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RETURN WITHIN THE BOUNDS OF THE PINHEIRO PRINCIPLES: THE COLOMBIAN LAND RESTITUTION EXPERIENCE

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ABSTRACT

In this Article, we argue that a successful program for land restitution and return for victims of forced displacement that obeys the Pinheiro Principles must take a comprehensive approach, or one that provides support programs for returning victims through centralized administration. We find that a minimalist restitution program, or one that simply provides a legal mechanism for obtaining restitution, is much less likely to succeed. In evaluating the likelihood of success, we consider whether the program will (1) adequately preserve victim choice while motivating victims to return, (2) provide for the fair and adequate administration of both restitution and return, and (3) enable returning victims to have more secure land tenure than when they were expelled. Along each of these dimensions of concern to returning victims, we conclude that, to be successful, a policy must provide for centralized

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administration of all phases of restitution and return, including extensive victim support.

Our evaluation of how public policy should implement the Pinheiro Principles is based on an analysis of the Victim's Law in Colombia in which we examine its approach to land restitution for victims of the Colombian armed conflict. Our analysis is grounded in the political, legal, and social background to land restitution in Colombia. The armed conflict in Colombia has lasted for over forty years and has left between three to five million displaced persons. Conditions in Colombia present both challenges and advantages for successful land restitution: challenges because displacement is still taking place in Colombia and advantages because the Constitutional Court has been a strong advocate for victims' rights.

I. INTRODUCTION

Rural citizens of Colombia have suffered repeated waves of internal displacement during the violence endemic to the country for the past sixty to seventy years, resulting in mass dispossession of property.[1] Significant displacement first occurred during *La Violencia*, a period of near civil war between the primary political parties that began around 1948 and lasted until the late 1950s or early 1960s. The displacement rates then tapered off until the mid-1980s,[2] when they began to increase again under pressure from guerrilla and paramilitary groups. These groups used various mechanisms, such as pure coercion and the illegal use of state institutions, to facilitate dispossession of property, primarily rural land.[3] The dispossession and displacement pose a major challenge to resolving the conflict in Colombia; as of 2010, there were between 3.4[4] and 5.2[5] million

1. *See* CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA 67–68 (2010); Ana María Ibáñez & Juan Carlos Muñoz, *The Persistence of Land Concentration in Colombia: What Happened Between 2000 and 2009?*, *in* DISTRIBUTIVE JUSTICE IN TRANSITIONS 279, 287–93 (Morten Bergsmo et al. eds., 2010), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_6_web.pdf.

2. *See* RODRÍGUEZ & RODRÍGUEZ, *supra* note 1, at 67–68; Ibáñez & Muñoz, *supra* note 1, at 5–9 (arguing that La Violencia caused significant displacement as did pressure from drug traffickers in the 1980s).

3. LÍNEA DE INVESTIGACIÓN TIERRA Y CONFLICTO, COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN (CNRR), EL DESPOJO DE TIERRAS Y TERRITORIOS: APROXIMACIÓN CONCEPTUAL 53 (2009), http://memoriahistorica-cnrr.org.co/archivos/arc_docum/despojo_tierras_baja.pdf.

4. SISTEMA NACIONAL DE ATENCIÓN INTEGRAL A LA POBLACIÓN DESPLAZADA (SNAIPD), INFORME DEL GOBIERNO NACIONAL A LA CORTE CONSTITUCIONAL SOBRE LA SUPERACIÓN DEL ESTADO DE COSAS INCONSTITUCIONAL DECLARADO MEDIANTE LA SENTENCIA T-025 DE 2004 86

internally displaced persons ("IDPs"), dispossessed of approximately 6.6 million hectares of land.[6]

In 2005, the UN Sub-Commission on Human Rights adopted the Pinheiro Principles, which define the rights of refugees and IDPs to return to their homes and to recover property.[7] The stated purpose of the non-binding Pinheiro Principles was to provide guidelines for one durable solution to IDP and refugee crises: the return of the displaced to their homes. These principles establish a demanding set of rights, granting the right to restitution for the lost homes and land to victims of dispossession with limited exceptions:

> All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.[8]

Restitution of this sort differs from reparations in that it consists of the return of or compensation for lost property, not of a remedy for other

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(2010), http://www.acnur.org/pais/docs/2813.pdf?view=1 (citing numbers from the Registro Unico de Población Desplazada as of April 2010). *See also* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), UNHCR GLOBAL TRENDS 2010: 60 YEARS AND STILL COUNTING 21 (2011), *available at* http://www.unhcr.org/4dfa11499.html (reporting that there were 3.6 million internally displaced persons at the end of 2010).

5. *Boletin Informativo de la Consultaria para los Derechos Humanos y el Desplazamiento No. 77: ¿Consolidación de qué?*, CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO (CODHES), Boletín informativo No. 77, Feb. 15, at 1, 8 (2011), http://www.codhes.org/index.php?option=com_docman&task=doc_download&gid=185&Itemid=50 (reporting the total number of people displaced between 1985 and 2010).

6. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, CUANTIFICACIÓN Y VALORACIÓN DE LAS TIERRAS Y LOS BIENES ABANDONADOS O DESPOJADOS A LA POBLACIÓN DESPLAZADA EN COLOMBIA 8 (Jan. 5, 2011) (reporting that 6.6 million hectares have been dispossessed since 1980); *see also* 5 LUIS JORGE GARAY SALAMANCA ET AL., COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, EL RETO ANTE LA TRAGEDIA HUMANITARIA DEL DESPLAZAMIENTO FORZADO: REPARAR DE MANERA INTEGRAL EL DESPOJO DE TIERRAS Y BIENES 57 (2009), *available at* http://www.internal-displacement.org/8025708F004CE90B/9C9025369DCE9579C12575E0005439CA/$file/Vol_5_TIERRAS.pdf (reporting that 5.5 million hectares have been dispossessed since 1998).

7. Scott Leckie, *Introduction* to THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS 3 (2005) [hereinafter Leckie, *Introduction*].

8. Special Rapporteur on the Housing and Property in the Context of the Return of Refugees and Internally Displaced Persons, *Principles on Housing and Property Restitution for Refugees and Displaced Person*, U.N. Sub-commission on the Promotion and Protection of Human Rights, Economic & Social Rights Council, princ. 2.1, U.N. Doc. E/CN.4/Sub.2/2005/17; Comm'n of Human Rights, Sub-Comm'n on the Promotion of Human Rights, 56th Sess. (June 28, 2005) [hereinafter THE PINHEIRO PRINCIPLES] (by Paulo Sérgio Pinheiro), *available at* http://www.unhcr.org/refworld/docid/41640c874.html.

wrongs suffered. In situations of mass dispossession, the required restitution or compensation can be expensive because of the costs associated both with (1) compensating the many secondary occupants who must be evicted to allow the victims to return,[9] and (2) administering multiple restitution proceedings. Independently, both costs can be substantial.[10]

The demanding nature of the Principles has led some to conclude that, while the Principles contain appealing standards, there are substantial challenges to designing a program that can satisfactorily implement those standards in situations of mass dispossession, like those displacements in Colombia.[11] Achieving a durable solution through the return of the displaced to their places of origin presents a number of challenges: balancing victim choice with incentives to return, ensuring equality of access and procedural fairness in the restitution process, and reforming an unstable and unjust pattern of land distribution. These challenges constrain the design of a program that can successfully implement the Principles. In particular, we argue that a developing nation with significant levels of dispossession can implement a successful restitution and return program under the terms of the Pinheiro Principles only if the program design takes a comprehensive approach. A comprehensive program combines restitution with strong, centralized administration and support programs directed at returning victims. In contrast, a minimalist program design might limit its ambitions to establishing a legal mechanism for restitution, without providing extensive administration or support for returning victims.

We base our argument in an analysis of the land restitution program design contained in the recently passed *Ley de Victimas*,[12] as well as appropriate contrasts between that design and that of the now-defunct *Programa de Restitución de Bienes* ("Programa Julio").[13] The current

9. *See id.* princ. 17.

10. *See, e.g.*, *Procuraduría General de la Nación*, LA VOZ DE LAS REGIONES 114 (2009) (citing MINISTERIO DEL INTERIOR Y DE JUSTICIA & UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), PROGRAMA MÁS INVERSIÓN PARA EL DESARROLLO ALTERNATIVO SOSTENIBLE (MIDAS), SUPUESTOS Y CÁLCULOS DE LA INSTANCIA INSTITUCIONAL DE GESTIÓN DE RESTITUCIÓN DE BIENES EN LA ATENCIÓN DE VÍCTIMAS DE LA VIOLENCIA (2009)) (reporting estimated costs of restitution in Colombia at approximately $250 million U.S. dollars, or $506,848,748,125 in Colombian pesos, over five years for 180,000 families, which constitutes just a fraction of the total number of displaced families).

11. *See* COMISIÓN DE SEGUIMIENTO, *supra* note 6.

12. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] (Colom.).

13. COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, PROGRAMA DE RESTITUCIÓN DE BIENES (2010) [hereinafter PROGRAMA JULIO], http://internal-displacement.org/8025708F004CE90B/006B86436CDDC863C12577C100358343/$file/PRB+(02JUL10)-1.pdf.

attempt to implement land restitution, as the first major post-Pinheiro Principles restitution effort, evolved with the Principles explicitly in mind.[14] The *Ley de Justicia y Paz* required the National Commission for Reparations and Reconciliation ("CNRR") to plan for a comprehensive restitution program based on the requirements of the Pinheiro Principles.[15] At the start of his term in 2010, President Juan Manuel Santos introduced the *Ley de Victimas*, incorporating several features of the *Programa* design,[16] and the Colombian Congress passed the *Ley* in June 2011. Both designs combine a legal mechanism for shifting the burden of proof in restitution proceedings from the plaintiff to the defendant with various administrative bodies and support programs.[17] The challenges for implementing the Pinheiro Principles strongly support the decision that the *Ley de Victimas* establish support programs and administrative bodies and suggest that extensive support and centralized administration is required to successfully implement the Principles.

In this Article, we evaluate whether a land restitution policy can overcome the challenges for implementing restitution and return under the terms of the Pinheiro Principles, using the Colombian *Ley de Victimas* as an example. After explaining the challenges that face any attempt to implement restitution and return in compliance with the Pinheiro Principles, we will describe the social context in which the Colombian government must implement a land restitution program. Second, we will describe the details of the *Ley de Victimas* policy for the restitution and return of dispossession victims, as well as touch on a few relevant contrasting provisions of the *Programa's* design. Third, we will argue that the *Ley de Victimas* broadly complies with the requirements of the Pinheiro Principles. Following this background discussion, we will examine how the public policy contained in the *Ley de Victimas* addresses the problems with implementing return through restitution and how it could better respond to those challenges. We conclude that the challenges to implementing restitution and return in accord with the Pinheiro Principles constrain the design of a potentially successful public policy: a comprehensive, as opposed to minimalist, policy design for restitution and

14. *Id.* at 7.

15. L. 975/05, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] arts. 44, 46, 49 (Colom.).

16. *Colombia no será la misma*, SEMANA (June 11, 2011), http://www.semana.com/enfoque/colombia-no-sera-misma/158344-3.aspx.

17. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 78 (Colom.).

return is more likely to overcome the challenges facing Pinheiro Principles-compliant land restitution.

II. CHALLENGES FOR RETURN IN COMPLIANCE WITH THE PINHEIRO PRINCIPLES

The Pinheiro Principles established a strong international standard governing the restitution of property.[18] They assert that a person has the right to restitution of arbitrarily dispossessed property,[19] regardless of whether the person is an IDP or a refugee.[20] They establish that a state has a duty to restore to a dispossessed person the particular property taken unless it is factually impossible to restore the property, in which case compensation is a sufficient remedy.[21] Additionally, the Principles establish significant requirements for the procedures that a state must employ to satisfy the right of restitution, with the aim of making restitution

18. An early version of the Pinheiro Principles emerged in the late 1990s as a standard governing the treatment of refugees and IDPs during displacement crises, and became highly visible as a result of the conflicts of that period, including those in Yugoslavia and Rwanda. *See* Leckie, *Introduction*, *supra* note 7, at 4. The U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted an early statement of restitution rights in 1998. *See* Promotion and Protection of Human Rights Res. 1998/26, Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons, Aug. 26, 1998, U.N. Doc. 1998/26 (Aug. 26, 1998), *available at* http://www.unhcr.org/refworld/docid/3dda64517.html. Following this watershed resolution, the Sub-Commission asked Paulo Sérgio Pinheiro to develop a more comprehensive approach to restitution rights for IDPs and refugees. Leckie, *Introduction*, *supra* note 7, at 4. In 2002, the Sub-Commission made Pinheiro a Special Rapporteur and requested that he develop his study into draft principles, which he submitted to the Sub-Commission in 2004. *Id.* The Sub-Commission adopted the final version of the Principles in 2005. *Id.*

Prior to the Pinheiro Principles, there were a number of international standards concerning the appropriate treatment of IDPs. The UN Universal Declaration of Human Rights proposed a general right of return in Article 13(2). Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., art. 13, U.N. Doc.A/810 (Dec. 10, 1948). However, this right of return did not include a corresponding right to property restitution. Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U. J. INT'L L. & POL. 441, 458 (2005). The Deng Principles expanded on this right of return. In 1998, the UN Commission on Human Rights endorsed the Deng Principles, which Special Rapporteur Francis Deng developed between 1992 and 1998. U.N. Commission on Human Rights, *Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons Mr. Francis M. Deng*, *in* GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT (2d ed. 2004). First and foremost, the Deng Principles require that various actors take measures to prevent displacement from occurring and establish standards for the treatment of those who have been displaced. *See id.* princs. 1–27. While the Deng Principles impose some weak obligations on governments relating to restitution, establishing that IDPs have the right to return to their homes and requiring that governments assist IDPs in obtaining restitution or compensation, they do not impose a duty to provide restitution or compensation. *Id.* princs. 28–30.

19. *See* THE PINHEIRO PRINCIPLES, *supra* note 8, at princ. 2.

20. *Id.* princ. 1.

21. *Id.* princ. 2.1.

accessible to marginalized, dispossessed persons.[22] As part of these procedural standards, the Principles encourage states to adopt a conclusive procedural presumption that persons who left their land during a period of violence left because of the violence.[23] Finally, the Principles establish rights not only for landowners but also for those with other forms of property interests in land, including tenancy.[24]

Any straightforward attempt to implement land restitution along the lines envisioned in the Pinheiro Principles faces substantial challenges to securing a durable solution to an IDP crisis through return. First, it is difficult to establish the correct balance between promoting return and leaving IDPs free to choose other solutions. Second, a restitution program is likely to suffer from administrative problems that interfere with its ability to adequately restore land and support return. Finally, a straightforward implementation of the Pinheiro Principles that does not provide comprehensive support may fail to change the circumstances of those returning in a way that makes the return stable.

A. Challenge: Promoting Return with Restitution Programs

Given that the principles put a strong emphasis on providing victims with restitution of their property regardless of their intent to return,[25] a restitution program that complies with the Pinheiro Principles may strike a poor balance between encouraging return and protecting victim choice. A restitution program design that fails to motivate victims to return will also fail to resolve or assist in the resolution of a significant displacement problem. Even if the policy motivates the displaced to return, a restitution program design must also respect the choice of the displaced to select some other resolution to their condition, particularly when return may entail risks.

On the one hand, the primary purpose of a restitution program is to facilitate the return to the place of expulsion;[26] enforcing property rights is

22. *Id.* princs. 11–15.
23. *Id.* princ. 15.7.
24. *Id.* princs. 16–17.
25. *Id.* princs. 2.1, 21.2; *see* Giulia Paglione, *Individual Property Restitution: From Deng to Pinheiro—and the Challenges Ahead*, 20 INT. J. REFUGEE L. 391, 407–09 (2008).
26. THE PINHEIRO PRINCIPLES, *supra* note 8, at 5. However, some find the connection that the Principles make between restitution and return problematic. According to Paglione, the Principles do not sufficiently separate the remedy for dispossession from the right to return, Paglione, *supra* note 25, at 406–07, potentially resulting in restitution program designs that inappropriately limit victim choice. While the Principles do not require that a restitution program make the right to restitution dependent on actual return, the Principles do imply that remedies for dispossession exist in order to promote

a secondary purpose. When victims do not intend to return to the land restored to them, a restitution program does not accomplish its goal. If the victim does not return to the land, she is likely to either sell the land, effectively converting restitution into monetary compensation, or simply not use the land, as it is not possible to do so without return. However, monetary compensation is often an insufficient way to address displaced people's problems. While money may provide temporary support for a displaced person, it is unlikely to resolve the underlying problems that displacement causes, including difficulty adapting to displacement conditions that are very different from those in the location of expulsion.[27] Restitution is less likely to adequately facilitate return when a large number of victims are reluctant to return. For example, in Colombia, only 5.8% of victims currently express a desire to return, while 34.9% are afraid to do so and 12.7% believe the conditions that led to their original displacement persist.[28] A restitution program must find ways to overcome victim reluctance and achieve actual return to accomplish the primary goal of post-conflict land restitution.

At the other extreme, the Pinheiro Principles establish that a restitution program design may not force a victim to return, either to receive restitution or for any other reason: "All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice."[29] As part of

return. *See id*. This connection is manifest in the fact that the Principles require that a program admit no remedy for dispossession other than restitution under most circumstances, problematically denying the dispossessed the right to select alternative remedies such as compensation or resettlement. *Id.* at 407–08. *But see* THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 21.1. Instead, the Principles only allow a program design to permit compensation as an alternative remedy when it is factually impossible to restore property to the dispossessed. Paglione, *supra* note 25, at 408. Additionally, return is promoted because the Principles do not imply that a program design can impose an explicit time limit on the right to restitution, prioritizing restitution regardless of the time that has elapsed and other events that have occurred since the dispossession. *Id*. at 409–12.

27. Consumption for displaced households is lower a year after displacement than in the first three months following displacement, possibly because savings and humanitarian aid become exhausted. *See* Ana María Ibáñez & Andrés Moya, *¿Cómo el Desplazamiento Forzado Deteriora el Bienestar de los Hogares Desplazados?: Análisis y Determinantes del Bienestar en los Municipios de Recepción* 11 (June 2006) (unpublished manuscript), *available at* http://economia.uniandes.edu.co/content/download/2137/12755/file/d2006-26.pdf. Additionally, part of the problem that confronts displaced agricultural workers is a lack of demand for their skills, making it difficult to adapt to their new economic conditions. *See id.* at 13.

28. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO ,INFORME DE VERIFICACIÓN SOBRE EL CUMPLIMIENTO DE DERECHOS DE LA POBLACIÓN EN SITUACIÓN DE DESPLAZAMIENTO 39, 41 (2010), *available at* http://www.codhes.org/index.php?option=com_docman&task=doc_download&gid=168&Itemid=99999999.

29. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 10.1.

this requirement, a restitution program may not condition restitution on actual return: "The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution."[30] This requirement limits the ways in which a program can use restitution to motivate victims to return to their places of origin since, under the Principles, restitution programs cannot force victims to return as a condition of exercising their property claim. Even though the Pinheiro Principles prohibit any requirement that forces victims to return for any reason, including to receive restitution,[31] they do permit a restitution program to strongly encourage victims to return so long as the means are non-coercive.

A successful restitution program will have to navigate these two extremes within the bounds of the Pinheiro Principles. On the one hand, the program design cannot limit victim choice by forcing victims to return to their homes. On the other hand, it needs to motivate victims to return in order to resolve the problem of internal displacement.

B. Challenge: Administering Land Restitution and Return

The Pinheiro Principles require individualized property restitution—that is, the return to each individual of the particular lost property—which poses a number of challenges for administration and implementation.[32] The individualized restitution requirement may create problems of fairness because restitution can only be accomplished through separate, individualized proceedings in each case.[33] For example, separate and individual restitution judgments may prevent or complicate the use of factual determinations from one proceeding in other factually related proceedings.[34] Any restitution process will have to address victims separately because restitution intrinsically involves the return of specific property to specific victims. This restitution, in turn, requires individualized adjudicative decisions to determine whether individual claimants had rights to particular goods, regardless if an administrative agency a court resolves the claims.[35] A restitution process that involves

30. *Id.* princ. 2.2.
31. *Id.* princs. 2.2, 10.1.
32. *Cf.* Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451, 456–59 (Pablo de Greiff ed., 2006).
33. *Cf. id.*
34. *See id.*
35. *See* U.N. High Commissioner for Refugees [UNHCR], Dept. of Int'l Protection, *Housing,*

individual decisions for a large pool of victims may result in two forms of unfairness: victims may have unequal access to the restitution institutions, and the institutions may follow their own procedures inconsistently. Unequal access may arise from geographic or educational differences, while procedural inconsistencies may arise from the fact that many different officials will be involved in the process.

Moreover, individualized restitution programs, which the Pinheiro Principles require, have potential for coordination problems between the restitution program and other reparative and social support programs.[36] Victims that seek restitution in order to return home need more than restitution of title to property. The victims need comprehensive support to restart the lives they were forced to abandon, including support for rebuilding homes and livelihoods.[37] Because the required restitution is individualized, but the victims return to geographically dispersed locations, victims will depend on local governments and other agencies to provide the support and social programs they need to resume their lives.[38] Under these circumstances, it is difficult to ensure that victims will have access these crucial programs.

C. Challenge: Transforming the Circumstances of Returnees

The designs of many restitution programs do not adequately address serious inequalities in land distribution or the ability of returnees to take advantage of the land once restored to them.[39] The programs' reinstitution of the "status quo" prior to dispossession does not effectively end the cycle of mass dispossessions. Specifically, a program design that follows

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Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework, ¶ 14, U.N. Doc. PPLA/2005/01 (Mar. 2005) (prepared by Scott Leckie) [hereinafter Leckie], *available at* http://www.unhcr.org/refworld/docid/425689fa4.html.

36. *Cf.* de Greiff, *supra* note 32, at 458–59; PROGRAMA JULIO, *supra* note 14, at 9.

37. *See* Representative of the U.N. Secretary-General, *Addendum: Framework on Durable Solutions for Internally Displaced Persons*, ¶ 10-11, *delivered to the General Assembly*, U.N. Doc. A/HRC/13/21/Add.4 (Feb. 9, 2010) (prepared by Walter Kälin).

38. *See* de Greiff, *supra* note 32, at 458–59.

39. *See* Nelson Camilo Sánchez & Rodrigo Uprimny Yepes, *Propuestas para una restitución de tierras transformadora*, *in* TAREAS PENDIENTES: PROPUESTAS PARA LA FORMULACIÓN DE POLÍTICAS PÚBLICAS DE REPARACIÓN EN COLOMBIA 193, 223–43 (Catalina Díaz Gómez ed., 2010); *see also* Rodrigo Uprimny Yepes & María Paula Saffon, *Reparaciones Transformadoras, Justicia Distributiva y Profundización Democrática*, *in* REPARAR EN COLOMBIA: LOS DILEMAS EN CONTEXTO DE CONFLICTO, POBREZA Y EXCLUSIÓN 31, 34–43 (Catalina Díaz et al. eds., 2009); Rodrigo Uprimny Yepes, Inaugural Address at Utrecht University: Between Corrective and Distributive Justice: Reparations of Gross Human Rights Violations in Times of Transition 7–14 (Oct. 21, 2009), *available at* http://www.uu.nl/university/research/EN/international_collaboration/latinamerica/Documents/OratieRodrigoUprimny.pdf.

the Pinheiro Principles may well fail to adequately transform the unequal land distributions, across both genders and socioeconomic classes, which exist in many states suffering from mass dispossession. Since the Pinheiro Principles require that the state fully restore all dispossessed property to its owners, even if the owners are or were wealthy, following the principles could recreate or exacerbate inequality in an already unequal society under certain conditions.

Inequality in land distribution is closely connected to the inability of small plot farmers to take advantage of the land they possess. While small plot farms can be more productive per hectare than large-scale farms, even though less productive per farmer,[40] agricultural policy often negatively affects their productivity.[41] As a result, small plot farmers face a number of impediments to the productivity of their land, including a lack of education, technology, and political connections, as well as government policies that focus on large farms.[42] Without these forms of social support, small plot farmers may have inadequate access to the markets, modern agricultural techniques, and farm equipment that could make a significant difference in their lives.

Restitution is unlikely to diminish the unequal land distribution across socioeconomic classes, which contributes to the unfavorable conditions for small plot farmers. Dispossessed farmers who were poor prior to dispossession are only entitled to restitution of relatively low value property, while those victims who were wealthier prior to dispossession receive more. Similarly, restitution is unlikely to close the gap between the poor and those who were wealthier prior to receiving restitution. Indeed, the gap could be exacerbated if the dispossessed who are currently wealthier generally lost more property via dispossession than those who are currently poorer.

Restitution is also unlikely to promote gender equality in land holdings. Although the Pinheiro Principles themselves might require restitution that improves the unequal land distribution across genders,[43] a restitution program that does not focus on gender equality in land titles will not improve this form of inequality under many circumstances. If men held

40. Albert Berry, *The Economics of Land Reform and of Small Farms in Developing Countries: Implications for Post-conflict Situations*, *in* DISTRIBUTIVE JUSTICE IN TRANSITIONS 25, 30–31 (Morten Bergsmo et al. eds., 2010), http://www.fichl.org/fileadmin/fichl/documents/FICHL_6_web.pdf (reporting that, for example, the value added per effective hectare for a farm of five or fewer hectares in Colombia historically has been twice the value added for a farm of 500 hectares or greater).

41. *Id.* at 29–30.

42. *Id.*

43. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 4.2.

title to the majority of land prior to dispossession, restoring title will not increase the gender equality of land holdings. As a result, straightforward restitution of land will often recreate the prior unequal distribution of land holdings between men and women, even if women are equally entitled to land restitution.

The fact that a public policy implementing the Pinheiro Principles is likely to maintain or exacerbate inequality is problematic for returning victims for at least two reasons. First, the land distribution in many societies with displacement crises is so unequal that it is unjust, both across socioeconomic classes and across genders.[44] In such circumstances, restoring a poor person to her pre-dispossessed state of poverty may violate her human rights or the fundamental requirements of distributive justice.[45] Second, although expert opinions are divided, inequality in land distribution might contribute to the sort of violence that produces mass dispossession, making a restitution effort that maintains or exacerbates inequality ultimately counterproductive.[46] At a minimum, conflict between large landholders and small plot farmers has been characteristic of Colombian civil conflict since the middle to late 1800s.[47] If land inequality caused the conflict that resulted in dispossession of the land, the failure to transform the unequal land distribution undermines assurances of non-recurrence of displacement and dispossession.

D. Challenge: Financial Constraints

The requirement of full restitution of all dispossessed property may place an enormous strain on public funds to the extent that it could be effectively impossible to satisfy the claims of all the victims, particularly while satisfying the other legitimate demands on state resources.[48] While a restitution program may be less expensive than many reparations programs

44. Sánchez & Uprimny, *supra* note 39, at 226.

45. *Id.* at 229.

46. *See, e.g.*, Maria Paula Saffon, *The Project of Land Restitution in Colombia: An Illustration of the Civilizing Force of Hypocrisy?* 12(2) REVISTA ESTUDIOS SOCIO-JURÍDICOS 109, 116–17 (2010), http://redalyc.uaemex.mx/redalyc/pdf/733/73315636005.pdf (claiming that the unequal distribution of land in Colombia is a primary cause of the protracted armed conflict). *But see* Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil War*, 56 OXFORD ECON. PAPERS 563, 587–89 (2004) (concluding that land inequality has limited general impact on civil wars worldwide).

47. *See generally* Catherine LeGrand, *Los antecedentes agrarios de la violencia: el conflicto social en la frontera colombiana, 1850–1936*, *in* PASADO Y PRESENTE DE LA VIOLENCIA EN COLOMBIA (Gonzalo Sánchez & Ricardo Peñaranda eds., 2007) (describing continuous but evolving conflicts between small plot farmers and large land-holders from the mid 1800s through the 1930s).

48. *Cf. id.* at 456.

because the state may not have to pay for the restored land,[49] it nonetheless has substantial costs.[50] Carrying out restitution requires the creation or allocation of judicial or quasi-judicial mechanisms for verifying that a claimant has a legitimate claim to the property.[51] When property occupied by a good faith third party is restored to the original owner, the program may have to pay compensation to the third party.[52] Moreover, a restitution program will have to establish means to protect property rights, such as land registries, and to prevent the illegitimate buying and selling of property.[53] These costs, as well as the overall success of the program, will determine whether a restitution program is a sound social investment.

III. HISTORICAL BACKGROUND TO LAND RESTITUTION IN COLOMBIA

In this section we will describe the factual background to land restitution in Colombia. First, we will describe how land dispossession arose and is structured, as well as the institutional and contextual challenges to land restitution in Colombia. Then, we will describe the process that led to the development of the *Ley de Victimas* land restitution proposal considered in the rest of this Article.

A. Conflict, Displacement, and Dispossession

Colombia has been in a state of armed conflict for over forty years.[54] The current civil conflict originated in the quasi-civil war, known as *La Violencia*, between the then dominant Liberal and Conservative political parties.[55] *La Violencia* began in the mid-1940s, possibly as the result of

49. *See, e.g.*, PROGRAMA JULIO, *supra* note 13 (reporting that the program will not compensate many categories of secondary occupants); Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 98, 113 (Colom.) (establishing that the funds for the program will come from several sources other than the general budget).

50. *See, e.g.*, Procuraduría General, *supra* note 10, at 114 (reporting that restitution for 180,000 families in Colombia would cost approximately $250 million U.S. dollars or $506,848,748,125 pesos over five years).

51. *See* Leckie, *supra* note 35, at 14 (arguing that judicial, quasi-judicial, or administrative mechanisms are necessary to formally resolve housing disputes and officially recognize land rights after a conflict).

52. *See* THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 17.1.

53. *See id.* princ. 18.

54. *See* MARCO PALACIOS, BETWEEN LEGITIMACY AND VIOLENCE 157–69, 190–93, 203–13, 240–45 (Richard Stoller trans. 2002); *see also* Report on the Demobilization Process in Colombia, Inter-Am. Comm'n H.R., OEA/ser.L/V/II.120, doc. 60, 17–18 (Dec. 13, 2004).

55. *See* PALACIOS, *supra* note 54, at 157–69; *see also* Inter-Am. Comm'n H.R., *supra* note 54, at 17.

vote competition in rural areas.[56] It became a severe crisis following the assassination of Liberal Party leader Jorge Eliecer Gaitan in 1948 and lasted until sometime between 1953[57] and the early 1960s.[58] Between 1964 and the 1980s, various leftist guerrilla forces emerged, including FARC,[59] ELN,[60] EPL,[61] and M-19.[62] By the early 1970s, wealthy Colombians, ostensibly threatened by these revolutionary groups, began to form self-defense forces supported by the military and police.[63] The self-defense forces evolved into paramilitary organizations that violently defended the drug trade and elite economic interests, engaging in murders and massacres.[64] Illegal armed paramilitary and guerrilla groups have created a persistent state of insecurity, particularly in rural Colombia.[65] The security crisis continues to the present as a result of continued guerrilla violence, as well as violence from the new illegal armed groups that emerged following the paramilitary demobilization in 2005.[66]

The ongoing conflict has produced one of the largest number of IDPs in any country in the world.[67] The primary causes of internal displacement are attacks by the guerrilla and paramilitary groups that have been active in Colombia.[68] Estimates of the numbers of IDPs as of 2010 range from 3.4[69] to 5.2[70] million. Estimates of the land lost by the displaced range more broadly from a 2006 estimate of 1.2 million hectares[71] to a 2010

56. *See* PALACIOS, *supra* note 54, at 157 (relying on research by Paul Oquist).

57. *See id.* at 151. In 1953, the dictatorship of Gustavo Rojas Pinilla decreased the importance of controlling votes. *See id.* at 151, 165. Following the dictatorship, in 1958 the National Front maintained the diminished importance of votes by designating a set number of positions for each political party and alternating the presidency between them. *Id.* at 155–56.

58. *See* PALACIOS, *supra* note 54, at 164–66.

59. Fuerzas Armadas Revolucionarias de Colombia. Report on the Demobilization process in Colombia, Inter-Am. Comm'n. H.R., *supra* note 54, ¶ 35.

60. Ejército de Liberación Nacional. Report on the Demobilization Process in Colombia, Inter-Am. Comm'n H.R., *supra* note 54, at 2.

61. *Id.*

62. *Id.*

63. *Id.*

64. Autodefensas Unidas de Colombia, Inter-Am. Comm'n H.R., *supra* note 54, ¶ 42.

65. *See* SNAIPD, *supra* note 4, at 86.

66. *See* HUMAN RIGHTS WATCH, PARAMILITARIES' HEIRS: THE NEW FACE OF VIOLENCE IN COLOMBIA 36 (2010); INTERNATIONAL CRISIS GROUP, COLOMBIA'S NEW ARMED GROUPS 2 (May 10, 2007), http://www.crisisgroup.org/~/media/Files/latin-america/colombia/20_colombia_s_new_armed_groups.pdf.

67. INTERNAL DISPLACEMENT MONITORING CENTER, COLOMBIA 1 (2010), http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/18EFD5E90A66EA75C1257725006524C1/$file/GO2009_Colombia.pdf.

68. Garay, *supra* note 6, at 34–35; PROGRAMA JULIO, *supra* note 13, at 17.

69. SNAIPD, *supra* note 4, at 86.

70. CODHES, *supra* note 5, at 1.

71. Ana María Ibáñez, Andrés Moya & Andrea Velásquez, *Hacia una Política Proactiva para la*

estimate of 10 million hectares.[72] A group of experts recently asserted that 6.6 million hectares, or 15.4% of the agricultural land in Colombia, has been taken.[73] Poor rural farmers comprise the vast majority of people displaced and dispossessed.[74]

This mass dispossession of land has occurred in a country where agrarian reform has repeatedly failed, leaving land ownership highly concentrated. An attempt in 1936 to clear up land titles granted the right to claim land to any person who had exploited the land in good faith for five years.[75] Unfortunately, the law provoked landowners to expel peasants from their land en masse and provide large landowners with a legal mechanism to claim formal title to vacant land that they had appropriated.[76] In 1944, the government withdrew the attempt at reform by passing a law protecting ownership of unused land.[77] To reverse the land concentration that *La Violencia* caused, the government began an attempt to encourage the productive use of land in 1961,[78] eventually permitting those working land to acquire title to that land under certain conditions.[79] Again mass expulsions resulted, and the government officially withdrew the reform in 1975.[80] In 1988, the government made yet another attempt at land reform with a law simplifying land transactions and granting land to peasants and demobilized combatants, but the law failed to significantly affect land distribution or agrarian structure.[81]

The result of Colombian land policy and civil conflict in the twentieth and twenty-first centuries is not encouraging, amounting to an agrarian counter-reform. By 2003, 0.4% of landowners held 62.3% of estates over 500 hectares while 86.3% of landowners held only 8.8% of estates under

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Población Desplazada, U.S. AGENCY FOR INT'L DEVELOPMENT 132 (2006), http://www.internal-displacement.org/8025708F004CE90B/664A37C39F38E4C8C1257225003A728C/$file/Informe+final+28+de+febrero+2006.pdf.

72. *Estrategia Contra la Impunidad y Herramienta para la Reparación Integral*, MOVIMIENTO DE VICTIMAS DE CRIMINES DEL ESTADO (Apr. 8, 2009), http://www.movimientodevictimas.org/index.php?option=com_content&task=view&id=280&Itemid=69.

73. COMISIÓN DE SEGUIMIENTO, *supra* note 6, at 7.

74. *See* SNAIPD, *supra* note 4, at 86.

75. Saffon, *supra* note 46, at 117–18.

76. Absalón Machado C., *Propuesta de elementos para una política de tierras en medio del conflicto*, *in* DESPLAZAMIENTO FORZADO ¿HASTA CUÁNDO UN ESTADO DE COSAS INCONSTITUCIONAL? TOMO II 13 (Consultoría para los Derechos Humanos y Desplazamiento CODHES ed., 2010); Saffon, *supra* note 46, at 117–8.

77. Machado, *supra* note 76, at 13.

78. Saffon, *supra* note 46, at 119.

79. L. 1/68, enero 26, 1968, DIARIO OFICIAL [D.O.] (Colom.); Machado, *supra* note 76, at 13; *see also* Saffon, *supra* note 46, at 3.

80. L. 6/75, enero 10, 1975, Diario Oficial [D.O.] (Colom.); Machado, *supra* note 76, at 14.

81. L. 30/88, marzo, 18, 1988, DIARIO OFICIAL [D.O.] (Colom.); Machado, *supra* note 76, at 14.

twenty hectares.[82] Estates of less than twenty hectares occupied 8.8% of the land area, and those of greater than 500 hectares occupied 62.5% of the area.[83] Moreover, the land registry, or *cadastre*, in Colombia has not been updated since 1994. In 2007, 54% of estates did not have current registries.[84] Additionally, the land registry does not include property rights other than ownership, such as possession and tenancy.[85] Finally, large landowners, due to their political influence, are subject to abnormally low property taxes.[86] In 1990, *Ley* 44 imposed property taxes between .1% and 1.6% of the property valuation, depending on the social stratum of the owner, the use of the land, and the age of the land registration.[87] However, in Bolivar, La Guajira, Magdalena, and Sucre, for example, landowners typically paid less than .1% of the land value in property taxes.[88] In addition, rural land was substantially undervalued for tax purposes, with land in cities comprising 84.9% of the total official land value and land in rural areas comprising 15.4% in 2003.[89]

Colombia faces the unique challenge of implementing a land restitution program for IDPs without a substantial change in the circumstances that created the displacement. State institutions and individual politicians who were deeply involved in creating, supporting, and using the paramilitaries remain in place. The Colombian military supported the creation of the paramilitaries, conducted joint military actions with them, and aided their attacks on civilians.[90] The national government allowed the creation of armed self-defense forces through the CONVIVIR program,[91] an action that aided the growth of illegal paramilitary groups nationwide.[92] Local

82. Carlos Salgado Araméndez, *Propuestas frente a las restricciones estructurales y políticas para la reparación efectiva de las tierras perdidas por la población desplazada*, *in* DESPLAZAMIENTO FORZADO ¿HASTA CUÁNDO UN ESTADO DE COSAS INCONSTITUCIONAL? TOMO II 37 (Consultoría para los Derechos Humanos y el Desplazamiento CODHES ed., 2010).

83. *Id.* at 37.

84. Rodrigo Uprimny & María Paula Saffon, *Reparaciones Transformadoras, Justicia Distributiva y Profundización Democrática*, *in* REPARAR IN COLOMBIA: LOS DILEMAS EN CONTEXTOS DE CONFLICTO, POBREZA, Y EXCLUSIÓN 31, 51 n.38 (Catalina Díaz Gómez, Nelson Camilo Sánchez & Rodrigo Uprimny Yepes eds., 2009).

85. Saffon, *supra* note 76, at 6.

86. *See* SALMÓN KALMONOVITZ & ENRIQUE LÓPEZ ENCISO, LA AGRICULTURA COLOMBIANA EN EL SIGLO XX 350–51 (2006).

87. *Id.* at 350.

88. *Id.* at 351.

89. *Id.*

90. *See* COMISIÓN COLOMBIANA DE JURISTAS, COLOMBIA: LA METÁFORA DEL DESMANTELAMIENTO DE LOS GRUPOS PARAMILITARES 149–52 (2010); *see generally* HUMAN RIGHTS WATCH, THE "SIXTH DIVISION": MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA (2001), *available at* http://www.hrw.org/reports/2001/colombia/.

91. L. 356/94, febrero 14, 1994, 41.220 DIARIO OFICIAL [D.O.] (Colom.).

92. *See* COMISIÓN COLOMBIANA DE JURISTAS, *supra* note 90, at 152–53.

elites, including politicians, landowners, and businessmen, frequently supported the expansion of paramilitary groups into their regions.[93] At the national level, many politicians had connections with the paramilitaries. A substantial portion of the Colombian Congress was accused of paramilitary involvement, including ex-Senator Mario Uribe, a cousin and political ally of the former president.[94] While some of the politicians involved in these scandals have been replaced, many of the political interests that collaborated with illegal armed groups are still represented in the government, and there is some evidence that the links between state institutions and paramilitary successor groups persist.[95]

The continuing conflict and its enabling conditions create problems both for the immediate security of those trying to obtain land restitution and for those attempting to provide credible assurances that displacement and dispossession will not recur. The immediate security of those attempting to return to their land has become a significant problem. Although paramilitary groups have largely demobilized and the level of guerrilla activity has dropped significantly in the last decade, two major guerrilla groups persist and new illegal armed groups contribute to ongoing conflict.[96] Since the 2005 Justice and Peace Law required paramilitaries to provide restitution to victims,[97] at least forty-five people asserting rights to land restitution have been murdered, while many more have received threats.[98] For example, in less than fifteen days in 2009, three leaders of groups promoting restitution rights were murdered.[99] New illegal armed groups, which formed out of the remnants of the paramilitary organizations, actively and illegally oppose land restitution, allegedly murdering four leaders of victims' groups in Urabá.[100]

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93. *See, e.g.*, *id.* at 154.

94. *La 'para-politica'*, VERDADABIERTA.COM, http://www.verdadabierta.com/parapolitica/nacional/2595-la-para-politica (last visited Feb. 25, 2011) (reporting that ninety-one members of congress have been accused of paramilitary ties, including Mario Uribe); *Mario Uribe Escobar: La Caída de un Cacique*, VERDADABIERTA.COM, http://www.verdadabierta.com/index.php?option=com_content&id=3045 (last visited Feb. 25, 2011) (reporting that Mario Uribe was convicted of having connections to the paramilitaries).

95. *See* COMISIÓN COLOMBIANA DE JURISTAS, *supra* note 90, at 85–89.

96. INTERNATIONAL CRISIS GROUP, IMPROVING SECURITY POLICY IN COLOMBIA (June 29, 2010), http://www.crisisgroup.org/~/media/Files/latin-america/colombia/B23%20Improving%20Security%20Policy%20in%20Colombia.pdf. The ongoing conflict makes it difficult to determine the number of victims with claims for restitution because the number continues to increase.

97. L. 975/05 julio 25, 2005, DIARIO OFICIAL [D.O.], arts. 44, 46, 49 (Colom.).

98. *Ya Son 45 Los Líderes De Víctimas Asesinados Por Reclamar Sus Tierras; En 15 Días Murieron Tres*, EL TIEMPO (June 2, 2010), http://www.eltiempo.com/colombia/justicia/ya-son-45-los-lideres-de-victimas-asesinados-por-reclamar-sus-tierras_7737280-1.

99. *Id.*

100. *Los están matando*, SEMANA (Mar. 14, 2009), http://www.semana.com/nacion/estan-

Despite these challenging circumstances, Colombian constitutionalism is a source of support for the implementation of a restitution program. Colombian constitutionalism has placed significant pressure on the state to implement a strong restitution program because the Constitution, vigorously enforced by the Constitutional Court, requires a robust restitution program. In 2004, the Constitutional Court held that the circumstances of IDPs in Colombia comprised an unconstitutional state of affairs,[101] meaning that "there is a recurrent violation of the fundamental rights of many persons, the solution of which requires the coordinated intervention of different State agencies."[102] The Court then ordered the Colombian government to address the unconstitutional state of affairs in accordance with international standards.[103] It later clarified that these standards include the Pinheiro Principles.[104]

In addition to the Constitutional Court, the international community pressured Colombia to implement a restitution program and address the problem of internal displacement generally. Intergovernmental human rights organizations such as the United Nations Committee on Human Rights[105] and the Inter-American Commission of Human Rights,[106] as well as prominent international non-governmental organizations, such as Amnesty International[107] and Human Rights Watch,[108] stressed the importance of access to restitution. The international community has also

matando/121735-3.aspx.

101. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025, Gaceta de la Corte Constitucional [G.C.C.] (Resulve Cuarto) (Colom.).

102. Saffon, *supra* note 46, at 132 n.98.

103. Corte Constitucional [C.C.] [Constitutional Court], octubre 14, 2010, Sentencia T-821, Gaceta de la Corte Constitucional [G.C.C.] ¶ 71 (Colom.); *cf.* PROGRAMA JULIO, *supra* note 13, at 7.

104. Corte Constitucional [C.C.] [Constitutional Court], diciembre 18, 2009, Sentencia T-967, Gaceta de la Corte Constitucional [G.C.C.] (Part 4) (Colom.) ("Finally, this Court cannot overlook the importance of the Deng and Pinheiro principles for resolving the matter under review, international law instruments that form part of the block of constitutionality in the broad sense, which is the reason they become relevant interpretational criteria or guidelines for guaranteeing the enjoyment of the fundamental constitutional rights of the forcibly displaced population." (translated by author)); *cf.* PROGRAMA JULIO, *supra* note 13, at 7.

105. U.N. Human Rights Committee, *Examen de los informes presentados por los Estados partes en virtud de artículo 40 del Pacto*, ¶ 23, CCPR/C/COL/CO/6 (July 28, 2010), http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/COL/CO/6&Lang=E; *see also* Representative of the Secretary-General, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, ¶¶ 71–86, *delivered to the General Assembly*, U.N. Doc. A/HRC/4/38/Add.3 (Jan. 24, 2007) (prepared by Walter Kälin).

106. Principle Guidelines for a Comprehensive Restitution Policy, Inter-Am. Comm'n H.R., Report No. 1/08, OEA/Ser/L/V/II.131 doc. 1 (2008).

107. AMNESTY INTERNATIONAL, U.N. Human Rights Council Tenth Session, Compilation of Statements by Amnesty International, IOR 41/011/2009 (Apr. 2009), *available at* http://www.amnesty.org/en/library/info/IOR41/011/2009/en.

108. HUMAN RIGHTS WATCH, *supra* note 66, at 16, 17, 25–28.

aided Colombia's efforts to respond to its endemic violence. For example, in the early 2000s, the World Bank supported projects to protect land rights in rural Colombia.[109] Previously, USAID funded initiatives that support the return of IDPs, such as a program in the Montes de María region.[110] Currently, the Swedish International Development Cooperation Agency funds the *Misión Apoyo el Proceso de Paz* of the Organization of American States,[111] which has provided support for displaced persons.[112]

B. The Road to Land Restitution

The process leading to land restitution in Colombia, which began with initiatives in the late 1990s, has been drawn out and complex. Following *Ley* 387 of 1997,[113] the government established a number of different programs designed to provide humanitarian aid[114] and protect the rights of displaced persons,[115] recognizing displacement as a problem. In 2000, the government created a registry of IDPs, established regional committees at

109. *See Protection of Patrimonial Assets of Colombia's Internally Displaced Population*, THE WORLD BANK, STATE-AND PEACE-BUILDING GRANT DATABASE, http://go.worldbank.org/LO5LK5MLZ0 (last visited Feb. 25, 2011); *see also* Elena Correa, *PCF Occasional Note Protecting the Patrimonial Assets of Internally Displaced Persons in Colombia*, THE WORLD BANK, THE POST-CONFLICT FUND, Nov. 2004, 2 http://go.worldbank.org/TFSMVK2Z70 (discussing the World Bank initiatives). The World Bank has also funded projects that deal with the IDP problem more broadly. *See generally* THE WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LOAN IN THE AMOUNT OF US$30 MILLION TO THE REPUBLIC OF COLOMBIA FOR A PEACE AND DEVELOPMENT PROJECT IN SUPPORT OF THE PEACE AND DEVELOPMENT PROGRAM (2004), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/05/24/000160016_20040524094518/Rendered/PDF/28656.pdf (reporting the review by the World Bank in considering a loan of $30 million to Colombia to advance development through peaceful measures).

110. *USAID/OTI Colombia Quarterly Report April*, USAID TRANSITION INITIATIVES, Apr.–June 2009, at 3, http://pdf.usaid.gov/pdf_docs/PDACP738.pdf.

111. *Our Work In Colombia: Negotiations—the solution for Colombia*, SWEDISH INTERNATIONAL DEVELOPMENT COOPERATION AGENCY, http://www.sida.se/English/Countries-and-regions/Latin-America/Colombia/Our-work-in-Colombia/ (last visited Feb. 25, 2011).

112. *Qué es la MAPP/OEA*, ORGANIZATION OF AMERICAN STATES, MISIÓN APOYO EL PROCESO DE PAZ, http://www.mapp-oea.net/index.php?option=com_content&view=article&id=58:que-es-la-mappoea-&catid=38&Itemid=27 (last visited Feb. 25, 2011).

113. L. 387/97, julio 24, 1997, DIARIO OFICIAL [D.O.] (Colom.).

114. *Cf. id.* art. 15 (requiring the national government to attend to the needs of displaced persons including physical and mental health, food, and housing).

115. *See* SISTEMA NACIONAL DE ATENCIÓN INTEGRAL A LA POBLACIÓN DESPLAZADA, POLÍTICA PUBLICA DE RETORNO PARA LA POBLACIÓN EN SITUACIÓN DE DESPLAZAMIENTO (PPR) (2009), http://www.accionsocial.gov.co/documentos/4636_Pol%C3%ADtica_P%C3%BAblica_de_Retornos.pdf; *cf.* L. 387/97, julio 24 1997, art. 4 DIARIO OFICIAL [D.O.] (Colom.); L. 173/98, enero 26, 1998, DIARIO OFICIAL [D.O.] (Colom.); L. 387/97, julio 18, 1997, art. 9 DIARIO OFICIAL [D.O.] (Colom.); PRESIDENCIA REPUBLICA DE COLOMBIA, ACUERDOS DEL CONSEJO NACIONAL DE ATENCIÓN INTEGRAL A LA POBLACIÓN DESPLAZADA ACUERDOS DEL CONSEJO (2005), *available at* http://www.dnp.gov.co/LinkClick.aspx?fileticket=G-v9skBqzbU%3D&tabid=1080; L. 501/98, mayo 25, 1998, DIARIO OFICIAL [D.O.] (Colom.); L. 489/99, diciembre 29, 1999, DIARIO OFICIAL [D.O.] (Colom.).

various levels to address the problem of displaced persons,[116] and made forcible displacement a criminal act.[117] The following year, the government began programs to protect rural land holdings, including land registers[118] and limitations on land transfers in areas experiencing displacement.[119] However, the government did not begin to implement these protections until 2004. In general, the actions in this period attempted to protect IDPs as well as prevent forcible displacement and dispossession, but a lack of institutional coordination limited their effectiveness.[120]

Basing its authority in *Ley* 387 and subsequent land protection initiatives, the Protection of Land and Patrimony Project (*Proyecto de Protección de Tierra y Patrimonio de la Población Displazada*) developed the institutional capacity to protect land rights. Between July 2003 and June 2005, the Project implemented a pilot land rights protection program, which focused on two populations: (1) those already displaced, via the individual route, and (2) those in an area with a high risk of displacement, via the collective route.[121] The individual route prevents the illegal transfer of property title after the titleholder has been displaced. Following the application of a displaced person, *Instituto Colombiano para el Desarrollo Rural* ("INCODER") registers the property in *Registro Unico de Predios y Territorios Abandonados* ("RUPTA").[122] Once the property is registered in RUPTA, property cannot legally transfer without official confirmation that the transfer is voluntary, impeding the legalization of dispossession.[123] With the collective route, the *Comités Territoriales para la Atención Integral de la Población Desplazada* ("CTAIPDs") respond to the

116. L. 2569/00, deciembre 12, 2000, DIARIO OFICIAL [D.O.] arts. 29–3 (Colom.).

117. L. 589/00, julio 6, 2000, DIARIO OFICIAL [D.O.] art. 268 (Colom.).

118. L. 2007/01, septiembre 24, 2001 DIARIO OFICIAL [D.O.] arts. 1, 2 (Colom.).

119. *Id.* arts. 1, 4.

120. DEPARTAMENTO DE PLANEACIÓN, REPÚBLICA DE COLOMBIA, CONPES 3057 DE 1999: PLAN DE ACCIÓN PARA LA PREVENCIÓN Y ATENCIÓN DEL DESPLAZAMIENTO FORZADO 10–14 (Nov. 10, 1999) http://www.dnp.gov.co/LinkClick.aspx?fileticket=3TeWl3PGdrU%3D&tabid=1080; RODRÍGUEZ & RODRÍGUEZ, *supra* note 1, at 78–79.

121. ACCIÓN SOCIAL , PROYECTO DE PROTECCIÓN DE TIERRAS Y PATRIMONIO DE LA POBLACION DE LA DESPLAZADA, PROJECT ON PROTECTION OF LAND AND PATRIMONY OF INTERNALLY DISPLACED PERSONS, BACKGROUND DOCUMENT FOR THE "WORKSHOP ON THE PROTECTION OF LAND RIGHTS AND PATRIMONY OF INTERNALLY DISPLACED PERSONS—BUILDING ON THE COLOMBIAN EXPERIENCE" 14–15 (2010), http://www.accionsocial.gov.co/documentos/Tierras_Doc/Workshop%20On%20The%20Protection%20Of%20Land%20Rights%20And%20Patrimony.pdf.

122. ACCIÓN SOCIAL, PROYECTO DE PROTECCIÓN DE TIERRAS Y PATRIMONIO, RUTA DE PROTECCIÓN INDIVIDUAL 1 (2010), http://www.accionsocial.gov.co/documentos/Tierras_Doc/RUTA_INDIVIDUAL.pdf.

123. *Id.* at 2.

circumstances in an area that caused or could cause displacement.[124] They identify the people at risk of property dispossession and employ similar measures to prevent illegal property title transfers.[125] Between September 2005 and March 2008, the Project expanded the geographically-limited pilot program to cover significantly more territory and added a focus on protecting the land rights of indigenous and afro-Colombian communities.[126] While these efforts developed important institutional capacity,[127] they failed to prevent further displacement and land dispossession.[128]

In 2004 and 2005, the legal situation changed dramatically, first, with the Constitutional Court's *Sentencia* T-025 in 2004, and second, with the passage of the Justice and Peace Law in 2005.[129] *Sentencia* T-025 held that the extremely vulnerable condition of displaced persons in Colombia constituted an unconstitutional state of affairs and that the government had to address those conditions.[130] While the decision ordered various government bodies to take steps to resolve the unconstitutional state of affairs, it did not provide specific details. Instead, the decision initiated a court-supervised process to develop and carry out a comprehensive policy.[131] The *Sentencia* itself, while concerned with ensuring displaced persons' rights with regard to return to their property,[132] did not order the government to implement a restitution program. However, it definitively established displacement victims' rights to truth, justice, and reparations.[133]

The Justice and Peace Law had a broad focus that extended beyond the problem of IDPs. With this law, Colombia began to pursue paradigmatic transitional justice mechanisms intended to respond to the legacy of civil

124. ACCIÓN SOCIAL, PROYECTO DE PROTECCIÓN DE TIERRAS Y PATRIMONIO, RUTA DE PROTECCIÓN COLECTIVA, 1 (2010), http://www.accionsocial.gov.co/documentos/Tierras_Doc/RUTA_COLECTIVA.pdf.

125. *Id.*

126. ACCIÓN SOCIAL, *supra* note 121, at 24.

127. *See id.* at 24–26.

128. COMISIÓN DE SEGUIMIENTO, *supra* note 6, at 10 (reporting that 351,210 hectares of land have been dispossessed between 2009 and July 2010); *see also Desplazan a 72 familias en norte de Colombia por combates entre bandas*, DIARIO ABC (Jan. 20, 2011), http://www.abc.com.py/nota/desplazan-a-72-familias-en-norte-de-colombia-por-combantes-entre-bandas/; *cf.* ACCIÓN SOCIAL, *supra* note 121, at 29 (reporting that land protection measures need to be increased in 300 municipalities and for ethnic groups).

129. *See* L. 975/05, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.).

130. *See* Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025, Gaceta de la Corte Constitucional [G.C.C.], ¶ 2.2 (Colom.).

131. *See, e.g.*, *id.*

132. *See id.* ¶ 2.2.

133. *Id.* ¶ 10.1.4(9).

conflict,[134] albeit in the unusual context of an ongoing conflict.[135] The statute's most prominent effect was to create a demobilization program for paramilitaries, including a partial amnesty for those paramilitaries who demobilized, confessed crimes, and turned in illegally obtained assets.[136] Additionally, the law established two primary ways for victims of paramilitaries to secure reparations. First, if the victim could identify the particular perpetrator of a crime, the victim could directly demand reparations from that perpetrator.[137] Second, if the victim was unable to identify the particular perpetrator, the victim could obtain reparations from the Reparations Fund, comprised of illegally obtained goods turned in by demobilizing paramilitaries.[138] Finally, in what later turned out to be important, the law also ordered the National Commission for Reparation and Reconciliation ("CNRR") to develop a property restitution program.[139]

In 2009, the Constitution Court issued *Auto* 008, which clarified and expanded upon the orders originally issued in T-025. The Court recognized that the unconstitutional state of affairs addressed in T-025 persisted and ordered the Director of Social Action, the government agency in charge of social programs for vulnerable populations, to present a report proposing ways to overcome the unconstitutional state of affairs.[140] Most importantly, the Court ordered the Ministry of the Interior and the Director of National Planning to develop a comprehensive reform of land policy, which the Court itself would oversee.[141] The new land policy was to contain a comprehensive restitution policy, including subsidiary programs necessary to support restitution.[142] As with T-025, the Court left it to the government to determine the details of the new land policy, subject to the Court's oversight.

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134. *See* Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370, Gaceta de la Corte Constitucional [G.C.C.] ¶¶ 6.2.4.1.7–6.2.4.1.12 (Colom.). *See generally* SERGIO JARAMILLO, YANET GIHA & PAULA TORRES, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION AMIDST THE CONFLICT: THE CASE OF COLOMBIA (2009), http://www.ictj.org/en/research/projects/ddr/country-cases/2379.html (describing the process of disarmament, demobilization and reintegration of various groups).

135. However, the International Criminal Tribunal for the former Yugoslavia is another prominent example of a transitional justice mechanism established during an ongoing conflict in the hope that it would help resolve the conflict. *See* Ruti Teitel, *Bringing the Messiah Through the Law*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS 177, 178–79 (Hesse & Post eds. 1999).

136. L. 975/05, julio 25, 2005, art. 24, 25, 29 DIARIO OFICIAL [D.O.] (Colom.).

137. *Id.* art. 23.

138. *Id.* art. 54.

139. *Id.* arts. 44, 46, 49.

140. Corte Constitucional [C.C.] [Constitutional Court], enero 26, 2009, Auto 008, Gaceta de la Corte Constitucional [G.C.C.] ¶ 83 (Colom.).

141. *See id.* ¶ 1.

142. *See id.* ¶ 83.

The government complied with *Auto* 008 in October 2009 by issuing the *Lineamientos de Política de Tierras y Territorios* ("*Lineamientos*"),[143] which outlined the structure of the new land policy. The broad policy contained several initiatives: (1) on land issues connected to displacement, (2) on establishing programs to prevent dispossession, (3) to protect the land of displaced property owners, (4) to provide reparations for displaced tenants, (5) to formalize and secure land rights, to strengthen institutional capacity, and (6) to improve information systems.[144] In addition to these measures, it incorporated a land restitution program as a central part of the new land policy.[145] The land restitution program that the *Lineamientos* proposed was to be implemented through the Property Restitution Program, merging the legal development of a restitution program originating in the Justice and Peace Law with the orders from *Sentencia* T-025 and *Auto* 008.[146]

When Juan Manuel Santos replaced Alvaro Uribe as the President of Colombia on August 7, 2010, he quickly changed course on many of his predecessor's policies, including land restitution. He introduced draft legislation for a *Ley de Tierras* (Land Law) on September 7, 2010, significantly reshaping land restitution policy in Colombia.[147] During the congressional debates, the *Ley de Tierras* was combined with the *Ley de Victimas* (Victim's Law), another law project introduced at the same time as the *Ley de Tierras*. In particular, the draft *Ley de Victimas* eliminated most of the special programs for support and monitoring the restitution process that the *Programa* contained, while leaving primarily the shift of the burden of proof from victim to land-occupier. On June 10, 2011, the *Ley de Victimas* was signed into law, as *Ley* 1448 *de* 2011.[148]

In the midst of this upheaval, the Constitutional Court released *Auto* 383 (2010), again following up its decision in *Sentencia* T-025 (2004) on the status of displaced persons. *Auto* 383 recognizes that the massive

143. DEPARTAMENTO NACIONAL DE PLANEACIÓN, MINISTERIO DE AGRICULTURA Y DESARROLLO RURAL, MINISTERIO DEL INTERIOR Y DE JUSTICIA & AGENCIA PRESIDENCIAL PARA LA ACCIÓN SOCIAL Y LA COOPERACIÓN INTERNACIONAL, LINEAMIENTOS DE POLÍTICA DE TIERRAS Y TERRITORIOS PARA POBLACIÓN VÍCTIMA DEL DESPLAZAMIENTO FORZADO, EN RIESGO DE DESPLAZAMIENTO FORZADO Y DEL DESPOJO (2009), *available at* http://www.dnp.gov.co/PortalWeb/LinkClick.aspx?fileticket=IHPNyCIWyYg%3D&tabid=1080.

144. *Id.* at 19, 23, 29, 32, 47, 50.

145. *See id.* at 53.

146. PROGRAMA JULIO, *supra* note 13, at 7–9.

147. *Ley de tierras y ley de victimas tendrán capítulo de restitución a desplazados*, SEMANA (Sept. 8, 2010), http://www.semana.com/noticias-nacion/ley-tierras-ley-victimas-tendran-capitulo-restitucion-desplazados/144198-3.aspx.

148. *See Colombia no será la misma*, *supra* note 16.

problems with institutional organization and noncompliance are undermining attempts to provide displacement victims with aid and to resolve the displacement problem. Local government bodies are not adequately formulating required plans for addressing the needs of the displaced.[149] The national government is not providing the local government bodies with adequate support,[150] nor is it taking adequate measures to coordinate and ensure local efforts are carried out properly.[151] Moreover, the Court specifically noted that victims returning to their homes need substantial support to restart their lives.[152] Following these factual determinations, the Court issued a series of orders designed to ensure that the national government provides effective support, coordination, and oversight of local governments.[153]

IV. THE *LEY DE VICTIMAS*

In this section, we will describe in more detail the land restitution design that the *Ley de Victimas* establishes to address the problem of restitution in Colombia. According to the final legislation, the *Ley de Victimas* creates a restitution program that generally complies with the Pinheiro Principles. Most importantly, the *Ley de Victimas* establishes a judicial presumption that people who transferred property in an area of generalized violence did so because of the violence:[154] a current occupant of the property who opposes the restitution claim must prove his or her good faith and lack of fault in occupying the land.[155] Those eligible for restitution under the terms of the *Ley* include anyone deprived of property rights by an illegal, armed group since 1991.[156] Eligibility for the favorable burden of proof under the *Ley de Victimas* is limited to those people who lost their property, possession, or occupation rights[157] as a direct or

149. Corte Constitucional [C.C.] [Constitutional Court], diciembre 10, 2010, A.S. 383, Sala Especial de Seguimiento a la Sentencia T-025 de 2004 (pt. V, sec. 1.4) (Colom.).

150. *Id.* sec. 2.7 at 27.

151. *Id.* sec. 3.11 at 39.

152. *Id.* sec. 6.3 at 52.

153. *See id.* secs. 9.1–9.6 at 79–89.

154. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 77–78 (Colom.)

155. *Id.*

156. *Id.* art. 75; *cf.* PROGRAMA JULIO, *supra* note 13, at 13 (extending eligibility for restitution to claims originating since 1980).

157. *See* Ley de Victimas art. 74 (omitting tenancy rights). The final version of the *Ley de Victimas* eliminated eligibility for those who lost tenancy rights, which was included in earlier drafts. The *Ley de Victimas* has mechanisms to prevent abuse of the favorable burden of proof. The *Ley* makes it a crime with a penalty of eight to twelve years in prison to add a fraudulent record to the

indirect consequence of international humanitarian law violations or grave and manifest violations of international human rights law.[158]

Restitution under the *Ley de Victimas* will occur through a specialized judicial process.[159] To apply for restitution under this process, a dispossessed person must add their lost property rights to the *Registro de Tierras Despojadas* (Registry of Dispossessed Lands) ("*Registro*").[160] Restitution will then proceeds through an administrative agency, the *Unidad Administrativa Especial de Gestión de Tierras Despojadas* (Special Administrative Unit for the Management of Dispossessed Lands) ("*Unidad Administrativa*"),[161] which will oversee the *Registro* and submit the entries to a judge with specialized experience in restitution proceedings. In the absence of such a judge, any judge with original jurisdiction may hear the case.[162] A person who adds their property rights to the *Registro* also will have the ability to submit their claim to a judge independently of the *Unidad Administrativa*.[163]

The judges will carry out the central task of the restitution program: determining whether a particular property can be restored despite opposing claims of good faith property rights, and if not, what alternative remedy is warranted.[164] The judicial proceedings are intended to be efficient and short, with less than four months between application and judgment.[165] The presiding judge is supposed to resolve all claims about land titles, even when the dispossession did not follow a standard pattern.[166] When

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Registro, and a crime with a penalty of ten to twenty years in prison for a public servant to act on a record he knows to be fraudulent. Ley de Victimas, art. 120. The *Ley* makes it a crime with similar penalties to present a fraudulent application for land restitution before a court. *Id.*

158. *Id.* arts. 3, 75. The earlier Programa Julio restitution design was less explicit about the favorable procedural consequences for purported victims of dispossession. Several special principles would have applied in restitution proceedings, including a principle of good faith and a principle of pro-victim interpretation. The good faith principle would have established that the burden of proof in restitution hearings lay with the party opposing restitution, since it required that the victim's allegations be accepted as true. The pro-victim principle would have established that when the relevant law was open to more than one interpretation, the law must be interpreted and applied in the manner most favorable for the victim.

159. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 76–80 (Colom.).

160. *See id.* art. 76.

161. *Id.* art. 105.

162. *See id.* arts. 105, 79, 80, 82.

163. *See id.* art. 83.

164. *See id.* arts. 91, 97; *cf.* PROGRAMA JULIO, *supra* note 13, at 33–34 (establishing an analogous mechanism for contentious restitution proceedings).

165. Ley de Victimas art. 91, para. 2; *cf.* PROGRAMA JULIO, *supra* note 13, at 40 (establishing that the proceedings should not exceed a year).

166. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 91 (Colom.); *cf.* PROGRAMA JULIO, *supra* note 13, at 39.

granting restitution, the judge should also evaluate any claims for compensation made by a good faith secondary owner, possessor, or occupant dispossessed as a result.[167] If the judge decides in favor of restitution, then the *Unidad Administrativa* will typically restore the dispossessed property to the claimant.[168] There is no option for an administrative resolution of uncontested restitution claims, unlike under the now defunct *Programa* design.[169]

Under certain circumstances, the judge presiding over the restitution proceeding may grant compensation to either the claimant or defendant.[170] The *Ley de Victimas* strictly limits the reasons for granting compensation to victims instead of restitution, thereby definitively establishing restitution as the preferred remedy for dispossession and reducing the financial burden of resolving many cases.[171] In general, the judge may only grant the victim compensation instead of restitution on the victim's request,[172] implying that the judge may not force compensation upon a victim. The recipient is entitled to one of two different types of compensation, monetary compensation or compensation in kind, either of which need to be equivalent in value to the original property lost.[173] First, a victim may receive as compensation in kind a plot of land similar to that lost, which the *Unidad Administrativa* will provide.[174] Under *Ley de Victimas*, a judge may grant compensation in kind when (1) the land is within a zone of risk for natural disasters, (2) when multiple people have been dispossessed of the same land, (3) when the legal or material restitution of the land would create a risk for the victim or her family, or (4) when the land has been completely destroyed.[175] Second, a defendant who succeeds in proving her good faith rights to the land absent any fault

167. Ley de Victimas art. 91; *cf.* PROGRAMA JULIO, *supra* note 13, at 41–44.

168. *See* Ley de Victimas art. 100.

169. *See* PROGRAMA JULIO, *supra* note 13, at 33.

170. *See* Ley de Victimas arts. 73, 97.

171. *See id.* art. 97 (providing four exceptions to the general rule of providing restitution); *cf.* PROGRAMA JULIO, *supra* note 13, at 46.

172. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 97 (Colom.); *cf.* PROGRAMA JULIO, *supra* note 13, at 46–47 (establishing a similar requirement that compensation only be granted on the victim's request).

173. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 97–98 (Colom.); PROGRAMA JULIO, *supra* note 13, at 47 (establishing an analogous provision for the *Programa* design).

174. *See* Ley de Victimas art. 97.

175. *Id.* The Programa Julio design had similar but slightly different conditions for compensation. The judge would have been able to grant compensation when the property was destroyed, a returning victim would suffer adverse psychological effects, the property was located in an insecure area, or landmines or unexploded munitions were located on the property. PROGRAMA JULIO, *supra* note 13, at 48.

may be granted monetary compensation from a fund that the *Unidad Administrativa* will administer.[176] The number of secondary occupants with compensation claims is reduced by excluding claims from people involved in the original dispossession or who knew about it.[177]

The *Unidad Administrativa* will be the primary administrative body overseeing restitution, coordinating the various stages of the proceedings and transfers of land and compensation.[178] It will administer the *Registro de Tierras Despojadas*, advance the restitution process, pay compensation to secondary occupants and dispossessed persons, and subsidize the payment of taxes on restored lands.[179] It will also oversee the *Fondo de la Unidad Administrativa* (Administrative Unit's Fund) ("*Fondo*"), which will contain the resources necessary to cover the costs of the program, including compensation.[180] Resources for the *Fondo* will come from the national budget, public and private donations, other ministries, from goods confiscated (*via extinción de dominio*) by the *Dirección Nacional de Estupefacientes* (National Drug Board), and from similar sources.[181] The *Unidad Administrativa* will not oversee the return process nor any support programs for returning victims, apart from those granting victims subsidies for taxes and other debts encumbering a restored property.[182]

In a gesture toward improving the social effects of land restitution, the *Ley de Victimas* has two important provisions. First, the restored land rights are protected by making it impossible to transfer those rights for two years, except through inheritance, without the authorization of the court that granted the restitution.[183] Second, the *Ley de Victimas* creates a special attention program for female victims of dispossession to ensure their access to restitution.[184] The program consists of priority consideration of land restitution applications by female heads of families,[185] priority in receiving a number of previously granted social benefits,[186] and

176. Ley de Victimas art. 98.

177. *See id.* arts. 88, 98; *cf.* PROGRAMA JULIO, *supra* note 13, at 40 (excluding from compensation those secondary occupants who do not substantially rely on the land as well).

178. *See* Ley de Victimas art. 105.

179. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 105 (Colom.)

180. *Id.* arts. 111, 112.

181. *Id.* art. 113.

182. *See id.* art. 105.

183. *Id.* art. 101.

184. *Id.* art. 114.

185. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 115 (Colom.).

186. *Id.* art. 117.

entitlement to receive joint restitution of land along with husbands,[187] presumably even when only he held legal title prior to dispossession.

While not part of the restitution effort, the *Ley de Victimas* does establish several complementary social programs for all victims of the armed conflict. It creates separately administered means of housing restitution for those victims who lost their housing by allowing victims who lost their housing to apply to the *Subsidio Familiar de Vivienda* (Family Housing Subsidy), which is funded by the *Fondo Nacional de Vivienda* (National Housing Fund) for urban housing and the *Banco Agrario* (Agrarian Bank) for rural housing.[188] The *Ley de Victimas* also provides access to various health services for all victims of the conflict.[189] Additionally, it grants victims support for payment of taxes and other debts encumbering a restored property[190] as well as access to programs to aid with obtaining credit.[191] These resources are helpful because such liabilities encumbering property have been used to dispossess a victim who was forced to flee his or her property because of violence.[192] Finally, it provides some support for education and professional development; victims will have guaranteed access to basic education as well as higher education institutions are instructed to facilitate victim access.[193] Victims also have priority access to programs sponsored by the institution for the professional development of the Colombian workforce, or SENA.[194] Additionally, they have preferential access to government employment.[195] By comparison, the now defunct *Programa* design also would have created programs for the economic development of returning people,[196] including job training,[197] support for developing professional

187. *Id.* arts. 91 ¶ 4, 118.

188. *Id.* arts. 123–27; *Subsidio Familiar de Vivienda de Interés Social Urbana*, MINISTERIO DE AMBIENTE, VIVIENDA Y DESARROLLO TERRITORIAL, http://www.minambiente.gov.co/contenido/contenido.aspx?catID=549&conID=1591 (last visited June 13, 2011).

189. *See* Ley de Victimas arts. 52–54; *cf.* PROGRAMA JULIO, *supra* note 13, at 58 (establishing health services for returning victims of dispossession).

190. Ley de Victimas art. 121; *cf.* PROGRAMA JULIO, *supra* note 13, at 67–72 (discussing a subprogram for Alleviating Debt Encumbrances); *id.* at 73–75 (discussing a subprogram for Clearing Property Titles).

191. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 128–29 (Colom.).

192. Linea de Investigación Tierra y Conflicto, *supra* note 3, at 52.

193. Ley de Victimas art. 51; *cf.* PROGRAMA JULIO, *supra* note 13, at 58 (establishing education access for returning victims of dispossession).

194. Ley de Victimas art. 130.

195. *Id.* art. 131.

196. PROGRAMA JULIO, *supra* note 13, at 59–60.

197. *Id.* at 60–61.

associations,[198] grants or loans for vocational projects,[199] and priority access to INCODER land grants.[200]

Beyond the components of the restitution program itself, the *Ley de Victimas* establishes several institutions that will coordinate and oversee the effort to aid all victims of the Colombian armed conflict. The *Sistema Nacional de Atención y Reparación Integral a las Victimas* (National System for Comprehensive Attention and Reparation for Victims)[201] is comprised of the *Comité Ejecutivo para la Atención y Reparación a las Victimas* (Executive Committee for Attention and Reparation for Victims) ("*Comité Ejecutivo*")[202] and the *Unidad Administrativa Especial para la Atención y Reparación Integral a las Victimas* (Special Administrative Unit for Comprehensive Attention and Reparation for Victims) ("*Unidad Administrativa Especial*").[203] These bodies have split competencies for assisting the victims of the armed conflict: the *Comité Ejecutivo* is a centralized body primarily responsible for large scale planning,[204] while the *Unidad Administrativa Especial* is primarily responsible for the decentralized implementation of programs for the victims.[205] The hierarchy and lines of responsibility for these institutions within the overall program are not specified,[206] nor is their relationship to the restitution process and the *Unidad Administrativa*,[207] leaving unclear what relationship the *Ley de Victimas* establishes among these institutions.

V. COMPLIANCE WITH THE PINHEIRO PRINCIPLES

While largely in compliance with the Pinheiro Principles, the *Ley de Victimas* has features that may conflict with the requirements of the Pinheiro Principles. First, the *Ley de Victimas* excludes restitution claims

198. *Id.* at 61.
199. *Id.* at 64–65.
200. *Id.* at 66.
201. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 162 (Colom.).
202. *Id.*
203. *Id.*
204. *Id.* art. 165.
205. *Id.* arts. 168–69. As opposed to splitting institutional competence between planning and implementation, the *Programa* design would have split institutional competence between administering the restitution procedure and administering the execution of judicial decisions and return of victims. PROGRAMA JULIO, *supra* note 13, at 91–95. The later institution would also have been responsible for inter-institutional coordination, both with state and civil society organizations. *Id.* at 91–93. Additionally, the *Programa* would not have created separate bodies for victim attention and for restitution, as it was only a restitution program.
206. *See* Ley de Victimas arts. 165, 169.
207. *See id.*

for victims whose rights the conflict affected before 1991.[208] Second, the design limits restitution claims to real property, exempting potentially sizable claims for personal property from the program.[209] Third, the *Ley de Victimas* restores joint title to couples.[210] Fourth, the *Ley* allows victims to receive compensation instead of restitution under certain conditions but otherwise limits claims for compensation. In this section, we will explain how the relevant provisions of the Pinheiro Principles should be interpreted and argue that the *Ley de Victimas* probably complies with the Principles.

First, the Pinheiro Principles probably allow a restitution program to exclude claims based on the age of the claim, so long as the limitation is not arbitrary. Principle 2.1 does not seem to permit a program to bar older claims: "[a]ll refugees and displaced persons have the right" to restitution or compensation.[211] They do not announce any limit on the time in which a person dispossessed may claim restitution. However, the official guide to implementing the Pinheiro Principles speaks favorably of the wide range of time limitations that different restitution programs have imposed on restitution claims.[212] As a result of both how the official guide interprets the Pinheiro Principles and the fact that most restitution programs have had to impose time limits on claims, the Pinheiro Principles should be understood to exclude arbitrary time limits on claims.[213]

The *Ley de Victimas* probably does not arbitrarily exclude claims for restitution based on the age of a claim when that dispossession had to occur in 1991 or later to qualify for restitution.[214] Although there has been some dispute on the matter,[215] the initial date might not be arbitrary because the cutoff coincides with a number of significant political events that immediately preceded the current period of massive displacement. In 1991, the country adopted a new Constitution and completed the

208. *Id.* art. 75. *But see id.* art. 3 (granting access to general victim assistance and reparation programs for claims originating in 1985 or later).

209. *Id.* art. 72; PROGRAMA JULIO, *supra* note 13, at 12.

210. Ley de Victimas arts. 91 para. 4, 118.

211. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 2.1.

212. *See* FOOD AND AGRICULTURE AGENCY OF THE UN (FOA) ET AL., HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS: IMPLEMENTING THE 'PINHEIRO PRINCIPLES' 27 (2007) [hereinafter HANDBOOK], *available at* http://www.unhcr.org/refworld/docid/4693432c2.html (providing guidelines to implement the Pinheiro Principles created as a result of a collaborative effort among many UN organizations and other NGOs).

213. *See id.*

214. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 75 (Colom.).

215. *But see* Rodrigo Uprimny, *Reparar las victimas, ¿desde qué fecha?*, LA SILLA VACÍA (Jan. 19, 2011), http://www.lasillavacia.com/elblogueo/dejusticia/21142/reparar-victimas-desde-que-fecha.

demobilization of the M-19 guerrilla group, marking the start of a new phase of the Colombian civil conflict.[216] Additionally, in 1991 the precursors to the main paramilitary group responsible for forced displacement, the *Autodefensas Unidas de Colombia* (United Self-Defense Forces of Colombia) ("AUC"), had not yet come into existence.[217] Finally, the vast majority of land dispossession occurred after 1991.[218] As there are some grounds for selecting 1991 as the maximum age of restitution claims, rendering the limitation non-arbitrary,[219] the *Ley de Victimas* is probably compatible with the Pinheiro Principles on this point.[220] However, a claim that the year is not arbitrary is weakened by the fact that *Ley de Victimas* grants assistance and reparations to all those victimized in 1985 or later[221] and, therefore, restricting only restitution, and not all victim support programs, to persons dispossessed since 1991.[222] Thus, it might be debatable whether the cutoff for claims is consistent with the Pinheiro Principles.

Second, the Principles are unclear as to when restitution must respect joint ownership rights of male and female heads of households. Principle 4.2 states that restitution programs should "recognise the joint ownership rights of both male and female heads of the household . . . ."[223] However, the text here is ambiguous. It could mean that even when the male head of household held sole rights to property prior to restitution, property should be restored to both. Or it could mean that when a female head of household held joint rights to the property prior to restitution, the property should be restored to both. The second interpretation is much weaker, simply amounting to a requirement of procedural equality: restitution

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216. *See La Constitución del 91, el Mejor Legado del M-19*, EL ESPECTADOR (Apr. 24, 2010), http://www.elespectador.com/impreso/politica/articuloimpreso199833-constitucion-del-91-el-mejor-legado-del-m-19.

217. *See* Inter-Am. Comm'n H.R., *supra* note 54, ¶¶ 42, 47.

218. COMISIÓN DE SEGUIMIENTO, *supra* note 6, at 9 (reporting that 1,023,703 hectares were abandoned, sold, or transferred to third parties between 1980 and 1997; 5,263,282 hectares between 1998 and 2008; and 351,210 hectares between 2009 and July, 2010).

219. Although the time limits may not be arbitrary given the recent Colombian history that produced much of the dispossession, this fact should not be taken to extinguish claims of victims from prior periods of displacement and dispossession.

220. As a point of contrast, the *Programa* set the cutoff at 1980, a choice that also probably was not arbitrary, since the current Colombian displacement and dispossession crisis primarily resulted from violence that escalated from the mid-1980s onward. *See* RODRÍGUEZ & RODRÍGUEZ, *supra* note 1, at 67–68; Ibáñez & Muñoz, *supra* note 1, at 5–9 (admitting all claims after 1980 would ensure that all claims from this cycle of violence were covered by the restitution program).

221. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 3 (Colom.).

222. *Id.* art. 75.

223. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 4.2.

programs must respect the property rights of women as well as men. The first interpretation would require an attempt to transform the unjust or unequal situation of property rights that existed prior to dispossession.

However, the official guide says that the

> provision is meant to combat sex discrimination which may occur when only male 'heads of households' are informally recognized as rights holders or when they are provided with formal title to housing or other property ownership rights, leaving women without legal control over what should also be treated as their property.[224]

This interpretation implies that the requirement is designed to prevent restitution programs from assuming that only male heads of households held property rights, particularly when the property rights were held informally without formal title or registration. In particular, Principle 4.2 prevents restitution programs from automatically denying women property rights when they have a spouse or permanent companion.[225] That is, the principle seeks to ensure that women enjoy equal rights to hold property, not necessarily to promote equal holdings between men and women that jointly own the property.[226]

Unlike the now defunct *Programa*, the *Ley de Victimas* exceeds the demands of the Pinheiro Principles on this point since it requires that title be jointly restored to a claimant and his or her permanent companion or spouse.[227] Given that the Pinheiro Principles simply require that a woman is not automatically excluded from receiving title because she has a spouse or permanent companion, the *Ley de Victimas* satisfies the requirement. Even if the Pinheiro Principles demand more than this minimum, the *Ley de Victimas* almost certainly satisfies whatever further requirement the principles impose. In contrast, the analogous provision from the now defunct *Programa*, while exceptionally vague, neither would have required universal joint restitution of title,[228] nor would it have established a general presumption that female spouses or permanent companions always lacked property rights to the land they jointly occupied prior to

224. HANDBOOK, *supra* note 212, at 36.

225. PROGRAMA JULIO, *supra* note 13, at 46.

226. *See* U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons* ¶ 12, U.N. Doc. E/CN.4/Sub.2/2005/17/Add.1 (2005). However, a principle requiring equal formal rights to hold property might require joint restitution to male and female heads of households under some conditions.

227. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 91 para. 4, 118 (Colom.).

228. *See generally* PROGRAMA JULIO, *supra* note 13.

dispossession.[229] Consequently, *Programa* might have also complied with the basic Pinheiro Principles requirement that women have the equal right to hold property and recover lost property, but the *Ley de Victimas* clearly surpasses both in furthering gender equality.

Third, the conditions under which restitution programs may provide compensation instead of restitution are complicated. The Pinheiro Principles assert that "[s]tates shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible, or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution."[230] Restitution is only impossible when the property in question has been destroyed or no longer exists.[231] However, the implementation guide says that it is also factually impossible to restore property when it has been physically damaged or when restitution would carry with it a substantial social cost, such as the destruction of a factory.[232] As a result, the requirement is not as strong as it may first appear: property is factually impossible to restore when there is some weighty consideration militating against restitution, such as a factory with substantial social value. Even so, it is clear, according to all the interpretative materials of the Pinheiro Principles, that a restitution program may only provide compensation instead of restitution when the victim voluntarily chooses compensation.[233]

The *Ley de Victimas* seems consistent with the Pinheiro Principles regarding the circumstances under which compensation may be granted instead of restitution. Before compensation is granted instead of restitution, the *Ley de Victimas* actually requires that victims meet both of the requirements in the Pinheiro Principles: the victim consents and restitution is difficult or carries a significant cost. The compensation that the *Ley de Victimas* permits is always granted in accordance with the principle of victim's consent since the claimant must apply for compensation instead of restitution.[234] Additionally, each of the conditions under which a victim can claim compensation under the *Ley de Victimas* meets the requirement of the Pinheiro Principles since the principles accept that a substantial social cost is sufficient to make restitution

229. *See generally id*.
230. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 21.1.
231. *Id.* princ. 21.2.
232. HANDBOOK, *supra* note 212, at 25–26.
233. *Id.* at 25; U.N. Commission on Human Rights, *supra* note 226, ¶ 70.
234. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 97 (Colom.).

factually impossible.[235] First, the claimant may apply for compensation when the land is in an area with a high risk of natural disaster or violence.[236] Second, a claimant may request compensation when it is factually impossible to restore the land, such as when it has been destroyed or when there are multiple claimants for the same land.[237]

Although the *Ley de Victimas* limits the conditions under which a victim can request and receive compensation, it does not violate the Pinheiro Principles on this point. The *Ley de Victimas* requires that the victim voluntarily apply for compensation instead of restitution,[238] making all of its conditions for compensation limits on eligibility for compensation rather than for restitution. That is, these conditions limit the circumstances under which a victim can request that the state provide compensation instead of restitution. When a victim does not choose to apply for compensation instead of restitution, the *Ley de Victimas* does not imply that he or she will ever be forced to do so.[239] Since the Pinheiro Principles do not impose extensive requirements on the conditions under which compensation must be offered, it is unlikely that the program design violates the Pinheiro Principles in sharply limiting the availability of compensation.

Finally, when the Pinheiro Principles state that IDPs have the right to restitution of property, they are most plausibly referring only to real property, not to personal property.[240] The Pinheiro Principles almost always discuss property along with housing and land, referring to them as "housing, land and/or property . . . ."[241] Given that property rights in housing and land are rights to real property, the Pinheiro Principles are naturally read as referring to real property when they use the word "property" in this context. This interpretation is reinforced by the fact that the Pinheiro Principles require that states establish registration systems for housing, land, and property.[242] Since registration systems are primarily used for real property, it appears that property is limited to real property.

235. The *Programa* would have complied with the Pinheiro Principles on this point as well, as it would have permitted compensation instead of restitution only when the property to be restored was destroyed, return would have adverse psychological effects for the victim, the property was located in an insecure area, or landmines or unexploded munitions were located on the property. PROGRAMA JULIO, *supra* note 13, at 46.

236. Ley de Victimas art. 97(a), (c).

237. *Id.* art. 97(b), (d).

238. *See id.* art. 97; *cf.* PROGRAMA JULIO, *supra* note 13, at 46–47.

239. *See* Ley de Victimas art. 97.

240. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 2.1.

241. *E.g.*, *id.*

242. THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 15.1.

Finally, the Explanatory Notes, an addendum to the Pinheiro Principles submitted by Sergio Pinheiro, explicitly state that "'[p]roperty' within the context of the Principles refers primarily to real and/or immovable property . . . ."[243] Consequently, the fact that the restitution program established by the *Ley de Victimas* limits restitution to land and housing does not result in a significant conflict with the Pinheiro Principles.[244]

The *Ley de Victimas* broadly complies with the Pinheiro Principles on the main points of potential discrepancy. Any actual deviations between the requirements are minor and unlikely to affect the conclusions we wish to draw about the implementation of return through restitution under *Ley de Victimas* in accord with the Pinheiro Principles.

VI. LAND RESTITUTION AND RETURN

The *Ley de Victimas* program design separates the right to restitution from return since it does not require that a victim return in order to receive restitution.[245] However, we will argue that the *Ley de Victimas* could better balance victim choice with the need to promote return if it included more substantial support programs specifically aimed at returning victims. The *Ley de Victimas* motivates return by limiting the transfer of restored land and by providing some return programs, but limiting the transfer of restored land interferes with victim choice, while the support programs offered can be taken advantage of without return. For these reasons, the *Ley de Victimas* strikes a less than optimal choice between victim choice and motivating return.

The decision to require or not to require return in order to receive restitution is a complicated one. On the one hand, the victims are presumptively entitled to possess their legal property holdings regardless of whether or not they return to the land. This idea is fundamental to the notion of property and is thoroughly embedded in Colombian domestic law[246] and in international law.[247] On the other hand, granting restitution of

243. U.N. Commission on Human Rights, *supra* note 226, ¶ 30.

244. Colombian law does define some property other than housing and land as real property. *See* CÓD. CIV., arts. 657–59 (Colom.).

245. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 72 (Colom.).

246. *See generally* COD. CIV., Libro Segundo Titulo XII (Colom.) (establishing the primary private law remedy for the equivalent of conversion).

247. *See* Universal Declaration of Human Rights, G.A. Res. 217A, art. 17, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, March 20, 1952, art. 1 (European Convention on Human Rights); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S.

land or monetary compensation to victims who will not return, as may be the case for most Colombian victims,[248] creates significant problems. A program providing restitution or compensation for the dispossession of land is commonly intended to resolve a displacement crisis. However, the financial support for non-returning displaced persons obtained from selling returned property, or from monetary compensation, may only temporarily support them unless underlying problems of displacement are resolved, particularly if displaced persons are likely to have persistent trouble with adapting to their post-displacement conditions.[249] Additionally, when victims receive restitution of land but do not intend to return, they are likely to sell their land, potentially consolidating or worsening the unequal distribution of land in rural Colombia and perpetuating the agrarian counter-reform.

The *Ley de Victimas* does not adequately reconcile the need to ensure victim choice with the need to promote return. While the *Ley de Victimas* does not require a victim to return in order to receive restitution,[250] it significantly constrains the options a victim has if she is going to receive benefits from the program. The *Ley de Victimas* strictly limits the conditions under which a victim can obtain compensation instead of restitution, permitting compensation only if the land in question is destroyed, overly dangerous, or subject to multiple claimants.[251] Moreover, a victim that successfully petitions for compensation will only receive compensation in the form of equivalent land, not in the form of monetary compensation that might help her establish a normal life in her current location.[252] As a result, many, if not most, victims of dispossession

No.36, 1144 U.N.T.S. 123 art. 21.

248. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, *Tercer Informe de Verificación sobre el Cumplimiento de Derechos de la Población en Situación de Desplazamiento*, 39, 41 (Dec. 2010) (reporting that only 5.8% of IDPs want to return to their place of origins, with 34.9% not wanting to return out of fear and an additional 12.7% because they believe that the conditions leading to displacement persist).

249. Consumption for displaced households is lower a year after displacement than in the first three months following displacement, possibly because savings and humanitarian aid are exhausted. *See* Ana María Ibáñez & Andrés Moya, *¿Cómo el Desplazamiento Forzado Deteriora el Bienestar de los Hogares Desplazados?: Análisis y Determinantes del Bienestar en los Municipios de Recepción*, 11 (2006) (unpublished), http://economia.uniandes.edu.co/content/download/2137/12755/file/d2006-26.pdf (last visited Feb. 25, 2011). Additionally, part of the problem that confronts displaced agricultural workers is a lack of demand for their skills, making it difficult to adapt to the new economic conditions. *See id.* at 13.

250. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 71–75 (Colom.).

251. *Id.* art. 97.

252. *Id.*

will be required to leave their current locations in order to take advantage of restitution or compensation from the *Ley de Victimas*.

At first glance, the exceptions based on various dangerous conditions reflect the principal reason why victims do not wish to return: fear of further violence and re-victimization.[253] However, this fear is not the only reason why victims do not want to return. Many victims do not want to return because return would involve giving up opportunities for social advancement and social services,[254] often in a city with quite different conditions of life and livelihood than in the rural settings from which they came.[255] For victims that have been living for many years in conditions of poverty in a city or other circumstances different from their place of origin, it may be preferable to receive monetary compensation or to receive other assistance where they are currently located. Such compensation would allow them to avoid further disruption to their lives while improving the lives that they have built in their new location.

The *Ley de Victimas* adds another requirement that particularly restricts victim choice in the context of a strict requirement of restitution: the victim cannot transfer the property rights to the restored land for two years without the "prior, express and motivated authorization" of the presiding court.[256] While the requirement is an important step toward preventing recurrences of forced land transfers,[257] it also has the side effect of preventing a victim who receives restitution from easily selling the restored land in ordered to finance his or her resettlement in a preferred area, such as a city. Obtaining court authorization may prove challenging because poor victims from rural areas may face substantial barriers to access the judicial system. Moreover, it does not explain what would constitute "motivated authorization." In combination with the strict limits on compensation, this restriction on transfer of restored land provides some incentive for victims to return to their place of origin since they cannot obtain meaningful benefits from the program otherwise, at least in the short-term.

253. *See* Comisión de Seguimiento, *supra* note 248, at 54 (reporting that 58% of victims who do not want to return because of fear, a belief that the conditions that led to the original displacement persist, or a lack of a place to which they can return).

254. *See id*. at 41.

255. *Id*.

256. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 101 (Colom.).

257. The requirement echoes an initiative to prevent coerced land transfers. *See* Decree 2007/01, septiembre 24, 2001, art. 4 DIARIO OFICIAL [D.O.] (Colom.).

The provisions for economic and social programs explicitly contained in the *Ley de Victimas* are unlikely to motivate return because they are not specifically aimed at supporting returning victims and, in fact, may be more accessible in the location of displacement. The *Ley de Victimas* does grant the national government the authority to implement a new rural development policy that prioritizes victims, but the terms of this policy have yet to be decided.[258] The basic problem is that the social and economic programs explicitly created by the *Ley de Victimas* are targeted at victims generally and not at the needs of returnees specifically.[259] The likely consequence of the broader targeting is that the programs will be available where the dispossessed and other victims are currently located, predominantly in the cities, and less accessible in the predominately rural areas to which the dispossessed in particular might return.[260] Additionally, the broad focus on all victims of the conflict with no specific emphasis on returning dispossessed victims will likely result in a lack of attention to the particular needs of returning victims. For example, the *Ley de Victimas* does not prioritize land grants from INCODER or loans for purchasing farm equipment, nor does it facilitate the formation of professional organizations, all of which are steps that the *Programa* would have taken to address the unique needs of returning victims.[261] As a result, the motivation to return that the *Ley de Victimas* provides is largely limited to the fact that a victim of dispossession would have difficulty taking advantage of the restitution program absent return.

The *Ley de Victimas* has two features that could potentially motivate victims to return to their places of origins: (1) restrictions on compensation and transfer of restored land, and (2) secondary programs that benefit victims. First, the *Ley de Victimas* only permits a victim to obtain compensation instead of restitution under limited circumstances and restricts the transfer of land restored through the program.[262] While these features should encourage victims to return, since they make actual return the easiest way to benefit from the program, they do so by sacrificing victim choice. A victim will not be able to both benefit from the program and chose to remain in the location of displacement. Additionally, even if victims can only effectively obtain benefits from the restitution program

258. Ley de Victimas, art. 206.
259. *See, e.g.*, *id.* arts. 51–59.
260. *See* SNAIPD, *supra* note 4, at 86 (reporting that most victims are from rural areas).
261. PROGRAMA JULIO, *supra* note 13, at 57, 65.
262. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 97, 101 (Colom.).

by returning to their homes, this may be insufficient to motivate large-scale return: victims are primarily hesitant to return because of fear that they will be displaced and dispossessed again.[263]

Second, the *Ley de Victimas* creates several social programs to benefit victims of the armed conflict. The creation of these programs could motivate victims to return by establishing a meaningful government commitment to improve victims' lives. This symbolic effect may help overcome the reluctance of victims to return for fear of continued insecurity and the possibility of re-victimization.[264] These programs could also motivate victims to return if they were aimed at helping returning victims reestablish themselves in their old homes and land. However, the use of secondary programs is not tied to actual return, as they are not directed at victims of dispossession in particular but rather to all victims of the armed conflict. While they may provide support for returning victims, these programs will not motivate return in the way they would if actual return were necessary to receive benefits from them. The *Ley de Victimas* could be a greater success in this dimension if the national government uses the authority granted to implement a robust rural development policy with a focus on the needs and interests of returning victims.[265]

Achieving an adequate balance between protecting victim choice and promoting return may require significant secondary programs that provide an incentive for victims to return. Without these incentives, the only way to encourage return is to limit the benefits of the restitution program to those who do return, either by preventing the transfer of restored land or by requiring return to receive restitution. Even with this incentive, victims still may be unlikely to return out of fear or other concerns. Implementing restitution and return satisfactorily under the terms of the Pinheiro Principles will require secondary programs that make return both possible and desirable.

VII. ADMINISTERING LAND RESTITUTION

The effective administration of restitution and return faces three main challenges: (1) ensuring access to the restitution procedure, (2) applying the procedure fairly and consistently, and (3) coordinating assistance for those who return to their land following restitution. We will argue in this section that centralized administration is necessary to meet these

263. *See* COMISIÓN DE SEGUIMIENTO, *supra* note 248, at 54.
264. *Id.*
265. *See* Ley de Victimas, art. 206.

challenges to implementing return within the bounds of the Pinheiro Principles.

The *Ley de Victimas* faces substantial challenges in achieving procedural fairness, both in ensuring equal access to the restitution proceedings and in ensuring consistent judgments. The *Unidad Administrativa's* centralized control of applications for restitution is potentially a significant aid in ensuring equal access to the restitution process, particularly if the *Unidad Administrativa* is managed correctly. The *Unidad Administrativa* will accept registrations of land in the registry of dispossessed property and oversee their submission to judges for restitution awards.[266] As other restitution efforts have demonstrated, strong central coordination and control of local restitution efforts can overcome even the considerable barriers to victim access posed by reticent local authorities.[267] By giving a central body the authority to oversee local authorities, as the *Programa* would have also done,[268] a restitution program may well be able to effectively monitor and address problems of unequal victim access to restitution proceedings.

The primary barrier to equality of access is the fact that the victims are spread throughout the country, probably requiring that the restitution program rely on local bodies to publicize the procedures and, potentially, to transmit registrations to the *Unidad Administrativa*. Local government resistance has been a general problem for providing assistance to

266. *See id*. art. 105.

267. The property restitution process in Bosnia-Herzegovina was initially plagued by significant problems with victim access to restitution procedures. International organizations centrally administered the program in Bosnia-Herzegovina, but local governments and agencies were in charge of receiving restitution requests from victims and carrying out certain parts of the restitution process. However, the local governments and agencies generally tried to obstruct the restitution process through delays, improper denials, and failure to publicize, presumably largely due to remaining ethnic tensions following the Bosnian War (1992–1995). These obstructions resulted in substantial problems for victim access to restitution. Charles Philpott, *Though the Dog is Dead, the Pig must be Killed: Finishing with Property Restitution to Bosnia-Herzegovina's IDPs and Refugees*, 18 J. REFUGEE STUD. 1, 4 (2005). Despite these initial problems posed by continuing ethnic tensions, the program eventually succeeded in providing restitution to the vast majority of victims following the creation of the Property Law Implementation Plan. International organizations responded to obstruction by local authorities with aggressive legal measures and also launched a massive information campaign to inform citizens of their legal right to restitution. *Id.*; *see also* Lynn Hastings, *Implementation of the Property Legislation in Bosnia-Herzegovina*, 37 STAN. J. INT'L L. 221, 231 (2001).

The Colombian program faces different problems including equal access and fairness of judgment complicated by geography and education more than deliberate political obstruction. However, the Bosnian example demonstrates that if the *Unidad Administrativa* is active and aggressive in addressing local problems of victim access, particularly when problems result from a lack of communication with victims, it should be able to use its position to facilitate victim access to restitution.

268. Of course, whether the *Unidad Administrativa* will effectively play this role depends to a large degree on its actual implementation, including its competence and good faith.

displacement victims, blocking both plans and implementation of assistance.[269] Neither the *Unidad Administrativa* nor any one of the new institutions has clear and direct authority over the local bodies that are instrumental to ensuring access to the restitution process,[270] and the relevant authority that may exist is in the hands of both the *Comité Ejecutivo* and the *Unidad Administrativa Especial*,[271] thereby splitting oversight of the restitution process between these institutions and the *Unidad Administrativa*. This division of oversight creates a substantial barrier to ensuring access for all victims, let alone the equality of access that probably can only be achieved through a combination of publicity efforts and application procedures.[272]

The adjudicative procedures that the *Ley de Victimas* establishes for restitution also face substantial challenges to achieving consistent judgments. Restitution judgments are less susceptible than reparation judgments to being unequal or unfair, since the actual land lost sets a concrete and objective scale for the size of a judgment, while the value of a personal injury of concern in a reparations judgment is inherently subjective. However, despite the objective scale for valuation, restitution judgments may also be inconsistent due to disparities in factual findings and in the application of the law.

The *Ley de Victimas* in particular is susceptible to such difficulties in the application of the presumption in favor of the victim. First, different court proceedings may reach different judgments on the facts necessary to establish the presumption, in particular whether a particular property was affected by violence.[273] These judgments will typically be relevant in more than one proceeding because they concern endemic violence that can affect more than one person. Second, different court proceedings may apply the presumption more or less strictly by requiring secondary occupants to prove their good faith without fault according to different standards.[274] The *Ley de Victimas* perhaps accentuates these consistency

269. *See* Corte Constitucional [C.C.] [Constitutional Court] diciembre 10, 2010, Auto 383, part V, 134 sec. 1.4, Sala Especial de Seguimiento a la Sentencia T-025 de 2004 (pp. 23–24) (Colom.).

270. *See* Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 105, 165, 169 (Colom.).

271. *See id.* arts. 165 para. 7, 168 para. 6.

272. *Cf.* Corte Constitucional [C.C.] [Constitutional Court], diciembre 10, 2010, Auto 383, part V, sec. 1.4, 2.7, 3.11 Sala Especial de Seguimiento a la Sentencia T-025 de 2004 (pp. 23–24, 27–28, 39–40) (Colom.) (recognizing that local government bodies have provided inadequate support for victims of displacement, in part because the national government has provided inadequate support and coordination).

273. *See* Ley de Victimas, art. 77; *cf.* PROGRAMA JULIO, *supra* note 13, at 36–37.

274. *See* Ley de Victimas, art. 77.

problems with the particular judicial restitution procedure it establishes: (1) it will use local judges, who are notoriously prone to corruption, to decide cases individually and not in panels of multiple judges, and (2) lacks a rigorous appeal procedure, which could help ensure consistency and fairness in judicial decisions.[275]

While the *Unidad Administrativa* probably will not be able to mitigate these problems, as they are outside of its explicit competency according to the *Ley de Victimas*,[276] other procedural mechanisms may help to some extent. In particular, the *Ley de Victimas* permits the accumulation of processes, or joinder, when various claims concern the same property or when the claims concern adjoining or neighboring properties.[277] Extensive and careful use of this mechanism to combine suits that share factual bases is likely to make decisions to apply the presumption in favor of the dispossessed more consistent. For example, if a particular village suffered mass displacement and dispossession, individual suits are likely to share factual questions that determine eligibility for the presumption since the same violence may have affected all relevant owners. Combining suits may also help with equal application of the presumption in certain cases. If the property of an entire village ended up in the hands of a single owner, consolidating cases may ensure that the same presumption is applied to all of the cases. This mechanism, however, does not ensure consistent application of the presumption across unrelated cases of dispossession, since no single suit could possibly cover the massive dispossession in Colombia by different actors during the past twenty years.

Following a successful restitution suit, the *Ley de Victimas* is unlikely to provide for adequately coordinated support for returning displaced and dispossessed persons. While the *Ley de Victimas* contains a number of support mechanisms for victims of the conflict, these mechanisms are not targeted at returning victims in particular.[278] The *Ley de Victimas* contemplates assistance for education,[279] health,[280] housing,[281] and professional development,[282] all of which will be provided through existing state institutions. Housing assistance will be provided through the

275. *See id.* arts. 79, 92.
276. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 105 (Colom.).
277. *Id.* art. 95.
278. *See id.* tit. V ("De la Institucionalidad para la Atención y Reparación a las Víctimas . . . .").
279. *See id.* art. 51.
280. *See id.* arts. 52–59.
281. *Id.* arts. 123–27.
282. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 130–1 (Colom.).

Subsidio Familiar de Vivienda,[283] with subsidies for rural housing administered by the *Banco Agrario* and delivered by local government bodies.[284] The use of local governments and institutions with a rural focus may allow returning victims to gain access to these subsidies. In contrast, professional training is to be delivered through SENA,[285] whose locations are heavily concentrated in the cities,[286] making them inaccessible for many victims returning to the rural areas.

Moreover, local governments are unlikely to provide effective aid to the returning victims even with the support of the new institutions established by the *Ley de Victimas*. The Constitutional Court has recognized that foot-dragging by local government bodies has been a recurring problem for effective attention to victims of displacement resulting in the failure to even formulate plans for providing services and assistance to the displaced, let alone actually providing them.[287] The institutional design in the *Ley de Victimas* is unlikely to improve this situation. While the *Ley de Victimas* creates a number of new bodies aimed at attention to victims of the conflict, it fails to establish a clear command hierarchy for attention to victims and clear lines of responsibility for failures to improve the situation.[288]

Finally, the *Ley de Victimas* creates no single institution that has a stated purpose or goal of coordinating support for returning victims.[289] The *Unidad Administrativa's* mandate is limited to overseeing the administrative process for obtaining restitution.[290] The rest of the new institutions appear to reflect the fact that restitution was originally to be handled in a law separate from the *Ley de Victimas*, as they do not have as explicit tasks coordinating victims programs with the restitution and return process.[291] Additionally, the institutions that the *Ley de Victimas* will create have overlapping and unclear lines of hierarchy and

283. *Id.* art. 123.

284. *Programa de Vivienda Rural*, BANCO AGRARIO, http://www.bancoagrario.gov.co/Vivienda/Paginas/Generalidades.aspx (last visited Sept. 24, 2011).

285. Ley de Victimas art. 130.

286. *Ubicación y Horarios de Atención*, SENA, http://www.sena.edu.co/Portal/El+SENA/Ubicaci%C3%B3n+y+horarios+de+atenci%C3%B3n/ (last visited Feb. 25, 2011).

287. *See* Corte Constitucional [C.C.] [Constitutional Court] diciembre 10, 2010, Auto 383, part V, 134 sec. 1.4, Sala Especial de Seguimiento a la Sentencia T-025 de 2004 (pp. 23–24) (Colom.).

288. *See, e.g.*, Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 105, 165, 169 (Colom.).

289. *See id.* arts. 105, 165, 169.

290. *See id.* art. 105.

291. *See id.* arts. 165, 169.

responsibility.[292] This institutional design is likely to result in a lack of adequate attention to whether returnees' needs are met.

The administrative structure of a restitution program, however, has the potential to mitigate problems with coordinating the programs that support the victims returning to their restored land. For example, the *Programa* design called for the creation of two administrative bodies that were supposed to coordinate program design and implementation of the program across different state organizations as well as with other Colombian transitional justice programs.[293] One body would have had as one of its primary tasks coordinating the various institutions involved in the *Programa*,[294] which would include the institutions assigned the role of supporting returning victims. As can be inferred from experiences in other land restitution programs, these institutions could have assisted in coordination of service delivery under the *Programa* as well as with services provided by the other transitional justice programs.[295] The *Programa* would have allowed the effort to coordinate geographically dispersed agencies to take advantage of the extensive information systems. The program design would have established two types of information systems that could have provided the means to monitor the overall scope and function of the program.[296] Other restitution processes have shown that information systems make it possible to effectively monitor a large-scale restitution effort under challenging circumstances.[297]

One final potential issue with the *Ley de Victimas* is the choice of a judicial procedure instead of an administrative one. Judicial restitution proceedings suffer from a number of severe limitations in the case of a mass restitution program. Most importantly, judicial procedures put the

292. *See id.* arts. 105, 165, 169.

293. PROGRAMA JULIO, *supra* note 13, at 91–93.

294. *Id.* at 13.

295. While the Bosnia-Herzegovina program most clearly demonstrates that central coordination can overcome significant barriers to victim access to restitution, it also demonstrates that central coordination of individual efforts can overcome significant supervisory problems. *See* Philpott, *supra* note 267. As a result, it is plausible that central bodies could effectively coordinate restitution and return with other transitional justice efforts.

296. PROGRAMA JULIO, *supra* note 13, at 83, 85.

297. While the monitoring efforts in Bosnia-Herzegovina were less exceptional than the coordination efforts, and less extensively discussed as a result, they were able to identify problems with victim access to the restitution process as well as the levels of success in securing victim restitution. Philpott, *supra* note 267, at 9 (reporting that following the PLIP, "the monthly collection and publishing of statistics on property restitution for each municipality . . . allowed for easier tracking of progress and some limited comparison between municipalities and regions"); *see also* Hastings, *supra* note 267, at 234 (reporting that monitoring revealed that less than 50% of victims had registered for restitution one month prior to a 1999 deadline).

decisions in the hands of autonomous judges less subject to a form of central control that could ensure consistency of factual determinations and application of standards. Additionally, systems of judicial restitution are much slower and more expensive than administrative proceedings.[298] Given the large number of potential restitution claims to be evaluated, an administrative procedure would be more efficient and more likely to ultimately succeed.[299] However, since the Pinheiro Principles do not require a judicial process for restitution,[300] this highly problematic feature of both program designs indicates nothing about the general viability of the Pinheiro Principles.

An analysis of the *Ley de Victimas* design suggests that the Pinheiro Principles can be implemented in a way that circumvents most administrative problems, so long as there are strong, central institutions coordinating the effort. Institutional development is essential to successfully administering a restitution program. To ensure equal access to the restitution mechanism, some central body needs to either conduct or oversee the local effort. Coordinating support efforts for returning victims who have received restitution also requires a central body with authority. Since the initial stage, access to restitution, the intermediate stage, the judicial process, and the final stage of return, take place in geographically-disperse locations, the support programs require strong central coordination in order to be fair and successful.

VIII. TRANSFORMING THE CIRCUMSTANCES OF RETURN

A restitution program that aims to return victims to their homes faces the challenge of changing the structure of rural agriculture so that victims will return to different circumstances than those they were forced to leave. We will argue in this section that a restitution program can meet this challenge only if it includes programs complementary to restitution. In particular, a combination of land grants, training, and loan programs can help change the adverse circumstances that victims faced prior to displacement.

While transforming rural agriculture is not an essential requirement of a restitution program since an independent land policy reform could

298. *See* Sánchez & Uprimny, *supra* note 39, at 254.

299. *See id.* (reporting that restitution efforts in Kosovo and South Africa had to adopt administrative elements in response to delays and that many observers felt these changes were necessary to address the large number of claims).

300. *See* THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 12.4.

accomplish such transformation, many political contexts demand both are addressed simultaneously. Implementing a program that fails to transform inequality is potentially quite harmful, as doing so can undermine broader attempts at land reform. For example, given the historic gaps between attempts at substantive agrarian reform in Colombia,[301] the *Ley de Victimas* will probably be the only reform initiative for many years. It is unlikely to be complemented by a more comprehensive land reform program aimed at reducing the inequality of rural land distribution in rural Colombia. Within the constraints of the Colombian political system, a restitution program may be the most that can be hoped for at present, making it an attractive policy.[302] However, a restitution program that does not actively seek to transform the inequalities in land distribution is a less than satisfactory alternative to full land reform.

Implementing the *Ley de Victimas* is unlikely to exacerbate the unequal distribution of agricultural land in Colombia. The vast majority of the dispossessed in Colombia were peasants,[303] so the claims are unlikely to generally involve large tracts of land the restitution of which could have a substantial, negative impact on equality of land distribution. Thus, restoring land to small plot farmers is unlikely to exacerbate the unequal land distribution and may even improve the land distribution. Likewise, returning land to small plot farmers is also unlikely to make a significant positive contribution to the equality of land distribution between the wealthy and the poor. The *Ley* only contemplates affecting the land distribution by rolling it back to what it was before the mass displacement and dispossession. As land had a problematically unequal distribution even before the massive transfers of land from the poor to the wealthy over the last twenty years, the *Ley de Victimas* will have a limited affect on this problem.

The *Programa* design suggested two additional mechanisms with which a restitution program could affect the distribution of land across socioeconomic classes beyond simply recreating the distribution prior to displacement.[304] First, a restitution program can prioritize restitution based on socioeconomic status: the *Programa* design selected different municipalities for restitution in part based on need and poverty-level of the

301. *See supra* notes 75–81 and accompanying text.

302. *See* Saffon, *supra* note 46, at 134–36.

303. *Cf.* SNAIPD, *supra* note 4, at 86 (reporting that according to the RUPD, 90% of displaced persons are from rural areas).

304. Notably, these measures would also complement programs aimed at assisting returning farmers, as they would attempt to increase both the portion of land held by small plot farmers and increase the size of the individual holdings.

population need.[305] However, to maintain compatibility with the Pinheiro Principles, a program cannot impose any cutoff for restitution claims based on a lack of poverty or need,[306] limiting the effect that the completed restitution program would have on wealth distribution. Second, a restitution program could give victims priority access to land from INCODER,[307] an action that would allow a program to affect the unequal land distribution in Colombia. While the history of land grants and land reform in Colombia does not augur well for the success of this sort of initiative, in principle, complementing restitution with land grants could allow a restitution program to comply with the Pinheiro Principles[308] while also positively affecting the equality of land distribution. Whether a state can improve the equality of land distribution through a program that complements restitution with land grants depends on whether the state can find appropriate land to distribute through the grants.

The *Ley de Victimas* is likely to have a positive effect on the gender distribution of land in rural Colombia. Every parcel of land restored through the mechanisms offered by the *Ley de Victimas* will be jointly titled to the claimant and his or her spouse or permanent companion.[309] Since men have substantially larger land holdings in rural Colombia than women,[310] joint restitution should therefore increase the portion of land held by women. Although the requirement for joint titling only applies to land restored through the mechanisms established by the *Ley de Victimas*,[311] the favorable terms for restitution proceedings under the *Ley de Victimas* should ensure that few people use other legal procedures to avoid joint restitution. This feature of the *Ley de Victimas* is commendable, as the Pinheiro Principles do not require that a restitution program address the gender balance of land holdings in this way.[312] It is complemented with features that seek to provide women with special support for accessing the restitution process, including priority in

305. *See* PROGRAMA JULIO, *supra* note 13, at 13.
306. *See id.* at 32–39.
307. *Id.* at 65.
308. The Pinheiro Principles do not permit the exclusion of dispossessed people from restitution on the grounds that they are wealthy or not in need. *See* THE PINHEIRO PRINCIPLES, *supra* note 8, princ. 3.
309. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 91 para. 4, 118 (Colom.).
310. Carmen Diana Deere & Magdalena Leon, *The Gender Asset Gap: Land in Latin America*, 31 WORLD DEVEL. 925, 940 (2003); *see* ACCIÓN SOCIAL, *supra* note 121, at 41.
311. Ley de Victimas arts. 91 para. 4, 118.
312. *See* PROGRAMA JULIO, *supra* note 13, at 32–39.

consideration of claims and in obtaining the restitution of land granted in a judgment.[313]

The restitution and return process envisioned by the *Ley de Victimas* is much weaker when it comes to improving the ability of returning victims to take advantage of the land and to change the conditions of exclusion that contributed to the original displacement and dispossession. Among the factors that create barriers to effective small plot farming are lack of access to subsidies, services, equipment, markets, and education.[314] While the *Ley de Victimas* does establish programs for health,[315] professional development,[316] education,[317] and housing,[318] these programs are not targeted at the unique characteristics of returning victims,[319] and they are not subject to adequate coordination.[320] Additionally, returning victims are likely to have problems accessing at least some of the programs. For example, as we discussed earlier, professional development will primarily proceed through the National Service of Learning ["SENA"], whose locations are mostly in large cities, not the rural locations to which the victims will generally return.[321]

Moreover, the *Ley de Victimas* takes important steps to strengthen land rights for rural peasants. First, it provides formal titles to the restored land and renders it difficult to transfer for two years, providing protection against future coerced transfers.[322] Second, it provides support for alleviating debts and taxes encumbering restoring lands[323] by preventing such debts from being used to seize the land.

The *Ley de Victimas* could take additional steps to ensure that the small plot farmers would be better able to take advantage of their restored land

313. Ley de Victimas arts. 114–16; *cf.* PROGRAMA JULIO, *supra* note 13, at 81.

314. *See* Sánchez & Uprimny, *supra* note 39, at 207; Berry, *supra* note 40, at 43, 63.

315. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] arts. 52–59 (Colom.).

316. *Id.* arts. 130–31.

317. *Id.* art. 51.

318. *Id.* arts. 123–27.

319. *See id.* arts. 51, 52–59, 123–27, 130–31.

320. *See supra* notes 278–92 and accompanying text.

321. Approximately 70% of SENA's different locations are in cities of over 100,000 people. *Ubicación y Horarios de Atención*, SENA, http://www.sena.edu.co/Portal/El+SENA/Ubicaci%C3%B3n+y+horarios+de+atenci%C3%B3n/ (last visited Feb. 25, 2011).

322. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 101 (Colom.); *cf.* PROGRAMA JULIO, *supra* note 13, at 72–74 (Subprogram for Clearing Property Titles) (establishing certain protections against dispossession by establishing clear titles to land and strengthening the land titling system).

323. Ley de Victimas arts. 112–13; *cf.* PROGRAMA JULIO, *supra* note 13, at 66–71 (Subprogram for Alleviating Debt Encumbrances) (providing assistance to ensure that public and private debts do not overly encumber property holdings).

than they were before displacement and dispossession. The *Programa* design contemplated training and advising such farmers on work-related issues[324] as well as grants and financing for agricultural and productive projects.[325] These initiatives would have had the potential to rectify many problems for small plot farmers, allowing for increased accessed to equipment, markets, and education. Importantly, all would have been specifically directed at returning victims[326] and coordinated by a central body.[327] It may be possible for the government to incorporate some of these programs in the final restitution process, as the *Ley de Victimas* authorizes the government to create a new policy for rural development.[328]

Features from the *Ley de Victimas* as well as the defunct *Programa* design suggest that the Pinheiro Principles' lack of a transformative focus can be mitigated by secondary programs to assist returning victims, but only when these programs are centrally administered and locally accessible to victims. Indeed, a program that includes an aggressive supplemental land distribution program could transform land distribution despite the Pinheiro Principles' requirement that all dispossessed people receive restitution. Other forms of support, such as loans and training, may also improve returning victim's ability to make use of their land. Both of these goals, however, require centralized administration to ensure that the programs are accessible and are meeting their objectives of transforming the conditions of life of returning victims.

IX. PAYING FOR RETURN

A final question that faces any restitution program design is whether the cost of a program to resolve the IDP crisis through restitution and return is a wise social investment. A comprehensive design is a better social investment than a minimalist restitution and return program because a comprehensive design is more likely to leave the victims in a position where they will not need to rely on the state in the future.

The *Ley de Victimas* is unlikely to place an excessive strain on public funds that will make it impossible to satisfy the claims of all the victims while also fulfilling other legitimate claims on state resources. The projected total costs for a comprehensive displacement policy has been

324. PROGRAMA JULIO, *supra* note 13, at 59–62.
325. *Id.* at 62–64.
326. *See id.* at 55–74.
327. *Id.* at 93.
328. Ley de Victimas, L. 1448/11, junio 10, 2011, 40.096 DIARIO OFICIAL [D.O.] art. 206 (Colom.).

estimated at $44.2 trillion pesos (approximately $25 billion dollars) over ten years and for accompanying land policies $7.2 trillion pesos (approximately $4 billion dollars).[329] The *Ley de Victimas* relies on restitution as the primary remedy for dispossession, potentially avoiding the cost involved in providing monetary or in-kind compensation to a victim of dispossession.[330] Additionally, it reduces the costs to the state by covering some costs from sources other than the general budget, looking to public and private donations, international aid, and confiscated goods, among others.[331]

At the same time, the costs of restitution should not be considered a straightforward drain on the state budget. Restitution may facilitate economic growth in the long term and support development more generally. While restitution may have a short term negative impact on economic growth, the medium and long term research indicates that restitution can support economic growth.[332] Pablo de Grieff claims that restitution programs can aid development by clarifying property rights[333] while Roht-Arriaza and Orlovsky list a number of ways in which reparations can more generally benefit development, including by promoting civil society development and land titling and registry creation.[334]

The costs of restitution are also offset by decreasing the need for other state spending to protect the constitutional rights[335] of the displaced population. Displacement is a major social problem closely connected to poverty that the Colombian government must address with public funds

329. SNAIPD, *supra* note 4, at 190.

330. Ley de Victimas, art. 97; *cf.* PROGRAMA JULIO, *supra* note 13, at 32, 46.

331. Ley de Victimas, art. 113; *cf.* PROGRAMA JULIO, *supra* note 13, at 11 (drawing funds first from those who directly caused the harm, then to a general fund of property turned in by demobilized paramilitaries, and finally to public resources to cover the costs of restitution). *But see id.* at 19 (reporting that demobilizing paramilitaries have turned in fewer goods than hoped).

332. *See* Ibáñez, *supra* note 2, at 10 (reporting that land unexploited due to displacement will reduce agricultural growth by 3.5% per year and that increased wealth concentration decreases public investment that benefits growth).

333. *See* Pablo de Greiff, *Articulating the Links Between Transitional Justice and Development: Justice and Social Integration*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT 28, 37 (Pablo de Greiff & Roger Duthie eds., 2009).

334. Roht-Arriaza & Orlovsky, *A Complementary Relationship: Reparations and Development*, *in* TRANSITIONAL JUSTICE AND DEVELOPMENT 170, 182–89 (Pablo de Greiff & Roger Duthie eds., 2009).

335. *See* Corte Constitucional [C.C.] [Constitutional Court], Sala Tercera de Revisión, enero 22, 2004, Sentencia T-025, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], Sala Segunda de Revisión, enero 26, 2009, Auto 008, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

regardless of whether it does so through restitution or through other means.[336] Unlike stopgap measures to address the immediate humanitarian needs of IDPs, land restitution accompanied by return may constitute a durable solution to the crisis.[337] While the problem of displacement in Colombia involves more than a lack of housing stability for the displaced, return would likely permanently improve the condition of displaced persons across a number of dimensions, including economic stability.[338] It is likely that land restitution may render unnecessary humanitarian aid and other measures that would otherwise be necessary to address the needs of the displaced population.

Whether restitution can decrease the need for spending on support for the displaced depends to a large extent on whether restitution permanently resolves the displacement problem, in part or in whole. However, it will only permanently resolve the problem if victims returning to their homes are able to restart lives in which they are self-sufficient and are not subject to further displacement. As a result, the costs of restitution will only be a good investment if the state provides the support that enables victims to become economically self-sufficient and takes adequate measures to prevent re-victimization. In this sense, the support programs that a comprehensive restitution policy creates are needed in order for restitution to be a worthwhile social investment. A comprehensive restitution program, despite its higher initial costs, is likely to be a better use of limited social resources in the long term.

X. CONCLUSION

As the case of restitution in Colombia shows, the apparent problems with the Pinheiro Principles are generally less severe than might be thought. The primary apparent problem with how the Pinheiro Principles constrain the design is that they preclude the restitution program from doing more to transform the distribution of land. However, this problem is

336. *See* Corte Constitucional [C.C.] [Constitutional Court], Sala Tercera de Revisión, enero 22, 2004, Sentencia T-025, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); Corte Constitucional [C.C.] [Constitutional Court], Sala Segunda de Revisión, enero 26, 2009, Auto 008, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

337. "A durable solution is achieved when former IDPs no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement." Rep. of the Secretary-General, *supra* note 37, ¶ 8. "A durable solution can be achieved through: Sustainable reintegration at the place of origin . . . Sustainable local integration in areas where internally displaced persons take refuge . . . [or] Sustainable integration in another part of the country . . . ." *Id.* ¶ 9.

338. PROGRAMA JULIO, *supra* note 13, at 47.

potentially surmountable by complementing land restitution with land grants to people who receive restitution, at least when a state has land available to distribute. Additionally, the individualized restitution awards that the Pinheiro Principles require do not create insurmountable administrative problems, since various institutional measures can coordinate awards across victims and with other social services and the costs of restitution can be kept under control and spread over time.

However, to make restitution and return a successful response to internal displacement, the program needs to take a comprehensive approach, including both institutions that provide centralized administration and programs that support returning victims. Centralized administration is necessary both to provide equal access to restitution and to ensure adequate and consistent support for victims as they return. Support programs are necessary to make return an appealing choice for victims and to ensure that victims can restart their lives when they return, to facilitate the transformation of rural agriculture, and to reduce the need for further social spending. Without these measures, restitution is less likely to significantly improve the internal displacement crisis.[339]

The *Ley de Victimas* land restitution design provides a useful model for evaluating how best to apply the Pinheiro Principles to facilitate return in an actual displacement crisis. It constitutes a refined strategy to address the IDP crisis in a nation with a more advanced IDP policy than any other nation.[340] Moreover, the design has both features that appear more minimalist, such as the primary focus on the restoration of land titles, as well as those features that are more comprehensive, such as the underdeveloped programs to meet the needs of returning victims and to provide institutional coordination. Most importantly, the design broadly complies with the Pinheiro Principles, providing clear examples of how those principles can be instantiated in a restitution program design. While the design may deviate from the strict requirements of the Pinheiro

339. While the administrative and support programs in the Ley de Victimas are suboptimal, there are still several opportunities for improvement. First, the Constitutional Court will likely receive a series of constitutional challenges, providing it with the opportunity declare the *Ley* constitutional conditional on changes necessary to resolve the unconstitutional state of affairs. Second, the *Ley* will require implementing regulations to put it into effect, which could both amplify the victim support programs, within limits, and better delimit authority and responsibility. Third, the *Ley* itself requires the government to create a new rural development policy with prioritization for victims of the conflict. This could provide an excellent opportunity to strengthen the support programs for returning victims.

340. *Colombia*, IDP VOICES, http://www.internal-displacement.org/80257297004E5CC5/9B53FD612B5E8D22802572980050ED0E?OpenDocument (last visited Feb. 25, 2011). *See generally* PROGRAMA JULIO, *supra* note 13.

Principles in limited ways, these minor deviations have minimal impact on the assessment of the Pinheiro Principles.