CHAPTER 10

BETWEEN RIGHTS AND POWER ASYMMETRIES: CONTEMPORARY STRUGGLES FOR LAND IN BRAZIL AND COLOMBIA

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I. INTRODUCTION

Many factors explain the current increasing visibility of land conflicts in Latin America. To begin with, this intensification involves a re-configuration of conflicts that date back to the European colonisation of Latin America and to the expropriation from the original populations during this period. Over the centuries, these conflicts have taken on new forms, following the variations of capital accumulation dynamics and the changes in legislation and policies that regularise land ownership and use.

The recent re-positioning of Latin America within the global division of labour, marked by the growing importance of a new mix of commodities on the regional export agenda, aggravates these existing conflicts. Lands that previously had little value, and that are far away from the larger settlements, come to be disputed to such a degree that the exploration of their subsoil or surface to cultivate agricultural products has transformed them into a promising source of profit.[1]

Additional reasons for these land conflicts are the search for new energy sources and the expansion of transportation and communication infrastructures. In this regard, the growing production of agro-fuels and the expansion of the areas occupied by hydro-electric dams, in addition to new highways, railroad lines, electrical transmission lines, *etc*., transform the way in which large extensions of land are used and in many cases lead to the removal of the traditional occupants from these areas. A similar process can be observed

[1] Eduardo Gudynas, "Estado compensador y nuevos extractivismos", (2012) 237 *Nueva Sociedad*, pp. 128–146.

in negotiations regarding climate change control or national/local initiatives to compensate for the environmental impact of human activities (through the creation of parks, protected areas, *etc.*). These measures impose limits on land use and restrict opportunities for the survival of the resident populations. In other cases, these populations are transformed into guardians of the areas integrated to the imagined global environmental patrimony, and are financially compensated to do so.[2]

Finally, the growing interest in the speculative use of lands should also be emphasised. It is well known that land is a traditional instrument of value – and not only in Latin America. In the conjunctures of the current economic crisis and the strong volatility of financial applications, the importance of speculative investments in land has grown dramatically, aggravating local conflicts.

The exacerbation of land conflicts in Latin America takes place in a context marked by enormous growth at the international and local levels in the body of international law, as related to transnational social rights (see Andreas Fischer-Lescano and Kolja Möller, Chapter 2 in this volume). A similar dynamic is also observed in case of the production and implementation of environmental law, involving the interplay of actions of governments, local communities, NGOs, environmental activists, and experts) and also in case of rights and guarantees established for cultural minorities. The issue of land titles is at the core of the new minority rights, as defined in a broad and bold way in 1989 by the International Labour Organization Convention 169, as well as the UN Declaration on the Rights of Indigenous Peoples in 2007, and other international agreements. Latin America is the region of the world with the largest number of countries that have not only ratified Convention 169 but also whose local laws have included legal protection for minorities (ILO 2009).

In the Colombian case, the ILO Convention 169 was ratified through Law 21 of 1991 and national regulations, especially Law 70 of 1993, which gave territorial rights to the Afro-descendant communities, as well as the right to prior, free, and informed consent in cases of development projects affecting their territories. In view of this fact, the local communities and NGOs cite the Article 7 of ILO Convention 169 to demand the respect of communities' land rights. In 2001, the Colombian Constitutional Court, bearing into consideration Law 70, claimed that Afro-Colombians are covered by the same international ILO status as the indigenous people (Constitutional Court of Colombia, 2001).

In the Brazilian case, land rights of Afro-descendant communities were recognised in the Constitution of 1988, Article 68. The process of titling is

[2] Astrid Ulloa, "Producción de conocimientos en torno al clima. Procesos históricos de exclusión/apropiación de saberes y territorios de mujeres y pueblos indígenas", desiguALdades.net Working Paper Series 21/2012 (Berlin, desiguALdades.net Research Network on Interdependent Inequalities in Latin America).

defined by Decree 4.887, which was adopted in 2003. The ILO Convention 169 was ratified through Decree (*Decreto Legislativo*) 143 in 2002. However, it has not been implemented yet.

The importance of granting land titles in order to protect cultural and ethnic minorities rests on the pivotal relationship between these minorities and their physical environment. This relationship is central to the very idea of cultural minority in Latin America. It involves in most cases indigenous populations, such as the *Quilombo* or *Palenque* communities; that is, settlements originally formed by peoples who had escaped slavery, in addition to other groups treated as traditional populations and who, in general, inhabit remote regions far from urban centres. The self-definition of these populations as minorities is fundamentally based upon the demand for recognition of certain distinct forms of land use and environmental resources, supposedly guided by the understanding of the environment transmitted across many generations. In this sense, the land, or more suitably, the territory that carries the key to identity is represented as a central source of material and symbolic reproduction for these populations.[3]

From a geographical standpoint, lands that have won new economic and political meaning in recent years due to the re-positioning of Latin America as a supplier of commodities and as a global environmental reserve overlap with territories occupied by minorities.[4] This causes the local land conflicts in Latin America today to be frequently marked by confrontation between seemingly irreconcilable rationalities, discourses, political strategies, and legal frameworks, such as:

a) The priority given to economic development and the need to use all available land surfaces for productive activities: agribusiness, mining, expansion of transportation infrastructure, diversification of the energy matrix, *etc*.
b) The expansion of transnational legal instruments geared to assure minimal social standards as well as the dissemination in most Latin American countries of social policies designed to protect "vulnerable groups" such as poor peasants and "traditional populations".

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3 See José Maurício Arruti, Mocambo: antropologia e história no processo de formação quilombola, (São Paulo-Bauru, ANPOCS/EDUSC, 2006), Jan Hoffman French, *Legalizing Identities: Becoming Black or Indian in Brazil's Northeast*, (Chapel Hill NC: University of North Carolina Press, 2009), and Diana Ojeda, "Green Pretexts: Ecotourism, Neoliberal Conservation and Land Grabbing in Tayrona National Natural Park, Colombia", (2012) 39 *The Journal of Peasant Studies*, pp. 357–375.

4 Andrea Zhouri and Raquel Oliveira, "Development and Environmental Conflicts in Brazil. Challenges for Anthropology and Anthropologists", (2012) 9 *Vibrant*, pp. 183–208, at 187 *et seq*.

c) Appeal for moderate use or even a complete renunciation of the use of natural resources in order to compensate for the global climate and environmental impact of economic activities undertaken in other regions.
d) The need for the (re-) conversion of land into cultural territories to conserve traditional ways of life and the transmission of ancestral knowledge.

In Latin American countries such as Colombia, there are other processes in which communities – and supportive NGOs and activists – appeal to other instruments of international law. In cases of violent violation of human rights, communities can resort to instruments embedded within International Humanitarian Law to protect civil populations from the effects of the wars. And considering the trend of countries to accept the jurisdiction of the Inter-American Court of Human Rights, there is an ongoing trend in which the communities, NGOs and activists appeal to this Court to denounce cases such as collective human rights violations, as in the case of the Colombian Afro-descent population. In this sense, the articulation of several instruments of international law, or the interplay of different elements of the transnational social rights, can be taken as a contemporary form to halt land-grabbing processes occurring in local settings in Latin America. The extent of the success of these processes are to be evaluated in the mid- and long-term; but, at least in the short run, the instruments of international law provided elements to contend and resist land-grabbing. Recent land-grabbing is a transnational social problem (Andreas Fischer-Lescano and Kolja Möller, Chapter 2 in this volume), because it is rooted in the food, financial and energetic crises starting at least from 2008, which saw/led to transnational actors (governments, transnational and national companies, investors, *etc.*) seeking to buy land in countries in Africa, Latin America and Asia.[5] Land grabbing disrupts the food supply in the targeted countries because it is aimed to expand monocultures such as oil palm (see Andreas Fischer-Lescano and Kolja Möller, Chapter 2 in this volume). The World Bank has proposed the regulation of land grabbing by offering the advocacy of good governance, or Code of Conduct on land grabbing. This proposal has been criticised because it does not have "a pro-poor orientation in the sense of proceeding a social-justice driven analysis of the causes of (rural) poverty and the need to protect and advance (rural) poor people´s land access and property interests".[6] Given this lack of "pro-poor orientation" in land grabbing, the communities in question resort to legal instruments, such as national and international law, in order to seek to protect their social rights.

5 GRAIN (2008). *Seized: The 2008 Landgrab for Food and Financial Security*. GRAIN Report, available at: www.grain.org/article/entries/93-seized-the-2008-landgrab-for-food-and-financial-security, last accessed 1 May 2015.

6 Saturnino Borras Jr. and Jennifer Franco, "From Threat to Opportunity? Problems with the Idea of a 'Code of Conduct' for Land-Grabbing", (2010) 3 *Yale Human Rights & Development Law Journal*, pp. 507–523, at 510.

This is the broader political context in which the two case studies presented in this chapter take place. Our arguments are divided into four sections. The first section briefly discusses some of the current interpretations of the expansion of the rights of cultural minorities, and based upon this debate, it proposes an analytical framework in which social and/or minority rights are understood as relays in asymmetrical power structures. The second section presents a case study of land conflict in the Pará State of the Brazilian Amazon, which involves the expansion of an area occupied by oil palm plantations for the production of biodiesel and its impact on negotiations of the *Quilombo* territories in the region. The third section is dedicated to the study of conflicts observed in the lower Atrato region on the border between Colombia and Panamá, specifically the issues involving the expansion of the cultivation of African palm trees on lands whose control is disputed by traditional rural oligarchies, new agrarian entrepreneurs, paramilitary groups, and indigenous, *mestizo*, and Afro-descendent communities. The final section explores different elements of these three arguments in order to show how minority rights – as related to transnational social rights in the sense of Andreas Fischer-Lescano and Kolja Möller, Chapter 2 in this volume – in some situations, can serve to strengthen the power of the local populations in their struggles to reach the guarantee of title and ownership of the lands that they occupy.

II. ANALYTICAL FRAMEWORK

The scope of this chapter is certainly not broad enough to discuss the vast multiplicity of analyses available within the specialised scholarship on the recent expansion of minority rights in the international political agenda and their incorporation into national and local legal and political frameworks. Nevertheless, delineating the extremes of the spectrum of analyses is a worthwhile and relevant endeavour that will contextualise our analytical-theoretical proposal within the existing debates. On the one hand, liberal multiculturalism sees the protection of cultural minorities as a necessary extension of individual rights. On the opposite extreme of the spectrum of interpretations are subaltern studies, which see social and minority rights as a dispositive that allows for the domestication and governmentalisation of differences.

Following the liberal multiculturalist position, as represented paradigmatically in the work of Will Kymlicka and his collaborators,[7] cultural

[7] See, for example, Will Kymlicka, *Liberalism, Community and Culture*, (Oxford-New York: Oxford University Press, 1989), idem, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford-New York: Oxford University Press, 1995), and idem, *Multicultural Odysseys: Navigating the New International Politics of Diversity*, (Oxford-New York: Oxford University

belonging corresponds to a fundamental space for the formation of choices and personal judgements. In this sense, the protection of cultural minorities is indispensable to individual autonomy, and conforms, for this reason, to a necessary extension of contemporary citizenship.

Historically, the constitution of modern nation states has implied the oppression of cultural minorities, which justifies, according to liberal multiculturalism, contemporary efforts to extend their rights:

> "This conception of [multicultural] citizenship attempts to replace or supplement nation-building policies with those that explicitly recognise and accommodate groups whose cultural differences have been excluded from the national imaginary, whether they be indigenous peoples, national minorities, racial groups, religious minorities, immigrants and refugees, or stigmatised groups such as gays and lesbians. This generates the familiar set of debates around minority rights and group representations that characterise multiculturalist literature."[8]

In this sense, the incorporation of minority rights into international law and into the agenda of international organisations observed in the past three decades, a process described by Kymlicka as "multicultural odysseys", represents what he considers to be a political and legal correction of the errors committed during the constitution of modern nation states.[9]

The analyses undertaken under liberal multiculturalism contain various analytical-theoretical deficiencies. They essentially involve, as discussed at greater length in other contexts,[10] the adoption of a pre-political and ahistorical concept of cultural identity, as if cultural belonging was constructed outside of the spaces of the dispute for resources and political and social power. These theoretical deficiencies aside, these analyses manifest a fundamental methodological limitation: in general, the studies linked to the field of liberal multiculturalism have a normative-prescriptive character. Therefore, they do not provide the instruments that allow for a discussion on the existing processes of negotiation, and of the reconstruction of cultural belonging observed in the specific contexts in which the implementation of rights and policies aimed at the protection of cultural minorities take place.

Press, 2007). See, also, Will Kymlicka and Bashir Bashir, "Introduction", in: idem (eds), *The Politics of Reconciliation in Multicultural Societies*, (Oxford-New York: Oxford University Press, 2008), pp. 1–24.

8 Kymlicka and Bashir, *The Politics of Reconciliation*, note 7 above, at 12.

9 Kymlicka, *Multicultural Odysseys*, note 7 above.

10 Sérgio Costa and Guilherme L. Gonçalves, "Human Rights as Collective Entitlement? Afro Descendants in Latin America and the Caribbean", (2011) 2 *Zeitschrift für Menschenrechte*, pp. 52–71. See, also, Sérgio Costa, "Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America", in: Kathya Araujo and Aldo Mascareño (eds), *Legitimization in World Society*, (Farnham: Ashgate Publishing, 2012), pp. 139–156.

The analyses of the expansion of minority rights located at the opposite extreme of liberal multiculturalism, subaltern studies, recuperate a fundamental aspect completely absent from the formulations of authors such as Kymlicka, namely the nexus between power and cultural difference.[11] The work of Partha Chatterjee represents perhaps the broadest contemporary effort to build on the theoretical foundations offered by Michel Foucault;[12] an innovative analytical perspective on the expansion of rights and public policies in contemporary post-colonial societies. Based upon the concept of governmentality, as developed by Foucault in his lectures at the *Collège de France* in 1978, Chatterjee establishes the distinction between citizens and the bearers of rights on the one hand, and the population, that is, the target of control and of government policies and the bearers of entitlements, on the other:

> "Rights belong to those who have proper legal title to the lands or buildings that the authorities acquire; they are, we might say, proper citizens who must be paid the legally stipulated compensation. Those who do not have such rights may nevertheless have entitlements; they deserve not compensation but assistance in rebuilding a home or finding a new livelihood."[13]

Citizens and populations, according to Chatterjee, form two different genealogies and refer to opposite practices of and narratives about politics and social policies. While the citizen-narrative relates to the nation state and to a correspondent rule of law, as well as to a demographically small civil society populations represent the bulk of inhabitants of post-colonial societies like India, who only relate to the state as the governed and who interact with the public agencies in search of benefits and security.[14] Although the population groups constitute, from the perspective of governmentality, groups created by the administrative rationality of the state, their designation leads them to develop a correspondent collective identity:

> "Although the crucial move here was for our squatters to seek and find recognition as a population group, which from the standpoint of governmentality is only a

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11 This aspect is also emphasised by many Latin American authors identified with the fields of cultural and postcolonial/decolonial studies, such as Diana Bocarejo, "Legal Typologies and Topologies: The Construction of Indigenous Alterity and its Spatialization within the Colombian Constitutional Court", (2014) 39 *Law and Social Inquiry*, pp. 334–360; Arturo Escobar, *Territories of Difference: Place, Movements, Life,* Redes, (Durham NC: Duke University Press, 2008); and Eduardo Restrepo, "Ethnicization of Blackness in Colombia. Toward De-racializing Theoretical and Political Imagination", (2004) 18 *Cultural Studies*, pp. 698–715, among others.

12 See Partha Chatterjee, "Beyond the Nation? Or within?", (1998) *56 Social Text*, 57–69, idem, *The Politics of the Governed*, (New York: Columbia University Press, 2004), and idem, "After Subaltern Studies", (2012) 47 *Economic & Political Weekly*, pp. 44–49.

13 Idem, *The Politics of the Governed*, note 12 above, at 69.

14 Idem, "Beyond the Nation? Or within?", note 12 above, at 61 *et seq*.

> usable empirical category that defines the targets of policy, they themselves have had to find ways of investing their collective identity with a moral content. This is an equally crucial part of the politics of the governed: *to give to the empirical form of a population group the moral attributes of a community.*"[15]

Chatterjee's reading of the relations between the state and the populations that are beneficiaries of its policies helps us to understand the impact of measures intended to protect cultural and ethnic minorities, in so far as these minorities are only constituted in most cases as communities that bear a common identity after they become potential targets of entitlements.[16] In addition, from a historical perspective, Chatterjee's findings apply to the important changes in the relationship between state and society observed in Latin America in recent decades. The national-populist import-substitution model which discursively integrated the entire population into universalising political categories of citizens and members of the nation, has disappeared. In its place emerges a heterogeneity of administrative categories that fragment citizenship into an endless set of groups of the governed and of beneficiaries of specific programmes and policies.

Nevertheless, the rigid separation established by Chatterjee between government and governed, civil society and population, citizenship and governmentality, limits the understanding of the effective shifts in the power relations in the cases studied in this chapter. That is, cultural and ethnic minorities can effectively make use of the instruments that the new minority rights offer them to influence the pattern of state interventions. These minorities come to relate not only to the agencies of the state as a target population for their benefits, but as citizens who demand rights and, in certain circumstances, who can initiate substantial changes in the quality of policies and of the state.

The less than rigid positions defined in distinct camps – on the one hand, the state and its citizens, on the other, the government and target groups – are borne out in the cases we studied, where we observe more dynamic power relations than a Foucauldian perspective would anticipate. Although new legal frameworks and policies do not in themselves immediately supersede brutal power asymmetries constructed throughout history, these new instruments contribute, in some cases, to a re-configuration of the ways in which power is negotiated and exercised. Therefore, it is an imperative analytical task to understand the specific circumstances that lead to shifts in power relations and the role that new rights, such as minority rights, perform in these changes. Ran Greenstein's tripartite distinction of powers is useful for the purposes of our

15 Idem, *The Politics of the Governed*, note 12 above, p. 72, italics in original.

16 Andrew Canessa, "Who is indigenous? Self-identification, Indigeneity, and Claims to Justice in Contemporary Bolivia", (2007) 36 *Urban Anthropology*, pp. 14–48. See, also, Costa, "Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America", note 10 above.

analysis. Studying the political transition in South Africa, the author highlights three of the most relevant dimensions of power:

> "[*S*]*ocial power* (access by individuals and groups to resources and control over their allocation), *institutional power* (strategies employed by groups and institutions in exercising administrative and legal authority), and *discursive power* (shaping social, political and cultural agendas through contestations over meanings)."[17]

The struggles for land imply the exercise of – and disputes for – power on these three levels. However, the concrete results of the struggles always remain contingent. That is, the degree to which, for example, the exercise of discursive or institutional power can modify established forms of access to available resources, particularly land ownership, is something that cannot be pre-defined on a theoretical level. In addition, patterns of state intervention cannot be defined *a priori*. In some cases, the institutional power of the state is practically non-existent. There are other actors, such as paramilitary groups or local chiefs or guerrillas who may exercise the role of a political authority and, to some extent, an administrative authority. In other cases, the state effectively appears as the government of populations, or in other situations even as a promoter of citizenship.

The place that the law – and more specifically minority rights – occupies in these shifts of power relations is variable. In the case of socio-economic rights in South Africa, Greenstein identifies two distinct forms of mobilising the discourses and instruments offered by the law: the legal route which "seeks to use the courts to enforce compliance by the state with its constitutional obligations", and an activist route "that uses rights discourse as a mechanism to force the state to change its policies, but again without challenging the role of the state as such".[18] According to Greenstein, effective changes in the state intervention pattern and in power relations only occur when legal and activist strategies are combined. That is, the struggles to make the state comply with its obligation to guarantee access to certain resources are only successful when popular mobilisations are accompanied by initiatives that activate the instruments of the legal system itself to pressure the state.[19]

For our case studies, it is crucial to maintain a high level of analytical openness in order to understand empirical situations that are quite different from each other. In compliance with this open-mindedness, we do not pre-

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17 Ran Greenstein, "State, Civil Society and the Reconfiguration of Power in Post-apartheid South Africa", *Centre for Civil Society Research Report 8*, (Durban: Centre for Civil Society, 2003), p. 1, italics in original.

18 Ibid., p. 37.

19 Ran Greenstein, "Socio-Economic Rights, Radical Democracy and Power: South Africa as a Case Study", in: Neve Gordon (ed), *From the Margins of Globalization: Critical Perspectives on Human Rights*, (Lanham MD: Lexington Books, 2004), pp. 87–126, *passim*.

establish a fixed correlation between the strategic uses of the new rights and their impact on power relations on the three levels mentioned above (that is: social, institutional, and discursive power). We understand that, as in electrical circuits, rights may function as "relays"[20] in circuits of political power. As such, they can operate in three alternative ways:

a) Rights serve as relays to modulate power, expanding the power of actors who previously had little political influence.
b) In extreme cases, rights, like electrical relays, can also function to block flows of power above the absorption capacity of a given circuit. This would be found, for example, in cases in which rights are mobilised to contain processes of violent removal of populations or those that protect the survival of a threatened group.
c) In other cases, neither the language nor the instruments associated with the new rights are mobilised, and therefore these remain innocuous, like electrical relays that are not activated if there is no electricity in the circuit.

III. COLLECTIVE TERRITORIAL RIGHTS IN THE CONTEXT OF GOVERNMENTAL AGROFUELS INITIATIVES – THE CASE OF THE *QUILOMBOS* IN PARÁ/BRAZIL

The high concentration of land property in Brazil, which began during Portuguese colonialism, was re-inforced after Brazil's independence. For instance, according to Law No. 601 of 18 September 1850, known as the Law of Land (*Lei de Terras*), public land could no longer be appropriated for agricultural use as before, but had to be purchased, instead. This was only possible for a privileged social class that was already in possession of vast areas of land. Hence, the high concentration of land was re-inforced and a lasting supply of labour on the plantations ensured. When slavery was abolished in 1888, the former slaves or resisting *Quilombolas* had no legal access to land. Today, most of their rural descendants are considered as landowners without title (*posseiros*, *i.e.*, occupiers).[21]

In the course of re-democratisation only 100 years later, the entitlement to land of rural Afro-descendant communities was recognised in Article 68 of

[20] The image of relays entered the field of sociology through the work of Michel Crozier and Erhard Friedberg, *L'acteur et le système: Les contraintes de l'action collective*, (Paris: Éditions du Seuil [1977] 1996), who, upon studying organisations, identified relays as intermediary actors between organisations and their surroundings. As used here, the relays do not refer to concrete actors but to rights that can impact on power relations.

[21] Girolamo D. Treccani, "Regularizar a terra: um desafio para as populações tradicionais de Gurupá", [Dissertation] (Belem: UFPA, 2006).

the 1988 Constitution.[22] In the aftermath, Brazilian black movements started fighting for the implementation of this law and the social recognition of cultural and territorial rights of *Quilombolas*. The new legal possibilities led to an ethnic re-identification of numerous communities of smallholder farmers, who now emphasise their common history of resistance against slavery in order to become legal owners of their land.[23] The category *Quilombo* implies a legal status: if their land is titled collectively, it cannot be commercialised and must be used in a "traditional manner".[24] Therefore, titled *Quilombo* territories have been effectively removed from the land market and are no longer available for agri-industrial uses.

After periods characterised by a noticeable growth of titles being issued to communities recognised as *Quilombo*, title proceedings have recently stagnated. The Brazilian government has 3,524 officially registered *quilombos*,[25] but as of 2012 only 192 communities had actually received their land titles, and in 2011 and 2012 only one collective title was issued *per annum*.[26]

There is considerable disenchantment among black movements. Political recognition of ethnic difference has been a critical milestone for the *quilombos* in terms of the re-construction of their missing history. But the legal enforcement of their territorial and political rights moves at a slow pace. The reasons are numerous: the inefficiency of the respective agencies, complicated property rights, lack of political commitment, as well as attempts to de-legitimise *Quilombo* communities with the allegation that rural black populations are falsifying their "real identities" as poor rural workers in order to profit from new rights.[27] In addition, agribusiness lobbying reaches into the parliament through the *Bancada Ruralista*,[28] thereby influencing directly the national debate on collective territorial rights. This lobby challenges aggressively the alleged "privileges" of traditional communities which supposedly impeded the development of Brazil into a global agro-energy-power.[29]

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22 See José Maurício Arruti, "Direitos étnicos no Brasil e na Colômbia: Notas comparativas sobre hibridização, segmentação e mobilização política de índios e negros", (2000) 6 *Horizontes antropológicos*, pp. 93–123, at 101–107; idem, note 3 above, at 66 *et seq*.

23 Arruti, note 3 above. See, also, French, note 3 above, and Sérgio Costa, "Au-delà du métissage. Antiracisme et diversité culturelle sous les deux gouvernements Lula", (2010) 78 *Problèmes d'Amérique Latine*, pp. 91–112.

24 INCRA, "Territórios Quilombolas. Relatório 2012", (Brasília: 2012), p. 5.

25 SEPPIR, "Programa Brasil Quilombola" (Brasília: 2013) at: http://bit.ly/10SG30U, last accessed 20 June 2014).

26 Bianca Pyl, "Governo federal titulou apenas uma terra quilombola em 2012", (2012) *Brasil de Fato*, available at: http://bit.ly/QHnJ6s, last accessed 14 March 2013. See, also, Comissão Pró-Índio de São Paulo, (2012) *Terras Quilombolas*, available at: http://bit.ly/Wqalo9, last accessed 14 March 2013.

27 Arruti, note 22 above, p. 87.

28 This is a fraction of parliamentarians of various parties identified with the interests of the agro-élites and agri-business.

29 Henri Acselrad, "Agronegócio e povos tradicionais", in: *Le Monde diplomatique Brasil*, 2 February 2012, available at: http://bit.ly/Z1Vs80, last accessed 14 March 2013. Arruti,

THE GOVERNMENT FUNDED PALM OIL PROGRAMME IN THE AMAZON BASIN AND THE *QUILOMBOLAS*[30]

For several years, the Brazilian state has been promoting large infrastructural, mining and agribusiness projects in Pará. This includes the state "Programme for the Sustainable Production of Oil Palm" for the production of biodiesel.[31] Like the controversial Belo Monte mega-dam project, this programme resumes a large-scale project from the 1970s. The novelty here is the reframing of agro-industrial palm oil production as a green climate protection measure. A binding zoning plan is to ensure that the programme involves only areas de-forested before 2008.[32] The focus is supposed to be on the degraded grazing pastures in the north-east region of Pará and on capturing as much climate-harming carbon dioxide as possible in the growing oil palms. The programme has selected for this propose around six million hectares in 44 municipalities. Since the launching of the program in 2010, the area of oil palm plantations has been tripled to 180,000 hectares. The corporation employees interviewed predict a further growth of the plantations to up to four million hectares in the coming decades. The reservations and territories of traditional communities within the plantations are not supposed to be affected by this.

However, these expansions have had a massive impact on the access to land and on the land use conditions of the *Quilombo* communities. This accounts for the following:

(1) The issues of property rights remain mostly unresolved in the region.[33] The palm oil corporation project has fuelled aggressive land speculation. Frequent land sales and purchases through front men cause rises in prices. Interviewed agro-experts speak of a de-coupling of prices on the informal land market. This increases the pressure on *Quilombo* communities that have not yet obtained a land title to sell their land properties. For example, the *Taperinha* community

note 22 above, pp. 90–91; Alfredo W.B. Almeida and Rosa Acevedo, "Strategien der Landenteignung in Amazonien. Agrobusiness und Bodenkonflikte", in: Willi Bolle (ed), *Amazonien. Weltregion und Welttheater*, (Berlin: Trafo, 2010), pp. 151–170, and Alfredo W.B. Almeida, "Direitos territoriais e étnicos: as estratégias dos agronegócios na Amazônia", in: Andréa Zhouri and Klemens Laschefski (eds), *Desenvolvimento e conflitos ambientais*, (Belo Horizonte: Editora UFMG, 2010), pp. 382–387.

30 The section outlines the results of a qualitative survey on the impact of increasing palm oil plantations in two *quilombo* communities – one with and one without collective land title – in the municipalities of Moju and São Domingos do Capim in the north-east region of Pará.

31 Rosa Acevedo, "Territórios *Quilombolas* Face à Expansão do Dendê no Pará", in: Sandra Maria Franco Buenafuente (ed), *Amazônia. Dinâmica do Carbono e Impactos Socioeconômicos e Ambientais*, (Manaus: Editora da UFRR, 2010), pp. 165–184.

32 EMBRAPA, MAPA, "Zoneamento agroecológico do dendezeiro para as áreas desmatadas da Amazônia Legal", (Rio de Janeiro: 2010).

33 In all of Pará there are four times as many land claims as real existing land, which is why the state is referred to colloquially as "the state with four floors" (Treccani, note 21 above).

in the *Quilombo* territory of Povos do Aproaga in the municipality of São Domingos do Capim has been waiting for years for the claimed collective land title, while they see themselves increasingly surrounded by the oil palm plantations of the Brazilian mining corporation Vale and the dominant transnational American agricultural company ADM (Archer Daniels Midland Company). Without this title and in the light of the continuously growing land prices, it will be difficult for the 120 families to withstand the pressure from the growing oil palm plantations. Five families have already sold their parcels of land to a larger land owner. The *Quilombo* representative is concerned that the titling will be delayed until so many parcels of land have been sold so that a collective title can no longer be issued due to the lack of connected territories. Even titled *Quilombo* territories do not warrant a stop: the *Quilombolas* of the *São Bernadinho* community in the *quilombo* territory Jambuaçu[34] in the Moju municipality report attempts to purchase land belonging to single families. The promises of the corporations to use only degraded grazing pastures of large land owners thus hardly seem all too reliable.

(2) The expanding plantations affect the heterogeneous "traditional" systems of land use in the region. The region designated for oil palm plantations consists by no means merely of degraded grazing pastures. Since colonial times this has been namely one of the most populated and oldest settling regions in the Amazonian basin. In addition to various small farms and traditional communities, some untitled and 34 collectively titled[35] *Quilombo* communities live there. The territories of the *Quilombo* communities in *São Bernadinho* and *Taperinha* are located within the expansion areas of the oil palm plantations. The *Quilombolas* report deforesting initiatives in their neighbourhood for the conversion of these areas to homogeneous oil palm plantations. They also report the socio-ecological[36] impact of the plantations on their land and resources. The

34 Jambuaçu is an interconnected *quilombo* territory of 14 communities, of which 10 hold a collective land title. Joseline S.B. Trindade, "Território Quilombola de Jambuaçu: Conflitos socioambientais e as estratégias 'participativas' da mineradora Vale S.A.", (2012) [Paper presented at the "XI Congresso Luso-Afro- Brasileiro de Ciências Sociais"], at: http://bit.ly/13VsazR, last accessed 14 April 2013); Projeto Nova Cartografia Social da Amazônia, "Fascículo 3 – Nova cartografia social dos povos e comunidades tradicionais do Brasil. Quilombolas de Jambuaçu-Moju – Pará", (Brasília: 2007).

35 There are no reliable numbers regarding untitled *Quilombos* in the region. The number of titled communities is based upon an index by municipalities compiled by the NGO Pró-Índio (Comissão Pró-Índio de São Paulo 2012).

36 This term stems from political ecology, maintaining that the relations between society and nature are mutual, and that ecological experiences of crisis are always socially articulated and therefore embedded in power relations (Paul Robbins, *Political Ecology: A Critical Introduction*, 2nd ed., (Chichester: Wiley-Blackwell, 2010); Raymond L. Bryant and Sinéad Bailey, *Third World Political Ecology*, (London: Routledge, 2005); Richard Peet and Michael Watts (eds), *Liberation Ecologies: Environment, Development, and Social Movements*, 2nd ed., (London: Routledge, 2010).

use of pesticides contaminates rivers: this causes the fish to die, as well as skin irritation for those living near to the rivers. The decrease in harvestable fruit is also attributed to the contamination of the ground soil and the groundwater with pesticides. Monocropping cultivation changes flora and fauna: local game is crowded out and the cultivation of bees impeded. The oil palm fruit lures in rats and snakes. Interfering with natural stream courses, for example, to construct roads or to irrigate plantations, impedes access to water and irrigation.

State officials, in interviews, admit to the negative effects of the palm oil program. Nevertheless, they consider the palm oil programme to be a necessary development project for the region. They point to the jobs created by the oil palm plantations, which offer the *Quilombolas* a way to escape poverty. The *Quilombolas* interviewed disagree. In their experience, the work in palm plantations is poorly paid and precarious. Most of the workers' monthly salaries yielded less than the minimum wage (about 250 euros) – too little to sustain a family. Particularly young people whose land does not produce enough often have no choice. The *Taperinha* representative is quite clear on this point: "This is no development for us, this is semi-slavery". According to him, instead of turning people back into "semi-slaves", the government should protect and promote their land-use system:

> "We did not fight slavery only to return to plantations to work as slaves."[37]

(3) The *Quilombolas* hardly have a voice in the public debate on the palm oil programme. No studies have been commissioned to investigate their complaints. The reasons for this are complex. Socially, the *quilombolas* are marginalised throughout Brazil. They have low monetary incomes and only have precarious access to education, health, and agricultural credits.[38] In the case of Pará, numerous municipal offices and single trade unionists directly co-operate with the palm oil corporations. Unlike the situation in the 1980s, there are hardly any NGOs in the region today. The state palm oil programme has exacerbated their marginalisation. Not only the *Quilombolas*, but the entire rural population of the region has been circumvented by the programme implementation. As of today, the mandatory public hearings and environmental impact assessments for large-scale projects still have not been carried out.[39] Instead, (state) agro-experts as well as the palm oil corporations have expanded the discourse of degraded

[37] Interview conducted by Maria Backhouse in 2011. All interview and text excerpts from Portuguese and Spanish were translated by the authors of this chapter into English.

[38] José Maurício Arruti,, "Políticas públicas para quilombos. Terra, saúde e educação", in: Marilene de Paula and Rosana Heringer (eds), *Caminhos Convergentes. Estado eSociedade na Superação das Desigualdades Raciais no Brasil*, (Rio de Janeiro: Heinrich Böll Stiftung, 2009), pp. 75–110.

[39] Resolutions CONAMA 01/86 and 009/87 mandate public hearings to enforce public participation in the process of environmental impact assessments. These were ratified in the state constitution of Pará in 1989.

grazing pastures by absorbing the old discourse of degrading traditional cultivation culture (shifting cultivation).[40] According to these experts, the agro-industrial palm oil production is a climate-friendly alternative to the traditional cultivation of manioc – an important crop for the *Quilombolas* and other smallholder farming cultures and main staple in the region. Thus, the *Quilombolas* are not only being spatially encapsulated or marginalised by the rapidly growing plantations, even their so-called traditional practices of land use are being questioned because of their ecological impact. The ambiguity of the term "traditional practice" is now being used against them; they are accused of promoting a system dating from the Stone Age that supposedly leads to land degradation.

Even the international environment politics closes the spaces of articulation for the so-called traditional communities, whose important impact on forest conservation is being emphasised in other contexts.[41] The widely endorsed strategy of conserving valuable primary forests and the climate by intensified monocropping of so-called degraded areas[42] proves, in the case of the *Quilombo*s, that what seems to be a climate protection strategy may further undermine the access of already marginalised groups to vital resources. Through the technocratic narrowing down of climate change policies into the estimation of carbon capture and storage, monocropping cultivation is reframed as green in a region that, at the same time, is made out to be degraded. Through the naturalising definition of an entire region as degraded, the existing land-use systems are de-legitimised and destroyed.

IV. COLOMBIA'S LOWER ATRATO REGION: TERRITORIAL RIGHTS, POWER ASYMMETRIES, LAW AND RESISTANCE STRATEGIES

Concentration of land is one of the dimensions of historical inequalities in Colombia, whose far-reaching consequences include violence and social unrest. In this country, lands lend social prestige and regional political power. Historically, landowners have hoarded the best lands, in several cases even

40 Regarding the deconstruction of the agro-economical homogenising discourse and the supposedly degrading shifting cultivation in the Amazonas areas: Francisco Assis de Costa, "*Amazonien – Bauern, Märkte und Kapitalakkumulation*", (Saarbrücken: Spektrum, 1989); Thomas Hurtienne "Agricultura familiar e desenvolvimento rural sustentável na Amazônia", (2005) 8 *Novos Cadernos NAEA*, pp. 19–71.

41 See, for example, Article 8 (j) of the Biodiversity Convention.

42 World Bank, "The World Bank Group Framework and IFC Strategy for Engagement in the Palm Oil Sector", (Washington DC: World Bank, 2011), available at: http://bit.ly/13VtfYa, last accessed 14 March 2013. See, also, Rhett Butler, "Could Palm Oil Help to Save the Amazon?", (mogabay.com, 2011), available at: http://bit.ly/ihvJ4d, last accessed 14 March 2013.

leaving them unproductive, unused or employed for livestock. They have also refused to introduce agrarian reforms and resisted efforts towards them by political or violent means. In 2009, the Gini co-efficient of land concentration in Colombia reached 0.86, one of the highest in the region.[43] Land re-distribution has been demanded generally upon the basis of a class conflict between landowners and peasants without land. However, since the 1990s, racial and ethnic ties to land and territories have gained visibility with the introduction of minority rights and policies. Indigenous people and Afro-descendants inhabited mainly marginalised areas. Besides the struggles for land re-distribution demanded by peasants within the borders of the agrarian frontier, new territorial conflicts emerged as a consequence in the areas inhabited mainly by indigenous people and Afro-descendants. New sources of pressure have emerged from landowners and governmental neo-extractivist development policies, both of which aimed at grabbing land to expand agriculture frontiers and to exploit their resources. This has been the case of the lower Atrato region in Northwestern Colombia, near to the border with Panama. This region, inhabited mainly by Afro-descendants and *mestizos*, was included within the collective territories of black communities. It is also recognised at international and national level as a biodiversity hotspot. Its strategic location at the Darien Region has also attracted interest; the Americas Transversal Highway is planned to cross this area. Since 1996, paramilitary and military groups have displaced thousands of people, grabbing lands to introduce monocultures of palm oil.

However, several resistance strategies have been adopted by the communities, which now demand the recognition of their territorial rights and restitution. They have availed themselves of the new language and instruments supplied by Law 70 of 1993, demanding their minority rights to be respected, including their belief in the nexus between culture and nature.

A. AFRO-DESCENDANTS' TERRITORIAL RIGHTS (LAW 70 OF 1993), VIOLENCE AND LAND GRABBING

The most important recent developments in the situation of the inhabitants of the Pacific region of Colombia, and specifically in the lower Atrato, were the legal advances since the 1990s which defined collective territories of black communities and protected conservation areas. The Colombian government adopted institutional changes to grant rights to black populations. The Constitution of 1991 proclaimed Colombia to be a multicultural and pluri-ethnic nation. Social pressure and the support of several social sectors as well as of the

43 UNDP, Informe Nacional de Desarrollo Humano 2011. Colombia Rural, Razones para la Esperanza. Naciones Unidas (2011), p. 197.

indigenous representative at the Constitutional Assembly favoured the inclusion of the Transitory Article No.55 (AT-55).

The AT-55 forced the Colombian Congress to enact Law 70 of 1993, which defined territorial rights for black communities. Thus, the identities of these populations were, in certain way, essentialised, or "frozen",[44] by the Law. It defined "black communities", as "the groups of Afro-Colombian families who have their own culture, a shared history and their own traditions and customs in the village-rural side (*campo-poblado*) relationship, revealing and maintaining awareness of identity to distinguish them from other ethnic groups".[45] These populations lived in "collective occupations" among the river basins of the rural Pacific region, carrying out "traditional practices of production". Law 70 included aspects such as their cultural protection as an ethnic group and the promotion of their social and economic development, in respect of those traditional practices of production.[46] In turn, Decree 1745 of 12 October 1995 brought into effect Chapter 3 of Law 70 of 1993, which defined the process of recognition of their collective property rights, as well as the role of community councils (*consejos comunitarios*) as the local authorities in charge of the management of the collective territories.[47]

These community councils are composed of a General Assembly and a Junta. In 2001, the Constitutional Court ruled that the black communities in Colombia have the same international ILO status as indigenous populations.[48] Under this status, black communities would be consulted before the undertaking of any projects that would affect these territories.

A nexus was established between the recognition of collective territorial rights and the environmental preservation of these territories.[49] The black communities have lived mainly in areas with rich biodiversity, including conservation forests, rainforest, and wetlands. The legislation aimed to include the participation of these communities in the evaluation processes of economic projects planned for the region.[50] Historically, the Pacific region's use of its resources includes small-

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44 Costa, "Freezing Differences: Politics, Law, and the Invention of Cultural Diversity in Latin America", note 10 above.

45 Republic of Colombia, Law 70 of 1993 (1993).

46 Ibid.

47 See Republic of Colombia, Decree 1745 of 1995 (1995).

48 See Constitutional Court of Colombia, Decision C-169 of 2001 on national special circumscription of ethnic groups, (2001).

49 Law 70 of 1993 includes as one of its principles "the recognition and protection of ethnic and cultural diversity and environmental protection, taking into account the relations established by black communities with nature", (Republic of Colombia, Law 70 of 1993, Article 3).

50 For example, Article 35 of Decree 1745 of 1995 established that a technical commission must evaluate proposals of projects for environmental licenses, concepts, permissions, and contracts for the exploitation of natural resources. Article 44 of Law 70 of 1993 established that black communities must participate in the design, elaboration, and evaluation of the environmental impact studies of the planned projects. Article 76 of Law 99 of 1993 claimed that the exploitation of natural resources should be carried out without affecting the cultural,

scale mining, logging, fishing, and gathering economies. Usually, megaprojects such as large-scale mining have been rejected by the respective communities, who garnered support from church representatives such as the *Verbitas del Verbo Divino*.[51] The legislation provided clear definitions of the collective property rights for Afro-descendants and *mestizos*, who had settled there decades and centuries ago.

Despite the recognition of territorial rights, these populations still have been affected by dispossession, mainly caused by to the introduction of monocultures. Paramilitary and military attacks were carried out in the lower Atrato because the area was a hiding place for guerrillas. Counter-insurgency activity drew the lower Atrato into armed conflict, with severe consequences for its local communities. The "Genesis Operation", which took place in February 1997, marked a breaking-point in the levels of violence. This "alleged" counter-insurgency operation against the 57th Front of the guerrilla fraction FARC was carried out by the 17th Brigade of the national army. Attacks by land and air were supported by paramilitaries of the Peasants' Self-defence Armies of Cordoba and Urabá (ACCU). Aerial bombings forced the displacement of thousands of people from the basins of the rivers Cacarica and Salaquí into the basins of the Truandó, Jiguamiandó, Curbaradó, and Domingodó rivers.

Those who stayed in the territory were advised by the paramilitaries to leave their lands because the war would continue and their lives would be at risk. However, those who returned found their lands cropped with oil palm monocultures.[52] After the people were forcibly displaced, paramilitaries and entrepreneurs began to occupy these territories.[53]

Dispossession and de-territorialisation have been introduced due to the asymmetries of power between external (military, paramilitary, and economic) actors and local communities. Governments, entrepreneurs, and paramilitaries have used violence to terrorise and displace communities, forcing them to accept the introduction of agro-industries. The government also promoted the policy of "Strategic Alliances" to forge the association between entrepreneurs

social, and economic integrity of indigenous people and black communities. In addition, Decree 1320 of 1998 enforced the process of prior consent from indigenous people and Afro-descendants to enforce Article 76 of Law 99 of 1993.

51 See Eduardo Restrepo, "Etnización y multiculturalismo en el bajo Atrato", (2011) 47 *Revista Colombiana de Antropología*, pp. 37–68.

52 The oil palm also arrived to lower Atrato because the Uribe government championed this sector, responding to the rise of global raw material demand for biofuels. See UNCTAD, *Challenges and Opportunities for Developing Countries in Producing Biofuels* (2006), available at: http://bit.ly/XLSWad, last accessed 14 March 2013, pp. 3 & 25.

53 There was a coalition between paramilitaries, functionaries of the INCODER, banana entrepreneurs, cattle ranchers, high range militias, and local chiefs, as well as unemployed peasants, drug traffickers, ex-guerrilla fighters, and retired soldiers. See Vilma Franco and Juan Restrepo, "Empresarios palmeros, poderes de facto y despojo de tierras en el Bajo Atrato", in: Mauricio Romero (ed), *La economía de los paramilitares: redes de corrupción, negocios y política*, (Bogotá: Nuevo Arco Iris, 2011), pp. 269–410, at 283.

and peasants to work for agribusiness, though the peasants could lose their property rights by being integrated as labourers in the plantations. In turn, agro-entrepreneurs have used their economic power to take advantage of the poverty of local communities, and "buy" or co-opt community leaders to enable the introduction of megaprojects.[54]

B. LAW AND RESISTANCE STRATEGIES AGAINST DISPOSSESSION AND DE-TERRITORIALISATION

There have been various social resistance movements in the lower Atrato. Historically, regional organisations chiefly demanded more adequate state attention and social policies as a response to the incursion of logging companies in the 1980s.[55] The resistance has also recently addressed violence, land grabbing, and the introduction of monocultures.

In the first place, Law 70 produced a change in the character and language of social organisations. Before Law 70, organisations such as the OCABA (Peasant Organisation of Lower Atrato) emerged from the Community Action Boards and the ACAMURI (Peasant Association of Riosucio Municipality). Law 70 created a shift in the identification and discourse of local populations. Struggles over the defence of forests were now subsumed under the notion of "territory". The peasant identity was incorporated into that of "black communities". Despite the partial victory that Law 70 embodied for the Afro-descendant rural populations, uncovering issues of discrimination and exclusion in urban populations,[56] one of its outcomes was the proliferation of social organisations in the rural Pacific, creating for the first time in history legal opportunities for national social movements to sustain their claims.[57] It also made social organisations established in the 1980s more visible.

Second, Law 70 gave the communities the possibility to achieve collective titling of the territories that they have inhabited for decades and centuries. In the lower Atrato, the populations were forcibly displaced before the achievement of collective titling between 1996 and 1997.[58] Even amid the violence, and as a defence strategy to preserve their rights, the communities applied for collective titling.[59] In the lower Atrato and in the Darien region, more than 720

54 Interview (J. Baquero), IIAP, October 2011 (all names of persons interviewed in Colombia are withheld for security reasons). Interviews translated from Spanish by J. Baquero.

55 Restrepo, note 51 above.

56 See Carlos Rosero, "Intervention", [Foro Regional IIAP. El Chocó Biogeográfico. 12 años después de la Ley 70 de 1993], IIAP 2005.

57 See Carlos Efren Agudelo, "Multiculturalismo en Colombia: política, inclusión y exclusión de poblaciones negras", p. 133, available at: http://bit.ly/YbV2A0, last accessed 14 March 2013.

58 It is relevant to remark that since these first episodes there have been several cases of forced displacement.

59 Interview (J. Baquero), inhabitant of Curbaradó, 2012.

thousand hectares were collectively titled for approximately 24 communities or community councils between 1999 and 2001.[60] The communities which benefited included the Afro-descendants who have been living in the region for several decades, and the *mestizo* peasants that arrived in the 1970s, having been displaced from the Sinú region by cattle ranchers. Although *mestizos* are not "black", as stated by Law 70, they have lived in harmony with the black communities. Thus, their collective rights have also been recognised, thanks to their productive practices and methods of land-use. In accordance with Law 70, they are "good faith occupants".

Third, many people have returned to their lands and have been resisting the actions of the paramilitaries and the agro-entrepreneurs. The populations created refugee areas such as the Humanitarian Zones, which are "fenced estates" that aim to provide security for the populations, upholding the International Humanitarian Law (IHL).[61] The local communities and NGOs cite the IHL in order to explain and point out that the Humanitarian and Biodiversity Zones are visibly marked with notices and warnings at their entrances, communicating to the armed actors the communities' decision to be neutral in the armed conflict. Thus, they avoid allying or collaborating with any of the armed groups, and demand that the armed actors abstain from fighting in these demarcated areas.[62]

After the international protest of several communities and NGOs, in 2003 the Inter-American Court of Human Rights granted the use of precautionary measures[63] to protect several threatened local leaders. Following Article 63.2 of the Inter-American Convention of Human Rights, the Inter-American Commission of Human Rights wrote on 5 March 2003 to the Inter-American Court of Human Rights, asking it to enact precautionary measures to protect the communities of *Curvaradó* and *Jiguamiandó*. Since 2003, the Inter-American Court of Human Rights has enacted several Resolutions. On 6 March 2003, the Court requested the state to adopt precautionary measures to protect the community councils and displaced families returning to the Humanitarian Zones. According to its requests, the Court:

> "i) Requires the State of Colombia to adopt, without delay, the measures necessary to protect the life and personal integrity of all members of the communities comprising the Community Council and families of Jiguamiando and Curbaradó; ii) Requires

60 Calculations made by Baquero (2012).

61 The International Humanitarian Law (IHL) is defined as a "set of rules, established by treaties or custom, applicable in international and non-international armed conflicts, which are also known as the 'law of armed conflicts' or the 'law of war'. Its goal is the reduction of the suffering of victims and the protection of essential resources for their survival, through limiting the adversaries' choice of war methods and means" (Peace Brigades International, 2011: 7).

62 Interview (J. Baquero) member of the CIJP (2012).

63 See Diego Rodríguez-Pinzón, "Precautionary Measures of the Inter-American Commission on Human Rights: Legal Status and Importance", (2013) 20 *Human Rights Brief*, pp. 13–18.

> the State of Colombia to investigate the events that led to the adoption of these precautionary measures, in order to identify those responsible and impose the corresponding sanctions; iii) Requires the State of Colombia to adopt the necessary measures to ensure that the beneficiaries of these measures can continue living in their place of residence, without any coercion or threat."[64]

Furthermore, several resolutions were enacted to re-new those measures, some of them requesting the state of Colombia to maintain the precautionary measures in *Curbaradó* and *Jiguamiandó*: Resolution of 17 November 2004, Resolution of 15 March 2005, Resolution of 7 February 2006, Resolution of 5 February 2008, Resolution of 30 August 2010, and Resolution of 25 November 2011. Also, the Resolution of 17 November 2009 established that the state should determine the number of protected families.

These precautionary measures have been an important instrument for the protection of these communities. Nevertheless, this instrument is not infallible, and many risks remain in the region for many sectors of the communities that are not protected by these adoptions: "not all the people in the region are covered by those measures, and some of them have been murdered, including leaders that claim lands; several others have been displaced, or remain displaced".[65]

In July 2013, the Inter-American Court eliminated the precautionary measures in *Curbaradó* and *Jiguamiandó*.[66] In the Court's eyes, the country's government has made advances to ensure the rights of the local populations. However, the communities and NGOs have complained that the risks of being displaced or killed for demanding their rights still remain, due to the presence of paramilitaries, other armed actors, and multiple economic interests. The actions of INCODER, the state agency responsible for lands and agriculture policies in Colombia, the Constitutional Court, and the legal system have made further advances. The Inter-American Court has also mentioned that, if necessary, precautionary measures *can* be implemented again.[67]

At the same time, other legal processes have been mediated by the Inter-Ecclesial Commission of Justice and Peace NGO (CIJP), demanding, before the Inter-American Court of Human Rights, that investigations be carried out for the murder of Marino López[68] and for the Genesis Operation mentioned above.

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64 Inter-American Commission of Human Rights, Resolution of 6 March 2003, p. 8.

65 See Inter-Ecclesial Commission of Justice and Peace, "Solicitud de precisión en el caso Curbaradó y Jiguamiandó", (2013), 3 July 2013.

66 *El Tiempo*, "Colombia gana 'round' en la Corte Interamericana", Bogotá, 2 July 2013.

67 See note 65 above.

68 This murder was particularly cruel. The paramilitaries cut his body into pieces and played football with his head in front of the population. The Marino López´s case was reviewed by the Inter-American Commission and by Inter-American Court on Human Rights. See the Inter-American Commission of Human Rights, *Informe No 64/111 Caso 12.573 Fondo, Marino López y Otros (Operación Génesis), Colombia* (2011), Washington DC, March, 2011.

Biodiversity Zones were also created to procure environmental protection and stable food supplies, and have also been physically accompanied by the CIJP and Peace Brigades International (PBI) NGOs. The communities have claimed their rights given by Law 70, carrying out actions, such as cutting down oil palm trees, to implement their rights *de facto*. Various fields formerly cropped with oil palm now look like a sort of "palm cemetery".[69] In addition, several hectares of oil palm plantations in the Lower Atrato were affected by Butt Rot Disease (BRD). Even so, the entrepreneurs continue their own "counter-resistance" by cropping new products such as the cassava and plantains, as new proposals for cropping oil palm continue to arrive in the area.

Fourth, the NGOs have also begun criminal cases against the companies that cropped oil palm in the area. An attorney from CIJP who represented the civilian parties in proceedings against the agro-entrepreneurs pointed out the fact that investigations initially were focused on environmental harm. Article 19 of Law 70 stated that productive practices developed in these territories must guarantee the subsistence of populations instead of giving priority to agro-industrial activities. Furthermore, the introduction of agro-industrial projects in the lower Atrato is illegal, because Article 15 of Law 70 prohibits the purchase of land owned by the collective territories by external parties.[70] Accordingly, the Colombian Institute for Rural Development recognised the illegality of the plantations.[71]

INCODER stated that 93 per cent of areas with oil palm belonged to the collective territories of the black communities in *Curbaradó* and *Jiguamiandó*. Some companies showed purchasing contracts that they apparently signed with local people. Even so, the said contracts were illegal because they infringed Article 15 of Law 70. The companies tried to legalise their land-grabbing through several mechanisms. One of them was the enactment of false property titles, obtained from corrupt notaries; another was the enlargement of some estates that they bought from people that had legal titles before Law 70. Oil palm companies and cattle ranchers also bought private properties that were issued by the system of titling uncultivated land (*adjudicación de baldíos*) before the introduction of Law 70. These properties were excluded from the collective titling.

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69 Interview (J. Baquero), NGO volunteer working in the region (2012).

70 Article 15 states that 'the occupation by parties external to the black communities of land issued as collective territories would not give these external parties the right to obtain titles or the recognition of improvements applied to the lands, and thus, they would be considered as "bad faith occupants"'. See INCODER, *Los cultivos de palma de aceite en los territorios colectivos de las comunidades negras de los ríos Curbaradó y Jiguamiandó, en el departamento del Chocó* (2005), Bogotá. The Law also states that areas could be sold, as a consequence of family dissolution, or depending on the procedures established by the communitarian councils. Privilege to sell the lands would be given to members of the same community or ethnic group.

71 INCODER 2005: 17. See note 70 above, at 17.

The courts have sided with the communities, showing that even part of the Colombian state, the judicial system, considers the entrepreneurs to have obtained their lands illegally and by force. These legal processes started after the accusations made by the local communities and the NGOs against oil palm companies. After the investigations performed in 2005, INCODER enacted a Resolution "recommending the suspension of crops and the return of 14,881 hectares, mostly cultivated with African palm, by 'bad-faith occupiers'".[72] By 2007, "a total of 23 entrepreneurs were charged with the crimes of land theft, forgery of public and private documents, harm to natural resources, the invasion of areas of ecological importance, and forced displacement".[73] Two agro-entrepreneurs of Antioquia (of the Pamadó S.A. Company) were recently sentenced to 10 years and five months of prison "for the crimes of aggravated conspiracy, forced displacement, and land grabs".[74] They were condemned for allying with paramilitaries in order to expand industrial palm crops in territories of the black communities. In these legal struggles, the proceedings have been mainly based upon national laws and regulations.[75]

Several hectares still remain under dispute. The government has used the cases of *Curbaradó* and *Jiguamiandó* as a model for restitution policies in Colombia. However, the government has been more focused on the "legal restitution" than in the real "material restitution". This involves the recovery and re-adaptation (*saneamiento)* of territories and the guarantee of security for peasants who return. The government initially planned to return the lands in May 2010 by giving the territory to a false legal representative who supported the interests of the agro-entrepreneurs. The Constitutional Court stopped the restitution by publishing the Decision of 18 May 2010, which forced the state to refine the process by conducting a population census within and outside the region, which would define the General Assembly that elects the Legal Representative of the community council. Currently, the process is still at a halt while the Constitutional Court defines the constitutional character of the census concluded in 2012. In addition, conflicts concerning the rights of the *mestizos* within the territories have arisen, such as the right to vote and to be elected as members of the Assembly. Nevertheless, the division has been created "from above" by entrepreneurs that "support" a sector of the Afro-descendants in the defence of their interests in the region.[76] Today the enterprises still remain in the

72 *El Tiempo*, "Es una investigación amparada en falsedades, dicen palmicultores", Bogotá, 22 December 2007.

73 Ibid.

74 *Noticias Uno*, "Empresarios de palma condenados por vínculos con paramilitares", 4 August 2013.

75 In a personal communication (Baquero, 2013) the CIJP was asked if they also invoked the international Law, but they did not respond. They emphasised the use of national, mainly environmental law, as the main strategy in legal actions against the companies.

76 Interview (J. Baquero), Lands Restitution Programme, Bogotá, 2012.

area, controlling big extensions of territories by bringing foreign workers in to occupy these lands, or by putting up enclosures and introducing livestock.

V. CONCLUSIONS

The struggles for land discussed in this contribution have been developed within a context characterised by improvements in the laws and policies designed to protect the ethnic and cultural minorities in Brazil and Colombia, following the multicultural turn[77] in international law. The studied cases of Brazil and Colombia reveal the interplay of resorting to diverse legal regimes in order to protect minority rights against processes of land grabbing. In both countries, there has been articulation of the legal instruments of ILO Convention 169 on land rights, the International Humanitarian Law, and cases presented before the Inter-American Court of Human Rights. These legal claims are part of the struggles of local communities, NGOs, activists, and some sectors of the government, to protect the rights of the Afro-descendant populations.

The contribution discussed to a greater extent the cases of Afro-descendent communities located in areas disputed by agri-industrial companies interested in expanding palm plantations for biodiesel production. In Brazil, the Constitution of 1988, as well as further legislation, has created the possibility to assign legal titles for the lands occupied by these communities. In the case of Colombia, the most important legal instrument has been Law 70 of 1993, which also prescribes the regularisation of lands occupied by the Afro-descendent communities.

The expansion of minority rights in the cases presented here does not have the impact described by liberal multiculturalism, namely, the preservation of the pre-existing cultural identities of minorities, so that the individual members of these minorities can develop a sense of personal autonomy within a culturally intact and coherent context. What we observe in north-east region of Pará in Brazil and in the Colombian lower Atrato, is a process of ethnic re-identification following the legal and political possibilities offered by new minority rights: groups previously engaged in struggles for land such as poor rural workers have re-articulated their interests as Afro-descendants. By doing so, they often differentiate themselves from other peasants who actually share similar life-forms and strategic interests with them, as in the case of the *mestizo* communities of the lower Atrato. Classificatory categories introduced by law and by policies have generated new loyalties and identifications, as suggested by Chatterjee in the passage highlighted in the first section of this chapter.

77 See Diana Bocarejo, "Legal Typologies and Topologies: The Construction of Indigenous Alterity and its Spatialization within the Colombian Constitutional Court", (2014) 39 *Law and Social Inquiry*, pp. 334–360, and idem, note 11 above.

Nevertheless, what the studied cases show is that the situation of the communities covered by the legal shift is more complex than the mere domestication and governmentalisation of differences as claimed by subaltern studies such as Chatterjee's. In Colombia as well as in Brazil, new minority rights have broadly re-configured local struggles for land. It is clear that the adoption of new rights does not abolish the existing power asymmetries. However, these rights re-frame the conditions under which struggles for land are conducted and negotiated. We can schematically confirm that the cases studied provided examples for all three types of impact produced by rights over power relations, as highlighted in the first section of this chapter. These are:

a) Minority rights serve to expand the discursive and institutional power of Afro-descendent communities and of their political allies, to the extent that claims for land, or better yet, cultural territories in both countries are now supported by the law and by specific policies. However, the impact of new rights over social power – *i.e.*, access to land – of Afro-descendants varies according to country and political circumstances. In Brazil, after a more favourable period during the 90s, when a considerable number of titles for the *Quilombo* communities were issued, we have observed a recent discursive and political counteroffensive of agri-industrial groups interested in using lands occupied by *Quilombo*s. These actors try to reduce the discursive power of Afro-descendant communities, accusing them of falsifying their ancestry and of applying environmentally hazardous production techniques. These opponents also dispute the institutional power of the *Quilombolas* by working at parliamentary and governmental level to change legislations and policies that protect minorities. In Colombia, titling processes have been carried out since the middle of the 1990s, and, in the lower Atrato, took place amid violence. However, representatives of agribusiness have not yet disputed the discursive and institutional power of the Afro-descendent communities, as observed in the Brazilian case. Their preferred methods are violence and the co-optation of local leaders.
b) Minority rights functioned as a relay in the Colombian case, where oil palm farmers falsified titles to expropriate the Afro-descendant communities illegally. As shown above, the abuse of power led to a blockade in the power circuit: the courts condemned the farmers and confirmed the rights of the Afro-descendant to their territories.
c) In the case of extremely asymmetric power relations, minority rights cannot be implemented even if they exist formally. In the Colombian case, the application of minority rights had to be defended through the articulation of several international law regimes, such as ILO Convention 169, International Humanitarian Law, and the cases presented before the Inter-American Court of Human Rights. This was observed in the lower Atrato during the military

and paramilitary offensives between 1996 and 2004. Despite the legal protection guaranteed by Law 70, the local population was forced to leave their territories.

d) The cases studied in Brazil and Colombia show differing patterns regarding the interplay between national and international law.

What is particular about the case of the Brazilian Amazon region is that no such interplay takes place, due to the lack of political space and the lack of will to enforce the territorial rights of traditional communities.

In the case of the Colombian Lower Atrato region, on the other hand, diverse legal frameworks linked to national and international law are combined within the broader framework of transnational social rights. Communities and NGOs mainly used the expansion of land rights, introduced through the recognition of cultural rights that benefited the Afro-descendants and the *mestizos*, to demand the communities' rights to recover their land, and to avoid the introduction of agribusiness and infrastructure projects without their previous freely informed, and prior consent as stated by the ILO Convention 169 and the territorial rights. In this way, the communities defend their "lives, beliefs, institutions, and spiritual wellbeing" against the introduction of development projects.

The use of international law goes beyond the right to previous consent. The case before the Inter-American Court for the Genesis Operation in Colombia is another example of the use of the international law by local communities and NGOs to claim truth, justice, and reparation. Bearing in mind that the Colombian State ratified the American Convention, the communities demanded the investigation of the state's responsibility in forced displacement and the murders of local people.

In such cases, the Commission has remarked that the affected groups have been the Afro-descendants to whom the Colombian state legally gave collective territorial rights, and, at the same time, ratified the American Convention at international level. However, notwithstanding the potential positive effects of the Commission's intervention, new challenges emerge from the local inter-ethnic conflicts, due to the various interpretations of the Multicultural Law. Some local groups have stated that only black people have land rights, even though the *mestizos* have also inhabited and owned these lands. To date, the main mediator has been the Constitutional Court, which enacted the legislation defending the rights of the *mestizos* to the territory in question, despite the fact that the Law (national and international) addresses the black people.[78]

78 See Constitutional Court of Colombia (2013), Auto 096 of 2013.