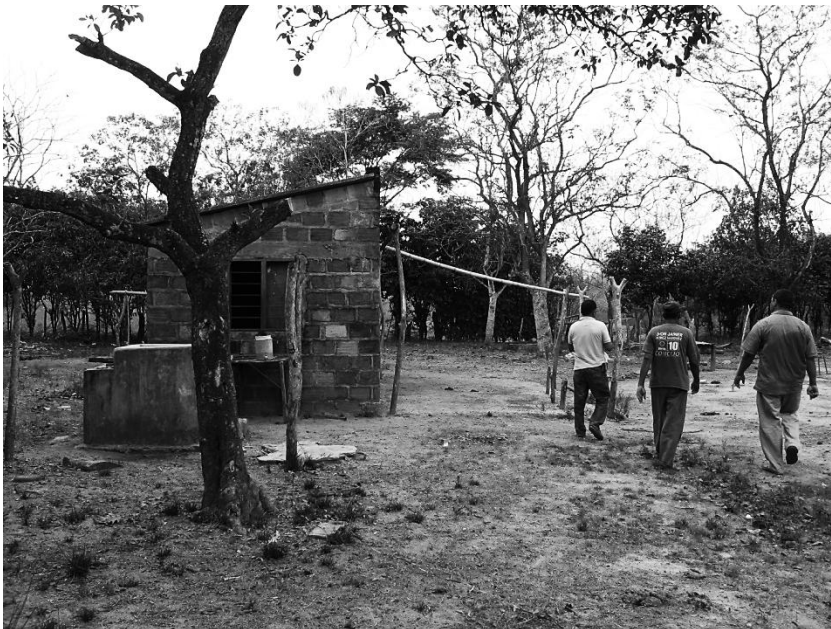


Justice or Dignity

A research to the transitional justice process of the forcibly displaced people of Mechoacán, Colombia



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Left, actual possessors visiting the former parcel of Josefina (one of the forcibly displaced) in Mechoacán; Right, a sign of the mining company Drummond identifying different parcels in Mechoacán.

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Abbreviations

ATCA	-	Alien Tort Claim Act	
AUC	-	Autodefensas Unidas de Colombia	- Colombian Self-defence Force
CCH	-	Corporacion Cartagena Honesta	- Honest Cartagena Corporation
CPR	-	Civil and Political Rights	
CSPPDF	-	Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado	- Commission for Monitoring Public Policy on Forced Displacement
CTI	-	Cuerpo Técnico de Investigación	- Technical investigation body
ESCR	-	Economic Social and Cultural Rights	
ICC	-	International Criminal Court	
ICCPR	-	International Covenant on Civil and Political rights	
ICESC	-	International Covenant on Economic Social and Cultural Rights	
ICHR	-	International Council on Human Rights Policy	
ICL	-	International Criminal Law	
ICTJ	-	International Centre for Transitional Justice	
IHL	-	International Humanitarian Law	
INCODER	-	Instituto Colombiano de Desarrollo Rural	- Colombian institution for rural development
INCORA	-	Instituto Colombiano para la Reforma Agraria	- Colombian institution for agrarian reform
MNC	-	Multinational Corporation	
RUPD	-	Registro Único de población Desplazada-	Unified Registry of Displaced Population
RUPTA-		Registro Único de Predios y Territorios Abandonada	- Unified Registry of abandoned lands and territories
UAF	-	Unidad Agrícola Familiar	- Agricultural Family Unit
Unidad-		Unidad Administrativa Especial De Gestión De Restitución De Tierras Despojadas	- Special Administrative Unity for the Gesture of Land Restitution

Introduction

Internally displaced people¹ are the biggest group of victims in the armed conflict in Colombia. As the country with the second most internally displaced people in the world, after Sudan, Colombia counts for more than 3 million internally displaced. This is 7% of the entire population, who had to flee from their lands because of the widespread violence in the country (Uprimny & Saffon, 2009). Land has always been one of the central themes of the Colombian armed conflict (Vidal, 2008; Lid, 2012; Saffon & Uprimny, 2012) and through conflict over territories and forced displacements the land became centralised in the hands of a few (Lid, 2012).

The discourse regarding the causes of forced displacement in Colombia defines economic interests as its main cause, provoking land grabbing and the centralisation of land (Goebertus, 2008; Franco & Restrepo, 2011). These conflicts over territory are not only fought by the fighting parties themselves but also motivated by the accumulation of capital by the ones in power (Bello, 2003) and development purposes, such as the construction of mines, dams and roads (Metha & Napier Moore, 2010). The majority of the violent forced displacements in Colombia happen in resource rich areas and municipalities with the highest income rates from natural resources (Bello, 2003; Lid, 2012). These areas where most forced displacement occurred are also subject of the most land centralization. 75% of these Colombian forcibly displaced were expelled from rural areas and 55% possessed land before their displacement, from this 55%, 94% abandoned or transferred their lands under pressure and thus lost their lands because of their displacement.² All together they abandoned approximated 5,5 million ha which corresponds to 10,8% of the agricultural surface of the country (CSPPDF, 2009 in Saffon & Uprimny, 2012).

Notably, multinational corporations (MNC) seem to benefit substantially from the displacements, especially agrarian companies. For example, 93% of all the land of the biggest palm oil companies together; Urapalma, Palmado, Palmas de Curvaradó and Palmas S.A., is part of the official collective territories of the afro-descendants who were violently displaced from their lands (Franco & Restrepo, 2011). But also the mining industry, in the coal, petrol and gold sectors, is partly situated on the lands of forcibly displaced people.³

At the moment there are even several lawsuits against MNCs accusing them of directly benefitting from the forced displacements and other human rights violations. Coca-Cola, Nestlé, Chiquita, Dole, Drummond, BP and Conquistador Goldmine are some examples of MNCs being sued (ICHR, 2002). Human rights lawyers are using the Alien Tort Claim Act

¹ Internally displaced people as defined by the UN 'Guiding principles on internal displacement' are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border" In this research they will also be referred to as: forcibly displaced people.

² 2009 Statistics of the Commission for Monitoring Public Policy on Forced Displacement (CSPPDF, to its Spanish acronym), in: Saffon & Uprimny, 2012.

³ Colombian human rights lawyers accuse the following companies of instigating and benefitting from forced displacement in Colombia: Coal mining companies BHP Billiton, Glencore-Xtrata and Angloamerican for the Cerrejon mine by means of a massacre in Bahia Portet-Guajira and Glencore in el Prado, Cesar; Gold mining companies GreyStar in Santander and Anglogold Ashanty in Meta, Bolivar and Antioquia; Oil companies B.P. and Perenco in Casanare, Oxy in Arauca and the whole área of the Limon-Covenas pipeline, Encana, Petrobank and Petrominerales in Putumayo and Narino and Harken Energy in Meta and llanos orientales.

(ATCA) to hold these MNCs accountable for their human rights violations and provide reparation for the victims. It is believed that criminal lawsuits for perpetrators of mass violence will help in the transitional justice process to make the transition from war to peace (Fletcher, 2002).

After more than 40 years of internal armed conflict in the country, the concept of transitional justice has found its way into policy making in Colombia and the government is implementing mechanisms and institutions typical of a transitional justice framework (Saffon, 2010). The transitional justice process started in 2005 with the '*ley the justicia y paz*' (Justice and peace law) (Lid, 2012), based on the demobilization of illegal armed forces in the country, especially the paramilitary forces: the Autodefensas Unidas de Colombia (AUC, United Self-Defence of Colombia). Its stated goal is 'to facilitate the peace process and the individual or collective reincorporation to civil life of members of illegal armed groups, guaranteeing the victims' rights on truth, justice and reparation' (law 975 of 2005, art. 1), creating a special criminal procedure for prosecuting and judging demobilized armed actors who committed atrocious crimes (Saffon, 2010).

Although this justice and peace law states the right to reparation for the victims, it did not create a special procedure to provide for this reparation. This provoked a lot of critique which stated that this transitional justice framework only focuses on the benefits for the perpetrators while the interests and needs of the victims stay unattended. Likewise, the lack of restitution measures regarding the forcibly displaced population was seen as a violation of the right to reparation for the displaced, especially because 'restitution' is the preferred remedy for forced displacement⁴ (Saffon, 2010).

The current government acted on this critique and president Santos put 'land restitution' as one of the fundamental themes on his policy agenda (Uprimny & Sanchez, 2010). This led in 2011 to the implementation of the '*ley de victimas y restitution de tierras*' (victims and land restitution law, in short 'the victims law'). This new law states, in broad terms, that all victims of human rights violations or violations of international criminal law have the right to truth, justice, reparation and non-repetition and that the state will do all in its power to ensure these rights (law 1448 of 2011), extending the former law with a clear focus on the needs of the victims. The law has a special chapter on land restitution for the forcibly displaced population (Title IV chapter III) and sees land restitution as a mean to facilitate the transition from war to peace (Saffon, 2010). This led to the creation of the *Unidad Administrativa Especial De Gestión De Restitución De Tierras Despojadas* (Special Administrative Unity for the Gesture of Land Restitution, hereafter called the *Unidad*) to attend and assist the victims of forced displacement and organise and execute the land restitution for the displaced population in Colombia (Ministry of agriculture and rural development, 2011).

The forcibly displaced people of the vereda⁵ Mechoacán in Colombia, however, do not use this new restitution program of the government. The people of Mechoacán were forcedly

⁴ The UN Principles on 'Housing and Property Restitution for Refugees and Displaced Persons' state in principle 2.1: "All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore" (United Nations, 2005).

⁵ 'Vereda' in Colombia refers to a rural district

displaced by paramilitary violence and now most of their lands are occupied by a big multinational coal mine, Drummond (VerdadAbierta, 2010). Nationally the displaced try to get their legal land titles back and internationally US and Colombian human rights lawyers are preparing a lawsuit against Drummond in the US by means of the ATCA accusing Drummond for the forced displacement of the people of Mechoacán in order to obtain their lands (Van Guardia, 2011).

This research is based on the transitional justice process of the forcibly displaced people of Mechoacán and the strategies they undertake to reach justice in their situation. What does justice mean to them and how do they perceive justice in their own situation as forcibly displaced? Do their needs correspond with the current notions of transitional justice? And will the means they undertake to achieve justice eventually realize their needs for justice? Regarding to these questions I investigated to what extent, if at all, the Alien Tort Claim Act lawsuit against Drummond in the US will contribute to the Transitional Justice process for the displaced people of Mechoacán? This is a qualitative research based on structured and unstructured interviews with forcibly displaced people of Mechoacán, the human rights lawyers preparing the ATCA lawsuit and government representatives as well as participant observations of the life of the displaced and the preparation process of the lawsuit.

Chapter 1 - Theoretical framework and methodology

1.1 Transitional Justice

Over the last decades, there has been a lot of interest in countries recovering from armed conflict or severe human rights violations and the fight against impunity has been central to the international human rights movement in recent years (Fletcher & Weinstein, 2002). Justice, has been the “rallying cry of many” who seek to repair the injury of the many victims caused by these violent acts (Fletcher and Weinstein, 2002:575). Since the Universal Declaration of Human Rights in 1948, the development of human rights norms, institutions and enforcement mechanisms has been driven by the international legal community, resulting in a legal framework—justice—to respond to gross human rights violators and war criminals including the International Criminal Court (ICC)(Fletcher & Weinstein, 2002). Thus, the predominant mechanism to respond to mass violence focuses on holding accountable the individual perpetrators of war crimes and other serious violations of international law.

This focus on accountability of the perpetrators of past atrocities after a dictatorship or civil war led in the late 80’s and early 90’s to the concept of transitional justice (Fletcher & Weinstein, 2002; Duthie, 2011; Nagy, 2008). Although there is no clear cut definition of transitional justice and different definitions vary in their meaning and context of the concept, based on these different definitions it is clear that the main goal of transitional justice is dealing with the wrongdoings and human rights violations of the past. For example Teitel states transitional justice is: “the view of justice associated with periods of political change, as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes” (in Nagy, 2008:277). Roht-Arriaza widens the context of transitional justice by defining it as: “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law” (in Nagy, 2008:277). And Duthie (2011:243) defines: “Transitional justice refers to a set of measures that can be implemented to redress the legacies of massive human rights abuses that occur during armed conflict and under authoritarian regimes, where ‘redressing the legacies’ means, primarily, giving force to human rights norms that were systematically violated.” He makes the practice of transitional justice more concrete by describing: “the different measures that together make up a holistic approach to transitional justice seek to provide recognition for victims, foster civic trust and promote possibilities for peace, reconciliation and democracy” (Duthie, 2011:243). These goals are affirmed by the International Centre for Transitional Justice (ICTJ) which also state that the measures that together make up a transitional justice process are: Criminal prosecutions, Truth commissions, Reparation programs and Institutional reform.⁶

As seen in the above definitions of transitional justice, the context in which the term is used is expanding from ‘periods of political change’ to ‘civil strife and repression’ to ‘massive human rights abuses’ in general. The measures associated with transitional justice have indeed increasingly been applied in post conflict contexts, in addition to post

⁶ As stated by the ICTJ on: <http://www.ictj.org/about/transitional-justice>. Accessed on 21 July 2012.

authoritarian contexts, in countries that have not undergone significant political transition and those that are still experiencing conflict (Duthie, 2011). This is also the case in Colombia where the focus of the transitional justice process lies not in the wrongdoing of repressive predecessor regimes but the widespread violence by guerrillas and paramilitaries during the internal armed conflict. Therefore Duthie's definition fits best in the Colombian context and is the one that will be used in this research.

Although forced displacement generally does not figure prominently in either the literature or the practice of transitional justice, it is a big problem integrally linked to massive human rights violations as widespread human rights violations often lead to displacement. Thereby, systematic displacement can itself constitute a serious human rights violation, including a crime against humanity and displaced people are often particularly vulnerable to human rights violations (Duthie, 2011). Transitional justice processes seek to redress the legacies of massive human rights violations and therefore also need to address forced displacement. Duthie (2011) appoints five measurements making up the transitional justice framework regarding to forced displacement:

1. Criminal prosecutions of those most responsible for violations
2. Reparations programs that distribute a mix of material and symbolic benefits to victims (including compensation and apologies)
3. Restitution programs that seek to return housing, land and property to those who were dispossessed
4. Truth-telling initiatives that investigate and report on periods of past abuse
5. Justice-sensitive security system reform that seeks to transform the military, police and judiciary responsible for past violations

With the implementation of the justice and peace law in 2005, the Colombian government started implementing measures based on a transitional justice framework in order to make the transition from armed conflict to peace (Saffon, 2010). In the victims law it is stated that it is based on a transitional justice framework to provide reparation for the victims⁷ (law 1448 of 2011), and also the ICTJ states they work with "the government and civil society groups in Colombia to pursue further truth and justice."⁸ The Colombian government even recognised the need to also address forced displacement in the transitional justice process and implemented a land restitution program by means of the victims law. These claims of the Colombian government and the ICTJ make the analytical concept of transitional justice very relevant in Colombia's peace process and reparation programs. Thus, regarding this context it is important for this research to use the concept of transitional justice to analyse the needs for justice of the forcibly displaced of Mechoacán.

⁷The law states to aim that "... [the victims] will be able to effective enjoy their rights to know the truth, to justice and reparation with the guarantee of non-repetition, within a transitional justice framework so they will be recognized as victims and dignified by means of materialization of their constitutional rights."

⁸ http://www.ictj.org/our-work/regions-and-countries/colombia_ accessed 7 July 2012

1.1.1 Trials

Some decades ago it was still believed that criminal trials would deter peacebuilding and reconciliation. Prosecuting the actors of the conflict would enforce feelings of antagonism and vengeance (Laplante, 2008). Peacebuilding processes were mainly based on truth and reconciliation with amnesty for the perpetrators of mass violence in order to build peace. Nowadays it is believed that there can be no peace without justice and that amnesties are unlawful (Laplante, 2008). This is reflected in the preamble of the Rome statute which called ‘an end to amnesty’ and the creation of the ICC (Laplante, 2008). Also the right to remedy and reparation of the UN states the duty of the state to investigate and punish perpetrators of violations of human rights or international humanitarian law (IHL).⁹ As well the victim’s right to “effective judicial remedy as provided for under IHL,”¹⁰ making remedy and reparation bind by legal prosecutions.

This focus on accountability formed the context which provided for the legal approach of transitional justice. Many advocates for the concept of transitional justice suggest that criminal trials for perpetrators of mass violence may be the single most appropriate response in order to make a transition to peace (Fletcher & Weinstein, 2002; Jaime, 2009). As demonstrated by Fletcher and Weinstein (2002) trials support the transitional justice process on five aspects:

1. to discover and publicize the truth of past atrocities
2. to punish perpetrators
3. to respond to the needs of victims
4. to promote the rule of law in emerging democracies
5. to promote reconciliation

It is argued that accountability provides a direct, moral, and ethical response to victims on behalf of society and the pain and experiences of victims are acknowledged and compensated by punishing perpetrators for their crimes (Fletcher & Weinstein, 2002). Neier (1998) even states that retribution makes a unique contribution to the alleviation of the pain victims experience (in Fletcher & Weinstein, 2002). In addition, punishment of the perpetrators would serve to re-enforce acceptable norms and prevent future abuses by dissociating violent actors of the rest of society (Moreno, 2005). As stated by Martha Minow (1998): “guilty verdicts afford public acknowledgment of what happened, and its utter wrongfulness” (in Fletcher & Weinstein, 2002:590). Furthermore, criminal trials will focus on individual perpetrators of mass violence instead of a certain group of society, facilitating reconciliation for the society as a whole (Moreno, 2005).

Regarding to truth finding it is believed that legal trials to prosecute the perpetrators of the violence are a legitimate way of discovering and publicizing the truth (Fletcher & Weinstein, 2002:587). Diane Orentlicher (1991) states: “the most authoritative rendering of

⁹ “In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to *investigate* and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to *punish* her or him.” Nr. 4 of the UN ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (emphasis mine).

¹⁰ Nr. 12 of the UN ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’

the truth is possible only as a result of judicial inquiry, and major prosecutions can generate a comprehensive record of past violations” (in: Fletcher & Weinstein, 2002:587). Currently, this conception is shared by commentators and practitioners of transitional justice who believe that due to a widespread acceptance of the impartiality of multilateral institutions, international criminal trials confer heightened legitimacy to the truth as captured in the judicial record (Fletcher & Weinstein, 2002).

All these advocates made legal justice based on criminal trials the solid pillar of transitional justice and trials “an essential component of reconciliation” (Laplante, 2008:935). Figure 1. shows this believed interrelatedness. A primary weakness of writings on transitional justice is, however, the lack of empirical evidence to substantiate claims about how well criminal trials achieve the goals ascribed to them. There have been few studies of the effects of criminal trials on victims, bystanders, and perpetrators and similarly there have been hardly any studies that examined or measured the contribution of trials to reconciliation (Fletcher & Weinstein, 2002). Neither do we know if trials indeed provide proper reparation for the victims.

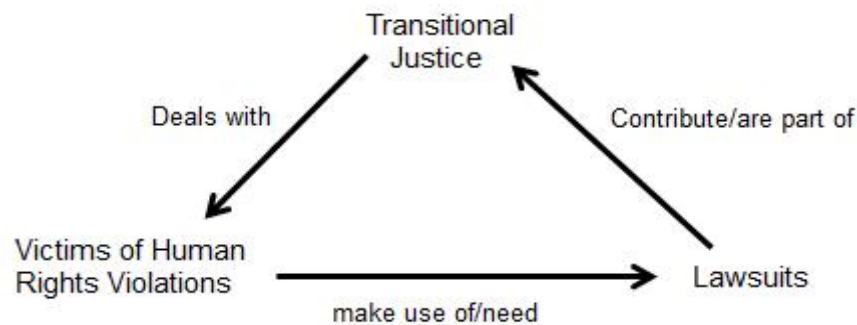


Figure 1. Schematic overview of the relation between Transitional justice processes, Criminal lawsuits and the victims of human rights violations.

1.1.2 Reparation

Besides prosecution of the perpetrators, reparations are also an important aspect of transitional justice. It is even said that without proper reparation for the victims a transition from war to peace is impossible (Saffon, 2010; Elster, 2012; Kalmanovitz, 2012; Saffon & Uprimny, 2012). The development of the right to remedy and reparations¹¹ reflect this believe just as the incorporation of reparations to victims in the Rome statute.¹²

The last decades, the international notion of reparation changed from a mere restorative meaning to the notion of integral reparation. Restorative justice tries to undo the violation through bringing the victim back to its *statu quo ante*, as to say erasing as best as possible the effects of the violations. Integral reparation, as stated by the UN includes:

¹¹ the UN ‘Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations on international human rights law and serious violations of international humanitarian law’.

¹² Article 75: “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”

restitution, compensation, rehabilitation, satisfaction and the guarantees of non-repetition,¹³ making restitution just one of many interrelated aspects of reparation (Saffon & Uprimny, 2012).

The legal approach of transitional justice, however, focuses traditionally on reparation under international law¹⁴ and is therefore still based on a restorative or corrective notion of justice¹⁵ (Nagy, 2008). Restoring the victim to its *statu quo ante*, however, is only possible if the majority of the external circumstances remain the same. For example, if widespread violence destroyed or deteriorated the whole environment or society it has no use to return someone his house if he won't regain his social network, his work or income and other basic needs to continue his life as before (Kalmanovitz, 2012). So, the more massive the destruction of the violence that took place the weaker is the application of corrective justice as means for reparation. Moreover, if the circumstances of the past provoked the violence or the armed conflict it is not preferable to restore these same circumstances as this might provoke a new conflict (Kalmanovitz, 2012; Saffon & Uprimny, 2012; Elster, 2012).

Another limitation of the legal focus of transitional justice is that it only addresses violations of Civil and Political rights (CPR) which can be resolved by legal processes holding the perpetrators accountable (Nagy, 2008). The socio-economic ramifications of violent conflict, such as poverty and inequality, are underrated and left unattended (Nagy, 2008). Structural violence¹⁶ and social injustice are seen as the context of the violence and not dealt with as causes of the conflict or the crime itself, as in violations of Economic Social and Cultural rights (ESCR) (Nagy, 2008). Structural violence or violations of ESCR, however, are well recognised causes of armed conflict (Scheibler, 2012) and especially in a case like Colombia are important factors to deal with in order to reach a sustainable peace (Saffon & Uprimny, 2012).

In regards to Colombia, it is well known that the internal armed conflict is closely linked to socio-economic inequality. Structural violence, social injustice and violations of ESCR lay on the basis of the conflict (Saffon & Uprimny, 2012; Vidal, 2008). The unequal distribution of land has operated simultaneously as one of the main causes of the conflict, one of the main factors that contributed to the permanence of the conflict and as a consequence of the conflict (Saffon & Uprimny, 2012; Lid, 2012; Vidal, 2008). To illustrate the unequal land distribution and its worsening during the conflict, Saffon and Uprimny (2012) compared the statistics of land ownership from 1984 with those of 2003: In 1984, 86,2% of the parcels in the country had less than 20 ha, corresponding to 14,9% of the Colombian surface and belonged to 85% of the landowners. In contrast, 0,4% of the parcels had more than 500 ha,

¹³ Principle 18 in the UN (2005) 'basic principles and guidelines on the right to a remedy and reparation for victims of gross violations on international human rights law and serious violations of international humanitarian law'.

¹⁴ Hereby I refer to international criminal law, international human rights law and international customary law.

¹⁵ See Appendix 1. For an overview of the different notions of justice, their definitions and their relation to transitional justice and reparations.

¹⁶ As explained by Galtung, structural violence refers to when "people are caught up in structures of exploitation and repression that are harmful and damaging to them, hence –physically- hurtful, and *violent* ... including the processes and mechanisms that prevent people from realizing their potential, that is, the silent violence of poverty, low education, poor health and in general low life expectancy inherent in the way societies are organized." Labelling poverty and underdevelopment as a form of violence, much less visible, but massively destructive. (Demmers, 2012: 57)

corresponding to 32,7% of the countries surface and belonged to 0,55% of the landowners. This big difference extended, in 2003 the parcels with less than 20 ha only corresponded to 8,8% of the surface and the parcels with more than 500 ha to 62,6%, thereby, reduced the proportion of these large landowners to only 0,4% of all landowners (Saffon & Uprimny, 2012).

Although the guarantee of non-repetition is traditionally focused on security sector reform, in order to obtain a stable peace is it really important to change the circumstances that caused the conflict (Elster, 2012; Kalmanovitz, 2012; Scheibler, 2012). Integral reparation including the guarantee of non-repetition in the case of Colombia thus implies to counteract the socio-economic inequality and uneven distribution of land. As opposed to restoring the victims of forced displacement to the same position of social exclusion and unequal land distribution that was part of causing the conflict (Saffon & Uprimny, 2012; Elster, 2012). 51% of the internally displaced in Colombia already lived under the poverty line before their displacement (CSPPDF, 2009 in Saffon & Uprimny, 2012). A reparation process for the forcibly displaced based on the traditional focus of transitional justice, corrective justice and CPR, therefore won't suffice to provide a durable transition to peace as it does not address the main causes of the armed conflict. Several authors therefore are arguing for different notions of justice to provide reparation for forced displacement in Colombia. They all have in common that they state the importance of focusing on the present and the future, based on current needs and efficiency, instead of focusing on (what happened in) the past and restore the pre-conflict situation (Kalmanovitz, 2012; Saffon & Uprimny, 2012; Elster, 2012).

1.2 Social and Distributive justice

Elster (2012) and Kalmanovitz (2012) advocate a reparation process for forced displacement based on the redistribution of land, to provide a more equal distribution and more efficient use of the land, by means of also assigning land to people who are not direct victims of forced displacement but equally in the need for a piece of land and income. Contrary to corrective justice, where the right to reparation applies equally to rich and poor victims, is what they call distributive or social justice, in which the inequality in access to basic needs is the basic principle for redistribution¹⁷ (Kalmanovitz, 2012).

Kalmanovitz (2012) argues that by means of social justice the people with the most unfulfilled basic needs have priority in the reparation process. To illustrate his argument he defines four different groups related to their rights to reparation under the different notions of justice as demonstrated in table 1. Corresponding to the principles of social justice, the groups I and III have the most right to the reparation resources, in order to ensure their basic needs and the equality in possibilities for all citizens. The only reason that group I would be prioritised over group III has to be based in needs of the present or efficiency in the future but not because of what happened in the past (Kalmanovitz, 2012). But, Kalmanovitz adds, in general the people who suffer most from a conflict are also the people who have the highest priority to social justice, and vice versa. So probably there will be a lot of overlap between the

¹⁷ See Appendix 1. For an overview of the different notions of justice, their definitions and their relation to transitional justice and reparations.

groups I and III and less people in group II, this makes the principle of social justice not so opposed to corrective justice (Kalmanovitz, 2012). This does also coincide with the statistics of poverty under forcibly displaced in Colombia which demonstrate that 97% have an income under the poverty line (CSPPDF, 2009 in Saffon & Uprimny, 2012). However, there will always be poor people with priority to social justice who are not victim which makes the group with right to reparation under social justice bigger than in regards to corrective justice. Elster (2012) admits that by making the groups of beneficiaries bigger, more land will be needed for restitution and taking land from large landowners will provoke great political opposition, nevertheless, he argues, as corrective justice might be easier in the short term, distributive justice will be necessary to construct a stable and durable peace (Elster, 2012).

	Social justice priority	No Social Justice priority
Corrective justice rights	Poor victims (I)	Non poor victims (II)
No Corrective justice rights	Poor people (III)	Non poor people (IV)

Table 1. Different groups regarding their rights to reparation according to Kalmanovitz (2012).

These notions of social or distributive justice as stated by Kalmanovitz and Elster overcome the limitations of corrective reparation, as currently maintained in transitional justice processes, and address the socio-economic situation of the forcibly displaced. They might provide for more preferable alternatives in the context of transitional justice, to ensure the guarantee of non-repetition, but ignore the right to remedy and reparations of all victims, also wealthy victims (Saffon & Uprimny, 2012).

Saffon and Uprimny (2012) try to overcome this problem to promote transforming reparation based on a combination of corrective justice and distributive justice. All victims will be assigned to reparation and simultaneously try to redistribute the land to overcome the unequal land distribution and social exclusion of the displaced. They argue this is possible because the dispossession of the many lands of the displaced contributed to the unequal distribution of land as most of these lands came in the hands of big landowners. Returning this land to their former owners, mostly poor small farmers, will then counter the centralization of land (Saffon & Uprimny, 2012). In addition can be top limits put on the size of the returned land so restitution won't create more centralization (Uprimny & Sanchez, 2010).

Nevertheless, restitution alone will not be enough to change the situation of social inequality from before the conflict because it cannot diminish the already existing land centralization and will not provide access to land for those who are not victims of displacement (Saffon & Uprimny, 2012). Therefore it won't improve the unequal access to basic needs in the country or provide full enjoyment of ESCR for the victims and other people of Colombian society. This means that the socio-economic inequality that caused the internal armed conflict persists, which is of course not a stable environment to build a sustainable peace. So how can the Colombian government provide integral reparation with the guarantee of non-repetition to all victims? How can they make the transition from war to peace, changing the socio-economic distribution in the country while simultaneously addressing the needs of all victims?

It is often argued that the socio-economic situation and the enjoyment of ESCR are part of social and development politics (Saffon & Uprimny, 2012). Although it is necessary to take these themes of inequality into account in peace building processes, these subjects are too

broad to address by means of reparations. The entire society takes part in the socio- economic situation of the country which means that a process purely directed to victims will definitely fall short. Furthermore, non-exclusive goods, such as health care and education are in general not perceived as reparation measurements by the victims because these are basic needs based on their citizenship and not on victimhood (Scheibler, 2012). In times of peacebuilding, however, the priority goes to measures which deal with the direct consequences of the conflict as a transitional justice framework does. But what is most needed in order to make the transition to peace?

Punishment and reparation justify their implementation intrinsically (Elster, 2012), that is why so many advocates have written their argumentations about why these two aspects of transitional justice are necessary in a successful peace process. Therefore, it is hard to claim that neither of them serves or makes any contribution in a transition to peace because that just feels wrong. Nevertheless, there is very little research on the real effect of different reparation processes or the conviction of perpetrators and their contributions to the transition to peace, as well as on the perceptions and needs of victims regarding their situation (Saffon & Uprimny, 2012; Fletcher & Weinstein, 2002). This lack of empirical evidence leaves important questions unanswered, like: Do victims need transitional justice based on reparation processes, public truth finding and (international) trials punishing the perpetrators? What kind of justice is desired by the victims? And can international trials or integral reparation contribute to the different aspects of transitional justice and satisfy the needs of the victims?

1.3 Need for justice experienced by displaced people

Most transitional justice processes are generally implied in a top-down manner based on studies and opinions of policy makers and researchers (Mika, 2009). However, there is more and more recognition of the importance of involvement of the victims in the development and practise of reparation processes to achieve the best results (Mika, 2009; Jaime, 2009). Mika (2009) even developed a new form of transitional justice which he calls *desde abajo*, or bottom-up, transitional justice. He emphasises that any reconciliation process should develop out of the needs and wishes of the victims themselves and the only way to do so is to inquire and involve them in the process. This also accounts for a transitional justice process as this supposed to be the transformation to peace and deals with the needs of the victims to reconcile with the past atrocities (Mika, 2009).

There exists little academic literature specifically on the need for justice experienced by forcibly displaced people. In a specific study about those forcibly displaced who have resettled in Medellin by Kerr (2010), interviews with the displaced pointed out that in order to retain their dignity they experienced a need for acknowledgement from the state, providing truth about and justice and reparation for what had happened. The latter in a serious, practical way providing housing, education and healthcare (Kerr, 2010). This need for practical reparation corresponds with the view of Guatemalan displaced people of Rio Negro; Johnston (2010) finds in her research about this community, displaced by the Chixoy dam in Guatemala, that the only meaning of reparation for them was to live with dignity. The

community needs assessments pointed out that “their vision of reparation was one that would enable families, neighbours and surrounding communities to again live in decent homes, gain access to fertile lands, electricity, water, education and job opportunities and, most of all, allow honest reconciliation with a bloody and painful past” (Johnston, 2010:353). Interestingly, Johnston (2010) explicitly states that the community did not notion a remedy of court trials and imprisonment of individual actors, nor a demand for monetary compensation to individual victims. The Guatemalan displaced, however, did want “the nation, as well as other responsible parties, to understand, acknowledge and provide meaningful redress for the horrible human rights abuses that occurred, especially those associated with or causally linked to hydroelectric dam development. More fundamentally, they wanted the power and opportunity to 'sit at the table' and help shape the scope and intent of remedial solutions” (Johnston, 2010:354).

The needs for justice as experienced by displaced people as stated in the above research seems to focus on retaining dignity by public acknowledgment, truth finding and practical reparation to improve the current living circumstances, and not on prosecuting the perpetrators. This is contrary to a transitional justice process which aims to deal with violations of human rights and humanitarian law by holding the perpetrators accountable for their deeds. Their needs do, however, coincide with other aspects of transitional justice which include truth finding and reparation. However, I cannot generalise these findings to the current needs for the displaced people of Mechoacán. So I put into practise Mika’s (2009) bottom-up transitional justice and did research to analyse the perception, needs and wishes of displaced people of Mechoacán, to analyse if they share the same needs and opinions as the displaced in Medellin and Guatemala, and if their needs coincide with the different aspects of Duthie’s transitional justice framework.

1.4 Methodology

This research is based on three months of fieldwork in Colombia:¹⁸ in Bogota, where the human rights lawyers preparing the ATCA lawsuit are situated; in Bosconia, where the biggest group of displaced people of Mechoacán lives together; and in Valledupar, the closest city to Bosconia, where the public prosecutor is investigating the forced displacement of Mechoacán, where the national legal process is being performed and where also the *Unidad* of land restitution has a base. During fieldwork I conducted qualitative inductive research to understand the current relevant themes for the forcibly displaced of Mechoacán based on the following questions:

- What is important to them?
- What are their needs, wishes and goals regarding their own displacement?
- What do they do to reach their goals?
- What is considered justice by them in their own situation?
- Do they express a need for justice conform the concept of transitional justice?
- And how do the means they chose to undertake contribute to satisfy their needs?

¹⁸ From the 26th of February till the 31st of May in 2012.

Eventually forming the main research question: To what extent, if at all, will the Alien Tort Claim Act lawsuit against Drummond in the US contribute to a Transitional Justice process for the displaced people of Mechoacán?

To clarify the connections between the different aspects of the main question, the ATCA lawsuit, a transitional justice process and the displaced, I adapted Figure 1 (see page 10) to the case of Mechoacán: As stated in paragraph 1.1 forced displacement constitutes as a consequent and a cause of human rights violations, but can also be perceived as a human rights violation by itself (Duthie, 2011). Therefore I put ‘forcibly displaced’ in the place of ‘victims of human rights violations’. The ATCA lawsuit against Drummond, being an example of a lawsuit, is put on the place of ‘lawsuits’. See Figure 2., this demonstrates the presumed relation between transitional justice, the ATCA and the forcibly displaced based on the theoretical debate about transitional justice. My questions about these relations are:

-Does a transitional justice framework satisfy the needs of the forcibly displaced of Mechoacán?

-Do the forcibly displaced need the ATCA lawsuit to satisfy their needs?

-Does the ATCA lawsuit contribute a transitional justice framework?

As also demonstrated in figure 2. These questions make another preliminary question necessary: What is the need for justice of the forcibly displaced of Mechoacán?

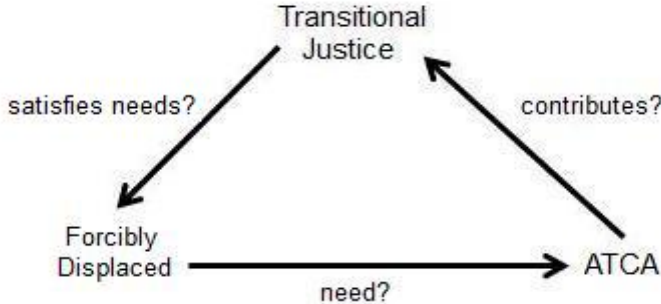


Figure 2. Schematic overview of the relation between the transitional justice framework, the ATCA lawsuit against Drummond and the forcibly displaced of Mechoacán with the questions of this research.

In order to understand the victims’ need for justice I first analysed the emic definition of justice for the victims by means of an introductory focus group and later through individual unstructured/open interviews with 11 displaced persons of Mechoacán; 5 women and 6 men, of which 8 are currently living in the village Bosconia in the municipality of Jagua de Ibirico in Cesar, 2 in Valledupar, also in Cesar, and one in Barranquilla, Magdalena but conducted in Valledupar, with the use of purposive (as they had to take part in the ATCA process) and snowball sampling. Then I investigated their perceptions, wishes and needs for justice, as well as the means they undertake to reach their goals, by means of semi structured in-depth interviews with the same displaced people of Mechoacán. To be able to understand their context and living circumstances I also performed one week of participant observations living together with them in the house of one family in Bosconia. To analyse if the need for justice as expressed by the displaces coincides with the concept of transitional justice, I used the concept of transitional justice based on Duthie’s (2011) definition, as explained below,

because his definition applies best to the Colombian context and he describes concrete measures of what the transitional justice process consists of regarding forced displacement.

In order to gain information about the process of the planned ATCA lawsuit, its goals, expectation and perspectives, I conducted semi-structured in-depth interviews with the two Colombian human rights lawyers preparing the case, using purposive sampling, as well as participant observations while accompanying one of the lawyers during his visit to the displaced in Bosconia. To investigate if the goals, expectations and perspectives of the lawyers coincide with the goals, expectations and perspectives of the victims I also conducted semi-structured in-depth interviews with the same group of displaced as described above and compared their data with the data of the lawyers. This information in combination with the data about the needs and perceptions of justice of the victims made it possible to analyse if the planned ATCA lawsuit will contribute to satisfy the needs of the victims.

To analyse if the planned ATCA lawsuit can contribute to a transitional justice process I used the analytical concept of transitional justice as defined by Duthie (2011) for the reasons explained in paragraph 1.1 on page 7, and because they overlap almost perfectly with the five goals as defined by Fletcher and Weinstein (2002) to which criminal trials can contribute to transitional justice (see paragraph 1.1.1 on page 9). Combination of these goals and aspects provided me with the following aspects of transitional justice regarding forced displacement:

1. Punishing perpetrators of those most responsible for violations of human rights or international law by means of criminal prosecutions
2. reparations programs that distribute a mix of material and symbolic benefits to victims (including compensation and apologies)
3. restitution programs that seek to return housing, land and property to those who were dispossessed
4. truth finding and publicizing by investigation and report of past atrocities
5. justice-sensitive security system reform that seeks to transform the military, police and judiciary responsible for past violations
6. Promoting rule of law in emerging democracies
7. Promoting reconciliation

Number 5 and 6, however, do not apply to the case of Mechoacán because the violence that provoked the displacement was committed by illegal paramilitaries and not by the national army or police, besides, Colombia is not an emerging democracy. Nevertheless, number 6 can apply if we make it just 'promoting rule of law'. For this research I will leave 'promoting reconciliation', number 7, out of the picture because reconciliation is such a broad concept that one could write an entire thesis researching if transitional justice promotes reconciliation. For this analysis I will thus use the aspects 1 to 4 and 6 as simple 'promoting rule of law'.

To gain better understanding of the forced displacement in Mechoacán and the current land restitution politics in Colombia I also visited the vereda Mechoacán and conducted a focus group with the people who currently possess the lands of the displaced of Mechoacán, by means of opportunity and snowball sampling and later semi-structured in-depth interviews with three of them. I also conducted semi-structured in-depth interviews using purposive sampling with:

- the public prosecutor who is investigating the displacement in Mechoacán
- the technical criminal investigator of the public prosecutor who is working on the case
- the regional director in Valledupar of the national land restitution program
- the representative of the national director of the national land restitution program
- the ex-director of the national institute for rural development
- the juridical investigator of the national institute of rural development who is currently investigating what happened in Mechoacán
- the son of the former caretaker of Mechoacán when the vereda was still owned by its Medellin owners¹⁹

When I found out that the displaced of Mechoacán are also pursuing a national legal process I interviewed one of the national lawyers performing this process and conducted participant observations accompanying her for two days when working on the case and talking to the victims to gain information about the process, goal and expectations of this legal process. All interviews were transcribed and then analysed using a coding system related to the different topics of the interviews.

Other data collection techniques that were used are document study and literature review. The document study refers to the many legal and investigative documents of the public prosecutor and their investigation team as well as of the official testimonies given by the victims and paramilitaries about the displacement in Mechoacán. The literature review was performed prior, during, and after fieldwork in order to understand the context of the Colombian internal armed conflict, the position of forcibly displaced people, and the policy reactions on the forced displacement in Colombia. But also to discover and understand the analytical debates and theories about the concepts of forced displacement, transitional justice, needs and perceptions of justice and reparation, as well the use and function of the ATCA nowadays.

1.5 Chapter outline

This thesis will answer the main research question by dealing with the different parts of the puzzle. It will start with the analysis of the ATCA lawsuit and then focus on the meaning and needs of justice as expressed by the forcibly displaced. Then it will see if the means these victims undertake will serve them in their struggle to justice and eventually analyse if the land restitution program of the Colombian government will provide proper reparation for the forcibly displaced.

Chapter 2 describes the case of Mechoacán, what happened and the current situation, in order to provide the necessary background information to understand the context and details of this research.

Chapter 3 analyses the ATCA lawsuit and its contribution to a transitional justice framework. It argues that if the perpetrator of the human rights violations or the crimes against humanity is a MNC, the ATCA contributes to the transitional justice process by closing the legal vacuum these companies enjoy and, as any lawsuit, contributes by means of; holding the perpetrator accountable, publicize the truth and provide indemnification for the

¹⁹ For the history of Mechoacán, see chapter 2 'the case of Mechoacán'.

victims. In addition, the chapter analyses the legitimacy of the ATCA in the case of Mechoacán arguing that it is not clear that Drummond is a perpetrator of the forced displacement in Mechoacán.

Chapter 4 uses the concept of bottom-up transitional justice, investigating the meaning of justice for the displaced of Mechoacán, their need for justice and the importance of justice according to them. It then analyses if their need for justice coincides with a transitional justice framework. The interview data demonstrates that the meaning of justice of the forcibly displaced of Mechoacán does coincide with the aspects of transitional justice. However, they do not express any need for public truth finding or punishing the perpetrators of their displacement which indicates they don't need a transitional justice framework.

Chapter 5 analyses the means the victims undertake in their struggle for justice, focusing on the national legal process and the ATCA process, demonstrating that there exists a mismatch between the perceptions, goals, and needs of the victims and the strategies they undertake to realize them. Arguing that the ATCA doesn't make a special contribution to satisfy the needs of the forcibly displaced of Mechoacán.

Chapter 6 elaborates on the new land restitution program of the Colombian government and analyses the difficulties it has to overcome in order to provide a durable solution for the forcibly displaced in Colombia in the context of a transition from war to peace.

Chapter 7 is the overall conclusion which states that there is no need for a traditional transitional justice process based on prosecutions and truth finding by the displaced of Mechoacán. The planned ATCA lawsuit can contribute to several aspects of the transitional justice process, especially if the perpetrator of the violations is a MNC, but as the victims do not express any need for most of the aspects of transitional justice and the chance for success for a ATCA lawsuit is rather small, the ATCA lawsuit won't contribute to a transitional justice process for the forcibly displaced of Mechoacán. Especially because it seems that a transitional justice process in its traditional form will not serve the victims of forced displacement in their wishes and needs. In order to provide a durable solution it is necessary to address the circumstances that provoked the armed conflict and take into account ESCR in a reparation process, in order to ensure the effective enjoyment of these rights by the victims so they can go on with their lives in dignity.

Chapter 2 – The case of Mechoacán

Mechoacán is a vereda, a rural district, in the municipality of Jagua de Ibirico in Cesar, Colombia. Originally the vereda was owned by a rich family of Medellin who had some cattle walking around but supposedly used the land for drug trafficking, as there was an airstrip with a connected tunnel on the vereda²⁰. In the beginning of the 90's, people of the region invaded Mechoacán in order to use the land for agriculture and make a living. The invaders had a really difficult time as they encountered a lot of opposition from the authorities. Their little village and many harvests got burned in order to force them to go away, but they didn't. In 1996 they finally got officially entitled to the land.

However, the people couldn't enjoy their land titles for long. Between 1999 and 2002, 33 families were forcibly displaced of the vereda by the Juan Andres Alvarez paramilitary force. Other people took possession of the lands of the displaced and in 2008, most of the land of Mechoacán is sold to the mining company Drummond.

2.1 Agrarian reform

The official entitlement of the land in name of the invaders of Mechoacán took place under the agrarian reform law of 1994²¹. This law was implemented to motivate people to colonize uncultivated land in order to make the Colombian countryside more productive²². The Colombian institution for agrarian reform (INCORA, now called INCODER, Colombian institution for rural development), divided the vereda in 131 *unidades agricolas familiares* (UAF, agrarian family unit) to adjudicate 131 families (Incoder, 2011a).

Entitlement under agrarian reform has several requirements. The beneficiaries have to be poor agrarian families who do not have any other piece of land. They are obliged to work the entitled land themselves. They are not allowed to rent or sell the land for the first 15 years. They have to use the land for agricultural purposes and finally, they are not allowed to leave the land abandoned (Incoder, 2011b). If the beneficiaries do not comply with these legal requirements, INCODER will take the land back and entitle it to other people admissible under the agrarian reform law. This process is called *caducidad administrativa* (Incoder, 2011b).

In case of illness or other exceptions that make it impossible for the beneficiaries to work the land, they can ask permission of INCODER to sell the land to other people, if the new owners are admissible for an UAF (Incoder, 2011b). INCODER then has three months to approve or reject the sale. If there comes no reply on a sale request within these three months, this is called *silencio administrativa*. By this administrative silence, as it is called, one is allowed to assume INCODER agrees, and execute the sale (Incoder, 2011b).

²⁰ Interview with Misael, the son of the caretaker of Mechoacán when the vereda was owned by the people of Medellin, on 3 April 2012 and interviews with the forcibly displaced of Mechoacán between 24 March and 26 April 2012.

²¹ Colombian law 160 of 1994.

²² Based on the interview with, Juan Manuel Ospina, the ex- national director of INCODER on 18 May 2012.

After the official entitlement, however, these rules were the last thing the people of Mechoacán worried about. Finally they could live peacefully, work their lands and live of the little income they generated from it. However, this peace didn't last long.

2.2 The displacement

From 1999 onwards, paramilitary presence became really evident in the region and 33 families became forcibly displaced by the paramilitary violence. For example, the story of Guillermo and Nilsa who lived in Mechoacán: One day they went to the village because Guillermo was sick and needed a doctor. When they came back to Mechoacán there were armed people around extorting the inhabitants of Mechoacán. On the land of one of their neighbours there even was a crossfire between the military and the armed group where two got killed (Testimony of Nilsa before the fiscalía of Valledupar, 2008). Nilsa's brother, José, was also extorted and the paramilitaries pressed him to pay a lot of money. He didn't have the money but they told him that he had to find a way to get it or they would kill him. Because he didn't have any money, José decided to sell his cows and with this money he paid the paramilitaries. However, they came back asking for more money and told him that he had to pay on a certain day, if not they would kill him. Because José didn't have any money or cows left he decided to go to Valledupar. Nilsa would soon follow because she was scared and after a while Guillermo and his son were the only ones left of 7 people who lived on their land. One night the paramilitaries killed a boy who always warned them when the armed groups were coming and that made them decide to leave as well.²³ Nilsa also tells about the fear they had for these armed groups. For example, one day the river had grown enormously but the paramilitaries had a checkpoint on the bridge. They needed to cross but were so scared of the paramilitaries that they crossed through the water which reached till their chests.²⁴

Also Aquiles and his family got displaced by paramilitary violence. Since 2000, he says, one noted the paramilitary presence in the vereda. They arrived hooded and armed and made the whole vereda talk about who they would kill or take away. They also extorted him. Together with a neighbour he had 20 cows and the paramilitaries told him he had to give some of those cows to them. However, since the cows weren't just his, he couldn't do that. His son then said to the paramilitaries that they didn't have to give them any cows because they worked hard for them. So then they told them to find another way to pay. Aquiles didn't know what to do and eventually sold his part of the cows to his neighbour to pay the paramilitaries. He received only 600 thousand pesos but he had no other option.²⁵ Another night, the paramilitaries came to the house and told them they had to leave, but his son stood up and said: "we don't have to do anything for anyone!" In response, the paramilitaries put his son face down on the ground and interrogated him. They said they would kill him if they were to see him again. Aquiles and his wife begged them to let their son go. Finally the paramilitaries let him go but told them they had 12 hours to leave. So the next morning they went to Riohacha. 4 years later the paramilitaries killed his son there. (Testimony before Accion Social, 2009).

²³ Interview with Guillermo and Nilsa, both forcibly displaced from the vereda Mechoacán, on 28 March 2012.

²⁴ Ibid. 23.

²⁵ Interview with Aquiles, one of the forcibly displaced of Mechoacán, on 29 March 2012.

What happened after the people left Mechoacán is that by means of different administrative processes the lands became owned or occupied by other people. One of these processes is the *caducidad administrativa*. After the people fled their houses, INCODER visited the area to check if the people complied with the requirements of the agrarian reform law. By seeing the land abandoned or occupied by new people they cited the *caducidad administrativa*, by which INCODER cancelled the entitlement of 21 of the original owners because they did not comply with the conditions (Incoder, 2011a). Some of these lands were then adjudicated to new owners, others stayed in ownership of INCODER meanwhile they were occupied by others (Incoder, 2011c).

Another administrative form by which land titles were changed is by means of *silencio administrativa*. During the years of the displacements INCODER did not reply to sale requests of Mechoacán, so the sales could be executed without official approval. In this way the new owners were not checked for admissibility under agrarian reform and people could sell although they were not allowed to. 19 parcels in Mechoacán changed ownership by means of this administrative silence and rich and powerful people, such as (ex) mayors, became owner of agrarian reform land (Incoder, 2011a). Many of these processes happened even without the knowledge of the original owners, as they lived somewhere else because of their displacement.²⁶

Eventually, just before selling the land to the mining company Drummond, a couple of actual possessors of Mechoacán and some rich people of the area came together with a notary and falsified many signatures. This allowed them to get all parcels officially registered in their names so they could legally sell to Drummond (Fiscalia of Valledupar, 2009). There were several reasons for this; some people bought land, for example under administrative silence, which was never registered, and the former owners were hard to find or did not even know they “sold” the land so they could not ask them to sign. Others had only bought the *mejoras*, the improvements constructed on the land, such as housing, plantation, grasslands etc., but not the land itself. Selling their *mejoras* to Drummond would pay a lot less than the land itself so they wanted to change their titles. However, there were also people, the most powerful, who never lived or worked in Mechoacán that just wanted to put some lands in their name so Drummond would have to pay them.²⁷

By all these different administrative processes, the people of Mechoacán, who were already forced to leave their homes and lands, were also removed from the land registers. At first they felt really powerless and could not do anything because they were scared and threatened; “What could I do? Nothing” is what Petrona said as a response to what she did after she got displaced. Also Aquiles explained: “nothing, what should I do? One stays quiet because what can one do? If one is not violent he doesn’t do anything”, even reporting could cost them their lives: “Before we couldn’t report because the police themselves would inform the paramilitaries.” Most important was to survive with their families. Josefina explains: “When they displaced us we couldn’t report because we were threatened and when one is

²⁶ Interview with Jairo, juridical investigator of Incoder working on the case of Mechoacán, on 23 May 2012.

²⁷ Ibid. 26.

under threat one cannot report because they will kill your family ... it is to know how to survive without losing anyone.”²⁸

When the displaced heard of the land sale to Drummond, they started trying to get their legal entitlement back, to ensure that if Drummond has to take their lands anyway, at least they will pay *them* for their lands and not the people who occupied their lands after they had left: “I can’t leave it behind now and lose it, I cannot lose it to stay with nothing. I lost my existence. We want to sell it but we cannot lose it, we’ve already lost everything.”²⁹ They find a lot of opposition in their struggle for land restitution. For example, the people who occupy the lands in Mechoacán at the moment are also fighting for their legal titles. They claim that they have bought these lands in an honest manner and that there has never been any displacement in the area; that the original owners just say that because they want to benefit from the sale to Drummond.³⁰



Forcibly displaced individuals from Mechoacán, currently living in Bosconia. From left to right: Yanis with her two children, Aquiles, Blanca, Manuel, Josefina, Luis, Guillermo and Nilsa.

2.3 Current situation

As of this moment, the mining company Drummond has bought 83 of the 131 parcels in Mechoacán, of which supposedly 14 were owned by displaced families but other people sold the land to Drummond. The other 48 parcels couldn’t be bought by Drummond because the legal entitlement is not clear or there are conflicting claims about the ownership. 39 of these parcels are the subject of legal investigation (Incoder, 2011a). See figure 3. for a map of

²⁸ From the interviews of Petrona, on 29 March 2012, Aquiles, on March 2012, Manuel on the 30 March 2012 and Josefina on the 31 March 2012, all forcibly displaced from Mechoacán. All quotes from interviews in this research are translated by the author.

²⁹ Interview with Josefina, one of the forcibly displaced from Mechoacán, on the 31 March 2012.

³⁰ Interviews with actual possessors of Mechoacán, between 22 March and 5 April 2012.

Mechoacán and its location next to the mine with the division of its properties and their current status. During the sales negotiations between Drummond and the current possessors they agreed to demolish all housing and constructions to prepare the land for the mining activities. Everything has been taken away by the people when they left, leaving Mechoacán as an abandoned barren. Some of the people who later found out they could not sell their lands, eventually came back and started to reconstruct some shelters for the time being. However, all lands in Mechoacán are subjected to heavy pollution from the coal dust of the mine which makes it inhabitable.

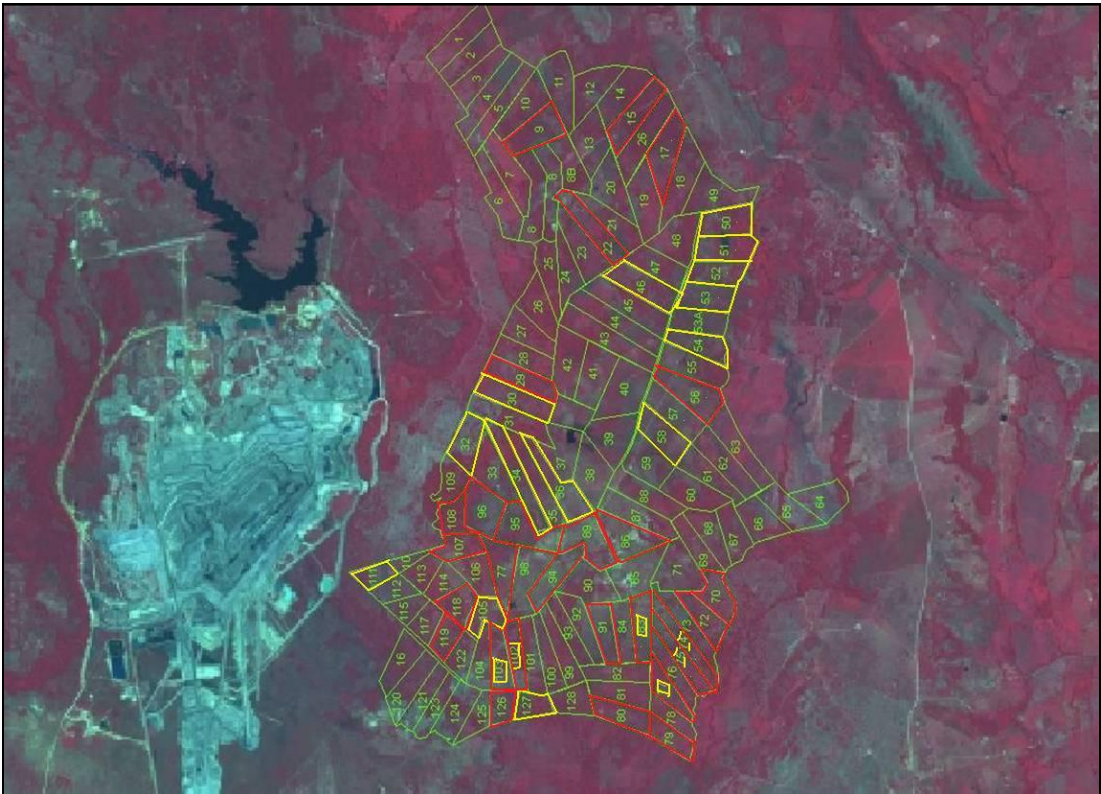


Figure 3. Map of Mechoacán with on the left Drummonds coal mine ‘La Loma’.³¹ Parcels indicated in yellow are bought by Drummond from different owners than the original beneficiaries of agrarian reform and subject of legal investigation regarding forced displacement. In red are parcels with protection measurements regarding forced displacement or legal investigations. All the other parcels are bought by Drummond without any problems.

The displaced reached their goal with help from the fiscalia³² and got their titles back on paper. In practise however, most of their lands are in the hands of Drummond or new possessors who want to sell it to the company (Incoder 2011a), so nothing really changed. The sale with Drummond is now obstructed by the claims of the displaced, stating that they are the

³¹ The map is from a presentation of the fiscalia segunda especializada of Valledupar, Colombia. The indications are made by the author based on information of Incoder.

³² The term fiscalia refers in Colombia to the public prosecutor. In this research will always be referred to it in the Colombian term.

legitimate owners. Nevertheless, enforcing the re-entitlement of the fiscalia proves to be very difficult.³³

In a certain way, the actual possessors of Mechoacán are victims of the situation as well. They are now trapped on the polluted lands of Mechoacán which they cannot sell because of the legal investigations. Fortunately, the majority of the possessors have another house so they do not have to live in the bad circumstances of Mechoacán today. However, some don't and they cannot afford to buy anything else without first selling the land in Mechoacán.³⁴ The possessors of course claim there never has been any displacement in Mechoacán and that they have bought the lands in an honest manner: "There has never been any violence, everyone sold in a just way."³⁵

Nevertheless the fiscalia of Chiriguaná investigated the official papers and proved that in 32 cases signatures or fingerprints of the displaced were falsified to entitle the land to other. In three cases it turned out that people even had signed after their death (Fiscalia of Valledupar, 2009). The fiscalia also demonstrated that when INCODER took the lands of displaced back under the *caducidad administrativa* they did not try to find out the reasons for abandon. Therewith, they knew about the violence in the region and even got confirmed that 11 terrains in Mechoacán were already registered in the Unified Registry of Displaced Population (RUPD, to its Spanish acronym) as land from displaced and still took it back or gave it to others (Fiscalia of Valledupar, 2009). In addition, the regional director of INCODER from that time is convicted for collaborations with the paramilitaries in order to appropriate land (Superior Tribunal of Valledupar, 2011).

It is clear that many land transactions in Mechoacán were performed in illegal ways. Contrary to the claims of the actual possessors, it is also evident that some people are forcibly displaced from Mechoacán. Nevertheless, it is impossible to generalize in this case. There are also people who are not victim of forced displacement that now claim to be forcibly displaced, and there are actual possessors who have nothing to do with the displacement in the area.

In addition to the national legal process, national and international human rights lawyers are now preparing a lawsuit against Drummond in de United States by means of the Alien Tort Claim Act (ACTA). They are claiming that the company played a role in the forced displacement of the people of Mechoacán and thereby benefitted from this displacement by appropriating the land.³⁶

³³ INCODER is obstructing any land restitution or sale in Mechoacán because they first want to complete their own analyses. In addition, corruption in the Colombian justice system provokes that instigators of the displacement go free which makes it hard to prove the displacement. See Chapter 5, paragraph 5.1.

³⁴ Based on a focus group and interviews with the actual possessors of land in Mechoacán, between 22 March and 5 April 2012, and a visit to the vereda on the 3rd of April 2012.

³⁵ Interview with Jesus Lobo, one of the actual possessors of land in Mechoacán, on 3 April 2012.

³⁶ Interviews with the Colombian human rights lawyers working on the ATCA cases against Drummond, on 24 April and 22 May 2012.

Chapter 3 – ATCA as part of the transitional justice process

3.1 The ATCA

The Alien Tort Claim Act (ATCA) is a 200-years old law which allows foreigners to sue in US courts for violations of international law. It applies to the same customary international law norms as international Criminal Law (ICL) such as the prohibition of slavery, genocide, torture, crimes against humanity and war crimes. It applies also to norms in treaties ratified by the United States, like the International Covenant on Civil and Political rights (ICCPR). Therewithal, plaintiffs must show that the corporation was in some way linked with a government bound by these norms and that they had a direct link with the perpetrator of the crime (ICHR, 2002; Kaleck & Saage-Maass, 2010).

Human rights lawyers in the US; mainly Terrence Collingsworth, and Colombia; Francisco Ramirez and Pedro Mahecha, are currently using this law to sue Drummond for its alleged relation to an illegal paramilitary army. The main accusation of the human rights lawyers against Drummond is that the company deliberately supported and financed, even founded, the Juan Andres Alvarez paramilitary front in order to provide security in their mining area.³⁷ This front, however, has committed widespread terror and caused excessive bloodshed in the region, going far beyond what was needed in their security mandate. The paramilitaries themselves as well as ex-employees of the company declared that Drummond gave orders and paid for the deaths of 3 union leaders who planned to strike against the company.³⁸ New evidence even accuses the paramilitaries of killing more than 600 people and displacing many others who lived on the line where a railway, which brings the coal to the port, has been constructed (District Court Alabama, 2009b). Similarly, they are accused of displacing 33 families from the vereda Mechoacán which is situated in the expansion area of the mine.³⁹

The whole case against Drummond consists of four lawsuits of which one is already finished, two are currently in court and one is still in the preparation phase. In the first case, the lawyers sued Drummond for the murder of the three union members, but they lost this case. In the second, they sued the company again for the same crime as in the first case but with new evidence (District Court Alabama, 2009a). Third, they are suing for complicity on the murder of more than 600 victims in the area where the railway from the mine to Drummond's port is constructed (District Court Alabama, 2009b). And in the final lawsuit they want to sue Drummond for their responsibility of the violent displacement of the people who lived in the extension area of the mine, Mechoacán.⁴⁰ In the context of the current transitional justice process in Colombia it is interesting to analyse if these lawsuits contribute to this process, addressing human rights violations.

³⁷ Interviews with the Colombian human rights lawyers working on the ATCA lawsuits against Drummond, on 24 April and 22 May 2012.

³⁸ Based on testimonies under the penalty of perjury of the United States law of (ex) paramilitaries and ex-employers of Drummond, taken by the human rights lawyers in the process of the ATCA lawsuits.

³⁹ Ibid. 37

⁴⁰ Ibid. 37

3.2 ATCA and transitional justice

Taking into account the aspects of transitional justice as stated by Duthie (2011), any lawsuit can contribute to this process as one of the main goals of transitional justice is processing lawsuits that address human rights violations or crimes against humanity. For that reason it is widely recognized that International criminal lawsuits for perpetrators of mass violence, will help in the transitional justice process (Fletcher & Weinstein, 2002; Jaime, 2009). In this case, an ACTA lawsuit against Drummond can contribute to the transitional justice process because in the end all lawsuits, by ICL law or civil law, are holding perpetrators accountable for their deeds and provide acknowledgement and reparation or compensation for the victims. As also pointed out by Jaime (2009), the legal search for reparation may not only provide restitution, compensation and rehabilitation for the victim but also help reveal the truth, provide public apology and condemn and punish perpetrators. Thus, analysing the aspects of transitional justice, the ATCA lawsuits against Drummond, if successful, contributes to all five of the aspects we are working with:

1. Punishing perpetrators most responsible for violations of human rights or international law by means of criminal prosecutions; according to the human rights lawyers Drummond is most responsible for the crimes because they instigated the violations by paying for them⁴¹. The ATCA lawsuits thus hold Drummond accountable for these violations and order them to repair or compensate the damage. A successful case against Drummond will discredit the company internationally which, according to the lawyers, might be the worst punishment for the company, causing loss of both clients and income.⁴²
2. Reparations programs that distribute a mix of material and symbolic benefits to victims (including compensation and apologies); “the lawsuit tries to repair in some form the displacement or murders of which Drummond has benefited”⁴³. One of the goals of the lawsuit is to obtain reparation for the victims; indemnity payments which will repair part of damage suffered and the conviction of the company will acknowledge the position of the victims and provide recognition.⁴⁴
3. Restitution programs that seek to return housing, land and property to those who were dispossessed; in the planned lawsuit regarding the forced displacement, land restitution is impossible as the land is polluted by the mine and is no longer habitable but part of the demanded indemnity can provide compensation by means of a similar piece of land.⁴⁵
4. Truth finding and publicizing by investigation and report of past atrocities; The main goal of the ATCA lawsuits of the human rights lawyers is publicizing the truth internationally: “Our expectation is that everything the companies have done will be

⁴¹ Interviews with the Colombian human rights lawyers working on the ATCA lawsuits against Drummond, on 24 April and 22 May 2012.

⁴² Interview with Francisco, one of the Colombian human rights lawyers working on the ATCA cases against Drummond, on 22 May 2012.

⁴³ Interview with Pedro, one of the Colombian human rights lawyers working on the ATCA case against Drummond, on 24 April 2012.

⁴⁴ Ibid. 41

⁴⁵ Ibid. 41

made visible to the American and the international society”⁴⁶ and legal processes in general are based on finding the truth in order to decide if the company needs to be convicted. The public conviction will thereby also demonstrate who is guilty, what happened and why.

5. Promoting rule of law; although an international lawsuit is by definition not promoting the national rule of law, ATCA lawsuits contribute to the international rule of law providing a manner to hold MNCs accountable for violations of human rights or ICL, closing the legal vacuum these companies enjoyed.

This last point brings us directly to the answer why the human rights lawyers use the ATCA, which is civil law, instead of ICL or international human rights law.

3.3 Legal accountability for MNCs

The reason for the strategy to use the ATCA is because of the existing legal difficulties regarding suing MNCs for human rights violations. Contemporary, international human rights law is still purely state centred. In the European, African or Inter-American human rights courts one can only sue a state for human rights violations and not an individual or a business corporation (ICHR, 2002). Notwithstanding, the European Court of Human Rights and the Inter-American Court of Human Rights have both held states responsible for human rights abuses that were or may have been committed by private actors, including private enterprises (ICHR, 2002). In this way a state can be held accountable for failing to protect human rights on their territory when they are violated by private companies, under the condition that the state ratified the relevant covenant on human rights. The United States for example still hasn't ratified the International Covenant on Economic, Social and Cultural rights (ICESC). These human rights courts can then give orders to states on what needs to be done and suggested remedies for the situation. Reparation in these cases, however, is executed by the state and the company who committed the violations remains unpunished.

Through International Criminal Law it is possible to prosecute individuals for the most serious international crimes such as piracy, slave trade, genocide, torture and war crimes. The International Criminal Court (ICC) can execute the prosecution if the home state is unwilling or unable to. In this way it is possible to prosecute employees or directors of a company involved in such grave crimes against humanity (ICHR, 2002). However, under the Rome statute the ICC has no jurisdiction over legal entities such as companies, only individuals, and proving the guilt of one individual regarding the human rights abuse involvement of a corporation is extremely difficult (Kaleck & Saage-Maass, 2010). Since the International human rights law only has jurisdiction for states and the ICL only for individuals committing crimes against humanity it is very difficult to hold a MNC accountable for human rights violations or crimes against humanity.

Nevertheless, the international covenants on human rights state that each state has ‘the obligation to take steps, individually and through international assistance and co-operation [...] with a view to achieving progressively the full realization of the rights recognized in the

⁴⁶ Interview with Francisco, one of the Colombian human rights lawyers working on the ATCA cases against Drummond, on 22 May 2012.

present Covenant by all appropriate means, *including particularly the adoption of legislative measures*' (Ssenyonjo, 2008 emphasis own). So when violations of human rights by non-state actors occur, the state is obliged to take appropriate measures to prevent, punish and investigate the harm caused by non-state actors and, provide access to effective judicial or other appropriate remedies at a national level to any person or group who is a victim of human rights violation (Ssenyonjo, 2008).

According to these words there has to be national legal options to impose human rights accountability on corporations. However, states where human rights protection is most needed are often those least able to enforce it, especially against MNCs who possess much desired investment capital or technology. These corporations wield unprecedented power and influence in local and global markets as well as in domestic and international affairs (Ssenyonjo, 2008). As also pointed out by the UN Special Representative of the Secretary-General on 'the issue of human rights and transnational corporations and other business enterprises', Professor John Ruggie, states:

Particularly developing countries, where the most violations take place because they are often subject to violence and chaos and have a weak justice system, may lack the institutional capacity to enforce national laws and regulations against multinationals on their territory even when the will is there, or may feel constrained from doing so by having to compete internationally for investment. The home states of multinational corporations are reluctant to regulate against overseas harm by these companies out of concern that those firms might lose investment opportunities or relocate their headquarters and argue that crimes committed abroad don't fall under their jurisdiction (Ruggie, 2008:192).

So on the national level the main obstruction to legal accountability is the fact that states are mainly unable or unwilling to bring MNCs before trial. This leaves a legal vacuum for MNCs in which they can do what they want to ensure the maximum profits. But is Drummond indeed a perpetrator of the forced displacement in Mechoacán as the human rights lawyers are claiming?

3.4 Legitimacy of the ATCA lawsuit against Drummond

There is a lot of supporting proof, in the form of declarations of (ex-) paramilitaries and ex-employees, about the payments Drummond made to support the paramilitary front and kill the union leaders.⁴⁷ It is more difficult to prove that the company had a direct link in the displacement of the people in the railway area or the expansion area. Although it seems more than coincidental that the exact areas that Drummond desired were struck with violence, murders, threats and displacement, provoked by the Drummond sponsored paramilitary front. Clear evidence showing Drummonds direct involvement is missing.

The paramilitaries who demobilised in 2006 under the justice and peace law are currently confessing their deeds. By explaining what happened and answering questions of victims they receive legal benefits, such as sentences of only 8 years instead of lifelong⁴⁸

⁴⁷ Based on testimonies under the penalty of perjury of the United States law of (ex) paramilitaries and ex-employers of Drummond, taken by the human rights lawyers in the process of the ATCA lawsuits.

⁴⁸ Article 29, Alternative Penalties: "In case the convicted has complied with the conditions provided in this law, The competent Chamber of the Superior Court of the Judicial District will impose an alternative penalty which

(Law 975 of 2005). They deliberately talk about vereda, 'el Prado', right next to Mechoacán, which is sold to the mining company Prodecco. They say they received orders to: "be present and pressure people to sell their lands ... these were places where they thought there was plenty of coal and in the future Drummond, or other companies like Prodecco, could buy these lands."⁴⁹ About Mechoacán, however, they don't say this. Although they do affirm that because these lands are also situated next to the mining area it was said that they possess substantial amounts of coal as well. Though about Mechoacán, they say, they have never committed displacement, they only targeted particular pro-guerrilla or criminal families:

The only thing that have these lands is, as they say, that because they are situated next to Drummond they are also part of the coal seam that exists in the area ... [however] We never displaced the people of Mechoacán. Yes, we were present and we did kill some people of Mechoacán ... [but] The Juan Andres Alvarez front never committed massive forced displacement in Mechoacán, neither did the Self-defence forces. We never said to the farmers that they had to sell their lands because they were close to Drummond and have coal, we never said 'hey, you have to leave here and sell your land' to any person, we never said this in that area ... In Mechoacán there were actions from our part ... we killed some ... the front entered and left the area all the time.⁵⁰

The paramilitary leaders, however, do acknowledge that it is possible that people got scared by their mere presence and left but they never intended to displace: "If I have to accept, as leader of the Juan Andres Alvarez front, that because we killed some people, their family or others moved away, I accept that. But massive displacement never took place."⁵¹

So why would they lie about Mechoacán with the risk of losing their benefits if they talk without any problems about what happened to their neighbours in el Prado? They probably don't. However, the fiscalia and the human rights lawyers think the paramilitaries got paid not to talk about Mechoacán.⁵² The fact that in nearby 'el Prado' the paramilitaries *did* had special land politics in order to sell to the mining company and since they knew about the coal in Mechoacán as well, the displacement of Mechoacán *does* look rather suspicious.

In any case, after the people left Mechoacán, others usurped the land and sold it to Drummond. So logically thinking, it would not make any difference for Drummond if they bought the land from the original owners or the new ones. The fact that there has been displacement on these lands only provokes many problems now and does not provide any benefit for Drummond. This makes it hard to say that Drummond explicitly provoked the displacement in Mechoacán in order to expand their mining area onto these lands. One has to keep in mind that originally the lands of Mechoacán were subject to the agrarian reform law, not allowing them to be sold until 2011. Inciting displacement could have been a manner to bypass this rule. It would have been easier, however, to make an arrangement with the

consist of the deprivation of liberty for a period of minimum five (5) and maximum eight (8) years, based on the gravity of the crimes and his effective collaboration in the clarification of these" (Law 975 of 2005).

⁴⁹ Video of the testimony of paramilitary 'el Mechanico' before the fiscalia '*general de la nacion*' under the justice and peace law.

⁵⁰ Video of the testimony of paramilitary leader 'Tolemaida' before the fiscalia '*general de la nacion*' under the justice and peace law.

⁵¹ Paramilitary leader Tolemaida talking in the video 'caso Mechoacán' of the fiscalia '*general de la nacion*'.

⁵² Interviews with the Colombian human rights lawyers and the fiscal working on the case of Mechoacán between 25 March and 22 May 2012.

government and INCODER to revoke this agrarian protection. Besides, the government already gave Drummond the concession.

What seems plausible is that many people got interested in obtaining the land of Mechoacán when they heard a big company like Drummond wanted to buy it. This view corresponds better with the actual situation as the majority of the new occupants of Mechoacán were influential people and local politicians who were probably the first to hear about Drummonds buying plans and are known for their close relationship with paramilitaries.

The argumentation used by the lawyers to sue Drummond states that Drummond founded and financed the Juan Andres Alvarez front. This incriminating fact makes them responsible for all the violence and human rights abuses this front has committed in the area. Drummond is the instigator of the crimes, since it might not have been possible to commit the crimes without its money.⁵³ For example, (ex-) paramilitaries explained they used the Drummond payments to grow their army from 20 to 200 men.⁵⁴ According to the lawyers it is not difficult to prove Drummond's responsibility for the forced displacement because the company had prior knowledge proving the existence of the coal on these lands. It is a well-known fact that Drummond's main goal is to mine this coal and thus to obtain the land, as bluntly said by one of the lawyers:

It is not difficult to prove [Drummond's responsibility regarding the forced displacement] because they paid and they knew there is coal. If they didn't know, all set, they didn't know, then I can't prove it and I will only sue them for financing paramilitaries. But they financed to displace because they need to extend the mine ... the companies have an attitude of 'I need this resource and you can give it to me in good sake or I will take it in bad sake but I will take it.'⁵⁵

It is important though, to take into account the local context in these years of conflict and paramilitary control before the demobilisation. In the 90's until 2005 the paramilitaries almost controlled the whole country; they were a nationally organised military force who had more power than the state forces, not only military but also politically and economically (Hristov, 2009). Considering this context one can ask if multinational, but also local, companies had any choice than to work with the paramilitaries? If they were the force who controlled the country, and especially the area where Drummond is situated, how could companies operate without collaborating with these forces? And is it honest to condemn them now for the atrocities committed by the paramilitaries like if the company was able to control them?

The human rights lawyers state that small companies or even powerful people of the region can say they had no other choice. In the case of a big MNC such as Drummond, however, they should have asked for the protection of the state and the national army instead of the illegal paramilitary forces. "Regarding to firms as powerful, this [the argument that they had no other choice] doesn't fit, when Drummond finds itself under attack it has to ask protection of the state, that the national army will protect them." The problem is that the

⁵³ Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012.

⁵⁴ Testimony under the penalty of perjury of the United States law of (ex) paramilitary 'Samario' taken by the human rights lawyers in the process of the ATCA lawsuits.

⁵⁵ Ibid. 53.

protection procedures of the state are really slow and MNCs don't have time to wait, so they prefer working with the illegal armed groups. The lawyers acknowledge that there is not one company or MNC that didn't work together with the paramilitaries. This is not because the state couldn't provide protection but because the state forces are very slow to respond. Thereby have companies such as Drummond many alternatives, even imposing diplomatic pressure, which take a longer time but don't have the high costs regarding human rights.

This argumentation has its flaws. It is widely known that the national army worked closely together with the paramilitary forces (Hristov, 2009). Asking for protection of the state would then not be so different from asking for protection from the paramilitaries. What happened, according to the lawyers, is that many people were surprised by the demobilisation of the paramilitaries and had expected that their power would last for ever. This might also apply to Drummond and explains why the company worked together with this illegal force, because as long as the paramilitaries were in power there wouldn't be any investigations. They misjudged the duration of the paramilitary power, however, and Drummond is now being investigated and sued for its relations with the Juan Andrés Alvarez paramilitary force.

3.5 Sub Conclusion

The only direct way to hold a multinational corporation legally accountable for human rights violations is by means of the ATCA in the US. In the context of a transitional justice process, which main goal is to deal with past atrocities and prosecute the perpetrators, the ATCA provides a necessary contribution in cases where human rights violations are committed by a MNC. The ATCA also contributes to all five aspects of transitional justice. However, its biggest contribution is closing the legal vacuum and providing a means to hold multinational perpetrators accountable for their deeds.

Nevertheless, the usefulness of this law still has to be seen, so far no plaintiff has yet won an ATCA case against a company. Especially holding Drummond accountable for their responsibility in the forced displacement of the people in Mechoacán will be difficult. Although the company eventually ended or will end up with the land, the direct role the company played in the displacement is not so evident.

And if the planned ATCA lawsuit against Drummond succeeds, will it then satisfy the need for justice as expressed by the forcibly displaced? In line with a transitional justice process the ATCA can provide reparation or compensation payments for the victims but does this contribute to the transitional justice process of the people of Mechoacán?

Chapter 4 - Bottom up Transitional Justice

In order to understand if the planned ATCA lawsuit against Drummond can contribute to the transitional justice process for the victims of the forced displacement in Mechoacán, I used the concept of Mika (2009) of transitional justice *desde abajo*. This means one needs to understand the perceptions, needs and wishes of the victims in order to know what a transitional justice process would mean for them, if the victims experience a need for justice, and what kind of justice would contribute to their reconciliation process. Before investigating their need for justice, however, it is important to know what the emic definition of justice is for the displaced people of Mechoacán; to know what the concept 'justice' means for them to be able to make the right interpretations about their expressed needs for justice.

4.1 The meaning of justice for the displaced of Mechoacán

For the people of Mechoacán it is not easy to talk about an abstract concept like justice. Although they all know the word and use it a lot, to explain what it means seems very difficult to them. Nevertheless, from the interviews⁵⁶ appeared six different aspects which the displaced relate to Justice. At first, the most important theme for them is the **law**, but after some discussion they agree that **truth** is the most important in order to execute justice. **Punishing the perpetrators** is also an important aspect of justice for them just as **repairing any damage** committed. They also talk a lot about **vengeance**, or '*justicia propia*' as they call it, and finally '*ser justo*' (be just) which is the base of everything but has absolutely nothing to do with the law. I will now elaborate on each of these.

- The Law

For the people of Mechoacán, justice means execute the law. Justice for them is a word that refers to the law; execute the law, live following the law and arresting the ones who don't follow the law. Two clear aspects of the law are mentioned: Declare what happened by giving reason to the one who is right and speaks the truth, "justice in favour of whom is right." And punish the one who committed the damage or injustice. One has to pay for his actions, "Justice is to pay for the wrong deeds or the injustice committed." The two important themes connected to justice by means of the law are thus finding the truth and punishing the perpetrator.

- Truth

As said above, an important aspect of justice for the people of Mechoacán is declaring the truth. Knowing the truth is even considered necessary to be able to execute good justice. Justice has to find the truth and give reason to the one who is right. Without knowing the truth one doesn't know who is right and cannot do justice. Interesting is that truth finding is seen as the responsibility of the judicial authorities in order to execute their justice or laws. However, also on the individual level, saying the truth is mentioned a lot as the basis for justice, "being just is to say the truth." It is important to know the truth in order to do justice but also in order to change things, if things are

⁵⁶ All the data introduced in this paragraph is based on the focus group and the interviews conducted with 11 forcibly displaced from the vereda Mechoacán, between 24 March and 26 April in 2012.

kept in secret and hidden they will never change. Therefore it is important that everyone knows the truth, then there will be pressure for change, as explained by Manuel, one of the displaced.

- Punishment

Punishing for crimes committed is the central theme of justice for the displaced of Mechoacán. As said above: justice = execute the law = punishing perpetrators in jail for their actions. It is believed this is necessary so people pay for their wrongdoings, this is to prevent them committing the same crimes again. The fact that a lot of people do commit the same crimes again after coming out of jail is just incomprehensible for the displaced, “These people really don’t know what is good and bad.” It is clearly stated that punishment is perceived as part of the law, legal convictions. Very interesting and different is the opinion of one woman, Obtolia, who stated that if people steal out of necessity it is better to help them finding a job than putting them in jail. Aid for the thief so that he doesn’t need to steal anymore would then be a form of justice as well.

- Reparation

Reparation is hardly mentioned when talking about justice. Only two men, Aquiles and Manuel, mentioned forms of reparation, or “making the bad good again” as forms of justice. Undoing the wrong, returning what had been stolen or if this is not possible trying to repair the damage.

- Vengeance

The opinions are diverged about the role and meaning of vengeance as form of justice. Some think that vengeance, or ‘taking justice in one’s own hands’ as they call it, is a legitimate form of justice to return to someone what has been done or let them pay for what they have done. However, the forcibly displaced make it very clear that this is not the same as justice of the law. They explain that it is possibly because the justice system in Colombia most of the time doesn’t provide satisfaction that people take justice in their own hands. The displaced do make side notes regarding this form of justice, like the risk that people find out and that one will be punished. Opponents of personal vengeance don’t think it is a good solution because violence only provokes more violence, it is better to solve things with the law. By killing someone, one would convert into a murderer and this can never be just, not even to let someone else pay for murder. “Murder makes someone unjust.”

- Be just

Being just, has for the displaced of Mechoacán a meaning comparable with the broad notion of justice as the word ‘*justicia*’ for them before all refers to the law. Being just is described as ‘human justice’ and ‘doing the right thing’; helping others who are in need and telling the truth. Forgiveness and solidarity are other words related to being just by the displaced. An important notion of this ‘being just’ is that one has to be just without intervention of the official law. The law of the ‘human justice’ is: “don’t do to others what you don’t want for yourself.” With this it is very clear to them that one always knows what is good and what not, if one does something good or bad. Examples of being just are: repairing damage, returning stolen goods, solving fights by means of talking, helping people and forgiving, one could say aspects of reparation

and reconciliation. Being unjust is: stealing, lying, killing and only thinking about oneself.

Their definition of justice has a clear retributive nature, by means of executing the law, punishing the wrongdoers and even taking vengeance. Also truth finding and knowing the truth is stated as necessary in order to do justice. This makes clear that the displaced focus on the past in their notion of justice; one has to know what happened in order to ‘make it right’. Further demonstrated by their meaning of reparation as ‘undoing the wrong’, this demonstrates the corrective character of their definition of justice. This coincides with the legal focus of transitional justice based on retributive and corrective justice.⁵⁷

Analysing these defining aspects of justice as stated by the displaced of Mechoacán in comparison with the five aspects of transitional justice, it is interesting to see that 4 of these aspects almost literally overlap. The only aspect they don’t mention is restitution programs but that is logical as this is their emic definition of justice in general and restitution programs are a specialized measure regarding displacement:

1. Punishing perpetrators by means of criminal prosecutions; a combination of their aspects of punishment and executing the law.
2. Reparations programs that distribute a mix of material and symbolic benefits to victims; literally said by one of them and by others expressed in the way of ‘undoing the wrong’ or ‘making the bad good again’.
3. Restitution programs that seek to return housing, land and property to those who were dispossessed; not mentioned.
4. Truth finding and publicizing by investigation and report; the most important aspect for them, necessary to do justice. It is also expressed that everyone has to know to the truth in order to change things.
5. Promoting rule of law; this is literally expressed in their main notion of justice as executing the law, living following the law and arresting the ones who don’t.

Knowing that the meaning of justice for the displaced people of Mechoacán almost exactly coincides with the aspects of transitional justice, we can now analyse if their current needs and wishes contain a need for justice regarding their situation as displaced, to which a transitional justice process can contribute.

4.2 The need for justice as expressed by the displaced of Mechoacán

The displaced people of Mechoacán all together state that justice for them would be reached if Drummond pays them for their lands by means of a sale.⁵⁸ This is perceived as just because it is their land and they cannot go back to living there as it is now the mining ground of Drummond: “We want them to pay us and then they will be doing something just, because it

⁵⁷ See appendix 1. for an overview of different types of justice and their definitions.

⁵⁸ Interviews conducted with 11 forcibly displaced from the vereda Mechoacán, between 24 March and 26 April 2012.

is ours”⁵⁹, they are fighting for their rights and that is also perceived as just, as stated by Josefina: “Justice is to claim our rights.”⁶⁰

Regarding justice, only two of the displaced talk about reparation of all the damage that has been done to them. Only paying back the land value would not be enough because in the past twelve years they could have had a good life on their land, they could have invested in cattle for example and now they don’t have anything.⁶¹ The victims don’t know exactly who should pay them the reparation; Drummond because they have the money? Or maybe the government? But not the paramilitaries because they don’t have any money anymore, the government took everything from them.⁶² But by any means, returning to them what they have lost would be justice according to the two displaced.⁶³ Only one woman explains that it is impossible to repair the damage because she lost her daughter and they can’t give her back.⁶⁴

It is interesting that none of the displaced expresses a desire to go back. Probably because they know this is not possible anymore but also only few people talk about a wish to have a new piece of land. The majority is already too old to work the land and their children are used to the urban life now.⁶⁵ Some women also explain that they are scared to live in the countryside again.⁶⁶

The biggest need of the displaced people of Mechoacán, that became clear in the interviews, however, is a material need; Money, to live, buy food, buy medicine and to improve their living circumstances in general.⁶⁷ At the moment they live in the poorest circumstances and have only little wooden houses, of which some don’t even have a floor. Some of the people really need medical help but don’t have the money to pay for it, and in general, all of them are just living day by day to make sure they have something to eat.⁶⁸ It is very important for the victims to improve their living circumstances, to get the medical attention they need and to be able to live independent from their children. For some, this would mean buying a new piece of land in order to generate an income.⁶⁹

After their displacement it wasn’t possible to live from their land anymore. The people of Mechoacán were forced to adapt to urban life, starting small businesses in selling coffee or empanadas or painting houses, which doesn’t generate a lot of income.⁷⁰ One of the displaced expressed literally: “there is no need for justice but a need for money” but, he added, if they wouldn’t had to leave their lands, they wouldn’t have this need for money because they would

⁵⁹ Interview with Aquiles, one of the forcibly displaced from Mechoacán, on 29 March 2012.

⁶⁰ Interview on the 3 March 2012.

⁶¹ Ibid. 59.

⁶² Interviews with Aquiles, on 29, and Manuel, on 30 March 2012, both forcibly displaced from Mechoacán.

⁶³ Ibid. 62.

⁶⁴ Interview with Petrona, one of the forcibly displaced from Mechoacán, on 29 March 2012.

⁶⁵ Interviews conducted with 11 forcibly displaced from the vereda Mechoacán, between 24 March and 26 April 2012.

⁶⁶ Interviews with Cecelia, on 28 March 2012 and Narcisa, on 26 April 2012, both forcibly displaced from Mechoacán.

⁶⁷ Ibid. 65.

⁶⁸ Based on participant observations while living with the displaced in Bosconia, from 28 March until the 1st of April 2012.

⁶⁹ Ibid. 65.

⁷⁰ Ibid. 65.

be able to live from their lands. Their need for money can thus be seen as a need for reparation for what was taken from them.

It is interesting that, in line with the research of Kerr (2010) and Johnston (2010), the displaced don't express a need for punishing the perpetrators regarding their own displacement. Contrary to this former research, the displaced of Mechoacán neither express a need for truth finding and only few seek reparation, while they do express a great need for monetary compensation. This is even their most urgent need.

Comparing the perceptions of the displaced regarding what would be justice in their situation with the aspects of transitional justice, it is striking that they now only mention one of the five aspects; reparation. While other aspects as punishment for perpetrators and truth finding are the aspects of justice they themselves came up with when asked what justice means and consists of. The displaced even state that "justice is to pay for the injustice committed." This means that according to the forcibly displaced of Mechoacán, justice as defined by themselves, is not desired, at least in the context of their own situation as displaced. Perhaps they don't perceive their own forced displacement as an injustice.

4.3 Perception of injustice

The victims of displacement of Mechoacán do feel that what is done to them is a big injustice; displacement and murder are acts that provoke a lot of grievance and cannot be undone or completely repaired according to them.⁷¹ "There has never been justice in our situation" as explained by Petrona "because they should have given us a card of displacement and they didn't, neither they gave us our land back nor did they pay for the land", so in the end they got nothing.⁷²

As explained in Chapter 2, the displaced couldn't do anything after their displacement as reporting their displacement was already too dangerous. The only thing they did was trying to survive, this made them feel powerless and depressed.⁷³ They weren't even recognized as victims of forced displacement what is perceived as an extra injustice done to them:

This is unjust! We need that displacement card in order to receive aid and I proved that I am a displaced person but they don't recognize this, I went a couple of times but they never gave me any help, one day I got tired of it and didn't return anymore, so I don't get the help others receive but what can I do?⁷⁴

Now, fortunately the situation changed. The victims declared their forced displacement and initiated the struggle to get their land titles back, this feels like justice for them.⁷⁵ In practise, however, nothing changed and Drummond still doesn't want to pay them for their lands, the delaying of this process is perceived as another injustice; "one feels

⁷¹ Interviews conducted with 11 forcibly displaced from the vereda Mechoacán, between 24 March and 26 April 2012.

⁷² Interview with Petrona, one of the displaced from Mechoacán, on 29 March 2012.

⁷³ Interview with Manuel, one of the displaced from Mechoacán, on 30 March 2012.

⁷⁴ Interview with Josefina, one of the displaced from Mechoacán, on 31 March 2012

⁷⁵ Ibid. 71

prohibited and obstructed because justice isn't accomplished and they don't respect our rights ... this is an injustice for the landowners."⁷⁶

4.4 Sub Conclusion

The forcibly displaced recognise that what has happened to them is a great injustice and acknowledge truth finding, criminal prosecutions and reparation as important aspects of justice, in line with the main aspects of transitional justice. Nevertheless, the displaced don't express a need for these aspects of justice regarding their own situation as displaced. Criminal prosecutions and executing the law seem to be the most important notions of justice for them; "justice is to pay for the injustice committed." Followed by truth finding because this is necessary in order to know who to punish. However, they don't express any wish for prosecution of the perpetrators of their own displacement, neither a need for truth finding to know why and by whom they are forcibly displaced. Just as the research of Kerr (2010) and Johnston (2010) pointed out that prosecutions are not important for victims of forced displacement. The only aspect of transitional justice that is mentioned is reparation, expressing the importance to repair the damage and losses provoked by their displacement. But with only two of the eleven people interviewed it is just a small amount who expresses this need.

So contrary to the broad literature and theories about the need for a broad transitional justice process or integral reparation, the displaced themselves, only express a need for reparation and not one of the other aspects of transitional justice. In order to do justice in their situation they just want Drummond to pay them for their lands, not because the company displaced them but because they are currently occupying their lands.

The most prominent expressed need of the forcibly displaced is clearly the concrete wish for material gain to be able to improve their living circumstances. In other words, to enjoy the basic needs of life. One could argue that this need for money is in fact a need for reparation or compensation, claiming the restitution of what they have lost, coherent to the corrective character of their definition of justice. On the other hand one can also perceive that their need for recognition and reparation is only motivated by the need to satisfy their basic needs, what they hope to achieve in the form of indemnity or compensation for their displacement. This essential need for material gain demonstrates a big switch from a retributive and corrective *meaning* of justice, in line with the notions of transitional justice, to a distributive or social *need* for justice.⁷⁷ The redistribution of the resources available, providing them with better opportunities, access to education and healthcare, a proper income, etc.

This data makes one think that transitional justice is thus not important for victims of forced displacement, at least not for the victims of Mechoacán. In line with the data of Kerr (2010) and Johnston (2010), who state that most important for the victims of displacement is the possibility to regain their dignity and have access to basic needs as education, potable water and healthcare. Most important for the victims of Mechoacán is also that they can go on

⁷⁶ Interview with Cecelia, one of the displaced from Mechoacán, and her son on 28 March 2012.

⁷⁷ See appendix 1. for an overview of the different notions of justice and their definitions.

with their lives but in improved circumstances, as to say, in dignity. If their need for material gain and money comes forth of their need to improve their lives, they could also satisfy this need by means of free housing, education and healthcare as stated by Kerr (2010) and Johnston (2010). A broad transitional justice process based on criminal prosecutions of those most responsible for violations; reparations programs that distribute a mix of material and symbolic benefits to victims (including compensation and apologies); restitution programs that seek to return housing, land and property to those who were dispossessed and truth-telling initiatives as advocated by Duthie (2011) and similarly by others (Fletcher & Weinstein, 2002; Nagy, 2008), seems exaggerated and not necessary for the wellbeing and reconciliation of the forcibly displaced of Mechoacán. So what will serve these victims of the forced displacement to satisfy their need for justice? What strategies do they undertake to reach justice? Will the means they use do fulfil their needs?

Chapter 5 – Between hope and empowerment

The victims of forced displacement of Mechoacán are currently very dispersed in their struggles to reach justice but in general they are using two different means; a national legal process, which has not yet ended in a lawsuit, and the planned ATCA lawsuit in the US against Drummond, which is also not in court yet.⁷⁸ The dispersion becomes clear on the national scale where 22 families are divided between 4 different lawyers and 11 families don't have a lawyer. Out of these 33 families only 15 participate in the planned ATCA lawsuit in the US.⁷⁹ There is currently one group consisting of 11 displaced families living in the village of Bosconia who are quite organised; they have a spokesperson, Josefina, and undertake all the same strategies to reach justice: the national process without any lawyer and the ATCA lawsuit.⁸⁰ This research focuses mainly on this group, however, I also spoke with 2 lawyers pursuing the national legal process and some of the victims they are representing.

5.1 National legal process

Despite the dispersion in the national struggle for justice the victims of displacement of Mechoacán all have the same goal: that Drummond will pay them for their lands, what is seen as the only just solution to their situation.⁸¹ With the help of the fiscalia the displaced have already regained their official land titles. Currently they are waiting for Drummond to pay them for the land the company is already using and to make an offer to acquire the remaining land.⁸²

The fact that Drummond already bought some of the land from different people is, according to the lawyers, Drummond's concern:

They [Drummond] shouldn't have bought the land from people who were not the legitimate owners in the first place, they have all the means and lawyers to investigate the legal entitlement of the lands they want to buy and thereby they knew about the violence and displacements of the region.⁸³

So now the lawyers are trying to pressure Drummond to hurry up with the negotiations but the company doesn't feel any need to pay soon.⁸⁴

The problem is that Drummond wants to wait until all legal processes are over and all cases are closed with a final decision which states who are the legitimate owners of the land. Then they can buy assured of paying the right person.⁸⁵ Moreover, it is currently not possible for Drummond to make an offer on the land as INCODER is also carrying out an investigation of the conflicting land claims in Mechoacán and doesn't authorise any sales until

⁷⁸ Interviews and participant observations with the lawyers working on the national legal process and the ATCA process in the US between 23 March 22 May 2012

⁷⁹ Interviews with 11 forcibly displaced from Mechoacán between 24 March and 26 April 2012

⁸⁰ Interviews and participant observations with the forcibly displaced from Mechoacán currently living in Bosconia, between 24 March and 26 April 2012.

⁸¹ Interviews with 11 forcibly displaced from the vereda Mechoacán, between 24 March and 26 April 2012.

⁸² Interviews with Sarely, public prosecutor of Chiriguana currently working on the case of Mechoacán on 25 March, and Ludys, national lawyer performing the national legal process for the displaced, on 23 March 2012.

⁸³ Interview with Ludys, lawyer performing the national legal process for the displaced on 23 March 2012.

⁸⁴ Ibid. 83

⁸⁵ Ibid. 83

they can confirm exactly what happened and who the legitimate owners are.⁸⁶ In theory this is straight forward procedure, however in reality these processes, legally and investigative, take years. INCODER, for example, assigned only one person to investigate the history of all lands of Mechoacán, which are 131, and el Prado (another conflictive vereda) to decide who are the rightful claimants.⁸⁷ In addition, INCODER appealed the decision of the fiscalia to retitle the displaced to their lands because they want to await their own investigation and don't agree with the decision of the fiscalia.⁸⁸ In the meantime the people just have to wait in arduous poverty until they've finally decided who is allowed to sell to Drummond. In case of the possessors still living in Mechoacán, this also means they are trapped in the pollution of the mine.

Another problem of the national justice system in Colombia is the high levels of corruption which prevent its fair functioning, causing impunity.⁸⁹ The people of Colombia confirm the failing of the Colombian justice system demonstrated in the opinions of all respondents of this research; the displaced, the possessors, the human rights lawyers and even the fiscalia themselves express their discontent of Colombian justice; "Justice is for sale" the people say.⁹⁰ Also beautiful described by a lawyer as: "Here, they [the judges] don't make decisions in law but decisions in 'friendship.'"⁹¹ It is striking that even the fiscalia, which is ofcourse part of the Colombian justice system, acknowledge the high corruption rates in their justice system: "sometimes they let themselves buy for whatever they got offered" as said by Sarely, fiscal of Chiriguaná.⁹² Interesting is that precisely Sarely just got convicted for corruption and extortion in a legal case (El Pilon, 2012). This malfunctioning of the justice system makes the people feel "less than an ant" according to Jesus Lobo.⁹³ Also the possessors express that: "The law here does not apply justice."⁹⁴

In the following example, however, the justice system seems to act in favour of the current possessors, especially taking in account that it's about the son-in-law of Jesus Lobo, one of the actual possessors of Mechoacán and father of the actual mayor. A man usurped at least 8 terrains in Mechoacán which he put in names of family members. He was known to have good relations with the paramilitaries and with local politicians (he is the husband of the

⁸⁶ Interview with Jairo, juridical investigator of Incoder working on the case of Mechoacán, on 23 May 2012.

⁸⁷ Ibid. 86.

⁸⁸ Ibid. 86.

⁸⁹ Research of the *Corporacion Cartagena Honesta* (CCH) demonstrated that only 20,9% of all legal cases end in an accusation, which means that of every accusation almost 5 cases are being absolved (CCH, 2003). Research of Rivera and Barreta for the ministry of internal affairs and justice of Colombia (2009) also demonstrate that the probability of conviction for a crime in Colombia does not exceed the 20% and in case of murder not even the 3%. Thereby were 13.737 judicial officials under legal investigation regarding corruption in 2009 and 100 judges in 2010 (Colombia reports, 2012). Currently even judges of Colombian high courts are subject of legal investigation regarding corrupt practices (Regional anti corruption initiative, 2012). In cases of accusations of members of the judicial system, however, impunity rates are even higher than 'normal' (CCH, 2003).

⁹⁰ Interviews with the displaced of Mechoacán, the current possessors of Mechoacán, the human rights lawyers preparing the ATCA lawsuit and the fiscalia investigation the case of Mechoacán, during the three months of fieldwork in Colombia.

⁹¹ Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012.

⁹² Interview with Sarely, public prosecutor of Chiriguana who was working on the case of Mechoacán, on 25 March 2012

⁹³ Interview with Jesus Lobo, one of the actual possessors of land in Mechoacán, on 3 April 2012.

⁹⁴ Ibid. 93.

mayor's sister), who also acquired lands in Mechoacán. This man was convicted for forced displacement and homicide based on substantial evidence (Fiscalia of Valledupar, 2011a). Nevertheless, he was completely liberated and freed from all accusations in an appeal where the judge stated that there had never been any forced displacement in Mechoacán at all (Fiscalia of Valledupar, 2011b). This kind of judicial decisions are typical in Colombian justice and make the legal struggle of the displaced very difficult.

5.2 ATCA lawsuit in the US

Two years ago the spokesperson of the group in Bosconia, Josefina, was introduced to Pedro Mahecha, one of the Colombian lawyers preparing the lawsuit, by the fiscalia on a meeting for displaced persons. At this time Pedro and the other lawyers were already involved in the two other lawsuits against Drummond and they decided to plan another one regarding forced displacement. The process is still in the preparation phase and not in court yet. Until now, only 15 families who are victim to forced displacement will take part in this lawsuit when it goes to trial. Others don't know about it or are refrained from joining because their lawyers tell them not to.⁹⁵

The process is affected by many difficulties. First of all, the long time span. The process started 2 years ago and is today still in the preparation phase, not even ready to go to court yet.⁹⁶ The main reason for this delay is that the lawyers are currently focusing their time and resources on the 2 other lawsuits that are in court at the moment and the case of Mechoacán doesn't have priority for them.⁹⁷ Thereby they don't have the money to pursue this third lawsuit simultaneously, so the victims of forced displacement will have to wait.

This leads to the second point as the decisions about on what time and resources are spent are made in the US. Mainly by Terrence Collingsworth and the lawyers collective of Conrad and Sherer, because that is where the money comes from.⁹⁸ This provokes sometimes discrepancies between the US and the Colombian delegation. Pedro, for example expresses his worries about the delay of the process:

It is difficult for me ... it is an ethical problem, we can't make those people wait any longer. Francisco has to pressure Terry to start with the case or we have to find other means because we did our promise to the victims and we can't let them down.⁹⁹

There are also disagreements about the role the victims play in the whole process. The Colombian lawyers would prefer better attention and psychosocial aid for the victims but this is perceived unusual by the US lawyers.¹⁰⁰ Pedro and Francisco would also like political participation for the victims, like a public campaign were they can make their voices heard

⁹⁵ Author's field notes of the participant observations with the forcibly displaced from Mechoacán and the lawyers executing the national legal process.

⁹⁶ Author's field notes, interviews and participant observations with the human rights lawyers working on the case of Mechoacán.

⁹⁷ Ibid. 96.

⁹⁸ Ibid. 96.

⁹⁹ Interview with Pedro, one of the Colombian human rights lawyers working on the case of Mechoacán, on 24 April 2012.

¹⁰⁰ Ibid. 99.

but there is no room for this in the US process and the results are not allowed to be publicised.¹⁰¹

Another difficulty is that the use of the ATCA for these kind of claims is still in its test phase and no one has won an ATCA case against a company yet (Kurlantzick, 2005). In addition, there is still much criticism from the international business community on the use of this law and the National Foreign Trade Council of the US stated that ATCA lawsuits could seriously damage the world economy and also discourage companies from rebuilding war torn countries (Lavelle, 2003). The US Supreme Court however confirmed the ability of plaintiffs to bring lawsuits in US courts under ATCA for human rights infringements based on violations of customary international law (Nolan & Tylor, 2009).

5.3 Mismatch

From the data of Chapter 4, it became clear that justice as perceived by the displaced regarding their situation would be that Drummond pays them their lands combined with a need for a material reparation or compensation. The national legal process they are executing indeed tries to realize Drummond's payment and the planned ATCA lawsuit also tries to provide reparation or compensation for the victims. Nevertheless, one can argue that there exist a mismatch between the goals and perceptions of the displaced and the means they undertake, especially regarding the ATCA but also in relation with the national process.

Regarding the national legal process the mismatch exist between the general meaning of justice and the corrupt Colombian justice system. The corruption makes that people don't have faith in the justice system. "There is no faith in the state nor in justice", states Sarely,¹⁰² "the justice system is ridiculed."¹⁰³ The displaced of Mechoacán describe the Colombian justice system as dirty, unjust and unfair and explain that justice in Colombia doesn't give the right to the people who have it but to the people with money.¹⁰⁴

It is not surprising that they don't have any confidence in their own process: "Faith is already lost, I don't have faith that they'll do justice."¹⁰⁵ But why did the forcibly displaced start this legal process in Colombia if they don't have any faith in the justice system or the outcome of their process? This seems a mismatch between the perceptions and opinions of the displaced and the method they undertake to reach justice.

Although they don't have faith in the process, they do have hope, they say, because "you should never lose hope"¹⁰⁶ and "without hope one doesn't do anything."¹⁰⁷ Even if the Colombian justice system doesn't work most of the time the forcibly displaced have hope that one day Drummond will pay them, just because they have to. But as corruption does

¹⁰¹ Interview with Pedro, one of the Colombian human rights lawyers working on the case of Mechoacán, on 24 April 2012.

¹⁰² Interview with Sarely, public prosecutor of Chiriguana who was working on the case of Mechoacán, on 25 March 2012.

¹⁰³ Interview with Rafael, criminal investigator of the fiscalia currently working on the case of Mechoacán, on 6 April 2012.

¹⁰⁴ Interviews with 11 forcibly displaced from Mechoacán between 24 March and 26 April 2012.

¹⁰⁵ Interview with Luis, one of the forcibly displaced of Mechoacán, on 29 March 2012.

¹⁰⁶ Interview with Petrona, one of the forcibly displaced of Mechoacán, on 29 March 2012.

¹⁰⁷ Interview with Cecelia, one of the forcibly displaced of Mechoacán, on 28 March 2012.

determine the outcome of many legal processes in Colombia, which means that the richest or most powerful party wins, and some possessors of Mechoacán are rich and powerful people, one can expect how the process will turn out.

Regarding the ATCA process, the most notable mismatch, is that the victims don't express any need for holding the perpetrators of their displacement accountable, while that is exactly the purpose of a lawsuit. Even more outstanding is that the victims don't even consider Drummond a perpetrator of their displacement. According to them it is clear that it were the paramilitaries with the help of INCODER who provoked their displacement.¹⁰⁸ Nevertheless, they are suing Drummond for being responsible for their displacement.

It should be considered, however, that in general the displaced don't really know or understand what this lawsuit is about. Only a few recognize the aim of the lawsuit to obtain reparation or indemnification payments from Drummond, for all the losses they suffered with their displacement.¹⁰⁹ The majority is not that informed and state things like: "because Drummond bought our land of the possessors", "because Drummond has to pay us royalties", "to get our lands back" or simply acknowledge that they have no idea and say: "Then the mouth keeps shut" as the answer to why they want to sue Drummond.¹¹⁰ Most families just joined because Josefina and Pedro told them they should and that it could result in some serious benefits for them.¹¹¹

Typically, those who do understand the aim of the lawsuit also don't blame Drummond for their displacement. The reason they believe that Drummond has to pay is: "Because that's just the way it is" or because "that is stated in the law", which clearly doesn't make sense.¹¹² This ofcourse is a big mismatch between the spirit of the lawsuit and the perceptions of the victims, who in fact are the plaintiffs.

Second, there is a mismatch between the goals of the human rights lawyers and the goals of the forcibly displaced to pursue the planned lawsuit. The main goal of the victims is material gain and thus to receive a monetary indemnification.¹¹³ The human rights lawyers do confirm that they will ask for indemnification for the victims, even as much as possible to inflict big expenses on the company. Nonetheless, their main goal to execute this planned lawsuit against Drummond is to gain international attention for the human rights violations of MNCs. As well as for the legal gap these companies currently enjoy and the difficulties they, as human rights lawyers, encounter in their struggle to hold them accountable. As explained by Francisco:

This awareness may lead to the development of international legislation, which would be wonderful. Whether or not the lawsuit will be successful is still uncertain but if we can create international consciousness for what is happening then we already reached a great goal.¹¹⁴

¹⁰⁸ Interviews with 11 forcibly displaced from Mechoacán, between 24 March and 26 April 2012.

¹⁰⁹ Ibid. 108.

¹¹⁰ Ibid. 108.

¹¹¹ Ibid. 108.

¹¹² Ibid. 108.

¹¹³ Ibid. 108.

¹¹⁴ Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012.

So, for the lawyers it not a priority at all that the lawsuit will succeed, which would lead to indemnification for the victims, as long as they get international attention.

Ofcourse they also aim to get the company convicted, as explained by Pedro:

Then they'll make a big example showing that it is possible to sue a big multinational and send the message into the world that a company who financed and supported a paramilitary force will be held accountable for its deeds, if they succeed they'll take a big step forward because that has never happened before.¹¹⁵

Thereby, the company will lose its name and prestige internationally and therefore a lot of money.¹¹⁶ The local people will be taught that the biggest source of work provision in the region is also the source of their human rights violations.¹¹⁷ "Creating visibility, that's the most important ... and thereby we can also ask a compensation for the victims"¹¹⁸ is how Francisco describes it. This demonstrates that the compensation for the victims is more or less a by-product of the process. Furthermore, Francisco states that they will demand compensation for the victims so that they can return to the countryside and get new land to work on.¹¹⁹ But the majority of the victims don't want to go back to the countryside anymore because they are too old or still scared.¹²⁰

It is clear that the motivations of the human rights lawyers to perform the lawsuit are very different than the reasons of the forcibly displaced to join the process. Only one of the victims, Manuel, expresses the same goal as the lawyers and says it is really important to gain international attention because with international pressure they could reach more and change the situation.¹²¹

Another mismatch regards the expectations the victims and the lawyers have of the lawsuit. The victims have in general, contrary to the national process, all have good faith in the successful ending of this lawsuit that has yet to start.¹²² The fact that the proceedings will be held in the US especially makes them believe it will be successful. Cecelia explains: "we have faith that justice in the US works better than here, that the laws are different over there, that it works for people with problems as well in a fair manner, not like here."¹²³ Also Petrona affirms this opinion: "In Colombia we never know when or what will come but in the US we know that one day it will come."¹²⁴ Aquiles adds to this that the process in the US could provide an extra benefit because there they talk about dollars and not about pesos.¹²⁵

¹¹⁵ Interview with Pedro, one of the Colombian human rights lawyers working on the case of Mechoacán, on 24 April 2012

¹¹⁶ Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012

¹¹⁷ Ibid. 115.

¹¹⁸ Ibid. 116.

¹¹⁹ Ibid. 116.

¹²⁰ See data demonstrated in chapter 4, based on interviews with the forcibly displaced of Mechoacán.

¹²¹ Interview with Manuel, one of the forcibly displaced from Mechoacán, on 30 March 2012.

¹²² Interviews with the forcibly displaced of Mechoacán, between 24 March and 26 April 2012.

¹²³ Interview with Cecelia, one of the forcibly displaced from Mechoacán, on the 28 March 2012.

¹²⁴ Interview with, Petrona one of the forcibly displaced from Mechoacán, on the 29 March 2012.

¹²⁵ Interview with Aquiles, one of the forcibly displaced from Mechoacán, on the 29 March 2012.

The lawyers preparing the case don't have such positive expectations. "Very honest, I think many cases will lose, and few are going to win"¹²⁶ says Francisco. He even claims he doesn't believe in human justice "because it is always a justice of interests, so you know who is playing."¹²⁷ But if they manage to provoke an international discussion about human rights legislation for multinational companies they are very happy.¹²⁸ Pedro, however, sees good possibilities with the case of Mechoacán but he recognizes that compensation is not the same as integral reparation for the victims, so the whole process can only provide them an incomplete justice.¹²⁹

5.4 Sub Conclusion

Simply said, and also acknowledged by the displaced themselves, their main preoccupation is some form of material gain, which they try to achieve through the means of justice. But in the end, it doesn't really matter where the money comes from and why, as long as it will come. These legal processes, however, take years, and in the meantime the victims live in the same miserable situation they came to just after their displacement. Some are in poor health and dying because they don't have money for medical help, others die because they just turned too old while waiting. These people will never be able to enjoy any payment or reparation of the suffering they have lived.

While the forcibly displaced express a need for distributive justice, as explained in chapter 4, they use the means of the legal system based on retributive and corrective justice, which does not address their current lack of basic needs. While they are most in need of the full enjoyment of ESCR, the ATCA only focuses on compensation for the violations of CPR and the national legal process to return them their land titles. However, the payments for their land, or the financial compensations that would result if they win the lawsuit, might enable them to satisfy their basic needs and enjoy their ECSR.

Nevertheless, both legal processes, national and in the US, have a very uncertain chance of success. Nationally the chance of success is small because of the high level of corruption and the poor position of the victims. Regarding the ATCA process, because of the experiment of using the ATCA law for human rights cases. Moreover, it is hard to prove Drummond's direct responsibility in the case of the forced displacement in Mechoacán, as explained in paragraph 3.4, which makes it difficult to condemn the company and provide for indemnification.

This leaves the victims holding on to their hope that one day these legal processes will turn out well for them, while there is no real empowerment to reach 'their' justice. But what different strategies could they try? The victims don't have access to much information or organisations that could help them. Could the newly implemented land restitution program of the Colombian government provide a solution in the struggle for justice for the displaced?

¹²⁶ Talking about all ATCA lawsuits against MNCs. Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012.

¹²⁷ Interview with Francisco, one of the Colombian human rights lawyers working on the case of Mechoacán, on 22 May 2012.

¹²⁸ Ibid. 127.

¹²⁹ Interview with Pedro, one of the Colombian human rights lawyers working on the case of Mechoacán, on 24 April 2012.

Chapter 6 - Unidad de restitución de tierras

On June 10th, 2011 the Colombian government implemented the *ley de víctimas y restitución de tierras* (victims and land restitution law) by which they dictate means of ‘attention, assistance and integral reparation for the victims of the armed conflict’ (law 1448 of 2011). The aim of this law is “to establish a joint system of juridical, administrative, social and economic means, on the individual and collective level, to benefit the victims, who have suffered individually or collectively, from the 1st of January 1985 till now, of violations of humanitarian law or the international norms of human rights related to the internal armed conflict, so they will be able to effectively enjoy their rights to know the truth, to justice and reparation with the guarantee of non-repetition, within a transitional justice framework so they will be recognized as victims and dignified by means of materialization of their constitutional rights.” (Law 1448 of 2011). This law puts restitution, aimed at returning the victims to the situation they were in prior to the violations, “at the heart of reparations” (Saffon, 2010: 143).

It even has a special chapter on land restitution for forcibly displaced (title IV, chapter III). As a consequence of this law, in the beginning of 2012, the Colombian government formed the *Unidad Administrativa Especial De Gestión De Restitución De Tierras Despojadas* (Special Administrative Unity for the Gesture of Land Restitution, hereafter called the *Unidad*) to serve and assist the victims of forced displacement and to organise and execute the land restitution for the displaced population in Colombia. Will this restitution program provide justice for the forcibly displaced of Mechoacán?

6.1 Process of land restitution

The process of land restitution consists of an administrative section, which is executed by the *Unidad*, and a juridical section which is executed by special judges and magistrates. Everyone who had to leave and abandon a territory caused by the armed conflict can subscribe at one of the 20 offices of the *Unidad* and ask for land restitution. An administration team will then verify the claim and check if it is rightful. To be rightful, it must be a claim from a displacement after the first of January 1991 (Ministry of agriculture and rural development, 2011). Why 1991? “This is a politically made decision based on analysis of the most violent periods in the country” as explained by Rachel Victorino, the representative of the director of the *Unidad* in Bogota.¹³⁰

When the claim is considered rightful, an investigation team from the *Unidad* will do research about the exact history of the claimed displacement. The main purpose of this research is to check if the story of the displaced is true, what land titles they have, or previously had, and to determine if the dispossession meets the requirements for land restitution.¹³¹ An important requirement for the land restitution is that the displaced person left and sold his land as a result of the armed conflict and not out of economic reasons.¹³² This

¹³⁰ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012. This is especially notable because the victims law states to deal with victims from 1985 onwards (Law 1448 of 2011).

¹³¹ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹³² Ibid. 131.

whole process may take about 60 days and in really difficult cases 90 days, whereby the *Unidad* also provides for all the evidence to support the case in the juridical part.¹³³

In the juridical section, a judge or magistrate, specially trained for land restitution cases, will analyse the evidence and decide if land restitution will take place and if so, in what form. In general the people will effectively return to the land they left behind. However, in case this is not possible restitution can take the form of another piece of land somewhere else or a monetary compensation.¹³⁴ In conflictive cases, when there are people opposing the restitution or more than one family claim the same piece of land, only magistrates deal with these cases. Then, the magistrates hear the opposition in order to make a decision.¹³⁵ The whole juridical process may only last for four months.

In addition to the land restitution, the *Unidad* is working on a follow-up process to ensure durable restitution. They want to provide funds for the returned displaced so that they can build housing and start a small agricultural business on their land. This is important because without this help many people might not be able to move back and start a new life on their recuperated land.¹³⁶ This follow-up process, however, is not yet implemented and the *Unidad* is still trying to find resources to be able to execute this plan.¹³⁷ Figure 4. is a schematic overview of the process.

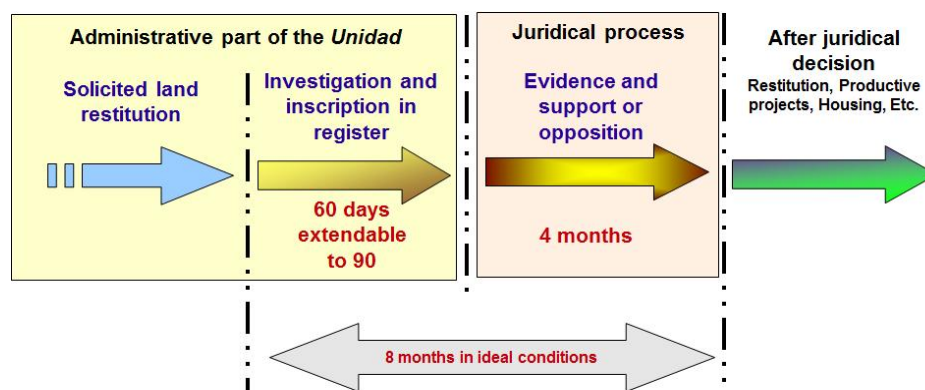


Figure 4. Schematic overview of the process of land restitution as demonstrated by the *Unidad*.¹³⁸

In theory a very nice program, but this restitution process is started more than 10 years after the biggest waves of forced displacement took place (Vidal, 2008) and for some cases more than 21 years after the displacement. This means that there will be many conflicting claims because the land of the displaced is owned or occupied by others. The judges and magistrates thus have to decide who the most rightful owner is and the *Unidad* will prepare evidence of ownership for the displaced to support them in court. Legal entitlement and registration of property rights, however, is very rare in rural Colombia. Many land

¹³³ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹³⁴ Ibid. 133

¹³⁵ Ibid. 133

¹³⁶ Ibid. 133

¹³⁷ Ibid. 133

¹³⁸ Figure from a powerpoint presentation of the *Unidad* : 'Unidad restitución de tierras' (2012).

transactions happen in informal ways and never get officially registered.¹³⁹ Research of the CSPPDF estimated, for example, that only 18.7% of the forcibly displaced held formal land titles (in Saffon, 2010).

Due to the lack of formal land titles the *Unidad* recognises four different entitlements: Owner, which means full legally registered ownership; occupant, who lives on the land of the state without any legal title but believes himself to be the owner; possessor, who lives on someone else's land, without a title, and believes himself to be the owner; and tenant, who doesn't have a legal title either, but doesn't believe himself to be the owner and had an agreement with the official owner about the land use.¹⁴⁰ Owners, occupants and possessors are all able to receive land restitution.¹⁴¹ The latter two, however, won't have any legal documents to prove their 'ownership' besides some informal sale agreements. This makes proving ones land titles very complicated which the predispositions of *buena* and *mala fé* tries to simplify.

6.2 Buena fé and mala fé

The juridical procedure to define who has the right to the land title is the same as in normal civil law with one exception. The displaced will always have the predisposition of *buena fé* (good faith) which assumes that they are making a rightful claim. Any sale transactions of the claimed land will have the predisposition that they happened in *mala fé* (bad faith).¹⁴² The actual owners thus have to prove that they acquired the land in *buena fé*. This means that they bought the land in an honest legal manner without influence by armed conflict. This also requires that they didn't have any knowledge about the conflict and the dispossession in the region at the time of purchase.¹⁴³ If the new 'owners' don't succeed in proving their *buena fé* the case should end in favour of the displaced.

¹³⁹ The system of official land registration in Colombia is rather complicated and consists of registering and signing at different institutions (based on interviews with the ex- director and juridical investigator of Incoder), the majority of the rural populations has no clue of all these rules and just make vocal sale agreements or use their own documents which don't have any legal value. As explained by the ex-director of Incoder, even notaries often don't understand the whole legal process, so what can you expect of an illiterate poor farmer? Furthermore, Colombia has no up to date register of land property, cadastre. The last time it was updated was in 1994 and in 2007, 54% was not up to date, this makes it also easier to 'legalize' appropriated land (saffon, 2010). Actors of land robbing put much effort to legalise their robbery and because of the informality of property transactions in rural Colombia this is very easy, thereby had (have?) many armed groups direct control over administrative and political institutions which made this even easier for them (Lid, 2012). For example, the regional director of Incoder in Valledupar at time of the displacements in the area, got convicted for paramilitarism (Superior Tribunal of Valledupar, 2011).

¹⁴⁰ Interviews with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012, Jairo, juridical investigator of Incoder working on the case of Mechoacán, on 23 May 2012 and Sarely public prosecutor of Chiriguana who was working on the case of Mechoacán, on 25 March 2012. And Explanation of the land restitution process from the ministry of agriculture and rural development: Preguntas frecuentes sobre la Restitución de Tierras en la Ley de Víctimas (2011).

¹⁴¹ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Ministry of agriculture and rural development (2011) 'Preguntas frecuentes sobre la Restitución de Tierras en la Ley de Víctimas'.

¹⁴² Interviews with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹⁴³ Ibid. 142.

Nevertheless, if the actual possessor succeeds in proving his *buena fé* he has to leave the property anyway because land restitution to the displaced comes first. The possessor will have the right to indemnification and will get a new piece of land or the value in money.¹⁴⁴ In this way the land restitution is in fact provoking displacement for the new ‘owners’.

In the case that the new ‘owner’ has invested a lot in the land and incited an impulse in agro industrial projects, he is allowed to stay but has to make an agreement with the original owner about renting the land (Law 1448 of 2011, art. 99). This way he is able to keep his business while recognising the rightful owner.¹⁴⁵ However, this article of the law is currently under revision by the Supreme Court because it is considered non constitutional. The victim of displacement would get some income from his land but is still not able to go back or buy a new piece of land somewhere else.¹⁴⁶

These concepts of *buena y mala fé* sound clear and logical but are in fact extremely difficult to work with or to prove; “How can you prove you didn’t know about the armed conflict and dispossessions in the region?”¹⁴⁷ This will make it very difficult to solve the many existing conflicting land claims.¹⁴⁸ For example, someone has to leave his home and land because of violence in the area, or is threatened to be killed and thus decides to leave. He is not able to return because of the violence and so he finds another place to live with his family. To be able to buy another home he is obliged to sell his land and so he does. Is he a forcibly displaced person? Yes, of course, because he left as a consequence of the violence. But he sold his land out of economic reasons. So would he have the right to restitution?

Imagine if he then sold the land to someone who says he didn’t know about the death threats and just wanted to have a nice piece of land. Is this a buyer of *buena fé*? Does this new owner have a right to indemnification? Is it possible not to know about the violence before you buy a piece of land? And what if the buyer *did* know of the violence but still wanted to buy the land, even more because now he could buy it cheap while he otherwise wouldn’t be able to pay for it. Or perhaps the buyer made the purchase in order to help out the displaced who desperately needed to sell his land. Is this buyer of *mala fé* and therefore can be expelled from the land if the former owner wants it back? These kinds of cases are not the exceptions but rather the majority of the cases the *Unidad* will have to deal with. When the *Unidad* was asked about the solutions for these kinds of conflicts they were unable to give an answer. They responded that the judge for the case would have to make that decision.¹⁴⁹ Hopefully the judges are able to give answers; otherwise, the *Unidad de restitución de tierras* won’t be able to solve the land disputes of the displaced.

In the cases like Mechoacán, where Drummond converted the lands of the displaced into mining grounds, restitution is not an option anymore. Regardless if the people who sold the land to Drummond acquired and resold the lands in *buena* or *mala fé*, Drummond itself might have bought the lands with a complete clear consciousness. So according to the

¹⁴⁴ Interviews with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹⁴⁵ Ibid. 144.

¹⁴⁶ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012.

¹⁴⁷ Interview with Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹⁴⁸ Interview with Juan Manuel Ospina, ex director of Incoder, on 18 May 2012.

¹⁴⁹ Interviews with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

Unidad, what would be the solution? Again the *Unidad* doesn't have a clear answer: Drummond should have to prove that it bought the land in *buena fé* and then make an agreement to pay rent to the displaced for the use of their land. But then Drummond would be paying for the lands it had already bought.¹⁵⁰ The displaced could also receive a monetary compensation in which case they would leave Drummond out of the problems. Should this compensation then also include the value of the coal in the ground?¹⁵¹ In the end, the representatives of the *Unidad* themselves came with questions and left the final decisions to the judge stating that it is not their task to decide who is wrong or right, they only prove the rights of the displaced.¹⁵² It is clear, at this point in time, that despite the predispositions of *buena* and *mala fé*, it remains very difficult to solve the land conflicts of the displaced.

6.3 Practical limitations

Besides these judgmental problems there are many practical difficulties that might prohibit successful land restitution to the displaced. First of all, it turned out to be really difficult to ensure the safety of the returnees, as there are many forces opposed to this restitution. It is especially difficult if the contested lands were acquired by armed forces or other powerful people, who practise land centralisation politics instead of land distribution (Lid, 2012; Vidal, 2008). People returning to their lands have been threatened or even killed and many were displaced again. Almost all community leaders fighting for restitution live under permanent threats or get killed (Lid, 2012).

Second, it is unsure whether there are sufficient resources to provide material or monetary compensation in case land restitution is not possible. This is troublesome, as in many cases land restitution isn't possible due to new land owners, profitable businesses or a lack of security in the area. A substantial part of the restitution cases needs compensation measures, in the form of another piece of land, or money (Lid, 2012; Vidal, 2008). The problem is that there are not so many barren lands of the state available and even less money for monetary compensations. The restitution process is thus mainly dependent on restitution of the original land and return of the displaced.¹⁵³

On top of that the *Unidad* bases their work on minimal estimates of the amount of dispossessed lands. According to their estimates they will have to deal with 360.000 cases, based on registrations in the RUPTA (Unified Registry of Abandoned lands and Territories),¹⁵⁴ while the lowest estimates state there are more than 3 million displaced in Colombia (Uprimny & Saffon, 2009). Not all of the displaced left behind a property, but the majority of displacement took place in rural areas where people in general do own land. In

¹⁵⁰ Interview with Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹⁵¹ Interview with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012.

¹⁵² Interviews with Rachel Victorino, representative of the national director of the *Unidad*, on 9 May 2012 and Nelson Silva, regional director of the *Unidad* in Valledupar, on 12 April 2012.

¹⁵³ Ibid. 150

¹⁵⁴ Interview with Rachel Victorino, see note 151, and a powerpoint presentation made by the *Unidad* (2012).

addition, far from all displacement cases are registered (Saffon & Uprimny, 2012). This results in much higher numbers which means that even more resources are required.¹⁵⁵

Third, the restitution program of the *Unidad* requires that everyone enlists in the separate system of the *Unidad* and does not use the already existing registers such as the RUPTA and the RUPD. This makes it highly improbable that they will assist all people who forcibly abandoned their land, as a lot of them do not have the information available or the means to travel to a city to enlist again. Another reason that people won't join the restitution of the *Unidad* is because the whole process is initiated too many years after most actual displacements. Many people already reconstructed their lives in their new habitat and don't want to move back. This is illustrated by the statistics of the CSPPDF who states that only 3.1% of the displaced population would like to return to its place of origin while 76.4% would like to remain in its current place of settlement, 6.7% to relocate to another municipality, 2.7% to leave the country, and 11% stated it was undecided (in Vidal, 2008). Besides, just as in the case of Mechoacán, did many displaced already start their own restitution processes by means of the national justice system and are less inclined to start another process with this new restitution program.

6.4 Sub Conclusion

Although the restitution program looks really nice on paper, the chance that it will succeed in providing reparation for all the forcibly displaced is very small. In the end, the government is trying to provide reparation for the forcibly displaced by means of corrective justice, restitution. They offer all victims the opportunity to return back to the country side, to their original lands or somewhere else, although this is very difficult and the majority of the displaced express they do not wish to return. In addition, the restitution program doesn't provide reparation to these victims who want to stay where they are. However, the fact that there are few displaced that want to return to their former homes might be an advantage for the *Unidad*, regarding their lack of resources.

In the case of Mechoacán, the chance of success is even slighter because of the complicated situation with Drummond, and the current possessors that also claim the land. Land restitution will not be possible, so the only forms of justice the *Unidad* could provide to the displaced of Mechoacán is resettlement somewhere else, a monetary compensation, or a rent agreement with Drummond. This may help the displaced to satisfy their basic needs and improve their living circumstances. In the case Drummond has to pay rent for the lands it is using, the wish for justice of the displaced of Mechoacán might as well be satisfied. Although not in the form of a sale, by means of renting the land Drummond is paying the displaced for it. It is questionable, however, if these payments will indeed enable the full enjoyment of basic needs and ESCR by the displaced.

In general, restitution alone will not solve any problems regarding the social exclusion and poverty of the rural population or provide significant improvements for the enjoyment of ESCR for the displaced. If the position of the rural population will not be improved, the

¹⁵⁵ See numbers of the introduction: 55% of all forcibly displaced owned land, that means at least 1.650.000 people, and 94% of them abandoned or sold it under pressure, this accounts for 1.551.000 people instead of 360.000.

reparation by means of restitution cannot guarantee non-repetition of forced displacement in the future. The *Unidad* tries to meet this need by developing a follow-up program for sustainable return. However, it is still uncertain if there will be enough resources for the implementation. Nonetheless, it is a good sign for the future that finally a land restitution policy has been developed and put in practice for the large displaced population of Colombia, as this has never happened before (Saffon, 2010) The *Unidad* will definitely do the best they can to succeed, now a lot of attention has been brought to this restitution. Hopefully the majority of the forcibly displaced will eventually be able to return and improve their living conditions, and the difficulties as described above will not prevent their restitution.

Chapter 7 - Conclusion

The emic definition of justice as expressed by the displaced of Mechoacán corresponds with the aspects that together make up the concept of transitional justice. The meaning of justice for the displaced thus coincides with a transitional justice framework, as to say, the victims of the forced displacement in Mechoacán consider a transitional justice process as justice. Their definition of justice has a clear retributive and corrective nature, based on punishment, paying for ones crimes and undoing the wrong or repairing the damage that is done.

Regarding their own situation as forcibly displaced, however, they do not express any need for these aspects of their definition of justice or transitional justice, except for a weak notion of reparation to restore everything they have lost. Justice in their situation would be that Drummond pays them for the lands the company is already using or want to use because they perceive they are the legitimate owners. They do not need to punish any perpetrators or find out why and by whom they were displaced neither they express a wish for land and house restitution or public apologies. This means that a transitional justice process with its current legal focus does not satisfy the needs of the forcibly displaced of Mechoacán. (See figure 3. for the schematic overview of the answers on the research questions)

The most important need for the victims of displacement from Mechoacán is improving their living circumstances, expressed in a need for material gain. Money, to buy food, clothes, medicines, improve their housing, start a little business, pay the education of their (grand)children, buy a new piece of land, etc. One could easily argue that this need for material gain is based in a need for reparation because the main reason the people of Mechoacán live in these poor conditions is because they were forcibly displaced from their lands. They had to leave almost everything they had behind and with their land they lost their most important means of income. If they would not have been displaced, they would not be living in the poverty they live in at the moment. Improving their living circumstances would then be restoring the circumstances they lived in before, although these were not very wealthy or comfortable either. However, one can also argue that the expressed need for reparation is motivated by the need to satisfy their basic needs, what they hope to achieve by means of legal justice in the form of compensation payments.

The expressed need for improved living circumstances by the forcibly displaced can also be interpreted as the need to address ESCR, which they are unable to enjoy in the current situation. Their current living circumstances can be perceived as structural violence and violations of their ESCR provoked by their forced displacement, or already present in their situation before the displacement. Eventually, it are the conditions of poverty and lack of basic needs that fuel their needs for material gain in whatever form, which demonstrates an interesting difference between their definition of justice which is retributive and corrective in nature and their expressed need for justice which is more based on social justice.

The ATCA contributes to the transitional justice process, as any lawsuit could, because it contributes to all the 5 main aspects of transitional justice. Moreover, the ATCA makes a special contribution because it creates the possibility to hold MNCs accountable for human rights violations, which in general is not possible because of many legal limitations. The ATCA thus provides a means to hold multinational perpetrators accountable in a context of transitional justice. (See figure 3. for the schematic overview of the answers on the research questions)

The ATCA itself, however, is a farfetched method to ensure this accountability, the subject of many critiques and attacks from the international business community and even the US government (Lavelle, 2003). So it lacks broad international support and therefore acknowledgement. On top of that, the ATCA does not ensure legal accountability for MNCs yet because it remains very difficult to reach a legal condemnation of a MNC for human rights violations, not one case has succeeded yet. On top of that, the ATCA does not recognize the due diligence principle¹⁵⁶ as a direct responsibility of the company must be demonstrated (Kaleck, Saage-Maass, 2010).

For now, the only real importance of the ATCA lawsuit is to gain international attention for human rights abuses by MNCs and pressure internationally to develop real human rights legislation for MNCs so the legal vacuum these big companies currently enjoy will disappear. Developing an adequate human rights legislation regarding these MNCs is an important job that needs to be done as Drummond is not the only company involved in human rights violations¹⁵⁷ (Nolan & Tylor, 2009; ICHR, 2002). Therefore, the MNCs are becoming more and more powerful and have a substantial influence and impact on the societies where they are present, so should they not have more human rights responsibilities as well?

The planned ATCA lawsuit against Drummond does not satisfy the need for justice as expressed by the forcibly displaced of Mechoacán, ‘Drummond paying them for their lands’. Nevertheless, the lawsuit can contribute to the needs for reparation and improvements in their living circumstances if they win, as big compensation payments will be made.

But that is *if*, the mere process of the lawsuit by itself, regardless if they win or not, does not benefit the victims in any way. They are not well informed about what the lawsuit exactly is about and why, and have no idea how the process is going. The only thing the lawsuit gives them is the hope that one day they will become really rich. Giving them expectations that might not become true and might end in deception, especially taking into account that until today, not one ATCA case has been won. These expectations can even

¹⁵⁶ “a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. The scope of human rights related due diligence is determined by the context in which a company is operating, its activities, and the relationships associated with those activities.” As stated by Rugie (2008) in his protect, respect and remedy framework.

¹⁵⁷ The following companies have been sued for human rights violations: Shell (for its alleged role in the events that led to the execution of Ken Saro-Wiwa in Nigeria); Chevron (for its alleged role in supporting violent government suppression of protestors on an off-shore platform in Nigeria); Unocal (for alleged complicity in the use of forced labor in Burma); ExxonMobil (for alleged complicity in abuses committed by Indonesian security forces in Aceh); and Coca-Cola together with bottlers of its soft drinks in Colombia (for alleged complicity in the suppression by paramilitaries of union activity, including the killing of a union activist at a bottling plant) (ICHR, 2002).

prevent them from undertaking other means that can help them in the short term. One example is a woman who was trying to get her ‘carta de desplazada’, a kind of ‘proof of displacement’ one receives of the government in order to receive humanitarian aid. She was denied this card at her first attempt and the investigator of the fiscalia had told her not to worry about this card because soon she would be rich anyway, so she did not try any further.¹⁵⁸ Meanwhile, she is still in poverty waiting for any money.

Nonetheless, even a successful ATCA lawsuit would not make a special contribution to satisfy the need for justice of the forcibly displaced, or a transitional justice process as desired by these victims. First, because the victims do not express any need for the aspects of transitional justice. Second, because they do not consider Drummond responsible for their displacement, so holding Drummond accountable does not have any meaning for them. Moreover, it is not even clear that Drummond actually had a role in their displacement. And third, as the forcibly displaced do not care where the money comes from, the ATCA is not an exclusive means for them. They could also receive reparation by other means, for example from the state via the Inter-American human rights court. See figure 4. for the schematic overview of the answers on the research questions.

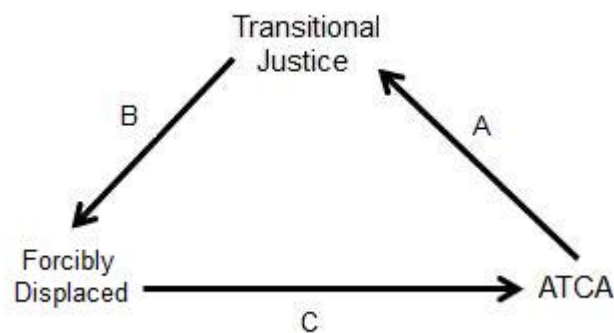


Figure 4. The answers on the research question in the schematic triangle.

A: Yes, the ATCA contributes to the transitional justice process if the perpetrator is a MNC.

B: With its current legal focus on retributive and corrective justice the transitional justice process can only for a small part satisfy the needs of the forcibly displaced, by means of reparation.

C: The forcibly displaced do not express a need for justice that corresponds with the ATCA lawsuit. Nevertheless, if they win the ATCA lawsuit could contribute to their needs by means of compensation payments.

In general the whole concept of transitional justice—perceived as a necessary process to make the transition from war to peace—seems only to inhibit the reconciliation process of the forcibly displaced of Mechoacán. While the main goal of the victims is to live their lives with dignity in humane circumstances with equal opportunities to succeed in their lives, they are now engulfed in a transitional justice vortex of truth finding, punishing the perpetrators, making good examples of the rule of law and providing reparation or restitution (but only to the real victims, which until now has been nobody). The continuing focus on the past atrocities might only prolong or even provoke feelings of injustice and victimhood, especially

¹⁵⁸ Interview with Nilsa, one of the forcibly displaced of Mechoacán, on 28 March 2012.

processes of truth finding which decide who are the real victims and thus rightful claimants, and who are not.

A simple solution to reconcile and leave everyone satisfied would be that Drummond pays both claimants, displaced and possessors, for the land, instead spending years dragging out a process to decide who is right and who is wrong. This process is putting everyone in a state of victimhood, aggravating and prolonging the land conflict. In the end the people designated as *mala fé* are left angry and frustrated, which might provoke a new conflict. For a big MNC, this is not even that much money, and if it is they could ask some help from the state, which will be less expense than a reparation program. The problem is that because of the whole transitional justice mind-set, this is perceived as an unjust solution, neglecting the rights of the victims, while reconciliation and peace, in the end, is the goal of transitional justice.

Because of the legal paradigm of transitional justice, it focuses only on CPR and retributive and restorative or corrective justice by means of criminal prosecutions, truth commissions, reparation programs and institutional reform.¹⁵⁹ The ATCA lawsuit and the land restitution program of the Colombian government both fit in this framework as they also focus on CPR, retributive (ATCA) and corrective (both) justice. This narrow view of justice, however, does not take into account the socio-economic context of the displacement and thus will not deal with the social inequality, poverty and unequal land distribution which are main causes of the armed conflict.

If the displaced win the lawsuit, compensation payments can change the socio-economic position of the victims and might also solve other problems. Conflicting land claims might be solved because people will not care about selling their land anymore as they already have a lot of money and people who want to have a new piece of land will be able to buy it. The compensation measures of the *Unidad* might also improve the living circumstances of the forcibly displaced by means of a new piece of land, economic compensation or a rent agreement. Nevertheless, retributive and restorative justice will not change the structures of society maintaining the socio-economic inequality. Therefore, it is widely questioned if this individual account of justice can provide integral reparation, including the guarantee of non-repetition (Elster, 2012; Kalmanovitz, 2012; Saffon & Uprimny, 2012).

As explained by Saffon and Uprimny (2012) in Chapter 1, it is important to change the circumstances that led to the violent conflict in order to guarantee the non-repetition. Sole monetary compensation or land restitution will not change the unequal distribution of land, the social inequality or the social exclusion in Colombia, which are main causes of the armed conflict, and thus cannot guarantee non-repetition or a durable solution for the forcibly displaced.

To provide a durable peace a restructuring of social society would be necessary, redistributing social opportunities, income, and access to land. Therefore it is really important to broaden the concept of traditional justice also addressing the ESCR of the victims. In the case of the forced displacement in Mechoacán, the victims are currently most deprived of

¹⁵⁹ As stated by the ICTJ on: <http://www.ictj.org/about/transitional-justice>. Accessed on 21 July 2012.

ESCR and their biggest expressed need is the recovering of the full enjoyment of these rights. This means that integral reparation corresponding to the current needs of the displaced incorporates to ensure they will enjoy their basic needs and ESCR.

The ATCA lawsuit is not able to realize this broadening of focus because the US did not ratify the ICESCR (Kaleck, Saage-Maass, 2010). Therefore it is not possible to make claims based on the violations of these rights. The land restitution program of the *Unidad*, can contribute to the enjoyment of ESCR if it extends its focus from pure restitution to the satisfaction of basic needs for the forcibly displaced. The program made a start with this process by developing the follow-up program but should make this fund available for any place where the forcibly displaced desire to settle. In addition, it could execute the reparation process in a progressive form based on distributive justice, as proposed by Elster (2012), Kalmanovitz (2012) and Saffon and Uprimny (2012) in Chapter 1, giving priority to the owners, possessors and occupants who are most in need.

The problem with reparation based on distributive justice in Colombia is the powerful political opposition; history has taught that it is impossible to implement an agrarian reform or other land distribution measures. Colombia implemented 10 laws in order to redistribute the land in rural Colombia which all failed¹⁶⁰ (Lid, 2012; Machado, 2004). With the last agrarian reform law of 1994 it is estimated that the government allotted 147.826 ha to 112.264 families between 1994 and 2007 (Vidal, 2008) which is much less than the estimated 5,5 million ha that have been violently appropriated during the conflict, the so called counter agrarian reform (Saffon, 2010). So why would it work now? Moreover, the numbers tell us that 76,4% of the forcibly displaced want to stay where they are, which is in general an urban setting (Vidal, 2008), and thus do not want to have a new piece of land or live in the countryside again. This of course does not help a land distribution process either.

A solution to these problems could be to implement a reparation process based on the guarantee of effective enjoyment of ESCR for the victims of forced displacement instead of a restitution process. In this way the socio-economic situation of the victims will be improved, in line with their expressed needs to improve their living conditions and opportunities to start income generating businesses. This will also alter the structural inequality and poverty in the country and the circumstances that caused the armed conflict contributing to a transition towards durable peace. The triangle will then look like in figure 4. Reparation will then be, in line with the research of Kerr (2010) and Johnston (2010), based on restoring the dignity of the forcibly displaced.

¹⁶⁰ Law 200 of 1936, 100 of 1944, 135 of 1961, 1a of 1968, 4a of 1973, 5a of 1973, 6a of 1975, 35 of 1982, 30 of 1988 and 160 of 1994 (Lid, 2012).

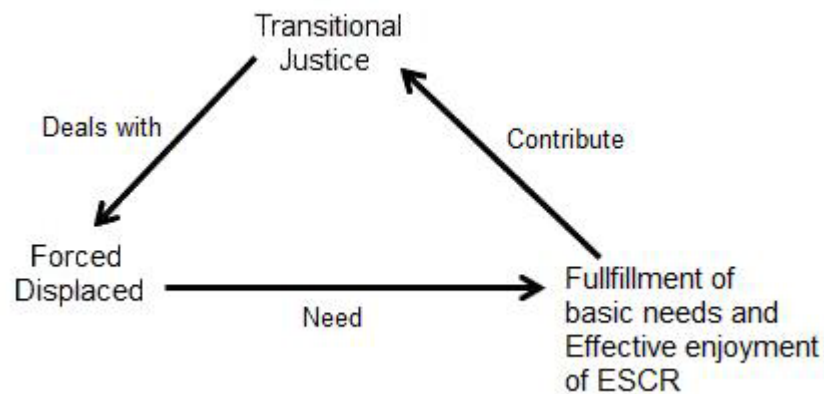


Figure 4. Schema of the relation of the fulfilment of basic needs and the effective enjoyment of ESCR in the transitional justice process for the forcibly displaced.

To be able to know if a distributive reparation process or any other transitional justice measure based on any kind of justice actually contributes to reconciliation and the transition to peace, extensive research has to be done based on data out of the field, measuring and comparing the real effect of trials, truth finding and different forms of reparation on the reconciliation of victims and the rest of society. For now, based on the data of this research, it seems that the way to peace would be securing that everyone is able to reconstruct and live their lives in dignity and equality, contrary to long processes of truth and justice that only prolong the focus on the past conflict and feelings of injustice and victimhood, instead of a focus on a peaceful future.

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Interviews

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Focus group with 9 forcibly displaced persons from the vereda Mechoacán on 24 March 2012 in Bosconia.

Semi-structured interviews with 3 current possessors of land in Mechoacán, between 3 and 5 April 2012 in Mechoacán and Valledupar.

Focus group with 6 current possessors of land in Mechoacán on 22 March 2012 in Mechoacán.

Semi structured interviews with 2 Colombian human rights lawyers working on the case of Mechoacán in preparation for an ATCA lawsuit against Drummond on 24 April and 22 May 2012 in Valledupar and Bogota.

Semi structured interview with 1 Colombian lawyer leading the national legal process of the displaced of Mechoacán on 23 March 2012 in Valledupar.

Semi structured interview with the public prosecutor of Chiriguaná who is investigating the displacement of Mechoacán on 25 March 2012 in Valledupar.

Semi structured interview with the technical investigator of the CTI investigating the displacement of Mechoacán on 6 April 2012 in Valledupar.

Semi structured interview with the juridical investigator of Incoder who is investigating the case of Mechoacán on 23 May 2012 in Bogota.

Semi structured interview with the ex-national director of Incoder on 18 May 2012 in Bogota.

Semi structured interview with the representative of the national director of the *Unidad de restitución de tierras* on 9 May 2012 in Bogota.

Semi structured interview with the regional director of Valledupar of the national director of the *Unidad de restitución de tierras* on 12 April 2012 in Valledupar.

Open interview with the son of the former caretaker of Mechoacán on 3 April 2012 in Jagua de Ibirico.

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Annex 1.

Overview and definitions of different notions of justice and their relation to transitional justice

Punishment	Retributive Justice	<p>Based on punishment. People get what they deserve and wrongdoers deserve blame and punishment in proportion to the harm inflicted. Individualistic, based on deeds of the perpetrator and focus on the past, to what is done, in order to define a proper punishment.</p>	<p>Traditional focus of Transitional justice/ Lawsuits</p> <p>Focus on CPR</p>
Reparation	Corrective/Restorative Justice	<p>Based on restoring the situation of before the inflicted harm. Individualistic, based on personal suffered damage and a responsible agent who needs to repair this damage, focuses on the past by trying to restore the situation of before the violations took place and based on the transfer of goods to the victim.</p>	
	Distributive/Social Justice	<p>Based on a just distribution of goods and burdens in society. Institutional and based on all members of society, focus on the present and the current and future access to basic needs trying to provide equal enjoyment of basic needs for everyone</p>	<p>Focus on fulfilment of basic needs and ESCR</p>

Definitions based on Fletcher & Weinstein, 2002; Saffon & Uprimny, 2012; Kalmanovitz, 2012 and Moreno, 2005.