1. Introduction

Transitional Justice (TJ) was introduced to Colombia in 2005 when Congress passed law 975/05: the Peace and Justice Law. This law regulates the demobilisation of members of ‘illegal armed organizations at the fringe of law’, and establishes a set of obligations for the postulantes as these are referred to after entering the process. Legal benefits such as reduced sentences can be obtained if and only if the victimiser is prepared to repair their victims; reparation of which restitution is an integral part. The inclusion of property restitution in the TJ process is one among several strategies to achieve sustainable peace in Colombia, and is presented as a sum–sum game. The victims and the victimiser are bound by the same legal framework and whereas the victims of conflict benefit from the restitution of their land rights, the postulantes are given lenient sentences and are enabled to reintegrate into civilian life as ordinary citizens.

A focus on the rights of the internally displaced people (IDP), who will be the beneficiaries of the policies of land restitution, was chosen because of the significance land has in the internal conflict. A saying in Colombia expresses this notion when stating ‘it is not the civil war that causes displacement; rather the civil war is being fought to produce displacement’. Different estimates on the size of the displaced population are in use that range from between 2.9 and 4.6 million people², leaving behind 2.5 – 10 million hectares of land³.

The purpose of this paper is to situate the right to restitution of land in TJ, and is based on the experiences made in the case of Colombia. Understanding that restitution of land is but one component of a larger TJ framework, it is important to note that even in the most successful cases of restitution the outcome need not be a cessation of violence. However, in this paper we choose to focus on what we deem to be the most important factor if any sustainable solution to the Colombian conflict is to be achieved; the restitution of land.

We begin with a discussion on the concept of restitution in TJ processes. A brief account of the historical context and the significance of land in the Colombian conflict are then presented, followed by a section on the scale of the displacement in contemporary Colombia, and how the right to restitution of land has been included in the current process. The third part of the article focuses on the domestically developed strategies to implement the right to restitution within the TJ framework in Colombia. I have identified three strategies developed to attend the IDPs' right to

---

¹ Norwegian Centre for Human Rights, UiO, August 15th 2009
² 2.9 million is the number used by the Colombian Government, while 4.6 is used by the Colombian civil society organization Consultoría para los Derechos Humanos y el Desplazamiento (CODHES).
³ The difference in the number of hectares stems from the different sources one chose to use. The high number is claimed by the victims’ organization MOVICE. Several other sources use numbers that lie in between these two extremes.
restitution that we have denominated judicial restitution, negotiated restitution, and restitution by confiscation. Finally I will conclude with a few remarks on the how restitution of land in transitional justice can be a catalyst for peace but only if the process is holistically envisioned and recognizes the many limits imposed by the context of war.

1.1. Defining restitution of land in transitional justice

Defining the terms restitution and TJ precisely is difficult as the concepts are applied to widely different contexts and are comprised by many different components. Jon Elster holds that “Transitional justice is made up of the processes, trials, purges and reparations that take place after the transition from one political regime to another”\(^4\). Another similar definition holds that TJ is “the conception of justice associated with periods of political change, characterized by legal responses to confront past wrongdoing of processes predecessor regimes”\(^5\). A third and broader definition determine TJ to be “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”\(^6\). Neither Teitel’s nor Elster’s definition would include the case of Colombia because no political transition has occurred; thus it is difficult to speak of a predecessor regime. Roth – Arriaza however also include armed civil strife, and does not limit the definition to past conflicts, rather past violations. Transitions of political regimes are different from transitions from conflict, especially in civil conflicts with multiple actors where it can be problematic to determine when the transition to peace has occurred. Changes in the political regimes are easily perceptible, but conflicts tend to be more diffuse. If some, but not all, of the actors in the conflict submit themselves to a process involving the administration of justice, truth and reparations, can we still speak of a transition? Can TJ be an array of institutional tools designed to bring about an end to conflict as well as mending past suffering after the conflict has ended? In Colombia this is being tested as we observe that trials, purges and reparations are taking place, yet there has been no end to the conflict. In spite of differences in definitions all such processes aim to create something new by correcting actions taken in the past.

While TJ is a relative new concept that has been used to describe the transitions in Latin America in the 1980s and in Eastern Europe after the end of the Cold War, even though as Elster (2004) argues it has been practised since 411BC, the concept of restitution has been an actively used and recognized legal term. But the concept has evolved, and while first applied to situations where states sought compensation from the aggressors of interstate-war, it now has become of relevance to individuals as well\(^7\). The right to restitution can be defined as the right to an equitable remedy that restore a person to the position they were, or would have been in, that is restoring the status quo ante, if not for the improper action of another\(^8\). The right to restitution of land after internal

\(^4\) Jon Elster, Closing the books. Transitional Justice in Historical Perspective. Cambridge University Press, 2004 
\(^5\) Ruti G. Teitel, Transitional Justice, Oxford University Press, 2000 
displacement is the “legally enforceable right to return to, to recover, repossess, re-assert control and reside in the homes and lands they had earlier fled or from which they had been displaced”\(^9\).

International standards have traditionally confirmed restitution to be the favoured mechanism of reparation in the aftermath of violent conflict\(^{10}\). Restitution of goods that have been stolen or damaged is an obvious choice that involves tangible results that are easily recognisable for the victims of conflict, if we limit ourselves to restitution of material goods. In cases where the objects can not be restored one can also more easily measure the value of the goods, and provide the victims with alternatives to restitution, such as compensation. It is important to note the sequencing as compensation is not simply an equal alternative to restitution but can be invoked only when restitution is not feasible.

The right to restitution has been affirmed by several international bodies, yet the strength of the principle is weak as all references are found in ‘soft law’ and the definitions used are multifaceted. This is reflected by the fact that, on universal level none of the human rights conventions give full guarantees of property\(^{11}\). The United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons that was adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005\(^{12}\) holds restitution to be the preferred method of reparation for the IDPs (art 2.2). The same year another set of principles were adopted by the UN General Assembly, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights and Serious Violations of International Humanitarian Law (UN Basic Principles)\(^{13}\), which to some extent alters the notion of preferred methods of reparation as restitution is defined as only one of several and equally desirable modalities of reparations. In addition the concept of restitution has been somewhat altered in text. Restitution has traditionally concerned property, but in article 19 in the UN Basic Principles the concept has been expanded to include restoration of liberty, employment, identity and the enjoyment of human rights etc.

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


\(^{10}\) Ibid.


\(^{13}\) UN General Assembly Resolution A/RES/60/147. *The ‘UN Basic Principles’*
the land and the right to cultivate the land? Problems of identification of both individuals and the land are likely to be considerable where few public records are kept, making it difficult to determine if $x$ has more rights to the land than $y$. In light of these issues one may argue that other alternative measures that have a comparatively better chance of being implemented at a reasonable cost are preferable to restitution.

However, restitution of land has several advantages over other forms of reparations. Restitution of property as part of TJ does not burden the government with additional costs. Budgetary restraint is a commonly cited reason for a state’s reluctance to fully comply with the obligation to repair; often a very valid reason as the states in question do have strained resources because of the conflict one is trying to solve. Williams (2007) states “Because it involves the return of existing property to its rightful users, its costs are often calculated primarily in terms of the political capital required to carry out unpopular evictions, rather than in terms of the mobilization of financial resources then often acts as a constraint on compensations-based programs”. The return of land does not carry any financial burdens of the state as it is the usurpers that will bear the cost. The cost of a program of restitution of land after conflict will be in terms of the massive judicial and administrative task of clarifying claims to land, a burden that would be significantly reduced if the usurpers clarify the truth and are willing to contribute to this process of recreating the cadastral records.

Another advantage of restitution is the consequent re-framing of the economic and political makeup of society. By restoring the victims to their former conditions in their place of origin one can restore their collective power to decide the future for their communities, regulate the activities which have been introduced in their absence, and on an individual level one will return the people to conditions that they are familiar with and have a realistic prospects of mastering and improving. The majority of the victims displaced in Colombia are subsistence farmers who have been forced to live in cities; an unfamiliar environment in which their expertise in agricultural activities is extraneous. While important to note that many of the victims have no immediate interest in returning, the right to restitution of land is not dependent on actual return. Restoration of legal rights to the land provides the opportunity to decide what they want to do with their lands; be it return, renting out, or selling the plot of land. In addition if we see the right to restitution of land as one part of an overall reparation scheme, one could argue for the possible transformative effects of restitution in creating a social fabric more conducive of prolonged stable conditions.

2. The context

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

---

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

15 Saffon and Uprimny, El potencial transformador de reparaciones. Propuesta de una perspectiva alternativa de reparación para la población desplazada. Dejusticia, 2008
The history of violence in Colombia is multifaceted, and explanations ranging from ideological, political, 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. Throughout its history numerous wars have been fought locally, regionally and even nationally. Though with different dynamics and in 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. Colombia is today a modern country which has well established democratic institutions, yet still we can observe some of the same traditional characteristics found a century ago. The differences between urban and rural realities are quite stark. Whereas the urban areas are modernized and controlled by the state, the rural areas are still dependent on a feudal tradition in which certain actors define the conditions. Semantically the use of the word ‘patron’ is widespread, and the dependence on these patrons is also very real. Statistically we see a strengthening of these patrons the last decades as the displacements and struggles over land contribute to an increase in the concentration of land. This trend has been described as the criminalization of the rural elite, as the links between the illegal armed groups, the traditional landowners and the drugs-cartels became increasingly intertwined in the 1990s. This constellation of actors have become empowered in times of war, and have amassed high levels of economic and political power, making their inclusion in any process concerning the rural Colombian makeup paramount.

2.1. The Significance of land

The relationship between forced displacement and usurpation of land is not uniform. Several different explanations can be forwarded for the act of displacement in times of war. Displacement can take place due to military concerns in areas where the antagonistic actors engage in direct struggles. It can be politically motivated as well. Displacement can serve to create a friendly population through population exchange, which lends political support to the actor controlling the given region. Thirdly the displacement can be economically motivated in which the distribution of land is concentrated in fewer hands. Displacements as a strategy of war incorporate all these aspects. In the following I will list these three aspects which I deem important to understand the dynamic between forced displacement and the usurpation of land.

The military significance of land. Unlike other South American states, Colombia has never developed a strong central state capable of controlling its own territory, and in the absence of the state several semi-legal and illegal groups have been created to provide security in these territories. From a military perspective control over territory and its inhabitants is vital. Control over territory means the presence of safe-zones in which the actors can regroup, train, rest and

---

17 Absalón Machado, La cuestión agraria en Colombia a fines del milenio. El Áncora Editores, 1998
19 Gustavo Duncan, Los señores de la Guerra. De Paramilitares, Mafiosos y Autodefensas en Colombia. Planeta Colombiana, 2006
plan future actions, and importantly gives the opportunity to form ties with the local population who can serve as informants or possibly be subjects for recruitment. The Illegal Armed Organizations at the Fringe of Law (IAOFL)\textsuperscript{22} do interact with the civilian population in the areas where they operate, and are indeed dependent on these for their survival. In order to have access to provisions the armed groups need to be situated in populated areas. Consequently one military tactic used by the paramilitaries has been to ‘drain the sea to catch the fish’. The logic is that by displacing the logistical network, the enemies will be starved into submission as no provisions can be bought or stolen. Much of the displacement in Colombia occurs from such rural areas, in which small farmers are forcefully displaced from their land to the urbanized zones where the official armed forces and the paramilitaries exert higher levels of control. Displacements due to military considerations are relatively easily reversed as it depends wholly on the level of hostilities. As high levels of tension are for the most part temporary as one of the actors 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 if the displacements were a side-effect of hostile actions that placed them in the line of fire. That the levels of return in Colombia are very low gives us an indication that the military objectives are not the principle cause of displacements.

*The economic significance of land.* The forced displacement in Colombia is centred in in semi-developed regions with moderate poverty and in which the resources are manifold\textsuperscript{23}. These regions are rich in the sense that they are apt for agricultural activities such as cattle ranching, rice- cotton- sugar- fruits- production, and more recently the cultivation of agricultural crops destined for bio-combustibles. Other economic activities related to the production of energy; coal, oil and hydro-electrics are also prominent. In addition the exploration of precious commodities such as metal and minerals are prevalent in the areas of displacement. Another important factor is the production of illicit crops, coca in particular\textsuperscript{24}. Coca cultivation is widespread in areas located far from the political and administrative centre and not easily accessible. Hence, these crops are easily controllable for the IAOFLs who have come to control the whole production line, from cultivation of the coca-leafs, processing the cocaine, and smuggling to the international markets. Given the economic importance of this trade ferocious battles have been fought with the aim of controlling territories in which these crops are cultivated.

Large scale projects make irreparable changes to the areas where they are developed. Transformation of the use of land, from subsistence farming to vast monocultures makes the reversal practically impossible for ecological and economical reasons. For example; reversal of hydro-electrical projects that involve damming or other infractions to the physical realities on the ground are not easily reversible. Uprooting entire plantations of bananas, rice, African palm, cotton, sugar etc. may not be feasible due to the cost of such operations or economically desirable for the original owners or the current stakeholders of these lands. If these lands are to provide

\textsuperscript{22} The concept ‘Illegal Armed Organizations at the Fringe of Law’ (IAOFL) is used in the Peace and Justice Law, and includes both former paramilitaries and former guerrillas. In the following the terms will predominantly by referring to paramilitary organizations.

\textsuperscript{23} Marta Bello, “El desplazamiento forzado en Colombia: acumulación de capital y exclusión social”. *Revista Aportes Andinos: Globalización, migración y derechos humanos* (Nº 7), 2003

\textsuperscript{24} Alejandro Reyes, Cited from the seminar *Land reform and distributive justice in the settlement of internal armed conflicts*. Bogotá 5-6 June 2009
acceptable social-economic conditions for the displaced peoples of Colombia a mere restitution may not be sufficient. The economic significance of the land usurped is above questioning. Control over the resources in and on the land is still of central value for the illegal armed actors as this provides them with a revenue needed to survive as an operative organization. Thus, considering their interest in the land is important when trying to skew this control back to the original owners and users of the very same land.

The political significance of land. In the late 1980s and early 1990s Colombia went through a process of democratisation in which a new political regime was created and consecrated in the Constitution of 1991. The political system was opened up and gave effective access to new political constellations, many of which had ties to guerrilla organizations that were demobilised in the peace-process in the early 1990s. Most important for the subsequent developments, however, was the process of decentralization that was introduced. Greater political and fiscal autonomy was ceded from the central state to the local and regional authorities. While this is a very sound policy in many cases, it backfired in the politically turbulent Colombia. In a context of war political freedoms are severely restricted, in particular in areas far from the centre. In the new decentralised regime the local communities became of value for the illegal armed organisations, both due to the revenue it received from the central state, and as a path of influence into regional and national political networks.

Through the process of decentralisation the local population on the land becomes of importance. By controlling their political voice the armed actors could control the political representation locally, regionally and nationally and have access to most of the administrative institutions of the state. Such control could be exerted by directing elections, and administer punishments on populations that did not do as told. The absence of an efficient meritocracy and the extensive use of political appointments to administrative positions will present a grave problem in any restitution process in Colombia as the implementing institutions on local level are still controlled by associates of those actors that perpetrated the displacements in the first place. Drastic changes of the political composition in the municipalities of Colombia can only be achieved in the long term. The armed organizations are not outside society, but make part of it. Physically removing them is not a viable option, and how to adjust to the political realities on the ground is one great challenge when implementing a program of land restitution.

2.2. Internal Displacement in contemporary Colombia

Given the magnitude of the problem of forced displacement in Colombia, the state faces an overwhelming challenge. Estimates on the size of the IDP universe varies depending on the sources studied. However, in all indicators the numbers are staggering. By 2008 the governmental agency Acción Social which operates a registry for the IDPs identified 2.8 million victims of displacement. The civil society organization CODHES estimate the number to be 4.6 million, or close to 10% of the total population of Colombia. The differences found are

explained by various factors. While CODHES has been counting victims since 1985, the government initiated their registering in 1995. In addition the definitions of victims of displacement vary, as some of the individuals included by CODHES are perceived as economic migrants by the state. These are predominantly found in regions of coca production, and as the state has clamped down on these activities the population have fled. However, the government holds that these are migrant workers and have simply moved to other areas in search of work, and are not to be considered victims of displacement.

The problem in defining the IDPs is also relevant for determining (in)eligibility for the right to restitution of land as not all IDPs have the same connection to land. In the case of migrant workers one could argue that these do not have any connection at all to a specified piece of land, but the majority, 60% – 70% of the displaced do have some form of tenure. A significant portion of this percentage, one out of two had legal ownership to these lands, 31.7 % had collective titles, 4.9 were occupants, 7.2% were rented, and the remaining 8.2% were in possession of the land.

In terms of the physical scale of the usurpation of land the data is not easily available. Estimates vary greatly from 2.8 – 10 million hectares of land; that is land used for agricultural purposes. 75% of these are concentrated in 10 of Colombia’s 32 departments: Antioquia, Caquetá, Chocó, Bolívar, Cesar, Magdalena, Guaviír, Meta, Córdoba, and Norte de Santander. These departments also have the highest number of displacements, and are departments in which activities such as mining and agro-industries are prominent. An increase in the concentration of land is prominent as the following data show. In 1984, 0.4% of the Colombian population owned 32.7% of the agricultural land. By 2001, 0.4% controlled 61% of these lands (IGAC-CORPOICA 2001). Concentration of land and displacement from land occurred in the same period, and it is therefore natural to assume that there exists some kind of relationship between these two phenomena. Studies show that the intensity of the displacements is significantly higher in regions where conflicts over land tenure are prominent.

To comprehend the task that awaits it is vital to get an understanding of the modalities used by the displacers. Land was obviously taken by physical force, but equally important to consider was the legal strategies employed by the victimisers. The Colombian Ministry of Agriculture initiated a program in April 2008 called ‘Programa de Consultas en Recuperación de Tierras’ (CONRET) that, through a survey of 800 displaced people identified five methods that were commonly used by the paramilitaries to remove the original population and to take over their land: 1) The land was bought under undue pressure for ludicrous prices, and/or paid by void checks. 2) In exchange for ones’ own life; in which the owners of the land had the option of selling or dying. 3) Transference of rights, where people without titles to the land were forced to sign a document in which they ceded their rights to the land. 4) Irregular possession of the land in cases where occupants were forced out in order for others to move in. 5) Falsification of signatures so that the land was sold without the consent of its owner. The accumulated effect of these strategies was the usurpation of millions of hectares of land. The victimisers went to great lengths to legalize their claim to the land. Strategies differed according to the type of tenure the

28 Salinas, Gonzáles, and González, Tierra, Oro y Conflictos. Instituto de Estudios para el Desarrollo y la Paz (INDEPAZ), 2008
29 Ibid.
30 Gallón and Díaz (eds) Revertir el destierro forzado: Protección y restitución de los territorios usurpados a la población desplazada en Colombia. Comisión Colombiana de Juristas, 2006
31 Eltiempo.com, Detectan cinco modalidades usadas por los grupos armados para quitarles la tierra a campesinos. (2008)
November 19
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.

3. Restitution of land in Colombian Transitional Justice

The main perpetrators of the forced displacement in the 1980s and 1990s were the paramilitaries that in 1997 converged into the organization Autodefenses Unidas de Colombia (AUC). The AUC entered exploratory peace-negotiations in 2002 and started demobilizing already by 2003, even before the terms of the demobilizations had been clarified. Two years after the first demobilisations the Peace and Justice Law, which dictates the rights and obligations of the victimisers, was passed by Congress. It is this law that introduces TJ language to Colombia, and was the result of a failed attempt to secure an amnesty for the members of the AUC. While most of the 31,000 demobilised members were given amnesties, the ones that had committed the most serious crimes, some 10% of the combatants, were to be subject to the special proceedings outlined in this law. In order for these to enjoy the legal benefits of reduced penalties, defined to range between 5 – 8 years of confinement, these postulantes are obliged to repair their victims.

This includes the obligation to return the land stolen and restore the conditions that existed before the violations were committed, in other words the obligation to provide restitution. In implementing the reparations the lines of responsibility lies first with the individual victimiser, second with his military squadron or ‘bloque’, third with the national organization, and then finally, and only as a subsidiary, the state (art 42). That is, the responsibility of the state presents itself as an act of solidarity with the victims of conflict only when the victimisers are unable to fulfil their obligations.

Restitution is explicitly included in the law which states that restitution as reparation is defined as the restoration of status quo ante, and includes the specific measures of a return to liberty, a return to one’s place of origin, and the return of the property stolen, if possible (Art 46).

Restitution as part of a victim’s reparation program is conceptually different from state guarantees to prevent displacement, assist the displaced and provide them with stable socio-economic conditions. The processes are different in the sense that it concerns different populations. In the TJ process the displaced peoples are but one group of victims, and not all displaced peoples have a place in an eventual process of restitution of land. For example, in order to seek reparations for harm suffered, victims must be registered at the Victims Registry operated by the Peace and Justice Unit at the Prosecutor General’s office; a list compiled of close to

---

32 This is not to say that the paramilitaries were the only ones responsible. Indeed, the different guerrillas operating in Colombia, most prominently the FARC, are also responsible for a significant portion of the forced displacement. The Colombian scholar Alejandro Reyes claims that close to 50% of the displaced have been so by the guerrillas.

33 During the peace-talks a different law was circulating in Congress; the law on Alternative Penalties, but was widely criticised by domestic and international organizations who called it a law of impunity. Consequently the law was retracted before voted on, and a new proposal was developed; the Justice and Peace Law (Rafael Pardo Rueda Fin del Paramilitarismo: Es Posible su Desmonte? Ediciones B. 2007).

34 During an interview with President E. Pizarro Leongómez of the CNRR in October 2007 it was expressed that only 5-10 % of the funds needed for reparation is expected to come from the postulantes, while the remainder would need to be funded by the state or international donors.

35 My translation
230,500 people who claim to be victims of guerrilla or paramilitary violence\textsuperscript{36}. Thus, according to the TJ framework in Colombia only those who have registered at the Prosecutor’s office can seek measures of reparation. That is; of an estimated population of between 2.9 and 4.6 million displaced, only a fraction of the 230,500 victims that have registered with this registry have the right to restitution of land within the parameters of the TJ process\textsuperscript{37}. Worth noting is that these numbers describe a very large universe of victims that is continuously increasing as more victims denounce the crimes committed against them, and seek inclusion in the TJ process. However, compared to an estimated 2.9-4.6 million victims who endured forced displacement, the registry suffers from a large backlog of cases that have yet to be denounced.

In spite of this, the law is inclusive considering that all victims of displacement since 1964 are eligible, and the definition of who holds the right to restitution is quite encompassing. Four kinds of tenancy are recognised and hold a right to restitution: Owners with legal titles to the land, possessionists who have bought and utilised land, but have yet to formalize the claim by registering the sale before a public entity. Tenants are those that work on another person’s land but have a written or oral contract in which the right to the use of land is paid in a percentage of the produce, and finally occupants who have cultivated virgin land and settled but have no formal titles to the land. How the right to restitution will be operationalised depends on these different connections to the land, but according to Colombian law all have the right to restitution\textsuperscript{38}.

3.1. Institutional framework

The process of reparation of the victims of conflict has unfortunately stagnated due to several problems; the slow procedures in the courts particularly as reparations are intimately connected to other elements of transitional justice. The right to truth and justice are central to the process and the sequencing in the Colombian process has given primacy to these. The process is as follows: The victimisers included in the process are first obliged to render ‘free versions’ all their crimes, and tell the whole truth about what happened and why it happened. This stage is followed by an investigative stage which culminates in prosecution and punishment according to ordinary law. The sentences are subsequently lowered to 5-8 years if the appointed judge finds the postulant to have complied with the conditions set forth in the Peace and Justice Law. After the judicial responsibility for a crime has been determined, the victims can subsequently seek reparations from the individual postulant who is then obliged to repair his/her victims with all resources illegally and legally obtained if necessary\textsuperscript{39}. As of date only one postulant has been sentenced\textsuperscript{40}, a sentence which also stipulated how the victims are to be repaired\textsuperscript{41}. None of the

\textsuperscript{37} This number includes all types of violations and is not restricted to internal displacement alone. The author has not been able to determine how many of these 230500 were registered as victims of forced displacement.
\textsuperscript{38} Acción Social, Nuestros Derechos Sobre la Tierra Como Población Desplazada. Proyecto Protección de tierras y Patrimonio de la Población Desplazada, 2007
\textsuperscript{39} Colombia’s Constitutional Court revised the law and in its sentence defined how some of the articles of the law were to be interpreted if the law was to be considered constitutionally valid (Sentence C-370/2006).
\textsuperscript{40} 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, Case number Rad. 11001600253200680526 Rad. Interno 0197 Wilson Salazar Carrascal, 2009
other 3000 or so postulantes have reached this point of the process as of yet, four years after the law was passed.

As the TJ process became operational, the executive branch found it necessary to regulate certain aspects of the Peace and Justice Law, and this was first done in decree 3391 of 2006. The decree regulates several aspects of the law, of which the theme of victims’ reparation is prominent\textsuperscript{42}. In terms of restitution of land in particular, article 14 is of importance and can be interpreted as an obstacle to the process of restitution of land. It introduces the ‘principle of opportunity’; a legal principle which in this context means that the prosecutor is not to pursue those cases in which a ‘third party’ has taken control over the property usurped\textsuperscript{43}. As we saw in the section of the different modalities of displacement one would expect that the majority of the holders of the land to be others than the paramilitaries themselves. Some do so in good faith, but even if this is not the case it will be virtually impossible to legally prove so in a court of law. Difficulties can be expected to rise not only because of the efforts to legalize the claim to the land, but also the strategy used to co-opt local administrative and political institutions; including the judiciary.

In light of the slow judicial processes the Colombian government created a new legal mechanism in order to repair the victims of the conflict. Decree 1290 of 2008 paved the way for administrative reparations in which the state, based on the principle of solidarity, obliged itself to take charge in the process of reparation\textsuperscript{44}. The decree thereby by-passed the judicial processes being forwarded against the individual victimisers, and pledged to repair the victims by monetary compensation for the suffering endured. This decree has been heavily criticised by civil society due to its template form of reparation, restricted reparation at best, and also because it relieves the victimisers of the burden of directly repairing their victims while simultaneously rejecting that the state had any responsibility for the crimes committed\textsuperscript{45}. Nevertheless, the administrative reparations programme is as of the moment the only legal mechanism which creates any form of reparation available within an acceptable timeframe. By providing reparations administratively the evidentiary standards are lowered, more victims are given real opportunities to exercise their right to reparation, and the possible threats to physical integrity that could result from direct reparations are mitigated. The administrative reparations programme explicitly includes the crime of forced displacement in its article 5, a crime defined to be worth 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 on more than one occasion. Victims of displacement can receive administrative monetary compensation for the suffering of being forcefully displaced, but this reparation does not prevent the victims to forward claims of restitution of their land or any of the other modalities of reparation as defined in the Peace and Justice Law.

\textsuperscript{41} The reparation was based on the funds ceded by the postulant to the Victims reparations fund. The victims have appealed the decision based on the lack of proportionality between the harm suffered and the defined reparations (CNRR Defensa de las víctimas apelaron sentencia contra “El Loro” Bogotá, 2009).

\textsuperscript{42} Decree 3391, Por el cual se reglamenta parcialmente la ley 975 de 2005. Issued by President Álvaro Uribe Vélez, 2006.

\textsuperscript{43} Gonzales, Perdomo and Mariño Reparación judicial, principio de oportunidad e infancia en la Ley de Justicia y Paz, Deutsche Gesellschaft für Technische Zusammenarbeit GmbH (GTZ), 2009

\textsuperscript{44} Decree 1290 Por el cual se crea el programa de reparación individual por vía administrativa para las víctimas de los grupos armados organizados al margen de la ley. Issued President Alvaro Uribe Velez, 2008.

\textsuperscript{45} MOVICE Sobre el Proyecto de Ley del Senado, 2008.

URL: http://www.movimentodevictimas.org/index.php?option=com_content&task=view&id=43&Itemid=41
The year 2008 proved to be an important year for the process of restitution of land in Colombia, and a number of developments have taken place of which the issuing of Decree 176 on January 24th 2008 is of great importance. The decree aims to regulate the Comisiones Regionales para la Restitucion de Bienes (CRRB) that the law of Peace and Justice has called for in its article 52 (Presidencia 2008). These commissions intend to give recommendations to the Comisión Nacional de Reparación y Reconciliación (CNRR) on how to develop a program of restitution, and will have a coordinating role when implementing such programs. Supplementing these commissions with technical experience is ensured by the establishment of a national Comité Tecnico Especializado (CTE) that has several regionally based committees capable of identifying the local and regional challenges. The composition of the committees is interesting as it consists of many of the same governmental institutions that are responsible for the implementation of national policy obligations towards the displaced peoples. Decree 176 is the first tangible step taken by any Colombian government to explicitly spur forward a process of restitution of land.

March 12 2008 the government issued the decree 768. The decree regulates article 127 of law 1152 of 2007 and establishes a registry of abandoned land ‘Registro Unico de Predios y Territorios Abandonados’ (RUPTA). This decree does to some extent reflect the wishes of the victims to create an alternative cadastral record of the land usurped, at least the technical part of their ‘catastro alternativo’, yet it is still too early to say how effective it will be. Nevertheless, it is a positive development as this is the first concerted effort to identify the land that has been displaced.

4.0 Domestic strategies for restitution of land

The process of restitution of land in Colombia is part of a TJ process that is relatively new, was introduced in harsh conditions, and has proven to be notoriously slow with regards to the victims’ right to reparations. Developing policies on land restitution and implementing these policies are two quite different things. Over time numerous positive initiatives have been introduced in Colombia, yet as of date no definitive results can be observed. Indeed, not even the crime of forceful displacement can be stalled; a fact painfully lived by some 380 000 people in 2008 alone. Other strategies are definitely needed and arguably the TJ processes can contribute to a sustainable solution through the realization of the right to restitution of land. Inevitable, this may imply significant concessions on the part of the victims, the victimisers, and the state alike. Recognizing that the principal problem in Colombia is the lack of security; restitution of land

---

46 Decree 176, Por el cual se reglamentan los artículos 51, numeral. 52.7; 52 Y 53 de la Ley 975. Issued by H. Sardi, 2008.
47 The first of these commissions was inaugurated on July 10th 2009 in the department of Antioquia (CNRR, Se instala primera Comisión Regional de Restitución de Bienes. (2009) July 7.
48 Decree 768 Por el cual se reglamenta el artículo 127 de la Ley 1152 de 2007. Issued by President Álvaro Uribe Vélez, 2008
49 MOVICE, Catastro Alternativo del Despojo: Una Alternativa de las Victorias para Ejercer el Derecho a la Restitución del Patrimonio de los desplazados, 2006
URL: http://www.movimentodevictimas.org/images/stories/pdfs/PLEGABLECATASTROALTERNATIVO.pdf
50 The presidential decrees issued signify an advance in the partial enjoyment of the victims’ right to reparation, but as a decree they are legally weak. This in combination with the perceived shortcomings of the decrees impelled opposition legislators to forward law-proposal 157 of 2007 known as Ley de Victorias. However, due to disagreements over the responsibility of the state for the violations committed, the proposal was turned down in Congress Even though the law was not passed I chose to mention it as one chapter I the law concerns the right to restitution; a chapter that was not widely criticised in the congressional discussions. It therefore seems to be certain agreement on the principle of a right to restitution.
without the compliance of the armed actors who have the ability to impede the peace process will be difficult to implement\textsuperscript{51}.

We have identified three mechanisms developed domestically in the context of the TJ process to attend the displaced populations’ right to restitution of land. First we will direct our attention to the TJ process as dictated by law; something we refer to as judicial restitution of land. The second part of the analysis is dedicated to an ad hoc arrangement that has been developed within the TJ process; an arrangement we choose to call negotiated restitution. Finally we will explore the mechanisms derived from what we have denominated restitution by confiscation.

3.1. Judicial restitution as reparation in transitional justice

By judicial restitution I refer to the institutionalized process contemplated in the Peace and Justice Law that binds the victimiser and the victims into the same legal framework. Judicial restitution as reparation in the Colombian TJ scheme involves a guided but friendly settlement between the victim and the victimiser from which a judicially determined sentence on reparation result. This strategy is the only fully institutionalised process for restitution of land in the transitional justice process found in contemporary Colombia.

Briefly explained; once the postulant has confessed and acknowledged his or her responsibility for the crime the displacement, and any other crime committed, he/she is sentenced according to the parameters of the ordinary penal code. These sentences are subsequently reduced, if and only if the postulan tes 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.

We have identified three main challenges regarding a judicial restitution of land as part of the TJ process as designed in Colombia. 1) It is only applicable to a restricted universe of victims 2) It is excessively time-consuming due to its sequencing 3) It is wholly dependent on the success of other aspects of the process.

With regards to the first challenge; the design of the process will allow only a miniscule percentage to be included in the institutionalized process of restitution of land when compared to the complete universe of internally displaced. The reason for this is a technical feature in the law that effectively restrict the victims’ inclusion thereby reducing the universe by utilizing a parallel registry for the identification and recognition of victims as explained in section 3.0. To be included in the TJ process victims must formally denounce the crime committed against them before the specialized unit of the Prosecutor Generals office, the Peace and Justice Unit. As of date, the universe of victims of the internal conflict in Colombia that have made such

denouncements do not exceed 235 000. Considering that the estimates of internally displaced people range from 2.9 – 4.6 million victims, it is obvious that restitution of land in TJ as contemplated in Colombia will not attend the majority of the victims of forced displacement. The challenge of converging universes has yet to be overcome as the institutional dispersion is considerable and little consorted communication between the different public entities responsible is observed. Efforts have been made to create overlapping rather than separate registries, but as of date the author of this paper is not aware of any concrete actions taken in this regard. Also, in the contemporary context, the act of denouncing the crime of displacement is not without risk, and an increasing number of victims who have done so have been assassinated.

Nevertheless, as the process continues one can hope to see a convergence of the registries as governmental efforts to streamline the institutions come into effect, more and more victims of displacement become aware of their rights as victims of the internal conflict, and the risk associated with inclusion in the process will be reduced as state assumes an independent and assertive role in regaining the control of public institutions.

The second challenge is also institutional as it concerns how the process is designed to be implemented, that is, the sequencing of the institutionalised process. Because the process is designed to follow the judicial proceedings, the obligation to repair, at least materially, becomes of relevance only after the judicial responsibility for the 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 postulant have been offered a specified reparation; a reparation that did not include restitution of land. The victims subsequently challenged the court decision, and appealed it on the grounds that the reparation did not fulfil the criteria of proportionality as set forth in international standards and also the Peace and Justice Law. On August 19th 2009 the Supreme Court of Colombia declared the sentence invalid. The Court explained the decision with 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 postulantes, that were to be destined 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 ones’ assets to this fund. Consequently, most of the postulantes have not given up their assets and the funds destined for reparation are low. The incentives to cede ones’ assets have also diminished as the lenient sentences seem not to be implemented. Another worrisome trend is the multiple assassinations among the postulantes themselves, and the numerous threats made due to their active participation. The problem is thus twofold as the incentives to participate are diminishing, and the context is changing and

---

52 Important to note as well is that not all of these are displaced.
53 See footnote 39
54 ElTiempo.com, Corte tumbó la única condena contra un paramilitar en Justicia y Paz; se trata de alias ‘El Loro’ (2009) August 19
increasing the costs as former powerful actors are being assassinated and are receiving threats. This trend is reinforced by the emergence of new ‘paramilitary’ structures who according to some observers count 10,000 men, of which 5,000 are demobilised members of the former paramilitary organizations\textsuperscript{55}.

The sequencing has not allowed even one victim to benefit from judicial reparation from their victimiser, and it is still unclear when the first process of judicial reparation will commence. In the only case a sentence has been reached, both the postulant and the victims were not satisfied with the process. The former for reasons of procedure and the uncertainly regarding the conditions needed to be fulfilled, and the victims because of the reparations defined in the sentence\textsuperscript{56}. Also, as mentioned earlier, this sentence was also declared void by the Supreme Court of Colombia.

The third challenge identified is closely related to the former. While it is finally up to a judge to decide if and how the restitution is to take place, the incentives to participate actively in the process are, 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 postulantes have given up their freedom on conditions that were later altered, thereby producing uncertain future prospects, and this can be one factor that explains in part why the paramilitaries have not been willing to contribute more substantially to the process of reparations. This is an interpretation endorsed by the paramilitaries themselves, conveyed both personally and through their lawyers\textsuperscript{57,58}. Nearly all of the top commanders have been extradited to the US on charges related to drugs-trafficking and are expected to receive punishments in the excess of 20 years in jail. Their place in the TJ process remains unclear as they technically still are part of the process, yet have been deprived of the most important incentive to adhere to the totality of it; the reduced penalties. Compliance has become less attractive and much more costly than initially expected, and has given rise to doubts over the viability of the alternative sentences.

The demobilised members of these illegal organisations are not stagnant actors, 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 arena; 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 control as their second in command, their families, their friends and their allies are today controlling the economic and political assets these leaders accumulated during times of war. These networks are substantial and reach from the local to the national arena. The networks are vested and represent a continuation of a tradition of clientilism, more than a rupture. Due to the power still retained by the actors involved, the TJ process very much hinge on the voluntary participation of the victimisers, and one should not underestimate the importance of this. The paramilitaries went to great lengths to legalise their claims to the land, and their success makes restitution through judicial mechanisms unbearably time- and resource-

\textsuperscript{55} These numbers were found by Corporacion Nuevo Arco Isis. Cited from EITiempo.com Narcotráfico, extorsión, sicariato y robo de tierras tendrían afectados a 25 departamentos. (2009) August 18.


\textsuperscript{57} Revista Cambio, Abogado defensor de Salvatore Mancuso y Rodrigo Tovar escribe para CAMBIO. (2009) March 11

\textsuperscript{58} Verdadabierta.com, Declaración de Salvatore Mancuso. (2009) June 26
consuming if the postulantes chose not to participate and clarify the different claims to land. Both legal and illegal political and administrative efforts to impede the victims’ right to restitution have been observed. Several tactics are being used ranging from the direct threats to ones’ 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 processes. By 2008, approximately 20 victims who fought for the right to their land have been assassinated, as attempts to obscure and legalize the massive transfers of land are taking place. The links between the current holders of the land and the paramilitaries is not entirely straightforward, and a process of restitution of land will be affected by this relationship. In order to create a comprehensive process that gives guarantees to the victims, one needs the voluntary participation of the paramilitaries to clarify who is in control of the land, how it came to be, and what are the obstacles of restoring the land to its original holders.

3.2. Negotiated restitution in transitional justice

Judicial restitution of land as outlined above follows the sequence of the domestic transitional process codified in the Peace and Justice Law. 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. 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 Cordoba, about a two hour drive outside the regional capital Monteria, some 87 families were successfully returned to their lands in 2008 in a process which was spearheaded by the regional office of the CNRR. The lands in question were two farms of about 2153 hectares in total from which the owners had been displaced in the late 1990s by the Castaño brothers and their ACCU, and were returned to their rightful owners by the paramilitary commander Salvatore Mancuso. Originally these lands had belonged to a company controlled by the wife of Mancuso, but were sold and redistributed as part of a 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. These families lived a short while on these lands before the ACCU and the Mancuso brothers showed up and displaced most of the families. In the 1990s these very same lands were sold back to the Mancuso family, through a ‘testaferro’, who by the time of the initiation of the TJ process were controlling and working the land. In 2008 the regional office of the CNRR was contacted by two groups of displaced farmers, who presented the titles to the land, explained their situation and sought restitution of their land from the current owner of the lands, Salvatore Mancuso.

However the region was very much unstable and a safe return still not possible, even though the paramilitary leader himself had been extradited to the USA. Mancuso was contacted and confronted with these claims, but he denied any responsibility for the displacement as it was not him, rather the Castaño brothers who had carried out the forced displacement. He did however,

59 Interview with Marco Romero, President of CODHES October 24th 2008
60 Fidel and Carlos Castaño; Paramilitary leaders who led the organization Autodefensas Campesinas de Córdoba y Urabá
61 Instituto Colombiano de la Reforma Agraria
62 Interview with Eduardo Porras Mendoza, Coordinator CNRR Regional office in Sincelejo. November 2008
recognise his obligation to repair the victims of conflict and the families’ rightful claim to the land, and agreed to provide them a meaningful restitution of the lands. 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; a leader who arguably still exert 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 TJ process. In July 2009 another similar case was settled with the paramilitary leader Manuel de Jesús Pirabán, and some 1817 hectares in the department of Meta are to be returned to the original owners.

The example contracts the challenges faced in Colombia. It shows the success of one TJ mechanism (albeit ad-hoc), and the apparent failure of a government lead initiative of land redistribution. Land reforms and other redistribution policies in Colombia have proved unsuccessful because the state was not able to protect its subjects on the land designated to them. In Colombia this is a very real problem as the central state never has had the monopoly of the use of force. In the absence of the state, armed actors at the fringe of law reign and install their own kind of justice. Most of rural Colombians live with these challenges on a daily basis, and have done so all their lives. As such, even the best intentions of the state are confronted with the harsh realities on the ground, something which results in failure and re-victimization when trying to fulfil its obligation to its citizens. Negotiated restitution avoids this problem by connecting an individual victimiser to a specific piece of land. It is a strategy that provides security and predictability by making the victimisers acknowledge their direct responsibility for the displacement and the future security of the victims.

When including the real power players into the process, one binds these by their word and by law. The direct relationship between the victims and the victimiser is important, as it serves to measure out justice, it serves to bring forth the truth and it serves as a means to sustainable reparation. By not taking responsibility for the lands, Mancuso could in theory maybe not prevent the return of these individuals to the land but could easily reach them and displace them once again. Most likely he could do so with no real legal consequence, as it is important to note that while the act of displacing is a crime in both the civil and military penal code, only one person has been sentenced for committing this crime. Negotiated restitution is not implemented by an agreement between the victims and the victimisers alone, but also entails an institutional feature by the supporting role of several governmental agencies including the Peace and Justice Unit at the Prosecutors Generals Office, the National Ombudsman, the National Police, the CNRR, and Armed Forces and is monitored by the MAPP-OEA. The role taken by these agencies in these processes of negotiated restitution is, however, not institutionalised.

This approach to land restitution can also help resolve two of the challenges identified with regards to the judicial restitution. First, it does not follow the sequencing prescribed by the law of Peace ad Justice. Instead of first determining the truth, then achieving a conviction which established the legal responsibility, we can observe that the act of reparation has been moved up

---

64 Eltiempo.com, Finca favorita de Mancuso vuelva a sus dueños (2008) June 27
65 Eltiempo.com, En el Meta, Primera restitucion de bienes de paramilitar desmovilizado en Justicia y Paz (2009) July 9
66 Law 522/99, Por medio de la cual se expide el Código Penal Militar, 1999
67 Law 599/00, Por la cual se expide el Código Penal Civil, 2000.
and is being implemented in parallel. 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 usurpers.

Nevertheless some problems are likely to persist. Not all of the rightful owners of these lands were displaced. Many were forced to leave, while some stayed behind and continued to work the land on behalf of their ‘new owners’. Upon return tensions can rise as the people who stayed came into conflict with those who left. These tensions are likely to come to the fore in many parts of the country as the processes proceed. Similar problems with other third parties are also likely to materialize. Third parties who, in good faith or not, have established themselves on usurped lands, and have invested heavily in large scale projects will also resist a process in which they stand to loose their investments. How to accommodate the displaced population and the current users of the land is a great challenge that can be overcome if negotiations are conducted between these and the victims directly.

A somewhat different challenge is how power relations on the ground have changed over the last four years. In the case of Mancuso, it is not clear how much influence he has, anymore and if he is capable of giving guarantees of non-repetition.\footnote{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 to prevent a re-victimization of victims.} In august 2008 one of the leaders who benefited from the arrangement detailed above was assassinated.\footnote{ElTiempo.com, Asesinan a líder de desplazados que reclamó tierras arrebatadas por Mancuso, (2009) July 29} In the second case concerning the lands usurped by Manuel de Jesús Pirabán the region is currently thought to be controlled by another paramilitary leader who is not party to the agreement made between the victims and their victimiser.\footnote{The paramilitary leader Pedro Oliveiro Guerrero and his ‘bloque’ Heroes de Guaviare’ demobilized in 2006, but subsequently withdrew his participation as the conditions of confinement changed. Today he leads a new paramilitary group called Ejército Revolucionario Antiterrorista de Colombia (Erpac). Eltiempo.com, En el Meta, Primera restitucion de bienes de paramilitar desmovilizado en Justicia y Paz, (2009) July 9} As the different strategies of restitution of land has commenced in Colombia, the changing nature of power relations have been manifested. Disturbingly high numbers of postulantes and their families, have been assassinated and the re-emergence of new paramilitary structures makes such restitutions less viable.\footnote{Semana.com, Los ‘paras’ silenciados (2009) August 13}

The CNRR is also in the process of developing some pilot projects in the regions of Urabá and Montes de María that follow much the logic of negotiated restitutions. Implementations of these have yet to be initiated, but the diagnostics of the cases as well as agreements with the paramilitaries in these regions are being actively sought. In cooperation with partner institution, several displaced communities have been identified and talks with the new actors in the region have been initiated. These talks\footnote{President E. Pizarro. Pizarro informed the author of these talks, and highlighted recent talks with the paramilitary leader Raúl Hashbin operating in the region of Urabá (Interview with President Pizarro of the CNRR, 11.6.2009)} have revealed the methods used by the paramilitaries, information that facilitates the identification of individual victims and the verification of the corresponding claims to lands. The projects are envisioned as a solution that can rebuild the communities displaced on their own lands by including them into the new conditions created on the ground in their absence, conditions that can be impossible and also undesirable to reverse.\footnote{Interviews with President Pizarro at the CNRR in 2008 and at the CNRR in June 2009}
3.3. Restitution by way of confiscation

Restitution by way of confiscation is the third strategy identified for securing the victims of displacements their right to restitution of land. Land usurped by the demobilised members has by large not been turned over as proscribed by law. As of 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 part of the postulantes, unclear rules on when to turn over ones assets, and finally the legal status of the land. The governmental agency Acción Social that controls the Fund has not accepted much of the land that has been offered by the paramilitaries because the lands have not been legally sanitized; that is the lines of ownership have not been clarified and the lands are legally disputed.

Whereas the latter two reasons are of significance non-compliance seems the most important reason for the lack of land available for restitution. In response to this the central state has developed a scheme to confiscate the land controlled by the postulantes for the purpose of restitution of land.

Restitution by confiscation entails several challenges for the TJ process. The land that is to be confiscated currently belongs to actors who exert significant economic and political influence in the local communities, and without their compliance it is doubtful that guarantees of non-repetition will be viable. Second, it will be difficult to identify the lands controlled by the postulantes given that the lands are located in distant regions where the victims of displacement continue to be threatened by the usurpers, or the new ‘owners’ of the land. Third, even if the lands are identified these are registered in the names of third parties, and their lawyers have advised them well on how to hide one’s assets and judicial processes of confiscation will consequently be extremely time-consuming.

According to international legal standards and norms, confirmed in both the Pinheiro Principles and the UN Basic Principles, compliance on part of the victimisers is not formally necessary. It is the state that is the ultimate duty-bearer of rights and must abide the obligation of remedying the victims of conflict, regardless of whether it is framed as responsibility or solidarity. But even though all states have obligations to their citizens, not all governments have the actual ability to comply with these.

Two experiences provide us with an indication of the problems faced when following a strategy of restitution by confiscation. The first example treats the sustainability of redistribution of land as forced displacement has reversed redistributional policies, while the latter concerns both the sustainability of such an approach as well as the procedural costs of expropriating land for the purpose of redistribution or restitution. The first experience is the agrarian reforms that have been introduced before in Colombia on several occasions. They have all failed to achieve the goal of a more just redistribution of the land as the land has been increasingly concentrated on fewer hands. Indeed, the most effective reforms have been the counter-agrarian reforms that have been observed in the wake of the massive forced displacements, including from lands that were redistributed in the aforementioned agrarian reforms. While policies have indeed been articulated, they have been written by legislators and are implemented by functionaries with strong influence in the local communities.
connections to the traditional landowners. Consequently the reforms have failed to be satisfactorily implemented, and a counter-reform of increased concentration of the land has been the result.

Secondly, one can also draw from another experience of land redistribution in Colombia which has used the strategy of confiscation. In the 1980 and 1990s the narco-cartels invested heavily in the rural regions; land that is subsequently being sought and confiscated by the state as it was bought with resources illegally obtained. These lands have in turn been used to relocate the displaced population along with other vulnerable groups in society. As of date, these policies of restitution by confiscation of land for the purpose of restoration and/or relocation of the displaced hardly represent an all encompassing strategy. According to figures from Acción Social and INCORDER from 2002 – 2007, some 54,565 hectares of land was given to 4,653 families. While not discarding these efforts, as they are of huge importance to those who benefit, they represent only 0.9% of the families displaced between 1997 and 2007. Perhaps even more importantly is that even though the state has confiscated the land, it controls the land only legally. Return to locations where the conflict over land has not been resolved can expose the beneficiaries to great risks. It is a bold strategy that could render immediate results, but it is also a risky strategy that could prove unsustainable and lead to re-victimizations, something that has already been observed.

The main problem of restitution by way of confiscation is the non-compliance of the postulantes; a problem which is extremely difficult to solve due to the practice of using third parties to hide one’s assets; in Colombia known as the ‘testaferrato’. Of the third parties several actors can be identified. Poor rural people without titles to land make up part of the equation as these were given the right to use land by whomever of the armed actors that controlled it. Distribution of land was to a greater extent privileging the file and rank of the organization as well as a security strategy for the paramilitaries. Other actors who have come to control the land usurped are multinational companies, national companies, agricultural investors which all have an interest in keeping what now is theirs. To understand this latter constellation of actors, who arguably constitute the largest group of these third parties, it is imperative to keep in mind the political objectives of the paramilitary groups. Their goal, according to their assertion, was not to destroy, rather to build and create a new Colombia free from insurgent forces; something that implied the need for economic progress. The paramilitaries were established in areas where the state was absent, and the objective was to bring the state to these areas so that infrastructure would be built and socio-economic conditions would be improved. To achieve this goal they had to do two things: first remove or co-opt adversary actors in the area, i.e the guerrillas and their allies, and secondly initiate viable economic projects that would attract the interest of the state. Now, with regards to the latter it was needed to remove the original holders of the land to make space for progressive large-scale projects. These projects were often ‘legitimate’ and some were even

76 Jorge O. Melo (eds) Colombia Hoy. Perspectivas hacia el siglo XXI, Tercer Mundo Editores, 1995
77 Absalón Machado, “Reforma Agraria: Una ilusión que resultó un fracaso” Revista Credencial Historia numero 119. 1999
78 Law 333 of 1996 and its regulatory decree 1458 of 1997 makes available 50% of the assets confiscated from narco-traffickers to the displaced population through the Fondo Nacional para la Atención a la Población Desplazada por la Violencia.
79 These figures only include those displaced between 1997 and 2007. The coverage of these policies will thus be even more trifling when including all those displaced before 1997.
80 ACNUR, ONU pide investigar asesinato de líder desplazado y requiere protección para otros, (2008) May 14
82 Mauricio Aranguren, Carlos Castaño: Mi confesión. La Oveja Negra Ltda., 2001
partly subsidized by the state. More often than not the paramilitaries did not run these companies and their names were not directly tied to these either, rather the paramilitaries used the aforementioned ‘testaferro’ and were able to benefit both personally, organizationally, economically and politically.

The use of this practice and the considerable efforts made to ‘legalize’ the claims to land can significantly complicate the process of land restitution as it will be difficult to identify the real holders of rights to the land in the wealth of legal documents that have been produced. Without the compliance of the actors responsible for the displacement, the judicial system will be swamped by claims and counter-claims to the lands in question. In a state where the judicial system is already stretched to its limits one would expect a very slow progress in determining who has the right to the land and, as it has been observed when the lands belonged to the narco-cartels, even if the processes are completed the risk of re-victimization continues to persist, thus, challenging the viability and sustainability of any process of restitution by confiscation.

5. Concluding remarks: An opportunity about to be missed?

Colombia is a country at war, and providing the right to restitution in such a context is a momentous challenge. Internal displacements have shaped Colombian society, and continue to do so as more than a thousand people are being displaced on a daily basis. In the wake of these crimes new political and economical structures have been created and are today embedded. The act of displacing a population in Colombia generally bears no costs for the displacer, and in order for the displacer to assume costs related to the restitution of land there must also be incentives for them to do so. Accordingly, the only improvement observed in terms of a reduction in the number of displacements took place from 2003 – 2005; the same period in which negotiations with the paramilitaries led to demobilization on the promise of legal and social benefits - benefits conditioned on providing reparation to victims, including the right to restitution. Resulting from this process were the two strategies identified as judicial and negotiated restitution; both depending on voluntary participation and reciprocity. However, as the benefits promised during peace-negotiation became increasingly distant, the demobilised paramilitaries have reacted by not fulfilling the conditions imposed on them. Consequently, the CNRR expects that restitution by confiscation will be the norm rather than the exception in the future process due to the lack of cooperation on part of the paramilitaries.

TJ implies a process that differs from ordinary justice, yet the process in Colombia has come to resemble more ordinary judicial processes rather than extraordinary processes. The legal framework has evolved and stands today closer to the international standards established in the Pinheiro and UN Basic Principles. While impossible to determine what would have happened if the original TJ framework had been preserved, one can today observe that the process is failing. One can also observe that all the costs adjacent to the changes have all been assumed by the postulantes. Arguably the increased legal symmetry with international standards seems to be impeding the process as a whole. Indeed, in a state where impunity is the rule rather than the exception, the cost of being outside of the process has become lower than being a part of the process. Consequently, paramilitary forces have re-engaged and are again active in most of their former strongholds. Failed peace-negotiations imply a continuance of conflict, and a continuance
of conflict will effectively mean that the victims of conflict will not be repaired. The universe of victims will continue to grow, and a re-victimisation of victims is likely to take place. The game has changed from a sum-sum game to a null-null game because neither the victims nor the victimiser stand to benefit from the TJ process. The population most affected by this development are the victims of conflict, and in particular the victims of forced displacement. Whereas the postulantes can return to illegal activities and enjoy the wealth accumulated during war without great risks of being held legally accountable, the victims will be deprived of their right to the truth, justice and reparation. Framed in this way, the problem is not whether enough justice and sufficient measures of reparation are being included in the process; rather that a failure of the process will result in no justice and no reparation for millions of Colombians victims of the armed conflict.