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Collective land tenure in Colombia

Background and current status

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Key messages

- The consolidation of the current legal regime for the protection of collective land tenure in Colombia is the result of a series of processes —social, political, economic, cultural, and legal— that have shaped and restructured collective land tenure, both as a concept and as an institution.
- The current legal regime of collective land tenure protection in Colombia is based on the inclusion of the principle of the social rule of law in the Colombian Constitution of 1991 and its development in the current context of transitional justice and peacebuilding.
- Collective land tenure in Colombia can be seen as political and legal recognition of the territory and identity-based rights of indigenous people and Afro-descendants, notwithstanding some prerogatives for *campesinos* in the context of *campesino* reserve zones.
- The main challenges for the effective legal protection of collective land tenure in Colombia are related to the proliferation of other regulatory frameworks representing parallel interests in the access to and use of lands and resources, as well as of the accommodation of the interests of multinational private actors.

Introduction

The current legal regime protecting collective land tenure in Colombia is based on the inclusion of the principle of the social rule of law in the Colombian Constitution of 1991. It sets forth that the State and its authorities should pursue the satisfaction of social needs and the protection of human rights, and then identifies ethnic communities as collective subjects of special protection. This protection is granted through the link with territorial mechanisms (specifically, the legal entity or institution created) that include indigenous *resguardos* (reserves) and the territories of Afro-Colombian communities. The communal territories of ethnic groups are inalienable, imprescriptible and not subject to seizure. The exploitation of natural resources in these territories must be carried out with the agreement of the communities involved and with respect for their cultural, social and economic integrity.

Overall, the existing legal regime of collective land tenure protection in Colombia includes appropriate regulatory instruments to enforce compliance. However, in spite of these instruments, the legal dimension needs to be weighed against the existence of other variables that prevent the effective implementation of law. These include, for example, the interplay between the regulations that govern ethnic communities' collective property rights; the regulations aimed at defining a territorial planning scheme; the legislation that defines how and under what conditions the use of natural resources can be carried out for economic purposes; the regulations for environmental protection; and recently the introduction of legal measures for transitional justice and peacebuilding. This interplay entails challenges that go beyond the interpretation of regulations to the power struggles among ethnic groups, regional and State authorities and groups outside the law, to mention a few of a wide range of stakeholders.

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Taking into account Colombia's current situation, where a post-conflict scenario is beginning to take shape, one of the main concerns is how to ensure the protection of collective land tenure within a transitional justice context characterized by a proliferation of norms and two contrary perspectives on the land and resources that have been "unavailable," due to the conflict, until now: as resources falling under the autonomy rights of indigenous people's territory, or as economic assets that are finally accessible due to the end of the war.

Given that the legitimacy of collective land tenure is the result of a variety of processes, it is worth exploring not only the content and scope of the current legal regime for protecting land tenure but also the way in which it has been consolidated as part of the constitutional order. Thus, this infobrief is structured as follows: (a) a summary of the historical development of collective land tenure in Colombia; (b) an assessment of the existing legal regime of collective land tenure protection[1]; and (c) an illustrative case study of the municipality of San José del Guaviare. Finally, the main conclusions and findings are presented.

This infobrief includes the main results and conclusions of the research report *"Background and current status of the legal protection of collective land tenure in Colombia"* [Antecedentes y situación actual de la protección legal a la tenencia colectiva de la tierra en Colombia], derived from the project "Historical trajectories and prospective scenarios for collective land tenure reforms in community forest areas in Colombia", led by the Center for International Forestry Research (CIFOR) and the School of Environmental and Rural Studies of the Pontificia Universidad Javeriana. The infobrief is part of CIFOR's global comparative study on forest tenure reform (https://www.cifor.org/gcs-tenure/).

History of the legal protection of collective land tenure in Colombia

The first appearance of the concept of collective land tenure in Colombia can be found in the indigenous *resguardo* mechanism introduced during the colonial period. This notion was used by the Spanish administration as way to segregate indigenous people. Indigenous *resguardos* served as a control mechanism: they ensured access to cheap labor while reducing the potential for an uprising. *Resguardos* also played an important economic role[2], since the village economy depended on them. Nevertheless, indigenous families only had the right to land use and exploitation within their lots.[3]

After the Valladolid debate over the treatment of colonized peoples in 1551, the "defenders of Indians"[4], and the Laws of the Indies[5] were introduced, under which certain rights of indigenous people started to be recognized. Nevertheless, as the economic structure began to change, the status of the indigenous *resguardo* declined. With the emergence of tobacco and cotton companies and with the construction of roads, the colonies became the "factories" of the colonial power. Thus, to consolidate the economic hegemony of upper classes in the Americas, the laws that protected indigenous people were largely disregarded across the continent. At the same time, slave labor began to be massively adopted.

In the case of the Afro-descendant population[6], the first record of their territorial rights can be found in the creation of independent communities or *palenques* in the Colombian Caribbean during the 17th century. Since *palenques* were formed by escaped slaves, these areas were never recognized by the Spanish Crown as legitimate Afro-descendants' territories. Still, it was in *palenques* where Afro-descendants formed communities, and political, social, economic and cultural expressions took shape.

Table 1 presents a brief summary of the concept of collective land tenure from the process of decolonization of the Americas to the 20th century.

Socio-legal analysis of the legal protection of collective land tenure in Colombia

The recognition of collective land tenure became a mechanism to restore the rights of indigenous peoples and Afro-descendants. These groups, exposed throughout the centuries to diverse forms of violence that sought the elimination of their cultural identities through systematic assimilation policies, became the object of legal protection

1 This systematization includes a survey of (national and international) regulations and of regulatory policies governing collective land tenure. The survey takes into account, first, the review of legal sources and secondary literature and, second, the conclusions from a multi-stakeholder workshop held in Bogotá, in November 2016.

2 It is worth noting that the indigenous *resguardo* played a key role within the framework of the colonial tax used for the benefit of expeditionaries and representatives of the Spanish Crown, particularly in the first period of market consolidation in the Americas.

3 In order to elaborate on this idea, both *encomiendas* and *resguardos* (the two mechanisms on which the agricultural economy of the colony was based) were designed for maintaining a feudal economic structure. The *encomendero* had political power, receiving the taxes that indigenous peoples paid to him. Part of this money went to the royal coffers while the remaining amount was kept by the *encomendero*.

4 Also known as *encomenderos*.

5 Among some of the provisions in the Laws of the Indies, it is worth noting: the non-alienation of *resguardos* by other natives, slaves or titles; and their confinement within the Indian reductions, with the primary objective of evangelizing the natives who had embraced the Catholic religion.

6 The Afro-descendants who arrived in the country were brought as slaves by the Spaniards. Therefore, during the colonial period, their rights of access to and use of lands and natural resources were never recognized.

Table 1. Historical evolution of regulations for collective land tenure protection in Colombia.

Period	Context	Land tenure	Details
Decolonization and Independence of the Americas (1813–1850)	Between 1820 and 1830, Simón Bolívar issued a number of laws for the protection of the indigenous people who had collaborated during the independence process.	+ Law 25 of 1824 enshrines the respect for the land ownership of indigenous people. + Indigenous people were expected to take part in the nation-state development project.	+ RISE in the concept of territorial tenure. + Indigenous people are favored.
Arrival of liberal governments (Second half of 19th century)	With the establishment of the liberal economic model, the dismantling of the indigenous *resguardos* began. In 1849, the dissolution of the *resguardos* was ordered. Then, in 1850, the federalization process allowed the creation of indigenous *cabildos* [councils].	+ *Resguardos* were seen as an obstacle to the development of the free market economy. + In 1859, Law 90 on the Organization of Indigenous *Cabildos* was passed and enforced in the Sovereign State of Cauca.	+ DECLINE of the notion of indigenous *resguardo*. + RISE in the recognition of political rights of indigenous people under the figure of the *cabildo* in Cauca.
20th century: regenerative project	End of federalism and emergence of centralism. The regenerative project pushed forward the Political Constitution of 1886. The unification of the country was proposed, and the Catholic religion was adopted as the national religion. Economic protectionism was introduced.	+ With Law 80 of 1890, the final subdivision of indigenous *resguardos* was conducted. This activated the land market. + This process was reinforced by Law 55 of 1905. + Ethnic identities were overshadowed, along with the recognition of their collective right to land tenure.	+ Final DECLINE of the figure of indigenous *resguardo* in the political sphere.
20th century: social movements, violence and power alternation between political parties (1958–1974)	Under the influence of ideological currents related to the idea of justice and social rights, a social mobility scenario developed. The struggle over land took a class dimension.	+ In 1957, the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was adopted in Geneva. + Reinterpretation of the 1890 Law by Manuel Quintín Lame, of indigenous origin.	+ RISE of claims for collective rights led by the affected peoples.
Second half of the 20th century: re-emergence of the figure of indigenous *resguardo*, Constituent Assembly of 1991	+ Changes in the State approach towards collective land tenure. In the 1980s, the protection of indigenous and tribal communities' rights became more important. + The Constitution of 1991 reflects the ideological change that took place in the political arena in terms of how ethnic communities were assimilated in the country.	+ Law 21, of 4 March 1991, helped to reduce the vulnerability of ethnic communities. In addition, communities were recognized as national heritage. + Law 160 of 1994 regulating indigenous *resguardos*. + Law 160 of 1994 regulating the existence of Afro-Colombian Community Councils.	+ RISE of the collective land tenure concept, both in social and political spheres. This became part of the constitutional order. + For the first time, this figure was beneficial to both indigenous communities and Afro-Colombians.

under the 1991 Constitution. The current legal regime for collective land tenure is based on this paradigm shift. This new regime defines indigenous *resguardos* as territorial entities with their own authorities, who perform administrative duties. Afro-descendant communities are seen as collective subjects with rights and obligations[7].

Tables 2, 3 and 4 delineate relevant socio-legal developments in three arenas: the protection of collective land ownership; environmental protection; and post-conflict reparations.[8]

7 It should be noted that indigenous groups in the country were directly represented in the National Constituent Assembly through Lorenzo Muelas and Francisco Rojas Birry, while Afro-Colombian communities did not reach the consensus needed to appoint delegates.

8 The following categories are considered for the interpretation of socio-legal developments in the field of collective land tenure: right of access; right of exploitation; right of management and administration; right of exclusion, protection and delimitation; and right of alienation.

Table 2. Protection of collective land ownership in Colombia since the Political Constitution of 1991.

Law	Content
Law 70 of 1993	Recognizes the collective land tenure rights of the Afro-Colombian communities that had occupied vacant lands in the coastal areas of the rivers of the Pacific basin.
Decree 2664 of 1994	Sets forth the procedures for the allocation and recovery of "vacant" lands, including safeguard provisions in favor of ethnic groups.
Decree 2164 of 1994	Includes all issues concerning the granting and titling of lands for indigenous communities.
Decree 1397 of 1996	Adopts provisions with regard to the need to perform impact studies in the face of the request and granting of environmental permits for projects implemented in indigenous territories.
Decree 1320 of 1998	Regulates prior consultation procedures regarding the national government and indigenous and Afro-Colombian communities for the exploitation of natural resources within their territory.
Decree 1953 of 2014	Addresses the lack of regulations in the field of indigenous territorial planning.
Decree 2333 of 2014	Includes a special administrative procedure to determine traditional and/or ancestral tenure.
Law 1776 of 2016	Establishes the interest areas for rural, economic, and social development [*zonas de interés de desarrollo rural, económico y social*, ZIDRES].

Table 3. Environmental regulations.

Law	Content
Decree 2278 of 1953	Introduces 'protective forest zones' and 'general interest zones'.
Law 2 of 1959	Sets out regulations on forest economy and natural resource conservation. Different areas of the country are selected as forest reserve areas. In addition, it establishes that the areas recognized as national natural parks are public goods and that vacant lands allocation is forbidden in these areas.
CONPES 2834 of 1996	Sets forth that, given that most of the forests in the country are located within indigenous *resguardos* or in lands collectively allocated to Afro-descendant communities, the aspects related to land tenure and forest titling should be revised, in order to propose management and administration schemes in line with the conditions of each region and type of property.
Art. 80 of Law 160 of 1994 **Decree 1777 of 1996** **Agreement 024 of 1996**	Create *campesino* reserve zones [*zonas de reserva campesina*, ZRC][a] to stabilize and consolidate the Colombian peasant economy; the ZRC creates the possibility of allocating unused lands acquired by the government through purchases from private stakeholders or through expropriation.
Arts. 82 and 83 of Law 160 of 1994	Establish the creation of entrepreneurial development zones [*zonas de desarrollo empresarial*, ZDE] to promote and protect private capital investment in the Colombian rural sector.
Court ruling SU-039 of 1997	Safeguards the rights of an ethnic community to life, territory, self-determination, and the defense of ethnic culture. This court ruling is a milestone in terms of the protection of the prior consultation right.

a The country now has six *campesino* reserve zones that were created between 1997 and 2000, covering 452,000 hectares; others are in process.

Table 4. Regulatory frameworks developed for community reparations in the context of the peace talks between the Colombian government and FARC-EP in Havana[a].

Law	Content
Law 1448 of 2011	The restitution of lands from which people were evicted is seen as a consequence of the armed internal conflict, the content and scope of which derive from the regulations on forced displacement (Law 387 of 1997 and regulatory decrees) and from the guidelines established by the Constitutional Court concerning the rights of victims of forced displacement (Court ruling T-025 of 2004).
Decree-Law 4633 of 2011	Establishes measures for the assistance, attention, full remediation, and restitution of territorial rights of victims belonging to indigenous communities and peoples.
Decree-Law 4625 of 2011	Establishes measures for the assistance, attention, full remediation, and restitution of territorial rights of victims belonging to Afro-Colombian communities and peoples.

a In the final agreement to end the armed conflict and build a stable and lasting peace signed in Havana, several factors related to collective land tenure are included that seek to remediate and redistribute territory. This is especially evident in section 1, Comprehensive Rural Reform, related to a structural transformation to enhance the socio-economic opportunities of Colombia's ethnic and *campesino* communities. Similarly, the Chapter on Ethnic Perspectives (section 6.2 of the agreement) identifies ethnic communities as population groups that have been victims of armed conflicts, which should thus have the maximum guarantees for the full exercise of their human and collective rights conceived from their own worldview.

Case study: San José del Guaviare — Understanding the tensions between the process of land appropriation and territorial planning

The department of San José del Guaviare, and more specifically, the municipality of San José, provides an opportunity to explore the complex nature of the legal regime of collective land tenure in Colombia. In addition, the implementation of the Havana peace agreement and post-conflict construction pose new challenges in this context, where a variety of narratives – on territoriality and on victimization – intersect.

In San José del Guaviare, there are tensions over access to and use of land and other natural resources. Recently, Jiw peoples have started to generate claims for the expansion of their *resguardos*. In particular, the claim over La María *resguardo* has brought to light the historical nature of the conflict. At the root of the current conflict is the superposition of the territorial ambitions of the different groups (*campesinos*, indigenous and Afro-Colombian peoples) and the national project of territorial planning, which proposes opening these lands for other uses. This is reflected in the way in which the State has tried to implement regional planning in the municipality through national laws, while at the same time other processes of territorial formation were progressing, out of step with this planning process and, often, contrary to existing rules.

Finally, this scenario needs to consider the emergence of coca cultivation in the territory and, with that, the influx of armed groups. The coca boom weakened the productive structures for activities such as agriculture or ranching. Furthermore, the armed violence led to the displacement of the civilian population.

The coca economy led to the creation of a "rootless" population in the municipality. The Jiw settled in the Guayabero River to cultivate coca and left La María *resguardo*. When they returned, this area had already been occupied by *campesino* settlers. Initially, the Jiw went to Barracón, where they encountered difficulties meeting their subsistence needs, as did the established population. As a consequence, they again considered returning to La María. After the entry into force of the 2011 Law of Victims, they made a legal claim on the territory. The Jiw have appealed to their rights for collective lands and have asked for an expansion of their territory.

The Jiw (who were historically nomadic) are currently "locked up" inside their *resguardos*, where the area and natural resources available are insufficient to ensure their survival. In this same area, there is a clash between indigenous and *campesino* territoriality. Territoriality implies an exercise of appropriation involving the way in which natural resources are used. In this case study, *campesinos* have more technologically sophisticated hunting and fishing practices than the traditional techniques used by indigenous people. Consequently, the Jiw have limited food sources. They also face the effects of tourist projects on the contamination of their water sources.[9]

Recently, the Department for Ethnic Affairs (DAE) of the Land Restoration Unit (URT) has won some battles for indigenous and Afro-descendant groups. In these cases, rights prevailed over the development of mining and energy projects. For this reason, when URT's visit to La María *resguardo* was made public, various politicians pronounced that restitution was like a "bulldozer". As a consequence of this misinformation, local *campesinos* entered the *resguardo* to protest, concerned that if the Jiw claim was successful, then they would be forced to abandon their territories and, hence, lose their investments.

Conclusions

The consolidation of the current legal regime for the protection of collective land tenure in Colombia is the result of a series of processes —social, political, economic, cultural, and legal— that have shaped and restructured collective tenure, both as a concept and as an institution. This process was based on the encounter and dialogue between the social function of property and the recognition of the special rights of ethnic and other social groups.

In light of the above, collective land tenure in Colombia is basically presented as a form of recognition of the identity and territorial rights of indigenous and Afro-descendant groups. An understanding of the socio-legal development of this idea permits the consideration of other historical issues related to: the recognition of indigenous people and Afro-Colombians as political subjects; the trajectory of Colombian nation-state building; and the presence of tensions between ethnic groups' actual opportunities for fully exerting their cultural identities and the State's tendency to simplify and homogenize. It also permits the consideration of historical claims and identity in shaping land policy.

The issues discussed here provide the general context for the development and assimilation of collective land tenure into Colombia's constitutional order in 1991. The strengthening of this legal structure and its institutional mechanisms is influenced by the establishment of international agreements, protocols and policies and by the struggles of indigenous, Afro-descendant and *campesino* social movements.

In tracing the historical-intellectual trajectory of collective land tenure in Colombia, the *resguardo* emerged as the main mechanism for the recognition of the communal nature of the relationship between individuals and territory. Although indigenous *resguardos* were conceived as a means

9 These arguments are supported by the review of government documents, secondary literature and the records of the field trip carried out on 24–26 February 2016.

to control the population, the *resguardo* later contributed to the development of protection mechanisms for those same communities, by granting them the rights to their ancestral territories. Simón Bolivar was the first to recognize these settlements during the decolonization period. After the colonial *resguardos* were dismantled in the interest of homogenization policies, they were later re-interpreted by indigenous resistance movements and served as a baseline for subsequent legal developments for the protection of collective land tenure.

The results of all of this have determined the nature of the collective property right in Colombia. With regard to access rights, Colombian legislation reserves collective property rights for ethnic communities. The *campesino* population is not seen as a subject of collective land tenure rights under this legal regime. Furthermore, *campesinos* are treated as subjects of production who should be integrated into the market economy. Finally, initiatives aimed at *campesinos* by state institutions such as INCORA/INCODER[10] have not had positive results. As a result of this and of the current post-conflict situation in Colombia, new tensions and debates have emerged regarding the possibility of considering the existence of a *campesino* identity.

The case of San José del Guaviare serves to illustrate some of the tensions underlying the collective land tenure regime.

10 Colombian Institute of Agrarian Reform (now Colombian Institute of Rural Development).

In spite of the existence of a regulatory framework that in theory is adequate to guarantee access rights to community territories, this is not always effective. Two variables are important in the current post-war context. The first is the overlap of territorial trajectories and the history of victimization of indigenous groups. The other is the interplay between the different legal frameworks used to regulate land use and tenure, particularly those associated with environmental protection and economic exploitation.

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