

The Project of Land Restitution in Colombia: An Illustration of the Civilizing Force of Hypocrisy?



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ABSTRACT

This article offers a theoretical interpretation of the dispositions on land restitution contained in the famous "Victims' Bill", which was debated in the Colombian Congress during the year 2008. The bill included specific mechanisms aimed at guaranteeing the restitution of land to victims of the Colombian armed conflict. At the time, the bill was endorsed by all the main political actors in the country –notably the government and the elites that support it, on the one hand, and victims' and human rights organizations and other opposition groups, on the other–. The fact that the restitution of land to victims of the Colombian armed conflict was being considered as a serious possibility by all political actors in the country seemed to indicate the existence of a consensus among actors whose positions are ordinarily opposed, on an issue that has traditionally led to high levels of polarization. This consensus is quite puzzling, because it seems to be at odds with the interests and/or the conceptions of justice advocated by these political actors, and because the restitution of land faces enormous

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difficulties both from a factual and a normative point of view, which indicates that it may not necessarily be the best alternative for dealing with the issue of land distribution in Colombia. This article offers an interpretation of said consensus, arguing that it is only an apparent consensus in which the actors are actually misrepresenting their interests and conceptions of justice, while at the same time adopting divergent strategies of implementation aimed at fulfilling their true interests. Nevertheless, the article concludes that the common adherence by all actors to the principle of restorative justice might bring about its actual realization, and thus produce an outcome that, in spite (and perhaps even because) of being unintended, might substantively contribute to solving the problem of unequal land distribution in Colombia.

Even though the article focuses in some detail on the specificities of the 2008 Bill, it attempts to make a general argument about the state of the discussion on how to deal with the issue of land distribution in the country. Consequently, it may still be relevant today, especially considering that a new Bill on land restitution is currently being discussed in Congress, which includes the same restitution goals as the Victims' Bill and many of its procedural and substantive details, and which therefore seems to reflect a similar consensus to the one analyzed in the article.

Key words: Victims' Bill, land restitution, restorative justice, Colombian armed conflict.

El proyecto de restitución de tierras en Colombia: ¿ilustración de la fuerza civilizadora de la hipocresía?

RESUMEN

El presente artículo ofrece una interpretación teórica acerca de las disposiciones sobre restitución de tierras contenidas en la famosa "Ley de Víctimas", la cual fue debatida en el Congreso colombiano en el año 2008. El proyecto de ley preveía mecanismos específicos encaminados a garantizar la restitución de tierras a las víctimas del conflicto armado colombiano. En su momento, el proyecto de ley fue respaldado por los principales actores políticos del país, incluyendo el gobierno y las élites que lo apoyaban, por un lado, y las organizaciones de víctimas y de derechos humanos y los grupos de oposición, por el otro. El hecho de que todos los actores políticos del país estuviesen considerando seriamente la posibilidad de restituir las tierras a las víctimas del conflicto armado colombiano parecía indicar la existencia de un consenso entre actores políticos cuyas posiciones normalmente están enfrentadas, sobre un tema que tradicionalmente ha generado altos niveles de polarización. La existencia de dicho consenso es desconcertante porque no parece corresponder ni a los intereses ni a la visión de justicia de dichos actores políticos, y además porque la restitución de tierras enfrenta enormes dificultades tanto prácticas como normativas, lo que indica que posiblemente no sea la mejor alternativa para enfrentar la problemática de distribución de tierras en Colombia. El presente artículo ofrece una interpretación de dicho consenso, argumentando que es sólo un consenso aparente en el cual los actores están en efecto desvirtuando sus intereses y visiones de justicia, pero al mismo tiempo adoptando estrategias de implementación divergentes encaminadas a promover

sus verdaderos intereses. Sin embargo, el artículo concluye que el respaldo dado por todos los actores al principio de justicia restaurativa podría llevar a su efectiva realización, y consiguientemente generar un resultado que a pesar de (o quizás por) no ser intencional, podría contribuir sustancialmente a resolver el problema de la desigual distribución de tierras en Colombia.

Aunque se enfoca con algún nivel de detalle en las especificidades del proyecto de ley del 2008, el artículo busca formular un argumento general sobre el estado de la discusión acerca de cómo lidiar con el problema de distribución de tierras en el país. Por consiguiente, el artículo puede ser aún relevante, especialmente teniendo en cuenta que actualmente se discute en el Congreso un nuevo proyecto de ley de restitución de tierras, que incluye las mismas metas de restitución y muchos de los detalles sustantivos y procedimentales de la Ley de Víctimas, y que por ende parece reflejar un consenso similar al analizado en el artículo.

Palabras clave: restitución de tierras, justicia restaurativa, ley de víctimas, conflicto armado colombiano.

O projeto de restituição de terras na Colômbia: ilustração da força civilizadora da hipocrisia?

RESUMO

O presente artigo oferece uma interpretação teórica com respeito às disposições sobre restituição de terras contidas na famosa “Lei de Víctimas”, a qual foi debatida no Congresso colombiano no ano 2008. O projeto de lei previa mecanismos específicos encaminhados a garantir a restituição de terras às vítimas do conflito armado colombiano. Em seu momento, o projeto de lei foi apoiado pelos principais atores políticos do país, incluindo o governo e as elites que lhe apoiavam, por um lado, e as organizações de vítimas e de direitos humanos e os grupos de oposição, pelo outro. O fato de que todos os atores políticos do país estivessem considerando seriamente a possibilidade de restituir as terras às vítimas do conflito armado colombiano parecia indicar a existência de um consenso entre atores políticos cujas posições normalmente estão enfrentadas, sobre um tema que tradicionalmente tem gerado altos níveis de polarização. A existência de dito consenso é desconcertante porque não parece corresponder nem aos interesses nem à visão de justiça de ditos atores políticos, e, além disso, porque a restituição de terras enfrenta enormes dificuldades tanto práticas como normativas, que indica que possivelmente não seja a melhor alternativa para enfrentar a problemática de distribuição de terras na Colômbia. O presente artigo oferece uma interpretação de dito consenso, argumentando que é só um consenso aparente no qual os atores estão, de fato, desvirtuando seus interesses e visões de justiça, mas ao mesmo tempo adotando estratégias de implementação divergentes encaminhadas a promover seus verdadeiros interesses. No entanto, o artigo conclui que o apoio dado por todos os atores ao princípio de justiça restaurativa poderia levar a sua efetiva realização, e consiguientemente gerar um resultado que apesar de (ou talvez por) não ser intencional, poderia contribuir substancialmente a resolver o problema da desigual distribuição de terras na Colômbia.

Embora se enfoca com algum nível de detalhe nas especificidades do projeto de lei do 2008, o artigo procura formular um argumento geral sobre o estado da discussão

acerca de como lidar com o problema de distribuição de terras no país. Por conseguinte, o artigo pode ser ainda relevante, especialmente tendo em conta que atualmente se discute no Congresso um novo projeto de lei de restituição de terras, que inclui as mesmas metas de restituição e muitos dos detalhes substantivos e procedimentais da Lei de Vítimas, e que, portanto parece refletir um consenso similar ao analisado no artigo.

Palavras chave: restituição de terras, justiça restaurativa, lei de vítimas, conflito armado colombiano.

FOREWORD

This article is not entirely topical, given that its main object of study, the “Victims’ Bill”, was tabled by the plenary of the Colombian House of Representatives over two years ago. The article was written before this last event took place, but it acknowledged the possibility of the Bill being tabled at the last minute. Even though the article focused in some detail on the specificities of the Bill and on the meaning of its eventual approval, it also attempted to make a more general argument about the state of the discussion on how to deal with the issue of land distribution in the country. This argument may still be relevant today, considering that only last week (end of September, 2010) the newly elected government of President Santos submitted to Congress a new bill on land restitution,¹ which includes the same restitution goals as the Victims’ Bill and many of its procedural and substantive details.² Therefore, the article might be useful in at least two senses. Firstly,



¹ Bill No. 085 of 2010 (Colombia), entitled “By which transitional norms for the restitution of lands are established”.

² The main differences of Bill No. 085 of 2010 and the dispositions on land restitution contained in the different versions of the Victims’ Bill discussed in the article are that the current bill significantly simplifies the procedure for victims to obtain the restitution of their lands, and it establishes a general presumption of invalidity of the legal transactions made over lands claimed to have been dispossessed from victims of violence. Thus, the new bill creates a special administrative authority (the Special Administrative Unit for the Management of Dispossessed Lands) in charge of creating and administrating a Registry of dispossessed lands, of filing the victim’s claims of restitution before the civil courts and of complying the latter’s sentences of restitution and compensation (art. 24 of Bill 085). According to the Bill, all legal transactions over the lands registered in the special registry will be presumed invalid, in the sense that violence might have affected the free expression of consent necessary for their validity (art. 4 of Bill 085). In consequence, the restitution claims filed by the Special Administrative Unit in the name of victims will only need to provide summary evidence of the facts on which the claim is grounded and information about the land. The claims will be presented before special agrarian chambers created in Civil Tribunals for the specific purpose of dealing with such claims, and they will be processed through a brief procedure that will have priority over other judicial matters (arts. 7, 10-20 of Bill 085). In those processes, the restitution of claimed lands will be judicially ordered unless there is more than one person claiming to have been dispossessed from the land, or the beneficiary does not want it in return but prefers a compensation (art. 19 of Bill 085). In those cases, an economic compensation might proceed instead of the restitution. In all other cases, the restitution will proceed even when there exist persons who prove to have legal titles over the land, who might receive an economic compensation but cannot expect to keep the land. If compared

the Victims' Bill and the technical and political discussions it prompted can be considered the most relevant antecedents of the current Bill. Hence, the analysis offered in this article might be helpful for understanding the process that led to the proposal of the Santos Bill, as well as its current content and the stakes it entails. Secondly, the main argument of the article is applicable to the current Bill and to the discussion it is likely to generate. Indeed, the new Bill illustrates in an even clearer way than the Victim's Bill the existence of a consensus among the main political actors concerning the convenience of dealing with the issue of land through the principle of restorative justice. Such a consensus is still puzzling since, as the article argues, there are strong factual and normative reasons for believing that the issue could perhaps be better dealt with through the principle of distributive justice. Moreover, the reasons identified in the article for believing that restitution is not the preferred method of any of the actors for dealing with the land issue still seem to hold.

However, a caveat is important: while the arguments formulated concerning victims' and human rights organizations seem to hold almost entirely, those concerning the government referred specifically to the Uribe government, and some of them might not be applicable to the new administration. Indeed, even though the Uribe and Santos governments share the same general political and economic orientation, and the groups that support them and believe their interests to be represented by them probably coincide to an important extent, differences in both style and orientation have started to emerge, even at this early stage of the Santos administration. This is particularly true concerning the land issue, which Santos has shown a clear resolve to deal with in quite a different way from his predecessor. Thus, he appointed as Minister of Agriculture a well-known technocrat who had strongly criticized the previous government's way of dealing with land issues, and who has publicly defended the crucial need of restituting dispossessed land to victims. Moreover, he proposed the Restitution Bill soon after taking office and defended it in a speech that underscored the government's commitment to land restitution and its decision to assign a remarkable amount of resources to achieving it. It remains to be seen whether these promises will

to the two versions of the Victims' Bill analyzed in this article, it can be easily noticed that the current bill establishes a much more favorable procedure for victims, since it creates a preferential procedure for the restitution of their lands in which the illegality of all transactions made over claimed goods is presumed, in such a way that victims need not prove the legality of their prior titles but merely state them along with the violent facts that led to dispossession, and that the proof of the legality of posterior titles over them can only justify compensation, but not the maintenance of the land. This preferential treatment of victims is much stronger than that of simply inverting the burden of the proof of the legality of rights over the land contemplated by the Victims' Bill. In addition to it, the new bill assigns the task of making and substantiating victims' claims before the courts to a special administrative unit, thus also relieving victims of doing those claims themselves.

be upheld throughout the legislative process, and especially whether they will translate into an equally serious commitment to an efficacious implementation strategy. But these differences are significant enough to suspect that they are not merely the result of differences in style, and may reflect the fact that the new administration has weaker links with the most recalcitrant sectors of the landed elite.

It is entirely up to the reader to determine to what extent the arguments made regarding the Uribe government are applicable to the Santos administration. Hopefully, I will be able to address these extremely complex and uncertain questions in the near future. But my intuition is that the general argument will remain valid, since in my view the principle of restorative justice is not the first choice of any of the relevant political actors for dealing with the problem of land distribution in Colombia. Yet, being the second best alternative, it might serve the purpose of breaking the political deadlock that for a long time has hindered the possibility of any land reform in the country, and hence produce quite significant effects in terms reducing inequality in land distribution.

INTRODUCTION

In November 2008, something quite unexpected happened in Colombia's Congress: The Committee on Constitutional Affairs of the House of Representatives approved a bill that sought to grant a broad range of rights to the victims of the country's armed conflict and established mechanisms for their protection. The "Victims' Bill" –as it is commonly called in Colombia– included a new chapter on specific mechanisms aimed at guaranteeing the restitution of lands that were abandoned or transferred under pressure by victims as a consequence of crimes committed against them.³ This chapter was proposed by the Uribe government and was backed by its political coalition. Moreover, except for some minor points of disagreement, victims' and human rights organizations viewed the chapter as an important step forward in the protection of victims' rights and in guaranteeing the non-recurrence of atrocious crimes.

The Victims' Bill has yet to be discussed and voted on by the Plenary of the House of Representatives in order to become law. And there are several issues over which these actors have profound disagreements, which could prevent the Bill from passing in the final stage of the legislative debate. But whatever the outcome, the approval of the chapter on land restitution by the



³ Bill No. 044 of 2008 (Colombia), Chapter II, entitled "The right to restitution", of Title VI, entitled "The right to reparations of victims".

House Committee is interesting in itself because it seems to indicate the existence of a consensus between political actors whose positions are ordinarily opposed, on an issue which has traditionally led to high levels of polarization: the role of land reform in the settlement of Colombia's armed conflict. Indeed, both the government and victims' and human rights organizations seem to agree on the adequacy of the principle of restorative justice as the basis for solving the problem of land allocation and as a means for facilitating the transition from war to peace. However, as we shall see, this apparent consensus seems to be at odds with the interests and/or the conceptions of justice advocated by these political actors regarding the issue of land.

This paradoxical situation could be interpreted to be the result of a sincere determination by all actors to transcend their particular interests and points of view, in order to commit to the most just solution to the problem of land dispossession in Colombia. However, an a priori admission of this explanation is unsatisfactory because, given that the actors' interests are identifiable, one should start by assuming that their motivations for agreeing on the principle of restorative justice are rational and self-interested, and one should only consider explanations based on altruistic motivations if the former prove to be inadequate or insufficient to account for their consensus.⁴ Furthermore, even if we assume that all concerned actors are acting on altruistic motives, this explanation would still be unsatisfactory because it is not clear that the objective of restituting land lost during the conflict is either feasible, or necessarily the best solution to the problem from the point of view of justice.

Therefore, the project of land restitution in Colombia offers the analyst a challenging case study for sorting out arguments of justice from other types of motivations. Indeed, it requires identifying the motivations that might lead certain political actors to appear to endorse a principle of justice that runs counter to their interests and that is different from the conception of justice they normally advocate. Moreover, the case offers an interesting opportunity to inquire about the effects that the endorsement of said principle of justice might have, and particularly to determine whether its effects might be different from those intended by the actors. In this paper, I will engage in an exercise of the sort, with the purpose of offering a plausible explanation for the puzzling consensus that suddenly emerged in Colombia in relation to the principle of justice and even the specific mechanisms through which the



⁴ According to Elster (1993, p. 19, note 41), "[t]his is a generally applicable procedure. To explain a given phenomenon, the actors are initially assumed to have rational, self-interested motivations. If their behavior cannot be explained on this minimal basis, altruistic (although still rational) motivations are introduced. If the explanation is still inadequate, nonrational motives are admitted. (...)".

land problem should be dealt with as a strategy for bringing about a transition from war to peace.

To do so, in the first section of the paper I will offer a brief historical account of the problem of land reform and its relation to the armed conflict in Colombia. In the second part, I will explain the way in which the project of land restitution under analysis intends to contribute to the solution of the problem in the framework of the transitional justice process recently implemented in the country. In the third part, I will argue that the support given to that project both by the government and the victims' and human rights organizations constitutes a puzzling consensus, due to its unexpectedness, to the factual and normative obstacles for approaching land reform from the perspective of restorative justice, and especially to the fact that in the past these actors have defended alternative conceptions of justice that are more closely in line with their interests. In the fourth part, I will attempt to offer an interpretation of these actors' joint support for the land restitution project, by arguing that it is only an apparent consensus, and that the true intention is actually to misrepresent their actual interests and conceptions of justice, while at the same time adopting divergent strategies of implementation aimed at fulfilling their true interests. In the fifth and last section, I will conclude by suggesting that these strategies of implementation notwithstanding, the common adherence to the principle of restorative justice might bring about its actual realization, and thus produce an outcome that, in spite (and perhaps even because) of being unintended, might substantively contribute to solving the problem of unequal land distribution in Colombia.

I. LAND REFORM AND ARMED CONFLICT IN COLOMBIA

In Colombia, the issue of land reform⁵ is intricately connected with the country's protracted armed conflict.⁶ The unfair distribution of land, the



⁵ By land reform I refer to an effective change in the agricultural structure of a country, aimed at guaranteeing the access to land of the landless. Following Berry, depending on the economic and political circumstances, reforms of this sort may take two different trajectories: (i) the expropriation of owners or holders of land, which tends to take place wherever, due to the scarcity of land, this is the only alternative for guaranteeing the access to land of the landless. (ii) The regulated expansion of the agricultural frontier, which can take place wherever the pressure for land can be satisfied with such expansion, and which should aim at impeding the creation of great extensions of property or possession (by setting upper limits) and at giving certainty to the rights over land (Berry, 2002, pp. 25-6).

⁶ The Colombian conflict is, along with the Palestinian-Israeli and the India-Pakistan conflicts, one of the longest armed conflicts in the world. See Colombian National Commission for Reparations and Reconciliation [hereinafter CNRR for its Spanish initials] (2006a). The most cautious analysts point at 1964 as the origin of the contemporary conflict, since this was the year in which the Colombian Revolutionary Armed Forces (FARC for its Spanish initials) –the strongest guerrilla group in the country– took arms. See CNRR (2006b). However, many other analysts point at the period of violence between the liberal and conservative political parties in the 1940s as the origin of the conflict as we know it nowadays. See Sánchez and

ambiguity of the rights over it, and the State's incapacity or unwillingness to adequately solve these problems are certainly one of the conflict's main root causes, and allegedly even the spark that ignited the current stage of the conflict.

The country's unfair distribution of land can be traced back to the nineteenth century, when the State allocated great extensions of public vacant lands to very few businessmen, by selling them at low prices or by issuing bonds and vouchers redeemable in land in order to meet public debt obligations.⁷ Substantial portions of the allocated land were not exploited by their owners and soon became occupied by settlers.⁸ However, in the 1920s, an increase in land prices⁹ sparked renewed interest in land, in some cases prompting businessmen to recover the properties on which they held legal titles,¹⁰ and in many other cases to misappropriate land occupied by settlers that was beyond their entitlements.¹¹ In reaction to this, settlers invaded even more land and challenged the legal titles over the land they occupied.¹² In this context, the Supreme Court of Justice issued a ruling establishing that the burden of proof on the existence and legitimacy of any legal titles rested on the alleged owners –which amounted to saying that, in the absence of such proof, the land in question would be considered public and vacant, and thus susceptible to being claimed by settlers–.¹³ This decision inflamed landowners who, given the illegal appropriations they had carried out, found it almost impossible to prove their ownership.¹⁴

In order to placate the confrontation between settlers and landowners, in 1936, the government promoted a law aimed at bringing about a land reform.¹⁵ Its most important provisions established the State's authority to expropriate land that had remained unexploited for more than ten years, the right of holders of privately owned land to claim property rights after five

Peñaranda (1991). The length and perpetuation of the conflict can be partially explained by the strong links between illegal armed groups and drug trafficking, as the latter constitutes an almost unlimited source of war financing. See López (2006).

⁷ Kalmanovitz and López (2006, p. 55); Melo (2007, p. 152).

⁸ Kalmanovitz and López (2006, p. 54); Berry (2002, pp. 27-8).

⁹ This increase was caused by the boom of coffee exports and by the investment in public infrastructure, which also generated an increase in the demand for labor. Kalmanovitz and López (2006, pp. 66-7); Berry (2002, p. 30).

¹⁰ Kalmanovitz and López (2006, p. 64).

¹¹ Melo (2007, pp. 152-3).

¹² Berry (2002, p. 31); Kalmanovitz and López (2006, p. 67).

¹³ Berry (2002, p. 31); Kalmanovitz and López (2006, p. 62.)

¹⁴ For this reason, the Court's requirement was commonly referred to as the "diabolical proof". Melo (2007, p. 153); Bejarano (2007, p. 231).

¹⁵ Law 200 of 1936. According to Berry (2002, p. 28), this law was the country's most serious attempt to promote an important land reform, and the only one that could have had a significant effect in the evolution of the country's economy and society.

years of having used it in good faith,¹⁶ and the right of evicted sharecroppers or tenants to be reimbursed for any improvements they had made on the land they held.¹⁷ Although the law appeared to be aimed at protecting settlers, it ended up benefiting the interests of landowners.¹⁸ Indeed, by establishing economic use as the criterion for determining the existence of ownership, it eliminated the requirement of proving legal titles over the land and, consequently, it enabled the legalization of appropriated vacant land, and even encouraged further appropriations by big landowners.¹⁹ Furthermore, by stipulating that users could claim ownership over privately owned land, the law created an incentive for landowners to evict sharecroppers and tenants, in order to avoid property claims on their behalf.²⁰

As a result, far from solving the conflict between landowners and settlers, the land reform added fuel to it, and thus became one of the main factors that contributed to the outburst of “La Violencia”, the devastating civil conflict between the Liberal and Conservative parties and their irregular armies, which besieged the country in the 1950s.²¹ During this conflict, the struggle for control over land translated into the violent dispossession of land and the expulsion of peasants, which produced a significant increase in the rate of privatization of public land and a consequent transformation of the structure of land ownership.²² “La Violencia” formally ended in 1958 with the National Front, a consociational agreement by which the Liberal and Conservative parties held alternating periods in office.²³ Nevertheless, communist offshoots from the Liberal guerrillas refused to demobilize and were subsequently persecuted by the official army.²⁴ They settled in new areas where a large number of peasants had fled from violence and organized themselves as armed peasant resistance groups.²⁵ Due to the absence of State control, these areas came to be known as “independent republics”, and were fiercely



¹⁶ That is, on a terrain that was not being exploited by its owner and under the belief that it was public vacant land. Kalmanovitz and López (2006, p. 69).

¹⁷ See Kalmanovitz and López (2006, pp. 68-9).

¹⁸ Berry (2002, p. 32); Kalmanovitz and López (2006, p. 69). Some even claim that the government specifically planned for the law to protect the interest of big landowners, and argue that the President of the time promised the latter that the law would allow them to legitimize their titles. Sánchez (1977); Legrand (1986), cited in Berry (2002, p. 32).

¹⁹ Berry (2002, p. 32); Kalmanovitz and López (2006, p. 69).

²⁰ Berry (2002, p. 32); Kalmanovitz and López (2006, pp. 69-70).

²¹ Although this civil strife had a strong ideological component, it also had an important social and economic dimension, and the conflict over the land played an important role in it. Berry (2002, p. 33); Kalmanovitz and López (2006, p. 317).

²² Ocampo et al. (2007, p. 332); Berry (2002, pp. 33-4).

²³ This agreement was in force from 1958 to 1974. For an analysis of this period, see chapter 2 of Gutiérrez (2007).

²⁴ Kalmanovitz and López (2005).

²⁵ Pérez (2004, pp. 75-6).

attacked by the government, particularly in times of Conservative rule.²⁶ One of the most ferocious attacks against such regions, directed against the Marquetalia “republic”, is considered the origin of the Colombian Revolutionary Armed Forces (FARC by its acronym in Spanish), which is currently the oldest and strongest guerrilla group in the country.²⁷

In the aftermath of “La Violencia”, the concentration of land in the hands of a few had intensified, with harmful effects not only in terms of the unfair distribution of land, but also in terms of efficiency in the use of land. In fact, at the time, the vast majority of rural land was devoted to cattle ranching, even though most of the population made a living from agriculture.²⁸ Moreover, while the former activity was developed in the most fertile lands, the latter was carried out in the poorest terrains, which were subject to continuous subdivisions and over-exploitation.²⁹ Lastly, property taxes were extremely low, and the precariousness of the property registry system encouraged landowners to conceal their wealth by acquiring land and undervaluing it in their tax statements.³⁰

To counter this situation, a new attempt at land reform was advanced in the 1960s.³¹ Among other things, this new land reform intended to restructure landholdings that had been affected during “La Violencia”, as well as to promote the organization of peasants in order to guarantee their participation in the implementation of the reform.³² However, due to the great pressure exerted by landowners against any property redistribution measures, the reform



²⁶ Pérez (2004, p. 77).

²⁷ Pérez (2004, p. 77); Berry (2002, p. 38). The survivors of the “Marquetalia Operation” founded the FARC, which had a strong rural component but also articulated a political discourse against the excluding political system created by the National Front. Pérez (2004, p. 77). According to Kalmanovitz and López (2005), this guerrilla group’s strength was “modest” until the 1980s, when it started profiting from drug production and trafficking. In contrast with FARC, all other Colombian guerrilla groups have had an urban extraction, and have been influenced by different leftist ideologies, including Marxism-Leninism, Maoism and Castrism. These groups include: the April 19 Movement (M-19 for its Spanish initials), the Popular Liberation Army (EPL for its Spanish initials), the indigenous guerrilla group Quintín Lame, the Workers’ Revolutionary Party (PRT for its Spanish initials), the Current of Socialist Renewal (CRS for its Spanish initials) and the Army of National Liberation (ELN for its Spanish initials). Today, only FARC and ELN are still active, and the latter is at the first stages of a peace negotiation with the government still with uncertain results.

²⁸ Kalmanovitz and López (2006, p. 285) assert that 43 million hectares were devoted to cattle raising, while only 2.33 million were devoted to agriculture, in spite of the fact that two thirds of the population were rural and therefore lived on agriculture. According to these authors, these data led Lauchlin Currie, at the time director of the World Bank’s mission in Colombia, to express that the use given to land in the country was “anti-economic”.

²⁹ Kalmanovitz and López (2006, pp. 285, 335). According to these authors, big landowners gave land an inefficient use because the latter was conceived as a source of power rather than as productive capital.

³⁰ Kalmanovitz and López (2006, pp. 285, 336).

³¹ Laws 135 of 1961 and 1 of 1968. The former law created the Colombian Institute for Agrarian Reform (INCORA, for its Spanish initials); the latter created the National Association of Peasants Users of the Agrarian Reform (ANUC, for its Spanish initials).

³² Kalmanovitz and López (2006, p. 337).

mainly focused on promoting the colonization of the agricultural frontier.³³ Thus, it allowed affecting property rights only exceptionally, for the most part by allowing sharecroppers and tenants who had previously requested ownership over the land they occupied to obtain it after a time period of ten years.³⁴ As a result, the reform failed to redress the high levels of concentration of land ownership, and might have even contributed to its increase.³⁵ Indeed, land colonization was promoted without any upper limits on the amount of land that could be acquired.³⁶ Furthermore, only 2% of the families that requested land obtained it outside the colonization areas.³⁷ On the other hand, once again the reform prompted landowners to evict sharecroppers and tenants before they could complete the ten-year period after which they could claim ownership over the land.³⁸

In spite of these meager results, any discussion about the unequal distribution of land and its inefficient use was soon dropped from the political agenda, primarily because of the great vigor exhibited by new cash crops at the time.³⁹ Nonetheless, this vigor sharply contrasted with the stagnation of traditional agriculture, which still provided 70% of rural jobs.⁴⁰ This scenario of an exclusionary development and the paralysis of the discussion on land reform led to the radicalization of a sector of the newly formed peasant organization, which invaded hundreds of thousands of hectares of land, and was subsequently subject to severe reprisals from the Conservative government.⁴¹ On its turn, this radicalization prompted the unity of the government and agricultural business groups around the defense of property rights.⁴² This unity materialized in the 1972 Chicoral Pact, designed by a bipartisan commission, which agreed to restrict the objectives of agricultural policy only to enhancing productivity, thereby practically ruling out any possibility of land expropriations.⁴³ After this agreement, the only alternative that remained for promoting land redistribution was for the State to purchase land vol-



³³ Berry (2002, pp. 40-1).

³⁴ Kalmanovitz and López (2006, p. 337); Berry (2002, pp. 40-2).

³⁵ Berry (2002, pp. 43-4).

³⁶ According to Berry (2002, pp. 43-4), for this reason, by the end of the 1980s 60% of the land entitled by the Incora was in the hands of big landowners.

³⁷ Berry (2002, pp. 43-4).

³⁸ According to Berry (2002, pp. 41-2), by 1974 only 1,819 out of 545,000 registered tenants had become landowners.

³⁹ Kalmanovitz and López (2006, p. 337).

⁴⁰ Berry (2002, p. 37).

⁴¹ Kalmanovitz and López (2006, p. 337); Berry (2002, pp. 42-3).

⁴² Kalmanovitz and López (2006, p. 337).

⁴³ This agreement obtained legal expression through Laws 4 and 5 of 1973. Kalmanovitz and López (2006, pp. 337-8); Berry (2002, p. 44).

untarily offered for sale by its owners, which became even more difficult to achieve once land prices ceased to be tied to their cadastre values.⁴⁴ For the rest, agricultural policy was limited to the development of projects aimed at enhancing productivity and income for small landowners, which led to increased inequality among peasants.⁴⁵ Additionally, all property taxes on farm land were eliminated.⁴⁶

The failed attempts to bring about a meaningful land reform in Colombia resulted in an alarming unequal distribution of land ownership, and especially in very high levels of concentration of ownership in the hands of a very few. By 1984, 86.2% of the country's estates had a size of less than twenty hectares, which occupied 14.9% of the land surface and belonged to 85% of the country's landowners. In sharp contrast, 0.4% of the estates had a size greater than 500 hectares, occupied 32.7% of the land surface and belonged to 0.55% of the country's landowners.⁴⁷ Unfortunately, these figures were only to worsen in the following years, as a result of the internal armed conflict's deep impact on land distribution.

The contemporary dynamics of the Colombian armed conflict originated in the 1960s and 1970s, when most insurgent guerrilla groups were created.⁴⁸ Paradoxically, however, the conflict became particularly acute in the late 1980s and early 1990s, when several of these groups demobilized as a result of peace agreements with the government.⁴⁹ This can be explained by at least three different factors. First, the two guerrilla groups that did not demobilize and that are still active (ELN and FARC) became substantially stronger, their control over territories increased, and their assaults against the civilian population became more frequent and severe.⁵⁰ Second, right



⁴⁴ Kalmanovitz and López (2006, p. 338).

⁴⁵ The most important policy of the time was the rural integrated development policy, which aimed at providing economic support to small food farmers. According to Berry (2002, p. 49), this policy had a positive effect in food production and in the income of benefited peasants, but a negative one in food prices and rural equality. Indeed, its limited scope did not only exclude many peasants from its benefits; it also prevented the policy from having indirect effects on non-benefited peasants.

⁴⁶ Kalmanovitz and López (2006, p. 349).

⁴⁷ Salgado (2009). As for the rest of the country's estates, 10.7% of them had a size between 20 and 100 hectares, occupied 24.7% of the land surface and were owned by 11.3% of the country's landowners. On the other hand, 2.7% of them had a size between 100 and 500 hectares, occupied 27.5 of the land surface and were owned by 3% of the country's landowners.

⁴⁸ For these groups, see *supra* note 25.

⁴⁹ Because of these peace agreements with guerrilla groups, the majority of their members obtained either individual pardons or the ceasing of criminal procedures against them. On these agreements, see Cepeda (2003); Colectivo de Abogados José Alvear Restrepo (2001).

⁵⁰ ELN did not participate in the 1980s peace negotiations because it found the negotiation agenda to be too restricted. However, a sector of this group, the Current of Socialist Renewal (CRS), did participate in the negotiations, and effectively demobilized in the 1990s. On the other hand, FARC participated in the initial stages of the peace negotiations in the 1980s. As a result, in 1984 they agreed on a conditional ceasefire, and in 1985 they created the Patriotic Union (UP for its Spanish initials), a legal political party conceived as

wing paramilitary groups emerged. Even though their creation was originally justified by the need to combat guerrilla groups more effectively, from the outset they systematically attacked the civilian population. They also forged strong ties with regional elites and agents of the State, which enabled them to rapidly expand their political and economic influence.⁵¹ Last but not least, the drug trafficking boom impregnated the logic of the armed conflict, by offering the armed groups an unlimited source of income, along with the establishment of various types of alliances with the drug lords, ranging from receiving support for certain activities to their direct involvement in drug trafficking.⁵²

The recent developments of the internal conflict have had devastating effects on the distribution of land ownership in Colombia. The appropriation of land has been a central objective of all the illegal armed actors,⁵³ who find in land control not only military advantages, but also a mechanism for

a preliminary stage in the guerrilla group's reinsertion to political life. Nevertheless, the peace negotiations failed and the ceasefire was broken. In the following years, the members of the UP political party were systematically assassinated or forcedly disappeared by paramilitary groups, in most of the cases operating in collusion with the State's armed forces. The dimensions of this persecution are such that many refer to it as an extermination campaign, and even as a political genocide. Indeed, more than 1,000 assassinations and more than 100 forced disappearances, among other acts, have been documented in a case that is currently being analyzed by the Inter-American Court of Human Rights. On this, see Colombian Constitutional Court (2006); Cepeda (2003); Colectivo de Abogados José Alvear Restrepo (2001). By the 1990s, the strength of ELN and FARC had increased exponentially, both in terms of the number of combatants and of their financial and military power, in great part as a result of their involvement in drug trafficking. Their attacks against the civil population mainly include economic extortion, kidnapping, and assassinations. In the past decade, these two groups have held new peace negotiations with the government, but so far they have not been successful. Thus, from 1999 to 2002, FARC sustained peace negotiations with the government, in an area that was demilitarized for that purpose. However, the negotiations failed to bring about a peace agreement and instead allowed FARC to enhance their military power, which led many to conclude that they never had a serious intention to achieve peace. On the other hand, ELN began peace negotiations with the current government in 2002, but so far they have not produced any significant results.

⁵¹ In spite of the diverse dynamics they adopted in different regions, paramilitary groups emerged as private armies in order to either defend landowners from the siege of extortion exercised by guerrilla groups, or to compete against them for the control of economic activities such as drug trafficking. However, since their origins they held strong links with members of the armed forces who believed in the need of illegal means to defeat guerrilla groups. UNDP (2003, p. 59); Romero (2003, p. 24). Therefore, their modus operandi has always been characterized by a "dirty war", mainly consisting in massacres and forced disappearances against members of civil society considered to be allies or supporters of guerrilla groups, in many cases only because of their political inclinations, such as members of leftist political parties, human rights lawyers, journalists and union members, among others (Uprimny and Vargas, 1990, pp. 117-8). Now, the links between paramilitary groups and State agents have not only included members of the public force, but also agents of intelligence, local politicians, and national Congressmen. As of today, criminal investigations for links with paramilitaries have been opened against 65 Congressmen, which represent 23% of the total of members of the current legislative. See Romero (2007); Duncan (2005). On the Colombian State's international responsibility for the emergence and expansion of paramilitary groups, as well as for specific atrocious crimes tolerated by or committed in collusion with State agents, see the five cases decided by the Inter-American Court of Human Rights on the subject: Inter-American Court of Human Rights (2004, 2005, 2006a, 2006b, 2007).

⁵² Saffon and Uprimny (2009a); López (2006); Duncan (2005).

⁵³ For analyses of the relationship between the Colombian armed conflict and the appropriation of land, see Bello (2004); Procuraduría General de la Nación (2006); Saffon and Uprimny (2009b).

legalizing their spurious assets, as well as a crucial source of economic and political power. Indeed, land control enables the creation of the territorial corridors they require for drug trafficking and to effectively control this business.⁵⁴ Moreover, the acquisition of land through figureheads or front men has been one of the most common mechanisms used for laundering money obtained from drug trafficking and other illegal activities.⁵⁵ Lastly, land control offers a means for establishing a monopoly of violence in territories where the State is absent and, on that basis, for exercising control over economic and political activities.⁵⁶

As a result, the violent appropriation of land has been a systematic practice during the conflict: it has brought about the dispossession of at least 5.5 million hectares of land equivalent to 10.8% of the country's agricultural land.⁵⁷ This phenomenon has been frequently labeled an *agrarian counter-reform*, since it has magnified the country's unequal distribution of



⁵⁴ However, most of the land owned by drug lords is not used for cultivating or processing narcotics, since a flagrantly illegal use of the land would make it an easy target of the extinction of dominion by the State. That is why drug lords only devote to drug cultivation and processing land of low quality owned by them, or otherwise either rent land owned by others, or buy the produce from small peasants. And that is also why they devote their good-quality land to cattle raising or recreation. See Kalmanovitz and López (2006, p. 334); Duncan (2005); Saffon (2006).

⁵⁵ Kalmanovitz and López (2006, p. 335); Duncan (2005).

⁵⁶ As Duncan (2005) shows, in their areas of influence paramilitaries have come to exercise control over a wide range of illegal, informal and even legal economic activities, such as smuggling, prostitution, gambling, transportation, wholesales, agro-industrial cultivations, and even local public resources, such as health contributions. Furthermore, as Romero (2007) shows, in their areas of influence paramilitaries have also come to manipulate elections by supporting specific candidates, which implies financing them, threatening or physically eliminating their contenders, forcing people to vote for them, and/or controlling the electoral results.

⁵⁷ This figure was obtained by one of the most systematic quantifications of land dispossession in the country, which was carried out by the Commission for the Monitoring of the Public Policy on Forced Displacement (hereinafter CSPPDF, for its Spanish initials) on the basis of a statistically representative survey to members of the forcibly displaced population. The CSPPDF (2009) calculated the figure on the basis of responses given by surveyed forcibly displaced persons who knew the measurement of the surface of the land they had abandoned or transferred under pressure through forced sales or other usurpation mechanisms. To do so, the CSPPDF (2009) calculated the average of hectares of land reported as abandoned or usurped, subtracted from it land reported as collective property or possession (to avoid double counting) and land reported to have an extension greater than 98 hectares (to which it assigned the average in order to avoid distortions), and multiplied it by the number of family groups that compose the displaced population. The statistical rigor of this study distinguishes it from previous estimations of the magnitude of dispossessed land, which indicated that the latter ranged between 2.8 million hectares (according to the Office in charge of Fiscal control of public entities) and 10 million hectares (according to the Alternative Cadastre, coordinated by the National Movement of Victims of State Crimes). Procuraduría General de la Nación (2006); Salinas (2008). Note that the figure of 5.5 million hectares might under-represent the amount of land dispossessed, not only because it discounts collective property or possession and estates of great extension, but also because it only accounts for land dispossessed from persons who consider themselves to be members of the forcibly displaced population. Although this is widely justified by the great number of forcibly displaced people (approximately 3 million) and by the fact that an important part of them report to have lost land (55%), it might exclude people who might have suffered land dispossession but who are not considered nor consider themselves to be forcibly displaced because they have a better socioeconomic situation than that population (CSPPDF, 2009).

land and has perpetuated its inefficient use.⁵⁸ In fact, over the last decades, the problem of land concentration in the hands of a few has worsened considerably. From 1984 to 2003, the area covered by estates of less than twenty hectares decreased from 14.9% of the country's land area to only 8.8% of it.⁵⁹ In contrast, in the same time period, the area covered by estates of more than 500 hectares increased from 32.9% of the country's land area to 62.6% of it.⁶⁰ Furthermore, the owners of the smaller estates previously accounted for 0.55% of the country's landowners, but now only account for 0.4% of them.⁶¹ These data appear to be reflected in the World's Bank Gini coefficient concerning inequality in rural ownership, which by 2005 was reported to be 0.85 in Colombia –higher than the Latin American average, which is 0.81–.⁶²

The most affected by this phenomenon have been the forcibly displaced persons, i.e. persons who were forced to flee from their homes as a result of violence or direct threats in the context of the armed conflict.⁶³ As of today, the forcibly displaced amount to approximately three million people –equivalent to around 7% of the Colombian population–.⁶⁴ Of this population, 75% of the family groups were expelled from rural areas and 55% were landholders be-



⁵⁸ Kalmanovitz and López (2006, p. 334); Saffon and Uprimny (2009b).

⁵⁹ However, the percentage of these estates over the total of estates in the country and the percentage of their owners over the total of landowners of the country did not change substantively in this period, passing from 86.2% to 87% in the first case, and from 85.1% to 86.3% in the second case (Salgado, 2009).

⁶⁰ This change took place in detriment not only of small properties, but also and especially of middle-size properties, which passed from covering 52.2% of the country's area to only 28.6% of it. (Salgado, 2009).

⁶¹ Nonetheless, the percentage of these estates over the total of estates in the country (0.4%) did not vary (Salgado, 2009).

⁶² López (2008, p. 41).

⁶³ In Colombia, the notion of forced displacement is defined by Law 387 of 1997, which establishes mechanisms for the “prevention, attention, protection, consolidation and socio-economic stabilization” of persons under that circumstance. According to article 1 of this law, “A displaced person is she who has seen herself forced to migrate within the national territory abandoning her place of residence or her habitual economic activities because her life, physical integrity, personal security or liberty have been infringed upon or are directly threatened, with occasion of any of the following situations: internal armed conflict, internal disturbances or tensions, generalized violence, massive human rights violations, infringements of international humanitarian law or other circumstances emanating from the previous situations, which might affect or drastically alter the public order”. In 2000, forced displacement was codified as a crime in Colombia, in the following terms: “He who, on the occasion and in development of the armed conflict and without military justification, (...) forcibly displaces the civil population from her place of residence, will incur in prison from ten (10) to twenty (20) years, a fine from one thousand (1,000) to two thousand (2,000) minimal wage salaries, and disqualification from the exercise of rights and public functions from ten (10) to twenty (20) years” (Colombian Criminal Code, art. 159).

⁶⁴ Official sources currently talk about 2,935,832 forcibly displaced persons in the country. See Acción Social (2009). However, this figure underestimates the magnitude of the phenomenon, as it only takes into account the number of persons who are officially registered in the government's Displaced Population Only Register, and it therefore excludes forcibly displaced people who have not been able to register. That is why other sources, such as the United Nations High Commissioner for Refugees, by 2006 already talked about more than three million forcibly displaced people in Colombia (UNHCR, 2006). According to this source, at the moment, Colombia is the country with the highest number of forcibly displaced people (UNHCR, 2009).

fore being displaced. Of the latter, 94% abandoned or transferred their land under pressure as a consequence of the displacement; however, only 18.7% of them held formal land titles.⁶⁵ This population was in a quite vulnerable socioeconomic situation before being forced to flee, and its situation worsened exponentially after its displacement. Indeed, before being victims of forced displacement, 51% of the family groups that make up this population had a monthly income below the poverty line, and 31.5% were below the extreme poverty line. After their displacement, these family groups have come to have a monthly income that is below the poverty line in 97% of the cases, and below the extreme poverty line in 80.7% of the cases.⁶⁶

But the *agrarian counter-reform* has not only had a harmful impact on land and income distribution; it has also preserved and even enhanced the inefficient use given to the country's land. In 2002, only 24.1 million hectares of land were devoted to agricultural activities, in spite of the fact that 53.9 million hectares of the country's land are suitable for farming. In contrast, even though only 10.2 million hectares of the country's land are suitable for cattle ranching, 41.7 million hectares were devoted to this activity.⁶⁷ Although it is not possible to explain these figures only or primarily as a result of the appropriation of land that has taken place during the recent stages of the internal conflict,⁶⁸ such appropriation is likely to have contributed to the accentuation of the inefficient use of land. In effect, in the last decade, the forcibly displaced population abstained from cultivating 1,118,401 hectares of land, which amount to 25% of the cultivated area in the country.⁶⁹ This



⁶⁵ CSPPDF (2009). According to the survey conducted by the CSPPDF (2008c), of the forcibly displaced family groups who said they had abandoned land with occasion of their displacement, 67.2% indicated they were owners of the land; however, when asked about the legal documents that support such ownership, only 20.2% of them indicated they had a public and duly registered deed, which is the main legal requirement for being recognized as a real estate proprietor in Colombia. Moreover, 7.6% of the surveyed family groups said they had a collective entitlement over the land, which corresponds to land adjudications made to ethnic minorities in Colombia. Therefore, all other persons who reported to be owners of the land are informal owners, with uncertain or precarious rights over it.

⁶⁶ CSPPDF (2009). Additional factors of vulnerability of the forcibly displaced population can be identified if its composition is compared to that of the Colombian population in general: 54% of the forcibly displaced people are women, in comparison with the 51.2% of the national population; 62.6% of the forcibly displaced are younger than 25 years, in comparison with the 48% of the national population; 3.7% of the forcibly displaced consider themselves members of indigenous communities, in comparison with the 3.4% of the national population; 21.2% of the forcibly displaced consider themselves Afro-Colombians, in comparison with the 7.2% of the national population; in 17.5% of the displaced family groups there is at least one physical or mentally impaired person, in comparison with the 6.3% of the national population. CSPPDF (2008a). See Saffon and Uprimny (2009a).

⁶⁷ Salgado (2009).

⁶⁸ Both because the amount of dispossessed land is much lower than the hectares of land devoted to cattle raising, and because traditionally the extensive use of agricultural land for cattle raising has been a problem in Colombia. See *supra* note 26.

⁶⁹ This figure was also calculated by the CSPPDF (2009), on the basis of surveyed displaced people who knew the extension of the land they cultivated before being displaced. From the total number of hectares

can certainly account for the deterioration of the economic situation of the displaced people who lost land and who, along with it, lost valuable income-generating assets.⁷⁰ Moreover, if this land has not been efficiently used after their displacement, its appropriation might have had a negative impact on the country's agricultural production.⁷¹

In spite of the central role that land has played in the contemporary internal armed conflict –at once as one of its causes, main objectives and most devastating consequences–, in the last three decades the State has persistently neglected to adequately address the problem of unequal distribution, to effectively protect rural landholders from dispossession, and to restitute or compensate the land relinquished or forcedly transferred as a result of violence. On the one hand, since the 1960s, there have not been any meaningful attempts by the State to carry out reforms aimed at equitably redistributing land ownership and/or at offering landless peasants access to vacant land.⁷² From the 1990s on, the State's policy on land has been based on a market approach, and it has therefore tried to guarantee access to land by providing subsidies to peasants who negotiate land purchases with owners.⁷³ However, so far, the policy has had meager results, due to corruption, to the scarcity of resources allocated for its implementation, to the lack of complementary mechanisms to ensure that the beneficiaries make effective use of the land, and to the appropriation by armed groups of land thus obtained by peasants.⁷⁴ Consequently, the policy has not produced any significant improvement in the access to land by landless peasants, and the few positive benefits it has

declared to have been cultivated, the CSPPDF calculated the average of uncultivated land per family group that lost land, and subtracted from it estates declared to be larger than five hectares, as well as areas devoted to drug cultivation and to other non-agricultural activities.

⁷⁰ As the CSPPDF (2009) argues in its most recent report, given that most of the forcibly displaced people were formerly peasants, the loss of land and other productive assets (such as animals) disabled their income-generation capabilities, as they passed from being "expert farmers to marginalized urban residents".

⁷¹ As it was said in note 52, there are plausible reasons for thinking that armed actors involved in drug trafficking devote appropriated land to cattle raising or recreation purposes. The CSPPDF (2009) suggests that, if this is indeed the case, it could be a relevant factor for explaining the decrease of the agricultural sector's gross product in the last years.

⁷² According to Kalmanovitz and López (2006, p. 338), in the end of the 1980s, there was a "shy" attempt to reactivate the policy of land redistribution; however, it failed, due to the lack of political support and enough resources, as well as to the fact that, in the early 1990s, the issue of land reform was incorporated into the "diffuse" agenda of peace negotiations with guerrilla groups. See Law 30 of 1988.

⁷³ Law 160 of 1994. See Reyes (1999, p. 212); Berry (2002, pp. 53-4); Kalmanovitz and López (2006, p. 338); Salgado (2009).

⁷⁴ According to Berry (2002, p. 54), by 1997, most of the land acquired on the basis of this policy had been directly purchased by the State not through subsidized negotiations, and the purchases had been characterized for corruption scandals. According to Kalmanovitz and López (2006, p. 340), the scarcity of resources resulted from the decision to restrict the source of subsidies to the State owned Caja Agraria. Also according to these authors, the lack of complementary mechanisms to guarantee the effective exploitation of land by beneficiaries permitted, in many cases, that the land obtained by peasants returned to its original owners or were bought by big landowners..

generated have been countered by the distorting effects that the armed conflict has on the land market.⁷⁵

On the other hand, for a long time, the systematic practice of land dispossession through violence was not effectively countered by the State. The State neglected the problem of land appropriation to such an extent that, as of today, there is not a complete, accurate and updated information system on property titles in Colombia.⁷⁶ In fact, the country's land registry system (cadastre) is extremely obsolete: many areas of the country have never been registered, the last national update of the registry was in 1994, and by 2007, 54% of the rural estates' registries had not been updated. Moreover, the cadastre information is often contradictory and has not been unified or cross-referenced with other official sources (such as those administered by notary offices and by the Ministry of Rural Development), it only includes information on actual land titles (thus excluding important personal rights such as landholdings, occupation and tenancy), and it only accounts for nominal land holders (thus ignoring quite common situations in which armed actors use front men to avoid prosecution).⁷⁷

This situation has offered important incentives for the violent appropriation of land. Indeed, the problems with the information system allow usurpers to easily "legalize" the appropriated land, especially when persons who occupy it have uncertain or precarious rights over it.⁷⁸ In Colombia, the methods used by armed actors for legalizing appropriated land have commonly included: the falsification of deeds over non-registered land, bribing or coercion of public officers to register them, purchase of land under coercion through figureheads or front men, and the application of legal schemes originally intended to protect landholders, such as prescription and false tradition.⁷⁹ In turn, the acquisition of legal titles over appropriated land



⁷⁵ According to Reyes (1999), it does not seem plausible to implement a land reform policy that does not take into account the effects of the armed conflict on the land market.

⁷⁶ Saffon and Uprimny (2009b).

⁷⁷ Saffon and Uprimny (2009b); Salinas (2009); CSPPDF (2008b). See also Colombian Constitutional Court, Award 008 of 2009.

⁷⁸ According to the first survey conducted by the CSPPDF (2009), of the forcibly displaced family groups who said they had abandoned land with occasion of their displacement, 6% said to hold it as possessors, 5% on the basis of an usufruct, 3% as de facto occupants, 3% as occupants of public vacant land, and 13% as having other types of tenancy. However, these data might underrepresent the phenomenon of precarious rights over real property, since, as it was mentioned in note 63 above, of the 67.2% displaced family groups who indicated to be owners, only 20.2% said to have complied with all the legal requirements for being formally considered as such.

⁷⁹ Saffon (2006); CSPPDF (2008b); Salinas (2009). The use of figureheads or front men is done through the legal figure of simulation, which aims at hiding the identity of the real parts to a public contract, by altering the agreement contained in the latter in a private document, which is taken to contain their real will. According to the Colombian Supreme Court of Justice, simulation is not necessarily illegal, as it does not always imply an illicit goal or the bad faith of the parties. However, there are many cases in which

imposes severe obstacles to the State's obligation to extinguish the titles of usurpers and/or to prosecute them,⁸⁰ given that the State is required to trace back all the transactions made involving the land in question. As a result, the appropriation and subsequent legalization of land can be done with very low risk.

Furthermore, for many years the State did not prevent or effectively penalize the illegal appropriation of land. Indeed, only until very recently was a policy aimed at legally protecting the land of the forcibly displaced population created.⁸¹ This policy, which started to be implemented in 2003, seeks to prevent land dispossession and to prevent the legal transfer of properties that were abandoned as a result of forced displacement. To this end it created a registry system that automatically includes any properties located

simulation implies a violation of criminal law. This is certainly the case of the use of figureheads to hide an illegal appropriation of land, which, as explained in the following endnote, constitutes a criminal offense. On the other hand, prescription allows the material possessor of an estate to judicially request its property after a quite short time, that is, after five years if possession is done in good faith –i.e. having a document that accredits the person as a proprietor, even if it is false or invalid–, and ten years if it is in bad faith –i.e. without having a document of the sort–. In such lapse of time, possession must be exercised publicly and non-violently (Law 791 of 2002). Prescription was originally created with the purpose of guaranteeing that property is held to the persons who use land, and therefore for protecting land possessors who, as many Colombian peasants, occupy the estate in which they live and work, without owning it. However, prescription can be easily claimed by land usurpers through front men who, after the appropriation, have possessed the land publicly and non-violently.

On its turn, false tradition permits the inscription on an estate's property registry of a transaction through which a non-owner of the estate agrees to transfer it to a person different from its material possessor. Such a transaction is possible under Colombian law, given that there is a distinction between the legal entitlement through which two persons agree the transfer of an estate, on the one hand, and the actual transfer of the state, which only takes place through the inscription of the deed in the property registry, on the other. This permits the sale of someone else's property (art. 1871 of the Colombian Civil Code), which makes sense whenever the seller acquires the property of the sold estate immediately after the transaction, and can therefore transfer its property to the buyer. Whenever this does not take place, in virtue of false tradition, the latter has a right to inscribe the transaction on the registry of the estate, and therefore to become an inscribed possessor. Very recently, a law was issued, which permits the "clearing" of false tradition, that is, the possibility of acquiring the property of an estate over which one has inscribed possession at least five years before, through an abbreviated judicial process (Law 1182 of 2008). Many suspect that the law had the underlying intention of benefiting demobilized paramilitaries by allowing them to acquire the property of the land they have appropriated. See Salinas (2009); Gutiérrez (2009).

⁸⁰ The State's duty to extinguish dominion over spurious assets is contained in Law 793 of 2002 (but already existed in a 1996 law), which establishes that the termination of asset ownership without compensation should be carried out whenever there is an unjustified patrimonial increase, the licit origin of which is not proved, or whenever the assets in question are derived from, are used as an instrument for or constitute the object of illicit activities, or are derived from the transfer of other assets with similar characteristics. On the other hand, according to the Colombian Penal Code, land usurpers can be prosecuted at least for the following offenses: destruction and appropriation of goods protected by international humanitarian law (which include all those goods that are not military targets) with occasion and in the development of the armed conflict (art. 154), land usurpation –by destroying, altering, suppressing or moving boundary stones– (art. 261), land or building invasion (art. 263), disturbance of possession (art. 264). Depending on the circumstances of the case, land usurpers could also be prosecuted for: asset laundering (art. 323), figureheading for the purpose of acquiring assets with money derived from drug trafficking and related offenses (art. 326), illicit enrichment derived from criminal activities (art. 327).

⁸¹ This policy is called Project for Protection of the Displaced Population's Land and Patrimony, and it is contained in Decree 2007 of 2000, which regulates Law 387 of 1997.

in certain areas of the country declared to be at risk of forced displacement, as well as any properties requested to be included in the registry by individuals or communities who have been victims of forced displacement. Once a property is registered in the system it cannot be transferred, which implies the invalidity of any legal transactions that intend to do so. In spite of its importance and potential, so far this policy has had a very limited scope, since the persons who have benefited from it represent less than 3% of the forcibly displaced population, and the majority of them are not actually displaced people but persons whose properties are in areas declared to be at risk of future displacement.⁸²

Finally, until very recently, there were no special judicial or administrative procedures to guarantee the restitution of land or to provide compensation for its value to the victims of forced dispossession.⁸³ As we will see in the next section, this situation has started to change, as a result of the implementation of a transitional justice framework, which has put the issue of reparations for victims of atrocities at the center of the political debate.

II. TRANSITIONAL JUSTICE AND THE PROJECT OF LAND RESTITUTION IN COLOMBIA

In the past few years, the demobilization of 35 right-wing paramilitary groups and over 30,000 of their members prompted the enactment of a special legal framework for dealing with atrocities committed by the demobilized actors of the Colombian armed conflict.⁸⁴ The framework includes mechanisms and institutions that are typical of a transitional justice scheme, even though the country is not yet facing a complete transition from war to peace.⁸⁵ Since



⁸² CSPPDF (2008b). According to the CSPPDF, as of March of 2008, 76,844 persons, who correspond to approximately 15,000 family groups, had benefited from the land protection policy, out of the total of 549,006 displaced family groups. Moreover, 48% of them requested the protection of their land collectively, and 49% of them did it on the bases of "risk declarations", which means that the vast majority of the land of forcibly displaced individuals remains unprotected.

⁸³ The Colombian legal system allows individuals to claim the restitution of land arbitrarily dispossessed or the compensation of its value through ordinary judicial processes –civil or criminal against private individuals, and contentious-administrative against the State–. However, given the massive and systematic character of land dispossession in the country's armed conflict, these processes seem to be insufficient for guaranteeing the restitution of land to all victims, and therefore the absence of special judicial or administrative procedures imposes an obstacle to the fulfillment of that aim.

⁸⁴ See Laws 782 of 2002 and 975 of 2005 (Colombia), their governmental decrees and the Colombian Constitutional Court's rulings on the constitutionality of the laws, particularly Ruling C-370 of 2006.

⁸⁵ Colombia is in the middle of an armed conflict, which is still far from ending. Indeed, there are two active guerrilla groups that have not concluded peace negotiations with the government, and it is still uncertain whether the recent demobilization of paramilitary groups will bring about the disarticulation of their criminal organizations, as well as the dismantling of their economic and political structures. However, due to the current implementation of a transitional justice legal framework, the Colombian context can be characterized as a case of transitional justice without transition or, in the best-case scenario, as a partial

the beginning of the discussions on the framework, victims' and human rights organizations insisted on the importance of dealing with the problem of land, and particularly of guaranteeing land restitution to the victims of dispossession.⁸⁶ However, designed mostly by the government and its political coalition⁸⁷, the legal framework has not addressed the matter explicitly. Quite on the contrary, although the framework recognizes restitution as a component of the right to reparations, the judicial and administrative procedures it has established to address this right do not include specific mechanisms for land restitution, and they even impose obstacles to its fulfillment.

Thus, Law 975 of 2005 created a special criminal procedure for prosecuting and judging demobilized armed actors who committed atrocious crimes,⁸⁸ which foresees quite low sentences in exchange for full confessions, the handing over of illegal assets, cooperation in the dismantling of the armed group and the cessation of all illicit activities. Within such criminal procedures, victims of crimes committed by the beneficiaries of the law can claim reparations.⁸⁹ However, the law does not contain a special procedure for victims of land dispossession to claim, as part of their reparation, the restitution of the specific plot of land they lost. The legal framework even seems to impose obstacles to claims of this sort, as it establishes that all assets

or fragmentary transition from war to peace. See Saffon and Uprimny (2009a); Uprimny et. al. (2006). For the theoretical and practical complexities of implementing transitional justice mechanisms in the absence of a complete transition, see Uprimny et. al. (2006), Saffon and Uprimny (2007). The transitional justice mechanisms and institutions currently implemented in the country include: legal pardons to demobilized individuals who have not committed atrocious crimes; a special criminal procedure to prosecute and judge demobilized armed actors who committed crimes of the sort with occasion of the armed conflict; a National Commission of Reparations and Reconciliation, which, among other functions, has a special Group in charge of elucidating the historic memory of the conflict; an administrative program of reparations, which will grant fixed monetary indemnities to victims of certain atrocious crimes. See Laws 782 of 2002 and 975 of 2005 (Colombia) and their governmental decrees.

⁸⁶ Uprimny (2005b).

⁸⁷ The majority of the dispositions that compose Law 975 of 2005 were contained in the Bill that was supported by the government and its political coalition during the discussion of the legal framework. The alternative Bill that competed with it was largely supported by victims' and human rights organizations and was defended in Congress by a coalition of political parties, including the liberal party and the Polo Democrático Alternativo [Alternative Democratic Pole] left-wing party (Uprimny, 2005b).

⁸⁸ The government has interpreted the condition for conceding legal pardons in a quite extensive way: it has considered those pardons applicable to all demobilized actors who do not have open criminal processes or sentences for atrocious crimes against them. In a country in which the impunity rate is exceptionally high, this can imply exonerating many perpetrators of atrocities. More than 90% (28,544) of the demobilized paramilitaries have benefited from such legal pardons (Saffon, 2009).

⁸⁹ To claim reparations, victims must present civil actions against direct perpetrators within the criminal procedure. Before the judge decides the amount and form of reparations, there is a conciliation stage (art. 23, Law 975 Of 2005). If victims and perpetrator reach an agreement on the matter, the agreement becomes part of the ruling. Otherwise, the judge orders the reparations she considers appropriate. The Colombian Constitutional Court established that, in case victims do not know the identity of their direct perpetrators, the latter are not part of the processes, or they do not have enough assets to cover the judicially ordered reparations, these are to be covered by the members of the group to which the perpetrator belonged and, if that is still not enough, subsidiarily by the State. Colombian Constitutional Court, Ruling C-360 of 2006.

handed over by armed actors should enter a Reparations Fund, which will be the main source of reparations claimed by victims. This could imply that appropriated estates handed over by demobilized actors would enter the general mass of assets destined to reparations, and could therefore end up being used not necessarily to repair the victims who have or had rights over them, but other victims.⁹⁰

In fact, the government has given the law an even wider interpretation, by establishing in Decree 3391 of 2006 that, as part of the fulfillment of their duty to provide reparations, demobilized actors can assign restituted land to the development of “productive projects”, in which demobilized persons and victims of forced displacement are to work together in a shared ownership scheme.⁹¹ Apart from the problematic forced reconciliation that these productive projects might impose on victims, they hinder the restitution of land lost by victims in so far as they do not consider former owners or landholders as the primary beneficiaries.

On the other hand, the recently created administrative program of reparations for victims expressly excludes the restitution of land as a possible reparation measure, indicating that specific laws on the matter will regulate land restitution.⁹² The truth is, however, that so far these laws are non-existent. Furthermore, the program of reparations envisages that monetary indemnities granted to victims of forced displacement will be paid in the form of a subsidy for the acquisition of housing, regardless of whether they have lost land or not.⁹³ This not only denies specific reparations for the damages caused by land appropriation, but also amounts to an attempt to repair the victims of forced displacement through social services, which the State has the obligation of providing to all citizens anyway –be they victims or not– in order to satisfy their social and economic rights, such as the right to adequate housing.⁹⁴

All the previous measures have been harshly criticized by victims’ and human rights organizations for implying a severe restriction on the right to



⁹⁰ Several organizations presented a constitutionality action against article 54 of Law 975 of 2005, which contains this provision, arguing that it violated the right to restitution of victims. However, the Constitutional Court did not analyze the charge substantively because it found it to be formulated inadequately. See Colombian Constitutional Court, Ruling C-370 of 2006.

⁹¹ Decree 3391 of 2006, arts. 17 (par. 2) and 19. This decree, as well as the law that it claims to regulate, have been challenged before the Constitutional Court and the State Council because of the forced reconciliation they imply. Actions presented by the Colombian Commission of Jurists (CCJ, 2007) and DeJusticia and other organizations (DeJusticia et. al., 2007).

⁹² Decree 1290 of 2008, art. 6, par. 1.

⁹³ Decree 1290 of 2008, art. 5, par. 5.

⁹⁴ For this reason, the Constitutional Court recently declared the unconstitutionality of article 47 of Law 975 of 2005, which established that the social services provided by the State to victims were a part of their reparations. Colombian Constitutional Court, Ruling C-1199 of 2008.

reparations of victims of forced displacement.⁹⁵ Indeed, according to international legal standards, the right to restitution constitutes “the preferred remedy for displacement”.⁹⁶ This can be explained by the fact that, in the majority of cases, the crime of forced displacement implies the loss of land and dwellings, the restitution of which is essential for guaranteeing the rights of forcibly displaced persons to a voluntary and secure return to their places of origin, and to adequate housing.⁹⁷ Therefore, victims’ and human rights organizations have claimed that the absence of adequate restitution measures in Colombia constitutes a violation of the right to reparations of forcibly displaced people, as well as an obstacle to guaranteeing their rights to return to their places of origin and to adequate housing.

This point of view has also been upheld by the Colombian Constitutional Court in the framework of the accountability process of the government’s public policy on attention to the forcibly displaced population. This process began in 2004 with the Court’s declaration of the situation of the forced displacement population as an “unconstitutional state of affairs”.⁹⁸



⁹⁵ See the public actions presented by the Colombian Commission of Jurists (CCJ, 2007) and DeJusticia and other organizations (2007) against the analyzed legal dispositions. See also CSPPDF (2008b); Uprimny and Saffon (2007); Saffon and Uprimny (2009b).

⁹⁶ Principle 2.2 of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (United Nations, 2005). Also according to this principle, “[t]he 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”. The Colombian Constitutional Court has declared these principles to be part of the “constitutionality block”, and therefore to be directly enforceable in the Colombian legal system. Colombian Constitutional Court, Ruling T-821 of 2007.

⁹⁷ These rights are recognized in the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (United Nations, 2005), as well as by the UN Guiding Principles on Internal Displacement (United Nations, 1998). According to the Colombian Constitutional Court, the latter principles are also part of the Colombian “constitutionality block”. Colombian Constitutional Court, Ruling T-025 of 2004. For the development of the argument according to which restitution is essential for guaranteeing these rights in the case of forcibly displaced persons, see Williams (2008). Following this author, privileging restitution in the reparations of forcibly displaced persons is essential for guaranteeing their right to return, in so far as the monetary compensation of lost land might limit the victims’ option of actually returning to their places of origin. This does not mean, however, that the right to restitution requires effective return because they constitute two independent rights (see *supra* note 94). Moreover, according to Williams (2008), privileging restitution is also essential for repairing the displaced persons’ right to housing, which is clearly violated through forced and arbitrary evictions—one of the main mechanisms for carrying out massive forced displacements—. On its turn, basing restitution on the right to housing allows it to be guaranteed not only in the case of owners, but also in cases of persons with precarious rights over land, such as possessors, occupants and tenants. Further, the right to housing provides a more solid justification to restitution than private property because the latter is not recognized in many international human rights treaties, and the treaties in which it is recognized do not clearly contemplate reparations in the case of its violation (Williams, 2008). See also Saffon and Uprimny (2009b).

⁹⁸ Colombian Constitutional Court, Ruling T-025 of 2004. According to the precedent of the Colombian Constitutional Court, an “unconstitutional state of affairs” exists whenever there is a recurrent violation of the fundamental rights of many persons, the solution of which requires the coordinated intervention of different State agencies. The Court has declared the existence of such a situation in a few occasions, while exercising her discretionary function of selecting and reviewing, by a sort of *certiorari*, *tutela* actions (writs of protection) through which individuals request the protection of their (violated or threatened) fundamental rights before any judge of the country. In those occasions, while revising a writ of protection presented

Said declaration led the Court to issue a series of complex orders to different governmental agencies aimed at ensuring that displaced persons would effectively enjoy a series of minimum rights,⁹⁹ as well as to retain its jurisdiction for verifying their compliance.¹⁰⁰ The Court's decision incorporated a wide range of rights in the State's duty to protect the forcibly displaced population,

by some individuals, the Court has found their situation to be originated in a structural problem, which does not only affect the plaintiffs but many other persons. Therefore, instead of ordering the sued State agency to protect the rights of plaintiffs, it has decided to give complex orders to various State agencies, which are aimed at overcoming the structural problem and which cover all persons who are under the same circumstances as the plaintiffs. In the case of the forcibly displaced population, the Court declared their situation to be an unconstitutional state of affairs after having decided several *tutela* cases in which individual displaced persons requested the protection of various rights, including freedom of movement, equality and non-discrimination, life, access to education and health services, and a minimum level of income. According to former Justice Manuel Jose Cepeda (2006), "by 2003 the Court had dossiers submitted by over a thousand IDP [internally displaced people] families". In Ruling T-025 of 2004, the Court revised more than one hundred *tutela* dossiers, and ascertained that the rights of the forcibly displaced population were being violated in a massive way, as a result of the insufficiency of financial resources and the precariousness of the existent institutional capacity to protect such rights.

⁹⁹ Among other things, the Court created a "Charter of Rights" of the forcibly displaced population and established minimum mandatory levels of protection for them; it ordered all national and regional State agencies that provide assistance to the forcibly displaced population to adapt their institutional capacities and resources in order to fulfill their duty of protecting such rights; it ordered the National Council for Comprehensive Assistance to the Displaced Population (composed by several State agencies) to adopt a plan of action intended to guarantee such rights in a timely and effective manner, which should include an adequate budget and schedule, as well as the identification of mechanisms required for its fulfillment; it required all involved agencies to guarantee the participation of organizations that represent the forcibly displaced in their decision-making processes (Cepeda, 2006).

¹⁰⁰ The Court retained its jurisdiction on the basis of article 27 of Decree 2591 of 1991, according to which the *tutela* judge can do so until the violated rights are entirely reestablished, or until the causes that threaten them are eliminated. As a result, the Court initiated a quite sophisticated process of accountability, in which it issues follow-up awards with the purpose of evaluating the level of compliance of its orders over time. In such awards, the Court establishes the criteria by which it will evaluate compliance, identifies the shortcomings of the State's policy, and orders specific measures considered necessary for achieving an adequate degree of satisfaction of the displaced people's rights, and more generally for overcoming the unconstitutional state of affairs. Many of those measures have implied high degrees of judicial activism and creativity, such as: the order to the government of submitting periodical reports of the policy's advancements; the invitation to the civil society of conforming a commission for monitoring the public policy on forced displacement (which became the CSPPDF, cited in many occasions throughout this paper), with the right to participate in the compliance process as a counterpart to the government and therefore also with the right of submitting periodical reports monitoring the government's level of compliance; the summoning of public hearings with the participation of both governmental agents and members of the forcibly displaced population and of civil society in general, in which the Court gathers information about levels of compliance from direct sources; the adoption of indicators for measuring the degree of satisfaction of the rights in question, which are chosen from indicators proposed by both the government and the civil society; the evaluation of the State's levels of compliance in the satisfaction of each right, as well as in the overcoming of the unconstitutional state of affairs, based on the information provided by governmental agencies and the CSPPDF, as well as by analytical documents provided by other organizations, such as organizations of forcibly displaced persons, the United Nations High Commissioner for Human Rights and universities. Colombian Constitutional Court awards 19, 50, 87, 138, 185 of 2004; 176, 177, 178 of 2005; 218, 266, 333, 334, 335, 336, 337 of 2006; 27, 58, 81, 82, 101, 102, 109, 167, 170, 171, 200, 206, 207, 208, 219, 233 of 2007; 2, 11, 5253, 54, 68, 82, 92, 93, 107, 116, 117 of 2008; 4, 5, 6, 7, 8, 9, 10, 11 of 2009.

which include not only civil, political, social and economic rights, but also the specific rights to which victims of atrocities are entitled.¹⁰¹

Therefore, since the beginning of the process, the Court declared that the State's duties with regards to the forcibly displaced population included the satisfaction of the right to obtain adequate reparations for the crimes committed against them. Moreover, the Court recognized that the restitution of assets from which the displaced population has been evicted is crucial for satisfying their right to reparations, and has therefore declared it a "fundamental right", which requires from the State the conservation of their rights to properties or possessions, as well as the reestablishment of their "use, enjoyment and free disposition".¹⁰² Yet, the Court recently declared that there is not an adequate State policy in place capable of guaranteeing the protection and restitution of abandoned lands, or the relocation of forcibly displaced persons in other lands where they can have autonomous sources of income. In consequence, the Court concluded that this situation threatens to perpetuate the unconstitutional state of affairs of the forcibly displaced population.¹⁰³

It was in the above context that the discussions on the "Victim's Bill" took place. The Bill was initially submitted by the Liberal party before the Committee on Constitutional Affairs of the Senate, with the explicit justification that the transitional justice framework being implemented in the country had almost entirely focused on providing benefits to perpetrators of atrocities,



¹⁰¹ According to the Colombian Constitutional Court, the "Charter of Rights" of the forcibly displaced population is composed by the following rights: (1) To be registered as a displaced person with one's family group; (2) to preserve all fundamental rights and to hold them as a subject of special protection by the State; (3) to receive humanitarian attention –consisting in essential food, drinkable water, basic housing and accommodation, appropriate clothing, and essential medical and sanitary services– during the three months following the displacement (extendable for other three, or longer if the condition of humanitarian crisis continues); (4) to the delivery of a document that proves the displaced person's inscription in a health provider agency; (5) to return to the place of origin in conditions of security, without being constrained to do so or to relocate in a specific place of the national territory; (6) to the identification (with the displaced person's participation) of the specificities of her personal and family situation, with the aim of determining the way in which she can work and generate income while she returns to her place of origin; (7) to a place in an educational establishment, in case of being under fifteen years of age; (8) to the immediate and unconditional respect of all these rights by the competent authorities, without the need of a judicial order to guarantee it; (9) to truth, justice and reparations. Colombian Constitutional Court, Ruling T-025 of 2004. Although in Ruling T-025 of 2004 the Constitutional Court seemed to restrict the rights to justice, truth and reparations to those displaced persons who were victims of crimes other than forced displacement itself, in its subsequent awards it made it clear that these rights applied to the entire displaced population as victims of the crime of forced displacement. See, for instance, Colombian Constitutional Court, Award 008 Of 2009.

¹⁰² Colombian Constitutional Court, Ruling T-821 of 2007. In order to justify the importance of restitution in the reparations of forcibly displaced persons, the Colombian Constitutional Court has also referred to their right to return to their places of origin –although also clarifying that they are independent rights–, and it has also alluded to the rights to property and possession, the violation of which "translates into a violation of the fundamental right to a dignified subsistence (...) and to work" in the case of poor peasants.

¹⁰³ Colombian Constitutional Court, Award 008 Of 2009.

while leaving the interests and needs of victims unheard and unattended.¹⁰⁴ Implicitly, though, the bill could also be seen as an attempt by Congress, or at least by some political parties, to recover some of the legitimacy lost as a result of the scandal that exposed links between paramilitary groups and over 20% of the country's Congressmen.¹⁰⁵

The original version of the Bill sought to create a comprehensive framework for the protection of victims of crimes committed during the armed conflict,¹⁰⁶ which included: the declaration of victims' rights and the principles that should guide their application; the specification of public servants' duties with regards to victims and of the applicable disciplinary sanctions in case of their violation; the reinforcement of victims' rights within the criminal procedures carried out against perpetrators; the provision of humanitarian aid to victims of atrocities; the establishment of special treatment for victims with regards to certain State-provided social services; the systematization of mechanisms for guaranteeing the right to reparations.¹⁰⁷ The latter objective,



¹⁰⁴ See the statements of motivations of Bill No. 044 contained both in the Report for the First Debate of Bill No. 044 of 2008 at the House of Representatives (2008) and in the Modifications Sheet to Bill 044 of 2008 at the House of Representatives (2008).

¹⁰⁵ Uprimny and Saffon (2008). In spite of the high number of Congressmen involved in criminal investigations for alleged links with paramilitaries (see *supra* note 49), the Colombian Congress did not approve a political reform aimed at overcoming the institutional crisis derived from this scandal, which sought to remove from their seats Congressmen who are being criminally investigated until and unless they are found innocent.

¹⁰⁶ The title of the original version of the Bill referred to "victims of violations of the criminal legislation, of international human rights laws and of international humanitarian law in the framework of the armed conflict". Specifically, the Bill originally defined victims as "those persons who individually or collectively have suffered damages (...) as a consequence of actions or omissions that constitute a manifest violation of international human rights laws or a serious violation of international humanitarian law" (art. 8 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008)).

¹⁰⁷ Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008). Concerning rights and principles, the Bill recognized and defined the rights to truth, justice, reparations, equality and due procedure. It also proclaimed, among others, the principle of good faith presumption in favor of victims, as well as the *pro homine* principle, aimed at guaranteeing the application of the law's interpretation that is most favorable to and less restrictive of victims' rights.

As for the duties of public servants, worthy of mentioning are the duties to treat victims with humanity and respect for their human rights, and to prevent that legal and administrative procedures generate new traumas to them. Moreover, the Bill established that the non compliance with these duties would constitute a disciplinary misdemeanor, which would be considered to have particular seriousness if it involved discrimination, a refusal to reestablish the dignity of victims or to publicly apologize when appropriate, or the provision of false information or the hindering of the access to information about the facts and causes of victimization. (arts. 120-1 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate [2008]).

With regards to victims' rights in criminal procedures, the Bill included special measures for protecting victims of sexual violence, and clarified and reinforced victims' procedural guarantees related to the access to information, evidence, and judicial assistance and protection.

Concerning humanitarian aid, the Bill contemplated the possibility of victims requesting to the Presidential Agency for Social Action and International Cooperation humanitarian a monetary aid for satisfying their basic needs related to food, personal hygiene, supply use, kitchen utensils, medical and psychological attention, emergency transportation and transitory accommodation in conditions of dignity. Furthermore,

without a doubt the most ambitious of the “Victims’ Bill”, aimed at creating a national plan for the comprehensive reparation of victims, which would integrate the existing reparation mechanisms and would complement them with both administrative and substantive measures. On the one hand, the Bill sought to establish a coordinated system of public authorities in charge of repairing victims.¹⁰⁸ On the other hand, the Bill recognized the State’s responsibility in the reparation of victims,¹⁰⁹ extended all reparation measures to the –so far excluded– victims of crimes committed by State agents,¹¹⁰ specified the components of the right to reparations and established rules and additional measures for their fulfillment.¹¹¹

the Bill established a duty for both public and private hospitals of providing immediate attention to victims of terrorist attacks, combats and massacres, without imposing any conditions for admission.

As for the special treatment offered to victims with regards to their previous duties, the Bill contained the suspension of the terms to pay taxes for persons who are victims of a continued atrocious crimes and for all victims during the year after the crime is committed; the admission of the possibility of granting municipal tax amnesties; the creation of special programs offering alternatives for covering unpaid debts and public services.

Concerning the special treatment offered to victims with regards to State’s social services, the Bill contained, among others, the coverage of funerary expenditures of victims who cannot afford them; a priority access to housing subsidies; the granting of loans for reconstructing or repairing assets damaged by the crimes contemplated in the Bill; a priority access to educational programs of technical training; the creation of programs for income generation; special quotas for public office; the provision of health coverage for all victims until they obtain a comprehensive reparation; exemptions on academic fees in public education institutions and discounts in private ones; the exclusion from debtors’ data bases.

The systematization of mechanisms for guaranteeing the right to reparations is referred to in the main body of this text.

¹⁰⁸ The Bill created the Office of the High Commissioner for Victims, which would direct the system in question. Furthermore, as a compliment, it established a “victimologic volunteering”, composed by civil society’s organizations, which would provide assistance to victims for claiming attention and reparation measures, and which would receive support from the State (arts. 112-3, 114-116, 42-3 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate [2008]).

¹⁰⁹ Art. 43 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008). According to article 8 of the same version of the Bill, the State’s responsibility was established on the basis of its international and national duty to respect and guarantee human rights. The motivation of the Bill contained in the cited Report explains that the violation of such duty can take place not only through actions and omissions of State agents or of the State’s institutional structure, but also through the State’s lack of diligence to guarantee human rights with regards to violations committed by non-State actors.

¹¹⁰ As can be seen in note 104, the Bill’s definition of victims included all persons who suffered damages as a result of atrocious crimes; therefore, it did not distinguish victims on the basis of who the perpetrator of such crimes was. In this, the Bill was entirely different from all other transitional justice legislation in the country, which only referred to demobilized members of armed groups, and therefore excluded victims of State agents from the rights and benefits conceded to victims, such as administrative reparations. As we will see, however, this changed in the new version of the Bill backed by the government.

¹¹¹ Following international and national legal standards on the matter, the Bill recognized compensation, rehabilitation, satisfaction (or symbolic reparations), guarantees of non-recurrence and restitution as the components of the right to comprehensive reparations. Regarding compensation, the Bill established the duty of the State to compensate both material and personal (moral) damages through the already existing judicial and administrative procedures. Concerning rehabilitation, the Bill declared the State’s duty to guarantee the recovery of victims from physical and psychological traumas and their social adaptation through medical, psychological and psychosocial attention. As for satisfaction (or symbolic reparations), the Bill recognized the State’s duty to implement measures aimed at reestablishing the dignity of victims and at diffusing the truth of past atrocities, such as: commemoration acts and monuments, decorations,

As one of the essential components of the right to reparations, the Bill recognized restitution measures aimed at returning the victims to the situation they were in prior to the violation of their rights.¹¹² Among such measures, the Bill ordered the restitution of land, dwellings and other assets relinquished from victims as a result of the atrocious crimes committed against them,¹¹³ and established some general guidelines for making that restitution possible. According to those guidelines, the restitution of assets should benefit not only victims who had property titles over them, but also former holders and tenants.¹¹⁴ Moreover, it should proceed with respect to assets dispossessed both *de facto* and through legal transactions made under coercion or threat. To facilitate the (otherwise very difficult) proof of the illegality of the latter, the Bill established that any transaction involving allegedly dispossessed assets should be presumed to be spurious if (i) the victim offered summary proof of her condition of victim of the crime that allegedly generated the dispossession and of her entitlement to the asset at the time the crime was committed, or

tributes, truth diffusion, identification and burial of bodies of forcedly disappeared persons, diffusion of perpetrators' apologies. Moreover, the Bill created new satisfaction measures not included in previous laws, such as: the exemption of victims from mandatory conscription, a national day of solidarity with victims, a specific national decoration for victims, a Center for Historical Memory, a Museum of Memory and a General Archive of the Armed Conflict. With regards to guarantees of non-recurrence, the Bill disposed they included: the punishment of perpetrators of atrocities, the prevention of new crimes, the promotion of victims' support organizations, the creation of a pedagogy of citizenship aimed at promoting constitutional values, the abolishment of laws that contribute to human rights violations, the control of military and intelligence forces, the dismantlement of paramilitary groups, the social reintegration of children soldiers, the exclusion from office of public servants involved in human rights violations. Finally, the rules and measures that the Bill conceived for satisfying restitution are referred to in the main body of the text. The Bill also established that these different components of the right to reparations should be satisfied for specific communities affected by acts of systematic or generalized violence through a specific program of collective reparations. Chapter VI of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008).

¹¹² The definition of restitution is not limited to assets, but also refers to the reestablishment of freedom, the recovery of life projects and the return to the place of origin (arts. 51-2 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate [2008]). Restitution was ordered as one of the measures aimed at reintegrating the collection of victims' property negatively affected by violence, along with reconstruction, compensation (monetary or through the delivery of an equivalent asset), and debts coverage (arts. 54-6 Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate [2008]).

¹¹³ The Bill restricted the right to restitution to victims whose land was dispossessed as a consequence of the crimes referred to in the definition of victims, thus excluding "collateral" victims of the armed conflict –i.e. persons who only suffered destruction or other damages against their assets, but who were not victims of serious violations of human rights or of international humanitarian law, which could include forced displacement–. Following Elster (2004, pp. 168-71), this corresponds to a general trend in reparation programs of offering low compensations to victims of destroyed property, as compared to victims of confiscated property, which has been justified by two types of arguments: that authors of confiscation benefit from it whereas authors from destruction do not (as in the case of France after 1815), or that confiscation implies intentionality whereas property damages that result from war do not necessarily (which was the argument of Jewish groups who opposed the compensation of war property damages to East European victims).

¹¹⁴ Art. 53 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008).

(ii) the asset was located in an area of the country where the tenancy, value, uses or accumulation of real property were notoriously altered during the period of time in which the supposed perpetrators of the crime exerted influence therein.¹¹⁵ This reversal of the burden of proof would imply that if those who committed the dispossession did not prove the legality and transparency of their transactions, the assets should revert to the victims along with the entitlements they had over them. However, third parties with entitlements over the assets could intervene in the process and claim the protection of their rights, which would only proceed if they proved their “good faith” in the acquisition of the property.¹¹⁶

During its debate in the Senate, the “Victim’s Bill” was backed by a wide group of senators from various political parties, the government’s party and the left-wing opposition party.¹¹⁷ Furthermore, it was vigorously supported by victims’ and human rights organizations, which criticized certain aspects and omissions of the Bill, but in general conceived it as an important contribution to the struggle against impunity.¹¹⁸ This support was the result of a serious



¹¹⁵ Arts. 57-9 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008). The second presumption included assets declared to be under risk of forced displacement, in accordance with the Project of Protection of the Displaced Population’s Land and Patrimony (see supra note 79). Following Elster (2004, p. 183), these presumptions and the reversal of the burden of proof that they imply seem to be aimed more at avoiding the denial of restitution to those who have a right to it than to avoiding restitution to proceed in cases where such a right does not clearly exist.

¹¹⁶ Arts. 60-1 of Bill No. 044, as contained in the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008). The Bill did not define the notion of “good faith”, but in the light of the Colombian legal framework, it seems to refer to third parties not participating in or being aware of the illegal origin of the assets, which evidently includes them not having acted as front men in transactions aimed at “legalizing” dispossessed land. Indeed, the Bill explicitly considered this possibility, by establishing that third parties who claimed to have entitlements over the assets would be submitted to criminal investigation. This would certainly generate a disincentive for front men to claim assets under a process of restitution. However, the Bill did not establish any guideline for solving conflicts of dual ownership or possession, which could emerge between victims claiming the restitution of property and third parties who actually prove their good faith in acquiring them. On the difficult problem of dual ownership see Elster (2004, pp. 171-2).

¹¹⁷ Thus, the Report for the Second Debate of Bill No. 044 of 2008 at the Colombian Senate (2008) was signed by Senators from all these political parties, acting as joint proposers of the Bill.

¹¹⁸ *Semana.com* (November 12 of 2008). The aspects of the Bill that victims’ and human rights organizations criticized included: the lack of an institutional organization specifically devoted to the objective of land restitution, the labeling of certain measures of humanitarian aid and social services as reparations, the incorporation of the (in their view) very insufficient administrative program of reparations into the law, the ambiguity with regards to the relation between judicial and administrative reparation procedures, and particularly to whether they were complementary or mutually excluding measures. For the statement of reasons that justified victims’ and human rights organizations’ support of the Bill see, among others, Ciurlizza (2008); Uprimny and Saffon (2008). According to the latter text, these reasons included: the symbolic importance of Congress promoting a law protecting victims, given the priority granted to perpetrators’ benefits and the para-politics scandal; the convenience of adapting national legislation on victims’ rights to international human rights standards on the matter; the need of systematizing victims’ rights, so far dispersed in various legal dispositions with little coherence among them; the appropriateness of creating specific mechanisms for achieving the instrumental efficacy of victims rights; the relevance of establishing the State’s responsibility (and not merely solidarity) as the basis for reparations in order to explicitly recognize human rights’ violations committed by State agents, as well as negligently allowed by

effort by the Bill's proponents to create a broad consensus on the need to protect the victims' rights and on the most adequate mechanisms for achieving that goal. The effort included carrying out public hearings in the Senate to listen to the views of victims and governmental and non-governmental organizations interested in the matter; promoting regional public hearings to explain the Bill's content to victims and to gather their proposals and criticisms; convoking a series of meetings with victims' and human rights organizations aimed at receiving technical and substantive feedback from them; organizing several meetings with the government in order to obtain its commitment and support for the Bill.¹¹⁹

In fact, even though initially the government indicated its commitment to the Bill and several members of its political coalition actively promoted it, the government gradually changed its mind on some of its aspects.¹²⁰ In particular, it opposed the Bill's definition of victims, arguing that it should not make reference to the existence of an armed conflict in the country, but rather to the more ambiguous category of violence.¹²¹ Moreover, the government rejected the inclusion of victims of State agents as beneficiaries of the Bill, arguing that these victims should claim the protection of their rights through general judicial procedures conceived for ascertaining the State's responsibility for specific damages caused by its agents.¹²² Accordingly, the

State institutions; the fundamental importance of treating all victims equally, regardless of the affiliation of their perpetrator, and thus of not discriminating victims of State agents; the requirement to satisfy victims' right to a comprehensive reparation, and therefore to guarantee its different dimensions (restitution, satisfaction, rehabilitation, guarantee of non-recurrence) and not only monetary compensation, and of doing so through different mechanisms (administrative and judicial).

¹¹⁹ In the years 2007 and 2008 I personally participated in many of the meetings convoked by liberal Senators to gather victims' and human rights organizations proposals and criticisms.

¹²⁰ These aspects and the arguments for opposing them were mainly extracted from the Vice-Minister of Justice's intervention in the second debate of the Bill held in the Plenary of the Senate in June 2008.

¹²¹ Indeed, in spite of the quite notorious fact that there is an armed conflict in the country and that the State participates in it through its armed forces, the government frequently denies that fact, and instead refers to the existence of a terrorist threat. A plausible reason for this denial is the government's objective to impede the international recognition of guerrilla groups as organized armed groups with political aims. See Uprimny (2005a).

¹²² The argument is clearly discriminatory, since through such general judicial procedures victims of State agents will never be able to obtain many of the benefits contemplated in the Bill, such as: the existence of specific duties of public servants towards them and of correspondent disciplinary punishments for their violation, the protection of certain rights in judicial procedures, the access to special measures of humanitarian aid, social services and specific reparation measures created by the Bill, the application of the guidelines on asset restitution, and particularly of the presumptions established to make such restitution feasible. Moreover, the argument according to which there already exist judicial procedures through which victims of State agents can achieve the protection of their rights could also be used with regards to victims of armed groups, who could try to achieve the protection of their rights through ordinary criminal and civil procedures. The point is, however, that the special judicial and administrative procedures foreseen in the "Victims' Bill" aim at making it easier for victims to achieve such protection, and that the reasons for granting this benefit to other victims (their special vulnerability, the massive and systematic character of the violation of their rights, the difficulties for obtaining declarations of responsibility through ordinary processes, etc.) are entirely applicable to victims of State agents. The government's argument is

government also opposed the Bill's recognition of the State's responsibility as the justification for victims' reparations, claiming that the latter were grounded exclusively in the State's solidarity with the victims, and not on any violation of its human rights duties.¹²³ On the other hand, the government also criticized the Bill in terms of its financial viability. Specifically, it argued that the national plan for the comprehensive reparation of victims was financially unfeasible and also unnecessary, given the already existent judicial and administrative mechanisms for victims to obtain reparations. The government was particularly opposed to the restitution measures proposed in the Bill, arguing that there were not enough financial resources or institutional capabilities for implementing them.

In spite of the former reservations, the day before the voting of the Bill in the Senate's plenary, the government agreed with the Bill's proponents that it would support it, and that they would work out their disagreements during the legislative process within the House of Representatives. However, to the surprise not only of the Bill's proponents but also of the government's political coalition, during the debate preceding the vote on the Bill, the government's representatives harshly criticized the previously mentioned aspects of the Bill, and emphatically requested its coalition to abstain from voting in favor of it. Given that its coalition has a wide majority in the Senate, the government's sudden switch of positions almost led to the failure of the Bill. However, many Senators ardently denounced the government's breach of the agreement made with the Bill's proponents, and as a result some members of the government's coalition decided to vote in favor of the Bill against the government's request, which finally led to its passing.¹²⁴

Things between the government and the Bill's proponents were smoothed over soon after, and their meetings for reaching compromises on the Bill's content to be presented in the House of Representatives continued. However, once again the government surprised the Bill's proponents when,

particularly problematic, since it implies that the Colombian State would have a moral stance for judging the victims of its own crimes as less worthy of reparations. In a similar vein, Lewy criticizes the German State's exclusion of certain victims from reparation after World War II, by saying: "Having just functioned as a mass murderer, [the German State] now felt it could judge who was worthy or unworthy of reparation" (Lewy, 2000, p. 55, cited in Elster, 2004, p. 180).

¹²³ Although this seems to be a minor detail, it is actually a quite crucial issue, as basing victims' reparations on the solidarity principle may amount to denying the State's responsibility not only for the many crimes directly committed by State agents, but also for the massive amount of crimes committed by paramilitary groups. Now, as mentioned in note 49, the Inter-American Court of Human Rights has declared in several rulings that the Colombian State is internationally responsible for these crimes, not only because many of them could take place as a result of State agents' complicity or negligence, but also because the State facilitated and even promoted the emergence and expansion of paramilitary groups in the country through legal dispositions that permitted the creation of private self-defense groups, which soon degenerated into paramilitary groups. See Inter-American Court of Human Rights (2004, 2005, 2006a, 2006b, 2007).

¹²⁴ Uprimny and Saffon (2008).

in its first debate in the House of Representatives, it categorically opposed the version of the Bill they had been discussing, and instead submitted an alternative proposal that was rapidly voted and passed by the Committee on Constitutional Affairs of the House of Representatives –the majority of which is also controlled by the government’s political coalition–.¹²⁵ The alternative proposal modified the content of the Bill to such an extent that the author of the initial proposal said the government had “chopped the Bill into pieces”.¹²⁶ In effect, the government’s proposal not only modified the aspects of the Bill that it had criticized during the debate in the Senate, but also introduced other dispositions that significantly weakened the Bill’s potential for effectively protecting victims’ rights.

Thus, the new version of the Bill refers to the notion of “victims of violence”.¹²⁷ Although it includes in its definition victims of both illegal armed groups and members of the State’s public force, it establishes different conditions for them to gain access to the benefits of the Bill: whereas the former may demonstrate their condition of victims through a summary proof in an administrative accreditation system, the latter must obtain a judicial decision proving that their perpetrators acted out of bad faith or negligence.¹²⁸ In addition, the Bill only recognizes the State’s responsibility as a basis for reparations if there is a judicial decision to this effect; in all other cases the reparations are based on the principle of solidarity.¹²⁹ Furthermore, the government’s Bill severely restricted the scope of the national plan for the comprehensive reparation of victims, and eliminated several institutions that had been conceived in the initial version of the Bill in order to implement the



¹²⁵ See *Semana.com* (November 12 of 2008). In Colombia, the legislative procedure (Law 5 of 1992) establishes that ordinary laws must be discussed and passed by a permanent Committee and by the Plenary of each of the two legislative chambers (the House of Representatives and the Senate), thus requiring that they be approved in four legislative debates. The “Victims’ Bill” was discussed and approved by the Senate Committee on Constitutional Affairs and by the Plenary of the Senate before it was approved by the House Committee on Constitutional Affairs. Therefore, currently it only needs to be approved by the Plenary of the House of Representatives in order to become a law.

¹²⁶ Cristo (2009).

¹²⁷ The Bill defines victims as “those persons who individually or collectively and before the sanctioning of this law have suffered harms against their rights (...), as a consequence of actions committed by members of illegal organized armed groups during and on the occasion of their belonging to such groups, which have violated the criminal legislation or constitute a manifest violation of international human rights norms”, as well as “those persons who individually or collectively have suffered harms against their rights (...), as a consequence of bad faith or negligent actions committed by individuals who, during and on the occasion of their belonging to the public force, which have violated the criminal legislation or constitute a manifest violation of international human rights norms, judicially declared” (art. 9 of Bill 044 of 2008, which currently corresponds to the text approved by the First Committee of the House of Representatives).

¹²⁸ For a critique of the discriminatory treatment given to victims of State agents see, among others, De Greiff (2008).

¹²⁹ Arts. 6 and 46 of Bill 044 of 2008.

plan.¹³⁰ On the other hand, the Bill introduced new restrictive measures, such as: the exclusion of future victims (i.e. victims of crimes committed after the Bill came into effect) from the benefits of the Bill; the establishment of very low upper limits to any reparations ordered by judicial authorities within the administrative program of reparations; the creation of certain special social services offered to victims as reparations; the restriction of the scope of restitution measures exclusively to real property assets.¹³¹

All these changes have led some of the original proponents of the “Victims’ Bill” and many victims’ and human rights organizations to declare that these new conditions are inadmissible, as they violate international human rights treaties, and might even put victims in a worse situation than they are currently in.¹³² Even though many of them have claimed that the Bill should be tabled,¹³³ there is an important reason that probably makes them hesitate whether to actually promote its tabling, or to support its passing and then challenge its problematic dispositions before the Constitutional Court: in spite of having been one of the targets of the government’s criticisms against the original version of the Bill, the dispositions on land restitution were not excluded from the government’s version; on the contrary, they were significantly reinforced by new substantive dispositions and procedural mechanisms apparently aimed at guaranteeing its efficacy.

In fact, the Bill contains a specific chapter devoted to property restitution for victims,¹³⁴ which was drafted based on a consultancy the government requested from the Program on Alternative and Sustainable Development (MIDAS,



¹³⁰ Thus, the new Bill restricted the national reparations plan to a governmental document that should articulate the activities and information systems of the different State agencies that provide attention to victims. Therefore, it turned such plan into an institutional coordination system and divested it from comprising and integrating the different reparation programs existent and to be created in the country. On the other hand, the government’s proposal eliminated from the Bill, among others, the Office of the High Commissioner for Victims and the national reparations system, and replaced it with a Monitoring Commission (arts. 94 and 113 of Bill 044 of 2008).

¹³¹ Arts. 44, 28 (par. 3) and 51 of Bill 044 of 2008.

¹³² The former is certainly the case of the discrimination against victims of State agents and future victims; the latter might happen as a result of the setting of upper limits to (so far discretionary) judicial reparations.

¹³³ Very recently, a wide group of victims sent a letter to the members of the House of Representatives explicitly requesting them to reject the bill, arguing that it goes against their interests and needs. See *Nación invisible* (2009). See also *Mesa nacional de víctimas pertenecientes a organizaciones sociales* (2008); *ICTJ* (2008); *United Nations* (2008); *Cristo* (2009).

¹³⁴ This version of the Bill also recognizes the right to restitution to victims whose land has been dispossessed as a consequence of the crimes referred to in the definition of victims (art. 51 of Bill No. 044 of 2008). However, since this definition refers now not only to serious violations of international human rights law and of international humanitarian law, but also to violations of the national criminal legislation, it is not so clear that it maintains the exclusion of collateral victims from restitution measures. Indeed, the Colombian Penal Code includes many offenses against economic assets, and particularly against property, such as the damage of another’s property, the violent disturbance of pacific possession, land invasion and land usurpation (arts. 261-5 of Law 599 of 2000 (Colombia)). Now, it would still be necessary for victims to prove intentionality, in the form of penal guilt, of authors of these acts.

by its acronym in Spanish) of the United States Agency for International Development (USAID). The chapter maintains the orientation given to restitution measures in the initial version of the Bill; however, instead of treating it as one of many other components of reparation, it puts property restitution “at the heart of reparations”.¹³⁵ Hence, the chapter also conceives as beneficiaries of restitution measures victims who were formerly owners, as well as holders, occupants and tenants.¹³⁶ Furthermore, it also admits the possibility of restitution of land dispossessed both *de facto* and *de iure*, and establishes a series of presumptions to facilitate the proof of dispossession. Indeed, the chapter indicates that legal transactions made by victims involving their allegedly lost assets will be presumed illegal if the victim summarily proves one of the following: that there was no payment or that it was derisory; that it was made under coercion of the victim or her family; that prior to the transaction the victim, a member of her family, or the owners, holders or tenants of neighboring properties were victims of forced disappearance, kidnapping, homicide or torture; that the property in question was used for preparing, facilitating, permitting or developing illegal activities.¹³⁷ Moreover, the chapter orders to give priority to restitution in areas of the country where the tenancy, value, uses or accumulation of real property were notoriously altered as a result of violence or intimidation exercised by perpetrators.¹³⁸

However, in contrast with the original version of the Bill, the new chapter on property restitution contains not only substantive dispositions, but it also establishes a specific procedural framework for putting these dispositions into operation. Thus, it contemplates the creation of a Truth Commission for land issues, in charge of elucidating the truth about the most serious episodes of land eviction and dispossession, and of making recommendations concerning the implementation of restitution measures. Moreover, the Bill grants the courts in charge of judging demobilized armed actors the compe-



¹³⁵ See the justification of the chapter contained in the Modifications Sheet to Bill 044 of 2008 House of Representatives, 157 of 2007 Senate (2008). In the new version of the Bill, instead of being one of the measures aimed at reintegrating the collection of victims' assets, restitution is conceived as the main category under which other reintegration mechanisms fall, such as reconstruction, compensation and real estate permutation. However, this is equivocal, as the latter two measures are not restorative, but rather compensatory. Moreover, the new Bill labels as restitution measures that do not even clearly correspond to reparations, such as housing subsidies.

¹³⁶ Art. 51 of Bill No. 044 of 2008.

¹³⁷ Art. 53-4 of Bill No. 044 of 2008. As can be seen, these presumptions are more demanding for victims of dispossession, who merely had to summarily prove their victimhood and their previous entitlements over the allegedly dispossessed assets in the version of the Bill promoted by its original proposers.

¹³⁸ Art. 55 of Bill No. 044 of 2008. Note that, in contrast, in the other version of the Bill, transactions over assets located in these areas were presumed illegal.

tence to resolve on victims' claims for restitution of their real property.¹³⁹ In exercise of this competence, these courts can undertake different processes, which can lead to one of the following decisions: (i) the declaration of the absence of just entitlement with respect to an asset and therefore the order to cancel existing entitlements over it; (ii) the clarification of legal entitlements over an asset, and the consequent decision to recognize or cancel them; (iii) the declaration of ownership on the basis of prescription, which will be considered to take place after three years of possession in case of good faith or after five years in case of bath faith; (iv) the order to reconstitute the possession of a private estate or the occupation of a public vacant one, which might be accompanied by the declaration of ownership or by State adjudication; (v) the order to reconstitute the tenancy of an asset previously held by virtue of a contract; (vi) the extinction of ownership over the land; (vii) the eviction of persons against whom a judicial decision of restitution has been issued.¹⁴⁰

All the former processes privilege the rights of victims over those of third parties who have entitlements over the assets in question. Indeed, the latter may intervene in the processes to prove the legality of the transactions through which they acquired the assets, but if the victims' claims to restitu-



¹³⁹ Art. 61 of Bill No. 044 of 2008. The version of the Bill submitted by its original proposers to the House of Representatives attributed this competence not only to the tribunals in charge of judging demobilized armed actors, but also to a to-be-created administrative institution (Pro-land in English), which would have the authority to decide victims' restitution claims, by holding jurisdictional functions in an abbreviated administrative procedure (arts. 78, 82, 86 of the Modifications Sheet to Bill 044 of 2008 at the House of Representatives [2008]). On the other hand, USAID's MIDAS Program suggested that this competence was given to civil tribunals specifically created for solving restitution claims, which would have the same hierarchical level than the criminal tribunals that judge demobilized actors, but would be specialized in civil law and would be exclusively devoted to restitution cases.

¹⁴⁰ Arts. 65-71 of Bill 044 of 2008. According to these dispositions, the declaration of the absence of just entitlement will proceed whenever members of an illegal armed group acquired the asset in question, third parties profited from the violence and intimidation exerted by such groups to acquire it, its property was granted by the State in violation of legal dispositions or under the coercion of an armed group, or the asset was transferred under the influence of an illegal armed group. In this process, the absence of just entitlement will be presumed if a legal transaction to transfer the asset took place in a time when illegal armed groups were present in the area, or when terrorist attacks, combats, massacres, or acts of forced displacement took place. The presumption will not allow proof against it if the transaction was done over priority areas for restitution purposes. Moreover, if the absence of just entitlement is declared, the person who appeared to own the asset will not have a right to the restitution of the price she paid for it or to the improvements it made to it.

On the other hand, the extinction of dominion can be requested not only by victims but also by any public authority, and it will proceed over assets that have been usurped, are owned by members of illegal armed groups, have been claimed by victims and their legal origin has not been proved by their owners, or have been used under the consent of their owner to refuge illegal armed groups, or to commit homicides, massacres, illegal detentions, or other human rights violations.

With regards to processes of declaration of ownership on the basis of prescription, note that the prescription terms foreseen for these cases are shorter than ordinary ones (see *supra* note 77). Note, also, that for these cases, as well as for processes of restitution of the occupation or adjudication of a vacant public land, the Bill established that the duration of forced displacement of a victim would be counted as possession or occupation time. Following a similar logic, the Bill establishes that, in processes of tenancy restitution, contracts will be considered suspended for the duration of the forced displacement of the victim.

tion proceed, that proof will only entitle them to request compensation. In the absence of such a proof, third parties will be considered to be holders in bad faith and will not have a right to obtain compensation for the assets or for the improvements made to them.¹⁴¹

It does not seem unreasonable to assume that victims' and human rights organizations would endorse the previously described measures. Indeed, all along the discussions about transitional justice in the country, these organizations have insisted on the crucial importance of carrying out effective land restitution measures for protecting the rights of the victims of forced dispossession, as well as for combating the country's *agrarian counter-reform*, thereby contributing to guarantee the non-recurrence of atrocities.¹⁴² Moreover, these organizations actively supported the chapter on property restitution that was contained in the version of the Bill submitted by its original proponents before the House of Representatives, which coincided to a great extent with the government's Bill on this particular topic.¹⁴³ The only significant differences between the two restitution chapters consist in the latter's exclusion of personal property from restitution measures and in its creation of a judicial (rather than administrative) procedure for solving restitution claims. Certainly, these differences might lead victims' and human rights organizations to criticize the restitution chapter of the Bill. But these criticisms would probably be aimed at fine-tuning the dispositions rather than rejecting them altogether.

Consequently, regardless of other major disagreements about the content of the "Victim's Bill" and of its actual final outcome, its discussion in Congress has shown that there is an odd consensus between the government and its political coalition, on the one hand, and victims' and human rights organizations and the political coalition that has supported their cause, on the other, on one of the thorniest and most polarizing issues in the country: how to deal with the problem of land allocation in the settlement of the armed conflict.



¹⁴¹ Art. 115 of Bill 044 of 2008. The privilege of victims over good-faith new owners corresponds to the trend that Elster (2004, p. 172) identifies, according to which "[w]hen (and only when) something like a generation has passed since the wrongful acquisition are the new owners allowed to retain their property". Indeed, it is very likely that claims of restitution will only be received from victims of crimes occurred after 1964, which is the date identified by the CNRR (2006b) as the contemporary origin of the Colombian conflict (see *supra* note 4). Therefore, they will be claims made within a same generation period. For a defense of limiting restitution claims to the relevant generation as a rule and only admitting intergenerational restitution exceptionally, see Cowen (2005, pp. 24-31).

¹⁴² See, among others, Uprimny (2005b); Uprimny and Saffon (2006); CSPPDF (2008b, 2009); Colombian Commission of Jurists (CCJ, 2008a, chapter 5).

¹⁴³ Modifications Sheet to Bill 044 of 2008 at the House of Representatives (2008).

III. SORTING OUT ARGUMENTS ON RESTORATIVE JUSTICE FROM INTERESTS AND OTHER CONCEPTIONS OF JUSTICE

The emergence of a consensus between the government and victims' and human rights organizations on the solution that should be given to the problem of land in the partial or fragmentary transitional process that is currently taking place in Colombia is of great significance. It means that these actors agree that the problem should be mainly approached from the perspective of restorative justice, rather than from the perspective of either distributive justice or economic efficiency. Indeed, by supporting the chapter on restitution of the "Victims' Bill", these actors seem to agree that the main purpose of land allocation measures should be to attempt, inasmuch as possible, to return the land to victims who were deprived from it during the conflict, regardless of their level of welfare and of the future use they might give to the restituted land. Therefore, they seem to agree that the protection of past entitlements over the land should have priority over concerns about unequal distribution and economic inefficiency of the land. In that way, following Elster, they appear to adhere to a "backward looking and rights-based" perspective, which focuses on past suffering, rather than on present need or on future social welfare, as the main criterion for allocating land.¹⁴⁴

Nevertheless, this consensus is disconcerting for various reasons. First of all, its emergence was completely unexpected, given the high degree of polarization generated by the issues of land allocation and transitional justice, and particularly the imminent disagreement about reparations of usurped land that seemed to prevail at the time the consensus suddenly emerged. As was shown in the first section of this paper, the question of how to deal with the problem of land allocation has traditionally been the subject of profound disagreements between defenders and detractors of land reform policies. Due to the State's inability to channel them adequately, these disagreements have become a deadlock that has blocked the possibility of reaching any compromise on the problem of land allocation, and has therefore contributed to the continuation of the armed conflict.

On the other hand, the recent massive demobilization of paramilitary groups and the subsequent creation and implementation of transitional justice mechanisms have generated a great deal of tension between the



¹⁴⁴ Elster (2004, p. 177) distinguishes between past suffering, present need and future welfare as possible grounds for reparations accorded to victims. On the basis of this distinction, he opposes restitution in kind and compensation, arguing that the former is "backward looking and rights-based" –thus privileging past suffering–, while the latter is "forward looking and utilitarian" –thus being based on future welfare– (Elster, 2004, p. 174). For a general development of the principles of justice based on need, on the one hand, and on efficiency, on the other, see Elster (1992, pp. 84-98).

government and victims' and human rights organizations regarding how the atrocities committed by their members should be dealt with.¹⁴⁵ One of the questions that created the most intricate tensions between those actors was the reparations of dispossessed land. In fact, as was shown in the second section of this paper, since the initial discussions of transitional justice mechanisms, victims' and human rights organizations had criticized the silence of these mechanisms on the problem of land usurpation. Moreover, during the debate of the "Victim's Bill" within the Colombian Senate, the restitution measures included in the initial version of the bill were one of the issues that generated most reticence in the government, and which even led it to request the government's coalition to withdraw its support from the entire bill.

On its own, the polarization generated by these issues does not constitute a sufficient reason for finding the consensus between the government and victims' and human rights organizations puzzling. In effect, this consensus could be seen as a sudden momentous decision by different political actors to set their differences aside, to jointly promote a project capable of solving the problem of land allocation and, in so doing, to contribute to the resolution of the armed conflict in the country. Actually, a context in which transitional justice mechanisms are being implemented constitutes a particularly propitious setting for promoting a project of this type, since transitions are often foundational moments in which profound democratic transformations can be instrumented. Nevertheless, there is an important reason for doubting that altruism is the primordial motivation for these actors to support land restitution: the latter is a very difficult aim to achieve, and it raises certain important justice concerns. Therefore, it is not obvious that the genuine and sincere desire to carry out the best and most just solution to the land problem in Colombia should be through a restorative justice approach.¹⁴⁶

In the context of a transition from war to peace, land restitution is an extremely difficult aim to achieve because it depends on the identification and proof of victims' entitlements over land before the conflict, as well as of the illegal or unjust nature of the new entitlements acquired over it during the



¹⁴⁵ These tensions have essentially been characterized by the government's adoption of pragmatic stances that tend to privilege impunity over justice and that thus ignore or give weak importance to victims' rights, on the one hand, and by victims' and human rights organizations' continuous insistence in the binding character of international human rights law and in the consequent necessity to adequately protect victims' rights, on the other. For a detailed analysis of these tensions, see Saffon and Uprimny (2009a).

¹⁴⁶ Here, I am following Elster's definitions of altruistic motivations and altruistic acts. According to him, an "altruistic motivation" is "the desire to enhance the welfare of others at a net welfare loss to oneself", and an "altruistic act" is "an action for which an altruistic motivation provides a sufficient reason" (Elster, 2006a, p. 185). Stated in these terms, my argument is that the desire of the government and of victims and human rights' organizations to provide the best and most just solution to the problem of land does not seem to be a sufficient reason for their support to the project of land restitution.

conflict. Of course, presumptions that alleviate the burden of proof might be imposed, as they intend to be in the Colombian “Victims’ Bill” (see section II), but these presumptions will still require a minimum degree of proof concerning the existence of previous rights and the link between new entitlements and wrongful acts.¹⁴⁷ However, in the aftermath of a conflict, even this minimal proof might be difficult to obtain, due to the destruction of documentation and records that often occurs during conflict, as well as the multiplicity of individuals with subsequent and concomitant rights over land, which is especially likely to arise when the conflict has been protracted.¹⁴⁸ In Colombia, the obsolete nature of the country’s information system on the juridical status of properties, the precariousness that has traditionally characterized rights over land, and the sophisticated legal transactions used by evictors to hide the illegality of their possessions, all exacerbate these difficulties to such an extent that the idea of founding the country’s transitional land policy on a restorative justice perspective seems almost absurd at first sight.

But the insistence on using the restorative justice approach for land allocation in the settlement of the Colombian conflict is not only problematic because of these practical difficulties. The normative basis for restorative claims is in itself problematic, as it opens the door for restitution measures to correct past injustices that lie much further back in time than those which transitional justice should be concerned about. Indeed, as mentioned earlier, restitution is based on past legal entitlements over land, the protection of which is conceived as a duty that implies the reparation of violations through the return of those entitlements to their original holders. The assumption that underlies this duty is that such legal entitlements are just, i.e. they are based on an uninterrupted chain of just acquisitions that justifies the protection of each of its links. Otherwise, it would not be clear why some entitlements (those acquired before the conflict) should be protected over others (those acquired after the conflict). Now, the problem is that almost all legal entitlements over land can be traced to an unjust acquisition if only one goes far back enough.¹⁴⁹ Consequently, setting the starting point of a specific conflict as the



¹⁴⁷ See *supra*, section II, pp. 11-2.

¹⁴⁸ Uprimny and Saffon (2007).

¹⁴⁹ According to Cowen (2005, p. 17), “[e]veryone living today, if he or she goes back far enough, can find ancestors who were oppressed and victimized. Few land titles have been acquired justly. Subsequent corporate assets have been built on stolen land or generated by investments on originally stolen land endowments”. This is why this author asserts that not even a radical libertarian as Nozick was willing to take the principle of rectification of unjustly obtained property rights to its land consequences. To justify this claim he cites the following passage from Nozick’s *Anarchy, State and Utopia* (1974, p. 231): “These issues are very complex and are best left to a full treatment of the principle of rectification. In the absence of such a treatment applied to a particular society one *cannot* use the analysis and theory presented here to condemn any particular scheme of welfare payments, unless it is clear that no considerations of rectifica-

temporal limit before which all legal entitlements should be considered just, and therefore deserving protection, might be considered arbitrary. Looking for just entitlements that truly deserve protection must lead to the conclusion that either no legal entitlements should be protected, or that those that should be are the very first entitlements granted over the land in question, the protection of which might not be very useful for repairing the victims of the conflict and for achieving a lasting transition from war to peace.

In the Colombian case, for instance, if we assert that land should be restituted to persons who were dispossessed from it during the current armed conflict, should we not admit as well that it should be also restituted to persons who, having entitlements over land, were illegally dispossessed from it before the conflict, especially considering that such dispossessions are at the roots of the present conflict? But following that logic, we could additionally claim that land should also be restituted to persons who were dispossessed from it during “La Violencia” conflict in the 1950s, which planted the seeds for the land occupations and subsequent dispossessions that took place before the current armed conflict.¹⁵⁰ And this would in turn allow us to trace the land dispossessions that lie at the origins of “La Violencia” and to recognize holders of legal entitlements in the early twentieth century and the late nineteenth century as possible beneficiaries of restitution measures. Since these persons mostly acquired their land from the State, we could either stop at this point and decide that they (or their heirs) should be the real beneficiaries of restitution measures, or we could continue arguing that the State’s entitlements over the land came from the illegal appropriation of indigenous peoples’ land by the Spanish crown in colonial times. Evidently, either one of these conclusions seems absurd, if the land restitution measures aim to repair the victims of the conflict and, in so doing, to contribute to the settlement of the armed conflict and to the non-recurrence of atrocities. Indeed, restitution measures would lead to the delivery of great extensions of land to persons who might not be even remotely considered victims of the Colombian conflict.¹⁵¹ Moreover, they would imply taking land away from persons who in many cases

tion of injustice could apply to justify it”. Therefore, Cowen (2005, p. 17) ironically concludes: “Nozick notes that Rawls’s Difference Principle(!) might provide the best operable rule of thumb for rectification”.

¹⁵⁰ This claim seems to be implicitly made by those who have criticized the Colombian Commission for Reparations and Reconciliation (CNRR, 2006b) for establishing 1964 as the origin of the contemporary conflict for the purpose of identifying the victims. For the reference to these criticisms see Buriticá (2006); Saffon and Uprimny (2009a).

¹⁵¹ In Colombia, indigenous peoples have been disproportionately affected by the contemporary armed conflict, and have been particularly targeted as victims of forced displacement. Indeed, according to the CSPPDF (2008b), 3,7% of forcibly displaced persons recognize themselves as indigenous, although indigenous persons in Colombia constitute only 3,4% of the national population. Therefore, it is highly likely that many individual members and even many communities as a whole (as owners of the collective property of their land they inhabit) have suffered the dispossession of their land. However, their actual

have legitimately acquired it through valid and just transactions. Finally, measures of the sort would not contribute to solving and could even worsen the problems of unequal distribution and inefficient use of the land, which nonetheless are considered to be important root causes of the conflict.

This brings us to another problematic feature of the restorative justice approach for allocating land: it might lead to outcomes that seem unjust from the perspective of other principles of justice, namely, distributive justice and economic efficiency. This is the case not only if we allow the restitution logic to go to its ultimate (and most absurd) consequences, but also if we restrict its application to the wrongs perpetrated during the armed conflict. In this case, as mentioned at the beginning of this section, since the protection of entitlements held prior to the conflict is the main concern of restitution measures, these can be implemented without considering the present level of welfare of their beneficiaries, or the future economic productivity of the restituted land. This backward-oriented perspective implies that victims who lived under conditions of deprivation and marginalization from the State's protection before the conflict should merely be returned to the legal situation in which they were prior to the violation of their rights, even if this situation did not prevent or actually promoted their marginalization. Moreover, this perspective implies admitting that victims who suffered from material losses in the past but who have recovered and now enjoy a comfortable economic situation should still be preferential beneficiaries of land redistribution, even if that results in the exclusion of other needier sectors of the population. The latter implies admitting that victims could use land reform as a mechanism for the reconstruction of previous fortunes,¹⁵² by claiming the restitution of large extensions of land despite the higher social and economic benefits these could yield if they were distributed among more people.

These justice concerns raised by restitution should be qualified in the Colombian case, both because the vast majority of victims belong to the most excluded sectors of the population and because the forced appropriation of land during the conflict has substantially contributed to increasing its inefficient use. Nevertheless, the possibility that restitution will run against or at least hinder the achievement of distributive and efficient outcomes consti-

condition of victims seems to be related more to these events than to the ordinary appropriation of their ancestors' lands.

¹⁵² Elster (2004, p. 170) suggests that restitution measures could allow for this phenomenon to happen, by referring to a counterexample: post-World War II legislation for compensating victims of destroyed property in France and Norway, which was based on "need and solidarity, rather than entitlement", and which therefore explicitly excluded "regressive" measures such as the compensation of " 'sumptuary' elements" in France, and the recreation of "prewar fortunes" in Norway (Elster, 2004, p. 170, citing the French law of October 28, 1946, and NOU, 1997, p. 47).

tutes an important reason for being puzzled about the support given by the government and by victims and human rights' organizations to the project of land restitution, due to the severe problems of unequal distribution and inefficient use of land faced by the country.

Given the significant difficulties that exist for carrying out a successful restitution policy and the concerns that the aim of restitution itself tends to raise from the point of view of other conceptions of justice, it seems quite unlikely that the consensus is exclusively or even predominantly motivated by the actors' sincere desire to give the problem of land the best and most just solution. The suspicion that non-altruistic motivations underlie the government's and victims and human rights' organizations' support of the land restitution project seems to be confirmed by the fact that, when dealing with the problem of land allocation, these actors have previously defended perspectives of justice that were quite different from the restorative perspective and that are more compatible with their interests. This is the last but most important reason why the sudden consensus between the government and victims' and human rights' organizations causes perplexity. Indeed, this consensus has emerged despite these actors' adherence to different conceptions of justice concerning the issue of land, and despite the fact that these conceptions are in line with their interests.

On the one hand, the Colombian government, with President Uribe as its head, has constantly defended a perspective according to which land allocation should be carried out by the State on the basis of the criterion of economic efficiency, although interpreted in a quite peculiar way. Indeed, the government has continued the tendency, described in section I of this paper, to base the State's policy of land allocation mainly on a market-based logic. However, it has attempted to exacerbate this logic, by facilitating and even subsidizing the access to land to agrarian businessmen who can exploit it efficiently, thus allowing a further concentration of land ownership and opening the possibility for obtaining legal entitlements over forcibly dispossessed land. These potential consequences of the government's defense of the efficiency principle would greatly benefit big landowners who have held strong connections with paramilitary groups and who constitute an important part of the support base of President Uribe's government.

Two examples clearly illustrate the government's stance. The first example is the "Statute for Rural Development", contained in Law 1152 of 2007, which was promoted by the government as the main instrument of its public policy on land reform, but which was recently declared unconstitutional by the Colombian Constitutional Court.¹⁵³ The statute practically excluded the



¹⁵³ Colombian Constitutional Court, Ruling C-175 of 2009. The Court declared the Rural Development Statute unconstitutional, mainly because it had not been submitted to a prior consultation process with

State's direct purchase of land as a mechanism for redistributing property, by restricting it to very specific purposes.¹⁵⁴ Instead, the statute aimed to expand the access to rural property mainly through subsidies for the purchase of land by small producers, the allocation of public vacant land, and the allocation of land recovered by the State as a result of ownership extinction processes.¹⁵⁵ In the case of subsidies, the statute conditioned their granting to the design of productive projects, which should demonstrate their financial viability and profitability, as well as an already existent agreement to buy a specific plot of land. As for the allocation of public vacant land, the statute did not limit its beneficiaries to small peasants and settlers of the agricultural frontier, but extended it to specialized firms capable of industrially developing the allocated land through modern production systems, thus guaranteeing productivity. Lastly, the statute foresaw that properties recovered through ownership extinction processes should be incorporated into the National Reparations Fund, so as to contribute to the reparation of victims of atrocious crimes, either by allocating them directly to the victims or by allowing the latter to exchange them for other properties, but only under the condition that they be voluntarily offered by their owners.¹⁵⁶

The above dispositions were widely criticized not only by victims' and human rights organizations, but also by academicians and even by State controlling agencies, because they risked contributing to the aggravation of the problems of unfair distribution of property and of the legalization of land acquired through coercion during the conflict.¹⁵⁷ According to these criticisms, the mechanisms contemplated by the statute for guaranteeing access to land could easily end up being detrimental to the interests of peasants and beneficial to the interests of agrarian entrepreneurs, thus widening the gap between the rich and the poor. Indeed, the imposition of

the country's ethnic communities who would be affected by it, in violation of the human rights' standards on this matter, particularly Convention No. 169 of the International Labor Organization. Although the consequence of the Court's decision was the expulsion of the entire text of the newborn law from the Colombian legal system, the content of the statute is worth analyzing because it clearly exemplifies the government's stance on the question of land allocation.

¹⁵⁴ These purposes were: granting land to landless ethnic minorities, to survivors of natural disasters, and to occupants of natural reserves (art. 71 of Law 1152 of 2007).

¹⁵⁵ On these processes see *supra* note 78.

¹⁵⁶ Arts. 56, 60-1, 90-1 and 133 of Law 1152 of 2007.

¹⁵⁷ For criticisms of the statute made by victims' and human rights organizations, see the third public action of unconstitutionality presented against Law 1152 of 2007 by Colectivo de Abogados José Alvear Restrepo and other human rights and victims' organizations (Colectivo de Abogados José Alvear Restrepo, et. al., 2007). This action was not decided by the Constitutional Court because it favorably decided the first action presented against the statute, which claimed its unconstitutionality for procedural reasons (absence of consultation to ethnic minorities). See also CCI (2008b); Cepeda (2007). For criticisms by academicians see Salgado (2009); Machado (2009). For a strong criticism made by the National Controller's Office, see Procuraduría General de la Nación (2008).

stringent conditions for the access to subsidies, which required financial and technical capabilities that poor peasants often lack, could limit their access to those benefits, and in the few cases that access was gained, the peasants would have to join productive chains dominated by large enterprises in order to satisfy the conditions, at the expense of their autonomy. Besides, the possibility of allocating public vacant land to specialized firms for their industrial development amounted to instituting a competition for the allocation of public land between settlers and poor peasants, on the one hand, and mid-sized and large entrepreneurs, on the other, with a disproportionate advantage for the latter, given the use of productivity criteria for assessing land development projects.

Furthermore, the statute was criticized because it set the bases for the acquisition of entitlements over forcibly dispossessed land, at least for two reasons. First, the possibility of allocating public vacant land to firms opened the door for the legalization of dispossessed public land previously occupied by victims with the expectation of obtaining its allocation.¹⁵⁸ Second, the privilege given to compensation over restitution measures –by assigning confiscated land to the National Reparations Fund and by restricting the possibility of exchanging land delivered to victims as reparations for the land they lost during conflict– implied blocking the use of restitution claims as a mechanism not only for repairing victims, but also and especially for recovering illegally dispossessed land in a more effective way. The statute's implicit closure of restitution claims could amount to allowing the legalization of vast amounts of land dispossessed during conflict, given the extremely unsuccessful outcomes of the other mechanisms available for recovering land from usurpers: ownership extinction and its voluntary handing over by armed actors.¹⁵⁹

The second example of the Uribe government's stance with regards to the problem of land can be found in the "Carimagua affair", which generated



¹⁵⁸ Indeed, in contrast with other cases of violent land appropriation, these cases are not so easily "legalizable" by usurpers, given that only the State can give entitlements over them through a procedure that, so far, is restricted to poor peasants and settlers. However, the opening of public land allocation to specialized firms would allow them to request the land they occupy by proving their entrepreneurial capacities, their violent appropriation notwithstanding.

¹⁵⁹ Although the law on dominion extinction establishes a short procedure and the reversion of the burden of proof for terminating the ownership of assets suspected of having an illicit origin or purpose (see *supra* note 78), it has produced very meager results. Indeed, on 2002 the current government planned to extinguish the dominion of 110,000 hectares of land by 2006; however, in June of 2005, only a few more than 5,000 had been effectively extinguished (Flórez, 2005, p. 13). On the other hand, demobilized armed actors have only delivered an extremely low quantity of appropriated land for the purpose of reparations. According to the Colombian Commission of Jurists (CCJ, 2008a), "Until December of 2007, the minutes of the Reparations Fund only reported the delivery on the part of paramilitaries of 4.654,2 hectares of rural estates and five urban real estate properties, which corresponds to a percentage between 0,07 and 0,08 of the land abandoned by the displaced population".

a heated public controversy.¹⁶⁰ Carimagua is the name of an estate owned by the State with an area of 15,000 hectares. In 2005, the government decided to devote this estate to the development of an agricultural productive project that would benefit around 1,000 peasant families, mostly belonging to the forcibly displaced population, who would receive titles to the land.¹⁶¹ However, in 2007, the government suddenly decided to change the use of the Carimagua estate in order to develop long life cycle crops there, and immediately afterwards opened a bidding process to award exploitation rights over the estate, which required proponents to demonstrate an extremely high financial capacity in return for very low installments.¹⁶² The scandal exploded when the National Controller's Office became aware of the bid and challenged it for going against the rights and interests of the forcibly displaced population. This report sparked the public debate, which became particularly heated when it became known that the bidders had close ties with the government.¹⁶³ The government was blamed for using the land policy to satisfy the interests of the richest and most powerful, at the expense of the protection owed to the forcibly displaced.

The initial response of the government to these criticisms was that, given the great potential of the Carimagua estate for large-scale production and the magnitude of the costs involved in preparing it for such type of production, the most efficient use that could be given to it was to hand it over to large enterprises, which would in turn offer employment to poor peasants and produce greater returns that could eventually be used to compensate the forcibly displaced persons. President Uribe literally said: "I think it is more interesting to have big projects of entrepreneurial industry than merely di-



¹⁶⁰ The news that revealed the scandal can be found in *El Tiempo* (February 10, 2008). The main arguments of the controversy are depicted in two documents: one elaborated by Cecilia López (2008) –an ex Minister of Agriculture who is currently Senator of the liberal opposition party and who prompted the political debate held in Congress against Andrés Felipe Arias, the current Minister of Agriculture, for the "Carimagua affair"–, and another prepared by Minister Arias in response to López's document (Arias, 2008).

¹⁶¹ The project was conceived as part of a much more ambitious agroindustrial project planned in the region, which, for the purpose of obtaining funding from international cooperation, was presented as aimed at creating a carbonic gas drain through the reforestation of the area, as well as the settlement of new population with agricultural economic opportunities. See Presidencia de la República de Colombia (2006).

¹⁶² The financial capacity had to be proved by demonstrating to have assets greater than 8,000 million dollars and a gross income greater than 25,000 million dollars in the previous 10 years. The monthly installments for a 50 year-long exploitation contract were of approximately 10 dollars per hectare during the first 9 years, and 100 dollars per hectare from the tenth year on (López, 2008, p. 22). However, according to López (2009, p. 22), approximately from the seventh year on, the revenues for the exploiters could be of around 10 million dollars.

¹⁶³ *El Tiempo* (February 13, 2008); *El Espectador* (February 19, 2008). According to López (2008), of the four firms that registered for the bid, one had been a minor donor to the President's campaign, another had the Treasury Minister's uncle as member of the Board of Directors, and a third one held contracts with State agencies.

viding the land into lots, which will be shacks with weeds and poverty”.¹⁶⁴ Instead of placating criticisms, the government’s response generated even more public indignation, represented not only in criticism by victims’ and human rights organizations, but also by the political opposition, the press and other sectors of civil society.¹⁶⁵ According to these criticisms, the government’s decision implied submitting the welfare of one of the most vulnerable and marginalized sectors of the population to the future and uncertain possibility of the profits earned by large enterprises being used to pay for such welfare. Moreover, the decision clearly illustrated the agrarian model that was being promoted by the government, which intended to promote “entrepreneurship” in the countryside, and which saw peasants as economically handicapped agents, thus intending to keep them away from rural areas and condemning them to poverty.¹⁶⁶ As a result of public pressure, the government decided to suspend the opening of the bid planned for allocating the exploitation of Carimagua, arguing that a “Commission of experts” would first evaluate the viability of allocating the estate to the forcibly displaced.¹⁶⁷

In the two previous examples, in spite of the rhetoric used to defend it, it is clear that the agrarian model promoted by the government does not entirely adjust to the principle of economic efficiency. Indeed, it allows for the increase of land concentration in the hands of a few, which –as was shown in section I– has produced quite inefficient uses of the land in Colombia. Furthermore, it offers land usurpers ways for legalizing dispossessed land, which –as was also mentioned in section I– has been frequently devoted to unproductive uses, such as cattle ranching or recreation.¹⁶⁸ Lastly, it seems to promote the exit of peasants from the countryside, as well as to inhibit the return of those already displaced from the armed conflict, thus hindering their autonomous generation of resources through the activity they are best acquainted with: land cultivation. This leads to speculation that the govern-



¹⁶⁴ *El País* (12 February, 2008).

¹⁶⁵ For declarations of victims’ and human rights organizations, see: Movimiento Nacional de Víctimas de Desplazamiento Forzado [National Movement of Victims of Forced Displacement] (2008); Organizaciones Agrarias y Rurales de Colombia [Colombian Agrarian and Rural Organizations] (2008); Rojas (2008); *Indymedia* (February 26, 2008). For declarations of the political opposition, see among others: López (2008); Robledo (2008). For press declarations, see: *El Tiempo* (February 10, 2008); *El Tiempo* (February 13, 2008); *El Espectador* (February 19, 2008); *El País* (12 February, 2008); Molano (2008). For other discussions promoted within the civil society, see the debate convoked by University of Los Andes on Carimagua (*Noticias Uniandinas*, October 7, 2008).

¹⁶⁶ From there on, the agrarian model defended by the government and illustrated in the “Statue of Rural Development” started to be commonly labeled as “the Carimagua model”. See, among others, Robledo (22 February, 2008); Rodríguez (2009); Suárez (2009).

¹⁶⁷ *El Tiempo* (February 10, 2008); *El Tiempo* (February 13, 2008).

¹⁶⁸ See *supra* notes 52 and 69.

ment's agrarian model is promoted not only with the purpose of applying economic efficiency to land allocation, but also for self-serving purposes.

These self-serving purposes would consist in the promotion of the interests of rich landowners who in many cases have proved to have strong connections with paramilitary groups, and who make part, are closely linked to, or exercise a strong influence on the political coalition of Uribe's government. Indeed, it is undeniable that landowners have played an important role in the current government, starting by Uribe himself, who is perhaps the country's first big landowner to reach the Presidency. Moreover, as Francisco Gutiérrez (2009) shows, in the past few years, landowners have been able to develop a "new, highly criminalized, agrarian lobby" capable of influencing significant policies, such as the "Statute for Rural Development".¹⁶⁹ In consequence, it seems plausible that the promotion of the government's agrarian model has been at least partly influenced by the intention to favor landowners' interests, by facilitating and even subsidizing their access to more land, and by allowing for the legalization of land violently acquired by paramilitary groups from which they might have benefited either directly or indirectly.

The former examples are important because they not only illustrate the conception of justice generally defended by the government on land issues, but also the correspondence of these conceptions with the government's interests. The examples are also useful for envisaging the particular conception of justice to which victims' and human rights organizations subscribe to regarding issues of this type, which also differs from the perspective of restorative justice described earlier in this section. Indeed, the criticisms raised against the "Statute for Rural Development" and the "Carimagua affair" by victims' and human rights organizations show that these organizations are not only concerned about the possible violations of victims' rights that the government's policies and decisions could cause, but also and especially about the harmful effects that such decisions could have on the general



¹⁶⁹ Following Gutiérrez (2009), the development of this type of lobby was made possible by several factors: (i) the empowerment of landowners in certain State policies, such as security, which allowed them to establish solid networks with State agencies. (ii) The criminalization of rural elites, resulting from their active participation in the creation and support of self-defense groups that degenerated in paramilitary groups, which rapidly learned to obtain access to the State through their landowners allies. (iii) The strengthening of these rural elites' networks with State agencies, as well as their relations with the political system, which have translated in the capture of several State agencies (including registry offices, security and policy-making agencies) and of the electoral apparatus. (iv) The protagonism of paramilitary leaders in the political system, who seem to no longer influence it only indirectly by providing security to certain politicians and by restricting access to others, but also to have a direct impact in electoral outcomes. Thus, Gutiérrez notes that one third of Congressmen who won in the last elections came from paramilitary controlled areas. Moreover, citing a paper by Acemoglu, Robinson and Santos (2009), he notes that paramilitaries' stronger influence in elections seems to have a strong correlation both with voters' favorable preferences for President Uribe, and with the support given to Uribe's major policies by Congressmen elected from paramilitary-controlled areas.

distribution of land ownership in the country. This was the case even when the government's policy risked restricting the victims' right to restitution, which was criticized for that reason, as well as for the obstacles imposed to the possibility of recovering dispossessed land from usurpers, and therefore of subverting the country's recent *counter-agrarian* reform.

This shows that the perspective of justice defended by victims' and human rights organizations concerning land allocation has not been primarily oriented towards protecting past entitlements over the land, but rather towards achieving a more just and less uneven distribution of land ownership in the country. This explains that such organizations have been eager to criticize the government's policies and decisions that affect not only victims of the armed conflict, but more generally persons excluded from access to land and therefore from mechanisms of subsistence and productivity. This also explains why such organizations have usually worked jointly with peasant organizations with the purpose of challenging policies that run against the interests of marginalized sectors of the rural population, such as poor peasants and ethnic minorities.¹⁷⁰ More importantly, the adherence of victims' and human rights organizations to the perspective of distributive justice on land issues explains the fact that these organizations have permanently insisted on the crucial importance of implementing a comprehensive and effective land reform with the purpose of fully overcoming the Colombian armed conflict and preventing its reemergence.¹⁷¹ From the point of view of these organizations, the unequal distribution of land is one of the most important root causes of the conflict, and the massive forced dispossession of land committed during the conflict substantially contributed to its worsening. Hence, without a land reform aimed at redistributing land ownership in a much fairer way, these mechanisms might lead to the perpetuation of the causes of violence, and might also institutionalize the even more unequal reconfiguration of land ownership produced by the armed actors through coercion.

From this perspective of distributive justice, victims' and human rights organizations have not only energetically criticized and challenged the government's policies and decisions on rural development, but also those specifically concerning transitional justice and victims' rights. Indeed, according to these organizations, peace agreements between the actors of the conflict, even if they imply some degree of accountability and satisfaction of the



¹⁷⁰ Two of the three public actions of unconstitutionality presented against the "Statute for Rural Development" are good examples of this, as they were jointly presented by victims', human rights and peasants' organizations (CCJ et. al., 2007; Colectivo de Abogados José Alvear Restrepo et. al., 2007).

¹⁷¹ See, among others, Colombian Platform of Human Rights, Democracy and Development (Plataforma Colombiana de Derechos Humanos, Democracia y Desarrollo, 2003, chapter 10); CCJ (2007); Cepeda (2009).

victims' rights to truth, justice and reparations, are not enough to prevent a relapse into conflict. Institutional reforms specifically aimed to guaranteeing the non-recurrence of atrocities are vital for attacking the structural causes of the conflict and for dismantling the political and economic structures created by armed groups, and particularly by the paramilitary groups' connections with State agencies and regional elites.¹⁷² Evidently, in the matter of economic power and land allocation, a redistributive land reform constitutes an unavoidable institutional reform to this effect.

However, victims' and human rights organizations have not limited their defense of a distributive justice perspective regarding land allocation to criticisms against the government's policies and decisions. They have also made specific proposals concerning the substantive elements that a reform of the sort should include. Thus, for instance, the National Movement of Victims of State Crimes launched an "Alternative Human Rights Plan", in which it proposed the development of a "comprehensive agrarian reform that benefits the Colombian peasantry and subverts the concentration of land ownership". The movement pointed out that, among other things, a reform of the sort should: (i) provide peasants with technical and scientific assistance, inexpensive loans, product marketing, crop insurance, support and incentives to small producers, and priority for the creation of cooperative firms; (ii) establish minimum and maximum land extensions; (iii) create a plan for the return to their places of origin or the resettlement of forcibly displaced persons, which includes offering them security, socioeconomic stabilization, education, health, loans and technical assistance for the satisfaction of their food security; (iv) guarantee the restitution of personal and real property usurped from victims of atrocious crimes.¹⁷³

As can be seen, the proposal puts a strong emphasis on distributive measures aimed to facilitating access to land and means of production for peasants in conditions of need (i). However, it also includes certain elements aimed to guaranteeing economic efficiency (ii) and the protection of victims' past rights (iii). Now, efficiency measures are compatible with the distributive aims of impeding further land concentration and of guaranteeing adequate conditions of subsistence for the beneficiaries of land reform by establishing minimum land extensions. Moreover, some of the measures intended to protect victims' rights seem to be more oriented towards giving privileged treatment to the forcibly displaced to satisfy their needs than towards demanding rigid protection of their past entitlements. That is why



¹⁷² For the development of this argument, see Uprimny and Saffon (2006).

¹⁷³ *Indymedia*, February 12, 2009.

they admit the possibility of substituting the resettlement on new land for the return to their places of origin. However, it is true that the requirement of asset restitution appears to be at odds with the general orientation towards satisfying needs, unless it is primarily promoted with the intention of taking dispossessed assets away from usurpers.

Be it as it may, clearly victims' and human rights organizations have not restricted their activism on land reform to the protection of victims' rights or to the satisfaction of their needs. Their criticisms and proposals have had a much wider scope, attempting to assure equal opportunities for access to land and production to all those in need, and therefore a more even distribution of land ownership in the country. At first sight, this wider scope might seem contrary to the interests of victims of the armed conflict, who would not be the sole beneficiaries of the promoted measures, and could therefore risk being affected by the lack of a focused policy. However, the socioeconomic profile of Colombian victims and the strong obstacles that exist for obtaining the restitution of land strongly suggest that victims could benefit more from a land allocation policy based on distributive justice than from one based on restorative justice, if the former were fully and efficaciously carried out.

Indeed, perhaps with the exception of some victims of extortive kidnapping, Colombian victims are one of the most marginalized and excluded sectors of society, and were so even before the commission of atrocities.¹⁷⁴ As was shown in section I of this paper, this is particularly the case of the forcibly displaced population, which comprises the vast majority of victims of the armed conflict, and whose members were already marginalized before being forcibly displaced, but have become significantly more pauperized and vulnerable afterwards. This means that, even before their displacement, these persons were potential beneficiaries of measures of distributive justice, and in many cases specifically of land reform measures aimed to guaranteeing them access to land of better quality or greater extension, technical or financial support for its adequate exploitation, or more certain entitlements over it. As a result, their restitution to the situation in which they were prior to the violation of their rights would very likely imply returning them to a situation of misery and subordination,¹⁷⁵ and would therefore constitute a less favorable outcome in terms of their welfare than guaranteeing them access to a real land reform.



¹⁷⁴ The socioeconomic profile of Colombian victims is thus similar to that of Guatemalan and Peruvian victims, the majority of whom pertained to Mayan groups in the former case and to rural populations in the latter case. In contrast, victims of authoritarian regimes in the Southern Cone mostly pertained to the middle classes. See Saffon and Uprimny (2009b).

¹⁷⁵ For this argument, see Saffon and Uprimny (2009b).

This conclusion is reinforced by the immense obstacles that, as mentioned at the beginning of this section, victims of forced displacement face for proving their right to obtaining the restitution of the land they lost. The existence of these obstacles, which seem difficult to surmount even with the relaxation of procedural constraints such as the burden of proof, suggest that, in most cases, victims' interests would probably be better served through the implementation of a profound land reform, at least for four reasons. First, a reform of this sort would guarantee all poor and vulnerable victims access to productive land, without requiring them to prove any past entitlements over land they lost.

Second, such a land reform would be based on the victims' present need, rather than past entitlements, as the main criterion for making land allocation decisions. This would permit granting victims priority in gaining access to land allocation, given their particularly vulnerable situation. Besides, this would allow granting them more certain rights over the allocated land than those which they had over the land they lost, and which in many cases facilitated its dispossession.

Third, a profound land reform would require the effective recovery of all land usurped by armed actors, in such a way that the dramatic enhancement of property concentration that resulted from the country's *agrarian counter-reform* could be reverted and that there would be enough land to be redistributed among the landless. It is quite possible that more land could be recovered more easily through a land reform, since the main justifications for recovering it would be its excessive concentration in the hands of a few or its unproductive use, which is much easier to prove than the illegality of the titles through which it was transferred.

Fourth, the fact that a land reform of this type could not always guarantee the return of victims to the specific plots of land they held before their displacement does not necessarily go against the victims' preferences. Indeed, with the exception of some groups of victims, such as indigenous peoples and Afro-Colombian communities, many victims might not have particularly strong preferences for returning to the land they occupied prior to their displacement, given that a large number of them were actually settlers of the agricultural frontier, who probably do not have deep roots that link them to the land they previously occupied.¹⁷⁶ Moreover, the likelihood of the victims



¹⁷⁶ This conclusion seems to be supported by the first survey conducted by the CSPPDF (2008c), according to which only 3.1% of the forcedly displaced family groups want to return to their place of origin. However, it is important to treat this piece of information with caution, given that the low intention of return could also be associated with the absence of basic security conditions capable of guaranteeing that the rights of returning victims would not be threatened again. Saffon and Uprimny (2009b).

accepting an arrangement of the sort would perhaps increase if the effective recovery of land usurped by armed actors actually took place in such a way that their possible desires to punish their evictors through restitution could still be satisfied and that the compensation measures were not seen as a cheap reward for allowing the legalization of usurped land to occur.

Consequently, the promotion of a distributive justice perspective of land reform by victims' and human rights organizations' does not go against the interests of victims of the armed conflict, who are the primary beneficiaries of their activism concerning transitional justice issues.

The previous account shows that the Colombian government, on the one hand, and victims' and human rights organizations, on the other hand, hold opposite conceptions of justice concerning land allocation: the former privileges a particular interpretation of economic efficiency, and the latter defend a strong version of distributive justice. These principles are different from the perspective of restorative justice entailed by the project of land restitution contained in the "Victims' Bill", and are much more in line with these actors' own interests than the latter perspective. Nevertheless, as shown in the second section, the government and victims' and human rights organizations have endorsed the land restitution Bill. In the next section of this paper, I attempt to offer a hypothesis to explain how this strange consensus came into being.

IV. MISREPRESENTING INTERESTS (AND THEIR CORRESPONDING CONCEPTIONS OF JUSTICE) AS REASON

The obvious question that emerges from the account in the preceding section is: why did the government and victims' and human rights organizations suddenly begin to support the land restitution project contained in the "Victims' Bill"?

It is only natural to ask this question, given the high degree of polarization involved in the discussions about land reform and transitional justice, the practical difficulties and justice concerns that land restitution raises, and especially the difference between these actors' interests and conceptions of justice, on the one hand, and the perspective of restorative justice that underlies the project, on the other. However, this question must necessarily be answered with some degree of speculation, since it inquires into the actors' motivations for defending a particular set of principles of justice, which they publicly present as a sufficient reason for motivating their support for the restitution project. Therefore, the question is based on the intuition that the reasons they give for supporting the project are not their true motivations. Moreover, the question is based on the intuition that the concerned actors are

consciously *misrepresenting* their motivations, with the purpose of achieving a particular goal.¹⁷⁷ Certainly, these intuitions can and should be based on solid arguments to justify them, in order to avoid functionalist interpretations.¹⁷⁸ Nonetheless, these arguments cannot offer conclusive evidence, since it is not possible to fully grasp the motivations on which beliefs are professed, and one must therefore only rely on their profession and on their publicly expressed motivations, which, among other things, might be the result of deceit and misrepresentation –as I myself claim to be the case here.

Having the former caveat in mind, the hypothesis I dare advance is the following: the government and victims' and human rights organizations' joint adherence to the principle of restorative justice and their consequent support of the land restitution project are merely an apparent consensus, aimed to misrepresent their desire to promote their respective conceptions of justice and interests, while adopting a particular strategy for the implementation of the restitution project suitable for satisfying these interests and conceptions of justice. In the case of the government, the strategy consists in promoting the inefficacy of the adopted mechanisms, thereby guaranteeing the preservation of the status quo with only minor modifications, while appearing to be committed to the protection of victims' rights. In contrast, the strategy of victims' and human rights organizations consists in promoting the efficacy of these mechanisms to the greatest extent possible, so that they can contribute to the achievement of distributive justice purposes, without having to confront the traditional resistance of landowners and other political elites.

Following Elster, the government and victims' and human rights organizations' common support for the land restitution project may be understood as an example of the strategic misrepresentation of interests as reason, understanding the latter as "any impartial, disinterested, and dispassionate



¹⁷⁷ According to Elster, "misrepresentation" is a phenomenon that consists in consciously presenting as the motivation for acting in certain way a different motivation from the one on which one actually acts, with the purpose of achieving a particular goal, or of being perceived in a particular way. Elster (1999, pp. 332, 370). As Elster notes, this phenomenon is different from "transmutation", which consists in unconsciously transforming a motivation that is found unacceptable by the actor to a more acceptable one. Elster (1999, p. 332). As Elster also notes, both misrepresentation and transmutation consist in "changes in beliefs about one's own motivation" rather than in "changes of beliefs about the world". Consequently, they are different from the more general phenomena of self-deception and wishful thinking. In particular, following Elster, the paradigm of misrepresentation is: "if I profess motivation Z for desiring Y others will punish me, therefore I will profess motivation X for desiring Y", which contrasts with the following paradigm of deception: "if I profess belief or desire X others will punish me, therefore I will profess belief or desire Z". However, Elster claims that this distinction is not absolute, as misrepresentation might have the effect of inducing change in behavior. Elster (1999, pp. 340-1).

¹⁷⁸ Here, a functionalist interpretation would consist in concluding that if the defense of land restitution satisfies the concerned actors' interests, then it must be the case that they defend land restitution for that reason, i.e. because it is functional to their interests.

motive” that can be perceived as being sincere.¹⁷⁹ According to Elster, sincerity requires that the impartial motive does not correspond too closely to the actors’ interests, and therefore the appeal to conceptions of justice is subject to the constraints of consistency and imperfection. Consistency requires that the conception of justice be “consistent with impartial conceptions adopted on earlier occasions”. In turn, imperfection requires that the conception of justice “deviate somewhat from the policy that, if adopted, would promote one’s interest maximally”.¹⁸⁰ In applying these ideas, my argument is that the government and victims’ and human rights organizations consciously decided to support the project of land restitution in order to be publicly perceived as motivated by the desire to promote restorative justice and therefore to protect victims’ rights over land dispossessed during the conflict, while surreptitiously promoting their own interests and their conceptions of justice. And they did so because, although these conceptions of justice are impartial motivations,¹⁸¹ promoting restorative justice has the appearance of being a more sincere motivation, given that their previously advocated conceptions of justice are more closely in line with their interests.

Thus, according to my hypothesis, the Colombian government suddenly decided to support the land restitution project contained in the “Victim’s Bill” in order to show its commitment to the protection of victims’ rights concerning land allocation, while betting that the difficulties involved in its implementation would prevent the project from having major instrumental effects. There are at least three reasons why the government had a strong incentive to start portraying itself as being motivated by the desire to promote restorative justice rather than its own version of economic efficiency. First, the “Carimagua affair” referred to in the previous section exhibited the government’s self-serving bias in the defense of its version of economic efficiency, and exposed it to public criticism. Indeed, in the “Carimagua affair” the government showed in an only too obvious way that its interpretation of the principle of economic efficiency benefited landowners and their paramilitary cronies, while harming landless victims. Therefore, it became clear that, from then on, the government’s decisions on land issues would be submitted to greater



¹⁷⁹ Elster (1999, pp. 338-9). Besides the conditions of impartiality and sincerity, Elster asserts that reason as a motive must also be a propositional truth, that is, it must be based on “the assumption that there is a *fact of the matter* by virtue of which what they say is either true or false”. According to Elster (1999, p. 337), these three conditions are inspired in the “validity claims” that Habermas establishes as commitments for agents who wish to understand something. On misrepresentation in general see Elster (1999, mainly pp. 372-84).

¹⁸⁰ Elster (1999, pp. 347, 349).

¹⁸¹ Again, following Elster (1999, p. 339), impartiality “is not a conception of justice, but a necessary feature of any view that wants to be taken seriously as a conception of justice”. Therefore, it is satisfied by various conceptions of justice, as long as they are capable of being formulated in impartial terms.

scrutiny, and that its defense of economic efficiency risked being rejected a priori as insincere. In that way, one could say that the imperfection constraint began to operate against the government's appeal to economic efficiency, and prompted it to adopt the rhetoric of restorative justice.

Second, the pressure exercised by the international community on the government to improve the human rights situation in the country has increased substantially in the last few years, and is particularly focused on the protection of victims' rights within the framework of transitional justice mechanisms.¹⁸² Therefore, the government has a strong incentive to portray itself as guarantor of those rights before the international audience, especially in order to counter the negative image it has forged as a result of recent scandals concerning the links between paramilitary groups and its political coalition, as well as human rights abuses committed by members of the public force.¹⁸³ The government's stance with regards to the issue of land dispossessed during conflict seems particularly relevant from the international point of view, due to the fact that the country has the largest population of forcibly displaced people in the world,¹⁸⁴ and that this population lives under conditions of severe deprivation, which do not seem to be surmountable without a sustainable solution to the problem of land. Also, from the international perspective, it seems quite untenable for Uribe's government to ignore or go against restitution claims that basically request the protection of private property stolen by illegal actors, when security and the protection of private property have been one of the most important banners of its policy for promoting foreign investors' confidence in the country.¹⁸⁵

For these reasons, it seems quite plausible that the government's decision to support the inclusion of land restitution measures in the "Victim's Bill" had to do with its desire to portray itself internationally as being



¹⁸² The attention of international governmental and non-governmental human rights' organizations to Colombia's situation has substantially increased since the demobilization of paramilitary groups and the creation of a specific framework for dealing with their atrocities in 2005. A good example of this, among many others, is the fact that the International Center for Transitional Justice (ICTJ) established its headquarters in Colombia only in 2006, and today Colombia is its most ambitious program in America (see its webpage: www.ictj.org). Another important source of the international attention on the country's human rights situation has been the discussion about the Free Trade Agreement between the United States and Colombia. Indeed, Democrat Congressmen have insisted in conditioning the approval of the treaty to a substantive improvement of such situation (See, for instance, *El Espectador*, April 19, 2008).

¹⁸³ For the scandal concerning links between paramilitary groups and Congressmen, see *supra* notes 49 and 103. The most recent scandal of human rights abuses committed by members of the public force is commonly known as the "false positives" scandal because it implied a massive killing of civilians, who were subsequently dressed as members of guerrilla groups and presented as combat deaths. See, among many others, Ronderos (2008).

¹⁸⁴ UNHCR (2009). See also *supra* note 62.

¹⁸⁵ See, for instance, Oficina de Prensa de Presidencia de la República (2009). I thank professor Rodrigo Uprimny for pointing out this argument.

concerned with the solution to the problem of land dispossession, and with its need to avoid acquiring a negative image in this field as a result of the “Carimagua” scandal. The fact that, as was mentioned in the second section of this paper, the government did not limit itself to giving that support, but actually proposed the chapter on land restitution that was finally approved by the House of Representatives, and did so based on a consultancy made by USAID’s MIDAS program, suggests that its concern with its international image in this issue was related to its sudden switch of stances.

Third, before the discussion of the “Victim’s Bill”, the government had publicly expressed certain opinions about victims’ reparations, which restrained its leeway for making decisions on the issue of land restitution, by submitting it to the “consistency constraint”. In fact, since the beginning of discussions on the design and implementation of transitional justice mechanisms in the country, the government has defended policies that refer to the perpetrators’ resources as the main source for funding victims’ reparations. And it has done so by explicitly arguing that the financial burden of reparations should rely primarily on those directly responsible for human rights violations and not on the State.¹⁸⁶ Although the government has not used this argument in relation to the discussion on reparations for land dispossession, applied to this discussion, it constitutes a strong argument in favor of land restitution. Indeed, an effective land restitution program might require a smaller budgetary effort from the State than the economic compensation for lost property, since the value of restituted assets would be assumed by the perpetrators and their front men. Therefore, the State would only have to cover the administrative and institutional costs of creating and carrying out the program, as well as the reparation of victims in those cases in which land could not be returned to them due to double-ownership problems (which could be minimized if vigorous efforts were made to recover land not only



¹⁸⁶ This is why the initial version of Law 975 of 2005, promoted by the government, established assets illegally obtained by demobilized actors as the main source of judicially ordered reparations for victims of atrocities. As mentioned in note 87, the Constitutional Court admitted the principal responsibility of perpetrators in funding victims’ reparations, and even extended its scope, by establishing: that the latter should not only be covered by illegally obtained assets but also by those legally obtained (as a result of perpetrators’ ordinary civil responsibility to repair damages caused by their actions); that when individuals’ assets were not enough to cover victims’ reparations these should be funded by assets belonging to other members of the actor’s demobilized group (in virtue of the civil principle of solidarity), and that only when all these assets were insufficient should the State be considered responsible for victims reparations (thus having a mere subsidiary responsibility concerning illegal armed actors’ atrocities). In spite of this, as mentioned in note 158, so far demobilized armed actors have delivered very few assets, and especially very few hectares of land, for the purpose of reparations ordered in judicial processes. This means that, even if the State has a subsidiary responsibility concerning such reparations, it could end up covering a great part of their cost, unless it undertook an aggressive strategy for recovering those assets from demobilized actors, which would perhaps be encouraged by a land restitution project explicitly requiring it and facilitating it through presumption mechanisms as the ones envisaged in the “Victims’ Bill”.

from direct perpetrators but also from their front men) or the perpetrators were unable to compensate them.¹⁸⁷

Precisely for this reason, during the “Victim’s Bill” debate in the Plenary of the Senate, Gustavo Petro –a Senator of the left-wing opposition party– said that the government’s reticence to land restitution based on its lack of financial viability was suspicious, and seemed to be the result of its permissiveness with regards to the legalization of paramilitary groups’ possessions, rather than its concern for reducing the State’s budgetary effort for repairing victims. With this remark, Senator Petro joined the objections based on both the consistency and the imperfection constraints, by highlighting how an inconsistent change in the government’s stance concerning the source of reparations would imply too close a correspondence with the interests of its political support base. Perhaps the government’s decision to turn to the defense of land restitution was also prompted by these criticisms.

An obvious question emerges: why did the government make this about-face without fearing that the consistency constraint would operate against it for having previously defended a conception of justice based on economic efficiency on land allocation issues? Two possible answers come to mind. The first is that the government’s defense of the principle of economic efficiency was always made in the context of discussions about the problem of land allocation in agrarian policies in general, but not in discussions about victims’ rights and the restitution of dispossessed land in particular. This was the case even in the “Carimagua affair”, in which the government’s initial decision to allocate the land to displaced families was not made within the framework of reparation policies, but rather within the framework of the agrarian policy of land allocation for the development of productive projects. Consequently, it is possible that the government’s decision to support the land restitution project would not necessarily have to be perceived as being inconsistent with its adherence to the principle of economic efficiency concerning the agrarian policy, as it could be seen as pertaining to an entirely different sphere with specific legal requirements, such as victims’ rights. This argument appears to be supported by the fact that the government’s consistency was demanded in Congress in connection with its previous stance concerning victims’ reparations, but not with regards to its interpretation of economic efficiency.

However, a much more obvious reason why the government suddenly adhered to the restorative justice perspective without fearing criticisms of inconsistency is that both the government’s interpretation of economic efficiency



¹⁸⁷ Evidently, in order to assert this in a conclusive way, it would be necessary to rigorously calculate the administrative and institutional costs of a restitution program.

and any possible demands for consistency with it became indefensible after the “Carimagua affair”. Given that its previous stance on land allocation seemed untenable after “Carimagua”, the government knew it would not be criticized for setting it aside, but instead it stood to gain legitimacy for finally deciding to commit to a compromise solution on this issue. And even if its contradictors suspect the government for being hypocritical, they would not criticize it for that reason, since they would still prefer its new stance on the matter, given that it would give them greater leeway in promoting their own interests and conceptions of justice.

Now, the government’s sudden adherence to the restorative justice perspective and its defense of the land restitution project does not mean that it has abandoned its interests or the vision of justice that corresponds to them. In my opinion, the government decided to change its stance on the issue of land allocation in order to portray itself as being committed to the protection of the victims’ past entitlements over dispossessed land, while promoting a strategy of implementation of the land restitution project aimed to minimize its instrumental efficacy. This is not a new strategy for the government. In fact, as professor Rodrigo Uprimny and I argued in a recent article, the government’s stance concerning the transitional justice framework that is being implemented in Colombia has been characterized by a recurrent manipulative use of victims’ rights, aimed to show a commitment with the legal standards that contain these rights, while promoting partial processes of impunity that contradict these legal standards, but that end up being legitimized by their rhetorical use (Saffon and Uprimny, 2009a). Specifically, the strategy consists in betting on the failure or the minimal efficacy of institutional arrangements that the government itself has promoted. Therefore, the success of the strategy depends on putting obstacles to the institutional arrangements that are known beforehand to be too difficult to overcome. For example, in the case of the law that established criminal procedures for judging demobilized armed actors who committed atrocities, the government’s strategy consisted in promoting a text that made very generous declarations of principle on victims’ rights to truth, justice and reparations, but that contained precarious mechanisms for materializing them in practice, and that was therefore doomed to leave victims’ rights unprotected, until the law was later revised by the Colombian Constitutional Court.¹⁸⁸



¹⁸⁸ Among the features of the initial version of Law 975 of 2005 that risked leaving victims’ rights unprotected, of particular relevance were: the possibility of subtracting from the already very lenient punishment of demobilized armed actors the time paramilitaries spent in the zone where they negotiated peace with the government, the fact that incomplete or false confessions by paramilitaries did not imply the loss of criminal benefits, and the restriction of the duty to repair only to illegally obtained assets still possessed by demobilized actors. Professor Uprimny and I have argued that perhaps because of the obstacles that

In a similar vein, the project of land restitution contained in the version of the “Victims’ Bill” promoted by the government establishes substantive principles that strongly favor victims’ claims to the restitution of land they abandoned or transferred under pressure during conflict, but sets up institutional mechanisms for their satisfaction that might be unable to produce significant effects. As was mentioned in section II of this paper, the government’s version of the bill is different from the alternative version supported by victims’ and human rights organizations, among other things, in that it imposes much stricter requirements for victims of State agents to prove their condition of such; it establishes presumptions to facilitate the proof of dispossession that are more demanding than those established in the alternative bill,¹⁸⁹ and it bestows the competence of solving restitution claims on the courts rather than administrative authorities, thus making the restitution process more burdensome from the point of view of procedural rules and evidence. Apart from the difficulties of proving dispossession, which –as mentioned in section III– exist even with the operation of presumptions, it is worth noting that all the processes that according to the government’s version of the bill may be undertaken by the courts can already be undertaken by different Colombian judges –the only institutional difference being that according to the bill all those processes will be the competence of the criminal courts currently in charge of dealing with demobilized armed actors–. However, so far these processes have not produced any significant results in terms of land restitution.

Consequently, there are good reasons for believing that, even though it contains important substantive declarations favoring the possibility of restituting land to victims of dispossession, the land restitution project could end up not producing a major impact in terms of reallocating land property in the country, given the difficult obstacles that it faces for doing so, and the government’s strategy of promoting the project’s inefficacy. But there are also good reasons for thinking that, despite those obstacles and the government’s lack of political will to effectively implement it, the land restitution project could have significant effects in terms of land redistribution, if only

these features would impose to the efficacy of the law, paramilitary leaders never criticized it, and even defended its text as a binding commitment acquired by the State when the Constitutional Court declared the unconstitutionality of many of its problematic characteristics in ruling C-370 of 2006 (Saffon and Uprimny, 2009a). Another example of the government’s strategy to promote the inefficacy of victims’ rights as recognized in the transitional justice legal framework are the decrees it has issued for regulating Law 975 of 2005, which in many cases have restricted the scope and efficacy of such rights. On this see also Saffon and Uprimny (2009a).

¹⁸⁹ For the differences, see *supra* notes 135 and 136.

the dispositions that clearly favor victims' claims to restitution were effectively applied with the aim of fulfilling their rights to the greatest extent possible.

This is, in fact, the reason why I believe victims' and human rights organizations would be willing to endorse the land restitution project, in spite of the differences between the text they supported and the one promoted by the government. Indeed, they would do so in order to promote a completely different implementation strategy from that of the government, with the purpose of achieving the project's full efficacy, and thus the maximum possible protection of victims' past entitlements over dispossessed land, through which a significant redistribution of land ownership could take place. This would not be the first time that victims' and human rights organizations would implement a strategy of this nature either. Indeed, as professor Rodrigo Uprimny and I also pointed out recently, these organizations have adopted a similar strategy with regards to the Colombian transitional justice framework, aimed to counter the government's manipulative use of the rhetoric of victims' rights by interpreting these rights as legally binding constraints, and hence demanding their effective application as a means to struggle against impunity (Saffon and Uprimny, 2009a). These organizations have carried out this strategy by politically attacking the government's manipulation of victims' rights and by judicially challenging the legal dispositions used to restrict their scope before a Constitutional Court known to be favorable to rights protection.¹⁹⁰

By analogy, these organizations could advance the strategy of attaining the effective implementation of the land restitution project by actively promoting the judicial processes therein foreseen and by demanding that the mechanisms that facilitate land restitution (including presumptions of dispossession, and the privilege of victims over third parties) be adequately applied in such processes, with the purpose of guaranteeing actual restitution for all victims of dispossession. Moreover, these organizations could also advance their strategy by publicly criticizing and denouncing any attempt



¹⁹⁰ Victims' and human rights organizations political attacks of the government's manipulative use of victims' rights have mainly consisted in publicly denouncing such use, as well as in formulating alternative proposals to the legal framework proposed by the government for dealing with atrocities. On the other hand, the judicial challenge of such framework has been carried out not only before the Constitutional Court, but also before the Supreme Court of Justice—which is the second instance of criminal procedures against demobilized actors, as well as the judge of Congressmen allegedly responsible of having links with paramilitaries— and the Inter-American Court of Human Rights—which has decided several cases on the Colombian State's responsibility for the violation of victims' human rights by paramilitary groups (see *supra* notes 49 and 121)—. Hence, this challenge has attempted not only to attain the exclusion from the Colombian legal system of legal dispositions that are contrary to the Constitution, but also to achieve judicial interpretations of other legal dispositions, in order to guarantee that they are favorable to the protection of victims' rights and to the struggle against impunity (Saffon and Uprimny, 2009a).

to limit or undermine this goal, as well as by judicially challenging the legal dispositions that impose obstacles to its achievement.

Now, the question that evidently comes to mind here is: why would victims' and human rights organizations be interested in promoting this strategy, in spite of the fact that they adhere to a conception of justice that favors a radical redistribution of land ownership, and that therefore differs from the restorative justice perspective that is the basis of the land restitution project? I believe there are at least four reasons why the victims would have an incentive to support a land restitution project.

The first reason is these organizations' awareness of the tremendous obstacles that exist in Colombia for carrying out a successful land reform policy with an important redistributive component. These difficulties result from the strong resistance exercised by big landowners who benefit from the unequal distribution of land. As shown in section I, all past attempts to carry out major transformations in the allocation of land in the country –at least through legal means¹⁹¹ have been strongly resisted by big landowners, who have managed to exercise a great deal of influence on the political system. In the words of Francisco Gutiérrez (2009), this influence has been exercised through “opposition or feet dragging” in order to “sabotage reforms from above”, as well as through “pressure and frequently outright violence” to “neutralize pressure from below”. Now, as described in section three, this influence has increased in recent years, as a result of the strong links between landowners and Uribe's government, and of the criminalized agrarian lobby that the former have developed (Gutiérrez, 2009). Therefore, the potential resistance to land reform initiatives has only become stronger.

As a result, victims' and human rights organizations know that initiatives of the sort are very likely to fail. And they have therefore begun to see in the right to reparations in general, and in its component of land restitution in particular, an alternative framework for promoting the transformation of land distribution in the country. In fact, this framework has a strong potential for overcoming landowners' resistance to land reform, both because it is less escapable, and because it might be conceived as less threatening for the status quo of land allocation. The right to reparations, and particularly that of restitution of dispossessed land, is less escapable by opponents of land reform measures because it appeals to the existence of past entitlements over land, the protection of which is stipulated in legislation in a much more precise way than the principle of redistribution, which has a more political



¹⁹¹ The *counter-agrarian* reform that has taken place in the country through the forced dispossession of land during conflict has indeed brought about important transformations, but they certainly have not been promoted through legal means.

than legal nature. Moreover, this right seems less escapable because, as it was mentioned in section II, international human rights standards conceive restitution as the privileged reparation measure for victims of forced displacement, due to its importance for guaranteeing their rights to return to their place of origin and to have housing. This has led international and national human rights organizations to pressure the Colombian State to implement restitution measures in order to solve the humanitarian tragedy of forced displacement, and has already led the Colombian Constitutional Court to recognize restitution as a fundamental right.

On the other hand, land restitution might become a suitable normative basis for overcoming landowners' resistance because, abstractly speaking, it does not imply as big a threat to the status quo of land ownership as land reform with a distributive orientation does. In effect, the nature of land restitution limits its possibilities for bringing about a structural transformation in land allocation because its scope is restricted to the protection of past entitlements. Furthermore, the justification for land restitution is less threatening to landowners' rights than redistribution because it is based on the idea –certainly accepted by landowners– that rights acquired over land should be fully protected.

This does not mean, however, that land restitution rules out the possibility of bringing about a significant transformation in land allocation. Quite the contrary, in contexts like Colombia where land dispossession has systematically affected the most excluded sectors of the population and has contributed substantially to the concentration of land ownership in the hands of a few, restitution may contribute –rather than be an obstacle– to the fulfillment of distributive justice goals. This is actually the second reason why I believe victims' and human rights organizations would be interested in promoting land restitution. Indeed, an efficacious and well-implemented policy of land restitution could have a profound effect on the country's land ownership structure, given the socioeconomic profile of affected victims, the massive use of forced displacement in the armed conflict, and the amount of land that has been dispossessed. In a country where no land reform policy has ever been successfully implemented, the sudden recovery of 5.5 million hectares (almost 11% of the agricultural land surface) and their allocation to the approximately three million victims of forced displacement, the majority of whom live under conditions of extreme poverty, would certainly have an enormous impact.

Moreover, if such a project had the purpose of satisfying victims' present needs and not merely of taking them back to the situation of deprivation in which they were before their rights were violated, land restitution could become quite a powerful tool for distributive justice. Among other things, a

land restitution project with such a purpose could attempt to recognize beneficiaries of land restitution more certain and less precarious rights than the ones they previously had over the restituted land, to provide them with technical and economic assistance for the development of productive projects, to establish minimum extensions for allocated land, to admit the possibility of victims exchanging their restituted land for land located elsewhere, to guarantee access to new land for victims who cannot be restituted, among other things. The purpose of satisfying victims' needs through a project of land restitution does not necessarily go against the perspective of restorative justice on which such a project would be based. Indeed, the beneficiaries of the project would still be identified in terms of the violation of past entitlements, and therefore restorative justice would still be the basis and legal source of their claims. However, the latter could be met with the more present-oriented purpose of satisfying certain victims' needs, and hence of assuring that the violation of their rights will not happen again.¹⁹²

Consequently, the fact that land restitution has the potential of promoting important distributive effects without generating the same degree of resistance as a redistributive land reform constitutes a powerful reason why victims' and human rights organizations would be interested in endorsing a project of that nature. However, it would be inaccurate to limit the explanation of these organizations' insistence on land restitution to the impact on land allocation that its efficacy could produce. Indeed, this insistence has been unrelenting and strongly based on arguments about the intrinsic importance of restitution for the protection of victims' rights and for the struggle against impunity. Therefore, I believe that a third reason why these organizations have an incentive to support the project of land reform is their actual commitment to the rights of the victims of atrocities, and their belief that their satisfaction is essential for putting an end to the armed conflict.

This explains these organizations' resolve in defending the priority that restitution should have over other components of the right to reparations concerning the issue of land, despite the advantages of other components of this



¹⁹² The idea, then, would be to establish a distinction between the legal source of the right to reparations and the purpose that the measures implemented for restituting victims could achieve. Whereas the source of restitution would always have to be the violation of past entitlements and therefore the right to obtain reparations in the form of restitution, its purpose could be either entirely backward-oriented and thus merely promote victims' return to the situation in which they were prior to the violation of their rights, or it could be present-oriented and hence attempt to satisfy victims needs through land restitution and other complementary measures, with the aim of preventing the violation of their rights from happening again. In the latter case, the link between restorative justice as the source of entitlements to restitution, and distributive justice as the purpose that should be achieved through a restitution project would be the guarantee of non-recurrence, on the basis of which measures would be taken not merely for repairing victims of past atrocities but for assuring that such atrocities will not happen again. For a full development of this idea, see Saffon and Uprimny (2009b).

right for promoting the redistribution of land, such as economic compensation. That resolve seems to be related, on the one hand, to these organizations' use of international human rights standards on reparations as the main source of their claims, and to the fact that these standards identify restitution as the prevalent measure for reparations of forcibly displaced persons. On the other hand, these organizations' resolve to privilege restitution in land reparations also seems to be related to the punitive role that restitution may play by requiring perpetrators and their front men to deliver dispossessed assets without compensating them, and to the important effects that this can have from the point of view of the struggle against impunity.

Moreover, victims' and human rights organizations' genuine commitment to the rights of victims of atrocities also explains why they insist in the specificity that measures for satisfying these rights should have with respect to other State measures aimed to provide social services.¹⁹³ According to these organizations, the State's duty to repair victims is based on its responsibility for the violation of human rights on its territory, and is therefore different from its constitutional duties to guarantee social and economic rights. Consequently, measures aimed to accomplish the latter duties should also benefit victims, but should not be considered as reparations for the violation of their rights. Otherwise, reparations would end up being reduced to the satisfaction of rights to which all citizens are entitled to regardless of whether they were victims of atrocious crimes or not, and would therefore fail to accomplish the important symbolic purpose of recognizing victims' suffering and restoring their dignity. Applied to the problem of land, this idea could imply that victims' and human rights organizations would be skeptical of reducing victims' reparations to a general project of land reform, which would not imply any recognition of their suffering and which could end up dissolving the duty to repair into the more general and disperse objectives of economic development.

In spite of the former arguments, one could very easily consider victims' and human rights organizations' reasons for supporting the land restitution project as naïve, given their opposition to the government's interests for doing so and the latter's strategy of rendering the project inefficacious. However, it is highly doubtful that these organizations are not aware of the government's intentions, particularly after the public exposure of its motivations in the "Carimagua affair". In consequence, I believe there is a fourth and last reason why these organizations are interested in supporting the



¹⁹³ See, for instance, the public action of unconstitutionality presented by DeJuSticia and other organizations against Law 975 of 2005.

project of land restitution, which has to do with their desire to restrain in some way the government's leeway for promoting its conception of justice and its corresponding interests. This desire would explain their adherence to a project, which to their knowledge is being strategically promoted to fulfill goals with which they do not agree, but which nonetheless would require the government to endorse the perspective of restorative justice concerning land issues, and would therefore submit it to the consistency constraint. This constraint could be used by victims' and human rights organizations to oppose any land policies that go against or fail to promote land restitution and the protection of victims' past entitlements in general.

In conclusion, from my point of view, the apparent consensus between the Colombian government and victims' and human rights organizations on the issue of land restitution is still far from implying any real consensus, as each of these actors adheres to it in order to satisfy very different interests and with very different implementation strategies in mind. However, the question that remains is what effects might the sole appearance of such consensus produce. In the final section of this paper, I conclude with some remarks on this issue.

V. LAND RESTITUTION: A FOCAL POINT IN THE DISCUSSION ABOUT LAND REFORM?

The fate of the land restitution project contained in the "Victims' Bill" is still very uncertain. At this point, it is not even clear whether the Bill will be approved by Congress and whether it will maintain the chapter on land restitution in case of being approved. However, given the weight of the motivations and strategies of the government and of victims' and human rights organizations for portraying themselves as supporters of the project, it is plausible that their apparent consensus on the land issue will not be limited to the specific project contained in the Bill. Thus, even if the Bill does not pass this time around, said consensus would probably reemerge in future discussions on the matter, and eventually lead to the approval of a land restitution project in Colombia. This is especially likely due to the strong pressure exerted by the Colombian Constitutional Court and the international community to give a lasting solution to the situation of the forcibly displaced population.

Now, the imminence of the implementation of a land restitution project in Colombia does not mean that the goal of restorative justice of restituting land to victims of dispossession will be satisfactorily achieved, or much less that its implementation will have a substantive effect on the distribution of land ownership. Indeed, the existence of radically different motivations for bringing about a land restitution project in the country and

of quite opposing strategies for implementing it do not allow making any definitive predictions about the ultimate orientation, efficacy and impact that a project of the sort would have. On the basis of the ideas presented in the previous section, two types of case scenarios¹⁹⁴ of what could end up taking place can be identified: on the one hand, the project of land restitution could be extremely inefficacious, and therefore produce very few positive results in terms of land restitution to victims of dispossession and an extremely meager overall impact on the country's distribution of land ownership. On the other hand, the project could be considerably efficacious, and consequently produce significant results in terms of the recovery of dispossessed land and its return to victims, and more generally in terms of the final distribution of land ownership in the country.

In my opinion, the likelihood that the Colombian case approaches one or the other type of scenarios depends to a large extent on the effect that the apparent consensus between the government and victims' and human rights organizations on land restitution might have on these actors' motivations for publicly defending the project and, consequently, on their strategies for implementing it. The first possibility is that the misrepresentation of these actors' interests (and their corresponding conceptions of justice) as an impartial concern for restorative justice does not affect these motivations substantially, and therefore remains as a deception strategy aimed to prevent them from being publicly known, while still promoting the actors' divergent goals. If this were the case, the final outcome that an eventually approved land restitution project would have in terms of land allocation would mostly depend on the actors' leverage and endowments. Indeed, the issue would be reduced to a matter of competing implementation strategies, the success of which would be determined by each actor's political advantages over the other. In such a setting, the government's implementation strategy, consisting in the promotion of the minimal efficacy of the restitution project, would surely end up winning the race.

Certainly, the Colombian government has much greater leverage and endowments than victims' and human rights organizations for influencing the orientation and implementation of public policies, and particularly of



¹⁹⁴ Here, I am using the notion of types in a Weberian sense, that is, in the sense of ideal types that do not coincide precisely with reality but that are useful for classifying its much more complex and messy situations. Therefore, it is evident that whatever the results of the implementation of a land restitution project in Colombia would end up being, they could hardly correspond exactly to one or the other of these types; rather, they would be characterized by being in the gray area between the poles of efficacy and inefficacy, significant or insignificant results in terms of land restitution to victims, and high or low overall impact on the distribution of land property in the country. However, such results could be classified and assessed on the basis of how much they approach one or the other type of case scenarios. For the notion of ideal types see Weber (1978, Vol.1, Chapter 1, notably pp. 19-22).

policies concerning land allocation. This is so not only (or mainly) because of the official functions that the government –like any other government– has of participating in legislative debates and executing and developing the law. In Colombia, the institutional advantages that these functions offer have been exponentially enlarged by the recent constitutional reform, which permitted the immediate reelection of the President without establishing new mechanisms for preserving an adequate balance of powers.¹⁹⁵ Among other things, this change has allowed for the government's disproportionate influence in the appointment of high ranking officials of government oversight bodies responsible for monitoring, controlling and counterbalancing the government's exercise of power.¹⁹⁶ This has resulted in an unprecedented concentration of power in the government's hands.

Moreover, the current government has frequently used these institutional advantages to disregard the legal and constitutional norms that it is supposed to apply. In fact, the government is renowned for its recurrent prac-



¹⁹⁵ The Colombian Congress reformed the Constitution in 2004 through a process that was quite opaque. The change was promoted by the government and its political coalition, and it allowed President Uribe to run in the next presidential elections, which were held in 2006. Therefore, since the beginning, the reelection was acutely criticized for being promoted for the exclusive sake of the President. Moreover, days before the constitutional reform, the reelection did not count with sufficient Congressmen votes for it to be approved, and rumors began about members of the government meeting with Congressmen and women who had announced they would vote against the reelection, and promising them public offices for their clients and other handouts in exchange of changing their votes. The day in which the reelection was voted, of the Congressmen and women who had attended those meetings, one did not show up and another effectively changed her vote. As a result, the reelection passed. Recently, the Congresswoman who changed her vote confessed that she did so as a consequence of the offers made to her by the government, which were later disregarded. Although she was sentenced to prison for that reason, the criminal and disciplinary investigations against members of the government who allegedly made her the promises have been precluded. The other Congressman who did not attend the voting session is currently being prosecuted. For the details of this political scandal, which is commonly known as the "Yidis-politics" after the name of the Congresswoman who confessed her vote swap, see, among many others, Coronell (2008); *El Tiempo* (May 11, 2008); *El Espectador* (21, April, 2008); *Revista Cambio* (May 1, 2008).

¹⁹⁶ Although before the constitutional reform that permitted the reelection the Constitution foresaw that the President would intervene in the election of many high rank officers belonging to many corporations, it did so through an institutional design that did not allow the same President to simultaneously participate in the election of officers of all those corporations, or of many members of the same corporation, by establishing differentiated terms of office and different moments at which these terms should start for each office. However, with the constitutional change that introduced the reelection, none of these terms and moments was changed. As a result, President Uribe has been able to participate in the election of the following high rank officers: the National Ombudsman (the President elected and reelected the current Ombudsman); the General Prosecutor (the President elected the current Prosecutor whose term is almost over, and hence in the following months will elect the next one); four of the five co-directors of the Central Bank; six of the seven justices of the disciplinary chamber of the Supreme Council of the Judiciary (the President integrated lists of three candidates from which Congress selected the justices); three of the nine justices of the Constitutional Court (the President integrated lists of three candidates from which Congress selected the justices, and it was been accused of only formally integrating the lists, by nominating only one candidate with real possibilities of being elected); the National Comptroller (the President nominated one of the three candidates in the list from which Congress elected the National Comptroller) (For an extensive description and analysis of these election processes and their effects on power concentration, see García Villegas et al. [2009]).

tice of issuing decrees that, instead of regulating laws, restrict their efficacy or contradict their main purposes. Although in many cases it is obvious that the decrees are illegal, the government seems to strategically take advantage of the slowness of the judicial process through which an official declaration of their illegality can be obtained, and therefore to speedily execute the decrees until then. This practice, labeled by some as “constitutional elusion”, has been frequently used with regards to transitional justice laws; indeed, the government has issued many decrees supposedly aimed to regulating these laws, which actually end up undermining their content or severely restricting their efficacy.¹⁹⁷ Since this practice has not affected in the least the President’s overwhelming popularity and political support,¹⁹⁸ it is very likely that the government could use it again in an eventual land restitution project almost costlessly and with impunity. This is all the more so since it could easily justify the inefficacy of such a project by referring to the enormous technical and legal difficulties implied by land restitution (see section III above).

If the government actually used such practices or any other strategy aimed to guarantee the inefficacy of a land restitution project, its success would amount to a great fiasco in terms of land redistribution in Colombia. In fact, the country’s severe problems of unequal distribution of land, high concentration of property in the hands of a few, and destitution of the very many would not only be maintained, but they would also be legitimated through a public policy that would send the message that the problem of land dispossession was dealt with by the Colombian state, and that the impossibility of solving it does not have anything to do with the government’s lack of political will, but is rather the result of insurmountable obstacles. The likelihood of this outcome constitutes a serious matter of concern for actual advocates of land restitution, as the promotion of the latter might end up becoming a trap that, instead of making restitution possible, might make it an even more difficult goal to attain.



¹⁹⁷ For the notion of “constitutional elusion”, see Quinche (2006). This notion appeals to the idea that the government’s strategy of issuing illegal decrees eludes the efficacious control exercised by the Colombian Constitutional Court, which is not competent for revising the constitutionality of regulatory decrees through its expedite process of judicial review. By virtue of the Colombian constitution (art. 237), this competence is exercised by the State Council through a much slower and complex process aimed at analyzing the legality of administrative acts. For the government’s practice of issuing illegal decrees concerning transitional justice laws, see *supra* note 187; Saffon and Uprimny (2009a).

¹⁹⁸ President Uribe’s popularity has risen up to 85% in some periods of his mandate, notably after the liberation of Ingrid Betancourt and other persons who had been kidnapped by the FARC for several years. According to a recent poll, 68% of Colombians have a favorable opinion of President Uribe, and 59% would go out to vote for a referendum that is currently being discussed in Congress in order to reform the constitution one more time so as to allow President Uribe to run for presidency for a second time. Of this 59%, 84% would vote in favor of such referendum. See Caracol (May 8, 2009).

Even though it is a latent risk, this need not be the outcome generated by the government and victims' and human rights organizations' consensus on land restitution. The second possibility is that these actors' misrepresentation of their interests and matching conceptions of justice will end up transforming their current motivations for supporting a land restitution project, in such a way that they are replaced by the motivation of actually realizing the restorative justice goal of land restitution. This possibility could arise as a result of the operation of the consistency and imperfection constraints over these actors' public expression of their commitment to restorative justice and land restitution. As explained in section IV, I believe these constraints influenced these actors' decision to express this commitment in the first place, by making them aware of the importance of being perceived as motivated by a justice concern that does not closely match their interests, and that they have previously defended in discussions on transitional justice. However, my argument here is that these constraints could lead these actors not merely to want to be perceived as such, but actually to truly be motivated by their commitment to restorative justice.

In effect, these constraints require that the government's and victims' and human rights organizations' future behavior concerning land issues match their publicly declared adherence to restorative justice and land restitution. This means that, once this adherence is expressed, they would not be able to back away from it, nor interpret it in a way that corresponds to their interests too closely. Eventually, this could make restorative justice become the main perspective from which all actors deal with the issue of land, which in turn would make land restitution the rule in the matter. This outcome could be generated not only by the actors' voluntary decision to abide by the consistency and imperfection constraints, but also by them being required to do so by the courts. In Colombia, it often happens that the intervention of the judiciary in general, and of the Constitutional Court in particular, radically changes the course of the implementation of laws and public policies by actively requiring that it adjust to fundamental rights and other constitutional principles. This has clearly been the case concerning the dispositions of transitional justice, which –as mentioned in section IV– originally contained mechanisms that were insufficient for protecting victims' rights, and which were therefore required by the Constitutional Court to be adjusted in substantial ways so as to be considered constitutional and remain within the legal order.

The probability that the Constitutional Court will intervene in the issue of land restitution is very high. The Colombian Constitution allows any citizen to bring before it "public actions of unconstitutionality" against any law and certain governmental decrees, with regards to which the Court performs

a judicial review.¹⁹⁹ Important and controversial laws almost always end up being brought before the Court with this purpose by non-governmental organizations, academic institutions or individual citizens, so undoubtedly the constitutionality of an eventually approved land restitution law would end up being revised by the Court. Furthermore, it is quite likely that the Court's intervention in this subject would aim to guarantee the efficacy of the land restitution project. As was mentioned in section II of this paper, in the framework of the accountability process of the government's public policy on attention to the forcibly displaced population, the Constitutional Court has already expressed its position on the matter, by declaring the restitution of evicted assets to the forcibly displaced as a fundamental right and by indicating that non-fulfillment of this condition risked maintaining their situation as an "unconstitutional state of affairs".

Hence, the intervention of the Constitutional Court would very likely promote the efficacy of an eventually approved land restitution law not only by adjusting its mechanisms in such a way that they effectively protect victims' rights, but also by monitoring and controlling its process of implementation within the framework of the forced displacement accountability process. This would open up important spaces for victims', human rights and other civil society organizations to demand the effective guarantee of land restitution to dispossessed victims, and therefore to further promote the efficacy of the project, and particularly to exercise pressure for overcoming any obstacles that may be placed in the way of restitution. Moreover, this would put specific political and institutional dynamics into motion, which would prevent the restitution process from being under the control of any single actor.

Faced with such a scenario, the government would probably opt for advancing the restitution cause rather than opposing it. Indeed, its opposition would become very costly due to the consistency and imperfection constraints. Furthermore, it would also be probably fruitless due to the dynamics of the



¹⁹⁹ Colombian Political Constitution (art. 241). See also Decree No. 2067 of 1991. The CCC can exercise judicial review of those governmental decrees that have been promulgated either in the exercise of exceptional powers conferred by Congress to regulate matters that are the competence of the legislature or to declare states of siege. Judicial review of all other governmental decrees is exercised by the State Council, as mentioned supra note 196. Besides the competence to decide public actions of unconstitutionality against laws and the aforementioned decrees, previous to their promulgation, the Constitutional Court decides on the constitutionality of statutory laws (which regulate special constitutional issues), laws that incorporate in the legal order international treaties ratified by the state, and laws that are objected by the President for constitutional reasons. Finally, the Constitutional Court also revises public actions of unconstitutionality against projects to reform the Constitution, acts convoking a referendum or a Constituent Assembly to reform the Constitution, and acts convoking and executing referendums regarding laws, plebiscites, and public consults. Concerning these projects and acts, the Constitutional Court's revision is exclusively formal, i.e. restricted to the identification of possible procedural vices (Saffon, 2007). For the list of issues decided by the Colombian Constitutional Court, see <http://www.corteconstitucional.gov.co/>.

restitution process itself. Therefore, its support for restitution would allow the government to obtain legitimacy, while resisting any further pressures for land reform aimed to go beyond restitution and to promote more general redistributive effects. On the other hand, also facing such a scenario, victims' and human rights organizations would possibly have to sacrifice to an important extent their more ambitious aim of bringing about a profound land reform in the country for the more modest objective of guaranteeing the restitution of dispossessed land. This would happen not only as a result of the requirement imposed by the consistency and imperfection constraints, which would demand these organizations to stick to the discourse of restorative justice and victims' past entitlements when dealing with the issue of land. It is very likely that the implementation of a land restitution project would simply exhaust the discussion about land allocation in the country, as it would privilege restorative justice as the main normative basis for solving the problem, and it would also show that the problem is already being dealt with.

As a result, the government and victims' and human rights organizations could end up jointly promoting the efficacy of a land restitution project, which was not the first choice of either one of them for dealing with the issue of land. Indeed, they would encourage a project with the potential for bringing about important changes in land allocation in the country, which, nonetheless, would be limited in scope, and hence would not allow for a structural transformation of the distribution of land ownership. Accordingly, land restitution could end up becoming a focal-point solution to the issue of land in Colombia: it would be each actor's second best choice for dealing with this problem. Furthermore, it would constitute a compromise capable of overcoming the deadlock that –as described in section II– has traditionally existed in the discussion about land in the country. Thus, land restitution could end up being supported by these actors not mainly for its intrinsic fairness, but rather for its focal-point nature.²⁰⁰

Although incapable of achieving the distributive justice objective of bringing about a profound reallocation of land ownership based on need, this focal point solution could produce a significant transformation of the tremendously unfair distribution of land in Colombia. In fact, it would be able to change the status quo of land allocation, which for a long time seemed unchangeable as a result of the stalemate in the discussion about land reform. Moreover, it would allow for the recovery of land concentrated in the



²⁰⁰ Therefore, restitution could operate in a similar way to the "equal division" principle, which according to Elster (2006b) "may be chosen as a focal point compromise between competing fairness-based claims (Schelling, 1960), rather than because of any intrinsic fairness property". However, Elster also notes that it is often difficult to determine on which of these two grounds is such principle chosen.

hands of a very few and for its allocation to a great number of victims, the majority of whom belong to the most excluded sectors of the population. Surprisingly enough, land restitution could end up doing all this, in spite of being the second-best choice of the different actors, and in spite of being initially promoted with the aim of achieving quite different goals. Thus, land restitution could end up proving that hypocrisy might, indeed, have a civilizing effect.²⁰¹

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²⁰¹ On this see Elster (1999, pp. 340, 402), who explicitly argues that the phenomenon of the "civilizing force of hypocrisy" might take place when the misrepresentation of motivations induces changes in behavior, and particularly when bad motivations are driven out by good ones.

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