

Contents

121 Editorial

Articles

- 122 JEMIMA GARCÍA-GODOS
Addressing Land Restitution in Transitional Justice
- 143 MALCOLM LANGFORD AND KHULEKANI MOYO
Right, Remedy or Rhetoric? Land Restitution in International Law
- 177 STEPHEN KABERA KARANJA
Land Restitution in the Emerging Kenyan Transitional Justice Process
- 202 ANNE HELLUM AND BILL DERMAN
The Making and Unmaking of Unequal Property Relations between Men and Women:
Shifting Policy Trajectories in South Africa's Land Restitution Process
- 230 FRANCISCO GUTIÉRREZ SANÍN
Land and Property Rights in Colombia – Change and Continuity
- 262 KNUT ANDREAS OVE LID AND JEMIMA GARCÍA-GODOS
Land Restitution in the Colombian Transitional Justice Process

Book Reviews

- 289 SINDRE BANGSTAD
Mashood A Baderin (2010)
Islam and Human Rights: Selected Essays of Abdullahi An-Na'im
- 293 HUGO STOKKE
Charles Beitz and Robert E. Goodin (eds) (2010)
Global Basic Rights



Editorial

The new editors of the NJHR are pleased to announce two major changes to our Journal.

Firstly, as you may already have noticed, the Journal's layout has completely changed. We wanted a more contemporary and distinct look to reflect our vision, and we think our publisher's designer has done a remarkable job.

Secondly, and more importantly, new members have been appointed to the Editorial Board and Editorial Committee. The new members are all top-level researchers or practitioners in the field of human rights. The editors are confident that our new team will offer fresh perspectives and contribute to ensuring that NJHR retains its reputation as one of the very best journals in its field. We thank them all for having graciously accepted our invitation.

The Journal's aim remains the same: to provide a cutting-edge forum for international academic critique and analysis in the field of human rights. Fostering academic dialogue in this field is more important than ever. Human rights violations show no sign of decline, and the international community has become increasingly aware of this. NJHR will stimulate the public debate on human rights by providing a place where a variety of perspectives on the theory and practice of human rights can be brought to the fore.

The Journal takes a broad view of human rights. The research on human rights should not be allowed to become a ghetto of international law. We therefore welcome contributions not only from lawyers, but also from researchers and practitioners belonging to the realms of social science, sociology, philosophy, history, and other fields where issues of human rights are debated. NJHR thus wishes to publish high quality and cross-disciplinary analyses and comments on the past, current and future status of human rights for profound collective reflection.

Some of our issues will be entirely devoted to topics that we believe will be of particular interest to our readers. The next issue will thus be devoted to questions of land restitution in transitional justice.

Readers are invited to suggest topics or propose contributions, or to forward us their critical reactions to what they find in these pages. The journal applies an impeccable double-blind peer-review process with two referees appointed to all papers.

Bård A. Andreassen and Jo Stigen

Land Restitution in Transitional Justice

An Overview

Jemima García-Godos

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Abstract: Long-term peace is commonly stated as one of the main objectives of transitional justice processes. The issue of land and property restitution for internally displaced people (IDPs) has increasingly been considered as a most important element in terms of political stability and the prevention of new outbreaks of violence. What are the implications of considering restitution a preferred measure of redress for refugees and displaced peoples in transitional justice processes? The aim of this article is to provide an overview of the right to restitution of land and property from a transitional justice perspective, based on a conceptual clarification of restitution as a form of reparation and a discussion of the implications of restitution for transitional justice policy and implementation.

Keywords: Restitution, Victim Reparations, Transitional Justice

I. Introduction

As war and armed conflicts around the world continue to produce massive internal displacement and waves of refugees, pictures of people on the move escaping from violence have become common on international news. According to the latest IDMC's global report, an estimated 26 million people were still displaced within their countries, the same number as in 2007 and the highest since the early 1990s.¹ Only occasionally do we see displaced peoples and refugees returning back home; this still is, unfortunately, more the exception than the rule. What happens to the land and property left behind by those who flee or have been expelled as

1 E Jennings and NM Birkeland, *Internal Displacement: Global Overview of Trends and Developments in 2008* (Internal Displacement Monitoring Centre, Norwegian Refugee Council, Geneva 2009).

a consequence of armed conflict? The number of unresolved land and property restitution claims in the world today is larger than the one being actually addressed. Given the increasing number of transitional justice schemes throughout the world putting forward an agenda of victims' rights, the issue of land restitution in transitional justice is a timely endeavour.

In the field of transitional justice, victim reparations have moved centre-stage in the international debate during the past decade, assuming both political and academic importance. This revitalised interest in victim rights and a victim-oriented perspective is partly due to and can be observed in, among others, the practice of the International Criminal Court and in the adoption of the Basic Principles on the Right to Remedy and Reparation (Basic Principles)² by the UN General Assembly in December 2005.³ According to the Basic Principles, victims have the right to justice and reparation for harm suffered. One of the forms of reparation identified by the Basic Principles is restitution, which includes the 'return to one's place of residence, restoration of employment and return of property' (art 19). Along the lines of this development, the issue of land and property restitution for internally displaced people (IDPs) is increasingly being considered as a most important element in terms of political stability and the prevention of new outbreaks of violence. A number of recent peace agreements since the mid 1990s can be said to have combined these issues, by incorporating some form of reparations measures, including restitution of property, for refugees and IDPs.⁴ What are the implications of considering restitution a preferred measure of redress for refugees and displaced peoples in transitional justice processes? The aim of this introductory article to the Special Issue on 'Land Restitution in Transitional Justice' is to provide an overview of the right to restitution of land and property from a transitional justice perspective, based on a conceptual clarification of restitution as

2 UNHCHR, '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', UN General Assembly Res 60/147 (2005) (adopted without a vote) (Basic Principles). Also known as the Van Boven/Bassiouni Principles, the Principles were adopted both by the Commission on Human Rights and by the UN General Assembly in April and December 2005 respectively.

3 J García-Godos, 'Victim Reparations in Transitional Justice: What is at Stake and Why' (2008) 26 *Nordic Journal of Human Rights* 111.

4 M Cox and C Harland, 'Internationalized Legal Structures and the Protection of Internally Displaced Persons' in J Fitzpatrick (ed), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (Transnational Publishers, NY 2002); M Bradley, 'Refugees and the Reparations Movement: Reflections on Some Recent Literature' (2007) 20 *Journal of Refugee Studies* 662.

a form of reparation and a discussion of the implications of restitution for transitional justice policy and implementation.

II. Understanding ‘Restitution’: From Refugee Studies to Transitional Justice

Restitution is one of the preferred remedies sought by victims of internal displacement, as it aims to restore the person to his or her original position prior to the loss or injury, or place in the position he or she would have been in had the violation not occurred.⁵ However, the issue of land restitution has received limited attention in the transitional justice literature until fairly recently.⁶ As Williams observes,

[W]ith its new, post-Cold War focus on addressing displacement, restitution has come to play an increasingly prevalent role in post-conflict settings, albeit one that is rarely conceived of in explicit transitional justice terms or integrated with transitional justice programming.⁷

This situation is progressively changing with the publication of studies documenting country experiences with restitution as well as contemporary debates linking transitional justice and post-conflict redress with development issues.⁸ This con-

5 C Bailliet, *Between Conflict & Consensus: Conciliating Land Disputes in Guatemala* (Institute for Public & International Law, Oslo 2002) 107.

6 As an illustration, the International Centre for Transitional Justice, a leading organisation in this field, issued a report on the subject first in 2007. See RC Williams, ‘The Contemporary Right to Property Restitution in the Context of Transitional Justice’ (Occasional Paper Series, International Center for Transitional Justice, NY 2007).

7 Ibid 49.

8 See for example A Buyse, *Post-Conflict Housing Restitution. The European Human Rights Perspective, with a Case Study on Bosnia and Herzegovina* (Intersentia, Antwerp 2008); M Cordial and K. Rosandhaug, *Post-Conflict Property Restitution: the Approach in Kosovo and Lessons Learned for Future International Practice* (Nijhoff, Leiden 2009); R Hall, ‘Reconciling the Past, Present and Future: The Parameters and Practices of Land Restitution in South Africa’ in C Walker and others (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press, Athens 2010) 17-40; and C Huggings, ‘Linking broad constellations of ideas: Transitional justice, land tenure reform, and development’ in P De Greiff and R Duthie (eds), *Transitional Justice and Development Making Connections* (Social Science Research Council, NY 2009).

trasts greatly, however, with the attention given to land restitution in the field of refugee studies, where the issues of return, repatriation, the right to housing and the right to a home, made the discussion about land restitution unavoidable.⁹ Committed scholars and practitioners alike succeeded in the 1990s to place the rights of refugees and IDPs on the international agenda, particularly UN forums. Human rights NGOs such as the Centre on Housing Rights and Evictions (COHRE) and Habit International Coalition played a significant role advocating the property restitution rights of refugees and IDPs.¹⁰ In the UN system, these efforts led to the adoption of two important legal instruments since the late 1990s: the Guiding Principles on Internal Displacement¹¹ in 1998 and in 2005, the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons¹² (also known as the Pinheiro Principles) and the UN Basic Principles. The Basic Principles clearly formulate victims' right to reparation, with restitution being one of its forms. We will return to this later.

According to Bagshaw, ongoing developments in international law and practice, in particular at the regional level, clearly point towards an emerging right to restitution of property. The GPID build on these precedents and mark an important step in clarifying law and practice in this area. Although the GPID do not in themselves constitute a legally binding instrument, their increasing international standing and recognition can only serve to enhance their authority as a practical tool to guide States confronted by internal displacement and the challenges arising

9 The literature on land restitution in the field of refugee studies is rich and extensive, both in terms of the conceptual and legal framework and in documenting country-based experiences. A detailed review of this literature is outside the scope of this report. For good overviews of the field, see among others, S Leckie (ed), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, NY 2003); S Bagshaw, 'Property Restitution and the Development of a Normative Framework for the Internally Displaced' (2000) 19 *Refugee Survey Quarterly* 209; G Paglione, 'Individual Property Restitution: From Deng to Pinheiro – and the Challenges Ahead' (2008) *International Journal of Refugee Law*; B Thiele, 'Recent Developments in United Nations Policy on Housing and Property Restitution for Refugee Return' (2000) 19 *Refugee* 3. Land restitution is a recurrent theme in the *Journal of Refugee Studies*, *Forced Migration Review*, and *International Migration*, among others. For a thorough compilation of international and national legal instruments, cases and materials, see S Leckie (ed), *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials* (Cambridge University Press, Cambridge 2007).

10 Thiele (n 9).

11 UNHCHR, 'Guiding Principles on Internal Displacement', UN Doc E/CN.4/1998/53/Add.2 (1998) (GPID).

12 UNHCHR, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons' (28 June 2005) Un Doc E/CN.4/Sub.2/2005/17 (Pinheiro Principles).

there that situation.¹³ On the same line, Prettitore argues that:

while the right of refugees and displaced persons to *return* to their homes is well-established in international law, the right to repossession of property lost during displacement is only now starting to be recognized on a regular basis. [...] It is becoming apparent that the right to repossession/compensation is becoming an integral part of international human rights law.¹⁴

The right to restitution for property lost on account of displacement is fundamental for IDPs and refugees. It is derived from general property rights and the obligation of the state to make good any violations producing injury. The *right to property* is established in the Universal Declaration on Human Rights; however, it is absent from the binding international human rights treaties ICCPR and ICESCR. Not surprisingly, the *right to restitution of property* is thus also absent from these instruments. Considering that there may be different understandings of what constitutes the right to property, it is possible that the right to restitution may be similarly unclear.¹⁵ Leckie argues that restitution rights cover not only formal owners, but also tenants and occupants. He therefore does not only use the term ‘property restitution’, but couples it with the term ‘housing’ to ensure that there is equal treatment given in the restitution process to both owners (‘property’) and non-owners (‘housing’), and also to draw attention to the fact that the right to housing is acknowledged more widely in international human rights law than are property rights as such.¹⁶ Since the end of the Cold War and the wave of ethnic conflicts arising in the 1990s, the right to housing, land, and property (HLP) restitution is gradually – albeit slowly – gaining attention and recognition.¹⁷

13 S Bagshaw, ‘Property Restitution for Internally Displaced Persons: Developments in the Normative Framework’ in S Leckie (ed), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, NY 2003).

14 P Prettitore, ‘The Right to Housing and Property Restitution in Bosnia and Herzegovina: A Case Study’ (2003) BADIL Working Papers 1 < <http://www.badil.org/en/documents/category/2-working-papers> > accessed 22 September 2010.

15 *Bailliet* (n 5).

16 *Leckie* (n 9).

17 See IS Aursnes and C Foley, ‘Property Restitution in Practice: The Norwegian Refugee Council’s Experience’, (2005) Norwegian Refugee Council; S Leckie, ‘New Housing, Land and Property Restitution Rights’ (2006) 1 *Forced Migration Review* 52; and S Leckie, ‘United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings: From Neglect to Tentative Embrace’ in S Leckie (ed), *Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations* (Cambridge University Press, Cambridge 2009).

The international community has lately come to realize the important role property rights may play in rebuilding peace and stability to a society. Conducting a restitution process in the aftermath of an armed conflict is thus a fairly new endeavour and is likely to be of topical interest in the future.¹⁸

The restitution process in Bosnia and Herzegovina is a case in point. According to Buyse, the international community's support to the effective implementation of the right to housing restitution enshrined in the Dayton Peace Agreement, contributed to the relative success of the process. Legal and practical measures were taken at the national and district levels to ensure that property laws made restitution feasible. By so doing, not only individual restitution rights were being protected, but also the rule of law was strengthened in the process.¹⁹

There is however, still a long way to go before restitution and HLP become uncontested issues on the international political and humanitarian agenda. Even in the context of peace operations supported by the United Nations, HLP rights are still difficult to promote and implement.²⁰ According to Leckie, it is necessary to improve the 'UN post-conflict HLP policy' to secure the implementation of HLP rights in UN peace operations.²¹ While the presence of supportive policy frameworks can advance HLP rights, it is questionable whether or not the implementation of such an important task – with clear consequences for long-term peace – ought to be undertaken by transitional UN Peacekeeping Administration Authorities rather than national governments.

Is it then feasible to argue for an emerging right to restitution?²² If so, this emerging right is arguably best defined, to date, in the Pinheiro Principles, art 2:

2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/

18 B Vagle and F de Medina-Rosales, 'An Evaluation of the Housing and Property Directorate in Kosovo' (2006) NORDEM Report 12/2006 <<http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/nordem-report/2006/1206.pdf>> accessed 22 September 2010.

19 A Buyse, 'Home Sweet Home? Restitution in PostConflict Bosnia and Herzegovina' (2009) 27 *Netherlands Quarterly of Human Rights* 45-60.

20 Leckie, 'United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings' (n 17).

21 Ibid 16.

22 Malcolm Langford and Khulekani Moyo address this question in their contribution to this Special Issue, which discusses the normative legal framework of a right to restitution.

or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.

Article 2 explicitly declares the status of restitution as a preferred remedy for displacement; so, the Pinheiro Principles as a whole provide practical guidance to governments, UN agencies and the international community on how to best address the complex legal and technical issues surrounding housing, land and property restitution. The Pinheiro Principles strengthen the international normative framework in the area of housing and property restitution rights, and they are firmly grounded in international humanitarian and human rights law, applying existing human rights to the specific question of housing and property restitution.²³ NGOs and UN agencies working on these issues have developed guidelines and handbooks to ensure the effective implementation of the Pinheiro Principles.²⁴ Recently, the Parliamentary Assembly of the Council of Europe issued a resolution calling to address and resolve HLPB issues taking into account the Pinheiro Principles, existing Council instruments and international law.²⁵ If developments in this area are already well in progress, what would then be the added value of transitional justice in terms of framing and securing the right to restitution? Our entry point to answer this question will be a conceptual clarification of restitution with regards to related terms applied in the field of transitional justice, and a discussion of restitution within the framework of the Basic Principles on the Right to Remedy and Reparation.

23 See *Langford and Moyo* (n 22).

24 See for example, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles'* (Multimedia Design and Production, Turin 2007), and *Housing and Property Restitution for Refugees and Internally Displaced Persons: International, Regional and National Legal Resources* (COHRE, Geneva 2001). Recently, the Parliamentary Assembly of the Council of Europe issued Resolution 1708 (2010) 'Solving property issues of refugees and internally displaced persons', calling for the resolution of HLPB issues, taking into account the Pinheiro Principles, existing Council instruments and international law.

25 Council of Europe (Parliamentary Assembly), 'Solving property issues of refugees and internally displaced persons' (2010) COE Res 1708.

III. Restitution as a form of victim reparations

Restitution and *reparations* are sometimes used synonymously. Both terms can be interpreted expansively to include a variety of ways to make amends. In the particular framework of transitional justice, however, restitution constitutes a form of reparation, so the terms ought not to be used interchangeably.

Even if the dictionary permits a broad interpretation, the term *restitution* typically suggests a more narrow concern with the return of specific items of real or personal property, something that comes clearly forward in the Pinheiro Principles. In contrast, the term *reparations* “has come to suggest broader and more variegated meanings.”²⁶

Compensation is another term often used in place of *restitution* and some authors even define restitution as a sub-category of compensation.²⁷ Gloppen, for example, indicates that restitution can take many forms, considering compensation, rehabilitation, acknowledgement and healing as part of restitution; indeed she uses the terms *restitution* and *restoration* interchangeably.²⁸ Other authors distinguish between the concepts. Mani, for instance, writes that “[w]hile restitution is often concrete such as land or property with, therefore a monetary value, compensation and indemnity are the directly monetary forms of reparation.”²⁹ It is common to refer to restitution and compensation together, as the right to restitution is often referred to as a right to restitution of something that was lost or alternatively, as a right to compensation for a particular loss if restitution is not possible.

In this article, we propose a definition of restitution as a form of reparation distinct from compensation. Any specific definition of restitution, however, will have to take into consideration the scope of restitution and that which is to be restituted, and so the array of choices abound. According to Bassiouni:

26 J Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Harvard University Press, Cambridge, Mass. 2006) 47.

27 J Thompson, *Taking Responsibility for the Past* (Polity, Cambridge 2002) in D Satz, ‘Countering the Wrongs of the Past: the Role of Compensation’ in J Miller and R Kumar (eds), *Reparations: Interdisciplinary Inquiries* (Oxford University Press, Oxford 2007) 178.

28 S Gloppen, ‘Roads to Reconciliation: A Conceptual Framework’ in E Skaar, S Gloppen and A Suhrke (eds), *Roads to Reconciliation* (Lexington Books, Lanham, Md. 2005).

29 R Mani, ‘Reparation as a Component of Transitional Justice’ in K de Feyter et al (ed), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Antwerpen 2005) 76.

[r]estitution involves the situation where something has been taken from the victim, which either the State or the individual violator has the ability to return, such as cultural property, *objets d'art*, or confiscated lands. It would also include such intangibles as the restoration of the right to vote or own property.³⁰

As can be seen, this is a broad understanding of restitution. From a more restrictive view, Roth-Arriaza states that '[r]estitution involves the return of property belonging to survivors that has been unjustly taken away from them'.³¹ At this point, let us look at what the Basic Principles on the Right to Remedy and Reparation have to say about restitution. We start with a brief presentation of the Basic Principles, followed by a discussion of victim reparations.

The process leading to the Basic Principles was initiated in 1988, with the commissioning by the United Nation of a study on reparations for victims of human rights violations.³² In 1993, Special Rapporteur Mr Theo van Boven delivered a report which became the basis for the process completed in 2005.³³ The study, and later the Basic Principles, recognized that all victims of gross human rights violations and fundamental freedoms should be entitled to restitution, fair and just compensation, and the means for as full rehabilitation as possible for any damage suffered.

The Basic Principles establish that the right to remedy comprises two aspects, the procedural right to justice, and the substantive right to redress for injury suffered due to act(s) in violation of rights contained in national or international law.³⁴ According to the Basic Principles, remedies include the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Specifically concerning reparation, the Basic Principles establish that 'in accordance with its domestic laws and international legal obligations, a State shall 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

30 M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers, NY 2002) 267.

31 N Roth-Arriaza, 'Civil Society in Processes of Accountability' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers, NY 2002) 108.

32 D Shelton, 'The United Nations Draft Principles on Reparations for Human Rights Violations: Context and Content', in K de Feyter et al (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, Oxford 2005) 11–33.

33 UNHCHR, 'Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Session' (1993) UN Doc E/CN.4/Sub.2/1993/8.

34 The next paragraphs draw on *García-Godos* (n 3).

serious violations of international humanitarian law'. The full and effective reparation envisaged by the Basic Principles includes: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, each explicitly addressed in articles 19–23.

The Basic Principles operate with a broad definition of reparations, one which addresses also alternative or complementary transitional justice mechanisms (that is to say, the right to justice, the right to truth). It is important to emphasize that the Basic Principles' focus on remedy and reparations does not exclude the right to justice, or the duty to prosecute violations that constitute crimes under international criminal law. This reflects the current international trend promoting accountability for past crimes in post-conflict societies and post-authoritarian regimes, while taking into account that accountability can take various forms, some aimed at fulfilling the requirements of international criminal law (prosecutions); others focusing on the needs of victims and their families (as reparations).

In defining *victim reparations*, De Greiff suggests distinguishing between definitions used in international law and the one used in reparation programs, as they involve different choices and justifications.³⁵ In international law, reparations refer to all sorts of reparatory measures implemented to address human rights violations, without necessarily targeting specific violations. Such a broad definition is needed in judicial processes in order to allow its adaptability to the individual case and to encompass as many situations as possible. In the context of designing specific reparation programs, a narrow definition of reparations is needed, as it refers to a specific target group (the victims) and a specific type of crime/human rights violation. This definition does not include truth-telling, criminal justice, or institutional reform. Instead, it operates on the basis of two fundamental elements: the types of reparation (material and symbolic), and the forms of distribution (individual and collective). The narrow definition of reparation is, in a sense, an operational one, suggesting certain limits to the responsibilities of those in charge of designing reparation programs.

The distinction between a juridical and an operational conceptualization of reparation might prove useful at the analytical and operational level, yet it should also be said that the operational definition is not only grounded on the broader juridical one, but it becomes itself a legal category which determines many aspects of the reparation involved. There is no inherent contradiction between juridical and operational definitions; they both focus and acknowledge the victim's right to

35 P de Greiff, 'Justice and Reparations', in P de Greiff (ed), *The Handbook of Reparations* (Oxford University Press, Oxford 2006) 451–477.

redress. While most debates on reparations centre on the applicability and implementation of juridical definitions to specific cases, the same distinction between a juridical and operational understanding of reparation may be applied to the issue of restitution. In other words, while there is certain international consensus on the emergent right to restitution as constitutive of victims' rights to remedy and reparation, this emerging right usually narrows down to physical assets when it comes to operational programming and actual implementation.

From the five forms of reparation distinguished by the Basic Principles, it is restitution, compensation and rehabilitation that are the one most commonly applied in the context of victim reparation programs. In the wording of the Basic Principles, compensation refers to economically assessable damage, and rehabilitation to medical and psychological care. On restitution, the Basic Principles state that:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property. [19]

Looking at this definition, Shelton notes that '[g]iven the long-standing preference for restitution in the law of state responsibility, it is surprising that the text does not adopt the mandatory 'shall, whenever possible' or indicate that restitution is the preferred remedy.³⁶ Despite the weaker formulation chosen ('should, whenever possible'), the definition used in the Basic Principles explicitly indicates that restitution aims to restore the victim to their original situation before violations were committed, addressing mainly personal but also material suffering. As can be observed, the Basic Principles provide a broad definition of restitution which includes both tangible and intangible assets. This definition actually addresses two aspects that ought to be highlighted and differentiated: *restoration* and *return*.

While restoration refers to specific qualities or status (the restoration of liberty, enjoyment of human rights, identity, family life, citizenship and employment), return refers to the action of effectively going back to one's place of origin as well as the actual return of property lost. The restorative aspect of restitution bears strong similarities and linkages to other two forms of reparation identified by the Basic

36 Shelton (n 32) 22.

Principles, namely satisfaction and guarantees of non-repetition. For instance, the effective restoration of liberties and enjoyment of human rights cannot take place in a context where the rule of law is limited; restoration of employment cannot be fulfilled in the absence of jobs; and so on. While it can be discussed whether family life is defined as the actual presence/existence of family members or as a way of life, the absence of housing – let alone appropriate housing – can render this right ineffective. Similarly when it comes to the exercise of citizenship rights, an institutional framework based on the rule of law needs to be in place to make such rights effective and accessible.

Based on the above, a serious discussion of restitution should be explicit about whether we are dealing with restitution in its restorative dimension or in its ‘returning’ capacities. Similar to De Greiff’s differentiation of reparations as used in international law and the one used by reparation programs, we may suggest differentiating between a broader, all encompassing definition of *restitution as restoration* and a narrow definition referring to *restitution programs* aimed to the return of displaced populations to their place of origin, the return of lost property, and alternative measures when these options are not viable. In what remains of this article, we will focus our discussion on the ‘returning’ capacities of restitution, opting for a narrow definition of restitution as used in restitution programs.

IV. The Subject of Restitution Programs: Victims of Arbitrary Displacement

The establishment of restitution programs in the framework of transitional justice and victim reparation is based on political decisions expressing the need and will to address the needs of victims of human rights violations suffered during armed conflict and/or authoritarian regimes. The first step in the development of such programs is the identification of a target population, that is, the target beneficiaries of measures provided by the program. In terms of transitional justice, the target beneficiaries are commonly referred to as victims, their status often being defined in terms of the violation(s) suffered. As a legal category in a given reparations program, the victim status is at the basis of any claims the victim may put forward and eventually have access to from the relevant agencies. Given that victims are identified by virtue of the violations suffered, it is important to identify which types of violation qualify a person as a victim-beneficiary entitled to take part in a reparations program.

In the case of restitution of land and property, the development and implementation of restitution programs imply the identification of refugees and internally displaced peoples as victim-beneficiaries of restitution programs. What are the violations that entitle refugees and IDPs to lodge restitution claims? According to the Pinheiro Principles, arbitrary displacement from one's own home, land or place of habitual residence constituted the basic condition that calls for the need of 'the right to be protected from displacement' (Principle 5). The principles also request that 'states shall prohibit forced eviction, demolition of houses, and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war'. These same arbitrary actions would then constitute the type of violation that defines refugees and IDPs as victim-beneficiaries. Looking back to the Basic Principles, arbitrary displacement can thus constitute a 'gross violation of international human rights law' and/or a 'serious violation of international humanitarian law'. This is more than a nuance in legal terminology; the operational implication of this is extremely important, because it makes possible the inclusion of large numbers of people in the universe of victims subject to the benefits of reparation – and restitution – programs. A good example of this is Colombia, where the internal armed conflict has caused massive internal displacement, and the number of IDPs has been estimated to be between 2.6 and 4.3 million people. Including IDPs in the category of victims of the Colombian reparation program is of great consequence.

V. Critical Issues in Restitution Programs

The identification of arbitrary displacement as the defining violation of the target beneficiaries of restitution programs is only a first step in the design and implementation of restitution programs. There are a number of challenges likely to be addressed differently at the national level by reparation programs, and some of these have already been identified in the Pinheiro Principles. Here we focus only on three issues that are particularly relevant from a transitional justice perspective: (i) the question of time in establishing restitution rights (first versus subsequent occupancy, inter-generational issues); (ii) the forms of tenure at the basis of restitution (effective versus formal occupancy, formalisation of property rights, collective versus individual restitution); and (iii) alternatives to restitution.

Time in the Establishment of Restitution Rights

A first issue to be addressed in restitution programs is that of *first versus subsequent/secondary occupancy*. Who is the rightful claimant of a property, the original owner, or subsequent owners? How to define or identify the original owner? This is a particular challenging issue in contexts where formal/contractual property rights are lacking. Subsequent owners may have acted in good faith when acquiring the property. In such situations, it is difficult to make a moral and legal argument for the eviction of subsequent owners in order to restore the property rights of an original owner. One possibility could be to include evicted subsequent owners in the category of victim-beneficiaries, on the basis that through restitution (to the original owners) they themselves become indirect victims of arbitrary displacement. Principle 17 of the Pinheiro Principles addresses these issues, calling for the protection of secondary occupants against arbitrary or unlawful forced eviction.

Inter-generational issues also play a role in establishing occupancy/ownership rights. In cases of protracted conflict it is difficult to ascertain how far back in time occupancy and/or property rights should be established and protected. Do younger generations have the right to claim land and property previously owned or used by their parents years after displacement took place? According to Principle 2.2, the right to restitution cannot be 'prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution'. In practice, the protection of rights of non-returning populations might be experienced as 'unfair' by people actually living there, either out of their own choice or for lack of alternatives. This is a very common case in post-conflict societies, where the interest of those who fled and those who stayed behind often collide once the conflict is over.³⁷ Where the younger generations belong to specific groups in vulnerable situations, such as ethnic minorities or indigenous peoples, one can find many valid arguments for their preferential treatment. This will, however, not necessarily remain uncontested by other social actors and vulnerable groups. However, according to Veraart, the systematic deprivation of property rights of specific groups constitute a great injustice that deprives people of their agency as economic actors; such injustices defy the passage of time and require legal responses.³⁸ As we can see, the boundaries between

37 See also the discussion on restitution by negotiation in Knut Andreas Lid and Jemima García-Godos' article in this issue.

38 W Veraart, 'Redressing the Past with an Eye to the Future: The Impact of the Passage of Time on Property Rights Restitution in Post-Apartheid South Africa' in *Netherlands Quarterly of Human Rights* 27 (2009) 45-60.

restitution and the ‘historical injustice agenda’ become blurred in this type of cases; we will return to this later.

Forms of Tenure and Restitution

Restitution programs are confronted with a choice regarding the forms of tenure to be considered as a legitimate base for restitution claims: *effective* versus *formal occupancy*, or both? According to Principle 16, the right to restitution of property is also applicable for land and property held in possession, and is not be limited by the absence of formal property rights: tenants, social-occupancy right holders and other legitimate occupants or users of housing, land and property ought to have their right to restitution protected. The background for this is that in many developing countries, formal property rights might not be sufficiently developed as to guarantee effective ownership and possession. Even in the presence of formal deeds and titles, other factors such as security and socio-political conditions can make actual possession impossible. The question is then how to prove and protect effective possession without undermining respect for formal property rights.

The legal status of land and property in countries emerging from armed conflict has an important role to play in the development of specific restitution programs, as acknowledged in Principle 15 of the Pinheiro Principles. In some countries property rights or rights of possession have not been formalized for a large number of properties, and so restitution programs might be considered a first step towards the *formalization of land and property rights*. The organization of institutions to deal with these matters requires not only technical capacity and resources, but also political will and support (or at least non-opposition) of landholders. The contemporary debate on the formalization of property rights highlights the importance of formal titles to provide security of tenure and other potential benefits for landholders.³⁹

Although restitution programs may provide good opportunities to formalize and/or legalize occupancy/ownership, such formalization involves the dislocation of alternative forms of tenure and property management at the local level, such as customary law or traditional practices. Restitution programs may indeed have a second aim of formalizing *individual property rights*, disregarding traditional practices that may prefer collective rights. While ‘restitution has come to be seen

39 See Francisco Gutiérrez’s article in this issue, where he explores the relation between the political regime and the development of property rights in Colombia, questioning many of the assumptions attributed to the positive correlation between property rights and distributive reforms.

as an individual act of redress',⁴⁰ we must be aware of other practices where *collective rights* over land and property are exercised, such as in indigenous communities, peasant societies and/or ethnic minorities. Although not necessarily unattractive for individual landholders, the protection of individual rights may be contrary to the collective rights of communities.⁴¹ This said, one must not take for granted that all forms of traditional or customary law practices regarding conflict resolution on land tenure disputes are respectful of property rights and rights of possession; in fact, the opposite might be the case.⁴²

Alternatives to Restitution

While restitution is still considered a preferred form of remedy for victims of arbitrary displacement, there are cases where the return and restitution to the land of origin of victims will not be possible, that is, when the loss of land and property cannot be reversed. These may be the case of land and property used for infrastructural or industrial development, or in ways incompatible with a reversal of the situation, such as mining projects or dams. A restitution program ought therefore to explore alternative forms of remedy such as individual or collective relocation into new areas or property; monetary compensation for the actual value of the property lost; or amnesties over property claims valid for specific time periods and places. Principle 21 of the Pinheiro Principles indicates that compensation is 'only to be used when the remedy of restitution is not factually possible', preferred by the victims instead of restitution, or in combination with restitution. Alternatives to restitution are likely to be a highly contested issue. It is therefore important to consider the processes and mechanisms leading to the choice of options and identification of victim-beneficiaries eligible for alternative measures. According to Buyse, compensation benefits were not fully considered as a viable

40 Williams (n 6) 11.

41 This was the case with the formalization process in post-conflict Peru, initiated in the late 1990s, where the large majority of peasant communities with collective rights to land opted for individual titling. See H Wiig and D O Fuentes, 'Closing the Gender Land gap: The Effects of Land-Titling for Women in Peru' (2009) Norwegian Institute for Urban and Regional Research Working Paper 2009:120 <<http://iloapp.nibrinternational.no/blog/perulandgender?ShowFile&doc=1260791102.pdf>> accessed 22 September 2010.

42 This is well substantiated in a recent study from post-conflict Liberia, where the existence of alternative systems of conflict resolution reduce security of tenure and foster conditions for continuous land encroachment. See A Corriveau-Bourque, 'Confusions and Palava: The Logic of Land Encroachment in Lofa Country, Liberia' (2010) Norwegian Refugee Council Report <<http://www.nrc.no/?did=9481900>>.

alternative to restitution in Bosnia and Herzegovina mostly due to a ‘one-sided emphasis on restitution’, rather than a consideration of beneficiaries’ preferences and actual possibilities to effectively return and reassume their property.⁴³ Participation in this process by the target population will most likely determine the success or failure of alternatives to restitution.⁴⁴

Given the complexity of the challenges outlined above, it is not surprising that the number of restitution programs implemented in post-conflict and post-authoritarian societies is not impressive, particularly when compared to the scope of arbitrary displacement. Restitution programs in West Germany and Kosovo, Guatemala and East Timor, Colombia and Afghanistan, all face(d) similar challenges. A comparative analysis of land and property restitution programs *transnationally* is emerging in the research agenda,⁴⁵ which is a welcome development with the potential to contribute both with an overall assessment of land and property restitution programs for policy-makers, and at the theoretical level, to understand the complex connections between stated and implicit aims of restitution and the various forms and shapes that restitution takes – and not – in practice.

VI. Competing Rights and Overlapping Debates

As it can be observed from the above discussion, the issue of land restitution in transitional justice often overlaps with other important debates, in particular, restitution for historical injustices, and restitution to address *structural inequalities* in access to land (often referred to as ‘the agrarian question’ or ‘the land issue’). These issues move beyond practices and understandings of retributive and restorative justice into the realm of distributive justice, raising the question of whether these realms ought to be treated separately or not.

The need for structural reform and the effective implementation of the right

43 *Buyse* (n 19).

44 For a detailed and thorough study of relocation of repatriated refugees in Ethiopia, see L Hammond, *This Place Will Become Home: Refugee Repatriation to Ethiopia* (Cornell University Press, NY 2004).

45 Leckie’s *Housing, Land, and Property Rights in Post-Conflict United Nations and Other Peace Operations* is an important contribution in this direction. The cases presented therein focus on land and property restitution rights in the particular context of United Nations peace operations, providing a firm empirical base for the development of policy recommendations.

to restitution constitute therefore a major challenge.⁴⁶ In those countries where agrarian structures are uneven, the issue of land restitution is bound to collide with more structural issues of inequality and the need for land redistribution and agrarian reform. Indeed, restitution programs can be seen by governments as a way to embark on deep structural reforms in the agrarian sector by distributing state-owned land to the victim-beneficiaries of restitution programs. In the strict sense of the term, this may be considered more as a form of compensation rather than restitution *per se*. In the presence of large numbers of landless peasants in rural societies, it can be expected that the prioritization of IDPs and refugees in restitution programs – however legitimate this is – will be contested by other disadvantaged groups. The term ‘competing rights’ conveys a situation where the framing and struggle for the protection of specific rights are in competition with other legitimate rights – sets of rights competing with other rights. Even within the framework of a specific restitution program, equal access and treatment may not be secured if differences such as ethnicity, race and gender are taken into consideration.⁴⁷

Yet another arena where competing rights are at play is the restitution claims of indigenous peoples on the basis of historical injustice. International law, and particularly the right to self-determination, has increasingly been recognized as a tool to be used in advocating restitution and compensation for indigenous peoples. The newly adopted Declaration on the Rights of Indigenous Peoples⁴⁸ contains a number of clauses relevant to the issue of restitution and compensation for lost lands. The Declaration reaffirms that compensation should only be used as a remedy in place of restitution when the latter is not possible:

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

46 As demonstrated in the articles by Stephen Karanja and Francisco Gutiérrez in this issue.

47 See Anne Hellum and Bill Derman’s case study of women’s right to restitution in post-Apartheid South Africa in this issue.

48 UN Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007 UNGA Res 61/295) (UNDRIP).

in quality, size and legal status or of monetary compensation or other appropriate redress. (art 28)

General Recommendation No. 23 on Indigenous Peoples⁴⁹ recognizes an additional requirement for the use of compensation as a remedy, namely that restitution must be impracticable for *factual*, rather than simply legal reasons. A lack of political will cannot, therefore, be an excuse to favour compensation over restitution.⁵⁰ It is widely acknowledged that:

with respect to indigenous peoples, the typical form of restitution per equivalent, i.e. compensation, is generally inadequate and ineffective to redress the tort suffered, on account of the limited value that economic assets usually have for these peoples. The choice of the forms of reparation should be made on a case-by-case basis.⁵¹

Thus, only where the return of the lands and territories of the indigenous is not possible for factual reasons, the right to restitution can be substituted by the right to just, fair and prompt compensation. It has been argued that such compensation should as far as possible take the form of land and territories.⁵²

While it could be argued that historical injustices ought to be addressed in transitional justice if stable peace is to be achieved, it is important to keep in mind that specific transitional justice mechanisms seek to address violations committed during authoritarian regimes and armed conflict, and will not necessarily be the best approach to deal with historical injustice and agrarian reform. The existence of contested claims from various groups in society other than those of victims should not be ignored. Yet, in post-conflict societies, how to prioritise limited resources among many legitimate and just claims? The overall aim of transitional justice mechanisms might indeed be the reframing of new societies based on prin-

49 UN Committee on the Elimination of Racial Discrimination (CERD), 'General Recommendation No. 23 on Indigenous People' (18 August 1997) UNGA Res 16/295.

50 B Thiele, 'Enforcing the Right to Restitution: Legal Strategies for Indigenous Peoples and the Role of International Law' in S Leckie (ed), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, NY 2003).

51 F Lenzerini, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction' in F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford 2008).

52 This is in line with Principle 21 of the Pinheiro Principles. See PS Chingmak, 'International Law and Reparations for Indigenous Peoples in Asia', in *Lenzerini* (n 51).

principles of peace, justice and equality,⁵³ yet the mechanisms available to transitional justice are far from sufficient both in terms of mandate and resources to address deep-rooted structural reforms. The contribution of transitional justice in this regard can be significant, yet modest, as De Greiff states, and only in a concerted effort with more comprehensive efforts. As overlapping debates and competing rights can continue to be expected when dealing with land and property restitution, there is a need to develop and use concepts and operational definitions that address specific claims and contexts in a very restrictive manner, while keeping in mind the larger picture.

VII. Concluding Remarks

Earlier we asked what the added value of transitional justice was concerning the right to restitution. It could be argued that the right to restitution does not need transitional justice to be advanced. In fact, the advocacy of the right to restitution has been relatively successful in framing this right and developing legal instruments to secure protection and implementation. However, I argue that the contribution that transitional justice brings to the issue of restitution is first, the ability to frame restitution claims in the larger framework of accountability for past violations, and second, the focus on victims.

With regard to accountability for violations committed in the past, there is an increasing international consensus over the many forms that accountability can take, and that all of them are closely interrelated. Accountability in terms of justice, truth and reparation are complementary forms, not necessarily opposed to each other. The right to restitution can thus be seen as part of a larger framework of claims seeking redress and accountability for human rights violations. In terms of policy and implementation, this means the incorporation of restitution issues in the policy and programming agendas of public institutions dealing with transitional justice at the national level. The institutionalisation of the issue of restitution by way of transitional justice is a development that deserves close attention in the future.

The second contribution that transitional justice brings to the right to restitution is its focus on victims. The identification of victims of arbitrary displacement as subjects of reparation and restitution programs highlights both the identifica-

53 *P de Greiff*(n 35).

tion of arbitrary displacement as a serious and/or gross violation, as well as the set of rights, benefits and entitlements assigned to the victim status in specific country settings. Can the identification as victims be counter-productive for those seeking restitution? Possibly, but we must also consider the normative and moral value that the concept of victim itself and victim rights in general are gaining in the public debates and practice of transitional societies; this can indeed enhance the framing of restitution claims.

Right, Remedy or Rhetoric?

Land Restitution in International Law

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Abstract: In 2005, the UN Sub-Commission on Human Rights declared in the Pinheiro Principles that restitution of land, housing and property in cases of displacement was a preferred remedy and a human right in international law. This paper argues that the *composite* legal method behind this claim cannot be sustained in international customary law but neither can a more conservative and *beneficiary*-based legal method that restricts such rights to a narrow group such as refugees. Instead, a *context-based* legal method makes the most sense of current legal sources. We argue that a right and remedy of restitution for displacement only arises in instances of *armed conflict* and, to a slightly lesser extent, the removal of *indigenous peoples* from ancestral lands and systemic and arbitrary eviction, usually carried out by *authoritarian regimes* on particular discriminatory grounds. Nonetheless, the approach in the Pinheiro Principles is more coherent and morally superior than the status quo in customary international law. The growing acceptance of the Pinheiro Principles should therefore be welcomed subject to refining their scope of application.

Keywords: Restitution, International Law, Human Rights, Remedies

I. Introduction

A growing chorus of voices has asserted that the restitution of housing, property and land in cases of displacement generates distinct obligations in international

¹ The authors would like to thank the two anonymous referees for comments on an earlier draft and Mayra Gomez for exchanges over the development of the new version.

law.² The central claim is that restitution for displacement is not to be regarded as a mere remedy. It is not commensurate with an order for compensation but rather it is the preferred remedy or even a human right in international law. Such a rights-based understanding of restitution is potentially promising for the victim-oriented field of transitional justice, the locus for this Special Issue. It strengthens arguments for establishing land restitution mechanisms in the aftermath of armed conflict and authoritarian regimes. Articulating the loss of home and place in the language of rights can help ensure that restitution is prioritised in the same way as classical civil rights claims, which have dominated transitional justice processes.³ Moreover, land restitution mechanisms may provide the basis for sustainable peace. Control over land and territory is a key determinant of armed conflict and integral to the survival of authoritarian regimes.⁴

At the same time, the emerging articulation of the right to restitution partly falls outside, and even challenges, the *ratione materiae* and *ratione temporis* of transitional justice. Transitional justice is typically concerned with redressing gross human rights violations that occurred during a *recent conflict* or *authoritarian regime*. The ‘movement’ for the right to restitution has cast its net wider to include displacement resulting from other situations; from situations of generalized violence through to development-based displacement and natural disasters. The underlying reasoning is compelling. Why should the cause of displacement determine the remedy when the process and result is comparable? Displacement by development projects are sometimes executed in the same brutal fashion as armed conflict. Moreover, claims by indigenous peoples to restitution straddle transitional and historical justice paradigms. In Kenya and Nepal, indigenous peoples and other groups are stretching transitional justice processes to incorporate this historical dimension.⁵ There are clearly some inherent conflicts between the shaping of the transitional justice and land restitution agendas.

However, this paper is not concerned with the intersection of the broad pa-

2 S Leckie, ‘New Directions in Housing and Property Restitution’ in S Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, New York 2003).

3 See E Schmid, ‘Economic, Social and Cultural rights (ESCR) in transitional justice: ‘Expanding’ mandates or ‘making human rights whole?’ (Phillips University Marburg, Center for Conflict Studies Annual Conference, Transitional Justice – Local conflicts, Global Norms 2010).

4 See generally P Collier and A Hoeffler, ‘Greed and Grievance in Civil War’ (Policy Research Working Paper 2355, World Bank, Washington 2000).

5 On Kenya, see Karanya in this issue. On Nepal, see P Jones and M Langford, ‘Between Demos and Ethnos: The Nepal Constitution and Indigenous Rights’, *International Journal on Minority and Group Rights* (forthcoming 2011).

radigms of human rights and transitional justice. Rather, it restricts itself to a legal assessment of two international human rights law claims made by the UN Sub-Commission on the Promotion and Protection of Human Rights ('UN Sub-Commission')⁶ in its so-called Pinheiro Principles: namely, that (1) restitution is the preferred remedy for arbitrary or unlawful displacement and (2) restitution is a human right in international law. These broad brush claims, often simply expressed as an amorphous 'right to restitution', test the boundaries of international customary law and it is worthwhile asking whether they can be sustained. If the claims are premature, one must look to international and national politics and jurisprudence to further develop and clarify international law. If they hold, or hold in particular circumstances, there are clear policy implications in situations where restitution is being ignored or resisted.

By adopting this juristic optic, we do not mean to imply that seemingly arid and legal existentialist questions of the status of the rights are of primary importance. In the field of restitution, they pale in comparison to the practical challenge of ensuring that secondary legal rules and institutions *fairly* and *effectively*⁷ ensure restitution in particular contexts.⁸ *Lex ferenda*, soft law, emergent or unresolved rights can be enough to provide a platform for catalysing national and international policy to take appropriate action. Nonetheless, the matter remains a controversy in international law. And unresolved legal questions can hinder some States and actors from taking responsive action.⁹

The paper begins in Section II by setting out the Pinheiro Principles followed by a description in Section III of the legal methodology to be used in assessing them. Some comments on the philosophical justification for the right are made in

6 Until the UN human rights structural reform in 2006, the Sub-Commission was the principal subsidiary body of the Commission on Human Rights and composed of twenty-six independent experts. It was abolished during the creation of the new UN Human Rights Council but partly replaced by an Advisory Committee with eighteen advisory members.

7 See P Diehl, C Ku and D Zamora, 'The Dynamics of International Law: The Interaction of Normative and Operating Systems' (2003) 57 *International Organization* 43; M Trebilcock and R Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar, Northampton MA 2008).

8 See other articles in this issue as well as A Buyse, *Post-Conflict Housing Restitution* (Intersentia, Antwerpen 2008); M Cordial and K Rosandhaug, *Post-Conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practice* (Martinus Nijhoff, Leiden 2009); Leckie (n. 7).

9 This is not necessarily to privilege a liberalist theory of international relations over a realist conception but some actors do justify their behaviour on legal uncertainty: see discussion in 'Introduction' in M Langford, Anna Russell (ed), *The Human Right to Water: Theory, Practice and Prospects* (Cambridge University Press, Cambridge, 2011).

passing. Section IV examines whether the general claim can be justified in international law while Section V takes up three cases where restitution has been more frequently mentioned in international law: post-conflict, indigenous peoples and ‘post-authoritarianism’. Section VI concludes by arguing that these three contexts ground a more legally solid ‘right to restitution’ but that the broader claim in the Pinheiro Principles should be the basis of future legal development.

II. The Pinheiro Principles

In 1997, the UN Committee on the Elimination of Racial Discrimination proposed nine topics for research by the UN Sub-Commission, one of them being the return of property to refugees and displaced persons.¹⁰ With the Sub-Commission facing pressure from States to both ‘limit’ its research programme and ‘enhance’ its cooperation with human rights treaty bodies,¹¹ the topic was a natural choice. The Sub-Commission immediately began work on the issue, with subsequent encouragement from States, and appointed a rapporteur, Paulo Pinheiro.¹² In 2002, Pinheiro produced a working paper which argued that ‘restitution as a remedy for actual or de facto forced eviction resulting from forced displacement is itself a free-standing autonomous right’.¹³ Citing different sources in international law, he argued that the traditional civil right to return to one’s country¹⁴ incorporated or was possibly complemented by a more specific right to return to one’s home.¹⁵ In addition, he briefly analysed some of the key challenges in exercising the right such as the lack of institutional process for restitution, secondary occupation, abandonment laws, destruction of property records and discriminatory application of laws.

10 CERD (8 March 1997) UN Doc. CERD/C7SR.1189.

11 Commission on Human Rights Resolutions 1996/25 and 1998/28.

12 See Sub-Commission Resolution 1997/112 and UN Commission on Human Rights Resolution 1999/47.

13 ECOSOC ‘The Return of Refugees’ or Displaced Persons’ Property: Working paper submitted by Mr. Paulo Sérgio Pinheiro pursuant to Sub-Commission Decision 2001/122’ (12 June 2002) UN Doc E/CN.4/Sub.2/2002/17 (E/CN.4/Sub.2/2002/17) [32].

14 For a discussion of the broader right to return under international law, see *Buyse* (n. 7) 141–2. However, he briefly comes to a pessimistic conclusion on the acceptance of the right to return (160) which seems at odds with his earlier analysis and Article 12(4) of the International Covenant on Civil and Political Rights.

15 *E/CN.4/Sub.2/2002/17* (n 12).

With the authority of the Sub-Commission, and after extensive consultations with legal experts, UN agencies, States and civil society groups, Pinheiro prepared and elaborated the *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, which now bear his name in vernacular usage. The Principles open with a claim that they are distilled from contemporary international human rights and humanitarian law and they set out a range of standards on dealing with housing and property restitution claims. The final text was endorsed by the Sub-Commission in 2005 and begins with the claim that restitution is a preferred remedy and right:¹⁶

States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.¹⁷

However, compensation is said to be acceptable if restitution was ‘factually impossible to restore as determined by an independent, impartial tribunal’.¹⁸

As noted, the Principles seek to expand the *rationae persone* beyond the groups who have apparently been mentioned most frequently in international legal practice, namely and apparently refugees.¹⁹ The articulation seeks to reduce the focus on the nature of the victim and place it on the fact of displacement itself. Thus, the list of beneficiaries extends beyond the ‘refugee’ to include the ‘internally displaced’ and ‘similarly situated displaced persons who fled across national borders but who may not meet the legal definition of refugee’.²⁰

Who are such persons? While refugees are a clear enough group for present

16 It is not clear from the text that restitution is claimed as a ‘human right’ as opposed to just a ‘general right’ in international law. However, the surrounding language in the preamble and text suggests it is the former not the latter. This also appears consistent with the language used by the General Assembly and Security Council on restitution in armed conflict.

17 ECOSOC ‘Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Final report of the Special Rapporteur, Paulo Sérgio Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons’ (28 June 2005) UN Doc E/CN.4/Sub.2/2005/17, Principle 2.2. The Sub-Commission had also earlier noted, ‘the right of all returnees to the free exercise of their right...to reside peacefully in the security of their own home’ Resolution 1998/26.

18 Ibid 2.1.

19 See *Buyse* (n. 7) Chapter 6.

20 Ibid. 1.2.

purposes, ‘internally displaced persons’ constitute a more recent legal concept. In 1998 they were defined by the UN Commission of Human Rights to be:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of *armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters*, and who have not crossed an internationally recognized State border. (Emphasis added).²¹

This definition extends by implication the scope of axiomatic restitution considerably. Moreover, it gives us a sense of who constitutes the third group of ‘similarly situated’ persons in the Pinheiro Principles namely, persons who for some reason may not meet the technical definition of refugees or internally displaced but who suffer displacement in similar circumstances.

While the Principles open up the protective mantle of land restitution considerably, the breadth of the right is limited in two respects. According to the Pinheiro Principles, the displacement must have been ‘arbitrary or unlawful’. This qualifier may exclude some or all natural disasters from the description of ‘arbitrary’. It may be possible and reasonable though to argue that *refusal* of the right to return to a home beset by a natural disaster is arbitrary and unlawful, thus falling under the Pinheiro Principles.²² Secondly, the causes of displacement listed in the definition of the internally displaced are all large-scale events. Thus, unlawful eviction of an individual tenant on the grounds of discrimination is unlikely to trigger the right or remedy unless it is part of a broader or systemic practice. However, the wording of the Principles appears to leave open the possibility that gross violations of human rights (in terms of intensity or breadth) may not always be required.

The *rationae materie* is also broad. A person’s home and land which is not underpinned by *real* or *formal* property rights is equally protected. The Principles in Section III thus refer to rights beyond right to property which protect homes (and possibly basic livelihoods) more broadly. These are the civil right to protection of the home, the socio-economic right to adequate housing and the right to non-

21 Principle 29 of the ‘**Guiding Principles on Internal Displacement**’ (1998) UN Doc E/CN.4/1998/53/Add.2 (**Guiding Principles on Internal Displacement**). These Principles conform with *Leckie* (n 1) attempt to situate the right to situations which are akin to ‘gross violations’ of human rights and do not follow legal procedures. It is notable though in the Pinheiro Principles that the adjective ‘gross’ has been dropped from in front of ‘violations’.

22 See exploration of this in M Langford ‘The Right to Return and Resettlement after the Tsunami disaster’ (2005) 2(2) Disaster Brief.

discrimination and gender equality. This inclusion of a broader array of human rights extends the rights to a wider group than would be covered by a mere right to property,²³ for example tenants, social occupancy rights holders and other occupants or users of housing, land and property (see Principle 16).

These opening statements are followed by a fairly comprehensive set of principles to guide the implementation of the right, as discussed in the Introduction to this Special Issue. Principles 10 to 21 set out a series of duties for States to ensure the practical recognition of return and restitution rights through the creation of procedures, passing of legislative measures, enforcement of decisions and the guaranteeing of participation in these modalities. At the same time, protections are built in for secondary occupiers who are to be protected against arbitrary and unlawful evictions.²⁴ In Principle 22, international organizations are encouraged to promote the right and strive to encapsulate the right in peace agreements and peace operations. The Principles end with a savings clause such that the Principles may not prejudice other rights recognised in human rights, refugee and humanitarian law.

III. Methodology

At the outset, from the perspective of moral philosophy, the claim that restitution is a 'human right' may be perplexing. Likewise, the assertion that restitution is the preferred remedy could be equally problematic for those concerned with the content of rights. For earlier and classic naturalistic rights theories, the protection of the right to property does of course figure prominently. While restitution is barely mentioned, the remedy of restitution would certainly fit the theories of Locke. Here, the right to property is grounded on the contingent basis of acquisition and is chiefly concerned with curtailing state interference.²⁵ However, contemporary naturalistic theories, with their focus on universal agency or capability, are likely

23 This is included in Principle 7.

24 Ibid, see Principle 17. Hence any inevitable evictions to be carried out against such a group of occupiers has to comply with international human rights law and standards such as due process, consultation, adequate and reasonable notice and the provision of legal remedies.

25 J Waldron, *The Right to Private Property* (Oxford University Press, Oxford 1998). But Locke and others are virtually silent on socio-economic rights like housing. As the right to housing extends the franchise of the restitution remedy, this source of justification is problematic.

to be less forgiving.²⁶ If rights to property and housing are controversial under *some* of these theories,²⁷ restitution is likely to struggle even more. Due to its spatial and time-bound contingency, it seemingly represents a second or third-order entitlement to another human right.

A more promising route may be the practice and constructivist justifications for human rights proposed by authors like Charles Beitz.²⁸ Inspired by contemporary international human rights practice, he views human rights as ‘requirements whose object is to protect *urgent* individual interests against certain predictable dangers ... under typical circumstances of life in a *modern world* order composed of states’ to which ‘political institutions’ must respond.²⁹ This formulation is more magnanimous in respect of contingent rights. It shifts the attention away from universal essentials or human nature as for Beitz, ‘an urgent interest is not necessarily an interest possessed by everyone’.³⁰ Rather, the criteria is that the interest is significant enough to be recognised across ‘a wide range of possible lives’ and, absent protections for the right, institutions will act in ways that ‘endanger this interest’.³¹ This formulation allows us to make sense of other conditional and detailed rights in international law, such as fair trial or trade union rights. Moreover, its pragmatism directs our attention to those cases which demand immediate attention by states and other political institutions and actors.

A right to restitution is likely to fare much better within this constructivist framework of Beitz, particularly due to its focus on *victims* and *repetitive* patterns of displacement. It is not clear, though, whether the Pinheiro Principles always encompass situations of ‘urgent interest’. The Principles protect ‘former homes, lands, properties or places of habitual residence’. Does this include opulent and vast homes, lands and properties, possibly acquired under highly dubious circumstances? Even international investment law, which provides extensive property rights to foreign investors, does not grant restitution in such cases. However, it may be just that there is a drafting error – that is to say, the word ‘other’ is missing before ‘places of habitual residence’, which would restrict the preceding interests

26 See M Cranston, *What are Human Rights?* (Bodley Head, London 1973); J Griffin, *On Human Rights* (Oxford University Press, Oxford 2008); and A Sen, *The Idea of Justice* (Belknap Press, Cambridge, MA 2009).

27 While socio-economic rights are being increasingly accepted under natural law theories, the ‘human’ right to property has faced harder weather.

28 C Beitz, *The Idea of Human Rights* (Oxford University Press, Oxford 2009). For the sake of brevity, I ignore in this discussion agreement-based theories of human rights.

29 *Ibid* 109. Emphasis added.

30 *Ibid* 110.

31 *Ibid* 111.

to those in the home.³² Nonetheless, to the extent that the Principles allow displaced persons to return to at least their homes (and also gain restitution of land and property necessary for the realisation of universally recognised human rights such as work), a constructivist theory of rights may provide the justifications for claiming restitution as a right.³³

Any moral theory would also need to address instrumental critiques.³⁴ While the benefits of restitution have been described above, critics have countered that placing restitution in the spotlight allows other states to escape responsibility for asylum or third state resettlement, and even encourage forced return. It may also overshadow policies needed for peace and justice such as land and property redistribution to meet socio-economic rights. Paglione thus attacks the ‘almost exclusive focus on individual real property restitution’ within the Pinheiro Principles. She argues that an ‘explicit preference for return among solutions to displacement’ undervalues ‘the importance of alternative remedies and overlook the rights of non-returnees’.³⁵

Restitution may have other unintended consequences. Concerns have been raised that the focus on restitution is particularly disadvantageous to weaker forms of property and housing rights (for example, tenancy and informal occupation). While these forms of tenure are admirably covered in the Pinheiro Principles, it is often more difficult to implement restitution for these groups in practice. This raises the prospect that restitution *in concreto* may simply favour formalised modes of property.³⁶

32 In email correspondence with Mayra Gomez of COHRE, she argues that since the term “habitual residence” is used eight times in the text of the Principles’, it is clear that the Principles are concerned with the ‘home’ not broader properties.

33 Indeed, the European Court of Human Rights tends to allow less discretion for interferences under both the civil right to a *home* and the right to peaceful enjoyment of *possessions* when a person’s home rather than general or additional property is in question.

34 See also the discussion in the Introduction to this Special Issue by García-Godos.

35 G Paglione, ‘Individual Property Restitution: from Deng to Pinheiro – and the Challenges Ahead’ (2008) 20 *International Journal of Refugee Law* 391 at 391.

36 This concern is potentially magnified by the manner in which the right to peaceful possessions is articulated in the Pinheiro Principles. A limitations clause is included under Principle 7 for this right. It states that public interest exceptions should be ‘read restrictively, so as to mean only a temporary or limited interference’. This phraseology is much narrower than, say, the European Court of Human Rights, whose approach has been to give States a large margin of appreciation for the right to property. The Pinheiro Principles therefore unwittingly support perhaps a neo-liberalist interpretation of property rights. However, if this restrictive reading is only meant to apply to property in the form of the home, then it would be more consistent with the ECtHR’s jurisprudence. The Court has generally adopted, but not always, adopted a narrower margin of appreciation in these cases. See also *Buyse* (n 7) and discussion below in Section IV.

These more theoretical and externalist approaches are not of immediate relevance to determining the place of restitution in international law. However, they do reveal some of the underlying tensions in current international legal practice, to which we now turn. Our research question is restricted to asking whether the two principal claims in the Pinheiro Principles are valid international law. In other words, is restitution the preferred remedy for displacement for rights such as property and housing and is restitution a human right in international law?

We have not been alone in revisiting this question, post-Pinheiro. In his survey, Buyse concludes that the evidence indicates that restitution as a remedy is still largely conceived in discretionary rather than preferential terms for individuals.³⁷ According to him, a human right to restitution may exist for a small group of victims but its wider protective scope is only ‘emerging’.³⁸ The Colombian Constitutional Court has been more upbeat on the question. In a case which the Pinheiro Principles clearly aspires to address, the applicant had fled a farm after her father’s murder and the ‘disappearance’ of her husband by a paramilitary group. She was not officially recognised as a displaced person by authorities and she had not received humanitarian protection or assistance to which recognised internally displaced persons were entitled.³⁹ The Court responded by declaring that:

[T]he right to the restitution of the property of which the people have been plundered, is also a fundamental right ... Article 17 of the Protocol Additional to the Geneva Conventions, the UN Guiding Principles on Internal Displacement (21, 28, and 29), and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons [Pinheiro Principles], constitute part of the constitutional framework, as they represent developments adopted by the international doctrine on the fundamental right to integral reparation for harm caused.⁴⁰

To determine whether these modest or strong conclusions are warranted, we must

37 *Buyse* (n 7). See also the earlier work by *Leckie* (n 1).

38 *Ibid* 137, 160

39 D Manrique, ‘Restitution for Internally Displaced Persons: A Step towards Peace And Recovery in Colombia’ (March 2008) 5(1) *Housing and ESC Rights Law Quarterly* 7–9.

40 *M.P. Catalina Botero* Decision T-821 of 2007 (Constitutional Court of Colombia) 43.

look to international customary law.⁴¹ There is no treaty-based source for either the remedial or rights-based claims. Customary international law classically relies on identifying *opinio juris* (the evincing by States of a legal obligation) and State practice. But it possesses a dizzying array of competing methodologies. These range from rival forms of positivism⁴² through to natural law, realism and deconstructionism.⁴³ Some also claim that human rights should be addressed under the third source of international law, general principles.⁴⁴ However, most of these approaches tend to treat human rights and humanitarian law as a special category. As their ontological character is normative, it is not expected that States will automatically comply in practice. Thus, most theories heavily weight expressions of State *will* for the existence and content of human rights, even though they may classify it differently as *opinio juris*, State practice or recognition of general principles.

The relevant sources will therefore be multilateral expressions (such as resolutions in the General Assembly or other international bodies) or ‘concordant’ bilateral and unilateral expressions (for example, peace agreements, military manuals, national legislation and case law and, for some authors, all verbal acts by state officials). To this could be added expressions by international institutions (courts, quasi-judicial bodies or UN officials), which can be relied upon to clarify the existence of a norm and even qualify as evidence itself.⁴⁵ However, in the case of the ‘creation’ of new human rights in international law, particularly custom, the stamp of approval from the UN General Assembly (GA) often figures as central. In 1969, Bilder proposed that a claim amounts to a human right if the General

41 The four sources of international law are contained in Article 38 of the International Court of Justice:

‘a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’.

42 For example, some prioritise *opinio juris* while others state practice.

43 For a recent overview, see B Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff, Leiden 2010). See also See AJIL Symposium on Method in International Law (1999) 93 *American Journal of International Law* 291–423.

44 B Simma and P Alston, ‘The Sources of Human Rights Law: Custom, Jus. Cogens, and General Principles’ (1992) 12 *Austl. Y.B. Int’l L.* 82.

45 One could add the traditional requirement that practice occurs ‘over a considerable period of time’ and that there is a ‘general acquiescence’ by States but the first is not necessarily critical. Custom can arguably be created overnight or spontaneously through State expression.

Assembly ‘says it is’.⁴⁶ In 1984, Alston developed this into a more formal model of deliberated acceptance by the assembly.⁴⁷ Many States appear to concur in this view although there appear to be varying views on the degree of deliberation needed.⁴⁸

Unlike methods applied by other authors, we will separate out the sources that make a general claim for a right to restitution (Section IV) and those in which it is recognised in a particular context (Section V). In the final section, we will analyse whether these sources can be combined to support the broader claim or whether we need to be more modest and look to further political practice before the right can said to have emerged in international law.

IV. General Remedy or Right

In international law, restitution is recognised as the preferred remedy for *interstate* claims, including deprivations of land, housing and property.⁴⁹ As early as 1928, the Permanent Court of International Justice,⁵⁰ pronounced that:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.⁵¹

The primacy of restitution was reaffirmed by the International Law Commis-

46 R Bilder, ‘Rethinking International Human Rights: Some Basic Questions’ (1969) *Wisconsin Law Review* 171.

47 P Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’ (1984) 78 *Am J. Int’l L* 607.

48 See comments by States in ‘General Assembly Adopts Resolution Recognizing Access to Clean Water, Sanitation’ (Media Release, Department of Public Information, General Assembly 28 July 2010) <<http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>>.

49 This might include a peace treaty at the end of a war or through claims grounded in human rights brought directly against the delinquent State by the victims. See D. Shelton, ‘The World of Atonement: Reparations for Historical Injustices’ (2003) 50 *NILR* 289–325, 308. See discussion on post-conflict in Section V below.

50 Predecessor to the International Court of Justice (ICJ).

51 *Case Concerning Factory at Chozow*, 1927 P.C.I.J. (Serv.A) No.9 at 29.

sion in its draft articles on State responsibility⁵² and the International Court of Justice (ICJ) in its 2004 Advisory Opinion.⁵³ The Court stated that 'Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized' during the construction of the wall in the Occupied Palestinian Territory.⁵⁴ However, while restitution has been consistently invoked by international courts and others as the primary remedy, compensation remains the standard form of award *sought* by States and ordered by tribunals.⁵⁵

Multilateral Fora

However, the extent to which restitution is recognised as a preferred remedy for human rights violations or right in itself is much less clear. If we turn to multilateral sources first, the proclamations of the General Assembly are of relevance, particularly the 2005 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 (2005) (Basic Principles). These Basic Principles affirmed that States must 'provide effective remedies to victims, including reparation' (Art 3(d)) and that victims have a right to reparation for 'gross violations of international human rights law and serious violations of international humanitarian law'.

In Article 18 of the Basic Principles, restitution is the first of five mentioned forms of reparation. Article 19 sets out a definition of restitution, which is broad and includes 'enjoyment of human rights', 'return to one's place of residence' and 'return of property'. However, restitution is not declared paramount. Rather, the Basic Principles take a principled and contextualised approach to remedies. Accordingly, the choice of remedy is to be determined by what is 'appropriate and

52 Draft articles on Responsibility of States for Internationally Wrongful Acts, August 2001. Articles 34 and 35 provide that 'Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction.... A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed...' (emphasis added).

53 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Rep. 2004 (I), p. 136, paras 151–153. See also *The Temple of Preah Vihear Case* (1962) ICJ Rep. p. 6 at 34.

54 The above view was endorsed by fourteen of the fifteen judges of the court.

55 This potential indicates the difficulties of implementing restitution. See generally A Buysse, 'Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law' (2008) 68 *Heidelberg Journal of International Law* 129, 132–133.

proportional to the gravity of the violation and the circumstances of each case' and it must be 'full and effective'.

Interpreting these rather authoritative Basic Principles with respect to a claim of a right to restitution (as remedy or human right) in cases of displacement is difficult. Four perspectives might be feasible. First, that the Basic Principles demonstrate that such a right has not emerged. The choice of remedies is framed in discretionary terms and an exception for displacement is lacking. This position could be supported by Dinah Shelton's comment on the history behind the formulation of the language on restitution in the Basic Principles:

Given the long-standing preference for restitution in the law of state responsibility, it is surprising that the draft does not adopt the mandatory 'shall, whenever possible' or indicate that restitution is the preferred remedy. Efforts to strengthen the language apparently ran into government objections during the consultations. It also should be noted that in any case restitution and cessation will be accomplished by the same act, e.g. restoration of liberty or return of property.⁵⁶

Second, and conversely, it could be said that the Basic Principles do recognise a right to restitution when read in the light of other emerging practice. After quoting the earlier and similar resolution on Basic Principles by the UN Commission on Human Rights,⁵⁷ Leckie argues that 'These and other remedial norms, then, have evolved from general legal principles to increasingly specific areas of legal practice, now clearly pointing to the emergence of an explicit right of refugees and internally displaced persons to the restitution of housing, land and property'.⁵⁸

A third view is that the framing of the Basic Principles gives a sense of where the right to restitution for human rights violations is in international customary law – that restitution is the remedy to be *first* considered but not necessarily *preferred* or *automatic*.

The fourth, and perhaps the most plausible, view is that the Basic Principles simply do not address the question of whether restitution is a preferred remedy for displacement. In other words, we are looking in the wrong place. The purpose of

56 D. Shelton, in F. Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, Oxford 2008) 47–72, 66–67.

57 UNGA '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' (28 June 2005) UN Doc E/CN.4/2005/L.10/Add.11.

58 Leckie (n 1) 9.

the Principles is to set out general remedial principles for all human rights violations. While they clearly give some sense of hierarchy, they are intended to cover a wide range of human rights violations. There are many human rights violations for which restitution is simply irrelevant. This can be seen in Articles 20 to 23 where a range of other human rights-specific remedies, from different types of compensation through to guarantees of non-repetition, are noted.

Support for this fourth view could be found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Passed twenty years earlier by the UN General Assembly, it focuses on particular violations, namely crime and abuse of power.⁵⁹ In this case, the language on remedy is more differentiated and restitution as a remedy and return of property is given more prominence.⁶⁰

If we turn to other general sources, we certainly can find evidence of an emergence of at least a preferred remedy, but only emergence. For example, the UN Commission on Human Rights affirmed in 1993 that the 'practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing'. In paragraph 4 of the resolution, it recommended that States 'provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs, to persons and communities that have been forcibly evicted'.⁶¹ Thus, restitution is mentioned first, like the Basic Principles, but the options of compensation or replacement land and housing are made comparable. Similar language was used in a follow-up resolution on forced evictions in 2004.

The UN Commission on Human Rights took a marked stance in its Guiding Principles on Internal Displacement of 1998. Principle 29 reads, 'Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement'.⁶² For the internally displaced one can therefore deduce at a minimum a duty to

59 Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. UNGA, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985) UN Doc A/40/53 (1985) [8].

60 Shelton also notes that the remedy of rehabilitation was included in the Basic Principles but logically not in the ILC Principles for State-to-State reparation. Ibid 66.

61 UNCHR Res 77 (1993).

62 See Principle 29 of ECOSOC 'Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2.

take steps to provide restitution. Simon Bagshaw notes that this does not necessarily amount to a right since the compilation behind the Principles ‘acknowledges that a right to restitution of property or compensation for its loss is not fully recognized’ but ‘identifies a number of developments ... which point towards a right to compensation as well as to an emerging right to restitution’.⁶³ Thus, the Commission appears to endorse an emerging but not fully fledged right for the internally displaced.

The clearest recognition in a multilateral fora has come from the 2006 Protocol on the Property Rights of Returning Persons.⁶⁴ This was formulated at the International Conference on the Great Lakes Region and signed by the Presidents of Angola, Burundi, the Central African Republic, Congo, the Democratic Republic of Congo, Kenya, Rwanda, Sudan, Uganda, Tanzania and Zambia. Not only does the Protocol explicitly mention and base itself on the Pinheiro Principles⁶⁵ but it reflects much of its substantive content. The rights of refugees and displaced persons are framed in general terms and include internally displaced persons fleeing from the effects of ‘development-induced displacement’. The Protocol also places attention on returning spouses, children and orphans and attaches model legislation for return and restitution that is to be adopted by each State. Thus, ten States which are acutely faced with the problem of displacement have unequivocally adopted the Pinheiro Principles. This counts considerably when weighing such sources for international customary law. But it would require similar forms of clear recognition before multilateral sources in themselves ground a general right to restitution as articulated in the Pinheiro Principles.

Jurisprudence

In terms of jurisprudence, the position is equally unsettled. Courts and quasi-judicial bodies have increasingly been asked to order restitution as a remedy for displacement. These cases arise under a wide range of human rights. We take a short tour through two international mechanisms to see when they have ordered restitution in cases of displacement.

63 S Bagshaw, ‘Property Restitution for Internally Displaced Persons: Development in the Normative Framework’ in *Leckie* (n 1) 391.

64 See Article 2 of Protocol on the Property Rights of Returning Persons (2006).

65 Article 3.3 states that ‘Member States shall ensure that the property of internally displaced persons and refugees shall be protected in all possible circumstances against arbitrary and illegal appropriation, taking into account the United Nations Principles on Housing and Property Restitution’.

States parties to the International Covenant on Civil and Political Rights (ICCPR) are obligated to provide an effective remedy in case of a violation of the human rights protected in that instrument.⁶⁶ The UN Human Rights Committee's General Comment No. 31 explicitly provides for the possibility of restitution as a remedy if a violation of the ICCPR rights is established.⁶⁷ The Committee has largely addressed the question of property-based restitution in connection with violations of the right to equality and has often been critical of attempts to limit restitution in national programmes. In the case of *Simunek et al v The Czech Republic*, which involved denial to a former Czech citizen of their property in the Czech Republic, it decided that the restitution should not be predicated on return or current citizenship. When redistributing property, the State could not arbitrarily decide on the legal status of the dispossessed property owners as a way of determining those eligible for restitution.⁶⁸

The European Court of Human Rights has been more circumspect on the question. This is clear in its decision in *Gratzinger and Gratzingerova v the Czech Republic*⁶⁹ which concerned a similar case involving exclusion of non-citizens. The Court found that the State's restitution programme did not contravene any rights or freedoms guaranteed under the European Convention for the Promotion and Protection of Human Rights and Fundamental Freedoms (ECHR or Convention). The finding is particularly surprising given that the Convention recognises every person's right to peaceful enjoyment of one's possessions.⁷⁰ But in *Van der Mussele v Belgium* the Court justified its position on the basis that Article 1 of Protocol 1 only protects *existing* possessions.⁷¹ However, the Court has not always been consistent on this point. In *Loizidou v Turkey*⁷² the Court not only invalidated Turkey's expropriation laws but ordered Turkey to return Loizidou's property.

66 See article 2(3) of the ICCPR.

67 UN Human Rights Committee, 'General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 [16].

68 *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic* (1995) Communication No. 516/1992, UN Doc CCPR/C/54/D/516/1992. In *Dr Karel Des Fours Walderode v The Czech Republic* (21 November 1996) No. 747/1997 UN Doc CCPR/C/73/D/747/1997, the Committee reiterated its earlier finding in *Simunek*. A requirement of citizenship for restitution of property was held to be arbitrary. According to the HRC, citizens and non-citizens suffered equally from communist-inspired State confiscations and this distinction was not justifiable.

69 *Gratzinger and Gratzingerova v Czech Republic* (App no 39794/98) (2002).

70 For an analysis of the differing results, see P Macklem, 'Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16 *European Journal of International Law* 1.

71 *Van der Mussele v Belgium* (App no 70) (1983) [48].

72 *Loizidou v Turkey* (App no 15318/89) (1996).

While the Court is unpredictable on the question of restitution, it is possible to discern some sort of pattern to the Court's reasoning which perhaps captures the current and developing state of international law. First, that the Court expresses a formal preference for restitution but has often left the final word to the State or the State-constituted Committee of Members which oversees implementation of judgments.⁷³ For example, in *Akdivar et al v Turkey*⁷⁴ it stated that 'a breach imposes, on the respondent State a legal obligation to put to an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach...'⁷⁵ but deferred to the Committee of Ministers to assess the feasibility of *restitution in intergrum*. Secondly, there has been an increasing tendency since the 1990s to order restitution, particularly where there is evidence of systemic violations,⁷⁶ which is of particular relevance to the Pinheiro Principles.

V. Specific Areas of International Law

Given the inconclusive nature of the general multilateral expressions and case-driven jurisprudence, we need to look elsewhere. When one examines other international law sources that deal with restitution and displacement, a clear and different theme emerges. The golden thread is a situation of armed conflict, which can be found running through modern peace agreements to multilateral resolutions. Moreover, it is arguable that systemic and arbitrary eviction on particular grounds, often under authoritarian regimes, falls into this category along with the land and territorial rights of indigenous peoples.

Post-Conflict

If one turns to some sources of international law dealing with armed conflict, the language concerning restitution changes dramatically. Take this statement from the UN Security Council in Resolution 1287 on Abkhazia where it:

73 *Papamichalopoulos v Greece* (App no 14556/89) (1993) Series A no 260-B.

74 *Akdivar et al v Turkey* (App no 21893/93) (1996).

75 *Ibid.*

76 *Broniowski v. Poland*, Friendly Settlement (Appl. No. 31443) (2005).

8. Reaffirms the unacceptability of the demographic changes resulting from the conflict and the *imprescriptible right of all refugees and displaced persons affected by the conflict* to return to their homes in secure conditions, in accordance with international law and as set out in the Quadripartite Agreement of 4 April 1994 (S/1994/397, annex II), and calls upon the parties to address this issue urgently by agreeing and implementing effective measures to guarantee the security of those who exercise their unconditional right to return, including those who have already returned. (Emphasis added)

Here, the Security Council unmistakably characterises a substantive form of return to one's homes as a human right. Not only does it use the word 'right' but prefaces it with 'imprescriptible', and in another resolution with 'inalienable'.⁷⁷ These terms are commonly attributable to human rights.

In this sub-section, we will examine a series of multilateral resolutions after first noting the rise of restitution in bilateral peace agreements and voluntary repatriation agreements and related national practice. What is interesting to note is that in cases of conflict, there is increasingly no separation made between refugees and *internally* displaced persons. The standard phraseology is 'refugees and displaced persons'.

Peace Agreements

State to State practice in the field of *peace agreements* has a long history of including restitution for refugees and displaced persons who lost their movable and immovable properties. For example, in the 1794 Treaty of Amity, Commerce and Navigation between Great Britain and the United States, American colonialists loyal to the British Crown who were granted the right to claim either restitution of their properties they had abandoned in the independence war or compensation for any commercial losses.⁷⁸ Similar examples can be found in the 1648 Treaty of

⁷⁷ UNSC Res 1287 (2001) UN Doc S/RES/1287.

⁷⁸ See generally M. Lynk 'The Right to Compensation in International Law and the Displaced Palestinians' located at <<http://www.arts.mcgill.ca/MEPP/prn/papers/mlink.html>> 4.

Westphalia,⁷⁹ the 1678 Treaty of Nimeguen between Spain and France,⁸⁰ the 1839 Treaty of London concerning the independence of Belgium⁸¹ and the 1920 Peace Treaty with Turkey.⁸²

However, restitution was framed and institutionalised as a State duty, not a right. Individuals could not legally enforce the obligations under these agreements until ad hoc arbitration and permanent human rights systems began to respectively develop in the early and late twentieth century. Moreover, over the last few centuries numerous peace treaties and other agreements have omitted mention of restitution and instead sanctioned or even authorised population transfers based on ethnic and national grounds. For instance, in the 1922 Greece and Turkey peace treaty which provided for the relocation of 2 million ethnic Greeks from Turkey and 500 000 ethnic Turks from Greece.⁸³

This patchwork of practice is partly visible in the *immediate* post-World War II period. Already in 1943, the Allied Nations recognised their duties under international law to protect the property interests of the Axis refugees with reference to

79 Treaty of Westphalia located at <<http://www.law-ref.org/WESTPHALIA/article12.html>>; see in particular Articles 6–10.

80 ‘All Subjects of the one part as well as the other, both Ecclesiastik and Secular, shall be re-established in the enjoyment of their Honour, Dignities and Benefices of which they were possessed of before the War as well as in all their Efforts, Movables and Immovables and Rents and Lives seized and occupied from the said time as well on the Occasion of the War as for having followed the contrary Party. Likewise in their Rights, Actions, and Successions fallen to them, thought since the War commenced without nevertheless, demanding or pretending anything of the Fruits and Revenues coming from the seizing of the said Effects, Immovables, Rents and Benefits till the publication of this present Treaty.’

81 ‘The Sequestrations which may have been imposed in Belgium during the troubles, for political causes, on any property or Hereditary Estates whatsoever, shall be taken off without delay, and the enjoyment of the Property and Estates abovementioned shall be immediately restored to the lawful owners thereof’ (Article XVI).

82 ‘The Turkish government solemnly undertakes to facilitate to the greatest extent the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacres or any other form of pressure since January 1st, 1914. It recognises that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered must be restored to them as soon as possible, in whatever hands it may be found. Such property shall be restored free of all charges or servitudes with which it may have been burdened and without compensation of any kind to the present owners or occupiers...’ (Article 44).

83 The ‘Convention Concerning the Exchange of Greek and Turkish Populations, 30 July 1923, reproduced in 2 Treaties of Peace, at 653 United Nations Conciliation Commission For Palestine, ‘Historical Precedents For Restitution of Property or Payment of Compensation to Refugees’, (18 March 1950) UN Doc A/AC.25/w/41 (Historical Precedents).

earlier classical peace treaties.⁸⁴ However, forced population transfers also featured. Forced population transfer was visited on groups ethnically tied to the aggressors. Thus, the Potsdam Declaration issued by the Allied Power provided for the 'orderly and humane' removal of German populations in Poland, Czechoslovakia, Hungary and Austria to Germany. This affected 15 million ethnic Germans with approximately 2 million dying in the process and many facing hunger, homelessness, unemployment and discrimination. Likewise, population transfer was effected in practice in the 1947 partition of India although the Pakistan and Indian governments agreed on the *principle* that the refugees still owned the property they were leaving behind.⁸⁵

Nonetheless, there is a clear shift in subsequent peace agreements in the post-World War II period.⁸⁶ The right to housing, land and/or property restitution has been incorporated in numerous peace agreements after conflicts in States such as Tajikistan, Georgia,⁸⁷ Burundi,⁸⁸ Rwanda, Liberia, Sierra Leone, Mozambique,⁸⁹ Guatemala⁹⁰ and Bosnia and Herzegovina. In many of these agreements the duty or right is clear. The 1992 General Peace Agreement for Mozambique, which ended seventeen years of civil war that left an estimated 900 000 people dead and hundreds of thousands forcibly displaced, provides that 'Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them

84 See *Historical Precedents* (n 82).

85 Ibid [11].

86 See T Rempel, 'Housing and Property Restitution: The Palestinian Refugee Case' in *Leckie* (n 1) 315.

87 'Returnees shall, upon return, get back immovable and movable properties they left behind and should be helped to do so'. See Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons signed on 4 April 1994 between Abkhazia and Georgian Sides, the Russian Federation and the UNHCR <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/MHII-65AA7P?OpenDocument>>.

88 In the case of displaced Burundian refugees, Article 2(2) of Protocol VI of the Arusha Peace and Reconciliation Agreement provided that 'All sinistres wishing to do so must be able to return to their homes' <http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html>.

89 See Article 8 of the Tripartite Agreement between the Government of Mozambique, the Government of Zimbabwe and the United Nations High Commissioner for Refugees for the Voluntary Repatriation of Mozambican Refugees from Zimbabwe signed in Maputo on 22 March 1993 <<http://www.unhcr.org/refworld/country,,UNHCR,,MOZ,456d621e2,3ee884a74,0.html>>.

90 The Agreement on the Resettlement of the Population Groups Uprooted by the Armed Conflict in Guatemala, 17 June 1994, states: 'In particular the case of abandonment of land as a result of armed conflict, the Government undertakes to revise and promote legal provisions to ensure that such an act is not considered to be voluntary abandonment and to ratify the inalienable nature of landholding rights. In this context it shall promote the return of land to the original holders and/or shall seek adequate compensatory solutions.' <http://www.usip.org/library/pa/guatemala/guat_940617.html>.

which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it'.⁹¹

In the case of Bosnia and Herzegovina, the Dayton Peace Agreement went further and created an institutional framework for restitution for refugees and displaced persons in addition to guarantees of the right to return to homes of origin and restoration of property. The Commission on Real Property Claims was given a remit under the Agreement to 'receive and decide any claims for real property ... where the property has not been voluntarily sold or otherwise transferred ... and where the claimant does not now enjoy possession of that property'.⁹² The Commission is often heralded as a blueprint and was a key part of the process in helping 442 168 refugees and 570 152 internally displaced persons return by 2006.⁹³ Moreover, Article 5 of the 1995 Constitution of Bosnia and Herzegovina specifically recognised the right to restitution for those who 'were deprived in the course of hostilities since 1991'⁹⁴ and the Agreement established a Human Rights Chamber of the European Court of Human Rights for Bosnia and Herzegovina. The latter delivered notable judgements on refugee and displaced persons' property issues. For example, in *Branko Medan and Others*, it found that the passing of legislation for the retroactive nullification of the Applicants' contracts for the purchase of their apartments involved violations of the Applicants' right to peaceful enjoyment of possessions rights under the first protocol to European Convention on Human Rights and the Dayton Accord.⁹⁵ A similar commission was later established in Kosovo and processed almost thirty thousand claims although its mandate and coverage were limited.⁹⁶

However, in some of these agreements, the duty is framed less robustly. Parties to the 2003 Liberia Agreement only committed themselves 'to create the condi-

91 See Article IV(e) of the General Peace Agreement For Mozambique signed at Rome on 4 October 1992 <http://www.usip.org/library/pa/mozambique/mozambique_10041992_gen.html>.

92 See Annexure 7 of the General Framework Agreement For Peace in Bosnia and Herzegovina, signed in Paris on 14 December 1995, 35 ILM (1996) 75.

93 UNCHR Representation in Bosnia and Herzegovina, Statistical Summary, 28 February 2006.

94 See Article II [5] of the Constitution of Bosnia and Herzegovina adopted on 1 December 1995 <http://www.servat.unibe.ch/icl/bk00000_.html>.

95 See *Branko Medan, Stjepan Bastijanovic and Radoslav Markovic v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Cases nos CH/96/3, 8 and 9). See also *Ivan Vidovic et al v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (Cases nos CH/98/174, CH98/180, CH/98/268, CH98/280) <<http://www.user.gwdg.de/~ujvt/hrch/0000-0999/0174admmmer.html>> and *Dusan Erakovic v the Federation of Bosnia and Herzegovina* (Case no) (1999).

96 *Cordial* (n 6); M Cordial and K Rosandhaug, 'The Response of the UN Interim Administration Mission in Kosovo to Address Property Rights Challenges' in *Leckie* (n 1).

tions that will allow all refugees and displaced persons to ... return to their places of origin or habitual residence under conditions of safety and dignity.⁹⁷ The 1990 Rwandan Peace Agreement provided for property and housing restitution for refugees and displaced persons but, controversially, limited to property abandoned in the last ten years.⁹⁸

Attaining a quantitative perspective on the rise of restitution in peace agreements is difficult. In a study of peace agreements from 1980 to 2006, Vinjamuri and Boesenecker find a noticeable rise in the inclusion of transitional justice mechanisms. Of 77 agreements, 130 discrete mechanisms were included.⁹⁹ Their research reveals though that only eight agreements (5 per cent) addressed property losses and restitution. However, in a more confined period of 1991 to 2004 (which covers 56 peace agreements), Leckie comes to a much higher figure of fourteen (25 per cent).¹⁰⁰ Leckie includes agreements which explicitly or implicitly reaffirm restitution as a right even if they do not include specific mechanisms. This figure is most relevant for our purpose and may actually be conservative – it is not clear that Leckie has surveyed all the agreements.¹⁰¹

Moreover, it is notable that the rise of restitution in peace agreements in the period has coincided with a dramatic fall in the incidence of population transfers. It is now viewed as ‘ethnic cleansing’ and its attempted use during the Turkish–Cypriot war of 1974 and the various post-Yugoslav conflicts was strongly criticised by the international community. ‘Deportation or forcible transfer of population’ is now listed as a crime under the Rome Statute and is defined in Article 7 (2)(d) as ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law’. Still, some scholars, seeking to contest claims for restitution such as those by Palestinians displaced in 1948 from the creation of the

97 See ‘Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building’ (Report of the Brookings Institution-University of Bern Project on Internal Displacement) (September 2007) <<http://www.brookings.edu/reports/2007/09/peaceprocesses.aspx?more=rc>> 30.

98 Peace Agreement between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons. See discussion in Lisa Jones, ‘Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda’, in *Leckie* (n 1) 199–224.

99 L Vinjamuri, Aaron Boesenecker, *Peace Agreements and Accountability: Mapping Trends from 1980 to 2006* (Centre for Humanitarian Dialogue, Geneva 2007).

100 S Leckie (ed), *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases and Materials* (Cambridge University Press, Cambridge 2007).

101 The overwhelming majority of agreements are between a State and non state actor and may be difficult to access.

Israeli State, have attempted to highlight the positive aspects of forced population transfer in international agreements. Eyal Benvenisti argues, in a rather strained fashion, for it on the basis that population transfer ensures that a State can manage levels of majorities and minorities for its future sustainability.¹⁰²

UN General Assembly and Security Council

Of greater import is the multilateral practice of the UN Charter bodies. One author has tracked 33 different General Assembly resolutions between 1946 and 2005 that refer to restitution.¹⁰³ In some cases the right is clearly affirmed, such as in the Resolution on The Situation in the Occupied Territories of Croatia (1994),¹⁰⁴ while in other cases the language is more general.¹⁰⁵ This recognition of restitution rights began as early as 1948, where the UN General Assembly Resolution 194(III) affirmed the right of return of Palestinian refugees fleeing conflict over the creation of the State of Israel. Referring to international law at the time, the General Assembly noted that ‘refugees wishing to return to their homes ... should be permitted at the earliest practicable date, and ... compensation should be for the property of those choosing not to return ... which under the principles of international law should be made good by the Government or authorities responsible.’¹⁰⁶ It is worthwhile to note that they clearly stated the refugee or displaced person’s right to return to ‘his/her house or lodging and not to his or her homeland’ and rejected two separate amendments that referred in more general terms to the return of refugees to the ‘areas where they come from’.¹⁰⁷

Some scholars read the resolution differently. Benvenisti points to the use of the word ‘should’ in the resolution and the more positive reaction by Israel than Arab States to its passage. He argues that the resolution left significant policy space for Israel and other States to come up with solutions that might not in-

102 Eyal Benvenisti, ‘The Right of Return in International Law: An Israeli Perspective’, (Stocktaking Conference on Palestinian Refugee Research, Ottawa, Canada, 17–20 June 2003).

103 Leckie, Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons (n 99).

104 Resolution 49/43.

105 UNGA Res 1672 (18 September 1961).

106 See also the then UN mediator for Palestine Count Folke Bernadotte’s report on the Right to Repatriation: ‘Progress Report of the United Nations Mediator on Palestine’ (1948) UN Doc.A/648.

107 See ‘The Meaning of General Assembly Resolution 194 (III), 11 December 1948 (The Right To Return)’ (BADIL Occasional Bulletin) (11 April 2002) Report No 11 <<http://www.badil.org/Publications/Bulletins/Bulletin-11.htm>> 2.

volve restitution. However, the General Assembly removed any doubt over this interpretation in subsequent resolutions. In 1974, it reaffirmed 'the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted'¹⁰⁸ and repeated it again in 1982 and declared 'once more that any attempt to restrict or to attach conditions to the free exercise of return by any displaced person is inconsistent with their inalienable right and inadmissible'.¹⁰⁹

The Security Council has iterated and reiterated the right to land, housing and property restitution on several more occasions. The Security Council has strongly cautioned against the forcible expulsions of persons from the areas where they live and attempts to change the ethnic composition of the population as well as affirming the right of the victims of conflicts and the displaced to voluntarily return to their homes.¹¹⁰ Within the context of forced displacements in the former Yugoslavia, the Security Council reaffirmed its 'endorsement of the principles that all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void and that all displaced persons have the right to return in peace to their former homes and should be assisted to do so'.¹¹¹ In further resolutions on Georgia (1993), Croatia (1994), Tajikistan (1995), Kosovo (1998) and Bosnia and Herzegovina (2001) the right of refugees and forcibly displaced persons' right to return in dignity to their lands, homes and property was affirmed.

Indigenous Peoples

While an increasingly consistent practice in armed conflict situations has emerged over the last century, the rights of indigenous peoples to restitution has been a more recent phenomenon. In 2007, the General Assembly adopted the Declaration on the Rights of Indigenous Peoples.¹¹² Structured like a treaty, the provisions

108 UNGA Res 3236 (22 November 1974).

109 See UNGA Res 37 (16 December 1982) titled United Nations Relief and Works Agency for Palestine Refugees in the Near East.

110 UNSC Res 752 (15 May 1992).

111 See UNSC Res 820 (17 April 1993). See also Security Council Resolutions 876 (Georgia) (19 October 1993), 947 (Croatia) (30 September 1994), 999 (Tajikistan) (16 June 1995), 1199 (Kosovo) (23 September 1998), 1357 (Bosnia and Herzegovina) (21 June 2001) in which the right of refugees and forcibly displaced persons' right to return in dignity to their lands, homes and property has been affirmed.

112 UN Doc A/RES/61/295v.

on ancestral lands and restitution have been described as quite ‘far-reaching’.¹¹³ Article 26 sets out the general right to ancestral land, in particular that ‘Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.’ Article 27 sets out the obligations of States to establish mechanisms for domestic recognition of these rights while Article 28 clearly preferences restitution as a remedy:

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*,¹¹⁴ 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. (Emphasis added)

What is particularly interesting is the manner in which remedies for violations of other rights in the Declaration are articulated. For example, restitution for redress for ‘cultural, intellectual, religious and spiritual property’ that has been obtained without consent is only listed as a remedial option.¹¹⁵ When it comes to human remains, it is the opposite. There is a clear and unequivocal right to restitution which is expressed more strongly than the case of land.¹¹⁶ This legal drafting suggests that the strength of a restitution remedy or right is conditioned by the nature of the human rights violation. Thus, the Declaration on Indigenous Peoples gives weight to an argument that in the case of land and property, restitution is the *preferred* remedy; not paramount but not optional either.

The earlier ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) is slightly more specific on the topic of restitution. However, there is debate over whether it provides a right to restitution *per se*.¹¹⁷

113 A Eide, ‘Rights of indigenous peoples – achievements in international law during the last quarter of a century’ (2007) 4 *Journal of Indigenous Peoples Rights*, 40 72–73.

114 Note that land is also the preferred means of compensation: ‘Article 28.2. 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.’

115 ‘States shall provide redress through effective mechanisms, which may include restitution’ (Article 11(2)).

116 Article 12 states that indigenous peoples have the ‘the right to the repatriation of their human remains’.

117 M Fitzmaurice, ‘Book Reviews: Alexandra Xanthaki, *Indigenous Rights and United Nations Standards, Self-Determination, Culture and Land*’ (2008) 19(4) *The European Journal of International Law* 859.

Article 14 provides that the ‘rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised’ and ‘[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.’ At a minimum, this implies that there is a requirement for a government to set in train the procedures that may lead to restitution of land and territory.

However, some argue that read together with subsequent provisions, Article 14 grounds a much stronger right. Article 16 in particular provides that ‘peoples concerned shall not be removed from the lands which they occupy’ and that ‘[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’ or that other land or compensation can be provided if agreed between the parties or determined by adjudication. Anaya therefore argues that restitution relates to previous dispossession: ‘the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to natural resources’.¹¹⁸ Xanthaki is more cautious. She argues that restitution only applies to contemporary relocation and ‘that the Convention does not go so far as giving indigenous peoples who lost their lands the right to restitution’.¹¹⁹

The curious difference in the opinions of both these authors, which underlines the dynamic circularity of international law, is that both partly derive their position from the general status of restitution in international law. Xanthaki claims that ‘[t]he right to restitution is not well established in international law, even though compensation is’.¹²⁰ Anaya refers instead to the emerging jurisprudence in the UN Human Rights Committee and Inter-American Court of Human Rights which affirms that indigenous groups have a right to a ‘continuing relationship with the lands and natural resources according to traditional patterns of use or occupancy’.¹²¹

Turning to this regional jurisprudence, the Inter-American Court on Human Rights in *Moiwana Community v Suriname*¹²² dismissed the State’s argument that the right to land restitution of the indigenous people was time-barred. It concluded

118 J S Anaya, *Indigenous Peoples in International Law* (Oxford University Press, Oxford 1996) 107.

119 A Xanthaki, *Indigenous Rights and United Nations Standards, Self-Determination, Culture and Land* (Cambridge University Press, New York 2007) 265.

120 *Ibid* 264.

121 *Anaya* (n 117) 106.

122 *Moiwana Community v Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 124 (15 June 2005).

that if the State is directly responsible for the original displacement of the population and does not facilitate for their safe return, the right to claim restitution is not lost. In *Sawhoyamaxa Indigenous Community v Paraguay*,¹²³ the Court recognised that indigenous peoples had a right to restitution since indigenous property is equivalent to state-granted full property title. Traditional possession therefore entitles indigenous people to demand official recognition and registration of property title.¹²⁴ Crucially, in coming to these findings, the Inter-American Court has reasoned that the indigenous peoples' right to restitution for the loss of their land is related to their unique dependency on and relationship with land.

Likewise, in *Centre for Minority Rights Development (Kenya) & Ors. on behalf of Endorois Welfare Council v Kenya*,¹²⁵ the African Commission on Human and Peoples' Rights confirmed the importance of restitution as a remedy for displaced indigenous people. The Kenyan government evicted the Endorois people, a traditional pastoralist community, from their homes at Lake Bogoria in central Kenya in the 1970s, to make way for a national game reserve and tourist facilities. The Commission determined that the Endorois people, having a clear historic attachment to the land, are a distinct indigenous people. The Commission ordered Kenya to recognise the rights of ownership and restore the Endorois people to their historic land among other orders.

Anaya's position is also supported by emerging national jurisprudence. In *Mabo v Queensland (No. 2)*,¹²⁶ the High Court of Australia handed down the seminal and watershed judgement on indigenous peoples' title to native land under Australian law. The Court held that the common law of Australia recognises a form of native title, to be determined in accordance with indigenous traditional law and custom. The Court further characterised native title as being able to be possessed by a community or individual depending on the content of the traditional laws and customs; inalienable other than by surrender to the Crown; and ranging from access and usage rights to rights of exclusive possession. Native title rights and interests were held to be based on laws and customs that pre-dated colonial expropriation.

123 *Sawhoyamaxa Indigenous Community v Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 146 (29 March 2006).

124 The exception is where lands have been lawfully transferred to third parties in good faith. In these cases, members of indigenous peoples who have been forcibly displaced from their lands are entitled to restitution thereof or to obtain other lands of equal extension and quality.

125 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights Communication No 276/2003.

126 *Mabo v Queensland* (1992) HCA 23; (1992) 175 CLR1.

Since then, many national courts have followed suit. In *Delgamuukw v The Queen*,¹²⁷ the Supreme Court of Canada ruled that absent extinguishment or surrender, aboriginal people have aboriginal title to lands they exclusively occupied at the time of colonisation. The Court thus recognised the existence of aboriginal title to the territory in question. In *Roy Sesana & Anor. v Attorney General*,¹²⁸ the High Court of Botswana held that the removal of the indigenous Basarwa San Community living in the Central Kalahari Game Reserve was unlawful after the indigenous community argued their right to remain on their ancestral lands. In *Richtersveld Community v Alexk Ltd and Government of the R.S.A.*¹²⁹ the South African Constitutional Court found that Richtersveld Community's customary right to ownership of its customary lands had survived the annexation by the British Crown. In *Adony Bin Kuwau v Kerajaan Negeli Johor*, the High Court of Malaysia ruled that the indigenous community had native title to the land in question, which meant the right to live on their ancestral lands. The Court stated that '...in Malaysia the aborigines'... rights includes, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the Aboriginal peoples would be entitled to this right'.¹³⁰

The above discussion indicates that a right to restitution for indigenous peoples is clearly emerging in international law. At a minimum it provides protection against contemporary displacement and a requirement for States to establish the procedures to address historical injustices and displacements while at its potential fullest it provides a stronger bundle of substantive rights to restitution for such prior displacements.

Systemic and Arbitrary Eviction under an Authoritarian Regime

If one peers below the surface of multilateral international standards and beyond peace agreements, a third potential field of restitution rights looms. Although the sources are slightly less abundant and more difficult to assemble into a coherent category, they all share the quality of systemic-based eviction on arbitrary grounds. Moreover, all of these sources arise in the situations of post-authoritarianism, which is interesting from the perspective of transitional justice. While the quality of democratic arrangements is not the explicit determining factor for

127 [1997] 3 S.C.R. 1010.

128 Case No 52/2002 (13 December 2006).

129 Case No 488/2001 (24 March 2003).

130 (1997) 1 MLJ 418 (1998)2 MLJ 158.

restitution, virtually all of these restitution rights are time limited to displacement under an authoritarian regime, suggesting that the right is *context* specific. We can distinguish three consistently occurring sub-contexts where restitution rights are recognised.

The first group are those displaced based on political opinions or opposition to a regime. An early example is the 1949 General Claims Law passed by the US in its occupied zone of Germany:

Those persons shall be entitled to restitution pursuant to this law, who, under the Nationalist Socialist Dictatorship ... were persecuted because of political convictions ... and have therefore suffered damage to ... possessions, property or economic advancement.¹³¹

In the British-Occupied Zone of Germany, the 1949 Restitution of Identifiable Property to Victims of Nazi Oppression (Law No. 59) also provided for restitution for those who were ‘unjustly deprived’ of property due to ‘political views, or political opposition to National Socialism’.¹³² In both Allies and Axis-occupied countries numerous property restitution laws were passed to victims of Nazi disposessions.¹³³ The Czechoslovakian Presidential Decree of 1945 nullified property transactions made ‘during the period of bondage’, the Yugoslavian Decree of 1945 created a procedure to reclaim property by owners forced to leave during occupation ‘as well as property seized by the occupants or their helpers’ and the France’s Decree of 14 November 1944 concerning property restitution. In contemporary times, invocation of political persecution can be found in the 2006 Iraqi Statute of the Commission for the Resolution of Property Disputes (concerning the previous Baathist political regime).

A second commonly mentioned factor is ethnicity, or rather ‘race and religion’. The order in British-Occupied Zone of Germany in 1949 for example referred to ‘race, religion, nationality’.¹³⁴ Decree No. 19 of 1944 of Romania and Italian Decree No. 5 of 1944 covered restitution of property to its Jewish owners. In

131 *Historical Precedents* (n 82) 5.

132 *Ibid.*

133 *Ibid.* 6. The Hungarian, Bulgarian and Romanian Peace Treaties also imposed a duty to return ‘in the shortest possible time, property removed from any of the United Nations’. See Alfred Drucker, ‘Book Review of Istavan Vasarhelyi, *Restitution in International Law* (Akademiaio Kiado, the Publishing House of the Hungarian Akademy of Sciences, Budapest 1964)’ 15 *Int’l & Comp. L.Q.* 263–269.

134 *Ibid.*

2000 in Kosovo, regulations extended restitution to victims who had lost property between 23 March 1989 and 24 March 1999 'as a result of discrimination'.¹³⁵ In South Africa, the Constitution specifically provides for land restitution in these circumstances, where: 'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled ... to the restitution of that property or to equitable redress'.¹³⁶ This was followed up by the Restitution of Land Rights Act¹³⁷ which provides for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory laws.¹³⁸

A third commonly cited factor is nationalisation or as some laws express it, a lack of monetary *consideration* for loss of property. The fall of the Soviet Empire in the late 80s saw a plethora of property restitution programmes in the Baltic States, Romania, Albania, Hungary, Bulgaria and elsewhere which sought to undo much of the nationalisation of property in the early years of communist rule.¹³⁹ In the Czech Republic, for example, the Small Federal Restitution Act of 2 October 1990 deals with all kinds of small-scale nationalisations, particularly those in the 1950s, whilst other legislation enabled restitution of larger or other properties as a result of illegal State interference against property and people after 25 February 1945, the day the communist authorities assumed power.¹⁴⁰ As discussed, the eligibility criteria were controversially limited to both citizens and permanent residents of the Czech Republic. However, the laws did try to protect subsequent purchasers.¹⁴¹

While each of these categories is partly discrete (particularly the third), it is

135 Section 2, General Principles.

136 Ibid. The cut-off date of 19 June 1913 reflects the date when the Native Land Act was enacted, a rather malevolent piece of legislation which created reserves for Blacks and prevented the sale of White territory to Blacks and vice versa.

137 Act 22 of 1994.

138 Ibid, see Preamble.

139 See R C Williams, 'The Contemporary Right to Property Restitution in the Context of Transitional Justice' (Occasional Papers Series, International Centre For Transitional Justice May 2007) <http://www.brookings.edu/articles/2007/0531propertyrestitution_williams.aspx> 11.

140 Ibid.

141 'The (restitution laws) balanced the relationship between former and subsequent owners, with claimants entitled to either restitution or compensation depending on the nature of subsequent use of the property. Subsequent purchasers were protected from loss of claimed property unless demonstrated to have acquired the property illegally or through personal involvement in the persecution of the former owners.... In addition, tenants living in restituted apartment buildings were protected from eviction or rent increases.'

interesting to note that in some jurisdictions they are articulated together. For example, Iraq's Statute provides an automatic right to restitution during the period of the Baathist regime although the burden of proof is considerably lowered if dispossession occurred for political and ethnic reasons.¹⁴²

This provision is based on an earlier order by the Coalition Provisional Authority which represented the numerous States who participated in the invasion of Iraq. Likewise, agreements between the two Germanic States since 1990 provided an umbrella clause for restitution. And Estonia's restitution law, on the other hand, almost replicates the Pinheiro Principles: 'property which was expropriated through *unlawful repression or by any other method* which violated the rights of the owner'.¹⁴³

VI. Conclusion

This paper has analysed the various sources in international customary law to assess whether the claim of the Pinheiro Principles of a right to restitution can be sustained. The method has departed from other approaches by dividing up sources according to the context for the articulation of the right to restitution: whether it is a general right or right articulated in a particular circumstance. The above survey demonstrates that the composite method of assembling all sources to justify a right to restitution and preferred remedy is difficult. The language of obligations, rights and remedies differs markedly between the different contexts. In the case of armed conflict, a clear right to restitution is regularly expressed. At the other end, a general restitution right or remedy is dealt with in vaguer or discretionary terms. The cases of indigenous peoples and systemic and arbitrary eviction fall in between.

Such fragmentation of the right to restitution should not be surprising. Situations of armed conflict occupy a special place in international law. The first

142 'Any person, natural or judicial, or their heirs, may submit a claim to the IPCC so long as the claim: (1) Arose between July 17, 1968 and 9 April 2003 inclusive; (2) involves immovable property, easements or servitudes ('real property', or an interest in real property; (3) That was confiscated, seized or expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner's or possessor's opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for the purpose of ethnic cleansing, shall meet this standard.'

143 Section 3(3) Republic of Estonia Principles of Ownership Reform Act 1991.

objective of States in the United Nations Charter is to provide international peace and security and the remit of the Security Council is limited by this objective. Armed conflict situations also regularly engage State-constituted UN organs due to their transboundary character or the involvement of peacekeeping and other international operations.

At the same time, the sources reveal a state of flux. States are increasingly articulating restitution as a right in cases of indigenous peoples and systemic eviction for particular grounds, usually under authoritarian regimes. A generous interpretation of international law would hold that restitution would usually be a preferred remedy or right in such circumstances as well as armed conflict. Indeed, this seems to be the position of the Committee on the Elimination of Racial Discrimination (CERD). In its General Recommendation No. 22 on refugees and displaced persons in the context of 'foreign military, non-military and/or ethnic conflicts' it stated that 'refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict.'¹⁴⁴ In its subsequent General Recommendation on the rights of indigenous people it called:

[U]pon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.¹⁴⁵

However, in its later General Recommendation No. 27 on Discrimination against Roma, which concerns a minority who frequently face arbitrary and forced eviction, there is no mention of restitution.¹⁴⁶

Beyond these three scenarios, the last decade has undoubtedly been witness to statements which simply place emphasis on arbitrary and unlawful displacement

144 See UNCERD 'General Comment No 22' (1996) UN Doc A/51/18.

145 See para 5 of UNCERD 'General Recommendation 23, Rights of Indigenous Peoples' (1997) UN Doc A/52/18, annex V at 122.

146 Contained in UN Doc A/55/18, annex V.

as the trigger for restitution. Notable among these are the ten African States in the International Conference on the Great Lakes Region which recognised the Pinheiro Principles and restitution laws in some States. Equally, the European Parliament has recently made reference to the Pinheiro Principles in its **Resolution 1708 (2010)**. It has called on member States to ‘guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs’ and to ensure that ‘ensure that such redress takes the form of restitution’. However, the emphasis of the resolution is on cases of armed conflict.

From a normative perspective, these recent developments of the general right of restitution in instances of displacement should provide the way forward for legal evolution, particularly given the numbers displaced by development project and natural disasters increasingly occupying a higher proportion of the displaced with the decline of conflict and authoritarian States. But this requires the generation of State consent. For example, States on the Human Rights Council should consider tabling the Pinheiro Principles for discussion, adoption and any clarification. Likewise, they could be taken up in regional forums. While this potentially opens the Pinheiro Principles up to be weakened, they will attain more legal and political legitimacy in the longer term. Moreover, it may present an opportunity to further tweaking and clarification of some of the State and non-State obligations.

Land Restitution in the Emerging Kenyan Transitional Justice Process

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Abstract: Land is identified as one of the core sources of conflict and population displacement in Kenya. The problem is rooted in land policies of continuity adopted by the government at independence, which failed to redress historical land injustices suffered by some African ethnic communities. The emerging Kenyan transitional justice process is a result of the political power-sharing agreement on national accord and reconciliation reached in early 2008 between the main political parties. Its objective is to implement a coherent and far-reaching political and economic reform agenda to address the fundamental root causes of the recurrent conflicts. Among the measures proposed are the establishment of a Truth, Reconciliation and Justice Commission (TJRC) and a National Land Reform Policy, with reparation and restitution as key components. This article analyses the situation of victims of displacement, the transitional justice process and the challenges it faces. It identifies the lack of mechanisms for restitution in both the TJRC and the Land Reform Policy as an obstacle to restitution. Furthermore, as the restitution process moves from the design to implementation stage, other external factors constrain its success.

Keywords: Transitional Justice, Restitution, Land Reform, Land Conflicts, Truth Commission, Historical Injustices, Economic and Social rights.

I. Introduction

Land is an emotive and volatile issue in Kenya because it bears significant political, economic, cultural and emotional value to the lives of the people. Approximately 80 per cent of the population live in the rural areas and depend on land for their livelihood.¹ Their social, cultural and economic activities are connected to land. Even those living in urban areas still maintain emotional ties with the rural land. During public holidays, they trek to rural areas for a break, away from hectic

¹ See United Nations Development Assistance Framework (UNDAF), KENYA, 2004-2008.

urban life. In fact, since the *S. M. Otieno Burial Case* in the 80s, it is common among Kenyans to refer to the urban home just as a ‘house’ and the rural house as the ‘home’.² Furthermore, most Kenyans anticipate to be buried at their rural homes upon death. For many communities, specific parcels of land bear sacred and cultural significance.³

It is also noteworthy that land has even greater significance as concerns economic activities. To the majority of the people, land is the only source of financial income and subsistence. Land is also important for building, housing and for public utility infrastructure such as schools, hospitals, water, recreational facilities, roads among others. Last but not least, land is used as loan collateral and security.⁴ It is a source of money for development and other personal needs. Land means social and economic empowerment.

Unfortunately, land has always been a source of conflict in Kenya. The history of land conflict is not new. It stems from the colonial and post-independence internal displacements. The internal displacement of persons has been a permanent feature of Kenyan history.⁵ The majority of the people perceive the root causes of the problem as the unjust displacements of masses of African people from their indigenous lands by the colonial settlers for their settlement and farming, and the colonial land transfer policies and legislation adopted by the independence government since 1963. At independence, most people expected the return of their ‘stolen’ land, but this did not happen as the new government adopted a ‘willing buyer, willing seller’ land transfer policy as prescribed by the colonial government during the transition to African rule. The policy favoured persons who could purchase land from the departing colonial settlers. Most victims of displacement did

2 Officially the case is known as *Virginia Edith Wambui v Joash Ochieng Ougo and Omolo Siranga* (Civil. Appeal No. 31 of 1987) [1987] eKLR. See also, Winfred Kamau, ‘Law, Pluralism and the Family in Kenya: Beyond Bifurcation of Formal Law and Customs’ (2009) IJLPF1; JW Ojwang and JNK Mugambi (eds), *The S.M. Otieno Case, Death and Burial in Modern Kenya*, (Nairobi University Press, Nairobi 1989); DW Cohen and ES Atieno Odhiambo, *Burying SM, The Politics of Knowledge and the Sociology of Power in Africa* (Social History of Africa Series, Heinemann, Portsmouth NH and James Currey, London 1992).

3 OMCT, ‘The Lie of The Land: Addressing the Economic, Social and Cultural Root Causes of Torture and Other Forms of Violence in Kenya An Alternative Report to the Committee on Economic, Social and Cultural Rights prepared by the World Organisation Against Torture’ (Report) (November 2008) 9 <http://www.omct.org/pdf/ESCR/2008/CESCR_kenya_OMCT_alt_report.pdf> accessed 12 April 2009.

4 Smokin C Wanjala, *Essays on Land law: The Reform Debate in Kenya* (Faculty of Law, University of Nairobi, 2000) 35.

5 Republic of Kenya, ‘Report of the Commission of Inquiry into Post Election Violence (CIPEV)’ (Waki Report) (October 2008) 273.

not benefit from the independence government's land resettlement schemes because they were required to pay for the land. Land was also allocated to politicians and politically-connected individuals sometimes under corrupt circumstances.⁶ The government failed to seriously embrace land restitution as a transitional justice solution despite the fact that the African nationalist movement and the Mau Mau rebellion were essentially motivated by land restitution claims.

The land conflict is embedded in historical injustice perceptions that opposing protagonists exploit politically and ethnically to manipulate and instigate land clashes at every general election year. The land clashes manifested themselves on a large scale for the first time in 1991 and have recurred every five years during general elections. These land clashes have contributed to the second wave of mass displacements experienced in Kenya. The most recent displacements occurred during and in the post-election 2007 chaos.

Previous efforts at land conflict resolution failed because of political wrangling among the political actors. Serious attempts at resolution emerged after the 2007 post-election violence and the subsequent signing of the political power-sharing agreement on national accord and reconciliation reached early in 2008 between the main Kenyan political parties. The agreement forms the basis for a transitional justice process that focuses on the implementation of a coherent and far-reaching reform agenda to address the fundamental root causes of the recurrent conflict. It asserts that, unless the deep-seated and long-standing issues on land that trigger crisis and conflict at every general election are resolved, taking interests of all the parties to the conflict into account, future encounters are inevitable. Among the measures proposed were the establishment of a Truth, Reconciliation and Justice Commission and formulation of a national land policy with reparation and land restitution as key components.

This article examines the emerging transitional justice process in Kenya and the limits of restitution in resolving long-enduring land conflicts and displacements. It also identifies the displaced persons and the causes of their displacement, and explores the design of transitional justice tools bearing implications on land restitution. The article discusses the lack of a specific restitution law in Kenya and

6 Tim OA Mwesele, 'The centrality of land in Kenya: Historical background and legal perspectives', in Smokin C Wanjala (ed), *Essays on Land Law: The Reform Debate in Kenya* (Faculty of Law, University of Nairobi, 2000) 22; UNCHR 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr. Rodolfo Stavenhagen, Submitted Pursuant to Commission Resolution 2005/51' (2007) UN Doc A/HRC/4/32/Add. 3, §60 5; Republic of Kenya 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land' (Ndungu Report) (June 2004); *Wanjala* (n 4) 33.

its implications on land restitution claims. Finally, it reviews the challenges for implementation of restitution with a focus on the roles of the political class, civil society and the international community.

II. Who are the Internally Displaced Persons in Kenya?

The UN Guiding Principles of Internally Displaced Persons define internally displaced persons as:

Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

The definition is broad and can include categories of persons displaced as a consequence of many causes in Kenya. Internal displacement in Kenya is a complex and multi-faceted social problem that revolves around and reflects unresolved issues of land and property, as well as the struggle for the control of political and economic resources.⁷ The answer to the question of who are the internally displaced persons in Kenya depends on the period in focus as displacement has occurred over historical epochs. The first wave of displacements referred to as historical displacements happened during the colonial era. The second wave of displacements took place in the post-independence era and has manifested itself in different forms: political and ethnic land clashes, land border and resources clashes, evictions for development purpose and urban displacement. For our purposes, I will concentrate on the historical displacements and political and ethnic land-based displacements only.

Each kind of displacement raises peculiar problems as regards the identity of victims and perpetrators. Sometimes the two exchange roles: the victims become perpetrators and vice versa. The faces of victims and perpetrators change too with

⁷ Jesse Bernstein and Prisca Kamungi, 'I am a Refugee in My Own Country': Conflict-Induced Internal Displacement in Kenya' (IDMC Report) (19 December 2006) 5 < [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/AF919E45D789BD0BC125724900350687/\\$file/Kenya%20Special%20Report%20Dec06.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/AF919E45D789BD0BC125724900350687/$file/Kenya%20Special%20Report%20Dec06.pdf) > accessed 4 June 2009.

different epochs. The discourse of restitution in Kenya must, therefore, confront the changing realities and narratives of victims and perpetrators.

Historical Displacements

The historical displacements affected many ethnic groups whose land was alienated for colonial settlement and farming in what came to be known as the 'White Highlands'. At the Coast province, Arab landlords displaced local communities in the 'Ten Mile Strip'. Through a number of legislative, administrative and trickery tactics, the Africans in the White Highlands were forcefully pushed into overpopulated and congested native reserves or forced to move into colonial settlers' farms as labourers and squatters.⁸ In the colonial land alienation, the victims were obviously the African people from various ethnic groups whose land was appropriated. The perpetrators were the colonialists and their local agents.

Political and Ethnic Land-Based Displacements

The political and ethnic land-based displacements, which took place between 1991 and 2008, created the second wave of internally displaced persons (IDPs) in the country. The displacements moved these people from their previously settled farms in the Rift Valley and in the Coast provinces, where they had settled after independence. The displacements therefore have a causal link with the colonial and post-independence historical injustices; they also have a political angle. They occur frequently during election years as politicians manipulate land conflicts for political purposes. The displacements are justified by the local communities on the basis of land restitution. In reality, however, they are ethnically and politically oriented. The displaced persons suffer eviction not only because they own land in the 'foreign' regions but also because of their ethnic identity and political orientation; namely, the political party they supported or voted for during the general election. Political parties are ethnicity-based in Kenya and minorities who support their ethnically dominated party tend to offend the majority ethnic group in the region.

Identifying the victims and perpetrators in the political and ethnic land displacements is complex. The victims and perpetrators may have changed status becoming perpetrators or victims depending on their assumed political orienta-

8 The history of colonization and land alienation is fully documented in monumental academic works and it is not useful to recount it here.

tion of the time. It is also difficult to pinpoint who the perpetrators and victims are in a situation of continuing displacement.⁹ The discriminate resettlement of some colonial displaced people and not others has led to a feeling of dispossession and new displacements where some colonial displacement victims have become perpetrators and the beneficiaries of resettlement have become new victims of displacement.

Statistics on Internally Displaced Persons

The exact number of the displaced persons in Kenya remains unknown. There are no records and data of displacements of persons during the colonial era. The displacements were however, massive and affected many communities. As regards ethnic land clash displacements, the estimates available are not conclusive; no scientific collection and correlation of data has been done.¹⁰

The only reliable statistics available are from the internally displaced persons (IDP) profile carried out by the government after the 2007 post-election violence in 2008. According to the data, those displaced from their homes numbered about 663,921 people. The IDP profile carried out by the government did not target all IDPs in the country. IDPs from previous years 1992, 1997 and 2002 were not included. The then government policy of denying that there were any IDPs meant that no effort was made to keep records of the displaced persons.¹¹ The 2008 profile also does not include persons displaced as a result of historical injustice, land borders and resource disputes, evictions on public interest and urban displacements. The government should improve data gathering in order to capture all categories of IDPs and depict the true picture of displacement on the ground.

9 Interview with George Wachira, Senior Researcher and Policy Adviser, Nairobi Peace Initiative – Africa (NPI-Africa), (Nairobi 3 February 2009).

10 John O Oucho, *Undercurrents of Ethnic Conflict in Kenya* (African Social Studies Series vol 3, Brill, Leiden 2002) 178; Binaifer Nowrojee, *Failing the Internally Displaced: The UNDP Displaced Persons Program in Kenya* (Human Rights Watch, New York 1997) 66, puts the figure of those displaced in the 1991–93 ethnic clashes to about 300,000 people. Newspapers had put the number of those displaced in the Likoni clashes in the Coast Province in 1997 to more than 120,000.

11 Prisca Mbura Kamungi, 'The Current Situation of Internally Displaced Persons in Kenya' (Jesuit Refugee Service Report) (March 2001) 22 <[http://www.internaldisplacement.org/8025708F004CE90B/\(httpDocuments\)/56BEB1A41FCB71F6802570B70059408D/\\$file/JRS+REPORT+_April+2001_.pdf](http://www.internaldisplacement.org/8025708F004CE90B/(httpDocuments)/56BEB1A41FCB71F6802570B70059408D/$file/JRS+REPORT+_April+2001_.pdf)> accessed 20 May 2009. Kamungi estimated the numbers to be about 228,744.

III. Land Restitution Claims

Victims of displacement – as individuals, communities or other collectives – have always pressed for restitution of alienated land, either legally or through administrative procedures. Even when these avenues failed, restitution was pursued through other means such as armed rebellion as in the case of Mau Mau war in the early 1950s. In fact, today's violent land conflicts are based on restitution claim justifications. Mau Mau was conceived around the concept of land and freedom. It was the clearest expression of a land restitution claim at the time. The fighters' motivation and the movement's ideology was the return of 'stolen land' by the colonialist to the African owners. But the post-independence era was a disappointment to most fighters and the landless. They were marginalized as land was allocated to the African political elite and colonialist loyalists.

Early in the 1920s, some Africans organised themselves and sued the colonial government for alienating African land for colonial settlement and relegating African communities to Native Reserves. The Supreme Court, however, reaffirmed the language of the Ordinances and declared Africans as 'Tenants at the Will of the Crown'.¹² With this declaration, any customary rights to land the African people had, were extinguished at the stroke of a pen.

The Maasai community have consistently articulated their claim for restitution of their land alienated by the colonial government. Through two agreements in 1904 and 1911 between the British colonial government and the Maasai leaders, the latter surrendered their land to the colonial government. Subsequently, in a 1913 Maasai court case, the Maasai unsuccessfully challenged the validity of the 1911 Agreement and the authority of the Maasai leaders signatories, and demanded restitution, including the right to return to the northern highlands and compensation for loss of stock.¹³ Hughes has observed that:

the Maasai's sense of loss and betrayal has not gone away. Complaints about the land alienation and its consequences have been articulated publicly on four main occasions: before the Kenya Land Commission (KLC) in

12 *Isaac Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indagara, Nganga wa Murito and Attorney General* (1922–23) 9 (2) KLR 102; See also HWO Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (ACTS Press, African Centre for Technology Studies, Nairobi 1991) 54.

13 See Lotte Hughes, *Moving the Maasai: A Colonial Misadventure* (Palgrave Macmillan, Basingstoke 2006).

1932; in 1962 at the second Kenya Constitutional Conference at Lancaster House, London; at talks in 2003–4 on the constitutional review; and most recently in threats by Maasai activists to sue Britain again, on the hundredth anniversary of the first agreement.¹⁴

15 August 2004 was the centenary of the signing of the controversial agreement between the British government and the Maasai. Claiming that the agreement had expired, the Maasai demonstrated across the Rift Valley Province and in the Kenyan capital city, Nairobi. They also invaded privately owned ranches in Laikipia District. The government, however, reacted by arresting several of them. In the process, one person was reportedly killed.

Ogiek and Endorois communities have also unsuccessfully brought restitution legal proceedings in court. The Ogiek lost land through government excision under the pretext of resettling squatters for environmental conservation. Sometimes the land has been allocated to politically influential individuals. In a ruling of 15 March 2000, the High Court ruled that the Ogiek had renounced their ancient traditions and hence forfeited their land rights.¹⁵ The Ogiek land rights in Kenya are contingent on the goodwill of others not their ancestral right, their land issue is still pending either in courts or in the hands of government.¹⁶

The Endorois were evicted from their ancestral lands around Lake Bogoria in the Rift Valley and from the Mochongoi forest on the Laikipia Plains for the creation of game reserves and for ruby mining. The Endorois community did not receive adequate compensation for this eviction, nor did they benefit from the proceeds from the reserve. They first challenged the eviction in the High Court, which rejected their claim to collective ownership of the land and referred to them as individuals with no proper identity. The court also stated that it did not believe Kenyan law should uphold a people's ownership of land based on historic occupation or cultural rights. Subsequently, the community took its case to the African Commission on Human Rights and People's Rights (ACPHR) in 2003. In 2005, the ACHPR finally made a commitment to issue and monitor 'urgent action

14 Lotte Hughes, 'Malice in Maasailand: the Historical Roots of Current Political Struggles' (2005) 104 (415) Afr Aff 207, 209.

15 *Francis Kemai, David Sitienei & Others v The Attorney General & Others*, in the High Court of Kenya at Nairobi Civil Case No 238 of 1999.

16 Ogiek Elders, 'Ogiek Community Views to the Committee of experts on the Constitutional Review' (Report) (24 July 2009) <<http://www.ogiekpeople.org/Home/ogiek-memorandum/downloads/OGIEKMEMORANDUMTOTHECOMMITTEE OF EXPERTS ON THE CONSTITUTIONAL REVIEW PROCESS.pdf?attredirects=0&d=1>> accessed 20 September 2010.

measures' to protect the community and its land from irreparable harm caused by mining. In June 2006, local officials after testing found Endorois' drinking water sources was poisonously contaminated because of ruby mining. They ordered the mining to stop until the case was resolved. A final decision from the ACHPR has vindicated the Endorois community's claim by directing the government to recognize the right to ownership and restitute Endorois ancestral land. The Commission also directed the government to ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.¹⁷

Many other minority communities have expressed or harboured interests in making claims for restitution of their land expropriated during colonialism that was never returned to them in post-independence. The Pokot, for example, claims land which today forms Trans-Nzoia District in the Western Rift. They claim that the colonial government paid compensation to the Kenyatta government for onward transmission to the community but that they never received any compensation.¹⁸ Other groups, such as the Sengwer, the El Molo, and others have not vocally expressed their claims but this does not disregard the fact that given a forum such as the Truth Justice and Reconciliation Commission they will not. In the Coast Province, the local communities have for many years agitated for recognition of their customary rights to land and the return of the land expropriated through the statutory tenure system.

The Mau Mau fighters lost their land when the colonial government confiscated the land belonging to alleged fighters and their sympathizers.

Banned by the colonial regime, the Mau Mau remained a proscribed movement during the first post-colonial government of the late Jomo Kenyatta, and even during the second administration – led by former president Daniel arap Moi. This made it difficult for the rights of Mau Mau members to be addressed.¹⁹

The uplifting of the ban in 2003, has allowed former fighters to register the Mau Mau War Veterans Association, which is now pushing for the rights of its members, including those pertaining to land. In a number of instances, IDPs who were

17 See decision of the ACHPR in Communication 276/2003.

18 Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical Injustices* (Issue Paper) (2004) 10.

19 Joyce Mulama, 'Rights-Kenya: The First Land Policy – But Perhaps Not the Best Land Policy' (24 November 2006) <<http://ipsnews.net/africa/nota.asp?idnews=35600>> accessed 26 May 2009.

displaced as a result of political and ethnic land clashes have sued for return of their land.

The sample of restitution claims presented above is a tinge of the problem. For a long time, government authorities have downplayed inefficiently and corruptly handled restitution claims. Consequently, frustration has led victims of displacement to desperation and sometimes to breach of the law in an effort to find justice. It is expected that the proposed transitional justice process will credibly deal with the problem. The task is enormous because different narratives of dispossession and entitlement will emerge. The transitional justice process will have to sort out the genuine and deserving cases from the bogus and unrealistic ones.

IV. Transitional Justice Tools for Land Restitution

As Kenya seeks to embark on a transitional justice process, it is important to understand the concept of transitional justice, its normative content and role. There is no firm consensus on the definition of the term transitional justice. It has been, however, defined as ‘a field of activity and inquiry focused on how societies address legacies of past human rights abuses’ in an effort to combat impunity and advance reconciliation during a period of definitive change in the political landscape. In other words, transitional justice is an internationally accepted mechanism that seeks to address past human rights violations while allowing nations and their people to move forward towards sustainable peace and reconciliation. It is a backward looking and forward looking process. It aims at confronting the painful legacy, or burden, of the past in order to achieve a holistic sense of justice for all citizens, to establish or renew civic trust, to reconcile people and communities, and to prevent future abuses. Transitional justice measures primarily seek to establish or restore trust between the state and citizens who conform to certain parameters. In order to accomplish its aims, transitional justice employs a number of mechanisms, mainly truth-seeking, prosecutions and amnesties, reparations to victims, institutional reform, vetting, reconciliation, and constructing memorials and museums.

Traditional transitional justice has, however, been critiqued because it tends to focus exclusively on civil and political violations of human rights and fails to include economic and social aspects of human rights. Critics argue that the root causes of the conflict that transitional justice attempts to redress are not purely political but also embedded in social and economic inequalities. Zinaida Miller observes that divorce of social and economic justice from transitional justice mechanisms allows

a myth to be formed that origins of conflict are political or ethnic rather than economic or resource based.²⁰ The failure to address inequality as a cause of conflict in the first place, increases the probability of re-emergence of conflict.²¹

Why is transitional justice necessary in Kenya? Kenya has undergone a series of political transitions, from colonialism to independence, from multiparty democracy to one-party autocratic rule and from one-party autocracy to multiparty democratic system; but during these transitions, transitional justice issues did not get bipartisan interrogation. Successive governments have opted for continuity or undertaken piecemeal reforms that failed in the long term for lack of political consensus.

Transitional justice is necessary in order to deal with human rights violations and historical injustices created by colonial displacements and post-independence displacements. The latter are linked to the colonial land alienation policies, which were adopted by the Kenyan government after independence and the post-independence autocratic rule. After the eruption of politically motivated ethnic clashes in the 1992 elections and the introduction of multiparty politics, transitional justice gained momentum but failure to change the regime ensured continuity. As such no serious efforts on transitional justice occurred until 2003 when the incoming National Rainbow Coalition (NARC) government appointed a Task Force to seek the public's view on the formation of a Truth and Reconciliation Commission. The Task Force acknowledged that 'the Kenyan state for the first time in its history was formally committed to transitional justice, the rule of law, and democracy'.²² In its findings, the Task Force recommended the formation of a Truth, Justice and Reconciliation Commission (TJRC) to investigate, inter alia, politically instigated ethnic clashes and the violation of economic, social and cultural rights. Despite the reported widespread support for it, the TRJC was not established because of political cleavages that ensued in the NARC government.²³ Hence, continuity became politically expedient. The 2007 post-election violence, however, reinvigorated the urgency for a transitional justice process. The demands were expressed in the power-sharing agreement signed by the two contending po-

20 Miller Zanaida, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice' (2008) 2 *IJTJ* 266, 268.

21 *Ibid.*

22 Republic of Kenya, 'Report of the Task Force on the Establishment of Truth, Justice, and Reconciliation Commission' (Matua Report) (26 August 2003) 9.

23 *Ibid.* See also George Wachira and Prisca Kamungi, 'Truth and Reconciliation Commissions in Transitional Justice in Africa: Lessons and Implications for Kenya' (Nairobi Peace Initiative – Africa, Background Paper) (April 2008) 2.

litical parties after the controversial 2007 presidential general election, the Party of National Union (PNU) and the Orange Democratic Movement (ODM), on 28 February 2008. It highlighted that,

The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country.

This agreement provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

As part of the agreement, the two parties agreed on the agenda for mediation known as the resolution of the political crisis with an annotated agenda and timetable. The agreement prescribes both short-term and long-term solutions to the crisis. The four agenda items form a full package of transitional justice process, which includes political, civil and socio-economic measures. They address the humanitarian crisis, resettlement of IDPs, interim coalition government, accountability and impunity, constitutional and institutional reforms, land reforms, arresting poverty, regional inequity and marginalisation, and unemployment among the youth. Agenda item 4 incorporates long-term solutions to the crisis. These solutions are significant for the transitional justice process and include reconciliation and land reform measures.

The concern here is with items addressing land restitution. Although the whole process is important for the success of land restitution, the focus is on items addressing national cohesion, unity and land reform. Envisaged under the national cohesion and unity item is the establishment of the Truth, Justice, and Reconciliation Commission proposed in the Truth, Justice, and Reconciliation Act of 2008. Under the land reform item, the formulation of National Land Reform Policy is envisaged.

The National Land Reform Policy

Land and agrarian reforms are not usually regarded as traditional transitional justice mechanisms. The goals of land reform entail mainly land tenure and regulatory reforms. Historical injustices, especially those rooted in colonialism, are seldom addressed. At the same time, as Huggins observes, ‘land tenure reform does not generally involve restitution of specific rights to victims of disposses-

sion, and hence has rarely been linked to the literature on transitional justice and restitution.²⁴ Restitution may be chosen as an instrument of transitional justice because it restores rights to their original status establishing a connection with past injustices. Neither redistribution nor land tenure reform, however, make that direct connection, and thus they lack the characteristics of transitional justice that is desired in addressing historical injustices.

The national accord and reconciliation agreement recognized land as a source of economic, social, political and environmental problems in Kenya over the years. Through a number of initiatives, including land reform, the agreement sought to address the problem comprehensively. The agreement placed land reform process into the parameters of the agreed transitional justice mechanisms. In Kenya, land is critical to the lives of people and, their social, political and economic existence. Transitional justice cannot succeed without tackling the problems related to land and in particular to land historical injustices. The agreement rightly has made land reform a component of transitional justice. Reconciliation and justice cannot be realised without resolution of historical land issues as land is essential to self-sustenance and the socio-economic survival of the displaced persons.

Kenya has had no properly defined or codified national land policy. In 2007, however, a draft National Land Policy was formulated and published.²⁵ Subsequently in December 2009, the Parliament approved the National Land Policy.²⁶ The overall objectives of the National Land Policy are to secure rights over land and provide for a sustainable growth, investment and the reduction of poverty, in line with the Government's overall development objectives. The policy aims to achieve this purpose through a framework of policies and laws designed to ensure maintenance of a system of land administration and management which offers all citizens access to and use of land; ensures economically, socially equitable and environmentally sustainable allocation and use of land; efficient, effective and economical operation of the land market; and efficient and transparent land dispute resolution mechanisms.

While the policy recognises that most land issues can be resolved through ordinary legal and policy reform measures, it also notes that some land issues will require special intervention and mechanisms. It identifies these issues as historical

24 Chris Huggins, 'Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform and Development' in Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development* (Social Science Research Council, New York June 2009) 333 and 352.

25 Republic of Kenya, Ministry of Lands and Housing, 'Draft National Land Policy' (Nairobi May 2007) (Draft National Land Policy).

26 Republic of Kenya, 'Sessional Paper No 3 of 2009 on the National Land Policy'.

injustices, pastoral land issues, Coastal region land issues, and rights of minority and marginalized groups, land rights in informal settlements and informal activities, land rights of internally displaced persons, among others.²⁷ The National Land Policy identifies a number of measures to resolve the special issues namely, redistribution, restitution, resettlement and land banking.

The policy adopts restitution as a solution to issues involving historical injustices and internally displaced persons. According to the policy, the purpose of restitution is to restore land rights to those unjustly deprived of such rights.²⁸ The policy calls for suitable mechanisms for restitution, reparation and compensation of historical injustices and claims, and establishment of legal, policy and institutional frameworks for dealing with the issues arising from internal displacements and resettlement of the internally displaced persons.

In the opinion of various stakeholders involved in the formulation of the policy interviewed for this article, land restitution in its strict sense of return of property may be a difficult endeavour in the Kenyan context. Historical land injustices have gone on for a long time and an approach, which involves arbitrary return of property may create new injustices and conflict. It was further acknowledged that restitution of land on the basis of pre-colonial ethnic boundaries is intricate as intervening factors of colonial land alienation, movement and resettlement of people beyond their ethnic frontiers, and economic development considerations further complicate the matter.

The novelty of the land policy rests in its recognition of the need to address historical injustices and therefore links land reform and transitional justice. Its drawback, however, is the lack of clear mechanisms for land restitution. Implementation of land restitution will depend on establishment of appropriate mechanisms.

The Truth, Justice, and Reconciliation Commission

The centrality of a Truth Commission as a component of transitional justice processes is well recognised. Truth commissions, essentially, are political processes not hampered by legality. In a situation where land claims are highly contested, the role of a truth commission in acknowledging the contested politics of land may be valuable, and government endorsement of a truth commission report could represent a legal precedent.²⁹

27 *Draft National Land Policy* (n 25) 3.6.

28 *Draft National Land Policy* (n 25) 3.6.1.2.

29 *Huggins* (n 24) 354.

The Truth, Justice, and Reconciliation Commission Act 2008, Section 3, establishes the Commission. The objectives of the Commission are to promote peace, justice, national unity, healing, and reconciliation among the people of Kenya through inquiry into human rights violations, including those committed by the state, groups, or individuals. The inquiry includes but is not limited to politically motivated violence, assassinations, community displacements, settlements and evictions. Its mandate also extends to major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. These objectives give the TJRC an expanded mandate that covers social and economic justice, unlike a traditional truth commission whose mandate is restricted to political and civil rights.

The Commission's mandate covers events that took place between 12 December 1963 and 28 February 2008. The mandate is restricted, compared to that proposed in the National Land Policy, which includes the entire colonial era. The Commission will, however, as necessary look at events antecedent to 1963 in order to understand the nature, root causes, or context that led to such violations, violence, or crimes. As such, its mandate could be wide because most of the post-independence land injustices have historical linkage to the colonial era displacements and human rights violations. To understand the real causes, it will be necessary to go back into the colonial era, a period outside the Commission's mandate. As such, the Commission must exercise caution in determining how far back in history to go. The further back it goes, the cloudier it gets to identify victims and perpetrators. In addition, the Commission must determine what is reasonable and practical within the two-year timeframe.

The Commission commenced its operations in 2009. A controversy surrounding the impartiality of the chairperson, however, hampers its full operations. Civil society organisations and victims of human rights violations during former President Moi's regime have rejected the chairperson and petitioned the High Court to stop the operations of the Commission. The critics question the impartiality of the chairperson who was a senior government official in the Moi regime. The allegation is that the chairperson was involved in human rights violations by the regime. The fallout has paralysed the work of the Commission and the government seriously contemplates its disbandment.³⁰

The Commission lacks a clear mandate on land restitution. The Commis-

30 Oliver Mathenge, 'MP to move motion for TJRC ouster' *The Daily Nation* (Nairobi Thursday 29 April 2010).

sion's importance, for purposes of land restitution, however, rests in investigating historical injustices. Nevertheless, the restrictive mandate of recommending reparations only could limit its effectiveness as it lacks powers to implement its own findings. The Commission, however, can play an important role in raising awareness of land injustices and as a negotiating forum for diverging narratives of land claims. As such, the Commission's work can complement the land reform process by making the process more just.

V. Land Restitution Legislation in Kenya

Kenya has no specific law on restitution.³¹ The right to restitution exists as a general principle of law that states that 'the breach of a duty not to cause harm gives rise to a right to restitution and, where restitution is materially impossible, to compensation'. Complainants can lodge claims for restitution under relevant laws governing a particular dispute, for example under tort law, contract law, land law and criminal law. Property restitution is therefore a common law remedy. The courts must determine whether a claim for restitution has been proven and order return of the claimed property or compensation instead of the return of property.

At independence, the Kenyan government retained the British property law that had evolved during colonial rule. The independence constitution entrenched the protection of property in Section 75 of the Constitution. Accordingly, the government cannot deprive a person of his or her property under compulsory acquisition powers without compliance with the established legal procedures and upon payment of prompt and full compensation.³² This constitutional protection is, however, limited because communal interests in land are not included in the protection. The property envisaged under the constitution is private property. Consequently, the clause only protects persons with title to land.

At independence the land formerly held under customary law was codified into the Registered Land Act (RLA) of 1963, Cap 300 of the Laws of Kenya.³³ The intention was to bring regulation of all land under this Act, as an expression

31 George Mukundi Wachira, 'Vindicating Indigenous Peoples' Land Rights in Kenya' (LLD thesis, University of Pretoria 2008) 191.

32 Constitution of Kenya s 75.

33 *Wanjala* (n 4) 32.

of governments' policy of individualisation of tenure.³⁴ However, land continued to be held under public tenure and communal tenure as under the Trust Land Act. Although the Trust Land constitutional clause and the Trust Land Act recognise communal or customary land interests, they can be defeated by statutory claims. The recognition of customary law is constrained by the constitution through the requirement that such law must not be 'repugnant to any written law'.³⁵ The RLA epitomises the application of English property rights in Kenya. The Land (Group Representatives) Act of 1968 which provides for adjudication of group rights and was meant to assist pastoral communities in owning and operating group ranches, did not offer effective protection for commonly owned land because it was based on the same individual private ownership tenure. It was not surprising that the registered group lands were subdivided and registered under individual titles shortly thereafter. The Land (Group Representatives) Act 'was in fact a roundabout way of entrenching individualized tenure amongst these communities'.³⁶ The regulation did not therefore protect communal land from further alienation for individual tenure.

The rationale of giving preference to an individual land tenure system was anchored on the Government's policy that sound agricultural development and the development of an agricultural based economy was dependent on individual tenure. So at independence, individual land tenure was given priority over common ownership under customary law. This had serious consequences for claims of land restitution based on customary law by individuals and groups.

Claims for restitution under customary law have failed because the Kenyan legal framework favours and protects legal title holders. Registered land owners acquire an absolute and indefeasible title to land unless such land was obtained by fraud or mistake and subject to any encumbrances.³⁷ The first registration of title under RLA, however, cannot be defeated by fraud or mistake. The registered owners enjoy absolute and indefeasible title.³⁸ Furthermore, the position of customary law is inferior to that of the Statute law under the Judicature Act and the Constitution.³⁹ Customary law application is also limited by the repugnancy clauses in

34 Ibid.

35 Constitution of Kenya s 115(2).

36 *Wachira* (n 30) 66.

37 The Land Registered Act 1963 ss 27 & 28.

38 The Land Registered Act 1963 s 143.

39 The Judicature Act s 3(2); and the Constitution of Kenya s 115(2).

these laws.⁴⁰ The judiciary interpretation of the laws has created a confused jurisprudence. The claims of restitution have centred on whether registration of an individual title under the RLA extinguishes the customary rights of access that other people may have regarding the land. In a number of cases, the registration of one family member as the sole owner of a family land, in exclusion of others, has led to domestic landlessness, conflicts and homicide. In some cases, those disinherited have lodged claims in the court requesting recognition as co-owners of the land under African customary law. But the interpretation of the relevant laws by the High Court has been confusing and disappointing to customary law claimants. The Court has issued equivocal decisions in the matter and has tended, on ideological preferences, to remain conservative and to be progressive at the same time. In some cases, the Court has upheld the rights of registered owners and ruled that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title.⁴¹ The Court in other cases has ruled that registration of title was never meant to disinherit people who would otherwise be entitled to their land. The Court has on these occasions imposed a duty of a trust upon the registered proprietor and maintained that he or she held the land as a trustee for the other entitled parties under customary law.⁴² The Court has relied on the device of a trust as known in English law, and in other instances the Court has come up with a hitherto unknown notion of an institution it has called the ‘customary trust’.⁴³

Group claims under customary law have not fared any better either, as manifested by the outcome of the group claims by the Ogiek and the Endorois ethnic groups. In the Ogiek case, the claim for recognition of the land they had occupied under customary law was defeated because they could not tender documentary evidence as proof of ownership of the land. The oral evidence submitted by Ogiek

40 Section 3(2) Judicature Act reads:

”The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

Section 115(2) the Constitution of Kenya states that: ‘Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law’.

41 See *Obiero v Opiyo* (1972) E.A. 227; and *Esiroyo v Esiroyo* (1972) E.A. 388.

42 See *Muguthu v Muguthu*, H.C. Civil Case No. 377 of 1968 in (1971) Kenya High Court Digest No. 16.

43 *Wanjala* (n 4) 43.

community was disregarded on the grounds that their cultural and economic activities had substantially changed and they did not necessarily depend on their continuous presence in the forests. In the Endorois case, the High Court refused to acknowledge the Endorois claim to collective ownership of the land by referring to the people as individuals with no proper identity. The Court also stated that it did not believe Kenyan law should uphold a people's ownership of land based on historic occupation or cultural rights. The two cases exemplify the obstacles of sustaining group customary claims to land under the current legal framework and practice that is inclined to the protection of private and public land interests over group interests to land.

The general principle of law to the right of restitution is also present at the international level. Its applicability in the context of state liability under international law can be traced back, at least, to a dictum by the Permanent Court of International Justice in *Chorzow Factory*.⁴⁴ The Court observed that restitution was a 'natural' redress for violation of or failure to observe the treaty provisions. The right to restitution is also articulated in a number of international instruments. Most of the instruments are in the form of non-binding declarations, principles and standards and therefore their legal effect may be limited. At the same time, the legal effect of the instruments depends on their domestication at the national level by the member states.

In Kenya the general principle on the application of international standards and norms, as in other common law jurisdictions, is that unless international instruments are domesticated they do not have the force of law.⁴⁵ In the absence of domestication, the domestic law applies. Of significance is that the courts also take into consideration international norms and standards that have been ratified but not domesticated where there is no inconsistency with the Constitution and domestic law.⁴⁶ In the event that the domestic law is inconsistent with international norms and standards, the courts follow Bangalore Principles⁴⁷ and give effect to the domestic law and draw the inconsistency to the attention of the appropri-

44 (1927) PCIJ, Sr. A., no 8, p 28; See also Ian Brownlie, *Principles of Public International Law* (4th edn Clarendon Press, Oxford 1990) 463.

45 See *RM and another v AG*, High Court of Kenya Nairobi Civil case no 1351 of 2002; See also *Okunda v Republic* (1970) EA, 453; *Pattni v Republic*, Miscellaneous Civil Application Nos 322 and 810 of 1999 (consolidated) Kenya Law Reports (2001) LLR, 246. See also *Wachira* (n 30) 104.

46 *RM and another* (n 45).

47 The Bangalore Principles were released as a summary of issues discussed at a Judicial Colloquium on 'The Domestic Application of International Human Rights Norms', held in Bangalore, India, 24–26 February 1988.

ate authorities for possible reform. The role of international standards and norms on the right to restitution in the Kenyan context depends on whether they have been ratified and domesticated. Unfortunately, Kenya has not domesticated most of the international instruments that it has ratified. The role of international law therefore depends on the courts' willingness to adopt a progressive interpretation and whether it seeks guidance from the international instruments.

This exposé on the law of restitution in Kenya indicates the inadequacy of the common law approach, as the jurisprudence of the court on land restitution claims is not settled. Common law lacks clear solutions on historical claims of land based on customary law as the latter is subordinate to statutory law. A property restitution law that gives equal legal standing to customary law and statutory law is overdue. It is expected that the land reform and the TJRC processes will interrogate this dilemma.

VI. Implementation Challenges

Designing a restitution system is one thing; however, the test is in the implementation. Although it may be difficult to anticipate all the challenges which may confront an emerging transitional justice process, a number of issues can be highlighted.

Political Support for Reforms

The willingness of the government to undertake reforms is clearly an essential prerequisite for the success of the transitional justice process. Transitional justice in Kenya has been unduly delayed due to lack of political will and commitment for reforms by the successive ruling governments. The fate of the current process depends on the willingness of the ruling coalition government to implement the reforms as stipulated in the national accord and reconciliation agreement. So far the government has shown commitment to establishing the legislative and institutional building blocks for reforms as discussed in the preceding sections. The legislation and institutions are not, however, adequate by themselves. The government must give full political support to the implementation of the legislation and the working of the institutions. The fear is that the ruling elite may withhold political support when the reforms adversely affect their interests. Earlier, the Parliament rejected the passage of a crucial bill for establishing a local tribunal to try those

involved in acts of impunity. There was also apprehension that the Cabinet would fail to approve the draft national land policy because of vested interests. The majority of the members of the Cabinet own large tracks of land which are targeted by the policy and together with foreign large-farm owners and their governments, were intensively lobbying to defeat the enactment of the policy. The fear, however, became unfounded when the Cabinet approved the document. This has boosted the confidence that the government supports the reforms, but the problem still looms because the Parliament has proven to be a stumbling block. The fear also that an ensuing struggle for supremacy between the Executive and the Parliament could derail approval of the policy was also exposed as unfounded when the Parliament endorsed the policy.

Funding the Process

The transitional justice process is a costly affair and societies emerging from a conflict situation may lack adequate resources for the process. The transitional justice process in Kenya involves appointment of numerous commissions that compete for government and donor funding. Apart from the two concluded commissions, the Kriegler Commission and Waki Commission, there are five other commissions which require funding, namely: the Interim Independent Boundaries Review Commission; Interim Independent Electoral Commission; the Committee of Experts on Constitution Review; the Truth, Justice and Reconciliation Commission; and the National Cohesion and Integration Commission. In addition, the establishment of a local tribunal or other justice procedures to try the perpetrators of post-election violence and the implementation of the land reform policy will require funding. It is probable that the government may prioritize other social development projects with immediate benefit to the people such as infrastructure, unemployment, and health care. Persons interviewed in Kenya expressed concern that the government might stifle the process through withholding allocation of adequate funds to the process where it perceives the process to be in conflict with the interests of the ruling elite.⁴⁸ The role of international donors in financing the process is crucial. The international community was instrumental in the funding of essential commissions: the Kriegler Commission and Waki Commission. They have also pledged to contribute to the financing of the TJRC, a

⁴⁸ The author carried out extensive interviews in Kenya in two periods in October 2008 and February 2009. He interviewed government officials, civil society organizations, religious and faith bodies, individuals, and internally displaced persons (IDPs).

local tribunal to prosecute impunity and the Constitutional Reform Committee. The Constitutional Reform Committee could not have started its work if it were not for donors because the government had not released its portion of finances.⁴⁹ The international donors, through the Development Partners Group on Land in Kenya⁵⁰ (DPGL), exclusively financed the national land reform policy formulation process. This support is likely to continue for a number of years also to assist with the implementation of the National Land Policy. The implementation of the policy will require KES 9.6 billions (ca. USD 12.6 million) over the first six years. Unless the international donor community provides the money, the process may stall. The resettlement of IDPs, for example, stalled because, in part, the international donors did not fully honour their pledges to provide funding and the government contribution was just a trickle of the required amount.

Identification of Victims and Perpetrators

Restitution entails identification of victims, beneficiaries and perpetrators. In the Kenyan context, this could prove to be a complicated endeavour. Firstly, in the context of historical injustices it may be problematic and even unfair to identify members of one ethnic group as victims while colonial displacements affected many communities. Individual members of an ethnic group could be regarded as victims and beneficiaries at the same time. The question is whether the term victim would be limited to individuals or should it encompass communities. At the same time why would some individuals and communities feel aggrieved and others not? Can one ethnic community claim ownership of large tracks of land while pre-colonial boundaries were contested and in flux? In a situation where the colonial government has left the scene, to what extent does the post-independence government bear responsibility for the sins of the former? What are the sins of the post-independence governments? In a situation where historical injustices have assumed ethnic interpretation, how does one define injury and guilt? How are different narratives of

49 Otieno Otieno, 'Truth team fights for survival' *The Daily Nation* (17 August 2009) <<http://www.nation.co.ke/News/Truth%20team%20fights%20for%20survival%20/-/1056/1003914/-/kkddds/-/index.html>> accessed 20 September 2010.

50 The Group is composed of three different categories of Development Partners: (i) Development Partners that provide un-earmarked funds through a joint funding arrangement, managed by a Financial Management Agent (FMA); (ii) Development Partners that provide earmarked funding with specific accounts of tracking mechanisms for their contribution; and (iii) Development Partners subscribing to the general principles agreed to by the group and the Ministry of Lands (MoL). See Development Partners Group on Land Kenya: Sector Strategy and Programme, 10 May 2006.

dispossession and entitlement that will emerge to be resolved? Secondly, in the context of post-independence land clashes there has been reconstruction of victimhood. Individuals and communities played double roles as victims and perpetrators. The TJRC has a colossal responsibility of extricating the labyrinth of victimhood and guilt. The TJRC will therefore be the scene for negotiating these issues.

Role of International Community

The international community played a commendable role in mediating the agreement that led to return of relative peace in Kenya after the 2007 post-election crisis. Even now at the implementation stage, their engagement in the process is still crucial. As the director of the Nairobi based Economic and Social Rights Centre, James Odindo Opiata has stated, the international community has played an influential role. Firstly, they can put pressure on the political class to act. After the role they played in the formation of the coalition government with PNU and ODM, the international community retains considerable leverage over the government. They should use it to sway the government into action in these matters. Secondly, the international community could influence the process by financing it. So far it has exclusively funded the land reform policy. The implementation of the policy and the TRJC will require substantial funding but the government may not make adequate resources available to the processes. International community funding is therefore crucial. But as Odindo cautions, there is danger of the process being wholly international donor driven. He warns that, in the event of the donors slow down, the process could stall. To avoid such an eventuality, the local actors should be there to support the process. After the dust has settled and the foreign donors have left, it is the local actors who are to sustain the process. It is crucial that local ownership of the process be established from the beginning. The problem is that local governments do not invest in matters of policy and long-term solutions. The money may be there but the priorities are different. In that case there is need to empower civil society to sustain the pressure on the government on implementation.

Reconciliation and Security

The government's priority on the return of the IDPs to their farms and homes is commendable but lack of reconciliation and security on the ground can hinder the return. Fear of fresh attacks on returnees may mire restitution. Reconciliation between the returnees and the local community should be given priority but

limited resources are being made available for the purpose. The historical injustice problem that led to displacement in the first place must be resolved. Consequently, the recent displacements have a linkage with the issue of historical injustices. Successful restitution in these displacements may depend on the successful resolution of the historical injustices. The two processes are interconnected.

The restitution program codenamed '*Operation Rudi Nyumbani*' (Operation Return Home), though well intended by the government, was perceived as a failure by civil society and the IDPs themselves. The aim of the operation was to encourage IDPs to return to their homes. The IDPs in Molo camps confided to this author that they feared venturing back to their farms and homes because of insecurity and hostility shown by the local community. Similarly, in a report titled *A Tale of Force, Threats and Lies: "Operation Rudi Nyumbani" in Perspective*, the Kenya Human Rights Commission states that most IDPs had not gone back to their homes because of insecurity and landlessness.

VII. Conclusion

The context of conflict determines the solutions adopted to resolve the problem. Barkan observes that 'not all political settlements were born equal'.⁵¹ The success of restitution program in Kenya will depend much on the prevailing context. The problem of land and displacement is historical, legal and transitional in nature. These factors are constraints that the restitution program must overcome.

The land conflict and displacements are historical injustices in character. The problem is traceable to the colonial land alienation policies that alienated African land for colonial settlement and farming, and the post-independence land policies that did not redress the problem by returning the land to the affected communities. This has perpetuated a sense of dispossession among the local communities who blame their predicaments on the migrant communities. In turn, the local communities express their anger through political and ethnic land evictions during elections. As such there is a causal link between the historical injustices and the political and ethnic land displacement. The linkage gives credence to the claim that historical injustices are continuous injustices and should not be treated as bygones.⁵²

51 Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (W.W. Norton & Company, New York 2000) 345.

52 Ibid 344.

The post-independence government opted for continuation of colonial property rights regime without reform to accommodate demands for land by African communities. This has created tension between individualised title ownership and customary land rights. Under the current law, individual rights to land have priority over customary rights. Land restitution claims based on customary rights, such as the claims by Ogiek and Endorois communities, stand no chance of success under the current common law restitution jurisprudence, which inclines towards individual property rights. Even international law principles have no meaningful place in the judicial system due to lack of domestication. For instance, the lack of a national legislation on IDPs hampers restitution and resettlement of the displaced persons in the country. Institutional inefficiency further complicates the legal administration of justice in land matters. The process is ineffectual, slow and corrupt. Legal and institutional reforms as recommended by the National Land Policy are urgent.

The agreement on national accord and reconciliation of 2008 sets out the transitional justice agenda for resolution of the political crisis identifying both short-term and long-term issues and solutions. The agreement prescribes a comprehensive transitional justice process that incorporates political, civil and social economic rights. Although restitution is not explicitly identified as one of the solutions, it is implied both in the immediate and long-term solutions that encompass political, civil and social economic human rights measures. In Agenda Item 2, the agreement calls for *immediate measures to address humanitarian crisis, promote reconciliation, healing and restoration* and in Agenda Item 4, the agreement identifies concrete measures on political civil and social and economic spheres.

Restitution, however, is a negotiated process focused on specific local solutions agreed upon by the parties to the conflict with the help of mediation. Two institutions will play a significant role in negotiating and shaping of a common restitution narrative: the Truth Justice and Reconciliation Commission is important in identifying restitution claims and restoration, and the National Land Policy will play the core role in resolving land conflicts by effecting necessary legal and institutional reforms. The strength of the policy is that it attempts to temper idealism with realism as it adopts both restorative and distributive solutions to land conflict. As the process moves from the design to implementation stage the success of the work of these institutions will depend on other external factors such as political will from the political class in carrying out necessary legal and institutional reforms, funding, and engagement by the international community and the local civil society.

The Making and Unmaking of Unequal Property Relations Between Men and Women

Shifting Policy Trajectories in South Africa's Land Restitution Process

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Abstract: Setting forth a rights-based land restitution strategy that marries social justice with business, South Africa's changing land restitution strategy involves the complex triangle of rights, rural poverty and markets. Tracking the legal claims of five dispossessed communities in Levubu in Limpopo Province, since they were launched in 1997, this article analyses how the South African government balances its responsibility for development and social justice from a rural women's perspective. Since rural women's claims have been lodged as part of group claim it focuses on how the relationship between individual rights and group rights is constituted in laws, policies and practices. It addresses the disjuncture between national gender neutral laws and policies and the gendered outcome of the land restitution process. Towards this end, it explores how government agencies, NGOs and business partners have dealt with structures of power at household and local community levels, and in what ways they are challenging power-holders in these spheres.

Keywords:

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I. Introduction: The South African Land Restitution Process at the Crossroads

South Africa's legal structures were profoundly changed to unmake race, class and gender injustices deriving from apartheid's radicalised land policy. The land restitution process, like many other reform processes launched by the current ruling party of South Africa, the African National Congress (ANC), has now entered a critical phase with the restoration of hundreds of highly developed commercial farms to claimant communities in the face of substantial landowner resistance and government over-commitment.

Limpopo Province, where this study is located, has seventy percent of its total land area under claim. The Province's commercial farms are an important contributor to South Africa's land-based export economy, through production of fruit, nuts, vegetables and timber, agro-processing, employment and other economic opportunities. The combination of productive land, substantial export revenues, pervasive restitution claims and past disappointments have led the ANC government to embrace a new model of restitution. This model known as the 'strategic partner model' entailed claimant communities forming a joint venture company with a private entrepreneur.² The entrepreneur – the 'strategic partner' – invests working capital and retains control of many farm management decisions for a period of ten years or more, with the option of renewal for a further period. The benefits to the claimant communities, who as part of the initial contracts are not allowed to use the land, comprise rent for use of the land, houses on the land, a share of the profits (if any), employment, and training opportunities for community members.

Setting forth a rights-based land restitution strategy that marries social justice with business, South Africa's changing land restitution strategy speaks to the complex triangle of rights, rural poverty and markets. The transition from a social justice to a business model raises a series of fundamental questions about how the South African government balances its responsibility for development and social

2 The model is described and analyzed in Bill Derman, Edward Lahiff and Espen Sjaastad, 'Strategic Questions for Claimant Communities, Government and Strategic Partners: Challenges and Pitfalls in South Africa's New Model of Land Restitution' in Cheryl Walker and others (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press 2010) 306–324.

justice and considers the relationship between gender, race, ethnicity and class.³ Our research, which has followed the legal claims of five dispossessed communities in Levubu in the Limpopo Province since they were launched in 1997 and 1998, addresses the twists and turns of this changing legal and political environment from a gender perspective.

This article examines the disjuncture between the principle of gender equality embedded in constitutional and national law and the gendered outcomes of South Africa's land restitution program with its overall focus on how the relationship between individual rights and group rights is constituted in laws, policies and practice. In the case of Levubu, and it is not exceptional, the rural restitution claims that have been successful are all group claims in tribal or chiefly names. The boundaries asserted for the land claims are those remembered by chiefs, royal families and elders, at often some indefinite time in the past. Thus initial legal criteria lean on past sociopolitical organization but now must respond to present imperatives including economic sustainability, race, class, and gender justice.⁴ Since rural women's right to restitution has been accommodated as part of group claims, lodged in the name of the chief, we have focused on the measures that have been put in place to ensure real equality between individuals within the claimant communities that have been successful. It has been claimed that land restitution has paid insufficient attention to local communities' complexities and divided interests. We ask how gender differences have been dealt with in this long and complicated process.⁵

An important concern of our study is thus to identify what Pettit and Wheeler term 'the deeply embedded power relations and structural barriers to securing rights'.⁶ To come to grips with the unequal effects of reforms that on paper are

3 For an analysis of how the concern for social justice has been balanced with market concerns see Anne Hellum and Bill Derman, 'Government, Business and Chiefs: Ambiguities of Social Justice through Land Restitution in South Africa' in F von Benda-Beckmann, K von Benda-Beckmann, and J Eckert (eds) *Rules of Law and Laws of Ruling: On the Governance of Law* (Ashgate Surrey, 2009) 125–151.

4 How the Rural Land Rights Restitution Act in practice favoured large tribal groups who lodged their claims under a chief is described by C Louw, 'Claims now require proof of tribal identity' *Farmer's Weekly* (24 June 2005); and Deborah James, *Gaining Ground? Rights and Property in South African Land Reform* (Routledge New York, 2007).

5 Kobus Pienaar, 'Having a Second Bite at Fixing Elandskloof and other Dysfunctional Sets of New Land Reform, Group Land Holdings and Management Arrangements,' (Conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, 13–15 September 2006).

6 J Pettit and J Wheeler, 'Developing Rights? Relating Discourse to Context and Practice' (2005) 36(1) IDS Bulletin 5.

gender-neutral, an examination of the gendered relationships that inform patterns of use, ownership and control is central from this perspective. Unless the asymmetric gender relations that underlie the notion of the household or the local community as a unitary entity are addressed, existing inequalities are likely to be reproduced whether land is held privately or communally.⁷ In seeking to secure equal rights for women, we thus ask how and to what extent have governmental and non-governmental land rights promoters been able to challenge power structures at national, local and household levels. How aware are the different actors involved in the land restitution process of structures of power at household and local community levels and in what ways are they challenging power-holders in these spheres? How is this awareness translated into measures aimed at ensuring that all the members of the claimant community benefit equally?

With this in mind we have explored how the right to equality has been respected, protected and promoted by the different actors that have been involved in four different phases of the land restitution process in the five claimant communities in Levubu. The four phases are: (i) the claims-making phase; (ii) the claims verification phase; (iii) the claims-settlement phase; and (iv) the implementation of the agreement phase (often referred to as the post-settlement phase). In each of these four phases the main actors include the participants in the claimant communities themselves, the Tshakuma, Ravele, Masakona, Ratombo and Shigalo.⁸ Other main actors are the Regional Land Claims Commissioner, the Provincial Department of Agriculture, Makhado municipality, NGOs and the strategic partners South African Farm Management (SAFM) (now bankrupt), and Umlimi (also bankrupt or at least dissolved as a corporation).⁹ We give particular attention to the Nkuzi Development Association,¹⁰ a rights-based land NGO, which from the very beginning assisted many of the claimant communities in Limpopo; it was hired at a later stage by the Regional Land Claims Commissioner (RLCC) to assist the communities in the restitution process. It continued to support communities in their efforts to finally receive the land. Nkuzi acted as translators and

7 Ingunn Ikdahl and others, *Human Rights, Formalization and Women's Land Rights in Southern and Eastern Africa* (Studies in Women's Law University of Oslo, Institute of Women's Law, Oslo 2005).

8 The Tshakuma, Ravele, Masakona and Ratombo are Venda speaking groups. The Shigalo is a Shangaan speaking group.

9 Ratombo and Shigalo entered into strategic partnership with MAVU. When MAVU pulled out it was succeeded by UMLIMI. Tshakuma, Ravele, Masakona and Ratombo entered into partnership with SAFM.

10 Nkuzi had multiple programs including assisting farm workers and farm dwellers. However, they are not relevant to this paper.

mediators for understanding the law and spirit of land restitution. Certainly some of their active members sought to link the injustices of past land appropriation to how rural life could be transformed through new institutions and participatory democracy. The return of land for them was part of what could be a fundamental transformation of South Africa. The rights-based land reform, however, required that government or others took positive steps to see that these rights were made available and utilized. Nkuzi saw itself as an organization that would fill the gap between the new land laws and people's capacity to claim their rights as equals. Women's rights were held to be by Nkuzi, as part of the overall vision of equality under the law.

To examine this process we have read legislation, policy papers, court records and empirical studies of the implementation of restitution settlements in different parts of the country. Community claims lodged with the Regional Land Claims Commissioner in Limpopo and constitutions of the five communal property associations formed by the claimant communities are key sources. We have tracked the transfer of between 80 and 100 privately owned commercial farms to these five claimant communities. We have utilized several methods and approaches in our research including: extensive interviews from 2005 to 2009 (but with greatest effort in the years 2006–2008) with all the parties, including local and regional representatives of the Provincial Department of Agriculture (PDOA) and the Regional Land Claim Commissioner's office (RLCC), municipal officials, senior managers within the three companies designated as strategic partners, leaders and members of claimant communities and the lawyers who represent them, commercial farmers and their legal representatives, farm workers, women, members of the boards of directors of the new Joint Venture Companies (JVCs), and employees of NGOs active in land reform in Levubu.¹¹ We also observed numerous community workshops and meetings between various parties, and analyzed the documentation of the negotiations. Through the archives of Nkuzi Development Association we have had access to information about the process over a longer time span. Finally, we carried out a survey of residents of four claimant communities to explore the kinds of benefits they hoped for and preferred, the history of their involvement with the land committees and communal property associations, and their current livelihood activities.

11 The study of the land restitution process is carried out with the assistance of three researchers from the areas employed by PLAAS: Tshililo Manenzhe, Themba Maluleke and Shirhami Shirinda.

II. Engendering the Land Restitution Process

South Africa's land reform in general and the land restitution process in particular is a well-suited case to examine the contested relationship between human rights and economic development from a gender perspective. South Africa's land reform – encompassing redistribution, restitution and secure tenure – is based on a rights-based approach aiming at substantive gender equality. The legal backdrop is the South African Constitution and a series of specific acts related to redistribution, restitution and secure tenure that all set out to promote substantive gender equality and prevent sex discrimination. To ensure that rural women who are part of group claims benefit equally, the Communal Property Associations (CPAs) Act of 1996 requires that women are equally represented in the legal body that hold the land on behalf of the community.¹² Given the centrality of the right to equality and non-discrimination the rights-based approach adopted by the South African government thus holds great promises for rural women.

By engendering and contextualizing the South African land restitution process, this study speaks to broader issues related to the analyses of the overlapping and conflicting relationship between rights-based and market-based approaches to land reform. Whether women's access, control and ownership are best facilitated by private or communal land tenure systems is a continuous site of contestation.¹³ Scholars within the 'human rights in context paradigm', of which we are a part, have pointed out that structural gender inequalities tend to be continued in land reform whether it is based on statutory, customary, private or communal ownership.¹⁴ This study explores the strengths and weaknesses of the South African attempt to craft a common property regime that through mandatory female representation and participation has the potential to break with past gender inequalities embedded in the customary land holding system developed under apartheid.

The initial phase of the land reform process, launched by the newly elected ANC government, was characterized by a strong emphasis on the political economy of poverty and the necessity for land redistribution and land restitution while including gender equity. Thus, the White Paper on Land Policy of 1997 states: 'Restitution policy is guided by the principles of fairness and justice. Gen-

12 Communal Property Associations Act No. 28 1996 (CPA Act).

13 See Anne Whitehead and Dzodzi Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Return to the Customary' (2003) 3(1–2) *Journal of Agrarian Change* 67–112.

14 *Ikdahl and others* (n 6).

der equity is one of the eight basic land reform principles embedded in the land policy document.¹⁵ A Land Reform Gender Policy was approved by the Minister of Land Affairs the same year.¹⁶ It set out a set of gender sensitive guidelines to be mainstreamed at all levels of the three main areas of land reform: land restitution; land redistribution; and land tenure reform.¹⁷ These included measures to ensure women's full and equal participation in decision-making, communication strategies, gender-sensitive methods in project planning, gender sensitive training, collaboration with NGOs and government structures and compliance with international political and legal commitments, such as the Beijing Platform of Action and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW).¹⁸

At this time, the emphasis on the political economy of poverty and social justice went hand in hand with a rights-based approach. A rights-based approach would, it was envisioned by leftist scholars, land rights NGOs and members of government alike, ensure a fair and transparent implementation of the new land policy. Through a combination of substantive rights, participation rights and accountability mechanisms, a rights-based approach was seen as an important tool in unmaking existing race, class and gender equalities.

The gender equality principle embedded in article 9 in the Constitution of South Africa of 1996 forms the legal backbone of South African women's right to equality in the restitution process.¹⁹ By the right to equality is meant substantive equality in terms of 'full and equal enjoyment of all rights and freedoms'.²⁰ Towards this end the Constitution prohibits both direct and indirect discrimination on the grounds of race, gender, sex, pregnancy, marital status, social status or sexual orientation.²¹ Direct gender discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and

15 Department of Land Affairs, 'White Paper on South African Land Policy' (DLA, Pretoria 1997).

16 Minister of Land Affairs, 'Land Reform Gender Policy' (April 1997).

17 See Cheryl Walker, 'Piety in the Sky? Gender Policy and Land Reform in South Africa' (2003) 1–2 *Journal of Agrarian Change*; Cheryl Walker, 'Women, Gender Policy and Land Reform in South Africa' (2005) 32(2) *Politikon* 297–315; N Erlank, 'ANC Position on Gender, 1994–2004' 32(2) *Politikon* 195–215.

18 CEDAW was ratified by South Africa in 1995.

19 See Catherine Albertyn, 'Equality' in Elsje Bonthuys and Catherine Albertyn, *Gender, Law and Justice* (Juta Legal and Academic Publishers, Cape Town 2007) 82–119.

20 Constitution of South Africa, art 9(2) 1st sentence.

21 Constitution of South Africa, art 9(3)(4).

characteristics of men or women, which cannot be justified objectively.²² Indirect gender discrimination occurs when a law, policy or program does not appear to be discriminatory on its face, but has a discriminatory effect when implemented. To prevent discrimination and facilitate substantive equality the Constitution allows the state to take proactive measures to 'promote the achievement of full equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.²³

III. Women's Rights as Part of Group Rights

The gender equality principle embedded in the Constitution informs the content, interpretation and implementation of the legislation that was put in place to frame the land restitution process. According to the Restitution of Land Rights Act of 1994 (hereafter referred to as the Restitution Act), a right in land means:

...any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession.²⁴

What it meant to be dispossessed of 'a right in land' posed problems at the legislative level. Women, who under apartheid customary law lacked capacity to hold or own land, did not in strict legal terms have 'a right in land' at that point in time. A narrow interpretation of 'a right in land' could have meant that women were excluded from the restitution process. Implementing the Act, the Chief Land Claims Commissioner had to come to terms with women's double dispossession under apartheid, and took women's *de facto* use rights and not their formal rights as the point of departure. This broad interpretation was in line with the Constitution's protection against direct, indirect and structural discrimination and section 35 of the Restitution Act setting out to:

22 CESCR 'General Comment No. 16' Article 3: The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights' (2005) UN Doc. E/C.12/2005/3.

23 Constitution of South Africa, art 9(2) 2nd sentence

24 Restitution of Land Rights Act No. 22 1994 (with Amendments).

... ensure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant[.]

Women's restitution claims could thus be constituted as individual claims or as part of broader group claims. Urban women's restitution claims were more often accommodated as individual claims settled through economic compensation. Mostly, rural women's claims were framed as group claims and in the case of Le-vubu as part of the general land claim under a chief.

The CPA Act of 1996 was written to create new institutions to hold and own land that was to be made available through the Restitution Act.²⁵ Without the CPA Act it was unclear to whom the land should be returned other than the chiefs and tribal authorities. The Act regulates the relationship between claimants holding property in common. The Act establishes that a communal property association is a legal entity that can own the land and has the capacity to sue and be sued.²⁶ To democratize property relations within the group, the CPA Act requires the drafting of a constitution regulating issues pertaining to membership and decision-making.

To explore how rural women's right to equality and non-discrimination have been accommodated as part of group claims in laws, policies and practice, we have focused on how the communal property associations (CPAs), who hold the restituted land on behalf of the claimant community, have considered gender issues, or not. How does the CPA Act address power relations within the claimant community and how has the Act been translated into practice by the different actors involved in the different phases of the land restitution process?

Among the principles to be accommodated in the Constitution are fair and inclusive decision-making processes and equality of membership.²⁷ The legal content of membership or the individual rights of members in group claims are not specified by the Act. The distribution of property between different groups or individuals within the community is, however, guided by the equality principle in Article 35 of the Restitution Act to 'ensure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and

25 *CPA Act* (n 10).

26 *Ibid* s 8(6)(a).

27 *Ibid* s 9(1).

a tenant'. How this standard provision is translated by the communities is particularly important from the perspective of married, divorced or widowed women who lack equal property rights under customary law that regulate family property.

IV. The Registration and Verification Process in Limpopo Province

Our study of restitution in Limpopo shows that all the rural restitution claims were constituted as group claims. There seems to have been consensus between claimant communities, the Regional Land Claims Commissioner (RLCC) and Nkuzi which assisted in the process, that the claims of people who had been displaced should be constituted as group claims. This in turn led to a focus on the chiefly boundaries at the time of dispossession as opposed to the land use of different social groups and individuals within that area. As groups like the Ravele, Masakona, Shigalo, Tshakuma and Ratombo lodged claims under their chiefs it became virtually impossible for less powerful social groups who were using the land such as farm workers or religious groups to lodge claims in their own right. While Nkuzi might have favoured greater emphasis upon actual land use, traditional leaders asserted their claims to certain territories marked by boundaries which became the boundaries for the land claims themselves, excluding those who were not members of the tribe.

Nkuzi provided extensive assistance to communities who wanted to lodge claims. As part of their gender mainstreaming strategy they made special calls for women's participation. Posters and calls for meetings initiated by Nkuzi in 1996 and 1997 were titled 'Women Claim Your Land before 31 December 1998,' reflect the efforts that were made to mobilize women within the dispossessed communities. The view that women used land on an equal footing with men resonates with the memories of both the dispossessed and their descendants. An Nkuzi lawyer, who grew up in a Shangaan area in Limpopo told us:

My observation as a young boy during the 60s, my grandfather who was also a headman of the place I am currently residing, had five wives and each of them had one or two plough fields on the wives' names. We all referred to our grandmothers' fields by their names. The one belonging to my grandmother was referred to as '*Nwa-Khonyani's field*' and not by my grandfather's name. In case my grandmother's house ran short of food,

she had to go to her maiden relatives to get food for her household. Our grandfather was fed wherever he would be staying at a particular time. It was the responsibility of the host wife to feed the husband. Women's rights to plough fields were dependent on the existence of the husband's household, but the women had usufruct rights to that land and total control over production on it.²⁸

Nkuzi issued a Land Claim Lodgment Manual in 1998. The Manual, which was used by staff members involved in the registration and documentation process, is written in gender neutral terms. The section on individual interviews states that 'It is important to take statements from people who were actually living on the land and who can remember the events that led to the dispossession or the removal.' The manual gave instructions to compile lists of the people dispossessed and their spouse, children/children-in-law, grandchildren and grandchildren-in-law. Nkuzi's emphasis on equality between community members did not sit well with the traditional leader's hierarchic notion of status and power within the community. According to Nkuzi's gender advisor there was a lot of discussion about how they should go about ensuring that all individuals in the community were put on an equal footing.²⁹ To change patriarchal power relations between the community members and the traditional leaders and between husbands, wives and children within the family Nkuzi tried to convince traditional leaders and male members of the claimant communities that everyone would benefit from an approach including women. The majority of the villagers with a memory of the forced removals were, according to Nkuzi, women. Men were often absent in the cities and mines when the removals took place. Nkuzi staff also argued that since women were the ones who catered for the wellbeing of the community members in terms of health, care and food they should be included in the claim on an equal basis. Through a strategy that appealed to traditional gender roles within the communities' women were included as equal individuals in the community claim.

What motivated the communities' choice of an approach based on individuals rather than households was, in the final analysis, a desire to make the claims as inclusive as possible. Lists supplied to the RLCC included the spouses, children and grandchildren of both men and women who had been dispossessed. They were registered as claimants in their own right. In line with the general policy of the Commission, the RLCC in Limpopo and Nkuzi, they attempted to take

28 Interview with Shirhami Shirinda (Elim 1 May 2009).

29 Interview with Furule Thembani (Tzaneen 25 July 2009).

down as much testimony and evidence of dispossession as possible although the claims were not made on the basis of individuals but on the group. Unlike the 'Permission to Occupy Permits' (PTO) utilized in the 'so-called homelands' during apartheid which were registered under the male household head, women were now registered in their own right. This broad interpretation, which recognized the realities on the ground, was in line with the Constitution and also the White Paper that set out to undo the double dispossession that women had been subject to under apartheid.

The large number of testimonies given by women who had been subject to dispossession speaks to this process. One example is Mhlaba Baloydi's testimony:

I am a woman of 80 years of age. I was born in the year 1917 on the farm Welgevonden 4LT, under the leadership of Hosi F.J. Shigalo. In 1938 we were informed by our Hosi F.J. Shigalo that the Government was ordering us to move to a place called Musibi. The reason given was that the place Welgevonden 4LT was proclaimed white area. When the forced removal started, our home consisted of five rondavels and one cooking hut. No compensation was given to us. We lost a lot of our properties, like mealies and other crops. Trucks and donkeys were used to remove our properties to Musibi. Because of the forced removal my grandfather lost a big herd of cattle, bags of mealie, tons, on the way and grains scattered. On our arrival at Musibi it was often raining, our properties got wet. Mealies fermented, some of our elders and myself got diseases. At Musibi there was nothing to be found. We stayed at Musibi for about 20 years. We left graves of our close relatives at Welgevonden. I therefore, for myself and the community of Hosi Shigalo as the descendant of our elders who are now dead, claim that Welgevonden 4 LT farm be restored to us/and or compensation paid for that land and our properties.

It became important for claimants to be able to document their claims as the Regional Land Claims Commission based in Polokwane, the provincial capital, undertook the claims verification process. Claimant communities had to demonstrate prior settlement and land use by the claimant communities and their antecedents. The RLCC accepted, in consonance with Nkuzi, that all individuals above the age of 18 who were themselves dispossessed or immediate descendants of dispossessed were eligible as members of claimant communities. The membership lists included all men and women who met the criteria now listed in the official list to be members of the CPA and the lists presented to the RLCC.

V. The Settlement Process – New Institutions, Norms, Policies and Actors

Having described the claims process we will now turn to the government policies that were applied in the different phases of the settlement process.³⁰ Communities formed land claims committees which, according to the CPA Act had to be changed into CPAs.

Communal property associations

As a part of the settlement agreement between the Regional Land Claims Commissioner and claimant community, the claimants had to form a legal entity, preferably a communal property association that would hold the land on behalf of the group.³¹ The aim was to democratize communal property relations. Land ownership was intended to be vested in the community, represented by the CPA. The CPA Act defined the community, not the chief, as the owner of the land held collectively by the group.³² Registration as a communal property association required the drafting of a constitution regulating issues pertaining to membership and decision-making. Among the principles to be accommodated in the CPA constitution, in accordance with the CPA Act, were fair and inclusive decision-making processes and equality of membership. Through equal membership rights women also attained equal ownership rights. Our research explores how the equality principle embedded in laws and policies was translated into practice in the course of the formation of communal property associations.

New Property Institutions

A main actor in this process was Nkuzi initially pressuring the RLCC to register land claims, and subsequently at the request of the RLCC, assisting the communities in the formation of CPAs. In this process, Nkuzi took steps to implement

30 On the legal framework that guided the land restitution process see J Dodson: 'Unfinished Business: The Role of Governmental Institutions after Restitution of Land Rights', in Cheryl Walker and others (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (Ohio University Press 2010) 273–287.

31 The alternative was to form a trust which would manage the new properties and resources on behalf of the community. This is a very restricted business model which was discouraged by the RLCC and Nkuzi.

32 *CPA Act* (n 10) s 8(6)(a).

the gender equality principle in the CPA constitutions, as required by the Act. Blueprint models, containing provisions of equal representation, drawn up by legal experts were used as point of departure for the workshops with the communities. In the course of the workshops and consultations with local claimants, Nkuzi program officers actively encouraged the communities to elect women on the CPA Committee.³³ When men resisted saying that this was not an issue for women, the Nkuzi staff answered that the CPA constitutions should not be discriminatory.³⁴ The communities were told that according to the new Constitution of South Africa discrimination against women was prohibited and that they needed to be represented on the CPA committee.

The formation of the CPAs went hand in hand with other initiatives directed at rural women both at government and NGO level. The strong political focus on women's rights in general and on women's land rights in particular was reflected in Nkuzi's work since its founding. In line with its gender mainstreaming strategy the organization appointed one of its staff members to act as a gender focus. The aim of this strategy was to strengthen women's participation in the land restitution process and in rural development more generally. Without a specific gender strategy Nkuzi's work on gender equality was to a large extent driven by national initiatives. Nkuzi was part of the NLC, a national network coordinating regional and local land rights NGOs. Nkuzi's gender advisor was member of NLC's gender committee and participated in NLC's gender workshops.³⁵ Nkuzi was also present when the Gender Education and Training Network (GETNET) in the Department of Land Affairs, Northern Province held gender training programs in Limpopo. The Nkuzi gender advisor's report from April 2000 reflects the need to train women with a view to more actively assert their interests in the land restitution process. Returning from a meeting with one of the claimant communities he noted that:

I typed up the amendments made from the CPA adoption workshop. I also typed up minutes from the same workshop. The amendments came as a result of changes that came from the adoption meeting. The problem is that most of the changes were coming from the youth and mostly the male participants in the meeting.

33 The CPA Committee can be best understood as the executive of the association.

34 Interview with Furule Them bani (Tzaneen 25 July 2009); interview with Shirhami Shirinda (Makhado 28 July).

35 Interview with FuruleThem bani (Tzaneen 25 July 2009).

In his report from August 2000 he noted:

The people are starting to get interested in the claim because they are getting more involved and the youth are very keen to participate. Women's participation still remains a problem, therefore a gender workshop for the whole community has to be organized for them.

While recognizing the need to train and empower women, Nkuzi's overall strategy lacked a gender component. No systematic approach enabling Nkuzi staff, that was almost entirely male with limited gender training themselves, to deal with the deep-seated patriarchal structures at community and household level in Limpopo, was delineated.³⁶ To ensure that women were brought onboard many Nkuzi staff, however, held separate workshops with women in the claimant communities.

Nkuzi's efforts to mobilize, include and enhance women's participation in the restitution process made a mark on the composition of the CPA boards.³⁷ However, not all respected the spirit if not the letter of their own constitutions. For example, the Shigalo Constitution set a minimum of four female members out of fifteen on the committee while only three women were elected. The Shigalo formed an executive committee with five members, none of them women. The Masakona and Ratombo constitutions specified that four out of nine members should be women. There are four women on the Masakona CPA committee. The Tshakuma formed a trust, not a CPA. The board has eleven members, with only one of them a woman. In two of these communities women were committee secretaries. None of the female committee members had been elected chair of a CPA in any of these communities. Reflecting on the outcome of the process one of the Nkuzi staff members was of the view that the process was rushed and to a large extent dictated from the RLCC:

Because RLCC decided that people should form CPAs there was not much choice. As community lawyers we should have informed them about the advantages and disadvantages of different ownership forms. In practice most of the constitutions were just cutting and pasting. It was not time and resources to engage in broad consultations with members of the community. If there had been time for discussions about what the community wanted

³⁶ Interview Theresa Yates, founding member of Nkuzi (Johannesburg 2 August 2009).

³⁷ In our examination of Nkuzi it is unclear how committed they were internally and externally to gender equality.

and how it could be translated into their constitution I think they would have taken ownership. As it now stands the communities are not following the procedures in the constitutions.³⁸

The CPA members were elected at a general meeting of the CPA. In practice it was, however, the members of the original land claims committees which had been formed to submit and pursue the claims that identified the candidates and presented them to the general membership. In spite of women not traditionally being present or speaking at meetings of elders or traditional councils, a number of female candidates were chosen. Like the CPA members in general, the women who were chosen, came from the most powerful families in the claimant communities. The two female members of the Ratombo CPA committee (which generally was dominated by the royal family) were members of the royal family. The women on the Masakona CPA board were well educated and already active in many community organizations. Female representation was, to our surprise, weakest among the Shigalo where the influence of the chief was weakest. Most of the elected women had been mobilized through the gender workshops and networks that Nkuzi was a part of when they were more focused on women from 1998-2001. Our impression from meetings we have held with women in the community is that no systematic attempts were made to coordinate and discuss the interests of the female membership in the CPAs. There has been a lack of attention to electing women who represented women and who reported back to women members.

New Property Norms

The Communal Property Association introduced a gender equal notion of property rights where all women: married, widowed, divorced or single, were awarded the same rights in the restituted land as equal members in the CPA. Thus, they become individual shareholders in a collective property on an equal basis with their fathers, brothers or husbands. The restituted land is constituted as a new form of common property vested in a new institution framed by new norms. It differs, for example, from Venda customary law which is based on a hierarchic construction of gender relations, embedded in a patrilineal and patrilocal, family and kinship system. According to the Masakona Headman, who presides over the Masakona tribal court, everyone who is a member of the Masakona society (tribe),

38 Interview with Shirhami Shirinda (Makhado 29 July 2009).

except children, can apply for land.³⁹ Single women can apply for land and have it registered in their own name. If a family applies for land, it is registered in the name of the husband. That is, according to the headman because ‘it is, according to custom, the man who marries the woman’.⁴⁰ The wife will, however, be registered as a wife in that document. When the husband dies the property will, be registered in the wife’s name. Yet, if the woman gets a new partner she is advised to apply for a stand in another community because this often leads to conflicts with the late husband’s relatives. Each divorce case must be taken on its own merits even though the husband is registered as the owner of the land and houses. To do justice in the individual case, the Tribal Council, according to the headman, looks into the circumstances of the divorce case including the interest of the child, who worked the land, and who is to be blamed for the divorce. The interest of the child is seen as very important. If the father is irresponsible and violent the mother will be given custody and a right to stay in the family home with the children.

VI. Tensions Between New and Old norms and Institutions

According to the CPA constitutions women are equal members. In practice there is, however, a tension between the principle of equal membership status and the customary norms that apply within the group. In many instances the CPA constitutions are interpreted in the light of the prevailing customary norms. Membership statuses of children – of sons and daughters who marry outside the claimant community – are, according to key informants in the CPAs, not the same. Unlike sons, daughters who marry non-community members cannot, according to both women and men we have interviewed, pass on membership. The patrilineal principle, according to the community members we have interviewed, will apply to widows who remarry. They will by implication be advised to leave the community and apply for land elsewhere, which will mean they will lose rights to the restituted property. The patrilineal principle will, in other words, take precedence

39 Our account of the customary law of the Masakona is based on interviews with contemporary tribal authorities. The ideals and principles described by tribal authorities often differ from the varied and shifting practices on the ground that are often referred to as ‘living customary law’. To our knowledge, ‘the living customary laws’ of the Venda and Shangaan groups included in our investigation have not been studied previously.

40 Interview with Masakona Headman (Masakona Tribal Offices 12 August 2008).

should it come into conflict with the equality principle embedded in the South African constitution and the CPA Act.

Inconsistencies Between Individual Membership Rights and Settlement Agreement

The rights of claimants, deriving from the settlement agreements that regulate the relationship between the CPAs and the strategic partner, are often unclear and inconsistent with the CPA constitutions. Despite the membership in CPAs by individuals, the two different kinds of government grants to be given with the settlement agreement did not go to individuals. The Settlement Planning Grants which were fixed at R1,440 per household and the Restitution Discretionary Grant, set at R3,000 per household seems to have no basis in law since *households* do not receive membership in the CPA, only *individuals*. In theory, the grants were to go to the CPA⁴¹ which would then decide on how to spend the monies. In practice, the government gave the monies directly to the strategic partners to assist them in the redevelopment of the restituted farms, and some monies went to the CPAs which were used for their expenses. What was to happen with highly unstable households and with often absent men as the 'legal' heads of households was not considered.⁴² We return to this issue below but let us note the disjuncture between on the one hand individual dispossession and individual membership in CPAs and, on the other, no provision or understanding of what households might or might not have been dispossessed.

From 'Woman-Focused' to 'Gender Neutral' Measures

The quota system for women was put in place to democratize communal property relations. The gender policy developed by DLA's Gender Unit included measures to ensure women's full and equal participation in decision-making, with the prime example being gender sensitive training. Yet in the course of the settlement process no measures were taken to empower women as members of CPAs and CPA boards. None of the workshops that were arranged by the RLCC or Nkuzi ad-

41 When we refer to CPA it is really only the committee, or the executive. Rarely was the whole membership informed of what was taking place with respect to monies.

42 The settlement agreement was sent by the RLCC on 8 February 2005. It was sent back to Limpopo RLCC for corrections and then resubmitted on 1 April 2005. The settlement agreement required the signatures of the head of Chief Land Claims Commissioner, the Chief Financial Officer and the Director General of Land Affairs and the Minister who signed it on 7 July 2005.

dressed how gender fairness should be integrated in the management and distribution of the fruits of the returned property. While initially seeing gender inequalities at the household and local community level as an important concern, Nkuzi's interventions in this phase turned to issues pertaining to the relationship between the CPAs, the strategic partners and government.

A number of factors have contributed to this development. Most importantly gender issues and understandings were not systematically integrated into Nkuzi's work. Nkuzi neither worked out a general gender strategy nor specific strategies related to its different areas of action. When the special gender consultant left the organization he was replaced by a woman who left Nkuzi shortly thereafter to work for the RLCC. She was never replaced.⁴³ Government at all levels also failed to provide leadership on how to achieve equality. While the South African Constitution calls for substantive equality and proactive measures that address gender difference, the national gender unit within the Department of Land Affairs (DLA) in practice held the view that the law was to be 'gender neutral'. By 'gender neutrality' was meant that it was beneficial for both women and men. This implied that projects addressing women's issues often were held up by DLA.⁴⁴ Nkuzi, for example, had a proposal for a woman's project that would support women's agricultural activities, which was turned down because it did not include men.

VII. New Norms and Institutions in a Shifting Political Context

This stagnation in the process of enhancing women's rights and gender equal property relations at the level of the claimant community, both in terms of accountability and empowerment mechanisms, coincided with the changing national land policies and priorities in 1999–2000; black commercial interests were given higher priority than gender equality and poverty elimination.⁴⁵ This is clearly re-

43 See —, 'Gender Review of the Area Land Reform Initiative Project of the Nkuzi Development Association' (Nisaa Institute for Women's Development, November–December 2005).

44 Interview with Theresa Yates (Johannesburg 2 August 2009).

45 See Ruth Hall, 'Two cycles of land policy in South Africa: Tracing the contours' in Ward Anseeuw and Chris Alden (eds) *The Struggle over Land in Africa: Conflicts, Politics & Change* (HSRC Press, Cape Town 2008).

flected in the shift towards a business model geared to the formation of strategic partnerships between CPAs and agro-business companies.

Marrying Social Justice with Business: Women's Rights in the Business Model

Faced with the enormous scale of developmental responsibilities involved in the demand for a just and sustainable post-restitution process, the government altered the land restitution process, at least in the case of relatively high value farms. In adopting a commercial farming model, as a condition for the return of their land successful claimant communities were required to form a joint venture or operating company through an agreement with a private entrepreneur.⁴⁶ According to the agreement the 'strategic partner', would invest working capital and take control of farm management decisions for a period of ten years, with the option of renewal for a further period. The potential benefits to the claimant communities would include: rent for use of the land and the farm houses, a share of the profits if any, preferential employment, training opportunities and the promise that they would receive profitable and functioning farms at the termination of the contracts and lease agreements. All the contracts provided clauses whereby community members were not free to move back onto their land for residential or farming purposes. Fundamentally the farms were to remain as is with the major difference being preferential hiring and training of claimant community members. And, no funds were set aside for the improvement of farm worker and farm dweller living conditions on the farms, nor to ensure that gender equality would be realized at all levels. These gaps demonstrate the fall-off between the SP agreement and what the South African constitution, the CPA Act and the CPA constitutions say about women's rights and gender equality.

By marrying a social justice and a modified business model the aim of this new institution, the joint venture company was to facilitate a transfer of agricultural and business skills to the CPAs. This new model of restitution raises many questions about the direction of the restitution program, the realization of benefits among claimants and the extent to which the original objectives of the South African land reform program as envisaged in the Constitution, the Restitution Act of 1994 and the ambitious gender policy are being achieved. A further critical issue is the capacity of the state to plan and implement complex commercial deals on such a scale, to provide the necessary support to claimants and their commercial

46 Draft Shareholders Agreement, MAVU and SAFM Template 2006/7.

partners and, over the longer term, to safeguard the interests of communities and their individual members, particularly women, farm workers and the poor.

The formation of the joint venture companies was, unlike the CPA process, not accompanied by any overarching guidelines from the RLCC and the DLA to ensure fairness and representativeness of community members on the board of directors and on the executive of the CPA.⁴⁷ Each CPA selects its own representatives to its board of directors. There are members from each CPA and they have been drawn from the executive committees and those who have been active for several years. The SPs are represented by an equal number one of whom serves as the board chair for the first three years. Lastly, there are two government representatives who are nonvoting. There are no requirements that a certain percentage of the board of directors be women or other segments of the claimant community so as to ensure fair and non-discriminatory representation. As we write this in May of 2010 the six joint venture companies formed and incorporated with two strategic partners, UMLIMI and SAFM, no longer exist due to their bankruptcy. Claimant communities are now being given greater choice in restructuring of farm management. They are also awaiting new government funding to keep the farms functioning. Nonetheless it remains instructive to examine the weaknesses in the SP model in relation to the promotion of women's rights and gender equality because they are most likely to be repeated.

No measures ensuring that men and women are equally represented on the boards of directors were put in place. Only one of the five communities, Masakona, appointed two women to the board of directors of the new joint venture company. The one woman representative on the board of directors for Ratombo is the daughter of the late chief and has a supervisory position on their farms. The female members from the Masakona sit on the CPA committee and are actively involved in the farm management. None of the other groups appointed women to the board.

Neither the new strategic partners, Nkuzi, DLA, RLCC nor the Makhado Municipality made any effort to promote gender equal representation within the new business model. This is reflected in the low representation of women. While recognizing that women are good workers, the agro-business companies see employment of women as a means to increased productivity, not an end in itself. Nkuzi, which still sometimes assists the community when there is a conflict with government

⁴⁷ Initially, each strategic partner wrote its own contract for the formation of the new companies. These contracts were modified over time with a commercial law firm providing pro bono legal assistance to the claimant communities at the behest of Nkuzi.

or the agro-business partner, does not raise issues related to unequal power relations within the community. The lack of commitment to promote gender equal representation on the board of directors is surprising given that the mayor, the city manager and the speaker of the municipal assembly are all women. In an interview with the speaker, she was surprised at the lack of women's participation.⁴⁸

Questions of broader justice and development issues will most likely be delayed further due to the crises now faced by claimant communities. It is, in our view, unlikely that gender and poverty issues will be prioritized. The business vision of agriculture is most likely to continue. Broader questions of who speaks on behalf of the CPAs on the board of directors and in the CPA committee will in all probability continue to be shelved in trying to preserve profitable farms. Due to lack of regulations ensuring fair representation of different segments of the claimant communities, combined with the non-specification of CPA members' rights and shares in the new companies, it is not unreasonable to predict that this new structure is likely to have very different consequences for the entrenched gender and class inequalities within the claimant communities. Under present circumstances where the farms are struggling for survival it has been difficult to raise such issues. It does raise the more general issue of the model's appropriateness for the claimant communities.⁴⁹

VIII. Distribution of Benefits: Individual Rights and Group Rights

According to the Strategic Partner Agreement, claimant communities will benefit through a combination of rent paid on the land and houses, a share in profits, training opportunities provided by the strategic partner and preferential employment opportunities in the enterprise. Although the full value of these benefits, with the exception of rent, has not generally been specified during the negotiation phase, community members are expecting significant material benefits from the restoration of their land and their involvement in the business ventures.

48 Interview with the speaker of the municipal assembly (Makhado Municipality, 4 February 2008). Municipalities are, according to the Municipalities' Act, responsible to ensure that all stakeholders participate at all levels of community development. Makhado Municipality has engaged a special company to give skills training to ordinary communities. Gender is, according to the speaker mainstreamed into all such programs.

49 These questions are addressed in Derman, Lahiff and Sjaastad (n 1).

Employment and Training on Farms

There are no transparent procedures for the election of directors or the employment of managers, technical personnel and workers. The processes are, as we have witnessed, informal. For example, available jobs are often allocated through a communication from the management company to the chair of the CPA or the chief who makes the selection. From our data, more women are being hired as farm workers than men from the claimant communities. It is possible that many more women will be trained since it has been difficult to find younger men who want to make a career of working on the farms. Yet, so far the employment and recruitment patterns have been highly hierarchic. Women have been employed as unskilled labour while the majority of those selected for skills training and leadership positions have been men. The women in the claimant communities, who struggle to make ends meet for their families, see the jobs as a great achievement. According to a woman in the Masakona community:

I have been a member since the restitution process started in the late 1990s. I did not even hope that we would get these farms one day. I have never had a paid job before so the work on the farms is an excellent opportunity to have money on my own. Now we never go hungry. In the past we would struggle. The money is still little but we are grateful.⁵⁰

Generally, although this may change, there is an apparent bias toward hiring men for administrative and supervisory positions on the farms. The clear exception is Masakona who have two female supervisors. While the strategic partners express the opinion that female workers are highly reliable and hard working they have not taken any systematic steps to work out a human resource management scheme ensuring that competent women are recruited and selected at all levels. In practice the selection process has been left to the communities who have put male candidates forward, particularly for leadership positions and training purposes. Instead of challenging patriarchal power structures within the community the business partners seem to be reinforcing them.

The Share of Rent and Profits Amongst the Members

The eventual benefits flowing to the community from the business enterprise

⁵⁰ Interview (Masakona 15 April 2008).

are to be distributed amongst the CPA members. On paper, the decisions will be made by the CPA committees in consultation with the members of the associations. The CPAs will have to make difficult decisions as to whether rent for land, which is currently being paid should be reinvested, used for CPA determined needs, or given back to individual community members. To date, the monies have been used for trucks, offices and office equipment and compensation to board or executive committee members for their time contributions. In one case the monies were used for redecorating a farm house for a chief and then for his funeral. It will be up to the joint venture company, not the CPA, to determine distribution of profits when and if there are any to the CPA. If benefits are given, the CPA committee will in theory consult with the CPA membership as laid out by their constitutions. In practice benefits have, however, been allocated to fund the work of the CPA committees without any consultation.

In the planning process in Limpopo, as elsewhere in South Africa, local communities were to a large extent seen as undifferentiated, with similar interests, and therefore no account was taken of their complexities and divided interests.⁵¹ The legal content of membership and the rights of members in a group claim have subsequently not been accomplished prior to the transfer of land. How to distribute property between different groups or individuals within the community is unspecified despite the obligation under section 35 of the RA to 'ensure that all the dispossessed members of the community shall have access to the land or the compensation in question on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant'.

While mandating internal democratic principles of participation and decision-making, CPA constitutions are vague or silent in relation to sustainable use of resources; individual use rights; and the allocation of benefits that will flow to the community from rent, profits from the new company, or grants from government. While not specifying individual use rights or individual shares, the constitutions make reference to ill or non-defined principles of fairness and equity. One (typical) example is the Ratombo constitution, which in one statement mandates fairness and equity, and in another, limits it:

- (1) Powers of the association and committee shall be interpreted and implemented at all times in accordance with the principle of fairness and equity.
- (2) Nothing hereinafter contained or implied shall preclude the Association

⁵¹ *Pienaar* (n 4).

or Committee from entering into arrangements involving differentiation between individual members, provided that a bona fide attempt is made to avoid ostensible disparity, and to ensure broad equity and fairness between affected members.

Interviews with CPA members of Ratombo, Shigalo, Ravele and Masakona reflect tensions as to how a fair balance between communities, households and individuals may be reached.⁵² Out of the 69 members interviewed 36 percent favour individual and/or household benefits alone. In this grouping a majority of women favoured the individual whereas the men preferred household payments, over which they would likely have greater control. Twenty percent of respondents favour dividing the benefits between individuals and households and the community. Once again there was a gender difference with only two women supporting this division. Those who thought that the community alone should receive the benefits accounted for 29 percent of the total, three quarters of which were men. Women were far more supportive of individual benefits whereas men supported household or community ones. In any event, decisions are already being made by CPA committees (the small group that manages CPA affairs, and most of whose members are men).

A group interview with Shigalo women illustrates how difficult it is to do justice through investment in common goods.⁵³ Emphasizing internal differences between community members in terms of age, education and participation many women were in favour of cash transfers to households. The group interview we held with Masakona women (June 2007) emphasized differences between the women who got individual benefits through jobs on the farms and those who were not employed. These women wanted benefits that could be distributed in the community. They wanted money to start income-generating programs and money for a water pump. Where membership is dispersed through two or more communities and members living in urban areas, reconciling these differences may pose new and unforeseen challenges.

Gendered and Classed Patterns of Power and Resources

Our findings are that there is a highly gendered and, to a certain extent, classed

52 These results are from a more general interview schedule for members of successful claimant communities focusing upon their backgrounds and expectations from the restitution process.

53 Field notes, Anne Hellum and Bill Derman, June 2007.

response to how benefits, if and when they come, should be distributed. Women favour individual benefits recognizing that if benefits are given to the community or to household heads they are unlikely to obtain them. The CPA leadership, where men are in the majority, favours community distribution and they are already gaining benefits not available to others. Yet women's views on this crucial issue are not articulated in laws, policies, constitutions or practices. Neither are they voiced in the general CPA meetings or on the CPA committee meetings that are dominated by men and women from the upper strata in the society.

The disjuncture between the principles embedded in both the national and the local CPA constitutions speaks to the overemphasis on the agency and empowerment of local communities and the under-emphasis on the structures of domination and power that exist within these communities. In the restitution process in Limpopo, as elsewhere in South Africa, local communities have by and large been seen as undifferentiated, with similar interests, and therefore little account has been taken of their complexities and divided interests.⁵⁴ No attempts were made either by government, Nkuzi or the Strategic Partners to give voice to women's concerns as to how benefits should be distributed. This is reflected in the lack of principles related to distribution of resources in the CPA Act, in the CPA constitutions and in the hiring policies of the joint venture companies. This reinforces Pienaar's call for specifying the rights of beneficiaries in CPAs which would work to the benefit of women and to the poorer members. Substantive equality in other words calls for proactive measures to reconfigure the gendered and classed relationship between individual and communal rights.

IX. The Future of Equal Land Rights – Between the Government, Business and Chiefs

Land restitution, like land reform in general, is a beginning and not an end, as pointed out by Cheryl Walker.⁵⁵ Unless given content in response to women's actual demands on the ground, the rights-based approach, embedded in law and policy, remains an abstract principle. It is through a responsive and dynamic application of these principles in actual struggles on the ground that the potential of advancing women's concerns may be realized. Rural women's right to equal

⁵⁴ Pienaar (n 4).

⁵⁵ Walker (2003) (n 16).

restitution is, as we have seen, not self-implementing but could be the result of a process that just has begun.

The declining political priority accorded to rural women's right to equality in the context of shifting, overlapping and conflicting political trajectories speaks to the options and limits of a rights-based approach to justice and empowerment for women. The initial thrust of the land restitution policy was to put a legal framework in place, ensuring that justice was done to all groups including women, and labour tenants were put into practice. In the claims-making process government laws and policies were supported by a network of non-governmental organizations; some focused specifically on displaced communities. All in all the claims-making era witnessed a concerted effort of government policy and civil society action and mobilization aimed at the legal empowerment of rural women. These initiatives, which were fuelled by a social justice trajectory, are manifest in new common property norms and institutions. Women have attained equal membership and ownership rights in these new institutions, which is no small thing. Through the creation of CPAs, the principle of equal participation and equal property rights has slowly gained ground in the claimant communities. The principles and practices of the CPAs seem to have had a spillover effect on the co-existing and overlapping traditional institutions. In some of the claimant communities where we have engaged with the traditional councils, the number of women representatives has been increased.

Yet these legal changes are, as we have seen, nothing but a platform for further struggle. These rights are not in and of themselves empowering but contingent on whether they are upheld through the training and the mobilization potential of the women in the CPAs and on the CPA and joint venture company boards of directors. The lack of proactive measures ensuring empowerment of women in these entities parallels the low political priority accorded to gender equality and social justice within the new business model. Formal inclusion in a market model governed by a narrow equal opportunity approach where existing gender hierarchies within the community and the household are regarded as private matters is reinforcing rather than changing existing inequalities. It is highly disturbing that the outcome of the Strategic Partner model has been the state abrogating its post-restitution responsibilities in a political context where universal citizenship and difference politics remains undecided and uncertain, particularly in terms of class and gender justice.

In practice, the new property institutions, both the CPAs and the joint venture

companies rely heavily on traditional authorities.⁵⁶ While chiefs neither figure in the CPA Act nor in the Joint Venture Company agreements, they are playing a significant role in negotiating workers rights, hiring practices and use of potential profits as they are considered by most members of claimant communities as the ultimate owners of the land. Illustrating how power relations are reconfigured within the claimant communities, our research demonstrates a need to strengthen and develop the CPAs as democratic property holding institutions. In a situation where the CPAs are dominated by a small male elite that favour community benefits that they can control there is a need to rethink their role from a gender, poverty and democracy perspective. What is needed are processes that can give space and voice to the quest for individual justice coming from women within the community.

⁵⁶ For further analysis of the position of chiefs in the CPAs and the JVCs see *Hellum and Derman* (n 2).

Land and Property Rights in Colombia – Change and Continuity

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Abstract: This article discusses the relationship between the political regime and changes in the definition, regulation, and enforcement of rural land property rights in Colombia from 2002 to 2010. The article evaluates the mechanisms through which governance arrays and property rights patterns interact in a country that has suffered chronic violence and deep inequality – especially in the countryside – in the last decades. Though some characteristics of the Colombian regime – working checks and balances, political competition – have been instrumental in preventing major disasters for victims and vulnerable sectors, they have also interacted permanently with forces related to coercive appropriation of land. The consequence of this ambiguous outcome is discussed.

Keywords: Property rights, Colombia, Land, Limited Government

I. Introduction

This article discusses the relationship between the political regime and changes in the definition, regulation, and enforcement of rural land property rights in Colombia from 2002 to 2010. In particular, I will focus on ‘limited government’, that is, a type of political regime where the actions of the executive, especially those related to property rights, are subject to an array of institutional constraints and checks and balances. Based on the Colombian example, I will suggest that for countries in the process of development – especially those facing the challenge of major reforms – there is a complex relation between limited government and the stable protection and stipulation of property rights. I show how: (i) limited government and political competition can solve problems, prevent disasters, and promote the rights of victims; but (ii) can activate negative institutional designs,

¹ I present here the results of research supported by the Norwegian Centre for Human Rights at the University of Oslo.

empower networks of private coercion, and merge with diverse forms of political capitalism. In particular, developing states face a dilemma: how to produce genuine distributive reforms without signaling that they will engage in a wholesale destabilization of property rights. The paper focuses on the concrete mechanisms through which governance arrays and property rights patterns interact, under the light of extant theories and the current Colombian experience.

There is an already voluminous literature on property rights, development and the political regime, whose basic proposition is that clarity in the definition and institutionalization of the former are pre-requisites not only of long term developmental trajectories, but also of peace and stability.² Given the importance imputed to them by this proposition, the crucial question is how do property rights appear, and how do they come to be guaranteed. The ‘emergence’ question in property rights was answered by Demsetz’ classical 1967 rendering, according to which they are the result of an effort to internalize externalities, when the market value of assets increases.³ The ‘institutionalization’ question has been answered from two points of view.⁴ On the one hand, stationary banditry.⁵ Through the figure of ‘stationary bandits’, Olson imagines how the state can emerge from an original situation in which some agents are producers and others have means of coercion. Roving bandits exploit and raid producers. Stationary bandits milk them, for example through rackets (which eventually develop into taxes). Contrary to roving bandits, stationary bandits have very strong incentives not to overtax or override property rights, as their stability will guarantee the bandits a stable flow of income. The institutionalization question has also been answered from the perspective of limited government. Limited government solves the main paradox of property rights: any government that has the prowess to enforce them also has the capacity to repeal them. So how can governments signal to asset owners and society at large that they will not destabilize property? Self binding governments⁶ are able to create the mechanisms that enforce limits to their power and simultane-

2 See for example D North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, Cambridge 1990); D North, *Understanding the Process of Economic Change* (Princeton University Press, Princeton NJ 2010).

3 H Demsetz, ‘Toward a Theory of Property Rights’ (1967) 57(2) *The American Economic Review* 347–359.

4 I rely here basically on S Haber, Armando Razo and Noel Maurer, *The Politics of Property Rights. Political Instability, Credible Commitments, and Economic Growth In Mexico, 1876–1929* (Cambridge University Press, Cambridge 2003).

5 M Olson, ‘Dictatorship, democracy, and development’ (1993) 87(3) *American Political Science Review* 567–576.

6 That is, governments that develop mechanisms to limit themselves.

ously a reputation of respect for the rule of law.⁷ Thus, they are able to guarantee property rights, and signal credibly that they will not expropriate or overtax. The internalization of externalities, political stability, and limited government, should largely account for clear and stable property rights, and thus for the social goods that they produce.

These mainstream explanations have been challenged in at least two relevant ways. First, Haber, Razo, and Maurer claim that the purported link between stable and clear property rights, on the one hand, and good social outcomes, on the other, is dubious.⁸ The regressions that try to associate the relevant variables are either unstable or generate the wrong results. Theoretically, the stationary banditry mechanism does not hold. Limited government is a more adequate source of stability, but between complete lack of specification and optimal limited government there are several stages which may allow property instability with growth, because there are forms of government that guarantee rights as a private, not as a public, good. In particular, they are able to enforce the rights of one group, eschewing, or undermining, the rights of others. This can happen through ‘crony capitalism’ – allocating assets to people well connected with a person or clique – or through what the authors call ‘vertical political integration’ (VPI). VPI is a situation where the rights of a group of asset holders are guaranteed by the alignment of interests between them and a third party with the capability of delivering credible threats to the government, *and* all three (asset holders, third party and government) coalesce to capture rents. This is a situation below limited government, but above despotism.

Fitzpatrick objects to mainstream theories from another, highly nuanced, point of view. The gist of Fitzpatrick’s argument is that mainstream theories of property rights do not account for the social and power conditions of Third World countries. There, he says, the state generally lacks the clout to enforce rights, let alone to settle disputes and allocate assets authoritatively to claimants. Governmental agencies are likely to be captured by rent seekers. The state is not the only authoritative source of rules, and so many systems of rules compete, allowing each claimant to formulate his demands in the terms that are more convenient for

7 For a similar argument in a much more general setting see J Elster, *Ulysses and The Siren: Studies in Rationality and Irrationality* (Cambridge University Press, Cambridge 1985).

8 Haber, Razo and Maurer (n 3).

him.⁹ Rights are stipulated in the frame of a densely layered network of formal and informal rules, which may be contradictory – even if we are speaking about rules within the state itself. All this applies with special force to rural land property rights, for two reasons. First, both market and state can be weak or even absent in rural settings of non developed countries. Second, land is a thing; as Fitzpatrick puts it, by its own nature it is inevitably ‘in rem’.¹⁰ Because of its ‘in rem’ nature, it is open to raids and attacks. It might be added that it is also a key strategic resource for launching attacks on others.

I draw on these two key insights to discuss how limited government can coexist with very unstable and poorly specified rural land property rights. The democratic nature of the Colombian political regime has been challenged from many quarters and points of view (for example, an early comparative account of the relations between democracy and violence did not tag Colombia as a full democracy).¹¹ The issue probably cannot be solved in binary terms. However, it is beyond dispute that the country has: (i) a genuinely competitive polity; and (ii) a very long and rooted tradition of limited government.¹² Working constitutional limits to the exercise of power were formalized in 1910, and remained almost without interruption throughout the twentieth Century. The 1991 Constitution deepened them significantly. Throughout Colombian history checks and balances have been everything but eyewash (with the probable exception of the 1949-1957 period). The judiciary has a distinctly independent status, and has come as far as to deny in 2010 the reelection of a president with a very broad social and electoral base – 70 percent or above of support in almost every opinion poll during eight successive years – and who did not exhibit any timidity when he thought he had to use his powers to squeeze out, from potential opponents, the desired outcomes. The system of checks and balances includes also a parliament that has at least a strong selective capacity of hindrance, and an uncensored press.

Even then, the performance of Colombia in terms of its capacity to guarantee

9 Some critics term this ‘legal pluralism’, others, ‘institutional multiplicity’. See for example de B de Sousa Santos and CA Rodríguez-Garavito, *Law and Globalization From Below: Towards a Cosmopolitan Legality* (Cambridge University Press, NY 2005). On institutional multiplicity, see the web page of the Crisis States Research Centre <<http://www.crisisstates.com/>>.

10 Terminology used by jurists, a heritage of Roman law, related to a property title over a thing; D Fitzpatrick, ‘Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access’ (2006) 115(5) *The Yale Law Journal* 996–1048.

11 B Powell, *Contemporary Democracies. Participation, Stability and Violence* (Harvard University Press, Cambridge, Mass. 1984). In the Colombian historiography there is an continuous dispute around the issue.

12 Which, as *Haber, Razo and Maurer* (n 3) explicitly state, is not coterminous with ‘democracy’.

stable and clear rural land property rights is miserable. Rural land is incredibly concentrated. Its distribution is significantly worse than the average of Latin America, the ‘lop sided continent’,¹³ which is in itself a feat. Though quantifications diverge, sometimes sharply,¹⁴ there is an almost universal consensus that Colombia has a rural Gini index well in excess of 0.8;¹⁵ it is one of the countries of the world that has a higher level of forced displacement (and is dipping into higher levels of inequality than ever).¹⁶ Rural land is not only poorly distributed – it can be snatched by coercion or actual violence – but this is a massive phenomenon, which incidentally does not affect only small land holders. The evidence about all this, both quantitative and qualitative, longitudinal and regional, is robust, and has undergone very few, if any, serious and systematic challenges.

What is surprising, though, is that: (i) limited government has not been destabilized by the wrong distribution, specification and enforcement of property rights, but also that (ii) the former has been unable to improve, or transform, the latter. This Colombian equilibrium that includes both ‘Constitutionalism’ and liberal patterns of governance, on the one hand, and rural coercion, brutality, and expropriation of the weak, on the other, is certainly surprising from the mainstream point of view. How to explain it? Drawing on the categories of crony capitalism, vertical political integration, the essentially in rem nature of land assets, and juridical pluralism, I suggest that, when applied to contemporary non developed nations, the mainstream property rights theory misses three essential points. First, not only the underestimation of the conflict-prone nature of proper-

13 K Hoffman and MA Centeno, ‘The Lopsided Continent. Inequality in Latin America’ (2003) 29 Annual Review of Sociology 363–390.

14 F Gutierrez and A González, ‘Force and ambiguity: Evaluating Sources for Cross-National Research – the Case of Military Intervention’ (Crisis State Research Centre Working Paper) (2009) 50.

15 See for example A Machado, ‘Tenencia de tierras, problema agrario y conflicto’ <<http://www.piupc.unal.edu.co/catedra01/pdfs/AbsalonMachado.pdf>>. The Misión de Estudios del Sector Agropecuario calculated that Colombia’s rural *Gini* in 1988 hovered around 0.85. My own calculations of the *Gini* land tenure, based on the figures of the Instituto Geográfico Agustín Codazzi, suggest that currently it already approximates 0.9. This is a quite extraordinary level of land concentration. The actual figure is probably larger, as official calculations do not take into account phenomena like hidden ownership.

16 See for example AM Ibáñez and P Querubín, ‘Acceso a Tierras y Desplazamiento Forzado en Colombia’ (2004) 23 Documento CEDE; AM Ibáñez and A Velásquez, ‘El Proceso de Identificación de Víctimas de los Conflictos Civiles: Una Evaluación Para la Población Desplazada en Colombia’ (2006) 36 Documento CEDE; AM Ibáñez, *El Desplazamiento Forzoso en Colombia: Un Camino Sin Retorno Hacia la Pobreza* (Unianandes, Bogotá 2008). Also, Comisión Nacional de Reconciliación y Reparación, *Proceso de Reparación a Las Víctimas: Balance Actual y Perspectivas Futuras* (CNRR, Bogotá 2007) (*Proceso de Reparación a Las Víctimas*).

ty distribution (which is flagged by Fitzpatrick¹⁷), but of the crucial role that coercion can play during it. In particular, given the in rem essence of land property, asset owners obtain a coercion differential vis-à-vis other agents, and have strong incentives to use it to accumulate (by force) ever more land. Thus, there is a strong problem of controlling social violence from above, not only violence from below or from the state.¹⁸ Second, the denial (or more weakly the underestimation) of a specific form of pluralism, where formal and informal rules interact to weaken the regulatory hold of the state over proprietors. Though the villain role in many stories about property rights is attributed to the so-called informal rules, formal institutional arrays may produce a de facto privatization of the enforcement of property rights. I will argue that, paradoxically, the negative effects of such a solution may be boosted by limited government and competitive politics. Finally, if the distribution of property rights falls below a critical threshold, they should be submitted to big-scale institutional reform. Otherwise, the use of coercion, collective action issues between owners, and diverse forms of ‘political capitalism’ will be prevalent. However, limited government is devised, among other things, to guarantee critical rights and prevent their change. The majority of theories of property rights focus on transitions from communal – where everybody and nobody is the holder of assets – to private property. Thus, resistance of the rights holders in the initial status quo is not an issue, theoretical or practical. However, in countries like Colombia, limited governments built upon extremely unequal and coercion informed property rights face numerous quandaries. How can they transit from a highly suboptimal modality of property rights to a better one, without losing their self-restraint? Should they promote (or not) the transformation of property rights, or simply their regulation? I will show here that the (exclusively) promarket model promoted by the international community – which strengthens the regulation of rural property rights via markets, in practice cancelling any type of redistributive effort – was a delusion, at least in the Colombian case. I exhibit here the concrete mechanisms that permitted their use by diverse agents to disseminate and neutralize regulatory responsibilities, and legalize the patterns of distribution produced by coercion. If this is the case, then the dilemma of countries in a development process, and/or facing conflict situations – how to redistribute land and at the same time signal that property rights in general will be respected – remains.

I will illustrate these problems with the Colombian institutionalization of rural

17 *Fitzpatrick* (n 9).

18 On which *Fitzpatrick* focuses, assuming correctly that assets like land can be challenged by squatters, organizers of raids, armed groups, etc.

land property rights between 2002 and 2010. The paper is organized in the following fashion. The first section lays out the context, narrating the Colombian tradition of – basically failed – reformist efforts and the state in which rural land property rights were in 2002. The second discusses the reformist thrust of the two Uribe administrations (2002–2006 and 2006–2010) and his governing coalition in three main areas: agency reconfiguration, changes in the mode of regulation, and redistribution (the first one corresponding to organizations, the last two broadly to the rules of the game). The third one is dedicated to the relation between poorly stipulated property rights and limited government. The conclusions stress the virtues of the latter, but suggest that countries in conflict face tough tradeoffs that cannot be solved through mechanical recipes and/or laundry lists. This has policy implications.

II. The context

Colombians have not ignored the fact that poorly stipulated property rights cannot only be utterly unfair, but also hatch conflicts and violence. Actually, a sector of its political elites has long been acutely aware of this. While promoting the first wave of agrarian reform in 1936, president Alfonso López Pumarejo claimed that the way in which property rights were defined in the country was unbalanced and unstable. Thus, it harmed *both* the poor and the rich. Another way of wording the idea is that it was as unfair as inefficient.¹⁹ Additionally, there were huge expanses of public land (*baldíos*), that gave the government latitude to reallocate property rights in a potentially redistributive fashion. Because of these two reasons, pacific reform was possible: promoting simultaneously redistribution and efficiency, could make *all* agents better off in the long run.

The López reform had mixed results;²⁰ its political consequences (starting with an increase in the polarization between Liberals and Conservatives) are still understudied. The very fact that the state was a huge landowner (of *baldíos*), but with

19 Actually, the diagnosis could be applied, without too many reservations, to the whole period that starts with López' observations. See for example R Albert Berry, 'Land Distribution, Income Distribution and the Productive Efficiency of Colombian Agriculture' (1973) XII(3) Food Research Institute Studies.

20 C LeGrand, *Frontier Expansion and Peasant Protest in Colombia, 1850–1936* (University of New Mexico Press, Albuquerque 1986); AO Hirschman, *The Problem of Land Tenure and Land Reform in Colombia* (Manuscript, New York 1962).

very low capacity of verifying and enforcing its property rights (given bureaucratic weakness, capture of chunks of the state by landowners, for example), gave strong incentives to diverse agents to seize and defend land through a combination of legal activities and the private use of coercion. Such a combination would become a characteristic of Colombian land disputes in the following decades. In 1944, López – during a second term – promoted what some analysts consider a counter-reform. Four years later, a ‘non declared civil war’, which pitted the two main political parties – Liberal and Conservatives – against each other, started. It is known in the Colombian historiography as *La Violencia*; according to Eric Hobsbawm it constituted the biggest violent 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 promising reconciliation. Previous Conservative presidents, and Rojas himself, toyed with the idea of promoting rural equality via taxes, but finally the proposals came to nothing.²¹

After the defeat of Rojas’ dictatorship and in the context of a consociational experiment called the National Front (1958–1974), two main agrarian reform efforts took place (in 1961 and 1968). Together, they founded the institutional landscape that was radically transformed by president Uribe. The 1961 reform (Law 135)²² 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. Besides, the use of the land was irrational (basically oriented to cattle ranching, though it was much less productive than agriculture). Second, the real alternative that society faced was not ‘to reform or to not reform’, but to reform or to wait for a revolution.²³ Third, the state should produce an institutionalization that included the main rural actors. Finally, expropriation was a tool which should be used only in extreme cases. The standard tool for redistribution was the purchase of the land by the state. The Law 135 created an autonomous agency (INCORA, Instituto Colombiano de Reforma Agraria –1961), which had several attributions, mainly spotting inefficient use of the land and negotiating with its owners and eventually with peasant organizations.²⁴ Both peasant and landowner organizations participated in the INCORA’s

21 Hirschman (n 19).

22 Law 135, 1961. Sobre Reforma Social Agraria.

23 JA Bejarano, *Ensayos de historia agraria colombiana* (Cerec, Bogotá 1987).

24 INCORA, *Five Years of Agrarian Reform: Report of Activities in 1966* (INCORA, Bogotá 1966).

board.²⁵ The official position of the landowners' agencies, forcefully repeated in innumerable publications and forums, was that in effect the country had more than enough unused land, so that instead of redistribution the government should promote colonization to alleviate demographic pressures.²⁶

Despite the great expectations triggered by Law 135 it did not produce significant change.²⁷ This prompted the 1966–1970 Carlos Lleras presidency to unleash yet a new reformist wave, on a much bigger scale.²⁸ Based on the belief that the 1961 experience had shown that initiatives from above had to be combined with mobilization from below, Lleras promoted a new peasant organization, the Asociación Nacional de Usuarios Campesinos (ANUC).²⁹ However, feet dragging by politicians, and very strong landowner reaction, which included violent methods, among other things, stalled Lleras' reformist impulse.³⁰ In 1972, a 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 they could offer landowners: (i) to expropriate their lands and buy them at a price higher than the market's; or (ii) to not expropriate it. Second, there was inefficiency. Third, the reform had not been able to make a breakthrough.

Other presidents experimented with different models of agrarian development, but the idea of redistribution never again returned to the central position it had had in the 1960's. President Virgilio Barco (1986–1990) took the theme back to the political agenda, but in a new form typical to the period: land expropriation was now conceived of in terms of the fight against criminality. He took a bold step, issuing in 1989 a decree that somehow reversed the burden of the proof for people linked to organized crime and demanded of them a demonstration that

25 Among others: SAC (Sociedad de Agricultores de Colombia), Federan (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).

26 This was, of course, a replication of the baldíos theme that had popped up in the discussions of the first half of the twentieth century.

27 Hirschman (n19).

28 Lleras had been the *éminence grise* of Law 135 and other redistributive proposals.

29 For an excellent historical study of the ANUC, see L Zamosc, *The Agrarian Question and the Peasant Movement In Colombia: Struggles of the National Peasant Association 1967–1981* (Cambridge University Press, Cambridge 1986).

30 C Escobar, *Clientelism, Mobilisation and Citizenship: Peasant Politics in Sucre, Colombia* (PhD Dissertation, University of California, San Diego 1998).

they had acquired their land legally (Decree 1893/89; 31 I come back to this point in section 4). 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 reaches the following – rather despondent – 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 virgin lands; and more than 65 thousand families in indigenous communities profited the demarcation of indigenous reserves. [...] In average, the cost of each benefited family was higher than 35 thousand dollars, and each redistributed hectare cost 2,45 dollars.³²

Thus, it is a fact that by the early 1990s the ‘old model’ – born under the aegis of the CEPAL³³ and the Alliance for Progress – had run out of gas. A big shift took place with Laws 35 of 1982 and 30 of 1988,³⁴ when it was decided that redistribution should not be promoted through administrative actions – say, an INCORA decision – but rather by market mechanisms. In 1994, the latter acquired

31 Decree 1893, 1989. Por el cual se complementan las medidas del Decreto legislativo 1856 de 1989, tendientes al restablecimiento del orden público.

32 A Balcázar and others, *Colombia: Alcances y Lecciones de su Experiencia con la Reforma Agraria* (Red de Desarrollo Agropecuario CEPAL, Santiago de Chile 2001). The 1.5 million hectares is standard, though there is certain divergence here between experts. The lowest limit is 1.4 million, the upper 1.8. At any rate, the amount of expropriated hectares is very small, less than 100 000 over the period. See AC Machado, ‘De la Reforma Agraria a la reforma rural’ in *Colombia, Tierra y Paz* (INCORA, Ministerio de Agricultura y desarrollo Rural, Bogotá 2002) 45.

33 CEPAL – Comisión Económica para América Latina; in English: Economic Commission for Latin America – ECLA.

34 Law 35, 1982. Por la cual se decreta una amnistía y se dictan normas tendientes al restablecimiento y preservación de la paz; Law 30, 1988. Por la cual se modifican y adicionan las Leyes 135 de 1961, 1a de 1968 y 4a de 1973 y se otorgan unas facultades al Presidente de la República.

concrete form: peasants would be given a subsidy to buy land (Law 160 1994).³⁵ However, this did not work very well, and new institutional reforms oriented to reinforce citizen participation in the reform process were introduced.³⁶ A national system of agrarian reform and the national council of agrarian reform were created; these mimicked an institutional solution that had been utilized since the early 1990s to introduce coherence and agency coordination in many crucial policy domains, with mixed results. The redistributive drive gradually lost momentum. In five years (1995–1999), the land incorporation pace to the *Fondo Nacional Agrario* (the entity that centralized redistributive issues) fell to 286,939 hectares and the number of families that benefitted from governmental redistributive actions to 19,397. Agency coordination could not be achieved.³⁷ In the meantime, property rights briefly came to the top of the political agenda, when expropriation under certain conditions was introduced in the new 1991 Constitution. However, the government lobbied very hard with the Congress and several actors to produce a reform that would eliminate the relevant article, which it eventually achieved. The main argument was that constitutionalized expropriation would scare away investors.

The reasons for the failure of the policies typical of the 1990s are well identified. The provision of subsidies only for land buying, weakened the will of peasants and other economic agents to develop viable productive packages that included technological improvement.³⁸ There was a political economy of subsidy distribution, which allowed intermediaries – both politicians and bureaucrats – to charge a price for their decision. Subsidies were also a tool that did not improve the coordination capacity of the state.³⁹ Though the idea was actually to skip intermediaries, peasants were much less organized than their counterparts – in good measure because of the bloodletting to which social leaders had been submitted; see for Table 1, so the notion of a direct negotiation between one and the other that had seemed so enticing to the architects of the institutional redesign was quite problematic.⁴⁰

35 Law 160, 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto colombiano de la Reforma Agraria y se dictan otras disposiciones.

36 AC Machado and H Samacá, *Las Organizaciones del Sector Agropecuario: Un Análisis Institucional* (TM Editores, Bogotá 2000).

37 Balcázar and others (n 31).

38 World Bank, 'Colombia: Una Política de Tierras en Transición' (Report CEDE) (2004) 29.

39 Ibid.

40 Human Rights Watch, 'Colombia: New Killings of Labor Leaders' (Report) (6 November 2007) <<http://www.hrw.org/en/news/2007/11/06/colombia-new-killings-labor-leaders>>.

Table 1. Peasant Leaders Assassinated over the Last Years, By Year/Department⁴¹

Region	2002	2003	2004	2005	2006	2007	2008 (Jan- June)	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
Cundinamara	1							1
Cauca		1						1
Total	14	8	5	3	2	7	4	41

Source: Calculations based on the *Noche y Niebla* publication. CINEP. January 2002 – June 2008

Furthermore, by then Colombia's conflict was, once again, in full swing. During the late 1970s and all of the 1980s, the country witnessed a steady increase in political and criminal violence; both threads frequently interacted with and boosted each other. The following vignette can help capture the proverbial qualitative leap that took place in those years. In 1978, what would come to be Colombia's main guerrilla, the FARC (Spanish acronym for Revolutionary Armed Forces of Colombia), had between 700 and 800 members; other groups were not much bigger.⁴² By the mid 1980s, it was a 20,000 strong army. Though the Colombian coun-

41 Note that the majority of the counts of political violence – especially those based on the press – suffer from substantive under-estimation.

42 JG Ferro and G Uribe, *El orden de la Guerra. Las FARC-EP: Entre la Organización y la Política* (CEJA, Bogotá 2002).

tryside had chronically hosted vigilante groups of the rural rich, the phenomenon was radically upgraded when different social actors (mainly, members of security agencies, cattle ranchers and other big landowners, and narco-traffickers),⁴³ coalesced in several regions⁴⁴ to create paramilitary organizations. They both grew and spread very fast, under the tacit but widespread tolerance of a big sector of the political system and the state.

The paramilitary started as punitive undertakings, but evolved very fast towards fully fledged regional governance projects.⁴⁵ Besides, paramilitary and narco bosses used the economic and coercive means that they had accumulated to fight back the guerrilla (or eventually rival paramilitary undertakings) to grab land from the peasants, or scare them into buying at prices significantly below the market ones. Peasants were evicted on a large scale, and the property titles passed to the hands of the paramilitary bosses or their networks. By the end of the 1990s, a full-scale agrarian counter-reform had already taken place.

If there was overwhelming evidence that the conflict had radically deteriorated the situation in the countryside, a strong argument could be made in the other direction: the misallocation of property rights had fueled the conflict. It did it in at least three very significant ways. First, though extreme inequality does not necessarily generate rebellion, not even generalized disaffection, it does create strong opportunities for interaction between the peasants and illegal agents, who can offer additional income, status, and other incentives. In other terms, extreme inequality (especially rural) puts the state in front of a severe informational problem, because it produces massive incentives for ‘tactical’, prosaic, every day defections. Second, it gives some agents the possibility of amassing enough wealth to mount private coercive undertakings, and use them to grab more land. Third, by deflating demographic pressures through colonization – the landowner program that eventually was implemented after the Chicoral pact – thousands of peasants were sent to expanses of land where they did not count in terms of having any kind of social ties or state presence. Furthermore, since these *colono* communities were in any case quite small, and the polity was competitive, politicians had no serious incentive to take the state there. Huge territories, thinly populated, and without the regulatory presence of the state, were thus open to the entry of illegal agents.

43 F Gutiérrez and M Barón, ‘Estado, control territorial paramilitar y orden político en Colombia’ in *Nuestra Guerra sin Nombre* (IEPRI, Bogotá 2006).

44 C Medina Gallego, *Autodefensas, Paramilitares y Narcotráfico: Origen, Desarrollo y Consolidación. El caso de Puerto Boyacá* (Documentos Periodísticos, Bogotá 1990).

45 Ibid; M Romero, *Paramilitares y autodefensas, 1982–2003* (Iepri-Planeta, Bogotá 2002); Gutiérrez and Barón (n 42).

Factors two and three interacted permanently: weak *colono* communities took over a piece of land, only to be coercively evicted by the vigilante groups of big landowners, who then resorted to political power and connections with specific agencies (see below) to legalize their deeds. This has produced a permanently violent expansion of the agrarian frontier in the midst of the conflict.⁴⁶

Thus, when President Alvaro Uribe came to power in 2002 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 started in 1948, and the other in the late 1970s and the early 1980s. The Colombian internal conflict, added to the strong link of the country with the global narco market, produced a large-scale transformation of the rural economy and society. At least three factors are behind this macro change. First of all, as seen in the previous paragraphs, there was a very strong criminalization of the rural elites. Simply put, many narcos bought land, and many landowners established economic links with the narcos (or became one themselves).⁴⁷ According to Reyes, the main of the purchase of land by narco-traffickers took place in the departments of Valle, Córdoba, Quindío, Risaralda, Antioquia and Magdalena.⁴⁸ The systematic use of violence and the increasing presence of rural providers of coercion and security, provided the rural rich, old and new the opportunity to snatch away hundreds of thousands of hectares of land that belonged to small, medium and sometimes even large tenants. Purchase and threat triggered a huge agrarian counter-reform – on a scale that the INCORA architects had not imagined.

While 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 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

46 The counterfactual (what would have happened if there had been a true reform) is treated in the excellent study by A Berry ‘¿Podría una reforma agraria haber evitado la crisis en Colombia?’ (2010) <<http://www.aceeconomicas.org.co/documents/reforma%20agraria.%20albert%20berry.pdf>>.

47 A Reyes, ‘Compra de Tierras por Narcotraficantes’ in F. Thoumi (ed), *Drogas ilícitas en Colombia: Su Impacto Económico, Político y Social* (Ariel-PNUD, Bogotá 1997) 279–346.

48 P Alejandro Reyes, *Guerreros y Campesinos* (Norma, Bogotá 2009) 74–78.

0.4% of landowners held 32.5% of land; in 2001 the top 0.4% held 61.2% of all registered land.⁴⁹

There are several other quantitative evaluations,⁵⁰ but there is broad consensus about the magnitude of the counter-reform, and its deeply criminal nature.

Second, the war produced a massive security crisis, which hit all the population, but mainly the rural elites. The guerrillas operated in the country, and did not have the power to target systematically the urban rich. Though there were probably further motives, insurgents preyed on cattle ranchers and landowners because it was technically much easier to threaten and exploit them. Kidnapping and rustling became major issues. Many ranchers reported being abducted several times. In the 1990's, more than 1000 kidnappings took place every year and, though there are no trustworthy figures with respect to the socio-economic conditions of the victims, a safe estimate is that a significant proportion of the victims were cattle ranchers. Furthermore, insurgent violence and rackets created incentives for the development of other, competitive, ones. Said in other terms, conflict violence triggered opportunistic violence. It was not an uncommon situation that a landowner was abducted, and the kin were unable for months to identify the group that was holding him for ransom. At the beginning of the century common criminals already represented a substantial portion of the total of kidnappings that were being reported in the country.⁵¹

Third, the paramilitary developed hand in hand with rural elites, and resulted in yielding to a highly localist stance. In Gutiérrez and Barón it is shown that the leaderships of the first paramilitary undertakings had strong cattle-ranching representation. Below leadership levels, interaction was very strong.⁵² According to an opinion poll applied by the Association of Cattle Ranchers,⁵³ 57 percent of respondents thought most of the cattle ranchers had supported the paramilitary, and 32 percent thought supporting the guerrilla was the rule. Direct involvement was not rare.⁵⁴ Coexistence and continuous interaction with non state armed

49 A Higginbottom, 'Globalization, Violence and the Return of the Enclave to Colombia' (2005) 48 *Development* 121–125.

50 See for example, Contraloría General de la Nación, 'La política pública sobre desplazamiento forzado en Colombia: ¿Solo Buenas Intenciones?' (2005) 307 *Revista Economía Colombiana* 54–55.

51 Fondelibertad <<http://www.fondelibertad.gov.co/2/>>.

52 *Gutiérrez and Barón* (n 42).

53 SP Castro, 'Aproximación Crítica al Discurso Ideológico de Fedegan: 1985–2006' (MA thesis, Universidad Nacional de Colombia, 2008) 120–122.

54 *Gutiérrez and Barón* (n 42).

groups and narcos exposed the traditional rich to a new repertoire of methods, visions, and ways of dealing with social conflict. But it also informed and educated the illegal groups. These learnt 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 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, State institutions follow. Unfortunately, State institutions only participate in these ventures when rich people are involved. We have to take the wealthy to all the corners of the country, and that is one of the missions of all our commanders.⁵⁵

This, of course, does not mean that every single individual belonging to that specific social sector became involved in illegal activities; nor does it deny that some would have preferred not to cooperate with the paramilitary had these not issued credible threats against defectors and even withdrawers. The fact of the matter, though, is that the paramilitary were able to build major models of regional governance, which were based on the support of several sectors of the population, including substantial portions of the rural elites, and with the mediation of key politicians. In effect, in the 1990s, the leadership of the main paramilitary group had launched the project of building a highly coherent anti-subversive army. However, this project failed, and the paramilitary federation fell under the weight of its centrifugal tendencies. Though this had very negative implications for the anti-subversive project – it is probably the case that more people died in the internecine interparamilitary confrontations that took place in the combats between the paramilitary and the guerrilla – it eventually produced very strong communication of the paramilitary with local and regional politicians (and also, in many departments, with members of the security, health and education agencies). By the end of the 1990s, observers were already

55 See <<http://doblecero.blogspot.com/archive/2008/06/05/palma-desarrollo-malefico-de-vicente-casta%C3%B1o.html>>, quoting an interview given by Castaño to *Revista Semana*.

noting that the paramilitary had been able to build local and regional models of governance. Additionally, they were starting to drift away from the two historical parties of the country (the Liberals and the Conservatives). At first they had supported them, and actually some of their leaders claimed direct spiritual connections with them,⁵⁶ but they resulted in discovering that parties were poor business partners because they collected high tolls for their services, were soft on terror (because they were overly accommodating due to short term electoral demands), and had been unable to properly address the security crisis the country was facing.

The criminalization of the rural economy, the link of the rural rich with the narcos and the paramilitary, and the security crisis, weakened the state regulation of property rights in two ways. First, it empowered rural elites in the security sector. States habitually establish working relations with their 'natural' clients and constituencies created by need or custom. 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 parts. At the national level, associations like the SAC (Sociedad de Agricultores de Colombia) became a privileged and often raucous interlocutor of the state in security issues. Second, it boosted the presence of this version of the rural elites – much more empowered policy wise and highly criminalized – in the political system. Certainly, in the old rural Colombia the alliance between the big landowner, the politician, the mayor, and the priest was common place, and informed both literature and early social scientific reflections.⁵⁷ However, this picture of total control reflected faithfully only the conditions of extreme cases. Furthermore, local closures of the political system – for example, the local capture of power by private agents – were on occasions compensated by some activity by the centre. 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.⁵⁸ This is also an extreme example, and certainly it was not the norm, but it reflects a dynamical tension between rules and objectives of politics at the centre, on the one hand, and town, landowner dominated, politics, on the other. By the late 1980s, the alliance between clientelistic

56 See for example M Aranguren, *Mi Confesión* (Oveja Negra, Bogotá 2001).

57 See for example F Leal and A Dávila, *Clientelismo: El Sistema Político y su Expresión Regional* (TM Editores, Bogotá 1990); J Guerrero, *Los Años del Olvido: Boyacá y Los Orígenes de la Violencia* (Universidad Pedagógica y Tecnológica de Colombia, Tunja 2007).

58 Díaz faced staunch landowner resistance, and eventually resigned.

political barons, paramilitaries, and rural rich was producing full closure in certain regions, and acting as the link between them and the central state.⁵⁹ This trend was reinforced by the transformation of the paramilitary in big armed machines which could provide security, punish dissidents, and coordinate the interests of both regional elites and state agencies.

III. Re-structuring and De-structuring

As indicated earlier, the redistributive proposals of the 1960s had run out of gas. At the same time, Colombian society and the state were facing two major tasks. On the one hand, to promote more equality and efficiency *in general*; the same task that the 1936, 1961 and 1968 reformers had faced. On the other, and on top of that, to restitute the land of the displaced peasants. Apart from the normative ones, the strictly political costs of not doing this were threefold: (i) giving a public message that massive violation of human and property rights not only go unpunished but can create de facto realities that the state will not reverse; (ii) legitimizing a massive economic empowerment of criminal actors; and (iii) allowing a highly inefficient, even worse than the historical standard (for money laundering, etc), use of the land.

Thus, the question was not if there was a problem, but how to juggle two massive quandaries that involved property redistribution. The answer was the following. The Colombian governments of the 1990s – following the neoliberal vogue that was so influential globally in the configuration of institutional designs⁶⁰ – conceived a new set of rules that gave the sector a market orientation. Uribe received an institutional array that had been reformed along the neoliberal prescriptions. During the 2002 presidential campaign, he made very clear that he agreed with them.⁶¹ The emphasis now would be on efficiency and not on redistribution. The latter would still be on the 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, however, would acquire cheap credit, technology and assistance to commercialize their products. All of this was clad in a discourse of ‘fraternity’ and harmony. Uribe and his team

59 See *Leal and Dávila* (n 56).

60 PH Hall, *Varieties of Capitalism* (Oxford University Press, NY 2001).

61 ‘Que campesinos sean empresarios’ *El Tiempo* (29 April 2002).

wanted to steer clear from both ‘feudalistic excesses’ and ‘populist [*agraristas*] discourses that foster class hate’.

Agreeing with the general neoliberal recipe, he pushed with enthusiasm his own package of reforms, which incidentally, reveals once again that there are many neoliberalisms, and that the difference between them is far from trivial. The reconfiguration of the agrarian institutions by Uribe started with the liquidation of INCORA – a highly symbolic measure – in May 2003.⁶² The same day, a new entity, INCODER (Instituto Colombiano de Desarrollo Rural) was created.⁶³ INCODER was in charge of the coordination of the national system of rural development.⁶⁴ Since the promulgation of the Rural Development Statute (yet a new law issued in 2007), it would eventually have to coordinate also the National Council of Land (Consejo Nacional de Tierras),⁶⁵ the National Unit of Land (Unidad Nacional de Tierras) – in charge on state owned land – and their subnational expressions. Since INCODER was the technical secretariat of the national system and it was a policy to make of it an agency as bureaucratically thin as possible, land property problems were dispersed among several agencies, as it will be discussed below.

The other two main functions of INCODER are to decide the allocation of public funds to specific projects, and to act as intermediary between rural producers and financial institutions. Distribution of subsidies and decisions to purchase land would be taken on technical bases, would deflate radically transaction costs, put a renewed emphasis on efficiency, and allow the coordination of market forces and civil society agents. For example, the board of the National Council of Land included representatives of ethnic minorities (Afro-Colombians and indigenous peoples), peasant organizations, civil servants, and representatives of the private sector.

Based on reports by state control agencies, NGOs, and the press, it is possible to identify at least three categories of flaws in this scheme with respect to the regulation of rural land property rights: weakness, permeability, and incompleteness.

62 Decree 1292, 2003. Por el cual se suprime el Instituto Colombiano de la Reforma Agraria, Incora y se ordena su liquidación.

63 Decree 1300, 2003. Por el cual se suprime el Instituto Colombiano de la Reforma Agraria, Incora y se ordena su liquidación.

64 The precedent is the Law 160, 1994 which created the National System for Agrarian Reform and Rural Peasant Development.

65 National Council of Land, a figure created by the Rural Development Statute, declared unconstitutional in March 2007.

Weakness

According to a Colombian state control agency, the *Procuraduría General de la Nación*, INCODER has shown acute difficulties to develop an effective coordination of the rural sector.⁶⁶ In the specific case of property rights of the land and redistribution policies, institutional dispersion has achieved its maximal level. At least the following agencies have a say in the issue:

1. INCODER itself. It was reformed through the Law 1152, 2007.⁶⁷ It is an autonomous entity, attached to the Agriculture Ministry. It is supposed to develop and follow programs of land acquisition subsidies, technical and financial support, and production infrastructure;
2. The National Directory of Narcotics, one of whose functions is to transfer land from criminals to IDPs (Internally Displaced Persons) and poor peasants. These redistributive actions were a function of INCODER, but due to corruption problems, it was eventually assigned to Acción Social, an agency in charge of policy for the poor;⁶⁸
3. The National Commission of Restitution and Reconciliation (CNRR). It deserves to be noted that the CNRR has neither the skills, nor the technical capacity, to face a challenge of the magnitude of counting the land seized by the paramilitary during the conflict, identifying it, and giving it back in adequate proportions to the victims. The CNRR, with a very thin bureaucracy, has manifested its discontent with the present state of things,⁶⁹ but it has no bureaucratic capacity beyond that.

A typical example of the bureaucratic impotence of the Commission is the following: The Law of Peace and Justice (Law 975, 2005)⁷⁰ established that paramilitary leaders should devolve the goods acquired through violence or other illegal means. However, it never established how or when, nor the way in which the devolution would be evaluated. Certainly, until today

66 Procuraduría General de la Nación, *Análisis a la ejecución de la Reforma Social Agraria y a la gestión del Instituto Colombiano de Desarrollo Rural INCODER* (Manuscript, Bogotá 2007).

67 Law 1152, 2007 (Law 1152). Por la cual se dicta el Estatuto de Desarrollo Rural y se reforma el Instituto Colombiano de Desarrollo Rural, y se dictan otras disposiciones.

68 'Extinción con más dientes' *El Tiempo* (21 December 2002).

69 *Proceso de Reparación a Las Víctimas* (n 15).

70 Law 975, de 2005. Por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios.

- this remains a mystery. Decree 3391⁷¹ calls the paramilitary to devolve the lands they have seized, which not surprisingly has not happened. By the end of 2008, the president of the National Commission of Reparation and Reconciliation, Eduardo Pizarro, declared that: (i) the devolution had been practically nonexistent; (ii) the paramilitary leaders had cheated; (iii) neither the Commission nor other state agency had a real estimate of the amount of land that the paramilitaries should give back.⁷² No action whatsoever ensued;
4. Acción Social was given – against the explicit advice of its director⁷³ – part of task (2) namely assigning land to IDPs, and partially supports CNRR activities. Acción Social is in charge of the National Restitution Fund (*Fondo Nacional de Reparación*) whose mission is to serve to victims' restitution. This Fund is composed of the properties given by armed actors and those where property termination is applied. But Acción Social has been fairly impotent;⁷⁴
 5. 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 property concerning Afro-Colombian communities. Typically, these communities have received only feeble support when they have faced serious disputes about property rights (for example, when palm producers invaded their communal lands);
 6. The National Directory for Reaction to Disasters can buy land to assist affected people by natural disasters;
 7. The National Land Agency is mainly in charge of clarifying state property rights. But it can also promote programs of land acquisition and adjudication to the peasant population; and
 8. In practice, the only entity that has been able to have some influence in the devolution of land to IDPs, has been the Constitutional Court, which does not belong to this scheme, and demanded from the government, in peremptory terms, a more aggressive approach towards the restitution of IDPs. It defined the unsolved IDP problem as a 'non constitutional state of things', and created instruments to demand and evaluate policies oriented towards concrete solutions.⁷⁵

71 Decree 3391, 2006. Por medio del cual se reglamenta parcialmente la ley 975 de 2005.

72 'Habla Vicente Castaño' *Semana* (Bogotá, 6 June 2008) <<http://www.semana.com/noticias-portada/habla-vicente-castano/87628.aspx>>.

73 See Acta de Plenaria 56 del 13 de Junio de 2007.

74 Comisión Colombiana de Juristas, *El Espejismo de la Justicia y la Paz Balance de la Aplicación de la Ley 975 de 2005* (Gráficas Editores, Bogotá 2007).

75 Constitutional Court, Verdict T-025/04.

In sum, the new institutional design is characterized by enormous dispersion. According to the report of the Procuraduría, INCODER had only nine offices in all the country, and their procedures were slow and sometimes unpredictable. INCODER did not have the bureaucratic clout to assume all the functions of the previous agencies that were abandoned, let alone to coordinate a huge and complex system in which many actors do not have the tools to fulfill the functions that they have been assigned.

Permeability

Perhaps even more serious than having only nine offices in the country, some of these agencies – and sometimes INCODER as a whole – have explicitly served the interests of big landowners, or active criminals, or of people who belong to both categories. INCODER has produced a continuous stream of decisions and/or initiatives oriented to favour the legalization of the land of the paramilitaries and other illegal or semi-legal agents – sometimes even to apportion to them even more land. Here are some examples⁷⁶:

9. The Rural Development Statute (Law 1152, 2007)⁷⁷ (RDS) included the possibility of acquiring land property for an alleged owner who could demonstrate pacific possession for five continued years.⁷⁸ Furthermore, the legalization could only be countered by the oral in situ testimony of a witness that declared that the possession had been shorter or imposed by non pacific means. Because of security and cost issues, this prevented evicted peasants from countering spurious claims to the land property by violent actors.⁷⁹ The bill was presented by the Agriculture Minister Andres Felipe Arias. Eventually, it was modified, including clauses that guaranteed that the cleaning up could not take place in protected or high rates of displacement regions (art 137);
10. The RDS also established high thresholds for accessibility to subsidies – implicit, for example, in the demand of presenting viable productive projects

⁷⁶ At any rate, this is a very incomplete list.

⁷⁷ Law 1152 (n 66).

⁷⁸ 'Polémica por proyecto que legaliza tierras' *El Tiempo* (18 September 2004); 'Urgen suspender la vigencia de la ley de tierras' *El Tiempo* (28 September 2004).

⁷⁹ MP Saffon and R Uprimny, 'El Potencial Transformador de Las Reparaciones: Propuesta de Una Perspectiva Alternativa de Reparaciones Para la Población Desplazada en Colombia' (DeJusticia Working Paper) (2008).

– although the government insisted that the peasants 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 its approval had not counted with the participation of peasants and minorities (indigenous peoples and Afro-Colombians) as the 1991 Constitution demanded;

11. The law 1182, 2008;⁸⁰ presented three times (2003, 2005, 2006) to the Congress, this initiative included originally the possibility of acquiring land property by proving a continued and peaceful occupation of the terrain. Since, in practice permitted the legalization of illegally occupied lands, it was eventually dropped;
12. A piece of land of 17,000 hectares had been – following prescriptions of the Constitution Court – allotted 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, it surrendered it to a group of entrepreneurs. It surfaced afterwards that very well connected people were among them. Eventually, the government found that the proposal was unviable, and had to seek for a formula to back off without losing face;^{81, 82}
13. The intent of legalization of the acquisition of land by palm oil entrepreneurs in territories held by black communities of the Pacific Coast, which is prohibited by law;^{83, 84}
14. In June 2008, 38,144 hectares were allocated in the Department of Vichada. Thirty-one cases of irregular beneficiaries were detected. Many of these were leaders of a small and underhanded party, Colombia Viva, that supported the president. For example, Eduardo Javier Parra, Colombia Viva's secretary, received 1,279 hectares, or Carlos Andres Vega Ortíz, Colombia Viva's coordinator in Valle, Nariño, Antioquia, Casanare, Caldas, Quindío and

80 Law 1182, 2008. Por medio de la cual se establece un proceso especial para el saneamiento de la titulación de la propiedad inmueble.

81 The main debate is captured by two opposing statements. The first, is made by the opposition liberal senator Cecilia López, 'Carimagua: modelo desplazador'. This document was replied to by the Agriculture Minister, Andres Felipe Arias, with the document entitled 'Carimagua: oportunismo difamador'.

82 'Expertos Dirán Qué Hacer con Carimagua' *El Tiempo* (4 February 2008).

83 Law 70 1993. Por la cual se desarrolla el artículo transitorio 55 de la Constitución Política. For additional events of this type, see the next section.

84 'Afrodescendientes Ganan "round" a Palmicultores' *El Tiempo* (15 October 2007); 'Tensión en tierras de palma de urabá' *El Tiempo* (23 October 2007).

Chocó received a grand total of 1,112 hectares;⁸⁵,

15. Agroingreso seguro; in 2009, the press discovered that one of the star programs of the government to combat rural poverty and support the rural poor had extraordinarily funded rural magnates, conspicuously some of the supporters of the Uribe campaigns in 2002 and 2006. Some of these people were key supporters of the campaign of the Minister of Agriculture, who decided to run in 2010. Additionally, it was found that the subsidies granted by Agroingreso Seguro had so many technical hurdles that they prevented the access of the rural poor to the program;
16. In 2010, it was found that INCODER allotted a piece of land to Guido Manuel Vargas López, one of the figureheads of Salvatore Mancuso. Mancuso is a member of the top leadership of the paramilitary, actually known as one of the most ferocious of it. Mr. Vargas received the land in the capacity of ‘victim of violence’.^{86, 87}

Incompleteness

Uribe’s reforms did not take place in a vacuum. They transformed an already very imperfect system of regulation of rural land property rights. In so doing, they did not address troublesome issues that originated in the past, and which have worsened with time.

Incompleteness in turn is divided into three subcategories. The first one is the inability of the state to deal with illegally acquired property. As reported in the first section, in the second half of the 1980s, precisely at the moment in which the redistribution of *legal* land was losing momentum, the possibility of redistributing *illegal* land appeared, and actually became one of the big pro-equality promises of the Colombian society for more than a decade. President Virgilio Barco tried to shift the burden of the proof to the shoulders of certain categories of accused, but his proposal was rebutted by the Supreme Court.⁸⁸

The idea that the criminalization of the countryside could be seen as an opp-

85 All of them were friends of Habib Merck, Colombia Viva’s Vice President. ‘Más de 38 mil hectáreas del Vichada pasaron ilegalmente a manos de amigos del senador Habib Merck’ *El Tiempo* (Bogotá 6 June 2008).

86 Incoder has declared that it already initiated the process to take the land back. As there are many precedents that show that these processes come to nothing, my guess is that Mr. Vargas will remain with the gift he received from the Colombian state.

87 ‘El Incoder dio tierra a ficha de Mancuso’ *El Tiempo* (25 March 2010).

88 By then in charge of Constitutional control.

portunity, and that redistribution could be stepped up as an anti-criminal policy was rediscovered in 1996 when – through Law 333⁸⁹ – the state obliged itself to expropriate⁹⁰ 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 judicial 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’.⁹¹ 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. Probably the overwhelming majority of Colombians have not heard a word about the policy instrument that would have split their history in two. Criminal organizations were able to set up strong legal defences, and in many cases the state was on the verge of having to offer extensive reparations to the targets of the *extinción de dominio* offensive.⁹² The INCODER revealed itself even more impotent in this regard. In 2007 it was reported that to legalize 14 properties for the state – 9 in the department of Meta, 3 in Córdoba, and 2 in Valle – 12 first-class lawyers had to work nine straight months.⁹³ This miserable return did not pay off the effort. There were also political issues. The intent of the government to offer some ‘narco-goods’ to IDPs was met with hard criticism. Why not guarantee them a safe return instead of trying to install them in new places, and in plots where full legalization was still an issue?

But by then, the Uribe government had decided that it had had enough, and chose to shuffle quietly the anti-criminal/pro-distributive proposal. It was so complicated to legalize and then to manage the goods confiscated from the mafia, the argument went, that it was not practical to try to use them in a redistributive framework.⁹⁴ Thus, the last macro program of redistribution of land in Colombia petered out.

89 Law 333, 1996. Por la cual se establecen las normas de extinción de dominio sobre los bienes adquiridos en forma ilícita.

90 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 was being removed from the Constitution.

91 ‘Extinción con más dientes’ *El Tiempo* (21 December 2002).

92 State action was even contradictory as long as it created a program of land adjudication to former paramilitary members. Incoder Administrative Agreement 48, 2006 governed the process.

93 ‘Las Plagas de la Reforma Agraria’ *El Tiempo* (26 May 2007); ‘Mechoacán: 4.700 Hectáreas en las Que Convergen Todos Los Males de la Reforma Agraria’ *El Tiempo* (26 May 2007).

94 A very small door was left open: they could be traded by other goods, and these could be used for an agrarian redistribution.

The second aspect of incompleteness refers to freezing the way in which property rights are legalized in Colombia. Land property has to be registered in the notaries and in the registry offices (*Oficinas de Registro e Instrumentos Públicos*, Offices of Register of Public Documents, or ORIP according to their Spanish acronym). Notaries are private individuals (instead, registry offices are run by civil servants). This system is imperfect for several reasons. First and foremost, the notaries are named by the President or by the governors⁹⁵ (depending on the type of notary) to pay political favors. Thus, it is likely that regional and local politicians – precisely those that are linked with highly criminalized rural elites – have a hold on them. When contentious issues arise – for example, who is the true owner of a plot of land, a cattle rancher or a settler – this strong imbedded bias is likely to bend the decision. Since notaries are among the best prizes the political system can offer, they play an often decisive role in the configuration of political coalitions.⁹⁶

Contentious issues *are* likely to arise, as, due to the failure of distributive programs colonization has been the typical way in which demographic pressures have been toned down. But property rights over colonized lands are essentially hazy. Furthermore, there is a long existing (1887) juridical figure in the Colombian legislation – the so-called ‘falsa tradición’, *false tradition*, which permits the legalization of property rights by people who have been tenants for a certain period of time. This already enabled the allocation of rights to violent actors, but Law 791 of 2002 further shortened the time of tenure required to claim the land to only five years.⁹⁷

Second, one of the typical forms of tax evasion in Colombia is underestimating substantially the price of property in the moment it is being notarized/registered. A substantial portion of owners have their land undervalued, and a percentage that is probably even bigger has not even passed through the registry system. Furthermore, a very big portion of peasants have common law marriages, so partners of victims frequently do not have proof of holding a solid claim to lost land. Cadastral records are very poor and incomplete. These are serious obstacles to any reparation–restitution effort. Notaries and ORIPs are unevenly distributed in the country, and there are broad zones without any coverage. The information provided by notaries to the public is capricious, in the optimistic version. Notaries

95 In Colombia there are basically three territorial levels (nation, department, and municipality); the governors are in charge of the departments.

96 Indeed, the vote that decided the reform that enabled Uribe to aspire to his immediate reelection in 2006 was provided by Yidis Medina, a conservative member of the house who obtained as a reward a notary for a member of her network. She is presently in jail.

97 Law 791 2002. Por medio de la cual se reducen los términos de prescripción en materia civil.

themselves are appointed by the president and governors, which establishes a direct link between allocation of property rights and political power. The adequate regulation of property rights can be sabotaged by corruption or intimidation. The armed conflict introduces additional problems: (i) violent agents can buy off or intimidate the personnel in charge of regulation; and (ii) the fall of the value of land due to the conflict fatally attracts illegal investment.⁹⁸ But forbidding land sale in conflict zones is nearly impossible.

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 ten municipalities. For example, Florencia (Caquetá) ORIP covers 14 municipalities, the San Martín (Meta) 18, and Quibdó is in charge of 14. All these are high intensity conflict municipalities. In 90 ORIPs information is stored manually, 57 use the computer without networking, and only 40 make use of a national networked system.⁹⁹

The third form of incompleteness is the failure to address the problem of fiscal laziness at the municipal level. In Colombia, the municipalities are in charge of the collection of the tax on land. This gives strong incentives to both rural elites and armed groups to threaten or buy off the major or their staff to prevent taxing. Many narratives suggest that this is precisely what has happened. It is true that the record of rural land tax collection has improved in the last eight years. At the same time, current evidence suggests there is a strong association between paramilitary presence, municipal backwardness, and fiscal laziness,¹⁰⁰

IV. Limited Government and Poorly Defined Property Rights – How do they Work Together?

We are now well poised to evaluate the complex relations between limited government and protection, regulation, and enforcement of property rights in Colombia. A very important part of the story is that of ‘positive association’. At key junctures, checks and balances have promoted the protection of victims and

98 ‘Carmen de Bolívar Renace Tras Muerte de Martín Caballero’ *El Tiempo* (26 November 2007); ‘Uribe Pide Frenar Presiones Para Venta de Tierras en Montes de María’ *El Tiempo* (10 August 2008).

99 There is no information about three ORIP.

100 F Gutiérrez, ‘Instituciones y Territorio: La Descentralización en Colombia’, in *25 Años de Descentralización en Colombia* (Konrad Adenauer Stiftung, Bogotá 2010).

rights – for example through the crucial, and highly innovative, declaration of the ‘non constitutional state of things’ by the Constitutional Court. When limited government fails, for example because of the weakness of the state, there are generally dire consequences both for vulnerable sectors of the population and to their access to land. Prima facie, venal judges do not represent a problem for the theoretical perspectives I examined at the beginning of this article; the same can be said of intimidated judges – who may be the rule rather than the exception in vast regions.¹⁰¹ They simply are the product of the weakness of the state.¹⁰² If the centre arrived with the correct set of tools, it would save the day.

Table 2

Limited government/ property rights	Good outcomes	Bad outcomes
Presence	A – Positive	B – ?
Absence	C – ?	D – Negative

Said in other terms, boxes A and D in the Table above behave as the theory would predict. The presence of limited government improves the stipulation of property rights, its absence deteriorates it. My claim is that there are least some B-box outcomes (and perhaps even Cs).

To understand this, it is necessary to start with the coordination of political representation and private provision of coercion that characterizes the agrarian block that makes part of the current Colombian national coalition. Note that here we do not have a third party enforcer – so there is no vertical political integration – nor a simple distribution of favours to friends, which would be the typical scenario of ‘crony capitalism’. We have instead a typical Weberian ‘political capitalism’¹⁰³ where agents have strong incentives to seek benefits and property allocation through political favours. The role of limited government and political competition in this scenario is rather ambiguous (so this takes us directly to the

101 M García (ed), *Jueces Sin Estado: La Justicia Colombiana en Zonas de Conflicto Armado* (Siglo del Hombre-DeJusticia-Konrad Adenauer-John Merck Fund, Bogotá 2008).

102 Of course, all this is not that simple. It may be asked why after a long experience of limited government large private coercion structures persist.

103 B Dillman, *State And Private Sector In Algeria: The Politics Of Rent-seeking And Failed Development* (Westview Press, NY 2000).

B-box). In fact, in comparative terms, they may explain Colombia's negative differential. Save standard anti-political folklore – all the Colombian elites, always, have represented faithfully agrarian sectors that have never had collective action problems; or the Colombian oligarchy is worse than its South American peers¹⁰⁴ – we do not have very good explanations of why Colombia is doing so much worse than its neighbours in this regard.¹⁰⁵ One plausible story is the following. All South American countries had more or less the same registry system (notaries plus offices). However, since the majority of them rarely had competitive politics, the link between the quest for power and the definition of property rights never got activated. To the contrary, in Colombia a highly competitive polity had to distribute the definition of property rights to regional and local party operators to buy off territorially based constituencies, which stopped in its tracks even reforms pushed vigorously from above.

For this to be true in the last decade, the agrarian block should be disproportionately powerful.¹⁰⁶ In the Colombian case, such a condition holds; actually, the political mechanisms through which the rural power excess is generated are more or less clearly identified. There are three such mechanisms. The first one is simply that – given the economic, political and coercive resources accumulated by the rural block in the regions – governments have strong electoral incentives for pandering to its interests. On the other hand, since property allocation is processed through the political system, the rural bloc has strong incentives to support the government. So the interests of one and another align. In effect, Acemoglu, Robinson and Santos found through a series of quantitative exercises that: (i) there is a strong correlation between paramilitary presence and intensity of preferences for the president and his allies; (ii) that the politicians most voted in paramilitary areas have been particularly supportive of crucial Uribe bills (especially the reelection one).¹⁰⁷ The second one is that in security – like in all policy areas – the state has selected clients, for example those that more frequently and decisively interact with the relevant issues. Given the Colombian developments, these have been cattle ranchers and more generally agrarian elites, victims of substantial kidnap-

104 F Guillén, *El Poder Político en Colombia* (Planeta, Bogotá 1996).

105 Even in comparison with Brazil Colombia is worse off – its rural inequality is peerless, but additionally property is unstable and poorly defined.

106 Colombia is a highly urbanized country: more than 70% of its population lives in cities.

107 D Acemoglu, J Robinson and R Santos, 'The monopoly of violence. Evidence from Colombia' (MIT Department of Economics Working Paper) (2009) No. 09-30.

ping and frequent raids and attacks.¹⁰⁸ Last but not least, the fact that more land translated into more political power offered strong incentives to the rural rich to further amass more land, not via market mechanisms but via coercion. They could use coercion to seize the land from small tenants, and use political capitalism to legalize the whole operation. This gave them more land, and thus ever stronger incentives to engage in such type of action: a vicious circle that has self sustained for a long period.¹⁰⁹ The mechanism has operated at full speed especially during armed conflict, where big violence machines, friendly to the rural rich, were able to engage in big scale expropriation of vulnerable asset owners.¹¹⁰ It is not necessarily that war was a direct product of the propensity to accumulate land; it is rather that it produced an environment that boosted and reaffirmed expropriation mechanisms.

Checks and balances and state self binding work very well – at least potentially – when addressing the issue of reparation. The declaration of a ‘non constitutional state of things’ by the Constitutional Court in effect forced the government to implement a series of measures that cannot be tagged as cosmetic by any just evaluation.¹¹¹ However, by its very nature, limited government does not have the tools to transform property structures when they are unjust, inefficient, and based on violent transactions. In a sense, this holds by definition. Here I have exhibited concrete mechanisms that explain how is ‘limited government limited’ First, even without taking into account coercion and political capitalism, access to juridical resources is unequal. The narcos were able to contract the best possible lawyers to delay any judicial overruling of their possession and usufruct of illegally acquired land. Second, the illegal nature of the transference of assets may be impossible or extremely difficult to prove, especially with the backdrop of an armed conflict. To being with, a large portion of the victims of expropriation were in a state of informality (have not registered their land, or they undervalued it when they registered). Common marriages are the rule in the countryside, so when the husband – in the majority of cases, the holder of the asset and the target of lethal violence – is killed, the wife has no title to support her claim over the land. Furthermore, many

108 So the glorious armed struggle of the guerrillas has played into the hands of the rural elites. It ought to be added that in some regions the guerrillas shot against popular leaders that were pushing regional forms of land redistribution, because they occupied lands of rural rich who paid quotas to the insurgents.

109 Since Colombia is a country with a huge expanse of unoccupied land, this was one of the traditional mechanisms of colonization and of movement of the agrarian frontier.

110 For the period known as ‘La Violencia’, see CM Ortiz, *Estado y Subversión en Colombia: La Violencia en el Quindío en Los Años 50* (Cerec-Cider Uniandes, Bogotá 1985).

111 Though their practical implementation has faced several difficulties.

illegal transferences of land, purchases made effective well below market value, are under threat. But since rural property is regularly undervalued, it would be difficult, if at all possible, even for a very big and powerful bureaucracy to sort out what has really been happening. Summing up all these factors, both rural rich and illegal actors can mount a sort of juridical guerrilla war against any redistributive effort, accepting the big measures but fighting back their concrete implementation with an army of shysters and politicians. In a way, these are the ‘weapons of the strong’ (in analogy with Scott’s ‘weapons of the weak’).¹¹² Sometimes, when conditions are unfavorable, the strong shy away from the ‘public register’ and retreat to the private one, where they enjoy a broad margin of maneuver. Actually, this played an important role in the reformist inertness of the Colombian state. Since big landowners had a place in the board of the agencies that were supposed to implement the reform, they were able to have access to privileged information, and to neutralize their activity. In the last years, this power has increased, and defensive measures (to prevent progressive distribution) have transformed into offensive ones – legalize violent expropriation, or obtain more land. As reported above, checks and balances have been instrumental in staving off these offensives. But at the same time they have enervated the redistributive effort oriented towards altering the status quo. Of course, this should not surprise anybody, as by design they should do precisely that.

V. Conclusions

The criticism of mainstream theories of property rights has enriched our vision of the complex role that those rights play in the consolidation of productive and political systems. Here I have suggested – based on the Colombian case – that the mainstream link between stability of property rights and limited government can be interrogated yet from at least three additional points of view. First, stated in the simplest possible terms, sometimes rulers need to reform. If the extant property system is highly inefficient, it deteriorates the social fabric, and/or produces extreme inequality, then it may as well be worth paying the price of instability. The canonical example, which North, Wallis and Weingast explicitly acknowledge,

112 JC Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, New Haven, CT 1985).

is slavery before the Civil War in the United States.¹¹³ Eliminating slavery cost a big war but, apart from the enormous human and political benefits, boosted productivity. This example shows that when engaging in reforms, rulers confront severe risks, informational problems, and contradictory demands. In particular, governments that want to reform have to unbind themselves, but at the same time they have to signal that they will do it only partially and temporarily.¹¹⁴ Second, sometimes the rich have strong incentives to use their power to accumulate more land via coercion. Land is not only ‘in rem’, but also a critical strategic resource in an internal conflict. Raids can thus be inflicted against the poor and the vulnerable. In Colombia, indeed, both the rural rich and rural poor were victims of attacks and incursions in the past decades, which increased the militarization of property relations. Third, the formal rules of the game can be biased in favour of agents that expropriate others – for example, because they have access to private coercion – and furthermore the bias might be strongly activated by vigorous political competition.

Nothing of this is only ‘theoretical’. In some countries maintaining limited government and political competition – which are social goods independently of their consequences – *and* promoting agrarian reform is a decisive political challenge. It is also a basically unsolved one. Probably the answer to it will come in the form of selective and carefully specified – in time and in policy space – ‘unbindings’, hopefully with international guarantees. Until now, though, the recipe of pure market regulation was prevalent. The bureaucratic catastrophe that it produced – though there are nontrivial differences between different families of neoliberal formulas – further blunted the capacity of the Colombian state to regulate property rights. In another context, it has correctly been emphasized that enforcement of such rights should be the main focus. But enforcement entails bureaucracy and technical tools.¹¹⁵ With the critical loss of bureaucratic muscle, the Colombian state resigned part of its functions to private agents, especially those with access to private means of coercion.

113 D North, J Wallis, and B Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge University Press, Cambridge 2009).

114 Otherwise, the result can be economic breakdown and/or totalitarian rule.

115 K Firmin-Sellers, ‘The politics of property rights’ (1995) 89(4) *The American Political Science Review* 867–881.

Land Restitution in the Colombian Transitional Justice Process

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Abstract: Land has been one of the central issues of the Colombian armed conflict since the 1950s. It has been present and addressed in multiple forms, including debates and policies regarding inequality, control over resources, agrarian reform, possession and property rights, forced displacement, land usurpation, agricultural development, etc. ‘Restitution of land and property’ in terms of victims’ reparations, is a more recent addition to these debates. Indeed, one of the most recent attempts by the Colombian state to address the issue of land is to include a restitution agenda in the Transitional Justice process initiated in 2005, as a component of the reparations program designed to meet the needs of victims of internal displacement. The aim of this article is to explore how the issue of land restitution has been incorporated in the Colombian transitional justice scheme in order to assess the potential contributions and limitations of transitional justice to a distributive justice agenda. The article is based on an analysis of current developments in the area of land restitution at the National Commission for Reparations and Reconciliation, the institution responsible for the design and oversight of the Colombian transitional justice process.

Keywords: Land Restitution, Transitional Justice, Colombia, Distributive Justice, Victim Reparations

I. Introduction

The ongoing debate on the relation between transitional justice (TJ) and development, tends to emphasize the need for awareness of the national and local contexts

where TJ mechanisms are to be applied.¹ It has been argued that inequalities will have to be addressed in order to secure a stable peace, an insight often formulated in terms of 'distributive justice', that is, a form of justice that takes into consideration the socio-economic and political forms of distribution and access to power and resources in any given society. In the framework of transitional justice, there are those who consider distributive justice to be an integral part of a TJ framework,² while others consider it to be part of the realm of politics, thus complementing but not included in the 'mandate' of TJ mechanisms proper. There is an increased acknowledgement, however, of the complementary role of distributive justice if the overall objective of a transitional process is sustainable peace.³

The need for distributive justice is particularly relevant in those societies with deep socio-economic inequalities. Existing social inequalities become no more evident than in patterns of land distribution. In Colombia, the issue of land has been part and parcel of the current armed conflict since it started in the 1960s. Historically a highly uneven society, the concentration of land in the hands of a few has increased dramatically in the course of the current conflict, particularly in the past decades. In 1984, 0.4 per cent of the Colombian population owned 32.7% of all agricultural land. By 2001, 0.4 per cent controlled 61% of these lands. During the same period, land concentration was observed to proceed in parallel with processes of arbitrary displacement, and it has been argued that there is some kind of relationship between these two phenomena. Indeed, studies show that the intensity of displacement is significantly higher in regions where conflicts over land are prominent

The issue of land in Colombia has been present in the public arena in multiple forms, from media coverage reporting the plight of people subjected to arbitrary displacement to numerous political initiatives aiming to address: inequality, agrarian reform, access to resources, rights of possession, property rights, forced displacement, agricultural development, among others; these are the most common terms used in any debate of the Colombian 'land question'. More recent terminol-

1 R Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 Int J Transitional Justice 292; P De Greiff and R Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council, New York 2009).

2 R Duthie, 'Toward a Development-sensitive Approach to Transitional Justice' (2008) 2 Int J Transitional Justice 292; W Lambourne, 'Transitional Justice and Peacebuilding After Mass Violence' (2009) 3(1) Int J Transitional Justice 28–48; C Huggings, 'Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development' in *De Greiff and Duthie* (n 1).

3 P De Greiff, 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration' in *De Greiff and Duthie* (n 1).

ogy is that of ‘restitution of land and property’ in terms of victims’ reparations. Indeed, one of the most recent attempts by the Colombian state to address the issue of land is to include a restitution agenda in the Transitional Justice process initiated in 2005.

Transitional Justice was introduced in Colombia with the congressional approval of Law 975 of 2005, known as Law of Justice and Peace. This law followed the negotiations between the Government and the paramilitary umbrella organization Autodefensas Unidas de Colombia (AUC) initiated in 2002, which led to ceasefire the same year and demobilisation in 2003.⁴ Law 975 regulates the demobilisation process of members of ‘armed organizations at the margins of law’ (AOML) and establishes a set of obligations for those participating in the process (known as postulados). As of March 2010, more than 50 000 members of AOML have demobilised, 35,000 belonging to the AUC.^{5,6} These figures, however, are challenged and some analysts have questioned the identity of the demobilised members and their relationship to the paramilitary groups. When the paramilitaries proclaimed a ceasefire in 2002 their members were estimated to be approximately 12 000 men and women, yet by 2006 more than 31 000 had demobilised. In addition there are claims that the paramilitary leadership did not act in good faith, and failed to include key personnel in the demobilization process.⁷ In introducing TJ mechanisms to a non-peaceful context, the law aims to promote a transition to peace by way of securing the victims’ rights to truth, justice and reparation (art 1), as well as providing conditioned amnesties and alternative penalties to victimisers. Whether the Colombian TJ process is more a promise of transition rather than a transition per se is an open question. Like other processes of negotiated transi-

4 During the peace talks a different law proposal was circulated in Congress, the ‘Alternative Penalties Law’, which was widely criticised by domestic and international organizations who called it a law of impunity. Consequently the proposal was retracted before voted on, and a new one was developed: the Law of Justice and Peace.

5 LV Eduardo Pizarro, *Ley de Justicia y Paz* (Cara y Sello, Semana y Editorial Norma, Bogotá 2009). In addition to the members of the AUC, several thousand guerillas from the organizations Fuerzas Armadas Revolucionarias de Colombia (FARC), Ejército de Liberación Nacional (ELN), Ejército Revolucionario del Pueblo (ERP) and Ejército Popular de Liberación (EPL) have deserted and demobilized under the same scheme and with the same rights and obligations as promised to their former enemies in the AUC.

6 F Pearl, *Buscando un Equilibrio Entre la Justicia y Paz: Avances y perspectivas de la Ley 975 de 2005* (Corporación Pensamiento Siglo XXI, Bogotá 2010). <www.altocomisionadoparalopez.gov.co/web/publicaciones/index.htm>.

7 GD Valencia, ‘Reconstrucción analítica del proceso de desarme, desmovilización y reinserción con las Autodefensas Unidas de Colombia, 2002–2007’ (2007) 10 *Perfil de Coyuntura Económica* 147–191.

tions, it involves the participation of actors with vested interests and certain level of power. Thus, in return for demobilisation, AOML members are offered legal, social, and economic benefits conditioned on an obligation to contribute into the clarification of the truth about human rights violations and providing reparations to their victims – including restitution of land. In the Colombian transitional justice process the destinies of victims and victimizers are closely interrelated; it has been designed as if they were two sides of the same coin.⁸

Envisaged as a component of the reparations program designed to meet the needs of victims of arbitrary displacement by paramilitary forces, restitution of land and property is considered by the government to partly contribute to a sustainable solution of the land issue, and by extension, of the Colombian armed conflict itself. Given the scope of internal displacement and dispossession in Colombia related to the armed conflict, the transitional justice process cannot ignore the land issue. However, it is legitimate to ask whether transitional justice mechanisms are an effective tool in pursuing the more general goals of distributive justice. According to Huggins, there is general agreement in that ‘restitution programs should not primarily be designed as an instrument for land distribution’, and that the conflation of restitution schemes with land reform undermines their legitimacy⁹ and confuses redress for specific violations of land and property rights with questions of socioeconomic entitlements.¹⁰ In the Colombian land restitution program, violations of land and property rights and socio economic entitlements indeed seem to be messily entangled, and the outcome of this process remains to be seen. The aim of this article is to explore how the issue of land restitution has been incorporated in the Colombian transitional justice scheme in order to assess the potential contributions and limitations of transitional justice to a distributive justice agenda. The article begins with a background discussion on the significance of land in the Colombian armed conflict, followed by an overview of the magnitude of forced displacement and usurpation of land in contemporary Colombia. We then move to consider three domestically developed strategies to implement the right to restitution of land within the Colombian TJ framework, here denominated *judicial restitution*, *restitution by confiscation*, and *negotiated restitution*. We conclude with some reflections on the implications of transitional justice for the issue of land restitution in Colombia, and how this relates to the pending distributive justice agenda.

8 J García-Godos and KAO Lid, ‘Transitional Justice and Victims’ Rights before the End of a Conflict: The Unusual Case of Colombia’ 42(3) *Journal of Latin American Studies* (forthcoming).

9 Huggins (n 2) 356.

10 Ibid 364.

II. Land in the Colombian Armed Conflict

The history of violence in Colombia is multifaceted, and explanations ranging from ideological, social, and economic determinants have been forwarded. It is not our purpose to define the determinants of the war, 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; a view also shared and recently expressed by the FARC leader ‘Alfonso Cano’ in his address to the incoming president Juan M. Santos.¹¹ Throughout its history numerous wars have been fought locally, regionally and even nationally. Though with different dynamics and on different scales these wars have been related to land either as direct physical control of the land and/or the struggle to control the political and administrative institutions in a given territory. The relationship between forced displacement and usurpation of land is not uniform, and there are at least three dimensions to consider in discussing the relevance of land in the Colombian armed conflict: military, economic, and political. These are briefly discussed below.

In contemporary Colombia, effective state presence and monopoly over the use of violence has been continuously challenged by semi-legal and illegal groups, taking over, on several occasions, the basic functions of the state. From a military point of view, control over territory and population is vital. Control over territory involves the presence of safe-zones in which armed actors can regroup, train, rest and plan future actions, while having the opportunity to form ties with the local population (who may serve as informants or possibly be subjects for recruitment). The AOML¹² 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 displace local populations to prevent their support to the guerrilla; in the absence of a logistical network and provisions, the guerrillas would be starved into submission. Much of the displacement in Colombia occurs from rural areas; small farmers are forcefully displaced from their land to the urbanized zones where the official armed forces

11 The 36 minute speech was published 29 July 2010 by the FARC on <[Http://resistenciafariana.blogspot.com](http://resistenciafariana.blogspot.com)>.

12 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 are used predominantly to refer to paramilitary organizations.

and the paramilitaries exert higher levels of control. Displacements due to military considerations are relatively easily reversed as it depends largely on the level of hostilities. As high levels of tension are for the most part temporary (one of the actors eventually achieves victory), the displaced populations can return within a reasonable time frame. Once military operations have ended one could expect the civilian population to return to their place of origin. That the levels of return in Colombia are very low gives us an indication that the military objectives are not the main cause of displacement.

Forced or arbitrary displacement in Colombia is centred in semi-developed regions with moderate poverty and in which the resources are manifold. These regions are rich in the sense that they are apt for agricultural activities such as cattle ranching, rice, cotton, sugar, and fruits production, and more recently the cultivation of agricultural crops destined for biofuels. 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 metals and minerals are prevalent in the areas of displacement. Another important factor is the production of illicit crops, coca leaf in particular, and the increasingly diffuse line between legal and illegal economies as profits from the drugs trade are invested in legitimate businesses. Coca cultivation is widespread in areas located far from the political and administrative centre and not easily accessible. Hence, these crops are easily controllable by the AOMLs who have come to control the whole production line, from cultivation of the coca leaf to processing cocaine, and smuggling it to the international market. The centrality of the drugs trade in the Colombian conflict has also been observed in the aftermath of the demobilization process. Both the guerrillas and the paramilitaries benefitted from this trade, and ferocious battles were fought with the aim of controlling those territories where coca crops are cultivated. In the aftermath of the demobilization, these territorial disputes have been reduced as alliances between the re-emergent paramilitaries or 'Bandas Criminales al Servicio del Narcotráfico' (BACRIM) and the guerrillas have been formed.¹³ These alliances are new phenomena in Colombia, and the Government differentiates between the former AUC and the BACRIM on the basis of their alleged purpose. The anti-insurgent nature of AUC made it impossible for them to consider an alliance with the guerrillas. The BACRIM, however, have no ideological limitations for cooperating with the guerrillas. In the event of a future peace, the drugs trade may not necessarily be affected; however, new criminal actors may continue to victimise the local populations.

13 AF Ávila and P Núñez, 'Expansión territorial y alianzas tácticas' (2008) 14 *Arcanos* 52–61.

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, hydro-electrical projects that involve damming or other infractions to the physical realities on the ground are not easily reversible. Uprooting entire plantations of bananas, rice, African palm, cotton, sugar, for example, may not be feasible nor economically desirable either for the original owners or the current stakeholders of these lands. If these lands are to provide acceptable social-economic conditions for the displaced peoples of Colombia a mere restitution may not be sufficient. Control of natural resources is of central value for the illegal armed actors, as this provides them with the revenue needed to survive as an operative organization. It is therefore necessary to consider the economic interests of AOML when trying to re-establish control over land resources back to its original owners/users.

In the late 1980s and early 1990s Colombia went through a process of democratisation in which a new political regime was created and enshrined 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 newly introduced process of decentralization. Greater political and fiscal autonomy was ceded from the central state to the local and regional authorities. This otherwise sound policy backfired in the politically turbulent Colombia. In a context of war political freedoms are severely restricted, in particular in areas far from the centre. In the new decentralised regime, 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. By controlling the popular vote armed actors were able to control local and regional political institutions and exert significant influence on national political institutions. This representation in legislative and executive bodies also gave them access to most of the administrative institutions of the state.

Displacement and Usurpation of Land in Colombia

The aggregate effect of the strategic use of military means in pursuit of political and economic goals is reflected in the magnitude of the phenomena of forced displacement from rural regions in contemporary Colombia. However, this is not a

recent phenomenon, but rather a constant in Colombian history.¹⁴ The two main waves of displacement occurring in the last century roughly coincide with the two main periods of political violence in the country: the civil war known as *La Violencia* (1948–57) and the current armed conflict (from 1964), which escalated drastically in the 1980s.

After the inter-elite ‘War of a Thousand Days’ (1899–1902) Colombia entered a period of instability and elevated political tension between two antagonistic parties organized under the patronage of the Liberal and the Conservative parties, that culminated in a new nationwide conflict. Before *La Violencia* a first consorted attempt for distributive agrarian reform was made in 1936 by the then president Alfonso López Pumarejo. However the reform met great resistance and the expected results did not materialize. Nevertheless, tension continued to rise between the two political elites, particularly in rural regions, leading to *La Violencia*, during which approximately twenty per cent of the country’s population was displaced. The spoils of war contributed to an even more uneven distribution of Colombian land resources.

After the civil war ended, the first consociational¹⁵ president Alberto Lleras Camargo put the land issue on the agenda in 1961, but was unable to find support for his proposal. A new momentum was created in 1968, and an agrarian reform was finally approved by Congress. However, as in 1936, a multitude of vested actors mustered strong resistance and impeded full implementation of the reform. Even though there has been political consensus at the national level concerning the need for a comprehensive agrarian reform in Colombia, the contentious nature of the agrarian question has led to the failure of these political experiments. Since 1968 the need for such reforms has not re-surfaced as an issue in Colombian politics, and the agrarian question in Colombia remains unresolved. In the absence of a political will to respond to the marginalized sectors of society, the phenomenon of forced dislocation from land has lingered. As the level of violence escalated in the 1980s the rural population was again affected, forced to abandon their homes and land once more. Instead of an agrarian reform aiming for a more equal distribution of land, a counter-agrarian reform ensued where criminal elements of society merged with the antagonists of the civil war, taking control over millions of hectares of fertile farmland.

14 The agrarian question has consequently been much debated in Colombia and several efforts to mitigate the conflicts over land have been codified since 1936: Law 200 of 1936, Law 100 of 1944, Law 135 of 1961, Law 1st of 1968, Law 4th of 1973, Law 5th of 1973, Law 6th of 1975, Law 35 of 1982, Law 30 of 1988, and finally Law 160 of 1994.

15 Consociational refers to Lijphart’s classification of electoral democracies, and fits well with the power-sharing governments of Colombia from 1958 to 1974 (1991).

In light of the new challenge President Virgilio Barco (1982–86) introduced a set of legal and administrative tools aimed at redistributing land confiscated from criminal actors – who were by then in the process of taking over a sizeable portion of the Colombian agricultural sector. Whilst sharing the same goal as the agrarian reforms, this policy of redistribution had an entirely different vantage point. The law was contested by the affected sectors of society and overturned by the Supreme Court on the grounds of being unconstitutional. A similar attempt resurfaced in the 1990s after a new constitutional regime allowing such measures was introduced in 1991. However, the results have been marginal as criminal actors have successfully impeded the process by an array of legal strategies. With the demobilization of paramilitary organizations in 2003 (primarily responsible for the usurpation of land in the 1980s and 1990s), a new impetus was created; and redistribution of land is once again being debated by Colombian decision-makers. Redistribution of land is today being framed in terms of ‘restitution of land’, where the responsibility to provide restitution lies in the hands of the victimizer. Restitution as part of a victim’s reparation program is conceptually different from state guarantees to prevent displacement, assist the displaced or provide stable socio-economic conditions; we will return to this in the next section.

Whereas the problem of land has been long debated in Colombia, the phenomenon of arbitrary displacement has not been equally discussed. Only in 1997 did the state truly recognize the phenomenon and designed a comprehensive law to attend to the needs of displaced peoples.¹⁶ Article 1 of Law 387/1997 defines an internally displaced as:

any person who has been forced to migrate within the national territory, abandoning his place of residence or customary economic activities, because his life, physical integrity, personal freedom or safety have been violated or are directly threatened as a result of any of the following situations: internal armed conflict, civil tension and disturbances, general violence, massive Human Rights violations, infringement of International Humanitarian Law, or other circumstances arising from the foregoing situations that drastically disturb or could drastically disturb the public order.

Estimates of the number of victims of arbitrary or forced displacement (Internally

16 Law 387 DE 1997 (Julio 18). Por la cual se adoptan medidas para la prevención del desplazamiento forzado; la atención, protección, consolidación y estabilización socioeconómica de los desplazados internos por la violencia en la República de Colombia.

Displaced People, IDPs) vary depending on the sources. However, all sources indicate an increase in numbers. By 2009 the governmental agency Acción Social, which operates an IDP registry, identified 3.3 million victims of displacement. The civil society organization CODHES¹⁷ estimates the number to be 4.9 million, or between six per cent and ten per cent of the total Colombian population. These differences are explained by various factors. Civil society has registered victims of arbitrary displacement since 1985, while the government initiated registration only in 1995; in addition, they operate with different definitions of 'victim of displacement'. The problem of defining IDPs is relevant for establishing the (in)eligibility of the right to restitution as not all IDPs have the same connection to land. In the case of migrant workers one could argue that these do not have any connection at all to a specified piece of land, but the majority, 60% – 70%, of IDPs do have some form of land tenure. A significant portion of these (50%) had legal ownership to the land, 31.7 % had collective titles, 4.9% were occupants, 7.2% were tenants (rented occupancy), and the remaining 8.2% were in possession of the land.

In terms of the physical scale of the abandonment and usurpation of land the data are not easily available.¹⁸ Estimates vary greatly among different sources, from 1.2 to 10 million hectares of land.¹⁹ Seventy-five per cent of these areas are concentrated in 10 of Colombia's 32 departments: Antioquia, Caquetá, Chocó, Bolívar, Cesar, Magdalena, Guaviare, Meta, Córdoba, and Norte de Santander. These departments also have the highest displacement numbers, and are depart-

17 Consultoría para los Derechos Humanos y el Desplazamiento.

18 In Colombia, a distinction is made between abandonment (*abandono*) and usurpation (*despojo*). While land can be abandoned due to the conflict, usurpation involves the act of arbitrarily taking over the land. The official definition of usurpation can be found at Acción Social: Presidencia de la República, 'Documento del Programa de Protección de Tierras y Patrimonio de la Población Desplazada', <www.accionsocial.gov.co/contenido/contenido.aspx?catID=3&conID=3341&pagID=6219> Accessed February 2009. The usurpation of land is of primary relevance in the context of the right to restitution in transitional justice.

19 Different estimates can be found in Q Ibañez, 'Acceso a Tierras y Desplazamiento Forzado en Colombia' (Report) (October 2003) <http://pdf.usaid.gov/pdf_docs/PNADG984.pdf> (1.2 million hectares); J Garay, *El Reto Ante la Tragedia Humanitaria del Desplazamiento Forzado: Aplicar políticas públicas idóneas y eficientes* (Comisión de Seguimiento a la Política Pública Sobre Desplazamiento Forzado, 2009) (5.5 million hectares); Acción Social: Proyecto Protección de Tierras y Patrimonio de la Población Desplazada (Acción Social, 2005); Movimiento Nacional de Víctimas de Crímenes de Estado en Colombia, 'Catastro Alternativo, estrategia contra la impunidad y herramienta para la reparación integral' <<http://colombia.indymedia.org/news/2007/08/70793.php>> accessed 30 September 2010 (10 million hectares). For an overview of different estimates see CNRR, *El Despojo de Tierras y Territorios: Aproximación Conceptual* (CNRR, Bogotá 2009).

ments in which activities such as mining and agro-industries are prominent.²⁰ As mentioned earlier, a correlation has been established between the increase of concentration of land and internal displacement from land occurred in the period 1984–2001. From this it can be inferred that the arbitrary displacement, at least in part, benefitted actors with economic interests.²¹

The main perpetrators of forced displacement in the 1980s and 1990s were the paramilitary forces, who used different modalities to displace people from their land and property.²² Land was obviously taken by physical force, but equally important to consider are the legal strategies used by the victimisers. In most cases (i) land was bought under undue pressure for ludicrous prices and/or paid by void checks, or (ii) in exchange for one's own life, so that the owners had the option of selling or dying (iii) Transference of rights, where people in possession but without formal titles to the land were forced to sign a document ceding their rights to others, or (iv) irregular possession of the land, where occupants were forced out in order for others to move in and take possession, have also occurred. Yet another practice has been (v) falsification of signatures enabling fraudulent sales of land without the consent of the rightful owners.²³ The accumulated effect of these strategies was the usurpation of millions of hectares of land. Victimisers 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.

20 M Bello, 'El Desplazamiento Forzado en Colombia: Acumulación de Capital y Exclusión Social' (2003) 7 *Revista Aportes Andinos: Globalización, Migración y Derechos Humanos*; Y Salinas, D González and E González, *Tierra, Oro y Conflictos* (Instituto de Estudios para el Desarrollo y la Paz (INDEPAZ), Bogotá 2008).

21 Comisión de Seguimiento a la Política Pública del Desplazamiento Forzado, 'Verificación del Proceso Nacional', VI Informe a la Corte Constitucional (2008), Chapter II.

22 The paramilitaries were not the only ones responsible; indeed, the different guerrillas operating in Colombia, most prominently the FARC, are also responsible for a significant part of forced displacement. The Colombian scholar Alejandro Reyes claims that close to 50% of the displaced have been made so by the guerrillas.

23 These methods were identified by a survey carried out by the *Programa de Consultas en Recuperación de Tierras (Conret)*, of the Colombian Ministry of Agriculture.

II. Restitution of Land in the Colombian Transitional Justice Process

The legal basis for the transitional justice process in Colombia is Law 975 of 2005, the Law of Justice and Peace. Law 975 establishes the victims' right to truth, justice and reparation while providing conditioned amnesties and alternative penalties for demobilised victimisers.²⁴ Whereas the great majority the AUC combatants were given amnesties, close to ten per cent of its members were to be subject to the special judicial proceedings outlined by the Law of Justice and Peace. To enjoy the legal benefits of reduced penalties (defined to range between 5–8 years of prison), the *postulados* are obliged to 'repair' their victims. This includes the obligation to return the land stolen and restore the conditions that existed before violations were committed; in other words the obligation to provide restitution. The judicial process starts with confessions by the victimisers about all their crimes, a stage known as 'free accounts' (*versiones libres*). This is followed by an investigative stage which culminates in prosecution and punishment according to ordinary law. The sentences are subsequently reduced to five–eight years if the appointed judge finds the *postulado* to have complied with the conditions set forth by Law 975. 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 provide reparation to his victims with all available resources (whether or not these were legally obtained).²⁵ As of date only one *postulado* has been sentenced,²⁶ a sentence which also stipulated how victim reparations are to be provided.²⁷ Four years after

24 Soon after its approval in July 2005, victims' organizations and the Commission of Colombian Jurists filed a case at the Colombian Constitutional Court (CC) questioning the constitutionality of the law. After extensive deliberations, the CC announced its Ruling C-370 in 2006 finding the overall law to be constitutional, although particular aspects of it were considered unconstitutional and thus needed to be interpreted and implemented differently. See Judgment C-370 of 2006 issued by the CC <<http://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm>>. An annotated law text including the CC decisions and specific considerations can be found at <http://www.fiscalia.gov.co/justiciapaz/Documentos/LEY_975_concordada.pdf>.

25 *García-Godos and Lid* (n 8).

26 The first sentence was handed down in 2009 in which a low level paramilitary, 'El Loro' Salazar, was convicted (Tribunal Superior de Bogotá. Sala de Justicia y Paz, Rad. 11001600253200680526 Rad. Interno 0197 Wilson Salazar Carrascal, 2009).

27 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 proportionality between the harm suffered and the reparations established by the court (CNRR, 'Defensa de las Víctimas Apelaron Sentencia Contra', *El Loro* (Bogotá 2009)).

the legislative framework was approved by Congress, none of the other *postulados* – in excess of three thousand – have reached this point of the process.

By defining restitution as a form of victim reparation, Law 975 has incorporated the issue of land into the Colombian transitional justice process. The law establishes a direct line of responsibility for reparation and restitution first and foremost upon the individual victimiser, secondly upon his/her military squadron or ‘*bloque*’ or even the umbrella organization (AUC). Alternatively, and only as a subsidiary or last resort, the state can bear the responsibility to provide reparations and restitution of land (art 42). According to the law, state responsibility in these situations presents itself as an act of solidarity with the victims of conflict only when the victimisers are unable to fulfil their obligations.²⁸

Legal and Institutional Framework

Restitution as reparation is defined in art 46 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*.²⁹ The law text does not make an explicit reference to arbitrary displacement as a definitional violation for the victim category and the subsequent right to reparation. However, such an inclusion is inferred from arts 8, 46 and 52, which refer to types of reparation, the scope of restitution, and the institutional framework for the implementation of the right to restitution respectively. The inclusion of arbitrary displacement as a basis for the right to reparation has enormous implications for the reparations program itself and the overall transitional justice process, because it expands the definition of victim to all victims of arbitrary displacement in Colombia; as we have seen, the estimate is between 3.3 and 4.9 million people. Adding the fact that the law applies to all victims since 1964, and that it recognizes different forms of possession and property rights, the Colombian definition of victim of arbitrary displacement and the subsequent right to restitution is among the most expansive definition of victim to date. This alone places the Colombian experience above all other cases of victim reparations in the Latin American region and elsewhere.

The following forms of tenancy are recognised as basis for the right to restitution: *owners* are those with legal titles to the land; *possessionists* refer to people who

28 During an interview with CNRR President E. Pizarro Leongómez in October 2007, it was expressed that only 5–10 % 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.

29 The authors’ translation.

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 somebody else's property but have a written or oral contract regarding the right to use the land against some form of payment, often a percentage of the produce. *Occupants* refers to people who opened, cultivated and/or settled on virgin land but have no formal titles. How the right to restitution will be implemented depends on these different connections to the land, but according to Colombian law all have the right to restitution.³⁰ It is, however, unlikely that the right to restitution will be effectively exercised by all but a fraction of IDPs. Some of them may in fact not have a connection to land or property in their places of origin. Those who seek reparation in the Justice and Peace process must be registered at the Victims' Registry operated by the Peace and Justice Unit (PJU) at the Prosecutor General's Office.³¹ By March 2009, this registry included the names of approximately 230 500 people claiming to be victims of guerrilla or paramilitary violence.³² As the registration process continues, the numbers are expected to increase. Nonetheless, the gap between registered victims and the universe of victims is abysmal.

As the transitional justice process became operational it became clear that Law 975 needed to accommodate contextual realities and the Government embarked on regulating certain aspects of the law. This was first done in Decree 3391 of 2006, where art 14 has been interpreted by some as an obstacle to the process of land restitution. This article introduces the '*principle of opportunity*': a legal principle by which the prosecutor is recommended not to pursue cases in which a 'third party' has taken control over usurped property. This is problematic because the majority of current land owners or holders are not former paramilitary members, but third parties. While some of them are real owners or possessionists, most of them are 'shadow-owners'.³³ Unfortunately, it is rather difficult to prove this in

30 Acción Social, *Nuestros Derechos Sobre la Tierra Como Población Desplazada* (Proyecto Protección de Tierras y Patrimonio de la Población Desplazada, Bogotá 2007); Law 1152 of 2007, Por la cual se dicta el Estatuto de Desarrollo Rural, se reforma el Instituto Colombiano de Desarrollo Rural, Incoder, y se dictan otras disposiciones, art 127; Decree N. 2007 of 2001, Por el cual se reglamenta parcialmente los artículos 7º, 17 y 19 de la Ley 387 de 1997, en lo relativo a la oportuna atención a la población rural desplazada por la violencia, en el marco del retorno voluntario a su lugar de origen o de su reasentamiento en otro lugar y se adoptan medidas tendientes a prevenir esta situación (Presidencia de la República de Colombia).

31 Here it is referred to the Colombian institution 'Fiscalía General de la Nación'.

32 This number includes all types of violations and is not restricted to internal displacement alone. The authors have not been able to determine how many of these 230 500 were registered as victims of forced displacement.

33 In Colombia the practice is known as *testaferrato* and the 'shadow-owners' are referred to as *testaferros*.

a court of law. Difficulties can be expected to arise due to continuous efforts to legalize land claims to the land and widespread strategies of co-opting 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 provide reparations to the victims of the conflict. Decree 1290 of 2008 paved the way for administrative reparations by which the state, based on the principle of solidarity, obliged itself to take charge of the process of reparation. The decree thereby bypassed the judicial processes being forwarded against the individual victimisers, and pledged to repair the victims through monetary compensation for the suffering endured. This decree has been heavily criticised by civil society due to its template form of reparation, and because it relieves the victimisers of the burden of directly repairing their victims while the state simultaneously rejects any responsibility for the crimes committed. Nevertheless, the administrative reparations program is as of the moment the only legal mechanism which creates any form of reparation available for the victims within an acceptable timeframe.

Administrative reparations had registration deadline set to April 2010, by which time 308 000 victims had filed their claims. Administrative reparations procedures involve lowered evidence thresholds compared to judicial procedures, thus facilitating victims' access to exercise the right to reparation; furthermore, this also limits possible threats to the security and physical integrity of victims. The administrative reparations program explicitly includes the crime of forced displacement in art 5, a violation defined to be worth a monetary compensation equivalent to 27 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 more than once for the same violation. Victims of displacement can receive administrative monetary compensation for the suffering of being forcefully displaced, while not being prevented from forwarding land restitution claims or any of the other modalities of reparation established by Law 975.

In January 2008 Decree 176 was issued to regulate the Regional Commissions for Property Restitution (*Comisiones Regionales para la Restitución de Bienes – CRRB*) established by Law 975, art 52. Since then, twelve commissions have been created in the cities of Medellín, Cartagena, Bogotá, Bucaramanga, Barranquilla, Cali, Mocoa, Neiva, Pasto, Quibdó, Sincelejo and Valledupar. These commissions are to provide recommendations to the National Commission of Reparation and Reconciliation (*Comisión Nacional de Reparación y Reconciliación – CNRR*) on the development of a restitution program, and will have a coordinating role when

implementing such programs. Supplementing these commissions with technical experience is ensured by the establishment of a national Technical Committee (*Comité Técnico Especializado* – CTE) that has several regionally based subsidiaries to facilitate the identification of 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 IDPs. Decree 176 is the first tangible step taken by any Colombian government to explicitly progress a process of restitution of land.

Decree 768 was issued two months after Decree 176 to regulate art 127 of Law 1152/2007, establishing a Registry of Abandoned Lands (*Registro Único de Predios y Territorios Abandonados* – RUPTA). To some extent the decree reflects the wish expressed by victims' organisations to create an alternative cadastral record of usurped lands (*catastro alternativo*), notably with the use of a different methodology aiming to create an inclusive registry. While RUPTA addresses some of the technical aspects conveyed by the alternative record, it is yet too early to assess the effectiveness of this measure. Nevertheless, this is a first concerted effort to identify and register usurped land.

III. Practices of Land Restitution in the Colombian Transitional Justice Scheme

Amid a number of challenges, such as funding, the re-emergence of violence by paramilitary groups, and the slow progress of judicial proceedings, the current transitional justice scheme has developed three mechanisms to address displaced peoples' right to restitution of land. One has been explicitly designed by the TJ scheme – *judicial restitution* of land; a second mechanism is based on experience with other government policies – *restitution by confiscation*; while the third mechanism developed *ad hoc* as part of the particular environment fostered by the TJ process – *negotiated restitution*. These will be discussed in turn.

Judicial Restitution

By judicial restitution we refer to the institutionalized form of land and property restitution resulting from the judicial process contemplated in the Peace and Justice Law. Judicial restitution as victims' reparation in the Colombian TJ scheme involves a guided but friendly settlement between the victim and the victimiser

from which a judicially established sentence on reparation is given. This strategy is the only fully institutionalised procedure for land restitution in the Colombian transitional justice scheme.

Briefly explained, once the *postulado* has confessed and acknowledged his or her responsibility for the crime of arbitrary displacement, and any other crime committed, s/he is sentenced according to the parameters of the ordinary penal code. These sentences are subsequently reduced, if and only if the *postulados* fulfil their obligations as dictated in the Peace and Justice 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, hereunder 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 victimiser. 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 victimiser will receive the legal benefits derived from the same law. However, the judicial restitution procedures face at least three main challenges: (i) judicial restitution is only applicable to a restricted universe of victims; (ii) it is extremely time consuming, because reparations come at the end of the judicial process; and (iii) it is dependent on the success of other aspects and phases of the process.

With regard to the first challenge, the design of the process will allow only a small number of victims to be included in the institutionalized process of restitution of land when compared to the universe of victims of arbitrary displacement. To be included in the TJ process victims must formally denounce the crimes they have been subject to by registering before the Peace and Justice Unit (PJU). The PJU's registry includes approximately one quarter of a million victims, while *Acción Social's* registry (also a government agency) confirms the universe of victims to exceed three million.³⁴ Estimates presented earlier show that the number of victims of one crime only, arbitrary displacement, range from 3.3 to 4.9 million people. The challenge of converging registries has yet to be overcome. While institutional dispersion is considerable, little consorted communication between different public agencies can be observed. Efforts have been made to create overlapping rather than separate registries, but no concrete results can be observed so far. Also, the risks associated with participating in the process need to be reduced if victims are to feel confident in registering their claims.

34 It is important to note that not all of these are displaced.

The second challenge is also institutional and concerns how the process is to be implemented, that is, the sequencing of the institutionalised process. Because the process is designed to follow the judicial proceedings, the obligation to repair, at least materially, becomes of relevance only after judicial responsibility for a given crime has been established. As of date 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 reparation benefits, which did not include restitution of land. The victims subsequently challenged this court decision, and appealed on the grounds that the reparation offered did not fulfil the criteria of proportionality as set forth in international standards and also the Peace and Justice Law. On 19 August 2009 the Supreme Court of Colombia declared the sentence invalid. The Court explained the decision as the Prosecutor's failure to include crimes central to the paramilitary project, making the judicial process incomplete.

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. Four years have passed since the enactment of the Peace and Justice 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 victimisers. This uncertainty is problematic as the different actors involved respond to this by hedging the actions made inside of the process. Many of the assets controlled by the *postulados*, that were to be destined for the Victims' Reparation Fund, have not been ceded. One reason for this is to retain some leverage in the process; a strategy enabled by the absence of an exact timeframe as to when one must cede one's assets to this fund. Consequently, most of the *postulados* have not given up their assets and the funds destined for reparation are low. The incentives to cede one's assets have also diminished as the lenient sentences seem not to be implemented. Another worrisome trend is the multiple of assassinations among the *postulados* themselves, and the numerous threats made due to their active participation. This trend is reinforced by the emergence of new 'paramilitary' structures (BACRIM) who according to some observers count 10 000 men, of which 5 000 are demobilised members of the former paramilitary organizations.³⁵

35 These numbers were reported by the independent Colombian research centre Corporación Nuevo Arco Iris and cited from the newspaper ElTiempo.com. See also CNRR, *Disidentes, Rearmados y Emergentes: ¿Bandas Criminales o Tercera Generación Paramilitar* (CNRR, Bogotá 2007) <www.cnrr.org.co/contenido/09e/spip.php?article1129&var_recherche=rearmados>; HRW, 'Paramilitaries' Heirs The New Face of Violence in Colombia' (Report) (2010) Doc. 1-56432-594-6.

The third challenge identified is closely related to the former. While it is ultimately up to a judge to decide if and how restitution is to take place, the incentives to participate actively in the process are, as mentioned, of importance. The benefits of restitution of land do not only befall the internally displaced; the victimiser also benefit in the form of reduced sentences, 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 former paramilitaries have not been willing to contribute more substantially to victim reparations. This is an interpretation endorsed by the paramilitaries themselves, conveyed both directly and through their lawyers. Nearly all of the top commanders have been extradited to the United States on charges related to drug trafficking, expecting to receive punishments in the excess of twenty years in prison. Their place in the TJ process remains unclear as they are technically still part of the process, yet they 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 this has given rise to doubts over the viability of the alternative sentences.

The demobilised members of these illegal organisations are not passive actors, rather 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 arenas; control over land is the most important factor in retaining this power. When deprived of 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 some level of control since their seconds-in-command, their families, their friends and their allies supervise/ manage the economic and political assets that these leaders accumulated during times of war. These networks are substantial and reach from the local to the national level, representing a continuation of a tradition of clientelism, more than a rupture with the past. Due to the power still retained by the actors involved, the TJ process very much hinges on the voluntary participation of the victimisers. The paramilitaries went to great lengths to legalise their claims to the land, and their success in doing so makes judicial restitution today an extremely demanding project, particularly if the *postulados* choose not to participate and clarify the different claims to land.

Indeed, the aspect of voluntary participation on the part of victimisers to clarify the truth is extremely important regarding the right to restitution. Both le-

gal and illegal political and administrative efforts to impede the victims' right to restitution have already been observed, among a range of legal manoeuvrings with the aim of obscuring and legalising massive transfers of land.³⁶ Tactics range from direct threats to victims' life and the assassination of victims forwarding claims against the victimisers, to more subtle institutional strategies involving undue influence in decision-making processes, impeding the registration of claims, and systematic efforts to obstruct the judicial process. By April 2010, 44 victims claiming their right to land from which they were arbitrarily displaced had been assassinated. The link between the current owners and the paramilitaries is not entirely straightforward, thus affecting the implementation of a land restitution process. 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 to restoring the land to its original holders, become a necessity in creating a comprehensive process that guarantees to rights of victims.

Restitution by Way of Confiscation

Land usurped by demobilised paramilitary members has by and large not been turned over as proscribed by the law. As of date only some 6 600 hectares out of an estimated 4.5 million hectares have been included in the Victims Reparation Fund. There are at least three reasons for this: non-compliance on the part of the *postulados*; unclear rules on when to turn over ones assets; and the legal status of the land. The governmental agency regulating the fund, *Acción Social*, has not accepted most of the properties/parcels (*predios*) offered by the paramilitaries because these have not been 'legally cleared'. A property is not legally cleared (*predios no saneados*) if the lines of ownership have not been established and rights over the properties are legally disputed. However, non-compliance seems to be the most important reason for the lack of land available for restitution. To meet this challenge, the central government has developed a scheme to confiscate the land controlled by the *postulados* for the purpose of land restitution; this is however, not free of problems.

First, the land 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 those lands controlled by the *postulados* given that these are located in distant regions where the victims of displacement continue to

36 Interview with Marco Romero, President of CODHES (Bogotá 24 October 2008).

be threatened by the usurpers, or the new ‘owners’. Third, even if the lands are identified, these are registered in the names of third parties, well-advised by their lawyers on how to hide one’s assets. Judicial processes of confiscation will consequently be extremely time consuming.

The problem of non-compliance by the *postulados* is extremely difficult to solve due to the practice of using third parties, ‘shadow-owners’ or *testaferros* to hide one’s assets. Third parties are composed of several types of actors. Poor rural people without formal titles to the land make up part of the equation; the right to use the land was given to them by whomever of the armed actors were in control at the time. Distribution of land was to a great extent a privilege for the rank and file of the organization, but also a security strategy for the paramilitaries. Other actors in control of usurped lands are multinational companies, national companies, and agricultural investors, who arguably constitute the largest group among third parties. To understand this feature, it is important to keep in mind the political objectives of paramilitary groups. Their stated aim was not to destroy, rather ‘to build and create a new Colombia free from insurgent forces’, something that implied the need for economic progress (Aranguren 2001). The paramilitaries established in areas where the state was absent or extremely weak, and their objective was to bring the state into these areas in order to build infrastructure and improve socio-economic conditions. To achieve this goal they had to do two things: firstly, to remove or co-opt adversary actors in the area, namely, the guerrillas and their allies, and secondly, to initiate viable economic projects that would attract the interest of the state. Regarding the latter, it was needed to remove the original holders of the land to make space for progressive, large-scale projects developed by national and multinational corporations that were often ‘legitimate’ and, in some cases, even partly subsidized by the state.³⁷ More often than not paramilitary commanders did not run these companies and their names did not appear in formal documents. Instead, they resorted to the practice of ‘*testaferrato*’ and were able to benefit both personally, organizationally, economically and politically.

The use of this practice and the considerable efforts made to ‘legalize’ the

37 In March 2009 the U.S. Dept. of Justice fined the Chiquita corporation 25 million USD for funding the paramilitary organization AUC. The victims have since filed a lawsuit against the corporation: *Doe v. Chiquita Brands International*, District Court of New Jersey, June 13, 2007; MM Aranguren, *Mi Confesión* (La Oveja Negra Ltda., Bogotá 2001). The palm oil company Coproagrosur, property of the paramilitary leader ‘Macaco’ received in 2004 a \$161,000 grant from the US Agency for International Development. Macaco’s assets were later surrendered as part of the Justice and Peace process. T Ballvé, ‘The Dark Side of Plan Colombia’ *The Nation* (27 May 2009).

claims to land can significantly complicate the process of land restitution. A wealth of legal documents has been produced as a result of this practice, and it will be difficult to identify the real right-holders to the land. Without the compliance of victimisers, the judicial system will be swamped by claims and counter-claims to the lands in dispute. In a state where the judicial system is already stretched to its limits one would expect very slow progress in determining rightful ownership.

Negotiated Restitution

Judicial restitution of land as outlined above follows the sequence of the domestic transitional justice process established by the Law of Peace and Justice. Negotiated restitution, on the other hand, bypasses the specialized courts, and is settled directly between the victims and the victimiser with the assistance of several governmental agencies. This form of restitution is based on the voluntary involvement of the paramilitaries, thus increasing the possibilities for effective guarantees of non repetition. Negotiated restitution, known in Colombia as 'entrega directa', contributes to clarifying the truth, providing reparation for the victims and ideally also to a process of reconciliation between the victims and the victimisers. It involves a narrative reconstruction of the past abuses, a recognition of responsibility, a clarification of land rights, and a commitment to coexistence. To better illustrate this process we will resort 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, about a two hour drive outside the regional capital Montería, some 87 families successfully returned to their lands in 2008 in a process which was spearheaded by the regional CNRR office. 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 brothers³⁸ and their paramilitary groups, and 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 governmental project to assist displaced and disenfranchised rural families. Thus, some 80 families were given rights and titles to the land by the governmental institution INCORA.³⁹ These families lived a short while on these lands before the ACCU

38 Fidel and Carlos Castaño: paramilitary leaders who led the organization Autodefensas Campesinas de Córdoba y Urabá (ACCU).

39 Instituto Colombiano de la Reforma Agraria.

and the Castaño brothers appeared and displaced most of them. In the 1990s these very same lands were again sold to the Mancuso family, by use of a *testaferro*, and by the time of the initiation of the transitional justice process they were still controlled by this family. In 2008 the regional CNRR office was contacted by two groups of displaced farmers, who presented the titles to the land, explained their situation and sought restitution from the current owner of the lands, Salvatore Mancuso.⁴⁰

Although the paramilitary leader himself had been extradited to the USA, the region was still unstable and a safe return not yet possible. Mancuso was contacted and confronted with these claims, and denied any responsibility for the displacement, arguing that it was not him but the Castaño brothers who had committed the forced displacement. He did, however, recognize his obligation to provide reparation to the victims and the families' rightful claim to the land, and agreed to provide them a meaningful restitution. Henceforth, the families were able to return to their lands and continue the life they were forced to leave behind almost 20 years ago. Most importantly they were able to return as part of a process which gave them guarantees of security from the paramilitary by a leader who arguably still exerts a significant amount of influence in the region. Until recently, this was the only known case of restitution of land in Colombia as part of the transitional justice process. In July 2009 a 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.

The strategy of negotiated restitution as presented above, addresses one important issue which is vital for the sustainability of the process: security. By making the victimisers acknowledge their direct responsibility for the displacement and the future security of their victims, this strategy may constitute a more sustainable solution to the issue of land restitution. Negotiated restitution not only involves an agreement between the victims and the victimisers, but also entails the institutional support of several governmental agencies, in order to establish conditions of security to facilitate return and restitution. In the example from Córdoba, the supporting institutions included the Peace and Justice Unit at the Prosecutors General's Office, the National Ombudsman, the National Police, the regional CNRR office, the Armed Forces, and MAPP-OEA in a monitoring role. This supporting role, however, is not institutionalized, being therefore an entirely *ad hoc* experience.

40 Interview with Eduardo Porras Mendoza, Coordinator CNRR Regional office in Sincelejo (November 2008).

This approach to land restitution can also help resolve two of the challenges identified with regard to judicial restitution. First, it does not follow the sequencing prescribed by the law of Peace and Justice. Instead of first determining the truth, then achieving a conviction which establishes the legal responsibility, we can observe that the act of reparation has been moved up and is being implemented parallel to the judicial process. The time needed for the effective implementation of this method is consequently sharply reduced, and can ensure 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 victimisers.

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 the 'new owners'. Upon return tensions can rise between those who left and those who stayed. Similar problems with third parties can also be expected. 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 by which they stand to lose their investments. How to accommodate the displaced population and the current users of the land is a 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 still has and if he is capable of providing guarantees of non-repetition.⁴¹ In August 2008, one of the local leaders restituted through the negotiation presented above was assassinated, allegedly by another paramilitary group not party to the agreement made between the victims and their victimiser.⁴² The changing nature of power relations in Colombia become manifested as different strategies of restitution of land take form. Disturbingly high numbers of reported assassinations of both victims and *postulados* and the re-emergence of new paramilitary structures can create an environment that makes future negotiated restitutions difficult to develop.

41 Non-repetition is one of the modalities of reparation defined in the Peace and Justice Law and entails the obligation of not committing new crimes and the prevention of the re-victimization of victims.

42 The paramilitary leader Pedro Oliveira Guerrero and his 'bloque' Heroes de Guaviare' demobilized in 2006, but he subsequently withdrew his participation as the conditions of confinement changed. Today he leads a new paramilitary group called Ejército Revolucionario Antiterrorista de Colombia (Erpac).

Finally, it should be mentioned that the CNRR is also in the process of developing pilot projects in the regions of Turbo, Antioquia; Chengue, Sucre y Mampujá, and Bolívar – projects that follow much of the logic of negotiated restitution. The pilots await implementation, but background reports and agreements with the paramilitaries in these regions are underway. In cooperation with partner institutions, several displaced communities have been identified and talks with the new actors in the region have been initiated.⁴³ These talks have revealed the methods used by the paramilitaries, information facilitating 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 from their own lands by including them into the new conditions created on the ground during their absence, conditions that in many cases are impossible or even undesirable to reverse.⁴⁴

IV. Conclusions: Transitional and Distributive Justice

– Similar Goals, Similar tools?

In light of the processes discussed above, how far can transitional justice take us with regards to the land issue and distributive justice in Colombia? Developments so far seem to prove Huggins right, that in countries with unequal access to land, restitution programs ‘can complement but not replace efforts to bring about land tenure reform’.⁴⁵ Developing and implementing policies to address the land issue have proven difficult. The three strategies of land restitution are part of a transitional justice process that is relatively new, was introduced in harsh conditions, and has proven to be notoriously slow with regards to the victims’ right to reparations. TJ processes can arguably contribute to a sustainable solution for Colombia’s displaced peoples through the realization of the right to restitution of land. However, this may imply significant concessions on the part of the victims, the victimisers, and the state alike, as seen in this case. Recognizing that security is the principal challenge in Colombia, restitution of land will be difficult to implement without the compliance of victimisers.

In the wake of the massive arbitrary displacement in Colombia, new political and economical structures have been created and even legalised. Although displa-

43 CNRR 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 E. Pizarro (Bogotá 11 June 2009).

44 Interviews with President Pizarro at the CNRR (Bogotá November 2008 and June 2009).

45 *Huggings* (n 2) 358.

cement is a crime in both the civil and military penal codes, this crime generally bears no consequences for the victimisers. The only improvement observed in terms of a reduction in arbitrary displacement occurred in the period 2003 – 2005; the same period in which negotiations with the paramilitaries led to the transitional justice process. Legal and social benefits were offered to the demobilized paramilitaries, on the condition that they provide reparation to their victims, including the restitution of land and property. Judicial and negotiated restitution strategies are the result of this process; both depending on the voluntary participation of victimisers. However, as the benefits promised during peace negotiations became increasingly distant, former paramilitaries have reacted by not fulfilling the conditions imposed upon them. Consequently, the CNRR expects that restitution by confiscation will be the norm rather than the exception in the future.

Of the three strategies identified, negotiated restitution seems to be the most sustainable option in the long term. It provides security for the victims, and to a certain extent, guarantees non-repetition. This option ought to be further explored. In contrast, restitution by confiscation does not necessarily take into account the security situation on the ground and there is a potential risk of re-victimisation. Judicial restitution is strained by its own institutional design, impeding the effective processing of cases and claims.

The blurred lines of ownership of thousands of properties and parcels of land in Colombia today pose a great challenge for any strategy of land restitution. Also in this regard negotiated restitution is better positioned to face the challenge, as it facilitates the access to information needed to clarify original ownership and tenancy relations. However, this strategy is vulnerable, due to its dependence on the voluntary participation of victimisers. A large-scale implementation of negotiated restitution would require the existence of real incentives for victimisers to participate. From this perspective, the withdrawal of incentives offered by the Law of Justice and Peace to those most responsible limits the process of land restitution. Rather than entering into the discussion of whether the Colombian process is a 'proper TJ process' or not, it is of greater interest to determine how successful or not the TJ mechanisms in place are. As such the article has intended to contribute to the growing TJ literature by presenting a series of possible challenges and limitations to such processes, in particular to restitution of land as a modality of reparation. Land restitution as victim reparations can prove sustainable, yet only bear modest results concerning the issue of uneven land distribution in Colombia. As we have seen, security, legal and administrative strategies, and economic interests play an important role in the effective exercise of the right to restitution for victims of arbitrary displacement in Colombia. The restitution program has

contributed to raising awareness and creating an institutional framework where restitution claims can be made; it has also raised expectations (particularly among government officials) about what it can actually deliver. Transitional justice and distributive justice may share the same goals of peace and justice; however, the means of the former, in this case restitution as reparations, falls short in addressing the complexities of distributive justice.

Book review

Charles Beitz and Robert E. Goodin (eds): *Global Basic Rights*, Oxford University Press, 2009.

Reviewed by Hugo Stokke

This is an anthology taking its point of departure in Henry Shue's *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, originally published in 1980. The book was written during Jimmy Carter's presidential tenure, at a time when human rights were an American foreign policy priority. Its political objective was broadening the human rights agenda to add subsistence rights to the security rights commonly assumed to constitute the core of human rights. With the election of Ronald Reagan, subsistence rights took a back seat position relative to the instrumentalisation of security rights in the cold war with the Soviet Union and other ideological adversaries. While domestic influence was marginal, *Basic Rights* did exert considerable influence within the UN, particularly through its novel conception of correlative duties.

What are the main theses of Shue's book? The editors advance two main arguments. First, that everyone has basic rights to security and subsistence and secondly, that the correlative duties to these rights apply equally to both categories of basic rights. The common view had previously been that security rights generally implied negative duties while subsistence rights implied positive duties. The best way to protect security rights was, as commonly understood, not to interfere with the execution of these rights while subsistence rights, according to the generally held view, meant aid, assistance and other types of positive action. Shue's great achievement was to argue that protection of security rights also meant positive duties and that protection of subsistence rights also meant the abstention from harmful action that could endanger the subsistence of individuals and people. Duties comprise 'to avoid depriving', to 'protect from deprivation' and 'to aid the deprived'; in other words, the duty to avoid depriving applies as much to subsistence as it does to security. The duty to protect from deprivation signals that third-party protection, namely some type of social arrangement, would have to be in place to prevent one party transgressing against another.

The other main argument was that some rights are basic while others are not. The enjoyment of the basic rights is essential to the enjoyment of the non-basic rights. Non-basic rights are conditional upon the basic rights, as they cannot be

enjoyed unless the substance of basic rights is actually enjoyed by way of social protection against standard threats. For Shue, having a right does not mean much unless the substance (what there is a right to) is actually enjoyed by appropriate social arrangements. Any type of protective arrangement would thus have to be social or institutional, meaning that duties cannot be squarely apportioned at the level of individuals, but would have to seek agencies of broader and higher capacities, beyond those of individuals. But problems remain, and the editors do not deny that assigning duties in the case of subsistence rights may be harder than in the case of security rights, but as argued below, that depends very much on how security rights are defined.

In an anthology, contributors may start from any of several points of departure. Some expound upon the research agenda set by Shue, others engage directly with the arguments in *Basic Rights* and yet others engage with earlier and later writings only marginally related to the issues raised by *Basic Rights*. Christian Reus-Smit explores the institutional reference of rights which over time has come to mean the sovereign state in a system of sovereign states, and how the relationship of individuals to states is paradoxical as the state both generates problems as well as provides remedies. Andrew Hurrell explores the predicament of rights in a world characterised both by a harder security climate and by a higher degree of interconnectivity, arguing that a return to old-style Westphalian politics is not a feasible option in today's international political climate while recognising that much of the human rights discourse has taken on a decidedly transnational nature. Neta C. Crawford argues how we can go from being passive bystanders to being at least active bystanders in the pursuit of a global moral responsibility which has both individual and institutional components. Richard W. Miller sketches an alternative approach to that of Shue to how the developed part of the world can exercise their responsibilities to the people of the developing countries without taking advantage of them, whether through trade, aid or restrictions on greenhouse gas emissions. David Luban examines the so-called Ticking Bomb Scenario in a topical and engaging essay, drawing upon Shue's earlier article on torture from the late 1970s, which acquired a new-found urgency in the aftermath of 9/11. On the same track, Jeremy Waldron examines whether or not security post 9/11 has had the unintended effect of narrowing and restricting the exercise of other rights in the name of security as a basic right, *pace* Shue. Simon Caney examines how human rights and responsibilities stand in relation to climate change, discussing more recent work by Shue on duties emanating from harmful environmental practices.

Some essays engage directly with the argumentative core of *Basic Rights* and might be worth examining in more detail. Judith Lichtenberg examines the

tri-partite duty structure of avoidance, protection and aid with a view to drawing distinctions between them. One important distinction is to what extent institutions can be blamed for failing to protect individuals from transgressions by other individuals. She discusses the scope of negative duties, considering Thomas Pogge's strong emphasis on these duties to the extent that most duties can be viewed as negative – a view at odds with much of the mainstream literature. In this respect, she points to the baseline problem, which says that any state of well-being must be evaluated from a baseline from where it is possible to say whether there has been a worsening or improvement. This also involves the well-known counterfactual that individuals may be worse off even in the absence of exploitative practices. An employed worker on an exploitative labour contract may on this account be better off than an unemployed worker. But this worker might risk being fired if he joins a trade union to negotiate a better contract. In this scenario, there is a negative duty to avoid depriving, even if the employer may argue that he has fulfilled the positive duty to aid the deprived. This is an important point to which we shall return in a little while.

Thomas Pogge does indeed engage with the argumentative core of *Basic Rights*, seeking to dismantle it by way of stringent logical analysis. It is the lexical priority of basic rights in relation to any other rights that is the object of his scrutiny and it is probably fair to say that he succeeds in doing so if this formalistic analysis is the only or best way of examining that relationship. I am not so sure that it is, and I find the evidence in the alternative approach adopted by Elizabeth Ashford as possibly the most interesting contribution to this collection. She delivers a strong argument why the right to subsistence should count as a basic right. She does so, not by examining this right as a necessary precondition for the enjoyment of other rights which is the object of Pogge's critique, but by looking at the substantive interdependence between this right and other rights. This can be done by considering the interests of the rights holder and how they are expressed in actual decisions. If there are difficult choices to be made, we would assume that the choices made would reflect her primary interests. In the article a hypothetical example is given whereby a woman is guaranteed a subsistence income only if she agrees to being subjected to torture. If torture or this type of agreement were to be prohibited, she would thus lose her main source of income. Following her weighing of interests, it would be in her interest to have this unsavoury agreement continue in the absence of any alternative means of securing a subsistence income. While this example sounds far-fetched, to say the least, it provides the important insight that individuals in positions of extreme vulnerability may be willing to accept exploitative and cruel practices if those are the only means of reaching a guaranteed

minimal level of living. A better real-life example would be the right against child labour particularly in those situations where the income from child labour provides the only means of securing a subsistence income and where it would be in the interest of both parents and children to accept this means in the absence of any alternative options. If alternatives were available, given the weighing of interests, it would be in the interest of both children and parents not to accept it. In this way, the right to subsistence takes precedence over liberty rights and Ashford's discussion of these predicaments is very illuminating and makes the reader reconsider the alleged dichotomy between negative and positive rights and duties.

A final observation: the priority of security rights over subsistence rights is very much based on the perpetrator of the violation being identifiable due to the narrowness of the conception of security; namely, physical security in the absence of murder, rape, mayhem, and assault. In the aftermath of 9/11, security has been used as a justification for drastically narrowing civil liberties and privacy and for launching the war of terror with drastic implications for the security of the inhabitants of Afghanistan and Iraq. Does enhanced security for some require reduced security for others? Further, as noted by the editors, environmental disasters do pose threats to physical security; one is the immediate effect of the disaster itself and the other is the social effects in terms of large-scale displacement of people. Should environmental disasters and their effects be considered a sub-set of security rights? In other words, security in 2010 has taken on another flavour than that of the 1980s, which requires a reconsideration of what security rights signify today. It would have been interesting to have Shue's thoughts on this issue, but oddly, there is no concluding essay by Shue on the validity of the *Basic Rights* arguments in the world of today. Perhaps he has already written what he has to say on the subject, but it would have improved what is a very fine collection of contributions to an important topic.

Book review

Mashood A Baderin: *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*, Ashgate Publishing Co., 2010.

Reviewed by Sindre Bangstad

It is with some trepidation that one accepts the challenge of reviewing an edited volume of Professor Abdullahi Ahmed an-Na'im's selected writings on human rights. For an-Na'im is, if anything, a towering intellectual figure for anyone remotely interested in topics relating to Islam, human rights and secularism as explored in scholarly literature over the past thirty years, and no less towering for those of us sympathetic to his aim of exploring convergences between Islamic exegetical traditions and modern human rights.

Isaiah Berlin (1907-1997) famously distinguished between scholarly foxes and hedgehogs. 'The fox knows many things, but the hedgehog knows one big thing'. In this respect, a designation of an-Na'im as a scholarly hedgehog would certainly be apposite. For an-Na'im's body of work on Islam and human rights is certainly reflective of a scholar who 'knows' that human rights as an instantiation of legal universality provides a necessary template in a modern globalised world, regardless of whether it expresses a universality that is foundationally particularistic. An academic educated at Cambridge and Edinburgh, the Sudanese-born an-Na'im (1946 -) has a distinguished record as a scholar and activist, with an impressive number of publications and books to his name. In the context of the so-called 'War on Terror' in recent years, which has provided political regimes in many corners of the world with license to engage in horrendous abuses of human rights, or even 'outsourcing' these to authoritarian client regimes, the necessity of upholding such rights has if anything become more obvious than ever since the end of World War II. As many readers will no doubt know, an-Na'im's commitment to human rights is anchored in his personal experiences as a follower of the Sudanese Islamic scholar Mahmoud Taha (1909-1985), executed for alleged 'apostasy' in 1985 in the course of the authoritarian Sudanese regime of Ja'afar al-Numeiri's (1969-1985) attempt to re-gain popular legitimacy in the Sudan through a process of forced Islamisation of Sudanese law from 1983. An-Na'im's ideological nemesis among Sudanese intellectuals, the Sorbonne-educated Islamist leader of the National Islamic Front (NIF), Hassan al-Turabi (1932 -) was central to this process. Were it not for an-Na'im, chances that his intellectual mentor Taha would have

been consigned to the role of yet another footnoted and semi-forgotten dissident in the modern Muslim world would have been great. For it was an-Na‘im who saw to it that Taha’s *The Second Message of Islam* was translated into English and published in 1987, and Taha’s influence on an-Na‘im is readily discernable from his own seminal book *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* from 1990. Having been detained in Sudan, an-Na‘im left the Sudan shortly after Taha’s trial and execution in order to take up a distinguished career as an itinerant legal academic and activist in the ‘West’. In the edited volume at hand, an-Na‘im’s measured and deft analysis of Taha’s career and trial from 1986 is the oldest essay to be included. One wonders, however, whether this essay might not usefully have been placed at the very beginning of this edited volume, if only so as to provide the readers with some sense of the chronology in an-Na‘im’s intellectual development.

Instead the editor has chosen to group the selected essays according to three overriding and rather arbitrary themes. The first part of the book contains mainly essays of a recent date, dealing with concerns central to an-Na‘im’s intellectual work in recent years, namely providing an Islamic rationale for a secular state. An-Na‘im details this argument with greater strength, detail and conviction in *Islam and the Secular State: Negotiating the Future of the Shari‘a* (2008). It would however be factually incorrect to argue that the concerns with secularism have not been present in an-Na‘im’s work from the very outset of his intellectual production in English. The fact of the matter is that the intellectual underpinnings of an-Na‘im’s work on secularism and the secular state has undergone significant shifts over the years,¹ and it is therefore somewhat unfortunate that the editor’s organisation of these selected essays contributes to obscuring this fact. Any reader is bound to discover that the themes central to an-Na‘im’s intellectual work are interwoven in what is perhaps best describable as an academic tapestry.

There is a strong linkage between the reform methodology to which an-Na‘im subscribes, and his advocacy of human rights on Islamic grounds and in Muslim contexts. But it would be to overstate the case to argue that Mahmoud Taha’s reform methodology has gained widespread acceptance among modern Muslims. In order to simplify, Taha’s reform methodology calls for an abrogation (*naqsh*) of the suras of the Qur’an revealed after the first followers of the Prophet Muhammad’s flight to Medina (*hijra*) in favour of the suras revealed earlier in Mecca. In the Tahan reform methodology, this would be the basis on which an interpretation of shari‘a consistent with equality between men and women (1), Muslims and non-Muslims (2), and full religious freedom (including the right to convert from Islam) (3) could be found. These are certainly concerns which have remained

central to an-Na'im's work ever since he left the Sudan, and which remain areas in which the tensions between classical interpretation of the shari'a and modern human rights are most apparent in the modern era. It would appear that an-Na'im's own references to Taha's reform methodology have steadily become fewer and less detailed over the years, which at the very least raises the question as to whether an-Na'im himself retains much faith in his intellectual mentors' reform methodology and its ability to convince practising Muslims.

While in little doubt about the predominantly 'Western' origins of modern human rights (against all and sundry declarations of specifically 'Islamic human rights'), an-Na'im is insistent on the very need to universalise human rights through strategies securing popular support for them, rather than recurrent pronouncements of the existence of such universality at the very outset, or imperial impositions. This end cannot be pursued by alienating the religious, not the least in Muslim countries. As would be expected, an-Na'im holds no special regard for the postcolonial elites of purportedly 'Islamic' states (such as Sudan, Pakistan, Saudi-Arabia and Iran) and their instrumentalisation of cultural relativism, nor for postcolonial intellectuals who from the safety of the ivory towers of the 'West' pronounce modern human rights to be a 'Western' legacy, and therefore *ipso facto* an instrument for 'Western' imperialism. This is for instance apparent in the article 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' from 1987. It is no doubt part of an-Na'im's intellectual grace that he does not take up the gauntlet of the epitaphs thrown at him from the most irate of his postcolonial/poststructuralist intellectual opponents. One of them is the UCLA Berkeley Associate Professor of Social Anthropology, Saba Mahmood, who in a particularly unmemorable essay in *Public Culture* in 2006 ('Secularism, Hermeneutics and Empire: The Politics of Islamic Reformation') charged that an-Na'im's liberal assumptions about the need for reform in the Muslim world, and his notions of religiosity, made him a virtual instrument in the hands of the very neo-conservative brand of modern US imperialism that he repeatedly and publicly opposed in the darkest years of the Bush Administration. Unlike these postcolonial critics, who offer no epistemological grounds for anything but the continuous assertion of mutual 'difference', an-Na'im is committed to exploring points of potential convergence between Islamic traditions (however conceived) and non-Islamic traditions. Nor is he afraid of pointing out in precisely which areas classical and historical interpretations of the shari'a fails to meet modern human rights standards. Keywords in this regard which appear throughout an-Na'im's work, and so too in this edited volume, are 'cross-cultural dialogue', 'legitimacy', 'internal legitimation' and so forth. But here we are at a crucial problem

in the work of an-Na‘im as a scholar and activist. For an-Na‘im does not bother to spell out in concrete details exactly how this process of internal legitimation of modern human rights in Muslim contexts is supposed to take place. This is in fact more of a problem than what an-Na‘im seems to allow, in as much as essays such as those reproduced in this volume are unlikely to be read by others than an intellectual and cosmopolitan elite in Muslim societal contexts.

In many respects, this reviewer finds an-Na‘im’s arguments for a secular state in Muslim contexts, concerns which for all the caveats introduced by an-Na‘im himself are central to his recent work, and which are detailed in the first section of this edited volume, to be the least convincing. Here, he is again adamant that secularism in a Muslim context must be founded on ‘the institutionalized practice of secularism, as an indigenous concept, rather than an externally imposed Western notion’, as he notes in the essay entitled ‘Reaffirming Secularism for Islamic Societies’ from 2003, and that ‘the importance of a religious rationale for secularism’ is not ‘sufficiently appreciated’, as he asserts in ‘The Interdependence of Religion, Secularism and Human Rights: Prospects for Islamic Societies’ from 2005. It is quite clear that what an-Na‘im has in mind here is a version of what the Canadian philosopher Charles Taylor has referred to as an ‘open secularism’, which does not impose unduly (from the point of view of popular opinion in any Muslim context) strict differentiations between religion and politics. Yet to insist, as an-Na‘im has done in recent work, that real religious freedom in a Muslim societal context is conditional on the adoption of some variant of a secular state brings the problematique of internal legitimation, which an-Na‘im’s work regretfully does not address in sufficient detail, into ever sharper relief. The essay ‘What do We Mean By Universal?’ from 1994, in which an-Na‘im argues that it seems ‘highly improbable’ that a secular state ‘could be sustained in the Islamic world today’ remains a sobering note for those uneasy about an-Na‘im’s more explicit endorsement of a secular state in recent years, and uneasy about the lack of internal legitimation underpinning it.

Finally, the one item missing from an-Na‘im’s reform agenda is – as far as this reviewer can ascertain – gay rights in the Muslim world. On this, an-Na‘im is consistently silent throughout his work. But let this not detract from the overall conclusion, which is that this volume, published by Ashgate in a format which is unfortunately prohibitively expensive, offers invaluable insights into the thought of one of the present era’s most significant and prolific Muslim legal intellectuals.

1 Cf. Cato Fossum’s recent M.A. Thesis *In a state of being religious: Notions of religiosity underlying Abdullahi an-Na‘im’s model for a secular state* (University of Oslo, 2010) for a detailed exploration of this question.