that had been utilized, with mixed results, since the early 1990s to introduce coherence and agency coordination into many crucial policy domains. However, redistributive results became increasingly weaker.<sup>49</sup> In five years (1995-1999), the land incorporation pace to the *Fondo Nacional Agrario* (the entity that centralized redistributive issues) fell to 286,939<sup>50</sup> and the number of families that benefited from governmental redistributive actions fell to 19,397. Agency coordination could not be achieved.<sup>51</sup>

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<sup>47</sup> Law 160 of 1994.

<sup>48</sup> Absalón C. Machado and Henry Samacá, 2000, *Las organizaciones del sector agropecuario: Un análisis institucional*, Bogotá: TM Editores.

<sup>49</sup> Table 2.

<sup>50</sup> Table 3.

<sup>51</sup> Balcázar *et al.*, *supra* n. 16.

Year/properties	0-20	20-100	100-500	>500
1984	86.2	10.7	2.7	0.4
1996	86.8	10.6	2.3	0.3
2003	87	10.4	2.2	0.4
Years/owners				
1984	85.1	11.3	3	0.55
1996	86.2	10.8	2.6	0.35
2003	86.3	10.7	2.6	0.4
Years/area				
1984	14.9	24.7	27.5	32.7
1996	13	21.5	20.8	44.6
2003	8.8	14.6	14	62.6

**Table 2:** Evolution of the Property Structure 1984-2003 (%). Source: Machado A.: La cuestión agraria en Colombia a fines del milenio, El Áncora Editores, Bogotá.<sup>52</sup>

Period	Purchase	Expropriation	Cession	Total
1962-1967	92,870	5,652	259,339	357,861
1968-1972	251,385	25,331	80,768	357,702
1973-1982	78,781	33,748	9,147	121,859
1983-1987	132,726	3,122	3,564	139,412
1988-1994	573,070	1,246	1,183	575,499
1995-1999	286,118	1,537	0	287,655
1962-1999	1,414,950	70,636	354,001	1,839,988

**Table 3:** Colombia: Land Incorporated to the *Fondo Nacional Agrario* by Period (Hectares). Source: Balcázar *et al.*, *supra* n. 16: 26.

The reasons for the failure of the policies typical of the 1990s are well identified. The provision of subsidies only for land purchase weakened the will of peasants and other economic agents to develop viable productive packages that included technological improvement.<sup>53</sup> There was a political economy of subsidy distribution, which allowed intermediaries – both politicians and bureaucrats – to charge tolls, for their decisions. Though the idea was actually to skip intermediaries,

<sup>52</sup> For 1984 and 1996, the following departments are excluded from the analysis: Antioquia, Chocó, San Andrés y Providencia, Guainía, Vichada, Putumayo, Amazonas, Vaupés, and Guaviare. For 2003, the following territorial entities are also not included: Bogotá, Cali, and Medellín.

<sup>53</sup> World Bank, *supra* n. 21.

peasants were much less organized than their counterparts – in good measure because of the bloodletting to which peasant social leaders had been submitted<sup>54</sup> – so the notion of direct negotiations that had seemed so enticing to the architects of the institutional redesign was quite problematic. Subsidies also did not improve the coordination capacity of the state.<sup>55</sup>

Región	2002	2003	2004	2005	2006	2007	2008*	Total
Antioquia	6						1	7
Arauca	1	1	2		1	3		8
Santander	3					1		4
Huila	2	1	1					4
Cesar	1	1						2
Atlántico		3		2				5
Chocó		1	1		1			3
Putumayo			1	1			1	3
Sucre						2		2
Bolívar						1		1
Cundi-namarca	1							1
Cauca		1						1
<b>Total</b>	14	8	5	3	2	7	4	41

**Table 4:** Peasant Leaders Assassinated in Recent Years, by Year/Department. \* through June. Source: Calculations based on the Noche y Niebla publication, CINEP, January 2002–June 2008.

Thus, when Uribe arrived in power, the situation was the following: the country had a long history of high-levels of agrarian inequality, which had been seriously worsened by two waves of violence – one that began in 1948, and one that began in the early 1980s. With respect to the policy utilized to meet the problem, leaving aside the 1936 experience, successive governments had tried their hand basically with four models. First, the use of an administrative tool – expropriation with compensation, via a specialized agency (INCORA). In this model, agrarian redistribution was given a relatively big political

<sup>54</sup> See, e.g., Human Rights Watch, “Colombia: New Killings of Labor Leaders”, 6 November 2007. Available online at: <http://www.hrw.org/en/news/2007/11/06/colombia-new-killings-labor-leaders> and Table 4.

<sup>55</sup> World Bank, *supra* n. 21.

weight, but crucial issues were negotiated with all actors. Second, the preservation of those tools, but the deflation of the political importance of the issue. Third, the coupling of agrarian redistribution and anti-crime policies. Fourth, the closing the chapter of administrative decisions, and opening of a market-oriented one, with a very low political profile. In which conditions would the reformulation of Uribe's era take place?

### 7.3. The Landowner Lobby

The weight of large landowners in the Colombian political system is one of the obvious reasons that Colombia has not witnessed a significant change in its agrarian property structures. Through opposition or foot-dragging, large landowners could sabotage reforms from above.<sup>56</sup> Through pressure and outright violence – even in the National Front period, which was relatively pacific – they could neutralize pressure from below.<sup>57</sup> Note that even in the most redistributive moments, big landowners had key access to decision-making bodies, including the INCORA board.

The dynamics of the armed conflict worsened the situation in at least three distinct senses. First, the rural elites were empowered in specific areas, like security. States habitually establish working relations with their “natural” clients and constituencies, which are created by need or custom.<sup>58</sup> As cattle ranchers and other rural rich became the preferred target of offences triggered by the conflict – like kidnapping and cattle rustling – networking between them and state agencies appeared or, probably in the majority of cases, strengthened and became more important for both parties. Landowners provided gas, food, and lodging to rural cops and other security agency members.<sup>59</sup> Local secu-

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<sup>56</sup> Gutiérrez and Baquero, 2007.

<sup>57</sup> Cristina Escobar, 1998, “*Clientelism, Mobilisation and Citizenship: Peasant Politics in Sucre, Colombia*”, Ph.D. Dissertation: University of California, San Diego.

<sup>58</sup> Romero, 2005.

<sup>59</sup> Gustavo Duncan, 2006, “*Los señores de la guerra: de paramilitares, mafiosos y autodefensas en Colombia*”, Bogotá: Planeta.

rity forces, on the other hand, were expected to at least pay special attention to the interests of their patrons. At the national level, associations like the SAC (*Sociedad de Agricultores de Colombia*) became privileged and often raucous interlocutors of the state in security issues.

Second, a long-term process of criminalization of the rural elites took place. The two-thronged process by which this occurred has been described in detail by several authors,<sup>60</sup> and here I only provide a very sketchy description. On the one hand, the traditional rural rich, as the main targets of some of the forms of the guerilla struggle (for example, kidnapping) became involved with the creation of self-defense groups. Indeed, a headcount of the creators of early self-defense entities found that cattle ranchers and drug traffickers, together with active and retired members of state security agencies, were prevalent.<sup>61</sup> With the brutalization of the methods of the guerrilla, the direct involvement in conflict became bigger and bigger. According to an opinion poll applied in the Association of Cattle Ranchers,<sup>62</sup> 57% of respondents thought most of the cattle ranchers supported the paramilitary, and 32% thought supporting the guerrillas was the rule. Direct involvement was not rare.<sup>63</sup> Coexistence and continuous interaction with non-state armed groups and drug traffickers – which frequently coexisted and allied – exposed the traditional rich to a new repertoire of methods, visions, and ways of dealing with social conflict. But such interaction also edified the illegal groups. The illegal groups learned that legal entrepreneurs were not only a potential ally – which they eventually could decide to bully and extort, acting as a praetorian guard – but also

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<sup>60</sup> Alejandro Reyes, 1997, “*Compra de tierras por narcotraficantes*”, in (several authors), “*Drogas ilícitas en Colombia. Su impacto económico, político y social*”, Bogotá: Ariel-PNUD-Dirección Nacional de Estupefacientes: 279-346.

<sup>61</sup> Francisco Gutiérrez and Mauricio Barón, 2006, “*Estado, control territorial paramilitar y orden político en Colombia*”, in *Nuestra Guerra sin Nombre*, Bogotá: IEPRI.

<sup>62</sup> Sandra Piedad Castro Contreras, 2008, “*Aproximación crítica al discurso ideológico de Fedegan: 1985-2006*”, Master’s Dissertation: Universidad Nacional de Colombia, Bogotá: 120-22.

<sup>63</sup> Carlos Medina Gallego, 2005, “*La economía de guerra paramilitar: una aproximación a sus fuentes de financiación*”, in *Análisis Político* 53: 76-87.

a bridge to obtain access to the state (beyond security agencies, with whom both paramilitaries and the rural rich had fluid relations). For example, Vicente Castaño – one of the most prominent paramilitary leaders, who did not join the peace process with the government – made the following statement in 2005:

In Urabá we have oil palm crops. I myself have persuaded entrepreneurs to invest in those long-lasting and productive projects. The idea is that rich people invest in those projects in different zones of the country. When the wealthy go there, State institutions follow. Unfortunately, State institutions only participate in these ventures when rich people are involved. We have to take the wealthy to all corners of the country, and that is one of the missions of all our commanders.<sup>64</sup>

On the other hand, the conflict and the full insertion of Colombia in the global coca market provided the conditions that allowed the massive acquisition of land by narcotraffickers and paramilitaries.<sup>65</sup> A substantial part of the land was acquired under the guise of normal purchase, but, as noted above, there also existed violent expropriation and threats. Given the nature of the phenomenon it is difficult to provide a solid quantitative evaluation, but Reyes' guesstimates suggest that narcos held ten million hectares by 1995; if anything, this figure has increased in recent years.

Third, the connection between the political system and this new rural elite – empowered policy-wise and highly criminalized – became increasingly stronger. Certainly, in the old rural Colombia, the alliance between the big landowner, the politician, the mayor, and the priest was commonplace, and informed both literature and early social scien-

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<sup>64</sup> See: <http://doblecero.blogspot.com/archive/2008/06/index.html>, quoting an interview given by Castaño to *Revista Semana*.

<sup>65</sup> Reyes, *supra* n. 28; Absalón Machad, 2004, “*Tenencia de tierras, problema agrario y conflicto*”, Available online at: [www.virtual.unal.edu.co/cursos/humanas/2004945/docs\\_curso/descargas/2da%20sesion/Basica/Absalon%20Machado.pdf](http://www.virtual.unal.edu.co/cursos/humanas/2004945/docs_curso/descargas/2da%20sesion/Basica/Absalon%20Machado.pdf).

tific reflections.<sup>66</sup> However, this picture of total control reflected faithfully only the conditions of extreme cases. Furthermore, local closures were on occasions compensated by some activity from the center. For example, president Carlos Lleras Restrepo named for a few months Apolinar Díaz Callejas, a Liberal radical, as governor of Sucre, one of the most backward departments and a bastion of landowner power.<sup>67</sup> This is an extreme example, and certainly it was not the norm, but it reflects the dynamical tension between rules and objectives of politics at the center, and town, landowner dominated politics. By the late 1980s, the alliance between clientelistic political barons, paramilitaries, and rural rich was producing full closure in certain regions, and acting as the link between the parties and the central state.<sup>68</sup> This trend was reinforced by the transformation of the paramilitary into large, armed machines,<sup>69</sup> which could provide security, punish dissidents, and coordinate the interests of both regional elites and state agencies.

The current situation, thus, is the following. First, there is an already long tradition of interaction between certain legal rural rich – especially cattle ranchers – and paramilitary groups. Second, there is a strong mix of legal and illegal agrarian agents. Third, the first two factors have converged to create and strengthen a strategy of destruction of peasant resistance and eviction of uncomfortable dwellers. Furthermore, rural elites and paramilitary machineries have been able to build relatively stable territorial structures of governance, in which they hold full control. A simple quantitative exercise<sup>70</sup> reveals that there is a very strong and statistically significant correlation between political homicide and displacement, and between paramilitary presence and dis-

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<sup>66</sup> See, e.g., Francisco Leal Buitrago and Andrés Dávila, 1990, *Clientelismo. El sistema político y su expresión regional*, Bogotá: TM Editores; Christopher Abel, 1987, *Política, iglesia y partidos en Colombia: 1886-1953*, Bogotá: FAES; Javier Guerrero Barón, 2007, *Los años del olvido: Boyacá y los orígenes de la violencia*, Tunja: Uptc.

<sup>67</sup> Díaz faced staunch landowner resistance, and eventually resigned.

<sup>68</sup> Leal and Dávila, *supra* n. 66.

<sup>69</sup> Duncan, *supra* n. 59.

<sup>70</sup> Table 5. The quantitative exercise consists of a classical correlation between political homicide ratio per 1.000 habitants, displacement per 1.000 habitants, and the presence of paramilitary groups.

placement – but none between political homicides and paramilitary presence. These results sit well with the qualitative narratives that show how non-state armies and criminalized economic agents can have an interest in providing security and deflating petty crime,<sup>71</sup> while maintaining as a last resort the use of selective violence against social leaders and vulnerable sectors of the population whose assets can be taken away. Fourth, it has been fully proved – by the judiciary, NGO's, and researchers<sup>72</sup> – that in these paramilitarized fiefdoms illegal actors and rural elites have very dense networks involving state agencies and officials. Crucial aspects of this interaction are: the capture of the electoral apparatus;<sup>73</sup> the capture of the entities in charge of the registration of land property (notaries, and the *oficinas de registro e instrumentos públicos* (ORIP)); the capture of many policy making agencies;<sup>74</sup> and, finally, the capture of the agencies in charge of the provision of security.<sup>75</sup> Through this power clearinghouse, rural elites and paramilitaries can combine threat with legal manipulation to override any semblance of genuine political competition. If necessary, the repertoire can be broadened by offering both sticks and carrots. For example, in a meeting organized by Jorge 40, the paramilitary that dominated for years a

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<sup>71</sup> Gutiérrez and Barón, *supra* n. 61; Francisco Gutiérrez and Mauricio Barón, 2008, “Subsidiary Orders. Coca, Emeralds: War and Peace”, in *Colombia Internacional* 67: 102-29; León Valencia, 2007, “Los caminos de la alianza entre los paramilitares y los políticos”, in *Parapolítica: La ruta de la expansión paramilitar y los acuerdos políticos*, Bogotá: CEREC – Corporación Nuevo Arcoiris: 11-59; PNUD, 2003, *Callejón con salida. Informe Nacional de Desarrollo Humano para Colombia*, Bogotá: PNUD.

<sup>72</sup> See, e.g., Gustavo Duncan, 2005, “Del campo a la ciudad: la infiltración urbana de los señores de la guerra”, Documento CEDE, 2005-2; Corporación Nuevo Arco Iris, 2007, “Los caminos de la alianza entre paramilitares y políticos”, *Arca-nos* 13.

<sup>73</sup> Cecilia López Montaña, 2008, “Carimagua, un modelo desplazador”, Manuscript.

<sup>74</sup> Gutiérrez, 2009.

<sup>75</sup> Carlos Medina Gallego, 1994, *La violencia parainstitucional, paramilitar y parapolicial en Colombia*, Bogotá: Rodríguez Quito; Alejo Vargas, 2002, *Las fuerzas armadas en el conflicto colombiano. Antecedentes y perspectivas*, Bogotá: Intermedio.

good part of the Caribbean Coast, the politicians that attended were promised not only a fixed quota of votes but also a percentage of the contracts paid by the municipalities.<sup>76</sup> In exchange, they had to promise fidelity and discipline (for example, abstaining from invading territory allotted to other politicians).

Descriptive Statistics			
	Median	Standard Deviation	N
Political Homicide per 1,000 Habitants	0.11957	0.163229	231
Displaced People per 1,000 Habitants	10.13487	12.812708	231
Presence of Paramilitary Groups	1.29	0.885	231

Correlations				
		Political Homicide per 1,000 Habitants	Displaced People per 1,000 Habitants	Presence of Paramilitary Groups
Political Homicide per 1,000 Habitants	Pearson correlation	1	0.421(**)	0.031
	Sig. (bilateral)		0	0.642
	Square sum and cross-product.	6,128	202,639	1,022
	Covariance	0.027	0.881	0.004
	N	231	231	231
Displaced People per 1,000 Habitants	Pearson correlation	0.421(**)	1	0.135(*)
	Sig. (bilateral)	0		0.04
	Square sum and cross-product.	202,639	37,758.064	351,882

<sup>76</sup> Though, they were warned, with a bound.

	Covariance	0.881	164,165	1.53
	N	231	231	231
Presence of Paramilitary Groups	Pearson correlation	0.031	0.135(*)	1
	Sig. (bilateral)	0.642	0.04	
	Square sum and cross-product.	1,022	351,882	179,983
	Covariance	0.004	1.53	0.783
	N	231	231	231

**Table 5:** Correlation between Political Homicide, Displacement, and Paramilitary Presence. \*\* The correlation is meaningful at 0.01 (bilateral) level.  
\* The correlation is meaningful at 0.05 (bilateral) level.

Fifth, the nature of the connection with the center changed. Leal and Dávila showed that in the late 1980s, paramilitarized leaders could utilize party tags to gather the votes and castigate extra-systemic threats; however, these leaders played a subordinated role in the political system.<sup>77</sup> In recent years, they have come to the forefront because of their ability to also produce intra-systemic exclusion – marginalizing from the competition other traditional politicians – and to sell security to actors. Researchers found that in the 2006 elections, 33 senators out of 100<sup>78</sup> and 50 representatives of the Lower House out of 165 were elected in paramilitary-controlled regions. Summed, these politicians obtained 1,845,773 votes.<sup>79</sup> Of course, it cannot be claimed that being elected in a paramilitary region is proof of complicity, but it is probable that it would not have been possible to get any massive support without some kind of permission.

In an important paper, Acemoglu, Robinson, and Santos<sup>80</sup> found through a series of quantitative exercises that: (a) there is a strong correlation between paramilitary presence and intensity of preferences for

<sup>77</sup> Leal and Dávila, *supra* n. 66.

<sup>78</sup> One hundred and two if the special districts for minorities are included.

<sup>79</sup> *Semana*, “*Para entender la Para política*”, 10 February 2007.

<sup>80</sup> Daron Acemoglu, James Robinson and Rafael Santos, 2009, “The Formation of the State. Evidence from Colombia”, Manuscript.

the president and his allies; (b) politicians who receive the most votes in paramilitary areas have been particularly supportive of crucial Uribe bills (particularly the reelection one).

These factors, in conjunction, demonstrate the development of a new, highly criminalized, agrarian lobby with much greater leverage at the center than it previously had. It is in this context that we can understand the continued stream of initiatives that favored the legalization of the land of the paramilitaries and other illegal or semilegal agents. Here are some examples:

- a. The Rural Development Statute (Law 1152 of 2007) included the possibility of acquiring land for an alleged owner who could demonstrate pacific possession for five continued years.<sup>81</sup> Furthermore, the legalization could only be countered by the oral *in situ* testimony of a witness who declared that possession had been shorter or non-pacific. Because of security and costs issues, this clause prevented evicted peasants from countering spurious claims to the land property by violent actors.<sup>82</sup> The bill was presented by the Agriculture Minister Andres Felipe Arias. Eventually, it was modified to include clauses that guaranteed that the cleaning up could not take place in protected regions or with high rates of displacement.<sup>83</sup>
- b. The Statute also established high thresholds for accessibility to subsidies – implicit, for example, in the demand of presenting viable productive projects – although the government insisted that the peasant requests would be assessed by local and national agencies. Though the Statute was approved in both Houses, it was declared unconstitutional by the Court in March 2009, because it had not been approved with the participation of peasants

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<sup>81</sup> El Tiempo, “Polémica por proyecto que legaliza tierras”, 18 September 2004B; El Tiempo, “Urgen suspender la vigencia de la ley de tierras”, 28 September 2004C.

<sup>82</sup> María Paula Saffon and Rodrigo Uprimny, 2008, “El potencial transformador de las reparaciones. Propuesta de una perspectiva alternativa de reparaciones para la población desplazada en Colombia”, Working Paper.

<sup>83</sup> Article 137.

and minorities (indigenous peoples and Afro-Colombians), as the 1991 Constitution requires.

- c. Law 1182 of 2008. Presented three times (2003, 2005, and 2006) to the Congress for consideration, this initiative originally included the possibility of acquiring land by proving a continued and peaceful occupation of the terrain. This condition prevented the law from passing, as it provided an opportunity for illegal occupation to be legalized. The next two attempts included modifications: the abovementioned procedure was eliminated, and the responsibility for correcting property titles with a false tradition was given to promiscuous judges.
- d. The Law of Peace and Justice (Law 975 of 2005) established that paramilitary leaders should devolve goods acquired through violence or other illegal means. However, it never established how, when, nor the ways in which devolution would be evaluated. Certainly, these details remain unknown today. Decree 3391 calls on the paramilitary to devolve the lands they have snatched, which not surprisingly has not occurred. By the end of 2008, the president of the National Commission of Reparation and Reconciliation, Eduardo Pizarro, declared that: (1) the devolution had been practically inexistent; (2) the paramilitary leaders had cheated; and (3) neither the Commission nor other state agencies had a real estimate of the amount of land that the paramilitaries should give back.<sup>84</sup> No action whatsoever ensued.
- e. A piece of land of 17,000 hectares had been allotted – following prescriptions of the Constitution Court – to displaced people. The decision was reversed by the Ministry of Agriculture. Arguing that the management of Carimagua by poor people would be highly inefficient, the Ministry surrendered it to a group of entrepreneurs. It surfaced afterwards that this group included very

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<sup>84</sup> *Semana*, Eduardo Pizarro Leongomez's talk at the forum "*Destierro y Reparación*", Medellín: 15 September 2008.

well-connected people.<sup>85</sup> Eventually, the government found that its proposal was unviable, and had to find a formula to back off without losing face.<sup>86</sup>

- f. The attempt to legalize land seized by palm oil entrepreneurs in territories owned by Afro-Colombian communities of the Pacific Coast, which is prohibited by law.<sup>87</sup>
- g. In June 2008, 38,144 hectares were allocated in Vichada. Thirty-one cases of irregular beneficiaries were detected. They included people strongly linked to Habib Merheg, at the time, vice president of Colombia Viva (one of the parties supporting president Uribe). For example, Eduardo Javier Parra, Colombia Viva Secretary, received 1,279 hectares, and Carlos Andres Vega Ortíz, Colombia Viva coordinator in Valle, Nariño, Antioquia, Casanare, Caldas, Quindío, and Chocó received a grand total of 1,112 hectares.<sup>88</sup>

## 7.4. Institutions

### 7.4.1. The Assumptions

The reader will note that the previous narratives have a common and rather bizarre pattern. The governmental coalition attempts to push

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<sup>85</sup> For example, Mario Escobar, uncle of a Minister, member of the board of the agency that was to implement the decision, and donor to the presidential campaign.

<sup>86</sup> El Tiempo, “*Expertos dirán qué hacer con carimagua*”, 4 February 2008A. The main debate is captured by two opposing statements. The first one is made by the opposition Liberal senator Cecilia López, “Carimagua: modelo desplazador” (“Carimagua: displaced model”). Agriculture Minister, Andres Felipe Arias, replied to this document with a document entitled: “Carimagua: oportunismo difamador” (“Carimagua: defamed opportunism”).

<sup>87</sup> El Tiempo, “*Afrodescendientes ganan ‘round’ a palmicultores*”, 15 October 2007F; El Tiempo, “*Tensión en tierras de palma de urabá*”, 23 October 2007G. Law 70 of 1993. For additional events of this type, see the next section.

<sup>88</sup> El Tiempo, “*Más de 38 mil hectáreas del vichada pasaron ilegalmente a manos de amigos de senador Habib Mehreg*”, 6 June 2008D. In Vichada, more than thirty-eight million hectares passed illegally through the hands of friends of Senator Habib Merheg.

forward a bill, which eventually fails, basically because of judicial controls (but also, as in the case of Carimagua, because of public outrage). The agrarian lobby is powerful, but not omnipotent.

More is needed to gain a better understanding of the political dynamics that help to explain the extremely unequal outcome of the Colombian rural world. Institutions are the second key dimension to the puzzle. As reported in section 7.1., the redistributive proposals of the 1960s ran out of gas. The governments of the 1990s – following the neoliberal vogue that was so influential in the configuration of institutional designs<sup>89</sup> – conceived of a new set of rules that gave the sector a market orientation. As in other cases,<sup>90</sup> such reconfiguration was based on a diagnosis that was far from unreasonable. The old agrarian redistribution implemented by INCORA involved very high transaction costs. In effect, it did not give a premium to efficiency. The new market rules of the game, however, brought their own problems, which were synthesized in section 7.2.<sup>91</sup> During his first campaign, Uribe made explicit his intent to go forward with pro-market orientation,<sup>92</sup> and in generating new emphases mainly on efficiency rather than redistribution. The latter would still be a component of the Uribe's agenda, but with caveats. First, the land to be bought for agrarian reform should be high quality. Second, it was necessary to avoid “unproductive fragmentation”. Beneficiaries of redistributive policies would also get cheap credit, technology and other assistance to commercialize their products. All of this was clad in a discourse of “fraternity” and equilibrium. Uribe and his team wanted to steer clear of both “feudalistic excesses” and “populist [*agraristas*] discourses that foster class hate”.

Once in government, the whole institutional landscape was reconfigured. The decision to liquidate the INCORA was taken in May

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<sup>89</sup> Peter H. Hall, 2001, *Varieties of Capitalism*, New York: Oxford University Press.

<sup>90</sup> See Gutiérrez, 2009.

<sup>91</sup> The complete evaluation is found in World Bank, *supra* n. 21.

<sup>92</sup> El Tiempo, “*Que campesinos sean empresarios*”, 29 April 2002A.

2003.<sup>93</sup> That same day, a new entity, INCODER (Instituto Colombiano de Desarrollo Rural) was created.<sup>94</sup>

INCORA	INCODER
In 2002 it had 2,300 functionaries.	In 2006 it had 796 functionaries.
It was the main agent of the agrarian policy.	It acts as a policy coordinator through various collegiate scenarios at the regional level.
It was in charge of state property clarification and indigenous reserves matters.	These functions, as the source of major administrative controversy, were transferred to other public institutions.

INCODER was in charge of the coordination of the national system of rural development.<sup>95</sup> Since the promulgation of the Rural Development Statute, it would eventually have to coordinate the *Consejo Nacional de Tierras*,<sup>96</sup> the *Unidad Nacional de Tierras* – in charge on state-owned land, and their subnational entities. Since INCODER was the technical secretariat of the national system and it was a policy to make the agency as bureaucratically thin as possible, land property problems were dispersed among several agencies. The *Dirección Nacional de Estupefacientes* (National Directory of Narcotics) would take the land of the criminals and transfer it to the common fund for agrarian reform (*Fondo Nacional de Tierras*). In 2007, *Acción Social* (Social Action) was – against the explicit will of its director<sup>97</sup> – empowered with the decision-making capabilities to restitute land to displaced people (and the responsibility to follow up throughout the process).

The other two main functions of INCODER are: (1) to allocate public funds to specific projects; and (2) to act as an intermediary between rural producers and financial institutions. Distribution of subsidies and decisions to purchase land would be taken on technical bases,

<sup>93</sup> Decree 1292 of 2003.

<sup>94</sup> Decree 1300 of 2003.

<sup>95</sup> The precedent is Law 160 of 1994, which created the National System for Agrarian Reform and Rural Peasant Development.

<sup>96</sup> National Council of Land, a figure created by the Rural Development Statute, declared unconstitutional in March 2007.

<sup>97</sup> See: *Acta de Plenaria* 56 of 13 June 2007.

would radically deflate transaction costs, put a renewed emphasis on efficiency, and allow for the coordination of market forces and civil society agents. For example, the board of the National Council of Land<sup>98</sup> included representatives of ethnic minorities (Afro-Colombians and indigenous peoples), peasant organizations, civil servants, and representatives of the private sector

#### **7.4.2. Institutional Inertia**

From the very beginning, the reorganization of the rural sector suffered from institutional inertia. There were basically three institutional problems that carried over from the past (and that occasionally expressed long-term trends). First, a supposedly equilibrated participation of different sectors in the agencies in charge of redistribution ended up empowering rural elites, precisely because the conditions of extreme inequality that supposedly were to be dealt with gave them too great an advantage at the outset. Notice that the INCODER and CONATI board compositions – Tables 7 and 8 – are similar, and basically reproduce the INCORA institutional design. The difference is that now, the bloodletting of leadership – which was already a nasty reality in the 1960s, but at a much lower level<sup>99</sup> – put social organizations on even worse footing. Second, the regional and municipal capture of the state by illegal agents, mainly paramilitaries, seriously perturbed the plans to enrich the agrarian institutional life with participatory activity. In particular, the framers of the 1991 Constitution had expected that decentralization, by empowering municipalities, would also empower citizens as decision-makers. In fact, such decentralization instead increased accessibility for paramilitaries. This increased accessibility, of course, has everything to do with property rights and land use. Criminal and/or paramilitary bosses could take mayors of small municipalities under their protection. As such municipal-level figures now had more powers – including, crucially, the ability to set and collect land

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<sup>98</sup> See Table 7.

<sup>99</sup> See Table 3.

taxes<sup>100</sup> – they became a preferred target for illegal agents to gain influence and access to decision-making.

The Agriculture and Rural Development Minister, or his delegate, who leads the Council.
The Environment, Housing, and Territorial Development Minister, or his delegate.
The Inner Affairs and Justice Minister, or his delegate.
The National Lands Agency ( <i>Unidad Nacional de Tierras</i> ) Executive Director.
The Incoder General Manager.
The Presidential Agency for Social Action and International Cooperation Director.
A delegate from the National Commission of Restitution and Reconciliation.
A delegate from the indigenous community.
A delegate from the black community.
A delegate from a peasant organization.
A delegate from an agrarian guild.

**Table 7:** National Council of Land Directive Board.

The Rural Development Office Director at the National Planning Department.
The Commerce, Industry, and Tourism Minister.
The Inner Affairs and Justice Minister, or his delegate.
The Agrarian Bank President.
The Agrarian Financing Fund ( <i>Finagro</i> ) President.
The National Lands Agency ( <i>Unidad Nacional de Tierras</i> ) Executive Director.
A delegate from an agrarian guild.
A delegate from a peasant organization.
A delegate from the National Council of Agriculture Secretaries – CONSA.
A delegate from the black community.
A delegate from the indigenous community.
A delegate from a peasant women organization.

**Table 8:** INCODER Directive Board.

Third, and relatededly, property rights in Colombia are extremely imperfect by nature. Land must be both registered with the notaries and in the ORIP. Though it is difficult to quantitatively evaluate, property values are frequently underestimated at the moment deeds are transferred. A significant portion of small tenants have their lands incompletely registered (for example, only with notaries), or not registered at all. Furthermore, a very large portion of peasants are married under common law, so partners of victims frequently do not have solid proof of holding when seeking to claim lost land. Cadastral records are

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<sup>100</sup> The enforcement of local autonomy in this regard is due to the Law 14 of 1983.

very poor and incomplete. These factors place serious obstacles in the way of reparation-restitution efforts. Moreover, notaries are private individuals, not civil servants, who in many regions have strong ties with the economic elites. Notaries and ORIPs are unevenly distributed throughout the country, and there are broad zones without any coverage. The information provided by notaries to the public is capricious, at best. The president and governors appoint notaries, establishing a direct link between the allocation of property rights and political power. This appointment process promotes Weberian “political capitalism”<sup>101</sup> – in other words, it strongly incentivizes economic agents to seek benefits and property allocation through political favors. Indeed, it is public knowledge that the nomination of notaries is used to pay political favors. There is a regulatory agency in charge of the notaries – the *Superintendencia Nacional de Registro* – but oddly enough its director is appointed by the president: therefore, the director must watch over officials who have been nominated by his boss. Not surprisingly, the *Superintendencia* has played no positive role in the regulation of land property rights.

### 7.4.3. The Outcome

Although the latter institutions were not created by the Uribe administration, some of them have been changed – however slightly.<sup>102</sup> Unfortunately, many of the assumptions on which the new landscape was based proved to be unrealistic and originated the wrong outcomes.

No comparative evidence demonstrates that such high levels of inequality as those prevalent in Colombia can be corrected solely through the use of market mechanisms. Perhaps the introduction of such mechanisms might help moderate certain types of inequality (for example, unequal access to institutions due to political connections). Unfortunately, in the Colombian context the introduction of market rhetoric and principles, at least in the agrarian context, did not even

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<sup>101</sup> Bradford Dillman, 2000, *State and Private Sector In Algeria: The Politics Of Rent-Seeking and Failed Development*, New York: Westview Press.

<sup>102</sup> The Uribe government in 2006 began a process of nomination of notaries by competition.

work in that sense. Since several regions were influenced, and some taken, by paramilitary/criminal networks, practices linked to “political capitalism” very rapidly found their way in the new institutional context. In particular, the pro-efficiency pro-entrepreneur orientation resulted in a wave of allocation of resources to well-connected rural rich. A report by the *Procuraduría General de la Nación* – a state controlled agency – synthesized the problems faced by the new institutions of the rural sector.<sup>103</sup> According to the report, since their creation, ten high-level officials were removed from their posts due to corruption. The majority of these cases were linked with intent to adjudicate land to people who were not entitled to receive it, or who had been condemned in penal processes.<sup>104</sup> Displaced people were supplanted, and the land given to politicians or their cronies.<sup>105</sup> When the intended recipients actually received the land, it was sometimes of very bad quality.<sup>106</sup> In some cases, purchases were apparently made at above market value prices. There was a mismatch between INCODER’s restitution figures and those of other agencies (like the *Dirección Nacional de Estupefacientes*).

The rural lobby was very active in the process of building new institutions, and it was also able to penetrate them. It is relatively easy to understand the mechanisms it utilized. For example, one of the ten officials fired for corruption was Ómar Quessep, the subdirector of INCODER, who distributed land of narcos to rural entrepreneurs (members of his party, friends, and clients, as seen in point (g) of the

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<sup>103</sup> Procuraduría General de la Nación, 2007, “*Análisis a la ejecución de la Reforma Social Agraria y a la gestión del Instituto Colombiano de Desarrollo Rural INCODER*”, Manuscript, Bogotá.

<sup>104</sup> Illustrative information is found in El Tiempo, “*Reforma agraria: 42 años negociando una finca*”, 22 April 2006D; El Tiempo, “*Jefe ‘para’ dice que gobierno sí le dio tierras*”, 12 April 2006E; El Tiempo, “*Tierras ofrecidas al incoder no sirven*”, 8 August 2007E; El Tiempo, “*Venta masiva de tierras en los Montes de María denuncian voceros de desplazados*”, 6 February 2008E.

<sup>105</sup> El Tiempo, “*Gobierno Dio 67 Lotes De Capo A Falsos Desplazados*”, 30 March 2006C. These kind of cases compelled the Agriculture Minister stop land adjudication. However, public pressure made him restart the process, but he withdrew INCODER from the adjudication of the land received from the Directory of Narcotics (2008B and C).

<sup>106</sup> El Tiempo, 2007E, *supra* n. 104.

last section). The land was supposed to be transferred to IDPs and poor peasants. In a phone conversation that was recorded by the authorities, Quessep claimed that he was a minion (*ficha*) of *Colombia Viva* and that Uribe had given INCODER to that party.<sup>107</sup> According to his version, this gave him a margin of maneuverability to distribute good land from the Magdalena Medio at his will. “The political part”, he concluded, is “manageable”. He asked for “modest” monetary retribution for his services.<sup>108</sup>

*Colombia Viva*, incidentally, is one of the political players that has been most deeply penetrated, possibly dominated, by the paramilitary. Senator Jorge Merlano<sup>109</sup> – for whom Quessep claimed to be a puppet – was absolved by a judge who claimed there was not enough evidence of his complicity with the paramilitary in June 2008. Internal Jorge 40 documents that fell into the hands of authorities demonstrated that the latter had a strategy of control of the new rural institutions.

However, the observations of the *Procuraduría* report go beyond the actions of the rural lobby. Another major problem arises from INCODER’s inability to effectively coordinate the rural sector. In the concrete case of property rights and redistribution policies, institutional dispersion has achieved its maximal level.<sup>110</sup> At least the following agencies have a say in the issue:

- INCODER. It was reformed through Law 1152 of 2007. It is an autonomous entity, attached to the Ministry of Agriculture. It is competent on the promotion of agrarian production through programs of land acquisition subsidies, technical and financial support, and production infrastructure.

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<sup>107</sup> Habib Merheg, also a congress member of *Colombia Viva*, together with a group of friends of his city (Pereira), was assigned 38,000 hectares of state-owned land without fulfilling the minimal legal requisites. They were supported by INCODER officials. To install Merheg and his friends, a group of tenants would have been evicted.

<sup>108</sup> El Tiempo, “La grabación que puso a temblar al incoder”, 6 March 2006B.

<sup>109</sup> He was a senator representing the Partido de la U, political party, and also integrating the government coalition.

<sup>110</sup> See Table 10.

- The National Directory of Narcotics. One of its functions is to transfer land from criminals to IDPs and poor peasants. These redistributive actions were a function of INCODER, but due to its high levels of corruption, this function of transferring land to IDPs was assigned to *Acción Social*.<sup>111</sup>
- The National Commission of Restitution and Reconciliation (CNRR). It is in charge of victims' restitution policy design. It deserves to be noted that the CNRR has neither the skills, nor the technical capacity, to face a challenge of the magnitude of quantifying the land snatched by the paramilitary during the conflict, identifying it, and returning it in adequate proportions to the victims. The CNRR, with a very thin bureaucracy, has manifested its discontent with the present state of affairs, but its real capacity does not seem to go beyond its ability to manifest discontent.<sup>112</sup>
- *Acción Social*. It was given – against the explicit advice of its director<sup>113</sup> – part of task b (assigning land to IDPs), and it partially supports CNRR activities. *Acción Social* is in charge of the National Restitution Fund (*Fondo Nacional de Reparación*) whose mission is to restitute victims. This Fund is comprised of properties given by armed actors and those where property termination is applied. But, *Acción Social* has been fairly impotent.<sup>114</sup>
- Ethnic Affairs Direction of the Inner Affairs Ministry. It is in charge of creating, enlarging, and clarifying property rights over indigenous reserves. This office also deals with land issues concerning black communities.
- The National Directory for Reaction to Disasters. This office can buy land to assist affected people by natural disasters.

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<sup>111</sup> El Tiempo, “*Extinción de dominio no ha tocado latifundios ilegales*”, 6 June 2005B.

<sup>112</sup> CNRR (Comisión Nacional de Reconciliación y Reparación), 2007, “*Informe al congreso. Proceso de reparación a las víctimas: balance actual y perspectivas futuras*”, Bogotá.

<sup>113</sup> See *Acta de Plenaria* 56 of 13 June 2007.

<sup>114</sup> Comisión Colombiana de Juristas, 2007, *El espejismo de la justicia y la paz. Balance de la aplicación de la ley 975 de 2005*, Bogotá: Gráficas Editores.

- The National Land Agency. It is mainly in charge of clarifying state property rights. However, it can also promote land acquisition and adjudication programs to the peasant population.

In sum, the new institutional design is characterized by enormous dispersion. According to the Procuraduría report, INCODER had only nine offices in all of the country, and their procedures were slow and sometimes unpredictable. The agency did not have the bureaucratic clout to assume all of the functions of the previous agencies that were scrapped, let alone to coordinate a huge and complex system in which many actors do not have the tools to assume the functions that they have been assigned.

#### 7.4.4. Checks and Balances

The outcome could have been worse had there not been a functioning – albeit imperfect – system of checks and balances. Despite the paramilitary influence, the Congress played an important role in political control.<sup>115</sup> The Constitutional Court, in turn, turned down several important bills<sup>116</sup> and demanded from the government, in peremptory terms, a more aggressive approach towards the restitution of IDPs. The Court defined the unsolved IDP problem as an “unconstitutional state of things”, and created instruments to demand and evaluate policies oriented towards concrete solutions.<sup>117</sup>

Date	Who calls the debate?	Topic
09/03/2002	Senators Hernan Francisco Andrade Serrano, H. Senador Jorge Enrique Robledo	Coffee policy
05/14/2003	Senators Carlos Moreno de Caro, H. Senador Samuel Moreno Rojas y H. Senador	Unemployment policy reduction

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<sup>115</sup> See Table 9.

<sup>116</sup> Law 1152 of 2007; Rural Development Statute; Law 1021 of 2006 concerning forest exploitation; and in Law 975 of 2005, the obligatory devotion of armed groups’ properties to victims’ restitution.

<sup>117</sup> Verdict T-025/04.

Distributive Justice in Transitions

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	Jaime Dussán Calderón	
08/12/2003	Senators José Jairo Cuéllar Devia, H. Senador Álvaro Araujo Castro, H. Senador Germán Vargas Lleras, H. Senador Luis Humberto Gómez Gallo	Government position on ALCA and agrarian price regulation
08/30/2005	Senators Ciro Ramirez Pinzón, Hernán Andrade Serrano	Panela producers and alcohol fuel
11/29/2005	Senators José Dario Cruz Salazar, Luis Emilio Sierra Grajales, Aurelio iragorri Hormaza, Ciro Antorio Rodriguez Pinzon	Indigenous opposition to TLC
05/03/2006	Senators Hector Eli Rojas, Bernardo Alejandro Guerra Hoyos, Luis Guillermo Velez Trujillo, Andres Gonzalez Diaz, Camilo Sanchez Ortega, Mario Suarez Florez, Jaime Dussan Calderon, Oswaldo Dario Martinez Betancourt, Edgar Artuduaga Sanchez, Juan Manuel Lopez Cabrales and others	Electoral fraud due to the paramilitary influence
10/10/2006	Senators Alirio Villamizar Afanador, Miguel Pinedo Vidal	Agrarian policy
11/07/2006	Senator Luis Humberto Gomez Gallo	Agro Ingreso Seguro program
09/18/2007	Senators Oscar darío Pérez Pineda, Juan Carlos Vélez Uribe and Gabriel Zapata Correa	Agrarian and macroeconomic policy
03/11/2008	Senators Alirio Villamizar Afanador, Carlos Cardenas Ortiz, Oscar Dario Perez Pineda, Juan Carlos Velez Uribe, Julio Alberto Manzur Abdala, Samuel Benjamin Arrieta Buelvas, Habib Merheg Marun, Jose Dario Salazar Cruz, Luz Helena Retrepo Betancourt and Manuel	The Carimagua affair

	Enriquez Rosero	
04/01/2008	Senators Antonio Guerra de la Espriella and Oscar Darío Pérez Pineda	Measures taken by the Central Bank (Banco de la República) on interest rates
08/08/2008 – 08/12/2008	Senator Nestor Ivan Moreno Rojas	Royalties

**Table 9:** Political control debates in Congress – including the Agriculture Minister.

Thus, checks and balances should be preserved at any cost if improvement is to be expected. Even then, the idea that the solution to extreme inequality is only to maintain and buttress checks and balances, or that positive change can be obtained only by strengthening the judiciary, would be wrong. There must be obstacles to prevent administrations from moving in the wrong direction, but certain latitude to move in the right one. As many of the pro-egalitarian policies will probably imply a certain degree of centralization and concentrated decision-making (see conclusions), too tight a binding might be counterproductive. The best example in the Colombian context is the intent of president Barco to produce a breakthrough, expropriating criminals and redistributing their assets, by Decree 1893/1989. The Decree was overturned by the Supreme Court, with consequences that will be considered in the next section.

### 7.5. Technical Challenges

Intent to push forward redistributive policies in Colombia has encountered severe technical problems. The unawareness of the existence of such problems is likely to have fatal consequences in the future, as well.

The old model of agrarian reform had to face the disarray of cadastral records; initially, it was supposed to overcome it, but it never did. The restructuring of the manner in which land is registered and property rights are regulated is also a major lingering issue. The current system of notaries and ORIPs is extremely disorganized, and it is the best way to allow the capture of property rights regulation by very backward regional elites. But perhaps the most eloquent instantiation of the importance of carefully considering technical capacities is ap-

parent in the twenty years of failure to transfer assets from criminals to peasants.

The adequate regulation of property rights can be sabotaged by corruption or intimidation: (1) violent agents can buy off or intimidate the personnel in charge of regulation. Since the *Superintendencia de Notariado y Registro* is inert by design, actors can partake in this behavior without legal consequences. For example, in 2005 only fifteen notaries were sanctioned despite overwhelming evidence of widespread irregularities;<sup>118</sup> (2) the decrease in the value of land due to the internal conflict fatally attracts illegal investment.<sup>119</sup> But forbidding land sale in conflict zones is nearly impossible. Nine hundred and eighty-four out of 1,001 Colombian municipalities are affected by displacement.

Sanction	30 days	60 days	90 days	120 days	150 days	180 days	Others
Suspended from of- fice	5	-	1	-	-	-	-
Dismissal	-	-	-	-	-	-	1
Acquit	-	-	-	-	-	-	3
Fine	-	-	-	-	-	-	-
Total archival	-	-	-	-	-	-	1

**Table 10:** Disciplinary decisions adopted in 2005. Source: Superintendencia de Notariado y Registro, [www.supernotariado.gov.co](http://www.supernotariado.gov.co).

Different redistributive alternatives are affected by poor cadastral records and lack of bureaucratic power of key agencies. There are only 190 ORIPs in the country, some of them having to cover more than 10 municipalities. For example, the Florencia (Caquetá) ORIP covers 14 municipalities, the San Martín (Meta) one covers 18, and the Quibdó one is in charge of 14. All of these municipalities are high-intensity conflict areas. In 90 ORIPs, information is stored manually, 57 use the

<sup>118</sup> See Table 10.

<sup>119</sup> El Tiempo, “*Carmen de Bolívar Renace tras muerte de Martín Caballero*”, 26 November 2007H; El Tiempo, “*Uribe pide frenar presiones para venta de tierras en Montes de María*”, 10 August 2008F.

computer without networking, and only 40 make use of a national network system.<sup>120</sup>

As reported above, the idea that the criminalization of the countryside could be seen as an opportunity, and that redistribution could be increased as an anti-criminal policy, was already present in the second half of the 1980s. President Barco was unable to implement his model, but in 1996 – through Law 333 – the state obliged itself to expropriate<sup>121</sup> narcos and other illegal agents and to use these goods to support social policies and redistribution. Short time limits were established: instead of the more than six years that a process took, the operation could be performed in three or four months. The Colombian government, and the United States ambassador, claimed that the new law “divided the Colombian history in two”.<sup>122</sup> The United Nations also hailed it as a model in the anti-crime struggle. However, five years later the state had not advanced an inch in the redistributive use of the assets of criminals. Criminal organizations were able to set up stiff legal defenses. Moreover, in many cases the state was on the verge of having to offer massive reparations to the targets of the *extinción de dominio* offensive,<sup>123</sup> but INCODER revealed itself even more important in this regard. In 2007 it was reported that to legalize 14 properties for the state – nine in the department of Meta, three in Córdoba, and two in Valle – 12 top-notch lawyers had to work for nine straight months.<sup>124</sup> There were also political issues, and, notably, the government’s intent to offer some “narco-goods” to IDPs was met with hard

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<sup>120</sup> There is no information about three ORIPs.

<sup>121</sup> More precisely, to terminate their dominion (*extinción de dominio*). The point is important as simultaneously the right of the state to expropriate legal private property were being removed from the Constitution.

<sup>122</sup> El Tiempo, “*Extinción con más dientes*”, 21 December 2002D.

<sup>123</sup> State action was even contradictory as long as it created a program of land adjudication to former paramilitary members. INCODER Administrative Agreement 48, 2006 ruled the process (El Tiempo, “*Ex ‘paras’ podrían vivir en tierras que auc usurparon*”, 14 February 2006A).

<sup>124</sup> El Tiempo, “*Las plagas de la reforma agraria*”, 26 May 2007A; El Tiempo, “*Mechoacán: 4.700 hectáreas en las que convergen todos los males de la reforma agraria*”, 26 May 2007B.

criticism. Why not guarantee the IDPs safe return instead of trying to install them in new places, and in plots where full legalization was still an issue?

By this time, the Uribe administration was fed-up and it chose to separate the anti-criminal and agrarian reform policies. It was so complicated to legalize and then to manage the goods confiscated from the mafia that it was not practical to try to use them in a redistributive framework.<sup>125</sup> Thus, the fourth and last agrarian reform model – and a promise that had marked Colombian policy making for almost two decades – petered out.

## 7.6. Conclusion

El Retiro is a plot of land placed near Peque, a small municipality of the department of Antioquia. INCORA decided to transfer it to poor peasants in 1964. Yet, in 2007, no decision had been taken. INCODER had inherited the assignment, but its officials did not even know the size of the plot: was it two, three, or four-thousand hectares? The officials ignored the landowners since Peque is a municipality disputed by several non-state groups. The director of the cadastral records of Peque reported that INCODER officials had called him during nine months to gather information, but had not once visited the area. Security conditions were complicated.<sup>126</sup> The episode illustrates both the failure of agrarian redistributive policies in Colombia, and the dynamic tension between change and continuity over the last eight years.

Albert Berry has claimed that successful agrarian reforms succeed quickly or they do not succeed at all.<sup>127</sup> If this observation is true – and Berry offers very strong evidence – timing is essential. The redistributive efforts of the Colombian state in the 1960s were marred by an excessively gradualist approach, which institutionalized the power of agrarian elites in key sectors. The criminalization of the countryside created a crisis but also an opportunity. New models of agrarian redis-

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<sup>125</sup> A very small door was left open: goods confiscated from the mafia could be traded for other goods, and these could be used for agrarian redistribution.

<sup>126</sup> El Tiempo, 2006 D, *supra* n. 104.

<sup>127</sup> Albert Berry, 2002, “¿Colombia encontró al fin una reforma agraria que funciona?”, in *Revista de Economía Institucional* 4(6): 24-71.

tribution were tried, in general rather timidly. Uribe bet on a full institutional reconfiguration, emphasizing market mechanisms, globalization, and efficiency as objectives. The result is an appalling distributive disaster, which is increasingly difficult to solve. The four models of agrarian change that were attempted in the last five decades have been dismissed, and nothing has appeared in their stead.

Why? First, war and criminality changed the agrarian lobby, giving it an even more backward and illegal character; but at the same time they empowered it. So there is a political economy of negative redistribution. This is a very important variable, but does not fully explain the current situation. Second, the new institutionalization favored very high levels of dispersion, with uneven and uncoordinated priorities, and without matching functions with bureaucratic muscle. In the context of long-term state failure to regulate agrarian property rights – expressed in the organizational and institutional weaknesses of notaries and ORIPs – the effect of this was to bury any state capacity for restitution/reparation/redistribution. It should be noted that the new institutional landscape adopted basic elements of the international community's rhetoric and recipes. Any serious evaluation of the Colombian process, as described above, should carefully consider this phenomenon. In this case, a substantial portion of the signals sent by the international community, even if adorned by the language of transparency, decentralization, and civil society participation, were deeply counterproductive. Third, there are sticky technical issues, which have appeared cyclically as technical obstacles to redistribution/restitution. While it would be naïve to consider them apolitical – in the sense that they are activated, evaluated and solved in typically political contexts – they have a core technocratic/bureaucratic component. Decisive action in this realm is necessary. Also, experience seems to suggest that international support should favor focused and decisive actions with short-time horizons. Checks and balances should be preserved at all costs, as they have played a crucial role in preserving the rights of voiceless sectors of the population; but they constitute the proverbial necessary-but-insufficient condition to produce redistributive policies. Modalities as a special jurisdiction for criminalized assets, with fast-track decisions and the inversion of the burden of proof, in the spirit of Barco's

intent, should be seriously considered. Agency re-centralization, with high levels of international accountability, seems necessary as well.

Redistribution and restitution are as important as ever. As in the 1930s, property rights over land in Colombia are both terribly apportioned and unstable: an explosive condition.

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## Seizure and Abandonment of Land and other Goods of Displaced Populations\*

Luis Jorge Garay and Fernando Barberi\*\*

### 8.1. Introduction

The problem of land is of fundamental importance in the treatment of internal displacement in Colombia because the displaced population's right to integral reparation is part of the rights that the Colombian state must guarantee. Moreover, *restitution* of land, housing, and other assets, which is one of the modalities of reparation, is the most preferred by the displaced population.

Thus, land dispossession in the country has been the subject of several studies attempting to estimate the number of hectares the displaced population has been dispossessed of, as well as those this same population has been forced to abandon due to violence.

As may be seen in Table 1 below, such estimates vary enormously, from 1.2 million according to Ibáñez, Moya, and Velásquez to 10.0 million according to the National Victim's Movement

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Source	Estimated Hectares (millions)
<i>Contraloría General de la República</i> (CGR)	2.9
Worker's Union Colombian Institute for Agrarian Reform (Sintradin)	4.9
<i>Acción Social</i> (Social Action) – Project: Protection of Land and Assets of Displaced Populations – PPTP – (Hired consultancy) <sup>1</sup>	6.8
Alternative Land Registry (National Victim's Movement) <sup>2</sup>	10
Ibáñez, Moya, and Velásquez <sup>3</sup>	1.2
World Food Program (PMA) <sup>4</sup>	4.0

**Table 1:** Estimates of abandoned hectares.

Differences in estimates may arise not only from the different periods of time when these surveys were made, but also from the definition of dispossessed or abandoned land, from the period when displacement was considered to have begun, and, more importantly, from the size of the sample used for the estimates.<sup>5</sup>

The *Comisión de Seguimiento de la Política Pública para el Desplazamiento* (Follow-up Commission on Public Policy for Displacement), taking into account the above considerations, decided to include in the second national verification survey, implemented in July

<sup>1</sup> Acción Social–PPTP, 2005, “*Diseño de una metodología participativa para la recolección de información y protección de bienes muebles*”, Bogotá.

<sup>2</sup> Movimiento de Víctimas de Crímenes de Estado, 2007, “*Catastro alternativo, estrategia contra la impunidad y herramienta para la reparación integral*”, Bogotá.

<sup>3</sup> A. M. Ibáñez, A. Moya, and A. M. Velásquez, 2006, “*Hacia una política para la población desplazada*”, Bogotá.

<sup>4</sup> World Food Program, 2001, “*Estudio de caso de las necesidades alimentarias de la población desplazada en Colombia*”.

<sup>5</sup> In this regard, it must be noted that this size should not be below that required for the estimated variables to yield reasonable variation coefficients, if possible below 5%, and in any case equal to or below 10%.

and August 2008, a series of questions directed at estimating the loss of land and other assets due to displacement.<sup>6</sup>

The said survey asked about the displaced population's assets, crops, and economic activity before they were forced to abandon its land. It should be noted that the displaced population's agricultural and livestock income was obtained through an indirect method, consisting in attributing to each family the net surplus of those agricultural activities performed before the displacement occurred. These estimates required the cross-examination of different sources of information regarding costs, prices, and returns, selected for their reliability and preferably for being issued by official sources.

## **8.2. Seizures or Forced Abandonment of Assets**

The phenomenon of forced displacement was accompanied by a massive loss of assets in the population of victims of this calamity. Some 55% of displaced families owned land before displacement, and of them 94% have been dispossessed, or forced to sell or to abandon their land. Similarly, 78.9% of displaced families owned cattle before displacement, and of them 92.4% were disposed or forced to sell; of the 43.6% that had crops, 96.4% were likewise dispossessed. It may thus be said that most of the displaced households were not only deprived of their assets, but also of their sources of income generation. For these families, these losses are aggravated by the fact of being forced to move into an urban environment, where they cannot engage in the ag-

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<sup>6</sup> The Second National Verification Survey was developed and processed by the Universidad Nacional de Colombia's Center of Research for Development (CID). It was applied in 61 municipalities, of which more than 60% have less than 200,000 inhabitants according to the 2005 census. When applying the survey, more than 8,400 households were surveyed, of which more than 6,300 were families that were displaced after 1997 and included in the Unified Register of Displaced Population (RUPD) since 1999. Similarly, more than 2,100 surveys of displaced families not registered in RUPD were applied. The displacement of this population also occurred after 1998. In addition, 4,100 surveys were applied regarding land modules and health. It may then be said that the theoretical objectives regarding sample size were met and that, therefore, estimates of compliance indicators of the rights established by the Constitutional Court show a high level of statistical accuracy.

ricultural and livestock activities for which they have develop their abilities and skills.

For these families, access to land, on which they could have crops or livestock activities, was fundamental for their livelihood. The deprivation of their assets meant simultaneously a loss of habitat, the destruction of part of their productive assets, and the abandonment of the territory to which they belonged, with the ensuing losses of human and social capital.

### **8.3. Estimate of Hectares Seized or Subject to Forced Abandonment**

This section is based on the answers given by the family groups surveyed who knew the number of hectares of land seized or subject to forced abandonment. Collective forms of property or tenancy that family groups claimed to have lost were excluded, in order to avoid double entries. It should be noted that this procedure entails underestimating the magnitude of lands seized or subject to forced abandonment.

The information reported by the families surveyed was further refined by excluding from the calculations of the percentage of hectares seized or subject to forced abandonment those groups that reported having been affected by seizure of abandoned lands with an extension of over 98 hectares.<sup>7</sup>

Based on this data, we calculated the percentage and total area of abandoned land. The calculation of land seized or subject to forced abandonment not only includes those the displaced population was forced to abandon, but also those it was forced to transfer to third parties, under duress, through forced sales, and those that, in general, were seized through any other means. Strictly, then, under the category of

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<sup>7</sup> Those who reported seizure of forced abandonment of land with an extension over 98 hectares were assigned the average of land seized or subject to forced abandonment for a family group, excluding those pieces of land. This exclusion was made in the interest of avoiding any over-estimations and producing only a conservative estimate.

land seized or subject to forced abandonment are included both land abandoned by the displaced people and land seized from them.<sup>8</sup>

Based on the percentage of land lost by each family group belonging to displaced populations, the magnitude of land seizure and/or forcedly abandoned may be calculated. It suffices to multiply the average number of hectares lost by each family group by the number of family groups that lost land.

In this regard, the low levels of variation coefficients should be pointed out, indicating the high degree of accuracy of the estimates concerning the area of abandoned land on the part of each family group belonging to displaced populations, for groups registered and unregistered in the Unified Register of Displaced Population (*Registro Único de Población Desplazada*, RUPD).

Thus, according to the data provided by the second national verification survey of 2008, the total number of hectares seized or subject to forced abandonment would amount to 5.5 million, that is, 10.8% of the country's agricultural area (Table 2).<sup>9</sup> So land abandonment has been massive both in terms of the great number of families involved (approximately 385,000) and in terms of physical area. Figure 2 shows that families not presently registered in the RUPD abandoned lands of 12.8 hectares in average, as compared to lands of 14.7 hectares in average for registered families.

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<sup>8</sup> In principle, reference was made to 'abandoned lands,' but due to the implications of this expression (which does not include in its meaning land sold under duress), it was decided to use 'lost land'. This expression, however, has two unsuitable implications: it is identified, in some cases, with events different from those contemplated for displaced populations: land may be lost due to problems pertaining to the owner's management, or due to fortuitous events, such as floods; in addition, loss implies irreversibility. The best option, therefore, would be to speak of land seized or subject to forced abandonment, considering that forced sale is a form of seizure. Additionally, it should be emphasized that, from a legal standpoint, these lands were not abandoned, because displaced populations still hold rights to recovery.

<sup>9</sup> The agricultural area of the country was calculated for year 2006 is 51,169,651 hectares, made up of 38,804,661 hectares of pastures and cuttings (livestock area) and 3,579,929 hectares of crops (Ministry of Agriculture, *Anuario Estadístico*). For 2008, the Ministry reports an agricultural area of 4,336,596 hectares (*Dirección de Política Sectorial*). The explanation for this difference is unknown.

Number of hectares	Total	Registered in RUPD	Not registered in RUPD
Average abandoned hectares	14.3	14.7	12.8
<i>c.v.e</i>	3.2	3.5	7.3
Total abandoned hectares	5,504.51	4,410.33	1,094.18
	Atlantic region	Andean Region	Other regions
Average abandoned hectares	13.7	11.8	19.2
<i>c.v.e</i>	5.3	5.2	6.2
Total abandoned hectares	2,104.41	1,500.78	1,899.31

**Table 2:** Dimension of land seized or subject to forced abandonment: average and total hectares according to registration in RUPD and by regions.

The greatest percentage of abandoned land is found in the Atlantic Coast Region (38.2%), followed by the region comprising Amazonia, the Orinoco watershed, and Chocó (34.5%), and finally the Andean Region (27.3%). As shown in Table 2, the region including Chocó, the Orinoco watershed, and Amazonia shows an average of land seized or subject to forced abandonment by the family group much larger than that of the other two regions (19.2 hectares versus 13.7 hectares and 11.8 hectares). This finding is consistent with the greater availability of land in these regions, where most of the border is made up of recently colonized land.

#### 8.4. Cultivated Area Lost by the Displaced Population

It is important to have estimates of the total area lost by the displaced population for the implications it has on the cost of land restitution or reparation, that is, for estimating damages resulting from displacement. However, it is also important to estimate the loss of cultivated area for displaced populations, in order to calculate opportunity cost or lost potential earnings from crops seized or forcedly abandoned, so that it may be restituted to the displaced population.

This section is based on the answers given by the persons surveyed who knew the number of hectares they cultivated, of which they were dispossessed, or were forced to abandon. Such information was

further refined by excluding from the average hectares cultivated by the family group those family groups reporting having cultivated areas of more than five hectares in one single plot of land.<sup>10</sup> Also excluded were those areas assigned to illegal crops (cocaine), pastures, and timber yielding areas, in order to make exclusive reference to agricultural areas with licit crops. Based on this data, we calculated the averages and total land that was no longer cultivated by displaced populations.<sup>11</sup>

As in the previous calculation, we can estimate the total area no longer cultivated by multiplying the average number of hectares no longer cultivated by displaced family groups by the number of family groups that were forced to abandon its crops. As earlier, we found a low level of variation coefficients, which indicates the high accuracy of the estimates.

According to the data provided by the second national verification survey of 2008, the total area no longer cultivated by displaced populations amounts to 1,118,401 hectares during the eleven years of displacement covered by the survey, with an average of 101,673 cultivated hectares seized or abandoned per year (Table 6). The earlier figure represents approximately 25% of the country's cultivated area, and the second approximately 2.3%. In so far as these areas no longer cultivated by displaced populations are not being efficiently exploited or have been used for extensive cattle raising, a decrease in the country's agricultural production has occurred. This could be one of the factors explaining the decrease in this economic sector's GDP dynamism in the past years.<sup>12</sup>

As shown in Table 3, the crops that displaced populations not registered in the RUPD were forced to abandon had a smaller average

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<sup>10</sup> This exclusion was made in the interest of avoiding any over-estimations and producing only a conservative estimate; plots of cultivated land above five hectares were considered extreme.

<sup>11</sup> Those who reported crops in the same land over five hectares were assigned the average of cultivated hectares by family group, excluding those pieces of land. This exclusion was made in the interest of avoiding any over-estimations and producing a conservative estimate.

<sup>12</sup> An in-depth investigation of this subject would be relevant for estimating the economic cost of the crime of forced displacement.

area than those of the registered population (2.4 hectares versus 2.8 hectares). This would strengthen the hypothesis that the conditions for unregistered displaced populations are less favorable.

	<b>Total</b>	<b>Registered in RUPD</b>	<b>Not registered in RUPD</b>
Average abandoned hectares	2.7	2.8	2.4
<i>c.v.e (%)</i>	3.1	3.5	7
Total abandoned hectares abandoned	1,118.40	218.68	899.71

**Table 3:** Dimension of abandoned crops: average and total number of hectares per registration in RUPD. Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

As shown in Table 4, the displaced population in the Atlantic Coast Region, which is characterized by a lesser access to land, was the population forced to abandon a greater cultivated area, up to 425,031 hectares, representing 38% of the total area of crops seized or abandoned.

	<b>Total</b>	<b>Atlantic Region</b>	<b>Andean Region</b>	<b>Other regions</b>
Average abandoned hectares	2,7	2,7	2,5	3,1
<i>c.v.e (%)</i>	3,1	4,7	5,3	6,5
Total abandoned hectares	1.118.401	425.031	404.998	288.371

**Table 4:** Dimension of abandoned crops: average and total hectares per region.

### 8.5. Income Generation Derived from Agricultural and Extractive Activities

Average family income for displaced populations before becoming victim of this crime was above the poverty line (at 2008 prices), amounting to \$1,325,683 (in 2008 Colombian pesos).<sup>13</sup> This is ap-

<sup>13</sup> Editorial note: one U.S. Dollar in 2008 was worth 2,240 Colombian pesos.

proximately 45% above the poverty line, which was set at \$917,425 (see Table 5 in the Appendix at the end of the chapter).<sup>14</sup>

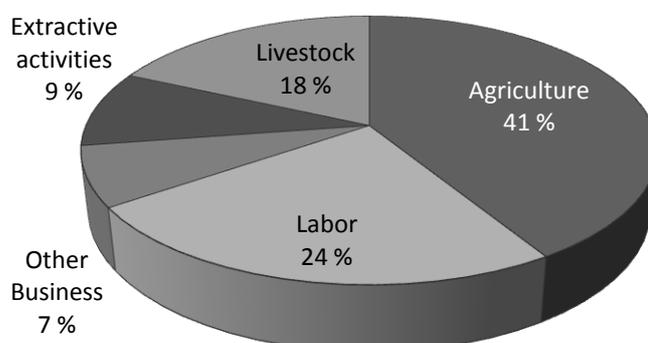
Table 6 (see Appendix) shows that the highest average income generated by kind of activity (1,051,528 USD in 2008) were derived from agriculture. Business (other than agriculture, livestock, and extractive activities) also generated a relatively high income (840,925 USD), but only 9.6% of family groups had this source of income. Similarly, income generated by extractive activities reached a relatively high level (688,668 USD); 13.9% of family groups had access to these activities. By contrast, income generated by labor (such as that of workers, employees, etc., including agricultural day workers outside their land) was, on average, relatively low (279,409 USD), even though these were massively recurrent activities, for in 96.6% of households at least one family member generated this kind of income.

Prior to displacement, the contribution of activities related to agriculture, cattle raising, or extraction of natural resources (timber, for example) to the total family group income was extremely important (under different forms of possession). On the one hand, 77.7% of family groups generated income derived from agricultural and livestock activities carried out in their own property, and 13.9% generated income derived from extracting activities (Table 6). For those presently registered in RUPD, these averages were slightly higher: 80.7% and 14.5%, respectively, as compared to 69.0% and 12% for those not registered in RUPD.

On the other hand, income derived from agricultural and livestock activities, together with that derived from extractive activities, contributed 68% of the family groups' income before displacement. Among these, the contribution of agricultural and livestock activities was considerable higher (59%) than that derived from the extraction of natural resources, which was in average 9% of the families total income (Figure 1).

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<sup>14</sup> Poverty and extreme poverty lines were calculated with the number of members family groups presently have, because it was considered unfeasible to obtain, through the survey, this information before the first displacement. For this reason, this calculation may be biased.



**Figure 1:** Family group income composition by activity before displacement. Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, July 2008. *Comisión de Seguimiento* and CID-UN. Note: In order to calculate the participation of each category, the average income (for each category) was adjusted by the average of income generating households (in each category).

More importantly, however, according to the data shown in Table 7, family groups generating income derived from agriculture and livestock registered an average family income above the line of poverty in 49%, while those groups that did not have access to this kind of income not only had an average family income below the poverty line in 54%, but were also below the extreme poverty line.<sup>15</sup>

In conclusion, the fundamental importance of income derived from agricultural and livestock activities is evident. It may therefore be asserted that, undoubtedly, engaging in this type of activities was what allowed family groups, in average, to live above the poverty line.

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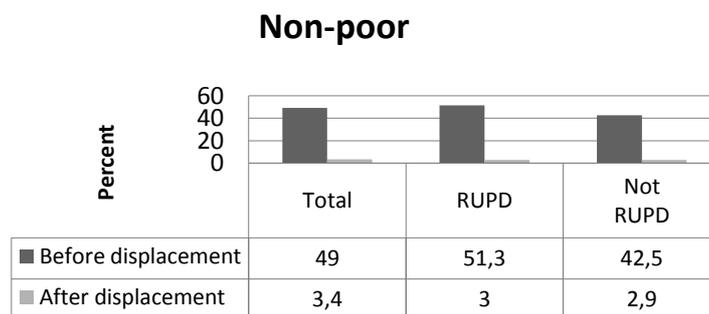
<sup>15</sup> The agricultural income referred to is that obtained by the family's work in a land owned by the family or by others, and does not include income derived from being an agricultural day worker. That is, it corresponds to the income contributed by the family's agricultural and livestock production system (or, in other words, by the peasant exploitation unit).

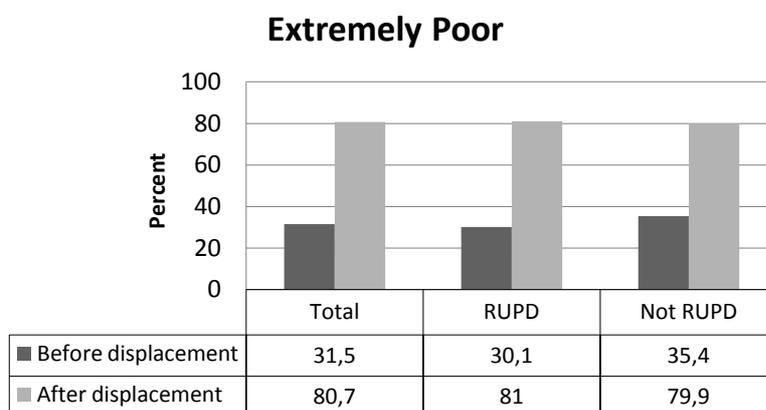
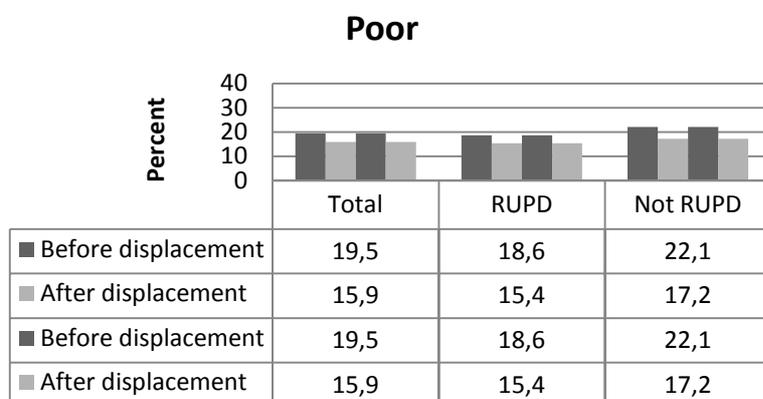
Generated income from agriculture and livestock	1,369,710
<i>c.v.e. (%)</i>	2.4
Did not generate income from agriculture	478,434
<i>c.v.e. (%)</i>	2.3
Did not generate income from agriculture or cattle	372,834
<i>c.v.e. (%)</i>	5.4

**Table 7:** Family group average income according to agricultural and livestock activities before displacement (in 2008 pesos). Note: Calculated on total family groups reporting for each category. Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

Finally, it should be emphasized that a high percentage of displaced family groups had an economy primarily based on a direct relationship with land and natural resources exploitation. In other words, they were basically peasants, and their economic organization guaranteed an income substantially higher than the one they presently generate.

As shown in Figure 2, nearly half (49%) of the registered displaced family groups had monthly income above the poverty line before displacement, while now only 3.4% is in this situation. From another point of view, poverty has increased from 51.0% to 97.6%, and extreme poverty from 31.5% to 80.7%. Thus, one of the most relevant consequences of displacement is to have drastically deteriorated the displaced family groups' income and, consequently, to have condemned a great percentage of Colombian families to poverty or extreme poverty. The implications of the present level of poverty and destitution in society are yet to be established, but their significant impact is evident.





**Figure 2:** Percentage of family groups in poverty and extreme poverty lines by registration in RUPD. Source: *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

As has been shown, a high percentage of displaced family groups worked the land and engaged in agricultural and livestock activities that provided them with income in money and in kind. This means that displacement not only introduced a dramatic change in their way of life, from a rural to an urban environment, but also deprived them of the possibility of engaging in activities for which they had developed abilities.

Farmers develop a high level of skills and knowledge outside of formal education for managing agricultural, livestock, and extractive

activities. These abilities are acquired through intergenerational communication and the circulation of information and knowledge among producers (neighbors usually), and among producers and intermediaries, rural developers, and other agents participating in the chain of production, transformation, and distribution systems of agricultural goods (forests, fishing etc.). Also part of this interaction are those agents offering inputs, credit and other services, as well as those public and private organizations participating directly or indirectly in the agricultural and livestock economy, and in rural development.

With the displacement from rural to urban settings, family groups lose the possibility of using these abilities for adequate income generation. In an urban environment, formal education is a fundamental variable of labor demand, but it is not usually compatible with a peasant profile. Furthermore, the restrictions faced by displaced populations in this environment do not allow them to engage in self-managed profitable activities, which were the source of substantial income in a rural environment. It should be kept in mind that labor income in rural areas was considerable below the legal minimum wage (279,409.2 in 2008 pesos) and, on the other hand, self-managed activities in an urban environment generate a substantially lower income compared to that generated by such activities in rural areas (\$332,897 versus \$987,762 from agricultural and livestock activities, \$688,688 from extractive activities, and \$840,295 derived from other business.)<sup>16</sup>

#### **8.6. An Estimate of Ensuing Damage and Opportunity Costs Due to the Seizure or Forced Abandonment of the Displaced Populations' Assets**

This section estimates the ensuing damage and opportunity costs due to the seizure or abandonment of the assets of displaced populations. Ensuing damage is defined as the value those assets would have in 2008 prices, and opportunity costs is the income that was not generated by the family groups that abandoned income sources in the period

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<sup>16</sup> Income of independent workers per family group was estimated based on the Second National Verification Survey.

between the date of their first displacement and 2008 (we suppose that restitution would occur in 2008).

### 8.6.1. Ensuing Damage

For purposes of the present chapter, ensuing damage includes the following categories: (i) land, (ii) real property other than land, such as houses, houses with plot, warehouses, offices, business premises etc., (iii) animals, including only cattle and horses because other animals are considered part of work capital in agricultural and livestock activities, and (iv) personal property, including not only furniture, but also machinery, tools, and means of transportation. It is relevant to note that estimates of the value of goods were “conservative”, in order to avoid overestimating asset loss at present prices.<sup>17</sup>

As shown in Table 8, loss of land constitutes an ensuing damage calculated in slightly over \$7.4 million (2008 pesos) in average for each family group that effectively abandoned land as a consequence of forced displacement. When abandoned assets as a whole, in addition to land, are considered, the sum increases to an average of approximately \$13.6 million for family groups that abandoned assets. The average cost of lost furniture may seem high (\$4.4 million 2008) but it should be kept in mind, on the one hand, that this amount corresponds to the cost of replacement of lost household goods and not to their commer-

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<sup>17</sup> In the case of land, estimates were based on the information provided by the *Instituto Geográfico Agustín Codazzi* (IGAC) for the country except the Department of Antioquia, which provided its own geographical information. Cadastral values were indexed to 2008 prices, based on the index for housing consumer prices for low-income families, and then adjusted, under the hypothesis that the cadastral value for each piece of land was equivalent to 60% of its commercial value. Information on other rural assets obtained by direct questioning in the survey was refined in order to exclude from the data persons who declared having property larger than 1 hectare or who valued their property over \$100 million pesos. In order to update prices to 2008, the index for housing consumer prices for low-income families was also used. The valuation of animals was performed, in the case of bovines, based on crossing information provided by Fedegan with that reported by experts in cattle prices, in order to adjust it to “peasant conditions” and avoid overestimation. For horses, experts were consulted who reported on the value of these animals in peasant economy. Finally, for home furniture, the cost of replacement for a standard five-member family was estimated.

cial value at the time of displacement, which could be much lower, for they had a reduced value due to use and, furthermore, that it includes higher value goods, such as machinery and means of transportation.

Type of good	Total	Registered in RUPD	Not registered in RUPD
Land	7,409,883	7,712,274	6,276,478
<i>c.v.e.</i>	3.2	3.5	7.2
Other assets	13,598,727	14,218,572	11,733,952
<i>c.v.e.</i>	5.6	6.5	11.5
Animals	6,748,665	6,847,855	6,330,018
<i>c.v.e.</i>	3.5	3.9	9.0
Personal	4,443,171	4,666,284	3,781,381
<i>c.v.e.</i>	2.4	2.7	4.9
Total goods	13,591,174	14,625,906	10,546,153
<i>c.v.e.</i>	2.3	2.7	4.9

**Table 8:** Average of ensuing damage caused to displaced family groups according to type of good abandoned (in 2008 pesos). Note: Calculated on the total of family groups that reported information for each category. Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

Total average of ensuing damage for each family group due to loss of assets was estimated in approximately \$8.4 billion (2008 pesos), of which 67% corresponds to the displaced population registered in the RUPD (Table 9). This amount represents 1.96% of the GDP at 2007 prices. This is the amount of the displaced families' patrimonial loss, which means both a more precarious quality of life and an extreme deterioration of their possibilities for income generation.

On the other hand, Table 10 shows the precarious reparation the displaced population would receive if the bill for the Law of Victims to be debated in the last sessions of Congress for 2008 was approved, for the bill only contemplates reparations for land and other real estate assets, eliminating reparations for personal property and animals that, jointly, represent approximately 55% of property loss for the displaced population.<sup>18</sup>

<sup>18</sup> Editorial note: the bill was ultimately not made into law; in June of 2009 the government sunk it, at the last stage of its legislative process.

Type of good	Total	RUPD	Not RUPD
Land	2.5	1.9	0.7
Other rural real property	1.6	1.1	0.5
Animals	1.8	1.4	0.4
Personal Property	2.8	1.9	0.9
<b>Total abandoned assets*</b>	<b>8.4</b>	<b>5.6</b>	<b>2.8</b>

**Table 10:** Total value of ensuing damage for family groups caused by forced displacement to June 2008 (2008 billion). \* Calculated as average value of total resulting damage by number of family groups that lost assets. Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

### 8.6.2. Opportunity Costs

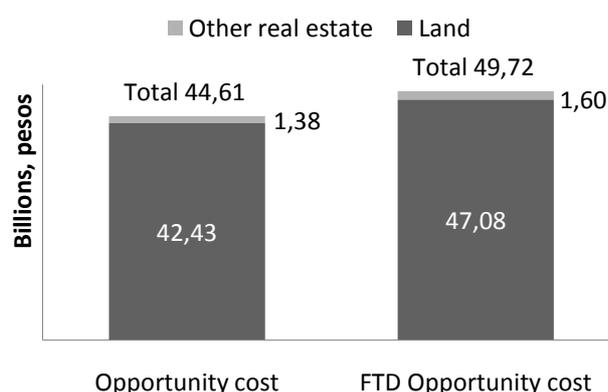
Estimates of opportunity costs were also conservative, for only income not received by the displaced population from land and other real estate seized or abandoned was considered.<sup>19</sup> In addition to being an asset, land is also a means of production that, due to displacement, ceased to be a way of generating income for displaced family groups. Consequently, in order to calculate the opportunity costs of land seized or subject to forced abandonment, the income derived from agricultural and livestock activities that was no longer received by each family group was projected from the moment the family group abandoned its land through 2008, obtaining a sum of approximately \$42.4 billion (2008 pesos) (Figure 3).

On the other hand, the opportunity costs corresponding to other rural real property was estimated according to the potential income its

<sup>19</sup> It should also be kept in mind that net income derived from the production of fruits and vegetables was not taken into account, with the exception of banana and plantain, because the information regarding these crops is based on commercial exploitation involving advanced technologies, quite different from the peasant structure for the production of such goods. These crops were assigned the average of the net total income of crops reported in the survey. This may tend to underestimate the opportunity costs in case some of these crops had been developed using advanced technologies.

hypothetical rent would have generated. The value of this rent was calculated according to housing market parameters, that is, 1% monthly of its commercial value for assets other than land. If the opportunity costs of other real property is added to land, the result is that displaced family groups did not receive an amount equivalent to \$44.6 billion (2008) (Figure 3).

It should be noted, however, that this amount does not include the opportunity costs of money not received, and should therefore be adjusted using the returns of fixed-term deposits (yearly effective rate of a 90-days FTD reported by the Banco de la República). Thus, as shown in Figure 3, the opportunity cost adjusted to the returns generated by fixed-term deposits would be \$49.72 billion (2008 pesos), an amount that represents 11.6% of the GNP at 2007 prices.



**Figure 3:** Total value of opportunity cost or loss of profit for family groups due to displacement to June 2008 (2008 billions). Source: II *Encuesta Nacional de Verificación de los Derechos de la Población Desplazada*, Comisión de Seguimiento and CID-UN: July 2008.

## 8.7. Conclusions

Displacement generated a massive pauperization process in a substantial percentage of the Colombian population. It went from a scenario in which 51% of the displaced families were poor and 30.5% extremely poor, to one in which 96.6% of these families are poor and 80.7% extremely poor. This change is explained by the substantial variation in

the composition of their previous income, derived, to a great extent, from agricultural, livestock and extracting activities, which produced much higher returns than what displaced populations in urban settings now generate.

In fact, prior to displacement, the contribution to the total income of family groups from activities related to agriculture, cattle, or the extraction of natural resources in their own land (under different forms of possession), was extremely important. Income derived from agricultural, livestock, and extractive activities contributed 68% of the family groups' income before displacement. The contribution of agricultural and livestock activities was much higher (59%) than that derived from the extraction of natural resources, which was, in average, 9% of the families' total income.

More importantly, family groups that derived their income from agricultural and livestock activities registered an average family income of 49% over the poverty line, while for groups that did not have access to this kind of income, the average family income was 54% below the poverty line and they were also below the extreme poverty line.

Displacement generated a massive loss of land, animals, and other goods that were productive assets for the displaced family groups. This entailed a substantial deterioration of their economic situation, and, simultaneously, inhibited their capacity for income generation. In fact, their expertise focused on the agricultural, livestock, and extractive production, so that most of the displaced population went from being expert farmers to marginalized urban inhabitants.

Total hectares seized or subject to forced abandonment would amount to 5.5 million, representing 10.8% of the country's agricultural area. Thus, land abandonment was massive in terms both of the great number of families involved, approximately 385,000, and of the size of its geographical area. The greater percentage of abandoned land is found in the Atlantic Coast Region (38.2%), followed by Amazonia, the Orinoco watershed and Chocó (34.5%), and lastly the Andean Region (27.3%).

The total area that was no longer cultivated by the displaced population would amount to 1,118,401 hectares during the eleven

years of displacement here contemplated. This represents approximately 25% of the country's cultivated area. In so far as these areas that are no longer exploited by the displaced population are not being efficiently used by anyone, or have been used only for extensive cattle-raising, a decrease in the country's agrarian production has occurred. This could be one of the factors explaining the decrease of the sector's GNP dynamism in the past years.

Total value of the ensuing damage represented by lost goods is estimated to be approximately \$2.5 billion (2008) for abandoned or seized land, and in \$8.4 billion for all the goods of displaced family groups, that is, the equivalent of 1.96% of GNP at 2007 prices. Opportunity costs for losses of land amount to \$42.3 billion, and the opportunity costs including other abandoned real estate amounts to approximately \$44.6 billion (2008 pesos). When this sum is adjusted by the returns of fixed-term deposits, the opportunity cost for the displaced families is estimated in approximately \$49.7 billion (2008 pesos), that is, the equivalent of 11.6% of the GNP at 2007 prices.

## Appendix

	Total	Atlantic Region	Andean Region	Pacific, Orinoquia and Amazonia
Income derived from agricultural activity	1,051,528	991,467	993,524	1,251,220
<i>c.v.e (%)</i>	3	4.8	5	6.3
Income derived from livestock activity	285,418	293,792	224,793	371,926
<i>c.v.e (%)</i>	2.5	3.9	4.2	5.2
Income derived from agriculture and livestock	987,762	934,215	903,275	1,255,300
	2.5	3.9	4.1	5.2
Income derived from extractive activity	688,688	493,279	823,852	713,922
<i>c.v.e (%)</i>	6	11.7	9.7	10.2
Income derived from other activity	840,295	745,823	781,418	1,023,695
<i>c.v.e (%)</i>	7.3	12.9	12	12.9
Labor income	279,409	230,076	289,287	348,274
<i>c.v.e (%)</i>	2.2	3.6	3.6	4.7
Family income	1,325,683	1,188,887	1,255,539	1,680,497
<i>c.v.e (%)</i>	2.3	3.8	3.8	4.8
Extreme poverty line	440,069	457,689	440,898	413,024
Poverty line	917,425	954,157	919,152	861,042

**Table 5:** Income-generating family groups, and average income generated by family groups according to kind of activity (in 2008 pesos). Source: *Encuesta Nacional de Verificación de la Población Desplazada, Comisión de Seguimiento* and CID-UN. July-August 2008. Note: Averages calculated based on total family groups reporting each kind of income before displacement.

Income	Average of income generating family (*)			Average income (**)		
	Total population	Total population groups registered in RUPD	Total family groups NOT registered in RUPD	Total population	Total family groups registered in RUPD	Total family groups NOT registered in RUPD
Family groups with income derived from agricultural activity	43.2	46.0	35.2	1,051,528	1,103,231.6	856,282.1
<i>c.v.e. (%)</i>	2.6	2.8	6.4	3.0	3.4	6.9
Family groups with income derived from livestock activity	71.4	74.6	62.1	285,417.5	297,577.8	243,673.3
<i>c.v.e. (%)</i>	1.5	1.5	3.7	2.6	2.9	5.8
Family groups with income derived from agriculture and livestock	77.7	80.7	69.0	987,762.0	1,056,984.7	756,411.5
<i>c.v.e. (%)</i>	1.2	1.3	3.2	2.5	2.8	5.5
Family groups with income derived from extracting activities	13.9	14.5	12.0	688,688.1	689,691.2	685,140.9
<i>c.v.e. (%)</i>	5.7	3.1	12.8	6.0	6.7	13.4
Family groups with income derived from other business	9.6	10.3	7.7	840,295.3	971,936.9	720,169.4
<i>c.v.e. (%)</i>	7.0	7.7	16.3	7.3	8.2	16.0
Family groups with	96.6	96.9	95.7	279,409.2	269,277.4	308,683.0

labor income									
<i>c.v.e. (%)</i>	0.4	0.5	1.0	2.2	2.6	4.6			
Income generating family groups	99.6	99.7	99.6	1,325,682.9	1,423,980.3	1,044,640.4			
<i>c.v.e. (%)</i>	0.1	0.2	0.3	2.3	2.7	4.8			

**Table 6:** Income-generating family groups and average income generated by family groups before their displacement according to kind of activity and registration in RUPD (in 2008 pesos). \*Calculated based on total family groups. \*\*Calculated based on total family groups reporting income for each category.

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## The Persistence of Land Concentration in Colombia: What Happened Between 2000 and 2010?\*

Ana María Ibáñez\*\* and Juan Carlos Muñoz\*\*\*

### 9.1. Introduction

The high concentration of rural property has been a constant in the history of Colombia. After three failed land reforms in the twentieth century, and decades of armed conflict and public policies that have favored the big landowners, high land concentration persists, with an escalating trend, and now the Gini coefficient reaches a value of 0.86, one of the highest in the world. During the period between 2000 and 2009, rural property became even more concentrated: particularly from 2005 onwards the trend increased, not only because of an increase in the number of properties but also due to the acquisition of new ones by the same owners.

The causes of land concentration in rural areas are diverse. The initial distribution of land during the colonial period, the policies governing the assignment of frontier land, colonization processes, public policies favoring large landowners, and the armed conflict are the factors that have determined the current land distribution in Colombia. Moreover, the thinness of land markets, and their strong fragmentation

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and high transaction costs are obstacles for market transactions that would transfer land to more efficient producers and would improve equity in land distribution. Finally, the three land reforms undertaken in the twentieth century failed because of the pressures of large landowners, and in the case of the 1994 reform, the intensification of the armed conflict and the ineffectiveness of governmental institutions.

The aim of this chapter is to study the evolution of land concentration in rural areas during the period between 2000 and 2009. We analyze the evolution of the concentration of rural property and its regional distribution. We also identify some exploratory hypotheses about the possible causes of the distribution of property in Colombia, with a particular emphasis on the dynamics of the armed conflict.

Our results show a slight increase in land concentration, especially from 2005 onwards. The concentration has deepened as a result of increases in the size of land plots and the acquisition of new properties by those who were already owners in year 2000. The statistics also reveal a considerable increase in the number of new property owners, presumably due to transferences in the land market, the updating of the cadastral registry, and land seizures.

The municipalities with largest land concentration in rural areas are located in isolated areas at altitudes higher than 2000 meters above sea level (masl), where production is non-agricultural, the soil is poor, natural resources are exploited, and on settlement areas. Finally, although the econometric estimates are preliminary, we find a possible correlation between increases in land concentration and the emergence of new owners, on the one hand, and the presence of armed groups, on the other.

The chapter is organized in four sections, including this introduction. The second section reviews the literature on the distribution of land in Colombia and its relationship with the prolonged civil conflict. The third section contains an analysis of national and municipal trends of land concentration for the period between 2000 and 2009. The fourth section concludes.

## 9.2. The Distribution of Land in Colombia and the Civil Conflict

In this chapter, we describe the evolution of land distribution during the first decade of the twenty-first century and also identify some potential determinants of the increasing trends. However, historical processes play a dominant role on current land distribution, and for this reason in this section we provide a brief historical overview.

The unequal land distribution in the twenty-first century is the result of state policies that originated in the colonial period and were consolidated in the following centuries. The dynamics of land concentration have also been entangled with the country's internal conflicts over the past two centuries. This section examines the historical dynamics of land distribution in Colombia, and analyzes the effect of public policies, the armed conflict, and drug trafficking on land distribution in Colombia, which is one of the most highly concentrated in Latin America and the world.

The structure of land distribution in Colombia began in the colonial age and consolidated up to the beginning of the twentieth century. Since the colonial period, the predominant premise to assign land was the Spanish concept of “*morada y labor*” (dwell and work), which contemplates that land should be assigned to the person who dwelled and worked on his plot. Ferdinand II of Aragon defined this condition for assigning land plots. In later years, the appropriation of frontier lands was permitted upon payment of a fixed sum to ensure a valid title, with the possibility of proving dwell and work later on. These regulations allowed for the best land in the valleys and high plains to be appropriated in the sixteenth century, either through valid property titles or through informal tenancies. Regulations for the exploitation of uncultivated lands were expanded in the following years; in 1777, the colonization of new land was permitted, with a commitment by the settlers to clear, sow, and cultivate within a fixed time limit, and in 1821 a law was passed allowing for the transfer of public lands to private owners.<sup>1</sup>

Land properties of the Catholic Church and indigenous reserves were covered by special regimes that were later abolished, that of the

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<sup>1</sup> Albert Hirschman, 1965, *Journeys toward Progress: Studies of Economic Policy-Making in Latin America*, Garden City: Doubleday.

reserves in 1810 and that of the Church in 1861 through the expropriation (*desamortización*) of mortmain. Powerful groups of the population took advantage of both processes to acquire the great majority of these properties and thus consolidated their regional predominance.<sup>2</sup> In the case of expropriations against the Church, the decision to auction its land plots substantially reduced prices, favoring the businessmen and financial groups that were able to buy them. This redistribution of a third of the country's land in favor of a minority increased land concentration.<sup>3</sup> After the independence from Spain, the assignment of frontier land to pay war debts and military services created new land-owning elites.<sup>4</sup>

Despite this continual process of land assignment, at the end of the nineteenth century and beginning of the twentieth, there were still great tracts of land available for settlement. Furthermore, a high percentage of land, both in large and small land holdings, lacked formal property titles.<sup>5</sup> The possibility of colonizing lands eased the social tensions of the nineteenth century by allowing a large mass of people who worked as laborers or sharecroppers (*aparceros*) to colonize new land and become landowners.<sup>6</sup> Nevertheless, the big landowners likewise benefited from the colonization processes, as they were able to enlarge their plots and consolidate some of the large properties that exist to this day.<sup>7</sup>

Powerful and influential groups of the population participated in the process of granting titles for frontier lands, which presumably contributed to the high concentration of land ownership in Colombia. Given the close links between these powerful groups and the state in-

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<sup>2</sup> *Id.*; Alejandro Reyes, 2009, *Guerreros y Campesinos: El Despojo de la Tierra en Colombia*, Bogotá: Editorial Norma.

<sup>3</sup> Paul Oquist, 1980, *Violence, Conflict and Politics in Colombia, Studies in Social Discontinuity*, New York: Academic Press.

<sup>4</sup> Reyes, *supra* n. 2.

<sup>5</sup> Oquist, *supra* n. 3.

<sup>6</sup> *Id.*; Hirschman, *supra* n. 1.

<sup>7</sup> Catherine LeGrand, 1994, "Colonización y Violencia en Colombia: Perspectivas y Debate", in *El Agro y la Cuestión Social*, Absalón Machado (ed.), Bogotá: Tercer Mundo Editores.

stitutions in charge of granting property titles, as well as these groups' advantages in accessing both the information required to claim lands and capital to cover the transaction costs, the programs for awarding titles seem to have amply favored them.<sup>8</sup> Similar situations occurred in other Latin American countries, where the granting of titles promoted the creation of large properties.<sup>9</sup>

The colonization processes caused land disputes between landowners and settlers. Peasants colonized lands beyond the agricultural frontier and large landowners seized them, turning the settlers into sharecroppers. During the period between 1880 and 1925, squatters created organizations to protect themselves from the abuses of large landowners and relied on institutional channels to solve land disputes.<sup>10</sup>

In the 1920s, economic factors increased the value of land and encouraged the expansion of the agricultural frontier, aggravating the expulsion of settlers and turning disputes over land into violent conflicts. First, by the mid-1920s uncultivated lands located in the center of the country had all been assigned, and the agricultural frontier in the Andean region had been exhausted.<sup>11</sup> Second, drops in farmers' per capita income due to the fall in coffee prices encouraged small producers to migrate and settle on privately held land.<sup>12</sup> Third, the scarcity of labor in large properties fostered the eviction of sharecroppers and settlers, who were then turned into day laborers.<sup>13</sup>

Incentives to accumulate land lay, and still lies, not only in its rising prices but also in the alternative uses of land. During the first half of the twentieth century, fiscal policies increased taxes on the earnings from industrial and commercial activities, while those on ag-

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<sup>8</sup> Hans Binswanger, Klaus Deininger, and Gershon Feder, 1995, "Power, Distortions, Revolt and Reform in Agricultural Land Relations", in *Handbook of Development Economics*, J. Behrmann and T.N. Srinivasan (eds.), Elsevier Science.

<sup>9</sup> Karen Macours, 2009, "*Land Titles and Conflicts in Guatemala*", Res Working Papers Csi-I64, Washington: IADB.

<sup>10</sup> LeGrand, *supra* n. 7.

<sup>11</sup> *Id.*; Hirschman, *supra* n. 1.

<sup>12</sup> *Id.*

<sup>13</sup> Oquist, *supra* n. 3.

ricultural and stock-raising production and landholding were practically non-existent. Land and cattle were thus a useful device to fictitiously reduce earnings from other activities in order to pay less taxes.<sup>14</sup> Besides contributing to decrease tax payments, land is a useful hedge against inflation and can be used as collateral for loans. Consequently, land prices exceed the flow of income from agricultural and stock-raising profits, thus making investment in land more attractive and excluding poor families from access.<sup>15</sup>

Disputes between large landowners and squatters left the official institutional channels during the mid-1920s. Peasants shifted from defensive to offensive activities and their initially isolated and sporadic attacks became coordinated actions by the end of the 1920s.<sup>16</sup> Response by large landowners did not take long and erupted with renewed violence. The eviction of squatters without any apparent justification increased, sharecropping weakened, and large landowners preferred to hire day laborers, especially in the cattle raising regions, an activity with few labor requirements.<sup>17</sup>

In some cases large landowners promoted the creation of groups of “loyal” peasants with the aim of replacing previous sharecroppers and tenants. Evictions were often accompanied by violent acts, like the burning of homes, in order to prevent sharecroppers from returning later.<sup>18</sup> The forced abandonment and coercive sale of lands caused political conflicts in some regions during the 1930s.<sup>19</sup> Informal land holding and insecure property rights created opportunities for false claims to land and abuses.<sup>20</sup>

The state’s inability to settle disputes between squatters and large landowners, and its clear reluctance to expropriate private property, was compensated by the opening of new territories for colonization.

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<sup>14</sup> Hirschman, *supra* n. 1.

<sup>15</sup> Alain De Janvry and Elisabeth Sadoulet, 2001, *Access to Land and Land Policy Reforms*, Unu-Wider Policy Brief No. 3, Helsinki.

<sup>16</sup> LeGrand, *supra* n. 7; Hirschman, *supra* n. 1.

<sup>17</sup> LeGrand, *supra* n. 7.

<sup>18</sup> Hirschman, *supra* n. 1.

<sup>19</sup> Oquist, *supra* n. 3.

<sup>20</sup> Macours, *supra* n. 9.

This led to recurrent cycles of colonization, land seizures, and intensifying conflict. In addition, in these regions the awarding of titles to frontier lands was never accompanied by state presence in the form of infrastructure investments, provision of subsidies for squatters, or social investment.<sup>21</sup>

The escalation of disputes led to the passing of Law 200 of 1936. The main objectives of the Law were to clarify property titles, to introduce stricter regulations about the eviction of sharecroppers, to encourage the productive exploitation of land (with a threat of expropriation), and to undertake a program of land reform. Despite the good intentions of Law 200, its deficient design created incentives opposite to what was originally intended. Sharecroppers initiated legal actions to nullify the titles of large landowners, while the landowners, fearing the loss of their lands, stepped up the massive eviction of sharecroppers.<sup>22</sup> This was an incentive for many large landowners, who had formerly made intensive use of manpower, to switch to intensive capital investments, and to enlarge cattle stock at the expense of agricultural production.<sup>23</sup> Large landowners also took advantage of the law to legalize large stretches of land.<sup>24</sup>

The Law was accompanied by state policies in favor of large landowners, such as the provision of credits by the government banks (*Caja Agraria*), technical assistance from the Ministry of Agriculture, police protection against land invasions, and the support of judges in the resolution of land disputes.<sup>25</sup> The convergence of all of these factors led to an artificial but significant increase in productivity and contributed to increased land concentration.<sup>26</sup>

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<sup>21</sup> Hirschman, *supra* n. 1.

<sup>22</sup> *Id.*; Binswanger, Deininger, and Feder, "Power, Distortions, Revolt and Reform in Agricultural Land Relations"; Oquist, *supra* n. 3.

<sup>23</sup> Oquist, *supra* n. 3.

<sup>24</sup> Reyes, *supra* n. 2.

<sup>25</sup> Oquist, *supra* n. 3.

<sup>26</sup> Alain de Janvry and Elisabeth Sadoulet, 1993, "Path-Dependent Policy Reforms: From Land Reform to Rural Development in Colombia", in *The Economics of Rural Organization: Theory, Practice, and Policy*, K. Hoff, A. Braverman, and J. Stiglitz (eds.), Johns Hopkins University Press.

The failed land reform of 1936 did not ease the growing conflicts over land. Quite the opposite, such disputes were exacerbated during *La Violencia*. On the one hand, in many regions the traditional conflicts among members of indigenous groups, large landowners, and squatters continued, and traditional disputes over land control mingled with partisan conflicts.<sup>27</sup> On the other hand, the purposive use of violence to seize lands and displace people became a common practice in certain regions. The forced displacement of landowners, abandonment of properties, and forced sales of land at low prices were strategies employed by different interest groups during *La Violencia*.<sup>28</sup> Moreover, in some cases the payment to combatants and loyal peasants was made assigning land in the dominated territories.<sup>29</sup>

Uncertainty over property rights and the total absence of state institutions in certain regions facilitated land seizures. The massive and violent redistribution of land frequently occurred in areas that underwent complete state collapse. This was especially common in areas where the property titles of large landowners were doubtful, regions of intensive colonization processes, and areas occupied by indigenous groups.<sup>30</sup> Even before *La Violencia*, there were clear signs of strong competition for land between squatters and large landowners; this led to disputes that could not be settled through formal channels due to the lack of participatory political mechanisms and state institutions.<sup>31</sup> Even though small landowners aligned themselves with one of the two main political parties in an effort to protect their property, they were the most affected by land seizures.<sup>32</sup> According to Oquist's estimates, over 393,000 hectares of land in Colombia were subjected to seizure during this period.<sup>33</sup>

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<sup>27</sup> Oquist, *supra* n. 3; Mary Roldán, 2002, *Blood and Fire: La Violencia in Antioquia, Colombia, 1946-1953*, Durham: Duke University Press.

<sup>28</sup> Oquist, *supra* n. 3.; Roldán, *supra* n. 27.

<sup>29</sup> Roldán, *supra* n. 27.

<sup>30</sup> Oquist, *supra* n. 3.

<sup>31</sup> Roldán, *supra* n. 27.

<sup>32</sup> Oquist, *supra* n. 3.

<sup>33</sup> *Id.*

Informal tenure and state absence facilitated land seizures and intensified the conflicts in recently colonized regions. Given the weak social ties in these regions, and the absence of state institutions, the social and legal controls over landowners were practically non-existent.<sup>34</sup> Disputes over land frequently escalated into violent conflict, as has also happened in Brazil and Guatemala in areas where property rights are highly informal.<sup>35</sup> Even though the land reform of 1936 did result in the formalization of some land titles, this process was insufficient due to the weak state presence and its inability to effectively protect property rights.<sup>36</sup>

The process of land seizure during *La Violencia* modified the structure of landholdings in certain regions of the country, and increased further the concentration of ownership in a few hands.<sup>37</sup> Conflict over land persisted in certain regions once *La Violencia* ended in 1953, while other regions saw the appearance of new waves of migration, some of which are immersed in the civil conflict to this day.<sup>38</sup>

The Colombian government's response to processes of forced displacement and land usurpation was similar to the solution adopted at the end of the 1930s: frontier land assignment and a land reform that was again unsuccessfully applied. The rate of frontier land allocation increased significantly during *La Violencia*. LeGrand finds that 60,000 hectares were annually assigned between 1931 and 1945; 150,000 hectares between 1946 and 1954; and the figure rose to 375,000 between 1955 and 1959.<sup>39</sup> Once the period of *La Violencia* was over, coloniza-

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<sup>34</sup> De Janvry and Sadoulet, *supra* n. 15.

<sup>35</sup> Lee J. Alston, Gary D. Libecap, and Bernardo Mueller, 2000, "Land Reform Policies, the Sources of Violent Conflict, and Implications for Deforestation in the Brazilian Amazon", *Journal of Environmental Economics and Management* 39, 2; Macours, *supra* n. 9.

<sup>36</sup> Macours, *supra* n. 9; Klaus Deininger and Gershon Feder, 1998, *Land Institutions and Land Markets*, World Bank Policy Research Working Paper No. 2014, Washington: World Bank.

<sup>37</sup> Oquist, *supra* n. 3.

<sup>38</sup> Reyes, *supra* n. 2.

<sup>39</sup> LeGrand, *supra* n. 7.

tion programs were undertaken to resettle families of peasants and displaced persons in remote regions.<sup>40</sup>

During the Carlos Lleras presidency, Law 135 of 1961 was passed with the purpose of carrying out an ambitious land reform program. The law's good intentions never resulted in a land redistribution. First, the expropriated lands were in remote regions and with poor soil quality. Second, the amount of expropriated land was far below the established targets. In the first year of the land reform, little more than 2,300 families received lands, the target being 10,000 families. By 1972, 123,000 titles had been granted, far short of the 935,000 families that had been identified as eligible, and only 1.5% of all large landholdings had been redistributed.<sup>41</sup> Third, the INCORA (the Colombian Institute of Agrarian Reform, which was created with the specific purpose of implementing Law 135) geared the land reform efforts towards granting titles to frontier lands, a less controversial initiative than expropriation. In fact, during these ten years, 85% of its activities concentrated on granting legal property titles to newly colonized lands.<sup>42</sup> Lastly, alongside Law 135, the Colombian government devised and implement a set of public policies that favored large producers and promoted the adoption of new technologies. These large investments improved the value of large landholdings, and made compensation payments for expropriation unaffordable for the state.<sup>43</sup>

The power of large landowners wound up thwarting the country's second land reform.<sup>44</sup> This happened despite the fact that the productivity of land in the 1960s was considerably higher on small properties, due to a more intensive use of land and the bigger proportion of it devoted to agriculture instead of cattle-raising.<sup>45</sup> In 1972, in the face of endless pressures from large landowners, the Chicoral Pact was nego-

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<sup>40</sup> Hirschman, *supra* n. 1.; LeGrand, *supra* n. 7.

<sup>41</sup> De Janvry and Sadoulet, *supra* n. 15.

<sup>42</sup> Donny Meertens, 2005, "Tierras, Derechos y Género: Leyes, Políticas y Prácticas en Contextos de Guerra y Paz", in *Informe Final*, Unifem.

<sup>43</sup> De Janvry and Sadoulet, *supra* n. 15.

<sup>44</sup> Meertens, *supra* n. 42; De Janvry and Sadoulet, *supra* n. 15.

<sup>45</sup> Albert Berry, 1972, "Farm Size Distribution, Income Distribution, and the Efficiency of Agricultural Production", *American Economic Review* 62, 2.

tiated and land reform came to an end. Law 4 of 1973 confirmed the end of land reform by limiting the invasion of frontier land to cases where they remained unproductive and abandoned; this was a return to the regulation of frontier land in the earlier Law 200 of 1936.

Thus, it is not surprising that the results of the land reform contemplated in Law 135 were insufficient. During the decade in which the reform was in effect (1960-1970), ownership became more concentrated by an increase in large properties and a regrouping of smaller ones.<sup>46</sup> The percentage of lands subject to intensive use on large properties increased by 59%, whereas it remained constant on small ones.<sup>47</sup> In sum, the land reform was effective in legalizing titles to frontier land properties, but inadequate as a means to redistribute land.<sup>48</sup>

Throughout the 1970s and 1980s, public policies favoring large landowners endured, as well as the granting of frontier lands with poor soils in remote zones to peasants. Investments in public goods in rural areas, such as roads, irrigation channels, and subsidized loans, continued to aim at the owners of large properties. In addition, the adoption of capital-intensive technologies and the expansion of cattle raising diminished the opportunities of employment for peasants.<sup>49</sup> While this policy explicitly favored the colonization of frontier lands, the great majority of colonized lands did not have formal property titles. An eloquent figure is that only 1.4 million of the 3.4 million colonized hectares had been granted property titles by 1980.<sup>50</sup>

The emergence of drug trafficking and its consolidation in the 1980s, together with the underlying prevalent dynamics, led to an even higher land concentration in Colombia, and to further evictions of peasants from colonization areas. In addition to land being a symbol of social prestige and an asset with multiple uses, the traffickers' accumu-

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<sup>46</sup> Luis Lorente, Armando Salazar, and Angela Gallo, 1996, “*Distribución de la Propiedad Rural*”, *Coyuntura Colombiana* 13, 2B.

<sup>47</sup> *Id.*

<sup>48</sup> Binswanger, Deininger, and Feder, *supra* n. 22.

<sup>49</sup> De Janvry and Sadoulet, *supra* n. 15.

<sup>50</sup> Dario Fajardo, 1994, “*La Colonización de la Frontera Agraria Colombiana*”, in *El Agro y la Cuestión Social*, Absalón Machado (ed.), Bogotá: Tercer Mundo Editores.

lation and purchase of land had a strategic purpose, as it permitted them to legalize illicit capital and provided areas where they could be safe or hide, and also to build an infrastructure of laboratories and landing strips.<sup>51</sup> Drug traffickers most frequently purchased land in consolidated areas and at higher prices than the returns from agricultural exploitation. The revenues from the sales of these lands were in turn invested in the purchase of more extensive properties in colonization areas. In this way, drug trafficking partly financed a new wave of colonization.<sup>52</sup>

During the 1970s and 1980s, the combination of the traditional dynamics of the land market and the emergence of drug trafficking caused changes in the ownership and prices of land. Between 1970 and 1984, large-scale ownership declined and medium-sized ownership consolidated. Nevertheless, land inequality levels were fairly stable because of the fragmentation of large properties.<sup>53</sup> This trend was reversed between 1984 and 1994 with the deterioration of mid-sized properties, the persistent fragmentation of small ones, and the consolidation of large ones.<sup>54</sup>

In 1994, the Colombian government designed a new land reform with the passing of Law 160 of that year. In contrast with the previous land reforms, this was based on market mechanisms for the transfer of land, not on the expropriation of unproductive lands. Peasants who were eligible as beneficiaries had to identify the plot of land, negotiate the purchase with the owner, and inform the INCODER (the Colombian Institute of Rural Development, which was created to replace the INCORA) in order to proceed with the transaction. The Colombian government offered a 70% subsidy for the purchase. The goal of this reform was to redistribute one million hectares, but the results have been insufficient.<sup>55</sup>

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<sup>51</sup> Reyes, *supra* n. 2.

<sup>52</sup> Lorente, Salazar, and Gallo, *supra* n. 46.

<sup>53</sup> *Id.*

<sup>54</sup> Meertens, *supra* n. 42.

<sup>55</sup> Klaus Deininger, 1999, “*Making Negotiated Land Reform Work: Initial Experience from Colombia, Brazil and South Africa*”, World Bank Policy Research Working Paper Series No. 2040, Washington: World Bank.

Between 1993 and 2001, 598,332 hectares were transferred, the transactions occurring mostly in four *departamentos*, which are the largest regional administrative units in Colombia, with half of the assigned plots located in only 40 municipalities.<sup>56</sup> Moreover, between 2002 and 2007, the INCODER concentrated its actions, as in previous periods, on granting titles to frontier lands, not on programs of land reform proper: 53.4% of the lands assigned by INCODER were grants of titles to squatters in frontier lands, 37.9% were collective land titles granted to Afro-Colombian communities, and 5.6% involved programs of land reform.<sup>57</sup> The dynamics of land concentration described in the previous paragraphs meant that, between 1960 and 1990, the Gini coefficient of land fell from 0.87 to 0.84, despite the two land reforms and the increasing flow of resources to the INCORA.<sup>58</sup>

The intensification of the internal conflict as a result of the emergence of paramilitary groups, and the use of drug money to fund them, aggravated the fight for land in some regions. Indeed, land and territory have been at the center of the Colombian armed conflict, in several ways: military disputes for territorial control, the need to establish corridors for transporting arms and illicit drugs, the exploitation of natural resources, and the use of land as war booty.<sup>59</sup> Moreover, the growing participation of armed groups in drug trafficking has created incentives for the accumulation of land in peripheral regions, where illegal crops can be grown more easily.<sup>60</sup>

The strategies employed by armed groups to exert territorial control and accumulate land have led, as they did during *La Violencia*, to the expulsion of millions of peasants from their lands. In order to seize their lands, the armed groups have used several strategies, such as co-

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<sup>56</sup> Juan Gonzalo Zapata and César Arismendy, 2003, “*Ordenamiento Territorial y Reforma Agraria en Colombia: Un Nuevo Enfoque para un Viejo Problema*”, in *Informe final presentado al Banco Mundial*, Bogotá: Fedesarrollo.

<sup>57</sup> Juliana Helo, Ana María Ibáñez, and Andrea Velásquez, 2008, “*La Informalidad de los Mercados de Tierras en Colombia*”, in *Informe final presentado a USAID*, Bogotá: Universidad de los Andes.

<sup>58</sup> Deininger, *supra* n. 55.

<sup>59</sup> Ana María Ibáñez, 2008, *El Desplazamiento Forzoso en Colombia: Un Camino sin Retorno hacia la Pobreza*, Bogotá: Ediciones Uniandes.

<sup>60</sup> Reyes, *supra* n. 2.

receive transfers, fence-shifting to seize plots previously in hands of people now displaced, the use of front men to keep plots from expropriation, and the acquisition of fore-closed plots, whose owners failed to pay mortgages because they were displaced.<sup>61</sup>

By the end of 2008, around 2.8 million peasants had been forced to migrate. More than half of the displaced population, 55.4%, had access to land before this forced migration, and the average size of their plots was 13.2 hectares. In many cases, it will be impossible to recover the abandoned properties, since only 31.2% of these peasants have formal property titles, 12.8% still control their property in some manner, and 25.8% hope to recover their property when they return.<sup>62</sup> In consequence, nearly 1.8 million hectares have been abandoned or seized, that is, 2.5 times the amount of lands assigned under land reform programs between 1993 and 2002.<sup>63</sup>

The land abandoned by the displaced population is being used in diverse ways. In some cases, it has been reassigned to peasants loyal to the dominant armed group in the region.<sup>64</sup> In others, the land has been appropriated by drug traffickers or by members of the armed groups. This is the case of the leaders of paramilitary groups, who have accumulated significant amounts of land.<sup>65</sup> But, in certain regions, the lands have been simply abandoned.

The processes of displacement and the seizure of lands have been particularly intense in regions where the absence of the state is prevalent and the protection of property rights weak. Areas of recent colonization, with a low density of population, recent settlement, weak social cohesion, and a marked informality in property rights, have been especially vulnerable to these phenomena.<sup>66</sup> Econometric estimates have found that forced displacement has been most intense in municipalities

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<sup>61</sup> *Id.*; Meertens, *supra* n. 42.

<sup>62</sup> Ana María Ibáñez and Andrés Moya, 2009, “Do Conflicts Create Poverty Traps? Asset Losses and Recovery for Displaced Households in Colombia”, Microcon Research Working Paper 10.

<sup>63</sup> Ibáñez, *supra* n. 59.

<sup>64</sup> Meertens, *supra* n. 42.

<sup>65</sup> Reyes, *supra* n. 2.

<sup>66</sup> Lorente, Salazar, and Gallo, *supra* n. 46.

with the highest informality of land holding.<sup>67</sup> Drug traffickers and paramilitary groups took advantage of the institutional void and the weakness of the state to guarantee the rights to buy lands in areas with a strong presence of the guerrilla, providing private security, raising property values, and profiting out of the subsequent increases in land prices.<sup>68</sup>

The capture of local authorities and institutions responsible for regulating land markets by armed groups has also facilitated the seizure of lands. In particular, the capture of public notaries and the cadastral registry offices in many regions of the country has allowed for transferences of lands to members of paramilitary groups, thus complicating the reparation processes and the protection of property rights for the displaced population.<sup>69</sup>

The consequences of displacement and land seizures for the displaced population are substantial. They migrate to urban regions and face huge difficulties in entering urban employment because their experience in agricultural work is not valued in urban labor markets. The great loss of productive and non-productive assets, restrictions on access to credit, and the weakening of their social networks impair their ability to generate income. As a result, the earnings of the displaced population in the municipality that receives them are less than half of what they formerly earned. In addition, their ability to accumulate assets is strongly limited, and barely a fourth of them manage to recover the assets lost through the conflict.<sup>70</sup>

The costs of forced displacement and land concentration are not limited to the displaced population. The long-term effects for the country's economic development may be important as well. On the one hand, the loss of earnings from land that remains unexploited reduces the growth of the agricultural GDP by 3.5% annually.<sup>71</sup> On the other,

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<sup>67</sup> Andrea Velásquez, 2008, "La Informalidad de los Derechos de Propiedad: ¿Determinante de la Estrategia Militar de los Actores Armados?", *Desarrollo y Sociedad* 61: 119-64.

<sup>68</sup> Reyes, *supra* n. 2.

<sup>69</sup> *Id.*

<sup>70</sup> Ibáñez, *supra* n. 59.

<sup>71</sup> *Id.*

an unequal distribution of land affects the rural population's ability to generate income, causing a greater inequality in income distribution. The lack of assets restricts access to credits and thus the possibility of financing productive investments.<sup>72</sup>

In Colombia, the *departamentos* with a higher land concentration show lower levels of growth, whereas the zones with more equitable distributions have higher levels of rural incomes.<sup>73</sup> Furthermore, the consolidation of new regional elites concentrates wealth and power even more in certain groups of the population. As in previous decades, these groups exert pressure for the shifting of public investments from ends which benefit the bulk of the population, like education, towards those which benefit a few owners of big properties, which affects the country's long-term growth.<sup>74</sup>

To identify the factors that unleashed the current concentration of land is a complex task. Diverse factors have worked together, contributing to give this concentration an inertia that, even now, would be difficult to reverse. Nevertheless, it is possible to single out four factors that have seemed to influence the distribution of property in Colombia. First, land distribution during the first few centuries of the colonial period enabled certain groups of the population to acquire the best land, creating landowning elites with a growing power to pressure for policies favorable to them, a factor which led to further accumulation. Second, land markets in Colombia are weak and highly segmented, have high transaction costs, and, on occasions, a preponderance of informal transactions.<sup>75</sup> This creates conditions that contribute to land concentration. Third, public policies have created incentives for the purchase of land that, to a large extent, have benefited large landowners. Tax benefits for landowners, rural public investments aimed at

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<sup>72</sup> Klaus Deininger and Lyn Squire, 1998, "New Ways of Looking at Old Issues: Inequality and Growth", *Journal of Development Economics* 57, 2.

<sup>73</sup> Lina Castaño, 1999, "*La Distribución de la Tierra Rural en Colombia y su Relación con el Crecimiento y la Violencia*", Universidad de los Andes.

<sup>74</sup> Oded Galor, Omer Moav, and Dietrich Vollrath, 2009, "Inequality in Land Ownership, the Emergence of Human-Capital Promoting Institutions, and the Great Divergence", *Review of Economic Studies* 76, 1.

<sup>75</sup> Deininger, *supra* n. 55.

large landowners, and obstacles to the leasing and sale of small properties are some examples. Finally, the armed conflict and drug trafficking have been a violent mechanism for the redistribution of land in Colombia.

The following section describes the evolution of land concentration in rural areas in Colombia during the period between 2000 and 2009. While we do not identify the determinants of such concentration, we will try to find out whether the armed conflict of recent decades influenced current land distribution.

### **9.3. The Evolution of Land Markets and Land Concentration: 2000 to 2009**

The beginning of the twenty-first century in Colombia was marked by a significant intensification of the armed conflict. The guerrilla and paramilitary groups consolidated their hegemony over many regions of the country, there was a complete absence of the state in a number of municipalities, and forced displacement reached its most critical point. Little is known about the impact of the intensification of the armed conflict on land markets and land concentration in the country. The aim of this section is to analyze the evolution of land concentration in rural areas in Colombia during the period from 2000 to 2009 and to identify possible links between the dynamic of land distribution and the armed conflict. It is worth noting that unraveling the causes of land concentration is not our aim; that would require a detailed historical study, which is not our objective. Neither do we intend to establish causal relationships between the armed conflict and land concentration. We only seek to identify possible correlations between the two variables.

#### **9.3.1. The Data**

The analysis of land distribution in Colombia is based on the information collected by the cadastral registry of the *Geographical Institute Agustín Codazzi* (IGAC). This institution has compiled cadastral information since the 1970s, consolidating a database on rural and urban land ownership for all of the country except the *departamento* of Antioquia, which has its own system of information.

Before 1983, the information on each property was limited to the characteristics of the land plot and its location. Law 14 of 1983 created a cadastral file, which is a system whose main goal is to gather information for the estimation of cadastral values. The information collected is compiled in two kinds of registers. The first has data about the owner, location, size of the plot, and constructed area. The second register has information about detailed characteristics of the buildings and other features of the property, which are the main raw data for the estimation of cadastral value. Although the collection of this information goes back to the mid-1980s, only data from the year 2000 onwards are available in electronic media.

Cadastral data were cleaned in order to correct input errors and other inconsistencies in the database. Once the first cleaning was done, a filtering process was applied to the database in order to identify properties that were not private, that is, properties belonging to the state, religious communities, indigenous communities, Afro-Colombian communities, and natural reserves, among others, which were excluded from our analysis. Finally, a database for private property was constructed for the years 2000 to 2009, which allowed us not only to identify the properties but also to follow their owners throughout the country.

Based on this data, we calculated descriptive statistics to examine trends by plot size and the number of properties in the cadastral registry, and we calculated Gini coefficients for land. In addition, we estimated two additional land concentration indicators: (i) Gini coefficients controlling for land quality, and (ii) Gini coefficients by owners. Since two properties of identical size may not necessarily have the same value due to differences in soil quality, it is important to correct land Gini by taking into account soil quality. To do this, we divided the size of the properties by the Family Agricultural Units corresponding to the region (UAF by its Spanish acronym).<sup>76</sup> Traditionally, land

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<sup>76</sup> The family agricultural unit (UAF) is understood as the basic productive entity for agriculture, stock-rearing, fish-farming or forestry, the size of which, in accordance with the agro-ecological conditions of the zone and the suitability of technology, allows the family to profit from their work and dispose of a surplus capital which helps to form their patrimony (Law 160 of 1994).

Ginis are calculated by land plot, ignoring that one person may own more than one land plot. To control for the possibility of ownership of multiple properties, we estimated Gini for owners<sup>77</sup>. With the aim of adding up all the properties belonging to a single person, we created an identifier of owners, and then aggregated the number and real size of the properties per person.

In this way, we found different estimates of the Gini: (i) land (traditional), calculated on the basis of the cadastral areas of plots; (ii) owners, which we obtained by adding all the properties of each person; (iii) lands (controlling for quality), dividing by the UAFS at the municipal level to estimate the Gini; and (iv) owners controlling for quality, which we obtained by adding up the UAFS belonging to the same owner throughout the country.

To calculate the Gini, we made robustness proofs using the four main methodologies: geometric, mean differences, covariance, and matrix estimation. The results for the different methodologies show little variation. Given that we did not find significant differences for the four estimates, Sen's proposal was chosen, which allows for comparability and simplicity.<sup>78</sup>

The estimated Gini is:

$$Gini = \left( \frac{1}{2n^2\mu} \right) \sum_{i=1}^n \sum_{j=1}^n |y_i - y_j|$$

Where  $n$  is the total number of register entries,  $m_y$  is the mean of the total area of the plot per property (Gini for land) or total area per owner (Gini for owners),  $y_i$  is the area of the plot of property "i" (Gini for land) or of the owner "i" (Gini for owners).

### 9.3.2. Evolution of the Concentration of Property: 2000-2009

Land concentration in Colombia increased during the period from 2000 to 2009. Graph 1 shows the evolution of the land Gini and the owners Gini, both not controlling and controlling for land quality. Before con-

<sup>77</sup> We suppose that each owner has exactly the same land portion in plot with several owners.

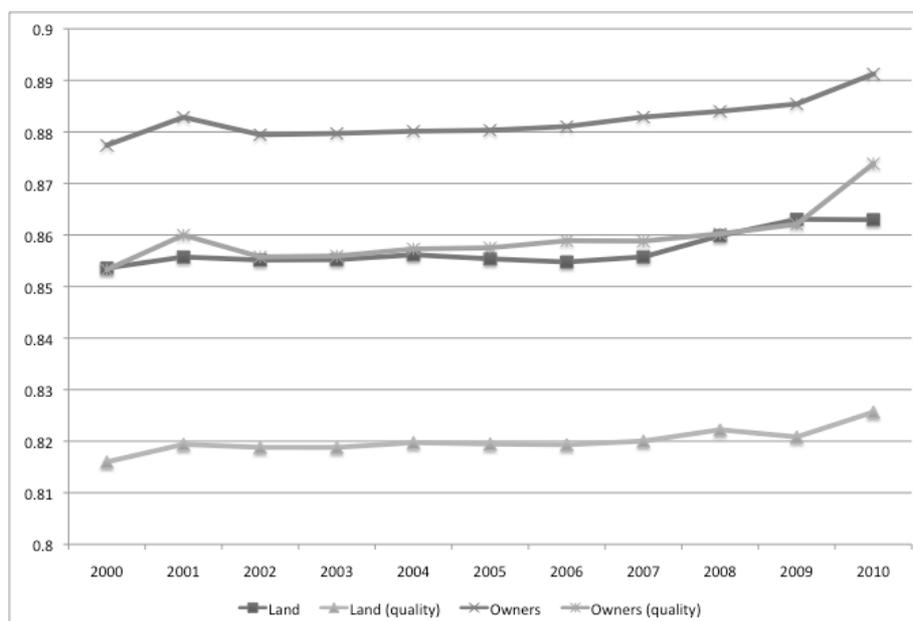
<sup>78</sup> Amartya Sen, 1973, *On Economic Inequality*, Oxford: Clarendon Press.

trolling for land quality, the land Gini increases, but in a barely perceptible way, from 0.85 to 0.86. When land concentration is calculated not only in terms of increases in land plots of each particular property, but also in the acquisition of several properties by the same owner, the rising trend of the Gini is accentuated, particularly from 2005 onwards.

In 2000, the owners Gini was 0.86 and in 2009 it rises to 0.88. While the increase may not seem significant, it is important to make two clarifications. First, 0.88 is the highest value seen up to now in Colombia since measurements have been made. Second, as was mentioned in the previous section, during thirty years the Gini for lands fell by 0.03 and then, in the past nine years, rose by 0.02.

When we control for the quality of land, we find that the Ginis fall slightly, but the trend persists. This implies that land concentration has taken place in regions with lands of a poorer quality. The gap between the land Gini and the owners Gini widens in a significant way from 2005 onwards and reaches a value of 0.03 in 2009. The difference between both Ginis indicates that land concentration is driven by the growth in land plots and the purchase of new properties by a few owners. The widening of this gap from 2005 reveals a significant expansion of the latter phenomenon.

Despite the rising trend in land concentration, it is surprising that increments in Gini are not more pronounced, given the massive abandonment of lands reported by the displaced population. Three complementary phenomena may explain this situation. On the one hand, it is possible that the seizure of lands is concealed by the use of front men or by the fictitious division of ownership among relatives or friends of the actual owner, and is thus not reflected in the indicators for concentration. On the other hand, concentration may not increase much when, rather than causing an increase in the size of the old properties, seizure caused a change in the owners of the same properties. Third, considering that data for the 1990s are not available, the increase may in fact be larger than reported.



**Graph 1:** Evolution of the Gini coefficients for lands and owners (2000-2010). Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

The distribution by the size of land plots remains fairly constant between the years 2000 and 2009 (Table 1). The properties of internally displaced people may range between three and 20 hectares and the share of these properties decrease slightly between 2000 and 2009. Likewise, there is a smaller percentage of properties between 20 and 200 hectares in 2009, compared to 2000. Furthermore, the percentage of properties larger than 200 hectares grew during the nine-year period, particularly properties between 1,000 and 2,000 hectares.

Land plot size	2000	2010
Less than 1hectare	0.49%	0.98%
1htas < 3htas	1.62%	2.71%
3htas < 5htas	1.70%	2.48%
5htas < 10htas	3.72%	4.86%
10htas < 15htas	3.12%	3.80%
15htas < 20htas	2.76%	3.31%
20htas < 50htas	12.46%	14.68%

50htas < 100htas	12.31%	13.23%
100htas < 200htas	12.69%	12.19%
200htas < 500htas	14.94%	12.48%
500htas < 1000htas	10.38%	9.84%
1000htas < 20000htas	8.42%	7.43%
>2000hts	15.38%	11.99%

**Table 1:** Distribution of lands by size (2000-2010). Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

The stable trends of Gini's and the share by size of the land plot may conceal an active transfer of properties caused by land market factors, illegal seizures, and the cadastral update. In order to determine whether this phenomenon did in fact take place, Table 2 reports the number of new owners registered between 2000 and 2009, as well as the changes in the size of the plots and owners of the old properties for the period between 2000 and 2009.

The number of new owners filed in the National Cadastral Registry rose by a little more than 1.4 million. This is equivalent to 46.6% of the land registered in 2009 and 51.6% of owners. Even though an update of cadastral registry has occurred, a percentage of these new owners may be explained by purchases or illegal seizures of properties that formerly belonged to the displaced population. Below we will undertake econometric estimates in order to determine whether the registration of new properties coincides with regions where more forced displacements occurred or where the presence of armed groups was persistent.

The remaining categories of Table 2 correspond to owners who appear both in 2000 and 2009. For these owners, we compare the number of properties and their area, and we group them according to dynamics of concentration and fragmentation. We found dynamics of concentration in 14.78% of the plots that appeared in the 2000 cadastral registry and in 17.24% of the properties. In particular, 12.33% of the properties played a role in the process of concentration insofar as their owners accumulated more and bigger plots. On the other hand, 3.82% of the owners continued to have the same number of properties, but of a larger size.

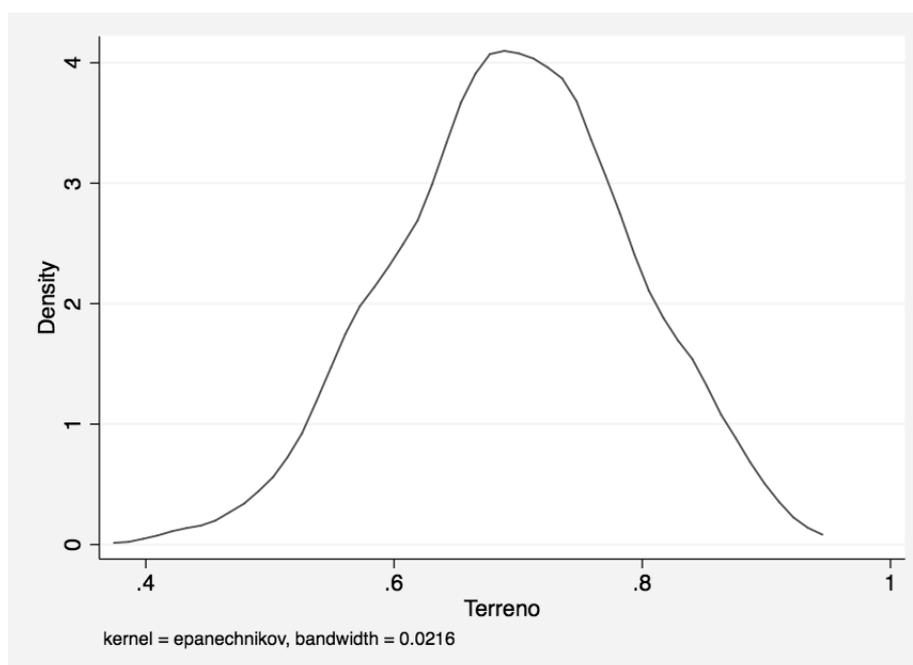
The fragmentation of plots seems less frequent in this period. The division of plots is recorded in 10.5% of the land and 9.62% of the properties. The shrinking of land size and a smaller number of properties were the main causes of this fragmentation.

	Number of owners	Plot percentage (2010)	Properties percentage (2010)
New owners	793,611	24.50%	21.26%
Plot size and properties constant	2,004,045	49.74%	53.68%
<b>Concentration</b>			
Plot size constant and smaller number of properties	82,232	2.20%	2.20%
Larger plot size and constant number of properties	128,713	7.79%	3.45%
Larger plot size and smaller number of properties	9,982	0.65%	0.27%
Larger plot size and larger number of properties	47,609	1.39%	1.28%
<b>Fragmentation</b>			
Smaller plot size and smaller number of properties	31,725	0.90%	0.85%
Constant plot size and larger number of properties	361,664	3.95%	9.69%
Smaller plot size and constant number of properties	203,307	7.73%	5.45%
Smaller plot size and larger Number of properties	70,214	1.15%	1.88%

**Table 2:** New owners, fragmentation and concentration of property: (2000-2010).  
Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

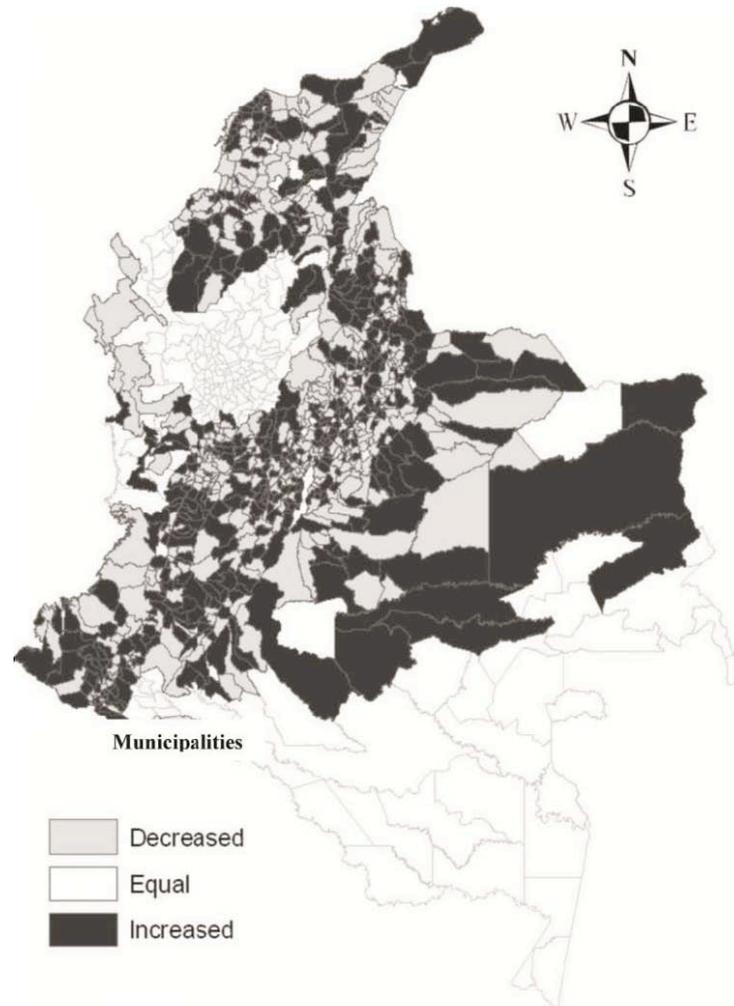
Although it shows some heterogeneity among municipalities, land concentration is high for the great majority of municipalities. Graph 2 shows the kernel distribution of the municipal Gini in the year 2009. The average municipal Gini is 0.726 and half of Colombian municipalities have a Gini higher than 0.732. The distribution shows that the bulk of Colombian municipalities have Ginis that range between 0.5 and 0.98. The municipality with the lowest Gini is San José del

Palmar (Chocó), with an index of 0.1403 and the one with the highest is Chiscas (Boyacá), with an index of 0.97929.



**Graph 2:** Distribution of municipal Ginis (2010). Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

Changes in land concentration in Colombia between 2000 and 2009 occurred in more than half of the municipalities. Map 1 shows the municipalities whose concentration rose, stayed the same, or fell. A little more than 56% of municipalities register an increase in land concentration, while 43.3% show a decline. The increase in concentration is a common trend along the Colombian territory and is not particular of isolated municipalities. Moreover, a high percentage of the municipalities that show increased concentration between 2000 and 2009 are located near the main productive centers of the country.



**Map 1:** Changes in land concentration: (2000– 2010). Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

While this concentration was seen throughout the country, determining the characteristics of the municipalities which faced an increased concentration is of prime importance. A first approach to this question is shown in Table 3 (see Appendix at the end of the chapter). There, the country’s municipalities are grouped in accordance with their agricultural and cattle-raising production, the quality of their lands, their altitude, their distance from the capital of their respective

*departamento*, the presence of natural resources, the activities of armed groups, and the magnitude of forced displacement. Likewise a comparison is made of the evolution of concentration in zones of colonization and consolidated zones.

Before analyzing the evolution by groups of municipalities, we compare the concentration in 2000 for the different groups. In the year 2000, the highest concentration of rural property was most frequently found in isolated zones at altitudes greater than 2000 masl, located on poor quality soils, where production was non-agricultural (for example, exploitation of natural resources), or in areas of colonization. It is worth noting, however, that the indexes of concentration in other regions are rather high and do not differ much from those of the more concentrated regions. The trend of concentration in the different municipal categories remains fairly stable over the ten years. Nevertheless, in the period between 2003 and 2006, the concentration deepened in regions devoted to the exploitation of natural resources, enduring colonization processes, and located in remote areas. The concentration in isolated regions continued to grow in 2009.

The concentration in 2000 and its subsequent evolution are different for municipalities with high and low indexes of violence. The municipalities with a persistent paramilitary or guerrilla presence show much higher indexes of concentration compared to those where there was a smaller presence, a difference which is more profound for the municipalities with a paramilitary presence. The municipalities with magnitudes of displacement above the national median show lower indexes of concentration of property, which means that the displacement process occurred more frequently in regions of small landowners.

To identify the determinants of such concentration is not simple. The initial assignment of lands, land markets, public policies, and the diverse conflicts throughout Colombian history would seem to be important determinants of the process of concentration. To untangle these determinants it would be necessary to carry out an analysis covering a long period of time, which is not possible due to the unavailability of the data. However, in recent decades land seizure, forced displacement, and the consolidation of Colombia's position as an exporter of natural resources makes it necessary to find relationships between land con-

centration, the emergence of new owners, and the possible determinants. To establish causality links between the armed conflict and the recent land concentration in Colombia is difficult. While the conflict might have produced an increase in concentration, the armed groups presumably tried to exert territorial control in regions with the most valuable lands and in those with a higher concentration of property.

The econometric estimates associate the changes in the Gini indexes for the period between 2000 and 2009 and the dynamics of concentration to the presence of armed actors and the initial conditions of the period, that is, the number of new owners and the cadastral area in 2000. The estimates also include a set of municipal controls that are not reported as well as fixed effects by *departamentos*.<sup>79</sup>

Before interpreting the results, a word of caution is necessary. First, the econometric estimates do not seek to establish causal relationships, given the abovementioned complications. Second, the relationship between forced displacement and land concentration is difficult to identify because of reverse causality. On the one hand, the armed groups are concentrated in regions which would seem to have a smaller concentration of property, presumably because of the ease of seizing the lands of small owners. On the other hand, mass expulsion may eventually lead to a higher concentration of land ownership. Finally, since forced displacement is still ongoing, many of the illegal transferences of land are not immediately captured by the cadastral registry. All of the above makes it difficult to arrive at accurate estimates, and thus the results are not reported.

In Table 4 (see Appendix), we report estimation results for the difference in size and number of properties between the years 2000 and 2009. In particular, we analyze the two dynamics that seem to have contributed more to land transfers and land concentration: (i) the emergence of new owners, and (ii) the increase in the size of land plots and the number of properties. It also includes the estimates, in Gini levels, of lands and owners, controlling for quality, for 2009.

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<sup>79</sup> Each of the econometric estimates included fixed *departemento* effects, controls for municipal geography, and dummies for quintiles of the quality of land and informality of land holdings, presence of natural resources, and areas of colonization.

The presence of armed groups is correlated with land concentration. Attacks by unknown armed groups are positively correlated with the number of new owners. Likewise, attacks by guerrilla groups are positively correlated with the number of new owners, the increased number of properties per person, and the growth of the properties. The estimates of Gini levels of 2009, both of lands and owners, indicate a positive correlation with the variables of the armed conflict. In particular, the Ginis have a positive correlation with the attacks by unknown agents and by paramilitary groups.

As could be expected, the initial conditions of land concentration, determined by historical dynamics, would seem to have the highest correlation with current concentration. This would imply that the initial distribution of property and the difficulties of reversing the persistence in this concentration, which is due to the weakness of land markets in Colombia, might be the main cause of land concentration in Colombia. Since these econometric estimates do not establish any causality, this is merely a hypothesis, which might be confirmed in future research.

In sum, although it would be hasty to state that there is a robust relationship between the processes of land concentration in Colombia and the armed conflict, the correlations between these events suggest that the effects of the armed conflict have had an influence on the structure of property in Colombia. Nevertheless, this is less a conclusion than an invitation to continue exploring quantitatively possible relationships that would help us to attain a clearer understanding of the structure of land ownership in Colombia.

#### **9.4. Elements for Discussion: By Way of Conclusion**

Land concentration in Colombia is caused by many factors. The initial distribution of land, the historical dynamics, the weakness of land markets, the armed conflict, and drug trafficking have determined the concentration of property in the country. To determine the effect of each one of these dimensions on the present concentration is difficult due to the lack of historical data about land distribution. Nevertheless, during the past decade, the intensification of the conflict and the con-

solidation of Colombia's position as an exporter of natural resources may have concentrated land property even further.

The analysis of land concentration trends in Colombia in this chapter allows one to reach four conclusions. First, the period between 2000 and 2009 was marked by a higher land concentration. Given the high indexes of concentration that prevailed in 2000, already the highest in Latin America, it would have been difficult to predict additional increases. However, there were increases from the year 2005 onwards. Second, instead of an increase in the size of properties, land concentration was the result of the acquisition of additional properties by the then existing owners. Third, the relative stability of the indexes of concentration contrasts with the significant appearance of new owners filed in the national cadastral registry. These new owners may have resulted from the purchase of plots, the cadastral updates, or land seizures as a result of the armed conflict. Fourth, the Colombian municipalities with the highest concentration are located in isolated zones, which have significant natural resources, poor soil quality, and the presence of colonization processes and armed groups.

While it is difficult to establish a causal relationship between the concentration of property and the presence of armed groups, a number of simple correlations reveals a positive relationship between both variables. The presence of all the armed groups – guerrilla, paramilitaries, unidentified groups – is positively correlated with land concentration, especially with the emergence of new owners, the increase of the number of properties per person, and the enlarged size of the properties. Furthermore, the conditions of concentration initially seen in 2000 have the highest correlation among all of the analyzed factors. The weakness of land markets, the few market transfers that occur, the armed conflict, and public policies that protect large landowners would seem to be obstacles to reversing the inertia created by the initial distribution of land in Colombia.

## Appendix

Category	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Agricultural municipalities (DANE classification)	0.683	0.683	0.683	0.684	0.684	0.685	0.681	0.687	0.688	0.688
Non-agricultural municipalities (DANE classification)	0.719	0.720	0.722	0.722	0.727	0.728	0.717	0.730	0.728	0.731
Good land quality: municipalities with UAFS lower than or equal to the national median	0.684	0.684	0.684	0.686	0.687	0.688	0.682	0.689	0.690	0.690
Poor land quality: municipalities with UAFS higher than the national median	0.697	0.697	0.697	0.697	0.698	0.699	0.694	0.701	0.702	0.703
Municipalities below 1000 masl	0.681	0.681	0.682	0.685	0.685	0.686	0.678	0.688	0.689	0.690
Municipalities between 1000 and 2000 masl	0.688	0.686	0.686	0.686	0.688	0.689	0.682	0.691	0.691	0.691
Municipalities above 2000 masl	0.713	0.713	0.712	0.712	0.713	0.713	0.717	0.713	0.715	0.715
Municipalities at less than 100 km from the capital of the state	0.697	0.697	0.697	0.697	0.700	0.701	0.697	0.701	0.701	0.706
Municipalities at more than 100 km from the capital of the state	0.682	0.681	0.682	0.684	0.684	0.684	0.678	0.687	0.688	0.685
Exploitation of gold, flowers, palms, petroleum, coal and emeralds	0.711	0.709	0.709	0.712	0.716	0.717	0.709	0.718	0.718	0.716
No exploitation of gold, flowers, palms petroleum, coal or emeralds	0.678	0.678	0.678	0.678	0.678	0.679	0.675	0.681	0.682	0.684
Municipality colonization (DANE classification DANE)	0.745	0.744	0.745	0.745	0.748	0.747	0.733	0.749	0.748	0.746
Consolidated municipality (DANE classification)	0.745	0.744	0.745	0.745	0.748	0.747	0.733	0.749	0.748	0.746
Municipalities with number of paramilitary attacks greater than or equal to the national median	0.700	0.702	0.703	0.702	0.703	0.704	0.695	0.706	0.704	0.706

Municipalities with number of paramilitary attacks less than the national median	0.683	0.682	0.681	0.683	0.685	0.685	0.682	0.686	0.689	0.689
Municipalities with number of guerrilla attacks greater than or equal to the national median	0.695	0.695	0.694	0.694	0.696	0.696	0.692	0.700	0.699	0.699
Municipalities with number of guerrilla attacks less than national median	0.682	0.681	0.683	0.685	0.686	0.687	0.680	0.686	0.688	0.690
Municipalities with individual displacement equal to or greater than the national median	0.682	0.678	0.682	0.682	0.685	0.687	0.676	0.688	0.690	0.691
Municipalities with individual displacement lesser than national median	0.700	0.703	0.697	0.699	0.699	0.698	0.699	0.700	0.699	0.699

**Table 3:** Annual evolution of Gimis, by categories (2000-2009). Source: Estimates of CEDE-IGAC, based on National Property Register – IGAC.

Variable	New owner		Larger terrain and more properties	Ginis in levels (2009)	
	Size of properties	Number of properties		Land Gini (Quality)	Owner Gini
Number of attacks by unknown agents	3.286* [1.63]	3.207* [1.62]	0.199 [0.17]	0.000158*** [0.000054]	0.000129** [0.000047]
Number of guerrilla attacks	34.26** [12.9]	30.19** [11.8]	3.297** [1.29]	-0.0000933 [0.00058]	-0.000189 [0.00057]
Number of attacks by AUC (paramilitary group)	-11.97 [21.4]	-16.04 [22.1]	1.923 [2.22]	0.0022 [0.0022]	0.00287* [0.0016]
Cadastral Area (2000)	0.389*** [0.10]				
Number of properties (2000)		0.0752 [0.058]	0.0105*** [0.016]		
Observations	654	659	649	658	658
R-squared	0.55	0.4	649	0.34	0.32

**Table 4:** Regresiones diferencia tamaño de propiedades, número de propiedades pormunicipio. \*\*\*Significant to 99% level; \*\*Significant to 95% level; \*Significant to 90% level. Robust standard errors with departmental cluster in brackets. The estimates included departmental and municipal controls that are not reported.

## Colombian Legislation and the Seizure of Lands and Territories

Yamile Salinas Abdala \*

### 10.1. Introduction

In Colombia, experts, academics, and public institutions like the Constitutional Court and the Attorney General's Office (*Procuraduría*), have repeatedly pointed to the close relationship between violence and armed conflict, and to problems associated with the possession of land and territories. Currently these problems are particularly relevant in the face of the pressing duty to guarantee the rights of victims, particularly those who have been forced to abandon their places of origin and belongings, as well as those whose rural properties have been usurped.

In the face of this obligation, it is important to review the factors responsible for this usurpation, and the existing limitations on the restitution of properties to the expelled populations. As the Court has stated, forced displacement is a systematic and massive practice, of which groups interested in controlling territories for military, political, or economic reasons, some armed and illegal, are responsible. This chapter analyzes the relationships between the seizure and illegitimate occupation of lands and territories, and some relevant Colombian legislation. We start with a brief mention of state obligations that derive from international agreements on human rights; then we discuss several Colombian laws and their impact on the protection and restitution of lands and territories, and finally we conclude.

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## 10.2. State Responsibility

International legislation obliges states to respect, guarantee, and adopt any measure needed to ensure the full and free exercise of human rights enshrined in international instruments. Within this wide range of rights are found the right not to be forcibly displaced, and the right not to be deprived of the use, enjoyment, and free disposition of material and intangible goods, both movable and immovable. Specifically, by virtue of the obligation to guarantee these rights, states have the duty to prevent, investigate, and sanction any violation of human rights, and to make an adequate, effective, and integral reparation for harms caused by such violations. When rights to property and possessions of movable and immovable goods are violated, the Pinheiros Principles state that the preferred means of reparation is the right to restitution, that is, the devolution of lands, houses, and other patrimonial goods. Only when this is not possible, or in cases where the affected parties voluntarily choose to, may compensation satisfy the right to reparation.

With regard to the third obligation above (to adopt measures that ensure a full and free exercise of human rights), Article 2 of the American Convention on Human Rights stipulates that states must undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms, which "... implies the adoption of measures in two respects, that is: (i) the suppression of norms and practices of any kind which entail a violation of the guarantees foreseen in the Convention or ignore the rights recognized therein or hinder their exercise; and (ii) the issuing of norms and the development of practices conducive to the effective observance of those guarantees".<sup>1</sup>

In the specific matter of rights to land and territories, the Pinheiro Principles on the restitution of homes and patrimony of refugees and displaced persons lay down the states' obligation to adopt "all necessary legislative means, including ... the adoption, amendment, re-

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<sup>1</sup> IACHR, *Castañeda Gutman*, para. 79; *Salvador Chiriboga*, para. 123; *Zambrano Vélez*, paras. 57, 153, and others case.

form or repeal of relevant laws, regulations and/or practices”.<sup>2</sup> In consequence, they may not “adopt nor apply laws that prejudice the restitution process” and should “repeal unjust or arbitrary laws and laws which otherwise have a discriminatory effect on the enjoyment of the right to housing, land and property restitution, and should ensure remedies for those wrongfully harmed by the prior application of such laws”.<sup>3</sup>

### 10.3. Domestic Legislation and Forced Seizure

Up to 1997, the right to property in Colombia could be exercised in an arbitrary way,<sup>4</sup> despite the recognition of the social function of property since 1936 (Legislative Act 1) and its ecological function since 1991 (Colombian Constitution). In pursuit of the first, two laws were elaborated: Law 200 of 1936, which enshrined the presumption of property, authorized expropriation of unproductive goods, and created agrarian judges; and Law 135 of 1961, which authorized the adjudication of wasteland (*baldíos*). After 1991, the new Constitution recognized collective property rights for indigenous groups and Afro-Colombian communities. In addition, the peasants’ right to own land has been regulated through the grant of land subsidies (70% of the value of the property), and through laws mandating the expropriation of goods deriving from drug trafficking (Laws 70 and 99 of 1993, 160 of 1994, 333 of 1996 and 765 and 793 of 2002).

Despite a series of agrarian reforms beginning in 1936, land ownership titles in Colombia have often been precarious. On the one hand, there are *owners* who have titles registered in public deeds offices, corresponding to property acquired through purchase, legal mandate, or judicial decision. On the other, there are *possessors* of goods that belong to third parties as well as *occupants* of wastelands, who in order to acquire full dominion would require a judicial mandate that establishes ownership or an administrative procedure that grants a title,

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<sup>2</sup> UN, 2005, E/CN.4/Sub.2/2005/17: Principle 18.1.

<sup>3</sup> *Id.*, Principle 19.

<sup>4</sup> Civil Code, Article 31: “... the real right in a corporal thing, to enjoy and dispose of it arbitrarily...”. The underlined word was declared unconstitutional by the Constitutional Court in sentences C-595 of 1999 and C-598 of 1999.

respectively. A fourth category is that of *tenants*, that is, persons who acknowledge the ownership of others and lease or enjoy usufruct over properties that provide them with basic sustenance.

### **10.3.1. Causes and Responsible Parties**

In decision T-025 of 2004 and edicts regulating its application, the Constitutional Court has referred to the complex causal framework of displacement, which is characterized by the intervention of illegal armed agents (paramilitary and guerrilla groups, and drug traffickers), legal armed agents (the armed forces, which engage in combat or fumigate illicit crops without taking preventive measures), illegal unarmed agents (some mafia organizations), and legal unarmed agents (politicians, businessmen, officials, etc.) (Constitutional Court, *Autos* 218 of 2006, and 004, 005 and 008 of 2009, among others).

However, the acts and omissions of the state have still not been sufficiently addressed by the Court, specifically with regard to the issuing and application of certain laws, and the responsibility in displacement, seizure of land, and legalization in favor of the perpetrators of displacement. These aspects are especially relevant given Colombia's obligations to respect, guarantee, and adopt measures to secure the full exercise of human rights.

### **10.3.2. Normative disharmony**

As mentioned above, the obligation to adopt all measures to safeguard human rights implies the obligation to (1) modify and revoke norms opposed to that aim, and (2) refrain from passing norms which prejudice them, especially when such norms, in addition to being unjust, are conducive to the violations of such rights, and contrary to the obligation to adopt adequate measures to investigate, sanction, and exact reparations for the violations.

#### **10.3.2.1. Modification and Revocatory Action**

The Colombian state has failed to fulfil its duty to reform domestic laws in pursuit of some reforms or revocations, as in the following cases.

**Civil Code.** The Code was adopted in 1887, when, of course, there were no circumstances of violence as those of the current internal conflict, nor international regulations on human rights, especially on the rights of victims of crimes against humanity, which has developed over the last **sixty** years. Without attempting to enter into a rigorous examination of the Code, it is sufficient to point out that it includes the concept of gross loss (*lesión enorme*), which refers to a large disparity between the value of a rural property and the amount received for it, regardless of the motive or the method by which the transfer took place (need, fraud, violence, etc.), as well as the concept of deceit (*simulación*), by which one or several parties commit fraud by concealing the true nature of a contractual act, usually through the use of a front man (*testaferro*).

This latter device, by means of which many of the transactions involving goods plundered from the displaced rural population are concealed, is now also governed by the principle of opportunity, which is regulated in Law 975 of 2005 and its regulatory decrees (Law 1312 of 2009). This principle gives public prosecutors the power to *cancel* the prosecution of a crime if they consider that its punishment is not opportune, regardless of whether the crime is the acquisition of property with drug money or through the activities of illegal armed groups. In this way, not only is the legitimization of seizure facilitated, but there is also increased impunity, which has characterized displacement and usurpation in the country throughout history.

Similarly, the 1887 Civil Code fosters the legalization of the possession acquired by force or violence if the affected owner does not denounce the offense within ten years of its occurrence. However, current constitutional jurisprudence is contradictory on this point. While in order to prevent the legalization of “illicit fortunes” the Court declared unconstitutional the prescription of terms in the expropriation of goods derived from drug trafficking and illegal enrichment (Court, 1997, Sentence C-377 on Law 333 of 1996), it did not do the same with the prescription on appropriation laid down in Article 1742 of the Civil Code. Clearly, in the second case the Court gave priority to legal certainty over the material rights of the dispossessed and displaced people, as it permitted the legalization of “what is in principle a factual

(even violent) situation not covered by the law” (Sentence C-579 of 1998).

With this decision, the Court steered away from measures adopted in the 1950s, during the times of *La Violencia*, meant to prevent economic profit through violent means. As the Law 200 of 1959 states, the presumption of free consent is vitiated in any transaction which, “from a state of abnormality, is made in the celebration of an act or contract under conditions so unfavorable that they support the presumption that it could not have been celebrated under circumstances of juridical liberty”. This presumption is related to one found in the Pinheiro Principles, which states that “States may, in situations of mass displacement where little documentary evidence exists as to ownership or rights of possession, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons of violence or disaster and are therefore entitled to housing, land and property restitution” (Principle 15.7).

**Agrarian legislation.** As was said earlier, in 1936 processes of agrarian reform began to guarantee access to property by peasants and to avoid excessive concentration of land in a few hands. This aim was never achieved; on the contrary, the law eventually produced what academics and analysts call an *agrarian counter-reform*.

The failure of the different attempts at agrarian reform are related to factors such as the unwillingness of political and economic agents to carry out redistribution of land, which led them to issue restrictive and ambiguous laws that also created corrupt practices and facilitated forced seizures. By virtue of those laws – the latest of which, Law 1152 of 2007, was declared unconstitutional by the Court, thus restoring Law 160 of 1994 – there arose and still continues to exist a multiplicity of complex situations that hamper the obligations to respect and protect the rights to ownership and possession of land, and to provide effective remedies to victims of exile and seizure. Among these, the following must be mentioned:

(a) Insecure holdings: A high percentage of the rural population are occupiers of wastelands due to negligent titling, including *third-parties without rights*, that is, persons who, in good faith or as the re-

sult of violent acts, or of colonization processes promoted by public authorities, live in ethnic or environmental reserves.

(b) Forced sales: In view of the lack of productive projects to accompany land grants, many of the beneficiaries of such programs were and still are forced to sell their properties, due to the impossibility of exploiting them and paying debt associated with their adjudication (subsidies and loans for agriculture and stock-raising), a situation which was and still is exploited by third parties who appropriated them by force.

(c) Losses of rights by state action: This refers to adjudications and the grant of titles that have been or are subject to agrarian processes like expirations and revocations, or to judicial auctions by state entities (INCORA, INCODER, *Banco Agrario*, etc.) due to abandonment, non-exploitation of plots, or non-payment of debts, without the respective authorities having taken or taking into account the situation of forced displacement affecting the beneficiaries of land reform programmes. In some cases, “recovered” real property is or has been subject to new adjudications, which creates conflicts between original title-holders who return to the territory and the beneficiaries of new adjudications.

(d) Past and present occupations of ethnic territories due to the delay in the process of establishing indigenous reserves or collective titles for Afro-Colombian communities, as well as the ambiguous interpretation of the norms in this field, and the interest in creating special zones for corporate development.

The problems just mentioned fly in the face of the obligation to guarantee the free and full exercise of human rights, which is *not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation, but also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights*.<sup>5</sup> This conduct extends to “all the branches of the State (executive, legislative, and judicial bodies) and other public or state authorities, on whatever level, be it national, regional or local”.<sup>6</sup>

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<sup>5</sup> IACHR, *Velásquez Rodríguez*, para. 167.

<sup>6</sup> Committee on Human Rights, 2004, General Remarks No. 31.

**Legislation on forced displacement.** Law 387 of 1997 established the policy of caring for internally displaced people on the basis of the principle of solidarity, not on the basis of the principle of responsibility to protect from violations of the rights to be free from displacement, and to use, enjoy and dispose freely of land and other properties. In that regard, the policy lacks a focus aimed to fulfil the duty to provide reparation to victims of such violations.

The policy thus ignores that, before its forced exodus, the rural population held rights to the lands and territories, even if precariously, and therefore that it has the inalienable right to obtain their devolution, or indemnification, and in both cases compensation for the harms suffered. In contrast, by favoring socioeconomic stabilization through programs of subsidized housing and the creation of employment and income in reception places, with virtually no promotion of the voluntary return to territories that are dignified and secure, or the restitution of lands and territories, these norms undermine not only the rights to reparation, but also to truth and justice. Moreover, impunity and the inability to create memory of the exile and usurpation are contrary to the state's obligation to "prevent the recurrence of violations of human rights ... and to adopt all the measures, legal, administrative and of other kinds, which may be necessary to prevent similar deeds from occurring again in the future".<sup>7</sup>

### 10.3.2.2. Legislation that Undermines Human Rights

Even though the effective provision of rights requires prevention of violations, the different branches of the Colombian government are often politically and judicially incongruous,<sup>8</sup> either because the authorities "accept their obligations in the matter of human rights but do not adopt the policies, laws and processes needed to comply with them" (vertical incongruity), or because those who are responsible for certain functions, like those related to economic or business activities, carry them out without paying heed to state commitments in human rights matters (horizontal incongruity).

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<sup>7</sup> IACHR, *Castañeda Gutman*, para. 79; *Salvador Chiriboga*, para. 123; *Zambrano Vélez*, paras. 57, 153, and other cases.

<sup>8</sup> UN, 2009, A/HRC/11/13.

The above can be seen in the following laws, approved on executive or Congress initiative, which establish measures that violate the right to property and possessions, as well as the right to restitution as the preferred means of reparation.

**National Development Plans for 2002-2010 (Laws 812 of 2003 and 1151 of 2007).** By means of the first Law, the 1994 agrarian reform was tacitly rescinded by a modification of the subsidy for lands and the creation of an integral subsidy for productive projects of a competitive and lucrative nature, which revolve around crops defined by the internal agenda of competitiveness, and operate through productive alliances between small peasant-farmers and companies. The alliances are financed with resources from the rural sector or from international cooperation. In addition, Law 812 defined as modalities of land grants, commodatum (concession), usufruct, and leasing, all of which have a temporary nature, and thus ignore the constitutional mandate to guarantee rural inhabitants access to the ownership of land, with a redistributive and social justice focus.

The same approach is reiterated in the 2006-2010 development plan, which only revindicates the right to property as a tool to ensure national and international investment, with the aim of achieving targets of economic growth and participation in international markets. Specifically, the rural aspect of this model of development implies stimulating export products to the detriment of the peasant economy, and by extension, of their rights to lands and territories. Under this model, displacement is turned into a strategy employed by the “interested armed agents, either for the direct realization of megaprojects for agriculture or the exploitation of natural resources, or to support certain companies and economic agents which develop these projects, and with which they have associated to profit from the benefits of such activities”.<sup>9</sup>

By the same token, the satisfaction of the right to reparation is omitted, insofar as many of the seized lands and territories are used for setting in motion what are known as “development projects”, without previously identifying the violations and the victims, or promoting the devolution of land. The affected persons are powerless in this situation,

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<sup>9</sup> Court, 2009, Edict 005.

given the absence of procedures or mechanisms to reclaim what was lost, probatory difficulties, as well as the continuation of the armed conflict. Within the frame of this development model, which has led to a 2.5% increase in the national Gini coefficient for land concentration between 2000 and 2009,<sup>10</sup> it is possible to find the following specific legislation.

**Forestry and Rural Development Laws.** They were declared unconstitutional by the Court for violating the fundamental right to effective voice of indigenous and Afro-Colombian communities, given that in many zones of the country the forestry, agricultural/stock-raising, and agro-industrial projects regulated by these laws would have taken place in their reserves, whose occupation and use by third parties has been a causal factor of their displacement.

**Laws 791 of 2002 and 1182 of 2008.** The first shortens the terms of prescription for raising restoration claims. The second sets out a special process for the acquisition of properties smaller than ten hectares, which become subject to the legal status of “false tradition” (*falsa tradición*) (Law 1182 of 2008), in which property is transferred by one party to another (by sale, for example) even though the vendor has no supporting legal title. The incorporation of this legislation ignores the special circumstances of the displaced population, which is too weak to undertake legal actions to defend their rights to property and possession, and it also facilitates the legalization of properties acquired through force and fraud, insofar as they do have access to resources and legal advice.

**The Laws of Expropriation (Laws 333 of 1996, and 765 and 793 of 2002).** In addition to not having expressly included the rights of the victims, they authorize the sale of these properties to finance the abovementioned “development projects”, without contemplating any form of restitution to the original owners. The Laws nowhere acknowledge that the concentration of land (effected mainly with resources from drug trafficking and illicit enrichment) has been marked by cruel episodes of displacement and plunder.

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<sup>10</sup> See Ibañez’s contribution to this volume.

#### **10.4. Opportunity to Reverse Forced Seizures**

Despite the scenario we have just described, the revindication of the rights to reparation of the victims of exile and forced migration has turned into a “window of opportunity” to address the conflicts over land and territories, and to seek solutions to the abandonment of the countryside. The ultimate aim is to prevent the repetition of the grave violations perpetrated against the rural population. To achieve that, we may rely on several Colombian and international human rights organs, as well as on important tools found in recent decisions of the Colombia Constitutional Court, particularly T-025 of 2004 and T-821 of 2007. In the former, the Court explicitly granted the displaced population the status of victims, and thus recognized their rights to truth, justice, reparation, and non-recurrence. In line with these ideas, the Court ordered the formulation of a policy of lands and territories, with a focus on gender and ethnic affiliation. It likewise authorized presumptions in favor of the victims for the sake of satisfying their rights, mainly in reaction to the insecurity of their holdings and to their difficulties in proving their property titles.

For the formulation and execution of this policy, the relevant authorities must not distance themselves from the international standards in the field, especially the Pinheiros Principles, which the Court incorporated into the set of constitutional principles cited in the above-mentioned sentence T-821. It is also necessary to implement the guidelines which emanate from the Court’s decision, as well as to identify the large number of limitations and gaps which need to be corrected in order to guarantee the effective enjoyment of property and possessions, and the protection of the rights to restitution and/or compensation. These components of integral reparation are, in turn, part of the policy of truth, justice and reparation, which was also mandated by the Tribunal.

#### **10.5. Conclusion**

To obtain peace and social justice, it is necessary to reverse forced displacement and to give reparations to victims, as a way of restoring their dignity and of recognizing their patrimonial rights to land and

territories, which they enjoyed before being forced to leave their places of origin.

Reparation, and more specifically restitution with the aim of non-recurrence, requires a reinterpretation of forced seizure and displacement, and an understanding of the patterns of violations, so that the causes and the responsible agents may be fully identified. This means undertaking an analysis of the relationships involved in the lands and territories, and the many interests which loom over them, and also of the model of development set forth recently in Colombian legislation, which favors competitiveness and productivity over the obligation to protect and guarantee the rights of the rural populations in general, and of the victims in particular.

In addition to ignoring the victims, failure to undertake this analysis prevents us from arriving at an explanation of the functional relationship between that model of development, displacement, and its legitimization. This is a fundamental aspect of any effort to harmonize Colombian norms and policies with international standards on human rights, an enterprise which implies revoking legislation that is opposed to those standards, and abstaining to adopt new legislation detrimental to the rights to property and possessions, and to integral reparation.

## **Ethno-Reparations: Collective Ethnic Justice and the Reparation of Indigenous Peoples and Black Communities in Colombia**

**César Rodríguez-Garavito\***

### **11.1. The Problem: The Blind Spot of Collective Ethnic Justice in Discussions About Transitional Justice**

As the chapters in this book show, the massive dispossession of land in Colombia – estimated to be more than 5.5 million hectares (around 11% of its agricultural land area) – presents complex challenges for transitional justice. In addition to the formidable problems regarding the *implementation* of restitution policies – which range from the absence of systematic cadastral information to the lack of title deeds on the part of peasant-farmer landholders who were displaced from their plots, and also include death threats against those who seek restitution – there exist dilemmas regarding the very *conceptions* informing programs centered on restoring land to those who were dispossessed.

Several of the essays in this volume show that this emphasis on restitution, characteristic of the restorative logic of transitional justice, may conflict with ethical, political, and legal principles that are just as important. In particular, since, from the viewpoint of commutative justice, this logic focuses on restoration, programs that are exclusively

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\* Director, Program on Global Justice and Human Rights of the Universidad de los Andes and founding member, DeJuSticia. This article is the result of efforts made in collective projects. The second and third sections are partly based on the author's presentation with Tatiana Alfonso at the colloquium that gave rise to this book, organized by the FICHL and the Program on Global Justice at the Universidad de los Andes. The fourth and fifth sections are based on the work done with Yukyan Lam on the legal standards of reparations for indigenous peoples and black communities in Colombia. For a full rendition of the latter, see César Rodríguez-Garavito and Yukyan Lam, 2010, *Etno-reparaciones*, Bogotá: DeJuSticia. Any errors, of course, are the sole responsibility of the author.

inspired by it may neglect considerations of distributive justice. Acting on this logic alone, for example, such programs may reinforce the highly inequitable distribution of land that already existed in Colombia before the massive dispossessions that have taken place in recent decades, or they might limit themselves to restoring lands of little worth to small peasant-farmers.<sup>1</sup> Hence this book aims to broaden the conceptual and empirical panorama on transitional justice in Colombia and elsewhere through the inclusion of other criteria that should be taken into account when designing equitable and non-discriminatory agrarian policies.

It is against that backdrop that this chapter seeks to expand the analysis of such problems through the incorporation of another criterion for the distribution of land: one which, despite its profound social, economic, and legal repercussions in Colombia, has not been systematically included in the discussion of, and policies for, transitional justice. I call this criterion *collective ethnic justice* (CEJ) and posit that it is analytically different from transitional justice and social justice.

Enshrined in the 1991 Colombian Constitution, this criterion had already inspired the awarding of titles over large areas of land to indigenous peoples before the adoption of the 1991 document, and it has since continued to support the collective property rights granted to Afro-Colombian communities (as well as new title grants to indigenous peoples).

To get an idea of the practical importance of this criterion, we must only compare the area of land that would be subject to restitution policies (that is, the 5.5 million hectares estimated to have been forcibly seized) to the statistics on the areas where collective land titles have been granted to ethnic minorities. This comparison provides an initial estimate of the relative weights of transitional justice and collective ethnic justice as sources for the distribution and redistribution of land in Colombia.

In relation to indigenous peoples, the figures show that the size of the collective territories to which they have been given titles

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<sup>1</sup> For details of this contrast between the commutative logic of transitional justice and the distributive logic of social justice, see the chapters in this book by Saffon and Uprimny and Kalmanovitz.

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amounts to nearly six times the area of individually-owned lands that have been seized, which are the focus of transitional justice. In fact, Table 1 shows that more than 31 million hectares have been allocated as indigenous reserves, that is, as collective territories that may not be alienated. It is interesting to note that a large portion of this area was granted before the 1991 Constitution – the title to most of it, in fact, was granted during a single presidential administration, that of Virgilio Barco (1986-1990).

Year	Area (hectares)	% titles granted per year	% accumulated title grants year by year	% title grants per presidential term
1967	5,115	0.02	0.02	Lleras Restrepo
1968	61,605	0.20	0.21	0.21
1973	2,000	0.01	0.22	Pastrana Borrero
1974	195,900	0.63	0.85	0.64
1975	2,500	0.01	0.86	López Michelsen 1.56
1976	50,767	0.16	1.02	
1977	10,600	0.03	1.06	
1978	423,234	1.36	2.41	
1979	53,252	0.17	2.59	Turbay Ayala 13.90
1980	435,991	1.40	3.99	
1981	164,920	0.53	4.51	
1982	3,674,659	11.80	16.32	Belisario Betancur 11.11
1983	761,026	2.44	18.76	
1984	1,420,932	4.56	23.33	
1985	337,063	1.08	24.41	
1986	940,749	3.02	27.43	Virgilio Barco 50.84
1987	360,966	1.16	28.59	
1988	1,302,007	4.18	32.77	
1989	13,879,117	44.58	77.35	
1990	285,350	0.92	78.27	César Gaviria 8.22
1991	100,708	0.32	78.59	
1992	514,779	1.65	80.24	
1993	1,668,451	5.36	85.60	Ernesto Samper 7.90
1994	274,099	0.88	86.48	
1995	314,525	1.01	87.49	
1996	143,810	0.46	87.96	
1997	355,171	1.14	89.10	
1998	1,645,960	5.29	94.38	

1999	308,199	0.99	95.37	Andrés Pastrana 1.96
2000	185,097	0.59	95.97	
2001	51,207	0.16	96.13	
2002	67,137	0.22	96.35	
2003	1,125,792	3.62	99.96	Álvaro Uribe 3.62
<b>Total</b>	<b>31,133,773</b>			

**Table 1:** Indigenous Reserves in Colombia. Source: Houghton, Juan. “*Los territorios indígenas colombianos: teorías y prácticas*” (“Colombian Indigenous Territories: Theories and Practices”). Based on data provided by Incoder, available online at: [www.constituyentesoberana.org](http://www.constituyentesoberana.org).

As for Afro-descendant communities, collective title grants were established by the mandate of the 1991 Constitution (transitional Article 55). The key piece of legislation resulting from this mandate is Law 70 of 1993, which is regarded as one of the most important recent agrarian reforms in Latin America<sup>2</sup> and a novel form of collective reparation for the legacy of slavery.<sup>3</sup> The result has been the adjudication of territories with an area very close to the figure for the lands that transitional justice focuses on. In fact, since 1993, more than five million hectares have been granted to black communities along the Pacific Coast, who meet the requisites of socio-cultural identity and communitarian economic exploitation required by Law 70 of 1993.<sup>4</sup> Thus,

<sup>2</sup> Karl Offen, 2003, “The Territorial Turn: Making Black Territories in Pacific Colombia”, in *Journal of Latin American Geography* 2: 1; Odile Hoffmann, 2007, *Comunidades negras en el Pacífico colombiano (Black Communities in the Colombian Pacific)*, Quito: Instituto Francés de Estudios Andinos (IFEA) – Institut De Recherche Pour le Développement (IRD) – Ediciones Abya-Yala; Ulrich Oslender, 2008, *Comunidades negras y espacio en el Pacífico Colombiano (Black Communities and Space in the Colombian Pacific)*, Bogotá: Instituto Colombiano de Antropología e Historia, ICANH.

<sup>3</sup> Claudia Mosquera Rosero-Labbé, 2007, “*Reparaciones para negros, afrocolombianos y raizales como rescatados de la Trata Negrera Transatlántica y desterrados de la guerra en Colombia*”, (“Reparations for Blacks, Afro-Colombians and Raizal Peoples as Those Rescued from the Transatlantic Slave Trade and Uprooted by the War in Colombia”), in *Afro-Reparaciones: Memorias de la esclavitud y justicia reparatoria para negros, afrocolombianos y raizales*, Claudia Mosquera Rosero-Labbé and Luiz Claudio Barcelos (eds.), Bogotá: Universidad Nacional de Colombia.

<sup>4</sup> On this process, see Arturo Escobar, 2008, *Territories of Difference. Place, Movements, Life, Redes*, Durham: Duke University Press; Libia Gueso, Carlos

unlike in most other Latin American legal regimes, the Colombian Constitution of 1991 – and the ensuing legislation and constitutional jurisprudence – recognized Afro-descendants as an ethnic group with collective rights similar to those of indigenous peoples.<sup>5</sup> Table 2 details, by department, the number of titles and areas granted, as well as the number of beneficiary families.

Departament	Number of titles	Hectares	Families
Antioquia	13	241,640	2,448
Valle del Cauca	26	339,483	6,053
Nariño	36	1,023,370	15,713
Chocó	56	2,944,919	29,071
Cauca	17	574,615	6,935
Risaralda	1	4,803	198
<b>Total</b>	<b>149</b>	<b>5.128.830</b>	<b>60.418</b>

**Table 2:** Distribution of Collective Titles Granted to Black Communities, by Department. Source: Grueso, Libia, 2006, “El Territorio como estrategia: construcción socio-cultural, natural y económica de los pueblos afro” (“Territory as strategy: the socio-cultural, natural and economic construction of Afro-descendant peoples”) in Informe de Gestión 2006, Bogotá: PCN, citing the Instituto de Colombiano de Desarrollo Rural.

Of course, these nominal figures do not present a true idea of the size of the territories in which indigenous peoples and black communities are able to exercise their collective rights effectively. In fact, these two ethnic groups are the populations most affected by forced displacement and thus by the violent seizure of the lands they have title to. To be more precise, according to figures found in the 2005 Census, Afro-Colombians are the ethnic group most affected by displacement (1.44% of them have been displaced), followed by the members of indigenous nations (1.27%) and the remainder of the population

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Rosero, and Arturo Escobar, 1998, “The Process of Black Community Organizing in the Southern Pacific Coast of Colombia”, in *Cultures of Politics/Politics of Cultures. Revisioning Latin American Social Movements*, Sonia Álvarez, Evelina Dagnino, and Arturo Escobar (eds.), Boulder: Westview Press.

<sup>5</sup> See César Rodríguez-Garavito, Tatiana Alfonso, and Isabel Cavellier, 2010, *Raza y derechos humanos en Colombia*, Bogotá: Observatorio de Discriminación Racial y Ediciones Uniandes.

(0.68%). In addition, some of these collective lands overlap with environmental conservation areas that may not be economically exploited.

Nevertheless, these statistics support the case for the incorporation of CEJ into discussions on transitional justice and provide a useful starting point for this chapter for two reasons. First, these statistics show that the issue of agrarian policy and reform in Colombia can neither be analyzed nor resolved without taking into account that, in practice, an important criterion for the allocation of land has been a concern for the constitutionally-protected claims of collective ethnic justice.

Second, the data highlights the fact that, as far as these territories and populations are concerned, the dilemmas over transitional justice – that is, the challenges posed by the reparation of victims of the armed conflict – overlap with dilemmas that pertain to CEJ itself. In other words, the challenge of restoring seized lands and effecting reparations for the displaced population acquires special significance when the former are collective territories and the latter are communities whose cultural survival depends on effective enjoyment of their rights to those territories.

The combination of these dilemmas has been acknowledged by the most important state intervention on the subject of forced displacement: Judgment T-025, issued by the Constitutional Court in 2004, and the follow-up process, which, through new decisions (known in Spanish as “*Autos*”) and public hearings, the Court has since advanced.<sup>6</sup> Specifically, in two fundamental decisions issued in 2009 (*Autos* 004 and 005), the Court required public policies on displacement to have a “differential focus” for ethnic groups (indigenous peoples and Afro-Colombian communities). This differential focus, the Court states, must guarantee that humanitarian aid, social programs,

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<sup>6</sup> In fact, during the first six years of follow-up (January 2004 to January 2010), this process consisted of 84 decisions and 14 public hearings. For a detailed analysis of the impact of this case and the follow-up process, see César Rodríguez Garavito and Diana Rodríguez Franco, 2010, *Cortes y cambio social: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia (Courts and Social Change: How the Constitutional Court Transformed Forced Displacement in Colombia)*, Bogotá: Dejusticia.

and policies of truth, justice, reparation and the guarantee of non-recurrence directed at ethnic groups protect their cultural identity and the collective relationship with the territory that such an identity entails.

However, the concept of a differential focus continues to be vague both in the Court's jurisprudence and in the public policy documents of the Colombian government. Moreover, although the state has acknowledged the need to combine criteria of transitional justice with those of collective ethnic justice, it has not converted this acknowledgement into concrete juridical guidelines or public policies. Thus, the conceptual clarification and practical application of this intersection of criteria for reparation continue to be pending tasks.

To help fill this conceptual and practical void, I concentrate in this chapter on collective ethnic justice as a criterion for reparation in general, and on the allocation of land in particular. The aim of the chapter is twofold. From an analytical viewpoint, it seeks to give conceptual clarity to the criterion, explaining its relationship to other parameters of justice that are relevant to agrarian and reparation policies, and sketching out its juridical and public policy implications. From a legal and policy viewpoint, it aims to flesh out its implications for transitional justice programs by laying out the standards that, according to international and national law, must guide reparations to ethnic minorities that have been victims of violence, displacement, and land dispossession.

To provide a factual grounding for this conceptual analysis, I make use throughout this essay of empirical and juridical materials on the collective territorial rights of indigenous and Afro-Colombian peoples. In the case of indigenous peoples, I use, as my main reference, the most systematic state pronouncement to date on the forced displacement and reparation of that population: the above-mentioned *Auto* 004 of 2009, issued by the Constitutional Court as part of that tribunal's follow-up of the general problem of displacement since 2004, the year in which it issued the structural judgment on that subject (T-025).

With these goals in mind, I divide the text into five parts. In the first, I propose locating the debate on transitional justice within a wider

discussion of different types of conflicts involving land and forced displacement, some of which cause dispossession and uprooting but are not systematically included in the policies and studies on transitional justice – for example, forced displacement that implies the abandonment of collective territories, or that which originates in legal economic activities (like mining or large monocultures). To do this, I lay out a comprehensive typology of land dispossession, which includes these and other cases.

With this as the background, in the second part I characterize the different criteria of justice that underlie different approaches to the solution of those conflicts – including transitional justice, social justice, economic efficiency, and collective ethnic justice. On the basis of this characterization, I analyze in greater detail the content of collective ethnic justice and compare and contrast it to other criteria of justice related to land.

In the subsequent sections, I switch from conceptual to legal analysis to flesh out the consequences of CEJ and its impact on the policies and the legal framework on reparations. In the third section, I analyze the standards on ethno-reparations that are set forth by international law. In the fourth section, I move to the Colombian context and close the chapter by specifying the standards that – according to CEJ as embodied in international and national law – should guide reparations to ethnic groups that have been victims of violence, dispossession, and forced displacement.

## **11.2. Typology of Land Dispossession**

To understand the dilemmas involved in the policies for assigning lands in times of transitional justice, it is necessary to enlarge the field of vision to appreciate the significance of the different criteria that come into play. In other words, it is necessary to locate the discussion on reparation policies within the range of other possible policies on distribution and redistribution of lands, which range from past policies of agrarian reform centered on social justice to contemporary policies

on the “modernization” of the countryside based on parameters of economic efficiency, as well as policies informed by CEJ.<sup>7</sup>

A useful step towards this broader panorama entails constructing a typology of the conflicts about land that are resolved in transitional, violent contexts. Therefore, to understand the approaches to conflicts about lands that are debated in transitional situations like the Colombian one, we first must explain the range of dispossessions that they try to deal with.

Table 3 sets forth a typology of land dispossession that combines two axes. On the one hand, the horizontal axis distinguishes between dispossession of individually-owned lands and that of collective territories. Thus, the variable here is the *title* to the land: an individual one in the case of the peasant-farmers stripped of their properties, and a collective one in the case of ethnic groups.<sup>8</sup>

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<sup>7</sup> For an analysis of the historical focal points of agrarian reform and their contrast with market-centered policies, see the chapter by Gutiérrez in this book.

<sup>8</sup> I use the term “title” in a more sociological than legal sense to include not only the cases in which the dispossessed were owners of the property but also, as is common in the Colombian countryside, those in which the dispossessed were holders or possessors of the property.

		Territory	
		Individual	Collective
Origin of dispossession	Illegal	Forced sales of peasant-farmer plots (Córdoba, Sucre)	Indigenous peoples or black communities displaced by illegal groups (Awas, Nariño)
	Legal	Peasant-farmers displaced by a mining project or building of a dam (Urrá)	Black communities or indigenous peoples displaced by palm plantations (Jiguamiandó/Curvaradó)

**Table 3:** Typology of land dispossession.

On the other hand, the variable on the vertical axis is the *origin* of dispossession, which distinguishes between dispossession caused by illegal activities and that caused by legal activities. The former include, for example, those caused by paramilitary and guerrilla groups as part of their strategy of territorial control and their involvement in narco-trafficking. The latter include all dispossession provoked by economic projects, which, although having the legal backing of the state, give rise to the forced displacement of individual proprietors or holders of lands (peasant-farmers) or those living on collective territories (the indigenous peoples and Afro-Colombian communities). Some well-documented illustrations of this type of dispossession are the displacements caused by mining projects or palm plantations,<sup>9</sup> or those

<sup>9</sup> See Procuraduría General de la Nación (PGN), 2008, *Primero las víctimas: criterios para la reparación integral de los grupos étnicos (The victims first: criteria for the integral reparation of ethnic groups)*, Bogotá.

provoked by the construction of dams within indigenous and Afro-Colombian territories.<sup>10</sup>

Of course, the evidence shows that legal and illegal causes are frequently combined, as in the well-known seizures of land from the communities of Jiguamiandó y Curvaradó (in the Chocó province), where some palm companies have made use of paramilitary groups to occupy the zone, including the collective territories of black communities.<sup>11</sup> Despite the existence of these hybrid forms of dispossession, for analytical purposes, the legal/illegal categories are useful as ideal types.

The primary contribution of a broad typology like the one proposed here is that it includes the different forms of dispossession that come into play in the discussions of, and policies on, displacement and reparations. In fact, as has been shown in the reports of state institutions,<sup>12</sup> academic studies,<sup>13</sup> and judicial decisions,<sup>14</sup> the forced abandonment of the nearly 5.5 million hectares has not been caused only by the acts of illegal groups, but by a set of complex hybrid factors, which also include activities that are legally endorsed by the state (or even, on occasions, undertaken by the state itself, as occurs with the construction of macro-infrastructure projects in indigenous territories or the fumigation of illicit crops whose secondary effects are harmful for legal peasant-farmer economies).

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<sup>10</sup> See AIDA (Asociación Interamericana para la Defensa del Ambiente), 2009, *Grandes represas en América, ¿peor el remedio que la enfermedad? Principales consecuencias ambientales y en los derechos humanos y posibles alternativas* (*Big Dams in America: Is the Remedy Worse than the Disease? Principal Environmental Consequences, Human Rights, and Possible Alternatives*), Available online at: <http://www.aida-americas.org/es>.

<sup>11</sup> *El Espectador*, “El dossier de los palmeros” (“The Palm Growers’ Dossier”), 21 May 2010.

<sup>12</sup> PGN, *supra* n. 9.

<sup>13</sup> Alejandro Reyes, 2009, *Guerreros y campesinos: el despojo de la tierra en Colombia* (*Warriors and Peasant-Farmers: The Seizure of Land in Colombia*), Bogotá: Norma.

<sup>14</sup> Constitutional Court *Auto* 008 de 2009 (on the seizure of lands from the displaced population); *Auto* 004.

By the same token, this typology allows for the inclusion of both cases of individual dispossession (which are usually the focus of the studies and policies of transitional justice and agrarian reform) and cases of displacement and usurpation in which the victims are ethnic minorities who occupy a collective territory.

The intersection of the two variables gives rise to four model types of situations of dispossession, which, in turn, lead to different requirements for reparation. The categories in the left-hand column of the table apply to displaced peasant-farmers. Such displacement may result from the acts of illegal groups, as happened in the case of the forced and massive sale of lands in the Córdoba and Sucre provinces in the 1990s through intimidation by the paramilitary groups that controlled the zone.<sup>15</sup> But the displacement of peasant-farmers may also arise from legal activities, such as mining or hydro-electric projects. A well-known case is the building of the Urrá dam in Córdoba, whose effects on traditional patterns of irrigation led to the forced displacement of rural inhabitants who individually owned or possessed lands.<sup>16</sup>

In the right-hand column of the table we find the situations highlighted in this chapter, that is, those where the victims are ethnic groups who have property or possession rights over communal territories. In some cases the forced abandonment of territories is rooted in disputes for the control of illegal activities like narcotrafficking (as in the massive displacement of the Awa indigenous people in Southern Colombia, who have been victim of the violence caused by guerrilla, paramilitary, and mafia groups). In other cases, the displacement occurred as a consequence of economic activities, which, in themselves, are legal (as in the abovementioned example of Jiguamiandó and Curvaradó, in the Chocó province).

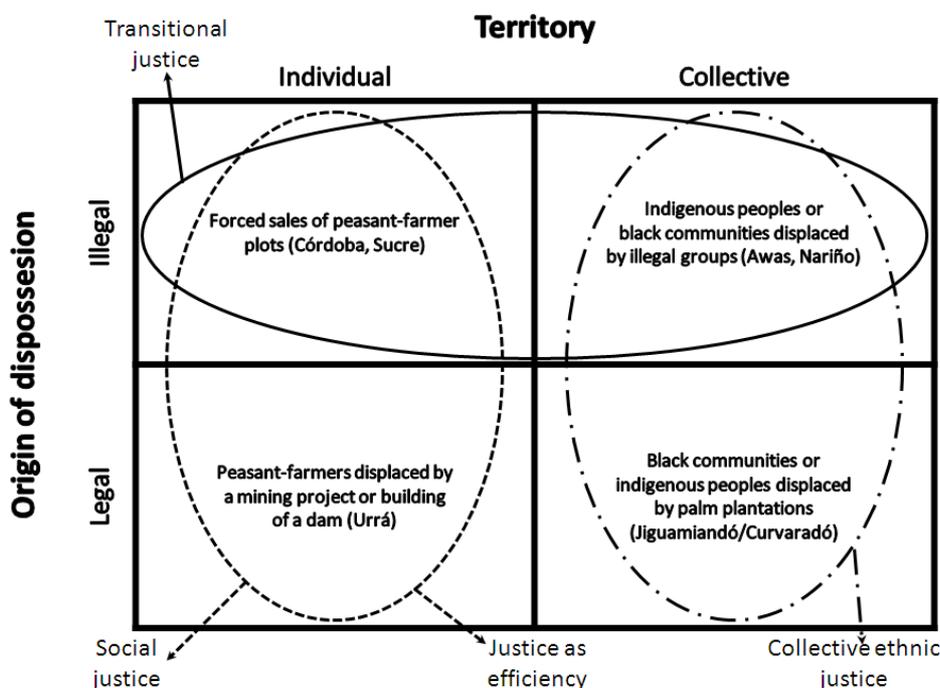
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<sup>15</sup> Reyes, *supra* n. 13.

<sup>16</sup> César Rodríguez-Garavito and Natalia Orduz, 2010, *Territorio, pueblos indígenas y desarrollo: el caso de la represa Urrá en Colombia (Territory, Indigenous Peoples and Development: The Dispute Over the Urra Dam in Colombia)*, Bogotá: DeJusticia.

### 11.3. Land Justice: Four Criteria

The above typology of conflicts over land is, at the same time, a map of the emphases of different approaches to the question of agrarian policy and reform. These emphases are shown in Table 4, which reproduces the typology of the previous table and highlights which conflicts are favored by the four different criteria of justice on the assigning of lands: transitional justice, social justice, justice as efficiency, and collective ethnic justice.



**Table 4:** Distribution of Land: Criteria of Justice.

The upper row of the table highlights *transitional justice's* emphasis on the victims of illegal dispossession in contexts of armed conflict. As Saffon and Uprimny show in their chapter in this book, transitional justice centers on the reparation of grave violations of human rights and international humanitarian law, like usurpations of lands and

forced, massive displacements. Thus, the privileged subjects of this approach are the victims of such violations.

In addition, transitional justice mostly looks toward the past and is guided by commutative justice, with its emphasis on restoring the situation that existed prior to the harm. Although the proposed typology includes dispossession of both individually and collectively-owned lands, until now the discussion on transitional justice in Colombia has tended to concentrate on the former, as is shown by the emphasis of the chapters in this book and the recurring mention of the 5.5 million hectares of individually-owned plots of land from which peasant-farmers have been displaced.

In the left-hand column are two focuses on the agrarian question: *social justice* and *justice as efficiency*, which share an emphasis on individually-owned lands but offer contrasting views on the criteria for assigning them. Whereas social justice emphasizes the redistribution of lands to small farmers as a mechanism to achieve inclusion and social equity, justice as efficiency favors market criteria to promote rural productivity through large-scale private investment. In this sense, while the central subject of the former is the poor peasant-farmer, that of the second is the investor. In contrast with transitional justice, both approaches look toward the future to the transformation of patterns of land ownership and exploitation.

As documented in the chapter by Gutiérrez, these two approaches have inspired Colombian agrarian policies at different times. While social justice underlay the agrarian reform programs of the 1930s and 1960s, justice as efficiency marked the policies implemented by the governments of Álvaro Uribe at the beginning of this century.

Beyond the details of these approaches to the agrarian question, it is interesting to show their relation to the approach that I highlight in this text, which has not received as much attention in studies on lands and reparations: *collective ethnic justice*. The table highlights what I have noted in the previous sections: CEJ's key trait is that it applies to communal territories that serve as a space for expressing and affirming the culture of a collectivity (in the case of Colombia, its indigenous peoples and black communities).

Thus, when compared to the other approaches, CEJ exhibits important differences, which justify its separate analytical treatment and explain its practical effects. In contrast to social justice and justice as efficiency, collective ethnic justice, in addition to its reference to collective territories, emphasizes cultural identity as a criterion for the distribution of land.

In comparison to social justice – and using the terms of Fraser’s well-known distinction between criteria of justice – we see that while social justice is centered on *redistribution* as a mechanism to counteract material inequities, ethnic justice revolves around cultural *recognition* as a way of correcting inequities of status.<sup>17</sup>

A paradigmatical demonstration of this approach is the above-mentioned Law 70 of 1993 on the land rights of Colombian black communities. Article 1 defines its objective as follows:

The object of the present law is to recognize the right to collective property of the black communities who have been occupying uncultivated lands in the rural areas along the riverbanks of the Pacific Basin, in accordance with their traditional practices of production, in conformity with the rules set forth in this law. It also aims to establish mechanisms for the protection of the cultural identity and rights of the black communities of Colombia as an ethnic group and to encourage their economic and social development, in order to guarantee that these communities obtain real conditions for equal opportunities in relation to the rest of Colombian society.

... This law will also apply to the uncultivated rural and riverside zones which have been occupied by black communities who have traditional practices of production in other regions of the country and comply with the requisites established in this law.

Thus, the main set of regulations on the traditional territorial rights of Afro-Colombians subordinate legal protection to the existence

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<sup>17</sup> Nancy Fraser, 2003, “Redistribution or Recognition? A Critique of Justice Truncated”, in *Redistribution or Recognition?*, Nancy Fraser and Axel Honneth (eds.), London: Verso.

of cultural patterns like “traditional practices of production”, with the aim of protecting the identity of black communities as an “ethnic group”. This recognition of cultural difference, therefore, is the precondition for promoting the redistribution of material opportunities through “the encouragement [of] economic and social development [of the communities]”.

Also, because of this emphasis, CEJ is clearly far from justice as efficiency, whose criterion for assigning lands is the maximization of social utility, measured not as a relationship among collectivities, but among individual agents in the market.

For the purposes of the specific subject of this chapter – ethno-reparations in contexts of armed conflict like the Colombian one – it is especially important to examine the relationship between ethnic justice and transitional justice. The comparison yields two central differences and one key similarity.

With regard to the differences, CEJ, in contrast to transitional justice, seeks to compensate for harms caused by massive and historic violations of rights, which generated inequalities among ethnic groups (for example, the enslavement of the Afro-descendant population and the genocide committed against indigenous peoples in colonial times). In Colombia and other parts of the world, this historical and intergenerational justice underlies the claims for the restitution of ancestral territories usurped from the indigenous peoples during the age of colonization and the demands for repairing the Afro-descendant population for the legacy of slavery.<sup>18</sup>

A further difference between CEJ and transitional justice is that the former not only looks toward the past, but to the future as well. This is so because it seeks to transform, instead of restore, the historic relationships between ethnic-racial groups. Hence, a typical mechanism that embodies the CEJ approach is affirmative action, which grants special conditions that allow ethnic-racial groups that have suffered discrimination access to goods and services from which they, in contrast with other citizens, have been excluded (for example, higher

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<sup>18</sup> Gerald Torres, 2008, “Indigenous Peoples, Afro-Indigenous Peoples and Reparations”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press.

education or skilled jobs). CEJ also looks to the future insofar as it seeks to promote a multi-ethnic and pluricultural society, as envisioned by the 1991 Colombian Constitution (Article 7), which reaffirms the cultural identity of such collectivities.

Notwithstanding these differences, CEJ and transitional justice overlap in one fundamental point: an interest in repairing the harms caused by forced displacement and dispossession of collective territories, which have taken place in the recent past (during the ongoing armed conflict). This intersection between the two criteria (seen in the upper right-hand box of Table 4) is precisely the center of the discussion on ethno-reparations, including the idea of a “differential focus” set forth by the Constitutional Court.

With the characterization of CEJ and other criteria of justice sketched out in this section as the background, in the following sections I move to an analysis of the practical consequences of this approach as embodied in international and national law.

#### **11.4. Collective Ethnic Justice and Reparations: The Standards of International Law**

Given the spirit of CEJ, local specificity is crucial when determining reparations for an ethnic group, as generalizing can lead to the adoption of measures that do not serve to repair for the harm done or, worse yet, cause greater harm to the group. In fact, the lack of standardized criteria on this subject at the international level, particularly in the UN system, is due in part to the difficulty of maintaining “jurisprudential consistency when considering the various claims received from indigenous peoples the world over”.<sup>19</sup> Moreover, as Shelton observes, the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law affirm that “reparation ‘is intended to promote justice’ by redressing injury

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<sup>19</sup> Claire Charters, 2008, “Reparations for Indigenous Peoples: Global Instruments and Institutions”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 165.

and thus should be proportional to the gravity of the violations or the harm suffered. The inclusion of these two elements (scope of the injury and magnitude of the misconduct) as tests for the nature and range of reparations give more flexibility to the decision-maker in affording redress than if either factor alone were the basis for judgment”.<sup>20</sup>

Nevertheless, several recurring principles and criteria on reparations for ethnic groups can be deduced from an analysis of international human rights instruments and the jurisprudence of international human rights bodies, particularly those of the Inter-American System of Human Rights. The principles and criteria, which can serve as best practice guides, can be summarized as follows.

***Reparations should include both procedural and substantive components.*** In accordance with international norms and the jurisprudence of human rights bodies, reparations must have both substantive and procedural components.<sup>21</sup> The substantive dimension is the subject of the other criteria discussed below. The procedural dimension requires states to provide access to justice. For ethnic groups in particular, Article 40 of the UN Declaration specifies that the recourses provided by the state must “give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”.

Similarly, the CERD Committee has emphasized the importance of ensuring that indigenous peoples have legal recourse at the domestic level.<sup>22</sup> In particular, the Committee has recommended that national institutions charged with resolving indigenous land issues take into consideration indigenous customary traditions.<sup>23</sup> Along the same lines,

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<sup>20</sup> Dinah Shelton, 2008, “Reparations for Indigenous Peoples: The Present Value of Past Wrongs”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 66 (citing Part IX of the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law).

<sup>21</sup> *Id.*, 65.

<sup>22</sup> Charters, *op. cit.* 183, citing the CERD Committee’s Concluding Observations: Suriname, UN Doc. CERD/C/64/CO/9, 12 March 2004.

<sup>23</sup> Charters, *op. cit.* 183, citing the CERD Committee’s Concluding Observations: Guyana, UN Doc. CERD/C/GUY/CO/14, 4 April 2006.

the UN Special Rapporteur on Indigenous Peoples urged the South African government to provide indigenous communities with resources and technical cooperation so that they could more effectively pursue their land restitution claims in practice.<sup>24</sup>

Thus, in relation to the procedural component of reparations, states should instruct their institutions to adopt a differential focus and designate resources where necessary to increase their effectiveness and attentiveness to ethnic groups' claims. Moreover, it is important to bear in mind the general criterion that judicial remedies, to be considered effective, must also be expedient and offer a solution within a reasonable time period. Lack of compliance of a reasonable time period renders these recourses illusory and ineffective.<sup>25</sup>

***Reparations for ethnic groups must have a collective dimension.*** Reparations must take into account the collective nature of the harm caused to the ethnic group. Similarly, it is important that reparations include measures that benefit the group as such, and not just individual victims who are members of the group. The Inter-American Court of Human Rights has held in cases involving ethnic groups that “reparations take on a special collective significance”,<sup>26</sup> and that in light of the fact that the individual victims belonged to a certain ethnic group, an important component of the individual reparations would be the reparations granted to the community as a whole.<sup>27</sup>

Considering the collective nature of the harm caused by the violations, the Inter-American Court has ordered various measures of col-

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<sup>24</sup> Charters, *op. cit.* 190, citing the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to South Africa, 15 December 2005, UN Doc. E/CN.4/2006/78/Add.2, para. 87.

<sup>25</sup> See, *inter alia*, IACHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, C-79, para. 134; UN Declaration, Art. 40.

<sup>26</sup> IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, C-125, para. 188.

<sup>27</sup> IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of 19 November 2004 (Reparations), C-116, para. 86; IACHR, *Case of the Moiwana Community v. Suriname*, Judgment of 15 June 2005, C-124, para. 194.

lective reparations, such as the establishment of a development fund to implement health, housing, and educational programs for the community<sup>28</sup> and the re-opening and staffing of a school in the village that had been shut down.<sup>29</sup>

***Reparations must be adequate and effective; determination of reparations should be from the bottom-up and focus on meeting the needs of the ethnic group.*** The adequacy and effectiveness of reparations are measured “not on the basis of solely material and/or objective criteria (consisting in ascertaining whether such measures are proportionate to the gravity of the breach and the consequent harm), but also and especially through evaluating the extent to which they are considered as adequate and effective by the individuals and/or peoples concerned (subjective criterion)”.<sup>30</sup> Thus, an approach to reparations that adopts the needs of the ethnic group as its starting point will help guarantee that the reparations provided to them meet these requirements. As former Inter-American Court attorney Karla I. Quintana Osuna and Gabriella Citroni observe, “[t]o be effective, such measures must meet the needs expressed by the indigenous community directly involved and avoid a paternalistic approach. Indeed, measures that are perceived by the community as externally imposed are likely to be useless and, in the long term, they may also produce negative effects ...”.<sup>31</sup>

In fact, this is the guiding principle now used by the Inter-American Court of Human Rights in deciding cases involving ethnic groups. The Court strives in its decisions “to satisfy the needs expressed directly by members of the indigenous communities in-

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<sup>28</sup> IACHR, *Case of the Moiwana Community v. Suriname*, Judgment, *op.cit.*, para. 214.

<sup>29</sup> IACHR, *Case of Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993 (Reparations and Costs), C-15, para. 96.

<sup>30</sup> Federico Lenzerini, 2008, “Reparations for Indigenous Peoples in International and Comparative Law”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 15.

<sup>31</sup> Gabriela Citroni and Karla Quintana, 2008, “Reparations for Indigenous Peoples in the Case Law of the Inter-American Court of Human Rights”, in *Reparations for Indigenous Peoples: International and Comparative*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 321.

volved”.<sup>32</sup> For example, following its decision in the *Case of the Plan de Sánchez Massacre v. Guatemala*, the Court arranged a committee that was incorporated into the community with the goal of formulating methods of medical and psychological evaluation, thereby allowing members of the indigenous group to participate in the creation of future public health policy.<sup>33</sup> Additionally, the Court ordered the state to provide money for the upkeep and improvement of a chapel that the community members had been visiting to pay homage to the victims killed in the massacre.<sup>34</sup> Moreover, as discussed *infra*, the Court has ensured that the beneficiary ethnic groups have equal say and capacity to participate in the implementation committees of development funds ordered in its judgments.

***Reparation measures should respect the cultural identity of the ethnic group.*** Closely related to this bottom-up perspective and in line with the CEJ approach outlined above, existing international standards indicate that the ethnic group’s cultural identity should also be a guideline in determining the measures of reparation and the manner in which they should be implemented.<sup>35</sup> Various international instruments support this idea. For example, Article 5 of ILO Convention 169 provides that in the implementation of the Convention’s provisions to benefit indigenous and tribal peoples, “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected”<sup>36</sup> and “the integrity of the values, practices and institutions of these peoples shall be respected”.<sup>37</sup> Similarly, the Guidelines on the Heritage of Indigenous Peoples provides for the restitution of human

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<sup>32</sup> *Id.*, 326.

<sup>33</sup> Nieves Gómez, 2008, “Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 152.

<sup>34</sup> IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 104.

<sup>35</sup> Citroni and Quintana, *supra* n. 31: 320.

<sup>36</sup> ILO Convention 169, Art. 5(a).

<sup>37</sup> ILO Convention 169, Art. 5(b).

remains and associated funerary objects to indigenous peoples in a “culturally appropriate manner”.<sup>38</sup>

In the Inter-American System of Human Rights, respect for the cultural identity of the beneficiary ethnic group is reflected in many of the reparation measures ordered by the Inter-American Court. For example, in the *Case of the Plan de Sánchez Massacre*, the Court ordered the Guatemalan state to conduct an act publicly honoring the memory of those executed, “tak[ing] into account the traditions and customs of the members of the affected communities in this act”.<sup>39</sup> In various cases, the Court has ordered, as a measure of reparation, the translation of its decision into the language of the ethnic group and its dissemination.<sup>40</sup>

Furthermore, following this principle, the existence or non-existence of official state records should not determine the scope of the reparations. For example, in assessing who should be considered a victim for purposes of receiving reparations in the *Case of the Moiwana Community v. Suriname*, the Court took into consideration the fact that many Maroons do not have formal identity papers, and thus accepted alternative methods of proving identity, such as “a statement before a competent state official by a recognized leader of the Moiwana community members, as well as the declarations of two additional persons, all of which clearly attest to the individual’s identity”.<sup>41</sup>

***Those implementing reparation measures should consult with the ethnic group, which should retain some level of control over the implementation.*** This principle is in complete accord with the general obligation that states have to consult with ethnic groups before adopt-

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<sup>38</sup> Principles and Guidelines for the Protection of the Heritage of Indigenous People, Art. 21.

<sup>39</sup> IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 101.

<sup>40</sup> See, *inter alia*, IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, paras. 102-03; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment *op.cit.*, para. 227.

<sup>41</sup> IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 178.

ing legislative or administrative measures that affect them.<sup>42</sup> Furthermore, it bears a close relationship to the bottom-up, needs-based approach to reparations described above. In fact, at the international level, there is much support for this principle, as can be seen in the following illustrative examples.

Article 15(2) of the UN Declaration provides that “States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society”. Likewise, Article 23 of the same instrument provides that “[i]ndigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions”.

In the UN system, among other examples, the Committee on the Elimination of Racial Discrimination (CERD) has “consistently [recommended] discussions between the Aboriginal and Torres Strait Islander peoples and Australia with ‘a view to finding solutions acceptable to the indigenous peoples and which would comply with Australia’s obligations under the Convention’”.<sup>43</sup> Significantly, the UN Special Rapporteur on Indigenous Peoples has recommended to the Canadian government that it negotiate compensation owed to the Métis ethnic group for past injustices.<sup>44</sup>

The importance of consultation in the context of reparations is emphasized also by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in various cases. For

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<sup>42</sup> See, *inter alia*, ILO Convention 169, Art. 6; UN Declaration on the Rights of Indigenous Peoples, Art. 19.

<sup>43</sup> Charters, *op. cit.* 184, citing UN CERD Committee Decision 2(54) on Australia, 18 March 1999, UN Doc. A/54/18.

<sup>44</sup> Charters, *op. cit.* 191, citing Report of the UN Special Rapporteur on Indigenous Peoples, Mission to Canada, 2 December 2004, UN Doc. E/CN.4/2005/88/Add.3.

example, in deciding a case regarding land claims brought by Mayan communities against the state of Belize, the Inter-American Commission urged Belize to adopt the measures necessary to secure the Mayan people's land rights through fully informed consultations with them.<sup>45</sup>

For its part, the Inter-American Court in the *Case of the Moiwana Community v. Suriname*, ordered Suriname to adopt measures to ensure the property rights of the Moiwana community, requiring the state to guarantee the participation and informed consent of the victims and the indigenous communities, including, in fact, neighboring indigenous communities.<sup>46</sup> For the developmental fund also ordered by the Court in this case, the tribunal provided that the fund should be administered by an implementation committee composed of three members: one elected by the victims, another by the state, and the third jointly by the two.<sup>47</sup> Similarly, in the *Case of the Sawhoyamaya Indigenous Community v. Paraguay* and the *Case of the Yakye Axa Indigenous Community v. Paraguay*, the Court ordered the establishment of community development funds for the purpose of implementing education, housing, agriculture, and health projects, as well as providing drinking water and sanitation. In both of these cases, as well, the Court specified that the fund's implementation committee should be composed of three members, one elected by the victims, one elected by the state, and the third by joint agreement.<sup>48</sup>

Indeed, as seen in these examples, consultation with and control by the beneficiary ethnic group are important elements to help ensure that the reparation measures meet the needs of the group and that the group ultimately takes ownership of them.

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<sup>45</sup> Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District v. Belize*, Case No. 12.053, Report No. 40/04 of 12 October 2004, para. 197(1).

<sup>46</sup> IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 210.

<sup>47</sup> *Id.*, paras. 214-15.

<sup>48</sup> IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, C-146, paras. 224-25; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment *op.cit.*, paras. 205-06.

*Complementary, compensatory measures should form part of the reparations.* In line with the above-mentioned argument that CEJ should look not only towards the past but also toward the future, the experience of the Inter-American Court has shown that integral reparations will often require that the state adopt collective measures to improve the living conditions of the ethnic group. This is especially true in cases where the violations have gravely affected the group's socio-economic conditions. For example, in the cases of the Sawhoyamaxa and Yakye Axa indigenous communities, the communities were forced to live in inhumane conditions precisely due to their inability at the domestic level to secure rights to their ancestral lands. Thus, the Court found it pertinent to order the creation of community development funds to provide drinking water and sanitation infrastructure, as well as implement education, health, housing, and agriculture projects.<sup>49</sup> Moreover, in both cases, the Court ordered that while the indigenous community remained landless, “given its special state of vulnerability and the impossibility of resorting to its traditional subsistence mechanisms”, the state must supply immediate and regular access to drinking water, medical care, infrastructure for the management of biological waste, and appropriate bilingual educational materials.<sup>50</sup>

Importantly, compensation as a form of reparation should not be confused with the investment of resources made by the state as part of its normal development activities or in compliance with its other obligations. For example, in the *Case of the Plan de Sánchez Massacre*, “[g]iven the harm caused to the members of the Plan de Sánchez community ... owing to the facts of this case”, the Court ordered the state to implement various educational, cultural, health, and infrastructure projects in these communities, “*in addition to the public works*

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<sup>49</sup> IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 224; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 205.

<sup>50</sup> IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 230; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 221.

*financed by the national budget allocated to that region or municipality*".<sup>51</sup>

***Reparations should take into consideration historical grievances and their lingering impact.*** Although this principle has not been as widely implemented as the others described in this section, it has been followed to some extent in the UN system. For example, as described above, the UN Special Rapporteur on Indigenous Peoples encouraged the government of South Africa not to limit the restitution of land claims by indigenous communities to a certain cut-off date.<sup>52</sup> Significantly, the UN Committee on the Elimination of Racial Discrimination "appears to require compensation for grievances suffered in the past ... It recommended that Australia 'pursue an energetic policy of recognizing Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past'".<sup>53</sup>

The Special Rapporteur on Treaties, Agreement and Constructive Arrangements between Indigenous Peoples and States (hereinafter "Special Rapporteur on Treaties") called for the need to repair historical grievances to indigenous peoples, declaring:

The Special Rapporteur is fully convinced that the overall Indigenous problematique today is also ethical in nature. He believes that humanity has contracted a debt with Indigenous peoples because of the historical misdeeds against them. Consequently, these must be redressed on the basis of equity and historical justice. He is also very much aware of the practical impossibility of taking the world back to the situation existing at the beginning of the encounters between Indigenous and non-Indigenous peoples five centuries ago. It is not possible to undo all that has been done (both positive and negative) in this time-

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<sup>51</sup> IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment *op.cit.*, para. 110.

<sup>52</sup> Charters, *op. cit.*, 190, citing the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to South Africa, 15 December 2005, UN Doc. E/CN.4/2006/78/Add.2, para. 87.

<sup>53</sup> Charters, 183, citing UN CERD Committee, Concluding Observations: Australia, 19 September 1994, UN Doc. A/49/18.

lapse, but this does not negate the ethical imperative to undo (even at the expensive, if need be, of the straitjacket imposed by the unbending observance of the ‘rule of [non-Indigenous] law’) the wrongs done, both spiritually and materially, to the Indigenous peoples.<sup>54</sup>

*The significance of the violation should be seen from the perspective of the ethnic group.* Once it is determined that a violation has been committed and that reparations are thus necessary, the significance of the violation and the measures of reparation should be determined from the viewpoint of the ethnic group. In this regard, “[i]t is only with an appreciation of indigenous understanding of their culture as holistic, symbolic, communal and intergenerational that a clearer assessment of the nature and extent of losses sustained by indigenous peoples can be made”.<sup>55</sup>

Adhering to this criterion, in determining compensation for non-pecuniary damages for both the Sawhoyamaxa and Yakye Axa indigenous communities, the Inter-American Court considered that “the special meaning that these lands have for indigenous peoples, in general, and for the members of the [communities], in particular, implies that the denial of those rights over land involves a detriment to values that are highly significant to the members of those communities, who are at risk of losing or suffering irreparable damage to their lives and identities, and to the cultural heritage of future generations”.<sup>56</sup>

In the case of violations against specific members of the ethnic group, the reparations should take into account the role that these victims have or had within the community. Violations such as forced dis-

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<sup>54</sup> United Nations Economic and Social Council, “Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report” (Miguel Alfonso Martínez, Special Rapporteur). 22 June 1999, UN Doc. E/CN.4/Sub.2/1999/20.

<sup>55</sup> Ana Vrdoljak, 2007, “Reparations for Cultural Loss”, in *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Federico Lenzerini (ed.), Oxford: Oxford University Press: 227.

<sup>56</sup> IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 222; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 203.

placement and attacks targeting specific group leaders have an enormous impact on the traditional community structure. The Inter-American Court in the *Case of the Plan de Sánchez Massacre* analyzed this dynamic, finding:

In the village of Plan de Sánchez, the traditional community structure was substituted by a vertical, militaristic structure; the traditional Mayan authorities were replaced by military agents and the heads of the PAC. The leaders who survived the massacre could not continue performing their role in the community because they were subjugated by the Army. The community's will, based on the consensus of its members and on the Mayan norms and values of respect and service, was eliminated and replaced by authoritarian practices and the arbitrary use of power. The imposition of the military structure affected community life in Plan de Sánchez, because it brought about the fragmentation of the group and the loss of reference points within it.<sup>57</sup>

***The search for truth and justice, as part of integral reparation, is especially significant for ethnic groups.*** Without generalizing, it is important to note that in many cases, establishing the truth about the violations and obtaining justice have cultural and spiritual significance for the ethnic group affected, and is therefore an important component of integral reparation. In this connection, the mere recognition that a human rights violation has occurred is not a sufficient form of reparation, especially in cases concerning indigenous peoples.<sup>58</sup> On the contrary, it is even more important that reparation measures include thorough investigations and the identification and sanction of those responsible for the violations. For example, in the *Case of the Moiwana Community*, the Inter-American Court concluded that:

... the ongoing impunity has a particularly severe impact upon the Moiwana villagers, as a N'djuka people. As indicated in the proven facts ... justice and collective responsibility are central precepts within traditional N'djuka

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<sup>57</sup> IACHR, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment, *op. cit.*, para. 49(16).

<sup>58</sup> Citroni and Quintana, *supra* n. 31: 334, n. 46.

society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit – and perhaps other ancestral spirits – may torment their living next of kin.

The Court also found that the failure of the state to investigate and determine the location of the remains of the victims had especially serious consequences on the members of the community, threatening their integrity and that of future generations: “they do not know what has happened to the remains of their loved ones, and, as a result, they cannot honor and bury them in accordance with fundamental norms of N'djuka culture ... Since the various death rituals have not been performed according to N'djuka tradition, the community members fear ‘spiritually-caused illnesses,’ which they believe can affect the entire natural lineage and, if reconciliation is not achieved, will persist through generations ...”.<sup>59</sup>

***The significance of land to ethnic groups must be considered in determining reparations. In cases of dispossession, restitution is the most preferred method of reparation.*** One of the clearest manifestations of CEJ in international law is the special protection given by the latter to ethnic groups’ lands (including ancestral lands). Indeed, international legal standards are based on the acknowledgment of the close relationship between their cultural identity and ethnic lands, as well as the impact that failure to respect these groups’ land rights has on many of their other rights. Thus, measures of reparation must include guarantees ensuring collective land rights, both in law and in fact.

Moreover, because of the significance of land, territory, and resources to ethnic communities, restitution of land (accompanied by repairing any environmental harm caused) is the ideal means of reparation when they have been dispossessed of lands they have traditionally

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<sup>59</sup> IACHR, *Case of the Moiwana Community v. Suriname*, Judgment *op.cit.*, para. 195.

occupied or used. Only if this is not possible for legitimate reasons, the state may use the alternative of providing fair compensation. Such compensation should consist of other lands, territories, or resources of equal quality, size, and legal status, or, if this is not possible, monetary or other appropriate compensation.

These principles are supported by numerous international instruments and jurisprudence. For example, Article 28 of the UN Declaration on the Rights of Indigenous Peoples specifies:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size, and legal status or of monetary compensation or other appropriate redress.

Article 10 of the Declaration states that “[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”.

The requirement that compensation be fair has both procedural and substantive components. In fulfilling the former, obtaining the agreement of the ethnic group through transparent processes is of vital importance. In regards to the substantive aspect, alternative lands must be equal in quality, size, and legal status. If monetary compensation is given, the amount must also be considered equitable and fair. For example, the Special Rapporteur on Indigenous Peoples criticized the New Zealand government’s redress to the Maori people as follows: “The overall land returned by way of redress through settlements is a small percentage of the land claims, and cash paid out is usually less than 1% of the current value of the land. Total Crown expenditure on the settlement of Treaty breach claims over the last decade (approx-

mately NZ \$800 million) is about 1.6% of the government budget for a single year”.<sup>60</sup>

Recognizing the importance of restoring to indigenous peoples their traditionally occupied or used lands, the CERD Committee’s General Recommendations on Indigenous Peoples similarly urges states to return “territories traditionally owned or otherwise inhabited or used” that have been taken from indigenous peoples “without their free and informed consent”.<sup>61</sup>

ILO Convention 169 also establishes a strong presumption against removing indigenous and Afro-descendant peoples from their lands. It first recognizes that states must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”.<sup>62</sup> Therefore, relocation of these groups from their lands is allowed only when “considered necessary as an exceptional measure”.<sup>63</sup> Additionally, “[w]henver possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist”.<sup>64</sup> The Convention further establishes that the next best alternative is to provide them with “lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development”.<sup>65</sup> Importantly, monetary compensation as mode of reparation is permitted only when the ethnic group has expressed a preference for it and there are “appropriate guarantees”.<sup>66</sup>

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<sup>60</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen: Mission to New Zealand, 13 March 2006, UN Doc. E/CN.4/2006/78/Add.3, para. 27.

<sup>61</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII: Indigenous Peoples, 18 August 1997, UN Doc. A/52/18, annex V.

<sup>62</sup> ILO Convention 169, Art. 13.

<sup>63</sup> *Ibid.*, Art. 16(2).

<sup>64</sup> *Ibid.*, Art. 16(3).

<sup>65</sup> *Ibid.*, Art. 16(4).

<sup>66</sup> *Ibid.*, Art. 16(4).

The Inter-American Court of Human Rights has extensive jurisprudence on the importance of land to ethnic groups and the appropriate measures of reparation when their land rights have been violated. For example, in the cases of the Sawhoyamaxa and Yakye Axa indigenous communities, the Court expounded on the special significance that land had for these communities: “The culture of the members of indigenous communities reflects a particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity”.<sup>67</sup>

Thus, the ideal form of reparation is restitution of ancestral lands to ethnic groups. The Court’s holding in the Sawhoyamaxa case is illustrative: “the Court considers that the restitution of traditional lands to the members of the Sawhoyamaxa Community is the reparation measure that best complies with the *restitutio in integrum* principle, therefore the Court orders that the State shall adopt all legislative, administrative or other type of measures necessary to guarantee the members of the Community ownership rights over their traditional lands, and consequently the right to use and enjoy those lands”.<sup>68</sup>

The fact that ethnic groups have lost possession of their traditional lands does not preclude their claims of ownership:

[T]he members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof [sic], maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith ... [T]he members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and

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<sup>67</sup> IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 118; IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 135.

<sup>68</sup> IACHR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 210.

quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights.

Regarding time restrictions on restitution claims in particular, the Court has provided that in cases “where the relationship with the land is expressed ... in traditional ... activities, if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control, ... such as acts of violence or threats against them, restitution rights shall be deemed to survive until said hindrances disappear”.<sup>69</sup>

In circumstances in which the traditional lands are currently in private hands, the Court has specified that “the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society”, taking into account for this determination the “specificities ... values, practices, customs and customary law” of the ethnic community affected.<sup>70</sup> States are permitted to consider other forms of reparation only when they have “concrete and justified reasons”.<sup>71</sup> In those cases, “the compensation granted must be guided primarily by the meaning of the land” for the ethnic groups affected.<sup>72</sup>

The specific parameters for the determination of alternative lands were established by the Court in the case of the Yakye Axa community: “If for objective and well-founded reasons the claim to ancestral territory of the members of the Yakye Axa Community is not possible, the State must grant them alternative land, (i) chosen by means of a consensus with the community, (ii) in accordance with its own manner of consultation and decision-making, practices and customs. In either

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<sup>69</sup> IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 132.

<sup>70</sup> IACHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment, *op. cit.*, para. 217.

<sup>71</sup> *Id.*, para. 149.

<sup>72</sup> *Id.*

case, (iii) the area of land must be sufficient to ensure preservation and development of the Community's own manner of live [sic]".<sup>73</sup>

Lastly, the recognition of the ethnic group's land rights must be made "effective in reality and actual practice".<sup>74</sup> In this connection, "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established".<sup>75</sup> The Court's conclusion in the case of the Yakye Axa community highlights this observation: "The common basis of the human rights violations against the members of the Yakye Axa Community found in the instant Judgment is primarily the lack of materialization of the ancestral territorial rights of the members of the Community, whose existence has not been challenged by the State".<sup>76</sup> The Court therefore ordered the Paraguayan state to delimit, demarcate, grant title, deed, and transfer the identified traditional land to the Yakye Axa community free of cost within a three year period.<sup>77</sup>

### **11.5. Collective Ethnic Justice and Reparations in Colombia**

How does CEJ (as embodied in international legal standards) translate into concrete regulations and policies on transitional justice and reparations in Colombia? I close the chapter in this section by tackling this question. To that end, I seek to flesh out each of the above-explained international principles in turn.

As noted, despite the considerable impact of CEJ in the granting of collective land titles to indigenous peoples and Afro-descendant communities, discussion of reparations to ethnic groups in Colombia has been relatively scarce. This becomes evident in the case of forced displacement, for example, as documents and policy produced by the national government and even, to a certain extent, by the Constitutional Court, often use the language of aid, assistance, attention or pro-

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<sup>73</sup> *Id.*, para. 217. Enumeration added.

<sup>74</sup> *Id.*, para. 141.

<sup>75</sup> *Id.*, para. 143.

<sup>76</sup> *Id.*, para. 211.

<sup>77</sup> *Id.*, paras. 215, 217.

tection – rather than reparations – in addressing the forcibly displaced indigenous and Afro-Colombian populations.

Given the infrequency of discussion on reparations with respect to ethnic groups, many of the norms presented in this section have been produced in the context of establishing guidelines for aid, assistance, attention, or protection for forcibly displaced ethnic groups or, in the case of Law 70 of 1993, in the context of strengthening rights to black communities' territories, in general. Nonetheless, these norms can also be applied in the reparations context, especially if the Colombian state aspires to have a policy *vis-à-vis* transitional justice that respects the above-mentioned international standards on reparations to ethnic groups.

It is worth highlighting one notable exception to the general lack of policies on reparations to ethnic groups: the “Victims First” (“*Primero las víctimas*”) project undertaken by the Office of the Attorney General (*Procuraduría General de la Nación*, hereinafter “OAG”), which aims to develop criteria on reparations to ethnic groups. The initiative is based on the feedback collected from ethnic groups in Colombia, as well as from jurisprudence of the Inter-American Court of Human Rights.<sup>78</sup> Given the affinity between such an initiative and the conceptual and legal perspective on CEJ advanced in this chapter, I draw extensively in considering each of the standards on reparations laid out in the previous section.

***Reparations should include procedural in addition to substantive components.*** As the OAG recommends in its Victims First project, effective realization of ethnic communities' right to territory requires that the state institute effective recourses for territory claims. In accordance with international jurisprudence cited by the OAG in its report, these remedies must respect due process principles and offer responses within a reasonable timeframe.<sup>79</sup>

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<sup>78</sup> PGN, 2008, “*Primero las Víctimas: Criterios para la Reparación Integral de Grupos Étnicos, Fase 2*” (“Victims First: Criteria for Integral Reparation to Ethnic Groups, Phase 2”), 21-23.

<sup>79</sup> *Ibid.*: 117-18.

Furthermore, the recommendations made by ethnic communities themselves on how to improve mechanisms designed to benefit them should be taken into account. For example, a general provision of Law 70 of 1993 relating to the rights of Afro-Colombian communities states: “The regulation of this law will be done taking into account the recommendations of the black communities that are its beneficiaries ...”<sup>80</sup>

***Reparations for ethnic groups must have collective dimension.*** As the OAG emphasizes, the Constitutional Court has manifested that “the rights of indigenous communities – which can be extended to tribal peoples (Afro-descendants) – are not ‘reducible to those of their members considered individually. Rather, these rights belong to the communities themselves, which, as such ... are autonomous, collective subjects and not simple aggregates of their members’”.<sup>81</sup> In a recent judgment, the Constitutional Court reiterated that “the fundamental rights of indigenous communities should not be confused with the collective rights of other groups of people; these communities are subjects collective in nature and not just the simple sum of their individual subjects who happen to share the same rights or diffuse or group interests”.<sup>82</sup>

Therefore, the OAG recommends that “the measures of reparation should be both collective and individual in nature, given the two

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<sup>80</sup> Law 70 of 1993, Ch. 8, Art. 60 (“*La reglamentación de la presente ley se hará teniendo en cuenta las recomendaciones de las comunidades negras beneficiarias de ella ...*”).

<sup>81</sup> Victims First, *supra* n. 78: 99-100, citing the Constitutional Court of Colombia, Judgment T-380 of 1993 (“*los derechos de las comunidades indígenas – extensivos a los pueblos tribales (afrodescendientes) – ‘no se reducen a los predicables de sus miembros individualmente considerados, sino que logran radicarse en la comunidad misma que como tal aparece dotada de singularidad propia ... como sujetos colectivos autónomos y no como simples agregados de sus miembros’*”).

<sup>82</sup> Constitutional Court of Colombia, Judgment T-769 of 2009: 19 (“*los derechos fundamentales de las comunidades indígenas no deben confundirse con los derechos colectivos de otros grupos humanos; estas comunidades son un sujeto colectivo y no una simple sumatoria de sujetos individuales que comparten los mismos derechos o intereses difusos o agrupados*”).

dimensions of the right to cultural identity”.<sup>83</sup> In fact, the OAG has urged that “claims made by ethnic groups be formulated collectively through their legitimate authorities ... unless, in accordance with the groups’ internal procedures, it is decided that individual requests can also be made”.<sup>84</sup>

In the context of territory rights, the importance of the collective dimension of ethnic groups’ rights is even more pronounced. For example, Chapter III of Law 70 of 1993, entitled “Recognition of the Right to Collective Property”,<sup>85</sup> includes provisions on the inalienable, non-prescriptive and non-burdenable nature of Afro-Colombian lands designated for collective use.<sup>86</sup>

Given the collective nature of ethnic groups’ territory rights, forced displacement affects this collective dimension in multiple ways. The Constitutional Court’s jurisprudence on indigenous peoples in situations of forced displacement has explained that “among the various aspects of forced displacement that constitute a violation of these collective rights are: the loss or abandonment of traditional territories, the uprooting that causes breaking with cultural practices directly associated with territory, the especially pronounced displacement of leaders and traditional authorities and its consequences on cultural integrity, and the general rupture of the social fabric caused by this crime”.<sup>87</sup>

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<sup>83</sup> Victims First, *supra* n. 78: 29 (“*Las medidas de reparación deben ser de carácter colectivo e individual, dadas las dos dimensiones del derecho a la identidad cultural*”).

<sup>84</sup> *Ibid.*: 99 (“*Las reclamaciones de los grupos étnicos se formularán de manera colectiva a través de sus autoridades legítimas ... salvo que de acuerdo con sus procedimientos internos se decida formular solicitudes individuales*”).

<sup>85</sup> Law 70 of 1993, Ch. 3 (“*Reconocimiento del Derecho a la Propiedad Colectiva*”).

<sup>86</sup> *Ibid.*, Ch. 3, Art. 7.

<sup>87</sup> Constitutional Court of Colombia, Order 004 of 2009: 32 (“*Entre los distintos factores del desplazamiento forzado que conllevan una violación de estos derechos colectivos se encuentran la pérdida o el abandono del territorio tradicional, el desarraigo que rompe las pautas culturales directamente asociadas al territorio, el desplazamiento especialmente agudo de los líderes y autoridades tradicionales con sus necesarias secuelas sobre la integridad cultural, y en general la ruptura del tejido social causada por este crimen*”).

Reparation measures that address forced displacement therefore must be evaluated from both a collective and individual perspective.<sup>88</sup>

Even in the event of indemnizations that involve the transfer of something of economic value to an ethnic group, Presidential Directive No. 01 of 2010 provides that measures should be taken to ensure its collective enjoyment by the group.<sup>89</sup>

***Reparations must be adequate and effective; determination of reparations should come from the bottom-up and focus on meeting the needs of the ethnic group.*** In Chapter VII of Law 70, on “Planning and Promotion of Economic and Social Development”,<sup>90</sup> various articles reflect this principle. Article 49 of this chapter, for example, states:

The design, execution and coordination of the plans, programs and projects relating to economic and social development, which are undertaken by the Government and international technical cooperation initiatives for the benefit of the black communities addressed by this law, should involve the participation of these communities’ representatives, with the objective of responding to their particular necessities, preserving the environment, conserving their traditional practices of production, eradicating poverty, and respecting and recognizing their cultural and social life. These plans, programs and projects should reflect the aspirations of the black communities in the area of development.

***Reparations should respect the specific and unique cultural identity of the ethnic group.*** The OAG provides that reparation measures should adhere to the cosmovision of the ethnic group.<sup>91</sup> The framework for such measures should be the ethnic communities’ customary laws, practices and values.<sup>92</sup> For example, the OAG warns that

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<sup>88</sup> *Ibid.*: 24.

<sup>89</sup> Presidential Directive No. 001 of 2010, regarding prior consultation of ethnic groups, Sec. 5(b).

<sup>90</sup> Law 70 of 1993, Ch. 7 (“*Planeación y Fomento del Desarrollo Económico y Social*”).

<sup>91</sup> Victims First, *supra* n. 78: 29.

<sup>92</sup> *Ibid.*: 100.

the recognition of reparations measures should not depend on the existence of official documents that accredit juridical personality (that is, that give legal recognition of a person before the law).<sup>93</sup> As the obligation to provide such documents is the state's responsibility,<sup>94</sup> the absence of them cannot be used as a reason for not repairing a victim.<sup>95</sup> Thus, as the OAG observes, alternative means, which respect the cultural identity of the group, may be used for proving that someone is a victim and should receive reparations.

In the context of protecting and repairing territory rights, respecting the specific cultural identities of ethnic groups is of vital importance and has been emphasized repeatedly in various domestic norms. For example, Law 70 commits the state to adopting measures to guarantee Afro-Colombian communities' right to economic and social development, "attending to the characteristics of their cultural autonomy".<sup>96</sup>

For its part, the Constitutional Court in Order 04 of 2009 concerning the displaced indigenous population mandated that the Plans for Ethnic Preservation and Protection (*Planes de Salvaguarda Étnica*) include the provision of "mechanisms for strengthening the social and cultural integrity of each beneficiary ethnic group".<sup>97</sup>

In the Directive on the Prevention of and Integral Attention to Indigenous Population in the Situation of Forced Displacement and Risk, with a Differential Focus, issued by the Ministry of the Interior and Justice (MIJ) and the Presidential Agency for Social Action and International Cooperation (Social Action), MIJ and Social Action warned: "Without the entities being prepared to attend this population and its cultural specificities, in addition to the lack of protocols on how to relate and communicate with the population, entities and officials

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<sup>93</sup> *Ibid.*: 104.

<sup>94</sup> American Convention on Human Rights, Art. 3.

<sup>95</sup> Victims First, *supra* n. 78: 105.

<sup>96</sup> Law 70 of 1993, Ch. 7, Art. 47 ("*atendiendo los elementos de su autonomía cultural*").

<sup>97</sup> Order 004 of 2009, *supra* n. 87: 34 ("*herramientas para el fortalecimiento de la integridad cultural y social de cada etnia beneficiaria*").

may disregard and even unintentionally abuse aspects of the displaced person's identity and dignity".<sup>98</sup> Return or relocation of displaced indigenous peoples, MIJ and Social Action add, must include state-coordinated measures that guarantee the population's ability, "as collectivities, to maintain their specific cultural characteristics",<sup>99</sup> wherever they may end up.<sup>100</sup>

Lastly, the most recent version of Social Action's proposed Roadmap for the Protection of Ethnic Groups' Territory Rights (*Ruta de Protección de los Derechos Territoriales de los Grupos Étnicos*) (hereinafter Ethnic Roadmap), allows traditional possession of territory by an ethnic group to be proven according to the uses and customs of that group.<sup>101</sup>

***Those implementing reparation measures should consult with the ethnic group, which should retain some level of control of their implementation.*** To fulfill the above-mentioned requirement of respecting the unique cultural identities of ethnic groups, measures should always be consulted with them before implementation and involve their participation during implementation. Although it does not specifically address the issue of reparations as such, Law 70 demonstrates the applicability of this principle in many of its provisions: Article 44 explicitly states, "As a mechanism for protecting cultural identity, the black communities will participate in the design, elaboration and evaluation of environmental, cultural and socioeconomic impact

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<sup>98</sup> Ministry of the Interior and Justice (*Ministerio del Interior y de Justicia*) and the Presidential Agency for Social Action and International Cooperation (*Agencia Presidencial para la Acción Social y la Cooperación Internacional*), Directive on the Prevention of and Integral Attention to Indigenous Population in the Situation of Forced Displacement and Risk, with a Differential Focus, 2006: 9. ("Al no estar las entidades preparadas para atender a esta población con sus especificidades culturales, sumado a la no-disponibilidad de protocolos de relación y comunicación con ellos, las entidades y funcionarios pueden ignorar, o incluso sin proponérselo, maltratar aspectos de la identidad y dignidad del desplazado").

<sup>99</sup> MIJ and Social Action Directive, 9 ("como sujetos colectivos que mantienen características culturales específicas").

<sup>100</sup> MIJ and Social Action Directive, 9.

<sup>101</sup> "*Ruta de Protección de los Derechos Territoriales de los Grupos Étnicos*" ("Social Action, Roadmap for the Protection of Ethnic Groups' Territory Rights") Proposal: October 2009: 30-31.

studies that are conducted for projects undertaken in the areas referred to by this law”.<sup>102</sup> Article 45 adds, “[f]or the purpose of following up on the mandates of this law, the national government will form a high-level Consultative Commission, with the participation of black communities from Antioquia, Valle [del Cauca], Cauca, Chocó, Nariño, the Atlantic Coast and the other regions of the country referred to in this law, as well as with the Raizal communities of San Andrés, Providencia and Santa Catalina”.<sup>103</sup> Similarly, Article 38 provides:

The members of black communities should have, at their disposal, means of professional, technological and technical training and education, which will help place them on an equal footing with other citizens ... These special training and education programs should be based on the black communities’ economic environments, cultural and social conditions, and concrete necessities. All studies in this regard should be done with the cooperation of the black communities, who will be consulted about the organization and operation of these special programs. They will gradually assume responsibility for the programs’ organization and operation.<sup>104</sup>

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<sup>102</sup> Law 70 of 1993, Ch. 6, Art. 44 (“*Como un mecanismo de protección de la identidad cultural, las comunidades negras participarán en el diseño, elaboración y evaluación de los estudios de impacto ambiental, socioeconómico y cultural, que se realicen sobre los proyectos que se pretendan adelantar en las áreas a que se refiere esta ley*”).

<sup>103</sup> *Ibid.*, Ch. 6, Art. 45 (“*El Gobierno Nacional conformará una Comisión Consultiva de alto nivel, con la participación de representantes de las comunidades negras de Antioquia, Valle, Cauca, Chocó, Nariño, Costa Atlántica y demás regiones del país a que se refiere esta ley y de raizales de San Andrés, Providencia y Santa Catalina, para el seguimiento de lo dispuesto en la presente ley*”).

<sup>104</sup> *Ibid.*, Ch. 6, Art. 38 (“*Los miembros de las comunidades negras deben disponer de medios de formación técnica, tecnológica y profesional que los ubiquen en condiciones de igualdad con los demás ciudadanos. ... Estos programas especiales de formación deberán basarse en el entorno económico, las condiciones sociales y culturales y las necesidades concretas de las comunidades negras. Todo estudio a este respecto deberá realizarse en cooperación con las comunidades negras las cuales serán consultadas sobre la organización y funcionamiento de tales programas. Estas comunidades asumirán progresivamente la responsabi-*

In relation to reparations specifically, the OAG requires that measures be determined with the ethnic group's participation.<sup>105</sup> Thus, "in the definition of measures of reparation, as well as in their execution, the communities should participate through their authorities".<sup>106</sup>

With regard to the displaced indigenous population, the Constitutional Court in Order 004 mandated: "In designing the Program of Guarantees of the Rights of Indigenous Peoples Affected by Forced Displacement, [the government] will apply the constitutional parameters on participation of organizations that advocate for indigenous peoples' rights and leaders of the indigenous peoples most affected by forced displacement".<sup>107</sup> As for the Plans for Ethnic Preservation and Protection, these must be "subject to prior, due consultation with the authorities of each of the beneficiary ethnic groups, in accordance with the parameters indicated repeatedly in constitutional jurisprudence so that the participation is effective and respectful of ethno-cultural diversity".<sup>108</sup>

In relation to the displaced Afro-Colombian population, the Constitutional Court, in Order 005 of 2009 regarding this population, likewise required that

the national government ... and the authorities on territory in the corresponding jurisdictions design and execute a specific plan for protection and attention in relation to

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*dad de la organización y el funcionamiento de tales programas especiales de formación").*

<sup>105</sup> Victims First, *supra* n. 78: 29.

<sup>106</sup> *Ibid.*: 105 ("En la definición de las medidas de reparación así como en su ejecución se debe contar con la participación de las comunidades a través de sus autoridades").

<sup>107</sup> Order 004 of 2009, *supra* n. 87: 33 ("En el diseño [del Programa de Garantía de los Derechos de los Pueblos Indígenas Afectados por el Desplazamiento] se aplicarán los parámetros constitucionales de participación de las organizaciones que abogan por los derechos de los pueblos indígenas, así como de líderes de los pueblos indígenas más afectados por el desplazamiento").

<sup>108</sup> *Ibid.*: 34 ("Ha de ser debidamente consultado en forma previa con las autoridades de cada una de las etnias beneficiarias, de conformidad con los parámetros que ha señalado de manera reiterada la jurisprudencia constitucional para que la participación sea efectiva y respetuosa de la diversidad etnocultural").

each of [the communities indicated by the Court], with the effective participation of these communities and respect for their constituted authorities. For the design and implementation of the specific plans, the authorities should ... promote the effective participation of these communities, following the jurisprudential rules on the participation of ethnic groups, respecting the legitimately constituted authorities, and guaranteeing sufficient opportunities for the leaders to present to their communities the measures that will be adopted and for the communities to present suggestions or observations that should be specifically considered by the corresponding national authorities and authorities on territory.<sup>109</sup>

Moreover, for the national plan on prevention, protection and attention, the Court “ordered the national government, specifically the Director of Social Action – in his capacity as the coordinator of the National System for the Integral Attention to the Displaced Population – and the [National Council for the Integral Attention to the Population Displaced by Violence], to design an integral plan of prevention, protection and attention to the Afro-Colombian population, with the effective participation of Afro-Colombian communities and full respect for their constituted authorities, as well as the participation of the relevant traditional authorities”.<sup>110</sup>

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<sup>109</sup> Order 005 of 2009: para. 169 (“*el gobierno nacional ... y las autoridades territoriales de las respectivas jurisdicciones, deberán en relación con cada una de estas comunidades, diseñar y poner en marcha un plan específico de protección y atención, con la participación efectiva de estas y el respeto por sus autoridades constituidas. Para el diseño e implementación de los planes específicos, las autoridades deberán: ... Promover la participación efectiva de estas comunidades, siguiendo las reglas jurisprudenciales sobre participación de los grupos étnicos, respetando las autoridades legítimamente constituidas, y garantizando espacio suficiente para que los líderes presenten a las comunidades las medidas que serían adoptadas y para que éstas presenten sugerencias u observaciones que deberán ser valoradas específicamente por las autoridades gubernamentales nacionales y territoriales correspondientes*”).

<sup>110</sup> *Ibid.*: para. 182 (“[La Corte Constitucional] [o]rdenará al gobierno nacional, a través del Director de Acción Social como coordinador del Sistema Nacional de Atención a la Población Desplazada, y al [Consejo Nacional para la Atención In-

The Ethnic Roadmap proposed by Social Action also recognizes the importance of consultation and participation of ethnic groups in relation to territory-related claims, specifying: “The indigenous governments (*cabildos*) or traditional ethnic organizations, as well as the boards of the black communities’ community councils, in their capacity as ethnic authorities, should be informed and consulted about requests for protection that correspond to territories in their jurisdiction, as well as the scope of the measures to be taken. For this purpose, these authorities will be contacted, and information will be requested from them to help identify the territory and determine the rights violated”.<sup>111</sup>

***Complementary, compensatory measures should form part of the reparations.*** As the OAG observes, reparations for violations of ethnic groups’ territory rights should be accompanied by measures that offer compensation: integral reparations do not consist solely of procedures or recourses that guarantee territory rights, but rather, they also require complementary measures that ensure the materialization of those rights and decent living conditions for the communities.<sup>112</sup> As the MIJ and Social Action Directive explains, “in the framework of return or relocation, programs directed toward socioeconomic consolidation or stabilization have as their objective the restitution of rights and the establishment of conditions for social and economic sustainability for the population. They should guarantee access to programs related to

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*tegral a la Población Desplazada por la Violencia], diseñar un plan integral de prevención, protección y atención a la población afro colombiana, con la participación efectiva de las comunidades afro y el pleno respeto por sus autoridades constituidas, y de las autoridades territoriales concernidas”).*

<sup>111</sup> Proposed Ethnic Roadmap: 42 (“*Los cabildos indígenas o asociaciones étnicas tradicionales y las juntas de los consejos comunitarios de comunidades negras en su calidad de autoridades étnicas deberán ser informadas y consultadas sobre las solicitudes de protección que correspondan a los territorios de su jurisdicción y de los alcances de la medida, para lo cual se oficiará a dichas autoridades, solicitando además la información necesaria para complementar la identificación del territorio y de los derechos vulnerados*”).

<sup>112</sup> Victims First, *supra* n. 78: 120.

land, housing, health, education, food, earning income, training and education, and the strengthening of organizations”.<sup>113</sup>

Drawing on the jurisprudence of the Inter-American Court of Human Rights, the OAG subsequently recommends the creation of funds for community development and community programs to improve infrastructure and medical attention.<sup>114</sup>

This concept has also been endorsed by the Constitutional Court, which, in Order 005 of 2009, specified that the “integral plan for prevention, protection and attention should contain, as a minimum ... a plan for the provision or improvement of housing for the displaced Afro-Colombian population”.<sup>115</sup>

***Reparations should consider historical grievances and their lingering impact.*** The OAG recommends that reparation measures “recognize the special vulnerability of indigenous and tribal peoples, derived from exclusion, racism and historic marginalization to which they have been subjected. These elements should be taken into account in the formulation and adoption of judicial, administrative or judicial-administrative programs for the reparation of these victims”.<sup>116</sup>

The Constitutional Court in Order 005 of 2009 “insisted that, in light of the situation of historic marginalization and segregation that

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<sup>113</sup> MIJ and Social Action Directive: 16 (“*En el marco del retorno o reubicación, los programas de consolidación y estabilización socioeconómica tienen como propósito restituir los derechos y generar condiciones de sostenibilidad económica y social para la población, deben garantizar el acceso a los programas relacionados con tierras, vivienda, salud, educación, alimentación, generación de ingresos, capacitación y fortalecimiento organizativo*”).

<sup>114</sup> Victims First, *supra* n. 78: 121.

<sup>115</sup> Order 005 of 2009: para. 182 (“*El plan integral de prevención, protección y atención deberá contener como mínimo...[u]n plan para la provisión y/o mejoramiento de soluciones de vivienda para la población afrocolombiana desplazada*”).

<sup>116</sup> Victims First, *supra* n. 78: 32 (“*Reconocer la especial vulnerabilidad de los pueblos indígenas y tribales, derivada de la exclusión, el racismo y la marginación histórica a los que han sido sometidos, elementos que deben ser tenidos en cuenta en la formulación y adopción de los programas judiciales, administrativos o mixtos para la reparación de las víctimas*”).

Afro-Colombians have faced, they should enjoy special State protection".<sup>117</sup> Emphasizing its holding in a prior case, the Court stated:

in relation to the special treatment that should be provided to Afro-Colombians, the Court expressed [in Judgment T-422 of 1996] that "the positive differentiation corresponds to the recognition of the situation of social marginalization of the black population, which has impeded access to opportunities for cultural, social and economic development. As with social groups who have suffered past persecution and unjust treatment which explain their current weakened state, special legal measures aimed toward creating new living conditions contribute to establishing social equity and consolidating internal peace. For these reasons, they are constitutionally legitimate".<sup>118</sup>

Reparations to ethnic groups therefore might include affirmative action initiatives that restore and promote access to opportunities and resources for cultural, social and economic development, which were historically denied to them.

*The significance of the violation should be seen from the perspective of the ethnic group.* The importance of this principle is evident in the following sentiment, expressed by the National Conference of Afro-Colombian Organizations (*Conferencia Nacional de Organizaciones Afrocolombianas – CNOA*), the Association of Displaced Afro-Colombians (*Asociación de Afrocolombianos Desplazados –*

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<sup>117</sup> Order 005 of 2009: para. 19 (“[la Corte Constitucional] ha insistido en que dada la situación de histórica marginalidad y segregación que han afrontado los afrocolombianos, éstos deben gozar de una especial protección por parte del Estado”).

<sup>118</sup> *Ibid.*: para. 19, citing Colombian Constitutional Court Judgment T-422 of 1996, (“en relación con el tratamiento especial que se debe brindar a los afrocolombianos, la Corte expresó: ‘La diferenciación positiva correspondería al reconocimiento de la situación de marginación social de la que ha sido víctima la población negra y que ha repercutido negativamente en el acceso a las oportunidades de desarrollo económico, social y cultural. Como ocurre con grupos sociales que han sufrido persecuciones y tratamientos injustos en el pasado que explican su postración actual, el tratamiento legal especial enderezado a crear nuevas condiciones de vida, tiende a instaurar la equidad social y consolidar la paz interna y, por lo mismo, adquiere legitimidad constitucional”).

AFRODES) and the Organization of Black Communities (*Organización de Comunidades Negras – ORCONE*): “If Afro-Colombian peoples’ relationship to territory is understood ... one can comprehend why forced displacement is akin to ethnocide”.<sup>119</sup>

The OAG insists that reparations must take into account the gravity of the violations and the harm caused, especially from the point of view of the ethnic group.<sup>120</sup> In this connection, the role of the victim or victims within the community should be considered.<sup>121</sup> Moreover, CNOA, AFRODES, and ORCONE warn against assuming the homogeneity of Afro-Colombian peoples, emphasizing that “the recognition of the diversity of being Afro-Colombian within the same community

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<sup>119</sup> National Conference of Afro-Colombian Organizations (*Conferencia Nacional de Organizaciones Afrocolombianas – CNOA*), Association of Displaced Afro-Colombians (*Asociación de Afrocolombianos Desplazados – AFRODES*) and the Organization of Black Communities (*Organización de Comunidades Negras – ORCONE*), 2008, Public Policy with a Differential Focus for the Afro-Colombian Population in Situations of Forced Displacement or Confinement: Proposals for Construction (*Política Pública con Enfoque Diferencial para la Población Afrocolombiana en Situaciones de Desplazamiento Forzado o Confinamiento: Propuestas para la Construcción*): 11 (“*Si se comprende la relación con el territorio ... se podrá entender por qué el desplazamiento forzado puede asimilarse a un etnocidio*”).

<sup>120</sup> Victims First, *supra* n. 78: 107.

<sup>121</sup> *Ibid.*: 104. See, e.g., Order 004 of 2009: 17, citing the Fundación Dos Mundos: “Additionally, indigenous children and adolescents have a fundamental role in the preservation and reproduction of their cultures. In this regard, forced displacement produces a destructive effect with irreversible ramifications. In effect, the uprooting and removal of minors from their community and cultural environments rupture the transmission of cultural knowledge and norms in many cases. Additionally, this is often accompanied by the loss of respect for their families, their elders and their own cultures”. (“*Adicionalmente, los niños, niñas y adolescentes indígenas y afrodescendientes cumplen un rol fundamental en la preservación y reproducción de sus culturas, respecto del cual el desplazamiento forzado genera un efecto destructivo de repercusiones irreversibles. En efecto, el desarraigo y la remoción de estos menores de edad de sus entornos culturales comunitarios, trae como consecuencia en una alta proporción de los casos una ruptura en el proceso de transmisión de los conocimientos y pautas culturales, aparejado a frecuentes casos de pérdida de respeto hacia sus familias, sus mayores y sus propias culturas*”).

... is crucial for not disregarding violations committed against Afro-Colombians who live in contexts different from ancestral territories”.<sup>122</sup>

For its part, the fact that the Constitutional Court proffered Orders 004 and 005 shows that it is analyzing the impact of forced displacement on indigenous and Afro-Colombian ethnic groups from their perspective. In particular, Order 005 emphasizes “the heightened risk of cultural destruction of Afro-Colombian communities due to internal forced displacement, confinement and resistance”.<sup>123</sup> In this connection, “one clear example of this is what occurs in some fishing communities. The communities in confinement or resistance lose contact and relation with other communities as a result of being unable to circulate freely within their territory. This poses a serious limitation to the expression of their intercultural life”.<sup>124</sup>

Taking into account the role of the victims as the OAG recommends, Constitutional Court Order 004 observes: “Another alarming facet of forced displacement of indigenous peoples in Colombia is that, according to reports received by the Court, there is an extensive and constant trend of permanent forced displacement of indigenous leaders and authorities who are threatened or attacked. This has devastating consequence on their cultural institutions. The central cultural role filled by authorities and leaders implies that their displacement is espe-

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<sup>122</sup> CNOA *et al.*: 12 (“*El reconocimiento de esta diversidad de ser afrocolombiano dentro de una misma comunidad de referentes y sentidos compartidos, es crucial para evitar el desconocimiento de las violaciones que se cometen contra afrocolombianos que habitan en contextos diferentes a los territorios ancestrales*”).

<sup>123</sup> Order 005 of 2009: 34 (“*El riesgo acentuado de destrucción cultural de las comunidades afrocolombianas por el desplazamiento forzado interno, el confinamiento y la Resistencia*”). Confinement, a form of displacement that has been particularly neglected, occurs when Afro-descendent communities are forcibly displaced within their own territory, thus being restricted to a limited part of the territory and losing the ability to circulate freely or exercise control over their land.

<sup>124</sup> *Ibid.*: para. 98 (“*Un claro ejemplo de esto en [sic] lo que ocurren en algunas comunidades dedicadas a la pesca. Las comunidades confinadas o en resistencia pierden, como efecto de la imposibilidad de movilizarse libremente por su territorio, contacto y relación con otras comunidades lo que a la postre constituye una seria limitación de la expresión de su vida intercultural*”).

cially harmful for the preservation of ethnic and social structures of their respective groups”.<sup>125</sup>

The Court thus orders that the Plans for Ethnic Preservation and Protection include “a basic component of protection for the leaders, traditional authorities and persons in risk because of their positions of leadership or activism”.<sup>126</sup>

The importance of evaluating the situation from the ethnic groups’ perspective is also reflected in Judgment T-769 of 2009, which ordered the suspension of a major mining project in Northeastern Colombia that had been undertaken in indigenous territories without prior consultation to the indigenous communities. In this case, the Court cites the observation of the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: “Whenever large-scale development projects are undertaken in areas occupied by indigenous peoples, it is probably that these communities face profound social and economic changes that the competent authorities are unable to comprehend, much less anticipate”.<sup>127</sup>

***The search for truth and justice, as part of integral reparation, is especially significant for ethnic groups.*** The OAG indicates that “the effective realization of the fundamental right to integral reparations in terms of restitution, indemnization, rehabilitation and satisfaction requires the materialization of the rights to truth, justice and non-

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<sup>125</sup> Order 004 of 2009: 13 (“*Otra faceta alarmante del desplazamiento forzado de los pueblos indígenas en Colombia es que, según se ha reportado a la Corte, hay un patrón extensivo, constante de desplazamiento forzado permanente de líderes y autoridades indígenas que son amenazados o agredidos, con efectos devastadores para las estructuras culturales. El rol cultural central que juegan las autoridades y líderes hace que su desplazamiento sea especialmente nocivo para la preservación de las estructuras sociales y étnicas de sus respectivos pueblos*”).

<sup>126</sup> *Ibid.*: 34 (“*componente básico de protección de los líderes, autoridades tradicionales y personas en riesgo por sus posturas de activismo o de liderazgo*”).

<sup>127</sup> Constitutional Court of Colombia, Judgment T-769 of 2009: 34, citing the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (“*Siempre que se lleven a cabo proyectos a gran escala en áreas ocupadas por pueblos indígenas, es probable que estas comunidades tengan que atravesar cambios sociales y económicos profundos que las autoridades competentes nos son capaces de entender, mucho menos anticipar*”).

repetition”.<sup>128</sup> Specifically, “integral reparation to ethnic groups implies the right to truth, as established in judicial proceedings, the right to historical and political truth, and the right to the identification, prosecution and punishment of the material and intellectual authors of the violations”.<sup>129</sup>

Constitutional jurisprudence supports this principle, as Order 004 requires the Plans for Ethnic Preservation and Protection to comply with victims’ fundamental rights to truth, justice, reparation and guarantees of non-repetition.<sup>130</sup> It also orders the Prosecutor General (*Fiscal General de la Nación*) to take actions to avoid impunity for the criminal conduct of which indigenous peoples have been victims.<sup>131</sup>

***The significance of land to ethnic groups must be considered in determining reparations. In cases of dispossession, restitution is the most preferred method of reparation.*** The rules contained in ILO Convention 169 concerning these criteria form part of Colombia’s normative framework, as this international instrument was approved and incorporated into domestic law through Law 21 of 1991. Since then, its principles have been reiterated by various state institutions.

The OAG has issued extensive guidelines on the subject of territory and reparations, emphasizing that reparation measures should include respecting and guaranteeing ethnic communities’ collective rights to territory.<sup>132</sup> It also warns that disregard for rights to territory endangers ethnic groups’ inalienable right to life, as well as their ethnic and cultural integrity.<sup>133</sup> Furthermore, the right to reparations implies the restitution of ethnic territories that have been abandoned for

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<sup>128</sup> Victims First, *supra* n. 78: 29 (“*La efectiva realización del derecho fundamental a la reparación integral en sus componentes de restitución, indemnización, rehabilitación y satisfacción exige la materialización de los derechos a la verdad, la justicia y la no repetición*”).

<sup>129</sup> *Ibid.*: 103 (“*La reparación integral de los grupos étnicos implica el derecho a la verdad judicial y a la verdad política e histórica, así como el derecho a que se identifiquen, juzguen y sancionen los autores intelectuales y materiales*”).

<sup>130</sup> Order 004 of 2009: 34.

<sup>131</sup> *Ibid.*: Res. 4.

<sup>132</sup> Victims First, *supra* n. 78: 112.

<sup>133</sup> *Ibid.*: 114.

reasons external to the community or usurped from them.<sup>134</sup> Only in extreme cases may reparations consist of providing ethnic groups with alternative territories.<sup>135</sup>

This last principle is reiterated in MIJ and Social Action's Directive, which explicitly provides that for state authorities to work toward relocation of displaced indigenous groups, "it is necessary that the groups concerned make such a request in writing, expressing their interest in being relocated to places other than where they came from, that is, to not return to their place of origin".<sup>136</sup>

The subject of territory and its significance for indigenous and Afro-Colombian peoples has also been addressed in detail by the Constitutional Court. For example, Order 005 explains that for Afro-Colombian peoples,

territory has an extremely profound importance that goes beyond simply having a place to live and sustain themselves. Territory is an expression of their collective memory, of their conception of freedom ... Territory is an integral concept that includes land, the community, the environment, and the interdependent relationships of these various elements. Customs and traditions related to their habitat, which they have maintained for centuries and which are expressed in traditional knowledge also form part of the conception of territory.<sup>137</sup>

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<sup>134</sup> *Ibid.*: 119.

<sup>135</sup> *Ibid.*: 120.

<sup>136</sup> MIJ and Social Action Directive: 15 ("*es necesario que los interesados soliciten por escrito expresando el interés de reubicarse en lugares diferentes a los de su procedencia., es decir de no retornar a su lugar de origen*").

<sup>137</sup> Order 005 of 2009: para. 93 ("*el territorio tiene una importancia muy profunda que va más allá de simplemente contar con un lugar para vivir y sostenerse. El territorio es una expresión de su memoria colectiva, de su concepción de la libertad...El territorio es una concepción integral que incluye la tierra, la comunidad, la naturaleza y las relaciones de interdependencia de los diversos componentes. Del territorio también hacen parte los usos y costumbres vinculados a su habitat que las comunidades afrocolombianas han mantenido por siglos y que se expresan también en los saberes que la gente tiene*").

The significance of violations of indigenous peoples' territory rights was described by the Court in Order 004 as follows: "Indigenous peoples are especially exposed in a state of defenseless to the armed conflict and forced displacement, primarily because of their situation *vis-à-vis* land ... At the same time, the importance of their territories for their ethnic cultures, subsistence and integrity render the causes of forced displacement as well as forced displacement itself more harmful".<sup>138</sup> Thus, the fact that their relationship to territory is crucial for their cultural and physical survival must not be forgotten.<sup>139</sup>

In fact, the Court has held that for both indigenous and Afro-Colombian peoples, the relationship that they have with their territory and its natural resources transforms forced displacement into a direct threat to their cultural survival.<sup>140</sup> It thus follows that the principal objective in relation to the forcibly displaced population is to guarantee their return in conditions of safety and dignity.<sup>141</sup> The state must also address special cases where individuals, families and communities cannot return to their territories due to continuing threats by those who displaced them.<sup>142</sup>

Although it is not exclusive to ethnic groups, the following passage from Constitutional Court Judgment T-602 of 2003 summarizes several of the principles mentioned above and serves as an appropriate conclusion to this chapter. In it, the Court shows a preference for returning displaced persons to their places of origin, emphasizes the importance of analyzing the violation through the lens of those affected, and suggests remedial measures that consider historic marginalization and promote affirmative action:

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<sup>138</sup> Order 004 of 2009: 9-10 ("*Los pueblos indígenas están especialmente expuestos, en indefensión, al conflicto armado y al desplazamiento, principalmente por su situación ante la tierra ... Simultáneamente, para los pueblos indígenas la importancia de sus territorios para sus culturas y su subsistencia e integridad étnicas, hace más lesivos tanto los factores causales del desplazamiento como el desplazamiento en sí mismo*").

<sup>139</sup> *Ibid.*: 12.

<sup>140</sup> *Ibid.*: 32, citing Colombian Constitutional Court Order 218 of 2006.

<sup>141</sup> *Ibid.*: 34.

<sup>142</sup> *Ibid.*

[In] Judgment T-602 of 2003 ... the Court emphasized that ‘when it is not possible to return persons displaced to their place of origin in conditions of dignity, willingness and security, the State response should be articulated around affirmative actions ... that guarantee (i) non-discriminatory access to basic goods and services, (ii) the promotion of equality, and (iii) attention to ethnic minorities and traditionally marginalized groups, as it cannot be disregarded that Colombia is a pluriethnic and multicultural country, and that a large part of the forcibly displaced population belong to ethnic groups ... [Moreover] it is well-known that these groups still face prevalent discrimination in rural areas and poor urban zones. Expressed in other words, the attention provided to the forcibly displaced population should be based in affirmative actions and in differential foci sensible to gender, age, ethnicity, handicap and sexual preference.<sup>143</sup>

## 11.6. Conclusion

In this chapter, I have sought to contribute to expanding our understanding of the range of theoretical, political, and legal approaches to distributive issues in transitional contexts. To this end, I have offered a typology of criteria for land allocation that includes – alongside the well-known approaches of distributive justice, corrective justice, and

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<sup>143</sup> *Ibid.*: 31, citing Constitutional Court Judgment T-602 of 2003 (“*la sentencia T-602 de 2003, precitada, donde la Corte enfatizó que ‘siempre que no sea posible el retorno al lugar de origen de los desplazados en condiciones de dignidad, voluntariedad y seguridad, la respuesta estatal debe articularse en torno a acciones afirmativas (...) que garanticen (i) el acceso a bienes y servicios básicos en condiciones de no discriminación, (ii) la promoción de la igualdad, y (iii) la atención a minorías étnicas y a grupos tradicionalmente marginados, ya que no puede obviarse que Colombia es un país pluriétnico y multicultural y que buena parte de la población desplazada pertenece a los distintos grupos étnicos ... y, bien sabido es que éstas padecen todavía una fuerte discriminación en las áreas rurales y en las zonas urbanas marginales. Para expresarlo en otros términos, la atención a la población desplazada debe basarse en acciones afirmativas y en enfoques diferenciales sensibles al género, la generación, la etnia, la discapacidad y la opción sexual’*”).

economic efficiency – a fourth criteria that is conceptually distinct and has specific support in international and domestic law: collective ethnic justice.

To flesh out the content of CEJ, I pursued a threefold argument. First, from a theoretical perspective, I examined the analytical and practical differences and similarities among the four approaches to land allocation and, on that basis, substantiated the analytical distinctiveness of CEJ. Second, from an empirical viewpoint, I pointed to evidence showing that, in practice, CEJ has informed massive programs of land allocation in Colombia, through the granting of collective land titles to indigenous peoples and Afro-descendent communities. Finally, from a legal perspective, I attempted to specify the content of CEJ as it has been established in international law and jurisprudence, as well as in Colombian law and court decisions.

Based on these arguments, this chapter singles out the standards that must guide reparations to ethnic minorities that have been victims of violence, displacement, and land dispossession, in Colombia and elsewhere. Specifically in the Colombian context – in line with international law, existing national legislation, and the key decisions of the Constitutional Court (Decisions 004 and 005 of 2009) – reparations to indigenous peoples and Afro-descendant communities that have suffered land dispossession and forced displacement must: (1) be consulted with the ethnic group, which should retain some level of control of their implementation; (2) include complementary, compensatory measures; (3) consider historical grievances rooted in ethnic and racial discrimination and their lingering impact; (4) be based on an assessment of the significance of land dispossession from the viewpoint of the ethnic groups as collectivities; (5) go hand-in-hand with the search for truth and justice, as part of integral reparation; and (6) take into account the particular importance of land to ethnic groups, which entails a preference for land restitution as a mode of reparation.

Beyond legal justifications, the fulfillment of these standards is instrumental for political reasons. As Holmes points out in his concluding remarks in this book, “[p]roperty restitution seems a much too minor policy change to have any serious impact on the yawning gulf between the urban haves and the rural have-nots that has tormented Co-

Colombia for so many bloody decades” – a gulf whose reduction he rightly sees as a political precondition for any meaningful democratic reform. Given that the indigenous peoples and black communities that are the beneficiaries of CEJ are among the poorest and most victimized of the rural have-nots, the task of systematically incorporating this criterion in discussions and policies on land reform should be a central concern for anyone interested in genuine democratic transformation in Colombia.



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## Distributive Justice and the Restitution of Dispossessed Land in Colombia\*

Maria Paula Saffon\*\* and Rodrigo Uprimny\*\*\*

### 12.1. Introduction: Land and Armed Conflict in Colombia

In Colombia, the problem of unfair land distribution is closely linked to the nation's internal armed conflict. Unfair land distribution has served as one of the most important causes of the conflict and as one of the factors that has prolonged and aggravated it most. In the recent stage of the conflict – roughly beginning in the 1980s – massive seizures of property by armed actors have accentuated the unfair distribution of land, thus generating a veritable agrarian counter-reform. This

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\* This text is based on previous work by the authors. In particular, it is a partial reformulation of the following texts: Maria Paula Saffon and Rodrigo Uprimny, 2009, “*El potencial transformador de las reparaciones. Propuesta de una perspectiva alternativa de reparaciones para la población desplazada en Colombia*” (“The transformative potential of reparations. Proposal for an alternative perspective on reparations for the displaced population in Colombia”), in *Desplazamiento Forzado. ¿Hasta cuándo un Estado de Cosas Inconstitucional? (Forced Displacement. Until when will there be an Unconstitutional State of Affairs?)*, Antropos–CODHES: Volume I; Rodrigo Uprimny and Maria Paula Saffon, 2009, “*Reparaciones transformadoras, justicia distributiva y profundización democrática*” (“Transformative Reparations, Distributive Justice and the Strengthening of Democracy”), in *Reparar en Colombia: los dilemas en contextos de conflicto, pobreza y exclusión (Reparation in Colombia: Dilemmas in Contexts of Conflict, Poverty and Exclusion)*, Catalina Díaz, Nelson Camilo Sánchez, and Rodrigo Uprimny (eds.), ICTJ – European Union – DeJuSticia: 31-70.

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situation poses an immense and immediate challenge: how can we compensate the victims of the massive land seizures that have occurred in recent decades, while taking into account that the distribution of land in Colombia was profoundly unfair before such seizures occurred?

Undoubtedly, the unfair distribution of land, together with the ambiguity of property rights and the state's inability or unwillingness to adequately address these problems, represents one of the root causes, and perhaps even the initial impetus, of the conflict in its contemporary stage. Colombia's unfair distribution of land can be traced back to the nineteenth century, when the state allocated great tracts of public wasteland to a handful of businessmen in an attempt to secure resources to pay off the public debt.<sup>1</sup>

The state never satisfactorily resolved this inequality, as it failed to carry out meaningful land reform over the course of the twentieth

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<sup>1</sup> Many portions of the allocated land were not economically exploited by their owners and wound up being occupied by settlers. In the 1920s this became a major source of friction, when the value of the land increased and the settlers attempted to challenge the legal entitlements of the large landowners. These tensions became especially acute when the Supreme Court of Justice issued a sentence that placed the burden of proof of the existence and legitimacy of those entitlements on the alleged owners, which amounted to saying that, in the absence of such proof, the land could be regarded as wasteland and thus open to occupation by the settlers. In common parlance this requirement was known as the "diabolical proof". Maria Paula Saffon, Unpublished, "The Project of Land Restitution in Colombia: An Illustration of the Civilizing Force of Hypocrisy?". Also see Salomón Kalmanovitz and Enrique López Enciso, 2006, *La agricultura colombiana en el siglo XX (Colombian Agriculture in the Twentieth Century)*, *Fondo de Cultura Económica*: 54-67; Albert Berry, 2002, "¿Colombia encontró por fin una reforma agraria que funcione?" ("Has Colombia Finally Found an Agrarian Reform that Works?"), *Revista de Economía Institucional* 4, 6: 27-31; Jorge Orlando Melo, 2007, "Las vicisitudes del modelo liberal (1850-1899)" ("The Vicissitudes of the Liberal Model"), in *Historia económica de Colombia*, José Antonio Ocampo (comp.), Planeta: 153; Jesús Antonio Bejarano, 2007, "El despegue cafetero (1900-1928)" ("Coffee Takes Off: 1900-1928"), in Ocampo, *supra* n. 1: 231. Agrarian reform in the 1930s unsuccessfully attempted to resolve the frictions between landowners and settlers. See *infra*, n. 3.

century.<sup>2</sup> This failure, in turn, generated a series of factors that would be crucial for the emergence of the armed conflict, such as the discontent and radicalization of the peasantry and the unleashing of repressive counter-measures by the governing elite.<sup>3</sup>

The Colombian state's failed attempts to carry out land reform led to an alarmingly unequal distribution of property, and allowed for

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<sup>2</sup> Law 200 of 1936 was the first and most serious attempt to carry out agrarian reform in Colombia. Law 200 established the state's authority to expropriate unexploited land, and the rights of settlers to claim, as their own, land occupied for a period of time and the value of improvements done to land of third parties. Although the law appeared to be aimed at protecting settlers, it ended up detrimentally affecting them, *inter alia*, because it operated as an incentive for formal landowners to evict settlers to avoid property claims. The unresolved social frictions caused by questions of land ownership were one of the factors behind the outbreak of *La Violencia* ("The Violence"), the devastating civil conflict which took place in the 1950s and which intensified the concentration of land in the hands of a very few. A second attempt at land reform took place in the 1960s, through laws 135 of 1961 and 1 of 1968, which sought to restructure land tenancy that had been affected during *La Violencia*, as well as to stimulate the organization of the peasant movement to guarantee its participation in the implementation of the reform. However, due to strong pressures against the redistribution of land exerted by landowners, the reform only focused on promoting the colonization of the agricultural frontier and admitted limits to private property only exceptionally. Thus, the reform did not attack the high levels of concentration of land and might even have increased the concentration since it encouraged colonization without upper limits to the areas of land that could be acquired. Saffon, *supra* n. 1; Berry, *supra* n. 1: 28-32, 40-4; Kalmanovitz and López, *supra* n. 1: 68-70, 337.

<sup>3</sup> Despite the meek results of agrarian reform in the 1960s (*supra* n. 2), concerns about the unequal distribution of land soon receded to a secondary plane. This led to the radicalization of the peasant movement, whereby the peasants invaded hundreds of thousands of properties and were, in turn, subjected to severe repression by the conservative party governments. This situation led political bodies and interest groups to unite in defense of property rights, and to sign the Chicoral Pact in 1972, which stated that the objectives of agricultural policy would be restricted to the increase of productivity and drastically limited expropriation. Since the Chicoral Pact, there has been no significant attempt of land reform in the country. From the 1990s on, state land policies have been based on the logic of the market and have thus tried to guarantee access to land through subsidies that may allow peasants to directly buy lands. These policies have had rather meager results. Saffon, *supra* n. 1; Kalmanovitz and López, *supra* n. 1: 337-8, 349; Berry, *supra* n. 1: 37, 44.

very high levels of land concentration in the hands of very few. By 1984, 86.2% of the country's estates were smaller than 20 hectares, accounting for only 14.9% of the land surface but belonging to 85% of the country's landowners. In sharp contrast, 0.4% of the estates were larger than 500 hectares, accounting for 32.7% of the land surface and belonging to only 0.55% of the country's landowners.<sup>4</sup>

These figures worsened in the following decades, as a result of the contemporary armed conflict's devastating impact on land distribution. In fact, in recent years, all illegal armed actors have sought the seizure of land as a fundamental objective.<sup>5</sup> These groups see land control not only as a means to provide military advantages, but also as a mechanism to legalize their illegal assets, and as a crucial source of economic and political power.<sup>6</sup> As a result, the violent seizure and usurpation of land have been systematically practiced during the last three decades of the conflict, and have resulted in the abandonment of

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<sup>4</sup> See Carlos Salgado, 2009, "*Propuestas frente a las restricciones estructurales y políticas para la reparación efectiva de las tierras perdidas por la población desplazada*" ("Proposals Regarding the Structural and Political Restrictions on the Effective Reparation of Lands Lost by the Displaced Population"), in CODHES, *supra* biographical footnote on page 387.

<sup>5</sup> For analyses of the relationship between the Colombian armed conflict and the appropriation of land, see Martha Nubia Bello, 2004, "*El desplazamiento forzado en Colombia. Acumulación y exclusión*" ("Forced Displacement in Colombia: Accumulation and Exclusion"), in *Programa Andino de Derechos Humanos. Globalización, migración y derechos humanos (Andean Human Rights Program. Globalization, Migration and Human Rights)*, Universidad Andina Simón Bolívar; Procuraduría General de la Nación (PGN), 2006, *Informe del Proyecto "Control preventivo y seguimiento a las políticas públicas en materia de reinserción y desmovilización"* ("Report of the Project "Preemptive Control and Following of Public Policies on Reinsertion and Demobilization").

<sup>6</sup> In fact, land control allows the armed agents to create territorial cordons needed for drug trafficking and thus for effective control of that business. Moreover, the acquisition of land through figureheads or frontmen has been one of the most common mechanisms used for laundering assets obtained through drug trafficking and other illegal activities. Finally, land control allows for the establishment of a monopoly of violence in territories where the state is absent and, on that basis, for the control over economic and political activities. Saffon, *supra* n.1; Kalmanovitz and López, *supra* n.1: 334-5; Gustavo Duncan, 2005, "*Del campo a la ciudad. La infiltración urbana de los señores de la Guerra*" ("From the Countryside to the City: The Urban Infiltration of Warlords"), *Documentos CEDE 2*.

approximately 5.5 million hectares, equivalent to 10.8% of the country's agricultural land.<sup>7</sup>

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<sup>7</sup> This figure was obtained by the Commission for the Follow-Up of Public Policy on Forced Displacement (*Comisión de Seguimiento a la Política Pública sobre el Desplazamiento Forzado* – CSPPDF for its Spanish initials). This Commission was made up of several civil society organizations in response to the Constitutional Court's invitation to participate in the process of verification of compliance with ruling T-025 of 2004, by which the Court declared the situation of the displaced population to be an “unconstitutional state of affairs” and ordered the government to implement a series of public policies aimed at overcoming it. In this process, the Commission acts as a counterpart to the government and presents periodical reports on government's compliance. Such reports are based, *inter alia*, on statistically representative surveys given to the displaced population. The CSPPDF estimated the magnitude of the land seized from the displaced population on the basis of answers given by the family groups surveyed in the second national verification survey (in Spanish, *Encuesta Nacional de Verificación – ENV II*), which calculated the surface of land that was either abandoned or transferred under pressure to third parties through forced sales or other mechanisms of usurpation. CSPPDF, *Proceso Nacional de Verificación de los Derechos de la Población Desplazada, Décimo Primer Informe a la Corte Constitucional, Cuantificación y valoración de las tierras y los bienes abandonados o despojados a la población desplazada en Colombia. Bases para el desarrollo de procesos de reparación (National Process of Verification of the Rights of the Displaced Population, Eleventh Report to the Constitutional Court, Quantification and Valuation of the Lands and Goods Abandoned by or Seized from the Displaced Population in Colombia, Foundations for the Development of Reparation Processes)*, Bogotá: January 2009. For the details of the estimate, see the chapter by Fernando Barberi and Luis Jorge Garay in this book. Given the representativeness of the survey's sample, it may be said that the estimation has enough statistical rigor for its results to be applied to the entire displaced population. As such, it may be distinguished from the estimates of several previous studies, which were not sufficiently representative and statistically rigorous. Those studies indicated the number of abandoned or usurped hectares lay between 2.8 million – according to the Contraloría General de la Nación (the Colombian office in charge of the fiscal control of public entities) – and 10 million – according to the Alternative Property Registry coordinated by the National Movement of Victims of State Crimes. See Procuraduría General de la Nación (Colombian General Comptroller's Office), *supra* n. 5; Yamile Salinas, 2009, “Derecho a la propiedad y posesiones de las víctimas. Retos para la reparación de las víctimas del delito de desplazamiento forzado” (“Property Rights and Possession of the Victims: Challenges for the Victims of the Crime of Forced Displacement”), in CODHES, *supra* biographical footnote on page 387: Volume 2: 105-133.

This phenomenon has frequently been labeled *agrarian counter-reform*, since it appears to have substantially magnified the already dramatic inequitable distribution of land in Colombia. Indeed, between 1984 and 2003, properties of less than 20 hectares fell from 14.9% to 8.8% of the country's area. By contrast, during the same period, properties of more than 500 hectares rose from 32.9% to 62.6% of that area. Moreover, the share of owners of the latter properties went from 0.55% to 0.4% of all landowners in the country.<sup>8</sup>

Colombia's internally displaced persons have been most affected by this phenomenon. In fact, 75% of the families who make up this population were driven out of rural zones and 55% claimed ownership before being displaced. Of the latter, 94% abandoned or were forced to transfer their land.<sup>9</sup> Now, the displaced population, which accounts for the overwhelming majority of the victims of the armed conflict in Colombia, and currently amounts to approximately 7% of the country's population,<sup>10</sup> is one of the most vulnerable sectors of society.

From a socioeconomic perspective, the internally displaced population was vulnerable even before it was forcibly displaced: 51% of the displaced family groups had an income below the poverty line, and 31.5% below the line of absolute poverty. But this situation grew exponentially worse after displacement: currently, 97% of the displaced family groups have an income below the poverty line and

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<sup>8</sup> Salgado, *supra* n 4. It is worth noting that the substantial increase in properties of more than 500 hectares was detrimental not only to small properties, but also, and especially, to medium-sized ones, which fell from 52% to 28.6% of the land area. Salgado, *supra* n. 4.

<sup>9</sup> CSPPDF, *supra* n. 7.

<sup>10</sup> Official sources currently report 3,303,979 displaced persons as of June 2010. See Acción Social, 2009, "*Estadísticas de la población desplazada*" ("Statistics on the displaced population"). Available online at: <http://www.accionsocial.gov.co/Estadisticas/publicacion%20diciembre%20de%2002009.htm>. Nevertheless, this figure underestimates the magnitude of the phenomenon of forced displacement in the country, since it only takes into account the number of persons registered on the government's Single Registry of the Displaced Population (*Registro Único de Población Desplazada* – RUPD in Spanish), and thus excludes displaced persons who have not been able to register themselves.

80.7% are below the line of absolute poverty.<sup>11</sup> Nevertheless, the vulnerability of the displaced population not only lies in its socio-economic profile, but also in the lack of protection of its land rights. Although 67.3% of the displaced family groups that have reported abandoning their land claim ownership over that land, it appears that only 18.7% of them are legally entitled to ownership in a formal sense.<sup>12</sup>

This situation is even more problematic given that the country does not maintain a comprehensive, coherent, and current registry system for land rights.<sup>13</sup> This deficiency has operated as an important in-

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<sup>11</sup> CSPPDF, *supra* n. 7. Additional factors of vulnerability of the forcedly displaced population can be identified if its composition is compared to that of the Colombian population in general: 3.7% of the displaced identify themselves as indigenous and 21.2% as Afro-Colombians, compared to the 3.4% and 7.2% of the total Colombian population; 54% of the displaced are women, compared to 51.2% of the population as a whole; 62.6% are under the age of 25, compared to the 48% of the Colombian population; 13.9% are illiterate, compared to the 7.1% of the Colombian population; in 17.5% of the homes of the displaced there is at least one handicapped person, compared to the 6.3% of the Colombian population. This data was taken from the first national verification survey (ENV I), done by the CSPPDF: CSPPDF, *Proceso Nacional de Verificación de los Derechos de la Población Desplazada, Primer Informe a la Corte Constitucional (National Process of Verification of the Rights of the Displaced Population. First Report to the Constitutional Court)*, Bogotá: January 2008.

<sup>12</sup> In accordance with the survey carried out by the CSPPDF of the displaced family groups that reported having abandoned land when they were displaced, 67.3% claimed that they owned the land, but when asked for legal documentation to uphold their ownership, only 20.2% said they had a duly registered public deed, which is the legal requirement for being considered the proprietor of a piece of real estate in Colombia. In addition, 7.6% of the surveyed family groups said they had collective title to the land. Consequently, all of the other family groups who reported that they were owners of their land are informal proprietors with uncertain or precarious rights to it. CSPPDF, *Proceso Nacional de Verificación de los Derechos de la Población Desplazada, Séptimo Informe a la Corte Constitucional (National Process of Verification of the Rights of the Displaced Population. Seventh Report to the Constitutional Court)*, Bogotá: October 2008.

<sup>13</sup> In fact, the system of land registration (“catastro”) is extremely obsolete: many areas of the country do not have any registry structure because they have not been clearly identified or delimited; the information on those areas that do have a registry structure was last updated on a national level in 1994, and by 2007 54% of the property registries had not been updated. In addition, the information on the registry contradicts, and has not been unified or systematized with, other official

centive for the violent appropriation of land, since armed actors can easily “legalize” seized property,<sup>14</sup> especially when the rights of persons who occupy the land are vague or precarious. In turn, the acquisition of legal titles to usurped land hinders the possibility of tracing and undoing the transactions made over such land, and therefore makes it very difficult to advance criminal prosecutions against usurpers and to apply the legal clause that allows the state to extinguish ownership of

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sources (like those administered by notaries and the Ministry of Agriculture); it only includes information related to real rights to the land (thus excluding important personal rights like possession, occupation, and tenancy), and it only takes into account the nominal, rather than real, landowners, which means that it ignores the impact, on the actual distribution of land, of the complex juridical operations that the armed agents have undertaken to “legalize” their land holdings and avoid judicial persecution, like the use of frontmen. Maria Paula Saffon, *Poder paramilitar y debilidad institucional. El paramilitarismo en Colombia: un caso complejo de incumplimiento de normas (Military Power and Institutional Weakness. Paramilitarism in Colombia: A Complex Case of Non-Compliance with Norms)*, Master’s Thesis: Universidad de los Andes; Salinas, *supra* n. 7.

<sup>14</sup> Legalization has been carried through such strategies as the falsification of deeds to non-registered land, the bribery or coercion of public officials to achieve registration, the purchase of land at low prices through threats and the use of frontmen, and the application of juridical devices originally meant to protect the possessors of land, like prescription and false tradition. Prescription allows the material possessor of an estate to judicially request its property after five years if possession is done in good faith (e.g., the claimant has a document that accredits her as a proprietor, even if it is false or invalid), and ten years if it is done in bad faith (e.g., the claimant has no such document). Throughout the duration, possession must be exercised publicly and non-violently (Law 791 of 2002). In turn, false tradition permits the inscription on an estate’s property registry of a transaction through which a non-owner of the estate agrees to transfer it to a person different from its material possessor. Such a transaction is possible under Colombian law since there is a distinction between the legal entitlement through which two persons agree to transfer an estate and the actual transfer of the estate, which only takes place through the inscription of the deed in the property registry. This permits the sale of someone else’s property (Article 1871 of the Colombian Civil Code), which makes sense whenever the seller acquires the property of the sold estate immediately after the transaction, and can therefore transfer the property to the buyer. Whenever this does not take place, in virtue of false tradition, the latter has a right to inscribe the transaction on the registry of the estate, and therefore to become an inscribed possessor.

illegal assets.<sup>15</sup> Thus, the seizure and subsequent legalization of land may be carried out with minimum risk.

In the face of this predicament, it is crucial to analyze how to approach reparations for victims of atrocious crimes committed during the Colombian armed conflict in general, and reparations for property usurpation of victims of the crime of forced displacement in particular. This consideration is especially important because there now exists in Colombia a legal framework to deal with the massive demobilization of paramilitary groups. This framework maintains the right of victims to obtain full reparation for harm suffered as a result of crimes committed against them.<sup>16</sup>

In general, reparations are approached from an essentially restorative perspective, whereby they are intended to return victims to the status quo *ex ante* – that is, the situation in which they were before the violation of their human rights – seeking to undo, insofar as possible, the detrimental effects of assaults on human dignity. Furthermore, in accordance with widely accepted standards of international human rights law, reparations must be integral and proportional to the harm suffered by the victim. Thus, if full restitution is not possible, there must exist alternative and complementary mechanisms of reparation, like compensation, rehabilitation, and satisfaction measures.

This restorative perspective of integral and proportional reparations is very relevant in cases of isolated crimes and in societies which, following Rawls's designation, are "well ordered" in the sense of being viable and truly regulated by basic principles of justice.<sup>17</sup> However, this perspective may be problematic when applied to massive human

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<sup>15</sup> The state's obligation to extinguish the ownership of illegal assets ("*extinción de dominio*" in Spanish) is found in Law 793 of 2003, which establishes that the extinction can be carried out without compensation in cases of an unjustified increase in wealth whose origin is unproved, or of assets derived from or used as an instrument for or an object of illegal activities, or derived from transactions with other assets with those characteristics.

<sup>16</sup> See Law 975 of 2005, better known as the law of "justice and peace", and particularly Article 8. Also see ruling C-360 of 2006 of the Constitutional Court of Colombia, which reviewed the constitutionality of that norm.

<sup>17</sup> See John Rawls, 1973, *A Theory of Justice*, Oxford: Oxford University Press: para. 69.

rights violations in “highly disordered” societies – that is, societies that have confronted profound political and humanitarian crises, and which were already unequal before the crisis occurred – especially when, as is common, the processes of victimization have primarily affected poor and excluded populations.<sup>18</sup>

There are two main reasons why the perspective of integral restitution is inadequate to deal with massive violations in unequal societies, which are contradictory to a certain extent, but paradoxically complementary. On the one hand, for certain analysts this perspective is too robust, since the conditions faced by poor societies attempting to overcome massive victimization make it very difficult for them to simultaneously meet the demands of integral reparation for all victims and the needs of other social sectors that, without having been victims of atrocities, also require the attention of the state because of their situation of poverty and material precariousness.<sup>19</sup> This problem is particularly serious with respect to reparations of seized land in Colombia, given the magnitude of usurpations and the number of victims, as well as the serious difficulties related to information and evidence-gathering concerning property rights that would need to be overcome to guarantee adequate restitution. In this way, the perspective of integral restitution can be considered too demanding, and therefore unrealistic.

On the other hand, the perspective of integral restitution may be insufficient when massive atrocities are committed in contexts of great inequality. The idea of restoring victims to the status quo *ex ante* might seem appropriate in societies that were democratic and relatively egalitarian before experiencing war or dictatorship, and where the victims were not part of the most excluded sectors of society – as might have occurred, to a certain extent, in Chile and Uruguay. In those contexts, the restoration of victims to the situation prior to the violation implies the reestablishment of their rights and of their condition as citizens included in the political community. However, this restorative perspec-

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<sup>18</sup> In a similar sense, see Pablo De Greiff, 2006, “Justice and Reparations”, in *The Handbook of Reparations*, Pablo De Greiff (ed.), Oxford University Press: chapter 12.

<sup>19</sup> *Id.*, 456.

tive seems insufficient in societies that were discriminatory and unequal before the atrocities, and whose victims primarily belonged to marginal or excluded sectors of the population – as in the cases of Colombia, Guatemala, and Peru.

In such contexts, structural conditions of exclusion and unequal power relations are generally at the base of the conflict, and explain to a great extent why only some social sectors are victimized. As such, the purely restorative focus of reparations appears limited, since it seeks to restore victims to a situation of vulnerability and deprivation. In such instances, reparations do not address the structural factors of conflict, whose transformation is essential both to guarantee the non-recurrence of atrocities and to overcome situations of unjust distribution. This point is obvious with regard to land reparations in Colombia, where the restitution of land would not necessarily deal with the problem of inequitable distribution of land – which, without a doubt, constitutes one of the structural causes of conflict. At best, such restitution would return victims of land seizures to a situation of economic precariousness, with lack of protection of their rights over land.

The above ascertainment conduces to an obvious perplexity. Clearly, ethical considerations and legal imperatives dictate that victims have a right to reparations, and the dominant normative focus in this field continues to be, for solid axiological arguments, the idea of integral restitution, with the aim of redressing harm done. However, it is also apparent that such a focus is insufficient to regulate efforts to overcome situations of massive violations in unequal and discriminatory societies. To deal with this dilemma, we propose a transformative vision of reparations – or a perspective of reparations with a potential for democratic transformation – and we advocate for its application to the problem of land dispossession in Colombia.

In essence, the notion of “transformative reparations” or “reparations with a potential for democratic transformation” conceives of reparations not only as a form of corrective justice that seeks to deal with the suffering caused by atrocities, but also as an opportunity to effect democratic transformation of societies. This transformation fundamentally seeks to overcome situations of inequality and exclusion which – as in the case of Colombia and especially with regard to its

inequitable distribution of land – may nourish humanitarian crises and the disproportionate victimization of the most vulnerable sectors of the population, and which are in any case contrary to basic principles of justice.

This chapter develops the proposal in three parts. The first part defines the perspective of transformative reparations and distinguishes it from the traditional restorative focus associated with reparations. However, it shows that, although the transformative perspective differs from dominant approaches, it remains in accord with Colombian and international legal human rights standards. The second part emphasizes that this vision of transformative reparations neither implies a weakening of the duty to repair nor a confusion between reparation programs and the state's general and special social policies aimed at satisfying social rights. For this reason, we insist in the need to distinguish between reparation programs, social policies, and measures of humanitarian aid, but also in the need to link them, with the aim of utilizing reparations as an opportunity to move towards societies with fairer distribution. The third part shows the usefulness of this perspective for dealing with the problem of massive and systematic seizure of land from the displaced population in Colombia, and sets forth the elements on the basis of which this approach should be advanced.

## **12.2. The Notion of Transformative Reparations**

As suggested in the preceding paragraphs, state policies for the reparation of victims of atrocious crimes may have either a purely restorative or a transformative focus. With the former, reparation measures aim to return victims to the status quo *ex ante* and to erase, as much as possible, the effects of atrocious crimes. With the latter, the objective is to go beyond mere restitution, in an effort to transform the relationships of subordination and social exclusion that are at the root of the conflict meant to be overcome, and that in any case seem iniquitous from the standpoint of distributive justice.

The transformative potential of reparations is particularly important in societies, like Colombia, which were already discriminatory and unequal before undergoing the trauma of war or dictatorship, and whose structures of exclusion constitute an essential factor of conflict,

as it is particularly evident with the inequitable distribution of land. In practice, it makes little sense for reparations to merely return a peasant to the poverty of her smallholding. Restoration of this kind is undoubtedly important in contexts like the Colombian, where atrocious crimes in general, and the crime of forced displacement in particular, have historically been characterized by impunity, and where there has generally not been any kind of reparation. Nevertheless, purely restorative reparations of this sort would not ensure one of the central aims of reparation, which is to guarantee the non-recurrence of atrocities, since they would leave untouched many of the conditions of exclusion that are at the basis of conflict, such as the inequitable distribution of land. Moreover, reparations with a restorative focus, while fully meaningful in terms of corrective justice, seem inappropriate in terms of distributive justice because they preserve unjust situations that violate the dignity of victims, as happens with the displaced population's material precariousness and lack of protection of rights over land.

Therefore, in the face of these sorts of situations, reparations should have a transformative potential, and not merely a restorative one – that is, reparations should address both the harm caused by the processes of victimization and the conditions of exclusion in which victims were living, and which allowed for, or facilitated, their victimization. If they remain unchanged, those conditions of exclusion place at risk the sustainability of the peace sought through mechanisms like reparations, and achieve, at best, the passage from acute to moderate violence,<sup>20</sup> and, at worst, the continuance and even the aggravation

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<sup>20</sup> It might be argued that this is what happened in Guatemala, where peace agreements were able to end hostilities, but were followed by new outbreaks of ordinary violence, which could perhaps have been prevented or reduced if the mechanisms for the transition to peace had paid attention to the structural conditions of exclusion that were at the basis of conflict, for example, by guaranteeing the participation in power and the access to land of the indigenous majority which had been systematically victimized. For an analysis of the absence of this guarantee as one of the reasons for the failure of reparations in Guatemala, see Rhodri Williams, 2008, “*El derecho contemporáneo a la restitución de propiedades dentro del contexto de la justicia transicional*” (“The Contemporary Right to the Restitution of Properties within the Context of Transitional Justice”), in *Reparaciones a las víctimas de la violencia política (Reparations for Victims of Political Violence)*, ICTJ.

of conflict. Furthermore, even if those forms of exclusion do not aggravate the conflict, their very existence is a form of democratic precariousness and social injustice, opposed to the human rights commitments of a democratic state, and should hence be overcome nonetheless.

Reparations in general, and the reparation of seized land in particular, should be understood as a tool of fundamental importance for both the resolution of conflict and the transformation of the relations that allowed for its creation and continuation, and, thereby, for the prevention of similar conflicts in the future. But, beyond the prospect of preventing future conflicts and ensuring the non-recurrence of atrocities, reparations provide an opportunity to promote democratic transformation of societies, with the aim of overcoming situations of exclusion and inequality that are contrary to basic principles of distributive justice. From this standpoint, reparations can be understood as a mechanism not only of transitional justice, with an essentially corrective traditional focus, but also of distributive justice, insofar as they compel decisionmakers to rethink the just distribution of benefits and burdens in societies undergoing transitions from war to peace or from dictatorship to democracy.

This form of understanding reparations thus links a concern for the past with a concern for the future, and prevents these concerns from becoming antagonistic or mutually exclusive. Therefore, it is a strategy that, in addition to dealing with the particularities of the conflict that is meant to be overcome, also responds to criticisms that reparation policies place exaggerated emphasis on the past.<sup>21</sup> In fact, their concern for contributing to the guarantee of non-recurrence shows that transformative reparations also place an emphasis on the future, and likewise recognize the importance of a comprehension of the past in

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<sup>21</sup> See, for example, John Torpey, 2005, “Victims and Citizens: The Discourse of Reparation(s) at the Dawn of the New Millennium”, in *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, K. De Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (eds.), Intersentia: 35-50. According to Torpey, one of the serious problems with the discourse on reparations is its exaggerated emphasis on the past and its injustices, which may lessen the importance of present and future injustices, and which in any case is motivated by a wish to darken the reputation of the perpetrators.

overcoming it and creating a better future. By the same token, since an understanding of the past is not restricted to the specific harms caused to victims, but also inquires into the underlying patterns of social exclusion that allowed them to occur, it is very relevant for collective memory.<sup>22</sup> This memory is in turn vital for the construction of a future order founded on the condemnation of past atrocities and the stigmatization of the regimes that permitted them,<sup>23</sup> and for the guarantee that both will remain in the past.

The perspective set forth here enables us to conceive of reparations not simply as a legal mechanism, but also as part of a broader political project for the transformation of society and particularly for the inclusion of victims.<sup>24</sup> By contributing to the task of transforming the conditions of exclusion and the relations of subordination that are at the origin of conflict, such reparations would contribute to the guarantee of non-recurrence and to the political and economic transformation of the social order, with the aim of making it more inclusive, just, and democratic.<sup>25</sup>

Since the power relations that are meant to be modified are multiple and heterogeneous, reparations should include different transformative dimensions. Thus, as previously mentioned, it is crucial that reparations have a potential for transforming the social, economic, and political relations that allowed for the exclusion or marginalization of

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<sup>22</sup> In a similar sense, see Rama Mani, 2005, “Reparation as a Component of Transitional Justice: Pursuing ‘Reparative Justice’ in the Aftermath of Violent Conflict”, in De Feyter, Parmentier, Bossuyt, and Lemmens, *supra* n. 21: 53-80.

<sup>23</sup> On the stigmatization of the previous regime as an important mechanism for struggling against impunity, see Michael Fehrer, 1999, “Terms of Reconciliation”, in *Human Rights in Political Transitions. Gettysburg to Bosnia*, C. Hesse and R. Post (eds.), Zone Books.

<sup>24</sup> On the importance of conceiving of reparations as a political project, see Pablo De Greiff, 2006, “*Enfrentar el pasado: reparaciones por abusos graves a los derechos humanos*” (“Confronting the Past: Reparations of Grave Human Rights Abuses”), in *Justicia transicional: Teoría y praxis (Transitional Justice: Theory and Praxis)*, Camila De Gamboa (ed.), Universidad del Rosario; Mani, *supra* n. 22.

<sup>25</sup> On the relevance of including the dimension of social justice in reparations, which have tended to give that dimension a marginal importance, see Mani, *supra* n. 22.

the majority of victims from access to their rights and from full citizenship. In addition, it is equally important that reparations have a potential for transforming the power relations that have subordinated or excluded certain types of victims, such as women, ethnic groups, or trade unions, in a way that they lead to a reformulation of the patriarchal, racist, and employer forms of domination that have nourished discrimination and violence in Colombia.

It is important to clarify that this alternative view of reparations does not imply an abandonment of the existing legal standards concerning the right of victims of atrocities to reparations. This alternative view is not an argument of *lege ferenda* implying a change in the normative standards in force concerning reparations; on the contrary, it is fully compatible with those standards. In fact, as Williams cogently explains, in recent decades, the concept of reparations underwent an important evolution in the field of international law, since it passed from being an approach chiefly centered on restitution to one in which restitution simply represents one component, among others, of integral reparations. Under this viewpoint, restitution need not be privileged in all cases, at least from the standpoint of human rights.<sup>26</sup>

Thus, as shown by the United Nations' recent "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"<sup>27</sup> and by the ongoing

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<sup>26</sup> Williams, *supra* n. 20. According to Williams, the original conception of reparations in international law arose from inter-state disputes, which generally dealt with assets that could be returned. Therefore, restitution was the essential component of reparations and was considered to be hierarchically superior to any other component, especially to compensation. Nevertheless, when reparations began to be used as a mechanism to deal with grave human rights violations, this restrictive vision of reparations as restitution began to be limited, given that generally those violations do not only affect patrimonial assets, and in many cases the damages they cause hinder or render inadequate the restoration of the victim to the status quo *ex ante*. These limitations led international human rights law to start conceiving of restitution as one of the components of reparations, whose adequacy for repairing must not be presumed but rather be analyzed on a case-by-case basis.

<sup>27</sup> UN General Assembly, Res. 60/147, Doc. A/RES/60/147, 16 December 2005.

rulings of the Inter-American Court of Human Rights,<sup>28</sup> international legal standards currently place restitution alongside compensation, rehabilitation, satisfaction, and guarantees of non-recurrence, as one of the five components of reparations. Each of these components is complementary, and there exists no hierarchical relationship among them.<sup>29</sup> The current concept of the right to reparations thus implies that, taking into consideration the particularities of each case, these five components should be combined to guarantee integral reparation. Since each

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<sup>28</sup> The reparation orders found in the rulings of the Inter-American Court of Human Rights always include diverse components, including on occasions restitution and rehabilitation, and in most cases indemnization or compensation, satisfaction, and guarantees on non-recurrence. For rulings condemning the Colombian state that include orders of the kind, see: IACHR, *Case of the Massacre of 19 Merchants v. Colombia*, Ruling of 5 July 2004, C-109; *Case of the Massacre of Mapiripán v. Colombia*, Ruling of 15 September 2005, C-134; *Case of the Massacre of Pueblo Bello*, Ruling of 31 January 2006, C-140; *Case of the Massacres of Ituango v. Colombia*, Ruling of 1 July 2006, C-149; *Case of the Massacre of La Rochela v. Colombia*, Ruling of 11 May 2007, C-163.

<sup>29</sup> First, restitution measures seek to restore victims to the situation prior to the violation of their rights, whenever that is adequate and the victim so wishes. This restitution is achieved through the return of patrimonial assets and the reestablishment of rights and of personal, family, labor, and social situations. Second, compensation or indemnization measures attempt to repair victims for the material, physical, and mental harms suffered, as well as for harms to their reputation and dignity, expenses incurred, losses of income and of opportunities, and costs of legal assistance and medical services, *inter alia*, whenever restoring the victim to the previous situation is not possible or desired by her. Third, rehabilitation measures include medical and psychological care and the legal and social services victims may require. Fourth, satisfaction measures seek to publicly acknowledge the harm suffered by victims and thereby restore their dignity. These measures include, *inter alia*, the prosecution, trial, and punishment of those responsible for the crimes, the dissemination of the truth, the search for forcibly “disappeared” victims and for the remains of the dead, the public request for apologies, and commemoration and tribute to victims. Fifth, measures for the guarantee of non-recurrence consist in institutional reforms and other type of mechanisms, which seek to prevent atrocities from occurring again. Such measures aim, *inter alia*, to promote the rule of law and the respect for human rights and democratic processes, to annul laws that foster or authorize human rights violations, to assure control over the armed forces and the security and intelligence services, and to achieve the dismantling of non-state armed forces and the social reintegration of child combatants.

component has different reparatory purposes and powers, in most cases the absence of one cannot be compensated by the presence of another.

Therefore, the restitution component is very relevant for cases of atrocious crimes which – like the forced displacement of persons – imply the forced seizure of assets and severe violations of the rights to housing and to return to one's place of residence, and whose reparation requires the devolution of lost assets and the reestablishment of the rights over them. Nevertheless, this does not mean that the right to reparations must maintain its traditional restorative focus because that focus does not sufficiently address all human rights violations. In particular, concerning forced displacement, the fact that restitution has a central place in the paradigm of reparations does not imply that it is the only form of reparations that should be implemented to assure the integral reparation of the displaced. On the contrary, where restitution measures are implemented, they need not have an exclusively restorative focus, but can instead have a transformative one.

The different reparatory measures may have a transformative focus or potential to the extent that they seek both to repair the harm and transform the power relations and inequalities that enabled the atrocities to occur. This paradigm is applicable even to restitution measures, which may restore a victim to the status quo *ex ante* by returning her seized patrimonial and non-patrimonial assets, but at the same time seek to transform the situation in such a way that the victim is not subjected to the same conditions of vulnerability and marginalization that allowed the crime to be committed against her.

Therefore, it is necessary to establish a conceptual distinction between restitution as a component of integral reparations and the restorative focus of integral reparations. In the former, the focus on the democratic transformation of reparations does not conflict with restitution since it is one of several measures that can – and in cases like forced displacement, must – be implemented for integral reparation to promote the transformation of the conditions of exclusion that are at the origin of the atrocities. For that reason, restitution may not have a purely restorative focus, but rather a transformative one. By contrast, in the case of restitution as the focus or perspective from which reparations are conceived, there appears to be an evident conflict with the

transformative focus or potential of reparations. Indeed, the transformative focus constitutes an alternative way of conceiving reparations, whereby their scope must not be limited to the specific violation and to the harm caused by it, but should extend to the conditions of exclusion that made it possible. Therefore, the purpose of reparations should be both to redress the harm and to democratically transform the underlying conditions.

A similar conceptual distinction may be established with regards to the relationship between the transformative focus of reparations and the guarantee of non-recurrence. In fact, this guarantee refers both to a particular component of integral reparations – consisting of mechanisms of institutional reform or of another kind specifically designed to guarantee that atrocities do not recur – and to a final purpose which all measures of protection of victims' rights, and especially reparation measures, can and should seek to achieve. In the first case, the specific measures for guaranteeing non-recurrence may have either a restorative or transformative focus, depending on what general perspective and aim reparations adopt on whole. Meanwhile, in the second case, the guarantee of non-recurrence is a very important part of the transformative aim of reparations. For that reason, it might be said that when reparations adopt a perspective or purpose of democratic transformation, they cannot be limited to concrete measures of institutional reform, nor be subsumed within them. Indeed, this purpose requires that all the components of reparations promote the transformation of the power relations that are at the origin of atrocities. Therefore, the component of measures or guarantees of non-recurrence that pertains to an integral reparation forms a very important, but not the sole, part of the mechanisms aimed at assuring the final purpose of non-recurrence through the transformation of the underlying structural conditions.

However, the transformative vision of reparations is broader than the guarantee of non-recurrence, since it implies regarding the reparations process as an opportunity to effect democratic transformation and overcome exclusion and inequality, even when they may not be associated with a possible recurrence of armed conflict or authoritarianism. Obviously, this broader and more ambitious view of reparations generates problems of its own. In particular, it could be argued that this con-

ception may lead to a conflation between reparation processes and general developmental strategies and policies aimed at satisfying economic and social rights. However, as we show in the following section, this conflation is neither desirable nor necessary.

### **12.3. Distinction and Articulation of Transformative Reparations, Social Policies, and Measures of Humanitarian Assistance**

The concept of transformative reparations is much more ambitious than the restorative concept. In fact, as has already been noted, the purpose of the former is not limited to the reparation of specific harms suffered by victims, but extends to the transformation of the conditions of exclusion that lie at the origin of conflict, and that allowed for or facilitated the commission of the atrocities. The transformative conception is even more ambitious since it may eventually deal with conditions of exclusion that, without being causal or dynamizing elements of conflict, constitute social injustices that should be overcome.

Although this conception is more ambitious than the restorative focus, it need not be confused with, or dissolved into, the general objectives of political and economic transformation of the social order characteristic of a transitional context, which go far beyond the scope and purposes of reparations of victims of atrocities.<sup>30</sup> To substantiate this thesis, we begin by outlining the distinctions between reparations, social policies, and measures of humanitarian assistance. We then demonstrate that, if we really wish to make the notion of transformative reparations operative, the necessary differentiation between these three types of policies should not lead to a strict separation, but rather to their dynamic articulation.

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<sup>30</sup> For a skeptical view of the ability of reparations to fulfill such an ambitious aim as transformation, see Mani, *supra* n. 22. For a critical analysis of Mani's ideas, see Maria Paula Saffon. "Estudio preliminar" ("Preliminary Study"), in *Enfrentando los horrores del pasado. Estudios conceptuales y comparados sobre justicia transicional (Confronting the Horrors of the Past. Conceptual and Comparative Studies of Transitional Justice)*, Manuscript.

### 12.3.1. Differences Between Reparations, Social Policy, and Measures of Humanitarian Assistance

Many analysts confuse state duties with respect to reparations, social policy, and humanitarian assistance. However, it is important to clearly distinguish the aims and legal sources of these duties. Although the implementation of these duties might occasionally coincide in practice, reparation for victims of atrocities, provision of social services to all citizens, and humanitarian assistance for victims of disasters are autonomous duties charged to the state, which have distinct origins and purposes.<sup>31</sup>

First, in the Colombian case – as in many other social or welfare states – social policies find their source in the Constitution. The Constitution seeks to protect the economic, social and cultural rights (ESCR) of all citizens. The development of social policy constitutes a general state duty, which requires the progressive and non-discriminatory guarantee of the satisfaction of ESCR for all persons, so that they may be exercised on equal footing. In addition, this policy, which is based on the idea of distributive justice, has a particular dimension that consists of the state’s special duty to guarantee the real or material equality of vulnerable populations. The means *par excellence* of this special duty is affirmative action or reverse discrimination, whereby populations that have traditionally suffered from marginalization or structural inequality are granted privileged access to ESCR.

Second, for private individuals, the source of humanitarian assistance is humanitarianism, or the principle of humanity, which in the Colombian legal system finds its foundation in the principle of solidarity (Article 95, Clause 2 of the Political Constitution). For the state, the source of humanitarian assistance derives from its duty to protect the fundamental rights of people.<sup>32</sup> The purpose of humanitarian assistance is to offer temporary help to victims of disasters (caused by natural catastrophes, armed conflicts, etc.), by ensuring their subsistence, alle-

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<sup>31</sup> Rodrigo Uprimny and Maria Paula Saffon, 2007, “*Reparación integral, atención humanitaria y política social*” (“Integral Reparations, Humanitarian Attention and Social Policy”), *Caja de Herramientas* 124.

<sup>32</sup> See: Constitutional Court of Colombia, Ruling SU-256 of 1996.

viating their suffering, and protecting their dignity and fundamental rights in situations of crisis. In this sense, humanitarian assistance is intended to *mitigate* or reduce the effects of a crisis, independently of its origin or the harm it produces. Likewise, humanitarian assistance only takes place in situations of crisis and only remains in force so long as the crisis persists. This explains why, although humanitarian measures are temporary by essence, their duration may be rather long or even indefinite in situations where – as in the case of the forced displacement of people in Colombia – the end of the humanitarian crisis does not seem to be near.

Finally, the source of the state's duty to repair lies in the harms suffered by victims of atrocities. The objective of this duty is to integrally redress such harms through diverse mechanisms so the effects of atrocities disappear and the dignity of victims is reestablished. In line with constitutional and international standards, the duty to repair is a responsibility of the state even when the crimes have not been committed by its agents.<sup>33</sup>

These distinctions allow us to conclude that integral reparations differ from social policy (both in its general and special dimensions), since they seek to settle a specific debt for direct acts of violence committed against certain victims. Although integral reparation policies must have a significant material content to deal with the effects of violence, they must also have a symbolic dimension since the harms caused are often irreparable. This symbolic dimension is a form of acknowledgement of the specific suffering caused to the victims – an acknowledgement that should establish them as active citizens, no longer excluded by the victimization processes. Moreover, the symbolic dimension of reparations makes visible violations of human rights, and thereby denotes a process of reconciliation between the state and its citizens, which reintegrates victims and their relatives into the political community. By contrast, social policy has neither that focus nor that specific symbolic dimension, since its aim is to overcome instances of social exclusion and poverty, but for citizens who are already integrated into the political community.

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<sup>33</sup> In this regard, see Constitutional Court of Colombia, Ruling C-370 of 2006.

With respect to humanitarian assistance, it is possible to conclude that, while the victims of atrocious crimes can and should receive such assistance from the state, this attention can in no way be regarded as part of integral reparations since its objective is radically different. In fact, humanitarian assistance simply seeks to temporarily stabilize the situation of victims, without guaranteeing the restoration of their rights. Therefore, it is crucial to maintain the distinction between this assistance and integral reparations even in cases like that of the displaced population in Colombia. In such a case, humanitarian assistance to victims of atrocities becomes more permanent than temporary<sup>34</sup> and includes more complex measures than immediate or emergency attention – such as socioeconomic stabilization and return to original places of residence. Nonetheless, while there exist similarities, the sources of reparations and humanitarian assistance are distinct, and the objectives of integral reparations cannot be fulfilled through measures that are simply intended to stabilize or lessen the effects of the crisis arising from the violation of rights.

Consequently, each of the three analyzed policies has a temporal dimension that is distinct from the others: reparations, when they assume an essentially restorative focus, look toward the past to evaluate the harm that must be addressed; humanitarian assistance focuses on the present to alleviate the effects of crisis; finally, social policies are concerned with the present because they attempt to ensure an immediate minimum fulfillment of ESCR, but they also look to the future, insofar as they seek the progressive satisfaction of the total content of those rights. Table 1 at the end of this chapter summarizes the differences between reparations, social policy and humanitarian assistance.

Despite the above distinctions, state social policy responsibilities, humanitarian assistance, and integral reparations are often confused in practice, leading to the dissolution of some into others. In the Colombian case, these confusion and dissolution have led to the belief that the right to reparations may be guaranteed through any kind of

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<sup>34</sup> In this respect, see Constitutional Court of Colombia, Ruling C-278 of 2007, in which the Court refers to the permanent character of humanitarian assistance for the displaced population.

benefit or service provided to victims by the state. This has had especially problematic repercussions for the displaced population.

Thus, for example, the second clause of Article 47 of Law 975 of 2005, known as the law of “justice and peace”, originally declared: “The social services provided by the government to victims, in accordance with the norms and laws in force, form part of [their] reparations and rehabilitation”. In applying this clause, for example, the government established that administrative reparations for victims of forced displacement would include subsidies for low-cost housing, which low-income citizens can (and should) access independently of whether they were victims of atrocities since subsidies are aimed to guarantee the social right to a decent home. Given the confusion that this clause created between reparations, social policy, and humanitarian assistance, several citizens and social organizations brought suit to challenge its constitutionality. In Ruling C-1199 of 2008 – an abstract review decision – the Constitutional Court declared the clause unconstitutional, arguing, among other things, that “it is not possible to confuse the provision of social services which the State must provide in a permanent way to all citizens without regard to their condition and the humanitarian attention which is provided in a temporary way to victims in disastrous situations, with the reparation owed to the victims of such crimes”.

The conceptual confusion between the state’s duties of integral reparations, humanitarian assistance, and social policy not only violates the guarantee of victims’ right to reparations; it also hinders analysis aimed at effecting satisfaction of that right. Indeed, as demonstrated above, the confusion of such duties allows the state to consider as part of reparations services that have very different aims than to redress the harms suffered by victims, such as satisfaction of economic, social, and cultural rights and alleviation of suffering resulting from humanitarian crises.

In turn, this confusion makes it possible for the state to limit social policies aimed at victims to reparations to which they are entitled by virtue of the harms suffered. Therefore, while it is important to preserve some link between social policy, humanitarian assistance, and

reparation policies, it is important to distinguish reparations from those other state duties towards its inhabitants and citizens.

### **12.3.2. Transformative Reparations and the Articulation of Reparations and Social Policy**

As shown, it is necessary to distinguish between social policy, humanitarian assistance, and reparation policies, since each policy has different origins and purposes. But it is equally important that these policies be properly articulated, with the aim of ensuring that they cohere with one another. This necessary distinction and simultaneous articulation of policies is closely linked to our proposal of transformative reparations.

Indeed, it is worth emphasizing that the notion of democratic transformation herein developed refers to the focus or potential of reparations. This means that democratic transformation represents the aspiration or purpose of reparations, which are consequently maintained as a legal and political project that is specific and differentiated from other broader political projects.

Actually, reparations are much more restricted than the general objectives of political and economic transformation in terms of both their beneficiaries and the facts they take into consideration. Thus, the recipients of reparations are victims of atrocious crimes and not the population as a whole, even though the latter may benefit from the positive effects that reparation measures can have in terms of inclusion, struggle against impunity, and guarantee of non-recurrence. By contrast, the objectives of political and economic transformation of the social order must regard the entire population as primary beneficiaries and give equal treatment to all members. Such objectives consist in combatting conditions of exclusion and, consequently, transforming, rather than perpetuating, the status quo.

Reparations consider the harms caused by atrocities and, if they have a transformative potential, the conditions of exclusion that enabled the commission of such crimes. However, reparations might not take into account all of the structural conditions of exclusion and subordination to which the marginal sectors of society are subjected, even

though they must be overcome to achieve true political and economic transformation of the social order.

In that sense, reparations with a transformative potential may contribute to the general purposes of political and economic transformation of the social order, and it is desirable that they do so in a way that they remain externally coherent with all other measures implemented to achieve that transformation.<sup>35</sup> Nevertheless, the fulfillment of these general purposes cannot be limited to that contribution, especially in contexts where we seek to overcome a regime of massive and systematic violations of human rights. Indeed, in these contexts, the accomplishment of such a goal undoubtedly requires many measures apart from reparations, such as the historical elucidation of truth, the establishment of criminal tribunals and the promotion of multiple, diverse institutional and political reforms.<sup>36</sup>

Moreover, it is possible for reparations with a transformative potential to develop even in the absence of broader projects of political and economic transformation. Therefore, reparations can actually amount to a preliminary step towards such projects, offering them a foundation, but not replacing them. There are reasons to believe that such a foundation could be established in Colombia with the implementation of reparations with a potential for democratic transformation. In fact, given the absence of a transition from war to peace – and the major difficulties in understanding the recent peace negotiations between the government and right-wing paramilitary groups as even a partial or fragmented transition<sup>37</sup> – there currently exists no general

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<sup>35</sup> For this concept, see Pablo De Greiff, 2006, “Introduction. Repairing the Past: Compensation for Victims of Human Rights Violations”, in *The Handbook of Reparations* Pablo De Greiff (ed.), Oxford University Press.

<sup>36</sup> On the need for complementarity between reparations and other measures of justice and truth, see, among others, Martha Minow, 2002, *Breaking the Cycles of Hatred. Memory, Law, and Repair*, Princeton University Press: chapter 1; David A. Crocker, 2002, “Truth Commissions, Transitional Justice, and Civil Society”, in *Truth v. Justice. The Morality of Truth Commissions*, Robert Rotberg and Dennis Thompson (eds.), Princeton University Press: chap. V; Mani, *supra* n. 22.

<sup>37</sup> These difficulties not only derive from the large number of paramilitaries who have rearmed, but also from the existing legal and political obstacles for the demobilization of paramilitary groups to lead to a true dismantling of the economic

project to politically and economically transform the social regime to one that is truly inclusive, socially just, and democratic. On the contrary, social polarization and the absence of a minimum consensus on core principles demonstrate that the state is still far from implementing such a project.<sup>38</sup> Therefore, the design and implementation of a political project of reparations with a potential for democratic transformation could lay the foundation for a broader and more ambitious project of political and economic transformation of the social order.

For similar reasons, the ambitious nature of the transformative potential of reparations may offer grounds for confusion between reparations and state social policies, given that the objectives and issues addressed by each may coincide in their implementation. In fact, in contrast to the restorative conception of reparations, by seeking to overcome the marginalization or domination of victims, the transformative perspective is concerned with issues of distributive justice that are usually addressed by state social policies – such as elimination of discrimination, and assurance of real equality of opportunities, political participation, an inclusive citizenry, and respect for difference and plurality, etc.

Thus, the fact that transformative reparations address issues of the sort can result in a practical coincidence of reparations and social policies; however, it is vital to make an analytical distinction between the two, since they are autonomous state duties with different legal sources and aims. As explained in the previous section, the two cannot be confused, lest the fulfillment of one is sacrificed in favor of satisfaction of the other. To maintain the separation, it is convenient to distinguish between the source or entitlement of reparations and their purpose or potential.

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and political structures that they created and which have served as the basis of the atrocities they have committed. See R. Uprimny, C. Botero, E. Restrepo, and M.P. Saffon, 2006, *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia (Transitional Justice without Transition? Truth, Justice and Reparation for Colombia)*, DeJuSticia.

<sup>38</sup> See, in this regard, Maria Paula Saffon and Rodrigo Uprimny, 2010, “Uses and Abuses of Transitional Justice in Colombia”, in *Law in Peace Negotiations*, Morten Bergsmo and Pablo Kalmanovitz (eds.), Second Edition, Torkel Opsahl Academic Epublisher, Oslo.

While the source or entitlement of the state's duty to repair is always the harm suffered by victims, the purpose or potential of a reparations policy may be either restorative or transformative. Therefore, while the harm must always be considered when determining the quantity and beneficiaries of reparations, the purpose or potential of such policies guides the manner in which they should be enacted. Hence, in contrast with a merely restorative reparations policy, state resources devoted to a reparations policy with a transformative dimension should be employed not only to restore victims to the situation prior to the harm suffered, but also to transform their situation of subordination or social marginalization. Consequently, a state policy of transformative reparations could coincide partially or completely with the purpose or potential of a social policy, but it would always be distinct in terms of its source or entitlement. Therefore, it could not be concluded that one type of policy fulfils the purposes of the other.

The distinction between social policies and reparations, and their necessary simultaneous articulation with a perspective of democratic transformation, thus allows reparations, which are essentially an expression of corrective justice, to also significantly contribute to the goals of equality and social inclusion that characterize distributive justice. Following the classic distinction found in Book V of Aristotle's *Nicomachean Ethics* between commutative-corrective justice and distributive justice, this effort to grant a transformative potential to reparations could be attacked for confusing the two. According to this potential criticism, reparations and transitional justice are essentially a form of commutative or corrective justice, since they seek to proportionally redress harms, either by restoring the victim to the status quo *ex ante* or by offering her monetary compensation equivalent to the damage suffered. From that standpoint, reparations seek a certain equivalence between the harm and the reparatory measure. By contrast, the intent to transform prior situations of exclusion and injustice, which is characteristic of the notion of transformative reparations, is linked to the idea of distributive justice, given that it assumes a fairer distribution of benefits and burdens in a society in transition. Therefore, it appears that transformative reparations would not require equivalence between the harms caused and reparations.

We believe, however, that this criticism is invalid, since our proposal distinguishes the configurative efficacy of each type of justice – commutative and distributive. Thus, we uphold a commutative-corrective vision to determine the beneficiaries and the eventual quantity of reparations, while the vision of distributive justice inspires the purposes of reparations. Indeed, we believe that reparations should not attempt to restore situations that were unjust and discriminatory, but should instead support advances toward a more equitable and democratic society. This combination is perfectly legitimate, especially if one considers that many legal and political institutions are characterized at the time of their foundation, and throughout their development, by their linking of different criteria of justice.

For example, in the field of criminal law, the most thought-provoking authors have tried to articulate different principles of justice, which are relevant at different stages of the exercise of punitive action, to provide a justification for punishment.<sup>39</sup> Thus, at the first stage, in defining crimes, utilitarian criteria of general prevention are prioritized, and retributive principles only receive secondary attention. But, to define the subject on whom a specific punishment will be imposed and the *quantum* of that punishment, the criminal system is conceived to operate with an essentially retributive focus, so that there exists proportionality between the harmfulness of the conduct, the degree of guilt of the agent, and the intensity of the punishment.

Similarly, there have been efforts to articulate different normative principles with respect to reparations. In effect, certain sectors in other fields of reparatory law have upheld the idea of linking reparations not only to visions of corrective justice, but also to other criteria, like the search for economic efficiency or for greater distributive justice. For example, in United States torts law, although certain sectors adopt a strictly corrective approach to harm and compensation, others

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<sup>39</sup> See, in this regard, Herbert L.A. Hart, 1990, “*Introducción a los principios de la pena*” (“Introduction to the Principles of Punishment”), in *Derecho y moral. Ensayos analíticos (Law and Morality. Analytical Essays)*, Jerónimo Betegón and Juan Ramón De Páramo (eds.), Ariel: 163 and ff. Equally, Juan Fernández Carrasquilla, 1989, *Derecho penal fundamental (Fundamental Criminal Law)*, Temis: 84 and ff.

– closely linked to the economic analysis of the law – contend that reparatory duties should be assessed with a criterion of economic efficiency since their most important purpose is to prevent, in the best possible way, certain undesirable conducts. In contrast, authors like Keating defend the idea that the United States torts regime should be conceived as a matter of distributive rather than corrective justice, since it amounts to adequately assigning the burdens and benefits of activities that are beneficial to society but carry risks.<sup>40</sup> According to him, a purely corrective approach not only faces difficulties for justifying guiltless responsibilities, which are so common in private law, but also tends to impose excessive burdens on victims, who must make the greatest effort to obtain reparations.

On a more practical level, it is common to find regulations or doctrines that, even if based on the idea that the duty to repair is grounded in corrective justice, nevertheless avoid a strict application whenever there could be excessive impacts in terms of distributive justice or economic efficiency. This point has been clearly shown by Henao,<sup>41</sup> who cites numerous cases of exceptions in civil or administrative law to the general rule that reparations must be integral and proportional to harm. For example, as Henao notes, certain regulations establish “indemnificatory ceilings” in the field of transport. The best-known example is the Warsaw Convention, which establishes limits for indemnifications for airplane accidents. If integral reparations were permitted in such cases, it would be very difficult to develop the air transport industry because the massive duty to repair in the event of accidents would impose excessive risk on airlines.

In other cases, criteria of equity, and ultimately distributive justice, limit the scope of the duty to repair integrally and proportionally

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<sup>40</sup> See Gregory Keating, 2000, “Distributive and Corrective Justice in the Tort Law of Accidents”, *Southern California Law Review* 74: 185 and ff.

<sup>41</sup> Juan Carlos Henao, 2007, *Le dommage. Analyse a partir de la responsabilité extracontractuelle de l'Etat en droit colombien et en droit francais (Harm, Analysis on the Basis of the Extra-Contractual Responsibility of the State in Colombian and French Law)*, Doctoral Thesis: Université Panthéon-Assas (Paris II). See especially section II of the third part of the thesis, where the author argues that the duty of integral reparations is more of a myth than a reality when one analyzes its many exceptions.

to the harm. Thus, there are hypotheses whereby, for reasons of distributive justice, civil law permits limitations on the duty to repair. For example, if a poor person harms a rich person, and it would be very costly for the former to compensate the latter, but the cost is relatively low for the latter when compared to her total wealth, then it seems equitable to limit the amount of compensation to be paid. In this respect Article 44 of the Swiss Civil Code is well known, as it states that if the harm was not intentional or due to negligence, and if reparations would lead the debtor to bankruptcy, then the judge may, in equity, limit the amount of compensation. This article allows for the application of a criterion of distributive justice to reduce the impact that a strict application of corrective justice would have in these cases.

The above does not imply that we must conclude that the rule of integral reparations must be abandoned, or that, as Henao asserts, it is only a myth that “makes spirits dream, but by distorting reality”.<sup>42</sup> Instead, we contend that, in accordance with contemporary developments of the theory of legal rules, the imperative to integrally and proportionally repair harm must be regarded, not as a strict rule or a definitive mandate, but rather as a principle or *prima facie* mandate.<sup>43</sup> As a *prima facie* mandate, the duty to repair is a principle with normative force, and consequently, attempts should be made to achieve full compliance. But, also, its application can be restricted in certain cases, not only due to factual restrictions, but also because it may conflict with other equally important principles, like distributive justice and economic efficiency.

In a similar sense, and partly following Walt’s theoretical developments, there exist three possible relationships concerning the occurrence of harm between the mandates of distributive justice and those of corrective justice.<sup>44</sup> Under the first hypothesis, the integral reparation

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<sup>42</sup> *Id.*, 701.

<sup>43</sup> For an elaboration of this view of principles, see Robert Alexy, 1993, “*Sistema jurídico, principios y razón práctica*” (“Legal System, Principles and Practical Reason”), in *Derecho y razón práctica (Law and Practical Reason)*, Fontanamera: 9-22.

<sup>44</sup> Steven D. Walt, 2006, “Eliminating Corrective Justice”, *Virginia Law Review* 92, 7: 1311-23.

of harm is unjust from a distributive point of view; under the second hypothesis, reparations are required even under criteria of distributive justice; and under the third hypothesis, the duty to repair is neutral in terms of distributive justice. Therefore, if one assumes that the mandate of integral reparations is a principle rather than a rule, then it is possible to formulate the following thesis: the duty to integrally repair subsists whenever it does not profoundly violate the imperatives derived from principles of distributive justice. In accordance with this thesis, hypotheses two and three are not problematic, since the duty to integrally repair subsists under both of them because it is neutral, or even required, under principles of distributive justice. By contrast, under the first hypothesis, the duty to repair can be limited or even eliminated where its effect on principles of distributive justice is too intense.

Under these conditions, why think that reparations of massive human rights violations cannot articulate different principles of justice?

#### **12.4. Transformative Reparations of Massive Dispossession of Land in Colombia**

Given the structural causes of the Colombian armed conflict and the profile of victims, the conceptual and normative proposal of transformative reparations is particularly relevant. In fact, as mentioned above, the Colombian society was strikingly unequal and discriminatory before the armed conflict. In the face of such inequality and exclusion, an approach tending toward democratic transformation is highly appropriate for thinking about reparations. This approach would aim to use reparations not only as a mechanism to acknowledge and redress harms caused to victims of atrocities, but also as an opportunity to help overcome the underlying conditions of inequality and exclusion.

Reparations for the systematic seizure of land occurred in Colombia provide one of the clearest opportunities to reflect on the transformative potential of reparations. First, reparations would seek to remedy the enormous magnitude of land dispossession. Second, reparations could greatly contribute to transforming the conditions of marginalization and exclusion of the displaced population both because of the socioeconomic profile of its members and because of the close re-

relationship between forced displacement and extreme inequality in land ownership. Such inequality is one of the most important structural factors that explain the origin and persistence of the Colombian conflict.

As shown in the introduction to this chapter, the special socio-economic vulnerability and marginalization of the displaced population existed before the occurrence of forced displacement. This fact highlights the limitations of a conceptual and normative approach that simply seeks to restore victims to the status quo before displacement, which was characterized – in most cases – by poverty and exclusion. The relevance of the alternative notion of reparations with a potential for democratic transformation is clearly apparent: it is necessary to transform the conditions of exclusion and the unequal power relations that allowed forced displacement to be systematically committed on a massive scale against particularly vulnerable sectors of society.

In seeking this end, reparation of the displaced population for the massive seizure of their land plays an essential role. Indeed, since the distribution of land ownership is one of the most important structural causes of the Colombian armed conflict, and one of the factors most responsible for its aggravation and persistence, the reparations for land dispossession could have an enormous potential for democratic transformation. Insisting on the reparation of usurped land could guarantee its effective recuperation, and this could enormously contribute to counteracting the effects of the agrarian counter-reform that has occurred in recent decades. Moreover, there exist mechanisms by which the recovered land could be used to repair the victims and to simultaneously assure the transformation of the power relations and inequalities that enabled the massive and systematic usurpation of land. Finally, such mechanisms might also ensure the democratic inclusion of those who suffered usurpation.

As explained above, international and Colombian legal standards for reparations of victims of grave violations of human rights and international humanitarian law traditionally privilege restitution measures. This privilege is especially prioritized with respect to the forced displacement of persons, since, in accordance with existing legal standards, the restitution of land, homes, and property is the “preferred

means of reparation in cases of displacement”.<sup>45</sup> On first glance, this insistence on restitution might be considered incompatible with the transformative purpose of reparations, since its main objective would seem to be to return victims to the status quo *ex ante*, even if the status quo was characterized by deprivation and/or social or political exclusion.

However, in the Colombian context, where the seizure of land perpetrated by armed groups has systematically affected the most excluded sectors of the population and has exacerbated the concentration of land ownership, restitution could contribute to – instead of serving as an obstacle for – the attainment of a more equitable distribution of land. Indeed, an effective and well-implemented policy of land restitution could profoundly affect the structure of rural property in Colombia. In a country where effective land reform has never been carried out, a very relevant transformation would result from the sudden recovery of nearly 11% of the agricultural surface (equivalent to the 5.5 million hectares that are estimated to have been usurped from the displaced population) and from its transfer to the more than 3 million victims of forced displacement, most of whom now live in extreme poverty.

Therefore, restitution may become a very important tool for democratic transformation where the atrocities that require reparations helped to sharpen inequality and social exclusion. In Colombia, this tool has unique importance since it has normative foundations that are

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<sup>45</sup> UN Economic and Social Council, Principle 2.2 of “Principles on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons”, E/CN.4/Sub.2/2005/17, 28 June 2005. See also UN, “Guiding Principles on Internal Displacement”, E/CN.4/1998/53/Add.2\*, 11 February 1998. In a similar sense, see, in the Colombian context, Constitutional Court of Colombia, Ruling T-821 of 2007. According to Williams, the special privilege given to restitution in international standards on forced displacement can be explained, on the one hand, by the importance that the restitution of those assets has for assuring the return of the displaced population to their places of origin. And on the other hand, by the close relationship that exists between the guarantee of such restitution and the protection of rights, not only of the right to private property but also and especially of the right to a decent home. Williams, *supra* n. 20.

perhaps more solid than those of land reform.<sup>46</sup> Moreover, transformative reparations might generate less resistance from the economic elites who benefit from the unequal distribution of land.<sup>47</sup> This is perhaps why many human rights organizations have insisted in recent years on the need to prioritize land restitution to victims above the redistribution of rural property from a broader perspective.

However, the efficacy of a land restitution policy notwithstanding, it is undeniable that the redistributive effects of a policy of the sort will always be limited. Indeed, restitution faces evident limits for achieving the structural transformation of the distribution of land, since its scope is restricted to the protection of previously existing entitlements. Restitution, on its own, will never be able to fully achieve the aim of distributing land ownership in an equitable manner. To diminish the concentration of land entitlements, policies must address the ownership of many more properties than those that have been seized during the armed conflict, and particularly in recent years. Policies must also benefit many more poor persons than the victims of forced displacement, especially those who do not have access to land. Therefore, transformative reparations require complementary measures, such as social reforms and development policies aimed at achieving the democratic transformation of power relations and inequality.

In some instances, land restitution may not effect any major democratic transformation, and it may, in fact, be counterproductive to achieving that aim. In Colombia, it is very difficult to prove victims' past entitlements over usurped land and the actual occurrence of usurpation – due to, *inter alia*, the precariousness and uncertainty of those entitlements, the insufficiency of official information about rural land ownership, and the perpetrators' use of sophisticated legal mechanisms

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<sup>46</sup> In international and Colombian legal rules, the right to reparations, and especially the right to the restitution of seized land, is stipulated in a much more precise way than the redistributive principle of justice, which has a much more political than legal nature.

<sup>47</sup> It is highly likely that a program of restitution would generate much less resistance from large landowners than a land reform. At least from a theoretical perspective, restitution does not imply as large a threat to the status quo of rural property. Besides, it is grounded in the idea, wholly compatible with the interests of big landowners, that acquired entitlements over the land should be protected.

to legalize usurped land. Moreover, given the long duration of the Colombian armed conflict, and its intricate relation with land, it is very likely that much of the land subject to restitution policies has been occupied by successive holders, who may also have been dispossessed through forced displacements, and who could consequently bring forward simultaneous restitution claims. The settling of these claims represents a problem of great magnitude for a policy of restitution.

For these reasons, a restitution program would quite likely face serious obstacles for assuring an effective devolution of land to victims of displacement and dispossession. If these obstacles are not overcome, then the implementation of a restitution program could even contribute to the legalization of land undertaken by its usurpers, since the usurped land that was not restituted might be regarded as legally acquired due to the absence of evidence.

But even assuming that a restitution program could be effectively implemented, restitution would still be problematic for the transformative approach to reparations since it is more concerned with past entitlements than with present needs of victims. This may lead to regressive outcomes in two ways.

First, in principle, restitution admits the possibility of “rebuilding fortunes”, since it may take place even if the devolution of land leads to property concentration, and it also allows for victims of dispossession to be privileged even if that leads to the lack of protection of other victims with more precarious rights, or of other, more needy, sectors of the population.<sup>48</sup> However, in the Colombian context, it is quite unlikely that such a result would occur, given that victims of forced displacement constitute the majority of the country’s victims and they belonged to marginal and vulnerable sectors of society even before their displacement, so the restitution of their land could not plausibly

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<sup>48</sup> Restorative measures implemented in the Czech Republic following the end of the Communist regime have been criticized precisely for that reason, since they led to the reconstruction of the bourgeois property-owning class that existed before the Communist regime, without taking into account the rights of victims of usurpations committed before that regime and the needs of access to property of other, poorer sectors of society. See, in this respect, Williams, *supra*, n. 20.

lead to the reconstruction of fortunes. Nevertheless, the theoretical existence of this possibility is problematic.

Second, the restitution of land could be regressive concerning victims who were vulnerable and excluded before the violation of their rights, such as the displaced population in Colombia, since it would restore them to a situation of similar vulnerability and exclusion, keeping intact the factors that allowed for or facilitated the forced displacement and land dispossession.

To prevent the abovementioned results from occurring, reparation measures should require the effective recovery of all dispossessed assets, as well as their transfer to victims and their priority use for assuring them access to land. However, except in special circumstances, such reparations need not necessarily ensure the return of the same asset to whomever lost it. Indeed, the effective recovery of usurped assets has a strong potential for radically transforming the distribution of land ownership in Colombia, taking into account that the dynamics of land dispossession in recent decades have significantly aggravated the concentration of land in the hands of a few. But, in addition, the use of those assets to guarantee victims' access to land is very relevant in terms of redistribution, considering that most victims are part of marginal and excluded sectors of the population and that the difficulties they face in proving their rights or the illegality of the dispossessions they have suffered could prevent their access to land within a restorative framework.

Thus, as Francisco Gutiérrez Sanín suggestively asserts in his chapter in this book,<sup>49</sup> a powerful link could be established between the policy of struggle against criminality (which has, as one of its main objectives, the recovery of illegally obtained assets, through the extinction of ownership over them)<sup>50</sup> and the policy of land redistribution, without falling into the possible traps created by the obstacles to restitution. From this perspective, the recovery of dispossessed land should become a priority state objective, and measures should be implemented to overcome the barriers that to date have hindered the effectiveness of

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<sup>49</sup> See Francisco Gutiérrez Sanín's article in this publication.

<sup>50</sup> See *supra* note 15.

legal mechanisms created for this purpose, such as the extinction of ownership.<sup>51</sup>

Once land were recovered, victims' access would not be limited by barriers like the absence of information, the precariousness of land rights, the difficulty of proving the usurpation, or the existence of many successive holders, since access would be guaranteed to all of victims of dispossession who could summarily prove their condition as such. Additionally, the priority given to certain victims in the access to the recovered land would not be determined on the basis of having more certain and solid entitlements, but rather by their degree of vulnerability, and hence, by their more or less urgent need to obtain access to a source of income. Likewise, for democratic transformation purposes, the size and kind of land that victims receive would essentially depend on their current needs rather than past entitlements.

Moreover, from this perspective, the allocation of recovered land would also seek to combat the factors that made it possible for victims to suffer the dispossession of their land, through such mechanisms as: the recognition of more certain entitlements over the allocated land than those which they previously had (and which very possibly made the victims privileged targets of forced displacement and land usurpation); priority allocations of entitlements over recovered land to victims who belong to sectors that have traditionally been excluded or marginalized from access to land entitlements, such as women; the establishment and enforcement of minimum and maximum thresholds concerning the size of rural property (with the aim of avoiding the allocation of unproductive land and the concentration of property); the establishment of security measures capable of ensuring that beneficiary victims who relocate themselves on the allocated land do not become victims of new displacements and seizures; the provision of technical and economic assistance to the beneficiaries of restitution, so they can develop productive capacities that allow them to effectively use the allocated land as a means of subsistence and income generation.

This perspective does not necessarily contradict international and Colombian legal standards on reparation, nor the privileged place

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<sup>51</sup> In this regard, see also *id.* These barriers are especially related to the impossibility of reversing the sophisticated legal operations undertaken over usurped assets.

granted to restitution by those standards. In fact, the beneficiaries of the allocation of recovered land would be chosen on the basis of their status as victims and of their prior, violated entitlements. To this extent, the reparation of harms would still be the normative source of victims' claims to obtain access to land. However, these claims would be met with a purpose oriented more toward the present than the past, consistent with guaranteeing the non-recurrence of atrocities and satisfying victims' needs. The distinction between the source or entitlement of the right to reparations and the purpose of reparation measures developed earlier is, therefore, wholly applicable here. The allocation of recovered land would always find its source in the harm suffered by victims, but it could have either a restorative orientation – whose main objective would be to return victims the same land they lost with the same entitlements they had over them – or a transformative orientation – whose main objective would be to contribute to a more equitable distribution of land.

Furthermore, the privileged place granted to restitution by the legal standards on reparations could strengthen the transformative perspective of reparations, by offering a clear and solid normative source to the state's duty to recover dispossessed land. This duty would cease to be based on political principles, like the importance of eliminating criminals' sources of enrichment (characteristic of the extinction of property over illegal assets) or the need to struggle against land concentration (characteristic of land reform). And it would be founded, instead, on the international and Colombian legal imperative to return to victims of atrocious crimes the assets seized or lost as a result of those crimes. Indeed, this return would be guaranteed, but the use of recovered assets would be regulated in such a way that they would not only satisfy the restorative purpose, but also carry out important redistributive functions.

Now, there are certain exceptional cases in which the restitution of dispossessed land should still be kept open as a possibility. These cases concern victims who have such a strong link with the dispossessed land that their rights would be violated if restitution were not privileged. These cases evidently include the country's ethnic minorities, who have a special link with certain lands because their beliefs and understandings of the world often grant land an essential role, and

because their survival depends, to a great extent, on the preservation of that land. It is also possible that these cases include some peasant communities, which claim particularly strong links with the dispossessed land, and insist on returning to such land.

Nevertheless, it is very likely that these communities are the exception rather than the rule. Currently, only 3.1% of the displaced family groups inscribed in the Single Register of Displaced Population (*Registro Único de Población Desplazada* – RUPD in Spanish) wish to return to their place of origin.<sup>52</sup> Certainly, this data must be analyzed with caution, since the minimal intention to return may be due in many cases to the absence of basic security measures that would compel victims to believe they could return without the threat of new displacements. However, this statistic remains quite telling, as it suggests that many victims would be willing to accept forms of reparation other than restitution. Moreover, many victims may not have a strong preference for returning to the land they occupied before their displacement, given that an important part of the displaced population is composed of settlers who possibly did not have profound links with the usurped land. Besides, it is likely that victims would be more willing to accept as reparation land other than that lost if it was recovered from their usurpers and if the land they received was granted with more solid entitlements, as well as with guarantees for its productive development.

Where restitution were to be privileged as a reparation measure, some mechanisms could be implemented to ensure its potential for democratic transformation, such as: the guarantee of access to restitution not only for victims who were formal landowners but also for those who were informal owners, possessors, tenants, and occupants; the establishment of evidence rules that give flexibility to the conditions required by the law to demonstrate past entitlements; and the solution of conflicts among potential possessors on the basis of the greater need and vulnerability of victims, among other factors.

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<sup>52</sup> See CSPPDF, *Proceso nacional de verificación de los derechos de la población desplazada. Sexto informe a la Corte Constitucional (National process of verification of the rights of the displaced population. Sixth report to the Constitutional Court)*, Bogotá: June 2008.

### 12.5. Final Considerations

Reparations of massive and atrocious human rights violations in unequal societies raise enormous practical, normative, and conceptual challenges. The effort to repair victims as integrally as possible remains an ethical and legal imperative, but perplexities persist as to how should that purpose be achieved. It seems neither justifiable nor convenient to mechanically transfer legal standards on reparations, which were mostly judicially created to solve individual and isolated cases in well-ordered societies, to design strategies of massive reparations in societies attempting to overcome a history of terror and profound inequality.<sup>53</sup> This transfer can be so polemical and counterproductive that some analysts, like Kalmanovitz in his chapter in this book, contend that just strategies in post-conflict situations must be essentially guided by criteria of distributive social justice rather than by considerations of corrective justice, which usually inspire reparation policies.<sup>54</sup>

This stance is important, since it demonstrates the need to consider the problem of reparations in these difficult situations in a more appropriate manner and to articulate the problems of corrective and distributive justice in such cases. But Kalmanovitz's solution to make the distributive dimension prevail in situations of post-conflict seems problematic since it ignores the specific claims of reparation for victims, which are not only just, but also have a measure of legal support that cannot and should not be ignored. Therefore, the notion of transformative reparations has a stronger democratic potential since it seeks to articulate the necessary and just tasks of redressing the pain and suffering of victims with the equally just and necessary tasks of building a more equitable and inclusive democratic society.

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<sup>53</sup> Pablo De Greiff has vigorously and correctly emphasized this point, which we share. See De Greiff, *supra* n. 35.

<sup>54</sup> See Pablo Kalmanovitz's chapter in this book.

## Appendix

**Table 1:** Differences between reparations, social policy and humanitarian assistance.

	<b>Factual origin</b>	<b>Normative bases</b>	<b>Aim</b>	<b>Beneficiaries</b>	<b>Temporal focus</b>
<b>Humanitarian assistance</b>	Catastrophe or emergency	Principle of solidarity and the state's duties to protect human rights	Mitigate the risk and reduce vulnerabilities	Persons in crisis	Today, since assistance is urgently needed
<b>Social policy</b>	Situations of poverty, exclusion, and inequality	Distributive justice and state duties concerning ESCR	Satisfy basic material needs	The poor	The present, with regard to the essential content of ESCR and to the identification of beneficiaries; the future, concerning the progressive realization of ESCR
<b>Reparations</b>	Offenses and grave violations of human rights and international humanitarian law	Corrective justice and the duty to repair	Erase consequences of offence, insofar as possible	Victims	Yesterday, since they seek to correct the effects of past deeds

## Concluding Remarks

Stephen Holmes\*

These contributions are truly fascinating. So many interesting and provocative things have been said that there is no way to adequately summarize, let alone criticize, the contents of this book. So I will instead make a few comments to stimulate thinking. Carl Schmitt, the Nazi legal philosopher, mocked Karl Marx. He said that Marx was childish because he believed that “seizing industry” was a revolutionary and historically unparalleled achievement. But this, Schmitt alleged, was naïve. Seizing industry, Schmitt argued, was trivial in comparison to seizing land. *Landnahme* has been by far the most important form of political action in human history. And next comes seizing and controlling sea lanes or major routes of global transportation. But *Landnahme* was the main act, defining the world that we still live in today. And it is true that, because of their decisive role in defining who owns what, brutal massacre and expulsion are part of the deep history of the human race, and not just a contemporary story. To take a relatively recent example, every piece of agricultural land in the United States was originally stolen. As a result, relying on the moral authority of the United States to push for giving stolen land back to the original owners is probably unrealistic given the total impossibility of applying any such principle to the United States itself.

Now one of the fundamental principles underlying systems of private property is the obligation to “give back what is stolen”. But almost all privately owned land today was, at one or more points in history, seized by force from its original inhabitants. “First ownership rights” were almost universally the product of force and fraud and, at any rate, could not have been, by definition, created through a proce-

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durally correct transfer of legal title. So here lies a philosophical puzzle or contradiction. All historically known systems of private property, including ours, are normatively based on the principle that what is stolen must be returned and, simultaneously, historically based on the refusal to return what was stolen.

This paradox does not undermine functioning systems of private property, presumably, because the original sin of violent expropriation is lost in the mists of time. When land seizure is not lost in the mists of time, as in the case of post-Communist redistributions of property to privileged insiders and criminal-apparatchik networks, or in the Colombian case discussed in this book, there is a problem. When force and fraud have been used to transfer property *within living memory*, the legitimacy of the property system as a whole is called into question.

Now I am fascinated by Elisabeth Wood's chapter for reasons both theoretical and practical, analytical and historical. And, while reading it, I kept wondering whether the categories "justice" and "injustice" are explanatory variables at all. Can justice and injustice be invoked to explain why, for example, violence breaks out or not? This would be a very un-Tocquevillean thought. One of Tocqueville's principal claims is that, historically, many highly unequal societies have been perfectly stable and largely immune to revolutionary or class violence, so that it cannot be said that, in itself, inequality *causes* political violence. Moreover, economic growth, which almost inevitably produces psychological and political tensions between the relative winners and losers of development, can sometimes fuel or trigger violence. This raises the question of the *causal* role of inequality and injustice in stoking political violence.

One possible example, about which I am not entirely confident but which is suggested by the El Salvador example detailed by Elisabeth Wood, is that El Salvador had a better chance of integrating its insurgents into the peaceful political process because insurgents were not implicated in terrible atrocities, nor were they associated with narco-traffickers. I am not sure if this is correct. But it suffices to illustrate the importance of the question of the role of justice and injustice as causal factors in the explanation of political violence. This question

has loomed over the entire book, which shifts back and forth between philosophical-analytical approaches and historical-explanatory approaches. If you believe that “ought implies can”, then you must agree that any moral assertions about what we are obliged to do and advocate doing must take into account what is historically possible. So what makes land reform possible in Colombia, and what factors make it difficult?

There is one thing that I do not quite understand: will the restitution of property to the peasants who lost it in acts of violent land seizure bring the conflict to an end or not? I have read both things. Some of the authors of this book suggest that such restitution would bring the conflict to an end, and others deny it. So I would like to see this important topic addressed in a more focused manner. This, too, is a causal or explanatory question about the nature and anticipated consequences of the land reform being proposed.

Whenever a political scientist hears philosophers talking about justice and economists talking about efficiency, not surprisingly, he is bound to ask: where is the politics? So the main thing I want to address now is the politics of land reform – the ways in which the asymmetries of political power in society influence the shape and feasibility of land reform proposals. But first I will say a few words about the inadequacy of focusing exclusively on justice or efficiency.

First of all, and this is my attempt to extend an argument made in Jon Elster’s chapter, *all attention to injustice is selective*. This is necessarily true because there are too many injustices in any given society to take them all into account, or to give them all adequate attention. And the principle by which our selective attention to injustice is distributed is neither impartial nor random. It is instead rigged. The selectivity of our attention to injustice is governed by asymmetries of political power. We ignore one injustice and focus on another depending on who has more political power or a more audible political voice. In the scramble to expropriate “orphaned” state assets after the collapse of Communism, for instance, the individuals and groups who managed to get hold of the most valuable pieces of property were those who had more political clout, those with greater bargaining leverage, those who had something to offer or who were capable of making credible

threats. So it is not as if asymmetries of political power are irrelevant to the topic of this book. And asymmetries of power are also important because they have a decisive impact on the selectivity of our attention to injustice.

Elster raised the selectivity problem when discussing the anomaly, not justified by impartial principle, that proposals to restitute lost land seem more politically popular than proposals to compensate for many other unjust deprivations, such as career chances irreversibly destroyed. In general, the groups that are well-organized or better-organized are more likely to have their claims for restitution at least discussed, if not satisfied.

Speaking about economists, one could ask: why have economists not devoted more attention to this issue before? I first encountered this peculiarity of the economics profession in conversations with an economist who was studying, or failing to study, Russia after the collapse of Communism. I asked him why entrepreneurs elsewhere did not do what “businessmen” in Russia did, namely eliminate competitors by using plastic explosives? This is a valid question because capitalists everywhere hate competition. So why was the violent attack on competitors so much more common in post-Communist Russia than, say, in the United States or Western Europe? The economist in question answered: economics does not explain the non-use of violence! That has always seemed to me a profound confession about the limits of economics as a social scientific discipline, unable to think creatively about perhaps the most important of all social problems, namely the cabining of spirals of violence. If you are tired of hearing economists talk as if they were all-seeing and all-knowing, go to Israel, because when a large security threat dominates discussions, economists sit silently in the back of the room. And if you try to explain the distribution of land (and water rights) in Israeli-occupied territory using exclusively economic categories such as efficiency, with no reference to political power and organized violence, you will not get very far. In fact, I think that this might be a profitable line of research, to compare land redistribution in Israel and Colombia, to determine the relative roles of justice and power in the patterns of land distribution in the two cases.

Now I am happy enough with the word “restitution”, but I am not that clear about what the word “transitional” is doing there. Studies of post-Communism were once called “transitology”. After some time, it became clear that a more accurate term would have been traumatology, which may be a useful nomenclature for Colombia studies as well. In any case, “transition” usually means that power has changed hands. So the question is: has power in Colombia changed hands? This is an important question because it addresses the limits of feasible reform proposals. If you want to reverse a policy that has been put in place and supported by the dominant forces in society, then are you not dependent on a shift in the array of forces or at least a shift in the way the dominant forces perceive their own interests? Elster argues against the idea of restitution of land, not in a Colombian context particularly, but in general; while César Rodríguez-Garavito and Maria Paula Saffon and Rodrigo Uprimny argue in favor of it. But I am not clear about what “transition” we are discussing here. After all, although the Colombian Constitutional Court blocked Uribe’s second return to power, his political coalition has retained power. So where are you going to find the political support to overturn the status quo and institute the land reforms you favor?

Elster distinguishes various reasons for allotting property to people who currently do not have it. We can give property to people who once had it or to people who need it or to people who can use it most efficiently. If I were examining these categories from an explanatory point of view, I would ask, why does a political elite, when redistributing property *selectively* to its clients, use one language of justification rather than another? The only serious explanatory question here, in my opinion, concerns the use of a style of justification for distributions, not the distributions themselves, which presumably follow a logic of power, patronage, and corruption. I would not assume, in other words, that Elster’s different rationales actually motivate the distributions that occur.

Anyway, back to the Colombian case. Has power changed hands? If power has not changed hands then “restoration” would simply recreate the *status quo ante* that produced the current impasse, not a very appealing prospect. There are, needless to say, plenty of cases in history of aborted land reform, going back to ancient times. After all,

the Gracchi brothers, Tiberius and Gaius, were murdered in the second century B.C. for their attempts to redistribute patrician land to the plebeians. In their travels they observed large tracts of unused farmland and proposed giving it to those who, in Elster's terms, both needed it and could have used it most efficiently. And they were murdered because those who would have lost from the proposed land reform had the power to stop them. You cannot offer up a serious project for land reform based only on considerations of justice and ignoring brutal facts about the interests of those who wield power.

It is true that the language of restitution is popular now, including in the international human rights community. But do not forget, as I already mentioned, that every bit of land in the United States was stolen and no one in his right mind is proposing to "restore" it to its original inhabitants, or indeed to redistribute it for any rationale you can imagine. No one in the United States associates the rule of law with giving back violently seized territory to those from whom it was seized. At the very least, proponents of land reform in Colombia should not count on serious U.S. support for their proposals.

Who are the potential winners from the land restitution proposals? I did not understand where this volume's authors think that the political coalitions to support their proposals can be found. Rodríguez-Garavito speaks about political coalitions, but the only potential members of such coalitions that he named were human rights groups. But these are not serious players in effective political coalitions. Where are the well-organized and amply resourced groups who have political clout and who can credibly threaten to withdraw cooperation that Colombian elites need, and who can therefore effectively push for land reform? And I do not mean victim groups to whom the urban land reformers deliver restitution while they remain essentially passive. I mean groups that will benefit from the proposed reforms and who also have sufficient political capacity to drive the process forward on their own. Where are they? Who are they? If the groups who benefit are victim groups without political power and who are likely to remain politically passive recipients of the urban reformers' morally admirable generosity, then, over the long haul, the groups that are politically powerful, if they do not block the reform, will simply hijack it. They

will take it over and twist it to serve their own interests, not the interests of the currently dispossessed.

One of the reasons to consider this possibility, if my amateurish knowledge of Colombia has not totally deceived me, is that the original confiscation of land was aimed at destroying the political power of the peasants. Is that not the case? Was that not why land confiscation was accompanied by the brutal killing of union leaders, aimed at reducing the capacity of the rural poor to organize for political reasons? If part of the purpose of the original confiscations was to reduce the power of the peasants, and if this strategy was successful, would-be land reformers today do not have well-organized peasant allies who can help them put land reform into effect. The reason why restitution is needed, in other words, is the same reason why restitution is so devilishly difficult. Justice requires that the Colombian peasantry be given back the power they have lost; but justice alone does not give them the power they need to reestablish their political role in the country. I do not mean to be cynical here. But it is no secret that the rights of big landowners, say, were respected long before the rights of orphans. In other words, *justice depends on power*. John Stuart Mill memorably said, however, that the dependence of justice on power is not a cynical observation. Rather it is a practical recommendation. If you want justice, you had better strategize and organize for power.

Now it is true that norms of justice have some, not entirely negligible, capacity to rally individuals into organized groups capable of pushing for reform. But these norms are weak. As David Hume said, justice is strong enough to shape our judgments about right and wrong, but too weak, on its own, to control our passions. To achieve anything even vaguely resembling justice, justice-seekers must make alliances with groups who have only partly overlapping aims and who, on many issues, embrace values that are deplorable from the standpoint of justice itself.

This leads me to a couple of concluding points. The first concerns deeds and title to land, especially lack of clarity of title. Again, as a student of Russia, I have noticed something striking, namely, that when the KGB came to power with Vladimir Putin, the chekists began systematically to strip property from the mostly Jewish “oligarchs”

who had flourished under Boris Yeltsin in the 1990s. But they did not destroy property rights. Why? They did not destroy property rights because property rights are useful, selectively, to members of certain social networks. If I am in the KGB, for example, I have a group-specific network of enforcers who can make the property title in my possession worth the paper it is printed on. I must have the deed. It is a necessary but not sufficient condition for my “owning” the property. It is my informal power, based on my KGB network, however, that makes the legal title valuable. If you are not in the KGB and not under its protection, then the legal title that places property formally in your name is worth nothing. The property can be taken from you with very little fuss. This example helps us focus again on the context of political power within which property rights, including land rights, exist. We read in Albert Berry’s chapter about all the ways in which the politically powerful can manipulate land ownership. For example, if new technologies are given to big landowners instead of small landowners, the government can then “justify” large landholdings by appeal to their observable efficiency, which the government itself has created by its systematically biased policies. This is an excellent example of the way in which decisions that correspond to the interests of the politically powerful can disguise their true purpose behind seemingly neutral economic categories such as “efficiency”.

Now one of the first shocks I had when I went to Colombia some years ago was the impression that, at least some of the time, “the democracy” did not refer to all inhabitants of Colombia but rather to the white people who live in the cities – that is, to a part of the society, the privileged part. Now this is certainly an oversimplification, because, as I said, I am writing from a deplorably superficial understanding of Colombian society. Nevertheless, the following considerations may be worth discussing. Any kind of genuinely democratic transformation must begin with the commitment to include previously excluded groups in a common national project, as apparently happened in El Salvador. And that, in the Colombian case, may require a deep transformation of a way of thinking, not to mention in the Colombian elite’s self-image. How to bring about such a transformation is far beyond my powers of imagination, but the daunting dimensions of the task seem at least worth flagging. And once we see things this way, then the dispro-

portion between the problem Colombia is facing and the land reform solutions proposed in this book become an issue. Property restitution seems a much too minor policy change to have any serious impact on the yawning gulf between the urban haves and the rural have-nots that has tormented Colombia for so many bloody decades.

Finally, if you want to be practical (and strategizing and organizing for power is the most obvious way), one thing to think about is how to split the powers that be. You have to play chess. You have to use tactics of divide-and-conquer. One time-tested method for changing a prevailing system of power is to devise ways to split the members of the ruling coalition and set them against each other. You must figure out what incentives could be used to bring some parts of the current ruling coalition over to the land-reform side. For example, the 1901 land reform in Ireland worked in the following way. Landowners were compelled to sell their lands, but only at market prices. The trick was that the government paid 90% of the price and the peasants who took possession of the land only paid 10%. It was a win-win strategy based on political realism, or the understanding that groups in a good position to obstruct reform must be bought off, or their visceral opposition blunted in some way. You cannot say, we are going to redistribute the land and, simultaneously, punish all those who currently have power. That this would not be a practical approach is the least that might be said.



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