

## Security and Inequality: Unprotected and Targeted?

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### Introduction

Nine out of ten persons in Paraguay believe the state does not give priority to the security concerns of the poorest segments of the population.<sup>1</sup> In societies affected by profound social and economic disparities such as ours, is security likely to turn into one of most unfairly distributed goods? Is security sometimes likely to be advanced in benefit of the most favored at the expense of the disfavored?

In this paper, I seek to draw attention to (i) the risks that markedly structural inequalities may pose to the democratic legitimacy of the processes by which collective decisions concerning security are made and (ii) the possible unfair implications of such decisions for the most marginalized segments of society. My first claim may well be read within the framework of current efforts examining the democratic authority of laws or policies in contexts of severe socio-economic disadvantages such as the Latin American.<sup>2</sup> My second contention seeks to supplement current debates by drawing out two concrete implications from the first general assertion. First, in markedly unequal contexts, the safety concerns of groups confronted with structural disadvantages may go unaccounted for in the political process and remain unattended as a consequence. Second, the security concerns of dominant groups may sometimes be secured at the expense of the most vulnerable whose rights may be ignored or infringed, particularly if the unprivileged are perceived by most favored groups as a security threat.

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<sup>1</sup> United Nations Development Programme (UNDP) National Report on Human Development Paraguay 2008, at 110

<sup>2</sup> I will be applying a familiar analysis that brings inclusion into the democratic assessment exercise. For one of the most prominent critical examinations of criminal laws more generally from a deliberative democratic perspective see e.g., Roberto Gargarella, “De la Justicia Penal a la Justicia Social,” available at <http://www.razonpracticayasuntospublicos.com/racionalidad/texto/Edicion%2012/De%20la%20Justicia%20Penal%20a%20la%20Justicia%20Social.pdf> Gargarella questions the legitimacy of criminal norms adopted in such contexts, especially those resulting from punitive populist approaches. I am broadly sympathetic to the ideas of inclusion and deliberation underlying this criticism.

I attempt to put forward this two-fold thesis through a critical examination of the decisions advanced in Paraguay during the last government (2003-2008) in response to the safety concerns raised by the parties involved in what has become one of the most pressing conflicts in the country: the one over the land. I use this case-study as the principal lens to elaborate on my argument. The first part of it questions the democratic legitimacy of the criminal laws and security policies adopted to deal with the several distinctive security problems associated with the land conflict. In this regard, I argue that such legitimacy was undermined as a result of the structural context of socio-economic disparities operating in the background of the conflict and within which such laws and policies were adopted. If democratic procedures owe legitimacy to their deliberative and inclusive character, as some theories of democracy assert, one may reasonably conclude in light of these theories that certain groups' systematic exclusion from the processes by which the sovereign will is formed undermines the democratic legitimacy of the resulting responses. The second part of my argument points to the unfair implications that socio-economic inequalities reflected in public discourse (and in the ensuing decisions) had for the enjoyment of security and basic rights by the most disfavored party in the conflict. Finally, I briefly speculate on the possible general application of these propositions in broader contexts of crime and insecurity.

But, before elaborating on the main arguments, this paper preliminarily contends that the former government overlooked the context of structural socio-economic inequality and historic deprivation in which conflict and insecurity in rural areas have emerged and escalated. As a result, the responses to the security concerns raised by the most powerful groups were mostly de-contextualized and mainly aimed at suppressing the conflict rather than at solving it. I question this approach and explore grounds for possible justification of an offense that the government,

echoing one of the party's concerns, regarded as the main threat to security in rural areas: unlawful property occupations by landless groups known as '*campesinos sin tierra*' (hereinafter 'campesinos').

In summary, using the example of the land conflict in Paraguay, this paper seeks to make the case for a democratic approach to address social conflicts as well as crime and insecurity more generally. I should make clear that the focus of my analysis on punitive responses does not by any means imply I am arguing in favor of a reductionist approach to complex social conflicts. Rather, my intention is to put things into context and to criticize the underlying rationale of stances of punitive nature that largely oversimplifies core highly complex problems.

My analysis proceeds in six parts. Part I describes the structural inequalities in which the land conflict is rooted and delineates the conflict's main features. Part II summarizes the main state responses to the conflict with a focus on the period of 2003-2008 and shows that these responses have largely privileged the security concerns of dominant groups over those of the most vulnerable ones whose rights were often ignored and infringed in the attempt to protect the most favored groups. Part III addresses the criminalization of unlawful property occupation and explores possible grounds for justification. Part IV introduces the defining normative ideals of deliberative democracy in light of which I conduct an assessment of the democratic legitimacy of the state responses to the security concerns arising from the conflict. Part V presents the unfair implications that security responses resulting from democratically flawed processes may have for the most disadvantaged. Part VI concludes.

## Inequality and Conflict

Property concentration of rural land has been a major source of inequality in Paraguay for decades.<sup>3</sup> In fact, the country has one of the most unequal distributions of land in the world.<sup>4</sup> Landholdings of over 1,000 hectares currently represent 77.08 percent of the surface area and only 1.05 percent of the total number of landholdings.<sup>5</sup> By contrast, landholdings of less than 10 hectares account for only 2.79 percent of the surface area and comprise 61.63 percent of the total number of landholdings.<sup>6</sup> This has obviously made ‘subsistence farming on small parcels of land very difficult, as rural lots of less than twenty hectares cannot produce enough to support an average family and to yield a surplus.’<sup>7</sup> Unsurprisingly, the country’s rural population has decreased dramatically over the latter half of the twentieth century in search of better opportunities in urban areas.<sup>8</sup> Today, 24.4 percent still lives in extreme poverty.<sup>9</sup> 32.4 percent does not enjoy access to basic housing, 28.7 percent to education, and 17.9 percent to minimum subsistence capacity.<sup>10</sup>

Concentration of land ownership has a long history in the country. The origins can be traced back to the 1870s when, at the end of the war with Argentina, Brazil, and Uruguay (1865-1870), extensive areas owned by the state were massively sold to foreign investors in an attempt

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<sup>3</sup> United Nations Development Programme (UNDP), National Report on Human Development Paraguay 2008, at 195

<sup>4</sup> The Food and Agriculture Organization of the United Nations (FAO) has estimated the Gini index of land distribution in 0.93, one of the highest in the world. *See*, World Bank “Paraguay. Impuesto Inmobiliario: Herramienta Clave para la Descentralización Fiscal y el Mejor Uso de la Tierra,” April 2007, at footnote 2.

<sup>5</sup> 2008 Agricultural Census

<sup>6</sup> *Id.* A comparison with the previous one from 1991 shows a clear tendency in the increase of property concentration. Landholdings between 100 and 500 hectares have increased by 34.8% while those above 500 hectares have augmented by 66.9%.

<sup>7</sup> Harvard Law School, International Human Rights Clinic, “Security in Paraguay: Analysis and Responses in Comparative Perspective”, Cambridge, MA, May 2007, at 108.

<sup>8</sup> According to the World Bank World Development Indicators 2007, rural population in Paraguay has dropped from 58.3 percent in 1980 to 41.5 percent in 2005.

<sup>9</sup> 2007 National Household Survey

<sup>10</sup> Dirección General de Estadísticas, Encuestas y Censo “Necesidades Básicas Insatisfechas – Paraguay 2002”

to attract resources and following the liberal model introduced in the 1870 Constitution.<sup>11</sup> Immediate successive governments did not do much to rectify the post-war land concentration scheme.<sup>12</sup> It was only at the end of the first half and, particularly, during the latter half of the twentieth century, that Paraguay started agrarian reform efforts through initiatives that unfortunately distributed land following exclusionary patterns.<sup>13</sup> The so-called ‘agrarian reform’ handed out twelve million hectares but 74 percent was assigned to only 2.5 percent of the beneficiaries.<sup>14</sup> With the exception of some initiatives in the sixties and seventies, when the Paraguayan state still owned considerable extensions of lands, governments have systematically failed to undertake a sustained strategy of land redistribution, let alone a comprehensive agrarian reform.<sup>15</sup> What is perhaps most noteworthy about the ‘agrarian reform’ initiatives is that during

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<sup>11</sup> “El fin de los monopolios estatales y la privatización de tierras fiscales, intrínseca al liberalismo económico, profundizó las desigualdades sociales proyectándolas en el largo plazo. Entre 1883 y 1885 se vendieron estancias de la patria y montes y yerbales del Estado, dando origen a latifundios y enclaves agroexportadores [...] Ocho consorcios acapararon más de un tercio del territorio paraguayo, en detrimento del campesinado que hasta entonces había cultivado en parcelas arrendadas al Estado. Se dio así soporte legal a la grave asimetría entre campesinos sin tierras y grandes propietarios, que persiste hasta nuestros días.” UNDP, National Report on Human Development Paraguay 2008 at 90-91

<sup>12</sup> “Los intentos posteriores de fomentar la pequeña propiedad rural dieron resultados exiguos y se mantuvo la concentración de tierras: en 1921 sólo el 6% de los habitantes tenía título sobre sus parcelas, mientras 163 latifundios detentaban en conjunto 15 millones de Has. de tierras agropecuarias o forestales, de un total de 32 millones censadas.” *Id.*, at 91.

<sup>13</sup> “Los gobiernos del Cnel. Rafael Franco (1936-7), el Gral. José Félix Estigarribia (1939-40) y el Gral. Higinio Morínigo (1940-48) fomentaron la creación de colonias agrícolas, pero debido a su limitada escala, esta política redistributiva no alteró significativamente la concentración de tierras. [...] En términos de estratificación social, desde mediados del siglo XX la antigua élite económica fue relativamente desplazada por nuevos sectores empresariales y terratenientes, beneficiarios del proteccionismo estatal, de contratos gubernamentales y de la distribución de tierras fiscales ...” *Id.*, at 93 and 94

<sup>14</sup> “Durante la segunda mitad del siglo 20, un programa de “reforma agraria” [...] distribuyó alrededor de 12 millones de hectáreas de tierra, pero 74 por ciento de estas fueron asignadas a sólo 2,5 por ciento de los beneficiarios. La reforma agraria, no obstante, también benefició a los campesinos sin tierra del sector rural – alrededor de 160.000 familias fueron asentadas en 3 millones de hectáreas, pero muy pocas de éstas poseen el título de sus tierras” World Bank, “Paraguay. Impuesto Inmobiliario: Herramienta Clave para la Descentralización Fiscal y el Mejor Uso de la Tierra,” April 2007, at iii

<sup>15</sup> “El Estado paraguayo nunca implementó políticas reales de redistribución de tierra (excepto en las décadas de los 60 y 70, cuando aun contaba con grandes extensiones de tierras fiscales) y mucho menos una reforma agraria integral. La política agraria que pregonaba la eliminación progresiva del latifundio y minifundio tuvo un efecto contrario: amplió aun más la brecha entre los minifundistas y grandes propietarios a la vez que incremento la pobreza crítica rural.” Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005,” 2007, Coordinadora de Derechos Humanos del Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas, at 9-10.

the dictatorship (1954-1989) a significant number of property adjudications was illegal, that is, a great part was allocated to those loyal to the regime with no legal entitlement to such allocation.<sup>16</sup> The Truth and Justice Commission found that 64.1 percent of the land adjudications carried out from 1954 to 2003 in the name of the ‘agrarian reform’ was illegal.<sup>17</sup>

Land demands and calls for agrarian reform exploded during the democratic transition. The *campesino* movement, which had been silenced and almost entirely disarticulated during the dictatorial decades, re-emerged vigorously upon return of democracy. In the first fifteen years (1989-2005), 895 land conflicts were registered.<sup>18</sup> Comprehensive agrarian reform, with land redistribution at its heart, has been the primary concern of the *campesino* movement. In practice, landless groups have appealed to a series of means, separately or in combination with one another to articulate their demands. Administrative and legal proceedings are normally the first channel they make use of. However, undue delays often lead to illegal occupation of lands regarded in most cases as ill-gotten, state-owned or non-rationally exploited *latifundios*.<sup>19</sup> Road blocking and mass mobilizations are also among the frequently used strategies. Occupations are not generally the first tactic to be brought into play. They are usually employed after available official-sanctioned means prove ineffective. As this is most of the time the case, it is not surprising that land occupation has become the main strategy used by landless groups to advance their claims. ‘It is the one that produces greater impact both on national authorities and public

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<sup>16</sup> “Algunas de estas tierras son consideradas tierras “mal habidas”, ya que fueron otorgadas a los partidarios del régimen de Stroessner (1954-89) como favores por servicios políticos, militares o civiles, sin ningún vínculo claro a las “aptitudes” agrícolas de estos beneficiarios tal como lo requería la ley” World Bank, “Paraguay. Impuesto Inmobiliario: Herramienta Clave para la Descentralización Fiscal y el Mejor Uso de la Tierra,” April 2007, at 2-3.

<sup>17</sup> Truth and Justice Commission Report, 2008, “Tierras Rurales Mal Habidas en el Paraguay 1954-2003,” at 25 Democratic governments (until 2003) were responsible for 12.8 percent of the total illegal adjudications.

<sup>18</sup> This included 571 public demonstrations, 370 land occupations, 357 violent evictions and 7.296 detentions in connection with criminal proceedings opened for illegal occupations and road-blocking. The first years were regarded as the most intense. In the following ones, the number of conflicts reached an average of 30.5 per year. *See*, Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005”, 2007, Coordinadora de Derechos Humanos del Paraguay, presentado al Consejo de Derechos Humanos de Naciones Unidas, at 10-11 and 57

<sup>19</sup> *Id.*, at 117

opinion. Through this strategy, the conflict becomes public and asymmetries in land distribution revealed, forcing the government to seek solutions...<sup>20</sup> Additional tension has been recently added to the historic conflict with the emergence of the agro-export model of development based on the mechanization and expansion of soy production. This has not only accentuated ancient social and economic divisions in rural areas. It has also brought an unrestrained use of toxic agrochemicals which in turn led to increasing deaths and intoxications of members of *campesino* and indigenous communities.<sup>21</sup>

In short, many and complex factors have historically shaped current unequal patterns of land distribution in Paraguay, which began in the 19<sup>th</sup> century with the massive post-war land privatization that gave rise to the “*latifundio-minifundio*” economic structure that survives until nowadays. The democratic years have not brought any major change. They have been generally marked by the same practices (e.g., unlawful land adjudications, although to a lesser extent), and by attempts to suppress the conflict mostly through violence and criminalization rather than by sustained and comprehensive efforts to address the structural underlying issues. Several factors at work have given rise to major violence and various distinctive security problems which have disproportionately affected the weakest party: *campesinos*.

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<sup>20</sup> *Id.*, at 65 Translation is mine

<sup>21</sup> In the period of 2003-2006, the National Toxicology Center (Public Health Ministry) registered 2.285 cases of intoxications by plaguicides, out of which 61 percent corresponded to agricultural use. *See also*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Paraguay, November 2007, p. 4: “The Committee notes with concern that the expansion of soybean cultivation has fostered the indiscriminate use of toxic agro-chemicals, leading to deaths and illnesses among children and adults, contamination of the water supply and the disappearance of ecosystems, while it has jeopardized the traditional food resources of the affected communities.” *See also*, Quintín Riquelme, ‘Para Disminuir Efectivamente la Pobreza Rural,’ Informe Anual de Derechos Humanos Paraguay 2008, Coordinadora de Derechos de Paraguay (CODEHUPY), at 671-2: “Desde el 2002 para adelante, a la intensa lucha por la tierra se ha sumado otro elemento de conflictividad, la contaminación del medio ambiente. Desde la masiva siembra de la soja y la fumigación con agro-tóxicos, este rubro ha pasado a ser uno de los principales focos de tensión entre poblaciones campesinas y productores sojeros. Varias denuncias de pérdidas de cultivos de autoconsumo, de intoxicaciones de personas, incluso de muertes se han realizado, sin que tenga la repercusión deseada en los organismos públicos de defensa del medio ambiente...”

## Responses

In this section, I briefly outline the most important state responses to both the substantive claims underlying the land conflict and the security concerns raised by the parties involved in it. Providing a full description of the responses here is clearly impossible. I attempt, however, to put the most relevant elements in place.

### *I. Responses to land claims*

The overall response can be regarded as mostly reactive, ambiguous, and partial.<sup>22</sup> State failure to put in place a comprehensive agrarian reform, as provided by the 1992 Constitution,<sup>23</sup> has been the main cause of discontent among *campesinos* and a major source of conflict. After more than ten years of its constitutional formulation (as of 2003-2008), the agrarian reform remained pending in practice.<sup>24</sup> Post-dictatorship governments have by and large acted on the basis of pressure to solve only the most urgent cases, mainly through land adjudication without further supporting measures.<sup>25</sup> A new legal framework was, however, set up in 2001 with the

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<sup>22</sup> See e.g., United Nations Development Programme (UNDP), National Report on Human Development Paraguay 2008, at 196: “[La] concentración de la propiedad de la tierra es histórica en el Paraguay y no fue corregida por políticas públicas. No existe una reforma agraria integral; tampoco políticas públicas claves que puedan afectar esta desigualdad...” See also, Riquelme, *supra* note 21, at 669: “Las numerosas leyes existentes sobre el tema agrario no están exentas de contradicciones, lo que hace que su aplicación resulte, en algunos casos, parcial y en otros, impracticable. Las reformas y las modificaciones que se han hecho sobre algunas de ellas en los últimos años no necesariamente ofrecen un marco que favorezca un mayor nivel de bienestar a la población más carenciada.”

<sup>23</sup> Articles 114 and 115 of the Paraguayan Constitution set the objectives and basis for the Agrarian Reform. Article 116 provides a special regime for the progressive elimination of unproductive extensions of land known as *latifundios*.

<sup>24</sup> Already in 1996, the Committee on Economic, Social and Cultural Rights (CESCR) had expressed concerns over the delays in the implementation of the agrarian reform in Paraguay. The CESCR recommended that the Paraguayan government continued working on the agrarian and tax reform in order to tackle the unjust distribution of wealth in the country. “Compilación de Observaciones Finales del Comité de Derechos Económicos, Sociales y Culturales sobre Países de América Latina y el Caribe” (1989-2004), pp. 217 and 219. In 2007, the CESCR pointed that its previous recommendations had not been fully and effectively addressed. In this regard, the Committee reiterated its concerns over the lack of access of indigenous and *campesino* groups to their ancestral and traditional lands and over property concentration in the hands of a small percentage of the population. Committee on Economic, Social and Cultural Rights, Concluding Observations, November 2007, pp. 3-4

<sup>25</sup> Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005”, 2007, Coordinadora de Derechos Humanos del Paraguay, presentado al Consejo de Derechos Humanos de Naciones Unidas, at 66



entry into force of the Agrarian Statute.<sup>26</sup> The statute provides the incorporation of *campesino* family-based agriculture into national development. It stipulates the expropriation of ‘unproductive *latifundios*’<sup>27</sup> but prohibits such expropriation in cases of ‘illegitimately occupied property.’<sup>28</sup> Congress plays a key role in the land re-distribution scheme by passing expropriation laws.<sup>29</sup> However, its intervention has often been regarded as marked in large part by partisan criteria or the defense of certain economic groups’ interests, rather than by a strategy to ensure land redistribution.<sup>30</sup> The legislative branch is in fact widely perceived as being responsive to dominant groups’ and legislators’ own interests rather than to those of most citizens or the disadvantaged.<sup>31</sup> Clientelism appears to be one of the strongest distinctive features of the Paraguayan party system,<sup>32</sup> which, as a recent study explains, is structured around “political organizations conformed by local figures and funded by big land owners and business persons.”<sup>33</sup> Furthermore, as some political analysts contend, disadvantaged groups, including

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<sup>26</sup> Ley 1.863/2001 “Que Establece el Estatuto Agrario.” Another important reform was introduced by Law 2.419/04 “Que Crea el Instituto Nacional de Desarrollo Rural y de Tierra” which created the National Institute of Rural Development and Land, in replacement of the former Rural Welfare Institute. Like the latter, the former’s mandate included the integration of the *campesino* population into the country’s economic and social development. INDERT’s role, however, as it has occurred with its predecessor, ‘appears to have been rather focused on that of a mediator in land conflicts between land owners and *campesinos* rather than on that of a promoter of the agrarian reform.’ See, Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005,” 2007, Coordinadora de Derechos Humanos del Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas, at 65

<sup>27</sup> Ley 1.863/2001 “Que Establece el Estatuto Agrario.” Article 9 defines unproductive *latifundio* subject to expropriation as non-rationally exploited property. In turn, according to Article 4, lands are not rationally utilized when they exploit less than 30 percent of their agrological productive area.

<sup>28</sup> *Id.*, Article 98

<sup>29</sup> Article 109 of the Paraguayan Constitution

<sup>30</sup> See e.g., Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005,” 2007, Coordinadora de Derechos Humanos del Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas, at 66

<sup>31</sup> Only 20% of the population trusts Congress. 52% of the non-poor population and 44% of the poor segments believe politicians responds to their own interests and to those of the richest groups. UNDP, *Indicadores de Gobernabilidad Democrática en Paraguay 2008*, at 43 and 46

<sup>32</sup> “[E]l Parlamento difícilmente funciona como representación de los actores sociales, sus miembros suben o se mantienen con esta lógica clientelar, y tienden a responder más bien a quienes financiaron sus campañas. La construcción de la gobernabilidad y la reducción de conflictos no pasan, pues, por acuerdos políticos públicos que satisfagan demandas y reivindicaciones colectivas, sino por acuerdos personales, privados, que apuntan a resolver conflictos de manera clientelar.” *Id.*, at 72

<sup>33</sup> *Id.*, at 71

*campesinos*, have found it difficult to find among existing party options one that can properly represent their interests in Congress.<sup>34</sup> Although there are some legislators concerned with landless groups' claims, their influence is far from being strong enough to alter the prevailing conservative forces in Congress.<sup>35</sup> Under these circumstances, it is not difficult to imagine how expropriation attempts and other relevant bills can be commonly frustrated. Even indigenous communities attempting to enforce Inter-American Court of Human Rights' judgments against Paraguay have found obstacles in getting expropriation laws passed in Congress.<sup>36</sup>

## II. *Responses to security concerns raised by land owners: land occupations*

On the whole, responses can be primarily characterized by its repressive and criminal nature.<sup>37</sup> Violent evictions, mass prosecutions and convictions, militarization of rural areas, and increase of criminal sanctions were among the answers to calls for security coming from landowners and soy producers. From 1990 to 2005, public forces executed 357 violent evictions and arrested 7.296 *campesinos* in connection with criminal proceedings opened for unlawful land

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<sup>34</sup> See e.g., Fogel, Ramón 2009 "El Gobierno Lugo, el Parlamento y los Movimientos Sociales" en OSAL (Buenos Aires: CLACSO) Año X, N° 25, abril. Fogel contends that "[e]ntre los partidos de izquierda y los socialdemócratas que participaron en las elecciones [los campesinos sin tierra, sin techos urbanos, trabajadores informales sindicalizados] no hallaron un partido que se identificara con sus intereses [...] en contraste con los agroexportadores y ganaderos que tenían para elegir potenciales aliados a liberales, ovidistas y patriaqueridistas." at 53

<sup>35</sup> A positive initiative in this regard is an investigation conducted by a group of legislators in 2004 to identify ill-gotten lands. ABC Color, November 6, 2004 "Identifican y denuncian a los que se adjudicaron tierras ilegalmente"

<sup>36</sup> ABC Color, 14 April 2010 "INDIGNO RECHAZO DE SENADORES Comunidad Yakye Axa, sin derecho a la tierra"

<sup>37</sup> See e.g., Juan Martens and Roque Orrego, 'Aumento del Uso del Sistema Penal para Perseguir a Organizaciones Sociales,' Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP-Paraguay) in Informe Anual de Derechos Humanos 2008, Coordinadora de Derechos Humanos Paraguay (CODEHUPY), at 174: "Es práctica del Ministerio Público judicializar o criminalizar las acciones de protesta o reivindicación que realizan las organizaciones sociales, iniciando procesos al margen de la ley o dictando órdenes de detención o solicitudes de prisión preventiva, contrariando las disposiciones constitucionales y procesales. De esta manera, buscan lograr la desmovilización de los grupos organizados e infundir miedo a quienes reclaman sus derechos. [...] Este hecho demuestra la incapacidad de que el Ministerio Público privilegie la acción tuitiva ante los sectores tradicionalmente vulnerados, a través del sistema de justicia, históricamente interferido por el poder político de los gobiernos colorados."

occupation.<sup>38</sup> The 1997 Criminal Code included violent and clandestine land occupation as a criminal offense with up to two years of prison or fine.<sup>39</sup> This provision has often been applied by public prosecutors in combination with other criminal offenses such as perturbation of public peace, criminal association, incitation to crime, and resistance.<sup>40</sup>

Occupations have been repelled by state agents, many times through a disproportionate use of force and without proper judicial orders. Evictions were at times done inhumanely. In some instances, *campesinos*' precarious homes were bulldozed and their possessions destroyed. In 2003, the executive authorized the intervention of the military to operate jointly with the police in response to 'citizens' growing concern over insecurity'<sup>41</sup> and, in 2004, it ordered the deployment of troops to rural areas, especially to those most affected by land occupations in order to 'preserve security and guarantee private property.'<sup>42</sup> In 2003, the executive also set up 'neighborhood security commissions' which actively operated in the poorest rural areas and were later on reported to be involved in abuses, such as house raids, arbitrary detentions, robberies, and ill-treatment.<sup>43</sup> In 2008, and as part of the amendments to the 1997 Criminal Code, penalties

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<sup>38</sup> Informe *Chokokue* sobre "Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005," 2007, Coordinadora de Derechos Humanos del Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas, at 10-11.

<sup>39</sup> Ley 1.160/97 "Código Penal." Artículo 142.- Invasión de inmueble ajeno: El que individualmente o en concierto con otras personas y sin consentimiento del titular ingresara con violencia o clandestinidad a un inmueble ajeno y se instalara en él, será castigado con pena privativa de libertad de hasta dos años o con multa.

<sup>40</sup> Criminal Code, Articles 234, 239, 237, and 296, respectively.

<sup>41</sup> Decreto 167/2003 "Por el cual se dispone la tarea conjunta de los Miembros de la Policía Nacional y Fuerzas Armadas de la Nación con la finalidad de garantizar la seguridad interna"

<sup>42</sup> ABC Color, Noviembre 5, 2004 "Ante sostenida ola de invasión de propiedades privadas despliegan tropas militares y policías en zonas rurales,"

<sup>43</sup> Decree 22.043 of August 14, 2003 by which the executive created the National Commission on Citizen Security whose aims included, among others, the implementation of neighborhood security commissions. These commissions were widely criticized by the press and civil society organizations. *See e.g.*, Amnesty International-Paraguay, which, on 26 June 2009, expressed: "Desde la instalación de las Comisiones Vecinales de Seguridad han existido denuncias relacionadas a agresiones, amenazas de muerte, actos de hostigamiento y homicidios cometidos por civiles armados contra miembros de organizaciones campesinas, dirigentes comunitarios y grupos indígenas en el contexto de conflictos sobre cuestiones sociales y agrarias" available at <http://www.py.amnesty.org/www/?q=node/267>. *See also* ABC Color, January 4, 2009: "La vigencia de la organización conocida como "comisión garrote" fue derogada por el decreto N° 1042 firmado por el presidente Fernando Lugo. Los llamados civiles armados fueron incentivados por el entonces ministro del Interior Rogelio Benítez (nicanorista), y han cometido torturas, asesinatos, coberturas a

for “invasion of private property” were increased up to five years of imprisonment in certain circumstances.<sup>44</sup>

### III. Responses to security concerns raised by campesinos: executions<sup>45</sup>

Neglect, mainly in the forms of lack of preventive measures and impunity, characterized state responses in this regard. From 1989 to 2005, seventy five *campesinos* were arbitrarily executed and two forcibly disappeared in the context of the struggle for the land. The poorest departments and the most affected by land disputes were, unsurprisingly, the ones with the highest numbers of victims. It has been demonstrated that 74 percent of the victims had links with some of the existing *campesino* organizations and that agriculture was the principal means of subsistence of all adult victims. Fifty three of them were killed by bands of professional murderers while twenty two were executed by the police either in their official capacity (during demonstrations, evictions, detentions) or outside their duties. Two victims died in state custody in connection with offenses linked to land disputes. In all the fifty three cases, the state did not comply with its duty to prevent these criminal actions<sup>46</sup> or to further investigate and sanction

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delincuentes y hasta cobraron supuestos servicios de seguridad a haciendas.” See also, “La ‘seguridad’ se convirtió en terror,” Informativo Campesino, Nro. 214. CDE, Centro de Documentación y Estudios, Asunción, Paraguay. Julio 2006, at 4.

<sup>44</sup> Ley 3.440/2008 “Que modifica varias Disposiciones de la Ley 1.160/97 ‘Código Penal’”: Artículo 142.- Invasión de inmueble ajeno. 1°.- El que individualmente o en concierto con otras personas, y sin consentimiento del titular, ingresara con violencia o clandestinidad a un inmueble ajeno, será castigado con pena privativa de libertad de hasta dos años o con multa. 2°.- Cuando la invasión en sentido del inciso anterior se realizara con el objeto de instalarse en él, la pena será privativa de libertad de hasta cinco años.”

<sup>45</sup> Data included in this sub-section has been obtained from Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005,” 2007, Coordinadora de Derechos Humanos de Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas.

<sup>46</sup> In three high-profile land conflicts (expropriation of lands of *Union Paraguaya S.A.*, *CIPASA* and *Alfa Inmobiliaria S.A.*), *campesino* organizations warned local authorities and the Ministry of Interior of the threats they were getting from criminal bands. Notwithstanding the calls for protection, no preventive action was taken. See Informe *Chokokue* sobre “Ejecuciones y desapariciones en la lucha por la tierra en el Paraguay, 1989-2005,” 2007, Coordinadora de Derechos Humanos del Paraguay, Informe presentado al Consejo de Derechos Humanos de Naciones Unidas, at 112

their authors.<sup>47</sup> The lack of adequate preventive measures to counteract the context of impunity in which murderers were operating shows a systematic disregard on the part of the state of its duties to prevent, protect and guarantee. Executions did not stop in 2005. They have continued over the consecutive years following the same impunity pattern.<sup>48</sup>

#### IV. *Responses to security concerns raised by campesinos: deaths by toxic agrochemicals*

Despite the rising number of deaths of members of *campesino* and indigenous communities and the persistent calls for effective regulation of toxic agrochemicals,<sup>49</sup> the former government did not adopt any effective measures. Moreover, save in few cases, proper criminal investigations were not even initiated.<sup>50</sup> The Committee on Economic, Social, and Cultural rights has urged the state “to adopt urgent measures to ensure that soybean cultivation does not undermine the ability of the population to exercise the rights recognized by the Covenant. Apart from ensuring compliance with laws on toxic agro-chemicals, the State party should establish an effective legal framework for protection against the use of toxic agro-chemicals and carry out effective and frequent inspections.”<sup>51</sup> In April 2005, a bill to regulate such use was introduced to the Chamber of Deputies at the initiative of various *campesino* and indigenous organizations. The bill, however, was never seriously debated and was finally rejected in September 2007.<sup>52</sup>

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<sup>47</sup> A total of sixty two criminal proceedings were initiated. In eighteen cases, no investigation whatsoever was carried out. In the remaining forty four cases, proceedings finalized through acquittals and extinction of criminal investigations. Only three resulted in convictions. *Id.*, at 126-127

<sup>48</sup> For example, during 2008-2009, nine arbitrary executions were registered. *See*, María José Duran Leite, “Persisten Asesinatos Selectivos y Ejecuciones en los Conflictos por el Acceso a la Tierra,” in Informe Anual de Derechos Humanos 2009, Coordinadora de Derechos Humanos de Paraguay (CODEHUPY): “La impunidad sistemática en las ejecuciones extrajudiciales tiene que ver sobre todo con predisposiciones sociales que históricamente han restado importancia a las víctimas cuando son campesinas y campesinos.” at 49 and 53.

<sup>49</sup> *See supra* note 21

<sup>50</sup> *See e.g.*, “Diez verdades en contra de la impunidad en el campo y un llamado a la paz,” Instituto de Estudios Comparados en Ciencias Sociales y Sociales (INECIP-Paraguay)

<sup>51</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations Paraguay, November 2007 at p. 6

<sup>52</sup> On September 7, 2007, *ABC Color*, reported: “De acuerdo con los hechos, los parlamentarios no pretendían discutir la propuesta, sino directamente votar, razón por la cual el debate fue corto, lo que confirma las predicciones de días anteriores, que no correría la propuesta presentada en mayo del 2005.” It was only in May 2009, under the

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In summary, landless groups' members seeking redress for historic inequalities have been systematic target of both public and private violence. Whether victims of excessive use of force on the part of the police, or victims of murder in the hands of private individuals, the state has largely failed to undertake protective action and conduct proper criminal investigations. Furthermore, the state has not given an effective and sustained answer to the background land concerns lying at the heart of the conflict. Thus, when it comes to unlawful land occupation, the response has generally been criminal proceedings, militarization and increase of criminal sanctions against unlawful occupiers.<sup>53</sup> When it comes to killings of *campesino* leaders or murderous use of agro toxics, state response has largely been non-protection and impunity. Does the fact that the interests of the vulnerable party have been commonly ignored or left largely unmet say something about the processes by which decisions concerning security in the context of this conflict were adopted? I take up this question in the section "Democratic Assessment".

### Criminalization

In 2006, amidst escalating unlawful occupations of rural lands, the president of the Rural Association of Paraguay called for the 'restoration of the rule of law' in the face of what could be 'crime disguised of social struggle.'<sup>54</sup> 'The Rural Association of Paraguay lacks moral authority to speak of legality since it has never taken a position against those of its members who have

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current administration, that a law was passed after very much controversy over the control and application of agrochemicals (Ley N° 3742/2009).

<sup>53</sup> This does not mean that privileged groups have found complete and effective response to their protection demands. The state has been generally been reproached by both parties for its absence and non-protection in conflict areas. On the whole, however, it can be said that *campesinos*' safety concerns have been disproportionately ignored compared to those of land owners and soy producers. Moreover, responses to the latter's concerns have often been undertaken without regard to *campesinos*' procedural (due process guarantees) and substantive rights (life, physical integrity).

<sup>54</sup> Diario 'La Nación' Julio 16, 2006

acquired property by illegal means,' responded the Secretary General of the *Mesa Coordinadora de Organizaciones Campesinas*, an umbrella organization representing landless groups.<sup>55</sup> This exchange clearly brings up some of the main issues I attempt to briefly examine in this part. In the next paragraphs, I first summarize the most salient features of unlawful property occupation.<sup>56</sup> Then, I explore possible grounds for its justification in certain cases. Finally, I make some concluding remarks on the implications that unlawful actions undertaken by landless groups may have for the rule of law and order more generally. The questions and arguments articulated in this section are rather exploratory and, as such, they are, of course, open to revision and refinement. They still need a great deal of fleshing out. For now, my intention is to simply open the door for discussions on possible forms of justification for illegal land occupation.

As noted above, unlawful land occupation has been the main protest strategy used by landless groups seeking redress for historical land injustice and unequal socio-economic conditions in Paraguay. Most of the time, it is used as a last and desperate resort to draw public attention, prompt political engagement, and press for legal changes. It ultimately pursues access to a means of subsistence from which these groups have been historically deprived: land. Illegal occupation in Paraguay must therefore be analyzed against the backdrop of structurally pervasive inequalities affecting the rural population and historic injustices concerning land distribution. The latter, as described earlier, has been for the most part the result of extended illegal exclusionary practices during the dictatorship which have, to a lesser extent, subsisted in democratic years.

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<sup>55</sup> Informativo Campesino, No. 214, Centro de Documentación y Estudios, Asunción, Paraguay. Julio 2006, at 17

<sup>56</sup> I attempt to delineate those aspects that most commonly cut across the majority of the cases of illegal property occupations. I acknowledge, however, the difficulties in outlining an all-encompassing descriptive account that comprehensively captures the variety of means employed in practice in land occupations and the diversity of claims made by different landless organizations. For example, a quick examination of the occupations that took place in the second half of 2004 shows that they were carried out to claim recovery of ill-gotten lands, to demand compliance with agreements reached with the executive, to request the removal from office of public officials, to require that a national plan on productive reactivation be put in place, and to stop the use of agro toxics.

Land occupation often brings disorderliness, especially, as a result of resistance to mass evictions. In many cases, it is carried out in a clandestine manner and, to a much lesser degree, through violent conduct that harms or is likely to harm persons or property.<sup>57</sup> Actions are normally undertaken with previous public warning but without singling out in advance any particular property since this would obviously ruin the strategy. Furthermore, they undeniably entail coercion, although not ‘naked coercion.’<sup>58</sup> Coercive methods are mostly supported by reasonable and just demands intended to gain empathy from as large an audience as possible. At the same time, unlawful land occupation evidently entails a breach of laws protecting private property and, therefore, an interference with the property rights of others. Some legal consequences must then follow for law offenders (i.e., evictions surrounded by proper procedural safeguards). However, the crucial issue here is whether illegal land occupation, when carried out as a form of political protest by socio-economically disadvantaged segments against an unjust land regime, should be regarded as an ordinary criminal offense or exempted from criminal sanction.

The provided description shows that many cases of illegal occupations may meet the characteristics offered as essential to acts of justifiable civil disobedience: conscious illegal public actions undertaken to bring about changes of laws and policies deemed contrary to basic rights. When setting out what seems to be reasonable conditions for engaging in civil

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<sup>57</sup> Some might reasonably argue that occupation of private property through clandestine trespassing may *per se* be violent since it threatens ownership and limits owner’s control over her property, even when no physical violence is employed against her or no physical damage is made to her property. There is, undoubtedly, a problem in outlining an appropriate notion of violence. I am using more of a commonsense understanding, which includes the likelihood of causing injury as the main criterion. The wording of the Paraguayan Criminal Code seems to confirm this notion by differentiating violent from clandestine occupation. Having said this, I must, however, acknowledge that there have been instances of violent occupations in which *campesinos* allegedly damaged property like farm tractors or injured the personnel working at the ranch.

<sup>58</sup> John Morreall, “The Justifiability of Violent Civil Disobedience,” in Bedau, Hugo A. ed., *CIVIL DISOBEDIENCE IN FOCUS* (Routledge, London 1991), at 137. Morreall argues that “[i]f people are presenting their demands not as reasonable and just, but simply as *demands* [...] then we say that these people are trying to *impose* their will on everyone else. The unacceptability of such ‘naked coercion’ is obvious.”



disobedience, Rawls contends that the violation of the principle of equal liberty is the more appropriate object of civil disobedience.<sup>59</sup> I believe the liberal account of disobedience provides room for possible justification of those cases of unlawful land occupation undertaken by groups subject to conditions of deep socio-economic inequalities against policies cast as contrary to the basic principle of equality. In effect, the social- and economic-based exclusion to which landless groups have been historically subject may call into question their status of full equal citizenship and, in this sense, unlawful land occupation might then be viewed as a way to demand inclusion in the equal citizenship status.

There are, nonetheless, some legitimate objections that may be raised as to the civilly disobedient nature of such land occupations. Interference with the rights of others is probably the most salient of these objections. On the liberal account, ‘any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one’s act.’<sup>60</sup> There is no doubt illegal occupations represent a clear interference with property rights of others and, not only a temporary restriction, but a possible elimination of these rights since *campesinos* normally seek to win definite possession of the occupied property. Occupations generally challenge owners’ entitlement to property rights. This is due, in part, to the fact that these rights have in many instances been acquired as a result of illegal policies and practices *campesinos* precisely protest against.<sup>61</sup> In these cases, there is therefore an obvious connection between the property rights infringed by unlawful occupations and the unjust policies or practices sustaining those rights, from which they in fact originate. In this way, infringing the rights of others is essential to bring

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<sup>59</sup> John Rawls, *A THEORY OF JUSTICE* (Revised Edition) (Cambridge, MA: Harvard University Press, 1971), at 327

<sup>60</sup> *Id.*, at 321

<sup>61</sup> There are, of course, cases in which occupations are not exactly aimed at recovering illegally-obtained property. *Campesinos* have been many times accused of occupying legally acquired lands and rationally exploited property. I leave these cases out of the justificatory scheme. I attempt to explore such scheme only for occupations of ill-gotten lands or unproductive *latifundios*.

the underlying injustice to light. *Campesinos* also occupy what they believe are non-rationally exploited *latifundios* whose elimination has not been sought by the government despite constitutional provisions establishing so. Could this also clear the civilly disobedient quality of the act? It goes without saying that justifying unlawful occupation in certain circumstances by no means implies giving *carte blanche* to *campesinos* to take justice into their own hands and simply take over occupied lands even if they are known to have been illegally acquired or non-rationally exploited. Land occupation should remain an act of protest limited to draw public attention to the unequal treatment illegal occupiers are subject to and to mobilize the sense of justice of the majority. Consequently, if there is some sense of justice underlying the society, legal procedures to recover ill-gotten lands (or to reduce the number of unproductive *latifundios*) should follow and criminalization of land occupation in such circumstances should be seriously questioned. Substantive land demands should also be met to the largest extent possible, through proper political and legal channels. In short, it does not seem unreasonable to argue that the above-mentioned circumstances need to be brought into the equation when applying criminal sanctions to illegal occupiers. This may sometimes lead to an exemption from criminal sanctions and others to more nuanced and fair approaches in the application of criminal laws.<sup>62</sup>

Finally, what do this all mean for the legal and political order more generally? Some may argue that when it comes to fragile democratic legal orders, such as the Paraguayan, these illegal shocks carrying disorder and lawlessness would probably not do any favor but, to the contrary, erode or damage the rule of law and the more or less well-functioning democratic arrangements upon which the system fragilely rests. Some may also reasonably worry about the implications

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<sup>62</sup> Attempts to justify unlawful protests led by excluded groups in other contexts have already been advanced in the region. For one of the most prominent justifications, see Roberto Gargarella, *EL DERECHO A LA PROTESTA: EL PRIMER DERECHO*, Ad-Hoc, Buenos Aires, Argentina, Abril 2005. Gargarella justifies violent illegal protests in Argentina by reference to theories of resistance to authority.

unlawful occupation may have for the private property regime more generally.<sup>63</sup> At first, one might tend to think that protests of this nature would indeed disservice the weak democratic order and rule of law. Further thoughts, however, may legitimately leave one wondering whether order is in fact worthy of preservation when is founded in the material deprivation of important segments of the population and disregard for their basic rights.<sup>64</sup> Furthermore, those left in deprivation would probably lack the political power to mount a challenge to the underlying basis of such order. So the question is whether the state can simply focus on restoring factual and legal order while overlooking the involved rights at stake and ignoring the complex and pressing problems that lie beneath disorder. This is even more problematic when the state is found to be in breach of the law in the first place. Can the state under such circumstances acceptably claim to be acting in accordance with the law or reinstating the rule of law? The legality of great part of the land regime in Paraguay has been widely questioned over the last years. It was clear that the beneficiaries of the three main legal instruments stipulating agrarian reforms (Agrarian Statutes of 1940, 1963 and 2001) were *campesinos* without land. In spite of this, 64.1 percent of the lands were adjudicated to individuals who did not qualify as beneficiaries by the law. This confronts us with a situation in which the government was in a state of illegality before landless groups disregarded the law themselves. The latter might be said rather a consequence of the state's failure to guarantee basic rights.

In short, when it comes to maintaining legal or factual order in circumstances such as the one herein addressed, the state should look at the broader context in which disorder and law violation take place and identify the variety and complexity of factors at play as well as the various rights at stake. Disorder and unlawfulness associated with complex social problems can

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<sup>63</sup> I thank Roberto Gargarella for suggesting that I considered these issues.

<sup>64</sup> Again, I thank Roberto Gargarella for pointing this out to me.

only be properly tackled through comprehensive measures that address the multiple facets of such problems rather than through simplistic punitive approaches that are likely to further reproduce and accentuate social stratification.

### Democratic Assessment

The analysis of the state responses to the safety concerns raised by those involved in the land conflict brings us back to the familiar connections of democracy with ideas of inclusion and equality. I first address these connections by reference to the deliberative theory of democracy and I then attempt to critically examine the Paraguayan case in light of this model's defining ideals.<sup>65</sup>

Despite its multiple versions, deliberative democracy main proponents seem to agree 'that the notion includes collective decision-making with the participation of all who will be affected by the decision or their representatives.'<sup>66</sup> In addition to this democratic part, proponents appear to agree on a deliberative aspect that refers to 'decision-making by means of argument *by* and *to* participants who are committed to the values of rationality and impartiality.'<sup>67</sup> Although some of its formulations have been criticized and refined in an attempt to accommodate other

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<sup>65</sup> As I pointed in the introduction, this analysis has been conducted more broadly and in different contexts by other authors in the region. See *supra* note 2. I herein conduct a similar exercise in the Paraguayan context and attempt to make the case for a substantive conception of equality required by democracy in contexts such as the Paraguayan.

<sup>66</sup> Jon Elster, Introduction, in *DELIBERATIVE DEMOCRACY* (Jon Elster *ed.*) (Cambridge University Press, 1998) at 8 Elster distinguishes the democratic part from the deliberative one. See also, Amy Gutmann and Dennis Thompson, *WHY DELIBERATIVE DEMOCRACY?* (Princeton University Press, 2004) Gutmann and Thompson argue that '[w]hat makes deliberative democracy democratic is an expansive definition of who is included in the process of deliberation – an inclusive answer to the questions of who has the right (and effective opportunity) to deliberate or choose the deliberators, and to whom do deliberators owe their justifications.' at 9.

<sup>67</sup> *Id.*

forms of political communication,<sup>68</sup> the requirement of inclusiveness, along with public deliberation, has been nonetheless regarded as essential by its most influential voices. In this part, I focus on the democratic requirement of inclusiveness and on its closely connected idea of equality.

As some deliberative democrats note, democratic legitimacy has increasingly ‘come to be seen in terms of the ability and opportunity to participate in effective deliberation on the part of those subject to collective decisions.’<sup>69</sup> So the basic idea behind the model of deliberative democracy is that norms should be agreed by *all* those affected by them. This means that when citizens relevantly affected by certain decisions are excluded from the public dialogue from which those decisions originate, the democratic legitimacy of the latter can undeniably be called into question. Inclusion is therefore a crucial test when examining the democratic legitimacy of norms or collective arrangements.<sup>70</sup>

Exclusion, almost needless to say, can be associated with formal or material barriers, or both.<sup>71</sup> The latter is perhaps most familiar in Latin America, a region generally known for the politically exclusionary or unequal effects of its extended socio-economic disadvantages.<sup>72</sup> In view of this extremely unequal socio-economic context, inquiring the precise understanding of

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<sup>68</sup> For an example of interesting criticism of deliberative norms defining what counts as proper deliberation, *see e.g.*, Iris Marion Young, “Activist Challenges to Deliberative Democracy,” *Political Theory*, October 2001.

<sup>69</sup> John S. Dryzek, *DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS* (Oxford University Press 2000) at 1.

<sup>70</sup> *See generally*, Gargarella, *supra* note 2 and also “Human Rights, International Courts and Deliberative Democracy” available at <http://www1.lanic.utexas.edu/project/etext/llilas/vrp/gargarella.pdf>

<sup>71</sup> “Exclusion can be formal, as with slavery, or it may be subtle, as when individuals who possess formal democratic rights do not speak out because of their economic circumstances, social biases against them, fear of reprisal, or lack of opportunity...” Melissa S. Williams and Stephen Macedo, Introduction in *NOMOS XLVI POLITICAL EXCLUSION AND DOMINATION* (Melissa S. Williams and Stephen Macedo *eds.*, New York University, 2005) at 17

<sup>72</sup> “For, as long as data on living standards have been available, Latin American has been one of the regions of the world with the greatest inequality. With the possible exception of Sub-Saharan Africa, this is true with regard to almost every conceivable indicator, from income and consumption expenditures to measures of political influence and voice, and including most aspects of health and education.” David de Ferranti et al., *INEQUALITY IN LATIN AMERICA: BREAKING WITH HISTORY?* The World Bank, 2004

equality required by democracy in general and by deliberative democracy in particular seems almost inevitable. The degree of complexity of this relationship is such that it results obviously impossible to address it at length in this paper in a way that does justice to relevant theoretical debates. However, suffice it to note that some prominent voices of deliberative democracy seem to agree that equality involves both formal and substantive requirements in order to sustain the deliberative democratic ideal. For Nino, for example, the justification of deliberative democracy ‘requires equal participation of those affected by the decisions.’<sup>73</sup> This involves not only ‘equal vote and voice but also the pre-conditions for such equality to be substantive and not merely formal.’<sup>74</sup> For his part, Joshua Cohen emphasizes that participants should ‘regard one another as formally and substantively equal.’<sup>75</sup> Other theorists similarly call attention to the importance of the substantive dimension of political equality. For some of them, deliberative democracy requires ‘equality of effective social freedom, understood as equal capability for public functioning.’<sup>76</sup> For others, a central feature of deliberative democracy is ‘equal opportunity of political influence,’<sup>77</sup> which, in one sense, ‘requires that asymmetries not give unfair advantage

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<sup>73</sup> Carlos Santiago Nino, *LA CONSTITUCIÓN DE LA DEMOCRACIA DELIBERATIVA*, Gedisa Editorial 1997, at 93. Translation is mine.

<sup>74</sup> *Id.* Translation is mine.

<sup>75</sup> Joshua Cohen, “Democracy and Liberty” in *DELIBERATIVE DEMOCRACY* (Jon Elster *ed.*) (Cambridge University Press, 1998) at 194 Cohen argues that “[t]he participants are substantively equal in that the existing distribution of power and resources does not shape their chances to contribute to the deliberation, nor does that distribution play an authoritative role in their deliberation.” *Id.*

<sup>76</sup> James Bohman, “Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities” in *DELIBERATIVE DEMOCRACY* (James Bohman and William Rehg eds.) (The MIT Press, Cambridge, MA 1997) at 322 As Knight and Johnson explain, “Bohman [...] develops a capacities-based conception of political equality that retains the spirit of Sen’s argument, but advances a different conception of ‘effective freedom.’ Bohman’s conception of deliberative equality is primarily concerned with the capacities relevant to participation in a deliberative process [...] He justifies this focus on grounds similar to Sen: that equality of resources is an insufficient remedy for deficiencies in effective participation because people differ in the capacities necessary to use available resources effectively.” Jack Night and James Johnson “What Sort of Political Equality Does Deliberative Democracy Require?” in *DELIBERATIVE DEMOCRACY* (James Bohman and William Rehg eds.) (The MIT Press, Cambridge, MA 1997) at 297 and 298

<sup>77</sup> Jack Night and James Johnson “What Sort of Political Equality Does Deliberative Democracy Require?” in *DELIBERATIVE DEMOCRACY* (James Bohman and William Rehg eds.) (The MIT Press, Cambridge, MA 1997) at 292

to participants’ and, in a second sense, ‘that asymmetries not place anyone in a position of unfair disadvantage.’<sup>78</sup>

In an attempt to address the connections between equality and democracy more generally, Robert Post has argued that what the logic of democratic legitimacy requires is ‘that citizens be treated equally with respect to the requirements of autonomous participation in the formation of public opinion.’<sup>79</sup> He believes that if democracy is understood ‘to rest fundamentally on a commitment to collective self-determination, it requires only those forms of equal citizenship that are necessary for the project of collective self-determination to succeed.’<sup>80</sup> Although this can be experienced as ‘thin and formal’<sup>81</sup> Post admits, however, that ‘[s]trong egalitarian principles may, in particular circumstances, have significant democracy-reinforcing effects.’<sup>82</sup> These circumstances include those in which citizens experience inequalities as alienating and can no longer identify with the state.<sup>83</sup>

Drawing on Post’s arguments, one can say that conditions of entrenched and extreme socio-economic inequalities can certainly alienate certain groups from participating in public

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<sup>78</sup> *Id.*, at 293

<sup>79</sup> Robert Post, “Democracy and Equality,” SELA 2004 at 12

<sup>80</sup> *Id.*, at 13 Post thinks it ‘preferable to say that the value of self-government requires that a people have the warranted conviction that they are engaged in the process of governing themselves. The distinction is crucial, for it emphasizes the difference between making particular decisions and recognizing particular decisions as one’s own. Self-government is about the authorship of decisions, not about making of decisions.’ *Id.*, at 3 Post asks himself how citizens recognize collective decisions as their own in increasingly heterogeneous societies. He believes that in order for citizens to experience the government as their own, they must be free to participate in the communicative process by which public opinion is formed. *Id.*, at 5 Equality of participation in public discourse, in his view, is thus measured ‘in terms of a freedom to participate in public discourse.’ *Id.*, at 8

<sup>81</sup> *Id.*, at 15 Post argues that “whereas democracy affirmatively requires that citizens be treated as equal with regard to the dimensions of their autonomous agency relevant for democratic legitimation, it contains no such requirement with regard to other inequalities. Democracy requires only that inequities that undermine democratic legitimacy be ameliorated. It does not require this for reasons of fairness or distributive justice, or because of any philosophic commitments that stand outside of democratic debate and decision-making, but simply because such inequities undermine democratic legitimacy.”

<sup>82</sup> *Id.*, at 14

<sup>83</sup> *Id.*, at 15-16: “[S]trong egalitarian principles can establish a dynamic and dialectical relationship to democracy. As these principles become politically salient, as they make inequities visible and oppressive, as they prompt citizens to experience these inequities as alienating, they prepare the way for the eventual emergence of democracy-based arguments for the amelioration of these inequities.”

discourse as they reduce their autonomous capacity to effectively do so and, ultimately, their possibility of recognizing the resulting decisions as their own. One can furthermore say that, under these conditions, only more demanding ideas of equality can serve democratic legitimacy properly. Therefore, in asking about equality in contextual circumstances such as those of Paraguay, one needs to keep an eye on a more robust idea of equality that may require amelioration of the profound material disadvantages operating in the background, if we are to sustain the democratic legitimacy of the political processes.

A closer look at the state responses to the safety concerns of the parties involved in the land conflict in Paraguay shows almost systematic disregard for the demands posed by the most vulnerable party. Political outcomes regularly disfavoring the underprivileged can let us reasonably suspect that there are serious disadvantages in the political process causing their consistent defeat. Moreover, in socio-economic contexts such as the one here addressed, it does not seem much difficult to link these political disadvantages with the multiple and mutually reinforcing inequalities at work in the background. My general conclusion is therefore that exclusion (or under-inclusion) and subsequent non-consideration (or under-consideration) of landless groups' viewpoints in the security public discourse seriously undermined the democratic process and its resulting outcomes.

### Implications

Security-wise, what could have been the main implications of systematic political disadvantage in the case herein examined? First, exclusion probably meant that *campesinos'* safety demands went unaccounted for in the political process. Second, and given that these demands were possibly left unattended as a consequence, *campesinos* were left completely or



partially unprotected. Regular unresponsiveness to their calls for protection from threats and attacks against their life and physical integrity (coming either from executions or fumigations) seems to show that this was presumably the case.

There is, yet, another way in which the profound asymmetries in economic power featuring in the background could have had a serious impact in this particular case. The other party's vastly superior economic power (and its presumably greater capacity to feature predominantly in public discourse) probably meant the obstruction in the public agenda of certain issues viewed as potentially detrimental to their interests but nonetheless fundamental for *campesinos'* safety (laws regulating the use of agrochemicals). At the same time, and when coupled with the weakness of *campesinos* in the political process, the political power of the most privileged could have meant the advancement of measures seen as protective to their interests but prejudicial to the safety (and basic rights) of the vulnerable opposite party (e.g., militarization, neighborhood security commissions, more severe penalties for unlawful land occupation).

This dynamics could probably help understand both non-protection and simultaneous severe criminal persecution of *campesinos* involved in the land struggle. Non-protection may be explained by their political incapacity to bring up the matter in the public debate and/or to the counterparties' predominant power to exclude it from the agenda. Persecution, in turn, may be explained by their political inability to counteract the arguments advanced by those who sought to portray them as 'simple criminals' and protect themselves against offenses *campesinos* were seen as likely to commit. Breaking with this pernicious dynamics (and limiting its possible unfair consequences) may require in certain cases setting 'a floor of civil equality' and, at the same

time, ‘a ceiling for too much agency freedom.’<sup>84</sup> Otherwise, public discourse on security and its resulting responses would be likely to be one-sided.

Can we draw more general conclusions from this case-study, applicable in broader contexts of insecurity and crime? Some may argue that these conclusions might make sense in the context of some specific conflicts with more or less delineated features involving clearly unequal parties but might not be similarly valid in broader and more complex contexts of insecurity associated with crime more generally. I obviously share these concerns. I, nonetheless, suspect that this dynamics may not be completely foreign to broader contexts of insecurity. A recent study on security and crime conducted in Paraguay has shown that “discourse that plays on security concerns to characterize alternative plans for reform as promoting the interests of criminality and wrongdoers [...] often targets and stigmatizes the portions of society that are perceived as more prone to commit crime.”<sup>85</sup> The study contends that, “[j]ust as increased media attention to crime can paradoxically remove crimes affecting poorer communities from the public view, this public rhetoric can marginalize low-income communities in the political debate.”<sup>86</sup> In this way, the report concludes “large segments of Paraguayan society—those that suffer most from the lack of personal security— [can be left] outside the political debates concerning crime control policy.”<sup>87</sup>

In sum, when, on one side, the arguments of the most privileged vastly dominate the security public discourse while, on the other, the counter-arguments of the weakest cannot even

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<sup>84</sup> James Bohman, “Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities” in *DELIBERATIVE DEMOCRACY* (James Bohman and William Rehg *eds.*) (The MIT Press, Cambridge, MA 1997) at 339 Boham points out that “[t]he possibility that some groups are so impoverished as to be excluded sets a “floor” of civil equality; the possibility that some groups are so powerful that they can limit the set of feasible alternatives in advance of deliberation sets a “ceiling” for too much agency freedom.”

<sup>85</sup> Harvard Law School, International Human Rights Clinic, “Security in Paraguay: Analysis and Responses in Comparative Perspective”, Cambridge, MA, May 2007, at 71-72.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

cross its doors, the potential loss of the democratic legitimacy of the resulting decisions and their possible unfair consequences for the most marginalized are significantly serious to urgently call for inequality ameliorations in the name of democracy and fairness.

### Conclusions

What I have tried to suggest in the argument elaborated through the lenses of this particular case-study is that, in articulating security responses, governments have to pay special consideration that political advantages and disadvantages resulting from serious socio-economic disparities do not translate into protection for the included and non-protection plus persecution for the excluded. The responses or (un-responses) to the security concerns that came to be associated with the land conflict in Paraguay can probably help understand how political disadvantage of the unprivileged possibly turned into their exclusion (or under-inclusion) from state protection and, at the same time, how political advantage of the most privileged probably led to their inclusion in state protection policies, sometimes by targeting and persecuting those who were perceived as threatening their security.