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THE RESTORATION AND PROTECTION OF AFRO-COLOMBIAN LAND TO ESTABLISH EQUALITY AND MITIGATE VIOLENCE

ABSTRACT

As the Colombian government is attempting to achieve peace in its country after fifty-two years of civil conflict, peace will not be attainable unless the Colombian government addresses the vulnerable status of Afro-Colombians and their land rights in the Pacific region of the country. The vulnerability of Afro-Colombians and their land rights have greatly impacted the instability in the nation. Throughout the civil conflict, numerous bloody skirmishes occurred on the arable lands of Afro-Colombian. These bloody skirmishes will continue because of the desire of criminal non-government actors to take the arable land and use it for profit. Colombian law dictates that before any development occurs on their lands, Afro-Colombians must be consulted. This policy is known as consulta previa. Criminal non-government actors have attempted to get around the consulta previa through violent measures. The Colombian government has failed to protect Afro-Colombians and their lands from these non-government actors. In turn, the Colombian government has encouraged businesses to seek out the arable land for development and has failed to enforce consulta previa. This Comment argues that these policies by the Colombian government have left Afro-Colombians vulnerable to continued violent attacks by both criminal non-government actors and businesses that the Colombian government supports. This Comment proposes that to protect Afro-Colombians and their lands the Colombian government should communicate with Afro-Colombians and implement a stronger policy of consulta previa by using the Declaration on the Rights of Indigenous People as a guideline and by granting Afro-Colombians the ability to veto the plans that are presented to them.

INTRODUCTION

Afro-Colombians in the Pacific Region of Colombia have uniquely endured violent attacks on their personhood, community, and property throughout the country's history. Unfortunately, this remains the case today, even as many other segments of Colombian society have begun to experience the promise of post-war prosperity and peace.

In November 2016, the Colombian government and the guerrilla group—*Fuerzas Armadas de Revolucionarias de Colombia* (FARC) signed a peace agreement that ended a fifty-two year conflict.¹ The Colombian Civil Conflict² led to 220,000 deaths, 7 million displacements, and around 33,000 kidnappings.³ The peace agreement signified many different things for Colombians: the end of half a century of bloodshed,⁴ a boost in the economy,⁵ and, for internally displaced citizens, a chance to return home.⁶

For the Colombians who live in major cities, such as Bogotá or Medellín, progress from the turmoil has been underway for several years.⁷ In those cities, the occurrence of violent crimes has decreased, and employment opportunities

¹ See Claire Felter & Danielle Renwick, *Colombia's Civil Conflict*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2017), <https://www.cfr.org/background/colombias-civil-conflict>; Juan Manuel Santos, *The Promise of Peace in Colombia*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/opinion/colombia-peace-process.html>; Joe Parkin, *Colombia Peace Process Weather Storm as FARC Hands in Weapons*, GUARDIAN (June 16, 2017), <https://www.theguardian.com/world/2017/jun/16/colombia-peace-process-farc-rebels-hand-in-weapons>.

² The war between the Colombian government, the FARC and several other insurgency groups during 1964 to the present day will be referred to as the Colombian Civil Conflict. See Felter & Renwick, *supra* note 1.

³ Nick Miroff, *The Staggering Toll of Colombian's War with the FARC Rebels Explained in Numbers*, WASH. POST (Aug. 24, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/08/24/the-staggering-toll-of-colombias-war-with-farc-rebels-explained-in-numbers/?utm_term=.45c53a0cc09b; see also *Colombia Kidnapping Down 92% since 2000*, *Police Say*, BBC (Dec. 28, 2016), <http://www.bbc.com/news/world-latin-america-38450688>.

⁴ See *On Victim's Day, Colombia Marches for Peace*, ICTJ, <https://www.ictj.org/multimedia/photo/victims-day-colombia-marches-peace> (demonstrating that there are Colombians that are skeptical that ending the conflict with the FARC will end all the violence in Colombia); Matthew Holmes, *Forgiveness Can Change A Country: Colombians on Peace Deal Referendum*, GUARDIAN (Oct. 1, 2016), <https://www.theguardian.com/world/2016/oct/01/forgiveness-can-change-a-country-colombians-on-peace-deal-referendum>.

⁵ Michelle Caruso-Cabera, *Colombian President: Peace Deal Would Boost Economy*, CNBC (Oct. 1, 2015), <https://www.cnbc.com/2015/10/01/colombian-president-peace-deal-would-boost-economy.html>.

⁶ Nick Miroff, *Colombia's War Has Displaced 7 million. With Peace, Will They Go Home?*, WASH. POST (Sept. 5, 2016), https://www.washingtonpost.com/world/the_americas/colombias-war-has-displaced-7-million-with-peace-will-they-go-home/2016/09/05/538df3c6-6eb8-11e6-993f-73c693a89820_story.html?utm_term=.1756db20a945 [hereinafter *Displaced 7 Million*].

⁷ See Nell McShane Wulfhart, *36 Hours in Bogotá, Colombia*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/interactive/2015/11/05/travel/what-to-do-in-36-hours-in-bogota-colombia.html>.

and access to healthcare have increased.⁸ But for those who live in the Pacific Region of Colombia, relief from the turmoil that characterized wartime is currently unattainable.

Peace in the Pacific remains unattainable because violence in the area is often connected with the desire for arable land and the facility to take land from its occupants.⁹ The desire for arable land is often manifested through forceful land grabs.¹⁰ The land can be taken from its occupants due to the lack of protections the Colombian government provides the occupants of the Pacific Region.¹¹

Violent forceful acquisitions of arable lands in the Pacific Region did not begin with the rise of the guerrillas, and such practices will not be eradicated by peace agreements.¹² The physical removal of people to acquire arable lands in post-Independence Colombia can be traced back to the early 1800s when landowners and the Colombian government asserted dominion over lands that were inhabited by Afro-Colombians and Indigenous peoples.¹³ Wealthy landowners and the Colombian government pushed several Afro-Colombian groups and Indigenous peoples off the land to establish an agricultural industry in the area.¹⁴ This physical removal detrimentally impacted Afro-Colombians' and Indigenous peoples' society, independence, and means of survival.¹⁵

The emergences of other violent actors such as the guerrillas, the *paramilitares*, and the cartels in the Pacific Region contributed to fights over lands that have exacerbated the pain of Afro-Colombians and Indigenous people,¹⁶ and interest in the arable lands of the Pacific has not ended. Today, the

⁸ See *id.* Contra Kat Martindale, *Researching Cities: Does Bogotá's transformation hold up to scrutiny*, GUARDIAN (Oct. 10, 2014), <https://www.theguardian.com/cities/2014/oct/10/researching-cities-bogota-transformation-scrutiny-colombia>; see Alex Warnock-Smith, *Story of Cities #42: Medellín escapes grip of drug lord to embrace radical urbanism*, GUARDIAN (May 13, 2016), <https://www.theguardian.com/cities/2016/may/13/story-cities-pablo-escobar-inclusive-urbanism-medellin-colombia>; Ashoka, *The Transformation of Medellín, and the Surprising Company Behind It*, FORBES (Jan. 27, 2014), <https://www.forbes.com/sites/ashoka/2014/01/27/the-transformation-of-medellin-and-the-surprising-company-behind-it/#71a5e58232cc>.

⁹ GEORGE REID ANDREWS, *AFRO-LATIN AMERICA, 1800-2000* 134 (Oxford Univ. Press 2004).

¹⁰ *Id.*

¹¹ See *id.*; Peter Wade, *The Cultural Politics of Blackness in Colombia*, 22 AM. ETHNOLOGIST 341, 345 (1995).

¹² See Wade, *supra* note 11.

¹³ ANDREWS, *supra* note 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Gimena Sanchez-Garzoli, *Stopping Irreparable Harm: Acting on Colombia's Afro-Colombian and Indigenous Communities Protection Crisis*, NOREF (June 2012), <https://noref.no/Publications/Themes/Global-trends/Stopping-irreparable-harm-acting-on-Colombia-s-Afro-Colombian-and-indigenous-communities->

fertile land of the Pacific Region is still being fought over because the lucrative industry of palm oil cultivation requires rich land.¹⁷

This Comment will focus only on the treatment of the Afro-Colombians of the Pacific Region.¹⁸ While Indigenous people endured transgressions similar to those suffered by the Afro-Colombians, Afro-Colombians are unique in a sense that the Colombian government and society historically denied their presence in the country.¹⁹ Since Afro-Colombians' status as a distinct group was essentially erased from the Colombian society, the Colombian government overlooked the unique historical and cultural connection that Afro-Colombians had to the land in the Pacific Region and ignored the pain that Afro-Colombians endured.²⁰

Throughout the battles for land in the Pacific, Afro-Colombians were subjected to horrendous acts of both physical and mental depravity: families were often removed from their homes at gunpoint; women were often raped; and, along with their land, Afro-Colombians lost their independence and culture.²¹

The Colombian government has attempted to make amends for its past behavior of prioritizing economic development over Afro-Colombian land rights and, in 1991, began to recognize Afro-Colombians' ties to certain lands in the Pacific Region through the ratification of Law 70 into its Constitution and the establishment of *consulta previa*.²² These laws provided Afro-Colombians

protection-crisis/(language)/eng-US (last updated June 19, 2017).

¹⁷ Nick Miroff, *In Colombia, A Palm Oil Boom with Roots in Conflict*, WASH. POST (Dec. 30, 2014), https://www.washingtonpost.com/world/the_americas/in-colombia-a-palm-oil-boom-has-its-roots-in-years-of-fighting/2014/12/29/ae6eb10c-796b-11e4-9721-80b3d95a28a9_story.html?utm_term=.62f18a616937 [hereinafter *Palm Oil Boom*]; *EU Indigenous and Community Palm Oil Tour*, BURNESSESS, <http://www.burness.com/wp-content/uploads/2016/04/Colombia-Palm-Oil-Brief.pdf> [hereinafter BURNESSESS]; see also C. .sar Augusto Rodriguez-Garavito et al., *Racial Discrimination and Human Rights in Colombia: A Report on the Situation of the Rights of Afro-Colombians*, GLOBAL JUST. SERIES (OBSERVATORY RACIAL DISCRIMINATION, COLOM.) (Dec. 2008), https://cdn.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_204.pdf.

¹⁸ For the rest of this Comment, the use of the term Afro-Colombians only refers to Afro-Colombians in the Pacific Region. The Colombian government recognizes four distinct classifications of Afro-Colombians: those in the Pacific Region, the raizal communities, those from the palenque, and Afro-Colombians who live in cities. See CONSTITUCIÓN POLITICA DE COLOMBIA [CONSTITUTION] July 4, 1991 [hereinafter CONSTITUTION]; see also Sascha Carolina Herrera, *A History of Violence and Exclusion: Afro-Colombians From Slavery to Displacement* (Oct. 31, 2012) (unpublished M.A. thesis, Georgetown University) (on file at Georgetown University).

¹⁹ See Wade, *supra* note 11.

²⁰ Rodriguez-Garavito et al., *supra* note 17.

²¹ ANDREWS, *supra* note 9, at 134.

²² CONSTITUTION, *supra* note 18; see Diana María Ocampo & Sebastain Agudelo, *Country Study: Colombia*, AM. Q. (Spring 2014); Myriam M. .ndez-Montalvo, *Consulta Previa: A Defining Issue for Latin*

with collective title to their lands, ensured certain lands rights and recognized the past assaults that Afro-Colombians faced on their livelihoods.²³ However, the Colombian government has failed to establish a clear policy on how to reconcile the interests of the agricultural industry with the interests of Afro-Colombians.²⁴

If the government does not reinforce the current protections to Afro-Colombian lands, such as *consulta previa*, Colombian citizens may continue to face more violence as eager business owners and *bacrim*²⁵ forcibly take Afro-Colombian land and assassinate Afro-Colombian leaders who attempt to assert and protect their land rights.²⁶ To move past the violence of the Colombian Civil Conflict, and to truly achieve peace within the nation, the Colombian government must prioritize the rights of Afro-Colombians over those of corporations by truly recognizing and respecting Afro-Colombians' rights to land.

Safety in the Pacific will only be possible if the Colombian government does four things: (1) moves away from its current loose legal framework of *consulta previa* and stops circumventing *consulta previa* by (2) communicating with Afro-Colombians, (3) using the Declaration on the Rights of Indigenous People (UNDRIP) as a guideline, and (4) granting Afro-Colombians the ability to veto. This Comment will advocate for the above proposal while examining the attendant obstacles it faces through four interrelated subtopics: Part I will detail a brief history of Afro-Colombians in the Pacific Region and the origins of the modern land-rights dispute. Part II will describe the current system of laws

America, FORD FOUND.: EQUALS CHANGE BLOG (Aug. 14, 2014), <https://www.fordfoundation.org/ideas/equals-change-blog/posts/consulta-previa-a-defining-issue-for-latin-america/> (noting that *consulta previa*, generally, is “the right of indigenous and ethnic communities to be consulted on matters affecting their culture and heritage.”); see also Wade, *supra* note 11 (discussing Law 70 and its exclusions); Indigenous Peoples and Minorities Section, U.N. Office High Comm’r Hum. Rts. [OHCHR] Rule of Law, Free, Prior and Informed Consent of Indigenous People (Sept. 2013), <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>. In Colombia, indigenous and ethnic communities have certain rights over traditional or ancestral lands. *Consulta previa* in Colombia dictates that the indigenous or ethnic community who have rights to a certain area of land are consulted when companies or the government wish to use the land. *Id.* at 1.

²³ See Sanchez-Garzoli, *supra* note 16. In the Pacific, Afro-Colombian communities in Antioquia, Valle del Cauca, Nariño, Chocó, Cauca, and Risaralda, collectively, were granted 159 land titles, spanning over 5.2 million hectares, by the Colombian government. *Id.*

²⁴ See *Palm Oil Boom*, *supra* note 17.

²⁵ Emerging criminal bands and new paramilitaries are known by the Colombian government as “bacrim.” Bacrim are sometimes hired by corporations as agents for the removal of lands or the protection of land. See Sanchez-Garzoli, *supra* note 16.

²⁶ Dan Kovalik, *Colombia: Ethnocide and Political Violence on the Rise*, HUFFINGTON POST: BLOG (Mar. 28, 2016, 9:12 AM), https://www.huffingtonpost.com/dan-kovalik/colombia-ethnocide-polit_b_9556570.html (last updated Dec. 6, 2017); see also Rodriguez-Garavito et al., *supra* note 17.

protecting Afro-Colombians' title to property. Part III will address problems with the current system, and Part IV will propose changes that will enable the system to provide more protections to Afro-Colombians. Part V will address criticisms to the general concept of *consulta previa*.

I. A BRIEF HISTORY OF AFRO-COLOMBIANS IN THE PACIFIC

The Pacific Region of Colombia is a predominately rural area that lacks access to infrastructure, healthcare, and education.²⁷ Home to the departments of Choco, Valle de Cauca, Cauca, and Nariño,²⁸ the region is inhabited primarily by Afro-Colombians, who make up ninety percent of the population.²⁹ The presence of Afro-Colombians in this area dates back to the 1500s.³⁰ To understand why Afro-Colombians have collective title to certain land and to appreciate the connection between Afro-Colombian land and the violent land-grabs by paramilitares and guerrillas, a brief history is necessary. This section will discuss four different time periods of Colombian history. The first section will discuss the arrival of African slaves to Colombia and their role in Colombian independence from Spain. The second section will discuss the development of the Afro-Colombian society. The third section will look at the destabilizing impact of guerrillas and paramilitaries on Colombia and Afro-Colombians. The fourth section will discuss how Afro-Colombians gained recognition by the government and were granted certain rights that protected their land and their culture.

A. Independence and Freedom

In the 1500s, Africans arrived in the Pacific Region of Colombia through the transatlantic slave trade.³¹ Spaniards enslaved Africans and exploited their labor

²⁷ Rodriguez-Garavito et al., *supra* note 17.

²⁸ STATOID, DEPARTMENTS OF COLOMBIA, <http://www.statoids.com/uco.html> (last visited Feb. 9, 2018); *see also* Wade, *supra* note 11.

²⁹ *Afro-Colombians*, MINORITY RTS. GROUP INT'L., <http://minorityrights.org/minorities/afro-colombians/> (last visited Feb. 9, 2018).

³⁰ ANDREWS, *supra* note 9, at 17.

³¹ *Id.*; *see also* Herbert S. Klein & Ben Vinson III, *AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN* (Oxford Univ. Press 2007) (discussing the transatlantic slave trade and the impact on Latin America).

in gold mines, sugar *haciendas*,³² and cattle farms.³³ Some Africans and their descendants were able to achieve freedom prior to emancipation.³⁴ African slaves, free blacks,³⁵ and mulattos³⁶ would play an integral role in the fight for independence against Spain that began in the 1800s.³⁷ Their involvement in the fight for independence would impact their status in society. During the battles for independence, gradual emancipation efforts occurred in liberated territories that were no longer under Spanish rule.³⁸ Emancipation, however, faced heavy resistance from wealthy landowners, and slavery in the area would not officially end until 1851.³⁹

During the slow process of emancipation, *libertos*⁴⁰ sought “to redefine their living and working conditions in such a way as to negate and obliterate the

³² A hacienda is “an agricultural estate, operated by a dominant landowner and a dependent labor force, organized to supply a small market by means of scarce capital, in which the factors of production are employed not for capital accumulation but also to support the status aspirations of the owner.” See GRETA-FRIEDMAN SÁNCHEZ, *ASSEMBLING FLOWERS AND CULTIVATING HOMES: LABOR AND GENDER IN COLOMBIA* 14 (Lexington Books 2006) (quoting Eric Wolf & Sindy Mintz, *Haciendas and Plantations in Middle America and the Caribbean*, 6 Soc. ECON. STUD. 380, 412 (1957)).

³³ ANDREWS, *supra* note 9, at 17; Herrera, *supra* note 18.

³⁴ See Marixa Lasso, *MYTHS OF HARMONY: RACE AND REPUBLICANISM DURING THE AGE OF REVOLUTION, COLOMBIA 1795 – 1831* (Univ. Pittsburgh Press 2007) (referring to free blacks); see also Peter Wade, *Afro-Colombian Social Movements*, in *COMPARATIVE PERSPECTIVES ON AFRO-LATIN AMERICA* (Univ. Press of Florida 2012). Africans and their descendants who achieved freedom prior to emancipation will be referred to as free blacks. See ANDREWS, *supra* note 9, at 17.

³⁵ See ANDREWS, *supra* note 9, at 17. The term “free blacks” is used in reference to African slaves who had runaway or had been freed. *Id.*

³⁶ See *id.* Over the ensuing centuries, African slaves and their descendants would intermarry with both European and Indigenous populations, becoming part of a racial classification system unique to the Spanish colonies in the Americas, with each racial classification bringing corresponding rights and privileges. *Id.* at 56. George Reid Andrews uses “mulatto” to describe someone of “known African ancestry,” and this Comment adopts that classification. *Id.* at 5. However, mulatto is commonly used to refer to someone with African and European ancestry. *Mulatto*, MERRIAM-WEBSTER (2017).

³⁷ ANDREWS, *supra* note 9, at 56. Simon Bolívar, one of the leaders of the independence movement, originally did not think it was necessary to include the emancipation of the slaves in his nation-building project. See Aline Helg, *Simón Bolívar and the Spectre of Pardocracia: Jos. . . Padilla in Post-Independence Cartagena*, 35 J. Latin American Studies 447, 449-450 (2003); see also Ishaan Tharoor, *Simón Bolívar: The Latin American Hero Many Americans Don’t Know*, TIME (May 13, 2013), <http://world.time.com/2013/05/31/simon-bolivar-the-latin-american-hero-many-americans-dont-know/>. As the war for independence went on, Bolívar realized that if the struggle for independence was to succeed, slavery would need to end. *Id.* At one point, Bolívar was given sanctuary in Haiti, and his discussions with Haitian President Alexandre P. . . tion influenced Bolívar’s position towards slavery. *Id.*

³⁸ See ANDREWS, *supra* note 9, at 57. These policies were called *libertad de vientres*—“Freedom of the Womb Laws.” *Id.*

³⁹ *Id.* at 56. Colombia officially recognizes May 21, 1851 as the official day slavery ended. See Oliver Sheldon, *Afro-Colombian Day: An Opportunity to Celebrate Culture and Equality*, COLOMBIA REPORTS (May 21, 2014), <https://colombiareports.com/colombia-celebrates-afro-colombian-day/>.

⁴⁰ “Libertos” is the term used to refer to black slaves who fought in the wars of independence and became free upon military service. See ANDREWS, *supra* note 9, at 62.

experience of slavery.”⁴¹ One way the *libertos* in the Pacific Region attempted to solidify their freedom was through the acquisition and ownership of land.⁴² Through the land ownership, *libertos* found the opportunity to survive without having to work on a *hacienda* as cheap labor⁴³ and the ability to provide shelter and food for their families.⁴⁴

Land after independence was also easily accessible.⁴⁵ Instability within the country had caused crop cultivation and mining to slow down, leading the owners of *haciendas* and mines to leave their lands and move to cities.⁴⁶ *Libertos* and other African descendants who did not move to cities would move on to not only these lands but also on to properties that had been abandoned by the Spanish crown but not yet reallocated by the new government.⁴⁷ Several of the black families who moved onto these abandoned lands requested grants of title from the government. Most of the requests were denied or ignored.⁴⁸ Yet, the government took no formal steps to remove the families from the area.⁴⁹ These families would stay on the lands undeterred by the lack of government recognition.⁵⁰

One reason for the government’s lack of effort to remove Afro-Colombians from the land, was the instability in the government.⁵¹ There were ongoing disagreements about the nature of the nascent government and its boundaries; and eventually, Venezuela and Ecuador would leave Gran Colombia to form their own states.⁵² Following the secession of Venezuela and Ecuador, the Republic of New Granada came into existence.⁵³ Yet disagreements over the new government continued. Wealthy landowners through their different political

⁴¹ *Id.* at 102–03.

⁴² ANDREWS, *supra* note 9, at 102–03; Herrera, *supra* note 18.

⁴³ ANDREWS, *supra* note 9, at 102–03.

⁴⁴ *Id.*

⁴⁵ *Id.*; Herrera, *supra* note 18.

⁴⁶ ANDREWS, *supra* note 9, at 102–03; Herrera, *supra* note 18.

⁴⁷ ANDREWS, *supra* note 9, at 102–03.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Fernán E. González, *The Colombian Conflict in Historical Perspective*, 14 ACCORD 10, 15 (2004), <http://www.c-r.org/accord-article/colombian-conflict-historical-perspective>. Gran Colombia was comprised of modern-day Colombia, Panama, Venezuela, and Ecuador. See *Gran Colombia*, ENCYCLOPEDIA BRITANNICA (July 22, 2016), <https://www.britannica.com/place/Gran-Colombia>.

⁵² Harvey F. Kline et al., *Colombia: Revolution and Independence*, ENCYCLOPEDIA BRITANNICA (Feb. 26, 2019), <https://www.britannica.com/place/Colombia/Revolution-and-independence>.

⁵³ González, *supra* note 51. The Republic of New Granada encompassed modern day Colombia and Panama. *Viceroyalty of New Granada*, ENCYCLOPEDIA BRITANNICA (Aug. 11, 2019), <https://www.britannica.com/place/Viceroyalty-of-New-Granada>.

parties, *el partido liberal* and *el partido conservador*, would cause the state to go through several civil wars and constitutional changes.⁵⁴

Following independence, the dispute between wealthy landowners over governance dominated the political sphere of Colombia.⁵⁵ These wealthy landowners fought for control of the Colombian government and caused the government's attention and resources to focus on the major cities, leaving those in the countryside, like the Afro-Colombians, to fend for themselves.⁵⁶ The lack of presence from the Colombian government allowed Afro-Colombians to live on abandoned land undisturbed for around one hundred years.⁵⁷ This time spent isolated from the rest of the country is one of the reasons for the creation of Law 70 and the practice of *consulta previa*.⁵⁸ Both policies acknowledge the different history of Afro-Colombians and attempt to protect their culture.⁵⁹

B. *Development of Afro-Colombian Society Post-Independence*

As the Colombian state was forming, Afro-Colombians were mostly ignored by the Colombian leadership.⁶⁰ This allowed the Afro-Colombians who moved onto abandoned land in the Pacific to develop a socio-economic structure of their own, entitled *trancos*.⁶¹ *Trancos* (tree trunks) dictated the use and allocation of land by using a system based on inheritance, in which the families who first arrived and cleared the land, received a portion of that land and that portion was passed on to other family members.⁶² Family members had a right to reside, work, and inherit the *minas* (mines), which were mining lands, and the *chagras*—the ancestral land used for agriculture and cattle, which consisted of

⁵⁴ See *id.* at 10, 12–13. List of wars: La Violencia (1948–1958), Guerra Civil (1860–1862), Guerra Civil de 1876, Guerra de los Mil Días (1899–1902). Timeline of Colombian governments: República de la Nueva Granada (1831–1858), Confederación Granadina (1858–1863), Estados Unidos de Colombia (1863–1886), República de Colombia (1886–present day). The disputes between wealthy landowners will be discussed in more detail later.

⁵⁵ See Herrera, *supra* note 18, at 28.

⁵⁶ *Id.*

⁵⁷ See Wade, *supra* note 11, at 345.

⁵⁸ See L. 70, agosto 27, 1993, DIARIO OFICIAL [D.O], translated in Norma & Peter Jackson, *Law 70 of Colombia (1993): In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands.*, Benedict College (1993), www.benedict.edu/exec_admin/intnl_programs/other_files/bc-intnl_programs-law_70_of_colombia-english.pdf; Herrera, *supra* note 18, at 16–34.

⁵⁹ See L. 70, *supra* note 58; Ocampo & Agudelo, *supra* note 22.

⁶⁰ See *id.*

⁶¹ See Herrera, *supra* note 18, at 19; Stella Rodríguez, *Fronteras Fijas, Valor De Cambio y Cultivos Ilícitos en el Pacífico Caucaño de Colombia* [Fixed Frontiers, Exchange Value and Illicit Crops in the Colombian Pacific Coast], 44 REVISTA COLOMBIANA DE ANTROPOLOGÍA 42, 47–48 (2008).

⁶² Rodríguez, *supra* note 61, at 48.

land used for agriculture.⁶³ The right could be inherited from the paternal or the maternal side, depending on the choice of the one exercising the right.⁶⁴ The system also had rules on how to rent and sell land.⁶⁵ As well as what happened to the land during certain life events such as divorce or migration.⁶⁶ During this time, Afro-Colombians mainly lived off subsistence agriculture, fishing, logging, and mining.⁶⁷

By the beginning of the twentieth century, changes to the Afro-Colombian way of life and the *trancos* system that governed their lives were under increased threat from outside forces.⁶⁸ Colombia began to export coffee bringing more wealth into the country and renewing interest in the fertile Pacific Region.⁶⁹ The Colombian government and wealthy landowners returned to the Pacific Region to reclaim the land that they had previously abandoned to use for the cultivation of cash crops.⁷⁰ Together, the government and wealthy landowners acted in conjunction to remove, often violently, the Afro-Colombians from the lands they had lived and worked on for generations.⁷¹ These forced seizures reduced many Afro-Colombians from landowners to mere tenants of their own homes and wage-laborers on their own lands.⁷² Dispossession was enhanced by the creation of a railroad that went from Cali to the Pacific coast.⁷³ As these newly-arrived landowners continued to increase their wealth and influence in the region, the status of Afro-Colombians diminished.⁷⁴

During the 1940s, Afro-Colombians faced another threat to their way of living. The Colombian Government initiated a credit program that attempted to regulate land tenure and titling leading to a “massive exploitation of wood, cattle ranching, oil palm plantations, and shrimp ponds.”⁷⁵ Some Afro-Colombians applied for these loans to engage in the agricultural and logging industries but

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Herrera, *supra* note 18, at 2.

⁶⁸ *See id.*

⁶⁹ *See* ANDREWS, *supra* note 9, at 117, 134.

⁷⁰ *See id.* at 134; *see also* Wade, *supra* note 11, at 345 (discussing the Colombian government’s hands-off approach to the Pacific Region).

⁷¹ *See* ANDREWS, *supra* note 9, at 134.

⁷² *See* Herrera, *supra* note 18, at 26, 30.

⁷³ ANDREWS, *supra* note 9, at 134.

⁷⁴ *See id.*

⁷⁵ Herrera, *supra* note 18, at 25 (citing GENTE NEGRA EN COLOMBIA: DINÁMICAS SOCIOPOLÍTICAS EN CALI Y EL PACÍFICO 206 (Oliver Barbary & Fernando Urrera eds. 2004)).

also as a means of regaining their land.⁷⁶ However, they were frequently outcompeted by corporate agricultural and logging operations, and often lost their territory to foreclosure.⁷⁷

While isolated from the rest of the country, Afro-Colombians created a culture and, with the establishment of *trancos*, a system that was distinctly theirs.⁷⁸ Yet, at the beginning of the twentieth century, Afro-Colombians saw their lives change drastically.⁷⁹ The society that they had developed was impacted by the sudden incursion of the government and wealthy landowners, as many of Afro-Colombians were forcibly moved off their lands for the sake of government sponsored, private-economic activities.⁸⁰ These activities, justified as economic development initiatives, negatively affected Afro-Colombians and their culture.⁸¹ Indeed, the disastrous impact of government development projects and outside private enterprise on Afro-Colombian society has been formally recognized by the Colombian government, as demonstrated by the adoption of Law 70 and *consulta previa*.⁸² These laws were designed to formally recognize past harmful practices and ensure their discontinuation.⁸³

C. Guerrillas & Paramilitaries

Afro-Colombians, already suffering from the loss of their lands, also had to contend with the disastrous consequences of another Colombian civil war: *La Violencia*.⁸⁴ The war formally lasted for a ten-year period, but its destabilizing effects continue to impact Colombia today.⁸⁵ *La Violencia* began in 1948 and lasted until 1958. During that period, the Conservative Party, the Liberal Party, and Communist supporters fought throughout the Colombian countryside, leading to the death of around 200,000 people.⁸⁶ During this time, Afro-

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See Herrera, *supra* note 18, at 19–21.

⁷⁹ *Id.* at 24.

⁸⁰ *Id.* at 26–26.

⁸¹ *Id.*

⁸² See L. 70, *supra* note 58; Ocampo & Agudelo, *supra* note 22.

⁸³ Ocampo & Agudelo, *supra* note 22.

⁸⁴ *La Violencia* is the term used to refer to the civil war of 1948-1958. See William Paul McGreevey, et. al., *Colombia: La Violencia, Dictatorship, and Democratic Restoration*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Colombia/La-Violencia-dictatorship-and-democratic-restoration>.

⁸⁵ *Id.* Following *La Violencia*, the communist supporters fled to rural areas of Colombia and began the FARC. See Felner & Renwick, *supra* note 1.

⁸⁶ McGreevey, *supra* note 84; see also World Peace Found., *Colombia: La Violencia*, MASS ATROCITY ENDINGS (Dec. 14, 2016), <https://sites.tufts.edu/atrocityEngine/2016/12/14/colombia-la-violencia-2/>.

Colombians, although isolated, were not immune from the turmoil that engulfed the rest of the country.⁸⁷

Following the formal end of *La Violencia*, peasants in the countryside who had mobilized to ward off the violence turned into the guerrilla group FARC.⁸⁸ Over time more guerrilla groups would form such as the *Ejército de Liberación Nacional* (ELN), the M-19, and the *Ejército Popular de Liberación* (EPL).⁸⁹ These guerrilla groups instigated violence throughout the country.⁹⁰ In response, landowners and wealthy businessmen, with the support of the Colombian government, created right-wing paramilitary organizations to protect their interests.⁹¹ The emerging mosaic of violent confrontations between the numerous armed groups in Colombia grew more dire and more complicated with the development of the drug trade and the drug cartels. In the 1970s, marijuana growth in Colombia bred “nouveau riche” drug traffickers, which turned into the drug cartels of Medellín and Cali.⁹² As the drug cartels grew more powerful, some drug traffickers created their own paramilitary groups to acquire more land to grow coca and marijuana.⁹³

The arable lands of the Pacific were useful in the cultivation of coca and marijuana and many Afro-Colombians were once again dispossessed of their lands — this time to make way for drug cultivation.⁹⁴ Certain guerrillas became involved in the drug trade, which caused problems between the cartels and the guerrillas.⁹⁵ The Medellín Cartel’s paramilitary arm began to work with the Colombian government to fight off the guerrillas.⁹⁶ Yet, the Medellín Cartel and the Colombian government would also continue to fight amongst each other.⁹⁷ While the battles between the guerrillas, paramilitaries, cartels and the Colombian military occurred throughout the entire country, they were especially frequent on and near land inhabited by Afro-Colombians.⁹⁸

⁸⁷ See McGreevey, *supra* note 84.

⁸⁸ See Lawrence Boudon, *Guerrillas and the State: The Role of the State in the Colombian Peace Process*, 28 J. LATIN-AMERICAN STUD. 279, 280 (1996).

⁸⁹ *Id.*

⁹⁰ See Boudon, *supra* note 88, at 280; see also Winfred Tate, *Paramilitaries in Colombia*, 8 BROWN J. WORLD AFF. 163, 164 (2001).

⁹¹ See Tate, *supra* note 90, at 194–95; see also González, *supra* note 51.

⁹² Tate, *supra* note 90, at 165; see also González, *supra* note 51, at 13.

⁹³ Tate, *supra* note 90, at 165.

⁹⁴ *Id.*; see also González, *supra* note 51, at 13.

⁹⁵ Felner & Renwick, *supra* note 1; see Tate, *supra* note 90, at 165; see also González, *supra* note 51, at 13–14.

⁹⁶ Tate, *supra* note 90, at 166.

⁹⁷ *Id.*

⁹⁸ Herrera, *supra* note 13, at 3–4, 103.

To contextualize the current threats that Afro-Colombians face today, one needs to understand the destabilizing effects that the rise of the cartels— in combination with the presence of guerrillas and *paramilitares*— had on Afro-Colombians and the entire country. The arable land of the Pacific was a vital commodity for these groups and led to numerous battles over the control of the land.⁹⁹ These fights caused the displacement of thousands of Colombians, especially Afro-Colombians, who fled into overcrowded cities.¹⁰⁰ The turmoil directly impacted the lives of Afro-Colombians, as many saw family members and friends die during land disputes.¹⁰¹ The constant struggle between the cartels, guerrillas, and *paramilitares* for control of fertile land with the capacity of drug cultivation was one of the main reasons Afro-Colombians lost such a vast amount of their land and their cohesiveness as a community.¹⁰² As efforts to restore Afro-Colombians' land rights occur under the authority of Law 70 and through the implementation of *consulta previa*, these actors continue to present a direct threat against that initiative.¹⁰³

D. Recognition

By the end of the twentieth century, the Colombian Civil Conflict had devastated the lives of countless Afro-Colombians.¹⁰⁴ The fights between the guerrillas, *paramilitares*, the cartels, and the Colombian government were often fought directly on their lands.¹⁰⁵ With continuing loss of control of their lands, Afro-Colombians had to seek other avenues for sustenance and shelter. Some Afro-Colombians got involved in the drug trade or joined either guerrillas or paramilitary groups.¹⁰⁶

Afro-Colombians who stayed in the region endured numerous traumatic events such as violence, displacement, and loss of family members.¹⁰⁷ These

⁹⁹ Hisham Aidi, *Afro-Colombians Face Surge in Racial Violence*, AL JAZEERA (July 18, 2015), <http://www.aljazeera.com/indepth/opinion/2015/07/afro-colombians-face-surge-racial-violence-150707094927679.html>.

¹⁰⁰ Louise Højen, *Colombia's "Invisible Crisis": Internally Displaced Persons*, COUNCIL HEMISPHERIC AFF. (Feb. 2, 2015), <http://www.coha.org/colombias-invisible-crisis-internally-displaced-persons/>. Afro-Colombians fled the area to overcrowded cities, adding to the number of internally displaced people and creating more problems for the government. See *Displaced 7 Million*, *supra* note 6.

¹⁰¹ Aidi, *supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.* Guerrillas, paramilitaries, cartels, and the Colombian government are all threats to Afro-Colombian restoration of land. *Id.*

¹⁰⁴ *Displaced 7 Million*, *supra* note 6.

¹⁰⁵ *Afro-Colombians*, *supra* note 29.

¹⁰⁶ *Id.* Some Afro-Colombians would also join the Colombian military. *Id.*

¹⁰⁷ See *Displaced 7 Million*, *supra* note 6; Aidi, *supra* note 99, *Afro-Colombians*, *supra* note 29.

traumatic events exacerbated the condition of Afro-Colombians who did not have access to substantial social resources.¹⁰⁸ Compared to other parts of the country during the 1990s, the Pacific was considerably more impoverished and less attended to by the national government.¹⁰⁹ The area lacked paved roads, and in certain parts, like Choco, Afro-Colombians traveled in raft-like boats along river channels.¹¹⁰ This created problems when violence broke out and Afro-Colombians attempted to flee.¹¹¹ The lack of roads also made access to health care difficult;¹¹² this was particularly damaging considering the pre-existing health risks created by the “scarcity of running water, potable water and sewage systems” in this area.¹¹³ With so many issues plaguing the Pacific, Afro-Colombians felt abandoned by the rest of their country.¹¹⁴

Seeking to reinforce democracy and stabilize the country after all the violence during the Colombian Civil Conflict, government officials sought to enact a new constitution.¹¹⁵

Once they learned of the potential for a new constitution, Afro-Colombians began to mobilize and attempted to acquire representation in the constitutional assembly.¹¹⁶ Their platform was based on the desire to regain the stability that they once had during the *trancos* era, and to regain that stability, they sought title to the ancestral lands that they had called home since independence in the 1800s.¹¹⁷ However, their land claim was rejected because the Colombian Institute for Agrarian Reform would not recognize Afro-Colombians as an

¹⁰⁸ See Rodriguez-Garavito et al., *supra* note 17, at 48.

¹⁰⁹ See Wade, *supra* note 11, at 342.

¹¹⁰ James Brooke, *Long Neglected, Colombia's Blacks Win Changes*, N.Y. TIMES (Mar. 29, 1994), <http://www.nytimes.com/1994/03/29/world/long-neglected-colombia-s-blacks-win-changes.html?pagewanted=all>.

¹¹¹ *Afro-Colombians and Indigenous Groups at Risk From Fresh Fighting*, UNHCR (Nov. 3, 2006), <http://www.unhcr.org/en-us/news/latest/2006/11/454b48392/afro-colombians-indigenous-groups-risk-fresh-fighting.html>. The article mentions the difficulties that Embera families, who are indigenous, have had fleeing while on rafts. *Id.* Yet Afro-Colombians in the Choco area also use boats to travel and face similar attacks, they also have encountered the difficulties of fleeing from violence while on a raft. *Id.*

¹¹² See Rodriguez-Garavito et al., *supra* note 17, at 48. The difficult Colombian terrain and the internal conflicts also exasperate the health care problems. *Id.*

¹¹³ *Id.*

¹¹⁴ Brooke, *supra* note 110.

¹¹⁵ Donald T. Fox, et al., *Lessons of the Colombian Constitutional Reform of 1991: Toward the Securing Peace and Reconciliation*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 467, 470 (Laurel E. Miller ed., 2010); see also Wade, *supra* note 11, at 346 (discussing how constitutional reform was a concession during the peace talks with the guerrilla group, M-19). Another positive measure for Afro-Colombians was that the Constitutional Court outlawed CONVIVIR, a right-wing paramilitary group in 1997. See Sanchez-Garzoli, *supra* note 16, at 2.

¹¹⁶ Yesenia Barragan, *To End 500 Years of Great Terror*, 49 *NACLA REP. AM.* 56, 58–59 (Mar. 14, 2017).

¹¹⁷ Dixon, *supra* note 115; see also Herrera, *supra* note 18, at 28; Rodriguez, *supra* note 61, at 48–49.

ethnic community, which was a pre-requisite to receive collective title.¹¹⁸ In response, Afro-Colombian communities collected signatures and protested the rejection by peacefully occupying government buildings in Quibdo.¹¹⁹

These protests were impactful; thus, in 1993, the Colombian government enacted Law 70 to the 1991 Constitution, adding language that recognized the existence of Afro-Colombians.¹²⁰ Never before had the Colombian government acknowledged the existence of Afro-Colombians and their distinct cultural identity until the passing of Law 70.¹²¹ Law 70 bound the Colombian government by granting protected rights to Ethnic communities, including Afro-Colombians.¹²² The law also granted specific land rights to Afro-Colombians.¹²³ More information on Law 70 will be provided in the next section of this Comment.

The hope that recognition by the government and the establishment of collective title to land would bring about change died quickly. Even in recent decades, Afro-Colombians continue to face terrible violence. One example is the massacre in Bojayá where, on May 2, 2002, seventy-nine people were killed in the crossfires of a fight between paramilitaries and the FARC.¹²⁴

Furthermore, the perpetrators of violent land acquisition in the Pacific Region have a new motivation: the cultivation of African oil palms.¹²⁵ Oil palm production has now become a lucrative business in Colombia, particularly in the Pacific Region, where most of the product is grown.¹²⁶ Colombia is currently Latin America's largest producer of oil palms.¹²⁷ The cultivation of oil palm has helped boost the Colombian economy,¹²⁸ and, as a result, the Colombian government plans to increase production "six-fold by 2020."¹²⁹ Yet, the

¹¹⁸ Dixon, *supra* note 115.

¹¹⁹ *Id.* Quibdo is the capital of Chocó. *Quibdo*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/place/Quibdo>.

¹²⁰ L. 70, *supra* note 58; *see also* Tianna S. Paschel, *The Right to Difference: Explaining Colombia's Shift From Color Blindness to the Law of Black Communities*, 116 AM. J. SOC. 729, 730 (2010).

¹²¹ Paschel, *supra* note 121 (discussing Colombian "color-blindness"); *see also* WADE, *supra* note 11, at 349 (discussing how Afro-Colombians were no longer invisible following the implementation of Law 70).

¹²² L. 70, *supra* note 58; *see also* WADE, *supra* note 11, at 349 (discussing Law 70 and its exclusions).

¹²³ L. 70, *supra* note 58; *see also* WADE, *supra* note 11, at 349.

¹²⁴ Sofia del Carril & Miriam Juan-Torres, *Peace in Colombia: The Tale of Bojayá*, YALE J. INT'L AFF. (Apr. 6, 2016), http://yalejournal.org/photo-essay_post/peace-in-colombia-the-tale-of-bojaya/. The Colombian military arrived four days later. *Id.*; *see* Sanchez-Garzoli, *supra* note 16, at 2.

¹²⁵ *Palm Oil Boom*, *supra* note 17.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Aditi Sen & Stephanie Burgos, *The Next Frontier for Palm Oil Expansion: Latin America*, OXFAM:

cultivation of oil palms presents a problem for Afro-Colombians and their goal to regain control of their lands, as well as preserve their culture.¹³⁰

While violent and illegal land grabs in the Pacific were often for the cultivation of illicit crops, there has recently been a rise of interested actors¹³¹ forcibly taking land for oil palm cultivation.¹³² Several townspeople have been violently forced off their lands, and their towns have been demolished to make room for the cultivation of African oil palms.¹³³ These forced removals are often performed by *bacrim* who are paid by corporations that ultimately reap the benefits of forced removals in the form of free fertile land.¹³⁴

One such town located in the center of Colombia, Mapiripán, was under the control of the FARC when it was attacked during July of 1997.¹³⁵ A week later, the town stood in shambles after a fight between paramilitaries and the FARC. Towns people, who were caught amongst the crossfire, “[were] torn limb from limb while still alive.”¹³⁶ Following the massacre, most of the town’s citizens fled to nearby cities.¹³⁷ Cecilia Lozano was one of those who fled Mapiripán.¹³⁸ She never understood why her town was attacked until she returned home, two years later, and saw her home replaced by oil palm groves.¹³⁹

Jiguamiandó and Curvaradó are two Afro-Colombian areas where displacement of Afro-Colombians has occurred to accommodate the production

THE POLITICS OF POVERTY (Oct. 26, 2016), <https://politicsofpoverty.oxfamamerica.org/2016/10/the-next-frontier-for-palm-oil-expansion-latin-america/>.

¹³⁰ See Ulrich Oslander, *Violence in Development: The Logic of Forced Displacement on Colombia's Pacific Coast*, 17 DEVELOPMENT IN PRACTICE 752 (2007).

¹³¹ Interested persons can include: corporations, *paramilitaries* (or now *bacrim*) and *guerrillas*.

¹³² Hannah Brock, *Marginalisation of the Majority World: Drivers of Insecurity and the Global South*, OXFORD RES. GRP. (Feb. 1, 2012), <https://www.oxfordresearchgroup.org.uk/marginalisation-of-the-majority-world-drivers-of-insecurity-and-the-global-south> (citing Amira Armenta, *Marginalisation of the Majority World: Crime and Insecurity in Colombia*, TRANSNATIONAL INSTITUTE); see also *Palm Oil Boom*, *supra* note 12.

¹³³ María Cristana Caballero, *Mapiripan: A Shortcut to Hell*, CTR PUB. INTEGRITY (July 28, 1997, 6:49 PM), <https://www.publicintegrity.org/1997/07/28/3357/mapiripan-shortcut-hell>.

¹³⁴ See *Resisting Displacement by Combatants and Developers: Humanitarian Zones in North-West Colombia*, NORWEGIAN REFUGEE COUNCIL (Nov. 2007), <http://www.internal-displacement.org/assets/publications/2007/200711-Dam-colombia-resisting-displacement-by-combatants-and-developers-country-en.pdf> [hereinafter *Resisting Displacement*].

¹³⁵ Caballero, *supra* note 110.

¹³⁶ *Id.*

¹³⁷ *Palm Oil Boom*, *supra* note 17; see also BURNES, *supra* note 17.

¹³⁸ *Palm Oil Boom*, *supra* note 17.

¹³⁹ *Palm Oil Boom*, *supra* note 17; see BURNES, *supra* note 17; see also *Oil Palm Cultivation (Palm Oil) Guide*, AGRIFARMING, <http://www.agrifarming.in/oil-palm-cultivation/> (last visited Oct. 1, 2018).

of oil palms.¹⁴⁰ The displacement of Afro-Colombians in Jiguamiandó and Curvaradó began in the 1990s when farmers and landowners, who received financial backing from the illegal drug trade, “used threats and harassment to banish the [Afro-Colombians] and appropriate their land.”¹⁴¹ Once Afro-Colombians fled their land, oil palm plantations took the place of Afro-Colombian homes.¹⁴²

As seen by the land grabs in Jiguamiandó and Curvaradó, other Afro-Colombian communities are likely to experience what the people of Maripán underwent: a complete loss of their homes through violent land acquisition as the Colombian government encourages the development of African oil palms in the country. While the people of Mapiripán are not Afro-Colombian, their experience demonstrates a common phenomenon in Colombia: the taking of land for lucrative industries.

With the rise of the oil palm industry, Afro-Colombians not only fear attacks over the acquisition of their land but also intimidation or retaliation against their community leaders.¹⁴³ Throughout the intersecting histories of the Afro-Colombian struggle for collective lands rights and the growth of the oil palm sector, several Afro-Colombian leaders have been assassinated.¹⁴⁴ In February of 1996, Francisco Hurtado, a legal representative elected for the council of the lower Mira River was murdered.¹⁴⁵ The man who shot Hurtado is reported to have said “why don’t you continue screwing around with this business of your Law 70!”¹⁴⁶ In 2008, a leader of a community council in the Mira Region was assassinated.¹⁴⁷ A note threatening the community to end its activism was found near the body.¹⁴⁸

While the Colombian government has initiated policies to protect Afro-Colombian land rights and culture, these policies fall short.¹⁴⁹ The Colombian government’s encouragement of the oil palm industry and the desire of businessmen, as well as *bacrim*,¹⁵⁰ to make money off the crop, has perpetuated

¹⁴⁰ Brock, *supra* note 132, at 6–7; *see also* BURNES, *supra* note 17.

¹⁴¹ Brock, *supra* note 132, at 6–7; *see also* BURNES, *supra* note 17.

¹⁴² Brock, *supra* note 132, at 6–7; *see also* BURNES, *supra* note 17.

¹⁴³ BURNES, *supra* note 17.

¹⁴⁴ *See* Rodríguez-Garavito et al., *supra* note 17, at 37; *see also* *Asesinado líder afro en Nariño*, AGENCIA PRENSA RURAL (Jan. 23, 2018), <http://www.prensarural.org/spip/spip.php?article22624>.

¹⁴⁵ Rodríguez-Garavito et al., *supra* note 17, at 37.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See* Sanchez-Garzoli, *supra* note 16, at 2.

¹⁵⁰ Emerging criminal bands and new paramilitaries are known by the Colombian government as “bacrim.”

the violent acquisitions of Afro-Colombian land. Without stability in the region, there can be no meaningful improvements to healthcare or infrastructure. More importantly, unless the government acts on the promise of Law 70 and *consulta previa* by enforcing Afro-Colombian collective land rights, the incentive for armed groups to forcibly take lands from those with no enforceable claims will remain and the violence that Afro-Colombians have endured for decades will not end.¹⁵¹

II. PROTECTIONS OF LAND

To rectify the years of government neglect of Afro-Colombians and the abuse Afro-Colombians have faced throughout their history, the Colombian government has signed treaties and created laws that recognize Afro-Colombians as a distinct ethnic community in Colombia.¹⁵² These laws compel the government to consider the land rights of Afro-Colombians. This section will look at the laws that the Colombian government has enacted to rectify the mistreatment of Afro-Colombians. First, this section will look at the legal framework that recognizes Afro-Colombians as a distinct group in Colombia and establishes a system of consultation between Afro-Colombians, the government, and corporations. Second, this section will look at this system of *consulta previa*, which ensures that Afro-Colombians have a say on what occurs on their lands.

A. Creation of Protections for Afro-Colombians

The Colombian government has made progress from its past practice of ignoring the presence and plight of Afro-Colombians in the country to acknowledging Afro-Colombian's territorial and cultural identity. The Colombian government's recognition of Afro-Colombians began in the early 1990s.¹⁵³ In 1991, the Colombian government signed a new constitution, which established protections for the cultural identity of ethnic communities.¹⁵⁴ Afro-Colombians fell under the broad description of "ethnic communities." Shortly after the new constitution went into effect, the Colombian government ratified the International Labour Organization convention on Indigenous and Tribal Peoples (ILO 169) which guaranteed the right of indigenous peoples by

Bacrim are sometimes hired by corporations as agents for the removal of lands or the protection of land. See Sanchez-Garzoli, *supra* note 61, at 2.

¹⁵¹ *Palm Oil Boom*, *supra* note 17; see also BURNES, *supra* note 17.

¹⁵² L. 70, *supra* note 58.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

requiring their free, prior, and informed consent before actions occurred on their land.¹⁵⁵ Then in 1993, the Colombian government adopted ILO 169 into its own laws with the passage of Law 70.¹⁵⁶

While ILO 169 detailed the rights of indigenous peoples, Colombia's Law 70 expanded the scope of ILO 169 to embrace other ethnic communities, including Afro-Colombians of the Pacific Region. Law 70 acknowledged that Afro-Colombians had been living in rural areas of the Pacific and independently governing themselves under the *trancos* system.¹⁵⁷ The Law established that Afro-Colombians had a right to collective title on the lands that they had traditionally inhabited.¹⁵⁸ Because of Afro-Colombians' rights to ancestral lands, the Colombian government and corporations would now have to consult with Afro-Colombians prior to any use of Afro-Colombian land.¹⁵⁹ The law also mandated that each enclave of Afro-Colombians establish a community council that would represent their area during these consultations.¹⁶⁰ The process of consultation between ethnic groups and corporations is known as *consulta previa* among the Spanish speaking Latin-American countries or free, prior and informed consent (FPIC), in English.¹⁶¹

With these laws, Colombia has some of the most progressive declarations for ethnic communities in Latin America.¹⁶² However, these progressive declarations belie the unwillingness of the Colombian government to enforce these rights.

B. Current System of Consulta Previa

To understand the potential pitfalls of *consulta previa*, it is important to have a basic understanding of how the consultation process is supposed to work. Even

¹⁵⁵ Free, Prior and Informed Consent (FPIC) dictates that indigenous groups or ethnic communities must first consent to acts by third parties, such as industries on their lands, before third parties proceed to act. FPIC ensures that indigenous or ethnic communities have a voice in what occurs on their lands. See Int'l Lab. Org. [ILO], *Indigenous and Tribal Peoples Convention*, pt. II, ILO No. 169 (entered into force Sept. 5, 1991), <http://www.humanrights.se/wp-content/uploads/2012/01/C169-Indigenous-and-Tribal-Peoples-Convention.pdf> [hereinafter ILO No. 169]; see also OHCHR, *supra* note 22.

¹⁵⁶ L. 70, *supra* note 58.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* See also: *Beyond Slavery* pg. 179.

¹⁵⁹ L. 70, *supra* note 58.

¹⁶⁰ *Id.*

¹⁶¹ Carlos Andr. . s Baquero Díaz, *Contested Lands Contested Laws: What's Going Wrong in South America with the Development and Application of the Domestic Laws to Implement*, AM. Q. 107 (Spring 2014), <https://www.americasquarterly.org/content/contested-lands-contested-laws>.

¹⁶² Sanchez-Garzoli, *supra* note 16, at 5.

though the consultation process is much more of a unilateral process where the corporations have most the bargaining power. The process, at least conceptually, happens in three phases: filing, consultation, and monitoring. Criticisms of the system will be discussed in the next section, but it is important to note that the system of *consulta previa* was primarily developed by the Constitutional Court, and the framework created by the case law has not been respected by corporations or *bacrim*, who often ignore the process altogether.¹⁶³

Colombia's filing process is emblematic of the investor-oriented approach the country has taken to *consulta previa*. In Colombia, *consulta previa* depends on the initiative of a potential investor or organization.¹⁶⁴ The potential investor or organization recognizes whether *consulta previa* may be necessary and files a project request with the *Dirección de Consulta Previa* (DCP).¹⁶⁵ The DCP ensures that the project request was properly filed.¹⁶⁶ Once the request is properly filed, the DCP determines whether the project will require *consulta previa*. This step may require a visit to the area involved.¹⁶⁷ At some point, the DCP begins to contact the ethnic or indigenous group.¹⁶⁸ If the communities do not respond, the DCP turns to the *Defensoría del Pueblo*,¹⁶⁹ *Procuraduría General de la Nación*,¹⁷⁰ and the *Instituto Colombiano de Antropología e Historia*¹⁷¹ to discuss whether the project should proceed.¹⁷² However, if the community does respond to the DCP, the DCP then helps facilitate the consultation between the ethnic community and the third-party planning to make use of the land.¹⁷³

The consultation phase begins with a pre-consultation meeting between the DCP and the ethnic group.¹⁷⁴ The DCP presents information about *consulta previa* and the rights the group has.¹⁷⁵ Together, the DCP and the group determines how the consultation will be "carried out."¹⁷⁶ The DCP also provides

¹⁶³ BURNES, *supra* note 17, at 2; *see also Resisting Displacement, supra* note 134, at 5.

¹⁶⁴ Sanchez-Garzoli, *supra* note 16, at 11.

¹⁶⁵ An agency in the interior ministry. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Ombudsman's Office of Colombia.

¹⁷⁰ Office of the Inspector General of Colombia.

¹⁷¹ Colombian Institute of Anthropology and History.

¹⁷² Sanchez-Garzoli, *supra* note 16.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

information on the project to the ethnic community.¹⁷⁷ The next step is for an actual consultation between the project investor or organization with the ethnic group. The DCP oversees the meeting. The purpose of the consultation stage is to create an agreement between the investor and the ethnic group.¹⁷⁸ At this phase of the process, consultations often become frustrated due to an information imbalance between the ethnic community councils and the investor. Following the consultation stage, is the monitoring phase. At this stage, an agreement should already be in place and a monitoring process as well as a schedule for follow-up meetings should be determined.¹⁷⁹

With the ratification of the new constitution, the signing of the ILO 169 and the passing of Law 70, the Colombian government not only recognized Afro-Colombians as a distinct group in Colombian society but also delineated specific rights for Afro-Colombians to preserve their culture and to protect their lands.¹⁸⁰ While these laws seemed like a step in the right direction towards ensuring Afro-Colombians' ability to enforce their collective property rights against interested actors who seek their land, these laws fall short and attacks on Afro-Colombians have persisted.¹⁸¹

III. SHORTCOMINGS OF THE CURRENT LAWS

There are several factors that limit the protections that the current laws establish for Afro-Colombians, but this comment will discuss two main factors. First, Law 70 does not guarantee Afro-Colombians complete control over their lands because it does not provide Afro-Colombians with the ability to veto projects during the *consulta previa* process.¹⁸² Second, Colombia's system of *consulta previa* was not established by a legislature and is a system of "scattered norms, guidelines, decrees, and presidential directives" that the Colombian government can ignore when it sees fit.¹⁸³ These shortcomings provide avenues for corporate interests to triumph over the rights of Afro-Colombians.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ L. 70, *supra* note 58.

¹⁸¹ Brock, *supra* note 132; *see also* BURNES, *supra* note 17.

¹⁸² Ocampo & Agudelo, *supra* note 22.

¹⁸³ *Id.*

A. *Structural Problems with Consulta Previa*

Consulta previa does not provide insight as to what would occur if Afro-Colombians veto a project. The Colombian version of *consulta previa* does not answer that question because neither ILO 169 nor Law 70 clearly address the possibility.¹⁸⁴ Yet this question deserves to be answered because the lack of a veto limits the ability of Afro-Colombians to protect their cultural and territorial integrity.¹⁸⁵ If Afro-Colombians are approached by a corporation with a project that will involve activities that they do not wish to allow on their lands and negotiations between the Colombian government, the corporation, and Afro-Colombians are not successful, what can the Afro-Colombians do? They must continue to negotiate, and, as past actions show, the Colombian government tends to side with corporations.¹⁸⁶ In fact, international law also tends to side with corporations in such negotiations maintaining that the exploitation of natural resources on Indigenous land by corporations is considered legal “as long as Indigenous rights to consultation, participation and redress . . . are met.”¹⁸⁷ The inability to say no to a project reveals the consultation process for what it is—a façade.

Ultimately, ethnic populations are faced with the choice between entering into a one-sided consultation process or refusing to participate and losing what little agency they do have. Corporations can play along when they see fit but know that at the end of the day, their deal will get done. How can Afro-Colombians fully protect their lands if each consultation process essentially requires that the Afro-Colombians give their consent?

¹⁸⁴ ILO 169 and the ILO Committee do provide certain protections to ethnic groups that ensure their ability to protect their territorial and cultural integrity. ILO No. 169, *supra* note 155. ILO 169 states that free and informed consent should occur prior to any relocation. *Id.* If consent is not granted, states must “follow procedures established under national law to allow for the ‘effective representation’ of the communities involved before relocating them.” *Id.* The ILO Committee has stated that the rights of ethnic groups may be subordinate to the interests of the state if the state “retains ownership of subsoil resources” and adheres with the following: discusses with the ethnic group prior to exploration or exploitation on the land, establishes the effect of the project, provides the ethnic group a “fair share of the benefits accruing from any natural resource extraction,” and provides “fair compensation for any damages caused by the []exploration and exploitation.” *Id.*; see also Angela Bunch, *Contradiction in International Law: Do Communities Get a Veto? International Law Isn’t Clear on the Matter*, AM. Q. (Spring 2014).

¹⁸⁵ Bunch, *supra* note 182; see also ILO No. 169, *supra* note 155.

¹⁸⁶ See EIAEnvironment, *Mapiripán: Between Water and Oil Palm*, YOUTUBE (Aug. 9, 2015), https://www.youtube.com/watch?v=6q2RU_8RRTc; *Palm Oil Boom*, *supra* note 12; see also BURNES, *supra* note 17.

¹⁸⁷ Bunch, *supra* note 182.

B. *Problems with the Implementation of Consulta Previa*

Since the ratification of the ILO 169 and the enactment of Law 70, the Colombian government has failed to implement a clear structure of *consulta previa*.¹⁸⁸ This lack of statutory structure allows the Colombian government to disregard *consulta previa* when it sees fit and leaves Afro-Colombians in danger.¹⁸⁹ This section will discuss examples of when the Colombian government has engaged in activities that directly contradict *consulta previa* and aggravate the structural shortcomings that already exist. This section will also acknowledge the role that the Colombian Constitutional Court has played in ensuring that the Colombian government adheres to Law 70 and *consulta previa*. This section will then discuss how the current presidential administration has approached the land rights of Afro-Colombians.

1. *Contradictory Policies of the Colombian Government*

One government activity that directly contradicted the principles of *consulta previa* was the passage of Law 99, which created a national authority, *el Ministerio de Ambiente y Desarrollo Sostenible*.¹⁹⁰ In addition to the creation of the environmental authority, the law also required consultation with ethnic communities prior to “granting environmental licenses whenever extractive projects . . . were expected to have an impact on ethnic communities.”¹⁹¹ The government also implemented decree 1320 in 1998 to regulate Law 99.¹⁹² The decree “provide[d] guidelines for analyzing the economic, environmental, social, and cultural impacts of natural resource extraction on Indigenous and Afro-descendant communities within their territories, and at the same time established a set of measures that would protect their integrity.”¹⁹³ While all of these regulations seem to be for the benefit of ethnic communities, such as the Afro-Colombians, these regulations occurred without prior consultation from such communities,¹⁹⁴ ignoring the objectives of *consulta previa*.¹⁹⁵

¹⁸⁸ Ocampo & Agudelo, *supra* note 22.

¹⁸⁹ *Id.*; Adam Wolsky, *Summary: The Perils and Promise of Consulta Previa*, AS/COA (July 23, 2014), <http://www.as-coa.org/articles/summary-perils-and-promise-consulta-previa>. It is also important to note that the displacement of several Afro-Colombians makes it hard to correctly implement *consulta previa* since more than 60% the Afro-Colombians who possess legal titles to collective lands are currently internally displaced and thus cannot contribute to the process. Sanchez-Garzoli, *supra* note 16.

¹⁹⁰ See Ocampo & Agudelo, *supra* note 22. The English translation of *el Ministerio de Ambiente y Desarrollo Sostenible* is The Ministry of Environment, Housing and Territorial Development.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Rodriguez-Garavito et al., *supra* note 17.

In the 1990s, the communities of Curvaradó and Jiguamiandó began fighting for recognition of their collective right to ancestral land and for the protection of their territory.¹⁹⁶ Oil palm investors and cultivators had taken lands in both Curvaradó and Jiguamiandó by harassing families to the point that they were forced to relocate.¹⁹⁷ In 2001, the communities in Curvaradó and Jiguamiandó were finally granted collective title to the lands they fled several years earlier.¹⁹⁸ Such declarations by the state granted the communities the privilege of taking part in the *consulta previa* process. However, formal recognition by the Colombian government as an ethnic community was not followed by restitution to their homes, and members of both communities remain displaced.¹⁹⁹ Such treatment led to criticism from international organizations. The Inter-American Commission for Human Rights issued “provisional measures of protection upon learning that the harassment had not stopped.”²⁰⁰ Similarly, the International Labor Organization (ILO) found that the Colombian government violated *consulta previa* in its treatment of the communities in Curvaradó and Jiguamiandó, and the organization requested that the government fulfill the consultation requirement and “guarantee the restitution of the lands.”²⁰¹

Despite criticism from international organizations, from 2006 to 2010, the Colombian government continued to circumvent *consulta previa* to pass laws that would facilitate Colombia’s compliance with free trade agreements.²⁰² The Forestry Law of 2006, the Rural Development Statute of 2007, and the reforms to the Mining Code of 2010 were all passed for the purpose of meeting the demands of free trade agreements,²⁰³ and all three legal measures had a direct impact on lands inhabited by ethnic communities.²⁰⁴ However, the Colombian government failed to comply with the mandate of *consulta previa* and never entered the consultation process with the affected communities.²⁰⁵

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Rodriguez-Garavito et al., *supra* note 17; *see also* Brock, *supra* note 132; *see also* Anouska Perram, *Defining communities in Colombia: The Afro-descendant Communities of Curvaradó and Jiguamiandó and communal land rights*, TERRANULLIUS BLOG (Apr. 8, 2013), <https://terra0nullius.wordpress.com/2013/04/08/defining-communities-in-colombia-the-afro-descendant-communities-of-curvarado-and-jiguamiando-and-communal-land-rights/>.

²⁰⁰ Rodriguez-Garavito et al., *supra* note 17.

²⁰¹ *Id.*

²⁰² Sanchez-Garzoli, *supra* note 16.

²⁰³ *Id.*

²⁰⁴ Rodriguez-Garavito et al., *supra* note 17.

²⁰⁵ *Id.*

In 2006, the Colombian government also initiated the implementation of the National Plan for Territorial Consolidation, which seeks to establish a government presence in neglected areas.²⁰⁶ These areas were near to or “correlated” with territories inhabited by Afro-Colombians in the Pacific and other ethnic communities.²⁰⁷ However, neither Afro-Colombians nor any other ethnic community was consulted.²⁰⁸ Yet, these communities did suffer as a direct result of the plan. Several members of ethnic communities faced violent retaliation by guerrillas who were upset by the government’s presence.²⁰⁹ In Tumaco, six Afro-Colombians who were participating in the consolidated area program were killed by members of the FARC.²¹⁰ It is possible that retaliation could have been prevented, if the Colombian government communicated with the Afro-Colombian community and learned more about the tensions in the Pacific from their perspective.

By ignoring its own rules, the Colombian government has engaged in policies that negatively impact Afro-Colombians. Such actions by the Colombian government contradict the objective of *consulta previa* as described by the ILO convention: to “guarantee [] respect of the territories and cultural integrity of peoples and communities.”²¹¹

2. Protection of Consulta Previa by the Colombian Constitutional Court

While the legislative and executive *ramas*²¹² of the Colombian Government continue to disregard *consulta previa*,²¹³ the Constitutional Court has repeatedly upheld the doctrine and even strengthened its policies.²¹⁴ Following the 1998 passage of Decree 1320, the Constitutional Court held the enactment of the decree to be unconstitutional because the government violated *consulta previa* by failing to consult with the ethnic communities impacted by the decree.²¹⁵ The Court also held the Forestry Law of 2006, the Rural Development Statute of 2007, and the reform to the Mining Code of 2010, to all be unconstitutional on

²⁰⁶ *Id.*

²⁰⁷ Sanchez-Garzoli, *supra* note 16.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See ILO No. 169, *supra* note 155; John B. Henrikson, *Key Principles in Implementing ILO Convention No. 169* 35–36, Int’l Lab. Org. [ILO] (2008). The Colombian Constitutional court accepts this characterization of the objectives of *consulta previa* and has used that definition in its rulings. Sanchez-Garzoli, *supra* note 16.

²¹² Branches.

²¹³ See, e.g., Sanchez-Garzoli, *supra* note 16, at 15, 16.

²¹⁴ Ocampo & Agudelo, *supra* note 22; see also Sanchez-Garzoli, *supra* note 16, at 14, 15.

²¹⁵ Ocampo & Agudelo, *supra* note 22.

similar grounds.²¹⁶ The Constitutional Court also reestablished a prior decision where the Court explained that ethnic communities had a fundamental right to *consulta previa*, since *consulta previa* protects ethnic communities' constitutional right of "social, economic, and cultural integrity."²¹⁷

In 2011, the Court established some of the responsibilities of the Colombian Government in relation to *consulta previa*.²¹⁸ The Court held that the government was "responsible for establishing a dialogue between parties based on good faith and agreeing to a flexible methodology, based on the particular needs of each community."²¹⁹ This decision also established that the *consulta previa* process should occur before operations displaced community members.²²⁰ To ensure that the government adheres to *consulta previa*, the Court also mandated that the certain watchdog government offices become involved in the consultation process.²²¹ The Court has also requested that the government keep track of the abuses committed against Afro-Colombians, which the government has failed to comply with.²²²

Despite the seeming indifference of all other branches of the Colombian Government to the multiple affronts to Afro-Colombian land rights and livelihood, the Constitutional Court seems to remain the sole government entity upholding the rights of Afro-Colombians.²²³ The Court's role as the sole champion of *consulta previa* suggests that while there have been all too few real-world examples of success, the legal principles guiding the process remain a source of hope for the future.

3. *The Future of Consulta Previa under President Santos*

While the Colombian executive and legislative branches in the past have tried to limit *consulta previa*, there have been some changes to how the current Colombian Government approaches *consulta previa*. The current President, Juan Manuel Santos, has tried to strengthen his administration's commitment to *consulta previa*. However, his efforts continue to fall short.²²⁴ President Santos

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Ocampo & Agudelo, *supra* note 22.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Sanchez-Garzoli, *supra* note 16.

²²³ Compare Sanchez-Garzoli, *supra* note 16, at 12, 13 (exemplifying the indifference of the executive and legislative branches to the process of *consulta previa*), with Ocampo & Agudelo, *supra* note 22, at 3–4 (describing the role of the Constitutional Court in strengthening the process of *consulta previa*).

²²⁴ Ocampo & Agudelo, *supra* note 22.

issued a directive which gave more responsibilities to the *Directorio Consulta Previa* and detailed a procedure for *consulta previa*.²²⁵ These procedural policies only detail how the government should proceed with the implementation of *consulta previa* and do not assist the communities who need to gain an even footing with the corporations who will be sitting on the other side of the bargaining table.²²⁶

Furthermore, Santos' administration seems to be more focused on streamlining the process of *consulta previa* to placate those who see the doctrine as a hurdle for economic development. Claudia Jimenez, director of the *Sector de Minería a Gran Escala*,²²⁷ noted that "some 7.3 billion in mining investment has been held up because of *consulta previa*" and other issues.²²⁸ Santos' *Comisión de Infraestructura*²²⁹ attributed the deficiencies of the development of infrastructure to problems with implementing *consulta previa*.²³⁰ In an interview, the Vice Minister of the Interior, Luis Ernesto Gómez focused only on the time concerns with *consulta previa*, emphasizing a government desire to expedite the process.²³¹ The preference for a speedy rather than effective consultation is yet another indication of the Colombian Government's prioritization of economic development over the safety of ethnic communities.

While the current administration seems uninterested in addressing the fundamental imbalance in bargaining power between the community councils and sophisticated profit-seeking entities during the consultation process, there have been some attempts to address past wrongs.²³² The current administration has attempted to rectify the Colombian Government's past policies towards Afro-Colombians, a clear example of which is The Victims' and Land Restitution Law.²³³ The law seeks to "provide reparations for victims of the internal armed conflict and restore land to some five million [internally displaced peoples]."²³⁴ This policy would restore the rights of hundreds of Afro-

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Large Scale Mining Industry.

²²⁸ Ocampo & Agudelo, *supra* note 22.

²²⁹ Commission on Infrastructure.

²³⁰ Ocampo & Agudelo, *supra* note 22.

²³¹ *Comenzó Concertación Sobre La Consulta Previa*, EL TIEMPO (Dec. 19, 2016), <http://www.eltiempo.com/politica/gobierno/entrevista-a-viceministro-de-participacion-sobre-consulta-previa-28594>.

²³² Sanchez-Garzoli, *supra* note 16, at 12.

²³³ The Victim's and Land Restitution Law addresses a common critique of the Colombian Government, which is the failure to adequately address the problem of internally displaced persons. See Rodriguez-Garavito et al., *supra* note 17; Sanchez-Garzoli, *supra* note 16, at 11.

²³⁴ Sanchez-Garzoli, *supra* note 16, at 11.

Colombians who have had to leave behind their ancestral lands and move to urban areas due to the violence in the region.²³⁵ However, this policy has failed to mitigate the violence that continues to plague Afro-Colombians.²³⁶ Bands of *guerrillas* and *bacrim* are still present in the Pacific Region and are still fighting over land, and Afro-Colombians remain at risk.²³⁷ The law has yet to be fully implemented, yet there are already signs that it may be fundamentally flawed due to the lack of input from those the law seeks to protect.²³⁸ Around twenty land rights activists have already been murdered since it went into effect.²³⁹

While the current presidential administration has taken some measures to revise *consulta previa* and address past wrongs,²⁴⁰ these measures have fallen short, as the administration does not seem to recognize the dangers that Afro-Colombians continue to face.²⁴¹ Nor does the administration respect the objectives of *consulta previa*, which aim to preserve and protect Afro-Colombian cultural and territorial integrity even when considering economic development.²⁴² Like most laws, *consulta previa* will only be as effective as those willing to enforce it. The Colombian government must take a fundamentally different approach to *consulta previa*; one focused on the mitigation of violence and the factors perpetuating violence. If not, the law will continue to serve corporate interests and Afro-Colombians will lack any viable avenue for safety and redress.

IV. A POSSIBLE ADJUSTMENT TO THE CURRENT SYSTEM

The current protections for Afro-Colombian land do not grant Afro-Colombians complete control over their lands and fail to provide a clear structure for adherence. These weak protections expose Afro-Colombians to further violence. Corporations and *bacrim* take advantage of the deficiencies in the system to swindle Afro-Colombians who choose to engage in negotiations or to physically remove Afro-Colombians from their lands. The Colombian government historically has played a role in supporting the desires of wealthy

²³⁵ Erin Mooney, *The Human Rights Situation in Colombia: Afro-Colombians and Indigenous People*, BROOKINGS INST. (June 8, 2005), <https://www.brookings.edu/testimonies/the-human-rights-situation-in-colombia-afro-colombians-and-indigenous-people/>.

²³⁶ See Sanchez-Garzoli, *supra* note 16.

²³⁷ See *id.* at 2.

²³⁸ *Id.* at 11–13.

²³⁹ *Id.*

²⁴⁰ See, e.g., *id.* at 11 (discussing passage of the Victims' and Land Restitution Law by the current President Santos).

²⁴¹ Sanchez-Garzoli, *supra* note 16.

²⁴² See Rodriguez-Garavito et al., *supra* note 17, at 34, 62.

landowners and corporations over the rights of Afro-Colombians. To ensure that Afro-Colombians can protect their land and culture from future attacks, Afro-Colombians' rights must be clearly established and respected. To do so, the Colombian government must work with Afro-Colombians to strengthen these policies. Otherwise, the perpetuation of violence will continue to negatively harm Afro-Colombians in all aspects of their lives.

To create a better system of protection for Afro-Colombians and their land rights, the Colombian government should change four fundamental aspects of the *consulta previa* regime: first, the government should move away from the current loose legal framework of *consulta previa* and stop circumventing the process mandated by *consulta previa*; second, the government must actively communicate with Afro-Colombians prior to implementing policies that affect them; third, the government should use the UNDRIP as a blueprint for creating a broader scheme of legal rights for ethnic communities; and, fourth, the government must grant Afro-Colombians the ability to veto proposals from governmental and corporate entities seeking to use Afro-Colombian land.

The first issue with the process is that *consulta previa* is only a loose system of “norms, guidelines, decrees, and presidential directives,”²⁴³ which makes it possible for actors to ignore *consulta previa*. The current system was not primarily established by the Colombian legislature, but by the Constitutional Court through a series of case holdings.²⁴⁴ The fact that most of the structure of *consulta previa* comes from case law has led to confusion among corporations on what the exact protocols and procedures are.²⁴⁵ This creates an avenue to neglect the system. For actors, such as corporations or *bacrim*, who simply refuse to comply with *consulta previa*, the weak system does not present enough consequences that will deter them from pursuing their economic aspirations through other means, such as physical removal.²⁴⁶

The lack of structure of *consulta previa* has also allowed the Colombian Government to further weaken the system by disregarding it. As discussed above, the Forestry Law of 2006, the Rural Development Statute of 2007, and the Mining Code of 2010 were all legal measure that had a clearly foreseeable impact on Afro-Colombian land.²⁴⁷ However, these measures were drafted and implemented without any apparent attempt to engage in *consulta previa* with

²⁴³ Ocampo & Agudelo, *supra* note 22.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See Brock, *supra* note 132; see also BURNES, *supra* note 17.

²⁴⁷ Ocampo & Agudelo, *supra* note 22.

Afro-Colombians. This disregard in favor of economic development also provides dangerous encouragement to corporations by reassuring them that the Colombian government values business over the rights of Afro-Colombians. A particularly egregious example is the implementation of the National Plan of Territorial Consolidation.²⁴⁸ Throughout the decision-making process, the Colombian Government again failed to include Afro-Colombians who would clearly feel the impacts of the policy during the execution phase.²⁴⁹ This plan did, however, leave six Afro-Colombians participants dead.²⁵⁰

While not all the measures necessarily exasperate the violence that Afro-Colombians and their lands face, these actions demonstrate to other actors, such as corporations and *bacrim* that the protection of Afro-Colombians is not a priority for the Colombian Government. These measures show corporations that efforts such as *consulta previa* will take a backseat to economic development, and that they can continue to use Afro-Colombian land as they see fit.

To ensure that the manipulation and disregard for Afro-Colombian land rights end, the Colombian Government needs to create a stronger system of *consulta previa*, and to stop engaging in policies that directly weaken the system which meant to keep Afro-Colombians on their lands.

The second necessary step the government must make is to communicate with Afro-Colombians, especially when the Colombian Government is legislating or carrying out policies that involve Afro-Colombians. As stated previously, the Colombian Government has consistently refused to participate in the consultation process with Afro-Colombians when passing laws or issuing presidential directives.²⁵¹ Afro-Colombians are better equipped to identify problems or tensions in the area.²⁵² Communication with Afro-Colombians could prevent further disastrous results of policy initiatives by the Colombian government such as the Victims' and Land Restitution Law. The Colombian Government should adhere to Law 70, which recognizes that Afro-Colombians have a constitutional right to consultation when outside actors use their lands,²⁵³ and communicate with Afro-Colombians when creating policies that will affect them.²⁵⁴

²⁴⁸ Sanchez-Garzoli, *supra* note 16.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Sanchez-Garzoli, *supra* note 16, at 12.

²⁵² *Id.*

²⁵³ L. 70, *supra* note 58.

²⁵⁴ *Id.*

The third change that the Colombian Government should adopt is to incorporate the UNDRIP principles into Colombian law. UNDRIP is an instrument initiated by the United Nations to end discrimination of indigenous people and ensure their protection.²⁵⁵ UNDRIP was adopted by the general assembly on September 13, 2007.²⁵⁶ While UNDRIP specifically applies to indigenous groups,²⁵⁷ since Afro-Colombians share a similar status to indigenous groups in Colombia, and the Colombian government could adopt an expanded version of the declaration that includes Afro-Colombians. The instrument would be useful in protecting Afro-Colombians because it is a “major step . . . for human rights,” as it provides for broader protections for indigenous groups.²⁵⁸ UNDRIP is non-legally-binding, but, despite its non-binding nature the Colombian government abstained from voting on the declaration in 2007.²⁵⁹

The Colombian Government cited conflicting provisions within its constitution as a barrier to adopting UNDRIP outright. However, the Colombian Government should still use UNDRIP as a guideline and implement a law with similar protections for Afro-Colombians as those afforded to indigenous groups under UNDRIP. UNDRIP-style laws would provide stronger protections for Afro-Colombians than ILO 169, the treaty that the Colombian version of *consulta previa* is based on. The declaration holds that the forcible removal of indigenous people should never occur.²⁶⁰ The adoption of this proposal into Colombian law would send a clear signal to corporations and *bacrim* that past practices of violent removal will no longer be tolerated.

UNDRIP also proclaims that States should obtain the free, prior, and informed consent of indigenous groups before “the approval of any project or legislative . . . measure that may affect them.”²⁶¹ The passage of a law which contains a similar provision would limit the Colombian government’s ability to pass laws that affect Afro-Colombians without first consulting with Afro-Colombians.

The fourth—and most critical—change the Colombian Government must make is the creation of a legally binding veto power for Afro-Colombian

²⁵⁵ G.A. Res. 61/295, at 2 (Sept. 13, 2007).

²⁵⁶ See Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/ 10612 (Sept. 13, 2007).

²⁵⁷ G.A. Res. 61/295, at 2 (Sept. 13, 2007).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Bunch, *supra* note 182.

²⁶¹ *Id.*

communities. Some legal scholars have also stated that the provisions in UNDRIP seem to provide a sufficient legal basis for granting indigenous groups a veto power.²⁶² The Colombian Government; however, should move beyond UNDRIP and establish that Afro-Colombians have definite right to veto any proposed activity on their lands. The ability to reject certain projects would provide Afro-Colombians a chance to ensure the protection of their lands. If Afro-Colombians had a veto power, they would no longer be forced to remain in a negotiation process with corporations where completion of the project is a foregone conclusion. Afro-Colombian community councils would instead be able to withdrawal their approval and corporations would be legally bound to respect that decision. The creation of a legally binding veto power would also demonstrate to corporations, and to *bacrim* that the Colombian Government recognizes, and respects Afro-Colombian land and culture. Hopefully, this would end the practice of corporations hiring *bacrim*²⁶³ to openly remove Afro-Colombians by force, without fear of legal consequences.

These four proposals, if implemented, will deter further assaults on to Afro-Colombian lands by corporations and *bacrim*, and, if not, these proposals will at least provide a vehicle for punishment if corporations or *bacrim* attempt to take Afro-Colombian land.

V. CRITICISMS OF *CONSULTA PREVIA*

While this Comment wishes to improve Colombia's current implementation of Law 70 by strengthening its approach to *consulta previa*, there are several criticisms of the basic principles of *consulta previa*. This section will discuss two criticisms from the point of view of ethnic community leaders and one criticism from the point of view of corporations.

Ethnic or indigenous leaders in other parts of Latin America have expressed frustration that *consulta previa* does not provide ethnic communities sufficient rights over their lands.²⁶⁴ Many projects which are presented to the communities are dealing with advanced engineering or technical issues, and negotiations are often couched in highly technical jargon. As a result, communities have no way of knowing the true extent to which those projects could harm their lands.²⁶⁵

²⁶² *Id.*

²⁶³ See *Resisting Displacement*, *supra* note 134.

²⁶⁴ See Barbara Fraser, *Why Consulta Previa Is Among the Most Divisive Issues in Peru*, AM. Q. (Fall 2015), <http://www.americasquarterly.org/content/why-consulta-previa-among-most-divisive-issues-peru> (discussing the problems that representatives of indigenous groups have addressed about Peru's *consulta previa*).

²⁶⁵ *Id.*

This is a valid criticism that points out a real shortcoming of the *consulta previa* process, but is one that the Colombian Government can attempt to alleviate by providing more educational resources and technical guidance to Afro-Colombians community councils.

The second criticism leaders of ethnic communities have concerns the current structure of *consulta previa*, which is regulated by domestic governments and not international organizations.²⁶⁶ Community leaders argue that international regulation would provide more protections to indigenous and ethnic communities.²⁶⁷ Their national governments charged with representing these communities have repeatedly limited the protections granted in the original ILO 169.²⁶⁸ If the Colombian Government were to adopt the principles of UNDRIP into its domestic laws, this would expand the current set of protections towards indigenous and ethnic communities.

Investors have also had problems with *consulta previa* due to the obstacles it creates for their projects. In Colombia, certain investors, continue to disregard Law 70 and the legal title of Afro-Colombians, and continue to forcibly take lands.²⁶⁹ For the investors who do wish to adhere to the law and participate in the *consulta previa* process, the disorder of the system and its complexities makes the process frustrating and difficult.²⁷⁰ Due to the disarray of the system, *consulta previa* is seen as a barrier to development by some.²⁷¹ Yet, this problem could be addressed if the Colombian government were to create clear laws on *consulta previa* instead of relying on the loose jurisprudential standards created by the Constitutional Court.

CONCLUSION

With the passing of Law 70 and implementation of *consulta previa*, Afro-Colombians have moved from being completely ignored by the Colombian government and have a defined role as a stakeholder in Colombia's economic development projects in the Pacific Region. The promise of *consulta previa* is to provide a mechanism for Afro-Colombians to protect their territory, as well

²⁶⁶ Baquero Díaz, *supra* note 159.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See Sanchez-Garzoli, *supra* note 16 (discussing the rise of *Bacrim*); see also Brock, *supra* note 132; BURNES, *supra* note 17.

²⁷⁰ Cemetos Progreso, *Two Views from Consulta Previa in Guatemala: A View From the Private Sector*, AM. Q. (Spring 2014) (detailing the opinion of a private sector organization in Guatemala).

²⁷¹ Ocampo & Agudelo, *supra* note 22 (discussing the opinions of Claudia Jimenez—the director of the *Sector de Minería a Gran Escala*—on the matter of *consulta previa*).

as their cultural identity, while also allowing them to work with the Colombian government and future investors to take part in the project of Colombian economic development on their own terms.

While Afro-Colombians in the Pacific Region now have some form of agency—in that they hold legal title to areas of vital importance to the Colombian economy, they continue to be ignored, abused, and abandoned by their government and fellow citizens. The Colombian government has failed in its implementation of the *consulta previa* regime. The government should ensure the protection and safety of Afro-Colombians as corporations and *bacrim* will continue to manipulate the process or illegally force Afro-Colombians off their own land.

As the Colombian government makes strides in its relations with the FARC, other guerrilla groups, and paramilitary groups to end the half a century of bloodshed, it is vital that the government ensure that all brutal violence within its borders ends, so that all its citizens may share equally in the promise of peace. To do so, the Colombian government should establish a clear policy on *consulta previa*. Without a stronger system of *consulta previa*, Colombia will not be able to move beyond its violent history and Afro-Colombians will continue to be harassed and murdered.

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