

# GUIDE ON THE PURCHASE AND ACQUISITION OF LAND RIGHTS AND RIGHTS OF USE



# GUIDE ON THE PURCHASE AND ACQUISITION OF LAND RIGHTS AND RIGHTS OF USE



Technical Secretariat:



## TABLE OF CONTENTS

This document is a self-regulating instrument of voluntary application, that serves as a guide to develop business activities in a way that is respectful to Human Rights and International Humanitarian Law. The application of these principles does not imply that *Guías Colombia* certifies the performance of business in Human Rights issues.

The organizations that adhere to *Guías Colombia* do it voluntarily and on their own behalf. The content of this guideline is public and of free access to anyone that wishes to consult and apply it. However, only businesses endorsing the initiative are bound to implement it. As to business associations, their adhesion to *Guías Colombia* does not bind or compromise any of the businesses that are part of it.

Technical Secretariat:  
**Fundación Ideas para la Paz**

Design and Layout:  
**Ladoamable**  
[www.ladoamable.com](http://www.ladoamable.com)

ISBN  
 978-958-59761-7-7

Bogotá, Colombia 2017

|   |  |    |
|---|--|----|
|    | SCOPE  | 4  |
|    | GENERAL GUIDANCE   | 6  |
|    | PLAN   | 9  |
|   | 3.1. Context Analysis  | 10 |
|   | 3.1.1. Preliminary Diagnosis   | 10 |
|   | 3.1.2. Property Analysis   | 10 |
|   | 3.1.3. Sources of Information for the Analyses   | 11 |
|   | 3.2. Risk Assessment   | 12 |
|   | 3.2.1. Context Risk Assessment   | 12 |
|   | 3.2.2. Property Risk Assessment  | 12 |
|   | DO   | 15 |
|   | 4.1. Land Rights Acquisition Management  | 16 |
|   | 4.1.1. Conditions Underlying Land Rights Acquisition   | 16 |
|   | 4.1.2. Dialogue and Information Management   | 17 |
|   | 4.1.3. Negotiation Process for Land Rights Acquisition   | 18 |
|   | 4.1.4. Procurement Process for Land Use Authorizations   | 19 |
|   | 4.1.5. Resettlement Management   | 19 |
|   | 4.2. Considerations for Special Territories  | 22 |
|   | 4.2.1. Territories of Ethnic Communities   | 22 |
|   | 4.2.2. Within Peasant Reserve Zones or in Process of Constituting a Peasant Reserve Zone Before Competent Authorities        | 22 |
|   | 4.2.3. Abandoned Territories due to Forced Displacement, Land Dispossession, or Armed Conflict                               | 23 |
|  | ANNEXES  | 25 |
|   | ANNEX A. Actions Consistent with Situations Provided Under Law 1448/2011   | 26 |
|   | ANNEX B. Good Faith Without Culpability in Corporate Contexts and Cases of Land Restitution to Victims of Land Dispossession | 29 |
|   | ANNEX C. Land and Territory  | 32 |
|  | GLOSSARY AND REFERENCES  | 35 |
|   | Glossary   | 37 |
|   | International References   | 43 |



## SCOPE

This document is based on the recognition of human rights as indivisible and interdependent, and on the fact that land issues are a cross-cutting theme<sup>1</sup> for the enjoyment of rights, particularly in rural areas. Indeed, land and territory are crucial for the fulfillment of fundamental human rights such as the right to access food, water, adequate housing, and cultural rights. In the business context, a significant number of business-related human rights may be impacted by the acquisition of land rights by companies. This Guide by *Guías Colombia* has the purpose of proposing a number of principles to plan and acquire land ownership rights or land-use rights, to avoid negative impacts on the enjoyment of rights.

*Guías Colombia* and, thereby, this Guide, takes the United Nations framework for Business and Human Rights, and its Guiding Principles as a reference for its implementation. Moreover, the present Guide emphasizes on the due diligence of companies regarding acquisition of land ownership and land-use rights in order to guarantee that business operations are respectful of both human rights and International Humanitarian Law (from now on IHL) in Colombia. This Guide focuses on the due diligence that companies should carry out from the planning stage through the land purchase or land-use rights acquisition stage, bearing in mind potential adverse impacts of these operations on human rights. Impacts specifically associated to land-use will be contemplated in other *Guías Colombia* guidelines that have been published or will be published; among others, the Security Guide and the Complaints and Claims Guide<sup>2</sup> and the Environmental and Prior Consultation Guides that will be published in the future.

The Institute of Human Rights and Business<sup>3</sup> (IHRB) claims that, in order to avoid land and human rights abuses it is required, among others things, to “*recommend a framework that companies should follow as part of the process of land acquisition*”. It is with this in mind that the *Guías Colombia* initiative seeks to provide through this Guide practical recommendations regarding due diligence in the field of human rights associated to the purchase and acquisition processes of land-use rights in Colombia.

This Guide focuses on the Plan-Do-Check-Adjust (PDCA) business cycle when purchasing land or land-use rights. It recognizes that if transactions and negotiations are carried out with respect, dignity, equal participation of the parties involved in the negotiation, transparency and through means that do not contravene international standards and national laws, there is a probability to avoid negative impacts on human rights concerning land. In this regard, three basic principles that derive from the IHRB’s Guide on Business, Land Acquisition, and Land Use are to be considered (IHRB: 2011):



<sup>1</sup> “Land Rights Issues in International Human Rights Law”, Elisabeth Wickeri, Anil Kalhan. [http://www.ihrb.org/pdf/Land\\_Rights\\_Issues\\_in\\_International\\_HRL.pdf](http://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf)

<sup>2</sup> See: <http://www.ideaspaz.org/tools/guias-colombia>

<sup>3</sup> “Guidelines on Business, Land Acquisition, and Land Use: A Human Rights Approach”, IHRB, 2011 <http://www.ideaspaz.org/tools/download/61056>

**Transparency:** Companies should be open, clear and transparent with the different stakeholder groups that have linkages with the territory about their motives and intentions on land-plots, as well as on the origin, means, and mechanisms through which they acquire the right to purchase and use the land.

Likewise, the company must provide information related to itself, its business and/or project, as well as any potential positive or negative impacts that may arise, and the measures that are contemplated to manage such impacts.

**Non-Discrimination:** The cornerstone of business activity related to land purchase or land-use rights acquisition must be non-discrimination. This implies that, for the land purchase and land-use rights acquisition processes, companies should include all relevant stakeholders in the consultation and negotiation processes, without any discrimination.

**Participation and constructive dialogue:** Companies should ensure that every consultation process on land-use rights acquisition is conducted fairly and openly. Similarly, there should be constructive dialogue mechanisms with the company’s stakeholders aimed at safeguarding human rights and IHL.

a number of reasonable action principles to promote business awareness on how to identify, prevent, and address adverse impacts derived from their activities and relationships in the context of a purchase or acquisition of land rights, and defines the appropriate instruments for its management.

Regarding companies’ due diligence associated with the purchase and acquisition of land rights, this Guide encompasses



## GENERAL GUIDANCE

Businesses that are members of the *Guías Colombia* initiative commit to:

1. Conduct due diligence processes during the life-cycle of business operations.
2. Explicitly and publicly state their rejection and disapproval of practices failing to comply with the respect of human rights and IHL, including, without limitation, land dispossession, forced displacement of civilian population, and activities compelling civilian population to involuntary abandon their territory as a result of armed conflict.
3. Do not exert undue pressure directly and adopt measures to reduce the likelihood of third parties using such pressure in the process of land plot negotiations to modify land tenure patterns. Have monitoring mechanisms available to verify that neither owners nor communities be subject to threats, violence, or any other intimidating acts that may constrain their free will, both before and during negotiation processes.
4. Implement effective communication mechanisms with communities to ensure the absence of undue pressure in negotiation processes.
5. Adopt measures to prevent complicity or responsibility<sup>4</sup> with outlaw groups operations resulting in forced displacement, involuntary land abandonment, land dispossession or any other criminal action.
6. Prevent economic development projects from hindering specific measures for the reparation of victims of land dispossession.

7. Take adequate measures to prevent that land purchase or land-use rights acquisition irreparably accentuates communities' vulnerability regarding access to land.
8. Make efforts to ensure the coexistence of corporate operations with other land tenure models.
9. Promote sustainable use of land owned by businesses.
10. Adopt measures aimed at preventing or mitigating undesirable effects over local communities, indigenous peoples and vulnerable groups, derived from speculation of land prices. To that end, businesses should streamline purchase procedures to foster the participation of the most vulnerable owners or possessors in the market. Sale prices and other relevant information must be subject to registration, analysis and publication, in order to set an accurate and reliable valuation base.
11. Support and contribute to the formalization of land tenure in the company's area of operations.
12. Support institutions and civil society organizations in the necessary processes to draft Zoning Plans (POTs) and Basin Management Plans (POMCAs), etc.

<sup>4</sup> **Complicity:** Indirect but substantial involvement in third party actions, consisting of contributing, helping, supporting, inducing, covering up, keeping silent, having knowledge and/or taking advantage of any such third parties actions.

**Responsibility:** Any conscious and free action prompting an event in which has been the direct or indirect cause.

Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Clarifying the Concepts of "Sphere of influence" and "Complicity". Human Rights Council, 8th Edition

13. Contribute, to the possible extent, to improve public information available on land tenure in the company's area of operations.
14. Identify ethnic and cultural specificities of indigenous or Afro-descendant communities living in the territory.
15. Identify vulnerable population groups in the company's risk assessments.
16. Implement dialogue mechanisms suitable and accessible for communities and, in particular, for vulnerable population groups.
17. Disclose among communities the existence of the company's grievance mechanism, as stated in the *Guías Colombia* Guide on Complaints and Claims.
18. Take into consideration other relevant guidelines of the *Guías Colombia* initiative to address all other adverse impacts of the project (i.e., environmental, social, security). For the companies in Colombia, if the project does not require an environmental license, comply with the directives set forth in the Handbook of Environmental Monitoring for Projects of the Ministry of Environment<sup>5</sup>.
19. Implement, to the possible extent and according to the outcomes of risk assessments, a monitoring plan to identify situations associated to phenomena such as forced displacement, involuntary land abandonment and land dispossession, or any other form of human rights violations.
20. Disseminate among contractors and providers, the company's commitment to implement this Guide. Regarding contractors directly implementing and/or participating in the process of land rights acquisition, include contractual clauses providing mandatory compliance with this Guide when applicable.

21. Include issues like land tenure and land access in the company's risks and impacts assessments, if the operation takes place in zones with acute social conflict and/or armed conflict.
22. When operations are conducted in territories undergoing armed conflict, include in the risk assessment information publicly available related to former land disputes, land dispossession, forced displacement of civilians, land abandonment, land concentration, the use of figurehead or front men, land plots with no land titles or irregular land titles, among others.
23. When operations are conducted in territories undergoing armed conflict, specifically include in the risk assessments the existence -or not- of illicit crops, and any other illegal activity such as the presence of illegal armed groups or anti-personnel landmines.
24. Incorporate a differential approach in interactions with communities, for land purchase and acquisition of land-use rights.

<sup>5</sup> If the project requires an environmental license, is necessary to include in the baseline the topics mentioned in this diagnosis.

# PLAN

### 3.1. CONTEXT ANALYSIS

#### 3.1.1. PRELIMINARY DIAGNOSIS<sup>6</sup>

Regardless of the approach adopted to acquire land rights, prior to the acquisition it is required to make a preliminary diagnosis, covering the following issues:

25. Economic, recreational, social and cultural land uses.
26. Areas of collective use.
27. Historical land use and traditional use of natural resources.
28. Socioeconomic and biophysical profile, according to guidelines set forth under the environmental-related guide to be issued by the *Guías Colombia* initiative.
29. Productive, social, common and economic infrastructure in the area (irrigation districts, sugar mills -in spanish known as trapiche-, crop processing, collection centers, community stands, etc.).
30. Connectivity and public services, inquiring as much as possible about women's role to have access to such public services, particularly, to drinking water.
31. Distribution of land property and land tenure structure.
32. Disaggregated gender data suitable to assess women's access to land ownership or joint-ownership, among others.
33. Presence and functioning of State institutions at the local level: transparency, relations between local, regional and national governments, functioning of the judicial system, royalty management, among others.

34. Armed or social violence dynamics, operations by illegal armed groups, impacts on land tenure derived from the presence of armed conflict.
35. Existence of collective territories hosting indigenous or Afro-descendant communities and existence of peasant reserve zones.
36. Potential land restitution processes in the region.
37. Existence of illicit crops.

#### 3.1.2. PROPERTY ANALYSIS

In addition, and specifically regarding land rights acquisition, the company should:

38. Collect suitable information to make a commercial appraisal of plots: size, topography, productive capacity, soil agrological conditions, water sources, natural resources, crops, production infrastructure, fences and boundaries, other constructions existing in the land plot (i.e., access roads and utilities), and environmentally valuable zones (i.e., forests, wetlands, etc.) or valued landscape zones.
39. Perform a field survey on socio economic conditions of the families living in the concerned land plots.
40. Perform a population census and, on a preliminary basis, explore the company's' expectations related to the acquisition of land rights.

<sup>6</sup> If the project requires an environmental license, it is necessary to include in the baseline the topics mentioned in this diagnosis.

#### 3.1.3. SOURCES OF INFORMATION FOR ANALYSES

To obtain such information, the companies are recommended as a minimum, to:

41. Consult the Zoning Plan (known in spanish as POT), Basin Management Plan (known in spanish as POMCA), or Territorial Zoning Schemes (known in spanish as EOT), and consult public entities such as: the Ministries of Internal Affairs, Agriculture and Rural Development, Environment and Sustainable Development, Mines and Energy, and other agencies like the Colombian Institute for Rural Development (known in spanish as INCODER), the Agustín Codazzi Geographic Institute (known in spanish as IGAC), the Colombian Authority for Environmental Licensing (known in spanish as ANLA), the Ombudsman's Office, the General Prosecutor's Office; the Historical Memory Center (known in spanish as Centro de Memoria Histórica), the Land Restitution Unit, the Unit for the Support and Comprehensive Repair of Victims (known in spanish as Unidad para la Atención y Reparación Integral a las Víctimas) and other relevant sources.
42. If the company is based in Colombia, use alternative data sources to complement the information gathered from official sources regarding conflict zones<sup>7</sup>.
43. Before acquiring land rights in areas affected by armed conflict or subject to forced displacement, the company should previously consult the Registry of Abandoned and Dispossessed Land from the Restitution Unit and, where available, the real estate records in the offices of the Local Committees for the Support of the Displaced Population.
44. Consult the reports from public offices and agencies vested with special mandate on gender and women issues, as well as reports from women organizations

regarding the social status of rural women related to land-use and tenure.

45. Identify any inconsistencies in real estate information and property-related conflicts.
46. Undertake an action plan that allows to: document due-diligence actions in the cases in which property-related conflicts have been identified, as well as strained relations between land owners, land users, possessors and/or tenants. This should be based on the consulted sources, that in this case should be all those that are available besides the ones provided by the competent authorities<sup>8</sup>.
47. If any part of the land in question is classified as an ethnic territory, consult with the competent authorities the ownership status of the land as well as the course of action to follow, to ensure that activities in the area are undertaken in accordance with best practices regarding consultation and involvement of local communities.
48. Be aware that due diligence must be done as complete and comprehensive as possible. The use of all the available sources of information facilitates the company's due diligence on the suggested actions in this Guide, and it makes it possible to identify any irregularity in the legal status of land plots for potential acquisition or purchase.

<sup>7</sup> For instance: regional early warning systems (SAT), Ombudsman, local NGOs, UN Agencies, community action groups (*Juntas de Acción Comunal*), the Risk Rate on Victimization of the Victims' Unit, among others.

<sup>8</sup> Grassroots organizations are civil society organizations at the local level that have a social activity that allows them to have access to first-hand information about past or present local violent dynamics.

## 3.2. RISK ASSESSMENT

Baseline information collected should be used for risk assessment of both the general context, and the land plots to be acquired. Consequently, businesses must take into account the following aspects:

### 3.2.1. CONTEXT RISK ASSESSMENT

49. Identify potential effects on the communities' traditional and/or cultural rights, derived from land acquisitions by the company<sup>9</sup>.
50. Identify potential violations of local communities' human rights, resulting from the definition of prices for land acquisition, either because payments are less than the actual value of the asset, or higher, triggering land price inflation and making impossible for local communities to purchase land.
51. When compensations are paid in cash, analyze potential risks on people receiving the compensation and on the general context.
52. Identify potential negative effects on local communities' derived from land purchases and access to rivers, roads and cultivated or grazing land.
53. Identify potential adverse impacts on communities food security.
54. Identify potential adverse impacts on women, such as worsening the current conditions of inequality, land access, access to public goods, or economic dependency.

55. Identify and analyze the effects on traditional knowledge associated to land-use and biodiversity management, as well as the communities' dependence on the exploitation of natural resources to ensure food security.
56. Analyze the effects on land-use and other forms of traditional and customary production of peasant communities.
57. Identify potential criminal activities triggering forced displacement.
58. Identify potential corruption or cooptation schemes of local authorities by groups outside the law.

### 3.2.2. PROPERTY RISK ASSESSMENT

The baseline information collected should be used for the property risk assessment (on the property subject to land rights acquisition), enabling the elaboration of technically feasible alternatives to avoid or mitigate potential adverse impacts, such as re-victimization of communities that have already been victims of armed conflict and land conflicts. To that effect, it is required to identify all the necessary elements to determine if forced displacement or land dispossession has taken place in the territory.

To that end, businesses should:

• • • • •

<sup>9</sup> See the Glossary for a definition of territory.

59. Give priority to the precautionary principle: Whenever possible, companies should refrain from acquiring land plots with allegedly irregular property titles. When the company is unable to abstain from purchasing the land because of the project nature, it should inform the competent authorities any doubt concerning the lawfulness of the land plot titles, and the authorities should consequently adopt measures as needed to resolve the matter. Businesses should act in conformity with any decisions made by authorities, if any, and, in any event, according to the law.
60. If the company is to be based in Colombia, include in the legal and land title studies, information associated to possible absence of consent as provided in Article 77 of the Colombia Law 1448/11. In that regard, Annex A of this Guide should be considered.
61. Identify ownership conflicts and/or strained relations among owners, occupiers, possessors and/or tenants, or any other land disputes. Companies should prepare an action plan to secure and document due diligence, and safeguard fundamental rights potentially affected by those conflicts.

**DO**

## 4.1. LAND RIGHTS ACQUISITION MANAGEMENT

### 4.1.1. CONDITIONS UNDERLYING LAND RIGHTS ACQUISITION

62. Based on the results of the baseline information and risk assessments, businesses should prepare a plan to manage the process of land rights acquisition. The plan should encompass the following elements:

- A handbook of unit prices.
- Compensation rules for resettlements, swapping, leasing, loans-for-use, or any other form of land tenure.
- Cost and time required for potential resettlements.
- Support plan of the competent authorities.
- Social and legal support plan to counsel families who have accepted land purchase.
- Proposals on risk management associated to human rights violations resulting from land rights acquisition.
- Plans to formalize land and housing ownership rights of single women and widows; also, women's joint ownership of their land and housing with their spouses, and their access to public goods.

63. Conduct due diligence actions in business interactions with security forces, seeking full respect for human rights, in case security forces are compelled to participate in evictions grounded on judicial warrants. For instance, companies may request assistance and support in Colombia from institutions like the General Prosecutor's Office, the Ombudsman and/or the Municipal Ombudsman.

64. When it is technically feasible and there are no security limitations, provide access to public goods like rivers, easements, transportation routes, or com-

munity assets such as cultivated or grazing lands to communities that depend socially, economically, and culturally on this access. To this end, it is required to:

- Engage in dialogue with communities to identify their specific needs regarding the access to the land used by the company.
- Adopt adequate measures to avoid limited access to these territories throughout the completion of the community resettlement, unless health or security risks exist.

65. Take into account any adjacent indigenous reserve zones (resguardos in Spanish) or river basins.

66. Take into account that Afro-descendant communities have the preferential right to be awarded with wastelands (baldíos in Spanish), over companies that may be considering to acquire them to develop productive activities.<sup>10</sup>

67. Request the competent authorities a temporary restraint warrant regarding the permission to sell real estate in the business operations area. This is to protect land rights, avoid third parties' involvement that may alter pre-existing situations, and discourage potential factors of violence.

### 4.1.2. DIALOGUE AND INFORMATION MANAGEMENT

In the processes of land rights acquisition, it is crucial that all the concerned parties have access to accurate information. This enables the parties to have an adequate communication between them. To that effect, companies should take into ac-

<sup>10</sup> Existence of award requests regarding collective territories and/or litigation associated to allocation of land should be consulted with the Agrarian Prosecutor's Office, INCODER, and the Indigenous and Afro-descendant Directorate of the Ministry of Internal Affairs.

count the *Guías Colombia* Guides on Communities and on Complaints and Claims. When referring to indigenous, Afro-descendant, Raizal or Gypsy (ROM in Spanish) communities, companies should follow the *Guías Colombia* Guide on Prior Consultation.

To that end, companies should:

68. Ensure that information and participation meet the following criteria:

- **Clarity, truthfulness and sufficiency:** Truthfulness is a driver of trust, transparency and credibility in corporate performance. The messages should clarify every uncertainty associated to the process. Clarity refers to building understandable messages for all parties involved, taking into account cultural, ethnic, economic, and social diversity. Sufficiency relates to the disclosure of information needed for communities to take informed decisions.
- **Timeliness:** Communication between the parties involved should be within the timeframe of required endeavors, so that communities have sufficient time and conditions to understand the information provided. Thus, it enables their participation in the analysis of the deal to be made and the understanding of any future consequences derived from such transaction.
- **Interculturality:** Cultural and ethnic diversity in areas where projects are being developed requires management rules that are respectful of cultural and social specificities and practices of the groups involved in the processes of land rights acquisition.<sup>11</sup>
- **Gender-based approach:** Women's voice and views in all matters should be taken into account on equal terms, and particularly on matters that impact them most. Any arrangements between companies and communities should

incorporate women's views, given their vulnerable condition.

- **Scope and range:** Information related to the processes of land rights acquisition should be obtained from several sources and means, ensuring wide coverage and consistency with the requirements and expectations of communities affected by these transactions.
  - **Horizontality and openness:** Regarding the communication process, all stakeholders should be recognized as companies' interlocutors on equal terms, particularly when it comes to facilitating the collection of clear, true, timely, and sufficient information.<sup>12</sup>
69. Undertake dialogue processes with communities, based on the provision of the following minimum information:
- Project or business goals and scope.
  - The results from the analysis of property baseline information.
  - Rules of negotiation, existing standards, negotiation options other than purchase, such as: swaps or resettlements; valuation systems, timing and negotiation deadlines.
  - Project stages and necessary conditions to complete each phase. To that end, transparency towards the community is of the essence regarding the reasons underlying the decision to continue or halt the project.

<sup>11</sup> With regard to ethnic groups, management rules should give priority to cultural particularities such as idiomatic and linguistic differences in communication processes; this implies the interaction with social groups using their own linguistic and cultural codes.

<sup>12</sup> The recognition of different interests, needs and expectations of parties involved should prompt companies to provide differentiated public information, that is, relevant information for land owners and possessors or their legally constituted attorneys, and disclosure of information for every other stakeholder.

- Communication mechanisms and channels business enterprises have available to hold effective dialogue with communities and authorities, even before starting land plot negotiations.
- Competent authorities for handling requests on rights' protection on behalf of the community.
- Grievances and complaints mechanism addressed to communities with relevant information on its operation, as set out under the Complaints and Claims Guide by *Guías Colombia*.

#### 4.1.3. NEGOTIATION PROCESS FOR LAND RIGHTS ACQUISITION

The negotiation process for land rights acquisition should lead to proportional, reasonable and balanced agreements between the company and land-plot owners. Such negotiation should be based on the recognition of the parties' rights, the assignment of responsibilities, the compliance with existing regulations, the appraisal of land plots, and the proposal of negotiation options for resettlements, swaps, purchases and easements, among others. The appraisal of land plots should be consistent with land particularities and market value.

To that end, companies should:

70. Adopt all measures within their reach, to ensure that negotiations and consultations with local communities are undertaken in secure contexts for the parties participating in the process, without compromising their physical integrity or freedom of speech and expression.
71. Consult uniform pricing criteria with the community, and inform them that land rights acquisition entails compliance with the commitments made<sup>13</sup> during criteria definition.

72. In public utility cases, and only after having exhausted all mechanisms of dialogue and direct arrangement, pursue actions provided in the law, whether through the creation of easements, expropriation, or the assessment of compensation, as the case may be.

#### 4.1.4. PROCUREMENT PROCESS FOR LAND USE AUTHORIZATIONS

73. Entrepreneurial projects in collective territories of indigenous or Afro-descendant communities, should additionally take into account all directives set forth under ILO Convention 169 on Indigenous and Tribal Peoples, as adopted in the Colombian Law 21/1991; Executive Order from the Colombian government number 1320/1998 regarding Prior Consultation with indigenous and Afro-descendant communities for exploiting natural resources in their territory; and others provided in the Colombian Law 70/1993 referring to Afro-Colombian communities.

#### 4.1.5. RESETTLEMENT MANAGEMENT

In the planning and structuring phase of the project, the company should review feasible alternatives to avoid, as much as possible, involuntary displacement of communities.<sup>14</sup> Any involuntary displacement may cause affectations to human rights.

Resettlement action plans should comply with the Colombian legal framework and be complemented with international standards and good practices on human rights and IHL issues.<sup>15</sup>

• • • • •

<sup>13</sup> Individuality prevails in negotiation processes; however, it is necessary to collectively consult general criteria and conditions for land rights acquisition.

<sup>14</sup> Involuntary displacement means any involuntary physical displacement of people, triggered by entrepreneurial projects. It is different from population resettlements, which are remedial management measures and, from forced displacement in the framework of armed conflict. See the Glossary for further information.

<sup>15</sup> See References.

Resettlement action plans should:

74. Identify people affected by the project and the impacts on those people.
75. Prepare a resettlement strategy that, regardless of the national legal framework, ensures a resettlement that is respectful of human rights.
76. Elaborate maps identifying population settlements; social, roads, cultural and economic infrastructure; soil composition, natural vegetation areas, water resources and land-use patterns and practices, for the purpose of assessing the consequences of land-use losses.
77. Identify and characterize potential sites for hosting the community to be resettled, in a way that may serve as input for negotiating and reaching agreements with families expecting their resettlement. This includes: population settlements; social, roads, cultural and economic infrastructure; soil composition, natural vegetation areas, water resources and land-use patterns and practices.<sup>16</sup>
78. Carry out a census of the affected people and their location, considering the different types of land tenure.
79. Take into account resettlement characteristics with regards to women's particular conditions, bearing in mind that women's burden of household tasks commonly depends on open access to water, sanitation, electric power and other facilities like washing, food storage and waste disposal.
80. Have available an inventory of assets likely to be lost by those to be resettled, including: current and potential productive use of land, houses and ancillary structures, private physical assets, private

companies, co-owned resources, public structures, cultural assets and infrastructure, among others.

81. Undertake socioeconomic studies and surveys on resettled people and hosting communities<sup>17</sup>, to determine:

- Demographic data;
- Social and economic data (ethnicity, health conditions, education, vulnerable population, occupation and income sources)
- Potential disruption of community life.

It is also required to consider social networks, family and vicinity relationships, access to production means and equipment collectively held, among others.

82. Allow and enable people subject to resettlement, to prepare an inventory of their real estate assets, investments and other material assets likely to be damaged, and document any non-monetary loss to be compensated.
83. These criteria should apply to all vulnerable people and affected groups, regardless of whether people or groups hold ownership titles over the concerned land plots.
84. Resettlement plans should have transparent information and dialogue mechanisms, respectful of human rights and IHL, to interact with communities and convey information on the outcomes from identification

• • • • •

<sup>16</sup> See "IFC Handbook for Preparing a Resettlement Action Plan", page 12.

<sup>17</sup> It is important to consider host communities of resettlements, as stated by the World Bank.

exercises, compensation rules, and any other relevant issue. The information and dialogue mechanism should:

- Adequately and sufficiently inform the affected population about their options and rights regarding resettlements.
- Have a grievance and complaints mechanism for resettlements, accessible to affected people and consistent with the Complaints and Claims Guide issued by *Guías Colombia*.
- Build capacities for effective dialogue with the community, through specific training and technical assistance mechanisms.
- Appropriately inform people likely to be affected, as to any plans and alternatives to be considered in the resettlement.
- Effectively disclose the resettlement plan and measures adopted to protect vulnerable people and groups.
- Grant reasonable time for communities to review any resettlement proposal and provide feedback and objections regarding the plan.
- Enable the provision of legal and technical counselling to people about their rights and options.
- Participate in public hearings so that affected people and groups may raise objections against eviction and/or alternative proposals.<sup>18</sup>

In managing resettlement issues, the company is required to:

85. Consider risks associated to impoverishment of communities due to the loss of production systems, production assets and, hence, revenue losses. Similarly, the company should consider the effects derived from undermining the community's capabilities and social networks.

86. Grant preference to the resettlement strategies that prioritize handing over land to resettled people whose livelihood depends on land.
87. Create conditions so that resettlement solutions contemplate, as much as possible, housing solutions that are adequate to the specific needs of family unit members with respect to access to water, sanitation, electric power, children daycare, and other facilities like washing, food storage and waste disposal.
88. Create conditions to favor women's access to employment, credit and entrepreneurial activities, fostering their autonomy, equality and dignity.
89. Give preference in compensation actions to joint beneficiary solutions between men and women. Single women and widows must be entitled to their own compensation.
90. Offer land unrelated options if land provision is not the preferred choice of people affected by involuntary displacement.
91. Promote conditions to allow competent authorities or incumbent third parties<sup>19</sup> to assist resettled communities in the decision-making processes.
92. Create conditions so that communities in resettlement areas may continue to develop their life-projects and economic activities, under equal or better conditions existing prior to the company's arrival.

<sup>18</sup> As to unavoidable eviction, companies should abide by the standards provided in the "Basic Principles and Guidelines on Development-Based Evictions and Displacement", prepared by the UN Special Rapporteur on adequate housing (A/HRC/4/18)", paras. 37 – 41.

<sup>19</sup> See "IFC Handbook for Preparing a Resettlement Action Plan", page 47.

The criterion set forth in the World Bank Operational Manual OP 4.12, para. 6, (a) (iii) is adopted in this Guide to define "replacement cost" as follows: "Replacement cost" is the method of valuation of assets that helps determine the amount sufficient to replace lost assets and cover transaction costs. In applying this method of valuation, depreciation of structures and assets should not be taken into account (for a detailed definition of replacement cost, see Annex A, footnote 1). For losses that cannot easily be valued or compensated for in monetary terms (e.g., access to public services, customers, and suppliers; or to fishing, grazing, or forest areas), attempts are made to establish access to equivalent and culturally acceptable resources and earning opportunities. Where domestic law does not meet the standard of compensation at full replacement cost, compensation under domestic law is supplemented by additional measures necessary to meet the replacement cost standard. Such additional assistance should be provided separately from other resettlement assistance under other clauses of para. 6.

93. Implement measures to ensure that resettled people be provided with assistance during their relocation.<sup>19</sup> In the event where people choose to sell directly, and when applicable, the company should provide a support strategy.
94. Ensure that the amount of compensations is equivalent to the full replacement cost of lost assets<sup>20</sup> directly attributable to the project.

## 4.2. CONSIDERATIONS FOR SPECIAL TERRITORIES

Due diligence should take into account all factors for the better understanding of both impacts on the community, and land-use and land meaning for those living in the territories.

Consequently, further to the Environment and Communities Guide issued under the *Guías Colombia* initiative, in special territories companies should:

### 4.2.1. ETHNIC COMMUNITIES TERRITORIES

95. Comply with all applicable domestic laws.
96. Respect traditional uses of natural resources:
  - Recognize and respect ethnic communities' right to use natural resources found in their territories, including the right to participate in the use, handling and conservation of those resources.
  - Recognize and protect any traditional knowledge relating to land-use and biodiversity management in their territories.
  - Foster the involvement of traditional authorities in the proposal and implementation of the company's productive projects, that are likely to irremediably and directly impact their livelihood.

<sup>20</sup> In that regard, see the "Basic Principles and Guidelines on Development-Based Evictions and Displacement", prepared by the UN Special Rapporteur on Adequate Housing (A/HRC/4/18), paras. 42 – 44.

<sup>21</sup> According to the World Bank Operational Manual OP 4.12, para. 6 (a) (iii), "[i]f the residual of the asset being taken is not economically viable, compensation and other resettlement assistance are provided as if the entire asset had been taken".

#### 4.2.2. WITHIN PEASANT RESERVE ZONES OR IN PROCESS OF CONSTITUTING A PEASANT RESERVE ZONE BEFORE COMPETENT AUTHORITIES

The company should:

- 97. Include in the project's management plan all aspects concerning population groups likely to have an increase in their vulnerabilities due to the company's land-use, and implement a management plan to handle such situations, as appropriate and as provided in the Environmental Guide issued by *Guías Colombia*.
- 98. Adopt all measures within its reach to ensure full respect of cultural and socio-economic rights of peasant communities:
  - Explicitly acknowledge that the implementation of certain projects may largely affect communities' traditional production practices, autonomy and identity, in areas of business operations. Consequently, the company should make appropriate decisions to mitigate such adverse effects.
  - Take into account land-use and traditional and customary production models in the implementation of livelihood projects for the population. To that effect, the company should foster communities' involvement in projects conceived for their benefit.
- 99. Take into account traditional practices and customs of natural resource exploitation:
  - As long as it is technically possible, encourage the communities' participation in the use, handling and conservation of natural resources.

- Identify and characterize any customary know-how related to land-use and biodiversity handling by local communities. Review how corporate activities may hinder the exploitation of natural resources and impact food security of local communities.
- Adopt a strategy aimed at respecting traditional practices and customs, based on the information above.

#### 4.2.3. ABANDONED TERRITORIES DUE TO FORCED DISPLACEMENT, LAND DISPOSSESSION, OR ARMED CONFLICT

The company should:

- 100. Adopt adequate measures to strengthen due diligence processes in case of investments made in territories where existence of both systematic land dispossession, and irregular land titling is evident. These actions may prevent businesses from becoming part or contributing to displacements or land dispossession.
- 101. Include in the risks management plan the design and implementation of monitoring mechanisms to regularly supervise ordinary business activities and identify the emergence of risk situations for communities within the framework of land negotiation processes.
- 102. When detecting sudden, unexpected and significant changes in the context of the company's operations that may be connected to forced displacement, involuntary land abandonment, or land dispossession, inform competent authorities of any threat of criminal activity leading to such situations.

- 103. Condemn the economic exploitation of lands associated to forced land abandonment or land dispossession. Make public and explicit statements disapproving practices failing to comply with human rights and IHL, such as displacement, involuntary land abandonment, and land dispossession.
- 104. Avoid being involved in any actions that directly or indirectly contribute to nurture forced land abandonment and land dispossession.

# ANNEXES



## ACTIONS CONSISTENT WITH SITUATIONS PROVIDED UNDER COLOMBIAN LAW 1448/2011

According to Law 1448/2011, any land plot in Colombia may be subject to land restitution claims. Therefore, it is required to pursue actions aimed at mitigating potential risks if, as a result of a restitution process under the mentioned Law, a nullity ruling is determined as a consequence of one or more presumptions set out in Article 77 of the Law (such as lack of consent or unlawful grounds in land purchases or contracts) as well as any subsequent transaction regarding a fraction or the entire property.

Such actions include:

| Specific Actions  | Sources of Information   |
|---|--|
| During land acquisition processes, compare the names of potential land sellers with the names recorded on property records; examine whether potential sellers have been convicted for being members, collaborators or funders of illegal armed groups (including drug-trafficking or related offenses), either directly or through third parties. | Consult judicial rulings and hearings publicly available that are explicitly related to the land plot subject to negotiation conducted before the Justice and Peace jurisdiction, in the Attorney General's Office; the website Verdad Abierta; and the Superior Council of the Judiciary.   |
| Collect information on whether acts of violence, collective forced displacement or violations to human rights occurred in the land plot vicinity by the time it was purchased, and whether individual or collective measures were required under the Colombian Law 387/1997.  | In connection to forced displacement phenomena, consult: the Ombudsman's Office (defense reports and early warning systems); General Prosecutor's Office; the Unit for the Support and Comprehensive Repair of Victims (formerly, Acción Social, translated to Spanish); Constitutional Court (Ruling T-025 and subsequent decisions); the Historical Memory Center; the UN Refugee Agency (UNHCR); the International Committee of the Red Cross (ICRC); the Consultancy on Human Rights and Displacement (CODHES); the Social Pastoral of the Catholic Church; the Norwegian Refugee Council; the Commission for Monitoring Public Policy on Displaced Population and, other civil society organizations. Likewise, information may be retrieved from open sources.<br>As to individual measures for land protection and other information regarding dispossession, refer to the Single Registry of Misappropriated and Abandoned Lands (RUTDA in Spanish) ascribed to the Land Restitution Unit; the Superintendence of Notary and Registration; the Bureau for Public Instruments Registration; the General Prosecutor's Office; the Ombudsman's Office; the Agrarian Prosecutor's Office; and the Municipal Ombudsman Offices. It is also possible to consult databases on victims of land dispossession or forced abandonment kept by the Agustín Codazzi Geographic Institute, the Institute for Rural Development; the archives of the Social Action Program for Land Protection, and the National Commission for Reparations and Reconciliation. |

| Specific Actions   | Sources of Information   |
|--|--|
| Verify if in adjacent properties, after or in parallel to the occurrence of threats and violent acts, there has been land ownership concentration, directly or indirectly, in the hands of one or more people, or whether significant changes on land-use took place (i.e., substitution of one-crop agriculture, extensive livestock farming or industrial mining). | Reports issued by the above-mentioned agencies in connection to forced displacement.   |
| Review if in the land plot purchase-sale contracts any of the buyers have been extradited for drug-trafficking or related offences committed directly or through third parties.  | Request information from the Ministry of Justice, the National Police Department or the Presidency of the Republic. Information can also be consulted in open sources.   |
| Verify if any land plot purchase-sale contracts done during or subsequent to the violence and forced displacement events, include transaction values for amounts below 50% of the actual land right value.   |  |
| Verify if any of the shareholding of community associations or cooperatives, land awardees under the Colombian Law 135/1961 and Executive Order 561/1989, have changed subsequent to forced displacement events.   | Information from the relevant supervisory agency in connection to potential stockholding changes in community associations or cooperatives.  |
| In case that the ownership of the plot has been the result of any administrative act, verify whether such administrative act might have legalized any dispossessed land. If that is the case, the administrative act is presumed to be null, as well as any private business transaction subsequently done with respect to a part or the whole asset.                | Review the administrative act to verify whether there is any claim of land dispossession. Request information from the Prosecutor for Agrarian Affairs, the Ombudsman's Office, the Registration and Notary Superintendence, non-governmental organizations, peasant, Afro-descendant and indigenous organizations, to find out whether there are substantiated accusations involving corruption by public authorities (notaries, INCODER, or others) to legalize dispossessed land. |

**Specific Actions**

**Sources of Information**

When property ownership results from a judicial proceeding, revise if the court's ruling initiated by the time when threats or acts of violence produced a forced displacement. If that is the case, acts of violence are presumed to have impeded the owner of dispossessed land to exercise his/her rights of defense in the proceedings that led to the legalization of the dispossessed land. A judge or magistrate is entitled to repeal court decisions that violate the rights of owners of the dispossessed land.

In case a property is possessed in a zone where a forced displacement occurred, find out whether such possession took place after 1 October 1991. If that is the case, it is presumed that the possession never occurred.

Consult the Land Restitution Unit whether the property to be acquired has been affected by any land restitution request.



**GOOD FAITH WITHOUT CULPABILITY IN CORPORATE CONTEXTS AND CASES OF LAND RESTITUTION TO VICTIMS OF LAND DISPOSSESSION**

Pursuant to the Colombian Law 1448/2011 on Victims and Land Restitution, it is expected that a significant number of hectares in Colombia may be restituted to victims of forced displacement or land dispossession in the forthcoming 16 years.<sup>22</sup> Thus, this Guide provides the principles for companies to conduct due diligence in the process of land rights acquisition in territories affected by armed conflict where forced displacement and land dispossession have occurred.

This Annex seeks to deepen the understanding of the concept of "good faith without culpability" as set out in Law 1448/2011. In the context of the *Guías Colombia* initiative, it is useful to understand the conduct expected from a company in relation to land rights acquisition in areas affected by armed conflict, and it is also useful for companies to behave in line with the due diligence approach put forward in this Guide.

Land restitution is none other than the right of victims of armed conflict to recover their land because of forced dispossession or abandonment caused by special situations of violence generated by armed conflict.

The new special and transitional legal regime adopted by the Colombian State to honor its constitutional duty to warrant full reparation of victims, entails significant challenges for companies when undertaking productive projects in rural areas so as to eventually prevent any adverse effects on the endeavors by public authorities and the society in general to repair victims.

The implementation of Law 1448/2011 on Victims and Land Restitution is a challenge, but still, it provides tools to enforce businesses compliance regarding their duty to respect human rights, as enshrined in the United Nations framework on Business and Human Rights.<sup>23</sup> Similarly, the Law sets forth processes to be followed by companies to ensure the legality of

property purchases or management, as a key element for developing projects in rural areas.

The legal tool available for companies under Law 1448/2011 is the "good faith without culpability". When acquiring land rights, and if companies abide from the beginning to what is expected by this form of good faith, not only will they be able to ensure the formal acquisition of land rights (use or ownership), but also the respect of the rights of victims to reparation, on the one hand, and legal certainty in land-related transactions, on the other.

The Colombian Constitution sets forth the "good faith without culpability" concept as a guiding principle of law.<sup>24</sup> In other words, "good faith without culpability" means that persons or organizations have the conviction of acting rightfully or correctly, and hold the belief that no harm is being caused, and the assurance that actions were entirely lawful.

Nevertheless, the Colombian Constitutional Court has extensively referred to this principle, distinguishing two key aspects: plain good faith, and conditional good faith.

<sup>22</sup> As of 2011, the target established in the National Development Plan was the restitution of 270,000 land plots to owners, possessors, and occupiers. This figure has been updated in view of the increasing number of requests for registration in the single land registry.

<sup>23</sup> UN Guiding Principles on Business and Human Rights. available at: [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>24</sup> Colombian Political Constitution, Article 83. Colombian Civil Code, Article 768.

'Plain good faith' means acting under the standards of loyalty, rightfulness and honesty. This standard is mandatory for everyone,<sup>25</sup> as provided in the Civil Code. On the other hand, "conditional good faith", together with the expression "without culpability", means carrying out the detailed analysis of the type of error that could be committed, that must not be other error than the one committed by any prudent and diligent person in a situation where discovering or noticing the error is very difficult or almost impossible to achieve.

Under such perspective, two conducts arise: the conviction of having acted correctly in the face of a particular situation, and the careful verification that the adopted conduct has not led to error.

In other words, "good faith without culpability" in land rights acquisition done by businesses means acting loyally, rightfully and honestly considering all and each particular surrounding circumstances, in this case, armed conflict in a given territory. This behavior, when done conclusively, diligently and systematically, prevents transactions of land rights that may affect the rights of victims of the Colombian armed conflict.

Three elements should be considered when conducting due diligence on transactions for land rights acquisition:

- In land restitution processes, the company's bad faith is presumed.
- Land dispossession presumptions set out in the law should be taken into account when assessing good faith.
- "Good faith without culpability" and due diligence, requires the consultation of various information sources.

Bad faith is presumed *de iure* where a company acts as a concurring third party in a land restitution proceeding. In that case, the company is bound to prove its good faith. This means a shift in the burden of proof.<sup>26</sup>

"Good faith without culpability" may be proven under Law 1448/2011 by taking into account the dispossession presumptions.<sup>27</sup> Those presumptions set forth unambiguous factual assumptions undermining the guarantee of land restitution rights. This enables companies to define a course of action to follow within the organization.

Colombian Law 1448/2011 sets out particular elements that characterize territories affected by armed conflict. These elements should be taken into consideration, not only in the initial analysis of the project, but also in the elaboration of baselines, definition of risk management plans and management plans to prevent and mitigate adverse impacts on human rights in communities living in the company's area of influence (e.g., victims of armed conflict).

Some of the elements to be taken into account in the initial analysis of the project are: the historical analysis of persons or groups who have entered into transactions of land plots subject to restitution, ensuring that no individuals convicted by reason of involvement with illegal armed groups or drug traffickers are part of the transaction; that no massacres, systematic acts of violence, or adverse effects have impacted the population settled in the vicinity of the land plots intended to be acquired; that no land-ownership concentration cases in the land plots intended to be acquired, or in the surrounding areas, have occurred; that no substitution food staple crops to one-

• • • • •

<sup>25</sup> High District Tribunal of Cúcuta (Norte de Santander), Special Division for Land Restitution Issues. Ruling No. 040/2013, p. 43. Reporting Magistrate: Plinio Alirio Correa Beltrán.

<sup>26</sup> Law 1448/2011, Article 78. Shifting the burden of proof. A prima facie evidence of the ownership, possession or occupation, and the recognition as displaced in the judicial proceedings or, otherwise, the prima facie evidence of land dispossession, will suffice to transfer the burden of proof upon the defendant or any other persons contesting the victim's claim in the restitution process, unless the latter had been also recognized as displaced from or dispossessed of the same land plot.

<sup>27</sup> Victims and Land Restitution Law, Article 74. Land dispossession means a violent and forced action, where a person is arbitrarily deprived from his/her property or the possession or occupation thereof, either de facto, through legal transaction, administrative act, judgment, or through violence-associated crimes.

crop agriculture, extensive livestock farming or industrial mining, has occurred. Existence of those elements is an indication that land dispossession or forced displacement took place, and the law provides a legal presumption in that regard.

One element to presume "good faith without culpability", is proving the use of all relevant information. A detailed analysis of the project calls for consultation of multiple sources of information, and a requirement to prove good faith without culpability.

Therefore, it is of utmost relevance to go beyond the initial analysis of the project, which is mainly based on secondary sources of information, mostly coming from official sources. It is required to make a list of social, private and State organizations familiar with the territory and suitable to provide inputs to conduct context analysis, and make agreements to exchange information with them. Good information provides stronger foundations and certainty for the property title studies on lands to be acquired. Sources of information cannot be limited to official sources.

By shifting the burden of proof regarding "good faith without culpability", the law ensures due diligence. Hence, companies located in territories under armed conflict should secure the access to different sources of information to verify that there are no signs of occurrence of land dispossession or forced displacement in land plots to be acquired.

Against that background, companies are advised to connect social and environmental management processes with property management processes – if not operatively connected – and adopt a joint-responsibility approach to ensure cooperation with public institutions and other stakeholders.



## LAND AND TERRITORY

Land and territory concepts are closely linked and must be jointly understood. The methodology of this Guide on land-related matters implies the need to address 'land' as part of a 'territory'. Therefore, it is indispensable to understand such link from a rights' perspective.

The purpose of this conceptual Annex is to describe the above-stated interdependence and how a company's involvement in a territory –considered as a whole – facilitates the inclusion of key conceptual elements to address potential adverse impacts on human rights brought about by the acquisition of land rights.

Territory can be defined as a specific location with intangible features derived from the way agents in that location connect, and encompasses a historical background (that does not necessarily respond to political administrative divisions established by the State), with specific political, economic, geographical, environmental, social, and cultural characteristics. All of the above make up the habitat where life projects of people and organizations are built, and where their roles and the interactions among themselves and their environment are defined.<sup>28</sup>

This definition embodies five key elements: (a) a geographical area; (b) a group of actors; (c) a set of specific characteristics; (d) a set of relationships; and, (e) a shared collective imaginary. No territory may be conceived without these attributes.

This Annex is not intended to address the comprehensive understanding of all five elements; rather, it describes how the first element (i.e., land) is the converging point of the other elements, from a human rights standpoint.

Land-use is thus determined by who the actors are, how they relate, and what their collective imaginary is. The foregoing

may have a positive or negative impact on the rights associated to access to land.

With no land there is no territory. Land is the physical foundation of territory and covers water, forests and airspace. The relationship between people and land is the first among the set of relationships that define a territory. Depending on how these relationships are developed, there might be territories more prosperous and advantageous than others, or more biased to be compliant with human rights, and suitable to become a more appropriate habitat for safeguarding people's rights.

The relationship between people and land is both individual and collective: men, women and children, as individuals; farmers, indigenous and Afro-descendants people, as groups of people. The relationship with the land depends on cultural specificities of the respective population group. The incorporation of such cultural specificities under the legal regime of land access and land tenure modalities is crucial for the effective enjoyment of other rights.

For peasants, *"land is the place they belong to, where, besides producing food, they build family and communitarian lives and generate jobs to maintain such land. Land means housing, recreational spaces, cemeteries, family and community stories, and cultural expressions. The relationship with the land is the relationship with nature, as land is part of nature"*.<sup>29</sup>

<sup>28</sup> See the Glossary for a definition.

<sup>29</sup> Report on the current status of economic, social and cultural rights in Latin America and the Caribbean, CLOC–Vía Campesina. Center for Legal and Social Studies (CELS).

The promotion of a peasant-agrarian economy is of great importance because it means the promotion of personal projects of peasant communities, whose life choice is living in rural areas.<sup>30</sup> These peasants are land owners or people expecting the formalization of such ownership; they implement environmentally-friendly production systems, and produce food under an economic approach both for self-consumption and for local trade or exchange. Agricultural economy strengthens family ties, empowers organizations and their members, and facilitates the coordination of such projects with other projects in the territory.<sup>31</sup>

Regarding indigenous peoples, their close ties to land must be acknowledged and considered a core foundation of their culture, spiritual life, integrity and economic survival. Their relationship with the land is not just a question of possession and production, but a material and spiritual element which they must fully enjoy to preserve their cultural legacy and thus ensure its transfer to future generations.<sup>32</sup> Therefore, the Colombian Constitution of 1991 marks the start of a new era for the legal protection of rights of indigenous peoples. Accordingly, international human rights conventions and domestic and international case law have strengthened the grievance and complaints mechanisms for indigenous peoples, for the effective enforcement of their fundamental rights. Collective ownership rights of land for indigenous communities is of utmost importance. The relationship between indigenous population and land lies not only on the fact that land is the source for survival, but also, an element of their world-vision and a vehicle for their cultural development.<sup>33</sup>

For Afro-descendant communities, the definition of territory also encompasses land. For them, *"territory is all what you can easily see and touch, that is to say, rivers, wetlands, forests, animals, land for farming and minerals; territory also includes things we cannot touch despite being part of our spirit of Afro-descendant peoples, such as cultural expressions, traditions, customs, supernatural forces, the protecting spirits of our ancestors, the proper way of interacting with nature and our ancestral knowledge"*.<sup>34</sup>

The difference in these communities' identity rests on their understanding of their relationship with the land, and their particular way of understanding wealth and economic development.<sup>35</sup> The State is bound to protect communities with cultures and ways of life largely different from the majority,<sup>36</sup> and is also obliged to ensure the respect and promotion of their autonomy and their right to prior consultation.<sup>37</sup>

Each particular relationship contributes to secure human dignity, and serves as a way to understand the concept of right to land as an intrinsic element of a territory. Although access to land is the first element of the right to land, and given the fact that the way to secure such right is through possession (effective enjoyment of the right to use and own), it is further required to ensure other means and resources to endow people with strong foundations to build their own life projects.

The scope of land rights is tied to the relationship with other rights, such as the right to adequate nutrition, decent housing, work, healthy environment, participation and association. The access to land tenure gives rise to the possibility for peasants, indigenous and Afro-descendant communities to develop production systems for self-consumption through small crops to

<sup>30</sup> Jesuitas Colombia, see [www.jesuitas.org.co](http://www.jesuitas.org.co). Standard peasant farms promoted under numerous Programs for Development and Peace.

<sup>31</sup> Ideally, every relationship between business enterprises and peasant communities should be grounded on dialogue. According to Colombian applicable laws, the recognition of these communities' social and cultural specificities and their interaction with the territory, does not mean that prior consultation mechanisms are extensive to projects developed in territories where peasant communities live. The international standard promoted by ILO Convention No. 169 does not bind States to hold prior consultations with peasant communities.

<sup>32</sup> Interamerican Court of Human Rights, Judgment of 31 August 2001. The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, p. 78.

<sup>33</sup> ONIC (2008). Marco Legal para los Pueblos Indígenas [Legal Framework for Indigenous Peoples]. p. 14.

<sup>34</sup> Ascoba, 2005. "Qué es para nosotros el territorio" [What is territory for us], Selva y Rio, Rio Sucio Chocó, December 2005 (quoting of Sergio Coronado in Derecho a la Tierra y al Territorio - [Right to Land and Territory] - CINEP Bogotá, 2009)

<sup>35</sup> Colombian Constitutional Court, Ruling 366 of 2011

<sup>36</sup> Coronado, Sergio, Derecho a la Tierra y al Territorio [Right to Land and Territory]. CINEP, Bogotá, 2009. p. 34.

<sup>37</sup> Prior Consultation, ILO Convention 169.

feed their families.<sup>38</sup> It is also the case of projects developed in line with particular social and cultural characteristics, and the possibility to build organizations and associations to strengthen communities' social tissue. Relationships and ties are woven around land. With no access to land, it is impossible to build those ties or relationships or develop personal projects because these are built with land as a productive base.<sup>39</sup>

There are other elements to be taken into account to understand the overall stand of land in a given territory. For instance, land-related rights and rights dependent on the guarantees of land-related rights must take into account specific characteristics of agents, such as their imaginaries and ways to interact with the environment. All of the foregoing reflects our understanding on the concept of territory.

.....  
<sup>38</sup> Coronado, Sergio. Derecho a la Tierra y al Territorio [Right to Land and Territory]. DHESC Document, CINEP. Bogotá. 2009

<sup>39</sup> Ibid.

# GLOSSARY AND REFERENCES



## GLOSSARY

The glossary below clarifies key concepts for the development and implementation of this Guide, and takes into account specificities and situations of the Colombian context in land-related matters.

### GOOD FAITH:

Is defined as the company's conviction of having acted correctly, with the belief that no damage or harm has been caused by its actions.

### GOOD FAITH WITHOUT CULPABILITY:

Is the conviction that the company has acted correctly, with no intention to cause harm or damage, and carefully ensuring that its actions are lawful.

### FORCED DISPLACEMENT IN THE FRAMEWORK OF ARMED CONFLICT:

Is understood as any action whereby illegal actors directly or indirectly vacate territories of alleged political enemies or of people refusing to abandon productive lands (Rettberg, 2012). To that extent, a victim of forced displacement can be any person compelled to abandon his/her home or place of usual residence and to flee somewhere else in the national territory, to protect his/her life and physical integrity, to seek security, and to secure personal freedoms (UN Document E/CN.4/1992/23; Victims' Law, Article 60).

When the population is compelled to flee from its place of residence, it becomes a target for further harms including adverse impacts on a wide range of rights and widespread loss of assets and properties. In the context of Colombia's armed conflict, forced land abandonment means *"the transitory or permanent situation whereby an individual is forced to leave the territory and deprived from the right to manage, exploit and have direct contact with the land plot that was left unattended because*

*of displacement"* (Colombian legislation - Victims' Law, Art. 74; Monitoring Committee, 2012). In principle, abandonment means the temporary suspension of the use and enjoyment of a given property; however, abandonment may favor the occupation by third parties and the definitive loss of the said property. Often, displacement is the result of other human rights violations in the framework of armed conflict, such as massacres, indiscriminate attacks against civilians, and genocide (Monitoring Committee, CODHES, 2011).

### LAND DISPOSSESSION:

It is understood as an action whereby *"a group of persons or an individual are materially and symbolically deprived, due to force or coercion, of [land plots] in which they used to exercise the rights of use, enjoyment, ownership, possession, tenure or occupation for the satisfaction of needs [...] Violence or coercion permanently deprive individuals and communities of rights acquired or recognized as humans"* (CNRR, 2009: 30). According to the Colombian Land Restitution Unit, dispossession means *"an action of armed groups, their representatives or even opportunists, to force lawful owners, possessors or occupiers of land plots to sell, hand out or vacate land, taking advantage of the context of violence and the victims' vulnerability."* Unlike involuntary abandonment, land dispossession embodies the express willingness of taking over the property in view of capitalizing profits therefrom by persons causing the displacement or other beneficiaries of such takeover.

Evidence of the complexities of land dispossession phenomena, are the different modalities used by perpetrators. Land dispossession is the result of a combination of both violent actions and legal resources, in different degrees and proportions. When companies have been involved in events of land dispossession, such involvement consists on the implementation of a number of actions ranging from fostering and funding illegal

armed groups to benefit from the land dispossession, to liability derived from lack of due diligence (Rettberg, 2012). Land abandonment or dispossession may be the result of both licit or illicit behavior.

#### WOMEN UNDER SPECIAL CONDITIONS OF VULNERABILITY:

Women who, by reason of age, sexual orientation, physical or mental condition, or due to socio-economic, ethnic, religious and/or cultural circumstances, encounter particular difficulties for the full enjoyment of their rights. Especially vulnerable women are the following: girls, widows, elders, lesbians, homeless women, women with disabilities, single mothers or heads of family without a partner, indigenous and Afro-descendant women, women belonging to religious minorities, displaced women, household workers, rural women, women living in conditions of poverty or job insecurity, and women victims of any form of violence.

#### RESETTLEMENT:

The IFC defines it as the complete process of relocation and reinsertion somewhere else as a result of a project. The World Bank and the IFC consider that resettlement should be understood as an opportunity to promote sustainable development by improving economic and social conditions of resettled communities.

#### INVOLUNTARY DISPLACEMENT IN THE CONTEXT OF CORPORATE ACTIVITIES:

Involutionary displacement in the framework of corporate activities arises when, in the context of infrastructure development or exploitation of natural resources, the non-voluntary transfer of part of the population to a place other than their usual place of residence, becomes necessary and mandatory.

Involutionary displacement, where relocation is necessary, should take place in a way that minimizes the impact over the communities' rights, in terms of access to land, housing and other social services, impoverishment, deterioration or loss of people's means of living.

Involutionary displacement is not forced displacement, as the latter occurs in the framework of armed conflict. When displacement occurs without having adopted measures and procedures suitable to ensure that it takes place in line with international standards on human rights, such displacement may give rise to the violation of such rights.

#### ARMED CONFLICT:

It refers to the existence of armed confrontation or hostilities between the army and irregular forces, or between irregular forces. The confrontation may be ranked as disturbance, internal tension or armed conflict, depending on the intensity of hostilities.

In armed conflicts, irregular forces have organized armed groups that engage in such an intense level of hostilities, that the government is bound to use military forces against them, instead of just police forces.

In any country sustaining an armed conflict there might be areas with greater or lesser intensity or frequency of hostilities and, therefore, there is the possibility to qualify some areas as armed conflict zones and, others, as zones with lesser or no armed conflict.

#### LAND TENURE:

Means, in legal or customary terms, the relationship between people – individuals or groups of individuals – and land. The relationship is multidimensional, as it encompasses social, technical, economic, institutional, legal, and political aspects. The relationship may be formal when relying on express State recognition and subject to legal protection, or informal, when based on non-written agreements and derive from traditions and customs. Land tenure types include: private ownership like housing or crop land plots, revenues and mortgages on dwelling or farms, livestock grazing lands of common ownership and State-owned parks and pathways, among others. This means that any person or group of persons may own land rights without possession (FAO, Land Tenure Service of the Rural Development Division. FAO Land Tenure Studies, Rome, 2003).

#### TERRITORY:

Territory means a specific location with intangible features associated to the way agents in that locate connect, and encompasses a historical background (that does not necessarily respond to political administrative divisions established by the State), with specific political, economic, geographical, environmental, social, and cultural characteristics. All of the above make up the habitat for building personal and entrepreneurial projects and defining the roles of agents and interactions among themselves and the environment.

Accordingly, territory may be any space with social or cultural meaning. This definition should be taken into account in the framework of land purchase or land rights acquisition.

Particularly, in the case of indigenous peoples, the meaning of right to land is more complex than the mere recognition of a collective possession. It also entails recognition of a series of cultural, social and political guarantees non-severable from land rights. Jurisprudence developed by the Constitutional Court upholds that the concept of territory not only refers to the geographical location of a community or 'indigenous reserve' but, also, the concept of "cultural environment" of the community (Ruling T-617, 2010).

#### LAND:

Is the physical foundation of any territory. Land also includes water and forests.

#### LAND TENURE MODALITIES:

Land tenure may adopt different forms, to wit: leasing (public and private), cooperative housing, renting, owner's occupation, emergency housing, and informal settlements, including land or property occupation. In Ruling T-585/2006, the Constitutional Court upheld that "regardless the type of tenure, any person must enjoy certain level of assurance of land tenure guaranteeing legal protection against eviction, harassment or any other threat".

#### PEASANT:

According to the UN Declaration Draft on the Rights of Peasants of the Advisory Committee of the UN Human Rights Council, peasants are men or women who have a direct and special relationship with land and nature, through the production of food or any other agricultural product. Peasants work the land and rely, above all, on family labor and other small-scale forms of labor organization. Peasants are traditionally embedded in their local communities and take care of local landscapes and agro ecological systems.

The term "peasant" can apply to any person, man or woman, engaged in agriculture, cattle-raising, pastoralism, producing hand crafts related to agriculture, or a similar occupation in rural areas.

The term "peasant" also applies to the landless. According to the Food and Agriculture Organization of the United Nations, the following categories of people are considered landless and are likely to face difficulties in ensuring their livelihood:

- Agricultural labor households with little or no land;
- Non-agricultural households in rural areas, with little or no land, whose members are engaged in activities such as fishing, making crafts for the local market, or providing services.
- Other rural households of pastoralists, nomads, peasants practicing shifting cultivation, hunters and gatherers, and people with similar livelihoods.

#### FAMILY FARMING UNITS (UAFs):

According to INCODER, a UAF is a basic productive unit to engage in agriculture, livestock, aquaculture or forestry. The land size of the production project with adequate technology should be able to generate revenue for no less than two minimum legal monthly wages. Moreover, it allows remuneration of family labor and to build a heritage.

**PEASANT RESERVE ZONES (ZRCs):<sup>40</sup>**

Colombian Law 160/1994 defines Peasant Reserve Zones as “geographic areas identified by the Board of Directors of the INCORA, taking into account regional agro-ecological and socio-economic characteristics”. According to this definition, regulations enacted under the mentioned Law will provide minimum and maximum areas to be awarded, designated as Family Farming Units (UAFs). Subsequently, the Colombian Government Executive Order 1777 set out some of the goals to be pursued, as follows: “(...) promote and stabilize the peasant economy; overcome underlying grounds of social conflicts; and, generally, foster conditions to achieve social justice and peace in the respective areas.” The Order also defines the objectives of ZRCs as controlling the agricultural frontier, redressing ownership concentration, building conditions for sustainable development of peasant economies and providing access to wastelands to settlers and peasants; implementing policies on rural development, and strengthening spaces for social and political dialogue between rural communities and the State. Agreement 026 adds up the objective of overcoming the underlying reasons of social conflicts, preserving public order and the support of programs for substitution of illegal crops.

According to Article 81 of Law 160, “settlement zones and those where large wastelands prevail, are peasant reserve zones”. This definition, which limits the creation of ZRCs to wastelands and settlement zones, was amended through Article 1, Executive Order 1777, therein including “geographic areas which agro-ecological and socio-economic characteristics require the regulation, limitation and zoning of ownership or tenure of rural land plots”. The Order opens the possibility of creating ZRCs in buffer zones of the Colombian National Parks Network. It also allows the subtraction of Protected Forest Reserves to create ZRCs. Finally, Agreement 024 provides a number of exceptions for the creation of ZRCs, to wit: (a) areas within the Colombian National Parks Network; (b) indigenous territories; (c) territories of Afro-descendant communities; (d) business development zones; and (e) areas designated for other purposes by INCORA or any other public entity.

**ETHNIC COMMUNITIES:**

In this document, the concept of ethnic communities is in line with ILO Convention 169 which recognizes cultural, economic and social specificities of indigenous peoples, extensive to Afro-descendant communities. The Interamerican Convention on Human Rights recognizes that these communities should have a reinforced and effective State protection, taking into account “their own specificities, economic and social characteristics, as well as their particular vulnerabilities, customary law, values, uses and customs”. In that sense, the Interamerican Court recognizes the importance of land and territories for a comprehensive guarantee of ethnic communities’ rights; in particular, their right to integrity and survival as groups with special cultural, social, economic, spiritual and political identification. For this reason, ignoring the rights of ethnic communities on their territories may entail violations of other basic rights, such as the right to cultural identity and livelihood.<sup>41</sup>

To date, 710 indigenous reserve zones located in 27 departments and 228 municipalities of Colombia, covering 34 million hectares (i.e., 29.8% of the national territory), have been recognized.

<sup>40</sup> Excerpt from “Zona de reserva campesina: política pública y estrategia para la defensa de territorios campesinos, Aportes para su reglamentación y aplicación” [Peasant reserve zone: public policy and strategy for the defense of peasant territories, Contributions for its regulation and application], Indepaz, [http://www.indepaz.org.co/wp-content/uploads/2013/04/Zona\\_de\\_Reserva\\_Campesina\\_Politica\\_publica\\_y\\_estrategia\\_para\\_la\\_defensa\\_de\\_territorios\\_campesinos.pdf](http://www.indepaz.org.co/wp-content/uploads/2013/04/Zona_de_Reserva_Campesina_Politica_publica_y_estrategia_para_la_defensa_de_territorios_campesinos.pdf)

<sup>41</sup> CODHES, CODHES Document No. 24 on the fundamental right to prior consultation, June 2012.

**Special Ownership Regimes Under Agrarian Law and their Restrictions**

| Ownership Regime  | Definition and Characteristics   | Restrictions   |
|---|--|--|
| Wastelands  | <ul style="list-style-type: none"> <li>State-owned lands and others which, after being awarded, subsequently return to State control.</li> <li>In Colombia, INCODER is the agency in charge of managing wastelands.</li> <li>INCODER issues titles corresponding to family farming units (UAFs), identified by INCODER as relatively homogeneous areas where families may gain net revenues for no less than two minimum legal monthly wages.</li> <li>Partition is not permitted.</li> </ul>      | <ul style="list-style-type: none"> <li>Mortgage liens are allowed within five years following the issuance of titles, only for guaranteeing farm-agriculture loans.</li> <li>No partition is allowed resulting in an area smaller than one UAF (except for events provided in Article 45 of Law 160/94).</li> <li>No person is allowed to acquire more than one UAF of wastelands.</li> <li>No more than one UAF of wasteland is allowed as capital contribution to a company.</li> <li>Grounds for reversal (illicit crops, breach of environmental laws).</li> <li>Sale is unrestricted although sellers may not be awardees of wastelands for 15 years, counted from the initial issuance of land titles.</li> <li>Penalties in case of default: straight rescission of the award.</li> </ul> |
| Land plots owned by the Colombian National Agricultural Fund (Allotment Regime) | <ul style="list-style-type: none"> <li>All property acquired by INCODER, regardless of the source (i.e., property conveyed by INCORA; bequests; property seized by the National Anti-Narcotics Department; properties whose ownership expired)</li> <li>Awarded only to beneficiaries of the agrarian reform.</li> <li>Property area equivalent to one UAF.</li> <li>Sale only upon expiration of the deadline provided in the allotment regime. INCODER has the first purchase option.</li> </ul> | <ul style="list-style-type: none"> <li>Penalties in case of default: administrative expiry.</li> <li>Term: 12 years.</li> <li>Sale, conveyance, possession or tenure requires approval from INCODER’s Manager and only available for beneficiaries of the agrarian reform.</li> <li>Exploitation in line with the conservation, rational use and protection of natural resources (i.e. the social function of property).</li> <li>Under Article 40 of the Colombian Law 160/94, no person may hold ownership, possession or tenure over more than one UAF.</li> </ul>  |

### Special Ownership Regimes Under Agrarian Law and their Restrictions

| Ownership Regime                       | Definition and Characteristics   | Restrictions   |
|--|--|--|
| Full land allowance (Allotment Regime) | <ul style="list-style-type: none"> <li>• Non-reimbursable State contribution for acquisition of rural properties and other resources to develop production programs in favor of beneficiaries of the agrarian reform.</li> <li>• Allowances granted through public bid.</li> <li>• Property area equivalent to one UAF.</li> </ul> | <ul style="list-style-type: none"> <li>• Penalties in case of default: rescission of the allowance.</li> <li>• Term: 12 years.</li> <li>• Sale of properties requires approval from INCODER's Board of Directors and is only available for beneficiaries of the agrarian reform.</li> <li>• Land plots may not be leased; rather, these must be directly and adequately exploited by the awardee. Tenure cannot be yielded.</li> <li>• Sales only upon expiration of the allotment regime. INCODER has the first purchase option.</li> </ul> |



## INTERNATIONAL REFERENCES

### INDIGENOUS PEOPLES:

- ILO Convention 169. [https://www.ilo.org/dyn/normlex/en/f?p=NORML-EXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORML-EXPUB:12100:0::NO::P12100_ILO_CODE:C169)
- "The United Nations Declaration on the Rights of Indigenous Peoples", 13 September 2007, General Assembly. [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_es.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_es.pdf)

### PEASANT TERRITORIES:

- United Nations declaration on the rights of peasants and other people working in rural areas– UN Human Rights Council Advisory Committee, A/HRC/AC/8/L.1. <https://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/WGRuralAreasIndex.aspx>
- Peasant reserve zones: In Colombia, ZRCs are initially referred to in Law 160/1994, Chapter XIII on Colonization, Peasant reserve zones and Entrepreneurial Development, regulated under Executive Order 1777/1996, Agreement 024 1996, and other resolutions adopted by INCORA's Board of Directors. Currently, there are six ZRCs in the country, located in Calamar (Guaviare), Cabrera (Cundinamarca), El Pato (Caquetá), Southern Bolívar (Bolívar), Río Cimitarra Basin (Antioquia and Bolívar) and High Cuembí and Comandante (Putumayo). Other seven zones are pending and, other ten requests have been filed in INCODER.

### RESETTLEMENT:

- "Handbook for Preparing a Resettlement Action Plan",

International Finance (IFC). Corporation <https://commdev.org/userfiles/ResettlementHandbook.pdf>

- "Voluntary Guidelines on the Responsible Governance of Tenure of lands, fisheries and forests in the context of national food security", FAO. <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>
- "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources", World Bank. [http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles\\_Extended.pdf](http://siteresources.worldbank.org/INTARD/214574-1111138388661/22453321/Principles_Extended.pdf)
- "Basic Principles and Guidelines on Development-Based Evictions and Displacement. Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living". A/HRC/4/18. [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf)



GUIDE ON THE PURCHASE AND  
ACQUISITION OF LAND RIGHTS  
AND RIGHTS OF USE

