

Global governance/politics, climate justice & agrarian/social justice: linkages and challenges

An international colloquium
4-5 February 2016

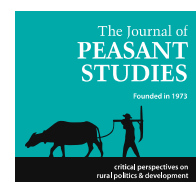
Colloquium Paper No. 19

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security in Colombia: *Towards democratic land-based resource control*

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International Institute of Social Studies (ISS)
Kortenaerkade 12, 2518AX
The Hague, The Netherlands

Organized jointly by:



ECOFAIR TRADE DIALOGUE

With funding assistance from:



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February, 2016

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[DRAFT] The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security in Colombia: *Towards democratic land-based resource control*

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Highlights of the Report

- The Voluntary Guidelines or Tenure Guidelines (TGs) are an important instrument rooted in international human rights law designed to benefit vulnerable and marginalized people with the goals of food security and the realization of democratic land access.
- In Colombia, there is an urgent need for both state and societal actors to use the TGs in cases where:
 - Rural poor people have existing access to land, but that land is threatened: **the need to protect existing access and tenure rights of the most vulnerable and marginalized people;**
 - Rural poor people do not have access to land: **the need to promote equitable and democratic redistributive reforms;**
 - Rural poor people do not have current access to land because they were displaced earlier: **the need to restore tenure rights and land access.**
- The TGs can fill policy gaps, strengthen, and reinforce policy objectives, existing policies or point to existing contradictions, but their ability to promote democratic land control is based on how, by whom, and for what purposes they are used.
 - In this regard it is important and necessary to always use the TGs to benefit vulnerable and marginalized people with the principles of democratic land access and control (Article 1.1).
- This report highlights three main issues fundamental to the Colombia peace process, rural social justice, and food security:
 - The TGs as a means to increase the recognition and protection of tenure rights for indigenous and afro-descendant territories, peasant reservation zones, national parks and forests;
 - The TGs as a means to strengthen and fill the gaps in Colombia's policies to promote redistribution, such as the market-led land reform programme;
 - The TGs as a means to strengthen Colombia's land restitution process and defend the rights of victims who have been affected by the armed conflict.
- Based on binding international human rights obligations, the TGs offer a powerful instrument for holding states accountable to their existing commitments around tenure, environmental and human rights.
- Effective use of the TGs requires inclusive and participatory spaces for engagement on multiple levels (national, regional, local) and with multiple state and societal actors to discuss policy-making, implementation, and accountability mechanisms.
- The voluntary nature of the guidelines can limit their effectiveness if they become interpreted as 'just another corporate social responsibility discourse'. It is therefore necessary to emphasize the existing human rights obligations embedded within the TG framework which increases their legitimacy and offers more leverage for accountability.
- As a policy instrument, interpretation of the TGs can become highly contested and therefore dangerous if they are used to legitimize forms of exclusion and dispossession of marginalized groups. We identify three broad political tendencies which are important to recognize when using the TGs:
 - Tendency 1: Using the TGs to facilitate or promote market-based approaches for tenure rights transfers and/or land-based resource deals;
 - Tendency 2: Using the TGs to mitigate adverse socio-economic, political and environmental impacts and to maximize opportunities for tenure rights transfers and/or land-based resource deals;

- Tendency 3: Using the TGs to stop and rollback violations of tenure rights and land-based resource deals.
- Only tendency 3 will work to resolve problems of tenure security and unequal resource access by prohibiting tenure rights violations and rolling back historically-based resource access injustices.
- The FAO should take the lead role in ‘Colombianizing’ the TGs, meaning:
 - Organizing and carrying out workshops at local, regional, and national levels with civil society organizations – in particular with indigenous organizations, Afro-descendant organizations and with peasant and small-scale farmer organizations;
 - Offering local/community-based organizations the necessary training for actually using the TGs as an instrument to strengthen their claims to access and control of resources. Specific and thematic workshops should be offered with a very accessible handbook on using the TGs as well as spaces where different local organizations can exchange their experiences;
 - Facilitating participatory spaces for individuals and organizations within the state and society to interact, discuss, and interpret the TGs and how they can be used to benefit the most vulnerable and marginalized peoples in society and democratize access and control over land and resources.
- Accountability mechanisms are vital:
 - We recommend a cross-cutting dimension of accountability called ‘transversal’ accountability whereby public oversight agencies bring together state and societal actors to engage in an inclusive and participatory way to design, use, implement, and monitor the use of the TGs for more democratic land access.

Introduction

Access and control over land and natural resources¹ remains one of the most important, albeit contentious, issues in the world today. In Colombia, much like the rest of Latin America, the struggle over land access and control has been one of, if not *the* most significant issue plaguing the country with continuous violent conflict, displacement and structural poverty. In the current context of a ‘rising global interest in farmland’ and particularly the increasing concentration of land control, democratizing land access is more urgent than ever if problems of rural poverty, hunger, displacement and violence are to be resolved (see World Bank 2011, FAO 2012, Borras et al. 2012). The increasing pressure on land, natural resources, and most importantly rural working people who depend on the land for their livelihood has prompted international organizations to establish global governance instruments as guidelines for dealing with contemporary land grabbing². Evidently, various state, social, and international actors view these new large-scale investments differently – as both opportunities for economic development and growth and as threatening the rural working majority and the natural environment for which they depend. Contingent on these viewpoints, global governance instruments to deal with land grabbing vary from those based on corporate social responsibility (CSR) initiatives or ‘codes of conduct’ (see von Braun and Meinzen-Dick, 2009; and for a critique see Borras and Franco, 2010) to inclusive and participatory inter-governmental frameworks based in human rights law such as the Food and Agriculture Organization’s (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (hereafter Tenure Guidelines or TGs).

These instruments are designed with underlying political tendencies which we could broadly group as (1) those which regulate in order to facilitate land deals; (2) those which regulate in order to mitigate adverse impacts and maximize opportunities of land deals; and (3) those which regulate to stop and rollback land deals (Borras et al., 2013). Global governance instruments are indeed *instruments* – they depend on how, by whom, where, why, and for what purposes they are used. Some instruments could potentially be used for all three outcomes, while others are restricted due to their initial design and objectives. As Franco (2008) points out, laws and policies do not self-interpret or self-implement; they are shaped, interpreted and implemented according to the very political interactions between state and societal actors.

In this paper, we will critically analyze the possibilities and limitations of the FAO’s Tenure Guidelines in order to advance democratic land control and access in Colombia. This global governance instrument was negotiated over several years with participation and endorsement of the 125 member countries of the Committee on World Food Security (CFS) as well as actors from the private sector, civil society organizations, and academia and is thought to be “one of the most democratic institutional frameworks for global decision-making for international agreements ever” (Seufert, 2013:184). The main objectives of the guidelines are to “improve governance of tenure of land, fisheries and forest...with an emphasis on vulnerable and marginalized people, with the goals of food security and progressive realization of the right to adequate food, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection and sustainable social and economic development” (FAO, 2012:1). Though ‘voluntary’ in nature, the Tenure Guidelines are based on binding international human rights obligations related to land and natural resources, equipping them with more political weight and thus leverage in the context of international law (Seufert, 2013:182).

In the Colombian context, the level of urgency and necessity for democratic land control could not be any greater. Contestation around land, natural resources, and territorial control lies at the heart of the

¹ Throughout this report we use the term land and/or natural resources to refer to land, forests, fisheries and other associated natural resources for which people depend to support their livelihood.

² Most prominently, these include the World Bank’s ‘Principles for Responsible Agricultural Investment’ (PRAI); IFPRI’s ‘Code of Conduct’; the International Land Coalition’s ‘Tirana Declaration’; the UN Right to Food Special Rapporteur’s ‘Minimum Human Rights Principles’; the UN ‘Guiding Principles on Business and Human Rights (Ruggie Principles)’; and the Food and Agriculture Organization’s ‘Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security’.

ongoing armed conflict. As formal negotiations for a peace process continue between the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, FARC) and the Colombian government in Havana, Cuba, democratizing land access and control remains a most critical aspect of the process.³ It underlies many of the points of negotiation itself – specifically concerning land reform, political participation, end of conflict, and the rights of victims. Democratizing land access and control is much more than simply a type of land reform or restitution, it requires reforming institutional structures which have historically excluded and marginalized the rural majority. It requires respecting democratic human rights, particularly the right to security of the person, the right to civic engagement, the right to food, the right to restitution, rights of indigenous peoples and the right to adequate housing. Some of these rights overlap, intersect and necessitate land and natural resource access; and all constitute the underlying principles of the Tenure Guidelines.

It is important to distinguish between human rights and other rights such as property rights, but also important to recognize the intersections between existing human rights and the human right to land. While rights-based legislation is exclusive and non-universal, human rights are universal and represent ethical and moral values inherent to human beings without any discrimination. Instead of entrusting the market to allocate land and resource access most efficiently and effectively, a human right to land would make it obligatory for states to “respect and not destroy this existing access to land; to protect existing access to land from interferences of third parties; and to fulfill and facilitate getting access to land for all those who do not have it and depend on it for their living” (Monsalve Suarez 2013, 241). Domestic legislation would therefore have to be in compliance with such a right, empowering and entitling landless people who depend on access to land for their livelihood, yet are continually excluded due to market-oriented approaches which often perpetuate existing inequalities, exclusion, and marginalization of the poor. As Monsalve puts it, “A human right to land would address existing gaps in recognition and protection of land rights according to the state’s obligation” (2013, 242). While a human right to land would be a significant achievement for democratizing land access, the FAO’s Tenure Guidelines offer an instrument based in human rights law which can be used in order to meet some of these same objectives. Similar to other legal instruments, it is about *how*, by *whom*, and for *what purposes* the TGs are put to use.

The former UN Special Rapporteur on the Right to Food, Olivier de Schutter, and the former UN Special Rapporteur on the Right to Housing, Miloon Kothari, have both called for the recognition of land as a human right (De Schutter 2010, Kothari 2007). For those who depend on land and other natural resources for their subsistence, being deprived of this access would restrict their enjoyment of the right to food (De Schutter 2010, 334). Further, where land ownership is highly concentrated with widespread landlessness and poverty, as is the case in Colombia, the need for land redistribution in order to provide people with an adequate standard of living is a human rights obligation (De Schutter 2010, 334). The Right to Adequate Housing also includes land as a necessary entitlement, stating that “Access to land can constitute a fundamental element of the realization of the right to adequate housing, notably in rural areas or for indigenous peoples” (OHCHR 2009,8). Currently, a draft Declaration on the rights of peasants and other people working in rural areas is in negotiation, which includes the right to land and would certainly be a great advance for the human right to land. As Gilbert puts it, “it is paradoxical, however, that notwithstanding the increasingly accepted perception that the realization of two fundamental human rights (food and housing) rely on the protection of the right to land, this right is not considered fundamental, as it is not to be found anywhere in international treaties...” (2013, 129). The Tenure Guidelines are an important instrument in this regard as they create a strong link between land and natural resource access and human rights, giving leverage and much more legitimacy to those struggling for rural social justice and democratic land control.

Our task at hand here is to critically analyze the possibilities and limits of mobilizing the TGs in order to advance democratic land control in Colombia. To do so, we will focus on three differentiated, yet very relevant, political settings around land control and access:

³ Separate exploratory talks for peace with the National Liberation Movements (Ejército de Liberación Nacional, ELN) are also ongoing.

1. **Where rural poor people have existing access to land but that access is threatened**
 - a. The need to *protect* existing access
2. **Where rural poor people do not have access to land**
 - a. The need to *promote* redistributive reforms
3. **Where rural poor people do not have current access to land because they were displaced earlier**
 - a. The need for *restitution*.

These three settings enable us to engage with the key land policies that can help ensure democratic land control, namely, the protection of existing democratic land access and control; the promotion of democratic redistribution of land control; and the democratic restitution for those who have been displaced – in other words to *protect, promote, restore* (Franco et al., 2015)⁴. These three key principles are found primarily in Articles 7, 8, 9, 14, and 15 of the TGs and are grounded in various human rights declarations and treaties’, rendering the TGs a potentially very powerful instrument in the pursuit of democratic land control. These include, but are not limited to, the following:

- Article 11 of the International Covenant on Economic, Social and Cultural Rights (pertaining to the right to food and other associate rights⁵);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The United Nations Declaration on the Rights of Indigenous People (UNDRIP);
- The Pinheiro “Principles on housing and property restitution for refugees and displaced persons” (“Pinheiro Principles”);
- The United Nations “Basic Principles and Guidelines on Development-based Evictions and Displacement”; and of course,
- The Universal Declaration of Human Rights (UDHR).

In the Colombian context, the use of human rights laws are particularly relevant and important since those with existing land access are constantly threatened by violence and conflict; land reform has been highly ineffective as ownership remains extremely concentrated and unequal; and though the restitution process is underway, Colombia has the second highest number of internally displaced people in the world.

The remainder of this article will be structured as follows: the next (second) section provides a brief history of the development of Colombia’s agrarian structure and the ongoing armed conflict, rooted in the highly unequal control over land-based resources. In the third, fourth, and fifth sections we examine how the TGs can be used in the three different political settings: (1) in situations where there is a need to protect existing tenure rights that are threatened; (2) in situations where there is a need to promote redistribution of tenure rights due to high concentration; (3) and in situations where there is a need to restore legitimate tenure rights to those who have been displaced or dispossessed due to the ongoing armed conflict. We analyze existing policies and legal frameworks in the context of the protection, redistribution, and restitution of tenure rights to show how the TGs can be used to benefit marginalized groups and increase democratic land control. By stressing international declarations and human rights laws embedded within the TG framework, we attempt to show how, where, and to what extent the TGs can be leveraged to reinforce and address gaps and contradictions of existing institutions regarding resource tenure rights. The final section highlights the implications and recommendations for state actors, international institutions, such as the FAO, civil society organizations, and the research and academic community in using the TGs for more democratic land access and points to important accountability mechanisms which can improve the process of making rights real.

⁴ Franco et al., (forthcoming) include restitution in their notion of redistribution; we have focused on the issue of restitution separately in this paper since it is highly relevant and important in the Colombian case.

⁵ See Appendix 1

Colombia's Agrarian Structure: Land and Conflict

To understand the importance and urgency of promoting democratic land access and control and how the TGs can be used, by whom, where, and for what purposes requires engaging with the roots of Colombia's agrarian structure and ongoing armed conflict which remains centred in land access and territorial control. The widespread inequality, poverty, and insecurity that continues today are not new phenomena. They must be understood in historical context and the unequal relations of land-based wealth and power that have persisted since the colonial period. While it goes beyond the scope of this report to provide an in-depth historical analysis of these processes as others have done (Arango Restrepo 2014; Reyes Posada 2009; Berry 2002; Fajardo 2002; Machado, 1998; LeGrand 1988), it is necessary to provide some historical context in order to understand the roots of Colombia's agrarian problems today and the ongoing armed conflict linked to these processes. Recognizing the power imbalances that exist within rural societies and agrarian systems – between those who have access and control over not only land-based resources, but also political and economic resources and those who do not is fundamental in order to address such problems.

Colombia's unequal agrarian structure dates back to the colonial period and has persisted under a regime of large-scale landed elite turned rural capitalist entrepreneurs and cattle ranchers. In the early twentieth century, the landholding structure was characterized by small-scale land parcels in the Andean, coffee-producing region and large-scale extensions in the lowland valleys and plains. In the 1920s, foreign investments by corporations such as the Tropical Oil Company and the United Fruit Company (UFC), among others⁶ led to a new phase of land appropriation and increased resource concentration with North American investments in (agro)extractive industries increasing from just US\$4 million in 1913 to US\$250 million in 1929 (Fajardo, 1983: 32). This had a dramatic effect on real estate activity as property values surged and the landed elites scrambled for land titles which resulted in “a massive privatization of public lands” (LeGrand, 1984:183). Much of the land was appropriated by economically and politically-influential elites as many claims were falsified and extended beyond their original boundaries which illicitly incorporated large swaths of public lands into the private land market, some of which were then sold to the UFC for banana plantations (LeGrand, 1984:183-4). Due to the widespread privatization, many peasant squatters were evicted or forcibly displaced, which served the interests of corporations such as the UFC not only for expanded territorial control of land and other natural resources, but also as an abundant supply of cheap labour for their plantations. However, the increased land-based inequalities and poor labour conditions led to a culture of resistance among the newly aligned interests of displaced peasant and rural wage labourers (Fajardo, 2014:14; LeGrand, 1984). This came to a peak during the 1928 ‘banana massacre’ when over 30,000 people participated in a strike against the United Fruit Company over unjust labour conditions. Violence erupted as military forces were sent in to re-establish order, killing hundreds or even thousands⁷ of protestors and imprisoning those strike leaders who survived (Caro and Ortega, 2012; LeGrand, 1984).

The so-called ‘double crisis’ of the economy and polity ensued with the Great Depression of 1929 and the election of Colombia's first Liberal Party government in 1930. Widespread social discontent, a downturn in the banana economy, rising production and logistical costs, and profitable opportunities elsewhere led to the United Fruit Company's gradual contraction, as it reduced its banana plantation area by 75 per cent between 1929 and 1934 (LeGrand, 1984:190). Many rural workers were thus left unemployed leading to extensive land occupations by the unemployed workforce and formerly evicted/displaced peasants, exacerbating tensions between settlers and landed elites. This prompted the implementation of Law 200 of 1936 which sought to allocate private titles to public lands (*baldios*) that were occupied, productive and serving an economic function. While some interpreted this ‘land for those who work it’ as favourable to settlers (see Hirschman, 1965), it actually enabled landed elites to expand their territorial control by using their political and economic leverage to claim disputed territory, evict settlers, and legitimize their tenure security (LeGrand, 1988; Reyes Posada, 2009; Fajardo 2014). Law 200 ultimately reinforced a highly unequal agrarian structure, increased

⁶ See Rippy, J. Fred (1931), *The capitalists and Colombia*, New York, Vanguard Press;

⁷ Exact figures remain disputed

rural tensions and conflicts, and reversed the more progressive 1926 Supreme Court legislation which was a planned colonization programme that would have deprived landlords of much territory by making it difficult for them to claim ownership of the land (Berry, 2002). Privatization and land enclosures successfully excluded the rural majority⁸, yet the ‘land for those who work it’ clause became problematic for landlords and their contracts with wage labourers. This prompted Law 100 of 1944 which stipulated sharecropping and other labour contracts as essential for public convenience and national interests, solidifying the process of both land (Law 200) and labour (Law 100) control by the landed elites. In 1948, the assassination of Liberal presidential candidate and popular leader among the marginalized rural majority, Jorge Eliécer Gaitán, sparked the civil war known as *La Violencia*, resulting in an estimated 200,000 deaths and displacing 2 million people between 1948 and 1958 (Reyes Posada 2009, 4 cited in Thomson 2011). The highly unjust and unequal agrarian structure underpinned *La Violencia*, which many argue contributed to the establishment of the armed guerrilla groups and exacerbated a cycle of ‘colonization-conflict-migration-colonization’⁹ which continues today (Fajardo, 2014; Berry 2002, LeGrand and Palacios, 2011). Yet, during *La Violencia* the manufacturing and agricultural sectors experienced strong growth, as increased capital accumulation coincided with frontier expansion, dispossession, a 15% decline in rural sector salaries, and repression of unions (Thomas, 2011:336; Fajardo, 1983). As Thomas puts it, “Capitalist development and violent conflict went hand in hand” (2011:336). Colombia’s history of armed conflict, rural poverty, and food insecurity is rooted in its unequal agrarian structure, highlighting the importance for greater democratic land control to break the colonization-conflict-migration-colonization cycle (Fajardo, 1983, 2014).

By 1954, over half of total landowners controlled just 3.5% of the land, with an average of less than 2 hectares each; while 3% of landowners controlled approximately 55% of land which were largely underutilized and mainly for cattle grazing (Fajardo, 2014: 27-8; Toro, 1985). Under the guidance of the World Bank, Law 135 of 1961 established the Colombian Institute for Agrarian Reform (*Instituto Colombiano de la Reforma Agraria, INCORA*) with a stated objective of “reforming the agrarian social structure through procedures to eliminate and prevent the unequal concentration of land ownership or inefficient fractioning and to reconstruct adequate land units in minifundio zones and give land to those who do not possess it (Article 1, par. 2, Law 135, 1961)¹⁰. Law 135 also established the family agricultural units (Unidades Agrícolas Familiares, UAF), which refers to the maximum amount of state land (baldíos) distributed sufficient for a family to earn an adequate standard of living, taking into account the agro-ecological zone in which it is located. Despite its promising discourse to transform the unequal agrarian structure, the implementation process was extremely limited due to intervention from political opponents and the high levels of corruption among INCORA’s highest officials (Fajardo, 2014:29). From 1962 to 1982, only 4.36% of the 800,000 rural households without land access were given land titles (Arango, 1994:137). Landed and business elites maintained strong ties with high-level politicians and, after the Chicoral Agreement (Acuerdo de Chicoral) in 1972, Law 4 of 1973 and Law 6 of 1975 were established which served to protect landlords from state intervention through two mechanisms. First, through Law 4, the establishment of ‘presumptive rent’ (renta presuntiva) which guarantees no state intervention for productive properties (including extensive cattle grazing), eliminating the possibility for land redistribution and thus excluding peasants from receiving public lands (baldíos). Second, Law 6 re-established sharecropping as a productive relation between landowners and tenant farmers, and sought to guarantee productivity and stability in the countryside, yet effectively excluded workers from receiving a legal title to the land (Fajardo, 2014:30). As peasants were both legally and violently displaced, many sought refuge in the less-accessible mountainous regions. The ongoing civil war and broader Cold War politics at play resulted in United States counter-insurgency intervention as the Colombian military was “firmly under the guidance of the USA” and was “one of the largest recipients of US military aid and training throughout the Cold War” (Stokes, 2005:5; Thomson, 2011). As armed conflict escalated, violently

⁸ The privatization of Colombia’s public lands went from an average of 60,000 hectares per year between 1931-1945 to an average of 375,000 hectares between 1955-1959 (Berry, 2002:33).

⁹ Fajardo, D.M.. 1993, *Espacio y sociedad. Formación de las regiones agrarias en Colombia*, Corporación Colombiana para la Amazonia:Bogotá

¹⁰ Author’s translation

displaced peasants and workers united to form armed insurgencies to defend their land and territorial access.

To this day, the FARC (*Fuerzas Armadas Revolucionarias de Colombia*) and the Colombian state have been engaged in an ongoing armed conflict centred on issues concerning democratic land access and territorial control. This conflict has become part of much broader processes of territorial control, the expansion of (agro)extractive industries, and various forms of dispossession entangled in complex relations among paramilitary groups, drug traffickers, agrarian elites and agribusiness, small farmers, peasants, indigenous, afro-descendants, guerrilla groups and state actors (see Escobar, 2013; Ballve, 2012; Grajales, 2011). The emergence of what is known as ‘parapolitics’ – the collusion between politicians and the right-wing paramilitary organization United Self-Defence of Colombia (Autodefensas Unidas de Colombia – AUC) – during the Uribe administration (2002-2010) “established an elite of ultra-violent warlords, intimately linked to drug traffic and deeply entrenched in local and national power networks” (Escobar, 2013). This national political scandal, which led to the incarceration of former President of the Senate of Colombia, Mario Uribe Escobar¹¹, among many other Colombian senators and governors, revealed the underlying ties and alliances among various state, corporate, drug trafficking, and paramilitary actors.¹² As Mariana Escobar asserts in her recent in-depth study, “Paramilitaries had made alliances with a significant share of elected and appointed politicians between 1998 and 2007, diverted hundreds of millions of dollars from public coffers, and penetrated the judiciary and security agencies” (2013:14). The ties and alliances among state, paramilitary, and military/police forces became more deeply intertwined and violent armed conflict against civilians and guerrillas ensued, with access and control over territory at the heart of the matter. Indeed, the violent conflict in the countryside should be understood in the broader historical context of land concentration, exclusion and marginalization in the countryside.

Over 50 years of armed conflict has resulted in the death or disappearance of over one million people and many more wounded both physically and emotionally, while roughly 6 million have been displaced (Fajardo, 2014:37). It is estimated that roughly half (52.2%) of those displaced lost their land due to theft or violent dispossession, representing 5.5 million hectares of land, equivalent to 10.8% of the total agricultural area in the country¹³. This has undoubtedly contributed to the extreme land inequalities that continue to characterize Colombia’s agrarian structure. The latest agricultural census reveals that 69.9% of total farm units control just 4.8% of the land, while 2.8% of farm units control 64.8% of the land (DANE-CNA, 2014). In fact, the landholding structure largely remains unchanged since 1960, which we discuss in more detail later in the report.

A recent report by the UNDP (2011) finds that Colombia’s current rural development model is inadequate and increasing vulnerabilities for rural inhabitants. The report highlights eight key characteristics of the current model which continue to marginalize the rural majority:

1. It does not promote human development and increases the vulnerability of the rural population
2. It is unequal and does not favor convergence
3. Gender differences are invisible and it discriminates against women
4. It does not promote sustainability
5. Land is concentrated, creating conditions for the emergence of conflicts
6. It is not democratic

¹¹ Uribe-Escobar is the cousin of former President of Colombia, Alvario Uribe.

¹² Collusions of organized crime and state actors were also present with the infamous drug cartels in the 1980s and 1990s. The emergence of the AUC is considered as the second generation of paramilitary groups, which arose as a result of the increased guerrilla warfare of the FARC and ELN, prompting landed, corporate, and political elites to finance private militias mainly for territorial control (see Escobar, 2013; Gutiérrez, 2007; Gutiérrez and Baron, 2006).

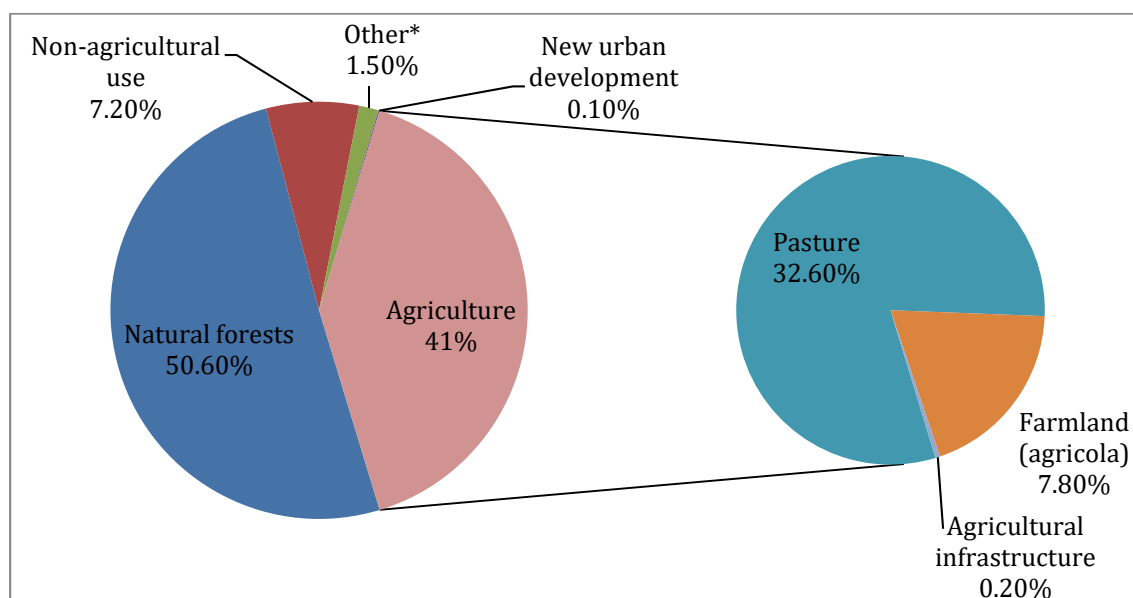
¹³ Comisión de Seguimiento a la política pública sobre desplazamiento forzado (2009), *El Reto ante latragedia humanitaria del desplazamiento forzado. Reparara de manera integral el despojo de tierras y bienes*, Bogotá, pp.57.

7. It does not strengthen rural institutions (UNDP, 2011:33)¹⁴

This model can be broadly characterized by three interrelated components. The first component is based on export-oriented coffee production which has been a principle source of agricultural export revenues for over a century and is dependent on small and medium-sized peasant production, yet remains tightly controlled and aligned with the economic, technical, political, and ideological interests of the export sector, represented by the National Coffee Growers Association (Federación Nacional de Cafeteros (Fajardo, 2014:39; but see Hough, P.A. 2010). The second component is that of agroindustry which controls vast expanses of land, including public land (baldíos), and unproductive cattle ranches which occupy the majority (80.4%) of the country’s cultivable land (DANE-CAN, 2014). Farm units with over 1000 hectares represent just 0.2% of the total, yet control 32.3% of total cultivated area (DANE-CAN, 2014). The third component is that the majority of the rural population consists of small and medium scale farmers and landless workers who have very limited access to land and other productive resources and continue to be marginalized, excluded, and impoverished (Fajardo, 2014:39).

While land inequalities remain stark, 80 per cent of Colombia’s total agricultural area is pasture (32.6% of the total rural area), mainly used for cattle grazing or unused, while just 15.7 per cent is used for crop cultivation (7.8% of the total rural area) (DANE-CNA, 2014).

Figure 1: Land use (%), total rural area



Source: DANE-CAN, 2014)

Other*: Non-agricultural infrastructure and other uses

Between 1984 and 2011, the area classified under agricultural use expanded from 35.8 to 40.2 million hectares (ha), yet 24 per cent of this 4.4 million ha expansion was appropriated by rural estates of over 1000 ha (Fajardo, 2014:40). Instead of confronting the land question in a redistributive and democratic way, the current rural development model maintains the unequal agrarian structure but has established special zones for rural development and economic interest known as ZIDRES (Zonas de Interés de Desarrollo Rural y Económico) which seek to promote the integration of peasant farmers with agro-industry. As Fajardo point out however, these asymmetrical relations are likely to revive a form of sharecropping and will exacerbate forms of dispossession through ‘legal channels’ (2014:41). Without challenging the land-based power inequalities through democratic land control, rural poverty, exclusion and armed conflict are likely to persist, regardless of the peace negotiations. Poverty and inequality are structural problems, historically rooted in the development of Colombia’s agrarian structure, as we have briefly covered. Structural problems require structural solutions concerning

¹⁴ Translated by author

land-based social relations and the broader relations of access. Residual, or market-based solution which seek to ‘integrate’ peasants with industry and into markets are likely to fail, create tensions, and even conflict. For example, the Washington Office on Latin America reports that between 1986 and 2012, 2,937 trade unionists were murdered with an impunity rate of over 90% (WOLA, 2013). These injustices are part of the struggle for land and without addressing these issues Colombia’s agrarian problems and armed conflict will not disappear. The TGs are an instrument that can help address these issues, but should be used in a participatory way and always to the benefit of the most vulnerable and marginalized groups in society, with accountability mechanisms from the local to the national.

In the following section, we focus on the need to protect existing tenure rights of indigenous, afro-descendant and peasants that are continually threatened by both (agro) extractivist expansion, armed conflict, and eco-tourism and conservation projects. We focus the analysis specifically on existing land and territory legislation and identify some of their shortcomings in protecting tenure rights and point to the TGs as a means to fill these existing gaps.

Protecting existing access

Introduction

The need to protect existing access to land, fisheries and forests for the most vulnerable and marginalized peoples in Colombia pertains, in large part, to indigenous territories (Resguardos), afro-descendant territories (Consejos Comunitarios de Comunidades Negras, Afrocolombianas, Raizales y Palenqueras), peasant reservation zones (Zonas de Reserva Campesina) and exclusive zones for artisanal fisheries (Zonas Exclusiva de Pesca Artesanal, ZEPA). In this section, we analyze these land and territorial rights, highlighting the policy gaps and shortcomings in protecting existing formal and informal tenure rights and how the Tenure Guidelines can be used to strengthen and address these gaps.

In 1991 Colombia ratified the International Labour Organization’s Indigenous and Tribal Peoples Convention 169 which guarantees the rights of indigenous peoples and recognizes, protects, and promotes their distinct identities, cultures and traditions, including their relationship to land and territory. The 1991 Constitution also explicitly recognizes the right to free, prior and informed consent for indigenous peoples (Law 21)¹⁵ while also guaranteeing exclusive fishing zones for small scale fisheries (ZEPA) (Law 13, 1990). It also states that natural parks and communal lands of ethnic groups (such as indigenous and afro-descendent communities) are “inalienable, inextinguishable and not subject to seizure” (Colombian Constitution 1991, Article 63). Further in 1993, Decree 1088 recognized the autonomy of indigenous territories through administrative authorities known as Cabildos; while a similar autonomy for Afro-descendant territories was granted via Community Councils (*consejos comunitarios*) through Law 70 of 1993. Under agrarian reform law 160 of 1994, peasant reservation zones (Zonas de Reserva Campesina, ZRC) were established to secure tenure rights for peasants by restricting land sales, prevent land concentration via displacement and dispossession, and encourage environmentally sustainable production (Fajardo, 2002:15). Unlike the territories granted to indigenous and afro-descendants, ZRC’s are allocated by the state in predefined ‘colonization areas’ (state lands) and are not autonomous territories, can be subject to seizure and are not granted free, prior and informed consent – all important and contentious differences concerning land tenure to those of the indigenous and afro-descendants.

Although existing national legislation and international law provides the legal framework for the protection of existing resource access, a more in-depth look at tenure protection reveals some shortcomings in regards to respecting and protecting people’s democratic access to tenure rights. Furthermore, it is important to account for the different property regimes which respect and protect people’s access in more appropriate ways than the western liberal tradition of private property rights, such as customary tenure (De Soto, 2003; but see Cousins, 2009 for a critique). With a renewed wave of land concentration, land grabbing and foreign investment in Colombia and Latin America (Salinas Abdala, 2012; Ballvé, 2012, 2013; Grajales, 2011; Ojeda, 2012; Gomez, 2012), the need to protect

¹⁵ Free, prior and informed consent is also part of ILO 169.

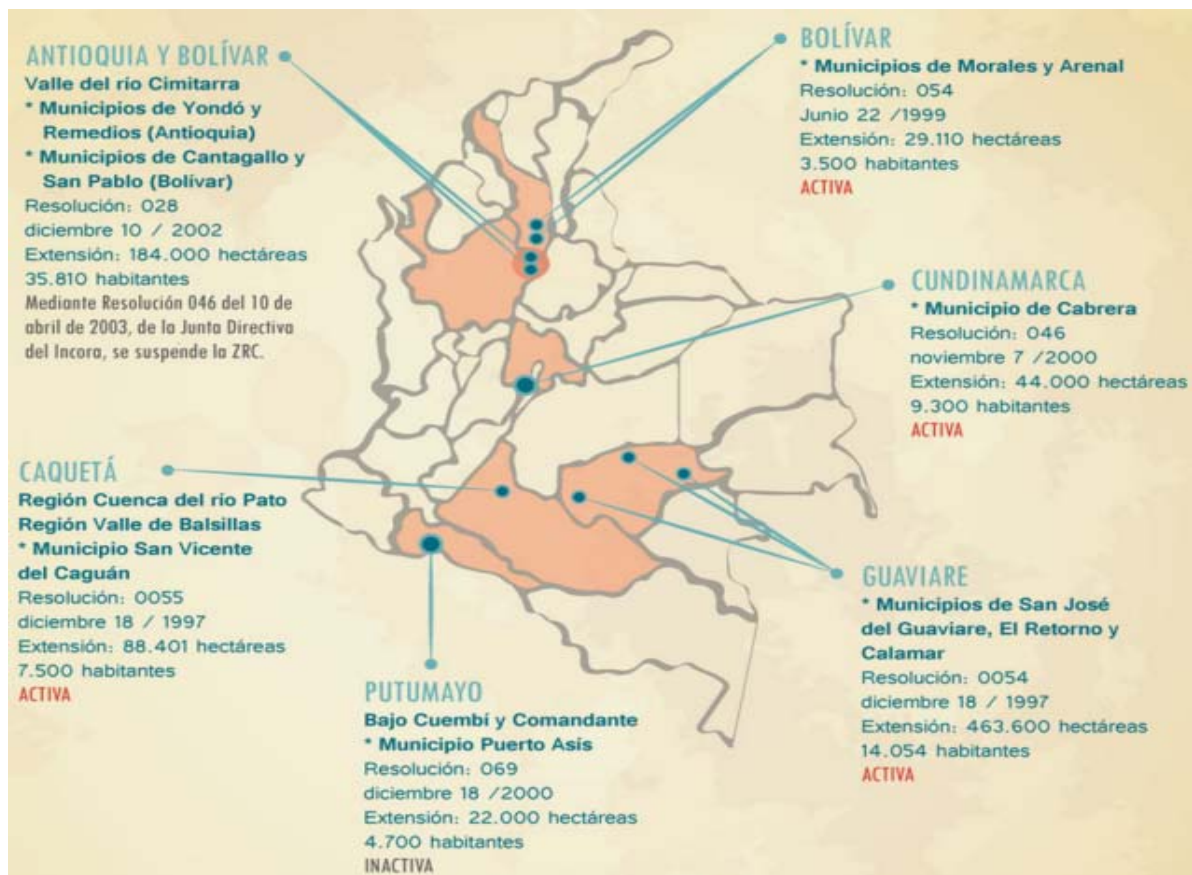
tenure rights of marginalized groups from both economic and extra-economic processes displacement is greater than ever.

In this section, we focus particularly on the need to respect and protect existing tenure rights of indigenous, afro-descendant, and peasant groups who have tenure rights that go beyond individual private property, yet remain threatened by (agro)-extractivist projects and landed elites. It is important to recognize, however, that these categorizations of ‘peasant’, indigenous and afro-descendant are inherently problematic since in many cases there are indigenous peasants and afro-descendant peasants, or indigenous and afro-descendants that are not recognized by the state. Moreover, the ways in which the state makes legible and simplifies complex conceptions of ‘culture’, ‘indigeneity’, and ‘minorities’ have led to certain ethnic *typologies* (characterizations and classifications of indigenous groups) associated with certain *topologies* (delimitations of an indigenous territory) which “have become a powerful way to discriminate against certain ethnic groups” (Bocarejo 2014:336; see Scott, 1998). These categorizations have also left peasant communities as ‘unmarked’ citizens, excluded from territorial rights despite sharing the same socio-economic issues as indigenous and afro-descendants and having a strong association with the land as territory (Bocarejo 2014).

Peasant reservation zones (Zonas de Reservas Campesinas)

Peasant Reservation Zone (Zonas de Reservas Campesinas, ZRC) were established as part of Colombia’s market-led agrarian reform programme under law 160 in 1994 as a means to protect small-scale/peasant farmers from selling their land or being forcibly displaced by landed elites and related (agro)extractivist expansion. But unlike indigenous and afro-descendant territories, ZRCs are not self-governed, autonomous territories. The ZRCs are state-authorized rural areas and organized through ‘Communal Action Boards’ (Junta de Acción Comunal) which coordinate development projects among the rural households and municipal/regional state authorities. From 1997 to 2002, six ZRCs were established throughout the country with a total land area of 827,166 hectares (0.72% of national territory) (see Map 1). With election of Alvaro Uribe, ZRC settlements stopped due, in large part, to two interrelated factors: (i) ZRCs were thought to be safe-havens for the FARC, known as ‘caguanes’, or self-governed independent republics; and (ii) ZRCs were in direct conflict with the expansionary interests of (agro)extractivist projects and landed elites. However, with the peace process underway, formalizing and supporting more ZRCs has been put back on the agenda as part of the agrarian reform process. As protected reservation zones, ZRCs prevent land concentration and dispossession, and can help build robust and sustainable livelihoods for small-scale peasant farmers.

Recognized Peasant reservation zones (*Zonas de Reservas Campesinas*)



Source: Caracol Radio 2013

http://caracol.com.co/radio/2013/07/16/media/1373986020_933902.html

Although formal recognition of ZRCs has not occurred since 2002, peasants have continued to settle in abandoned rural areas and baldíos in hopes of receiving formal ZRC titles. Currently, there are many demands for ZRCs not yet recognized and therefore lacking tenure protection. While the ZRCs remain a politically contentious issue particularly as they go against the interests of economic elites and the current (agro)extractivist rural development model, they can provide the needed tenure protection for the majority of the country's marginalized peoples and build sustainable productive economies and significantly contribute to the country's food security. Yet despite peasants' strong connection with, and dependence on, the land as a form of livelihood and territory they remain excluded from territorial rights as those granted to indigenous and afro-descendant peoples. Peasants have thus become excluded by the Colombian state's multicultural regime "as it makes legible and privileges particular forms of racial and ethnic differences at the expense of others such as class" (Ojeda, 2012:359). Peasants, who make up the vast majority of the rural population, are therefore left in very precarious and vulnerable positions vying for access to land in an agrarian structure that is highly concentrated and controlled by landed and agribusiness elites. Even in the Sierra Nevada de Santa Marta Biosphere Reserve and Tayrona National Park, a UNESCO site with a total area of 675,000 hectares, peasants are considered 'eco-threats', while indigenous are deemed as 'ecological natives' or eco-guardians (Ojeda, 2012; Ulloa, 2005). As Ojeda explains:

"Environmental protection discourses and practices have translated into land-grabbing mechanisms under which the protection of nature – allegedly made possible by its commodification for tourist consumption – justifies and even legitimates the dispossession of local community members such as fisherman, transporters and peasants. The resulting restructuring of resource access, use and control has been justified by 'green' purposes of biodiversity conservation (Ojeda 2012: 364).

In this instance, the Tenure Guidelines can be used to reinforce and strengthen existing legislation which is either not being fulfilled or fall short of existing human right law. Article 81 of Law 160 indicates that Zonas de Colonización (settlement areas) and public lands (baldíos) are prioritized for ‘peasant reservation zones’ (Zonas de Reservas Campesinas). According to Article 3.1.1 of the Tenure Guidelines, states should “identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights” (FAO, 2012:3). Additionally, in contrast to landed elites with hundreds or even thousands of hectares used for cattle grazing or agribusinesses producing various ‘flex crops’ (oil palm, soybeans, sugarcane, etc.) for export, peasants depend on the land for their wellbeing, their livelihood, and their access to food, which in turn ties the ZRCs and peasants’ right to land to fundamental human rights¹⁶.

Indigenous peoples

In 1991, Colombia ratified ILO Convention 169, a legally-binding international instrument signalling the state’s obligation to respect and protect the rights of indigenous peoples. This was enshrined in Colombia’s Constitution of 1991, which granted indigenous peoples ‘special territorial jurisdiction’ (Art. 246), provided safeguards to their territories (Art. 329), and the right to self-governance (Art. 330). Decree 1088 of 1993 granted indigenous communities the right to form their own administrative authorities, known as *Cabildos* (Councils), to exercise autonomy over their territories. In 2009, Colombia endorsed the UN Declaration on the Rights of Indigenous Peoples, reinforcing the state’s commitment to respecting and protecting indigenous rights to control and access land, territories, and resources. Despite this promising legislation, the UN High Commission for Human Rights reports that the 1.37 million indigenous in Colombia live in ‘structural poverty’ with 7 out of every 10 indigenous children suffering from undernourishment (HCHR, 2014).

Almost 70 per cent of Colombia’s 1,378,884 recognized indigenous population live among the 710 *resguardos*¹⁷ throughout the country. The other 445,084 indigenous (27% of the identified total) that do not have recognized collective territorial access to the land (CEPAL, 2012). Further, the state only recognizes 87 different ethnic groups while the Indigenous National Organization of Colombia (Organización Nacional Indígena de Colombia, ONIC) recognizes 102 indigenous groups the country (Jiménez, personal communication, 2015). This lack of recognition can be understood, at least in part, in terms of the ‘indigenous typologies’ characterized by the Colombian state in their practice of multiculturalism which defines who is legitimately indigenous according to where and how they live (Bocarejo 2011, 2014). According the ONIC’s Life Planning Advisor, Beiman Jiménez, one of the key problems for indigenous groups in Colombia is the lack of recognition and under-estimation of the population in official censuses which results in insufficient support from the state. Jiménez asserts that 50% of the 102 indigenous communities are at risk of disappearing, while 66 are at extremely high risk (Jiménez, personal communication, 2015).

ONIC’s former senior advisory, Luis Evelis Andrade, maintains that the most impoverished indigenous communities are those located in regions rich in natural resources such as in the Pacific region, la Sierra Nevada, la Guajira, la Orinoquia, and the jungles of Vaupés and Guaviare (HCHR, 2014). The positive correlation between regions rich in natural resources and the impoverishment and displacement of indigenous peoples stresses the importance for more recognition, protection, and support for indigenous communities, especially in the context of extractive industries such as mining, oil and gas, and agro-industry which often threaten resource access, contaminate resources, and displace the most marginalized groups in the areas in which they operate. Despite controlling 28% of the national territory, indigenous territory is 98% forests, meaning that sustainable agro-forestry and the protection from deforestation due to agro-industrial expansion are at the forefront of indigenous struggles. According to Jiménez, the indigenous logic is based on collectivity and respect for nature, which can create conflict with indigenous peasant farmers who want to manage land on a more

¹⁶ These include, the right to an adequate standard of living; the right to adequate food and housing; the right to work and the right of self-determination (see <http://uhri.ohchr.org/en>)

¹⁷ *Resguardos* are land reservations for indigenous peoples that are collective, inalienable, imprescriptible, and not subject to seizure (Art. 63; Art. 329).

individualistic basis, yet live within the collective territory. Non-indigenous and indigenous peasants also have a strong cultural and spiritual relationship to the land, yet the manner in which they work the land is not recognized as ‘indigenous’, leading to tensions with both the state and the broader indigenous organizations. For Jiménez, indigenous territories lack protection from encroachment by both agricultural producers and (agro) extractive industries such as mining, hydrocarbons and industrial agriculture (Jiménez, personal communication, 2015).

There is also ambiguity in the legal definitions of what constitutes indigenous land and their associated rights. Indigenous *resguardos* are defined in Article 2, Decree 2001 of 1988 and Decree 2164 of 1995 in slightly different ways, though both refer to the legally assigned or state-recognized boundaries of the land. Indigenous territories have a separate definition defined in Article 2, Decree 2164 of 1995 which goes beyond state-recognized boundaries to lands that are regularly or permanently possessed or are not under possession but constitute the traditional environment of indigenous social, economic, and cultural activities (see Bocarejo 2014). The ambiguity of this latter legal definition renders it subject to political interpretations among different actors with competing interests over the land and resource rights. This can become particularly problematic with regards to the process of ‘prior consultation’ (*consulta previa*) and who decides what constitutes ‘regular/permanent possession’ as well as ‘traditional indigenous environments’. While these interpretations can too often be used to favour those with political and economic influence and power, and further exclude and displace already marginalized groups, the use of the Tenure Guidelines can reinforce and strengthen this legislation in order to protect the most “vulnerable and marginalized people” (Article 1.1) through an inclusive, participatory consultation process by “taking into consideration existing power imbalances between different parties” (Article 3B.6). But to use the TGs in combination with national legislation and international treaties’ such as ILO 169 is contingent on the ability of such marginalized groups and their allies within and outside the state to use these frameworks effectively and hold people and corporations accountable for their actions.

Land, forests, and fisheries which are and have been historically inhabited by indigenous peoples should be recognized and protected for its “social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems” (FAO, 2012: Article 9.1). While it is clear that many indigenous territories have been recognized, the ongoing rural conflict and vast amounts of lands unrecognized and unprotected has put indigenous territories at risk. This obligation of both state and non-state actors is expressed throughout Article 9 of the TGs and reinforced by the International Labour Organization’s Indigenous and Tribal Peoples Convention ratified by the Colombian state in 1991. One important issue to take into account is the “effective participation off all members, men, women and youth, in decisions regarding their tenure systems...” (FAO, 2012: Article 9.2). Both states and non-state actors must acknowledge that local politics, including within indigenous territories, are not politically neutral, nor non-contentious, even with the *Cabildos* which are the governing indigenous authorities (Decree 1088, 1993). Certain power dynamics in decision-making and resource allocation processes must be taken into account when there is a need for state and non-state actors to engage with indigenous communities, particularly concerning free, prior and informed consent (Law 21, 1991).

Despite the existing national legislation and the ratification of international treaties, injustices around tenure security and social support threaten the existence of many indigenous communities today. The importance of the TGs in this regard is to reinforce and strengthen existing legislation which may not be fulfilling its objectives. The TGs should be viewed as a minimum standard by which state and non-state actors should oblige. When current legislation and policies are not meeting their objectives they must be reformed in both substance and operational approaches. We will discuss how these gaps can be addressed in a more operational way at the end of this section.

Afro-descendant communities

While Colombia’s constitution of 1991 declared the nation as multicultural and pluri-ethnic and ratified ILO 169, the International Convention was not applicable to afro-descendants until 2003. However, under domestic legislation, afro-descendants were granted collective and autonomous territorial rights in 1993, but not considered part of the legally binding international convention of

ILO 169. Law 70 was passed in 1993 which granted afro-descendant communities collective territorial rights over ancestral lands – now covering over 5 million hectares – and established communal councils (Consejos Comunales) as their main administrative authority. According to this law, the state should guarantee the protection of, and access to, ancestral territories for afro-descendants, protect their cultural identity and civil rights, and support their right to autonomous control over their territories. Despite the importance of Law 70 of 1993 in finally recognizing collective territorial and cultural rights for afro-descendants, their resource-rich ancestral lands have resulted in their marginalization in at least two ways: first as a site of armed conflict and agribusiness expansion, particularly for oil palm plantations, resulting in violent displacement; and second obliging them become ‘eco-guardians’ (See Ojeda, 2012) or to engage in productive activity that fits within a certain ethnic ‘typology’, limiting the terms of their resource control and forms of production (see Bocarejo, 2014). Cardenas calls this ‘green multiculturalism’, which “puts natural resources in the hands of multicultural subjects while charging them with global environmental responsibility. In this way, environmental friendliness gets construed as a cultural trait that defines black subjects’ authenticity and a determinant factor in the decision to grant them special rights” (2012:125).

The estimated population of afro-descendants is 4,311,757, or 10.6% of the Colombia’s population, with over one million living in Valle del Cauca and the vast majority located along the pacific coast (CEPAL, 2012:44). Afro-descendant communities remain disproportionately marginalized and displaced due to the ongoing forms of discrimination, racism, exclusion, and a lack of recognition of their territorial rights (Vélez Torres, 2014; Hristov, 2005; Oslender, 2007). Between 2001 and 2009, 73.3% of forcibly displaced people of ethnic origin were afro-descendants (CEPAL, 2012). An in-depth study of afro-descendent communities in the Alto Cauca by Vélez Torres (2014) exemplifies these struggles and the need for territorial recognition and protection. Extractivist economic activity in La Toma has forced afro-descendants to migrate from their territory, excluded them from their right to free, prior and informed consent, and generated broader socio-environmental conflicts leading to increased impoverishment and food insecurity (see Vélez Torres, 2014). Similarly, Oslender (2007) explains how economic interests in the African Palm sector colludes with paramilitary groups which violently displaces entire afro-descendant communities, invoking a terror campaign among local residents while bringing in other sources of labour. Oslender argues that there is “an underlying changing economic rationale for development in the region” and that “forced displacement is not the result of the armed conflict, but its objective” (2007:761). Afro-descendant communities are granted the same territorial rights and should be protected under the same legal frameworks as those previously discussed concerning indigenous peoples, including the right the prior consultation. Despite such existing legislation however, it is clear that there are deeper structural inequalities at play which continue to exclude and displace the most marginalized groups in society. The stark land-based power inequalities exacerbate these tensions and forced displacement and forms of exclusion continue as many studies have shown (Bocarejo, 2014; Ojeda, 2012; Velez Torres, 2014; Hristov, 2005; Oslender, 2007). The issue then becomes how marginalized groups can protect their rights in the context of structural inequality, in which those with land-based wealth and political-economic influence and power continue to exclude and displace the rural majority – through both violent and ‘legal’ means.

In the following section, we discuss the possibilities for using the Tenure Guidelines in order to protect existing land and resource access for Colombia’s most marginalized populations -- peasants, indigenous and afro-descendants – and how they can reinforce and strengthen existing legislation and hold various state, societal and corporations accountable for illicit and unjust actions.

Conclusions: the need to protect

Existing land inequalities and resource concentration have put indigenous, afro-descendants, and peasants along with small-scale family-based agriculture among the most marginalized populations in rural Colombia. Violent land grabbing persists and is carried out by means of what some call illegal ‘land laundering’ whereby in some cases “paramilitaries put the grassroots development apparatus – its discourses, institutional forms, and practices – to work as a means for carrying out and laundering their land grab” (Ballvé 2013, 72). Further, Grajales asserts that the legalization of violent land grabbing “is possible thanks to the association of local politicians, business actors, and paramilitary

groups” (2015, 4). In a country where just 21% of rural properties hold formal titles, illegal land grabbing has become widespread due to the lack of legal protection and power imbalances at the local level. This puts the rural poor and the most marginalized peoples in society in very precarious and vulnerable situations.

With such high levels of land concentration, internally displaced peoples, and ongoing conflict, the need to protect existing land rights does not only apply to the 21% of formalized rural properties, but also to those that are not protected by law. Article 7.1 of the Tenure Guidelines points to this obligation, declaring that “When States recognize or allocate tenure rights to land, fisheries and forests, they should establish, in accordance with national laws, safeguards to avoid infringing on or extinguishing tenure rights of others, *including legitimate tenure rights that are not currently protected by law*. In particular, safeguards should protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights” (emphasis added).

The issue at stake here is how to decide which tenure rights are legitimate that are not currently protected by law. In the context of ongoing violent conflict and restitution, the state must recognize the existence of local elites, mafias, and authorities who form alliances with corporate actors in order to pursue violent land grabbing and ‘launder’ the illegal land through formal channels of titling. Even representatives from the Colombian Petroleum Association (*Asociación Colombiana del Petróleo*, ACP) acknowledged that their associates must always deal with what they call “local mafias” when operating in particular regions; forced to essentially pay them in order to continue exploration or exploitation (ACP, personal communication, 2015). These ‘local authoritarian enclaves’ are not uncommon throughout the region and should be acknowledged and taken into account when formulating land and resource-oriented policies to be carried out at local levels (see Fox 1990). If these local mafias are able to assert their influence over corporate actors in the petroleum sector, we can certainly imagine the kind of power they have over the poor and the allocation of resource access in their regions.

The Tenure Guidelines emphasise the need to ensure the protection of formal and informal tenure rights (Art. 7.1) for the most “vulnerable and marginalized people” (Art. 1.1). Yet, in order to make these rights real, implementation strategies must account for the unequal power relations in societies which we have attempted to highlight throughout this report. Article 3B.6 of the TGs addresses this issue during consultation and participation processes, stressing the importance of “taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes” (FAO 2012:5). In highly unequal and conflict-ridden areas, this requires participatory processes of engagement involving community councils, women and youth organizations, state actors from multiple levels of government and potentially non-governmental organization to foster capacity building and establish monitoring and accountability mechanisms that will ensure existing legislation and international obligations are respected.

Despite international legal frameworks which have been ratified (ILO 169, 1991; UN Declaration on the Rights of Indigenous Peoples, 2007) and national legislation recognizing and protecting territorial and reservation rights of indigenous (Law 21, 1991; Decree 1088, 1993), Afro-descendants (Law 70, 1993), and peasants (Law 160, 1994), gaps remain in Colombia’s national legal framework which put these marginalized minorities at risk of displacement and food insecurity. In particular, there is a need for more recognition of territorial rights for afro-descendants and indigenous without stipulating such rights to their role as ‘eco-guardians’. There is an urgent need to recognize more peasant reservation zones (ZRC) to not only protect the rights of peasant communities but to also rollback and stop land concentration which is becoming increasingly controlled by (agro) extractive industries seeking minerals, hydrocarbons, and industrial (flex) crops. The central issue at stake here however, is not necessarily the creation of new legislation or international treaties, but how and by whom they are interpreted and implemented. This requires greater participatory engagement among the various actors involved, in both the state and society, and accountability mechanisms which renders the granting of rights meaningful. Without effective implementation and accountability mechanisms, laws and regulatory measures become increasingly subject to the political terrain of contestation among

competing actors and thus to the underlying power relations entrenched in the highly unequal agrarian structure which continues to exclude, displace, and marginalize the rural majority.

Several points of recommendation should be highlighted here:

- Recognition and protection via consultation with indigenous, afro-descendants and peasants regarding their territories
- Participatory processes of engagement with community councils, social organizations, civil society organizations working in local areas that can circumvent local mafias and political elites who may control and influence resource access and distribution
- Engagement through participatory workshops with the rural civil society organizations on the Tenure Guidelines and human rights

Promoting redistributive reforms

Land reform and the agrarian structure

Colombia has one of the highest indices of land inequality in Latin America with a Gini-index of land concentration of 0.86. Just over 1 per cent of landowners control over 50 per cent of agricultural land, while nearly 80 per cent of landowners have access to just over 10 per cent of the land (UNDP 2011, 20). These extreme rural inequalities remain the focal point of violent conflict and the persistence of rural poverty in the countryside. Redistributive agrarian reforms are therefore urgent and necessary, not only to tackle the problem of persistent rural poverty and inequality, but also for agrarian justice, human rights obligations and the peace process.

Colombia's current agrarian reform law has been in effect since 1994 (Law 160). At its inception, the Colombian Institute of Agrarian Reform (*Instituto Colombiano de la Reforma Agraria, INCORA*) was the principal institution responsible for implementing the law¹⁸. In 1996, the World Bank granted US\$1.82 million to INCORA in order to fund several projects and establish a technical unit in order to carry out a market-led agrarian reform (MLAR) (Mondragon 2006). The aim was to create an 'efficient' land market based on MLAR principles of clear, tradeable, and enforceable private property rights, subsidized credit, and 'willing-seller willing-buyer' land transactions without state bureaucratic interference. Through the establishment of the state Agrarian Bank, peasants could receive a subsidy of up to 70% of the value of the land with credit available at market interest rates for the remaining 30% in order to "facilitate the voluntary negotiation of land between peasants and landowners" (Acuerdo No. 025; Art. 21; Art. 13 of Law 160). However, the programme has been largely unsuccessful due, in part, to a reduction in INCORA's budget, high interest rates and defaults in payments by beneficiaries (Mondragón 2006, 166). In 1997 for example, of the 38,451 applicants, only 3,113 (8%) were selected. The total number of beneficiaries continued to fall, and by 2001 only 662 families benefitted from the programme receiving an average of 12 hectares per family (Mondragón 2006, 166-167). Aside from INCORA's lack of programme funds, the majority of beneficiaries ended up defaulting on their loans due interest rates which were higher than the income they were generating from the initial stages of family-based farming. But these programme flaws should not simply be understood as technical and administrative shortcomings or anomalies. It is the fundamental assumptions, as Borrás (2003) points out, of the market-led model of Colombia's agrarian reform programme that are inherently problematic.

The underlying assumptions of Colombia's MLAR programme presume that 'rational' individuals will enable land markets to work efficiently and thus facilitate a voluntarist 'willing-seller, willing-buyer' competitive market environment, lowering land prices and transaction costs through quick and non-contentious land transactions. However, as Borrás (2003) and even World Bank economist Klaus Deininger (1999) reveal, these assumptions have not materialized in the real world. Deininger, for example, found that landowners in Colombia were taking advantage of the 70% land subsidy for peasants by overstating the price of their land and thus covering the complete land value with the grant (1999, 669, n. 17). Borrás echoes these findings in his multi-country case study of MLAR programmes, concluding that "land price setting (or 'fixing') in the countryside of developing

¹⁸ INCORA was established under Law 135 in 1961.

countries today is determined by class and political power in a manner not recognized by the MLAR proponents. Politics play a crucial function; and the power of dominant classes to influence price setting for land regardless of its true economic value is crucial” (2003, 389). In a country of extreme land-based wealth inequality like Colombia, it is necessary to acknowledge and take into account the power dynamics between wealthy landowners and poor peasants in negotiation processes. Even the peasantry itself is a heterogeneous group of people with different capacities and abilities to access financial, political, or social resources. Deininger found that many “potential beneficiaries are generally unable to go through the steps required in a ‘negotiated’ type of land reform without assistance” which led to what he calls the ‘agrarian bourgeoisie’ capturing the benefits of the Colombia MLAR programme (1999, 660; 656). Ignoring the power asymmetries between groups of people and the economic and political influence this entails in a negotiation process is a fundamental flaw among MLAR proponents and their idea of a voluntarist ‘willing-seller willing-buyer’ market environment. This issue is even more problematic in Colombia’s conflict-ridden countryside where power dynamics go beyond the economic and political to outright violence. These fundamental problems are integral to MLAR programmes and help explain the failures of Colombia’s agrarian reform which only reached a mere 10 per cent of its target of one million hectares of land distribution from 1994 to 2000, which it intended to complete in four years (1994-1998) (Borras 2003, 382).

In 2003, INCORA was replaced by the Colombian Institute of Rural Development (*Instituto Colombiano de Desarrollo Rural, INCODER*) with Decree 1300, though still operating under Law 160 of 1994. Under the Ministry of Agriculture and Rural Development, INCODER became responsible for the execution of agricultural policies, land titling, as well as the administrative and technical functions to carry out such policies. However, the failure of its predecessor, INCORA, to fulfill the state’s objectives led the Uribe government to implement a different strategy under the same MLAR framework. The functions of INCODER were therefore much more decentralized, as nearly half of the state agencies disappeared throughout the country (UN-Habitat 2005). From the point of view of certain actors within the state, the failures of Colombia’s agrarian reform was not due to the underlying assumptions and logic of its market-led programme, but rather the heavy state bureaucratic institutions which were corrupt, inefficient, slow and costly (Department of National Planning, personal communication, 2015). The decentralization process sought to give municipal and departmental institutions more autonomy in carrying out the agrarian reform policies, though without sufficient resources to increase their capacity to do so. The assumption here, as Borras points out, is that “decentralization guarantees transparency and accountability, administrative efficiency and speedy policy implementation...” (2003, 389). Reducing the programme’s failures to technical and administrative issues which can be resolved by decentralization ignores the political context and unequal agrarian structure of rural society. Local polities are not neutral, quite the reverse, they are much more easily subject to very entrenched local power dynamics, sometimes characterized by what Jonathan Fox calls ‘local authoritarian enclaves’ (1990, 1994). This has indeed been the case in Colombia, as many rural families are left out of the land reform process, unable to access local institutions and increasing their vulnerability and possibility for violent displacement (UN-Habitat 2005).

Despite its intentions, Law 160 of 1994 has failed in its objectives to improve the income and quality of life of the peasant population; to promote and consolidate peace through social justice and wellbeing and to reform the agrarian social structure and eliminate and prevent unequal concentration of rural areas (Art. 1, Law 160). Not only has the law been unable to dismantle Colombia’s unequal agrarian structure and the persistence of rural poverty, hunger and conflict, land concentration has also increased. Between 2000 and 2009, the concentration of rural property increased in 23 of the 32 departments with the average Gini Coefficient of landownership countrywide increasing from 0.877 to 0.885¹⁹ (IGAC, 2012). Further, as we can see from Table 5, the landowning structure has remained relatively intact from 1984 to 2011 (Fajardo, 2014). Table 6 shows the Gini-Coefficient for each department, as well as the percentage change from 2000 to 2009, demonstrating the severe rural

¹⁹ Gini Coefficient is a statistical measurement between 0 and 1, whereby 0 = perfect equality and 1 = perfect inequality.

inequality and lack of progress being made with Colombia's agrarian reform programme under Law 160.

Table 5: Landowning structure, 1984 and 2011

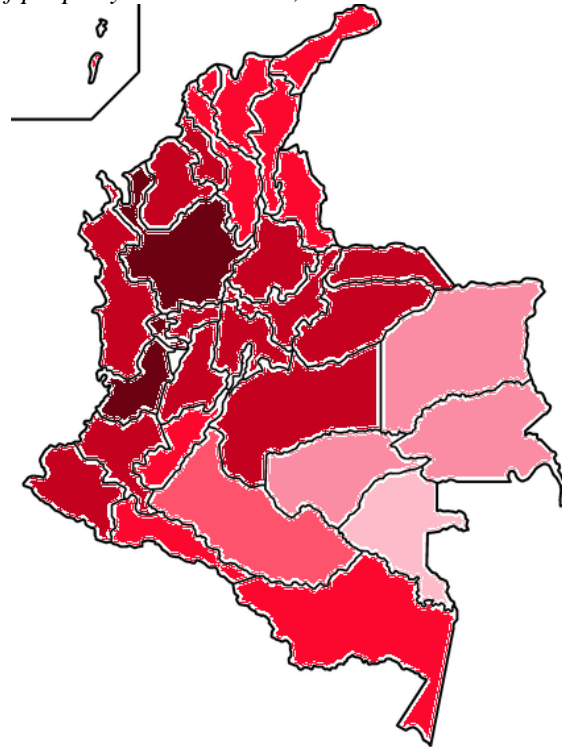
Size of parcel	1984		2011	
	% of landowners	% of hectares	% of landowners	% of hectares
0.1<20	86.1%	14.9%	84.8%	17.8%
20<50	7.5%	12.6%	8.1%	14.4%
50<200	5.2%	25.3%	5.4%	24.9%
200<500	0.9%	14.5%	1.1%	12.3%
500<1000	0.2%	7.9%	0.3%	9.8%
1000<2000	0.1%	5.5%	0.2%	7.6%
>2000	0.1%	19.2%	0.1%	13.2%
Total	100.0%	100.0%	100.0%	100.0%

Source: Fajardo, 2014

Table 6: Gini coefficient of property concentration, 2000-2009

Gini coefficient of property concentration, 2000-2009									
Department	Gini	% Change	Department	Gini	% Change	Department	Gini	% Change	
Vaupés	0.41		Huila	0.78	0.5	Risaralda	0.83	3	
Guainía	0.54	54	La Guajira	0.78	1.4	Casanare	0.84	-0.8	
Guaviare	0.56	11.2	Magdalena	0.78	0.4	Cauca	0.84	2.6	
Vichada	0.57	12.3	Amazonas	0.79	12.4	Chocó	0.85	4.4	
Caquetá	0.64	7.1	Santander	0.8	1.2	Meta	0.86	-1.1	
Putumayo	0.72	5.7	Tolima	0.8	0.8	Arauca	0.87	1.1	
Atlántico	0.73	-1.9	Sucre	0.81	-0.1	Caldas	0.88	1.4	
Norte de Santander	0.73	3	Cundinamarca	0.82	1.3	Quindío	0.88	-0.1	
San Andrés	0.73	1.9	Nariño	0.82	0.8	Valle del Cauca	0.91	1.8	
Bolívar	0.76	1	Boyacá	0.83	-4.2	Antioquia	0.91	5.7	
Cesar	0.77	2.7	Córdoba	0.83	1.2				

Figure2: Gini coefficient of property concentration, 2000-2009



Source: Table and Figure are the author's own elaboration based on data from UNDP, 2011.

It is clear from this data, as well as from a myriad of studies, that Colombia's redistributive reforms are failing its rural populace and exacerbating rural conflict, poverty and hunger, through the continuation and worsening of land inequality and concentration (see Mondragón, 2009; Borras 2003; Machado, 2009; UNDP 2011; Fajardo 2014, García 1999; Salinas Abdalá 2012). Without democratic land access and control, rural poor people – who represent the rural majority – are unlikely to be food secure, have proper housing, and escape poverty. This inevitably leads to more conflicts and may encourage people living in destitute to search for alternative livelihoods, such as drug trafficking or be forced to move to urban slums. In this context of over 20 years of failed redistributive land reform, what can be done? One possibility is to re-assess the reform programme, identifying its limitations and failures, and refer to some of the guiding principles of the Tenure Guidelines on redistributive reforms as a way forward.

Using the Tenure Guidelines: the need for redistribution

Article 15 of the Tenure Guidelines addresses some of these issues by providing some fundamental guiding principles on 'redistributive reforms', many of which are based on international human rights obligations. The 'right to adequate housing', for example, which is part of the Universal Declaration of Human Rights (ICESCR) states that "increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement" (CESCR 1991). The need to redistribute land to the landless is echoed in Article 15.3 of the Tenure Guidelines which calls for redistributive reforms "where a high degree of ownership concentration is combined with a significant level of rural poverty attributable to lack of access to land, fisheries and forests..." (FAO 2012, 25-26). While this is certainly the case in Colombia, important questions around how to carry out redistribution and who should take the lead role remain vital. Colombia's market-led agrarian reform has failed to redistribute lands in a sustainable way, as we can see from the increased concentration in Table 5 and Figure 2 above and as Borras (2003), Mondragón (2009), Fajardo (2014), among others have argued in their analyses. Aside from "voluntary and market based mechanisms", Article 15.1 calls for the "expropriation of private land, fisheries and forests for a public purpose" (FAO 2012, 25). Rather than

simply distributing ‘*baldíos*’ (public lands) which usually have low production potential in remote regions or reverting to a willing-seller, willing-buyer market-led reform, expropriating private lands which are either unproductive, illegal, or exceed a strict land ceiling would begin to dismantle the extremely unequal agrarian structure that exists today. This is the key difference between distributive and redistributive reforms. As Fox reminds us, *distributive* reforms “are qualitative changes in the way states allocate public resources to large social groups”; while *redistributive* reforms “change the relative shares between groups” (Fox, 1993:10). In other words, redistribution implies zero-sum action and necessarily involves taking from one group to give to another (Fox, 1993). In the context of rural Colombia, the extremely high level of land concentration and rural poverty cannot be resolved without redistributive reforms. Yet, the manner in which the land reform has and continues to be pursued is principally distributive, allocating public resources via ‘*baldíos*’ and credit programmes without challenging the unequal land-based power relations which continue to exacerbate rural poverty, violence, and food insecurity in the countryside.

Relatedly, Article 15.2 calls for land ceilings when implementing redistributive reforms. But while some may argue that Law 160 does include a land ceiling of one Family Agriculture Unit (*Unidad de Agricultura Familiar, UAF*), loopholes have rendered it ineffective. For public lands distributed by the state (‘*baldíos*’), land reform beneficiaries cannot receive more than one UAF, which is considered the amount of land necessary in a specific region and according to the agro-ecological conditions, for a family to obtain a decent livelihood. It is also illegal for an individual to accumulate, via private transaction, more than one UAF if the land was previously granted by the state as a ‘*baldío*’. However, according to Oxfam, between 2010 and 2012, Cargill acquired 52,576 hectares of land – all of which were previously granted as ‘*baldíos*’ – in the Altillanura region of Colombia, over 30 times more than the limit of one UAF (Oxfam International, 2013). By creating 36 different shell companies, Cargill was able to purchase 39 adjoining UAF plots. This tactic, facilitated by the law firm Brigard & Urrutia, has also been used by Colombian company Riopaila Castilla and Brazilian company Grupo Monica which have acquired 42,000 hectares and 13,000 hectares, respectively, through the creation of shell companies (Oxfam International, 2013:18). This is a relatively easy loophole, especially for large multinational companies to bypass, rendering the ‘land ceiling’ seemingly ineffective.

Further, as several researchers have pointed out, many land reform beneficiaries struggle to pay back the 30% loan plus interest required when they receive land from the state (see Deininger 1999; Borrás 2003; Mondragón 2006). This has resulted in many loan defaults and ultimately poor people having to give up their land due to indebtedness. Without sufficient financial support and agricultural extension services provided to those land beneficiaries just starting out, it is extremely difficult and very unlikely that they can advance. The initial stages for land reform beneficiaries are the most crucial for their success and sustainability as productive farmers and their right to an adequate standard of living. In this regard, Article 15.4 of the Tenure Guidelines urges States to take into account the financial and other contributions of beneficiaries “and not leave them with unmanageable debt loads” (FAO, 2012:26). Article 15.6, calls on States to “ensure that policies and laws assist beneficiaries, whether communities, families or individuals, to earn an *adequate standard of living from the land, fisheries and forests* they acquire and ensure equal treatment of men and women in redistributive reforms” (FAO, 2012: 26, emphasis added). As a fundamental human right enshrined in Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to an adequate standard of living is an international obligation and without initial financial, social, and productive support through agricultural extension services and public infrastructure, land reform beneficiaries are constrained from this fundamental human right. This is reiterated in Article 15.8 of the TG’s, whereby “States should ensure that redistributive land reform programmes provide the full measure of support required by beneficiaries, such as access to credit, crop insurance, inputs, markets, technical assistance in rural extension, farm development and housing. This provision of support services should be coordinated with the movement on the land by the beneficiaries” (FAO, 2012:27). These are essential components of a redistributive land reform programme that must be fulfilled in order for people to secure access to their fundamental human rights. Subjecting land reform beneficiaries to pay for 30% of the parcel

plus interest rates – considering that most are living in poverty and just starting to establish a productive farm unit is a predictably flawed plan which is bound for failure

Conclusions and recommendations

Colombia's land reform programme certainly consists of objectives consistent with the TGs and international law in many respects. The issue at stake here is not necessarily that land policies are absent (though some certainly are) or contradictory to the goals of democratic land access and food security, but rather that they have consistently failed to meet these objectives. First, since 1984 the landholding structure has almost gone unchanged, with a Gini-coefficient among the highest in the region at 0.885. Despite extreme land-based and wealth inequalities the state maintains a market-led agrarian reform which fails to account for the underlying imbalances in terms of negotiations and access to financial, political and social resources. Second, the failure to promote redistributive reforms rather than distributive reforms is not changing the land-based wealth inequalities in agrarian society. Third, the widely known loopholes which enable agro-industries such as Cargill and Grupo Monica to control more than the land ceiling allotment of 1 UAF through the creation of shell companies renders that policy objective virtually obsolete, at least for those corporate lawyers who can circumvent the law. Fourth, the high interest credit and lack of other financial support cripples small-scale farmers, particularly recent land reform beneficiaries starting from scratch. Fifth, the lack of training and support services due, in part, by the decentralization scheme which stripped away public support for farmers contributed to the low success rate of land reform beneficiaries. The following table provides a summary of these key components:

Table 7 Promoting redistribution through Market-led Agrarian Reform

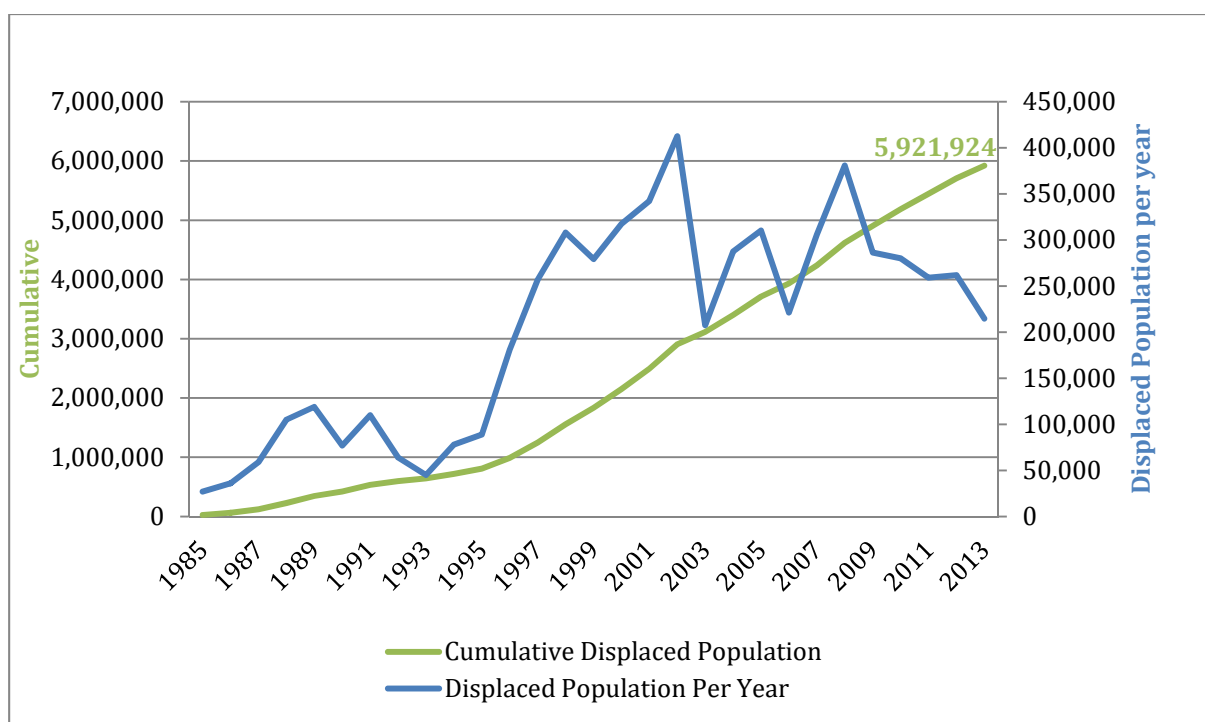
MLAR Component	Partially Available/ Lacking/Contradictory	Tenure Guidelines	International Law
Land reform for the landless	Partially Available: Market-led approach has led to few beneficiaries; land concentration increased from 2000-2009; Gini-Coefficient 0.885	Article 15.3: “where a high degree of ownership concentration is combined with a significant level of rural poverty attributable to lack of access to land, fisheries and forests...”	United Nations High Commissioner for Human Rights, Right to Adequate Housing: “increasing access to land by landless or impoverished segments of the society should constitute a central policy goal...including access to land as an entitlement”
Redistributive?	Lacking: No redistribution of land-based wealth, only distribution	Article 15.1: calls for the “expropriation of private land, fisheries and forests for a public purpose”	
Land Ceiling	Partially Available: Loopholes in the UAF enable corporations such as Cargill and Grupo Monica to acquire over 30 times land ‘ceiling’	Article 15.2: States may consider land ceilings as a policy option in the context of implementing redistributive reforms.	
Financial support/credit	Partially Available: Former 70:30 subsidy/credit scheme led to widespread defaults and indebtedness	Article 15.4: Urges States to take into account the financial and other contributions of beneficiaries “and not leave them with unmanageable debt loads”	Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights
Support/extension services	Lacking: INCORA’s lack of funds and decentralization stripped away support systems	Article 15.6: “ensure that policies and laws assist beneficiaries, whether communities, families or individuals, to earn an <i>adequate standard of living from the land, fisheries and forests</i> they acquire and ensure equal treatment of men and women in redistributive reforms” Article 15.8: States should ensure that redistributive land reform programmes provide the full measure of support required by beneficiaries, such as access to credit, crop insurance, inputs, markets, technical assistance in rural extension, farm development and housing. This provision of support services should be coordinated with the movement on the land by the beneficiaries”	Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights: the right to an adequate standard of living is an international obligation and without initial financial, social, and productive support through agricultural extension services and public infrastructure, land reform beneficiaries are constrained from this fundamental human right

Restoring access to the displaced

Introduction

Between 1985 and 2013, an estimated 5,921,924 people (13% of the total population) were forcibly displaced in Colombia due to armed conflict (CODHES 2014). According to the Information System of Displaced Population (*Sistema de Información sobre Población desplazada*) 76% of those forcibly displaced between 1996 and 2011 migrated from rural to urban areas (CODHES 2014). This comes as no surprise given that the majority of conflict occurs in rural areas, leading to increased rural-urban migration, landlessness, and urban slum expansion. In terms of Internally Displaced People (IDP) worldwide, only Syria has a higher number of IDPs at 6.5 million. As a result of such rampant forced displacement, the National Centre for Historic Memory estimates that 8.3 million hectares of land (14% of the country's territory) has changed hands illegally (Centro Nacional de Memoria Histórica, 2013). It is the rural poor, peasant farmers and particularly minority ethnic groups such as Afro-descendants and Indigenous that disproportionately bear these costs, as 102 indigenous communities are at risk of disappearing; 32 of which have less than 500 people (Centro Nacional de Memoria Histórica, 2013:278). Further, the United Nations Human Development Report found that in 2007, 43,630 Afro-descendants were forcibly displaced, while in 2010, 20,542 lost access to their land. In 2011, President Santos passed the 'Victims and Land Restitution Law' (*Ley de Víctimas y Restitución de Tierras 1448*, hereafter Victims' Law), which came into effect in 2012 – the same year in which the current peace negotiations began. This law is designed to return illegally acquired land to their rightful occupants – those who have been forcibly displaced since 1991 – granting them legal tenure rights and providing them with other forms of reparation and support. Special Decree Laws were also established 2012 to restore territorial access and control to indigenous peoples (Decree 4633) and afro-descendants (Decree 4635) who were displaced due to armed conflict.

Figure 3 Displaced Population, annual and cumulative, 1985-2013



Source: Author's own based on data from CODHES 2012, 2014

Restitution and Human Rights

The passing of this law is of particular importance since, unlike the previous government under Álvaro Uribe (2002-2010), the Santos government acknowledges the internal armed conflict and agreed to negotiate a peace process. Important steps have been taken to carry out this process, including establishing several institutions in order to fulfill the mandate of victim reparation and land restitution. These include the Land Restitution Unit (Unidad de Restitución de Tierra, URT), responsible for administering and implementing land restitution; the Unit for Attention and Reparation of Victims (Unidad para la Atención y Reparación Integral a las Víctimas, UARIV), responsible for the implementation of full reparation to victims of the conflict; restitution judges and magistrates, responsible for carrying out the judicial process; and the National Centre for Historic Memory (Centro Nacional de Memoria Histórica), responsible for gathering information regarding the violent conflict and the victims for full reparation purposes (Amnesty International, 2014). However, severe shortcomings in both design and implementation threaten to delegitimize and undermine the restitution process.

Under the Victims' Law (Law 1448), victims of the armed conflict (not including adult members of armed groups) can claim reparations for harm carried out since 1985 (Art. 3, Law 1448), while land restitution applies for those displaced since 1991 (Art. 75, Law 1448). The Law itself defines victims as those who suffered from International Human Rights infractions since 1985 as a result of the internal armed conflict (Ley 1448, Article 3). Article 28 outlines the rights of victims, including the right to truth, justice, and reparation; the right to return to one's place of origin or be relocated under voluntary conditions with security and dignity; the right to land restitution, among others. Those who were forcibly displaced from their land both directly and indirectly due to the internal conflict have the right to land restitution so long as they are either the formal land title holder (*propietario*), possess the formal land title in another's name with proof of transfer (*poseedor*), or can show occupancy rights (*ocupante*) of untitled land acquired in 'good faith' of which they can and are willing to work and is no more than one Agricultural Family Unit (UAF)²⁰. These three types of land rights holders are eligible for land restitution, but may be subject to monetary compensation or relocation to another property if restoring access to their original land is not possible.

One of the central tenets of the Victim's Law is the principle of 'good faith' – ambiguous in nature and inherently problematic as a result. Article 5 of Law 1448 presumes victims claiming land restitution are acting in 'good faith' and therefore the 'opponents' must prove that they acquired the land legally via a 'willing seller-willing buyer' principle and could not have known that it was an area of forced displacement. When another party claims ownership over the same parcel as a claimant, they are referred to as 'opponents' (*opositor*). Opponents may be IDPs themselves who were forced from their original lands, settling on apparently unused land, or who purchased land through apparent legal means but which was actually land of other IDPs. On the contrary, opponents could also be agro-industrial corporations seeking to expand their production. A recent report by Amnesty International based on fieldwork carried out in 2013 and 2014 points out that most 'opponents' are peasant farmers who lack the financial resources to hire legal counsel resulting in their inability to prove they acted in 'good faith', while "very few cases have challenged land occupation by large national or international companies, paramilitaries or others who may have been responsible for the forced displacement and dispossession of the claimant" (Amnesty International, 2014:26, 31). One of the main problems with the 'good faith' principle, similar to the findings of both Borrás (2003) and Deininger (1999) concerning poor people or peasants (i.e. the powerless) in negotiating the terms of a 'voluntary, willing-seller willing-buyer' land transaction, is the unequal relationship among the rural poor and the wealthy – whether large-scale landowners, agro-industrial corporations, or other economically and politically influential actors. This speaks to the importance of dismantling the highly unequal agrarian structure which is reflected in the functioning of institutions through political and economic influence. Without challenging the existing unequal land-based power relations, it is unlikely that the restitution process will succeed in its mandate.

²⁰ The Family Agricultural Unit (*Unidad Agrícola Familiar*) is a variable unit of farmland required to sustain a family farm, subject to each region's agro-ecological conditions (Art. 38 of Law 160, 1994).

A recent study done by the Norwegian Institute for Urban and Regional Research for example, suggests that “few IDPs indicate they will actually return to the land” (Garcia-Godos and Wiig, 2014:45). Since for many, entire generations have passed since families lost their land, they may have found alternative forms of employment, or may not want to return due to ongoing violent conflict and/or traumatic past experiences. Moreover, recent data from the Land Restitution Unit (URT) reveals that only a small fraction of those who apply for land restitution are actually considered. As of the end of 2014, for example, there were 72,623 applications for land restitution of which just 25,215 (34.7%) were located in the ‘micro-focalized’²¹ (eligible) zones. Of these 25,215 applications, only 9,695 passed the requirements, meaning that just 13.3% of the initial 72,623 applications were formally registered for the restitution process (URT, 2015). With nearly 90% of applicants rejected and a process that, “under ideal conditions”, takes a minimum of nine months to complete, it seems very unlikely that people will continue to have faith in the process, potentially leading to its demise unless radical changes are made to help the millions of IDPs in Colombia (Restrepo Salazar, 2012). Further, only 29,695 hectares of the estimated 8 million hectares illegally acquired throughout the conflict have been subject to the restitution process, of which 8,400 hectares were restored to a single family (Amnesty International 2014; República de Colombia, 2013). Data from the URT shows that thus far, 85% of expected claimants have not presented their claim to restitution unit. Colombia’s NGO Alliance²² (*Alianza de las ONG*) who work and support victims, point to the following six principal causes for which claimants are not coming forward (Forjando Futuros, 2014):

1. Fear of violence. From January 2008 to March 2014, 66 community leaders and claimants were assassinated.
2. Lack of confidence in authorities due to previous human rights violations and conflict.
3. Failure of the previous restitution act (Law 975) of 2005 under President Uribe.
4. Lack of available information regarding their rights.
5. Power imbalances between legal assistance available to victims and powerful economic elites.
6. Excessive bureaucratic process and procedures set by the URT

Moreover, the demoralizing factor caused by the almost 90% rejection rate could also be added to this list. One of the most important factors here is the lack of coherence with a redistributive agrarian reform process. Without dismantling the unequal power structures which characterize Colombia’s countryside, existing land-based social relations will prevail, likely reversing most of the advances in land restitution in the long run.

One provision within Law 1448 which exemplifies the State’s commitment to maintaining the existing agrarian structure and its commitment to the agribusiness and extractive sector is Article 99. If an area of land that is subject to restitution has an existing agro-industrial project operating with landowners that claim to have acquired the property ‘in good faith’, then they are not obligated to return the property to its rightful owner (the victim who was displaced). In other words, the agro-industrial project is prioritized over the right of the displaced victim to return to his or her land (see Tenthoff, 2011). The agro-industry must however, offer the displaced victim a contract to work for the industry as a wage labourer on his or her own land. The idea of offering a violently displaced victim a job as a wage labourer for an agro-industrial company on their own land that directly or indirectly led to their displacement is probably the most insensitive pro-industrial provisions written into the Victims’ Law 1448. The injustice is astounding. The alternative is to offer the victim ‘adequate financial retribution’, but in no circumstance will the displaced victim regain control over their lands if an occupant acquired it ‘in good faith’. This Article sets the Victims’ Law 1448 below the standards set by the 2005 United Nations ‘Pinheiro Principles’ on Housing Property Restitution

²¹ ‘Micro-focalized’ zones are those specific municipalities, villages, or even individual parcels eligible for land restitution. The Defence Ministry and National Security Council decide which larger areas will be prioritized (macro-focalization) based on the security situation of the area, the historical density of dispossession and the conditions for return. The Local Land Restitution Operative Committee (Comités Locales de Restitución de Tierras, COLR) then decides which areas to micro-focalize within the macro-focalized region (see Article 76 of Law 1448; Decree 599 of 2012).

²² NGO Alliance (*Alianza de las ONG*) includes: Asociación Tierra y Vida, Fundación Forjando Futuros, Fundación Paz y Reconciliación, Colombia Sin Heridas, Instituto Popular de Capacitación IPC, Redepaz.

for Refugees and Displaced Person. Article 2.1 of the Pinheiro Principles state that “All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that *is factually impossible to restore* as determined by an independent, impartial tribunal” (UNHCR, 2005, *emphasis added*). Colombia’s Victims’ Law 1448 privileges industry at the expense of displaced victims’ right to return to their land when it is *factually possible* for them to return.

If the property is deemed to have been acquired ‘in bad faith’, the displaced victim may take over the administration of the existing agro-industrial project or be paid rent. While this provision is extremely problematic, in the very best of cases it is almost unimaginable how this would work out on the ground. In a case of a ‘bad faith’ opponent, the displaced victim (likely a poor peasant) will hypothetically help administer an agro-industrial project of a corporation who potentially violently displaced the victim, their family, and community. Moreover, due to the micro-focalization aspect of the restitution process, individual villages or even single parcels are subject to restitution, meaning that the surrounding area and thus one’s access to other land-based resources such as water, forests, as well as infrastructure (roads, electricity) may be controlled by the agro-industrial corporation who potentially owns other parcels in the region. While hypothetical, this example is in no way implausible; in fact, it is probably the most likely real-life situation. This exemplifies the processes technical approach to land policy. It assumes that by allocating a land title as a tradeable good, it will automatically self-implement and self-interpret, which of course is not the case as land governance is inherently political (see Franco 2008). Moreover, it is important to remember that landed property rights do not exist in a vacuum; they are not independent “things”, but rather social relations between people (Tsing 2002). While micro-focalization may appear to be politicizing certain geographical regions according to their density of IDPs and potential for violent conflict, they are in fact doing just the opposite. By focusing on one specific zone for restitution within a broader region which remains unchanged, micro-focalization actually works to de-politicize the area by allowing existing land-based power relations to prevail (see Borrás and Franco 2010).

Not surprisingly, the Land Restitution Unit report in 2014 reveals that of the nine economic projects belonging to ‘bad faith’ opponents, none of the claimants decided to exercise their rights to return to their land and administer the project. Furthermore, according to the Office of the Procurator General, “in almost all land restitution cases in which there has been an opponent, the opponent has been a victim or a peasant farmer who innocently occupied land being claimed” (Amnesty International, 2014: 41). However, due to a lack of access to resources needed to defend a claim ‘in good faith’ (lawyers, institutions), victims and peasants who are poor, who may be IDPs themselves with land not in a micro-focalized zone, are forced to leave their lands once again.

Much like the previous section on redistributive land reform, it is not sufficient to simply have policies and programmes in place if they do not meet their objectives. The limitations of the Victims’ Law are not fulfilling the rights of displaced peoples, nor leading to social justice in the countryside. In a recent interview with a coordinator for the Special Administrative Management Unit for Land Restitution and Displacement (Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas, UAEGRTD), it was acknowledged that the ambiguity in the Victims’ Law is problematic but that these are dealt with on a case by case basis and decided upon by the restitution unit’s special judges and magistrates. Issues that remain most problematic, according to the coordinator, are the ongoing security concerns throughout the country, third party claimants, Article 99 concerning existing agribusiness controlling a victim’s rightful property, and the concept of ‘good faith’. As the representative of the Restitution Unit explained, most of these issues remain in the hands of a few judges who ultimately decide the fate based on available evidence and arguments. The issue here however, is whether or not victims are receiving sufficient expertise, resources, and advice to defend their claims against powerful corporate actors. Progress to date would indicate that they are not. In this regard, it is important to re-assess policy design and implementation as well as refer to the Tenure Guidelines for guiding principles on restitution. Article 14 of the TGs is devoted to this issue. Of particular importance, is Article 14.4, which states that “Claimants should be provided with adequate assistance, including through legal and paralegal aid, throughout the process. States should ensure that restitution claims are promptly processed. Where necessary, successful claimants should be provided

with support services so that they can enjoy their tenure rights and fulfil their duties. Progress of implementation should be widely publicized” (FAO, 2012:25). Whether claimants or opponents, it is the rural poor who lack adequate legal assistance in defending their territorial rights, especially when up against economically and politically influential actors. Article 14.2 also calls for States to return the original parcels or holdings to those who suffered the loss, or their heirs, by resolution of the competent national authorities (FAO, 2012:25). The right to restitution is also a fundamental human right under the 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, which states that:

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property” (OHCHR, 2005).

However, the Colombian State has prioritized agribusiness and other extractive industrial development (mining, hydrocarbons) over land restitution, allowing existing agro-industrial projects to continue production and land control even when a victim proves their right to this same parcel of land (Article 99). This injustice not only contradicts the State’s declaration to follow the Tenure Guidelines, but also its obligation to fulfil fundamental human rights, under international treaties. In this case, both the Tenure Guidelines and the Pinheiro Principles hold the state to a higher standard than the existing legislation, mainly due to Article 99. Not only should this article be revised in order to prioritize the rights and needs of IDPs, the Land and Restitution Unit itself needs to be fully coordinated with INCODER and national land registry and engage with civil society groups at the local level for a more participatory restitution process which incorporates the broader programme of agrarian reform and takes into account territorial demands of indigenous, Afro-descendants, and Zonas de Reserva Campesina (ZRC).

Conclusions and recommendations

The passing of the Victims and Land Restitution Law 1448 in 2011 was certainly a historic moment in Colombia. From the previous administration’s neglect of the armed conflict and therefore victims of such to the Santos administration acknowledgement and formal recognition of these realities is an important step for the victims and the peace process. However, as previously mentioned, many problems persist both with the design and implementation of the restitution process. First, of particular importance is Article 99 of Law 1448 which prioritizes agro-industry over a victims’ right to return to their place of origin. This is in contradiction with Article 2.1 of the Pinheiro Principles and Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law as well as Article 14.2 of the Tenure Guidelines. Second, the lack of available information regarding tenure restricts the restitution process from handling all cases with transparency. Third, the ambiguity embedded in Law 1448, particularly regarding the ‘good faith’ principle in Article 5 renders decision-making to be made in court, often between a corporate lawyer defending influential corporations and a lawyer provided to the ‘claimant’ or ‘victim’ (depending on the case). It is important to remember that laws are yet another instrument – to be interpreted, used, and implemented subject to negotiations and available evidence. The following table summarizes some of the key issues regarding restitution and points to both the TGs and international human rights law in order to strengthen and fill the gaps in the state’s existing legislation and policy amework and their obligation to international human rights and the TGs.

Victims and Land Restitution Law 1448	Partially Available/ Lacking / Contradictory/ Problematic	Tenure Guidelines	International Law
Article 28: the right to return to one's place of origin	Partially Available: Only applies if there is no existing agro-industry in one's place of origin	Article 14.2 calls for States to return the original parcels or holdings to those who suffered the loss, or their heirs, by resolution of the competent national authorities	United Nations High Commissioner for Human Rights, Right to Adequate Housing: “increasing access to land by landless or impoverished segments of the society should constitute a central policy goal...including access to land as an entitlement”
Article 5: Principle of 'good faith'	Problematic: Subjective to individual arguments; neglects power imbalances; ambiguous	Article 14.4: States should develop gender-sensitive policies and laws that provide for clear, transparent processes for restitution. Information on restitution procedures should be widely disseminated in applicable languages. Claimants should be provided with adequate assistance, including through legal and paralegal aid, throughout the process. States should ensure that restitution claims are promptly processed. Where necessary, successful claimants should be provided with support services so that they can enjoy their tenure rights and fulfil their duties. Progress of implementation should be widely publicized.	Pinheiro Principles and the 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
Article 7: Guarantee of due process	Partially Available: Almost 90% rejection rate denies rights of majority of victims	Article 14.1: States should consider providing restitution for the loss of legitimate tenure rights to land, fisheries and forests Article 14.4 States should ensure that restitution claims are promptly processed	Pinheiro Principles and the 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
Article 99: Prioritizes agro-industry over victims' right to return	Contradictory: Contradicts Article 28 in Law 1448 as well as Article 14.2 of the TGs, and Article 2.1 of the Pinheiro Principles and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of	Article 14.2 calls for States to return the original parcels or holdings to those who suffered the loss, or their heirs, by resolution of the competent national authorities	Article 2.1 of the Pinheiro Principles state that “All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal” (UNHCR, 2005, emphasis

International Human Rights Law
and Serious Violations of
International Humanitarian Law

added); **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**

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property” (OHCHR, 2005).

Final Conclusions

Political tendencies and accountability mechanisms

While it is clear that in the context of the three key elements we put forward for democratic land access and control – to protect, promote, and restore – legal frameworks and institutions for tenure protection, redistribution, and restitution are in effect in Colombia, they have proven to be insufficient and ineffective in meeting their objectives. This is not to say that legal institutions concerning land and territory are obsolete; on the contrary, legal frameworks concerning land and territorial rights are relatively comprehensive, though insufficient, in terms of institutional recognition certain rights, albeit with considerable spaces for negotiation and ambiguity embedded within the legal frameworks. The current legislation and policy implementation processes concerning land and natural resource access leave much to be decided by market forces, imbalanced negotiations under ambiguous legal frameworks, and lack robust, multi-level accountability mechanisms which empower marginalized groups and strengthen the enforceability of their rights. The problems of democratic land access and control in Colombia therefore have less to do with the recognition of rights than with the enforceability (and extension) of those rights. As Fox puts it:

“Institutions may nominally recognize rights that actors, because of imbalances in power relations, are not able to exercise in practice. Conversely, actors may be empowered in the sense of having the experience and capacity to exercise rights, while lacking institutionally recognized opportunities to do so. Formal institutions can help establish rights that challenge informal power relations, while those informal structures can also undermine formal institutions” (Fox 2007:335).

One of the central obstacles for democratizing land access and control in Colombia is the lack of institutional reform within the existing agrarian institutions. The same institutions that led to the highly unequal agrarian structure and problems of rural poverty are being used under a similar market-based logic. The underlying assumptions of Law 160 of 1994, for example, remains under the guise of free-market principles, ignoring unequal terms of negotiations which are so central to the entire process. Furthermore, the agribusiness bias and ambiguous nature of the ‘good faith’ principle which underlies the restitution programme has become highly problematic for displaced victims. With ongoing violence in the countryside and high levels of land-based wealth inequality, legal frameworks tend to favour those with the capacity to negotiate and defend their interests in the court of law, that is, the economic and political elites. One reason for this is the increasing decentralization of legal institutions and the high degree of autonomy for local elites.

Decentralization and local autonomy are not inherently problematic, but they become so in the context of great power imbalances within society and between the state and its citizens. This is the case in rural Colombia with a highly unequal agrarian structure, the widespread presence of local authoritarian enclaves and massive internal displacement. In this context, and as argued by both Ballvé (2012) and Grajales (2015), Colombia’s decentralization reforms have enabled existing politico-economic powers to both reinforce and reconfigure their relationships with the state and influence over local institutions. This is coupled with very weak institutional oversight within the Colombian state linked to the ongoing armed conflict and implicated ‘parapolitics’ previously discussed. These factors have contributed to what Jonathan Fox calls ‘low-accountability traps’ whereby the power imbalances within and between rural civil society and state actors (weak vertical accountability) interact with the weak institutional oversight, checks and balances within the state (weak horizontal accountability) in a mutually reinforcing way (Fox, 2007). Low-accountability traps are hard to break, but can be triggered by “‘virtuous circles’ of mutual empowerment between proaccountability actors in both state and society” (Fox, 2007:354). These ‘virtuous circles’ can be driven by two interlocking processes, as explained by Fox:

“First, autonomous indigenous and peasant regional organizations need to combine vertical integration with horizontal spread, in order to gain the combination of grassroots grounding, national linkages, monitoring capacity, and bargaining power needed to change the balance of power between the state and rural civil society. Second, reformers within

public institutions need to encourage ‘enabling policy environments’ – state initiatives that tangibly reduce the costs and risks associated with poor people’s collective actions” (Fox, 2007:354).

The Tenure Guidelines can help trigger these virtuous cycles if they are used in a very pro-active and pro-poor way. First, the TGs can give leverage to rural civil society organizations by linking existing national legislation and the TGs with international human rights law – which we have demonstrated in this report. This form of vertical accountability is also inherently horizontal as it implicates the state’s domestic obligations with their commitments to international law and UN declarations and therefore applies pressure from the international community. The TGs can also be used as a unifying framework in the pursuit of more democratic land access by united marginalized groups with broadly similar interests in protecting and extending existing land access, redistributive agrarian reform, and restoring land and resource access to internally displaced people. Furthermore, the FAO has committed to ‘Colombianize’ the TGs with capacity building workshops involving rural civil society organizations in collaboration with commitments from NGOs such as FIAN and the Universidad Externado de Colombia. These elements can help empower marginalized people, build a more robust rural civil society and change the balance of power with the state, thereby facilitating stronger vertical accountability.

The present political environment and peace negotiations is also an opportune time for the TGs to be used in rural development policies going forward. In particular, the first two points of agreement in the peace negotiations consider policies for ‘integral agrarian development’ (including land reform) and political participation. New institutions are being established as INCODER will soon be dissolved. This creates opportunities for pro-reform and pro-accountability state actors to form ‘enabling environments’²³ which can open new spaces for participatory engagement among state and social actors in local or regional level projects and increase the institutional oversight. For example, in the second point of agreement of the peace negotiations, the national government has committed to draft new legislation to guarantee and increase spaces for citizen participation, engagement, and implementation in development plans; society-led transparency mechanisms; a massive awareness campaign for the dissemination of people’s rights, among many other things. These commitments offer promising opportunities for such enabling environments to be realized. With pressure from non-state actors promoting the TGs such as the FAO, international NGOs such as FIAN, academics and researchers, civil society organizations and public oversight agencies, these enabling environments can strengthen horizontal accountability and trigger mutually reinforcing interactions between state and society to increase accountability, empower the poor and make rights meaningful and real. This is referred to as ‘transversal’ accountability (Isunza, 2003) whereby public oversight agencies bring together state and societal actors in a cross-cutting ‘diagonal’ way that combines the horizontal and vertical accountability processes (Ackerman 2004; Fox, 2007). This inevitably entails a very inclusive and participatory process within which the TGs can offer a central reference point for accountability.

The Tenure Guidelines are the result of an inclusive, participatory process involving the collaboration of state and civil society actors, and this should continue through to their use and implementation on the ground to expand the sphere of public participation in democratizing land access. Without inclusive and participatory methodologies for effective use of the TGs, it is likely that they will simply become a legitimating mechanism for those in positions of power to solidify and exacerbate land and resource-based inequalities. Methodologies for implementation that involve ‘transversal’ accountability mechanisms with synergetic spaces for state-society interaction will increase the likelihood for effective use of the TGs in ways to benefit the most marginalized groups in society (see Fox, 2000; 2007). As Ackerman argues, “the opening up of the core activities of the state to societal participation is one of the most effective ways to improve accountability and governance” (2004, 448). For this type of ‘co-governance’, it is essential that civil society actors participate in the initial stages of the design process and are not simply included as ‘participants’ at a later stage of state-led initiatives (see Fox, 2000; 2007; Fung and Wright 2001; Isunza, 2003; Ackerman 2004). The TGs, as a strategic instrument of accountability, can therefore be used by diverse state and rural civil society

²³ Fox defines ‘enabling environments’ as “the institutional context that either facilitates or blocks the collective action that is critical to providing leverage and voice to underrepresented people” (2007:140).

actors for greater democratic land access and control, but must always benefit the most vulnerable and marginalized in society, as stated in Article 1.1 (Art. 1.1, FAO, 2012).

While the TGs offer a great opportunity for greater governance around land and resource tenure, they equally pose a great threat. As we mentioned in the introduction, global governance instruments like the TGs are indeed *instruments* – they depend on how, by whom, where, why, and for what purposes they are used. The greatest threat the TGs pose is if they legitimize undemocratic land control and exacerbate land-based wealth inequalities through their use and capture by certain anti-reform elites with political and economic interests in maintaining the current agrarian and power structures in rural society. It is therefore important to consider the three main political tendencies around land governance which are highly relevant for understanding the political contestation that will likely arise throughout the interpretation, use, accountability and monitoring of the TGs: (1) regulate to facilitate land deals; (2) regulate to mitigate negative impacts and maximize opportunities; (3) regulate to stop and rollback (Borras, Franco and Wang, 2013). While the first two tendencies perceive commercial land deals as desirable and inevitable, respectively, the TGs are therefore an instrument to facilitate this expansion and to potentially mitigate some of the negative social and environmental consequences of the land deals. While tendency one is relatively clear in its objectives of facilitating land deals, tendency two attempts to develop short term strategies to mitigate negative consequences but nonetheless accepts that land deals are desirable or inevitable. Both of these tendencies are dangerous for the most vulnerable and marginalized groups, since they fail to stop land deals and the violation of legitimate tenure rights as well as rollback existing land-based wealth inequalities based on historical injustices. These two tendencies, and especially the second, are the most common forms of interpreting global governance instruments, codes of conduct, or corporate social responsibility frameworks. The end result however amounts to *'business as usual'*.

The Tenure Guidelines, from their initial design, have been much more participatory and democratic than other land governance instruments. The combination of state, society and corporate actors coming together across four continents from 133 countries to agree on these guidelines which draw on existing international human rights laws and declarations is a significant achievement. But this process will become meaningless if this same participatory spirit and emphasis on the most vulnerable and marginalized is not carried through to its use, implementation, accountability and monitoring. The most promising way to benefit the most marginalized groups, protect legitimate tenure rights, promote redistributive pro-poor reforms and restore access to displaced victims of armed conflict is to use the TGs to stop and rollback land deals and tenure rights violations. This third political tendency put forth by Borras et al (2013) is the only one that opposes the continued expansion of (agro)-extractive industries which is a major driving force behind the high levels of land concentration and displacement in Colombia today. The TGs will undoubtedly unfold in the context of a highly contentious political arena. We urge those pro-poor actors to use the TGs how they were meant to be used – to benefit the most marginalized groups – and not allow state, civil society, or corporate actors to appropriate the TGs under their own terms in order to maintain their own expansionary interests and leave the agrarian structure unchanged.

While agrarian dynamics in Colombia present a very complex situation for land and natural resource distribution and access, there are many opportunities for transformative change going forward. The TGs offer an opportunity to strengthen accountability mechanisms and support the rights of the poor, landless, and displaced. With peace negotiations on the line, land politics remain a focal point in order to end rural conflict and start developing an integral model for rural and agricultural development. The following provides some implications and recommendations for states, international institutions, civil society organizations and research and academic communities for using the TGs to promote democratic land access.

Implications and recommendations

States

States should take a lead role in ensuring that public policies and tenure laws are in accordance with the Tenure Guidelines in order to fulfill existing international human rights obligations and democratize land access. This should include participation and coordination with civil society groups

at the national, regional, and local levels to facilitate stronger and more dynamic interaction between the state and civil society, as well as with public oversight agencies. In the Colombian context, the high degree of land concentration and unequal landed property relations, first and foremost, requires a redistributive agrarian reform programme which will effectively transform the agrarian structure. As we have shown in this report²⁴, the landholding structure has largely remained unchanged after decades of a market-led land reform. When public policies and programmes fail to meet their objectives, particularly after twenty years of implementation (1996 market-led agrarian reform programme, for example), it is necessary to change the design and strategy. As we have pointed out above, allowing the market to be the main driver of land reform in the context of highly unequal socio-economic relations among ‘willing buyers and willing sellers’ typically leads to a re-concentration of land access. We recommend a state-led approach with participation from civil society and strong public support for beneficiaries, including agricultural extension services based on building an integral rural development model with strong local linkages for production and consumption. This also requires applying a land ceiling on large-scale landholdings and ensuring that land meet a culturally appropriate socio-economic function. This integral rural development strategy should be designed, carried out, and monitored with participation from rural civil society, in particular peasants, small-scale farmers, rural wage labourers, indigenous and afro-descendants.

Without a more equitable distribution of land and resource access, problems of poverty, inequality, hunger, and violence will persist. The current rural and agricultural development model is based on agro-industrial monocrop production of raw materials for agro-fuels and industrial food inputs. High land concentration for the production of oil palm (concentrated among four companies with 22,000 ha each), beet, sugarcane, cassava and more recently soybeans have been facilitated by “policies offering incentives to foreign investment, by stimulus and incentives for large-scale plantations, and by reforms to agrarian laws that remove the restrictions on the acquisitions of large tracts of land” (Gomez, 2014:3, and see Salina 2011). It is therefore crucial that state policies shift this bias towards small-scale agriculture since they represent that vast majority of producers and are the motor of a vibrant rural economy.

The protection and recognition of tenure rights, particularly informal and customary tenure rights which are currently not protected by law should be recognized and legitimized. This is echoed throughout the Tenure Guidelines (see Articles 2,5,7,8,9,11,12,17,20,21,25) and in the rural context where the vast majority relies on land and resource access for their wellbeing this recognition is rooted in international human rights law regarding the right to food, the right to housing, the right to an adequate standard of living, and the rights of indigenous peoples. Of course, the Colombian context presents great challenges given that, of the roughly four million rural properties, only 21% are formalized; 59% are informally in possession under ‘good faith’ and the rest are unknown (Garzón, personal communication, 2015). While a formalization process is underway, how, by whom, and for what purposes it is carried out is crucial. According to the Department of National Planning’s Advisor for Ethnic Minorities, Land and Social Planning for Property, Ricardo Garzón, one of the major challenges from a planning perspective is dealing with local elites and the local power imbalances which can undermine the equitable distribution of goods and services at the local level. The history of violent conflict and continued presence of armed groups coupled with vast informal and illegitimate land tenure relations have only intensified these power imbalances, enabling the persistence of what Jonathan Fox (1990) calls ‘local authoritarian enclaves’ whereby a few powerful actors at the local level (sometimes referred to as *caciques*) dominate decision making and access mechanisms, preventing “the effective extension of basic political rights to the entire population” (Fox, 1994:107). As Garzón acknowledged, it is important to take these local political dynamics and power relations into account when designing and implementing policies at the national, regional, and local levels. With the government’s new ‘decentralization’ strategy this may present new challenges and difficulties which will require more complex multi-level monitoring and implementation schemes. If these local authoritarian enclaves are to be dismantled, it is unlikely that local (bottom-up) or national (top-down) strategies will be to do it alone. The most promising way to counter local authoritarian enclaves and to successfully carry out pro-poor policies for rural democratization are when efforts

²⁴ See Table 5

from state and societal actors come together in a mutually reinforcing and complementary way (See Fox, 1993; Borras, 2003). This requires direct participatory implementation and monitoring processes at the local level with direct (resource and personnel) support from the state at multiple levels (local, regional, national).

However, complex multi-level monitoring and implementation schemes will be challenging given the current lack of coordination among state institutions dealing with land reform, restitution, and territorial right which already hinders the effectiveness of the state's broader objectives. Both within and among institutions such as INCODER (Colombian Institute for Rural Development), URT (Land Restitution Unit), and the Department for National Planning, effective coordination is lacking. The regional director of the Land Restitution for the state of Bolívar, Alvaro Tapia, stated that “the principal challenge facing the Land Unit is the disorganized state of the national land registry. INCODER, the Agustín Codazzi Geographic Institute and the land notary offices all have out-of-date and sometimes contradictory information about land property coordinates and ownership” (in Haugaard et al 2013: 12). This was also reiterated by personnel in the national Land Restitution Unit office in Bogotá, who stated that the lack of information on land tenancy rights creates many ‘unknowns’ which hinder the restitution process and can render poor landless victims of conflict to take their case to court against economically and politically powerful corporate actors (URT, personal communication, 11 August 2015). Further, a senior advisor in charge of managing, promoting and evaluating rural and agricultural development policies in the Sustainable Rural Development Division of the Department of National Planning expressed frustration with the land reform and restitution policy frameworks in particular. This advisor said that despite their recommendations, the policies are not being re-oriented accordingly. Their policy evaluations and recommendations are not accessible to the public and for internal use only. It is thus very clear, based on personal communication with several actors within different state institutions that there are tensions and disagreement with the existing land policies and their ineffectiveness. The lack of coordination among institutions and lack of transparency both within and across institutions contributes to these inadequacies. Without reforming these institutional structures which played a key role in shaping the current agrarian structure, it is unlikely that problems of poverty, inequality, food security and conflict will be solved.

International institutions

For international institutions such as United Nations organizations and specifically the FAO who, along with civil society, state representatives, and the private sector created the Tenure Guidelines, they should increase their engagement with both the state and civil society actors on how and by whom the TGs can be effectively used. This requires, what one FAO representative in Colombia referred to as the need to ‘Colombianize’ the TGs – that is, to incorporate the TGs within the national tenure policies at the state level and to engage with those who they are targeting at the societal level, the “vulnerable and marginalized” in society (Article 1.1, TGs). We recommend that the FAO take the initiative in ‘Colombianizing’ the TGs by organizing and carrying out workshops at local, regional, and national levels with civil society organizations – in particular with indigenous organizations such as ONIC and their affiliates, with Afro-descendant organizations, with peasant and small-scale farmer organizations, women’s organizations, etc. This is crucial in order to introduce the TG principles, their rootedness in international human rights law, and the initiatives taking place to implement the TGs throughout the country. It is also important to listen and understand the local perspectives and their take on how the TGs can be used; what problems or obstacles may arise; and the opportunities they have for democratizing land access and social justice in the countryside. The usage and implementation of the TGs should be carried out in a similar manner to the way they were decided upon in the first place – a participatory, democratic environment with inputs from a variety of actors. Of course, since the emphasis is on the most vulnerable and marginalized peoples, it is important to use the TGs in order to favour these people.

We also recommend and support the proposal put forth by the UN CFS High Level Panel of Expert (HLPE) report on land grabbing to organize a UN observatory within the FAO which is linked to the TGs. While this initial proposal requires national governments to prepare annual reports about land investment impacts on communities, food security and the environment, it would be equally as important to include the initiatives carried out by national governments to implement the TGs in their

national policy frameworks and to engage with civil society. This would also allow for a more transparent multi-lateral monitoring system and reporting in order to strengthen TG implementation and their effectiveness going forward.

Lastly, we echo the call previously made in a FAO report by Sergio Gómez (2014) on ‘The land markets in Latin America and the Caribbean: concentration and foreignization’ for a ‘complaints centre’ within the UN system and connected to the TGs “to provide a space for local communities to come together and to demand accountability” (50). This would enable more participation from the community level with TG implementation, monitoring, and accountability efforts. TG’s cannot be a ‘top-down’ initiative – it was not designed that way and should not be carried out that way. Thus, it is imperative that the FAO facilitate spaces for integration and interaction among state-level actors and civil society actors every step of the way.

Civil society organizations

Civil society organizations (CSOs) such as indigenous, Afro-descendant, peasant and small farmer organizations are, broadly, for whom the TGs are meant to serve. However, the best way to ensure the demise of the TGs as just another corporate social responsibility scheme is to ‘implement’ them as a top down initiative, excluding the very people they claim to support. CSOs are certainly interested in how they can use the TGs to defend their rights and for more democratic land access, but this will require spaces of engagement with both the state and non-state actors, such as the FAO, NGOs, and academics. Institutional arenas whereby they are able to participate in use, implementation, monitoring and accountability mechanisms are essential for the TGs to be used in a real and meaningful way and to democratize land access.

For CSOs as an ‘entity’, though diverse and wrought with internal tensions around land/resource access and territorial control, the TGs offer an opportunity to hold state and corporate actors accountable and protect/defend their tenure rights/demands. The underlying objectives of the TGs should be for democratic land access and control and social justice which is a point of intersection among the various CSO groups mentioned here. The challenge is to reconcile the differences among the various interests of diverse CSOs, each with their own histories, struggles, visions and demands and mobilize together on the basis of the intersections of their demands and struggles. The TGs can offer some alliance-building in the context of defense of human rights, but to construct alternatives a new framework which captures all of their struggles and demands, complete with tensions and conflicts, is necessary for strategic alliance building and stronger mobilization ‘from below’. But while alliances among rural society’s most marginalized groups is encouraged in order to increase their capacity vis-à-vis state and corporate actors, it is important to maintain a high degree of autonomy so as to not lose sight of long term objectives, principles, and goals. The risk of interactive state-society relations is that the economic and political influence of state actors can sometimes co-opt civil society leaders, which can reconfigure their movements’ ability to independently formulate their own goals and constrain their capacity to hold the state accountable.

Rural civil society in favour of stopping and rolling back land deals and tenure rights violations should therefore seek to form alliances to strengthen their position against prevailing forms of resource concentration and expansion, but also engage with a push for new participatory spaces with state actors, public oversight agencies, and the broader non-government international and national community such as NGOs, academics, and the FAO.

Research and academic community

Researchers and academics can play a very important role in the use, implementation, and monitoring of the TGs. This requires stepping out of the realm of purely academic research and engaging with CSOs, international institutions such as the FAO, and state actors. It requires doing research with a sense of urgency on relevant and practical issues and in the interests of the most vulnerable and marginalized in society. Researchers and academics can collaborate with CSOs on ‘big picture’ framing and articulating demands to help build stronger alliances and forces of mobilization which are often challenged by powerful economic and political elites. They should always play a secondary role to the CSOs they are working with, but offer their research and expertise when needed and called upon.

It is also very important for research and academic communities to organize and expand their networks both regionally and thematically in order to produce cutting-edge, empirically-based research on a variety of connected themes across the world. In the context of the TGs, this will help us understand and identify common trends, tendencies, shortcomings, achievements, tensions and opportunities for TG use and implementation. ‘North’-‘south academic networks as well as building linkages with the NGO community are also important for dynamic research which combines practitioner, policy-oriented research with academia. Further, it is critical that we start to build networks among academics, NGOs, development practitioners, political activists, and government officials in order to inform policy making and advocacy work around the TGs and ultimately to strengthen their effectiveness.

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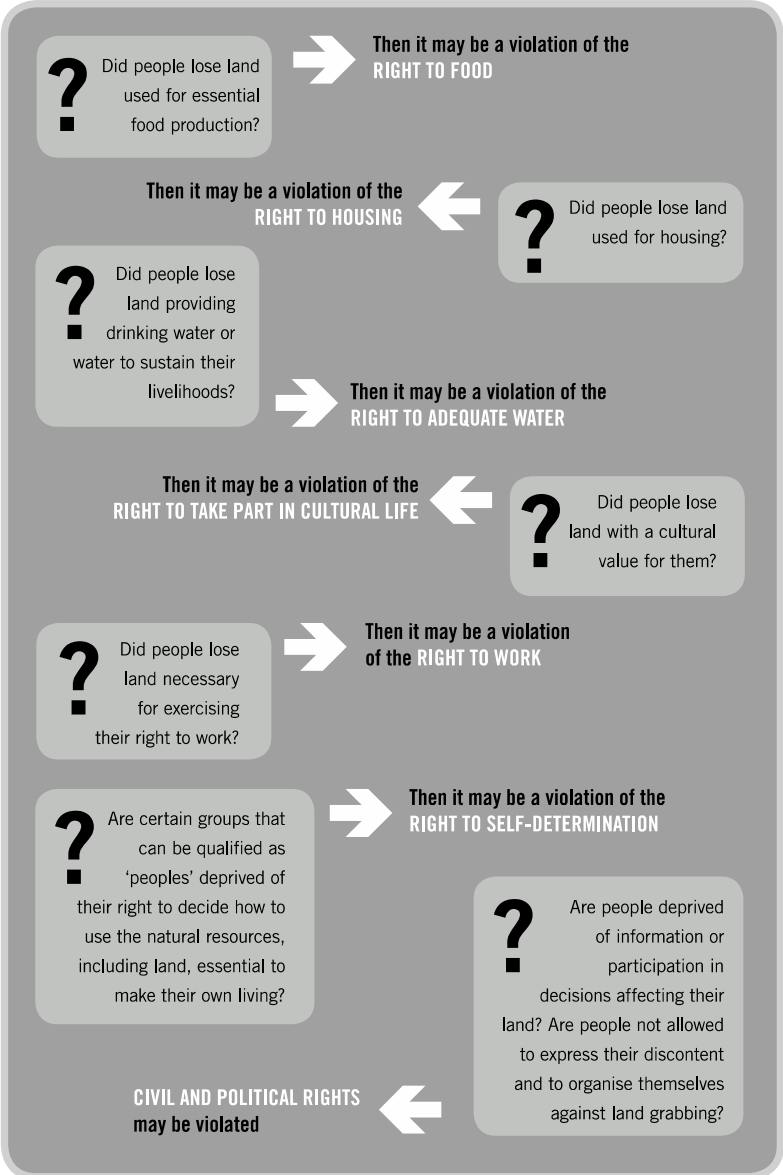
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APPENDIX I: How land is linked to different human rights



Source: (Monsalve Suárez et al. 2015, 25)