

# Limited statehood in Latin America: The rights of rural populations

## The Colombian case

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### Abstract

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Rural territories in Latin America represent the paradoxes of multicultural societies caught between the demands for sustainable economic development, ecological conservation as well as adequate social and legal systems. These rural territories are poor and suffer from a lack of State presence and fundamental rights. The Covid-19 pandemic in 2020–2021 exacerbated this situation. This chapter is a socio-historical study with the methodology of comparative constitutional law to review the evolution of the rights of rural populations in Latin America in the context of the activities of the Inter-American Human Rights Court and the advent of the United Nations Declaration on the Rights of Peasants. The chapter uses the case of Colombia and the implementation of the Comprehensive Agrarian Reform of the 2016 Peace Agreement to show the legal and judicial difficulties, as well as the contradictions that arose, in efforts to guarantee the rights of the rural populations.

### *I. Introduction*

In Latin America, the rights of peasants<sup>1</sup> (campesinos) and ethnic groups 2 have historically been instituted through agrarian reforms, which have been a part of legislative, economic and political agendas to overcome

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1 In the discusión of the United Nations Declaration of the Peasants and Rural Workers (UNDROP), it was pointed that the term of Peasant is a derogative and medieval term, and these types of sujetos do not exist in Europe, however, the Peasant term is appropriate because indicates political and social subordination, a rural person who does not have access to land. However in some countries like Mexico, Bolivia and Colombia, peasants it means that they are subjects to the Agrarian Reforms. In Marc Edelman, What is a peasant? What are peasantries? A briefing paper on issues of definition (OHCHR, 2013) 2

colonial and unproductive systems in the countryside in the pursuit of economic growth. Agrarian reform has also been a core objective of peasant movements and communist guerrillas, whose aims has been to overthrow existing oligarchies with their large land-owning hacienda base while also transforming social and productive relations in the countryside.<sup>2</sup>

- 3 Most Latin American constitutions have recognised the rights of ethnic communities, their ancestral lands and the access to rural land to peasants as a form of land distribution. Latin American countries have incorporated the Inter-American human rights system into their legal systems as a superior norm and accepted the litigious competence of the Inter-American Court of Human Rights. Its jurisprudence has been protecting the rights of the indigenous people and farmers but had a lesser impact on the improvement of the quality of life of rural populations.
- 4 In 2018, rural poverty in Latin America increased by 2 million people for the first time in ten years.<sup>3</sup> Rural populations represent 18 % of the region's total population, accounting for 29 % of the poor in Latin America and 41 % of those suffering from extreme poverty.<sup>4</sup> The urban-rural divide is huge and rural development is stagnating, which makes it necessary to adjust the Sustainable Development Goals in rural territories. However, as of late 2021, the Covid-19 pandemic that was at the time of writing ravaging Latin America has led to a contraction of the regional economy by 9.1 %<sup>5</sup> and an increase in inequality and extreme poverty. This is generating economic, social and environmental setbacks, especially for rural territories. As noted by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), "[t]he historical political and economic exclusion and marginalisation of the more than 800 indigenous peoples in the region has been accentuated as a result of insufficient State responses to the cri-

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2 Jean LeCoz *Las Reformas Agrarias de Zapata a Mao Tsé-Tung y la FAO* (Editorial Ariel 1976) (hereafter LeCoz, 'Las Reformas Agrarias').

3 Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO) *Panorama de la Pobreza Rural en América Latina y el Caribe* (FAO, Santiago 2018).

4 Ibid, 2.

5 The United Nations Economic Commission for Latin America and the Caribbean-ELAC. *Pactos políticos y sociales para la igualdad y el desarrollo sostenible en América Latina y el Caribe en la recuperación pos-COVID-19*. (Naciones Unidas, 2020) (hereafter ELAC, *Pactos políticos*).

sis”<sup>6</sup>. The ECLAC has recommended that countries make political reforms and forge new social pacts to protect rural citizens.<sup>7</sup>

This is a call to implement the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) to overcome the problems of development and human rights in rural Latin America. It constitutes the most complete and up-to-date legal instrument for the human rights of farmers and rural workers, as those who suffer disproportionately from poverty, the effects of environmental degradation and climate change, despite this same group being the key actors involved in nature conservation and food security.<sup>8</sup>

This chapter uses Colombia as a case study, which is a particularly relevant example in the region for its repeated attempts at implementing conventional agrarian reforms without engaging in structural change<sup>9</sup> with constitutional rights for peasants and ethnic groups. However, the country has an overlapping geography of extreme poverty, criminal groups and special bio-ecosystem territories. It is a country whose rural territory covers 75 % of the land surface and is home to 31 % of the Colombian population living under conditions of a multidimensional poverty index of 90 %.<sup>10</sup> In Colombia’s rural municipalities, only 6 % of the land area is subject to a degree of formal land titles, while the remaining 94 % is used and occupied by total informal arrangements.<sup>11</sup> Poor territorial planning and inadequate environmental controls mean that agribusiness, extensive cattle breeding and mining combined with illegal economies<sup>12</sup> are driving deforestation

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6 The United Nations Economic Commission for Latin America and the Caribbean-ECLAC *El impacto del COVID-19 en los pueblos indígenas de América Latina-Abya Yala* (Naciones Unidas Press 2020).

7 ELAC, *Pactos políticos* (n 1).

8 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (17 December 2018) Resolution 39/12, Human Rights Council, 39<sup>th</sup> Session (hereafter UNDROP).

9 Alegrett, Raul ‘Evolución y tendencias de las reformas agrarias en América Latina’. (FAO,nd) < [www.fao.org/3/j0415t/j0415t0b.htm](http://www.fao.org/3/j0415t/j0415t0b.htm) (last accessed 27 September 2021).

10 DANE Departamento Administrativo Nacional de Estadística, República de Colombia. *Medida de pobreza multidimensional*. (DANE, 2020).

11 DNP Departamento Nacional de Planeación. República de Colombia *El campo colombiano: un camino hacia el bienestar y la paz* (DNP 2015) 39.

12 Coca plantation, illegal mining, logging and wildlife trafficking.

and biodiversity loss,<sup>13</sup> a volatile mix that is further jeopardising the human rights and development of the rural communities.

- 7 During the negotiation of the Peace Process (2012–2016)<sup>14</sup> and during the senate debates of the shelved Agrarian Judicial branch project bill<sup>15</sup>, there was a key official phrase that was endlessly repeated, that the Agrarian Reform is an historical debt with the countryside. This recognition summarises the failures of over more than half a century and is a testament to a political tradition that perceives agrarian reform as a part of a peace agenda with armed groups and a promise to progressive access to land and reparations for peasant victims of the conflict.<sup>16</sup> Nevertheless, after five years, no substantial progress has been made and the rural security situation is worse, with record numbers of peasants and social leaders being killed. Beyond its relevance at a national level, a review of the Colombian case also highlights difficulties in guaranteeing peasants' rights at the local and within the Inter-American System. Consequently, the present study offers recommendations for overcoming the obstacles and scenarios that affect the implementation of the rights of rural populations.

## II. The rights of rural populations in Latin American Constitutions

- 8 In Latin America, as noted above, peasants' rights and rural regulations have historically been instituted through agrarian reforms, which have been a part of legislative and political agendas to overcome colonial systems in the countryside and have been instituted in the pursuit of economic growth, often under the guidance of the World Bank, UN agencies and the United States cooperation agency USAID. Agrarian reform has also been a core objective of peasant movements and communist guerrillas, whose aim

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13 UNDP- United Nations Development Programme. *Colombia Rural, Razones para la esperanza*. (INDH.PNUD, 2011).

14 Oficina del Alto Comisionado para la Paz, Presidencia de la República de Colombia. *Tomo II Instalación de la mesa de conversaciones, inicio de los ciclos de conversaciones y la discusión del punto I*. (Biblioteca del proceso de paz con las FARC-EP 2018) 197.

15 Lozano, Angelica. *Proyecto de Ley 395 de 2021. Ponencia en la sesión del 25 de Mayo de la Comisión Primera del Senado, Comisión Primera del Senado de la República de Colombia*, (Gaceta N° 607- 2021, 2021).

16 Acción Social Colombia *Ley de Víctimas y de Restitución de tierras Colombia* (Acción Social 2011).

has been to overthrow the oligarchy with its large land-owning hacienda base and transform social and productive relations in the countryside.<sup>17</sup>

Since the 1910 Mexican Revolution, the region's history of the incorporation of a social function for property and collective land property for indigenous peoples and farmer cooperatives has been one of a long and contradictory partnership with liberal ideas of free markets and individual property, a blend which has affected the success of agrarian reforms.<sup>18</sup> In the 1990s, Brazil<sup>19</sup>, Bolivia<sup>20</sup>, Colombia<sup>21</sup> and Ecuador<sup>22</sup> passed reforms that guarantee the right to property with a social and ecological function in their new constitutions. For the peasants, their constitutional rights (or an expectation thereof) are limited to access to rural land. In the case of Bolivia (Article 398), Ecuador (Article 282) and Venezuela (Article 307), land concentration is restricted to avoid the creation of unproductive parcels of land while the Colombia Constitution (Article 64) protects progressive access to land and property for rural workers, individuals and associative forms. Ecuador (Article 282) creates a land fund for peasants to gain equal access to land and the Venezuela Constitution protects the right to land for farmers (Article 307). However, even under the above-mentioned reforms, farmer communities do not have the same rights as indigenous and ethnic populations.

For their ethnic rural populations, twenty-two Latin American countries have ratified ILO Convention No. 169<sup>23</sup> and supported the UN Declaration on the Rights of Indigenous Peoples<sup>24</sup>. These indigenous rights are treated as constitutional individual and collective rights in the majority of the Latin American Constitutions.<sup>25</sup> For example, indigenous rights typically include the right to self-determination, self-government and self-development in

17 LeCoz, 'Las Reformas Agrarias' (n 1) 146.

18 LeCoz, 'Las Reformas Agrarias' (n 1) 149.

19 Constituição da República Federativa do Brasil 1988, Art. 22.

20 Constitución Política del Estado Plurinacional de Bolivia 2009, Art.30.

21 Constitución Política de Colombia 1991, Art. 58.

22 Constitución de la República del Ecuador 2008, Art. 57.

23 International Labour Organization, Indigenous and Tribal Peoples Convention (opened for signatures 27 June 1989, entered into force 5 September 1991).

24 Office of the High Commissioner for Human Rights, United Nations Declaration on the Rights of Indigenous Peoples (approved by the General Assembly 3 September 2007).

25 Georgetown University y Organización de Estados Americanos 'Base de Datos Políticos de las Américas, Derechos de los Pueblos Indígenas. Análisis comparativo de constituciones de los regímenes presidenciales' (*Georgetown University y Organización de*

their territories, as well as to the use of the resources located there, the right to prior consultation, protection of their culture, religion and language, indigenous jurisdiction, health, education and communication. The first decade of the millennium left the region's indigenous peoples with two contrasting outcomes, one was the unprecedented rights gained in terms of political participation and the right to the prior consultation but left them with the continuation of the marginalisation of the benefits of economic development.<sup>26</sup>

11 The indigenous segment of the region's population is considered the poorest<sup>27</sup> and the States are having problems harmonising their legal pluralism with inimical relations within their respective indigenous jurisdictions.<sup>28</sup> The Indigenous Law and Indigenous Jurisdiction is not recognised as a valid law by the State Judges for conflict resolution and it remains necessary to transform the interaction between jurisdiction in a plural-legal system towards "models of deliberative democracy to develop procedures and institutional practises for multicultural societies to overcome the liberal dichotomy based on individual rights".<sup>29</sup>

12 Indeed, indigenous communities in Latin America are experiencing new forms of exclusion.<sup>30</sup> Most of the State institutions that deal with indigenous issues and affairs do not have public policies with an ethnically-differential approach and do not have proper mechanisms to protect the right to prior consultation.<sup>31</sup> As documented by the 2018 Special Rapporteur of the Human Rights Council, the region's indigenous people are facing criminalisation or the killing of their leaders when they oppose the activities and/or construction of:

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*Estados Americanos*, 1998) <<https://pdba.georgetown.edu/Comp/Derechos/indigena.s.html>> last accessed 16 June 2021.

26 Banco Mundial, *Latinoamérica Indígena en el Siglo XXI*. (Banco Mundial, 2015) (hereafter Banco Mundial, *Latinoamérica Indígena*).

27 Ibid, 6.

28 Ruiz Morato, Natalia "La resistencia y la sobrevivencia de la justicia indígena en Colombia" [2016] *Revista Científica General José María Córdova* vol.14 no.17, 347 (hereafter Ruiz Morato, "La Resistencia").

29 Ibid, 375.

30 Banco Mundial, *Latinoamérica Indígena* (n 7).

31 Claire Wright, Alexandra Tomaselli, *The Prior Consultation of Indigenous Peoples in Latin America Inside the Implementation Gap* (Routledge 2021).

“[...]extractive industries, agribusiness, infrastructure, hydroelectric dams and logging. In other instances, indigenous peoples’ ways of life and subsistence are deemed illegal or incompatible with conservation policies, leading to the prohibition of indigenous traditional livelihoods and other violations of other human rights of indigenous peoples”<sup>32</sup>.

### *III. The Inter-American Human Rights Court in the protection of rural populations*

The Inter-American Court of Human Rights (IACHR) has been creating 13 jurisprudence since 2001 based on the American Convention on Human Rights (ACHR),<sup>33</sup> ILO Convention No. 169 and the International Covenant on Civil and Political Rights,<sup>34</sup> to provide guidance for the region’s States to recognise and protect indigenous rights and allow indigenous populations to have access to collective land. It is worth mentioning at this juncture that this process has been made possible largely by the activities of various indigenous movements and their strategic litigation strategy.<sup>35</sup>

The IACHR establishes the recognition of indigenous people and tribal 14 groups as a collective subject of law with the right to legal personality,<sup>36</sup> the right to life in the cases of genocide and massacres<sup>37</sup> and the right to

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32 Human Rights Council 46 session, *Report of the Special Rapporteur on the rights of indigenous peoples* A/HRC/45/34 (18 June 2020).

33 American Convention on Human Rights (opened for signatures 22 November 1969, entered into force 18 July 1978) (hereafter ACHR).

34 The International Covenant on Civil and Political Rights (opened for signatures 16 December 1966, entered into force 27 March 1976).

35 Asier Martínez de Bringas “Strategic litigation as a framework for the protection of indigenous rights. An analysis of some of the achievements, difficulties and challenges involved” [2020] *The Age of Human Rights Journal* (hereafter Martínez de Bringas, “Strategic Litigation”).

36 *Saramaka People v Suriname* (Judgement) [2007] IACHR (hereafter *Saramaka People*).

37 *Plan de Sánchez massacre v Guatemala* (Judgement) [2004] IACHR, *Caso de la masacre de la Rochela v Colombia* (Judgement) [2007] IACHR *Comunidades afrodescendientes desplazadas de la cuenca del río Cacarica v Colombia* (Judgement) [2012] IACHR.

a decent life.<sup>38</sup> In 2020, the IACHR, based on Article 26 of the American Convention, granted the rights to a healthy environment, adequate food, clean water and participation in cultural life to these populations for the first time.<sup>39</sup>

- 15 In terms of the right to land, the IACR has recognised the right of occupation, possession<sup>40</sup> and property of the collective land of indigenous peoples as these have a connection to the land which is the basis of their culture, spiritual life and economic survival.<sup>41</sup> Indigenous land property rights cover enjoyment uses and control of the natural resources in their territories.<sup>42</sup> States have duties to provide: a) the “geographic certainty” of indigenous collective property, which entails a responsibility to delimit and demarcate specific indigenous territories as well as the obligation to grant the property title; b) refrain from acts that could lead governmental agencies or third parties to affect the existence, value, use or enjoyment of the indigenous territory, c) to guarantee collective indigenous property rights and control of its natural resources without any kind of third party interference.<sup>43</sup> States must also guarantee the right to prior consultation and the right to participation in matters concerning both indigenous territories and people.
- 16 The asymmetry between the positivisation of the indigenous rights and their precarious socio-economic situation of indigenous people is related to the implementation gap of the IACHR’s decisions at the national level, the limitation of the only litigation strategy to solve the indigenous situation<sup>44</sup> and the antagonistic relationship between indigenous groups and the States in terms of land rights and resources property in affected territories for strategic infrastructure, mining and/or energy projects.
- 17 In comparative terms, the rights assigned to peasants do not have the same jurisprudential development as those assigned to ethnic groups. Howe-

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38 *Xámok Kasek v Paraguay* (Judgement) [2010] IACHR; *Yakye Axa v Paraguay* (Judgement) [2005] IACHR (hereafter *Yakye*); *Sawhoyamaxa v Paraguay* (Judgement) [2006] IACHR (hereafter *Sawhoyamaxa*).

39 *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina*. Judgement) [2020] IACHR (hereafter *Nuestra Tierra*), p. 155.

40 *Sawhoyamaxa* (n 37), the traditional possession of indigenous peoples over their lands has the equivalent effects to the property title granted by the State.

41 *Yakye* (n 37).

42 *Saramaka People* (n 35).

43 *Nuestra Tierra* (n 37) 155.

44 Martínez de Bringas, “Strategic Litigation” (n 29).



ver, farmer movements in Latin America have ensured that much of the jurisprudence applied to ethnic groups is also applied to farmers<sup>45</sup> as the IACHR has recognised peasants as a distinct segment of the region's population that possesses its own cultural ties that have developed around its relationship with the land.<sup>46</sup> However, the jurisprudence has not provided legal obligations for States on how to deal with the problems of rights to food, collective territory, health and work for peasants.<sup>47</sup> Furthermore, despite the Inter-American Commission on Human Rights verifying that peasant communities are victims of continuous discrimination, it has done so without finding an effective response for State institutions to allow peasants to exercise their human rights, particularly their economic, social and cultural rights.<sup>48</sup>

The peasants-centric jurisprudence of the IACHR is focused on the 18 protection of the rights to life, physical integrity and personal liberty of peasant leaders and human rights defenders in the cases of the grave violations committed by military forces against peasants during periods of internal conflict in many Latin American countries.<sup>49</sup> The case of *Hacienda Brazil Verde Workers v Brazil*<sup>50</sup> in 2016 is the first decision to rule on the historical structural discrimination and the work conditions of peasants in a privately-owned cattle ranch in Brazil. It was a case that showed the phenomenon of slavery and trafficking in the poverty of a rural context and the lack of national justice for vulnerable peasants. The IACHR evaluated the slavery situation in poor rural territories, where affected individuals are controlled through violence, deception and/or coercion to significantly

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45 Coordinadora Latinoamericana de Organizaciones de Campo (CLOC- Vía Campesina) y del Centro de Estudios Legales y Sociales (CELS) 'Audiencia sobre la situación de los DESC en las comunidades campesinas en América Latina y el Caribe' Comisión Interamericana de Derechos Humanos, (CIDH 2013) <<https://www.cels.org.ar/common/documentos/InformeDESCCampesinosCIDH.pdf>> last accessed 20 April 2021 (hereafter CLOC- Vía Campesina and CELS, 'Audiencia').

46 *Masacres de el Mozote y Lugares Aledaños v El Salvador* (Judgement) [2012] IACHR.

47 CLOC- Vía Campesina and CELS, 'Audiencia' (n 36) 21.

48 CIDH 'Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia, Capítulo IV: Derechos de los Pueblos Indígenas y Comunidades Campesinas' (OEA 28 de junio de 2007) p. 223.

49 *Baldeón García v Perú* (Judgement) [2006] IACHR, *Masacre de Pueblo Bello v Colombia* (Judgement) [2006] IACHR *Caso Cabrera García y Montiel Flores v México*, (Judgement) [2010] IACHR.

50 *Caso Trabajadores de la Hacienda Brazil Verde v Brazil*, (Judgement) [2016] IACHR (hereafter *Trabajadores de la Hacienda Brazil Verde*).

restrict or deprive them of their individual freedom to exploit them through the use, management, benefit, transfer or divestment of their person.<sup>51</sup>

- 19 During the process, it was clear that the Inter-American Commission of Human Rights had intervened in the case of *Hacienda Brazil Verde Workers* and made some recommendations.<sup>52</sup> Even though the Brazilian institutions involved were aware of the situation and were incapable of addressing the workers' vulnerability, the IACHR found the Brazilian State guilty on a number of counts. Firstly, for the violation of the right not to be subjected to slavery and trafficking established in Article 6 (1) of the American Convention on Human Rights, an offence which occurred in the context of a situation of historical structural discrimination. Secondly, for violating the right to due diligence and reasonable time judicial protection, the right to a fair trial<sup>53</sup> and the right of access to legal recourse<sup>54</sup> in the American Convention on Human Rights.<sup>55</sup> This particular jurisprudence mandates the Latin American States' obligations in relation to private actors' abuses in cases of servitude, slavery, human trafficking and forced work. All these States must prevent these crimes and adopt comprehensive preventive measures to protect victims and at-risk groups and provide an adequate legal framework with strong institutions to investigate, punish and prevent impunity.

#### *IV. The application of the UNDROP in Latin America*

- 20 As described above, in the national constitutional systems and the Inter-American human rights system there is an asymmetry in the protection of the rights of peasants since they are not the subjects of specific international treaties. The Latin American peasant movement has denounced the fact that the effective enjoyment of economic, social and cultural rights by peasants is still curtailed by extreme poverty in rural areas. There are no regulatory frameworks to guarantee food sovereignty and the right to adequate food for peasants, who are affected by monoculture- and agrofuel-ba-

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51 *Trabajadores de la Hacienda Brazil Verde* (n 48) 341.

52 *Trabajadores de la Hacienda Brazil Verde* (n 48) 4.

53 ACHR (n 31) Art 8.1.

54 ACHR (n 31) Art 25.

55 *Trabajadores de la Hacienda Brazil Verde* (n 48) 268–272.

sed activities. Indeed, there is not even legal security over rural land, which encourages land grabbing and undermines peasants' right to territory.<sup>56</sup>

In 2018, the United Nations adopted the UNDROP, thanks largely to the efforts of the international farmers' movement. This declaration is the up-to-date international legal instrument for the human rights of farmers and rural workers and it is harmonised with several human rights treaties as well as the 2030 Agenda for Sustainable Development. The declaration is also a result of the recognition that many of the world's farmers suffer disproportionately from poverty as well as the effects of environmental degradation and climate change, despite being key actors in nature conservation and food security. Most of the countries in the region voted in favour of the declaration, however, Argentina, Brazil, Colombia and Honduras abstained while Guatemala voted against it.

The UNDROP applies to the following subjects: a) peasants<sup>57</sup> and their dependent families, b) any person engaged in rural activities<sup>58</sup>; c) indigenous peoples and local communities working on the land, transhumance, nomadic and semi-nomadic communities, and the landless engaged in rural activities, d) rural workers, migrant rural workers and seasonal workers<sup>59</sup>.

Under the UNDROP, States have the following obligations: a) protect, respect and fulfil the rights of peasants and other people working in rural areas (Article 2.1); b) integrate the UNDROP and make constitutional

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56 CLOC – Vía Campesina and CELS, 'Audiencia' (n 36).

57 Any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetised ways of organising labour, and who has a special dependency on and attachment to the land.

58 Artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area.

59 The instrument has a special regulation for: the protection of rural women (Article 4), to natural resources (Article 5), life (Article 6), legal personality (Article 7), freedom of thought, conscience, religion, opinion, expression and peaceful assembly (Article 8), to organise to protect their interests (Article 9), participation (Article 10), to information (Article 11), access to justice (Article 12), safe work conditions and social security (Articles 13, 14 and 22), food and food sovereignty (Article 15), an adequate standard of living (Article 16), land ownership/use (Article 17), a safe, clean and healthy environment (Article 18), to seeds (Article 19), biological diversity (Article 20), drinking water and sanitation (Article 21), health (Article 23), adequate housing (Article 24), the right to education and training (Article 25) and cultural rights (Article 26).

and legal reforms to progressively achieve the implementation of the relevant rights (Article 2.1); c) take all necessary measures to ensure private individuals, organisations, transnational corporations and other business enterprises respect the rights of peasants and rural workers (Article 2.5); d) establish mechanisms to ensure the coherence of the State's agricultural, economic, social, cultural and development policies with the new UN Declaration (Article 15.5); e) take appropriate measures to eliminate the roots of the historical discrimination that affects peasants, rural women and workers (Articles 3.3, 4.1, 4.2). In essence, the UNDROP mandates serious agrarian, constitutional and judicial reforms and adjustments in the various economic models operating in Latin America to be more in favour of the region's farmers and rural workers.

24 The 2018 resolution includes obligations for international, regional and intergovernmental organisations (Article 27) so that such entities contribute to the full respect, realisation and application of the Declaration as well as follow up on its effectiveness. With regard to the enforcement of the UNDROP, it should first be integrated into the implementation of the Sustainable Development Goals, second, there should be adjustments to the agendas of several UN agencies, third, voluntary UN funds<sup>60</sup> should be established, and fourth, accountability and monitoring mechanisms should be implemented that include new special procedures and universal periodic reviews.<sup>61</sup>

25 The UNDROP has already been implemented into the Inter-American Human Rights system, as seen in 2020 when the IACHR applied it in *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina*. The court considered the peasant population that, although not a part of the international judicial process, was a vulnerable group and a material part of the conflict over land use and ownership. The State, if having to relocate a peasant population, must guarantee the rights of the affected peasants in accordance with the UNDROP. The IACHR ordered guidelines for the relocation of the affected peasant population: a)

60 A United Nations voluntary Fund means a fund comprising voluntary contributions paid by UN member to offers financial support in grants to the implementation of the UNDROP

61 UN Human Rights Office of the High Commissioner, 'Joint statement by UN human rights experts, 1st anniversary of the adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas' (17 December 2019) < <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25439&LangID=E> > last accessed 30 October 2021.

to have legal processes to avoid compulsory evictions, b) to have processes to solve conflicts caused by relocation, c) to guarantee impacted individuals had access to productive land with adequate infrastructure and services, including technical assistance and training for productive activities. Despite this positive example, at the local level, the UNDROP has faced several challenges in its implementation due to the impacts of the Covid-19 pandemic.<sup>62</sup> To analyse this dynamic, the Colombian case is presented below due to its current agrarian reform and the recognition of the rights of peasants.

### *V. The Colombian case*

The 1991 Colombian Constitution establishes fundamental rights for ethnic groups (Articles 329 and 330), established indigenous jurisdiction (Article 246) and a peace jurisdiction (Article 247). In addition, the Court protected the progressive access to land ownership of peasant workers along with their social, economic and cultural rights (Article 64) as well as the social-ecological function of property (Article 58). However, the Colombian State has had problems guaranteeing the rights of ethnic groups and peasants. Law 160 of 1994<sup>63</sup> established various peasant reserves, which are areas of uncultivated land that must be given to peasants for economic development with ecological purposes. Thirteen peasant reserves were created with a further 34 designated areas yet to be recognised as successive administrations have been opposed to creating reserves in areas with a guerrilla presence.<sup>64</sup> Inside the judicial system, there is no agrarian jurisdiction specifically focused on resolving rural conflicts and there is not a single programme in agrarian law in the law faculties at any Colombian university.

62 La Via Campesina, 'Respect peasants' rights, COVID 19 has made peasant agroecology an urgent necessity' (*La Via Campesina*, 11 February 2021) <https://viacampesina.org/en/respect-peasants-rights-covid-19-has-made-peasant-agroecology-an-urgent-necessity-la-via-campesina-at-cfs47/>.

63 Ley 160 de 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto Colombiano de la Reforma Agraria y se dictan otras disposiciones. (COL).

64 Archila Neira, Mauricio, García Velandia, Martha Cecilia, Parra Rojas, Leonardo, Restrepo Rodríguez, Ana María. *Cuando la copa se rebosa: luchas sociales en Colombia, 1975 – 2015*. (CINEP-PPP 2019), Organización de las Naciones Unidas para la Alimentación y la Agricultura *Las zonas de reserva campesina: retos y experiencias significativas en su implementación*. (FAO 2019).

## 1. The contradictory application of the farmer's constitutional law

- 27 In the absence of a specialised administration to administer justice for rural issues, ethnic groups and peasant movements have reclaimed their rights through *Tutela*, it means constitutional action for the protection of fundamental rights, based on their condition as victims of the armed conflict, land dispossession and violations of their human rights<sup>65</sup>. The Constitutional Court has highlighted this unconstitutional state of affairs regarding the situation in rural areas.<sup>66</sup>
- 28 Ethnic groups in Colombia are subject to special recognition and protection while also being holders of special rights, namely: to self-determination and self-government over their land and natural resources<sup>67</sup>, to a healthy environment and biocultural rights<sup>68</sup>, to prior consultation<sup>69</sup> and their own jurisdiction. However, despite constitutional protection and public policy orders, it has not been possible to guarantee the fundamental rights of these ethnic groups due to the armed conflict. In some cases, the situation is dire, with 34 ethnic groups in danger of extinction.<sup>70</sup>
- 29 The peasant movement has succeeded in getting the Constitutional Court to determine differential treatment for peasants who are victims of social marginalisation.<sup>71</sup> However, the present study is critical of this change because there is no legal protection for peasants in non-vulnerable situations. In this regard, the peasant movement in Colombia has provided another definition of a peasant, namely, one who is a historical and intercultural subject, is involved with land and nature, has a social organisation based on family and community work and who sells his or her

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65 T-754 2006 Corte Constitucional [decision] (2006), T-151 2011 Corte Constitucional [decision] (2011).

66 T-025 2004 Corte Constitucional [decision] (2004).

67 SU-383 2003 Corte Constitucional [decision] (2003).

68 T-294 2014 Corte Constitucional [decision] (2014); SU- 123 2018 Corte Constitucional [decision] (2018).

69 C-139 1996 Corte Constitucional [decision] (1996).

70 Ruiz Morato, "La Resistencia" (n 26).

71 C-006 2002 Corte Constitucional [decision] (2002).

labour.<sup>72</sup> Güiza et al<sup>73</sup> have compiled the peasant constitutionalism of the Constitutional Court, which includes: a) the content of rural development programmes, b) the recognition of peasants as subjects of constitutional protection and c) the recognition of peasant rights, the right to land, the right to participate in the development of public policy.

Unfortunately, the legal system has difficulties applying constitutionally 30 binding agrarian jurisprudence. In the High Courts, it has become evident that there is no interpretive unity on the application of Vacant State Land Law (VSL) to peasants. This is the cause of the severe disfunction between the Constitutional Court and the Civil Chamber of the Supreme Court. The Constitutional Court in Ruling T-488 of 2014 and T-293 of 2016 established that the rights of the nation over VSL are imprescriptible and highlighted that the rulings issued by civil judges that adjudicate rural land through adverse possession are improper. Taking a contrary position, the Civil Chamber of the Supreme Court, in Judgement 1776 of 2016, did not follow the constitutional binding jurisprudence. In their interpretation of Law 200 of 1936<sup>74</sup>, VSL cannot be understood as land without formal title or no holders of real rights, meaning that a peasant can acquire ownership by virtue of occupation of the land. In short, it is the latter court's view that it is the State and not the farmer who has to demonstrate the VSL situation. In conclusion, this lack of judicial coherence promotes informal and illegal land tenure and makes it impossible to implement rural social programmes.

## 2. Transitional land justice

Following the Constitutional Court Decision C-715 of 2012, the National 31 System of Attention and Integral Reparation to Victims was created, this led to the formation of the Special Administrative Unit for Land Restitution that employs a body of land restitution judges. This unit seeks to overcome

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72 Acosta Navarro, Olga Lucia, Duarte Torres, Carlos Arturo, Fajardo Montaña, Dario, Ferro Medina, Juan Guillermo, Gutiérrez Sanín, Francisco, Machado Cartagena, Abasalon, Penagos Concha, Ángela María y Saade Granados, Martha María. *Conceptualización del campesinado en Colombia. Documento para su definición, caracterización y medición*. (Instituto Colombiano de Antropología e Historia 2018).

73 Güiza Gomez, Diana Isabel, Bautista Revelo Ana Jimena, Malagón Pérez Ana Maria, Uprmy Yepes Rodrigo. *La Constitución del campesinado: luchas por el reconocimiento y redistribución en el campo jurídico*. (Editorial DeJusticia 2020).

74 Ley 200 de 1936. Sobre Régimen de Tierras. 21 de enero de 1936 (COL).

the problem of land dispossession as a violation of human rights and will continue to do so until its mandate expires in 2031.

- 32 Transitional land justice has highlighted the continuous failures of the legal and institutional system to regulate land ownership in the following areas: a) the impossibility of adjudicating when the dispossessed lands are located in areas newly declared as national parks and/or forest reserves; b) the material impossibility of returning land to petitioners when the dispossessed areas have been subsequently granted mining titles or they are now occupied by infrastructure and/or agro-industrial projects;<sup>75</sup> c) when problems of due process exist in the administrative processes of land restitution;<sup>76</sup> d) underfunding makes it impossible to fulfil orders by land restitution judges for the construction of infrastructure and public services in restituted territories<sup>77</sup>.
- 33 The long march to address the violent conflict and land distribution issues plaguing the country, the 2016 Peace Agreement aimed to put an end to the Colombian State's long-running conflict with the FARC guerrillas. According to the Kroc Institute's monitoring report<sup>78</sup> on compliance with the Peace Agreement, the Comprehensive Agrarian Reform (CAR) is the aspect of the agreement with the most difficulties and delays in achieving the stated goals, an issue compounded by budget reductions to do so. The 2018–2022 government prioritised the definition of the areas of the Development Programmes with Territorial Approach (PDET)<sup>79</sup> and the multipurpose cadastre. However, these programmes did not make signifi-

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75 Comisión Colombiana de Juristas *Radiografía de la restitución de tierras en Colombia* (Comisión Colombiana de Juristas 2019) (hereafter Comisión Colombiana de Juristas *Radiografía*).

76 Procuraduría General de la Nación, República de Colombia. *Informe sobre el estado de avance de la implementación de las estrategias de acceso a tierras y uso del suelo rural contempladas en el acuerdo de paz*. (Procuraduría General de la Nación 2021) (hereafter Procuraduría *Informe*).

77 Comisión Colombiana de Juristas *Radiografía* (n 72).

78 Peace Accords Matrix, Kroc Institute for International Peace Studies *Five Years of Peace Agreement Implementation in Colombia: Achievements, Challenges, and Opportunities to Increase Implementation Levels, December 2016 – October 2021*. (Notre Dame 2021) (hereafter Kroc Institute *Five Years of Peace Agreement*).

79 The Development Plans with a Territorial Focus (PDET) are part of the Peace Agreement to build peace and strengthen State presence in territories where institutions have historically had a limited presence. This plans are the guidelines to carry out socio-economic development to the municipalities most affected by violence in the context of the armed conflict.



cant progress in 2020 due to the Covid-19 pandemic<sup>80</sup>. The PDET areas still do not have justice services and, by some estimates, the Colombian State “will take 57 years to implement” the agreed upon agrarian reforms<sup>81</sup>. The Attorney General’s Office reviewed the *Agencia Nacional de Tierras* (National Land Agency)’s management and found that it has not awarded even 1 % of the total of the land that has to be adjudicated to the peasants. However, 81 % of the processes of the land adjudication carried out by the entity are in the preliminary stage, which indicates that there is no clarity on how much land is available for the Land Fund for the vulnerable rural population. The report concludes the ongoing need for agrarian justice to expedite the processes of access to rural land<sup>82</sup>.

### 3. Obstacles and adjustments for the implementation of a rural population’s rights

The implementation of rural population rights in Colombia is directly 34 affected by the obstacles that the Peace Agreement has been facing. The structural obstacles in terms of the allocation of logistical, operational and financial resources of the agreement are: a) a lack of political will on the part of government leaders combined with conflicting views that seek to redefine or disregard commitments due to different visions of governance<sup>83</sup>, b) corruption and co-optation by personal interests – both legal and illegal – of State entities that affect old and current agrarian reforms<sup>84</sup>, and finally, c) an unprecedented urgency to address the Covid-19 pandemic<sup>85</sup>.

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80 Kroc Institute *Five Years of Peace Agreement* (n 75).

81 Gobertus, Juanita. “Is Colombia’s Peace Over? Challenges and Progress in Implementing the Peace Accords. (Conference Presentation in David Rockefeller Centre for Latin American Studies Harvard University 2021).

82 Procuraduría *Informe* (n 73).

83 Interview with Camilo Niño Izquierdo, Comisión Nacional de Territorios Indígenas (Bogotá 25 July 2021); Interview with Arnobis Martínez Zapata, Coordinador Territorial de la Asociación campesina del sur de Córdoba (Montería 30 August 2021).

84 Albertus, Michael. and Kaplan, Oliver ‘Land Reform as a Counterinsurgency Policy: Evidence from Colombia’ [2012] *Journal of Conflict Resolution*. 77 (2): 198–231; Ruiz González, Luis Enrique ‘Élites y restricciones institucionales de las reformas agrarias: La implementación del acuerdo de paz en Colombia’. [2020] *Revista De Derecho*, (53), 88–110; Machado, Abasalon. *Problemas agrarios colombianos*. (Siglo XXI 1991) Molano Bravo, Alfredo. “Zonas de Reserva Campesina”. *El Espectador* (Bogotá September 5 2010).

85 Kroc Institute *Five Years of Peace Agreement* (n 75).

- 35 Another obstacle affecting governance and social stabilisation for the Agreement is the dynamics of violence due to the reconfiguration of regional criminal groups that transform the relevant rural territories into war zones. The implementation of the Agreement requires the organisation and participation of the communities involved, nonetheless, rural habitants, who have led the programmes established by the Agreement, such as coca crop substitution, land restitution and environmental rights, have been murdered by these criminal groups. Between 2016 and April of 2021, 904 such social leaders were murdered<sup>86</sup> and, at the end of 2019, the highest ever number of internally displaced persons was registered, close to eight million according to government statistics<sup>87</sup>.
- 36 The 2018–2022 administration has focused its efforts on a military security strategy; however, the State institutions are having problems entering these territories to allocate land to peasants who can then develop productive projects for land protection and ecological conservation purposes. A survey of unmet legal needs showed that the justice services strategy of the government is centred on fighting crime in the cities<sup>88</sup> rather than creating legal services for rural territories. In 2022, the Constitutional Court declared an Unconstitutional State (*estado de cosas inconstitucionales*) due to the low level of implementation of the Peace Agreement<sup>89</sup>.
- 37 It is noteworthy that the government, failed to pass the Agrarian Judicial Law as some senators, as well as house representatives, stated that this project is no longer a priority for this government<sup>90</sup>. The senators who oppose the bill object to the democratisation of rural land, the participation of peasant organisations in the agrarian processes as well as the *ultra-*

86 Jurisdicción Especial para la Paz, República de Colombia 'JEP alerta que el 2021 ha sido el inicio de año más violento desde la firma del Acuerdo de Paz' (*JEP* 26 January 2021) <<https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-alerta-que-el-2021-ha-sido-el-inicio-de-a%C3%B1o-m%C3%A1s-violento-desde-la-Firma-del-Acuerdo-de-Paz.aspx>> last accessed 2 May 2021.

87 United Nations News. 'Asesinatos de defensores de derechos humanos en zonas remotas de Colombia' *UN. News*. (Junio 18 2020) <<https://news.un.org/es/story/2020/06/1476202>> accessed 2 May 2021.

88 DANE. Departamento Administrativo Nacional de Estadística. República de Colombia. *Encuesta de Convivencia y Seguridad Ciudadana*. (DANE 2021).

89 SU 020–22 CC (2022).

90 Duzan, Maria Jimena "Un Congreso que legisla de espalda a los colombianos?" (*Maria Jimena en Vivo YouTube Channel*, 22 June 2021) <[www.youtube.com/watch?v=slW1-hZYXUg](https://www.youtube.com/watch?v=slW1-hZYXUg)>.

and *extra-petita*<sup>91</sup> powers of the agrarian judges<sup>92</sup>. In addition, due to the economic crisis that the country is going through because of the Covid-19 pandemic, agrarian judges are not considered a necessity and there is no budget to implement the new judicial branch<sup>93</sup>.

Finally, to begin effectively addressing many of the issues cited above, the commitment of key actors is needed, for example, university law faculties, as these are engines for the generation of legal knowledge and should use their law programmes in terms of agrarian law to guarantee the implementation of the rural population's rights. Furthermore, peasant organisations, reeling from the martyrdom of many of their leaders, need to be protected and their political, social and economic participation in all the spaces of consolidation of the integral rural reform guaranteed. It is also necessary to secure a serious commitment from the legislative and executive branches to implement the CAR. 38

## VI. Conclusions

The main challenges involving ecological, economic, social and human rights in Latin America are in rural territories. Latin American constitutions and the Inter-American Human Rights systems exist as an asymmetrical partnership in the recognition of the rights of rural populations between the ethnic communities and farmers and rural workers. 39

The UNDROP was adopted by a large majority of UN Member States in 2018. Its entrance into the jurisprudence of IACHR in the Inter-American Human Rights system allows for the harmonisation of current legal instruments. The declaration also allows the region to update the rights of the peasants, ethnic groups and rural workers according to the contemporary demands of the farmers' movements in terms of food security as well as land, economic, social and cultural rights. However, embracing the UN- 40

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91 *Ne Ultra petita*: The judge grants more than requested by the party. *Extra petita*: The judge grants something different from what was requested by the party. These capacities are available to the judge to protect the weaker party – the poor peasant in the agrarian process. If the evidence in the agrarian process demonstrates situations different from those requested, the judge rules based on the evidence and not on what was requested by the peasant petitioner.

92 Congreso de la República de Colombia. Senado, Comisión Primera de Asuntos Constitucionales. *Segundo Debate de la Ley 134 de 2020* (24 May 2021) (hereafter Congreso *Segundo debate*).

93 Congreso *Segundo debate* (n 89).

ROP requires several reforms at multiple levels: a) at the local level, major social, economic and legal reforms are needed; b) at the international level, there is a need for the establishment of funding as well as new accountability and monitoring mechanisms.

- 41 Latin America's constitutions, the jurisprudence of the IACHR and Colombian constitutional jurisprudence in particular have shown that judicial decisions alone are not enough to overcome the region's history of exclusion and discrimination of rural populations. The challenge in Latin America is the material implementation and re-structuring of national institutions and the re-definition of the development model towards rural territories. The current monitoring mechanisms in the Inter-American System and UN agencies are fundamental instruments but the reality is that they are becoming the primary source of the humanitarian disaster. This situation merits creating new mechanisms to reinforce the application of the IACHR decisions and mechanisms of accountability in terms of international civil and criminal liability for those responsible, in particular, those who do not apply the orders of the Inter-American Human Rights System.
- 42 The Colombian case has a progressive constitution in terms of indigenous rights and provisions on peasants' land rights. The lack of effectiveness in the decisions on the rights of the rural populations of the Constitutional Court and the transitional land tribunal have escalated interethnic rural conflicts and perpetuated the endemic violence. The peasant populations in rural territories live in a vicious cycle as they are caught between land informality, illegal land use and criminal groups which impede the implementation of the CAR of the Peace Agreement.
- 43 The Colombian Comprehensive Agrarian Reform shares some of the goals and rights elucidated in the UNDROP. The Colombian legal system needs structural reforms in terms of agrarian justice and the development of rural programmes that enforce the rule of law, peacebuilding and overcome the systematic violations of the human, economic, social and environmental rights of vulnerable rural populations. It requires commitment from law faculties, the judiciary and the legislative branch as well as inter-institutional coordination among national and local State entities combined with greater participation from the peasant organisations. Failure to implement this concerted effort can only result in the situation in rural Colombia continuing its downward spiral.