

## **PROPERTY RESTITUTION IN GUATEMALA: A TRANSNATIONAL DILEMMA**

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The evolution of Guatemala's legal system is an intriguing yet complex process of integration of a plurality of legal orders: international legal instruments, national law, and indigenous customary norms.<sup>2</sup> Norms created at the international level are disseminated on the national level, thereby increasing societal demands and expectations which place pressure on a system which is often delayed in providing response due to counter pressure by status-quo minded elites.<sup>3</sup> In essence, Guatemala is a quintessential "transnational state". It is host to a variety of international organizations and actors and over 700 NGOs seeking to implement international human rights on the national level. In addition, there is a growing movement of indigenous groups claiming recognition of their customary norms that partially base their legitimacy on the standards upheld in the international arena. The question of property restitution provides an intriguing case to examine the interplay of transnational demands and responses. Although some groups such as refugees may be empowered as a result of support by the international community in organization and presentation of demands, others such as internally displaced persons or non-displaced persons remain voiceless during the transition to peace. It has been asserted that the return of the Guatemalan refugees itself represented a "trans-or post-national space" due to the coordination of international agencies and NGOs to diminish State control of the process.<sup>4</sup> The success of returning refugees to attain land has been deemed to be

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<sup>2</sup> See Rachel Sieder, "Repensando la democratización y la ciudadanía: el pluralismo legal y la reforma institucional en Guatemala", in CLAUDIA DARY, ED., *LA CONSTRUCCION DE LA NACION Y LA REPRESENTACION CIUDADANA* 341,343 (FLA SCO 1998).

<sup>3</sup> The legal system's incoherence may be attributed to its lack of autonomy from malfunctioning economic and political systems seeking to uphold a neo-feudal social structure in which "(h)e who controls the land, controls the power, and he who controls the power, controls the land." THOMAS & MARJORIE MELVILLE, *TIERRA Y PODER EN GUATEMALA* 18 (Colección Seis 1982).

<sup>4</sup> Finn Stepputat, "Repatriation and Everyday Forms of State Formation in Guatemala", in BLACK & KHOSER, *THE END OF THE REFUGEE CYCLE?* 210, 213 (Berghahn Books 1999).

directly linked to the pressure placed on their behalf by international actors.<sup>5</sup> In total, 41,670 refugees attained restitution or compensation of alternative lands (while the landless received credits) via FORELAP.<sup>6</sup> A total of 36 *fincas* (measuring 1,250 *caballerias*) were provided. Approximately half of the refugees had repatriated collectively, of which an additional half received restitution of their original land or alternative land, while the rest purchased new land.<sup>7</sup> The passage of time reduced the enthusiasm of returned refugees due to questions of viability of the return in the absence of full integration. Lack of follow-up for attaining socio-economic support, legal titles, technical assistance, infrastructure, potable water, electricity, access roads, or agrarian credits combined with ongoing boundary disputes with neighbors to create a situation of continuous uncertainty.<sup>8</sup> Housing for refugees often was nothing more than shantytown materials. They were crowded onto lands that proved insufficient to provide sustenance for all.<sup>9</sup> These territories often required farming, forestry, or ranching skills not retained by the populace.<sup>10</sup> Between 1999 and 2000, at least 500 former refugee families returned to Mexico declaring themselves to be victims of “economic violence” due to problems regarding access to

<sup>5</sup> Paula Worby, “Security and Dignity: Land Access and Guatemala’s Returned Refugees” in REFUGE- Canada’s Periodical on Refugee Issues: Special Issue on Refugee Return, Vol. 19, No. 3 pp.17-24 (2001)

<sup>6</sup> The right to return of refugees has been supported by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolution 1998/26, “Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons”, adopted 26 August 1998: “Reaffirms the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish.” See also UNHCR EXCOM Conclusion No. 18 (XXXI)-1980, “Voluntary Repatriation” (A/AC.96/588), para.48 (3) and UNHCR EXCOM Conclusion No. 40 (XXXVI)-1985, “Voluntary Repatriation” (A/AC.96/673), para. 115 (5).

<sup>7</sup> Brian Egan points out the irony of this process, as General Romeo Lucas Garcia, a key leader of the counterinsurgency attacks who obtained over 32,000 hectares, sold three estates to a group of returnees in 1994. Brian Egan, “‘Somos de la Tierra’: Land and the Guatemalan Refugee Return” in NORTH & SIMMONS, id. At 95, 105.

<sup>8</sup> See Worby; supra footnote 5, and RICHARD BLACK & KHALID KOSER, THE END OF THE REFUGEE CYCLE? REFUGEE REPATRIATION & RECONSTRUCTION (Berghahn Books 1999).

<sup>9</sup> The initial large-scale return pursuant to the CAPP Accord of 1993 brought approximately 25,000 refugees to Victoria 20 de Enero in the Ixcán. This community suffered attacks, lacked infrastructure, services, and access roads, as well as basic food and health needs. Fear of attacks by neighboring communities resistant to refugee return as well as military actors impeded further large-scale returns. In 1995, eleven peasants were shot dead and over thirty wounded by soldiers in Xaman as they were preparing a celebration of the anniversary of their return. Bureaucratic delays by the various land agencies prompted further criticism as well as accusations of misuse of donor funds by the State and other forms of corruption (such accusations are ongoing, e.g. FONAPAZ and IOM funds, FOGUAVI, INTA).

<sup>10</sup> LIAM MAHONY, RISKING RETURN: NGOS IN THE GUATEMALAN REFUGEE REPATRIATION, 57 (Life & Peace Institute 1999).

land/titles, social and economic integration, access to basic services, development support, and conflicts with neighbors. Some families are being allowed to attain legal migrant status, while others may be deported back to Guatemala. In this author's opinion, such economic violence may be deemed persecution, given that the State is denying them the basic right to subsistence (including food and shelter).<sup>11</sup> As noted by one of CONAVIGUA's representatives, "We are not being killed by bullets, we are being starved to death."

Ironically, UNHCR announced the funding of an infrastructure and credit program for the 12,367 million refugees who opted to remain in Mexico. It is hoped that news of this aid will not result in a false pull factor for other refugee who are losing hope in Guatemala. A point of concern is that CEAR and UNHCR shut their offices in Guatemala in spite of the fact that full reintegration of displaced persons has yet to be accomplished.<sup>12</sup>

Resistance by the Chamber of Agriculture and the Army limited places of return and lack of reintegration support reduced the viability of the return in the long term. Although organized displaced persons, such as refugees and CPRs, received restitution or compensation dispersed IDPs were largely excluded from such programs and remain limited in their ability to place demands on the State.<sup>13</sup> The timeline for implementation of the Peace Accords has been extended to 2004, yet the majority of IDPs actively seeking land from the government will be directed to apply for land credits to purchase new land rather than aspire to receive restitution of lost property. The extent of success of the span of "transnational action" to fundamentally empower marginalized groups within the society to effectively pursue demands within the State structure has been very limited. Five years after the Peace Accords, government and non-

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<sup>11</sup> See Animesh Ghoshal & Thomas M. Crowley, "Refugees and Immigrants: A Human Rights Dilemma", HUMAN RIGHTS QUARTERLY, Vol. 5 (3) 327, 329 (1983) citing UDHR, Art. 23, CESC, Art. 7, and Atle Grahl-Madsen, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, vol. 1, 201-9 (A.W. Sijthoff 1966) Additional conflicts arise from the fact that the location of return is located in ecologically fragile areas.

<sup>12</sup> The EU is financing some reintegration programs in the North, Southern Coast, and Southwest for returnees in Guatemala, focusing on economic development by way of infrastructure, credits, micro-enterprise assistance, education, agrarian support, and community organization.

<sup>13</sup> CPRs Sierra & Peten received 134 *caballerias* of land, animals, agricultural machinery, and seed with international support via FONAPAZ. CPR Ixcán attained land via the Church and the international community.

governmental institutions remain extremely weak and the notion of an active civil society is almost non-existent. The international community has essentially lowered its expectations of transformations in face of significant resistance by powerful groups, e.g. large landowners, military officers, etc. which place pressure on the State not to meet its promises under the Peace Accords or its international obligations.<sup>14</sup> The State was accused of providing only partial remedy to the problem of forced migration.

The lack of enforcement mechanisms on the national level limits respect for socio-economic rights.<sup>15</sup> In turn, the international community was deemed guilty of omission to act in this arena, first due to failure to pursue full inclusion of dispersed IDPs within restitution and return programs on account of State pressure not to open this Pandora's box, and second due to the emergence of donor fatigue where some international actors were eager to declare the return a success prior to verification of the its durability.<sup>16</sup> A report on internal displacement in the Americas reveals the incongruity between the international perspective and the reality on the ground: It claims "With the reestablishment of peace in Central America, no more than a few thousand remain displaced there" while at the same time conceding that the Guatemalan

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<sup>14</sup> Resources accumulated via tax collection have actually decreased in recent years, rendering funding of programs vulnerable to cutbacks before effective implementation. Donors are frustrated with the elites for refusing to pay full taxes to the State, thereby minimizing the amount of national resources available for social programs, such as education and health care. They are doubly confounded by the State's own decision to give social programs a low priority in the distribution of resources, instead depending on the Donors to fund such areas. In 2001, the American Ambassador to Guatemala stated clearly that such action was causing Donors to question the validity of their financing programs. Guatemala invests less than 2% of its Gross National Product in education.

<sup>15</sup> There is a strong link between the original political impetus for flight and current socio-economic impulses. In terms of social inequality, Guatemala ranks second to Haiti as worst levels of human development. The Gini index calculated at .55, one of the highest levels of inequality in the world. Poverty levels in Guatemala are high: 57% of the population is considered poor (75.6% in rural areas), while 27% is extremely poor (39.9% in rural areas). Over half of the economically active population has informal jobs. High fertility rates (an average of 6.2 children in the rural areas) provoke land fragmentation, which in turn results in exhaustion of soils, deforestation of ecologically fragile areas (e.g. the Peten), as well as migration. Migrants to the Northern region of the country in search of land ironically enter the zone with the highest level of social exclusion. See UNDP, GUATEMALA: LA FUERZA INCLUYENTE DEL DESAROLLO HUMANO (<http://www.pnud.org.gt> 2000).

<sup>16</sup> MINUGUA was criticized; indeed it even criticized itself, for failing to address socio-economic concerns, in part due to a lack of methodology. Recently, it has attempted to remedy this deficiency by elaborating reports on land issues and other socio-economic concerns, unfortunately its mandate runs out in 2003. HABITAT formulated a Housing Rights Barometer that may be of use to MINUGUA. See e.g. MINUGUA reports on "Situacion de los compromisos relativos a la tierra en los acuerdos de paz" and "Los Conflictos en Guatemala: un reto para la sociedad y el estado" (February 2001).

government failed to implement its promises regarding provision of land to the displaced.<sup>17</sup> In this author's opinion, it is incredible that the dire straits affecting the internally displaced population calculated to total ¼ million in 1998 in Guatemala alone may have so radically changed in the absence of any significant government program to attend to their return/reintegration and restitution needs.<sup>18</sup> Formal adoption of Peace Accords should not by any means be interpreted as a guarantee of solution to internal displacement. Guatemala lacks absorption capacity for its IDPs (and even some argue for its returned refugees as well) due to the absence of a land distribution program or provision of services/credits and infrastructure necessary for survival in rural areas. Those who leave rural areas for the cities will find little opportunity for improvement; indeed marginalized existence in the swelling shantytowns surrounding the cities is hardly a conclusion that will lead to the re-attainment of human dignity.<sup>19</sup> An equally disturbing survival alternative is the formation a floating body of seasonal laborers (curiously equivalent to total ¼ million people as well), subject to severe exploitation and rootlessness. It is perhaps no coincidence that the majority of these laborers originate from the Quiche area that underwent primary repression during the war.<sup>20</sup> Others seek land in the North, occupying national parks and engaging in deforestation, or migrate abroad to Mexico and the US.

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<sup>17</sup> Roberta Cohen, Francis M. Deng & Gimena Sanchez Garzoli, *Internal Displacement in the Americas: Some Distinctive Features*, The Brookings-CUNY Project on Internal Displacement (May 2001).

<sup>18</sup> The United Nations Population Fund, the National Commission for Attention to Repatriates, Refugees, and Displaced Persons, and the Technical Commission for the Implementation of the Accord on Resettlement of Persons Uprooted by the Armed Conflict conducted a census "La poblacion desarraigada en Guatemala: Cifras actualizadas y situacion socioeconomica" (May 1997) which calculated dispersed IDPs to total 242,386 persons. Dispersed IDPs were also excluded from CIREFCA and PRODERE reintegration programs in part due to political reasons. See UNDP/UNHCR, *CIREFCA: An Opportunity and Challenge for Inter-Agency Cooperation*, 11 (May 1995).

<sup>19</sup> See also Gisella Gellert, "Migration and the Displaced in Guatemala City in the Context of a Flawed National Transformation", in NORTH & SIMMONS, 112, 113: "... (L)arge numbers of Maya and other peasants moved to Guatemala City and secondary urban centers in an effort to escape rural violence and extreme poverty. The precarious situation of these displaced and culturally uprooted people in the urban areas has been largely ignored. . . . The situation of rural peoples who were displaced and find themselves in Guatemala City and other urban centers is every bit as bad as and, in some instances, perhaps even worse than that of returning refugees and others in rural areas. Moreover . . . the problems of displaced and poor migrants in the cities have not been recognized although they too are victims of the armed struggles and the related collapse of rural communities. In fact, the displaced people in the cities are almost invisible. They struggle to survive under circumstances in which they remain unnamed, marginal and misunderstood, in the peace accords and other policy documents alike."

## **Historical Background of Displacement & Dispossession**

Internal displacement in Guatemala has been continually ongoing since the colonial epoch. The liberal reforms of the 1870's resulted in the expropriation of indigenous lands and forced eviction that has yet to cease over a century later.<sup>21</sup> Indigenous lands were nationalized and/or sold off to the coffee exporters. Peasants were forced to farm small parcels in the highlands (e.g. Quiche) while providing seasonal labor for the coffee plantations in the lowlands. These people formed seasonal labour needed for the expanding export crop plantations. Debt peonage evolved into a vagrancy law (1934) that required landless to work for others at least 150 days per year. Revocation of this law occurred in 1945, and in 1952 Arbenz enacted the Law on Agrarian Reform that distributed 10% of private lands and 280,000 national lands to 138,000 families. A military coup supported by the CIA and the United Fruit Company commenced a 36-year civil war that decimated the countryside. The epoch of military rule brought about a counter reform, in which peasants in the zone between Izabal and Ixcán were evicted and large tracts of land were distributed to military officials, politicians, and other elites. Scorched earth tactics resulted in the deaths of 200,000 people, destruction of 440 indigenous villages, internal displacement of 1 million persons, and external displacement of 151,000 refugees. New groups were brought in by the Army as part of a specific state policy to divide communities and break ethnic or other group identification. The Commission on Historical Clarification has characterized these actions as constituting ethnocide.

Displacement has and continues to occur as a result of multifarious causes: in the past causes were internal conflict and ethnocide, at present forced evictions, development-based evictions, and displacement due to natural disasters constitute the root of new migration. However, the failure to provide a permanent solution for the displacement linked to the civil war reveals that this continues to be a source of continuing concern. The Inter-American

<sup>20</sup> Quiche was the site of 344 massacres during the war.

Commission of Human Rights confirms that although the refugees and CPRs have been resettled, a substantial portion of dispersed internally displaced persons have not received attention.<sup>22</sup> Instead they remain poor, marginalized and anonymous. There has been no significant change in land distribution in the last three decades, in spite of the war and the Peace Accords.<sup>23</sup> Indeed, land conflicts submitted to the Presidential Office for Legal Assistance and Resolution of Land Conflicts (CONTIERRA) have increased from circa 300 in 1999 to a grand total of 1,103 in 2001.

Some observers have argued that IDPs are resettled in urban areas and do not wish to return to rural areas. In contrast, it would appear that many IDPs do not return due to fear of repression upon return and the fact that there is a state of economic repression in the rural areas that render return unfeasible. Many of the shantytown inhabitants actually engage in agricultural activity, thus belying the notion that they are no longer be interested in land restitution.<sup>24</sup> In spite of limited fertility, surrounding plots are invaded and cultivated in order to provide some degree of security of food.<sup>25</sup> If forced eviction was the root cause of migration, then until restitution of land of land is provided, IDPs will continue to be victimized.<sup>26</sup>

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<sup>21</sup> UNDP: GUATEMALA: LA FUERZA INCLUYENTE DEL DESAROLLO HUMANO (<http://www.pnud.org.gt> 2000).

<sup>22</sup> Comision Interamericana de Derechos Humanos, Quinto Informe Sobre la Situacion de los Derechos Humanos en Guatemala, (OEA/Ser.L/V/II.111 Doc. 21 rev. 6 abril 2001). It states that although the government promised to purchase 23 fincas for dispersed IDPs, it only purchased 4 fincas in 1999.

<sup>23</sup> It is estimated that 65% of land is held by 3% of agro-exporters and large landowners. Small farms make up only 11% of the total. Instead, land fragmentation on account of demographic pressures, exhaustion of land, deforestation and other types of environmental degradation are rising. UNDP estimates that the amount of families with direct access to land actually diminished in the past twenty years, from 61% to 49%. In the same period, the percentage of rural peasants working for others increased from 22% to 33%, the percentage of peasants renting land increased from 8% to 17%, and the landless increased from 22% to 33%.

<sup>24</sup> UNDP: GUATEMALA: LA FUERZA INCLUYENTE, see footnote 2, estimating that 40% of the economically active urban poor engage in agriculture activity.

<sup>25</sup> SANTIAGO BASTOS & MANUELA CAMUS, SOMBRAS DE UNA BATALLA , 84 (FLASCO 1994).

<sup>26</sup> In comparison, IDPs who flee to shantytowns in Colombia are given access to government land programs based on how recently they have been displaced. This is based on the erroneous assumption that with the passage of time IDPs will have somehow found permanent solutions to their plight, regardless of a lack of support from the government or international community. Instead of solving problems, hundreds of thousands are forced to live

### **The Peace Accords**

The Peace Accords were heralded as the starting point for a renewed social contract between the State and society. They are considered to be especially noteworthy because they extend beyond traditional realm of cease-fire arrangements and highlight the need to address the root causes of the conflict, such as racism, socio-economic inequity, and human rights abuses. However they do not carry the force of law, nor do they create legal rights. They also do not have a set time period for implementation. At present, international and national actors state that the peace accords remain stagnated. Both the Arzu and Portillo governments failed to pursue implementation of the accords, preferring instead to uphold the status quo. Others have stated the sheer breadth of the Accords themselves rendered implementation within a short time period to be impossible.

International actors were frustrated by the society's failure to vote in favor of constitutional reforms in 1999 which would have rendered legal weight to some of the guarantees in the Peace Accords. The abstention by the majority of the population clearly indicated a low level of confidence in state institutions and severe weakness of civil society. This in turn resulted in displeasure by international donors, further weakening the viability of the Peace Accords. It is likely that the Peace Accords will be abandoned in favor of a new program espousing similar guarantees. Although it is true that many have lost faith in the Accords, many peasants who were empowered by learning about their human rights and constitutional rights via dissemination by NGOs will be greatly disillusioned should the Peace Accords be declared void. The Accords provide new vocabulary, values, and information to the people. To declare these norms to be worthless may prove to be a symbolic loss for marginalized groups that felt that it articulated their own sense of worth.

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deprived of basic services and necessities in squalor with little hope for the future. Instead of being referred to as IDPs, they eventually become "disposable people", marginalized by both the state and the society.

One of the most important themes within the accords is the need for greater access to land.

The Agreement on Socioeconomic Aspects and the Agrarian Situation signed between the Guatemalan Government and the Guatemalan National Revolutionary Unity (6 May 1996),

Chapter III, addresses the agrarian tie to development:

*“The solution to the agrarian and rural development problems are essential and unavoidable to solve the situation faced by a majority of the population that lives in rural areas and that is the one most affected by poverty, extreme poverty, inequities, and the weakness of state institutions. The modification of the system for ownership and use of land must strive to include the rural population in the economic, social, and political development. Thus, the land will become-for those who till it- the basis for economic stability, the groundwork for their progressive social welfare, and guarantee their liberty and dignity. . .*

*The changes accepted by the parties will allow the country to effectively use its citizens’ capabilities, particularly the wealth of its Indian people’s traditions and cultures . . .It is essential that the state increase and reorient its efforts and resources toward the countryside; and to support an agrarian modernization in a sustained manner to achieve greater justice and efficiency.”*

The government committed itself to sponsor credit systems and mechanisms, marketing, agrarian legislation and legal protection, registry improvement, labor relations, technical aid and training, agrarian resources, and organization of the rural population. The absence of any reference to expropriation is a clear indication what agrarian reform is not intended to include. It addressed access to justice concerns by calling for the creation of “swift judicial or non-judicial procedures to solve lawsuits related to land and other natural resources” and “compensation mechanisms for farmers, peasants, and communities undergoing situations of extreme poverty have been or may have been dispossessed for reasons not attributed to them . . . or the municipalities, communities, or individuals whose properties may have been usurped, or adjudicated in an anomalous and unjustified manner through mechanisms involving abuse of authority. ” Regarding compensation, direct restitution procedures have yet to be adopted. The lack of espousal of a serious land redistribution policy thus far has rendered this Accord illegitimate in the eyes of the rural groups.

The Agreement on Resettlement of the Population Groups Uprooted by the Armed

Conflict (17 June 1994) specifically addressed the needs of refugees, returnees, and internally displaced persons.<sup>27</sup> The agreement calls for recognition of their right to voluntary, secure, dignified return to their place of origin or place of choice, with opportunities for full social, economic, and political integration. The uprooted are expected to participate in decision making of return and development. With respect to land rights, the Accord calls for a reversal of the INTA policy to declare land “voluntarily abandoned” and provide restitution and/or compensation. In addition, the State is to adopt a strategy for legalization and award of land titles.<sup>28</sup>

Indigenous People may refer to the Agreement on Identity and Rights of Indigenous Peoples. It calls for the elaboration of administrative and legislative mechanisms for award of title, protection, restitution, compensation, recognition and recovery of communal, collective, and individual tenure rights. However there is no indication whether restitution is to be made in kind or in monetary form, how restitution is to be established, e.g. oral evidence, colonial title,

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<sup>27</sup> The Agreement between the government and the Permanent Commissions of Guatemalan Refugees in Mexico of 8 October 1992 set forth an international juridical frame of reference which included *inter alia* the Universal Declaration of Human Rights, the CCPR, CIREFCA, Conclusions 18 & 40 of the Executive Committee of UNHCR, and Resolution 1991/5 of the UN Sub-Commission on Prevention of Discrimination of Minorities. It set forth that refugees would be able to freely elect the location for their residence, however in practice the refugees were pressured by the Army and the Chamber of Agriculture to accept less fertile lands. Another guarantee regarding the right of non-discrimination, including socio-economic rights, was rendered ineffective in practice. Refugees claiming provisional, full title ownership, or notarized to land were to have their rights verified by the National Institute for Agrarian Transformation (INTA). Many had lost their property records during the war and were dependent on the government to confirm their claims. Unfortunately, INTA suffered from widespread corruption and “lost” a significant number of files thereby inhibiting return. Problems arose from the fact that INTA had declared much of their lands to be abandoned and thus issued new titles to new communities had been brought in by the Army as upon their absence. Speculation rendered astronomical purchase prices, and rewarded large landowners for their coercive tactics during the war that had enabled them to amass large landholdings via displacement. Refugees whose lands were unoccupied reclaimed their possessions without problems. Those whose lands had been occupied by others had to wait for the government to sort out which community would keep the property and which would be resettled elsewhere. Of interest is that the agreement points out that should court action be required to resolve the conflict, the returnee could opt for resettlement elsewhere. Indeed, given the amount of occupations and double titling, many refugees chose resettlement rather than endure expensive, lengthy processing within a court system in which they had no faith. The current value of the lost property provided a discount for credits for new purchase. Landless refugees were offered credits for land purchase.

<sup>28</sup> The Letter of Understanding between the Government of Guatemala and UNHCR Relating to the Voluntary Repatriation of Guatemalan Refugees called for the government to allow permit landless refugees access to land and registration in like manner to other nationals. It also guaranteed the right to recovery and registry of land, or in the alternative compensation of land similar in quality and location to that previously owned or occupied (including registry) for those who were formerly land owners, claimed rights to land, or occupied land. Letter of Understanding between the Government of Guatemala and the Office of the United Nations High Commissioner for Refugees Relating to the Voluntary Repatriation of Guatemalan Refugees (13 November 1991).

etc., neither is there a date for validity of restitution claims. The State is expected to recognize indigenous rights to access to lands and resources to which they have historically depended on for their subsistence, (wood cutting, springs, etc.) or spiritual activities. The agreement calls for suspension of prescription terms that can result in forced eviction of indigenous people. The indigenous people are to participate in the use and administration of natural resources on their land. They should be consulted prior to exploitation of natural resources on their land and be granted compensation for losses. Supplementary titles must be suspended when addressing property claimed by indigenous people.<sup>29</sup>

Concern arose due to the lack of legally binding status of the Accords. Donors were afraid that upon a change in regime, much of the policies within the Accords would be abandoned. In order to change the character of these provisions, draft constitutional reforms were drawn up to transform the Peace Accords into law. Unfortunately, the reforms were rejected by referendum in 1999. In March 2001, MINUGUA declared the peace process, in particular the socio-economic guarantees, to be completely stagnated, querying its own mandate given that “it is difficult to verify something which is not happening.”<sup>30</sup>

In October 2000, a series of marches organized by indigenous and rural groups were held across the country in which demands were made for land distribution (taking into account indigenous norms), provision of title for housing in invaded property, implementation of ILO Convention Nr. 169, amendment of article 39 in the Constitution on private property, and respect for freedom of association. Additional concerns regarding the need for minimum wage, ongoing forced evictions, and misuse of donor funds by land agencies were also presented. The government was accused having ignored the Accord on Socio-Economic and Agrarian Situation and engaged in “agrarian repression”. A poll revealed that only 6% of Guatemalans considered the Peace

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<sup>29</sup> It is to promote the number courts to address land cases and provide expedited procedures for settlement. Agrarian law and indigenous norms is to be taught in the law schools. Legal aid is to be made available for land claims. Free translation is to be made available for legal matters. Indigenous communities are to receive information regarding land rights and legal mechanisms. Discrimination against women in this regard is to be eliminated.

<sup>30</sup> Statement by Juan Pablo Corlazzoli, MINUGUA spokesman, quoted by Alberto Ramirez, “Desplazados desean vivienda” in PRENSA LIBRE 30 March 2001.

Accords to be of continued importance.<sup>31</sup> Key problems include lack of financing for the land programs.<sup>32</sup> President Portillo wryly announced to a group of demonstrators that he did not even have dirt in his ears to distribute to the landless. In addition to large-scale organized protests taking place every year since the adoption of the Peace Accords, there are smaller demonstrations by single communities who travel to the capital together to place their demands (sometimes hitching rides, by bus, or even on foot). The vision of the undernourished children and adults willing to stand in front of the buildings for days on end, waiting for a response by the President, the Congress, or the various land/housing agencies is a heartbreaking testimony of the devastating effects of government inaction.<sup>33</sup> It is estimated that two-thirds of the rural population in Guatemala is food insecure, thus hunger is an ongoing problem. By 2001, the march had grown to include 50,000 peasants, all of whom linked the clamour for land to the right to food. The march was accompanied by invasions of farms which provoked immediate reaction by the Government. Although the peasants called for expropriation of land for distribution, the President noted that such action would only result in a return to violence. Instead, the President offered the following concessions:

- 1) *An additional Q20 million for the Land Fund*
- 2) *Implementation of the Law on Catastre*
- 3) *Creation of a Commission to discuss peasant demands, inter alia reorganization of the Land Fund, the creation of an expropriation program to distribute land to peasants, creation of an administrative Indigenous Institute & Institute of Indigenous Labor, and reform of the Labor Code*

The peasants responded that the creation of the commission was a mere stalling tactic; they would prefer the government to take actual measures. Dialogue is viewed as an instrument of repression rather than peace.

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<sup>31</sup> Poll conducted by Vox Ciudadana, quoted by Miguel Gonzalez Moraga, "FRG no priorizo la paz en su agenda", in PRENSA LIBRE, 29 December 2000.

<sup>32</sup> CNOC was exasperated with the stagnation of conflicts in CONTIERRA, 620 credit requests in the Land Fund, and 200 requests to issue titles for property in the Ministry of Agriculture. It is believed that there are over 600 land titles in dispute. The Land Fund claims to lack sufficient funding for the purchase of properties, stating it needs Q500 million. As a result of the protests, it received Q100 million to finance the purchase of farms for rural groups. The government established a high level commission to negotiate possible solutions between CNOC (National Coordinator of *Campesino* Organizations) and CACIF (Coordinating Committee of Agrarian, Commercial, Industrial and Financial Associations) to the demands, but by December it was declared a failure by CNOC due to its lack of mandate to make decisions or implement accords. The rural, indigenous, and human rights groups are facing a wave of repression in terms of threats, harassment, arrest orders, and even assassinations. The Land Fund claims to have resolved 357 cases while 411 are under investigation.

## Natural Disasters

The earthquake in 1976 left 500,000 people living in 400 precarious settlements within the capital. Unaided by the government, they built shacks and formed the shantytowns surrounding the capital. The Archbishop's Office in Guatemala fears that these settlements are at risk of destruction in the event of other natural disasters. Hurricane Mitch resulted in the evacuation of 100,000 persons, the destruction of many houses constructed along the banks of river and lakes or on steep ridges, and ensuing displacement of residents in the North, Northeast, and Eastern regions of the country.<sup>34</sup> The State claims to have returned 54,195 victims to their homes or alternative homes.<sup>35</sup> Because many victims were returned to their areas of origin they were unable to attain safety, as these areas retained a degree of risk. Volcano eruptions and forest fires provide additional fomentation of displacement in the country. Assistance from IOM, USAID, GTZ etc. was provided for housing and infrastructure needs after natural catastrophes. However delays in actual provision of housing resulted in homelessness for some peasants that lasted up to a year.

## Reparation Norms

The foundation for reparation is found within the Global Accord on Human Rights, Point 8, which notes that the Parties recognize that it is a humanitarian duty to provide reparation and/or assistance to the victims of human rights violations. It calls for such reparation/assistance to be provided by civil governmental programs that prioritize those most in need according to socio-economic criteria. The Accord on Historical Clarification, No. 145-96, Article 9, states that the State has to assist victims of human rights violations. The Law on National Reconciliation, Decree No. 145-96, Article 9, reiterates the humanitarian duty of the State to assist victims of

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<sup>33</sup> In July 2001, 250 peasants from Chahal, Alta Verapaz took over the Land Fund in protest to excessive delays responding to their applications. "Ocupan FONTIERRA" in PRENSA LIBRE 4 July 2001.

<sup>34</sup> UNDP, EL ROSTRO RURAL DEL DESAROLLO HUMANO (<http://www.pnud.org.gt> 1999).

<sup>35</sup> MIN UGUA, LA POLITICA DE VIVIENDA EN EL MARCO DE LOS ACUERDOS DE PAZ (August 2001)

human rights violations. For this purpose, it calls for coordination by the Peace Secretariat (SEPAZ) of civil and socio-economic programs in pursuit of the Commission on Historical Clarification (CEH) recommendations. SEPAZ has assistance projects within Alta Verapaz (SEPAZ support alone), Rabinal, Baja Verapaz (UNDP-UNOPS support), Chimaltenango and Quiche (USAID support). The program commenced in 1999 and is expected to conclude in 2003. Its primary objectives are to promote reconciliation and development in the communities which were most affected by human rights violations, poverty, and underdevelopment. It will include the funding of land credits but will not include direct individual restitution, as this is considered the responsibility of the state. The USAID program is intended to provide direct aid for 10,000 families (40,000 indirect) in 25 communities. The combined programs expect to reach 40 communities (16,000 direct beneficiaries and 64,000 indirect). Beneficiaries include communities, groups, and families that have suffered serious human rights violations, cases falling between 1962-1996, victims of extreme poverty and armed conflict, high level of social exclusion, and high level of indigenous population. Widows and orphans will be prioritized. The program is intended to provide a model for the Guatemalan Government's own National Program on Assistance/Reparation. However, the reparation program lacks sufficient funding, institutional capacity, and political will.

The Law on National Reconciliation that absolves responsibility for such acts may stymie persons seeking to pursue penal remedies from the courts for their eviction during the war.<sup>36</sup> It may be possible to argue that the harm is continuing should the occupation remain occupied. Ideally, efforts should be taken to have the courts declare this law invalid, given that it is itself an instrument of impunity that prevents victims from attaining reparation.<sup>37</sup>

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<sup>36</sup> The Inter-American Commission of Human Rights declared El Salvador's amnesty law, which denied both penal and civil remedies, to violate articles 25 and 8 of the American Convention.

<sup>37</sup> See Commission on Human Rights, Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report presented by Mr. Joinet, E/CN.4/Sub.2/1997/20/rev.1 (2 October 1997).

In spite of the fact that CONDEG lobbied for restitution for IDPs, the government flatly rejected this. As an alternative to restitution, legislation was adopted to provide credits for poor peasants seeking access to land. The Land Fund Law was subject to much drafting input by rural and indigenous organizations in its initial stages. However, during the final revisions, some groups complained about exclusion and lack of transparency within the Congress. The coincidence of a referendum to reform the Constitution in 1999 (including a provision to recognize indigenous law, which may have possibly assisted efforts towards recognition of historic title) deviated some attention and effort away from the Land Fund legislation. Protests regarding substantive and procedural irregularities in the drafting and adoption of the law were cancelled in order to focus on organizing support for the constitutional reforms. The referendum rejected the Constitutional reforms, and the Land Fund law seemed somewhat of an afterthought in comparison. When it was finally adopted the categories for assistance were such: 1) Peasants without land, 2) Peasants with insufficient land, and 3) Those living in poverty.<sup>38</sup> Uprooted persons, particularly those headed by widows or single women are to receive special priority.

### **Land Registry & Cadastre**

A draft Law on Registry & Cadastre Information is expected. Boundary disputes and conflicts due to double or triple titles over the same property, questionable validity of provisional or full titles issued by the now defunct INTA, or disagreement over actual location of properties are endemic. The goal is to establish certainty within the land market by registering properties, prevent evictions and boundary disputes, and establish control for pricing and sale of properties. It is estimated that 60% of properties do not coincide with the measurements recorded in the registry. The crucial test for the registry program is to ensure that the registry will not reward those who obtained the land via coercion or corruption. The measurement of landholdings

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<sup>38</sup> Decree No. 24-99, Art. 21. In addition, the Land Fund and CTEAR have a separate accord regarding land credits for IDPs (4 February 1998) that remains valid.

should be complemented by investigation of the history of the property, including oral testimony by concerned parties regarding customary claims.

The World Bank has identified four categories of land:

1. *Inscribed Land: Claimant has registered ownership*
2. *Formalized Land: Claimant has a document of possession, but has not registered it.*
3. *Documented Land: Claimant has a document of possession by a prior owner or another type of document relevant to the property*
4. *Informal Land: Claimant lacks title to the land, but holds it in possession*

CONTIERRA Peten has been given the mandate to resolve conflicts between various claimants and arrange for the sale/rent of land, issuance of usufruct rights, as well as resettlement of possessors. CONTIERRA is supposed to investigate the time of arrival of different possessors; however there does not appear to be any established criteria for the consideration of equity concerns or provision of alternative land in the event of expulsion as a result of registry determination.

### **Housing Policy**

Housing is an area of pressing concern in Guatemala. Although the State constructed 1,500 new homes, it is estimated that there is a shortage of 1.3-1.5 million homes, with an annual demand of 50,000 new homes. By 2000, the State had failed to meet the housing needs of widows, displaced persons, and demobilized soldiers. Interest rates are high, ranging from 17-24% while the number of institutions offering housing credits has decreased 65%.<sup>39</sup> There are over one million persons in the nation illegally occupying 365 properties in precarious zones.<sup>40</sup> In February 2001, President Portillo announced a new housing policy intended to focus on the needs of the rural and poorer populace. The State declared that it would invest Q200 million for the construction of housing. The NGO *Fundacion Guillermo Toriello* and FONAPAZ will distribute resources, half of which will be earmarked for uprooted families within the *Zona Paz*

<sup>39</sup> Miguel Gonzalez Moraga, "Demanda Habitacional: FOGUAVI sin dinero" in PRENSA LIBRE, 4 March 2001.

<sup>40</sup> They demand provision of title so that they can request provision of services and infrastructure, such as water and electricity. FONAPAZ itself was criticized for excessive delays in providing roofing materials for IDPS (over 250

(Peten, Alta & Baja Verapaz, Chimaltenango, Quiche, Solola, San Marcos, Huehuetenango, and Totonicapan).<sup>41</sup> Housing projects in Alta and Baja Verapaz alone are expected to benefit 30,000 families.<sup>42</sup> In addition, the National Federation of Housing Cooperatives (FENACOVI) has been granted Q100 million in order to provide housing for uprooted and demobilized persons.<sup>43</sup> One month after the declaration, four hundred displaced persons and demobilized soldiers representing 5,500 families protested the lack of implementation of housing promised to them in the Peace Accords and other official acts.<sup>44</sup> In August 2001, two thousand persons marched from the Supreme Court to the Public Ministry to demand cessation of forced eviction and the provision of housing for the poor.<sup>45</sup>

### Jurisprudence

Due to the fact that there is no specific procedural remedy for use in forced eviction cases, some peasants have turned to the right of *amparo*, a remedial mechanism against arbitrary actions by authorities that threaten to violate constitutional rights. *Amparos* originating from property disputes are usually based on violation of Article 39 on the right to private property, Article 67 on indigenous lands, and/or Article 12 on the right to defense of the individual and his rights (due process guarantee).<sup>46</sup> In practice, the majority of *amparo* cases are thrown out

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families) in Alta Verapaz. "The Dispossessed: Land: The Time Bomb" in ON THE RECORD, Vol. 11, Issue 7 (17 July 2000), ([Http://www.advocacynet.org](http://www.advocacynet.org)).

<sup>41</sup> Resources are derived from different governmental entities, including FOGUAVI, the Central American Economic Integration Bank, and the Inter-American Development Bank and estimated to total Q210 million.

<sup>42</sup> Byron Dardon, "Presentan la nueva política de vivienda" in PRENSA LIBRE, 9 March 2001.

<sup>43</sup> In spite of these policies, the Housing Fund (FOGUAVI) itself was left without sufficient funding to develop housing projects for low-income families a second year in a row. FOGUAVI's mandate is to provide housing credit assistance for families earning less than Q2, 000 per month. In practice, it was accused of corruption involving the developers and the banks, resulting a subsidy scheme for middle-income families that would render a profit.

<sup>44</sup> Alberto Ramirez, "Desplazados desean vivienda", in PRENSA LIBRE, 30 March 2001.

<sup>45</sup> Alberto Ramirez, "Quieren casas para los pobres", in PRENSA LIBRE, 10 August 2001.

<sup>46</sup> Article 12 of the Guatemalan Constitution: The defense of the individual and his rights are inviolable. No one can be sentenced or deprived of his rights without being summoned, heard, and tried in a legal procedure before a judge or a competent and pre-established court. No individual can be tried by special or secret courts or through proceedings that are not legally pre-established.

<sup>47</sup> Article 39: Private property is guaranteed as a right inherent in the individual. Any person can freely dispose of his property according to the law. The State guarantees the exercise of this right and will have to create those

without review on the merits. Problems arise from lawyers filing *amparos* without having exhausted ordinary remedies.<sup>47</sup> Although it may be that some lawyers may be unaware of the ordinary remedies, they may decide to pursue *amparos* given the emergency nature of evictions, the excessive delays of the lower courts, and the possible fear that the lower judges are not objective. Given the reluctance of the courts to recognize *amparo* claims within eviction settings, there is a need for a speedy, objective mechanism designed specifically for forced evictions. The Constitutional Court seems most concerned about minimizing abusive use of the *amparo* (which is often cited as a problem) and is reluctant to consider the substantive demands regarding abuse of power by state actors, in particular the judiciary.<sup>48</sup> This is worrisome given that it is the judiciary that issues eviction orders and places penalties for usurpation charges. Corruption and lack of knowledge of international standards regarding the rights of squatters and customary possessors result in arbitrary evictions that needs to be reviewed. In addition, it will not address private actors as the *Amparo* law does not grant it jurisdiction (with the exception of private law entities and organizations which have been recognized by the law, such as political

conditions that enable the owner to use and enjoy his property in such a way as to achieve individual progress and national development in the interest of all Guatemalans.

Article 67 of the Constitution: “The lands of the cooperatives, native communities, or any other form of communal possession or collective agrarian ownership, as well as the family heritage and popular housing, will enjoy the special protection of the State, credit assistance, and preferential technology which may guarantee their ownership and development in order to insure an improved quality of life to all inhabitants. The native communities and others which may own land that historically belongs to them and which they have traditionally administered in special form will maintain that system.”

<sup>47</sup> There are a variety of civil and criminal procedures that may be invoked in the event of forced eviction, depending on the actor at hand. Should the judiciary issue an eviction order, it may be challenged via *impugnation*, this procedure is also valid for actions against decrees or other laws determining boundaries, expropriating property, etc. One may also file a nullification action, Article 613 Civil Procedure Code or a *reposition* claim, as established in article 402 of the Criminal Procedure Code.

<sup>48</sup> See e.g. Expediente No. 440-92, 9 March 1993, Gaceta de la Corte de Constitucionalidad. In this case the justice of the peace issued a possession order on behalf of Juan Valdez Cubas, and accompanied the police to a property occupied by Mr. Jose Gerardo Aycinena Ochoa. Mr Ochoa did not have his registry documents on him, and thus was promptly evicted. A later investigation revealed that indeed the justice had confused properties, and Mr. Ochoa filed an *amparo* claim (based on violation of his constitutional rights to property Article 12 and defense (due process), Article 39. The First Instance Civil Tribunal denied Mr. Ochoa’s *amparo*, noting that Mr. Ochoa should have used ordinary civil procedures. Mr. Ochoa appealed to the Constitutional Court. The Constitutional Court agreed with the tribunal, pointing out that in spite of his *de facto* eviction, his legal right to the property remained intact; hence he should pursue ordinary remedies. Magistrate Rodolfo Rohmoser Caldeavellano issued a dissent in which he criticized the court’s lack of response to be a clear case of abuse by the judiciary in light of the palpable damage to Mr. Ochoa’s constitutional rights.

parties, associations, syndicates, cooperatives, etc.) Because private security groups conduct many evictions from rural *fincas*, this is precisely the area that requires attention.<sup>49</sup>

Regarding indigenous issues, the Constitutional Court issued an advisory opinion in which it declared that ILO Convention Nr. 169 is not in violation of the Constitution.<sup>50</sup> The Congress ratified the instrument although stating that the Constitutional Guarantees should have priority over the Convention's standards, in spite of the fact that the Constitution itself places the international norms above the constitutional standards.<sup>51</sup> It is clear that the Congress' key interest was upholding the private property guarantee, which some Guatemalans as "the fundamental basis of civilization", blaming land usurpation for the climate of legal instability and ensuing lack of investment in Guatemala. The Constitutional Court has held that individual possession even by a member of the group disqualifies land from its communal character, thereby rendering Article 67 inapplicable.<sup>52</sup> Many indigenous communities in Guatemala divide the land among individual families in terms of possession in order to prevent dispossession by outsiders, but ownership is held in common. Indeed, most tribes have community review of sale of possession rights, thereby diminishing the individual characteristic of possession. It is strange that the Constitutional Court would prioritize possession over title rights. Ironically, the effort taken by indigenous people to protect their land rights results in further dispossession by the

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<sup>49</sup> See e.g. Expediente No. 172-91, 3 October 1991, Gaceta de la Corte de Constitucionalidad. Mr. Falvio Anibal Gramajo Ovalle was prevented from entering his property by a private security service (*Vigilancia e Investigaciones Privadas-VIP*) acting on a court order upholding an eviction request brought by Lucido Fernandez Caseres and Edgar Rene Cardillo Chavez. The Judge of Champerico recognized that the private security group had confused properties, and Mr. Ovallo filed an *amparo* with the First Instance Tribunal of the Department of Retalhuleu, claiming violation of his constitutional rights to defense and property. The Tribunal denied the *amparo* stating that Mr. Ovallo should have pursued ordinary penal procedures. Mr. Ovallo appealed to the Constitutional Court that denied *amparo* as well, stating that since the agents were non-state actors, *amparo* was an inappropriate remedy.

<sup>50</sup> Expediente 199-95, Corte de Constitucionalidad, 18 May 1995.

<sup>51</sup> Article 46 notes that international human rights treaties and agreements ratified by Guatemala take precedence over municipal law. However, article 44 notes that in the event of a conflict between an international treaty and the Constitution, the latter would take precedence. But see The Vienna Convention on the Law of Treaties; Article 27 prohibits a State from invoking its internal law to avoid international obligations.

<sup>52</sup> Expediente 1250-96, 30 July 1997, Gaceta de la Corte de Constitucionalidad. This is similar to the practice of New Zealand's Maori Land Court, which converted Maori customary communal land to Maori freehold land which was deemed to be held by individuals under common law and thus could be transferred to non-indigenous people.

IAN BROWNLIE, *TREATIES AND INDIGENOUS PEOPLES*, p.5, footnote 7 (Clarendon Press 1991).

State. In short, the State should design specialized tribunals to handle forced eviction claims; otherwise thousands of peasants will remain without access to justice.

### **Balancing Rights and Policy**

In 2000, it was estimated that 5,992 families were forcibly evicted from their homes.<sup>53</sup> When evictions are to occur, the Attorney General's Office for Human Rights send staff to verify that the process is conducted in conformance with the law. Unfortunately, there are many complaints that such action is conducted without respect for due process norms. MINUGUA has also appeared at eviction events, although some have offered criticism that these actors have at times appeared after the violence has occurred. Reference to international standards on forced evictions or displacement is rarely made.<sup>54</sup> Effort to find alternative accommodation or compensation depends on the political attention received. High profile cases have produced compensatory solutions due to international attention, such as the inhabitants of the disputed territory between Belize and Guatemala who were given monetary compensation (between Q2-16,000 per family). In spite of the compensation, one of the community leaders pointed out "Money is of little use when the people don't have land to cultivate."<sup>55</sup> The Land Fund offered to assist the community purchase farms in the Peten with the compensation money. Yet, there are countless cases of marginalized groups lacking advocates who are evicted without regard to their survival needs. Even in the case of high profile cases, such as returning refugees, they are rarely given the follow up assistance needed to make relocation viable.

### **Obstacles to Effective Restitution**

The Commission on Historical Clarification identified reparation to human rights victims, including restitution of lost property, as being one of the conditions for a full transition to

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<sup>53</sup> Frente de Pobladores de Guatemala, cited by MINUGUA, LA POLITICA DE VIVIENDA EN EL MARCO DE LOS ACUERDOS DE PAZ (August 2001).

<sup>54</sup> See General Comment No.7 on Forced Evictions, adopted in May 1997 by the UN Committee on Economic, Social and Cultural Rights: "forced evictions are prima facie incompatible with provisions of the Covenant, and can only be carried out in exceptional circumstances."

reconciliation and the rule of law in Guatemala.<sup>56</sup> It identified four restitution categories and categorized their difficulty of resolution:<sup>57</sup>

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<sup>55</sup> Statement by Moises Cardona quoted by Miguel Gonzalez, "Petición: Campesinos salieron de Belice", in PRENSA LIBRE, 6 March 2001.

<sup>56</sup> The American Convention, Article 21 (2) sets forth a compensation standard for lost property: "*No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*"

The San Jose Declaration calls upon States to pay attention to land ownership rights with respect to IDPs. The UN Guiding Principles on Internal Displacement, Principle 29 (2) offers a cautious standard for reparation:

*"Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation."*

It is curious that the right to restitution is qualified "to the extent possible", indicating that a State could opt instead to provide monetary compensation, symbolic reparation, or other form of reparation. The Guiding Principles on Internal Displacement places the power of choice of form of reparation on the State. Simon Bagshaw states that the requirement that the compensation is "appropriate" or the reparation is "just" is sufficient to prevent gross deviation from restitution standard. See Simon Bagshaw, "Property Restitution and the Development of a Normative Framework for the Internally Displaced" in REFUGEE SURVEY QUARTERLY, Vol.19 No. 3, 207, 214-215 (Oxford U. 2000). In my opinion, it would have been preferable to utilize the restitution standard, if that is what is regarded as the optimum remedy. It should be noted that there is neither a specific determination that the State should be the source of the compensation. Hence, one may assume that compensation may be pursued from non-state actors however, given the un-likelihood of cooperation in this regard, the State itself should assume responsibility for distribution of restitution, regardless of how it collects funds for such programs. Thus, even though just reparation may include restitution, it may well be that the State would opt for one of the other categories that would not directly address the land issue. The all-inclusive nature of the standard may prove to be its weakness in practice. It should be noted that there is neither a specific determination that the State should be the source of the compensation. Hence, one may assume that compensation may be pursued from non-state actors however, given the unlikelihood of cooperation in this regard, the State itself should assume responsibility for distribution of restitution, regardless of how it collects funds for such programs.

The ILA Declaration of Principles of International Law on Internally Displaced Persons, Article 9, states in more direct language:

*"Internally displaced persons shall be entitled to restitution or to adequate compensation for property losses or damages and for physical and mental suffering resulting from their forced displacement."*

This standard does not make clear whether the State or the IDP has power of choice over form of reparation.

Of interest is that the ILA addressed the fact that refugees appeared to have more protection regarding their property rights than those who fled within borders. Hence in order to provide similar guarantees for IDPs, it notes that Article 9 is meant to be read in conjunction with Article 3 (1):

*"Internally displaced persons are entitled to all the rights as citizens of the country of displacement. To the extent that such rights do not adequately address their vulnerable position, they also benefit from the rights secured by international law for aliens, refugees and stateless persons."*

Thus, although the national law may not have provided a right to restitution for IDPs in Guatemala, the ILA suggests that such right may be drawn from international law.

Because many IDPs in Guatemala are indigenous, they would be best served by pursuing restitution demands under the ILO Convention Nr. 169, Article 16 (4) which grants them the choice of remedy:

*"When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees."*

In January 2000, the Commission on Human Rights adopted "Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of International Human Rights and Humanitarian Law." Commission on Human Rights, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur Mr. M. Cherif Bassiouni, E/CN.4/2000/62 (18 January 2000). See also Draft Articles on State Responsibility of the International Law

1. *Displaced persons claiming INTA provisional titles to national lands now possessed by groups brought in by the Army and/or INTA- Significant difficulty*
2. *Displaced persons claiming individual or collective title to private land dispossessed by INTA, the Army, or spontaneous influx- Medium-high difficulty*
3. *Displaced persons claiming usufruct possession of municipal lands under indigenous law conflicting with dispossession of the municipality itself or spontaneous influx- medium difficulty*
4. *Displaced persons dispossessed by powerful political and economic actors- Very High difficulty*

Owners who attained their lands via illegal measures, coercion, forced sales, corruption etc. have yet to be prosecuted. Indeed, some of them have actually had the audacity to sell "their land" to the returning forced migrants.<sup>58</sup> The State Banks are given priority in financing property sales via the Land Fund (including the Army's Bank), prompting criticism by rural groups that the Bank and other military actors should give the land free of charge given the irregular means by which they appropriated the properties. The expropriation of these properties to fund restitution demands is a concept that is supported by various rural and indigenous groups, however the sheer power of the landholders makes such action unlikely. According to Goodwin-Gill, expropriation of property without compensation may amount to persecution.<sup>59</sup> The State has suggested that it will "define compensatory formulas" to resolve land conflicts within the coming year. Currently, some landowners offer to rent land to peasants at a reasonable rate. Although the Land Fund considers these offers reasonable, especially when compared to the speculative purchase prices, the peasants reject this option, as they will not accept renting as the provision of

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Commission Articles 1-3. Its definition of reparation includes the standards contained in the UN Draft Basic Principles and Guidelines on the Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law describing the variety of remedies included within "reparation".

<sup>57</sup> Commission for Historical Clarification, Guatemala: Memoria del Silencio, Chapter III, La Ruptura del Tejido Social: Desplazamiento y Refugio, para. 410.

<sup>58</sup> Brian Egan points out the irony of this process, as General Romeo Lucas Garcia, a key leader of the counterinsurgency attacks who obtained over 32,000 hectares, sold three estates to a group of returnees in 1994. Brian Egan, "'Somos de la Tierra': Land and the Guatemalan Refugee Return" in NORTH & SIMMONS, id. At 95, 105.

<sup>59</sup> Guy S. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW, Second Edition, 77 (Clarendon Press 1996)

one's home. For rural peasants, actual ownership of the land is the only alternative considered to give them security and restoration of identity.

The Commission for Historical Clarification found that out of all the testimonies it received, only once case resulted in investigation, judicial processing, and provision of reparation for the harm caused. The State remains responsible for the displacement that occurred during the war, given that the military has been deemed the prime actor. Regardless of regime change, the State must provide remedy for the human rights violations. The fact that the State has not succeeded in punishing violators due to its amnesty laws, call for action by the judiciary to declare these laws inconsistent with international human rights standards and open the door for future prosecution.<sup>60</sup>

### **Looking Beyond Restitution**

One problem arises from the fact that restitution implies providing the same legal status as the previous occupation of property. In countries such as Guatemala, where the majority of rural peasants (including IDPs) have no more than *de facto* possession of land with possible claims of adverse possession, historic title or other customary rights, solution would require more than a mere return to the prior rights. Registration of such claims and provision of official titles is essential for a durable return. It is important to note that in Guatemala, property rights are difficult to ascertain given registration deficiencies, double-titling, and customary claims. Hence, alternative forms of evidence, such as of oral testimony as opposed to written documentation, are essential to the establishment of customary possession rights. The State has agreed to adopt measures to provide title for indigenous land by requiring municipal reports on tenancy of land and follow-up by the Land Fund. However, there are many boundary disputes

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<sup>60</sup> Of interest is that the ILA addressed the fact that refugees appeared to have more protection regarding their property rights than those who fled within borders. Hence in order to provide similar guarantees for IDPs, it notes that Article 9 is meant to be read in conjunction with Article 3 (1):

*"Internally displaced persons are entitled to all the rights as citizens of the country of displacement. To the extent that such rights do not adequately address their vulnerable position, they also benefit from the rights secured by international law for aliens, refugees and stateless persons."*

involving municipalities v. individual families or other municipalities. It is unlikely that the publication of municipal reports will result in the issuance of immediate titles. Of interest is the proposal by Scott Leckie that restitution rights be recognized not only for formal owners, but also to tenants, occupiers and other tenure groups.<sup>61</sup>

### **Coercive sales of property**

The UN Committee on the Elimination of Racial Discrimination issued a general recommendation emphasizing that:

*"All such refugees and displaced persons, have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void."*<sup>62</sup>

Many Guatemalans were coerced into selling their land (or that of their displaced family) during the war. At present there has been little activity regarding restitution of lands obtained in this manner. In Quiche, some parties have sought conciliation assistance to settle the matter by dividing the property among the new and former possessors or providing compensation to the former possessor. Not all cases are resolved, many persons fear that there will be no alternative accommodation for them in the event they have to admit the illegitimacy of their possession, and hence they avoid discussion of the conflict. Some state that the legacy of a culture of violence renders conciliatory efforts in vain. Coercion is considered the key towards implementation of a solution. However, it may be necessary to look beyond the appearance of innate conflict. The root of aggression may well be the survival instinct; loss of land is equivalent to loss of food, water, and shelter. Should programs of alternative land be made available, parties may be more forthcoming to conciliation of their conflicts.

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Thus, although the national law may not have provided a right to restitution for IDPs in Guatemala, the ILA suggests that such right may be drawn from international law.

<sup>61</sup> Scott Leckie, "Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice" 5, 53 REFUGEE SURVEY QUARTERLY, Vol. 19, No.3 (2000).

<sup>62</sup> The Committee on the Elimination of Racial Discrimination, General Recommendation XXII (49), adopted at the 1175<sup>th</sup> meeting, on 16 August 1996 (A/51/18).

Regarding present forcible evictions conducted by non-state actors, the very fact that such actions remain free from correction by the judiciary indicate that there is tolerance of this action and such evictions will remain ongoing.<sup>63</sup> It is undeniable that victims are unlikely to name those responsible for their plight in an open court due to fear of retribution, especially when the state itself proves unable to counter such actions.<sup>64</sup>

### **Expectations for the Future**

In 2000, the Bipartisan Commission on Land Rights presented a report in which it called for a national cadastre and registry, protection of indigenous lands, the creation of an Attorney General's Office for Land Conflict resolution, a National Agrarian Institute, as well as an agrarian and environmental tribunal. Draft legislation on restitution and another creating an agrarian & environmental tribunal to treat land conflicts is expected to be presented in 2002-2003. Pursuit of litigation in traditional courts is advisable, indeed needed, for high-profile cases that may provide land for the landless as well as attain a symbolic value of retribution for victims of displacement. In addition, a system of legal aid would be requisite in order to maintain accessibility for marginalized persons. The government has agreed to increase the number of courts available for land disputes with flexible procedures, provide legal aid for land claims as well as free translation services.<sup>65</sup>

### **Towards Improved Transnational Action for Return & Restitution for IDPs**

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<sup>63</sup> In December 1998, the UN General Assembly adopted the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144 (8 March 1999). It declares the right of persons to benefit from an effective remedy in the form of a hearing before an independent, impartial, and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with the law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay." Art. 9. Article 10 states that "No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms. . ."

<sup>64</sup> See Ellen L. Lutz, "After the Elections: Compensating Victims of Human Rights Abuses", in ELLEN LUTZ, HURST HANNUM & KATHRYN J. BRUKE, *NEW DIRECTIONS IN HUMAN RIGHTS*, 195, 201 (University of Pennsylvania 1989). A tragicomic example of the state of impunity reigning in Guatemala was President Portillo's decision to send his own family to Canada upon receiving threats by non-state actors.

<sup>65</sup> The law schools are offering classes on agrarian law (including relevant customary norms).

The international human rights mechanisms have been criticized for being inefficient and thereby inappropriate to remedy situations of internal displacement due to their time-consuming procedures and non-binding character of their findings.<sup>66</sup> Recently however, the International Colloquy on Guiding Principles on Internal Displacement called for increased use of the individual complaint mechanisms and state reports within the UN as pertaining to internal displacement.<sup>67</sup> A dichotomy exists between the national context in which IDPs have difficulty attain concrete restitution because they are treated as disparate, individual cases by the State easy to ignore, and the international arena where their demands are collectivized and allocated to UN Special Representative Deng or his Inter-Agency Standing Committee counterpart Kofi Asomani, rather than treating cases individually within the ordinary mechanisms. However, given the state of absolute impunity in Guatemala, international response by the human rights bodies may help provide some relief, at least symbolic to IDPs who feel forgotten. Hence, this section reviews these actors and suggests strategies for Guatemalan IDPs to pursue their claims on the international level.

In its review of Guatemala's report, the Human Rights Committee pointed out that the situation of the poor would remain unchanged unless a system of compensation was pursued and stated concern for impunity that was preventing such implementation.<sup>68</sup> Guatemala ratified the Optional Protocol to the CCPR, thus IDPs who have been unable to attain justice within the national system may be able to file claims with the Human Rights Committee. However, Guatemala issued a declaration which limits the Human Rights Committee to consideration of complaints pertaining to acts or omissions occurring after the date of accession of the Protocol (28/02/2001). Hence, IDPs would be unable to seek remedy for property lost due to forced

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<sup>66</sup> Rainer Hofmann, "Internally Displaced Persons as Refugees", in ACTA JURIDICA HUNGARICA, Vol. 35, 179, 186 (1993) Additional problems include expense.

<sup>67</sup> Brookings Institute, "Summary Report: International Colloquy on the Guiding Principles on Internal Displacement, Vienna, Austria September 2000" (<http://www.brook.edu/fp/projects/idp/conferences>).

<sup>68</sup> Human Rights Committee, Summary Record of the 1491<sup>st</sup> meeting: Guatemala, CCPR/C/SR.1491 (29 October 1997); Concluding Observations, CCPR/C/79/Add.3, para 13. (3 April 1996).

eviction or forced migration unless the occupation was deemed to be ongoing. Although the right to property is not included in the CCPR, Guatemalan IDPs may be able to file claims which link their dispossession to the following rights:

1) **Freedom of movement and residence of persons** Guatemalan IDPs who remain unable to return due to fear of repression may wish to consider filing claims similar to the internal banishment cases in which the Human Rights Committee called upon States to recognize the wrongfully subjected to internal exile, specifically calling for compensation.<sup>69</sup>,

2) Those who suffered wrongful expropriation or takeover of property without remedy may issue a claim based the right to **equality before the courts**. Indeed, discrimination against indigenous persons within the justice system is well documented as well as lack of access to courts by the poor. In *Olo Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, the Committee ordered return of expropriated property or appropriate compensation, as a result of inaction by the judiciary and administrative agencies in the face of wrongful expropriation based on discrimination on political grounds.

3) Many Guatemalan IDPs were denied restitution possibilities based on the fact that they had not left the country. This is discriminatory and denies them **equal protection of the law**. Claims could be filed based on the Committee's views in *Simunek et. Al v. The Czech Republic*, Communication No. 516/1992 & *Adam v. Czech Republic*, Communication No. 586/1994, in which the State's refusal to grant compensation due to lack of citizenship and permanent residency was considered to be discriminatory. In the case of Guatemala, the same argument applies in the inverse situation; those abroad were granted compensation while those who remained within national borders were excluded.<sup>70</sup>

<sup>69</sup> *Mpandanjila v. Zaire*, Communication No. 183/193; *Mpaka-Nsusu v. Zaire*, Communication No. 157/183; *Bwalya v. Zambia*, Communication No. 314/1988.

<sup>70</sup> Fear of an avalanche of claims is unwarranted due to the notion that that the claims must be based on the original possession, not cumulative claims per additional persons. Intergenerational restitution efforts in Eastern Europe hardly raise eyebrows, yet cries of impossibility are shouted within the Latin American context, presumably due to the latter's likelihood of relying on oral proof rather than documentary evidence.

3) The process of displacement caused tremendous upheaval in Guatemalan's cultural life, much of which was linked to the land. Forced migration resulted in a loss of communal ties, assumption of anonymous existence dispersed within city slums, or floating, rootless mode of life due to seasonal labor in rural areas. Return to the land of origin is essential to resumption of cultural life, particularly for those of indigenous background. Claims pursuant to the right to enjoy one's culture may address return interests by being inextricably linked to the right to movement and residence. The Committee upheld the link between the right to freedom of movement and residency and **the right of members of minority groups to enjoy one's culture** in *Lovelace v. Canada*, Communication No. 24/1977. It declared denial of a Maliseet Indian woman's right to live on a reservation to be a breach of Article 27 "read in the context of articles 12,17,23,2,3 and 26".

4) Guatemalan IDPs of indigenous background who have been evicted from the lands of their ancestors may also consider filing claims based on interference with **the right to family and privacy**. In *Hopu & Bessert v. France*, Comm. No. 549/1993, the Committee held that the construction of a hotel on burial grounds amounted to interference with right to family and privacy and called for effective remedies:

*"The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term 'family' in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life . . ."*<sup>71</sup>

Guatemalan indigenous people consider themselves to be the children of corn, the earth being their mother. Although it is clear that the Committee limits recognition to burial grounds, many indigenous people identify all of their lands as having spiritual value to them and may therefore wish to seek an expanded view of protection (although this would be unlikely to be recognized).

<sup>71</sup> *Hopu & Bessert v. France*, Communication No. 549/1993, adopted 29 July 1997, para. 10.3.

These cases demonstrate the creativity of the Human Rights Committee in addressing property related concerns by linking it to other essential rights.

### Views by CERD & CESC

The State is expected to recognize CERD's competence for receiving individual complaints by 2002. This will permit the Committee to review those aspects of forced eviction/displacement that have discriminatory roots. In its review of the State's report, CERD specifically called for compensation of property that cannot be restituted and included inquiries as to land distribution and land conflicts involving IDPs, refugees, and indigenous people.<sup>72</sup> The State rejected the suggestion of land reform, characterizing it as "arithmetically simplistic and counter-productive".<sup>73</sup> CERD's final conclusions clearly call for land reform, restitution, and compensation:

*“ . . . Recommends that the State party take measures to ensure a fair and equitable distribution of land, taking into account the needs of the indigenous population, including those persons returning to the territory after the end of the armed conflict. The Committee stresses the importance that land holds for indigenous peoples and their spiritual and cultural identity, including the fact that they have a different concept of land use and ownership. It is suggested that the State party use the provisions of ILO Convention No. 169 as guidelines for resolving land distribution issues, and to consider, in the light of that Convention, the question of compensation for properties that cannot be restituted.”<sup>74</sup>*

The Committee on Economic, Social, and Cultural rights supports CERD's focus on land reform:

*“Overcoming the resistance to reform from vested interests which have, in the past, caused the failure of agrarian reform, and which continue to be relevant today, is of major importance. Thus, as recognized by the State party, the root causes of the armed conflict remain to be tackled, embedded as they are in socio-economic disparities and uneven land distribution in an almost feudal like system characterized by discrimination against the indigenous and rural populations. . .*

*While the Committee appreciates the open admission of the Government that land was illegally appropriated by force in the past and that plans are in place to address this problem, the Committee*

<sup>72</sup> Committee on the Elimination of Racial Discrimination, Summary Record of the 1190<sup>th</sup> Meeting, CERD/C/SR.1190 (10/03/97) at para. 18.

<sup>73</sup> Committee on the Elimination of Racial Discrimination, Summary Record of the 1191<sup>st</sup> Meeting, CERD/C/SR.1191 (07/04/97) at para. 16.

<sup>74</sup> Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/304/Add.21 (23 April 1007) at paras. 30-31.

*remains convinced that the issue of land ownership and distribution of land is crucial to addressing economic, social and cultural grievances of a substantial segment of the population*

*The Committee stresses that the implementation of the Covenant's provisions cannot be ensured without reform and adequate implementation of the peace accord, which require above all the just distribution of wealth and of land.*"<sup>75</sup>

The CESC also noted its serious concern for IDPs.<sup>76</sup> At the time, the State was frank in remarking that it had no intention to buy back ancestral land, rather it would focus on improving the registry system to record "the legitimate owner of the land".<sup>77</sup> This was problematic due to the absence of exploration of titles attained by corruption, fraud, theft or violence, as well as the lack of examination of historic and prescription claims. This rendered the registry program risky as it may have legitimized theft. When the new timeline for implementation of the Peace Accords was adopted, the provision of titles for indigenous land was highlighted as a prime focus, follow-up to be provided by the Land Fund.<sup>78</sup> The Committee recommended close monitoring of land redistribution using Article 14 of the Constitution (on Expropriation of Fallow Lands) and the Accord on Socio-Economic Aspects and the Agrarian Situation. In spite of the Committee's suggestion, the Guatemalan government has made little, if any, progress towards exploration of expropriation possibilities in the interest of land reform.

### **Other UN Actors**

The UN Special Representative on Internal Displacement and the UN Rapporteur on Housing should conduct a joint visit Guatemala to investigate the situation of internal

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<sup>75</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations, E/C.12/1/Add.3 (28/05/96) at paras.10, 17 & 23.

<sup>76</sup> Id. At para. 20.

<sup>77</sup> Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.13 (28/05/96) at para. 24.

<sup>78</sup> The Inter-American Commission of Human Rights called for recognition of "historical or secular title of the lands of the Mayan population and peasants in general" as well as access to property for the displaced and relocated populations. It had previously called for recognition of possession rights and the elaboration of programs to prevent dispossession and increase access to ownership. OAS, Annual Report of the Inter-American Commission on Human Rights 1993, p. 466 (1994) The Independent Expert on the Situation of Human Rights in Guatemala explicitly linked the phenomenon of internal displacement to the struggle for land. She focused on forced eviction, the need for housing and employment solution, legal titles, and access to land. Commission on Human Rights, Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, E/CN.4/1996/15 (05/12/95).

displacement in order to recommend strategies for housing and infrastructure needs in urban and rural areas. There is a strong need for the Special Representative on Internal Displacement to place special focus on the reintegration needs of IDPs in the post-conflict stage. This is particularly true given that the UN Office for Coordination of Humanitarian Affairs' Senior Coordinator on Internal Displacement's mandate is obviously directed more towards immediate humanitarian crises, thereby ignoring displacement that is ongoing as a result of a lack of remedies in the "post-conflict" period.<sup>79</sup> What may actually be needed is a Special Coordinator for development response to internal displacement in order to provide a holistic approach to the problem. What is most disturbing is that although the Guiding Principles on Internal Displacement provides a definition that refers to various causes of displacement including human rights violations and natural disasters, the international community seems to prefer to focus on displacement resulting from humanitarian conflict. This serves to narrow the target group for distribution of scarce resources and attention, however it negates the reality that displacement remains ongoing past the stage of humanitarian crisis. It takes on new forms; veiled by the shroud of poverty one is tempted to say that the problem no longer exists.

The UN Rapporteur on the Independence of Judges should include specific references to the legal concerns of IDPs in his follow-up review of Guatemala. The Rapporteur made thirty-two recommendations to the State pursuant to his visit in 1999, including a call for recognition of the primacy of human rights instruments over conflicting constitutional provisions and the need for a state-run legal aid program in order to provide access to justice for the poor. Unfortunately, with the exception of the establishment of the Judicial career and the law on civil service, the State did not comply with the Rapporteur's recommendations. Instead, within the year following his visit, violence against members of the judicial system, impunity and obstruction of justice actually increased. In May 2001, the Rapporteur returned once more to Guatemala.

<sup>31</sup><sub>6</sub> A positive development is OHCHR's recent joint initiative with UNCHS on housing rights and tenure.

### **The Inter-American System**

Guatemalan IDPs may present a claim to the Inter-American Commission on Human Rights. The Commission was involved in the mediation of a land dispute in Los Cimientos involving k'iche IDPS and ixil persons who were brought in by the Army. Although the Commission announced the near settlement of the case, in July 2001 the k'iches were violently evicted and forced to flee once more after a group of armed men entered their homes, brutalized the men and raped some women. The Commission has previously addressed wrongful dispossession of property in the Marin case 10.770, Report No. 12/94, 1 February 1994.<sup>80</sup> The Commission stated that the right to property is inalienable and hence no State, group, or individual should suppress it. The lack of indemnification and rapid recourse before the courts violated the victim's right to property, judicial guarantees, and judicial protection. The Commission directly addressed the problem of internal displacement in Guatemala in the Mejia Case, Nr. 10.553, Report No. 32/96, 16 October 1996. Guatemala's Civilian Auto defense Patrols (PACs) attacked the community of Centro Parraztut Segundo in the department of Quiche on account of their refusal to join the patrols. One person was murdered; others were assaulted and subjected to death threats. Thirty-nine persons were forcibly displaced and prevented from returning home due to similar threats, in spite of the presence of the Assistant Human Rights Ombudsman. In 1990, the IDPs filed a writ of habeus corpus due to the threats. Six years after the event, the State had yet to investigate or prosecute those responsible for these actions. The Commission held that the State was responsible given that the PACs were state agents coordinated by the National Defense Ministry according to Law 19-86 (7 January 1986). The Commission held that the State was responsible given that the PACs were state agents, coordinated by the National Defense Ministry according to Law 19-86 (Jan. 7, 1986). The Commission referred to the Inter-American Court of Human Rights' position that with respect to

violations of Convention rights” . . .the State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”<sup>81</sup>

It found that with respect to the displaced, the right to humane treatment, Article 5 (1) of the American Convention on Human Rights had been violated as they had been subjected to mental trauma and anxiety resulting in their forced displacement which in itself is a violation of freedom of movement as guaranteed by Article 22 (1) of the Convention:

*“Through these threats, the military commissioners and the PAC members caused trauma and anxiety to the victims and constrained their ability to lead their lives as they desire. The victims lived in fear until they were eventually forced to leave their community, thereby having to reorganize their lives as a result of threats.”*<sup>82</sup>

These violations were repeated upon their failed attempt to return home, and the Commission added that this event implied an additional infringement as the displaced persons were intimidated to the point where they decided not to return home, thus violating their right to choose their place of residence.<sup>83</sup> It noted that the displacement was a direct consequence of the State’s failure to protect the community against these threats.<sup>84</sup> The Commission held that the lack of processing of the habeas corpus motion filed by the displaced persons constituted a violation of their right to due process and judicial protection, as guaranteed by Articles 8 and 25 of the Convention and upheld by the Inter-American Court of Human Rights in the Velasquez Rodriguez Case:

*“States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law”.*<sup>85</sup>

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<sup>80</sup> Marin Case, Case 10.770 (Nicaragua), IACHR Annual Report 1993. Although the Commission called for restitution of property and indemnification for damages and injuries at the time of usufruct, the State never complied with the decision.

<sup>81</sup> Maria Mejia v. Guatemala, Case 10.553, Report No. 32/96, Inter-Am. C.H.R., OEA/Ser.L./V/II.95 Doc.7 rev at 370 (1997) at para. 69 quoting Velasquez Rodriguez Case, Judgment of July 29, 1988, pars. 169, 170.

<sup>82</sup> Id. At para. 60.

<sup>83</sup> Id. At para. 61, 64, & 65.

<sup>84</sup> Id. at para. 72.

<sup>85</sup> Id. At para. 66, quoting I/A Court H.R., Velasquez Rodriguez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No. 1, par. 91.

Hence it concluded that the State had failed to respect the rights of the victims, hold accountable those responsible for the violations, and to provide reparations or compensation damage experienced.<sup>86</sup> The report was published due to State non-compliance.

The Inter-American Court of Human Rights has imputed responsibility to the Guatemalan State for human rights violations where proof has established a *modus operandi*.<sup>87</sup> In spite of the fact that the acts were not considered the product of State policy and the superior authorities lacked direct knowledge of the events, the Court stated that these facts proved insufficient to erase the international responsibility of the State to ensure persons the full and free exercise of their human rights. The Judiciary's failure to efficiently punish the offenders was condemned for being a violation of judicial protection guarantees. This precedent is valuable for IDPs as they should be able to establish similar *modus operandi* regarding their displacement and dispossession of property, the State's participation and/or tolerance and encouragement of other actors in such actions could be proved. Should the national courts fail to provide remedies for those claiming restitution due to forced evictions by the PACs and Guatemalan Army; it would be wise to pursue the case on the regional level. There is precedent within the Inter-American Commission of Human Rights regarding destruction of property by military actors.<sup>88</sup>

The Inter-American Court of Human Rights has held that the State has a legal duty to prevent human rights violations, investigate and sanction offenders, and provide just reparation to victims.<sup>89</sup> The prevalence of impunity such that a victim is not restored of his/her rights,

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<sup>86</sup> Id. at para. 73.

<sup>87</sup> Paniagua Morales et. al., I.A. Court H. R., Series C No. 37, Sentence 8 March 1998. The case involved victims of disappearance, detention, and/or murder between 1987-1988. See also Blake Case, I/A Court H.R., Series C No. 37, Sentence 24 January 1998. The Court concluded that the Guatemalan military authorized a civilian patrol group to kill an American journalist in 1985. The State was ordered to investigate and sanction those responsible and provide just indemnification in the form of monetary compensation (including costs of processing the case to the IACHR. See Blake Case- Reparations, I/A Court H.R. Series C- No. 48., Sentence 22 January 1999

<sup>88</sup> The Commission declared Suriname to be in violation of Article XXIII of the American Declaration on account of the Army's burning of property belonging to a person who was later detained, tortured, and executed. OAS, IACHR Annual Report 1988-89, p. 132, Case No. 10.117 27, Resolucion No. 19/89, September 1989.

<sup>89</sup> Garrido & Baigorria Case, Reparations, I/A Court H.R., Series C, No. 39 at para.73, Sentence 27 August 1998.

results in violation by the State of its duty to assure the free exercise of those rights.<sup>90</sup> The Court considers the right to compensation for a human rights violation to be a customary norm:

*“Upon the occurrence of the illicit act which is imputable to the State, international responsibility arises from this due to violation of an international norm. Due to this responsibility the State attains a new legal relation which consists in the obligation to make reparation.”*<sup>91</sup>

Of interest is that in order to determine the scope of reparations for the Saramaca tribe, the Court substituted customary norms for formal civil law when the latter proved ineffective.<sup>92</sup> The State failed to provide enough registry offices to facilitate marriage registry in the interior of the country. Hence the Court recognized the successors of the victims according to the tribe’s customary law. In Guatemala, indigenous people have long accused the State of denying them effective legal services regarding property matters and similarly argue for the recognition of their customary norms when calling for restitution of land.<sup>93</sup>

<sup>90</sup> Id. Para.73 quoting Velasquez Rodriguez, par.174. (Look UP).

<sup>91</sup> Garrido & Baigorria, Reparations, I/A Court H.R., Series C No. 39, para. 40 (1998).

<sup>92</sup> Aloeboetoe et. al., Reparations, I/A Court H.R. , Series C No. 15, paras. 58 and 62 (1983).

<sup>93</sup> If we consider the case of a socio-economic claim for access to property as opposed to a civil claim for restitution of lost property, Victor M. Rodriguez Recia argues that a collective group could present a claim to the Court based on violations of socio-economic-cultural rights Victor M. Rodriguez Rescia, “Las reparaciones en el sistema interamericano de proteccion de derechos humanos”, in REVISTA DEL INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, Vol. 23, p. 129, 135 (1996). Indeed, the UN Special Rapporteur on the Question of Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights) stated clearly that these rights are not merely reflections of an ideal to be achieved in the future, rather they “have a firm legal foundation and can be claimed at any moment and their violations punished.” Buergenthal suggests that the American Declaration’s provisions may fill in the socio-economic normative gaps within the American Convention. Both the Court and the Commission appear open to exploring petitions addressing socio-economic rights in the future. The American Declaration recognizes the right to property in its socio-economic manifestation:

*Article XXII: Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.*

The American Convention upholds the civil-political variant with hybrid twist due to a social interest clause: *Article 21 (1): Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.*

*(2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*

Thomas Buergenthal, “The American Human Rights Declaration: Random Reflections”, in K. Hailbonner, G. Röss., and T. Stein (Eds.), Staat und Volkerrechtsordnung, 133, 138 (1989), cited in Matthew Craven, “The Protection of Economic, Social, and Cultural Rights under the Inter-American System of Human Rights” in DAVID HARRIS & STEPHEN LIVINGSTONE, (EDS.), THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS, p.289,303 (Clarendon Press 1998). Craven criticizes the Commission for being reticent to address violations of economic, social, and cultural rights. However, the reports from the late 1990s show an improvement in the Commission’s treatment of land issues and forced evictions. See OAS, Report on the Situation of Human Rights in Mexico, p.46-47, OEA/Ser.L/V/II.100 (24 September 1998) noting 300 land conflicts in Oaxaca and calling upon the State to combat paramilitaries supported by landowners. See also OAS, Report on the Situation of Human Rights in Brazil, p. 124-125, OEA/Ser.L. /V.II.97 (1997) in which the Commission criticizes the limited nature of the land reform program, repression of landless protesters, and infringement of indigenous lands. It calls upon the

The Joint Vote by A.A. Cancado Trindade and A. Abreu Burelli in the Loaya Tamayo Case, Reparations, provides an overview of the evolution of the concept of the right to reparation as forming part of a trinity, including the right to the truth and the right to justice (which begins with access to justice) which is blocked by internal legal measures and actors pursuing impunity (such as actors who declare self-amnesty).<sup>94</sup> They state that such actions are incompatible with State obligations to investigate violations, provide justice and reparation. They highlight the Court's recognition in the sentence of a call for reparation based on loss of one's life plan "proyecto de vida" rather than mere *dano emergente* and *lucro cesante*, calculating the calling, circumstances, aspirations, potential and aptitude of the person. Thus the damage would affect the loss of opportunities for personal development in an irreparable or difficult to restore manner.<sup>95</sup> The existence of a person is altered by arbitrary and unjust factors that contradict the notion of protection by the State. In the case, after being forcibly detained, the victim was forced to abandon her studies, move abroad, remain isolated, subject to economic hardship, and suffering physical and psychological harm. Hence, the victim asserted this had altered her life so as to interfere irreparably with the attainment of personal, family, and professional goals.<sup>96</sup> It should be noted that the Court was unable to derive method to render an economic value to interference with the life plan "*proyecto de vida*", thus it returned to a standard of *restituto in integrum*. It should be highlighted that Guatemalan IDPs' *proyectos de vida* are intrinsically tied to the land. Given that the majority originates from rural areas in which they engaged in farming, their

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State to issue title to indigenous lands and provide federal protection to indigenous lands. The Commission has called for cessation of construction projects on indigenous lands in Brazil (See also Case No. 7615 IACHR Annual Report 1984-5 at 24-34 on the wrongful dispossession of the Yanomami tribe.) The Commission called for compensation for property destroyed by the Nicaraguan military after the forced displacement of the Miskito Indians (OAS Docs. OEA/Ser. L/V/II.62, doc. 10 rev.3 (1983) & OEA/Ser.L/V/II.62, doc. 26 (1984). The Commission successfully conciliated a dispute between the Lamelxay and Riachito Indians and the State of Paraguay. The State was accused of selling indigenous land, resulting in the tribes' displacement. The State agreed to repurchase the land and transfer title to the tribes, as well as guarantee the safe return of the tribes. (Case 11.713, Report No.90/99 (Paraguay) IACHR. The Commission called for titling of indigenous and Afro-Colombian lands, protection from interference, provision of land to IDPs and voluntary return of resettlement. See OAS, Third Report on the Human Rights Situation in Colombia OEA/Ser.L/II.102 (26 February 1999).

<sup>94</sup> Loaya Tamayo, Reparations, Joint Vote of Cancado Trindade and Abreu Burelli, para. 2.

<sup>95</sup> Loaya Tamayo, Reparations, para. 150.

identity, sense of security and source of nourishment for the family is tied to the land. This is especially true in the case of indigenous IDPs who would add a spiritual and historic link to the land. Hence restitution of land would indeed amount to providing full reparation for the loss of one's *proyecto de vida* due to displacement.

Cancado Trindade & Abreu Burelli state that the notion of reparation based on '*proyecto de vida*' is intrinsically linked to the notion of the human spirit and liberty, each person's right to choose his own destiny and aspirations.<sup>97</sup> The inability to achieve the natural culmination of one's existence is deemed to have a high existential value. Indeed, such loss is experienced by internally displaced persons who are left completely abandoned in shantytowns where they are disconnected from their communities of origin, lose their sense of identity, become anonymous or wrongfully accused of being guerillas, deprived of work and educational opportunities, lack documentation, hygienic living conditions, and sufficient food and water.<sup>98</sup>

## Conclusion

*"Indeed, Central America has been considered the most effective 'laboratory' for attempts to address post-war situations involving uprooted populations."*

*Cohen, Deng & Sanchez-Granola<sup>99</sup>*

Perhaps the most significant challenge remaining is dispelling the notion that Guatemala formed part of a transnational experiment that has been concluded at the will of the international community. Uprooted persons remain in Guatemala regardless of donor fatigue, termination of programs, and closure of the UNCHR office. What is needed is the adoption of new policies to address the challenges present in the post-conflict stage. Indeed, the very notion of post-conflict itself is a fragile concept given the significant increase in human rights violations, violence, and

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<sup>96</sup> Id. At . 152.

<sup>97</sup> Loaya Tamayo, Reparations, Joint Vote of Cancado Trindade and Abreu Burelli, at para.15.

<sup>98</sup> In Colombia they are literally referred to as "disposable/discardable people".

<sup>99</sup> Cohen, Deng & Sanchez -Garzoli, see footnote 17.

crime.<sup>100</sup> Some observers warn that Guatemala is in danger of lapsing into a pre-conflict situation. Regarding causes although the State blames the legacy of a “culture of violence” as a result of the war, other groups blame increased poverty. Reluctance to address the fundamental problems involving land distribution and restitution claims will result in continuing migration, internal and external. Essentially, it becomes a question of old wine in new bottles, today’s seasonal laborers, shantytown inhabitants, and illegal migrants include displaced persons who never attained remedy to their plight. It is time to invert our perspective and reexamine prevention strategies after the return phase in order to remedy incomplete restitution and reintegration efforts and hinder a reemergence of new migratory cycles. Donors should provide funding for restitution initiatives that go beyond general public works.

With respect to the national actors, ratification of international norms, such as ILO convention No.169, remains meaningless in the absence of incorporation of the standards within actual policies and practice. The Constitutional Court should uphold its own Advisory Opinion and refer to ILO Convention Nr. 169 when reviewing property disputes which address indigenous customary claims to land. Primacy of the provisions of all human rights treaties should be respected over conflicting constitutional provisions. The State should incorporate the standards of ILO Convention Nr. 169 regarding indigenous property rights, the General Comment on Forced Evictions, the Guiding Principles on Internal Displacement (in particular principles 28 & 29), and the CCPR & CESCRC within its land and housing agencies. Prosecution of those persons who have egregiously violated rights via scorched earth tactics during the war and illegitimate takeovers of land is essential to the reestablishment of justice within the nation. Those who amassed properties during the conflict must provide reparation to the dispossessed. In view of the pressures placed on then national legal system, ratification of the Rome Treaty establishing the International Criminal Court would be a welcome event to increase the

<sup>100</sup> The Inter-American Development Bank listed Guatemala as one of most violent countries in the world. It is undeniable that the international community itself is exasperated with problems linked to corruption and impunity

possibility of attaining justice.<sup>101</sup> In like manner, the creation of an International Human Rights Court would be of undeniable worth to IDPs around the world.

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<sup>101</sup>plaguing Guatemala that negatively affect aid programs.