

***Between Conflict & Consensus:
Conciliating Land Disputes in Guatemala***

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To my parents, Doctors Esther & Marcelo Bailliet, who dedicated their lives to address the negative impact of poverty upon community mental health - they are my constant source of inspiration

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Bibliography

ACRONYMS

- ACPD** Consultative Assembly of Uprooted Populations
- ADN** Association of National Dignitaries
- ADR** Alternative Dispute Resolution
- AEU** Association of University Students
- ARZOC** Activities in Support of Reconciliation in Conflict Areas (joint USAID/IOM program)
- ASC** Assembly of the Civil Society
- ASIES** Association of Research and Social Studies
- ASIL** American Society of International Law
- AMADESPI** Mayan Association for Integral Socio-Productive Development
- ASCODAS** Colombian Association for Social Assistance
- BANRURAL** Program for Rural Investment
- BANVI** Housing Bank
- CACIF** Coordinating Committee of Agrarian, Commercial, Industrial and Financial Associations
- CALDH** Center of Legal Action for Human Rights
- CCPR** Covenant on Civil and Political Rights & United Nations Committee on Human Rights
- CEAR** National Commission for Attention to Repatriates, Refugees and Displaced Persons
- CEDAW** Convention on the Elimination of All Forms of Discrimination Against Women & United Nations Committee for the Elimination of Discrimination Against Women
- CEDECON** Center for Defense of the Constitution
- CEH** Commission for Historical Clarification
- CERD** International Convention on the Elimination of All Forms of Racial Discrimination & United Nations Committee on the Elimination of Racial Discrimination

CESC United Nations Committee on Economic, Social and Cultural Rights

CESCR Covenant on Economic, Social and Cultural Rights

CIEN Center for National Economic Research

CIREFCA International Conference on Refugees in Central America

COHRE Centre on Housing Rights and Evictions

COINDE Council of Development Institutions

CONAVIGUA National Council of Guatemalan Widows

CONDEG National Council of Guatemalan Displaced Persons

CONGCOOP Coordination of NGOs and Cooperatives

CONIC National Indigenous & Peasant Coordinator

CONTIERRA Presidential Office on Legal Assistance and Resolution of Land Conflicts

COPMAGUA Coordinator of the Mayan People

COPREDEH Attorney General's Office for Human Rights

COJUPA Legal aid branch of CONIC

CONAP National Council of Protected Areas

CNCE National Center of State Courts

CNOC National Coalition of Peasant Organizations

CPRs Communities of People in Resistance (collectivized IDPs)

CTEAR Technical Commission for the Execution of the Accord on Resettlement of the Populations Uprooted by the Armed Conflict

CUC Committee of Peasant Unity

ERC United Nations Emergency Relief Coordinator

EU European Union

EXCOM UNHCR Executive Committee

FAO UN Food & Agriculture Program

FESOC Syndicate Federation of Peasant Workers

FGT Guillermo Toriello Foundation

FMLN Farabundo Marti National Liberation

FLACSO Latin American Faculty of Social Sciences

FOGUAVI Housing Fund

FONAPAZ National Peace Fund

FONATIERRA National Land Fund

FORELAP Fund for Labour & Productive Reintegration for the Repatriated Population

FRG Guatemalan Republican Front (political party)

FUNDACEN The Penny Foundation

GA United Nations General Assembly

GDP Gross Domestic Product

GNP Gross National Product

GRICAR International Group of Consultancy and Support for the Return

GTZ Gesellschaft fur Tecknische Zusammenarbeit

HRC United Nations Human Rights Committee

IACHR Inter-American Commission of Human Rights

IASC United Nations Inter-Agency Standing Committee

ICC International Criminal Court

IFRC International Red Cross & Crescent

ICRC International Committee for the Red Cross

ICVA International Council of Voluntary Agencies

IDB Inter-American Development Bank

IDP Internally Displaced Person

IGN National Geographic Institute

IGT Ministry of Labour's Inspector General of Workers

IIDH Inter-American Institute of Human Rights

ILA International Law Association

ILO International Labour Organization

IMF International Monetary Fund

INTA National Institute for Agrarian Transformation

IOM International Organization of Migration

INCORA Colombian Institute for Agrarian Reform

IUSI Immovable Property Tax

MAGA Ministry of Agriculture

MINUGUA United Nations Mission in Guatemala

MP Public Ministry

NFU Norwegian Association for Development Research

NGO Non-Governmental Organization

OAS Organization of American States

OAU Organization of African Unity

OCHA United Nations Office for Humanitarian Affairs

OCHCR United Nations Office for Humanitarian

PAC Civil Self-Defense Patrol

PAN Partido de Avanzada Nacional (political party)

PARinAC NGO-UNHCR Partnership in Action

PCIDA Permanent Consultation on Internal Displacement in the Americas

PNC National Civil Police

PROPAZ OAS Peace Program

SEPAZ Peace Secretariat

UN United Nations

UNDP United Nations Development Programme

UNFPA United Nations Population Fund

UNHCR United Nations High Commissioner for Refugees

UNHCHR United Nations High Commissioner for Human Rights

UNICEF United Nations Children's Fund

URNG Guatemalan National Revolutionary Unity

USAC University of San Carlos

USAID United States Agency for International Development

USCR United States Committee for Refugees

USD United States Dollar

UTESP Unity of State and Public Sector Workers

WFP World Food Program

WHO World Health Organization

Part I

Part I: Introduction

1. Origin of the Study

The origin of this thesis may be traced back to the summer of 1994 at which time I served as assistant to the UNHCR Legal Advisor for the Americas in Geneva. The turmoil in Rwanda and the plight of the Haitian refugees overshadowed the problems related to internally displaced persons (IDPs) in Central America. Although field reports consistently attested to the clamour for restitution of land and the lack of legal aid by IDPs in Guatemala, questions arose regarding UNHCR response in relation to its mandate. First, there was concern as to whether these were development issues rather than humanitarian concerns, and second, whether the mandate extended beyond refugee protection to that of IDPs themselves. I was disturbed by the injustice of UNHCR and State policy to provide assistance to returning refugees and collective IDPs (CPRs) seeking property restitution, while largely excluding dispersed IDPs who constituted the majority of the displaced in Guatemala.

These issues were highlighted by the concurrent celebration of the ten-year anniversary of the Cartagena Declaration on Refugees of 1984 which had been adopted by the International Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, in response to the experience of forced migration in Central America. The Declaration's conclusions included a call for national authorities and international organizations to protect and assist internally displaced persons while relieving them of their hardships.¹ By 1994, the Declaration had been characterized by some as representing regional customary law, however there was concern that it had protection gaps pertaining the reintegration needs of internally displaced persons. A separate declaration was adopted: the San Jose Declaration on Refugees and Displaced Persons (1994) which reaffirms the validity of the Cartagena Declaration but provides additional protection guidelines.²

The San Jose Declaration cites concern for the increase in internal displacement of persons on account of human rights violations (falling beyond the scope criteria set forth in

¹ Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena on 19-22 November 1984, Conclusion 9.

² The San Jose Declaration on Refugees and Displaced Persons was adopted by the International Colloquium in Commemoration of the Tenth Anniversary of the Cartagena Declaration in San Jose 5-7 December 1994.

the Cartagena Declaration) and calls for “the safeguarding of those rights” as this is “an integral element for both the protection of the displaced and the search for durable solutions.”³ It notes that although the problem of the internally displaced is the “fundamental responsibility of the States of their nationality”, it remains a concern to the international community due to the human rights issues that are linked to the causes of refugee flows.⁴ Hence, protection is considered to be transnational depending on national and international actors.

The ensuing emergence of a plethora of soft-law norms applicable to IDPs sponsored by the United Nations Special Representative on Internal Displacement and the International Law Association in spite of the continuing applicability of general human rights norms resulted in a debate as to whether the creation of a new protection category was warranted. Although there is certainly no lack of relevant international standards, the problem arises from the discrepancy between the international community’s adoption of theoretical norms and its actual practice when designing policies on the ground. International organizations revealed discomfort with the recognition of IDPs as an operational category of assistance, allegedly due to difficulty of implementation and discriminatory effects towards persons not falling within the category. Resistance by the States of origin was an added pressure, as they were reluctant to open the door to an avalanche of claims when the coffers had been largely depleted by refugees.

Hence, there was need to examine the role of international and national remedial mechanisms in implementing these norms, specifically with respect to property restitution. I address both soft and hard mechanisms- ranging from international human rights monitors to executive land agencies and the Constitutional Court at the national level.

Given the weakness of the judiciary in Latin America, and in Guatemala in particular, the renewal of interest in alternative dispute resolution for property conflicts provided me with an additional institution to consider as a possible forum for access to justice. I first learned about the renaissance of alternative dispute resolution (ADR) within Latin America during my placement at the Inter-American Commercial Arbitration Commission in 1995. Of special interest was that Guatemala had adopted modern arbitration legislation as a means of decongesting the justice system and offering efficient alternatives to court systems

³ Introduction to conclusions. It calls upon States to adopt legislative and administrative measures based on the Cartagena Declaration’s principles in order to attain durable solutions for refugees and displaced persons. The Cartagena Declaration’s definition of refugee requires persons to be outside their country of origin as a result of threat to their lives, safety or freedom due to generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed public order.

⁴ Sixteenth Conclusion.

characterized by corruption and inertia. The lack of access to justice is a phenomenon that plagues all members of society, not only displaced persons. However, a link may be established to forced migration issues due to the fact that the absence of a responsive judicial system stimulates forced evictions and denies the possibility of remedy to those who have been dispossessed of their land. I chose to study the activities of Guatemalan Presidential Office of Legal Assistance and Resolution of Land Conflicts (CONTIERRA), a hybrid conciliation mechanism that was intended to fulfil in part the Peace Accords' guarantees of access to justice for rural peasants.

Additional interest in ADR as pertaining IDPs is need for remedies that are able to address the complex consequences of displacement beyond loss of property: *i.a.* loss of self-esteem, isolation from community, and abandonment by the State and society. Mechanisms which enable IDPs to tell their story, regain communal ties, and attain a renewed sense of self have a positive value during democratic transition. Essentially, ADR may possibly assist in evolving social capital, i.e. social trust and confidence in state institutions. Given that the end goal of conciliation is restoration of communal harmony, not merely the achievement of an accord, it may address equity needs which are not met in the formalistic framework of the courts. Hence, the developments in the justice sector and the on-going claims of the internally displaced persons provided me with a rich area for research.

In short, this study is deliberately transnational in response to the subject matter of internal displacement: it addresses the norms elaborated by special committees in Geneva, Washington D.C. and London (as well as their monitoring mechanisms) while also exploring policies promoted by the State with respect to land distribution and the use of conciliation in local villages in Guatemala. My curiosity was driven by a need to gain a holistic understanding of the interplay and interdependence (or lack thereof) of the various levels when addressing internal displacement and property restitution.

2. Background Overview



La Soga y la Ovación

The origin of the problem:
"We want land"
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"One of the underlying assumptions behind conflict resolution is that conflict has to be resolved in a way to reduce social injustice as well as eliminate political oppression and economic inequities."

Ho-Won Jeong⁵

The 21st Century has commenced with great attention being placed on prolonged internal conflicts and unstable post-settlement situations in which it is sometimes difficult to declare when the crisis stage has ended. The world is inundated with examples of countries undergoing transition from ethnic division and conflict based on the distribution of land as a means of attaining power, wealth, or survival, such as South Africa, Yugoslavia, Zimbabwe, and Guatemala. One of the most challenging issues present in these societies is the design of national mechanisms to resolve disputes which arise when displaced persons return to their

⁵ Ho-Won Jeong, "Research on Conflict Resolution" in HO-WON JEONG, CONFLICT RESOLUTION: DYNAMICS, PROCESS AND STRUCTURE 3, 31 (Ashgate 1999), citing D. Ronen, "Can There Be a Just Resolution of Conflict" in 5 (1) PEACE AND CONFLICT 8-25 (1998)

place of origin, or resettle in a new area, and are confronted by persons laying claim to the same land. The lack of provision of suitable land for return or resettlement thrusts displaced populations into new cycles of conflict and forced migration. As proposed by Carment & Schnabel there is a need to design strategies for preventive peace building or second-generation conflict prevention.⁶

Guatemala may be characterized as a nation undergoing a 500 year-old protracted social conflict between the minority elite group (*ladino* European ethnicity) that retains control of most of the land and the majority rural peasants (mostly indigenous), many of whom have been dispossessed or excluded from land ownership. The struggle to create a “new society” is complicated by a deep chasm between those who wish to overcome past repression and attain greater rights to participation in civil life and those who wish to maintain the advantages they have by resisting significant alterations of social structures.⁷ In addition,

⁶ David Carment & Albrecht Schnabel, *Building Conflict Prevention Capacity: Methods, Experiences, Needs*, UNU Workshop Seminar Series Report, Working Paper No. 5 (The Peace building and Reconstruction Program Initiative, IDRC, Ottawa & The United Nations University, Tokyo June 2001) available at <http://www.idrc.ca/peace/en/reports/paper05/applied.html>. “If we talk of a ‘culture of prevention’, we mean that the prevailing view within a non-state or interstate organization or a government is that stabilizing peace, alleviating poverty, improving environmental protection, supporting the development, promoting good governance, and assisting the displaced and vulnerable members of society are crucial elements in preventing potential instability and conflict. Identifying and targeting specific root causes with great potential for conflict escalation, is the key task of all those interested in applied conflict prevention. . . . over the long run structural prevention strategies include putting in place international legal systems, dispute resolution mechanisms, and co-operative arrangements at the regional level as well as meeting people’s basic economic, social, cultural, and humanitarian needs.”

UNDP describes conflict prevention as decreasing risk factors such as: “ (a) inequity, by addressing disparities among identity groups and effects on gender relations; (b) inequality, by addressing policies and practices that institutionalise discrimination; (c) justice, by promoting the rule of law and the effective and fair administration of justice; and (d) insecurity, by ensuring human security and strengthening accountable, transparent and participatory governance that promotes equitable economic growth, inclusive social development and national ownership of development programs.” Executive Board of the United Nations Development Programme and of the United Nations Population Fund, *Role of UNDP in Crisis and Post-Conflict Situations*, 18 (DP/2001/4) 27 November 2000 available at <http://www.undp.org>.

⁷ Edward Azar defines a protracted social conflict as originating “when communal groups (defined by shared ethnic, religious, linguistic, or other cultural characteristics) are denied their distinct identity or collective developmental needs.” The identity is seen as being “dependent upon the satisfaction of basic needs such as those for security, communal recognition and distributive justice”. Human rights allows a means by which to express demands for recognition of identity and needs. He asserts that “(n)either military nor legal strategies will be successful in bringing about a definitive end to the crises and outbreaks of collective violence or war generated by these conflicts”, therefore he calls for alternative methods of conflict management to increase the levels of trust and build confidence, for use in combination with development strategies. EDWARD E. AZAR, *THE MANAGEMENT OF PROTRACTED SOCIAL CONFLICT: THEORY AND CASES*, p. viii & 2 (Dartmouth 1990). He further characterizes protracted social conflicts as having “. . . enduring features such as economic and technological underdevelopment, and un-integrated social and political systems. They also have other features that are subject to change, but only when conditions allow for far-reaching political changes. These include features such as distributive injustice that require the elimination or substantial modification of economic, social and extreme disparities in levels of political privilege and opportunity. Any ‘solutions’ that do not come to grips with these features are solutions that must rest on law enforcement, threat or power control by the more powerful party to the conflict. Conflict is likely to erupt once again as soon as there is any change in the balance of forces, in leadership, or in some other significant eco-political conditions. . . We are led to the hypothesis that the source of protracted social conflict is the denial of those elements required in the

there is a multiplicity of interpersonal-inter-communal property disputes among the rural poor at the local level.

Within Guatemala, the cycle of infringement of land rights, violence, and ensuing displacement has been repeated so often so as to stagnate development and social cohesion. Since the colonial period, indigenous people have been subject to forced eviction in order to provide plantation owners with labour and land. An attempt by President Arbenz to alter the inequitable division of land in Guatemala via expropriation in 1952 resulted in a coup d'état and 36 year civil war. The conflict devastated the society by breaking apart communities, dispossessing people from their land, and ravaging the countryside via scorched earth tactics. It inflicted a culture of violence, hostility, passivity, and distrust that prevails to this day. One million persons were internally displaced, 100,000 killed, and 151,000 were exiled as refugees. Although the land issue retained primary interest during the peace process, the Peace Accords failed to include any guarantee of land reform based on expropriation, thus there has been no change whatsoever in land distribution.⁸ UNDP identified inequitable land distribution as the underlying factor of the extensive poverty and social and economic inequality in rural Guatemala.⁹ It is estimated that 2% of the population owns 65% of the arable land, 75% of the best quality land is held by 1% of producers, while 20% of the land is utilized by 96% of producers.¹⁰ The Gini index for land distribution is calculated at a shocking .85 (0 = perfect equality, 1 = perfect inequality).¹¹ The amount of families with

development of all people and societies, and whose pursuit is a compelling need in all. These are security, distinctive identity, social recognition of identity, and effective participation in the processes that determine conditions of security and identity, and other such developmental requirements." Edward E. Azar, "Protracted International Conflicts: Ten Propositions" in EDWARD E. AZAR & JOHN W. BURTON, *INTERNATIONAL CONFLICT RESOLUTION* 28 (Wheatshaf Books 1986). *See also* JAY ROTHMAN, *FROM CONFRONTATION TO COOPERATION: RESOLVING ETHNIC AND REGIONAL CONFLICT*, 39 (Sage 1992). Rothman describes protracted social conflicts as "characterized by long-standing, seemingly insoluble tensions that fluctuate in intensity over extended periods of time. They generally can be traced back to colonial boundaries and cultural rivalries and are most clearly manifested in economic inequalities." *See also* Ho-Won Jeong, *supra* note 5 at 9. He points out that in ethnic conflicts, power asymmetries do not result in diminishing conflict, instead oppressed groups retain determination to achieve freedom and autonomy, thus conflict is prolonged. *See* note 1 at 9.

⁸ UNDP concluded that "... the structure of ownership of the land, source of the majority of exclusions within the country, does not appear to have substantively changed in the second half of the 20th century." UNDP, *GUATEMALA: LA FUERZA INCLUYENTE DEL DESAROLLO HUMANO* (2000) (hereinafter *La Fuerza Incluyente*). In 2002, UNDP confirmed that land distribution was unchanged.

⁹ *Id.*

¹⁰ MINUGUA, *SITUACION DE LOS COMPROMISOS RELATIVOS A LA TIERRA EN LOS ACUERDOS DE PAZ* (MAY 2000).

¹¹ MESA NACIONAL MAYA DE GUATEMALA, *SITUACION DE POBREZA DEL PUEBLO MAYA DE GUATEMALA*, 108 (COINDE 1998). The majority of rural peasants are indigenous, hence deprivation of access to land results in severe marginalisation of indigenous people: 89.5% of the Mayan population is poor and 81.70% of farmers are extremely poor.

direct access to land actually diminished in the past twenty years, from 61% to 49%.¹² 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%.¹³ The root cause of the conflict remained un-remedied and the conflict has re-emerged in the form of protest marches and land invasions.

The existence of a divided society, characterized by racism and exclusion so endemic it may well be considered *de facto* apartheid, inhibits yet also calls for the elaboration of procedural mechanisms by which to empower marginalized groups, channel disputes in peaceful manner, and provide remedies.¹⁴ The State's democratic institutions and processes exist only on a superficial level. The rule of law, the principle of equality of citizens, and the primacy of human rights and freedoms have limited validity in practice.

Guatemala's transition to democracy has exposed it to an increase in ethnic/class disputes due to high expectations among marginalized groups, such as indigenous people, rural peasants, and internally displaced persons about their rights to equal citizenship, on both political and socio-economic levels. Further aspirations that have yet to be implemented address group autonomy, social justice, and human rights protection issues.¹⁵ In part, the failure of these groups to attain response to their demands for redistribution of resources is due to their own fragmentation as well as the stratification of the State.

In contrast, the elite network (composed of land-owners as well as the military, of which some members form part of the former category as well) is nefariously solid due to its reliance on client networks, corruption, and impunity to maintain the distribution of power, resources, and access to the State. This forms a type of "dark side of social capital", which at present is accused of overwhelming the State as well as the society. Elections result in a change of individuals who uphold oligarchical interests rather than enact structural changes to

¹² UNDP, LA FUERZA INCLUYENTE supra note 8.

¹³ Over 470,000 rural families are landless although 4 million hectares of land remains uncultivated. The agricultural sector composes over 25% of Guatemala's GDP is the source of most of its exports. Over half of the working population is located in the agricultural sector. Although there has been no change in the concentration of land, the percentage of land dedicated to ranching and export crops increased in the past 30 years. UNDP supra note 7.

¹⁴ "Throughout its history, since the days of the Spanish conquest, Guatemala has been a divided country. At no time was a real effort made to forge a nation uniting all the inhabitants of the country. Far into the twentieth century, the ruling elites saw themselves as constituting a Hispanic nation within which the indigenous population had no true right of abode. It would now seem that the true challenge to the Ladino group of the population is to acknowledge that the racist ideology that has pervaded Guatemala for centuries has been one of the main reasons for the ruthless treatment of the Mayan communities." Christian Tomuschat, "Clarification Commission in Guatemala" in 23 HUMAN RIGHTS QUARTERLY, 233, 257 (2001).

¹⁵ See T.R. Gurr, "Peoples Against States: Ethnopolitical Conflict and the Changing World System", in 38 (3) INTERNATIONAL STUDIES QUATERLY 347-377, cited in Ho-Won Jeong & Tarja Vayrynen, "Identity Formation and Transformation" in HO-WON JEONG, supra note 5 at 61.

improve development.¹⁶ The political elites have been defined as a “connecting nexus” between the Army and the business elites or “serving merely as a transmission belt.”¹⁷ The political system is constrained from achieving democratic reform on account of the influence of the oligarchical elite (landowners, military). The economic system’s evolutionary capacity has been stymied by the prevalence of neo-feudalistic agrarian practices based on export crop plantations exploiting seasonal laborers.¹⁸ Indeed, it has been noted that the merger of political and economic interests is so complete that the latter swallows up the former entirely.¹⁹

There is a direct link between the lack of equality within the nation and the extent of corruption and impunity affecting the performance of State institutions, spanning the Executive, the Legislature, and the Judiciary.²⁰ Freedom House’s ranking of the state of democracy and freedom in the world for 1999-2000 categorized Guatemala as being only “partly free” due to restriction of political and civic rights. On a scale of 1-7 (1= highest degree of freedom, 7= lowest degree of freedom), Guatemala received a score of 3 for political rights and 4 for civil liberties. Key criticisms included “Rampant official corruption and the often violent harassment and intimidation by unknown assailants of rights activists, judicial workers, journalists and witness to human rights trials . . . (and) increase in instances of vigilante justice”.²¹ In terms of insecurity, the Inter-American Development Bank listed Guatemala among the five most violent countries in the world.²²

Thus, the issue of property distribution does not merely reflect the malfunction of the economic system, but also that of the political and legal spheres- “He who controls the land, controls the power, and he who controls the power, controls the land.”²³ For large landowners,

¹⁶ THOMAS & MARJORIE MELVILLE, *TIERRA Y PODER EN GUATEMALA* 18 (Coleccion Seis 1982). See also PRENSA LIBRE, “Editorial: Finaliza año malo para Guatemala” (31 December 2001) at <http://www.prensalibre.com>.

¹⁷ Rene Potevin, “Reflections on the Problems of Democracy in Guatemala” in LIISA L. NORTH & ALAN B. SIMMONS, EDS., *JOURNEYS OF FEAR: REFUGEE RETURN AND NATIONAL TRANSFORMATION IN GUATEMALA*, 31,34 (McGill- Queen’s University Press 1999).

¹⁸ See “Un país de corte feudal” in PRENSA LIBRE 12 October 2000, citing Maria del Carmen Acena, president of the Centro de Investigaciones Economicas Nacionales, CIEN, who attributes Guatemala’s poverty to its maintenance of feudal economic practices and calls for meeting the people’s basic needs for schools, potable water, health care, and housing.

¹⁹ Rene Poitevin, *supra* note 17 at 35.

²⁰ Freedom House criticized the legal system’s lack of personnel, problems with intimidation of witnesses, lawyers, and judges, lack of transparency and accountability, and exclusion of indigenous people from access to justice. See Freedom House, “Freedom in the World: Guatemala” at <http://www.freedomhouse.org>.

²¹ *Id.* Freedom House’s previous report highlighted an increase in insecurity. It criticized the existence of “a climate of violence, lawlessness, and military repression” and upscale in narco-trafficking.

²² Nefer Muñoz, “Central America: The Most Violent Area in the Americas”, in INTER-PRESS SERVICE, 31 July 2000.

²³ Melville, *supra* note 16 at 19.

land is the guarantee of wealth, power, and social status; distribution of their land would entail a diminishment of such gains. For peasants, particularly those of indigenous descent, it is the place of historical and spiritual links to ancestors, provider of nourishment to families, and the well-spring of collective bonding and communal identity. Because land is identified as the source of life in its various manifestations and the primary form of occupation, thus serving as a symbol of control over one's own destiny, conflicts provoke strong emotions. Transcendental questions arise with respect to equitable division of resources within a society, group autonomy, and each individual's right to basic human dignity. Hence, there is a fundamental contradiction as both groups consider the land to be a source of survival, but on much different scales.²⁴ This complicates dispute resolution, because in essence the parties believe that there are no substitute satisfiers for land, and the land claims remain ever present.²⁵

The right to property restitution as such for internally displaced persons remains an evolving area of law, given that specific standards have not yet been elaborated within a binding instrument. In the past few years, internally displaced persons have gained recognition and attention by human rights actors and activists. Both the UN Sub-Commission on the Promotion and Protection of Human Rights and the UN Committee on the Elimination of Racial Discrimination issued resolutions calling for property restitution to returning internally displaced persons.²⁶ International legal experts in Geneva, Vienna,

²⁴ At the root of this problem is what Dorner refers to as the "dualistic function of land"; he notes that in Latin America there is an inherent clash between the "social function" of land, as provider of jobs, food, and homes for the people at large, and the "economic function" of land as source of harvest for export goods sold by elites or rental income for the state in the case of mining, drilling, etc. DORNER, PETER, *LATIN AMERICAN LAND REFORMS IN THEORY AND PRACTICE: A RETROSPECTIVE ANALYSIS*, 10 (The University of Wisconsin Press 1992).

²⁵ See Christopher Mitchell, "Necessitous Man and Conflict Resolution: More Basic Questions about Basic Human Needs Theory" in BURTON, JOHN, (ED.) *CONFLICT: HUMAN NEEDS THEORY* 149, 164 (MacMillan 1990), discussing basic human needs as static vs. dynamic.

²⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, Resolution 1998/26 on "Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons" and UN Committee on the Elimination of Racial Discrimination, General Recommendation XXII (49) adopted at the 1175th Meeting on 16 August 1996, in Annual General Assembly Report of the Committee on the Elimination of Racial Discrimination, Official Records, Fifty-first Session Supplement No. 18, UN Doc. A/51/18 (1996). The latter highlights a situation relevant to Guatemalan IDPs where persons were forced to sell their land by acts of violence and threats: "*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.*"

In 2002, the Sub-Commission on the Promotion and Protection of Human Rights considered a working paper on "The Return of Refugees' or Displaced Persons' Property" which highlighted "the absence of effective and accessible judicial remedies, which severely limits the utility of pursuing judicially based solutions as a means of restoring rights to housing and property". U.N. Sub-Commission on the Promotion and Protection of Human Rights, Working Paper submitted by Mr. Paulo Sergio Pinheiro pursuant to Sub-Commission decision

London, and Washington D.C. elaborated soft law principles applicable to internally displaced persons, which include a call for restitution, compensation or reparation of lost property: The Guiding Principles on Internal Displacement (1998) promoted by the UN Special Representative on Internal Displacement and the Declaration of Principles of International Law on Internally Displaced Persons (2000) elaborated by the International Law Association.²⁷

As mentioned previously, in the field, humanitarian and development aid agencies regarded the creation of soft law impractical to implement on the ground as it would lead to problems regarding financing compensation, identification of internally displaced persons, and further conflicts with other marginalized groups.²⁸

In 1999, the Guatemalan government announced that the return of the refugees was finally completed. A total of 36 fincas (measuring 1,250 caballerias) had been provided to 41,670 repatriated refugees.²⁹ The majority of these acquisitions were made possible by a special fund, *Fondo de Reinsercion Laboral y Productiva para la Poblacion Rapatriada* (FORELAP), which issued revolving credits repayable to the same community, rather than a bank or the State. Although UNHCR, IOM, the Donors, and the State celebrated this achievement as closing the chapter on the need to resettle victims of conflict induced forced migration, there appeared to be an air of disquietude. During the negotiation of the Peace Accords, UNHCR primarily focused its property restitution advocacy efforts on those falling directly under its humanitarian mandate, i.e. refugees, thereby excluding the majority of displaced victims, i.e. dispersed internally displaced persons (IDPs).³⁰ The United Nations

2001/122 on “The Return of Refugees’ or Displaced Persons’ Property”, Fifty-fourth session, E/CN.4/Sub.2/2002/17, para. 44 (12 June 2002).

²⁷ See Declaration of Principles of International Law on Internally Displaced Persons, Article 9: “*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*” International Law Association, Report and Resolution No. 17/2000, 69th Conference in London 25-29 July 2000. See also the Guiding Principles on Internal Displacement, Principle 29 (2): “*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.*”

UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Addendum: Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, (11 February 1998).

²⁸ Cecilia Bailliet, “Unfinished Business: The IDP Land Question in Guatemala” in FORCED MIGRATION REVIEW (Refugee Studies Programme April 2000); See also Cecilia Bailliet, “Preventing Internal Displacement: Conciliating Land Conflicts in Guatemala” in REFUGEE SURVEY QUARTERLY (Oxford U. 2000); See Also, Cecilia Bailliet, “Property Restitution in Guatemala: A Transnational Dilemma”, in SCOTT LECKIE (Ed.), HOUSING AND PROPERTY RESTITUTION: A COMPARATIVE STUDY (Transnational Publishers 2002).

²⁹ 1 *caballeria* = 45.1 hectares.

³⁰ Some IDPs were included within returning refugee communities.

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.³¹ Due to financial constraints and lack of political will both the international community and the State exhibited reluctance in addressing the restitution demands of the larger category of victims, regardless of the fact that they experienced forced eviction/forced migration in like manner to refugees.

The severe fragmentation of dispersed IDPs and disappearance into the urban shantytowns destroyed social networks and in turn prevented a successful lobby for international or national protection. In contrast, refugees were organized in camps where they were able support each other, identify their demands, and coordinate with international organizations to attain response.³² The same was true for the collective IDPs, *Comunidades de Pueblos en Resistencia*, who reached the attention of the OAS.³³ Although the Guatemalan land agencies receive inquiries from IDPs on a daily bases, there has been no initiative to create a strategy for them. In short, this group may be substantial in number but it has been deemed to be politically irrelevant in Guatemala by the state and international actors.³⁴ CONDEG has accused the State of deliberately attempting to reduce the number of IDPs in order to avoid assuming responsibility for restitution.

It has also been suggested that the State would not recognize IDPs as a category because it did not want the issue addressed in the Commission on Historical Clarification.³⁵ The Commission's report was released to the public in March 1999 and received much attention as it clearly described the extraordinary displacement and other human rights abuses undergone by the rural population.³⁶ It identified reparation to human rights victims,

³¹ 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).

³² On the ability of refugees to create social capital, see Peter Loizos, "Are Refugees Social Capitalists?" in STEPHEN BARON, JOHN FIELD & TOM SCHULLER, SOCIAL CAPITAL: CRITICAL PERSPECTIVES 124 (Oxford University Press 2000).

³³ Comision Interamericana de Derechos Humanos, Informe Especial sobre las Comunidades de Pueblos en Resistencia (OEA 1994).

³⁴ One exception is the Inter-American Commission of Human Rights which highlighted its concern for restitution needs of IDPS in its Fifth Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.111, Doc.21 rev., (6 April 2001).

³⁵ Interview with Lic. Antonio Argueta, COJUPA, 16 February 1998.

³⁶ The Historical Clarification Commission (CEH) released its report, "Guatemala: Memory of the Silence", in which it charged the Guatemalan State with acts of genocide against the Mayan people. The State was identified as being responsible for 90% of the 200,000 deaths during the conflict. The CEH investigated 669 massacres the victimization of 42,000 people (among whom 29,000 disappeared or were killed). It was highlighted that of the

including restitution of lost property, as being one of the conditions for a full transition to reconciliation and the rule of law in Guatemala.³⁷ It identified four general groups deserving property restitution and categorized their difficulty of resolution, however a chapter identifying the specific property claims of IDPs was eliminated from the final version.³⁸

1. *Displaced persons claiming National Institute for Agrarian Transformation (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*

In addition to the displaced populations, the historically unjust distribution of land has resulted in ongoing frustration among landless peasants, peasants with insufficient land, and poor rural workers seeking compensation for unpaid wages due to the absence of an effective land distribution program. In like manner to IDPs, these groups remain heavily fragmented.

investigated crimes, 344 massacres and 45.52% of human rights violations occurred in the Quiche department, which has a majority indigenous population. The worst events were deemed to have occurred between 1981-83. Given that the principal charge is genocide, prosecution of Generals Romeo Lucas Garcia and General Efraim Rios Montt is promoted by the Center for Legal Action in Human Rights, as amnesty laws cannot shield them from this charge.) However, it is unclear whether the forced displacement of people will be a basis for prosecution and whether property will form part of the claim for compensation.

³⁷ 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.

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 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”.

³⁸ Commission for Historical Clarification, Guatemala: Memoria del Silencio, Chapter III, La Ruptura del Tejido Social: Desplazamiento y Refugio, para. 410.

Many peasants and indigenous groups seek recognition of their customary holdings but encounter problems due to the lack of clarity within the registry system, e.g. there is a problem with double-titles, misalignment between registry information and the actual physical location of properties, destruction of titles during the war, non-acceptance of communal norms/prescription claims/historic title, etc. The opponents of these claims include powerful plantation owners (companies and private families), ranchers, State entities (such as the Army), military officers (some linked to narco-trafficking) who became landowners during the war through coerced or fraudulent appropriation, as well as other peasants. Further problems are presented by the increasing scarcity of land due to soil degradation and surge in population.

Thus, the state of inequity as pertaining land distribution is derived from the ongoing existence of neo-feudal structures which corrupt the function of the economic, political, and legal systems, and the existence of an elitist society defined by ethnicity and class which negates the majority equality in the enjoyment of citizenship rights.

3. Objective of the Thesis

Due to the myriad of ongoing and potential land conflicts and the obvious need for empowerment of these marginalized groups; I became intrigued by the procedural aspects of return and reintegration during the post-conflict phase. Essentially, the right to restitution is contingent on the right to remedy or recourse.³⁹ The lack of effective remedial and

³⁹ The U.N. Sub-Commission on Promotion and Protection of Human Rights, formerly Prevention of Discrimination and Protection of Minorities, issued Resolution 1998/26 which criticized the implementation of laws which violate property rights thus impeding the return and reintegration of refugees and internally displaced persons and urged: “. . . all States to ensure the free and fair exercise of the right of return to one’s home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems.” U.N. Sub-Commission Resolution 1998/26 on “Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons”, adopted at the 35th meeting 26 August 1998. The emphasis on dispute resolution in this resolution is one of the few examples of formal recognition of the importance of procedural mechanisms to implement and uphold substantive property rights of internally displaced persons.

The UN Guiding Principles on Internal Displacement, Principle 7 (f) states: “The right to effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.” This provision leaves open the possibility that alternative dispute resolution mechanisms may be utilized, as long as there is access to a court as a final instance.

The ILA Declaration of Principles of International Law on Internally Displaced Persons, Article 8, notes: *“In the case of a Federal, non-unitary or divided State, internally displaced persons are entitled to the same treatment as is accorded to local permanent residents, particularly in respect to . . . access to courts . . .”*

The emerging standards relevant to internally displaced persons recognize the formal right to remedy but do not address the impracticalities that may prevent the right from being remedied. Unlike, the instruments relating

enforcement mechanisms on the national level limits respect for civil & political rights as well as socio-economic rights thus inhibiting peace consolidation. The coincidental creation of a hybrid conciliation mechanism for land disputes in Guatemala provided me with an appropriate case study. The Presidential Office for Legal Assistance and Resolution of Land Conflicts (CONTIERRA) is the official conciliatory mechanism for land conflicts established in 1997 by the Guatemalan government and is considered one of its primary structural responses to demands for effective dispute resolution to land conflicts.⁴⁰ The description of its function identifies the need to create new interaction between the State and the society:

”CONTIERRA . . . assumes a historic responsibility in the national agenda, oriented towards the search for negotiated solutions based on the participation and presence of various sectors involved in conflicts related to the agrarian issue, surmounting the roots of conflict, favoring the articulation of the Guatemalan efforts to reach a democratic coexistence which will lead the country on the path of development.

This Office shall have the jurisdiction to promote the development of a culture of dialogue for the search of consensus alternatives by way of participation and direct involvement of the State Institutions and the Civil Society in the resolution of land conflicts.”⁴¹

These statements contain an implied recognition of the fact that the civil society has been excluded from participation in land issues and that the traditional means of dispute resolution have been unsuccessful. The key goals presented by CONTIERRA are to resolve land disputes and to promote social capital renewal by stimulating trust and dialogue within communities, between different communities and groups, between social groups/communities and State institutions, and between rural peasants and the agribusiness sector, e.g. the Chamber of Agriculture. It is intended to be the means by which to transform the agrarian conflict into ”democratic coexistence with social justice”, thereby equating peace building with social justice.⁴²

The objective of the thesis may identified as follows:

First, I address the function of the transnational law making process as possible “linking social capital” for IDPs. Does the elaboration of soft law norms, in particular the Guiding Principles on Internal Displacement, and use of specialized/general monitors provide an appropriate framework to address IDPs’ need for land distribution and property restitution? I seek to understand whether there remain any protection gaps and whether a new legal instrument for IDPs is required.

to housing, the IDP instruments do not include require the State to provide translation facilities, legal aid, cost waivers, etc. The failure to place a duty on the State to make this procedural right effective in practice was curious, given that the standards do place such duties on the State as pertaining other rights.

⁴⁰ Acuerdo Gubernativo No. 452-97 4 June 1997.

⁴¹ Dependencia Presidencial de Asistencia Legal y Resolucion de Conflictos Sobre La Tierra, CONTIERRA: Estructura Organizacional, p. 1 (Guatemala, October 1997).

⁴² Id. at 4.

Second, I describe the structural background context, in order to assess the impact of dysfunctional social systems (politics, economics, and law) upon dispute resolution in its varied forms. As this is linked to structural social capital, I address participation in policy-making processes (formal v. informal), type of regime, the rule of law, and the legal framework.

Third, as the main goal of the thesis, I seek to explore whether the use of a hybrid conciliation mechanism in a post-settlement situation may serve to resolve property disputes in order to inhibit second-generation displacement. A sub-goal is to undertake a preliminary examination of CONTIERRA's capacity for stimulation of social trust and confidence in the State, thereby examining its potential as a peace-building mechanism.

*It is my contention that preservation of an ethic of recognition within a dispute resolution mechanism is contingent on the elaboration of a framework which permits **equal party participation**, incorporation of **pluralistic legal norms**, and provision of **responsive output** to address human needs. I propose that such guidelines are needed to permit IDPs and other marginalized groups to enjoy rights that are crucial to their empowerment, i.e. restitution of property and remedy.*

4. Background Theories and Methodology

This study heeds Maria Stravropoulou's advocacy for research based on finding the "root causes" of displacement with reference to international social, political, and historical settings.⁴³ Although she warns against "internalist" perspectives, stating that they hinder adequate resolution of displacement crises, it is the contention of this author that due regard must be held for the primacy of domestic causes and responses. Within Guatemala, unequal land distribution, a malfunctioning/inaccessible justice system, and the legacy of internal violence at the national level are indeed among the principal root causes of displacement, and solutions are currently being sought on the national level, albeit with international input. Given the fact that internal displacement is a factor of the breakdown or weakness of the State, the resolution of the crisis depends on reorganization of the national political, economic, and legal infrastructure, as well as the germination of social capital. The role and influence of the international community is explored to explain how its protection and remedial mechanisms fare in comparison and in conjunction with national institutions in terms of providing remedy to IDPs.

⁴³ Stravropoulou, Maria, "The Right Not to Be Displaced", 9 AM. U.J.INT'L. L.& POL'Y 689 at 690 & 698 (Spring 1994).

In accordance with these objectives, the methodology juxtaposes traditional legal review of hard & soft law on the international, regional, and national levels with an overview of the political and economic systems within Guatemala, empirical, qualitative study of cases by the ADR mechanism, and reference to quantitative data pertaining to social capital. This is a hybrid study that crosses boundaries not commonly traversed within legal research. I sought to conduct a study that assesses the role of law within a specific context and utilize multidisciplinary frameworks of review. I present as a caveat that I am neither an anthropologist nor a sociologist; my education and experience is grounded in law and political science, thus expectations regarding methodology, theoretical basis, etc. should not be based on the former fields although there is a certain degree of influence due to referred sources.

I seek to demonstrate the challenges of law in its procedural and substantive variants within political and economic settings that are based on social exclusion, inequality, and communal fragmentation.⁴⁴ In order to address these issues comprehensively, I have conducted traditional review of legal norms and case law but also sought to describe the background context affecting the function and impact of norms and mechanisms. Hence, in addition to legal sources, I consulted literature pertaining to both systems theory and social capital perspectives.

⁴⁴ 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, LA FUERZA INCLUYENTE supra note 8.

4.1. Social Science Theories

4.1.1. Systems Theory

Easton Model

“A political system is a goal-setting, self-transforming and creatively adaptive system”

*David Easton*⁴⁵

David Easton constructed a model for the analysis of a political system. He envisioned the political system as a somewhat organic entity which is exposed to outside influences and reacts to them.⁴⁶ It authoritatively allocates societal values by way of depriving one of a valued possession, blocking the attainment of the valued possession, or granting access to such to one group as opposed to another.⁴⁷ A political system is also considered to be a means of resolving differences and mobilizing societal resources and energies towards the pursuit of goals.⁴⁸ The legal system accomplishes the same task and thus maintains social order by providing forums and procedures to resolve disputes which cannot be solved privately. It issues output of authoritative statements reflecting the distribution of values:

“When they appear as statements, authoritative allocations take the form of verbal indications of the binding rules that are to guide the performance of tasks. They are decisions on the part of the authorities that certain actions should be or will be taken. In a legal system, they appear as laws, decrees, formal legislation, regulations, or administrative and judicial decisions. In non-legal systems, they may simply be the opinion of a council of elders or of a paramount chief, about what ought to be done under the circumstances. But whatever the specific form, they stand as authoritative outputs since they indicate that the authorities intend that activities will be undertaken to maintain or modify the distribution of some of the valued things in a given society.”⁴⁹

A regime depends on the support of the people in order to be effective, thus people must be allowed to place demands on the system. Demands are defined as statements proposing or rejecting the authoritative allocation of a value and (together with support) represent changes or disturbances taking place in the environment. They may be specific, e.g.

⁴⁵ EASTON, DAVID, A FRAMEWORK FOR POLITICAL ANALYSIS 132 (Prentice Hall 1965) (hereinafter Framework).

⁴⁶ EASTON, DAVID, A SYSTEMS ANALYSIS OF POLITICAL LIFE, 21 (The University of Chicago Press 1965) (hereinafter Systems).

⁴⁷ EASTON, FRAMEWORK, supra note 45 at 50 (Prentice Hall 1965).

⁴⁸ EASTON, SYSTEMS supra note 46 at 153.

⁴⁹ Id. at 354.

restitution of land, or general, e.g. reduction of poverty and pass from one subsystem to another. As presented below in Figure 1, the demands are received as **inputs** by the system (represented by the black box) which makes policy decisions resulting in **outputs** to the populace & environment, which in turn prompts **feedback** thus provoking new inputs. All social systems, e.g. the legal system, the political system, and the economic system, are considered to be dynamic in the sense that the feedback mechanisms allow the system to learn from past actions, instill changes in structures, goals, or behavior, and regulate itself in order to persist throughout the future when undergoing stress.⁵⁰ However, an overflow of demands (demand-input overload) due to excessive volume and variety will backlog the system and stagnate the process. Thus, he concludes that the State should have a means of organizing demands in order to deal with them effectively. In general, the decisions and actions of a social system should respond to the demands placed on it. If so, support increases (in the form of approval/acquiescence of political objectives) and the process functions smoothly. If the demands are not heeded, and policy actions have no correlation to the demands (output failure), the system will lose **support** and undergo stress, ranging from hostile apathy to protest marches, in the worst case leading to collapse. Some demands may be extremely complex and difficult to respond to, in spite of being limited in number. Systems which receive an excessive number of demands which are also of a complex nature will undergo extreme stress and prove unlikely to render efficient response. Output may respond only to the most influential members of society (those deemed to be politically relevant), and this may generate initial stability but risks promoting further divisions due to the exclusion of marginalized groups.⁵¹

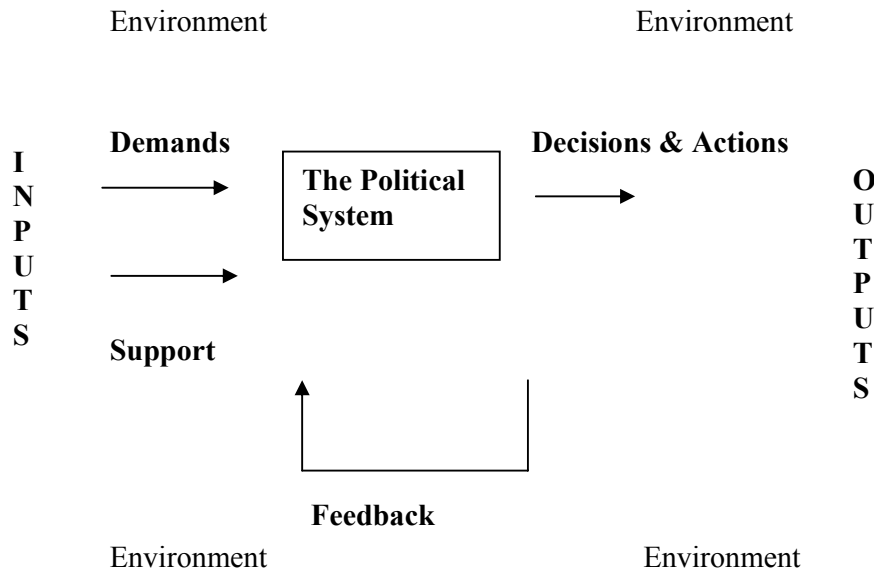
The pressures of outside forces (both intra-societal and extra-societal) such as the economy, demographics, culture, and international community, form the **environment** of the system and also affect the functions of the process by prompting reaction in the form of input demands, support, and pressure. This model has been utilized within the field of legal development as well.⁵²

⁵⁰ DAVID EASTON, *THE ANALYSIS OF POLITICAL STRUCTURE* 118 (Routledge 1990). See also EASTON, *SYSTEMS* at 19.

⁵¹ EASTON, *SYSTEMS*, supra note 46 at 401 & 408. He points out that although it takes “. . . a great accumulation of disappointments and frustrations to disillusion members with an ongoing system, it would normally require an even greater series of deprivations to rouse them to the kind of organized action required to transform a regime or destroy a political community.”

⁵² See ROBERT B. SIEDMAN, *THE STATE, LAW & DEVELOPMENT*, 193 (St. Martin's Press 1978)

Figure 1⁵³ Easton's Simplified Model:



Analysis of social systems requires overview of the inputs, conversion processes, production of outputs and response to feedback.⁵⁴ Regarding inputs, we are to consider the types of demands, e.g. resolution of land disputes, and support of the system. Demands may call for recognition of customary rights or maintenance of the status quo. International organizations may be very supportive of peace building initiatives, while elites may pressure the entity to refrain from achieving social justice. Conversion processes combine the values behind choice making (which is intrinsically linked to the degree of party participation, as well as autonomy and background of decision makers) with norms in order to arrive at decisions or accords which form output. For example, in court proceedings, parties have a low degree of participation. The judge may be of *ladino* background, have a formal law bias and believe that the courts should exclude themselves from social engineering. He/She may fail to recognize the validity of a claim based on historic title and may undergo pressure from elite actors to uphold the current distribution of property. In conciliation, the parties retain a high degree of participation. They may be of indigenous descent and seek to invoke the Peace Accords and customary norms as relevant frames of reference to attain social justice.

Output may be tangible, such as restoration of property, or intangible such as maintenance of the rule of law within the society or restoration of a sense of dignity to a victimized group or individual. Should social systems prove non-responsive to demands and feedback due to lack of empathy, bias, etc., or engage in actions which the populace rejects as

⁵³ EASTON, SYSTEMS, *supra* note 46 at 32.

⁵⁴ SIEDMAN, *supra* note 52 at 193.

illegitimate, then the system risks overload, rejection, or attack.⁵⁵ Excessive time in processing or overload of demands may overwhelm the systems, causing them to breakdown.

Hence, this study intends to highlight the tension between policies pursuing systems maintenance in order to provide stability within a post-war State and expectations by marginalized groups as well as international observers and donors regarding social justice reform as a means to emancipate repressed groups and individuals, i.e. internally displaced persons and indigenous people, within the society.

In addition, I referred to Nonet & Selznick's discussion of systems theory as pertaining the degree of repression, autonomy, and responsiveness quality of law in relation to its level of independence from power politics.⁵⁶ They present an overview of the legal system as undergoing an evolution in relation to the political social order in which three stages are passed:

- 1) **Repressive law:** *This is characterized by the subordination of law to power politics, privileges of the elite are upheld, and the populace is coerced into submission,*
- 2) **Autonomous law:** *Law separated from politics, focus on rules and black letter law, procedural fairness, no judicial activism to solve social problems,*
- 3) **Responsive Law:** *It integrates legal and political powers but submerges coercion in order to respond to social needs and aspirations advanced by integrated legal and social advocacy; the judiciary may protect values and interests of weak members of society neglected by the legislature and the executive and address social patterns and institutional arrangements which victimize individuals or groups. Social conflict including protests is accepted as leading to negotiation and dialogue, the legal process is an alternative form of political participation (expanded legal aid, class action suits, etc.)*

In order to determine the law's nature, they call for “. . . empirical study of interdependent and variable aspects of legal ordering, for example, the legitimisation of authority, the sense of justice, the making and application of rules, legal cognition, legal development, legal competence, legal roles, legal pathology . . .” They look at variables such as “the role of coercion in law; the interplay of law and politics; the relation of law to the state and to the moral order; the place of rules, discretion, and purpose of legal decisions; civic participation; legitimacy; and the conditions of obedience.”

⁵⁵ EASTON, SYSTEMS supra note 46 at 439. He points out: “Where the authorities listen with empathy to feedback response from varied social classes, ethnic or racial groups, it will probably reflect this through the fact that among the authorities, in position of influence, will be found members drawn from these demographic groupings.”

⁵⁶ See PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION, TOWARD RESPONSIVE LAW, at 14 (Harpur & Row 1978).

Drawing inspiration from these theories, I chose to present a background overview of the political-economic system in order to understand its negative impact on the evolution of legal system. It is contended that the dysfunction within the former on account of corruption, lack of transparency, and oligarchical tendencies stimulates segmentation and exclusion of citizens and in turn renders the function of legal system, both its norms and institutions, to serve elite interests. As mentioned previously, the legal system is further rendered inconsistent by existence of contradictory subsystems of norms, e.g. indigenous law, formal law, and human rights law which form the basis of expectations and claims by different interest groups, resulting in varying degrees of recognition by the State as pertaining legitimacy and enforceability.

4.1.2. Social Capital

The notion of social capital is of multidisciplinary origin and thus subject to different definitions according to the perspective of the person utilizing it. Its normative flexibility has resulted in critique due to vagueness as well as praise on account of creative application in contextual development studies.⁵⁷ I became interested in the term due to the fact that it may be used to address structural frameworks; **macro social capital** includes the rule of law, legal framework, type of political regime, and level of participation in policy process.⁵⁸ This perspective is founded on the notion that social capital evolves in relation to the State, not apart from it.⁵⁹ The majority of social capital literature has initially addressed the horizontal-local-voluntary social capital variants within society itself, e.g. associations and organizations, as defined and promoted by Robert Putnam.⁶⁰ These entities are considered to be structural components of **micro social capital**.⁶¹ Micro social capital may also address cognitive

⁵⁷ See John Harriss & Paolo de Renzio, "'Missing Link' of Analytically Missing? The Concept of Social Capital" in 9 (7) JOURNAL OF INTERNATIONAL DEVELOPMENT 919-937 (1997).

⁵⁸ See JOHN HARRISS, *DEPOLITICIZING DEVELOPMENT: THE WORLD BANK AND SOCIAL CAPITAL* (LeftWord 2001) (hereinafter *Depoliticizing Development*) and Peter Evans, "Development Strategies Across the Public-Private Divide" in 24 WORLD DEVELOPMENT 6 (1996) he notes that social capital is inherent in relationships that cross the public-private divide and highlights that the Third World countries lack reliable institutions, rule based-political competition, and the necessary egalitarian social structure to promote the stimulation of social capital.

⁵⁹ *Id.* at 50 citing Skocpol in M. Fiorina & T. Skocpol (Eds.), "Civic Engagement in American Democracy" (Brookings Institute Press 1999).

⁶⁰ See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (Simon & Schuster 2000).

⁶¹ Structural micro social capital includes horizontal organizations which include collective/transparent decision-making processes, accountable leaders and practices of collective action and responsibility. Anirudh Krishna & Elizabeth Shrader, "Social Capital Assessment Tool" prepared for the Conference on Social Capital and Poverty

factors, such as values (trust, solidarity, and reciprocity), beliefs, attitudes, behavior, and social norms.⁶² Further sub-division includes:

Bonding social capital: *Strong ties between immediate family members, neighbours, close friends, etc. sharing similar demographic characteristics. This may result in “dark side of social capital” as groups exhibit tendencies to preserve their own interests to the exclusion of other groups in society thus strengthening polarization, inequity, and divisions within society.*

Bridging social capital: *Weaker ties between people from different ethnic, geographical, and occupational backgrounds but with similar economic status and political influence. Bridging action is intended to heal social fragmentation, restore communal harmony, and prevent conflict and displacement.*⁶³

Linking social capital: *Ties between poor people and those in positions of influence in formal organizations such as banks, agricultural extension offices, schools, housing authorities, or the police.*⁶⁴ *In this thesis, I pay particular attention to linking social capital via transnational lawmaking initiatives as pertaining IDPs with respect to international experts and monitors, as well as at the national level vis-à-vis executive land agencies, development institutions, and the Public Ministry.*

As a lawyer, I was interested in assessing the role of law in a post-settlement society- to what extent can the law and its institutions promote faith in the State as well as social trust? In spite of the fact that there has been a call for research exploring the macro structural aspects of social capital, there does not appear to have been much empirical research which specifically focuses on the legal structures. In part, this may be due to the fact that the authors tend to be social scientists whose primary interests address other aspects of social capital, although many highlight the importance of the rule of law and legal structures as supporting

Reduction, The World Bank, Washington DC., 22-24 June 1999, citing K. Bain & N. Hicks, “Building Social Capital and Reaching Out to Excluded Groups: The Challenge of Partnerships”, paper presented at CELAM meeting on The Struggle Against Poverty Towards the Turn of the Millennium (Washington D.C. 1998).

⁶² Id.

⁶³ On social capital see NAT J. COLLETTA & MICHELLE L. CULLEN, VIOLENT CONFLICT AND THE TRANSFORMATION OF SOCIAL CAPITAL, 5 (THE WORLD BANK 2000); Cecilia Lopez Montano, “Pobreza y Capital Social: Informe para la CEPAL” (17 October 2000) identifying conflict resolution mechanisms as policies directed at improving social capital; Margarita Flores & Fernando Rello, “Capital Social: Virtudes y Limitaciones” paper presented at the Regional Conference on Social Capital and Poverty, CEPAL & Michigan State University, Santiago de Chile 24-26 September 2001. Other formulations include simple divisions between horizontal and vertical social capital: Horizontal social capital is accomplished by promoting trust, empathy, cooperation, civic engagement, and human rights education among like and diverse groups divided by religion, socio-economic class, ethnic identity, etc. Vertical social capital is achieved by improving confidence in state institutions as well as empowering and promoting greater civic participation by previously excluded groups (thereby improving relations between the State and civil society). The World Bank notes that “(t)he broadest and most encompassing view of social capital includes the social and political environment that shapes social structures and enables norms to develop. This analysis extends the importance of social capital to the most formalized institutional relationships and structures, such as government, the political regime, the rule of law, the court system, and civil and political liberties.” It sets forth the importance of the State to support the creation of norms between communities and the need for social stability and support for the State itself. See <http://www.worldbank.org/poverty/scapital/whatsc.htm>.

⁶⁴ JOHN HARRIS, DEPOLITICIZING DEVELOPMENT *supra* note 58 at 87 citing M. Woolcock in DEVELOPMENT RESEARCH INSIGHTS (September 2000) available at <http://www.id21.org>.

social capital.⁶⁵ I believe that there is a need for studies by lawyers which focus the discussion of social capital to the sub-topics of the rule of law, access to justice, legal frameworks and mechanisms for dispute resolution, as well as their link to cognitive elements relating to social trust and civic confidence at the national level.

The advantage that a lawyer may bring to social capital research is his/her specialized interest and understanding of norms; laws are formalized norms. I seek to clarify the role of creation and application of formal norms in building social capital, as well as their contrary application for destruction of social capital.

First, I provide an overview of the transnational soft law-making processes as a form of linking social capital intended to empower IDPs. In particular, with respect to the Guiding Principles on Internal Displacement, I demonstrate complications pertaining to effectiveness of empowerment function due to questions regarding the legitimacy and applicability of such norms when drafted outside traditional law making structures as well as problems regarding implementation in practice. I examine the strategy of transnational protection umbrella composed of inter-governmental actors, NGOs, etc. in order to understand whether it is actually emancipatory in function or whether it may promote further non-response to the restitution needs of IDPs.

Second, I describe the background context in Guatemala relating to structural social capital. Specifically, I address the weakness of the rule of law due to impunity and corruption, as well as contradictions and bias within the legal framework, e.g. progressive provisions on expropriation of land, indigenous land, and prescription rights contained in the Constitution and the Civil Code vs. penalties for usurpation in the Penal Code. In addition, I review the relevant provisions within the Peace Accords due to their stated purpose as norms which would restore social cohesion to the nation. Like the Guiding Principles, their soft law status raise similar questions regarding legitimacy, enforcement potential, etc. Because I am concerned with property issues, I examine the policy of the executive land & reparation agencies created to implement the Accords with respect to assisting dispersed IDPs access assistance to their plight.

⁶⁵ Narayan identifies sociologists, anthropologists, political scientists and economists as those participating in the debate on social capital. Deepa Narayan, "Bonds & Bridges: Social Capital & Poverty" (World Bank July 1999). See also Peter Evans, "Government Action, Social Capital and Development: Reviewing the Evidence on Synergy" in 24 (6) *WORLD DEVELOPMENT* 1119-1132 (1996), see also Jonathan Fox, "How Does Civil Society Thicken? The Political Construction of Social Capital in Rural Mexico" in 24 (6) *WORLD DEVELOPMENT* 1089-1103 (1996). He proposes that the rule of law complements the efforts of marginalized groups to organize themselves. See also Patrick Heller, "Social Capital as a Product of Class Mobilization and State Intervention: Industrial Workers in Kerala, India" in 24 (6) *WORLD DEVELOPMENT* (1996), discussing the impact of the progressive State's pursuit of labour reform as generating social capital.

As pertaining the type of regime and participation, I explore the repressive tendencies within the regime and the impact on formal and informal forms of participation in policy processes (voting, membership in associations, and participation in marches).

With respect to cognitive aspects of micro social capital, I scrutinized the rate of change in levels of confidence in the government and justice system at the national level by referring to quantitative statistical data compiled by Latinobarometro and other Gallup/Vox polls addressing the follow issues: public opinion pertaining to distribution of wealth, interpersonal trust, satisfaction with democracy, respect for the law, access to justice, equality before the law, cognisance of rights, and confidence in the judiciary, the executive, and the FRG political party.⁶⁶ In this manner I sought to understand whether the society considers the State institutions and the legal norms to be legitimate and responsive.

Latinobarometro collects statistics are derived from questionnaires distributed to a sample of homes within seventeen nations in Latin America. It should be noted that as the statistics were available only via purchase at significant cost- the minimum purchase price is set at USD 595.00, and each variable and sub-variable costs USD 35.00 per country & per year. Latinobarometro's data has been referred to by UNDP, IDB, The Economist, and other social scientists in research institutions. Due to budget constraints, I was unable to conduct a comparative analysis with other countries within the region as pertaining each selected variable, however Latinobarometro's website does include press releases which provide regional overviews on a selection of the variables within specific topics, e.g. support of democracy. Hence, I did complete some comparison to the total rate within the seventeen Latin American countries surveyed by Latinobarometro with respect to the variables available to the public of interest to me, and purchased the variables addressing the issues listed previously.

The 2001 and 2002 surveys were conducted by the CID-Gallup company for Latinobarometro conducting 1000 interviews representing a probabilistic sample of homes, and meeting quotas based on gender and age of interviewees. The margin of error was 3.1%, and the survey is considered to be representative of 100% of the population. The 2000 survey was conducted by CEOP company for Latinobarometro. One thousand interviews were conducted among a probabilistic sample of homes representing 90% of the urban population.

⁶⁶ Latinobarometro conducts a public opinion survey that reviews the opinions, attitudes, behavior, and values of the population in Latin America. It addresses the following subjects: Economy & international trade, integration and regional trade, democracy, politics and institutions, social policies, civic culture & social capital, the environment, and current issues. <http://www.latinobarometro.org>.

The margin of error was 3.1%. The 1996 survey was initiated by Borge & Associates-selecting 1005 cases for Central America.

As pertaining participation in political processes, I interviewed representatives from peasant and indigenous organizations and Donors. I assess the increase in participation in informal participation protest marches and land invasions (referring to media sources, such as PRENSA LIBRE and SIGLO XXI) and decrease in formal participation via elections (statistical data), associations (statistical data, secondary sources, and interviews), and referendum (media sources and statistical data). Such information forces us to re-examine to the larger context in which CONTIERRA is operating and helps us gain insight as to what may be expected in the future.

Third, with respect to CONTIERRA in particular, I undertook a qualitative analysis of a selection of cases in order to understand its role in strengthening communication between different groups/individuals/sectors so as to improve social trust. In addition, I pay heed to the negative impact of the dark side of social capital and asocial capital which inhibits the elaboration of bridges between different groups and impedes the development of linkages between the state and society.

4.2. Legal Analysis and Methodology

I sought to attain a holistic understanding of the problem of un-addressed restitution and remedy claims of internally displaced persons in Guatemala by reviewing the existing international, regional, and national apparatus (institutional mechanisms, norms, and practice). As mentioned previously, the research is deliberately transnational: I interviewed and reviewed the positions of experts and human rights monitors in Geneva, Washington D.C., and Costa Rica, as well as donor, NGO, and national government staff in Guatemala. Finally, I observed State-sponsored negotiations among rural peasants in their own local villages. Thus, I present the linkages and gaps between efforts to consolidate peace, achieve social justice, and promote implementation of human rights by upholding IDP rights to restitution of property and recourse at the different levels.

4.2.1 Analysis of Law-Making Processes

My review of hard and soft law instruments at the international, regional, and national levels sought to reveal the normative clarity, legitimacy, enforceability, and empowerment function of specific rights to property, restitution, and remedy/recourse contained within as pertaining internally displaced people and indigenous people. In addition, I was interested in the extent of use of cross-referencing of rights and instruments as a means of legitimizing soft law instruments, i.e. the Guiding Principles on Internal Displacement claims, as well as specific property claims presented by indigenous people based on customary norms. Thus, I explore the layers of law and highlight remaining protection gaps in spite of cross-referencing. I review case law, decisions, and recommendations of international & regional human rights bodies, as well as the Constitutional Court in Guatemala and CONTIERRA with a view towards understanding to what extent these institutions promoted recognition of a progressive understanding of the above-mentioned rights as pertaining IDPs and indigenous people.

4.2.2. Methodology

4.2.2.1. International Level

Perhaps one of the most difficult aspects of implementation of international human rights is the fact that the emphasis on the international mechanisms themselves has resulted in a parallel, almost separate discussion of access to justice. Yet, the linkages between the international and national mechanisms provide a rich area for analysis. The need to provide protection to IDPs and assist them in claiming rights to restitution, especially pertaining to property, requires a transnational approach extending beyond the traditional humanitarian paradigm of assistance:

“Operationalising human rights in the context of forced displacement engages a multitude of different needs: (1) Monitoring, reporting and verifying human rights conditions, (2) Introducing mechanisms of international accountability of human rights violators, (3) Ensuring effective local law-enforcement capabilities, and (4) Identifying and securing a range of local capacity-building requirements. However clear the importance of an integrated or comprehensive approach to the prevention and solution of forced displacement, it is equally evident that this array of activities necessitates partnerships and collaboration, among UN human rights mechanisms, non-governmental organizations (NGOs), relief agencies and national institutions.”⁶⁷

⁶⁷ ANNE F. BAYEFSKY & JOAN FITZPATRICK (EDS), HUMAN RIGHTS AND FORCED DISPLACEMENT p. x (Martinus Nijhoff Publishers 2000). See also Juan E. Mendez & Francisco Cox,

Because of the inherent limitations in the existing protection framework for IDPs, I examine the current efforts to elaborate the IDP protection category within international soft law and consider whether there is a need for the creation of a new legal instrument pertaining to IDPs. The principle difficulty was the absence of hard law specifically applicable to internally displaced persons and restitution of property. This study commenced prior to the elaboration of the Guiding Principles on Internal Displacement and the ILA Declaration of Principles on Internal Displacement and was concluded after their finalization; hence I followed the development of soft law. Given that these instruments are intended to be partially based on *lex lata* (as they reiterate provisions from human rights and humanitarian law conventions) while also offering *lex ferenda*, e.g. the right of recovery- questions arose as to possible problems regarding legitimacy and implementation. I was curious as to whether IDPs were better protected by soft law/“hybrid law” elaborated by two groups of experts as opposed to hard law created by State representatives. Have these norms and special monitors formed linking capital for IDPs, thus empowering them through identification as a category for protection and advocacy at the international level? Does cross-referencing different hard and soft law instruments serve to legitimise the identification of specific rights?

At present, the international human rights response framework available to IDPs may be divided into four categories:

- 1) *Mechanisms for Individual Complaints (Conventional mechanism)*
- 2) *Review of State Reports (Conventional mechanism)*
- 3) *Country & Thematic Rapporteurs/Experts (Extra-conventional mechanism)*
- 4) *Donor Assistance Programs. (Extra-conventional mechanism)*

The majority of human rights monitoring mechanisms are “soft” institutions based on a conciliatory structure which focuses on dialogue, rather than “hard” adjudicative entities. At the international level ADR bodies were originally elaborated due to the absence of international juridical court structures.⁶⁸ With the exception of the Inter-American Court of Human Rights, Guatemalan IDPs may only seek recourse of soft monitors. We must consider

“Solutions: Human Rights Verification and Accountability” in BAYEFESKY, 176, 185: “. . . the return of IDPs after a situation of internal conflict benefits from an effort by the international community in the form of on-site verification and accountability mechanism. . .”

⁶⁸ Christine Chinkin, “Alternative Dispute Resolution under International Law”, in MALCOM D. EVANS, ED., REMEDIES IN INTERNATIONAL LAW. THE INSTITUTIONAL DILEMMA, 123, 126 (Oxford Hart Publishing 1998).

what is the effect of increased use of soft law and soft mechanisms with regard to prevention/resolution of conflicts and human rights violations linked to forced displacement and loss of property, or providing restitution/access to justice for such experience. Are these evolving human rights norms better upheld by formal or informal mechanisms? Do the soft mechanisms adequately address the dispossession and need for restitution for IDPs?

The Committee on Internally Displaced Persons of the International Law Association has stated that the applicable legal norms can be divided into the following three categories: preventing displacement, addressing displacement crises, and resolving displacement.⁶⁹ This thesis addresses only procedural norms within the prevention and resolution context, not immediate assistance situation. Although it may appear that the selected norms of study fall only under the category of resolution, it is the contention of this author that the establishment of a permanent dispute resolution system for land issues involving IDPs and potential IDPs is also preventive in nature, given that it aims to counter a reoccurrence of displacement.

I address the protection gaps within hard and soft law international instruments, specifically with respect to access to justice and land rights as pertaining IDPs. Given the concern as to whether indigenous persons and minorities have greater protection under the law, the instruments applicable to these groups are also explored. The following universal human rights/refugee conventions were analysed for application: the Universal Declaration of Human Rights; the 1966 UN Covenants on Civil and Political Rights, and Economic, Social, and Cultural Rights; the 1951 Convention Relating to the Status of Refugees; the International Convention on the Elimination of All Forms of Racial Discrimination; ILO Convention No. 169; the UN Guiding Principles on Internal Displacement, the ILA Declaration of Principles of International Law on Internally Displaced Persons; and the UN Draft Declaration on Indigenous Population. Humanitarian law, particularly Protocol II to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War IV (1949) was also consulted. I consulted secondary sources to illuminate my understanding of the relevant rights within these instruments.

The international chapter assesses the effectiveness of monitoring the implementation of these rights by the international bodies created for such purpose. Because these bodies emit only secondary soft law comments, statements, reports, etc., their task is limited due to lack of coercive capabilities. It has been argued that these actions place moral pressure on governments and serve to highlight the pressing need to address certain situations, however it

⁶⁹ See UN. Doc. E/CN.4/1995/50 (1995) at 28 citing Rainer Hofman, Rapporteur for the International Law Association Committee on Internally Displaced Persons, 66th Conference, Buenos Aires, 14-20 August 1994.

remains necessary to explore whether these mechanisms are appropriate for concrete resolution of land conflicts. I reviewed Guatemala's reports to the U.N. Human Rights Committee (as well as case law), Committee on the Elimination of Racial Discrimination, Committee on Economic, Social and Cultural Rights, Committee Against Torture, Committee on the Elimination of Discrimination Against Women, and Committee on the Rights of the Child, although due to the repetitive observations of these committees, I present only the conclusions of the CCPR, CESC and CERD. These three committees offered the most relevant analysis pertaining to the issue of land distribution. I sought to understand how these bodies address access to justice and land rights issues with a view towards application to internal displacement situations. My inquiry also addressed whether the UN bodies utilize IDP category when addressing Guatemala, or do they refer to restitution norms and concerns as generally applicable to all persons or other groups?

Reports by MINUGUA (UN Mission in Guatemala), the UN Independent Expert on Guatemala, the Special Rapporteurs on Extra-judicial, Summary, or Arbitrary Executions, Torture, Independence of Judges and Lawyers, Racism, Human Rights Defenders, and Internal Displacement as regarding the situation in Guatemala were also consulted. Further background information was collected by consulting various UN reports on related topics: Indigenous People and Access to Land, Mass Exodus, Freedom of Movement, Forced Evictions, Poverty, Housing, Property, and Restitution.

I followed up this initiative by seeking to understand the policies of the international organizations with respect to the topics of indigenous rights, IDPs, access to justice, and land reform. In order to attain a trans-national perspective I traveled to Geneva, Washington D.C., Costa Rica, Guatemala, and Colombia in order to conduct interviews with international observers, donors, NGO staff, indigenous activists, ADR experts, IDP organizations etc.

Interviews were conducted with representatives from the World Bank (Rafael Flores & Cora Shaw), the Inter-American Development Bank (Anne Deruyttere), USAID (various), UNHCR (Andrew Painter, Francisco Galindo Velez, Paula Worby, & Jenifer Otsea), UN High Commission for Human Rights (Daniel Helle, Markus Schmidt, John Henriksen, Bjorn Petterson), Red Cross (Cesar Marin) IOM (Fernando Calado Bryce, Tanya Sisler & Shyla Vohra), UNDP (various), MINUGUA (various), and the ILO (various) in Geneva, Guatemala, Colombia and Washington D.C. Experts such as Luke. T. Lee, Rainer Hoffman, Roberta Cohen, Robert Goldman, Daniel Helle, and Theo van Boven were interviewed or consulted by telephone in order to inquire as to the drafting of the principles from the International Law Association and the UN. I also interviewed NGO representatives from Human Rights Watch

(Jennifer Bailey), the Indian Law Resource Center (Armstrong Wiggins) and U.S. Committee for Refugees (Hiram Ruiz).

In order to understand how the international community was promoting the concept of IDP protection, I attended the Norwegian Refugee Council's conference on internal displacement in 1997, the Workshop on Implementing the Guiding Principles on Internal Displacement in Bogota, Colombia 27-29 May 1999, FAFO's conference on "Making Return Sustainable" in Brussels 2000, and the Norwegian Refugee Council's conference on "Internally Displaced Persons: Lessons Learned and Future International Mechanisms", in Oslo, Norway 2001. Finally, I attended the Peace Research Institute in Oslo (PRIO)'s conference "Guatemala: Five Years after the Peace Accords" 12 December 2001 in order to understand whether the UN, NGOs, donors, and national political actors considered there to be any progress in implementation of the Peace Accords.

Libraries visited included the Library of Congress in Washington, the World Bank Library, the Inter-American Development Bank Library, the OAS Library, the Refugee Policy Group Library, the UN library, the UNHCR Center for Documentation (I owe Jeff Crisp special thanks), the Norwegian Refugee Council Library, the University of Oslo Law Library & Library of the Norwegian Institute of Human Rights, the George Washington University Law Library, and the Nobel Library in Oslo.

4.2.2.2.Regional Level

With respect to the regional level, I was fortunate to conduct the research during a time of introspection within the Inter-American System. There was increased interest in addressing the needs of marginalized groups within the region, and moving beyond traditional analysis of civil and political rights in order to address socio-economic rights and even progressive transcendental rights, e.g. the right to "*proyecto de vida*" (life's project- implying fulfillment of aspirations) and the right to the truth. In addition, the Court has addressed the problem of human rights violations conducted by Non-State actors. These developments provided me with a vision as to the possibility of attaining appropriate remedies for IDPs.

Methodology in the regional arena followed a similar pattern to the international level. The regional juridical framework was reviewed with respect to the same rights to property, restitution, and remedy. This included analysis of the case law of the Inter-American Court of Human Rights, case law and reports of the Inter-American Commission of Human Rights (The Commission is noteworthy due to its elaboration via soft law in the form of a General

Assembly resolution, its application of soft law when supervising compliance with the American Declaration of Human Rights, and emission of secondary soft law in the form of recommendations)⁷⁰, and reports by the Permanent Consultation on Internal Displacement in the Americas. The role of the Special Rapporteur on Internal Displacement, Robert Goldman, in the Americas appears to be not easily separated from his activities in the Commission, hence although I was granted an interview, in terms of documents, I was referred back to the reports by the Commission itself.

The following regional instruments were consulted: the 1984 Cartagena Declaration; documents from the 1989 International Conference on Refugees in Central America (CIREFCA); the American Convention on Human Rights; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights; the American Declaration of the Rights and Duties of Man; the San Jose Declaration on Refugees and Displaced Persons; the 1987 Contadora Act for Peace and Cooperation in Central America; the Andean Declaration on Displacement and Refuge; the Permanent Consultation on Internal Displacement in the Americas' Draft Legal Principles on IDPs, and the Draft Inter-American Declaration on the Rights of Indigenous Peoples.

Additional interviews were conducted with representatives from the Organization of American States (Yadira Soto, Sandra Dunsmore, Roberto Laporta & Michael Brown), the Inter-American Commission of Human Rights (Osvaldo Kreimer & Elizabeth Abi-Mershed), the Permanent Consultation on Internal Displacement in the Americas (Cristina Zeledon), Project Counseling Services (Gordon Hutchinson), and Fundacion Arias para la Paz y el Progreso Humano in Washington D.C. and Costa Rica. Libraries within these institutions were consulted, and staff from the Inter-American Court and Commission responded to my email/telephone inquiries.

4.2.2.3. National Level

Jan Borgen has noted that given that States bear primary responsibility for the protection of their citizens, the “human rights of the internally displaced persons should first and foremost be implemented at national and local levels.”⁷¹ Analysis on the national level seeks to define whether the national institutional mechanisms, including executive land

⁷⁰ See Dinah Shelton, “Commentary and Conclusions” in DINAH SHELTON (ED.), COMMITMENT AND COMPLIANCE 451 (Oxford University Press 2000).

⁷¹ Jan Borgen, “Extending UN Protection to the Internally Displaced: Legal Policy Issues” in Norwegian Refugee Council, Norwegian Government Roundtable Discussion on United Nations Human Rights Protection for Internally Displaced Persons, p.52 (February 1993).

agencies/related program, the Constitutional Court, and official ADR mechanism for land disputes addressed the needs of potential, former, and actual IDPs and indigenous persons for restitution/redistribution of property and/or access to justice in land disputes. The impact (or lack thereof) of international actors on national policy was studied. Once again, a central issue is to what extent is the IDP label necessary and whether it is applicable for protection. I interviewed staff within the executive land agencies and was granted access to relevant reports. I also consulted reports by UNDP, MINUGUA, USAID & the U.S. Department of State, as well as various NGOs on political, economic, and legal topics.

Review of the Constitution, the Peace Accords (soft law), Land Fund law, penal code, civil code, arbitration law, and other relevant legislation for IDPs, indigenous groups, and general poor was completed to understand the substantive norms pertaining to property and remedial issues. Due to the unsuccessful effort to reform the Constitution to recognize indigenous customary law during my field trip, research was conducted to understand how these norms and mechanisms compared with their formal counterparts available in Guatemala. Consultation of publications by scholars on the topic were complemented by interviews with indigenous leaders. I also consulted literature on the Peace Accords, IDPs, and the agrarian issue in Guatemala.

I assessed the performance of land agencies and courts with a view towards understanding party participation (access), recognition of pluralistic norms, and responsiveness of output.

The principal court which had categorized its jurisprudence at the time of my field research was the Constitutional Court. In 1999, I interviewed the president of the Constitutional Court and was granted access to database and case files. In terms of case law analysis the Constitutional Court provided a rich sources of cases. The procedural remedy of *amparo* in Guatemala, which permit persons to file claims against state actors who abuse their powers by violating human rights and constitutional guarantees, receives focus.⁷² Given the fact that the *amparo* remedy was designed to increase access to justice, I decided to concentrate my review of these cases to the Constitutional Court as a means of comparison between the formal mechanism and the ADR mechanism. The *amparo* mechanism was of special interest to me because although it is often heralded as a key form of protecting human

⁷² *Amparo* is a measure by which a person seeks protection of one's fundamental rights by the courts in the form of protection against arbitrary acts, threats, restrictions, or violations of one's constitutional guarantees or legal rights. In the event of past violation, one may seek restitution. If the violation entails a legislative act, it may be declared unconstitutional. See Vasquez Martinez, Edmundo, EL PROCESO DE AMPARO EN GUATEMALA, (Procuraduria de Derechos Humanos Guatemala 1997)

and civil rights, the Commission on the Strengthening of Justice accused it of being spoiled by its use as a groundless, dilatory recourse intended to block or deter judicial decisions, thereby impeding access to justice and infringing human rights dependent on judicial processing.⁷³ The question is whether the formal procedural reforms have rendered alternative dispute resolution mechanisms redundant, are they complementary/do they serve different purposes, or do they indicate the need for new mechanisms? My review of the cases attempts to answer this query. Further presentation of the criteria for selection of cases is included in the chapter on amparos in Part III.

Unfortunately, review of lower court cases was rendered impossible due to juridical disorganization in Guatemala. The same factors that plague the local population's access to justice, equally affected its research. The lack of systematization of jurisprudence in Guatemala resulted in an *ad hoc* application of justice, as judges and lawyers were not always aware of or willing to apply the criteria utilized in past cases.⁷⁴ Although the Guatemalan Judicial Organ has a department of judicial statistics, it had been noted that "the department does not have updated, reliable, statistics, given that the courts do not send timely, complete information."⁷⁵ In addition, the forms utilized for information collection did not permit an analysis of the type and quantity of decisions, the profile of the persons seeking recourse from the courts, the duration of the processing, etc.⁷⁶ Some lower court cases were provided to me by local legal NGOs, otherwise, reference was made to studies on the lower courts and reports by international agencies (MINUGUA, IDB, and USAID), the Supreme Court, NGOs, media, and government sources documenting the inefficient judicial system and problems with impunity. Guatemala is undergoing judicial reform at present, thus it is possible to envision future improvement in the lower courts and hence the possibility of further research.⁷⁷ Since my field missions, the World Bank has supported the elaboration of a database for the judiciary which may facilitate future studies.

Because of discrepancies between the law on paper and the law in practice, I reviewed data on actual implementation of rights and duties by state and non-state actors. Statistics on

⁷³ Comision de Fortalecimiento de Justicia, *Una Nueva Justicia para la Paz*, Resumen Ejecutivo del Informe Final de la Comision de Fortalecimiento de Justicia 45-46 (Magna Terra April 1998).

⁷⁴ See Oneida Najarro, "Corrupcion: Juzgados de cuatro departamentos son los mas denunciados", in *PRENSA LIBRE* 11 January 2000.

⁷⁵ Ana Montes Calderon, *Diagnostico del Sector Justicia en Guatemala*, 26 (Banco Interamericano de Desarrollo Sept. 1996). See Also Comision de Fortalecimiento de la Justicia, *supra* note 73, in which the Commission for the Strengthening of Justice calls for the systematisation of jurisprudence in order to remedy arbitrary application of the law

⁷⁶ Calderon, *Id.*

⁷⁷ MINUGUA did complete a study of lower cases in a diversity of subject matters which it turned in to the Supreme Court advocating reforms (see *infra* Part III).

corruption, impunity, and observance of human rights were obtained from Freedom House, the Inter-American Development Bank, Transparency International, the World Bank, MINUGUA and the Attorney General's Office for Human Rights.

The central focus of my empirical field research consisted of direct observation of CONTIERRA, the institution charged with conciliation of land conflicts during two visits in the Spring semesters of 1998 and 1999. I initiated the study with a great deal of optimism based on the stated goals of CONTIERRA, and the ambitions of the conciliators themselves. I accompanied the conciliators on their field trips, interviewed two CONTIERRA directors, twelve conciliators, and parties to conflicts. Due to ethical considerations, I spoke to parties when they approached me, rather than vice-versa in order not to affect the processing of the cases. The majority of CONTIERRA interviews were unstructured; I chose to ask questions while on the road trip, during meals and other breaks in the conciliation sessions, and of course back at the CONTIERRA office. I also reviewed the case files of ongoing conflicts during this time period. Specific information pertaining to case selection is included in Part IV.

I was fortunate to have gained the long-term trust of the conciliators and thus was given open responses (even regarding politically charged issues) throughout my field trips and through telephone interviews/email while back in Norway. This proved true regardless of changes in leadership within CONTIERRA and the national government. In part this may have been due to my Argentine heritage, (thus escaping resistance and distrust sometimes encountered by "gringos" in the field and avoiding linguistic confusion) or my youth and gender. However, it is also likely that my link to Norway provided me with an aura of beneficence, due to the government's historic generosity and goodwill throughout the peace process. Because CONTIERRA only made one visit per month to each community, it was impossible for me to get to know the parties very well; hence I relied on the conciliators to provide me with indirect information regarding power relations between parties, leadership divisions, etc.

My findings are limited in the sense that most of CONTIERRA's cases submitted for conciliation remained in initial stages. There were very few cases that had proceeded sufficiently to conduct a full review of all stages of conciliation. Thus, I selected cases which addressed forced eviction/forced displacement and assessed the problems evident at the varying stages of evolution, regardless of whether CONTIERRA was able to conclude the case or not. However, it is hoped that identification of the issues presented here will stimulate further research in this arena. I believe that this study is valuable because it reveals

the complex problems of use of conciliation in a post-settlement setting characterized by deep socio-economic and civil inequity. By the end of the study, my optimism had been replaced by realism due to the severity of structural problems impeding the consolidation of peace.

After having demonstrated the structural inequities which are the root cause of weak social capital in Guatemala in Part III, I then examine three of the key obstacles inhibiting the growth of social capital: intra-community divisions, “anti-social capital” and prevalence of authoritarian heritage, i.e. the “dark side of social capital”. These obstacles are direct consequences of the structural background described previously. I refer to quantitative statistics on interpersonal trust, once again linking it back to the deficiencies within the legal system, as it lacks legitimacy and responsiveness with respect to the marginalized groups, thus it does not provide them with a back-up of incentives or sanctions in the event of breach of trust between parties. I then proceed to identify indicators of CONTIERRA’s ability to generate social capital by empowering marginalized groups and restoring communal harmony via observation of cases.

Additional (more formal) interviews were conducted with representatives from the Constitutional Court (President Rueben Homero Lopez Mijanos) and conciliation centres (Maricruz Villatorio, Chamber of Commerce Center for Conciliation & Arbitration, Anabela Alvarez Ruiz, Center for Mediation, Rodolfo Rohmoser, Center for Conciliation & Arbitration, Dr. Guillermo Morray, Oficina Juridica de Derechos Humanos, Jorge Mario Galicia, IDEAS, various at Bufete Popular Ixcan, Dr. Mario Corzo Rojas, Center for Support to the State of Law). I consulted the Public Ministry (various) and the Ministry of Labor (Manuel Luna, Hugo Morales Tello & Victor Davila, Inspector General of Workers).

I also interviewed representatives from the executive agencies: Land Institutions (Francisco Barrios & Harvey Taylor Fondo de Tierras, Hector Olivas, FONAPAZ, Osvaldo Aguilar, INTA, Carlos Valladares Luis Rodriguez Ibanez & Carlos Sosa CTEAR, CEAR (various), Ricardo Goubaud, FOGUAVI, Arnaldo Aval, Carlos Sosa, Maria Antoineta Torres, Marco Antonio Currich, and others at CONTIERRA.

Finally, I visited institutions charged with resettling the displaced, church groups, and NGOs representing the displaced, indigenous, or minority groups (Fermina Lopez, CONAVIGUA, Manuel Perez CONDEG, Vidal Jutzutz, AMADESPI, Roberto Tobar, FESOC, Daniel Hernandez, CUC, Eliseo Perez Mejia, COPMAGUA, Sotero Sincal Cujcuj, Council of Development Institutions, Juan Tiney National Indigenous Coordinator) and indigenous law experts Dr. Jose Emilio Rolando Ordonez, University of San Carlos and Juan

Leon, Defensoria Maya. NGO libraries consulted included the Fundacion Myrna Mack, ASIES, FLACSO and ASCODAS.

In order to attain a broader comparative perspective, information was obtained from the Property Commission in Bosnia, the Land Claims Court in South Africa, and the Conciliation Centre for Land Disputes of Mexico.

5. Outline of the Thesis

This thesis is divided into five parts. Readers may choose to read the parts consecutively or according to subject-matter preference, however the principle part is Part IV as it contains the majority of my original empirical research. Thus, Parts II-III may be considered background material.

Part II describes the recent elaboration of soft-law norms addressing internal displacement at the international level, e.g. the Guiding Principles on Internal Displacement, and explores to what extent this serves a linking social capital. Are these norms considered to be legitimate and enforceable? Did the creation of these norms and monitoring mechanisms empower IDPs in Guatemala specifically with respect to property restitution? Does cross-referencing to other hard law and soft law instruments strengthen the recognition of specific rights for IDPs, i.e. the right to property, remedy, and restitution? Are there protection gaps? What role have other international and regional human rights norms and mechanisms had in protecting internally displaced persons and indigenous people in Guatemala and their human rights as related to property? I present a strategy for IDPs to present claims to the U.N. Human Rights Committee via cross-referencing other rights and review progressive precedents within the Inter-American Court of Human Rights.

Part III reviews the structural background of the political-economic and legal systems in Guatemala in order to highlight the link between the failure of State institutions to provide responsive action to demands pertaining property and diminished confidence in the State. A further consequence is weakened social cohesion, in part evidenced by low levels of social trust. The reader may refer back to the review of social capital which delineates my approach to structural social capital in this Part. I seek to understand the degree of participation in formal mechanisms as well as informal mechanisms and to what extent these mechanisms are considered to be legitimate and effective by the general populace, the State, and international

actors. This Part addresses asymmetrical developments within the social systems as well as internal complexity of the legal system as divided between formal law, indigenous law, and human rights law. Specifically, it contains a review of *amparos* to the Constitutional Court in order to understand the extent to which this mechanism serves to uphold human rights claims or customary claims linked to property. This presentation is intended to assist our understanding of why alternative mechanisms were sought to for persons or groups facing forced eviction/displacement or requesting restitution for property.

In Part IV, the central part of the thesis, I examine the performance of Guatemala's official hybrid ADR mechanism for land disputes, CONTIERRA. I seek to understand to what extent the mechanism was effective at resolving disputes pertaining to potential, former, or actual internally displaced persons and indigenous people in Guatemala. In addition, I explore whether CONTIERRA able to empower these groups. Investigation was directed at discovering whether CONTIERRA recognized the rights to remedy and restitution of IDPs and indigenous people via:

- 1) *Support of equal party participation in proceedings*
- 2) *Recognition of pluralistic norms, e.g. customary rights, international rights, and equity standards relevant to particular identity groups, i.e. indigenous people and internally displaced persons. Because one may infer that recognition of these norms is a form of recognition of group identity, assessment of the extent to which CONTIERRA permitted the application of an expansive view of relevant norms would reveal the actual opportunities for empowerment by utilizing an ADR framework for dispute resolution as opposed to the court.*
- 3) *Promotion of responsive output, e.g. restitution or compensation of land in order to stimulate concrete resolution of land disputes*

Because CONTIERRA's mandate identifies goals beyond the elaboration of final accords, e.g. improving the consolidation of peace and democracy, I identify preliminary factors pertaining to its potential impact on social capital, i.e. social trust and confidence in state institutions.⁷⁸ I offer recommendations for improvement of CONTIERRA and the courts in order to provide guidance for potential use of ADR in other post-settlement situations around the world.

Part V contains final contemplations that present an overview of some of the key issues raised in the study and their relevance in the broader context.

⁷⁸ In part, this addresses Varshney's query pertaining to initiatives promoting intra-communal v. inter-communal linkages within a highly segregated society which lacks the latter. See ASHUTOSH VARSHNEY, *ETHNIC CONFLICT & CIVIC LIFE: HINDUS & MUSLIMS IN INDIA* 299-300 (Yale University Press 2002).

It is hoped that this study will contribute to the calls by UN Special Representative on Internal Displacement for greater research in issues pertaining to property restitution and access to justice as pertaining internally displaced persons. The research became interactive, I sought to understand the plight of IDPs and in turn ensure that my initial findings were distributed to donors, observers, as well actors working with IDPs and property rights in other regions of the world. I contacted the Brookings Institution to receive a copy of the Guiding Principles in Spanish to disseminate in Guatemala, as MINUGUA, UNDP, AID, IOM, the State, and IDP groups had not heard of them. I sent information to the Norwegian Refugee Council's Global IDP Database to ensure the inclusion of Guatemalan IDPs in the 2002 edition of the IDP report. Three articles based on this study were published in *Forced Migration Review*, *Refugee Survey Quarterly*, and a book edited by Scott Leckie. Further information was provided to others elaborating ADR model mechanisms for in other regions with the intention of highlighting the possibility of improving upon this model.⁷⁹ Unfortunately, I observed my predictions regarding the stimulation of new cycles of violence due to lack of State response to property claims come true; by 2002 the escalation of land invasions, protests, crime, and instability was significant enough to prompt international concern. The current attention placed by multilateral and bilateral donors on the problem of poverty and its link to violence is a positive development that provides an appropriate backdrop for this study. It is hoped that this thesis provides "lessons learned" for those participating or observing the struggle for attainment of social justice and consolidation of peace in Guatemala as well as in other countries undergoing similar difficult transitions. In sum, Guatemala serves as an empirical example from which we may glean understanding of the problems involved in international and national approaches to dispute resolution of land conflicts as a means of preventing and resolving displacement.

⁷⁹ COHRE has called for empirical studies revealing the lessons learned in situations involving States resistant to recognizing a right of restitution for IDPs in order to devise a strategy to attain better response in the future.

Part II

Part II: Protection of Internally Displaced Persons at the International Level- A Transnational Quandary

In this Part, I seek to present the international framework for protection of internally displaced persons. I begin by describing the creation of the category of “internally displaced person” by international experts. I analyse problems relating to the lack of a cessation clause, bias against socio-economic rights, and present the potential retreat from the IDP category as a legal definition per se. I then present an overview of the specific enforcement mechanisms available for IDPs, including the UN Special Representative on Internal Displacement, UNHCR & UNDP, the Inter-Agency Standing Committee’s Special Coordinator on Internal Displacement, the OCHA Emergency Relief Coordinator, the OCHA IDP Unit and the Permanent Consultation on Internal Displacement in the Americas. As many IDPs are indigenous people, I cite the definition of indigenous people and relevant specific enforcement mechanisms, i.e. UN Rapporteur & Working Group, as well as a mechanism within the ILO. I review the UN human rights treaty monitors’ assessment of the situation regarding the rights to property, restitution, and remedy in Guatemala. I also offer a strategy for presentation of claims by IDPs to the UN Human Rights Committee via cross-referencing other human rights within the CCPR.

The rights to property, restitution, and remedy are the key focus of this thesis; thus I conduct an overview of the relevant norms at the international and regional levels. In the final section, I assess the activities of the Inter-American Commission & Court in enforcing these rights, with particular attention paid to the case of IDPs and indigenous people in Guatemala. The goal of this Part is provide understanding as to the gaps in protection and potential for improved action as pertaining IDPs and restitution of property in Guatemala, specifically calling upon international actors to uphold an ethic of recognition as pertaining IDPs.

1. Transnational Law as Linking Social Capital

“Only human rights processes and bodies perceived as legitimate will be taken seriously; only states perceived as legitimate can enforce human rights successfully.”

*Julie Mertus*⁸⁰

Increased reference to the emergence of “transnational law” conducted by national lawyers, international institutions, NGOs, and popular organizations calls for discussion of how such fluid structures function. It is a complex notion which varies according to the context in which it functions. The burgeoning attention given to oppressed groups, such as indigenous groups, peasant laborers, and displaced persons is cited by Boaventura De Sousa Santos as exemplifying the transnational form of law:

*“The national legal field is increasingly interpenetrated by transnational legal forms which unfold in complex relations with both the state legal order and the local legal orders . . . Rather than being the product of an intellectual crusade by well-meaning jurists or philosophers, the transnationalisation of the legal field is being promoted by practicing lawyers, state bureaucrats and international institutions, as well as by popular movements and NGOs. Far from being a monolithic phenomenon, it is extremely diverse, combining uniformity with local differentiation, top-down imposition with bottom-up creation, formal declaration with interstitial emergence, boundary-maintaining orientation with boundary transcending orientation.”*⁸¹

This may potentially serve as a means to empower vulnerable persons or groups within repressive societies via the establishment of linkages to influential persons within international human rights organizations, NGOs, etc. who articulate an interest in liberating them from their marginalized existence. In this manner, it is a form of social capital, specifically “linking capital”. The elaboration of norms becomes uncoupled from the State and instead attached to people and movements. Instead of being pursued by States, the demand for and recognition of new protection categories and elaboration of a body of rights is promoted by local and international NGOs, academics, popular organizations, and expert committees outside the traditional framework of law-making. Such processes are proposed to

⁸⁰ Julie Mertus, “Human Rights and the Promise of Transnational Civil Society” in BURN H. WESTON & STEPHEN P. MARKS, *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 433, 442 (Transnational Publishers 1999).

⁸¹ BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION*, 250 & 252 (Routledge 1995).

seek to adhere to goals of transparency, accountability and inclusive participation while promoting social change.⁸²

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.⁸³ 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.⁸⁴ 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.

In the area of internal displacement, the appearance of independent expert committees which elaborated new norms to recognize the IDP protection category deliberately avoided the political quagmire of the UN General Assembly (for example the Guiding Principles on Internal Displacement was created by a committee headed by the UN Rapporteur on Internal Displacement, Francis M. Deng, and the Declaration of Principles on Internally Displaced Persons was adopted by the International Law Association). This prompted cries of illegitimacy by State representatives who consider such action exclusionary and anti-democratic. However, given the plurality of interests at the global level, one may concede that it may be very difficult to attain true consensus to design legal norms and mechanisms which will empower marginalized groups in a significant manner.

The issue of land distribution in particular is considered a topic which traditionally has been dealt with at the national level. To the extent international law and monitors have input it is intended to supplement, guide, or correct national initiatives, not replace them. Each level is imperfect, they have their own particular weaknesses and dysfunctions. It is the interaction, or lack thereof, between international and national norms and mechanisms that provide interesting areas of discussion. One cannot be overly optimistic as to the ability of the law making processes and their implementing mechanisms to provide solutions to serious social problems. However, the elaboration of soft and hard law may serve to highlight problems

⁸² Mertus, *supra* note 80 at 442.

⁸³ 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 (FLASCO 1998).

⁸⁴ 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." MELVILLE, *supra* note 16 at 18 (Colección Seis 1982).

which require attention by designing new protection categories, e.g. internally displaced persons, and suggest standards for potential solution, e.g. restitution of property and land redistribution.

I sought to pursue an assessment of the success and limitations of the transnational initiatives pertaining to IDPs and their rights to property restitution and remedy/recourse by following the criteria of norms, participation, and output.

Upon assessing the norms themselves, I first review the various drafts of a definition of internally displaced persons from a variety of international and regional agencies. I explore to what extent such norms are regarded to be legitimate, capable of implementation, and valuable? Do they serve as a means to empower IDPs to assert rights in order to escape from marginalized existence? Are they drafted appropriately in order to provide an adequate level of protection or do they include protection gaps? Is there bias in the interpretation of the norms that may negatively affect their implementation, i.e. civil and political rights v. socio-economic rights?

I then review the status of the right to property and its restitution within the relevant general human rights instruments. I also assess the wording of such rights in the specific instruments designed for IDPs and indigenous people. Is there divergence or conflict between the standards in the various instruments? I query whether the language contained within the instruments was clear and comprehensive? Are they empowering? Is there a need to create new hard law for IDPs?

With respect to participation, I was interested in discovering whether IDPs in Guatemala actually attained a greater voice via the elaboration or implementation of soft law norms as opposed to hard law. Given the perception that States quashed the voices of IDPs, would expert committees prove more empowering or “democratic”?

As pertaining output, I examined the different types of oversight and enforcement mechanisms. I sought to understand whether the specialized and general human rights implementing mechanisms resulted in restitution of property to dispersed IDPs in Guatemala? What is the effect of the exclusion of participation by State representatives in the creation of the IDP soft law instruments with respect to their legitimacy and enforcement potential? To what extent are international protection mechanisms dependent on the existence of political will at the national will as well as a base level of rule of law in order to enforce their decisions/recommendations?

Another development identified by de Sousa Santos is the emergence of “transnational states” or in the alternative, states which are heavily dominated by the

international system.⁸⁵ Guatemala has been the host to a plethora of international and regional actors, including human rights monitors, such as MINUGUA characterized by its ubiquitous white vehicles, Donors such as the EU and USAID, the former's presence also symbolized by the use of a particular vehicle, specifically Land Rovers, and over 700 NGOs. Hence, it is important to assess what impact (or potential impact) international human rights actors demonstrate on the State and its society.

Guatemala's additional characterization as a "weak state" vulnerable to interference by Non-State Actors and limited in enforcement capabilities of both national and international policies provides a counter force to international pressure/demands for improvement of human rights. Thus, Guatemala provided an empirical study for assessment of transnational approaches to internal displacement within a transnational state.

2. Elaboration of the IDP Category at the International Level

There are currently about 20-25 million internally displaced persons in the world, as compared with 12 million refugees.⁸⁶ Internally displaced persons are in especially precarious positions, as they are technically not protected under the 1951 Convention on the Status of Refugees due to the fact that they have not crossed state borders.⁸⁷ This issue is further complicated by the traditional battle between national governments seeking to preserve their sovereignty through public order actions and the efforts of international organizations seeking to uphold basic human rights, but limited in effect by their mandates. However, the

⁸⁵ SANTOS, *supra* note 81.

⁸⁶ The countries including significant IDP populations during 2001-2002 are: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Bosnia & Herzegovina, Burundi, Colombia, Croatia, Cyprus, DRC, Eritrea, Ethiopia, FRY, Georgia, Guatemala, Guinea, Guinea-Bissau, India, Indonesia, Iraq, Israel, Kenya, Lebanon, Liberia, Macedonia, Mexico, Myanmar (Burma), Nigeria, Pakistan, Palestinian Territories, Peru, Philippines, Rep. Of Congo, Russian Federation, Rwanda, Senegal, Sierra Leone, Solomon Islands, Somalia, Sri Lanka, Sudan, Syrian Arab Republic, Turkey, Uganda, and Uzbekistan. See Global IDP Project at <http://www.idpproject.org>.

⁸⁷ The definition of a refugee as provided by Article 1 of the Convention Relating to the Status of Refugees and amended by Article 1 of the 1967 Protocol relating to the Status of Refugees describes one who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." See also Cartagena Declaration of 1984, conclusion 3, which although expanding the refugee definition to include those threatened by "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disrupted public order" must have "*fled their country*"; and OAU 1969 Convention on Refugee Problems in Africa, article 1, sec. 1 reiterating the condition of being "*outside the country of his nationality*".

development of human rights in the past decade has appeared to penetrate the wall of sovereignty by extending the concept of international jurisdiction to include situations occurring within domestic borders. This was perhaps most eloquently noted by U.N. Secretary-General Boutros Boutros-Ghali in his speech at the opening of the World Conference on Human Rights on 14 June 1993:

“I am tempted to say that human rights, by their very nature, do away with the distinction traditionally drawn between the internal order and the international order. Human rights give rise to a new legal permeability. They should thus not be considered either from the viewpoint of absolute sovereignty or from the viewpoint of political intervention. On the contrary, it must be understood that human rights call for cooperation and coordination between States and international organizations.

In this context, the State should be the best guarantor of human rights. It is the State that the international community should principally entrust with ensuring the protection of individuals. However, the issue of international action must be raised when States prove unworthy of this task, when they violate the fundamental principles laid down in the Charter of the United Nations, and when-far from being protectors of individuals-they become tormentors. . .

In these circumstances, the international community must take over from the States that fail to fulfill their obligations. This is a legal and institutional construction that has nothing shocking about it and does not, in my view, harm our contemporary notion of sovereignty. For I am asking- I am asking us- whether a State has the right to expect absolute respect from the international community when it is tarnishing the noble concept of sovereignty by openly putting that concept to a use that is rejected by the conscience of the world and by the law. Where sovereignty becomes the ultimate argument put forward by authoritarian regimes to support their undermining of the rights and freedoms of men, women and children, such sovereignty-and I state this as a sober truth- is already condemned by history.”⁸⁸

The speech highlights two concepts which are important to this thesis, first that the State remains the principal authority charged with upholding basic human rights standards. This follows democratic theory in which the governing entity is founded through a social contract granting rights to its citizens. In the case of internal displacement, the very nature of the crisis reveals the primacy of State responsibility. The breakdown of social stability, as exemplified by the forced movement of people, tests the legitimacy of the State in preserving order throughout its defined territorial borders. Whether the State has had a direct role, or merely acquiesced to the actions of others prompting displacement, the principal duty of rectification of the situation lies with the national government. Failure to find an effective, permanent solution to the crisis may result in further destabilization of the State, increased violence, and possible collapse of the nation.

⁸⁸ Boutros Boutros-Ghali, “Human Rights: The Common Language of Humanity”, Address at the opening of the World Conference on Human Rights on 14 June 1993.

The second point of interest is that there is parallel duty of the international community to supplant the State in upholding human rights, should the State fail in its task. Hence, the social contract appears to be extended to other States, through their adhesion to universal and regional human rights conventions. Indeed, the basis of human rights is the recognition of a person's universal characteristics, i.e. he/she is a world citizen whose rights transgress borders. It is clear that in situations involving internal displacement, international action to assist the State in retaining basic human rights/humanitarian norms may be the only means by which individuals can hope to have these norms respected at all. In 1999, U.N. Secretary-General Kofi Annan reaffirmed this doctrine noting that the U.N. Charter allowed for "a recognition that there are rights beyond borders" and that States had a duty to call upon the international community to assist preventing crimes against humanity and other human rights violations.⁸⁹

However, for reasons of political tradition, culture, and geographical efficiency, programs seeking to sustain human rights or humanitarian norms in the long-term should ideally be pursued through their integration within the national framework of the State or its domestic NGO counterparts.⁹⁰ Programs which remain defined only as an international effort can sometimes be perceived by States as being temporally limited or lacking comprehension of the domestic situation. The assimilation of the international norm within the domestic arena is crucial for the actual implementation of the norm.

The primary problem with respect to testing this vision of international cooperation by addressing internal displacement is that this is an area that has not been traditionally perceived as "transnational" due to the tendency of states to hide this problem behind the wall of sovereignty. In 1992, the United Nations appointed Dr. Francis M. Deng as Representative of the U.N. Secretary-General on Internally Displaced Persons. Dr. Deng reiterated Boutros-Ghali's speech as the basis for the UN's engagement in the arena of IDP's:

"In dealing with the many diverse situations of internal displacement, it is important to understand the problems of internal displacement in their national context, the obstacles to providing adequate protection and assistance, and what needs to be done both by the Government and by the international community to remedy the situation. This can best be done in a spirit of cooperation with Governments by recognizing that internally displaced persons fall within the domestic jurisdiction and therefore under the sovereignty of the countries concerned, but that national sovereignty carries with

⁸⁹ Michael Littlejohns & David Buchan, "Annan Backs 'Rights Beyond Borders'", FIN. TIMES, Sept. 21, 1999, at 5. Human Rights Watch labeled this the "Annan Doctrine".

⁹⁰ See Jan Borgen, "Extending UN Protection to the Internally Displaced: Legal Policy Issues" in NORWEGIAN REFUGEE COUNCIL, NORWEGIAN GOVERNMENT ROUNDTABLE DISCUSSION ON UNITED NATIONS HUMAN RIGHTS PROTECTION FOR INTERNALLY DISPLACED PERSONS, 52 February 1993, stating that "the human rights of internally displaced persons should first and foremost be implemented at national and local levels".

it certain responsibilities towards those within its jurisdiction. If, during crises of internal displacement, Governments are unable to discharge their responsibilities to provide their citizens with adequate protection and assistance, they are expected to invite, or at least accept, international cooperation to supplement their own assistance, the international community should be expected to assert its concern and fill the vacuum created by the Government's failure to discharge its responsibility."⁹¹

Dr. Deng called for the establishment of a legal framework to enhance the protection for the internally displaced. As a preliminary effort, he engaged the Ludwig Boltzmann Institute of Human Rights (Austria), the American Society of International Law (USA), and the International Human Rights Law Group (USA) to assist by forming a compilation and analysis of legal norms pertaining to internally displaced persons.⁹² The study found that although the right not be displaced exists in international law, "its specific content and its limitations remain unclear."⁹³ Deng invited further research in this arena and identified various areas of protection concern which have not been explicitly covered by existing international law with regard to the internally displaced.⁹⁴ Although the areas of insufficient guarantee are plentiful, this thesis will focus on his advocacy for the recognition the ***rights to fair and effective recourse of court, i.e. the right to remedy, and restitution.***

Each of the articulated procedural rights are particularly salient when considered within the context of land rights and the substantive right to return, yet this was not sufficiently addressed according to the UN's preliminary identification of IDP protection issues.⁹⁵ Hence it is to this issue that further research and analysis is now being directed.

⁹¹ UN Doc. E/CN.4/1995/50 (1995) at 8. See also COHEN & DENG, *MASSSES IN FLIGHT*, 276 (Brookings Institution 1998)

⁹² These reports are included as working drafts within the Addendum to the Representative's report to the 1995 session of the U.N. Commission of Human Rights (U.N. Doc. E/CN.4/1995/CRP.1 (1995), E/CN.4/1995/50/Add.3), and in amended form in U.N. Doc. E/CN.4/1996/52/Add.2 (1995). Copy of the ASIL/International Human Rights Law Group Study, *INTERNALLY DISPLACED PERSONS AND INTERNATIONAL LAW*, is available from the ASIL library. The Brookings Institute has published a book containing the report's findings. It should also be noted that the Refugee Policy Group (USA) and the Norwegian Refugee Council (Norway) provided reports on the existing institutional mechanisms for IDP protection. See RPG, *Improving Institutional Arrangements for the Internally Displaced*, (1995) and NRC, *Institutional Arrangements for Internally Displaced Persons: The Ground Level Experience*, (1994).

⁹³ Report of the Representative of the Secretary General, Mr. Francis M. Deng, *Compilation and Analysis of Legal Norms* (U.N. Doc.E/CN.4/1996/52/Add.2)1995.

⁹⁴ *Id.* at 104-107. The areas of concern are discrimination, protection of life, gender-specific violence, detention, shielding, forcible recruitment, subsistence needs, medical care, free movement, family related needs, the use of one's own language, religion, work, education, associations, political participation, access to international assistance, disappearances, the missing and the dead, the use of land mines, the need for personal identification, documentation, and registration, property, and relief workers and organizations.

⁹⁵ UN Doc. E/CN.4/1995/50 (1995) at 9.

Indeed, it is often the violation of land rights that results in internal displacement and hampers their return.⁹⁶

2.1 Creating A New Category for International Protection

“The emancipatory energy of human rights struggles has always lain in the ever-incomplete list of granted rights and, consequently, in the legitimacy of the claim to new rights.”⁹⁷

Boaventura de Sousa Santos

The first challenge to discuss is how to properly address the concerns of those traditionally excluded from protection or recognition by the state, e.g. indigenous people and internally displaced persons. The question arises as to the legitimacy of creating new protection categories, whether these may be practicably implemented or would they would promote greater discrimination against other underprivileged groups and promote further social divisions. Is such recognition the best means to liberate a group of oppressed persons from the circumstances of despair? Is it actually necessary?

The trauma of displacement may be measured pursuant to a human dimension: the separation from one’s community and environment, resulting in anonymity; the loss of the original vision of one’s future, prompting a loss of self-esteem and an accrued sense of vulnerability; and the lack of means to provide nourishment to one self and one’s family, causing disease and death. This adversity is intensified when persons are deprived of supplemental forms of identity and support, as provided under refugee regimes. Persons who cross borders as a result of forced migration may attain protection by international organizations, such as UNHCR, which provide documentation, medicine, food, family reunification assistance, education, etc. Ironically, the period in exile may be one of development for certain groups, such as women, who are taught organizational skills which

⁹⁶ See James C. Hathaway & R. Alexander Neve, “Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented Protection”, in 10 HARVARD HUMAN RIGHTS JOURNAL 115, 131 (1997) discussing repatriated refugees’ land conflicts in Guatemala; see also Robert F. Gorman & Gaim Kibreab, “Repatriation Aid and Development Assistance” in JAMES C. HATHAWAY (Ed.), RECONCEIVING INTERNATIONAL REFUGEE LAW, 35, 65 (Martinus Nijhoff 1997) calling for strengthening property rights institutions to allow for community reconstruction.

⁹⁷ SANTOS, supra note 81 at 347 & 342. Yet he warns that new human rights are possible only if they “have been appropriated in the local cultural context.” Risse & Ropp concur that “. . . international norms are more likely to be implemented and complied with in the domestic context, if they resonate or fit with existing collective understandings embedded in domestic institutions and political cultures.” THOMA RISSE, STEPHEN C. ROPP & KATHRYN SIKKINK (EDS.) THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE at 271 (Cambridge University Press 1999).

may assist their emancipation upon return. In contrast, persons who fail to cross borders are often left in a gray zone in which they are forgotten by the international community and the State of nationality. Essentially they remain outside the protective realm of the law. Differences may disappear upon refugee return, as some groups find themselves to face internal displacement due to renewed land conflicts with reception communities, lack of socio-economic assistance or access to basic services, etc.

Over the past few years, there has been a veritable explosion of interest in internal displacement, much of it coinciding with review of the 1951 Convention on the Status of Refugees on its 50th Anniversary. Some queried its continued applicability in a world dominated by internal forced migration. As noted by the U.S. Representative to the United Nations, Richard Holbrooke:

*“Of course, there is no real difference between an ‘official refugee’ and an internally displaced person- especially to the victim. The sterile and bureaucratic initials IDP have been enshrined in UN and international legal documents, but they are a euphemism that allows the world to ignore an enormous problem.”*⁹⁸

On 13 January 2000, Ambassador Holbrooke delivered an address to the Security Council in which he called for expansion of the refugee definition to include IDPs and assign a single agency to the task of protection.⁹⁹ Resistance was presented by China which considered humanitarian assistance to internally displaced persons to be a possible intrusion on the sovereignty principle. The UN High Commissioner for Refugees, Sadako Ogata, followed up Holbrooke’s initiative by advocating the adoption of a new protocol to the 1951 Geneva Convention and/or the adoption of a General Assembly declaration to expand its protection coverage to address mass movements, economic migration and pursuit of a comprehensive approach to internal displacement.¹⁰⁰ The High Commissioner stated that the UN needed to act in coordination with other actors to protect the internally displaced, as the humanitarian community was “failing the internally displaced” given that inter-agency collaboration “has proven to be too slow and unpredictable”.¹⁰¹ However, she frankly stated that such action

⁹⁸ Richard Holbrooke, “The World Must Not Forget Refugees Within Countries”, in INTERNATIONAL HERALD TRIBUNE 9 May 2000.

⁹⁹ Holbrooke noted that “to a person who has been driven from his or her home by conflict, there is no difference between being a refugee or an IDP. In terms of what has happened to them, they are equally victims but they are treated differently.” Statement by U.S. Permanent Representative to the United Nations, Ambassador Richard Holbrooke, on “Promoting Peace and Security: Humanitarian Assistance to Refugees in Africa”, in the Security Council, 13 January 2000, published in U.S. Committee for Refugees, WORLD REFUGEE SURVEY 2000, 30 (U.S. Committee for Refugees 2000).

¹⁰⁰ Sadako Ogata, “An Era of Mass Migrations Needs Updated Rules”, in THE INTERNATIONAL HERALD TRIBUNE, 23 August 2000, p.8.

¹⁰¹ Sadako Ogata, “Protecting People on the Move”, Address sponsored by the Centre for the Study of International Organization, New York, 18 July 2000.

would require increased financial resources and political commitment on the part of governments, factors which received variable support as the UNHCR budget was reduced and some developing countries accused IDP protection to be a mere strategy to intervene in domestic affairs.¹⁰²

Because IDPs are often hidden and collectively de-humanized, the State and/or society may view them as guerrillas, sub-humans, or “disposable” people (as in Colombia). As a result, they suffer a severe loss of self-worth and ability to pursue or even define aspirations. Their identification thus embraces external and internal components. They have a dire need to be recognized in order to regain a sense of dignity and claim their basic rights. The creation of the category of IDPs’ greatest value may be its verbal enunciation to grant a sense of identity linked to human rights. Hence, an initiative for IDPs to organize and claim rights is defensible, although the fact that it seems to have evolved from the top expert level down to the popular level instead of the inverse provides a paradoxical twist as the benevolence to provide a “voice on behalf of the voiceless” does not resolve their clamour to express themselves.

2.2 Definition of Internally Displaced Persons

2.2.1. Preliminary Drafts

Due to the fact that there is no universally binding document on internal displacement, there are various concepts of internally displaced persons. In the Red Cross’ Symposium on Internally Displaced Persons, October 23-25, 1995, there was some discomfort with the notion of establishing a set definition of internally displaced persons, for fear of excluding or discriminating against others.¹⁰³ There was concern for giving rights to internally displaced persons that minorities or indigenous persons in the same situations would not enjoy. The UN

¹⁰² In addition, she reiterated the need to explore the root causes of forced migration, and the development needs upon return. Of special interest is the fact that the UN High Commissioner for Refugees called for an increased role of the UNHCR in conflict mediation, a position supported by Guy Goodwin-Gill. United Nations Security Council, Press Release SC/6783, January 13 2000, “Security Council, following briefing by High Commissioner for Refugees, calls for increased resources to meet Africa’s substantial needs”, cited by Guy S. Goodwin-Gill, “UNHCR and Internal Displacement: Stepping into a Legal and Political Minefield”, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2000, 31 at footnote 2 (U.S. Committee for Refugees 2000).

¹⁰³ Jean Phillippe Lavoyer (Ed.) Internally Displaced Persons Symposium, Geneva 23-25 October 1995, 35 (International Committee of the Red Cross 1995).

High Commissioner for Refugees (UNHCR) Executive Committee's (EXCOM) Conclusion No. 75 (XLV) 1994 suggested the following:

“Displaced persons are people who are still within the borders of their country of origin, and who, like refugees, fear persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. They may also be displaced as a result of natural disasters such as floods or famine.”

This definition was of obvious interest because although it repeated the persecution standard and the categories contained within the 1951 Convention on the Status of Refugees, it added “environmental displaced persons” which extended the protection category significantly. This met with concern by some observers who distinguished forced flight on account of coercion by man as opposed by coercion by God. (However, in situations in which a government discriminates in providing assistance to victims of Acts of God, this would provide a link to the traditional concept of persecution.)

The UN initially adopted a working definition which expanded beyond the UNHCR EXCOM version by abandoning the persecution standard per se but settled upon a numerical requirement and a list of the most dramatic causative factors:

“Persons who have been forced to flee their homes suddenly or unexpectedly, and in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.”¹⁰⁴

The reference to armed conflict, internal strife, and systematic violations of human rights is derived from the Inter-American standards contained within the documents discussed further below. This is positive given that internal displacement is often conducted by actors seeking to expel entire groups or communities, especially when seeking to take over land, rather than individuals as was more common for refugees during the Cold War.

The International Organization for Migration (IOM) offered a similar definition:

“The expression ‘internally displaced persons’ generally refers to persons who, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, have been forced to flee their homes, suddenly or unexpectedly, and in large numbers (mass movements), and who are within the territory of their country. Internally displaced persons also include returnees who, having fled to another country, subsequently return to their own country but are unable to return to their original place of residence.”¹⁰⁵

¹⁰⁴ Analytical Report of the Secretary General on Internally Displaced Persons UN. Doc. E/CN.4/1992/23.

¹⁰⁵ IOM, “Internally Displaced Persons”, Contribution of the IOM to the 3 February 1993 meeting of the United Nations Inter-Agency Standing Committee (IASC).

The numerical requirement met with much criticism within Latin America, because one of the principal characteristics of displacement in the region is that the displaced tend to leave in small groups, such as families, rather than mass-movement. It also recognizes the problem of cyclical displacement, where refugees return and become IDPs when prevented from re-entering their homes. Indeed, this is the primary problem in Bosnia and Yugoslavia, as IDPs refuse to relinquish properties which they took over to the returning refugees. Some refugees in Guatemala had met similar problems. In addition, the definitions do not address other causes, such as socio-economic conflicts, terror induced by drug trafficking, or development projects. We may consider the PARinAC Document of the Global NGO and UNHCR Conference in Oslo, Norway, 6-9 June 1994, section on Internal Displacement. Recommendation 40:

“There is a need for a flexible definition of internally displaced persons which should not be restricted by existing mandates of concerned UN agencies and/or NGOs, and should be based on practical and empirical analysis of the root causes of displacement. The phenomenon of displacement should be approached in a holistic manner by adopting a definition which includes a diverse set of causes. The various grounds for displacement should be given due attention when discussing the roles of various agencies.”

On the regional level, significant attention has been rendered to the fact that many migrants flee situations which do not encompass the traditional international concept of political persecution but rather are linked to the weakness of the State in its ability to protect its citizens:

“Ethnic rivalries, conflicts over land, private armies, drug traffickers and other forms of organized crime often result in lawless violence that forces large numbers of persons to abandon their homes. Even when state actors are clearly the perpetrators, their motives may not necessarily be political in a classic sense: members of the security forces are often employed in violence to solve rural conflicts over land or over agricultural labour, or to wage ‘wars against crime’ that are really directed indiscriminately against slum dwellers in large cities. . . Even though most of our continent is experiencing an unusual moment of constitutional rule, it is no secret that our fledging democracies are increasingly overwhelmed by the various forms of violence we described and can hardly pretend to be able to protect their citizens from it.”¹⁰⁶

The Cartagena Declaration of 1984 addressed the need to consider IDPs (without defining them) within the program of human rights and transition to peace, this document is considered to be customary regional law, however it remains unspecific as pertaining this group. The 1989 International Conference on Refugees in Central America (CIREFCA) suggests a open cause-focused definition but refers to massive violations of human rights:

¹⁰⁶ Juan E. Mendez, “A Proposal for Action on Sudden Forced Migrations”, p.2-3, paper presented at the Conference on Sudden Forced Migration Emergencies in the Americas, Washington D.C., September 30-October 1 1997, hosted by the Organization of American States, the Inter-American Institute on Human Rights, the Open Society Institute Forced Migration Projects, United Nations High Commissioner for Refugees.

“Displaced persons are persons who have been obliged to abandon their homes or usual economic activities because their lives, security or freedom have been endangered by generalized violence, massive violations of human rights, an ongoing conflict or other circumstances which have or are seriously disrupting the public order, but who have remained within their own countries.”¹⁰⁷

In practice, CIREFCA proved unable to help most internally displaced persons; due to lack of political will, the programme has since been shut down. We may also wish to consider the initial document elaborated by the Permanent Consultation on Internal Displacement in the Americas (PCDIA) which co-operates with the Inter-American Commission of Human Rights but is technically independent from the OAS system. Its members originate from the UN, IOM, Inter-American Commission of Human Rights, ICRC, and various NGOs. It studies the phenomenon of internal displacement with the region, conducts field missions, and has collaborated with other international organizations to design strategies for protection and response. It offered a definition that refers to both threats to freedom and massive human rights violations:

“Every person who has been forced to migrate within the national territory, abandoning his place of residence or his customary occupation, because his life, physical integrity or freedom has been rendered vulnerable or is threatened due to the existence of any of the following man-caused situations: internal armed conflict, internal disturbances or tensions, widespread violence, massive violations of human rights or other circumstances originating from prior situations that can disturb or disturb drastically public order.”¹⁰⁸

The PCDIA’s Minimum Standards for the Protection of IDPs were utilized only in 1992-93. They were later supplanted by the Guiding Principles on Internal Displacement promoted by the UN Special Representative on Internal Displacement. The *raison d’être* of the PCDIA has recently been called into question, given that recognition of internal displacement crisis situation is only appropriated to Colombia and, to a lesser extent, Mexico. Although the PCDIA considered expanding its oversight focus to include the new wave of migration, supposedly attributed to socio-economic factors, there was not much support to be found as the prevailing view *vis-à-vis* IDP protection is deemed to be rather conservative.¹⁰⁹

The San Jose Declaration on Refugees and Displaced Persons of 1995, created to commemorate the tenth anniversary of the Cartagena Declaration, does catalogue the needs of IDPs, however, it does not contain a set characterization of the concerned population. Hence,

¹⁰⁷ Conference on Refugees in Central America 1989.

¹⁰⁸ Permanent Consultation on Internal Displacement in the Americas. Experts such as Juan Mendez and Cristina Zeledon who were consulted for the UN Guiding Principles as well.

¹⁰⁹ Email correspondence from Cristina Zeledon, CPDIA, 28 March 2000.

the regional definitions are open and adaptable to the varied manifestations of displacement, but given their soft-law status they may have limited enforcement possibilities.

It should be noted that within refugee law, emphasis is often placed on political causes for flight as legitimising protection. Economic causes tend to be viewed as invalid, which is impractical in Latin America where economic repression is a tool of oppressors.¹¹⁰ Latin American jurisprudence places greater emphasis on social and economic rights and development issues. The San Jose Declaration on Refugees and Displaced Persons appears to be drafted in order to confirm the importance of socio-economic rights within the context of displacement in the Americas: Conclusion 9 underscores “the importance of fostering full observance of economic, social and cultural rights”; Conclusion 14 calls for a linkage of reintegration efforts to sustainable development efforts targeting extreme poverty, human needs, and respect for human rights, including economic, social and cultural rights; and Conclusion 16 calls for attention to those rights which are crucial for their survival, security, and dignity. As noted by Carlos Maldonado, “The United Nations system and international community should continue to assist Central America in this process, moving beyond a focus on emergencies to consolidation and prevention programs.”¹¹¹

This is a strategy which was first embarked upon within Central America’s CIREFCA Esquipulas Agreement II. The goal was to promote the social, economic, and cultural rights of the uprooted populations in order to establish peace and prevent further migration. Among various approaches, it was considered important to focus consensus creation mechanisms, decentralization of the State, promotion of respect for human rights (including economic, social, and cultural rights), law reform, civic participation, social integration, and sustainable development and equity at the local level.¹¹² The idea is to break the “ominous cycle of poverty, exclusion, violence, emergency”.¹¹³ Indeed, Maldonado notes that the second generation displacement (no longer based on political persecution, rather it is a result of violations of social and economic rights and extreme poverty) “. . . manifests the inability of the countries in the region to accelerate a process of social inclusion, and full exercise of human rights in their integrity.”¹¹⁴

¹¹⁰ Arboleda, Eduardo, “Refugee Definition in Africa and Latin America”, in *International Journal of Refugee Law*, vol. 3, no. 2 (1991).

¹¹¹ Maldonado, Carlos, “Derechos Humanos y proteccion de los desarraigados en situacion de post-conflicto”, in *Instituto Interamericano de Derechos Humanos, ESTUDIOS BASICOS DE DERECHOS HUMANOS VII*, 133,140 (San Jose, 1996)

¹¹² *Id.*

¹¹³ *Id.* At 139.

¹¹⁴ *Id.* 138

The UN Convention on Economic, Social, and Cultural Rights addresses precisely the issues of greatest concern to marginalized groups within rural-based societies- e.g. the right to an adequate standard of living (Article 11, including the rights to food, clothing, and housing) as well as the right to work (Article 6) and right to health (Article 12). Some of these rights are also included in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (Article 6 Right to Work, Article 10 Right to Health, & Article 1 Right to Food) For a peasant, food is the equivalent of the right to life, in turn food is contingent on work, which in a rural society requires access to property. Thus, peasants cite the lack of access to property as the root of hunger. Denial of the means by which to provide one’s family with sufficient food is considered to be a violation of the person’s basic human dignity and thereby potentially an act of persecution. In addition, I wish to emphasize that what is deemed to be a “mere” case of socio-economic inequity is often linked to un-remedied violations of civil and political rights (this is discussed further in this Part). It should be noted that the CESCR also seeks to guarantee the more transcendental aspects of human life, such as mental health in conjunction with physical health, the right to continuous improvement of living conditions, and the right to culture. Finally, it highlights “empowering rights” intended to grant persons the means by which to change their situation for the better, e.g. the right to education and the right to participate in trade unions and strikes. This author argues in favour of recognizing the infraction of both “first and second-generation rights” as legitimate causes for protection in keeping with the principle of the indivisibility of human rights, particularly with regard to determining when the need for protection has ceased.¹¹⁵

2.2.2. The Guiding Principles on Internal Displacement & the ILA Declaration of Principles on Internally Displaced Persons

After consideration of the various drafts, the Guiding Principles on Internal Displacement was created in primary consultation with eleven experts drawn from academia, UN, and ICRC.¹¹⁶ The Guiding Principles were not formally adopted by the General

¹¹⁵ On the indivisibility of human rights see the UN Declaration on Development (1988).

¹¹⁶ The primary experts for the Guiding Principles were Jean-Francois Durieux, Robert Goldman (Special Rapporteur on IDPs for the Inter-American Commission on Human Rights), Daniel Helle, Walter Kölin, Jean Phippe Lavoyer, Erin Mooney, Manfred Nowak, Toni Pfanner, Maria Stavropoulou, Ellen Zeisler and Roberta Cohen. Their backgrounds are European and American, however Francis Deng is from Sudan. Additional consultation with experts from “various geographic regions” was conducted as well, particularly at the Vienna

Assembly or other UN body, instead they remain outside of political debate and were drafted in a process which avoided criticism based on concern for infringement on sovereignty. It has been suggested that human rights experts may be perceived to act in pursuit of objective ideals rather than political interests, thereby providing a new source of morality to replace that which some claim was lost with the demise of churches.¹¹⁷ Such soft approaches are positive in that they diversify outlets for group oral emancipation. In 1998, the UN Special Representative on Internal Displacement, Francis M. Deng, submitted the Guiding Principles on Internal Displacement, in which the definition was amended as follows to exclude the numerical requirement and to refer to human rights violations (not systematic) thereby widening the scope of coverage:

“Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”¹¹⁸

This definition continues to receive some criticism due to the continued inclusion of natural disasters, limits on application on the ground, and the lack of cessation clause (discussed below). Michael Barutciski questioned the validity of the IDP category, noting “(t)hat some groups may sometimes be more vulnerable in particular scenarios is a matter for operational priorities, not for legal or conceptual development.”¹¹⁹ However, it has received tremendous support by the Brookings Institution, referred to in resolutions of the UN General Assembly and Human Rights Commission, and is being disseminated around the world to governments, NGOs, universities, international organizations, etc.¹²⁰ The Guiding Principles may be considered primary soft law as it is addressed to the international community as a

Meeting in January 1998. See Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, E/CN.4/2002/95 para. 6 (16 January 2002).

¹¹⁷ See JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY (Jonathan Cape 1999). He mourns the fading of moral law due to the departure of morality, via churches, as social influence. In order to reawaken moral sensibility, he calls for a “humanization of ethics, rooted in human needs and values”.

¹¹⁸ United Nations, Guiding Principles on Internal Displacement, introduction, paragraph 1, (E/CN.4/1998/53/Add.2, 11 February 1998).

¹¹⁹ Michael Barutciski, “Tensions between the Refugee Concept and the IDP Debate”, in 3 FORCED MIGRATION, 11, 13 (Refugee Studies Programme/ Global IDP Survey December 1998).

¹²⁰ Commission on Human Rights, Resolutions on Internally Displaced Persons 1992/3, 1993/95, 1994/68 (E/CN.4/RES/1994/68), 1996/52 (E/CN.4/RES/1996/52) 19 April 1996, 1997/39 (E/CN.4/RES/1997/39), 1998/50 (E/CN.4/RES/1998/50), 1999/47 (E/CN.4/RES/1999/47) 27 April 1999, 2000/53 (E/CN.4/Res/2000/53), 2001/54 (E/CN.4/Res/2001/54). General Assembly, Resolutions on Protection of and Assistance to Internally Displaced Persons, 52/130 (A/Res/52/130) 26 February 1998, 54/167 (A/RES/54/167) 25 February 2000, 50/195 (A/RES/50/195) 11 March 1996, 56/164 (A/RES/56/164) 20 February 2002, 48/135 (A/RES/48/135) 18 February 1994, and 1994/174 (A/RES/49/174) 24 February 1995.

whole.¹²¹ It seeks to reaffirm human rights and humanitarian norms contained in other instruments while elaborating new norms within the specific context of internal displacement, in particular that of the right to reparation.

Almost concurrently, the International Law Association adopted a Declaration of International Law Principles on Internally Displaced Persons (2000). The International Law Association is an international NGO composed of lawyers from private practice, academia, government, and the judiciary, as well as other experts that organises committees to study, clarify, and advance international law. It offers the following definition that excludes the numerical requirement and recognizes the fact that Non-State actors may wield greater control than the State in these situations:

“Article 1

1. . . . *Persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife, or systematic violations of human rights, and who have not crossed an internationally recognized State Border.*
2. *This Declaration applies also to victims of natural or man-made disasters wherever the responsible State or de facto authority fails, for reasons that violate fundamental human rights, to protect and assist those victims*
3. *By ‘de facto authorities’ are meant any non-State entities in actual control of parts of a State’s territory which are parties to an armed conflict and/or internal strife or have generated or hosted internally displaced persons.”¹²²*

The International Law Association’s Committee on Internally Displaced Persons noted that IDPs suffered due to “the traditional concept of sovereignty and restrictive allocation of resources”, as well as the “absence of an international law regime governing IDPs threaten fundamental human rights as well as international peace and security.”¹²³ The traditional treatment of IDPs as simply a subset of citizens for purposes of international protection and assistance has become glaringly inadequate and superficial.”¹²⁴ In juxtaposition to the UN

¹²¹ See Dinah Shelton, “Commentary and Conclusions”, in DINAH SHELTON (ED.), COMMITMENT AND COMPLIANCE, 449, 450 (Oxford University Press 2000).

¹²² ILA Declaration of International Law Principles on Internally Displaced Persons, adopted at the 69th Conference of the International Law Association, held in London, 25-29 July 2000, Resolution No. 17/2000.

¹²³ The ILA formed a Committee on Internally Displaced Persons which included members of academia, UNHCR, national governments, etc.: Luke T. Lee, Rainer Hofmann, Yukio Shimada, Carol Batchelor (not present 2000), Chaloka Beyani, Woon-Sang Choi, Ruth Donner, Maryellen Fullerton, Nils Geissler, Vera Gowlland-Debbas, Daniel Haile, Jean-Marie Henckaerts, Bosko Jakovljevic, Manuel C. Herrera (not present 2000), G.J.H. van Hoof, John B.K. Kaburise, Tzu-wen Lee (not present 2000), Yu V. Maleev (not present 2000), Adherbal Meira Mattos, H.W.O. Okoth-Ogendo (not present 2000), James A.R. Nafziger, Myong-Joon Roe, Louis Sohn, Jerzy Sztucki, Budislav Vukas, Lincoln Wee, and Andreas Zimmermann. Their backgrounds included Asia, Africa, Latin America, Europe, and North America. This Declaration was adopted during the 69th Conference of the International Law Association, held in London, 25-29 July 2000, Resolution No. 17/2000.

¹²⁴ Introduction to Report by the Committee on Internally Displaced Persons, London Conference (2000), para. 2.

Guiding Principles, which are not “intended to create a separate legal status of IDPs as a subset of victims of human rights violations”, the ILA Declaration intends “to highlight the unique status of IDPs as de facto refugees confined in their national territories, hence justifying a special protection regime.”¹²⁵ This indicates possible support for amending the 1951 Convention on the Status of Refugees to include IDPs or elaborating a new convention with a new implementing agency.¹²⁶ At present, the ILA Declaration retains soft law status and serves as a complement to the Guiding Principles on Internal Displacement which also maintains soft law status- both instruments have been drafted by experts and exposed to a certain degree of consultation with other actors, however neither have been processed via the the UN law-making organs (see *infra* 2.4 on enforcement).

Because the Guiding Principles on Internal Displacement refers to human rights in general, it does not specify a preference for civil and political over socio-economic rights. Hence one may argue that persons fleeing the latter abuses would be entitled to protection as well. In contrast, the ILA issued a commentary to its IDP definition in which it explained its exclusion of “natural or man-made disasters” as factors of internal displacement, due to its linkage to “economic and social rights, rather than civil and political rights.” The violation of the latter rights is considered to reveal a “refugee-like situation”, whereas violation of the former is deemed not to dispel the presumption of full protection and assistance of the State. This position is unfortunate given that it limits the protection possibilities of this document in actual internal migration situations. In addition, the ILA definition refers to “systematic violations of human rights” thereby placing a higher threshold for inclusion within the protection category. The section below explores the dilemma of bias against socio-economic rights with respect to the lack of a cessation clause within the Guiding Principles on Internal Displacement. I seek to reveal how the interpretation by the Guiding Principles’ own advocates avoids addressing the root causes of displacement.

¹²⁵ Id. Para. 3.

¹²⁶ See Luke T. Lee, “The London Declaration of International Law Principles on Internally Displaced Persons: Its Significance and Implications” in 14 (1) JOURNAL OF REFUGEE STUDIES, 70,71 (Oxford U Press 2001)

2.3 Cessation of IDP Status & Bias against Socio-Economic Rights

No international instrument, including the Guiding Principles on Internal Displacement, addresses when an IDP ceases to be such. It is curious that an instrument which was designed to fill in the gaps in international law would omit such an important aspect of protection. It may well be that the drafters chose to model the principles on human rights and humanitarian law which do not refer to cessation clauses, rather they highlight derogation conditions on the State. However, the very nature of forced migration begets comparison to refugee law. The provision of benefits or special protection to persons as a result of a temporal event requires an analysis of when such action is no longer required. Chaloka Beyani set forth:

“However inclusive it may be, a definition of internally displaced persons cannot be open ended. Certain classes of persons should be excluded from the definition. These include, the homeless, prisoners of war, war criminals, persons who commit crimes against humanity and acts contrary to public order which cause persons to flee, and rural urban drifters in squatter areas. A cessation clause has to be included within the definition to enable the appraisal of conditions in which protection or assistance to internally displaced persons should cease, having regard to the prevailing circumstances and the need for protection.”¹²⁷

Such considerations are not present in the Guidelines. Cohen & Deng recommend case by case analysis and cite various notions for cessation of status, including:

- 1) *Renewed security and possibility for IDPs to return and reintegrate in their areas of origin;*
- 2) *Prevalence of socio-economic factors as a cause for displacement, rather than conflict and persecution; or*
- 3) *Resettlement (including socio-economic integration) in another area.¹²⁸*

The first and the third factors are akin to the cessation standards in Article 1 (C) of the 1951 Convention on the Status of Refugees and equally valid in the context of internal displacement. The second standard is disturbing because it calls into question the validity of socio-economic rights as the root causes of displacement. Fronhöfer notes

¹²⁷ Chaloka Beyani, *Internally Displaced Persons in International Law*, 27 (Paper located in the Refugee Studies Programme 1995). I take issue with the lumping of homeless people in drifters for exclusion, without examining the causes for their homelessness.

¹²⁸ COHEN, ROBERTA & DENG, FRANCIS M., *MASSSES IN FLIGHT*, 37-38 (The Brookings Institution 1998).

that:

“Whilst the primary right is directed at halting actions by the state (i.e. deportation and forced resettlement, along with human rights violations and military actions resulting in the flight of the persons affected) so that civil and political rights are not violated, the secondary claim calls for extensive additional action on the part of the state: a guarantee of elementary living conditions (basic provision of food, water, shelter, etc.), the assurance of social and cultural needs (education, religious teaching) and comprehensive measures to return and reintegrate the internally displaced persons with at the same time a guarantee of special procedural rights to enable these claims to be implemented.”¹²⁹

As noted previously, the Guiding Principles’ definition of IDP includes those “forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of . . . violations of human rights . . .” There is no limitation regarding exclusive applicability of civil and political rights. One may deduce that the general reference includes social and economic rights as well, including the right to property (which has hybrid civil, political, social, and economic qualities) as enshrined in, inter alia, the Universal Declaration of Human Rights (Article 17), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5), and the American Convention on Human Rights (Article 21). The Guiding Principles prohibit arbitrary deprivation of property and call for recovery of lost property or compensation/reparation (Principles 21 & 29). Given that the land is the primary form of subsistence in Guatemala, the failure by the State to remedy the inequitable land distribution or respond to restitution claims by the dispossessed is a form of discrimination by the State which may at best be categorized as the promotion of impunity and at worst a form of persecution as the means of survival of the rural population is being denied.¹³⁰ As mentioned previously, Deprivation of property restitution in a primarily rural-based economy may effectively infringe the right to life, housing, and food. It is unacceptable that refugees are granted the means to restitution while internally displaced persons are denied like remedy after suffering the same dispossession.

Cohen & Deng discuss and compare U.S. Committee for Refugee’s categorization of persons in Cyprus (continued IDP definition) and South Africa (cessation of IDP status for many) as examples of how to determine cessation status. In the former, although the IDPs

¹²⁹ Dirk Fronhöfer, “Internally Displaced Persons: The Problem of ‘Internally Displaced Persons’ in the Context of Human Rights, International Refugee Law, and International Humanitarian Law”, in 55 *Law and State* 7, 16 (1997).

¹³⁰ See UN Special Rapporteur on the Question of Impunity of Perpetrators of Human Rights Violations (economic, social and cultural rights), Mr. El Hadji Guisse Scott, Final Report to the Commission on Human Rights, E/CN.4/Sub.2/1997/8 para. 140 (27 June 1997), calling for restitution for illegal dispossession. See also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees 54 (1992) noting that discrimination may amount to persecution when affecting the right to earn one’s livelihood.

have been resettled for over two decades, the lack of solution to the conflict and the continued presence of the UN are noted as factors for continued IDP identification; in addition to the fact that “many of the displaced still wish to return home.”¹³¹ South Africa was considered to present a different case, regardless of the fact that they admitted that the land problems resulting from prior apartheid practices have not been resolved in spite of the change in government and its establishment of land programs. Instead of calling for continued recognition of IDP status for restitution purposes, they curiously note that:

*“Moreover, since the end of apartheid, it could be argued that the displacement of many is now a land and economics issue and that in some cases people who had never been ‘displaced, are living in worse conditions than those who had been displaced generations ago.”*¹³²

This statement is intriguing because it seems to dismiss the central issue that land conflicts are often the root causes of displacement, and their continuing existence should not be identified as factors for cessation status. This author would argue that on the contrary, they should sustain the characterization, should the definition be implemented at all. The decision to characterize the situation as “merely a land issue” loses sight of the essential crux of the problem which is the need to resolve the root of the conflict provoking forced migration. The fact is that persons who remain victimized by the prior regime are entitled to redress. The Guiding Principles’ identification of right to reparation of lost property in Principle 29 has been cited as a necessary right.¹³³

Ironically, the position of Cohen, Deng, and U.S. Committee for Refugees correlates with the detractors of IDP definition, such as James Hathaway, who strongly emphasized the fact that it is more important to support the human rights of the general population as a whole, instead of a select group:

*“. . . I cannot see why one ought to effectively privilege the internally displaced in comparison to other internal human rights victims. Is the woman who is trapped in her house or her community because, were she to leave, she would be seriously violated truly less at risk than the woman, who, by reason of the same fears, has fled to another part of the country? I think that is nonsensical. It is completely superficial. If we are serious that now we are in a position to enter behind the wall of sovereignty, we ought not privilege those who are displaced, effectively doing a disservice to those who are trapped in their own homes, and we ought simply to get about the business of enforcing international human rights law internally if we honestly believe that is a possibility. This project is an unfair and inappropriate privileging of a subset of internal human rights victims.”*¹³⁴

¹³¹ COHEN & DENG, supra note 128 at 38.

¹³² Id. at 39.

¹³³ Michael Kingsley-Nyinah, “What May Be Borrowed; What Is New?”, in 4 FORCED MIGRATION 32, 33 (Refugee Studies Programme/Global IDP Survey April 1999), citing the Compilation and Analysis of Legal Norms relevant to the Protection of Internally Displaced Persons (E/CN.4/1996/52/Add.2).

¹³⁴ Commentary by James Hathaway, in Proceedings of the 90th Annual Meeting of ASIL, p. 562 (1996). See also Luke T. Lee, Internally Displaced Persons and Refugees: Toward a Legal Synthesis?, in 9 JOURNAL OF REFUGEE STUDIES, 27, 36 (1996), stating: “To the extent that their basic human rights have been violated, they are entitled to protection and assistance—whether as refugees abroad or as internally displaced persons within

The inability of the pro-IDP definition camp to provide a coherent explanation of how the definition is to be applied in practice renders it more vulnerable to Hathaway's attack. If this comment is juxtaposed to Cohen & Deng's justification for non-application of the definition to South Africans, we find that that they are actually in accord with each other. In my opinion, the key difference between an IDP and a person who remained in his/her home is the dispossession of property. Hence, it is senseless to dismiss the very factor which may warrant the use of the categorization.

Cohen & Deng also imply that "displacement across generations" may be a legitimate basis for non-inclusion. This contradicts Deng's prior statement that "The issue is not so much one of duration of time as one of solution- that is, whether the fundamental problems connected with uprootedness have ceased to exist or at least been significantly alleviated."¹³⁵ Certainly in the case of the Palestinian refugees, their span of time in exile has intensified their demand for restitution and recognition of their victimization. Would it not be discriminatory to negate IDPs the same right to seek restitution?

One may question whether the IDP label is necessary, would it not be simpler to advocate the right to restitution of all dispossessed persons in general? In short the current explanation offered for cessation of IDP status seems shaky because it appears to rest on subjective political considerations regarding the regime in power rather than objective legal determinants with respect to the IDPs themselves. A case by case approach may not be advisable for the promotion of IDP rights because it leads to ad hoc responses, which is exactly what the Guiding Principles was intended to avoid. Given that international organizations and the State criticized the IDP label as being too vague to apply, the above description regarding termination of status does not adequately respond to this concern.

The U.S. Committee for Refugees claims that due to the lack of guidelines, the application of cessation status is subjective. It noted that they removed Nicaraguans and El Salvadorans from the definition utilizing the following criteria:

their own countries. . . It should be stressed that equal rights for all individuals-be they nationals or aliens, refugees or internally displaced persons-is implied in all universal and regional human rights instruments through the use of such expressions as 'all human beings', 'everyone', 'no one', or 'all'.

¹³⁵ Francis M. Deng, "Dealing with the Displaced: A Challenge to the International Community", in 1 GLOBAL GOVERNANCE 45, 51 (1995). See also Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng: Addendum Report on the Mission to the Sudan, E/CN.4/2002/95/Add.1 para. 27 (5 February 2002) noting the plight of IDPs residing in areas for over ten years without minimum socio-economic guarantees- they live in "acute impoverishment and loss of livelihoods", thus he calls for financial resources to meet housing, nutrition, water, sanitation, education, human rights, and peace-building needs.

“...USCR considered people no longer displaced if they voluntarily returned home to live, whether the conditions that led them to flee had significantly improved or not. We also considered them no longer displaced, whether they returned home or not, when the conditions that led them to flee improved sufficiently that most observers considered that the displaced could safely return home, and when refugees from those countries repatriated from neighbouring states.”¹³⁶

These statements are contradictory because the first condition is a subjective consideration, the second objective, and the third is a result of a combination of subjective and objective analysis. In short, the explanation appears to mimic the 1951 Convention on the Status of Refugees' cessation clauses but the reference to refugees appears worrisome when analyzing the continuing validity of the IDP label. This criterium provokes criticism because of the radically different positions of refugees as opposed to internally displaced persons. Refugees are often organized and have support by the international community, whereas internally displaced persons are generally dispersed, anonymous, and lack advocates for their needs. The refugee return may be based on protection guarantees and arrangements negotiated specifically for them. The fact that the refugees have attained a final solution to their plight has no relevance to the situation of the internally displaced population which continues to wait for response by the State. To assume that they are no longer in a precarious situation due to the fact that the refugees are reintegrated is to turn a blind eye to the reality of the problem. If forced eviction was the root cause of migration, then until restitution of land or due compensation is provided, IDPs will continue to be victimized.

As pertaining Colombia, U.S. Committee for Refugees determined that due to the fact that it is not safe to return and the fact that IDPs may wish to return home in spite of economic integration in a new area, the definition should still be applied to them.¹³⁷ The government limits provision of humanitarian assistance to three years, based on the erroneous assumption that after such time, one should be self-reliant. Priority to the Colombian land reform agency's (INCORA) programs is ironically given to those who have been most recently displaced. Instead of solving the problem, they force hundreds of thousands of people to seek refuge in the shantytowns surrounding the cities. Deprived of water, electricity, solid housing, schools, and hospitals, these communities are subjected to an inhumane existence without any hope of improvement. The failure to provide guidelines to the Colombian government as to how to properly select persons to include in the protection programs has resulted in an inefficient system which exacerbates the crisis. The UN Special Representative on Internal Displacement conducted two field missions to Colombia in 1994

¹³⁶ U.S. Committee for Refugees, *Colombia's Silent Crisis: One Million Displaced by Violence*, 18 (U.S.C.R. March 1998).

¹³⁷ *Id.*

and 1999. His report highlighted the difficulty of identifying IDPs, as many did not seek out State authorities or aid organizations for fear of persecution or reprisals.¹³⁸ He listed indigenous people and Afro-Colombians, victims of natural disasters, victims of armed conflict displacement as IDPs, but the State countered that identification was problematic:

“It was explained to the Representative that displaced persons fear being identified as that endangers their security. Instead, they prefer to be assimilated into the community. As a consequence, the problems of internally displaced persons are generally the same as those of the community, which generally shares the same plight of poverty and deprivation. The displaced should therefore not be treated as an undifferentiated mass, not even conceptually: any attempt to define the term should be flexible enough to ‘fit’ all the individuals concerned and their needs. Some distinction between internally displaced persons and formerly internally displaced persons may also have to be made on the basis of criteria such as time/regularization of settlement to another area. At the same time they have to be differentiated from other groups in so far as their needs for protection and assistance are specific.”¹³⁹

A holistic approach to those in need was advocated:

“. . . the plight of the internally displaced and that of the community in which they reside in are often inter-linked and should therefore be treated as such. . . The nature of internal displacement in Colombia, in which the displaced “protect” themselves by “disappearing” into the community, makes the situation of the internally displaced in Colombia, even more than in other countries, closely intertwined with the problems of the community as a whole, which would in turn favour seeing their needs for services and development as inseparable”¹⁴⁰

The same conditions have been ascribed to the displaced populations in the outskirts of Guatemala City.¹⁴¹ According to the Guatemalan government:

¹³⁸ Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng: Colombia, E/CN.4/1995/50/Add.1 (03/10/94). He noted the inequitable land distribution, 3% of landowners own more than 70% of the arable land. He criticized the state of impunity, concentration of political power in two parties (excluding civic participation), counter-agrarian reform, and violence. There was a declaration by a seminar on IDPs in Colombia which called for need for re-distributive agrarian reform to facilitate return and prevent further displacement. Deng called for protection of land and property rights, respect of humanitarian law norms prohibiting displacement, the right to life and physical integrity, as well as special protection for women (especially widows). Deng returned to Colombia for a follow-up visit in May 1999 during which a Workshop was held on implementing the Guiding Principles on Internal Displacement. The Workshop highlighted the problem of counter-agrarian reform efforts and development projects as a source of forced migration. The participants called for greater action by the judiciary to investigate threats to communities, recognition of traditional forms of ownership, restitution or compensation for abandoned property, and prevention of development induced displacement. The Workshop recommended removing the requirement that IDPs pay 30% of the cost of new land. Seven thousand indigenous persons had been displaced in the last two years. The State was criticized for delays in providing protection and assistance to IDPs. The situation was bleak, increased violence and internal displacement, *refoulement* at the borders, and visa policies adopted by European nations intensified the crisis. He criticized the state for not implementing effectively Law 387 on Internal Displacement.

¹³⁹ Id. at para. 110.

¹⁴⁰ Id. at paras. 133-134

¹⁴¹ OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, NUNCA MAS INFORME PROYECTO INTERCIOCESANO DE RECUPERACION DE LA MEMORIA HISTORICA, VOLUMEN I IMPACTOS DE LA VIOLENCIA, 155 (Arzobispado de Guatemala 1998).

“In general terms, the internally displaced person from the start is not in a special situation. On the contrary, he is in the same general situation as the rest of the population facing extreme poverty.”¹⁴²

The official denial of recognition of the existence of a significant IDP population resulted in a quick dismissal by international observers of this problem. Although in 1998, the U.S. Committee for Refugees identified 250,000 internally displaced persons in Guatemala, the following year it did not include them in its report, stating:

“Displaced Guatemalans who wish to return home are no longer prevented from doing so by conflict or fear of persecution. For most, the barrier is the government’s lack of political will and/or resources to provide the displaced the land and assistance they would need to return home.”

In this author’s opinion, it is incredible that the dire straits affecting ¼ million persons may have so radically changed in one year so as to justify their removal from a category of protection in the absence of any significant government program to attend to their claims. Given that the deprivation of access to a domestic remedy is itself a basis for international protection, it is ridiculous to use the argument that such a situation constitutes grounds for exclusion from such. Indeed, Goodwin-Gill has noted that expropriation of property without compensation may amount to persecution.¹⁴³ In addition, given that the land is the primary form of subsistence in Guatemala, certainly the failure by the State to remedy the inequitable land distribution or respond to restitution claims by dispossessed is a form of discrimination by the State which at may be categorized as promoting impunity at best or establishing persecution, at worst, given that the very means of survival is being denied, including access to food and shelter.¹⁴⁴ If their lands are occupied by others and no alternative permanent solution has been attained how can it be stated that the conflict is over. A marginalized

¹⁴² Government document, “Elementos de politica de gobierno para la atencion de la poblacion afectada por el enfrentamiento armado interno”, discussing the plan for the fight against poverty 1996-2000 (on file with FONAPAZ). *But See* the CEH noted that in spite of common root causes of despair, IDPs undergo aggravated circumstances: “*Before being displaced, the majority shared the common problems of the Guatemalan rural peasant: lack of sufficient & good quality land, border problems, lack of documentation to establish the communal right to land, as well as the right of inheritance for the children. Displacement precariously aggravated this situation.*” COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE, chapter III, “La Ruptura del Tejido Social: Desplazamiento y Refugio” at para. 408.

¹⁴³ GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW*, 77 (Clarendon Press 1996).

¹⁴⁴ See Animech Ghoshal and Thomas M. Crowley, “Refugees and Immigrants: A Human Rights Dilemma”, in Vol. 5 (3) *HUMAN RIGHTS QUARTERLY*, p. 327, 329 (1983) stating that governments are expected to provide a minima of human rights including: “Persons must be able to find and hold employment which is capable of sustaining basic human needs (food, clothing, shelter) and must be able to hold employment reasonably commensurate with their training.” (citing UDHR, art. 23, CESC, art. 7 and Atle Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1 201-9 (Leyden: A.W. Sijthoff, 1966). See also James Hathaway, “‘Fear of Persecution’ and the law of human rights”, in *BULLETIN OF HUMAN RIGHTS* 91/1, P. 98, 103 (UN 1992) noting that “... the deprivation of certain of the socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter or health care will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution.

existence in the shantytowns is hardly a conclusion that will lead to the re-attainment of human dignity. Poverty begets insecurity, and there is a need to invest in security by diminishing marginalisation through restitution of property and development assistance.¹⁴⁵ This calls for long-term involvement by the international community, a prospect not favoured by Donors or agencies which traditionally close up shop and move on to new conflicts after formal accords have been signed.

A principle reason many IDPs do not return is fear of physical violence by the current possessors. As long as restitution or compensation is not given to the displaced, it is difficult to assert that the infringement on their right of freedom of movement or choice of residence has ceased. Further concern may be exhibited at the comments of Guatemalan experts such as Gonzalo De Villa, who claim that the inhabitants of the shantytowns “. . . do not perceive that their major need is land for farming. People move to and live in Guatemala City because they have shifted their vision toward ways of work and survival that do not involve possession or a piece of land. No one in the capital is demanding farmland”.¹⁴⁶ Although it is true that some inhabitants have given up aspirations to return to rural areas, there are many who indeed dream of a plot of land to call one’s own. A few struggle by invading surrounding plots to cultivate vegetation in spite of the limited fertility of the area in order to have some security of food provision.¹⁴⁷ Flight to the city was not so much a result of a pull factor as that of a push factor by economic or other form of repression in the rural region.

A report co-authored by Cohen on internal displacement in the Americas reveals the incongruity between international perspectives 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 government failed to implement its promises regarding provision of land to the displaced.¹⁴⁸

Cohen & Deng explain their reluctance to include poverty and economic factors within the definition:

“To be sure, persons forced from their homes because of economic injustice and marginalisation tantamount to systematic violation of their economic rights would come under the definition. But in most cases of economic migration, the element of coercion is not so clear, and development programs generated by the national and international agencies would be the most

¹⁴⁵ See comments by Michael Jones, OCHA, in Roundtable Conference on Internally Displaced Persons: Lessons Learned and Future International Mechanisms, Oslo, 23 May 2001.

¹⁴⁶ Gonzalo De Villa & W. George Lovell, “Land and Peace: Two Points of View” in LIISA L. NORTH & ALAN B. SIMMONS, *JOURNEYS OF FEAR: REFUGEE RETURN AND NATIONAL TRANSFORMATION IN GUATEMALA* at 45 (McGill-Queen’s University Press 1999).

¹⁴⁷ SANTIAGO BASTOS & MANUELA CAMUS, *SOMBRAS DE UNA BATALLA*, 84 (FLASCO 1994).

¹⁴⁸ 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)

appropriate means of addressing their problems. What distinguishes the internally displaced and makes them of concern to the international community is the coercion that impels their movement, the human rights abuse they suffer as a result of their displacement, and the lack of protection for them within their own countries."¹⁴⁹

This author would argue that the eviction of Guatemalan IDPs from their land was indeed systematic, their failure to return is due to ongoing fear of repression by current land occupants, and they experience human rights violations (such as violation of the right to property, housing, choice of residence, etc.) due to the lack of protection by their own State.¹⁵⁰ The State continues to be unwilling to provide legal protection to the internally displaced persons who were deprived of land. The argument that the number of IDPs has indeed been reduced requires a cogent analysis which explains how the human rights violations have ceased, including deprivation of the right to property, interference with one's home, etc. Most importantly, international experts must not be so arrogant so as to determine that IDPs have no longer a protection need without confirmation by IDPs themselves. According to Vidal Jutzutz, an IDP of the Asociacion Maya de Desarrollo Socio-Productivo Integral (AMADESPI), the issue is rather straightforward: "We will stop being displaced when we have a *finca* to sow and live on. . . The *campesino* was born with his land, the war took it away. The land is his destiny- life and death."¹⁵¹ These statement reveals transcendental aspects of life linked to property. In my opinion, determination of restitution v. compensation rights requires consideration of these characteristics. One may review the jurisprudence of the Inter-American Court of Human Rights regarding "*proyecto de vida*" as relevant precedence in this regard (see *infra* section on IACHR). In addition, Jutzutz believes that it is important to continue to utilize the IDP definition in order to recognize what happened during the war- thus calling for adherence to an ethic of recognition.

¹⁴⁹ COHEN & DENG *supra* note 128 at 17.

¹⁵⁰ Bill Frelick cites a UNHCR official who reiterated the voluntary choice principle as being the relevant criteria, claiming that "the return in safety and dignity standard applies only to refugee repatriation, not to internally displaced returns. He questions the reliability of the voluntary standard, given the variable quality of information given to the displaced persons in question. He states that by implementing displaced persons' right to return home, necessitates remedying the root causes of displacement", a task which he considers to be beyond the mandate of humanitarian agencies." In addition, he advocates promotion of local integration and resettlement options as more viable policies for ending displacement crises. Bill Frelick, "Aliens in their own Land: Protection and Durable Solutions for Internally Displaced Persons", in U.S. Committee for Refugees, World Refugee Survey, 30, 36 (1998). Such position is supported by Rainer Hofmann: "Obviously, just as in the case of voluntary repatriation of refugees, internally displaced persons will only return to their homes if they are guaranteed that the root causes resulting their internal displacement have ceased to exist." Rainer Hofmann, "International Humanitarian Law and the Law of Refugees and Internally Displaced Persons", in European Commission, Law in Humanitarian Crises: How can International Law Be Made Effective in Armed Conflicts?, 249, 304 (Year Missing).

¹⁵¹ Interview with Vidal Jutzutz 15 May 1999.

UNHCR's Guatemala Office espoused the position that IDP problem no longer exists in Guatemala.¹⁵² UNHCR questions the validity of the category itself, stating that it is difficult to prove who is an IDP due to the length of time and cyclical nature of internal displacement, an attitude which is shared by IOM and AID representatives as well.¹⁵³ Representatives from all three institutions were concerned that IDPs may be a needless category, and that perhaps it would be more holistic to address communities in need. In this author's opinion, it seems discriminatory to state that the identification of a refugee, which also requires proof, is somehow more reasonable than that of an IDP. This attitude appears to be focused on limiting the duty of protection rather responding to need. Although it may appear more holistic to provide assistance to communities at large, the fact remains that IDPs were dispossessed in like manner to refugees and deserve assistance. Those who retained their homes have other needs. Resistance by the State was an added pressure, as it was reluctant to open the door to an avalanche of claims when the coffers had been largely depleted by refugees in the absence of reception of additional donor funds. Indeed, the international agencies felt strapped by reduction of the budgets as well. Hence, an unspoken collusion emerged where the State and the UN both set aside the problem of providing restitution of land to IDPs in Guatemala. Exception was made by the Inter-American Commission of Human Rights in its fifth report on Guatemala which specifically calls upon the State to address the property needs of the IDPs.¹⁵⁴ In terms of restitution, IOM representative claims individual reparation is deemed to be difficult due to burning of the registries; however this would be true for refugees as well.¹⁵⁵ The prevailing view is that it is not possible to attend to IDPs as a group per se, it is better to focus on geographic zones composed of diverse groups affected by the violence rather than focus on one category to the exclusion of others.

Emphasis is placed on a need to close the chapter on IDPs and move on, as one cannot help everyone. In this author's opinion, aside from the CPRs, it does not appear that the chapter on IDPs was ever opened. The complexity of this issue reveals the inherent difficulties with respect to transferring the IDP notion from guidelines to policy on the ground. Rather than considering the attainment of solutions for refugees as the final chapter,

¹⁵² Telephone interview with Paula Worby, UNHCR, 13 April 1999. I was equally dismayed in Norway when a representative of the Norwegian Refugee Council working with the Global Database on IDPs stated "I didn't know there were IDPs in Guatemala."

¹⁵³ Interviews with Fernando Calado, IOM, 13 April 1999 & representative of USAID (anonymous), 11 April 1999.

¹⁵⁴ Inter-American Commission on Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111, Doc.21 rev. (6 April 2000).

¹⁵⁵ Interview with Francisco Calado, IOM, 13 April 1999.

it would be better to view it as the penultimate step in the process towards securing justice for all victims of forced migration.

Although it may appear to be more effective to provide aid to communities at large, and thereby preventing accusations of discrimination by persons falling outside the IDP category, the fact remains that IDPs were dispossessed of their property in like manner to refugees and deserve similar restitution. A person who was not displaced still retains his home, hence the need in this case would indeed be socio-economic assistance to promote development. A person who was dispossessed of his home requires restitution of his property. As long as such a remedy is not provided, the infringement on his right to freedom of movement, choice of residence, right to property, and freedom with arbitrary interference with one's home will not cease.

The fact that the international donors seem to discredit the validity of the UN principles regarding IDPs renders it difficult to imagine effective dissemination among national lawyers and NGOs interested in protecting the displaced. There is a clear line of separation between the role of the international community in creating theoretical norms, and its actual practice in designing policies for application on the ground. In turn, there is also a communication gap between the supposed receiving community and the donor institutions, as the latter are hindered by State interests that often clash with those of the community at large. As long as the State refuses to recognize IDPs as falling under a separate category of protection, the donors will find it difficult to promote such recognition. The international community then risks becoming "enablers" for national interest groups who wish to avoid addressing internal displacement. Donor fatigue may result in a declaration of premature success and withdrawal of support at the very point when new strategies are needed to prevent setbacks in the reintegration process. Victims who find themselves abandoned prior to solution of their problems end up feeling both ignored and discarded.

In conclusion, there appeared to be an unconscious collusion between international actors and the State to deny the continuing existence of dispersed IDPs in Guatemala in spite of the fact that no durable reintegration solutions were ever provided to them. It is my contention that the policy to sweep IDPs under the rug intensified property disputes (characterized by land invasions), deprived IDPs of recognition of the violations they have/or continue to be subjected to as well as their rights to restitution and remedy, and served to uphold exploitation of peasants as seasonal laborers. The bias against socio-economic rights and the ad-hoc approach to cessation of IDP status has resulted in a failure to uphold an ethic of recognition as pertaining IDPs and is one of the causes of current instability within

Guatemala. In the event of the creation of hard law instrument on IDPs, it would be advisable to include cessation clauses which clarify the criteria for determining when protection is no longer needed, but without relying on a socio-economic bias which only serves to excuse the State from addressing the needs most crucial for return and resettlement with dignity. Failure to directly address the issue of when protection is no longer necessary results in further marginalisation and exclusion of people, as States are not pressed to alter policies which neglect to address structural inequities which subject people to a miserable quasi-existence.

2.4 Enforcement of the Guiding Principles & Potential Retreat from IDP as a Defined Category

“While the Guiding Principles have been well received at the rhetorical level, their implementation remains problematic, and often rudimentary. In addition, some Governments, admittedly a minority, question the manner in which the Principles were developed . . .”

Special Representative on Internally Displaced Persons, Mr. Francis Deng¹⁵⁶

Concern was cited for the fact that the Guiding Principles is lacking a proper enforcement mechanism.¹⁵⁷ Limited enforcement possibilities complicate implementation of new norms. Indeed, the Guiding Principles may have backfired somewhat as it has met with significant resistance from the G-77 states which resent their exclusion from the creation of the norms and suspect ulterior motives related to intervention in domestic affairs. The relegation of drafting to a select number of experts was accused of being in contrast to traditional norms regarding the creation of an international legal instrument. Indeed, part of the reason why the International Criminal Court has attained such positive response in spite of previous prediction to the contrary was the fact that the conference was inclusive of state governments which were given a “voice” in the drafting process. The drafters of the Guiding Principles may have proved too cautious and thus missed an opportunity to create a binding instrument and implementing mechanism which may have actually succeeded. The failure to

¹⁵⁶ Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, E/CN.4/2002795 (16 January 2002).

¹⁵⁷ Dr. Deng pointed out that the Principles were elaborated due to the specific request of the UN Commission on Human Rights and General Assembly in resolutions adopted by States. See The Brookings Institution, “Summary Report: International Colloquy on the Guiding Principles on Internal Displacement, Vienna, Austria, September 2000) (hereinafter Summary Report) available at <<http://www.brook.edu/fp/projects/idp/conferences/vienna200009/summary.htm>>

invite States to a forum in which to discuss protection needs and draft relevant norms may have removed IDPs from the forefront of States' agendas. In short, from the perspective of the G-77, the speedy elaboration of soft law appeared to be a political tool rather than a legitimate means of international law-making. The drafters of the Guiding Principles may have ignored the educative value of treaty-making. As noted by Chase & Chase:

*“A treaty is a consensual instrument. . . . Modern treaty making, like legislation in a democratic polity, can be seen as a creative enterprise through which the parties not only weigh the benefits and burdens of commitment but also explore, redefine, and sometimes discover their interests. It is at its best a learning process in which not only national positions but also conceptions of national interest evolve and change.”*¹⁵⁸

Deng notes that the Guiding Principles are not “a legally binding instrument, but they have been treated widely as binding customary law or binding instruments, partly because they are based on hard law”.¹⁵⁹ Hence in spite of its soft law label as mere principles, the wording of the text is overwhelmingly clear in its intention to highlight binding commitments. Most of the principles reiterate the norms espoused in existing human rights and humanitarian instruments. In terms of actually creating new rights, the instrument limits itself to only a few areas, of which of most concern to this thesis is the right to recovery of or compensation for dispossessed property.¹⁶⁰ The fact that the Guiding Principles are not actually promoting the elaboration of a entire new category of rights, rather they serve to remind states that IDPs are already entitled to rights under existing instruments may excuse the deviation from debate in political forums and may provide evidence of *opinio juris* regarding the norms reiterated within. The Guiding Principles' defenders pointed out that they were “comprehensively grounded in existing international law and could acquire authoritative force by serving as a source of inspiration to judicial, quasi-judicial and monitoring bodies that invoke the Principles as an expression of the international law that has to be applied”.¹⁶¹

Hence, the language of the UN Guiding Principles is rather strange; it is a melange of “hard law” and “soft law” standards. At the time of drafting, there was concern for non-lawyers who complained that juridical language was difficult to understand and called for a more accessible document. In addition, as previously mentioned, there was a genuine fear of

¹⁵⁸ Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 4-5 (Harvard University Press 1995).

¹⁵⁹ Interview with Francis M. Deng in UNHCR, *REFUGEES*, Vol. 4 No. 117 (1999).

¹⁶⁰ Other rights include the duties of states to accept intervention by humanitarian organization, duties of Non-State actors to protect IDPs, non-return to areas of danger, non-discrimination, protection from internal disturbances and disasters, etc.

¹⁶¹ Brookings Institution, *Summary Report*, supra note 157.

antagonizing states by elaborating a document that would appear to infringe upon state sovereignty. This has resulted in the drafting of some principles with variable language (see *infra* discussion on the rights to restitution & property and Annex on the right to return). This is a negative factor of having a drafting process which is relatively quick and not subject to a broad-based and thorough review by persons outside the expert committee (although the drafters assert that was some consultations with a variety of actors for the Vienna Conference in 2000). Had the principles been pursued within a more formal process, the language may have proved more coherent. Given that the drafters of the Guiding Principles have the aspiration that this document will become customary law and hence binding upon states, it might have been better to have undertaken an even broader-based review.

Although the international consensus at present is in favour of the creation of soft law to address IDP issues this thesis challenges the validity of this approach given the emergency nature of IDP crises.¹⁶² The slow evolution of customary law or “eventual” adoption of treaties is inherently contradictory to the needs of those people who are left without defense by the state in crisis conditions.

Deng expressed concern that States would prove resistant to the elaboration of a hard law instrument, and hence it was better to adopt an instrument which would be more agreeable to the politically charged environment. This view was confirmed by Kälin who highlights the length of time required to have an instrument adopted by the Human Rights Commission and the General Assembly, the difficulty in attaining sufficient ratifications, and dependence on implementing legislation at the national level.¹⁶³ (With respect to the length of time, it is important to point out that the Rome Statute establishing the ICC took approximately five years to complete, in spite of the prevailing belief that many observers believed finalization was an impossible dream. In contrast, the UN Draft Declaration on Indigenous Rights is still in negotiations.) In addition, international bodies influenced the norm-making process, as Cohen claims that the Commission on Human Rights preferred reference to existing legal instruments, rather than the elaboration new juridical standards, and that ICRC feared that a new legal instrument would conflict with the Geneva Conventions.¹⁶⁴ Hence, articulation of the rights of IDPs as pertaining to human rights, humanitarian law, and

¹⁶² See Refugee Policy Group, HUMAN RIGHTS PROTECTION FOR INTERNALLY DISPLACED PERSONS, An International Conference June 24-25, 22 (1991) discussing clear support for a soft law approach leading to the creation of customary law and the adoption of treaties in the future.

¹⁶³ Walter Kälin, “How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework”, Presentation at Roundtable Meeting Ralph Bunche Institute for International Studies, CUNY Graduate Centre, 19 December 2001.

¹⁶⁴ Roberta Cohen, “The Development of International Standards to Protect Internally Displaced Persons” in BAYEFSKY & FITZPATRICK, *supra* note 67 at 76, 78.

refugee law (by analogy) was deemed to be a better course of action than non-identification of the protection category or creation of a new legal instrument applicable to IDPs and refugees.

Ironically, because some states remain suspicious of the Guiding Principles as an instrument to promote infringement of national sovereignty, the Special Representative is increasingly meeting resistance to his missions- to the point where he may be denied entry into the country or access to internally displaced persons.¹⁶⁵ Thus, Deng's effort to bypass resistance by certain states by elaborating soft law instead of hard law proved fruitless, in the end he faced the same issue with regard to implementation.

In addition, when a root cause of the problem is ineffective governmental mechanisms to handle conflicts, the response should not be one which promotes delayed or half-hearted response by the state. In fact, the soft-law approach may result in an exacerbated IDP situation as well as evolution from IDP status to refugee status via border crossings, so that the international community will be forced to deal with a more grievous situation later on, e.g. Colombia. In turn, the rise of the reference to "internal flight alternatives" by countries of asylum is increasingly restricting the right of persons to attain refugee status and thus results in the creation of IDPs from rejected asylum-seekers.¹⁶⁶ Considering that IDPs are recognized as having the right to seek asylum under the Guiding Principles (as well as UDHR), displaced persons may result in an eternal cycle of internal and external migration.

After the drafters of the Guiding Principles underwent significant critique regarding the definition, Kälin declared that the Guiding Principles offered a "descriptive identification" rather than a definition *per se*.¹⁶⁷ It is stated that IDPs are not granted additional rights compared to normal citizens (although it must be pointed out that the drafters originally argued that it did grant rights to restitution, documentation, etc.).¹⁶⁸ The purpose of the description is highlight their vulnerability and need for protection. Although it is admitted that a flexible definition may be difficult to implement in a regular manner, it is also noted that critique of the 1951 Refugee Convention is that it is too precise and therefore excludes

¹⁶⁵ See Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng: Addendum Report on the Mission to the Sudan, E/CN.4/2002/95/Add.1 (5 February 2002) in which the State is accused of not allowing the construction of workshops on the Guiding Principles due to concern of infringement of sovereignty.

¹⁶⁶ See Cecilia Bailliet, "Perpetuating Internal Displacement: The Misapplication of Internal Flight Alternative and Non-State Agents of Persecution within the Context of Colombian Asylum Seekers" in 1 JURIDIKUM 56-59 (2000) or Cecilia Bailliet, "Perpetuando el desplazamiento interno: la mala aplicacion de la alternativa de huida interna y los requisitos de visado relativos a solicitantes de asilo colombianos" in 5 MIGRACIONES FORZOSAS 28-30 (octubre-diciembre 1999).

¹⁶⁷ WALTER KÄLIN, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, ANNOTATIONS, AMERICAN SOCIETY OF INTERNATIONAL LAW & The Brookings Institution Project on Internal Displacement, Studies in Transnational Legal Policy, No. 32.

¹⁶⁸ Marc Vincent, "IDPs: Rights and Status" in 8 FORCED MIGRATION REVIEW, 29-30 (August 2000).

the majority of forced migrants from the realm of protection.¹⁶⁹ Reference has also been made to it as the “working definition”.¹⁷⁰ Current advocacy of expansion of the refugee definition may support a wider notion of IDPs as well.

Yet, it appears worrisome that the elaboration of soft law standards is accompanied by the diminishment of legal language itself (see *infra* discussion on the rights to property, restitution, remedy and return). One would have assumed that the soft character of the instrument as a whole would have inspired the drafters to elaborate stronger or more progressive standards. Given that the Guiding Principles are theoretically not binding but intended to one day evolve into hard law, one would question what value the description has if it is not drafted to be interpreted as legal terminology. Marc Vincent of the Norwegian Refugee Council prefers to view the Principles as an “advocacy framework.” This view was supported by UNHCR Evaluation and Policy Analysis Unit:

“1. The concept of ‘internally displaced people’ should be the subject of critical review. While the concept has proven to be of considerable value for the purposes of advocacy, its use as an operational category is more questionable, especially in situations where displaced and non-displaced populations experience the same or similar conditions of life, and where internally displaced do not wish to be described in that manner.

2. Further consideration should also be given to the application of the IDP concept, especially in protracted situations of internal displacement. More specifically, UNHCR and its partners should ask under what circumstances can IDPs be said to have found a solution to their plight, even if they have not returned to the place from which they were originally displaced.”¹⁷¹

The primary concerns raised are: First, discriminatory treatment vis-à-vis local communities. However, I wish to point out that the same issue has arisen with respect to refugees vis-à-vis host communities and policies have been designed to support local integration and sustainable development initiatives in protracted refugee situations, without requiring them to give up their refugee identity or corresponding rights.¹⁷² Second, attention is given to the fear held by displaced persons themselves as pertaining inclusion in an identity category which is met with derision within the society at large and potential targeting for attack as “subversives”. In my view, it would be preferable to place resources into educating the society as to the human dignity of IDPs and improving security, rather than discard a protection status which provides recognition of past human rights abuses and supports recognition of a right of restitution or compensation which may be the key to true

¹⁶⁹ Id.

¹⁷⁰ The Brookings Institute, Summary Report *supra* note 157.

¹⁷¹ Guillermo Bettochi, Ana Grace Cabrera, Jeff Crisp & Anna de la Varga Fito, Protection and Solutions in Situations of Internal Displacement: Learning from UNHCR’s Operational Experience at 7 (UNHCR EPAU/2002/10 August 2002) available at <http://www.unhcr.ch>.

¹⁷² See e.g. UNHCR, Zambia Initiative: Refugee-Hosting Community Development Programme: Donors Mission Report (18-28 March 2002 UNHCR) available at <http://www.unhcr.ch>.

empowerment. As discussed further in the section on reparations, I do not believe that victims should give up their victim status until they have been given the means by which to assume a new identity based on dignity and security. Such condition often requires some type of material restitution, such as land. The final concern addresses the issue of cessation, which I have addressed previously and concluded is a valid concern which merits attention. Nevertheless, the phrasing of the second clause is such that it suggests potential problems regarding the right of restitution of the original property. International agencies may be unable or unwilling to pursue return of IDPs to the property of origin due to security concerns, occupation by other groups, etc. The key issues are how to ensure that such determination be conducted pursuant to objective criteria and with the direct participation of the IDPs, and whether the transnational system will guarantee that adequate alternative property is provided for resettlement so that IDPs will not be condemned to consider the shantytowns in which they disappeared to be their permanent home.

Hence, the normative approach to IDP protection at the international level retains a soft, conciliatory approach which is expected to allay fears of infringement of sovereignty by States but may actually be limited in terms of enforcement possibility unless it is backed up by hard mechanisms such as international tribunals or pressure by Donor agencies. Until a hard law instrument is drafted, the most practical strategy would be to enforce the rights enshrined in the general human rights contained in the international and regional conventions, as well as national constitutions, bypassing debate over IDP instrument validity. To some extent, the IDP definition remains a curious hybrid semi-legal collection of norms which serves to highlight a social problem but may be limited in the ability to ensure solutions due to lack of normative clarity and enforcement problems.

The sections below describe the role of the UN Special Representative on Internal Displacement, the UN High Commissioner for Refugees, the UN Development Programme, and other agencies within the Inter-Agency Coordination Mechanisms for Internal Displacement.

2.5 Specialized Protection Institutions for IDPs

2.5.1. The UN Special Representative on Internal Displacement

The Special Representative on Internal Displacement was appointed in 1992 to address internal displacement through reports, field visits, and consultations with States confronted by displacement crises. As of January 2002, he had conducted missions to Angola, Armenia, Azerbaijan, Burundi, Colombia, East Timor, El Salvador, Georgia, Indonesia, Mozambique, Peru, Rwanda, the Russian Federation, Somalia, Sri Lanka, the Sudan, Tajikistan, and the former Yugoslavia.¹⁷³

He was charged with developing the Guiding Principles on Internal Displacement and ensuring their dissemination and implementation. He assumes an advocacy role and meets with the UN High Commissioner for Human Rights and the Emergency Relief Coordinator in order to design protection strategies. His style has been characterized as “non-confrontational”, which has been criticized as not necessarily being the appropriate approach to taken with States reluctant to address their displacement problems.¹⁷⁴ Further, it has been noted that this office has a limited mandate and minimal staff and resources.¹⁷⁵ The Representative is unable to receive individual complaints. He may speak with government officials as to situational concerns rather than individual cases. He admits to avoiding an adversarial approach to governments with displacement problems. Due to concern for rejection on account of charges of “infringement of sovereignty”, Mr. Deng prefers to remind states in a cordial dialogue that it is their own duty to respond to the needs of their people. Hence the State is encouraged to permit the international community to assist it in providing protection to its people.

However, he has exhibited frustration with the fact that IDPs accuse their own States as being non-representative and antagonistic to their needs, as they are often characterized as being “the enemy” due to their poverty, ethnicity, etc. He is an eloquent, erudite speaker who

¹⁷³ Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, E/CN.4/2002/95 (16 January 2002).

¹⁷⁴ Simon Bagshaw, “Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16 March-24 April 1998, 10 INTERNATIONAL JOURNAL OF REFUGEE LAW No. 3 548, 556 (1998).

¹⁷⁵ Stavropoulou, Maria, “Displacement and Human Rights: Reflections on UN Practice”, in 20 HUMAN RIGHTS QUARTERLY 515, 523 (1998), stating that ideally the Representative should be able to make “frequent country visits, requests for information on allegations of forced displacement, and urgent appeals to governments, rather than just limiting himself to one or two visits a year.”

can literally bring tears to people's eyes when describing the severe problems facing IDPs, thus one laments the fact that so little financial support is given to his office. His eloquent words ring empty due to inability to follow-up in action. His colleague at the Brookings Institution, Roberta Cohen, is an energetic partner who is highly skilled at lobbying support from governments and international organizations. Indeed, she has exhibited great speed in disseminating the Guiding Principles to targeted countries.

Mr. Deng has addressed the link between land issues and internal displacement on numerous occasions. His report on Mozambique called for access to land and recognition of land tenure as a means of "vital importance to the prevention of future displacement" and noted the need to study customary legal practices.¹⁷⁶ As pertaining to East Timor, he called for "mechanisms for addressing issues of property restitution and compensation, and especially the problem of illegal occupancy, need to be established and equitable solutions found."¹⁷⁷ Deng cited lack of land as a cause of displacement in El Salvador as well, and called for strengthened protection of land rights in Colombia.¹⁷⁸ Although he has visited Colombia twice to disseminate the Guiding Principles and consulted the Government on the protection needs of the IDPs; he has never visited Guatemala. He continually calls upon state to elaborate compensation procedures and effective remedies, including compensation for land.¹⁷⁹

Ironically, in spite of the fact that his visits within Latin America target a country undergoing a humanitarian emergency, his written policy is in favor of the elimination of second-generation displacement cycles: "Violations of human rights not only are the root cause of displacement but also continue to threaten the displaced once they have fled and often can impede their return."¹⁸⁰ Thus, he advocates linking protection to development agencies, such as UNDP & World Bank, noting "Displacement is a symptom of conflict which is a result of a structural problem."¹⁸¹ Unfortunately, as discussed later, protection coordination appears to focus primarily on humanitarian assistance. A shift from focus on

¹⁷⁶ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, to the Commission on Human Rights, on Mozambique, E/CN.4/1997/43/Add.1 at Chapter IV: Conclusions (24/02/97).

¹⁷⁷ Report of the Representative of the Secretary-General, Mr. Francis M. Deng, to the Commission on Human Rights, on East Timor, E/CN.4/2000/83/Add.3 at para. 66 (6 April 2000). See also similar comments with respect to Rwanda [E/CN.4/1995/50/add.4 para. 13 (1995)] and Tajikistan [A/51/483/add1 para. 35 (1996)]

¹⁷⁸ Report of the Representative to the Commission E/CN.4/1995/50 (2/02/95).

¹⁷⁹ Report E/CN.4/1998/53 (11/02/98) at para. A.

¹⁸⁰ Id. at para. 11

¹⁸¹ Comment by Francis Deng in Roundtable Conference: Internally Displaced Persons: Lessons Learned and Future International Mechanisms, Oslo, Norway, 23 May 2001.

conflict, to focus on development may actually help to end the violence and ensuing migration.

Deng seeks to convince states to look positively towards the challenge of addressing the causes of the conflict and internal displacement in order to improve the situation of the country as a whole, his motto being: “In a crisis lies opportunities.”¹⁸² Thus, his most valued strategy is reminding governments that there is common interest held by all sectors of society, including the displaced to attain a better future. His message that IDPs are not the enemy is necessary to humanize victims in the eyes of State & Non State actors who may have demonized them through use of labels such as “subversives”, “animals”, etc. He has stated that although there were similarities in IDP crises around the world, each country presented unique factors which called for “protection and assistance strategies appropriate to the particular context of the case in point.” To some extent, this approach may result in ad hoc strategies.

In conclusion, the Special Representative’s reports and remarks confirm that there is a need for greater emphasis on prevention and alleviation of consequences of displacement, which in turn requires an examination of restitution of land and general land distribution, as well as access to justice. However, he has not addressed the situation of IDPs in Guatemala. Since the Special Representative himself has no resources to deliver protection and assistance, we must turn to the operational agencies for review of their assistance possibilities for IDPs.

2.5.2 UNHCR & UNDP

The Special Representative on Internal Displacement admitted that there were gaps in institutional framework pertaining to IDPs:

*“Most obvious among these is the lack of any one international organization mandated to assume responsibility for the internally displaced. While the conferral of such responsibility upon a new or existing organization such as UNHCR had seemed the logical remedy, it does not appear to be a viable solution at this time. Instead, insofar as the problem of internal displacement exceeds the capacities of any single organization and cuts across human rights, humanitarian assistance, and development regimes, a continuation of collaborative regimes is certainly the most realistic framework in which to proceed. At the same time, however, the collaborative approach has been ad hoc and has been constrained by problems of coordination and neglect of protection.”*¹⁸³

¹⁸² This perspective was shared by the Head Of Operations of the ICRC, Francoise Krill, who stated that it was essential to pay attention to the belts of poverty in the shantytowns which she considered ticking time bombs.

¹⁸³ Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, E/CN.4/1998/53 (11/02/98), II 1. On 13 April 2000, Deng issued the following statement to the Commission on Human Rights during its 56th Session: “The time has come to go beyond ad hoc responses and

Concern was reiterated by the U.S. Representative to the United Nations, Richard Holbrooke, who called for the selection of a lead agency for IDP situations (ideally UNHCR), greater involvement by humanitarian and development agencies, issuance of reports by the UN Secretary General, and greater support for Deng.¹⁸⁴

With respect to UNHCR; the road to accepting greater responsibility for IDPs has been fraught with skepticism. The Report of the International Conference on the Protection Mandate of UNHCR, The Hague, September 1998 actually suggested that in-country assistance to IDPs should be left to ICRC in conflict situations and OCHA in non-conflict situations in order to prevent confusing UNHCR's mandate.¹⁸⁵ It appears that such suggestion may have been partially a result of the fiascos attributed to UNHCR and/or States with respect to the "safe havens" in El Salvador, Bosnia, Afghanistan, Iraq, Cuba, Haiti, Rwanda, etc.¹⁸⁶ Although UNHCR initially exhibited some reticence towards expansion of its mandate over IDPs, it eventually agreed to move towards greater involvement by way of increased cooperation with other agencies and partners.¹⁸⁷ UNHCR set forth that

*"When refugees and displaced persons are generated by the same causes and straddle the border, not only are the humanitarian needs similar, a solution to the refugee problem cannot usually be found without at the same time resolving the issue of internal displacement. . . . In many situations, effective reintegration of refugees requires assistance to be extended also to the internally displaced in the same locality or community."*¹⁸⁸

By 2001, the new UN High Commissioner for Refugees, Ruud Lubbers, stated that UNHCR "had a clear interest in helping IDPs", and was assisting 5.3 million IDPs (In 2002,

to agree on a clear legal and institutional framework for protecting internally displaced persons. Their precarious plight, as highlighted in the country situations in this report and in the unpredictability of national and international responses, underscores the urgency of translating the normative and institutional frameworks created thus far into actual protection on the ground." The International Law Association's Committee on Internally Displaced Persons reiterated Deng's concern in its Report during the London Conference (2000), noting a bias in favor of refugees, ad hoc approaches to IDP protection, inadequate funding to the Special Representative and IDP projects. It calls for a General Assembly resolution allocating resources for IDPs. (paras.5-6)

¹⁸⁴ Richard Holbrooke, "The World Must Not Forget Refugees Within Countries", in INTERNATIONAL HERALD TRIBUNE 9 May 2000.

¹⁸⁵ Working Group on International Refugee Policy, Report of the International Conference on the Protection Mandate of UNHCR, Peace Palace, The Hague, The Netherlands, 18 September 1998, in 12 (2) JOURNAL OF REFUGEE STUDIES 203 (1999).

¹⁸⁶ For a critical review of safe havens, see Leonardo Franco, "An Examination of Safety Zones for Internally Displaced Persons as a Contribution Toward Prevention and Solution of Refugee Problems", in N. AL-NAUIMI and R. MEESE (EDS.), INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW, 871-897 (Kluwer 1995); see also Bill Frelick, "Down the Rabbit Hole: The Strange Logic of Internal Flight Alternative", in WORLD REFUGEE SURVEY, 22 (US Committee for Refugees 1999); and UNHCR, THE STATE OF THE WORLD'S REFUGEES, Chapter 3 (1997).

¹⁸⁷ See Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the 56th Session of the United Nations Commission on Human Rights, 11 April 2000. See also UNHCR, "Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees" (UNHCR 6 March 2000).

¹⁸⁸ UNHCR, Id.

this figure rose to 6.4 million IDPs). He delineated the general criteria for UNHCR assistance to IDPs:

- 1) *When they are located in the same areas as refugees or returnees and it is difficult to distinguish between them*
- 2) *When refugees become IDPs upon return due to lack of integration*
- 3) *When helping IDPs may help strengthen asylum across the border*
- 4) *Where helping IDPs could impact the prevention or solution of refugee problems*
- 5) *Where IDPs have similar protection and solution needs to refugees.*¹⁸⁹

These categories reflect UNHCR's past experience regarding the commonalities of refugee and IDP protection issues, and it is questionable to what extent UNHCR will be able to decline assuming a responsibility for IDPs since these categories are so broad that they are likely to encompass all situations. In Guatemala, some dispersed IDPs merged with refugees and were able to attain assistance from UNHCR upon return, but the majority were excluded. However, at present we are witnessing refugees becoming IDPs and migrants due to lack of reintegration aid in the form of agricultural credits, technical assistance, access to basic services, infrastructure, legal aid, etc. Dispersed IDPs are awaiting property restitution/redistribution provided to refugees but not to them. Both refugees and IDPs need the state to improve reintegration initiatives in order to resolve their problems. Failure to address the land claims of dispersed IDPs means prolonging ongoing conflicts with returned refugees. In 2000-2001, 500 Guatemalan refugees chose to return to Mexico, in part due to ongoing land conflicts. Hence, joint strategy for both groups is required, lest both groups fail to achieve reintegration.

UNHCR response is conditioned on authorization by the UN Secretary-General or other competent organ of the UN, consent by the State and adequate funding (unless IDPs are already an operational part of UNHCR's mandated responsibilities). These factors emphasize respect for the sovereignty principle and realistic economic limitations in an era of humanitarian cutbacks. The UNHCR's own Evaluation and Policy Unit issued a report which admitted that the requirement to raise additional funding for IDP operations made ". . . UNHCR's engagement unpredictable, and. . . undermines the integrity of the organization's

¹⁸⁹ UNHCR, UNHCR's Policy on Internally Displaced Persons: Speaking Notes of Ruud Lubbers, 23 May 2001.

IDP policy.”¹⁹⁰ It called for decision regarding involvement to take into consideration IDP needs.

Not only is UNHCR being pressured to expand its mandate to include IDPs, it is being pushed to address diversified, long-term protection needs as well. There is a call for return to conflict prevention strategies, which merges humanitarian, human rights, and development approaches. Concern for inequitable distribution of economic resources which prompts forced migration has been cited by UNHCR.¹⁹¹ What remains unclear is what role UNHCR can play in these areas. It appears to be facing a mid-life identity crisis. The celebration of the 50th Anniversary of the 1951 Convention on the Status of Refugees resulted in renewed assessment of the UNHCR’s past accomplishments and failures as well as its future role. Gil Loescher bemoaned UNHCR’s primary humanitarian focus as eclipsing the need to examine human rights protection needs and development issues:

“For UNHCR staff, the general tendency is to perceive emergencies in terms of logistics and not as failures of politics, the development process or ethnic relations . . . UNHCR is primarily about assistance-the delivery of food, shelter and medicine-to refugees and war-affected populations. Successes and failures of humanitarian action are judged primarily in terms of technical standards of aid delivery and in fulfilling the material needs of refugees and threatened populations. In UNHCR, as in so many organizations today, success is measured quantitatively-how much relief can be delivered and how quickly. The central importance of human rights protection of displaced and threatened populations is frequently neglected.”¹⁹²

At the same time Loescher cites concern for UNHCR’s expanded efforts to deliver development assistance as going beyond its resources and expertise. He advocates the adoption of a humanitarian niche which would also include promoting solutions to refugee problems.

In my opinion, enforcement of the human rights needs of IDPs and refugees upon return would not necessarily require the construction of a new humanitarian niche, but rather strengthening of the human rights mechanisms (national and international) which already exist, such as courts, human rights commissions, and guidance for the development agencies to begin their programs at an earlier stage towards the end of a conflict or during transition to

¹⁹⁰ Bettocchi et.al. supra note 171.

¹⁹¹ UNHCR is expected to return its focus to extraterritorial refuge and the pursuit of reintegration upon repatriation, including “legal and judicial capacity building”. The attainment of a rule of law, justice, and accountability is part of UNHCR’s new concerns. The Ministries of Justice of Rwanda and Tajikistan have received UNHCR support. Aside from humanitarian assistance, IDP concerns may be addressed by way of increased activities by the UN regarding human rights and access to justice in post-conflict countries, specifically noting the importance of assisting efforts to attain restitution or compensation for victims, and prosecution and punishment of perpetrators. UNHCR, THE STATE OF THE WORLD’S REFUGEES, Chapter 4, (1997).

¹⁹² Gil Loescher, “UNHCR and the Erosion of Refugee Protection” in 10 FORCED MIGRATION REVIEW Review, 28 (Refugee Studies Centre, University of Oxford April 2001)

peace in order to reintegrate the displaced. Essentially, it is a question of removing displacement from the exclusive humanitarian field of action and transferring it to the development arena.

Both UNHCR and UNDP are sorely lacking the funds necessary to enable them to assume greater leadership in the area of internal displacement, thus substantial fundraising is required. Development has never been as appealing as humanitarian issues for fund raising; hence they are promoting the integration of the two spheres of assistance.¹⁹³ Another problem is that UNDP is part of the UN and shares the same failings regarding inaction due to concern for accusations of infringement of state sovereignty and prioritizing political considerations over legal, objective ones. It received criticism from Human Rights Watch in the past for placating the host State to the point of failing to protect IDPs in Kenya.¹⁹⁴ I queried the head of UNDP in 2000 as to why it wasn't more involved in IDP issues, the answer being that they simply weren't aware that as to what role they could play. Since, then they have hired advisors to provide strategic advice on IDPs.

Other development agencies such as USAID, the World Bank, IDB, etc. have also demonstrated interest in the "gray zone" between humanitarian action and development assistance. One may note that the gray zone is not a transitional event; it traverses stages of assistance and attention, as well generations of people- the underlying continuum of poverty, repression, resistance, conflict, migration, return, and reconciliation has yet to be permanently concluded. The present consensus is that development actors need to be involved at earlier stages, rather than being pulled in at the end of cycle with little hope of preventing a recurrence of events.

In the period after September 11th 2001, there has been increased attention and resources available for development aid and conflict resolution/prevention initiatives. The gap between security issues (primarily based on civil and political rights) and development issues (based on social, cultural, and economic rights) was closed, and donors searched for strategies which would address the linkages between them. The Inter-Agency Standing Committee has elaborate guidelines for UNDP regarding reintegration in transition situations, and the UNDP itself has elaborated strategies on conflict prevention and post-conflict situations which

¹⁹³ Jeffrey Sachs calls for the creation of a "Powell Plan" to emulate the Marshall Plan and promote development and peace in the least developed countries. Jeffrey Sachs, "What's Good for the Poor is Good for America", in THE ECONOMIST pp.48-49 (14 July 2001). See Also Steven Holtzman, "Rethinking 'Relief' and 'Development' in Transitions from Conflict" (The Brookings Institution January 1999).

¹⁹⁴ HUMAN RIGHTS WATCH/AFRICA HUMAN RIGHTS WATCH, FAILING THE INTERNALLY DISPLACED: THE UNDP PROGRAM IN KENYA (1997).

address in part IDP issues.¹⁹⁵ UN High Commission for Refugees proposed cooperation between UNHCR, the World Bank and UNDP for a *sui generis* approach to refugee repatriation, reintegration, rehabilitation, and reconstruction in order to bridge the gap between development work and humanitarian work.¹⁹⁶

Although focusing on refugees, the High Commissioner has also called for donors to provide financing for development programs for internally displaced persons as well. His proposal is promoted as a means of empowering the displaced to be agents of development, ensuring durable/sustainable solutions, and supporting peace and security. Collaboration will be pursued via “joint ventures” on a country-by-country basis, in which UNHCR would take primary responsibility for targeted IDPs at the beginning, but later turning over responsibility to UNDP so as to not leave a protection gap upon exit. Although UNDP has at times assisted IDPs as targeted groups, it most often utilizes the targeting approach for demobilized soldiers. UNDP will seek to assume responsibility for IDPs as members of holistic community categories seeking development assistance rather than specific target groups, in part this is due to the fact that IDPs often join other poor communities after displacement or lose target status due to the passage time and lack of clear standards for determination of cessation status. I remain concerned due to the lack of clarity pertaining the transition of IDPs from targeted groups to members of a community seeking development assistance. In particular, the issue of the right to restitution may become lost during such transitions. For example, it is possible that UNHCR may determine that an IDP no longer merits targeted identification in spite of lack of provision of restitution for dispossessed property by the State (as such action often takes time), thus upon transfer for UNDP assistance, the solution offered may be micro-projects for the community as a whole and the specific claim of restitution linked to the dispossession of the IDP may fall by the wayside.

Of interest, the High Commissioner highlights the need for “bottom-up” contextual approaches which will permit the organizations to “learn as you go”.¹⁹⁷ This reveals the

¹⁹⁵ See e.g. Evaluation Office, *Sharing New Ground in Post Conflict Situations: The Role of UNDP in Support of Reintegration Programmes* (UNDP January 2000); Omar Bakhet, *Linking Relief to Development* (UNDP June 1998); Bernard Wood, *Development Dimensions of Conflict Prevention and Peace-Building* (Paper prepared for the Emergency Response Division, UNDP, June 2001); and UNDP, *Working for Solutions to Crises: The Development Response* (UNDP date missing).

¹⁹⁶ See Statement by Mr. Ruud Lubbers, United Nations High Commissioner for Refugees to the 24th Meeting of the Standing Committee, 24 June 2002, available at <http://www.unhcr.ch>. This approach is based on an initiative by the Brookings Institution in 1999 to call upon UNHCR, UNDP and the World Bank to link short-term humanitarian relief aid to long-term development assistance. This is intended to promote “sustainable reintegration” of displaced persons by addressing the transition phase between conflict and post-conflict periods. See UNHCR, *THE STATE OF THE WORLD’S REFUGEES 142* (Oxford University Press 2000).

¹⁹⁷ *Id.*

influence of “decentralization theory” which has become mainstream within the development community, in part as a means of bypassing the corrupt State and increasing participation by society in development programmes.

From the perspective of UNHCR’s Evaluation and Policy Analysis Unit, promotion of use of local NGOs, human rights organizations, and other actors within civil society to form “protection networks” is admittedly linked to UNHCR’s own limited capacity.¹⁹⁸ Although it also presents this approach as means by which to “. . . empower IDPs to defend their rights as citizens living in their own country”, there is concern that this is not the principle reason for such action. The transnational initiatives are presented as a means of granting recognition to a plethora of voices within society, but they are unfortunately also linked to the downsizing of the international organizations and disillusionment with States which remain non-responsive to marginalized groups. Indeed, the former U.N. Special Coordinator on Internal Displacement, Dennis McNamara, asserted that the UN expressed less enthusiasm for improving its response to IDPs than NGOs.¹⁹⁹ I fear that the veneer of transnational approaches will not address the structural weaknesses within the international system. Although it is clear that IDPs should be given a voice in expressing demands and claiming rights, international agencies must also be given sufficient resources to offer concrete protection and assistance. The current tendency to pursue “umbrella actions” based on reliance on NGOs and other actors may result in uneven practices, a lack of accountability, and a diminishment of the UN voice. In addition, I believe that development requires strategies which strengthen linkages between the state and the society, hence the latter should not be given excessive priority as its evolution remains interdependent on that of the former and vice-versa.

Thus, far, UNHCR and UNDP have pursued a pilot program initiated in Zambia and there is great focus on the African region as a whole. It is more likely that initiatives within Latin America are to be directed at Colombia than Guatemala. The latter is deemed to have resolved its displacement situation, regardless of the decisions of Guatemalan returnees to head back to Mexico due to failed reintegration or the lack of provision of durable solutions for dispersed IDPs. At present, both UNHCR and UNDP are present in Colombia, but UNHCR has withdrawn from Guatemala. UNDP is present and supporting strengthening of the structural framework, justice reform, security, land tenure (registry, land market, micro-

¹⁹⁸ Bettochi et. al. supra note 171 at 5.

¹⁹⁹ Marc Vincent, “The UN and IDPs: Improving the System or Side-Stepping the Issue?” (Overseas Development Institute 21 November 2001) available at <<http://reliefweb.int>>.

enterprises), women's rights, indigenous rights, etc. It is not very active with respect to dispersed IDPs as a targeted group, instead it is pursuing community development programs. Hence, we are unable to confirm how many IDPs are actually being assisted.

The 1989 Conference on Central American Refugees (CIREFCA) may be considered a precursor of Lubber's current proposal. It brought together UNHCR, UNDP, Donors, NGOs, the governments of Guatemala, Belize, Costa Rica, El Salvador, Honduras, and Mexico in order to address the development needs of returning refugees. Regarding internally displaced persons, the majority were left out due to state pressure not to address their needs. Quick Impact Projects focusing on infrastructure needs, education and job opportunities were launched. Unfortunately, UNHCR admitted that "lack of donor interest beyond the initial phase and limited local government commitment to incorporate these projects into national development strategies, rendered many of the projects largely unsustainable."²⁰⁰ Although many hailed CIREFCA for granting legitimacy to national human rights NGOs, these gains have been lost in the recent period. Once again human rights activists are being labeled "subversives."

2.5.3 Inter-Agency Coordination of Humanitarian Assistance to Internally Displaced Persons: Inter-Agency Standing Committee, Emergency Relief Coordinator, Senior Inter-Agency Network on Internal Displacement, Special Coordinator on Internal Displacement, & OCHA Unit on IDPs

The Inter-Agency Standing Committee and Emergency Relief Coordinator (ERC), Mr. Kenso Oshima, seeks to coordinate UN agencies to provide assistance to internally displaced persons. The latter entity is expected to advocate assistance and protection needs of IDPs, mobilize resources on their behalf, monitor and report IDP situations on a database, help achieve access to IDPs, etc.²⁰¹ UN Resident/Humanitarian coordinators are placed in countries to oversee protection of IDPs on the ground and the ERC is deemed to be responsible for "ensuring that the protection and assistance needs of internally displaced persons are effectively addressed by the international community".²⁰² The Humanitarian Coordinators

²⁰⁰ UNHCR, THE STATE OF THE WORLD'S REFUGEES, 143 (Oxford University Press 2000).

²⁰¹ Report of the Representative of the Secretary-General on Internally Displaced Persons, Mr. Francis M. Deng, E/CN.4/1999/79 (25/01/99) para. 38. The Inter-Agency Standing Committee is composed of the United Nations High Commissioner for Refugees, the World Food Program, the International Committee of the Red Cross, the UN Development Programme, and the Office for the Coordination of Humanitarian Affairs.

²⁰² Id. Humanitarian Coordinators are appointed by ERC, Resident Coordinators are appointed by UNDP, but the office may be combined.

can recommend to the ERC that a lead agency be appointed to assume responsibility for IDPs contingent on the special competencies of the agency and the needs of the IDPs. This is intended to ensure that there will be no protection gap. In 2000, these Humanitarian Coordinators were limited by lack of sustained funding.²⁰³ A suggestion was made for the creation of an IDP coordinator to work and prepare country plans and strategies in specific countries.

In September 2000, the IASC set forth that it would create a Senior Inter-Agency Network on Internal Displacement to make reports on selected countries and make proposals for international response. The Network is composed of the Director of the Internal Displacement Unit and Senior Focal Points from all member and standing invitee organizations of the Inter Agency Standing Committee, including OCHA, UNICEF, UNHCR, UNDP, UNHCHR, WHO, FAO, WFP, UNFPA, ICRC, IFRC, IOM, ICVA, SCHR, InterAction, Repr. Of the SG on IDPs, and the World Bank. The UN Office for Coordination of Humanitarian Affairs created a Senior Coordinator of the Network on Internal Displacement in order to ensure better interaction among the agencies. This concern was heightened upon review of the case of Colombia, in which the IASC admitted that the needs of the IDPs were not being met. There seemed to be “no common assessment of the protection and assistance needs of IDPs nor any proposed common strategy to address such needs . . . The current humanitarian response on the part of the Agencies is inadequate.”²⁰⁴ It also noted the importance of sending assistance to the displaced “before they blend into the urban poor”, thereby admitting a central problem in the design of a protection category which may be practically inapplicable. Dennis McNamara, formerly of UNHCR, took on the position and was engaged to review seven countries from the perspective of providing a humanitarian response, including Ethiopia, Eritrea, Burundi, Angola, Afghanistan, Indonesia and Colombia. He was eventually replaced by Kofi Asomani. Additional duties include monitoring internal displacement globally, identifying operational gaps, provide training, guidance, and expertise, advocate IDP causes, mobilize resources, etc. He reiterated that protection and assistance response would be designed on a case-by-case basis.

This author is concerned that this approach will not necessarily assist IDPs in Guatemala. Central America did not appear to be included in his review mandate. A point of interest is that the enforcement mechanism commenced as being focused on humanitarian situations, but has evolved to seek to design strategies for human rights and development

²⁰³ Special Co-ordinator of the Network on Internal Displacement, Interim Report, (9 April 2001).

²⁰⁴ IASC-WG Meeting, 17 September 1999, Colombia Background Paper, 5-6.

needs given that the UN Guiding Principles also includes human rights violations (civil & political as well as social, economic, and cultural) as a basis for protection, thereby requiring enforcement in post and pre-conflict situations. We must remember that a purely humanitarian focus 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.²⁰⁵ Yet the field missions have indeed targeted countries undergoing or emerging from more recent humanitarian crisis (although some countries have been in crisis for several decades), thus Guatemala, may not receive attention.

OCHA created an IDP Unit (staffed by seven members of UNDP, UNHCR, WFP, UNICEF, IOM and NGOs, active as of January 2002) to coordinate and provide guidance to humanitarian agencies working with IDPs- its mission statement reveals the commitment to transnational approaches to protection of IDPs:

“Recognizing sovereignty as a form of responsibility, the Unit will seek to use all fora to engage governments and non-state actors to provide access and physical security to the displaced.

The Unit will call on UN agencies, intergovernmental and non-governmental organizations as well as the displaced themselves, to enhance their commitment and accountability to a credible institutional response to internal displacement.”²⁰⁶

It has conducted missions to Colombia, Somalia, Sudan, Zimbabwe, Indonesia, West Africa, Sri Lanka, Afghanistan, and Uganda. Carlos Maldonado of UNHCR is the Unit’s focal point for the Americas, however the countries listed include Colombia, Ecuador, and Peru, not Guatemala. The Unit’s mandate is intended to identify operational gaps in responses to internal displacement and support linkages between humanitarian and development agencies, thus it seeks to prevent reoccurrence of abandoned transition situations involving failed reintegrated displaced persons, such as Guatemala. The Unit is very small in staff and resources, thus it is important to retain realistic expectations as to its capacity. As mentioned previously, NGOs and IDPs are given more responsibility with respect to finding solutions in part due to the UN’s downsizing.

²⁰⁵ In 2002, The Special Representative on IDPs visited Mexico, thus addressing the needs of IDPs involved in a protracted conflict rather than humanitarian emergency.

²⁰⁶ See <http://www.reliefweb.int/idp>.

In May 2001, a conference on “Internally Displaced Persons: Lessons Learned and Future International Mechanisms” was co-sponsored by the Norwegian Ministry of Foreign Affairs and the Norwegian Refugee Council. Both the UN High Commissioner for Refugees, Ruud Lubbers, and the UN Special Coordinator of the Senior Inter-Agency Network on IDPs, Dennis McNamara, stated that they would condition response on consent by the State which bears primary responsibility for the protection of the internally displaced. These mechanisms ignore the reality that the prime actors are not the official leaders. Rather than focusing only on humanitarian aid, it is necessary to contemplate how to remove the economic and military power of the actors actually instigating the flight. As wars drag on for decades in Colombia, Sudan, Angola, etc. the refugees and IDPs wait in vain for a chance to return home. There was concern that resolution of the conflict in Sudan would entail resolving the battle for control over oil. The same holds true for most conflicts in the world, whether it be oil, minerals, narcotics, etc.²⁰⁷ When I queried a Donor representative as to what possible solution she foresaw for forced migration due to repression by non-State actors, she stated simply “Stop buying their diamonds.” Indeed, designing strategies to curtail arms trade and black market activity is an overwhelming task. The world’s top crime syndicates annually gross 1.5 trillion dollars, resources which surpass that of many national governments. At the end of the conference, a Sudanese refugee stood up and exclaimed that he was tired of hearing UN officials talk:

“I am a child of war. I lost my eight brothers to war, my parents . . . I just want to know when I can take my daughter back to Sudan and say 'Look, here is your plot of land . . . here are your people. For ten years, (Deng, also Sudanese) has been talking. While all you people are talking, people are dying. When will there be more than words?”

His comment was left unanswered.

²⁰⁷ See “A Merciless Battle for Sudan’s Oil” in THE ECONOMIST 29 August 2002. In March 2001, the UN Security Council placed sanctions on Liberia, banning its diamond sales and strengthening an arms embargo against it, due to its provocation of conflicts and forced migration in Sierra Leone and Guinea via arms for diamond exchanges.”Diamonds are a War’s Best Friend”, in THE ECONOMIST (12 May 2001).

2.5.4. Permanent Consultation on Internal Displacement in the Americas

The PCIDA produces reports with recommendations which are disseminated primarily to the governments under review, thus its work is not greatly publicized, a point of critique. It is difficult for NGOs to follow-up a report which is unavailable for public review. It has produced one study on Colombia and two on Guatemala.²⁰⁸ Currently, the Consultation is undergoing a reevaluation of its mandate, as there appears to be a view that displacement is receding in the Americas, only Colombia and parts of Mexico are recognized as prime areas of concern.²⁰⁹ Although some argued that attention should be centered on those considered to be displaced on account of socio-economic factors, this did not receive much support by those unwilling to move out of an “orthodox” vision of displacement.²¹⁰

The 1996 study on Guatemala reviewed the inequitable land distribution and the continuing land conflicts due to demographic pressures and lack of reform of the *latifundio-minifundio* system.²¹¹ Land is described as divided between private, communal, municipal and cooperative, however the State is accused of not recognizing communal and municipal land rights. The land claims of the displaced are seen as being a political re-vindication that is often described by organizations as being linked to the Mayan cultural link to the territory. However, claims placed by individual ladino peasants appear more utilitarian as they present the land as a means to work and feed the family rather than a subject of historic tradition. The report calls for equal access to land by women. The lack of documentation for traditional

²⁰⁸ Its 1997 study on Colombia provided an extensive review of the causes, characteristics, and effects of internal displacement. It has an extensive description of the counter-agrarian reform conducted by large landowners, ranchers, narco-traffickers, paramilitaries, guerilla, developers, etc. It focused on economic, psychological and cultural factors, the needs of children, women, and elderly as well as the particular circumstances of indigenous and Afro-Colombian displaced persons. It reviewed the applicable law and policies adopted by the State and NGOs. It offered recommendations to the State regarding land rights: including the proposal to adopt a policy to protect the land rights of the displaced, the creation of judicial and administrative measures to limit appropriation illegal appropriation of land, sanction of public officials or other authorities who take advantage of the violence to take over land, regulation of the land market to control purchase and sale of land in conflict areas, suppression of the land market in expulsion zones to protect dispossessed peasants, increase of resources to INCORA for distribution of land to the displaced, and protection of indigenous and Afro-Colombian land rights.

The 1993 report on Colombia noted that prevention of internal displacement depended on the strengthening of administration of justice mechanisms in order to diminish impunity and protect vulnerable members of society. The lack of protection mechanism for land rights is characterized as a factor in the increase in polarization between society members, violence, and displacement. It called for increased access to justice by IDPs. It noted that the State should adopt national norms for protection of IDPs. The legal regime was cited for being favourable to forced evictions, and the State was called upon to protect IDP lands and redistribute land to them.

²⁰⁹ The UN Special Representative on Internal Displacement conducted a field mission to Mexico in 2002.

²¹⁰ Email correspondence from Cristina Zeledon, (28 03 2000).

²¹¹ CONSULTA PERMANENTE SOBRE DESPLAZAMIENTO INTERNO EN LAS AMERICAS, INNFORME FINAL MISION IN SITU A GUATEMALA (1996).

lands, the prevalence of double-titles and environmental concerns complicate the problems. Of interest is that the Commission recommended priority legalization of land in areas of internal displacement, i.e. Quiche, Huehuetenago, and Alta & Baja Verapaz as well as an inventory of all land to serve as public information. It also called for negotiation and arbitration mechanisms to address land conflicts. Finally it recommended investment in non-agrarian areas, such as road construction, telecommunications, tourism, industry, forestry, and markets to promote job growth in other areas as well as promotion of alternative crops such as cardamom and special fruits.

At present the government appears to have followed several of PCIDA's suggestions: it has enacted reforms to improve women's access to property, promote investment in alternative crops, roads, forestry, tourism, etc., and it is undergoing a registry and catastrophe program in the Peten. In addition, the State has also created a hybrid conciliation mechanism for land conflicts, discussed in Part IV. However, indigenous people note that communal and municipal rights to property are still not respected. Thus, the PCIDA appears to have had some influence on policy, but the problem regarding indigenous rights to property remains contentious.

2.5.5. Conclusion on Institutional Mechanisms

The key problem with respect to implementing the Guiding Principles is the lack of identification of one key institution to be primarily responsible for IDPs. It will be interesting to see how the OCHA Internal Displacement Unit, Inter-Agency Special Coordinator, the Special Representative on Internal Displacement, NGOs, regional actors, and the UNHCR-UNDP-World Bank collaborative joint ventures interact. Should there be confusion over mandate, coordination difficulties, competition for resources, etc. this may result in greater misunderstanding as to which institution bears responsibility for IDPs.

The field missions completed by the Special Coordinator and the IDP Unit to this date primarily focused on countries undergoing or emerging from recent humanitarian crisis, thus Guatemala's IDPs may be considered no longer of immediate concern. I am in favor of the UN High Commissioner's proposal for collaboration with the World Bank and UNDP in order to promote sustainable return and reintegration. However, I am curious as to UNHCR's case-by-case cautious assumption of mandate over IDPs and the possibility of protection gaps in the transition to UNDP mandate. Specifically, I am concerned that there is a lack of clarity with respect to the transfer from "IDP targeted group" to member of a

community seeking development assistance. The shift of category may potentially result in a loss of possibility for attainment of restitution for dispossession. Thus, in my opinion there should be mechanisms elaborated to prevent the “magic disappearance” of IDPs upon UNHCR’s withdrawal, as unfortunately happened in Guatemala.

Finally, I believe that it is important to recognize that the era of transnational protection is in part based on downsizing of the UN and recognition of non-responsiveness by State actors; in such a structural context it may not be possible to guarantee the effective participation by IDPs in defining demands and claiming rights. The lack of clarity as pertaining protection responsibility among NGOs, intergovernmental agencies, IDPs themselves, etc. may result in further protection gaps as well as potential clashes with State actors, should they feel excluded. Below, I examine the proposals for future implementation mechanisms.

2.5.6. Proposed Future Implementation of the Guiding Principles on Internal Displacement

In 2000, an International Colloquy on the Guiding Principles on Internal Displacement was held in Vienna.²¹² The following proposals formed part of the Colloquy’s Plan of Action: 1) Support increased activity by the UN & regional human rights systems (as well as national human rights commissions & NGOs) to study IDP problems and refer to the Guiding Principles when monitoring human rights situations and when assessing individual complaints, 2) Promote the use of the Guiding Principles by international criminal tribunals, 3) Encourage the use of the Principles by national human rights commissions, NGOs, courts, etc. 4) Expand the role of the Special Representative for information gathering, and 5) Consider the establishment of an expert panel of NGOs, academics, IDP representatives, and UN agencies (assisted by local groups monitoring on the national level) to review the implementation of the Guiding Principles. The proposals seek to utilize the current protection regime, while offering alternatives that bear similarity to the existing structures in their limitations on enforceability. However, the emphasis on collaboration with local actors reveals an open approach that admits that a purely international strategy is unlikely to reap success.

²¹² The Brookings Institution, “Background Paper: International Colloquy on the Guiding Principles on Internal Displacement, Vienna, Austria, September 2000”, (<http://www.brook.edu/fp/projects/idp/conferences>).

The review of an expert review panel seems insufficient because the actual need for IDPs facing return and reintegration problems is concrete human rights protection and development assistance on the ground in the form of land restitution, agricultural credits, etc. This requires international financing and the elaboration of national structures to distribute such resources and respond to demands. Further issuance of “soft” opinions in Geneva may provide some benefit but it may take time before it translate to actual policy output at the national level. Experts (and a few token IDPs) are more likely to receive job placement before IDPs at large as a result of such strategies. The suggestion to promote the Guiding Principles in international criminal courts is very interesting because the key to providing restitution to IDPs in Guatemala would entail expropriation of land from the military officers who forcibly evicted the peasants during the war. Given the weakness of the national court system, utilization of penal courts abroad via universal jurisdiction would be of significant benefit. The Commission on Historical Clarification indicated that the forced dispossession amounted to genocide, hence there is potential for such cases to proceed.

In spite of the “youth” of the Guiding Principles, already the Constitutional Court of Colombia has referred to the Principles in two decisions, and its parliament designed legislation based on the Principles, thus adding legitimacy to the norms as a potential customary law.²¹³ Dr. Deng and the Brookings Institution have sponsored various conferences around the world to disseminate the Guiding Principles and call for national implementation via the creation of committees, adoption of national law, and design of assistance programs to help IDPs in the field. Unfortunately, these conferences do not have substantial direct participation by IDPs themselves, although there may be “symbolic” appearances by one or two IDPs. Strategic discussions regarding implementation of the norms is largely controlled by the international, State, and NGO representatives. Apart from the possibility of a select number of IDPs participating in the proposed expert panel and workshops on implementation of the Guiding Principles, the Plan of Action does not appear to grant much of a voice to IDPs themselves.

²¹³ Constitutional Court of Colombia, decision T-186589/T-201615/T-2549, see also Brigadier Roper Mora et. Al., Judgment T-227/97, 5 May 1997 recognizing violation of the right to freedom of movement of IDPs who had been prevented from entering the department of Cudinamarca by the Governor. The Colombian Congress amended the Penal Code to criminalize forced displacement. Walter Kälin cites official reference to the Guiding Principles by Burundi (Protocole relatif a la creation d'un cadre permanent de concentration pour la protection de personnes deplacees (C.P.C/P.P.D) 2 February 2001) and Angolan governments (Conselho de Ministro, Decreto No. 1/01 de 5 Janeiro, Normas sobre o reasentamento des populaces deslacados, Diario da Republica, I Serie No.1, Sexta Feira, 5 Janeiro de 2001. See Walter Kälin, “How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework”, Presentation at Roundtable Meeting, Ralph Bunche Institute for International Studies, CUNY Graduate Centre, 19 December 2001, notes 16 &17.

National courts and parliaments may enforce the principles by referring to them when issuing decisions or adoption legislation. These actions help grant legitimacy to the Guiding Principles as a source of law. However, in spite of reference within domestic legislation, case law, or policies, internal displacement situations may actually worsen in the period after dissemination, due to the weakness of the rule of law as such within the nation. Such has been the case in Colombia where it is estimated that there are currently 3 million internally displaced persons, at the time of Dr. Deng's conference on the Guiding Principles there were 1 million internally displaced persons. The law, whether hard or soft, may prove simply unable to combat the forces impelling displacement. This is especially true in situations where the persecutor is a non-state actor. This highlights the difference between *de jure* compliance and *de facto* compliance.²¹⁴

We may consider Luke T. Lee's suggestion that sanctions may well be needed to force States to uphold their duties under the UN Charter and cease from instigating forced displacement; he calls for utilization of Articles 5 and 6 of the UN Charter to suspend or expel offending states from the UN. He also considers the possibility of amending the mandate of UNHCR, the creation of a new organization to address IDPs, as well as the establishment of a trust fund for IDPs.²¹⁵ At present, there does not appear to be sufficient political will or available resources to pursue these suggestions. Hence, the Guiding Principles and the ILA Declaration serve to highlight the problem of internal displacement and provide standards for review of specific situations, however they are limited due to questions regarding legitimacy, infringement of sovereignty, contextual complications related to non-state actors, and lack of resources. In the next section, I present a brief review of the instruments pertaining to indigenous people.

²¹⁴ Dinah Shelton, "Commentary and Conclusions", in DINAH SHELTON, COMMITMENT AND COMPLIANCE 456 (Oxford University Press 2000).

²¹⁵ Luke T. Lee, "The London Declaration of International Law Principles of Internally Displaced Persons", 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 454, 458 (2001).

3. Indigenous People

It is important to consider that in Latin America, many former, actual, and potential IDPs are indigenous people.²¹⁶ Indeed, indigenous people and their lands are targeted by the same groups of private security groups, narco-traffickers, army, etc. which persecute IDPs.²¹⁷ The causes of flight and their protection needs are similar. One must assess what rights indigenous persons have, how they compare with IDP rights, and whether legal protection is effective in practice. There may be possible conflicts on account of a State attempt to uphold the land rights of one group over that of the other, or rejection of both claims. For both groups, a critical element of both the cause and effect of internal displacement is the violation of land rights. In this section, I present the definition of indigenous people and identify the specialized mechanisms available to them at the international level.

3.1 Definition of Indigenous People

UN Special Rapporteur on the Problem of Discrimination against Indigenous Populations, Maritnez Cobo formed the following definition which highlights self-definition, non-dominance, historical factors, and a common culture which includes a legal system:

“Indigenous communities, peoples and nations are those which, having an historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in these territories, or parts of them. They form at present non-dominant sectors of society and are determined to perceive, develop, and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal systems.”²¹⁸

In terms of definition, historical, cultural, and socio-economic characteristics along with self-identification by indigenous people is recognized by the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, Article 1:

²¹⁶ Sixty percent of Guatemala’s total population is indigenous.

²¹⁷ See Avirama, Jesus & Rayda Marquez, “The Indigenous Movement in Colombia” in VAN COTT, DONNA LEE, *INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA*, 83 St. Martin’s Press (1995).

²¹⁸ UN Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para.379 (1986).

“1. This Convention applies to:

- (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
- (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”²¹⁹

The OAS Draft Declaration, Article 1, contains a similar scope of application:

“1. This Declaration applies to indigenous peoples as well as peoples whose, social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partly by their own customs or traditions or by special laws or regulations.

2. Self-identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this Declaration apply.”

The definitions are broad, and thus cover a significant percentage of IDPs in the countries under study. This is especially important given that indigenous land rights are firmly established in ILO Convention No. 169, and indigenous persons have an express right (albeit not absolute) against forced relocation and right of return that other IDPs do not.²²⁰ It should be noted that an integrated approach with respect to both groups appears to be accepted in Latin America as evidenced by the Guatemalan peace accords, the Guiding Principles on Internal Displacement, and the San Jose Declaration on Refugees and Displaced Persons which specifically call for attention to be given to indigenous uprooted populations as well as other IDPs.²²¹

²¹⁹ Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 (entry into force 5 September 1991).

²²⁰ However, it should be noted that the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has affirmed the “right to remain of all persons.” Sub-Commission Resolution 1994/24, para. 1, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Geneva, 1-26 August 1994, UN document E/CN.4/Sub.2/1994/56, 28 October 1994 at 67.

²²¹ “UN Guiding Principles on Internal Displacement, Principle 9, ”States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

3.2 Specialized Protection Mechanisms for Indigenous People

3.2.1. UN Rapporteurs, Working Group, and Forum for Indigenous Affairs

According to Brownlie, the UN's activities in the arena of indigenous law is largely "incidental" limited to General Assembly resolutions on racism and specific country situations.²²² Anaya confirms that "For the most part these procedures are not devised specifically to address the historically rooted grievances of indigenous peoples, nor are they clearly jurisdictionally equipped to provide the full range of conventional and customary norms that are most relevant to remedying those grievances."²²³ However he support the use of negotiation as means for finding solutions. Below, I identify the latest international specialized mechanisms for indigenous people. All of them retain soft powers. Because of their recent creation, it was not possible for me to assess their impact in practice.

In 1999, the UN Special Rapporteur on Indigenous People and their Relationship to Land, Ms. Erica Irene A. Daes produced a study which highlighted the need for fair judicial mechanisms on the local level, the creation of a permanent capital fund for the provision of compensation in the event restitution is not possible, as well as the need for a conciliation & complaint mechanism at the international level.²²⁴ A Working Group was established which has produced one report on Indigenous issues in Mexico, highlighting land conflicts and displacement as key problems.²²⁵

In May 2000, the U.N. Commission for Human Rights agreed to establish a Forum for Indigenous Affairs composed of eight representatives from indigenous communities, and eight from states selected by the CESC in consultation with indigenous organizations. The

²²² IAN BROWNLIE, *TREATIES AND INDIGENOUS PEOPLES*, 66 (Clarendon Press 1992). Brownlie praises the draft Universal Declaration on Rights of Indigenous Peoples, although in this author's opinion, the extraordinary length of time being spent on its revision deserves much criticism.

²²³ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 184 (Oxford University Press 1996).

²²⁴ Commission on Human Rights, Second Progress Report on the Working Paper on Indigenous People and their Relationship to Land, prepared by Mrs. Erica Irene A. Daes, Special Rapporteur, E/CN.4/Sub.2/1999/18 (03/06/99) at paras 124 & 148.

²²⁵ Commission on Human Rights, Human Rights of Indigenous Peoples, Report prepared by Mrs. Erica-Irene A. Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations, on her visit to Mexico (28 January-14 February 2000) E/CN.4/Sub.2/2000/CRP.1 (2 August 2000).

Forum will address human rights, environment, sustainable development, health, education, culture, gender, and children's issues. The forum will not issue juridically binding decisions. Hence dialogue and conciliation will be pursued.

In 2001, the Commission on Human Rights appointed a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People to receive communications of violations and recommend remedy of such actions.²²⁶

At the regional level, the Inter-American Commission for Human Rights appointed a Rapporteur on the Rights of Indigenous Peoples from 1996-1999, Carlos M. Ayala Corao, to help elaborate the Proposed American Declaration on the Rights of Indigenous Peoples, prepare special reports on indigenous rights for the country reports, conduct on-site missions, and assist in the preparation of cases involving this issue for presentation to the Inter-American Court (Awas Tingi) or friendly settlement (Exne).²²⁷

In sum, the latest mechanisms seek to highlight the need to address the root causes of abuse of indigenous peoples, e.g. land issues, but appear to be limited due to their lack of enforcement mechanisms. In section 5, I discuss the role of the UN human rights monitors and Inter-American Commission & Court with respect to IDP & indigenous rights to restitution of property in Guatemala. Below, I address the ILO mechanism for Convention No. 169.

3.2.2. ILO Convention No. 169- Oversight Mechanism

In accordance with the terms of the Accord on the Identity and Human Rights of the Indigenous Peoples, Guatemala ratified ILO Convention No. 169 in 1996 but progress in its implementation has been slow.

The State is required to submit a new report to the ILO's Committee of Experts on the Application of Conventions and Recommendations in 2003. This Committee issues comments back to the State or requests further information. It may publish observations in a report which is submitted to the Tripartite Commission (composed of employers' groups, governments, and worker organizations) which in turn submits a report to the International Labour Conference. The Commission of Norms of the International Labour Conference may call upon the government to appear before it to clarify an issue of concern.

²²⁶ Commission on Human Rights, Resolution 2001/57 (E/CN.4/RES/2001/57) (24 April 2001).

²²⁷ See Inter-American Commission of Human Rights, The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, Doc. 62 (20 October 2000).

The ILO complaint mechanism is not available to individuals, however it is open to governments, syndicates (international or national), or employer organizations. Hence, indigenous persons or groups must first lodge their complaints with the above-mentioned groups in order to request them to pursue the claim further. In a sense, this limits effective remedy, because not all indigenous people are linked to organized entities; often participation in unions results in repression. It would be beneficial if the ILO amended the rules to permit claims representing formally unorganised groups who are most often the victims of labour rights violations.

Complaints are delivered to the ILO Governing Body which forms a committee to review the case if deemed admissible. The Committee contacts the government and files a report with the Governing Body. The government may send a representative to appear before the Governing Body. It may publish the complaint or initiate a complaint to a Commission of Inquiry. The Commission may visit the country and issue a report with recommendations and a time frame for implementation. The final report is published and delivered to the government and the Governing Body. The Committee of Experts on the Application of Conventions and Recommendations follows up on implementation of the recommendations. The government may appeal to the ICJ for a final decision.

Indigenous groups may send information directly to the Commission of Experts for use in its overview of reports.) In 1999, the Popular Federation of Peasant Farmers sent a communication to the Committee of Experts on the Application of Conventions and Recommendations regarding Guatemala's application of ILO Convention Nr. 169. The Committee issued an individual observation that stated that Guatemala's first report was brief, admitting that it had not implemented the mechanisms to implement the Peace Accords. The Committee requested that the State provide more details in its future reports and strive to implement both the Peace Accords and the Convention. The ILO has provided assistance to indigenous groups for claiming labour rights as well as other issues of concern. Some progress is being made in the area of labour reform within legislation. As of 2001, a total of 42 complaints were filed by worker associations against the Government of Guatemala regarding their right to association. Concern was cited regarding threats, attacks, assassinations, kidnapping, torture and harassment of union organizers by non-state agents as well as official actors. The state of impunity has limited prosecution of violators and provision of remedy to victims. Penalization of strikes restricted their ability to organize, strikes are closely supervised by the state, and agricultural workers are prohibited from

striking during harvest time. The current government claims to have sought to amend the labour and penal codes to bring them into line with ILO norms.

However, in 2000, the Committee of Experts voiced its concern for “the lack of concrete progress in practice.” By 2001, it had voiced its “deep concern (for) the large number of acts of violence against trade union officials and members which have been alleged, including numerous murders and death threats.” Essentially guarantees regarding labour rights are intrinsically tied to the land. Peasant workers demand compensation in the form of land for violations regarding minimum wage, vacation time, etc. Failure to abide by labour norms keeps thousands of peasants in conditions of dire poverty and dependent on seasonal labour. Should labour norms be respected, workers would be able to lead a more stable, settled life rather than undergo cyclical displacement. Unfortunately, the ILO office in Guatemala has only one staff member, which complicates monitoring activities, particularly given the sheer scale of labour problems in the country. If the international community is sincere in its interest to reduce violations of human rights and related displacement, there is a need to provide additional financial and human resources to those organizations addressing root cause of conflict and migration, e.g. failure to implement labour standards.

In the next chapter, I present the rights to property, restitution, and remedy.

4. Property-Related Rights of the Dispossessed

4.1. The Right to Property under Human Rights Law

The right to property is subject to a wide variety of interpretations which complicate the achievement of universal understanding and implementation. It not contained in either the Covenant on Civil and Political Rights or the Covenant on Economic, Social, and Cultural Rights due to disagreement with respect to limitations of this right and the form of compensation in the event of infringement.²²⁸ The Covenants were elaborated in order to provide a legally binding collection of specific human rights and their limitations, hence the exclusion from these documents weakens the normative value of this right as a possible

²²⁸ See Catarina Krause, “The Right to Property” in ASBJØRN EIDE, CATARINA KRAUSE & ALLAN ROSAS, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, 191, 194 (Martinus Nijhoff Pub. 2001) citing UN doc. A/2929, Annotations on the Text of the Draft International Covenants on Human Rights. Official Records of the General Assembly, Tenth Session, Annexes, Agenda Item 28, Part II, (1955), pp. 65-67. Krause provides an interesting review of the case law within the European human rights system.

standard of customary law. (I discuss the interpretation of other rights within the CCPR as protecting property interests further in this Part.) It is guaranteed in the Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (v), the Convention of the Elimination of All Forms of Discrimination Against Women, Art. 16 (1)(h), Article 1 of Protocol No. 1 of the European Convention on Human Rights, Article 14 of the African Charter on Human and Peoples' Rights, the American Convention on Human Rights (discussed below), the American Declaration of the Rights and Duties of Man (discussed below), and Article 13 of the 1951 Convention on the Status of Refugees.²²⁹ The right to property also appears within the International Bill of Human Rights in Article 17 of the UN Declaration of Human Rights as general principle of human rights:

- “1. Everyone has the right to own property alone as well as in association with others.*
- 2. No one shall be arbitrarily deprived of his property.”¹*

This standard recognizes the right of property as extending to individuals as well as collective groups and places emphasis on respecting legal norms and procedures when alienating a person or group from their property. Thus, there is an implicit link to the right of remedy and restitution. Claims arise when persons are dispossessed without being given the chance to challenge the act in court or when the form of compensation is considered to be inappropriate. There is a lack of clarity as to what constitutes an appropriate remedial mechanism, e.g. administrative agency v. court, and what is an appropriate form or standard of compensation, e.g. cash vs. alternative land, just vs. full market value (these issues are further addressed in the sections on remedy and restitution). In addition, the concept of ownership is subject to varying interpretations, within Guatemala, elites only recognize formal title while indigenous peasants claim historic title or other customary possession rights. Both groups may claim to be protected by the above article, but courts will disagree as to what constitutes ownership, particularly under formal national law. Although originally drafted as soft-law, it has been argued that the UDHR's norms “have become legally binding

²²⁹ CERD Article 14: “Everyone has the right to own property alone as well as in association with others.” CEDAW article 16 (h) “The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.” 1951 Convention on the Status of Refugees, Article 13: “The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto. . .” ECHR, Protocol 1: Every natural or legal persons is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. . .” African Charter, see note 236.

on all members of the United Nations as an authoritative interpretation of member states' human rights obligations, or that the UDHR is binding on all states as customary international law through state practice and *opinio juris*.”²³⁰ This position is not shared by all commentators, and there is a tendency to determine the status of each right in particular as opposed the instrument as a whole. Ironically, although absent from the CCPR & CESC, the right to private property is often cited by Western leaders as being a fundamental right forming one of the pillars of democracy, indeed President George W. Bush highlighted this right as one of the “non-negotiable demands of human dignity.”²³¹ In spite of this passionate characterization, there remains a lack of understanding regarding how to define the right to property and what status it has.

There is a dichotomy pertaining to the right to property which has been well-described by Andrew Painter:

*“... (T)he right to property can be viewed from two perspectives: that of the landed and that of the landless. From the perspective of the landed, the right to property is a civil right, one intended to ensure protection against arbitrary State interference. From the perspective of the landless, the right to property is an economic and social right, a prerequisite to the fulfillment of other guaranteed human rights, such as the right to life and an adequate standard of living. Under the latter perspective, there is a positive State duty to ensure that sufficient lands are available to all.”*²³²

This is evident at the regional level; we may consider the right to property as conceived as a socio-economic right (or hybrid) in the American Declaration, Article XXIII:

“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.”

“Essential needs of decent living” refers to the right to an adequate standard of living (UDHR Article 25, CESC Art.11) may be understood in their bare minimum as including the right to food, clothing, and housing, but I suggest it may also may be linked to the right to work,

²³⁰ Dinah Shelton, “Commentary and Conclusions” in DINAH SHELTON (Ed.), COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449 (Oxford U. Press 2000). See also Montreal Statement of the Assembly for Human Rights March 22-27 1968, 9 J. Intl. Comm. Jurists 94, 94.95 (1968) noting that the Declaration is an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary law. See also the Proclamation of Teheran at the UN International Conference on Human Rights, 23 UN GAOR., UN Doc. A/Conf. 32/41 (1968) noting that the Declaration constitutes an obligation for members of the international community.

²³¹ President George W. Bush, State of the Union Address (29 January 2002) available at <http://www.whitehouse.gov>. He identifies other non-negotiable demands to include the rule of law, limits on the power of the State, respect for women, free speech, equal justice, and religious tolerance.

²³² Andrew Painter, “Property Rights of Returning Displaced Persons: The Guatemalan Experience”, 9 HARVARD HUMAN RIGHTS JOURNAL, 145, 167 (1996), citing Roger Plant, “Land Rights in Human Rights and Development: Introducing a New ICJ Initiative, 51 REVIEW 10, 11 (1993).

which in a rural society implies access to land (property = work = food = life).²³³ The reference to “dignity” raises the standard owed by the State to the individual in order to ensure that individuals are not maintained within situations which are deplorable to their physical, mental, and spiritual well-being. As noted by Krause:

*“If the realization of property rights only entails a right to own property for those who are in a position to acquire property and a protection against arbitrary interference with these existing property rights, it is difficult, at least morally to justify the right to property. A perception of human rights as an interdependent and indivisible whole calls for a wider interpretation of the right to property, which does not hamper the effective enjoyment of other rights, including social rights.”*²³⁴

Indigenous people or IDPs claiming customary possession are more likely to be protected by this variant of the right to property in combination with cross-reference of non-discrimination guarantees, as supported by Anaya, Schaaf & Tulberg:

*“. . . indigenous systems of land tenure give rise to property interests that, along with other forms of property, are embraced and affirmed by Article XXIII of the American Declaration. The fundamental principle of nondiscrimination, which is itself enshrined in the Declaration and is part of general international law, leads to this interpretation of the reach of the right to property articulated in Article XXIII. A contrary interpretation of Article XXIII would allow discrimination to persist against indigenous peoples with regard to their own modalities and forms of landholding and resource use.”*²³⁵

Thus, the socio-economic version of property is presented as a norm which permits cross-reference to other fundamental rights and which empowers marginalized individuals and groups by requiring consideration of their customs and traditions as pertaining property.

One may contrast the right to property’s formulation as a civil right with hybrid characteristics under the American Convention, 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.”*²³⁶

²³³ On the right to an adequate standard of living see Asbjørn Eide, “The Right to an Adequate Standard of Living Including the Right to Food” in EIDE, KRAUSE & ROSAS, supra note 228 at 133.

²³⁴ Krause, supra note 228 at 209.

²³⁵ Toledo Maya Cultural Council on behalf of Maya Indigenous Communities of the Toledo District Against Belize, Petition to the Inter-American Commission on Human Rights, reprinted in ISFAHEN MERALI & VALERIE OOSTERVELD, GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS 186, para. 94 (University of Pennsylvania Press 2001).

²³⁶ Compare with Article 14 of the African Charter on Human and Peoples’ Rights:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

The clear identification of public need provides an opportunity to conduct expropriations to benefit members of society who are deprived of basic dignity as long as the act is conducted in conformance with the law.

Here property serves a dual function of both “use” and “enjoyment”, thus emphasizing the role of property in defining one’s individual life, either to sustain oneself or to fulfill other transcendental elements inherent in human experience. There is no explicit reference to ownership. The Inter-American Court examined this issue in the *Awas Tingi* case (25 November 2000, paras. 142-155) discussed in the section on property indigenous people as well as in the section on the Inter-American System.

We must also consider the fact that the social interest clause provides a twist that leaves open the possibility that that State may alter the individual use of property in order to benefit the society at large. Under this interpretation, property has a social function that serves the community as a whole and is distinguishable from its benefits to the individual. Nevertheless, the Convention sets forth that alienation of property must be in conformance with the principle of just compensation and due process.²³⁷

Governments which pursue policies based on the social function of land usually form land reform programs targeting idle or under-used lands for expropriation in order to benefit marginalized groups lacking access to property (see *infra* Part III on Brazil and expropriation of land). In Guatemala, this is exemplified by Arbenz’s expropriation program of 1952. In spite of the fact that this program was limited and did provide compensation to landowners, there was disagreement as to the amount of compensation. In addition, at the time, social interest was equated with communism, and elites clung to the notion of the right to property as absolutely inalienable, regardless of social circumstances. Arbenz’s downfall serves as a symbol of the precarious results of different conceptions of the right to property within a society. To this day, disputes between peasants, landowners, and the Guatemalan State revolve around this issue.

In terms of enforcement, Davidson reports that “The Commission has held that the right to property is fundamental and inalienable and that no State, group or person may undertake or conduct activities to suppress the rights upheld in Articles XXIII and 21.”²³⁸ Thus both State and Non-State actors are expected to respect both versions of the right to property. This

²³⁷ The preference for just compensation runs contrary to full market value norm, in keeping with UN General Assembly Resolution 1803 (XVII) of 14 December 1962.

²³⁸ See Case 10.770 (Nicaragua), IACHR Annual Report 1993, 293, at 229, para 13. See also “Report on Nicaragua”, if. 442 at 465, cited in Scott Davidson, “The Civil and Political Rights Protected in the Inter-American Human Rights System, in David Harris, “Regional Protection of Human Rights: The Inter-American Achievement”, in DAVID HARRIS & STEPHAN LIVINGSTONE (Eds.), *THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS*, 213, 276, (Clarendon Press 1998).

The Additional Protocol on Economic, Social and Cultural Rights (San Salvador Protocol) addresses the right to work and the right to food, but not property. However, given the fact that agriculture is the primary form of subsistence in Guatemala, a link is evident.

implies that the State may be held liable for infringement of property claimed by IDPs or indigenous people pursuant to customary possession, even if such act is committed by a Non-State actor. Given that significant percentage of forced evictions in Guatemala are conducted by private landowners, the State should be held accountable for failing to protect victims from such actions (see Part III on Forced Evictions).

The UN Special Rapporteur on The Question of Impunity of Perpetrators of human rights violations (economic, social and cultural rights), Mr. El Hadji Guisse Scott, stated clearly that economic, social, and cultural 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.”²³⁹ Indeed, the Rapporteur recommends the incorporation of socio-economic standards into national law for implementation by courts and authorities, including investigation and sanction of offenders and provision of reparation to victims, noting that “Those who have been illegally dispossessed must be able to retrieve their full property. . .”²⁴⁰ The question is where can one attain reparation? The Guatemalan Attorney General’s Office for Human Rights has issued statements accusing the State of non-implementation of socio-economic human rights, however these are general in nature rather than case-specific.²⁴¹ The challenge to provide a forum in which such rights are considered legitimate grounds for evaluation of claims and design of solution.

UN Guiding Principles on Internal Displacement, Principle 21, is an amalgamation of humanitarian and human rights standards which conforms to the civil & political variant due to the emphasis on adherence to legal procedure and norms in the event of alienation:

1. *No one shall be arbitrarily deprived of property and possessions.*
2. *The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:*
 - A. *Pillage;*
 - B. *Direct or indiscriminate attacks or other acts of violence,*
 - C. *Being used to shield military operations or objectives,*
 - D. *Being made the object of reprisal; and*
 - E. *Being destroyed or appropriated as a form of collective punishment.*
3. *Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.*

This principle is a reflection of both hard and soft law standards. The intention here is to provide protection guidelines for property rights during conflict and after its termination.

²³⁹ Commission on Human Rights, Final Report on the Question of the Impunity of Perpetrators of human rights violations (economic, social and cultural rights), Mr. El Hadji Guisse, Special Rapporteur, E/CN.4/Sub.2/1997/8 para 98 (27 June 1997)

²⁴⁰ Id. At para.140

²⁴¹ See generally, MERALI & OOSTERVELD supra note 235.

These provisions are very relevant to the situation in Guatemala, where persons are expelled in order to allow appropriation of their land by other actors; completing a counter agrarian reform. Destruction of property during the war due to scorched earth tactics was significant and well documented by the CEH. Peasant villages were used as shields during the war and homes were pillaged by both non-state and state actors. Unfortunately, many peasants lacked formal title to property (in many cases, the registries were burned), and the State will not guarantee recognition of oral evidence and customary claims to property. Occupation by outside groups and individuals of property belonging to IDPs remains ongoing. Due to the scale of the damage, lack of resources, and conflicting claims to land, the State has not provided restitution for such damage. In some cases, displaced persons have had to buy back property they abandoned, share the property with new occupants, or move on due to threat of violence.

Criticism has been offered that this provision should have included a section prohibiting coerced sale of property, which is a common phenomenon in both Guatemala and Colombia. It is questionable whether this is necessary, given that domestic commercial law usually includes protections against fraud and coercion in contracts. Considering the fact that many IDP situations involve claims for recognition of the right to property from a socio-economic perspective, the Guiding Principles failed to address one of the key obstacles to resolving and preventing internal displacement. However, the fact that it does not specify “private property” may indicate a window for creative interpretation akin to that of the Inter-American Court of Human Rights in the *Awas Tingi* case (see 4.3.1.).

If we consider the right to property from a gender perspective, Principle 4 calls for the application of its guarantees without discrimination of any kind, including sex. However it does not set forth specific provisions calling for guaranteeing women’s right to property and its compensation (Principles 21 and 29), as it does for health care (Principle 19), documentation (Principle 20), and education (Principle 23).

It may be argued that Principle 9 may form a basis for a more progressive claim:

“States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”

The Guiding Principles also contains a non-discrimination clause which highlights the right of internally displaced persons to “enjoy in full equality the same rights and freedoms under international and domestic law as do other persons in their country” without discrimination due to their displacement (Principle 1, Guiding Principles). The ILA contains

a similar principle which calls for guarantee of rights under human rights law, humanitarian law, and refugee law and prohibits other grounds of discrimination, such as gender, social origin, language, etc. (Article 2). These provisions strengthen IDP claims to property related rights contained in international legal protection instruments.²⁴²

In sum, the most serious problem pertaining to the right to property is the lack of normative clarity. It is absent from the CCPR and the CESC, although present in the UDHR, CERD, & CEDAW. It remains divided between the socio-economic variant as contained in the American Declaration, the hybrid variant contained in the American Convention (both of which are most beneficial to indigenous people, IDPs, and other marginalized groups deprived of the means by which to enjoy an existence with dignity) and the civil and political variant, which is often interpreted to refer only to formal title. One may suggest that the notion of ownership remains vague (especially given the increased attention with respect to indigenous rights to land).

There also remains disagreement as to whether or not property has a social function, as identified within the American Convention. If one were to accept this interpretation, a State may be encouraged to engage in expropriation in order to benefit IDPs so as to guarantee enjoyment of an adequate standard of living and realization of basic needs. The Guiding Principles curiously upheld the civil and political standard, thus failing to espouse an empowering variant of the right to property that would provide solution to their displacement and support recognition of customary claims. However the absence of the qualification “private property” may indicate potential interpretation of the right as a hybrid in like manner to Article 21 in the American Convention as defined by the Inter-American Court of Human Rights. We may recall that the provision addressing the special tie of peasants, pastoralists and indigenous people to their land may provide a key towards improved policy as pertaining addressing IDP property-related needs in practice.

²⁴² At the regional level, the San Jose Declaration on Refugees and Displaced Persons, Conclusion 16 (e), calls for the guarantees of rights to “. . . ownership of one’s land and other property” without clarifying what ownership means.

Within humanitarian law, Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in the Time of war prohibits destruction and appropriation of property unless it is justified by military necessity and carried out lawfully. Within internal conflicts, Protocol II to the Geneva Conventions, Article 14, prohibits destruction of foodstuffs, agricultural areas, crops, livestock, drinking water installations, supplies and water works. Article 17 prohibits the displacement of civilians unless there are imperative military reasons or the security of the civilians are involved. The Tuku Ábo Minimum Humanitarian Standards, Article 3 (2) prohibits pillage. Guatemala has not ratified either Geneva Convention IV or Protocol II. However, the state is bound by customary norms pertaining to humanitarian law.

Unfortunately, the commentators to the Guiding Principles have reflected a civil and political bias with respect to cessation determination, thus the property rights of IDPs in a practical context of protracted displacement may find themselves unprotected due to labelling of interests as “mere” socio-economic concerns. In contrast, the prohibition destruction or illegal appropriation, occupation, and use of abandoned property is an example which reflects contextual realities.

The lack of a common understanding as to the characteristics of the right to property results in clashes between marginalized groups, state officials, and formal landowners. In order to attain a more comprehensive understanding of this right, particularly in context, I support the use of cross-referencing other human rights linked to property. IDPs may assert a right to property but they may not be unanimous in their understanding of what it means, nor are they likely to agree with the position presented by State officials. This issue is further complicated when considering the right to restitution.

4.2. The Right to Restitution under Human Rights Law

It is well-established within the literature on international law that a violation of an international obligation by a state gives rise to a duty of reparation to another state.²⁴³ The interesting area of evolution is the notion of a duty of restitution to an injured individual, particularly with respect to violation of rights of the nationals of State. Much of the jurisprudence addresses expropriation of property owned by aliens, one of the key issues being the legitimacy of use of a national standard for determination of the legality of the action as well as the terms of compensation.²⁴⁴ Here, we are concerned with the

²⁴³ See DIXON, MARTIN, *TEXTBOOK ON INTERNATIONAL LAW*, 231 (Fourth Edition Blackstone Press 2000) and BROWNLIE, IAN, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 465 (Fifth Edition Clarendon Press 1998), citing *Chorzow Factory Case (Merits Germany v. Poland)* 1928 PCIL Ser. A. No. 17.

²⁴⁴ Developed nations support the notion of an international minimum standard to measure the legality of treatments of aliens (*Chattam Claim* and *Neer Claim*), while developing nations favor use of a national standard which requires states to give aliens the same treatment as nationals, not more favourable treatment (Art. 9 *Montevideo Convention on the Rights and Duties of States* 1933). DIXON, *Id.* at 243.

The UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources sets forth that expropriation shall be based on reasons of public utility, security or national interest which override individual interests, “appropriate compensation” shall be provided in accordance with both national and international law. Developed nations argue in favour of a principle of non-discrimination when considering the legality of expropriation. There is disagreement as what appropriate compensation consists of, the Hull Formula suggests “prompt, adequate and effective” indicating common currency, developed countries often support consideration of full market value of property at the time of the expropriation or before expropriation (including lost future profits), and payment within a reasonable time. Should the expropriation be deemed to be unlawful or discriminatory, the State may be liable for damages beyond compensation. Developing nations argue in favour of consideration of the economic condition of the State, profits already made, value less than market rate- net

establishment of international minimum standards pertaining to measuring the legality and terms of compensation for the loss of property belonging to nationals, applicable to dispossession by both State and Non-State actors.

The remedy may take the form of compensation, restitution, apology, punishment of responsible individuals, prevention of recurrence of the violation, etc. Restitution is one of the preferred remedies sought by victims, as it aims to restore the person “to his or her original position prior to the loss or injury, or place in the position he or she would have been had the breach not occurred.”²⁴⁵ Theo Van Boven described the notion of redress to victims as one which has been largely neglected:

*“At the international level: the matter may complicate international relations and be considered as largely a domestic issue. At the national level: the lack of consensus how to disassociate oneself with the past; a fear of creating new divisions; it is not part of the culture of the society; the massive nature of the problem and the inability to cope with such a massive problem; the unwillingness of regimes to acknowledge the wrongs and injuries of the past.”*²⁴⁶

Given the absence of the right to property from the CCPR & CESC, the right to restitution of such is also absent from these instruments. As previously mentioned, the American Convention on Human Rights, Article 21 (2), addresses compensation in the event of expropriation, rather than restitution. It sets forth: “No one shall be deprived of his property upon payment of just compensation, for reasons of public utility or social interest, and in cases and according to the forms established by law.” However the Inter-American Court has developed significant jurisprudence on the notion of restitution, hence I discuss this separately in the section on the Inter-American System.

In January 2000, the Commission on Human Rights adopted “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law”.²⁴⁷ This instrument notes that States are obligated to respect,

book value based on assets paid in lump-sum, and non-inclusion of future profits. However, the Charter of Economic Rights and Duties of States, General Assembly Resolution 3281 (XXIX) and the Declaration on the Establishment of New International Economic Order, General Assembly Resolution 3201 (S-VI) set forth that a State may refer to national norms instead of international norms and do not refer to any standard of non-discrimination or public purpose. See DIXON, Id. at 250-257.

States may also be held responsible for failing to protect property from attack by revolutionary groups, see *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka* (1991) 30 ILM 577, cited in DIXON at 233.

²⁴⁵ BLACK’S LAW DICTIONARY (West Pub. Co 1991).

²⁴⁶ THEO VAN BOVEN, CEES FLINTERMAN, FRED GRUNFELD & INGRID WESTENDORP, Eds., SEMINAR ON THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 4 (Maastricht, 11-15 March 1992).

²⁴⁷ 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).

ensure respect for and enforce international human rights and humanitarian law norms, including those found in customary international law, treaties, and domestic law. In order to do such, States are called upon to adopt “appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.” States have the duty to prevent, investigate, and “where appropriate” take action. The State must also provide victims “with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation” and remedies and reparation. Should the act constitute a crime under international law, the State has a duty to prosecute and punish violators. Reparation utilizes the definition elaborated by Theo Van Boven and is inclusive of the standards contained in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law.²⁴⁸ It is advised that “adequate, effective, and prompt reparation” be provided to promote justice, thus reiterating the Hull Standard used in expropriation cases. The Basic Principles identifies reparation to take the form of any one or more of the following:

1. **Restitution**-should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one’s place of residence, and restoration of employment and return of property.
2. **Compensation**-for economically assessable damage, such as
 - a. Physical or mental harm, including pain, suffering and emotional distress
 - b. Lost opportunities including education
 - c. Material damages and loss of earnings, including loss of earning potential
 - d. Harm to reputation or dignity
 - e. Costs required for legal or expert assistance, medicines and medical services.
3. **Rehabilitation**- including medical and psychological care, as well as legal and social services
4. **Satisfaction and guarantees of non-repetition**-including any or all of the following:
 - a. Cessation of continuing violations
 - b. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others
 - c. The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
 - d. An official declaration or a judicial decision restoring the dignity, reputation, and legal and social rights of victim and of persons closely connected with the victim.

²⁴⁸ Final Report of the Special Rapporteur, Mr. Cherif M. Bassiouni, submitted in accordance with Commission resolution 1999/33. Annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law. UN Doc. E/CN.4/2000/62 (2000). See Also Draft Articles on State Responsibility of the International law Commission Article 1-3.

- e. *Apology, including public acknowledgement of the facts and acceptance of responsibility.*
- f. *Judicial or administrative sanctions against persons responsible for the violations*
- g. *Commemorations and tributes to the victims*
- h. *Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels*
- i. *Preventing the recurrence of violations by such means as:*
 - (i) *Ensuring effective civilian control of military and security forces*
 - (ii) *Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces.*
 - (iii) *Strengthening the independence of the judiciary*
 - (iv) *Protecting persons in the legal, media and other related professions and human rights defenders*
 - (v) *Conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.*
 - (vi) *Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as the staff of economic enterprises;*
 - (vii) *Creating mechanisms for monitoring conflict resolution and preventive intervention.*

Thus, even though just reparation may include restitution, it may well be that the State would opt for one of the other categories which would not directly address the land issue. The all-inclusive nature of the standard may prove to be its weakness in practice.²⁴⁹

The right to restitution for property lost on account of displacement is fundamental for IDPs. It is derived from “general property rights and the obligation of the state to make good

²⁴⁹ Alberto Gomez of the Colombian Commission of Jurists has stated that the people call for “acceptance by the State of its responsibility, not just economic restitution.” He notes that the people want to preserve a memory of the events, and hence prioritise moral reparation. Interview 17 March 1998.

An interesting comparative case that I found in Colombia is that of a group of internally displaced persons in Quibdo, Choco specifically identifies the lack of collective title and forced abandonment of land as two of the causes of their plight. They demanded provision of title to their land as a condition for return. In addition they requested reparation in both collective and individual forms. Collective reparation was to include:

1. *Public recognition by the State of its responsibility for the atrocities which prompted displacement*
2. *Construction of a park in memory of the victims*
3. *The publication of a book which would relate the true facts and be used within schools and universities*
4. *Improvement of hospitals in Riosucio, Bojaya, and Quibdo*

Individual reparation was to consist of indemnification for:

1. *Physical and moral harm*
2. *Loss of income*
3. *Damage to reputation and honor*
4. *Lost property*

any violations producing injury”.²⁵⁰ Of course, considering that there does not appear to be a unified understanding of what constitutes the right to property, we remain wary that the right to restitution may be similarly unclear. Kōlin & Goldman note that “(a)lthough such right is not explicitly recognized in international law, there is a certain trend in international practice to accept such a guarantee.”²⁵¹ Leckie advocates that restitution rights cover not only formal owners but also to tenants, occupants and other tenure groups.²⁵² I support Leckie’s position because I embrace the holistic concept of the right to property as a hybrid/cross-over norm which protects possession or customary claims to land as well as formal title.

Both the UN Sub Commission on the Promotion and Protection of Human Rights and the UN Committee on the Elimination of Racial Discrimination issued statements calling for property restitution to returning internally displaced persons.²⁵³ The U.N. 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.”*²⁵⁴

²⁵⁰ Dowty, Alan, “Return or Compensation: The Legal and Political Context of the Palestinian Refugee Issue”, in WORLD REFUGEE SURVEY, 28 (US Committee for Refugees 1994), citing Donna Arzt & Karen Zughuib, “Return to the Negotiated lands: The Likelihood and Legality of Population Transfer between Israel and a Future Palestine State”, in 24 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS, 1444-1445 (Summer 1992).

²⁵¹ Kālin, Walter & Goldman, Robert K., “Legal Framework”, 108-109, in COHEN & DENG, supra note 128. They note that “(r)ecognition by the international community of a right of internally displaced persons to restitution of lost property and compensation for its loss . . . would be of utmost importance for internally displaced persons.” Annex 7 of the Dayton Peace Agreement, Article 1 (1) which recognizes the right of displaced persons “to have restored to them property of which they were deprived during the course of hostilities. . . and to be compensated for any property that cannot be restored to them.” The International Criminal Tribunal for the Former Yugoslavia has not yet issued a statement regarding restitution of property (Rule 105) or compensation to victims (Rule 106).

The International Convention on the Elimination of All Forms of Racial Discrimination, Article 6 guarantees the right to seek just and adequate reparation or satisfaction from national tribunals for any damage suffered as a result of discrimination”.

See Also Lavoyer, Jean-Philippe, “Protection under International Humanitarian Law”, in Lavoyer supra note 104 at 34, calling for “at least” the creation of a “system of fair compensation” to address property and housing recovery issues. See also Cohen, Roberta, Protecting the Internally Displaced, US Committee for Refugees World Refugee Survey (1996), citing the need for “restitution or compensation for property lost during displacement.”

²⁵² Scott Leckie, “Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice”, 19 (3) REFUGEE SURVEY QUARTERLY 5, 53 (2000).

²⁵³ UN Sub Commission on the Promotion and Protection of Human Rights, Resolution 1998/26 on “Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons”, and UN Committee on the Elimination of Racial Discrimination, General Recommendation XXII (49) adopted 16 August 1996.

²⁵⁴ The Committee on the Elimination of Racial Discrimination, General Recommendation XXII (49), adopted at the 1175th meeting, on 16 August 1996 in Annual General Assembly Report of the Committee on the Elimination of Racial Discrimination, Official Records Fifty-first Session Supplement No. 18 UN Doc. A/51/18 (1996).

The standard calls for the return of the original property lost during displacement, but leaves open the possibility that such restitution may not be possible. IDPs are not clearly given the right to determine whether or not return of the original property is feasible, hence the State may make this determination without the input of IDPs. The failure to include them in such assessments is dis-empowering. The final sentence is particularly relevant to the situation in Guatemala, where peasants have been forced into selling their land by acts of violence and threats. A provision negating the legitimacy of sale of property under duress should be incorporated within a new instrument on IDPs.

The ILA adopted a Declaration of Principles of International Law on Compensation to refugees which although geared in title towards compensation for trans-border migration, addresses compensation interests of internally displaced persons in principle 4:

“A state is obligated to compensate its own nationals forced to leave their homes to the same extent as it is obligated by international law to compensate an alien.”²⁵⁵

The Declaration sets forth a general standard that does not explicitly require restitution of land. Of particular interest is that the instrument sets forth State liability for direct coercion and indirect coercion, the latter including “deliberate creation or perpetuation of conditions that so violate basic human rights as to leave people with little choice but to flee their homelands.”²⁵⁶ Hannah Garry criticizes attempts to set forth a right of compensation to refugees due to the complexity of establishing a cause of action, proving liability, determining the conditions of payment, identifying the correct jurisdiction, and enforcing the decision.²⁵⁷ I remain less cynical, due to the current progress made by commentators in recognizing the validity of claims based on violation of the right to freedom of movement and choice of residence, or as Maria Stravropoulou coined “the right not to be displaced”, as well as my review of the cases before the Human Rights Committee, Inter-American Commission of Human Rights, and Inter-American Court of Human Rights (see *infra*). These cases reveal the possibility of reclamation against the State for infringements linked to forced displacement by cross-referencing other fundamental rights, regardless of whether it was a

²⁵⁵ Declaration of Principles of International Law on Compensation to Refugees, adopted by the International Law Association 65th Conference, Cairo April 1992.

²⁵⁶ *Id.* This corresponds to the jurisprudence of the Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras*, judgment of 29 July 1988 (Annual Report of the Inter-American Court of Human Rights (1988) 35: “. . . an illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”

²⁵⁷ Hannah R. Garry, “The Right to Compensation and Refugee Flows: A ‘Preventive Mechanism’ in International Law?” in 10 (1/2) INTERNATIONAL JOURNAL OF REFUGEE LAW 97 (1998).

State or a Non-State actor. Compensation may be provided in either monetary form, recognition of title to customary land, or restitution of land. Of course, the key problem is enforcement, hence these decisions may be “symbolic” in effect in the immediate period, but serve to promote the elaboration of an international customary standard in the long run.

Garry questions whether compensation can serve any preventive function against the creation of new refugee flow, due to the fact that it may not address the root causes of forced migration.²⁵⁸ In my opinion, in the case of internally displaced persons victimized by a counter-agrarian reform, it would be essential to provide restitution of property over monetary compensation, as only restitution of land would tackle the root cause of flight.²⁵⁹ Thus I consider restitution of land to indeed be preventive of second-generation displacement.

The property issue was later covered by the ILA Declaration of Principles of International Law on Internally Displaced Persons, Article 9, which states in direct “hard law” language although maintaining “soft law” value:

“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. Hence, it leaves IDP vulnerable to the will of the State as there is no right of participation in selection of restitution.

Rainer Hofmann had originally drafted this provision to read:

²⁵⁸ Id. at 116.

²⁵⁹ Ellen Lutz sets forth the issues relevant to compensation claims:

1. *Who is entitled to compensation? (Victim or relative)*
1. *For what categories of loss or damage should compensation be paid? (moral v. tangible)*
2. *From whom may compensation be sought? (State v. private actors)*
4. *When may a person seek compensation?*²⁵⁹ *(Statute of limitations)*

She also notes that procedural mechanisms, investigation of claims, and awards are other subjects meriting discussion. Lutz claims that although victims should have the right to seek redress from those who committed the violation;

“(U)ltimate responsibility for ensuring that former victims receive adequate compensation should lie with the state. There are several reasons for this. First former victims of human rights abuses often do not know the identities of those who perpetrated the abuses against them, and lack written records or the unwillingness of those involved to admit their participation or implicate others may preclude discovery of their identities. This is especially likely where abuses were committed by government-tolerated but autonomous paramilitary or civilian vigilante groups. Second, to the extent the identity of the persecutors is known, individuals may be fearful of publicly (or even privately) naming those who harmed them for fear of retribution. Such fear may be well-founded in states where the government is unable to control paramilitary or civilian vigilante groups, or when former perpetrators of human rights abuses retain sufficient power that the government fears offending them.”

Thus she clarifies that there is a need to guarantee equal right to compensation by providing such through the state, rather than having a victim’s compensation dependent on the wealth of the perpetrator as another factor in favor of state responsibility. Ellen Lutz, “After the Elections: Compensating Victims of Human Rights Abuses” in ELLEN L. LUTZ, HURST HANNUM & KATHRYN J. BRUKE, *NEW DIRECTIONS IN HUMAN RIGHTS* 205 (University of Pennsylvania 1989).

*“All such persons are entitled to adequate compensation for any unlawful requisition or losses of their property incurred as a result of political or belligerent actions attributable to the government in place after the cessation of such actions or to an appropriate share of any compensation which may be made available for any unlawful requisition or losses of property incurred as a result of political or belligerent actions not attributable to the government in place after the cessation of such actions.”*²⁶⁰

He explained the reasoning behind such wording:

*“It is suggested that there exists, under present international law, a right to be compensated for losses of property incurred as a result of political or belligerent actions if such actions are **attributable** (it should be recalled that even acts not committed by State organs might be attributable to the State if its organs were not willing to prevent such actions being taken by third persons and thus violate their obligation of protection against such acts) to the government in place after cessation of such actions. Admittedly, it might be argued that such a right is recognized only with regard to aliens and not yet with regard to nationals. Indeed, the question as to whether nationals are generally entitled to compensation for losses of their property incurred under such circumstances probably has to be answered in the negative. Therefore, this provision only concerns compensation for **unlawful** requisitions and losses of property. Obviously, this entails the next question, namely which body of law, domestic or international, should be used in order to decide whether such an act is to be considered as unlawful. It is suggested that such acts being in breach of international law entail a right to compensation; whether the same is true for acts being in breach of the respective domestic law remains an open question: therefore, it is proposed to use this rather ‘vague’ formulation which seems to be flexible enough to respond to future developments. Another problem concerns compensation for unlawful requisitions and losses of property incurred as a result of political or belligerent actions **not attributable** to the government in place after the cessation of such actions. It is suggested that current international law does not provide for a right to compensation under such circumstances. If, however, such government should make compensation available, then all internally displaced persons are entitled to receive an appropriate (thus allowing to take into account the personal situation of the persons involved) share of such compensation.”*²⁶¹

It should be clarified that it appears that Hofman was referring to the “accountability view” which sets forth that in situations in situations of total civil war in which there is no State or quasi-State authority to link responsibility to, such as Afghanistan under the Taliban regime, the State may not be held accountable for human rights violations. In refugee cases the German courts formerly applied this notion with respect to persecution: an asylum seeker claiming persecution from Afghan rebels is not recognized as being entitled to refugee status, because there is no State to attribute responsibility for the persecution.²⁶² Hence, by analogy, an Afghan seeking compensation for unlawful loss of property would be left without remedy. The opposing doctrine is known as the “protection view”. It sets forth that regardless of

²⁶⁰ Rainer Hofmann, “International Humanitarian Law and the Law of Refugees and Internally Displaced Persons”, in European Commission, *LAW IN HUMANITARIAN CRISES: HOW CAN INTERNATIONAL HUMANITARIAN LAW BE MADE EFFECTIVE IN ARMED CONFLICTS?* Vol. I, 249, 296 footnote 75 (1995).

²⁶¹ *Id.* at 297.

²⁶² See *R v. Secretary of State for the Home Department ex parte Aitsegeur*, Queen’s Bench Division CO/1765/98, 18 December 1998, discussing the accountability view as interpreted by German courts v. protection view with respect to a claim of persecution. The German law has since been amended to eliminate this practice.

whether or not there is a State in existence or may be imputed to be responsible, the lack of adequate protection is the key factor for establishing a claim of persecution. Hence, in the hypothetical the Afghan would be entitled to remedy. There is a clear division in approaches, thus governments arising after civil wars may adopt either position. However, as Hofmann points out, regardless of which of these doctrines is espoused, in the case in which the State or quasi-State was in existence at the time of the violations, liability as pertaining to its tolerance, encouragement, or omission to act in the face of non-state agent violations may be established.²⁶³ He noted that the Committee chose not to adopt his provision because they were concerned that by “opening the hornet’s nest” they may be bogged down in discussions and jeopardize the adoption of the principles.²⁶⁴

In spite of the Dayton Peace Accord, the ILA’s Committee did not feel that the notion of compensation as pertaining displaced persons had yet achieved customary status. In addition, he claimed that the Committee did not consider the compensation issue to be its key concern. It should be remarked that the final version of Article 9 does not exclude compensation claims for violations of non-state actors, due to its general wording.²⁶⁵

The revised version did not include these varied nuances, opting instead for a general duty of restitution for property lost on account of forced displacement, leaving open the question of whether conditions may established for its application. He states that there is a need to address “whether and to what extent and by what means such rights to return and compensation might be implemented and, if need be, enforced by the international community.”²⁶⁶ Rainer Hoffman noted that aliens and refugees appeared to have more protection regarding their right to property than citizens. Thus the ILA provided a commentary which notes that Article 9 is meant to be read in conjunction with Article 3 (1) which states:

“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.”

²⁶³ France does not recognize State liability for omission to act against actions by Non-State actors.

²⁶⁴ Telephone interview with Rainer Hofmann, 14 October 1999.

²⁶⁵ The Iran-US Claims Tribunal and UN Compensation Commission are cited as the relevant sources of guidance for choice of law to determination compensation.

With respect to Guatemala, restitution was offered to refugees and the CPR communities who showed proof of title, refugees and dispersed internally displaced persons who could not prove title ownership were offered credits to purchase land. It may well be that the Guatemalan state limited restitution based on the practical matter of formal proof, however given the majority of displaced persons only had possession rights or historic title, this limited the provision of remedy to victims of dispossession. In addition, dispersed internally displaced persons with title were not included in the arrangement with the CPR communities, and their actual title excluded them from participation in the credit schemes of the Land Fund. Finally, many lack the means to pursue claims in the courts. Hence they were caught in a catch twenty-two, with title but without land.

²⁶⁶ *Id.* at 305.

Hence, even if the national law does not provide a right to restitution, the ILA claims that such right may be drawn from international law.²⁶⁷ Hofmann concluded that this would “provide stronger protection for internally displaced persons than for nationals who are not internally displaced persons. It is a means of providing better protection to the victims of government policy when people have to flee within the borders of one country.”²⁶⁸

The UN Guiding Principles, Principle 29 (2), is more cautious standard:

“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.”

Compensation is a lower standard than restitution. It is curious that the term “recovery” was used instead of “restitution” in the UN Guiding Principles on Internal Displacement. “Recovery” is defined as “(i)n its most extensive sense, the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withheld from him.”²⁶⁹ “Restitution” is “an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred. . . Act of making good or giving an equivalent for or restoring something to the rightful owner.”²⁷⁰ This variance is important because, under the UN Guiding Principles, the right to recovery is guaranteed, with an alternative of compensation. Hence, if the return of one’s actual property is impossible, under the principles the person could then make a compensation claim. Although compensation could include the giving of an equivalent or substitute of equal value, it may result in a monetary payment, rather than issuance of land that may impede reintegration strategies. The compensation available could be may not be substantial, thus resulting in further loss after displacement. The restitution standard would allow the court or administrative body to call for distribution of property of like value to that lost, and other compensation to return the person to the position he would have been in had the displacement

²⁶⁷ Commentary 2 to Article 9, Draft Declaration of Principles of International Law on Internally Displaced Persons, International Law Association, Report of the Sixty-Eighth Conference in Taipei (1998).

²⁶⁸ Comments by Rainer Hofmann at the Working Session of the Committee of Internally Displaced Persons, Id. at 492.

²⁶⁹ Black’s Law Dictionary, (West, 1991).

²⁷⁰ Id.

not occurred. The right to restitution may be the strongest impetus for implementation of a land reform program.

It is curious that the right to recovery 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 State may deem restitution impossible due to destruction of the property after military operations, environmental disaster, etc., lack of resources to finance full restitution, or other reasons. As opposed to the standard set for indigenous people, the Guiding Principles grants the power of choice of form of reparation not to the IDPs, but rather the State. Hence, in like manner to the ILA standard, IDPs are not guaranteed a voice in determining the viability of full property restitution and thus are deprived of a right to participation in the design of solutions to their displacement.

Internal conflicts often result in severe damage to the property being claimed, due to bombardment, placement of mines, contamination of water, etc. In some cases, the State may opt to give priority to development projects which would benefit the nation over individual or community property claims. Furthermore, states have difficulties removing the current land occupants due to a prohibitive cost of re-purchase, power imbalances evidenced by continued violence in the arena, or the reticence of a judiciary which is reluctant to declare puissant actors to have acted fraudulently or with coercion. Without significant support by international actors, including the provision of financial assistance to fund restitution efforts and security support to protect the judiciary enforcing the right, it is more than likely that many cases will arise in which recovery of property is deemed not to be possible by the state.

Hence the second clause, regarding compensation and just reparation is of special significance. The phrase is awkwardly worded: “authorities shall provide or assist . . .” There is no specific determination that the State should be the source of compensation. One may interpret this clause to mean that the State is given the option of choosing between establishing a compensation fund itself or facilitating the pursuit of such from other sources, e.g., provision of legal services for litigation against possessors of the property, etc. 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. Thus, even though just reparation may include restitution, it may well be that the State would opt for one of the other categories which would not directly address the land issue. The all-inclusive nature of the standard may prove to be its weakness in practice.

The suggested standard is “appropriate compensation or another form of just reparation.” The problem with this phrase is that appropriate compensation may not necessarily amount to full restitution of the lost property. This would protect the State from falling into bankruptcy on account of restitution claims by IDPs. In other words, under a restitution standard, IDPs would have the right to be restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred . . .” If an IDP is given monetary compensation or symbolic reparation, such as the publication of a memoir, the erection of a commemorative statue, etc., he may still be landless. In addition, it may appear that the State would be upholding the displacement by not pursuing restoration of IDP land rights.

Commenting on this issue, Simon Bagshaw concedes problems with cash compensation:

“For example in the case of cash compensation there will likely be difficulties in determining what constitutes an equitable sum. Compensation may also be seen as a means of legitimising ethnic cleansing and other human rights violations. Moreover, the payment of cash compensation may only serve to compound the situation of those displaced. Throwing money at displaced persons whose livelihoods are dependent on access to land, such as farmers and pastoralists, will not necessarily solve their problems in the same way as would allocation of equivalent land elsewhere in the region or country. It is with this in mind that Principle 29 (2) stipulates that when restitution is not possible the authorities will assist the displaced in obtaining “appropriate compensation or another form of just reparation(emphasis added).”²⁷¹

In this author’s opinion, it would have preferable to utilize the restitution standard if that is what is regarded as the optimum remedy. The adjectives “appropriate” and “just” may fall short of restitution in practice.

The problem is that without emphasizing restitution, those who pursued counter-agrarian reform strategies or ethnic cleansing policies may be de facto rewarded for their nefarious efforts. Instead of abandoning the pursuit of the right to restitution to be impracticable, one should focus on the creation of effective measures to prosecute those who have wrongfully appropriated themselves of property and implement domestic legislation to recognize the decisions of international bodies such as the Inter-American Court of Human Rights and Human Rights Committee.²⁷² In my opinion, given the absence of the right to

²⁷¹ Simon Bagshaw, “Property Restitution and the Development of a Normative Framework for the Internally Displaced.” 19 (3) REFUGEE SURVEY QUARTERLY, 207, 214-215 (Oxford University 2000). Scott Leckie advocates the use of alternative housing or land, housing credits, bonds, vouchers, subsidies, tax reductions, etc. instead of cash. See Scott Leckie, “Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice”, in 19 (3) REFUGEE SURVEY QUARTERLY, 5, 60 (2000).

²⁷² Frelick recommends the establishment of specific criteria for displaced persons to receive “protection and solutions” assistance as opposed to humanitarian aid:

restitution from the principal human rights instruments, the breadth of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law, as well as the inadequacies and divergences between the ILA Declaration of Principles on Internally Displaced Persons and the Guiding Principles on Internal Displacement, it would be advisable to adopt a clear restitution standard within a new hard law instrument applicable to IDPs. At present, IDPs have a vague “expectation of a right” to some form of compensation rather than an actual right to restitution, thus the potential for enforcement is actually weak.²⁷³

“ . . . that the displaced persons in question are not in danger of falling victim to armed conflict or to human rights abuse by their own governments or by paramilitary groups that their governments are unable or unwilling to control, and that they are not in danger of being forcibly returned to places where they would be harmed”, supra note 150 at 39.

²⁷³ The value of recognizing a right to restitution is not only valuable for reintegrating displaced persons, but also for preventing further displacement crises. See Lee, Luke T., “The Declaration of Principles of International Law on Compensation to Refugees: Its Significance and Implications”, in 6 (1) JOURNAL OF REFUGEE STUDIES, 66 (1993). However, States may be reluctant to take on substantial economic liabilities. As noted by Lutz, a government may not claim lack of responsibility for human rights violations attributable to state:

“The fact that those running a government were not in power when the human rights abuses occurred does not lessen that government’s obligation to ensure adequate compensation for former victims. An internal change of government does not have any bearing on a state’s international law obligations. These obligations require states to protect human rights and to provide redress when abuses of power result in human rights violations. That duty passes to the new government just as do all other bilateral and multilateral legal obligations. Of course it is entirely appropriate for a new government to indemnify itself by fining or confiscating the wealth and property of the individuals who were previously involved in persecution to help fund the compensation program. Even states faced with severe economic problems must honour their duty to provide redress to former victims of human rights abuses. A state’s shortage of hard currency may, as a practical matter, delay some portion of compensation payments, but it should not be an excuse for failure to review claims or award appropriate damages.” See Ellen L. Lutz supra note 259 at 206.

Victor M. Rodriguez Rescia states: “The only way to exempt the State from responsibility (for the actions of its agents in the exercise of its function) is if it has not supported or tolerated the transgression, or if the act occurred in spite of its preventive actions, it has done everything in its power to assure that the illicit act will not remain unpunished, and in the case that it is processed, adequate reparation is made to the victims or their families for the harm suffered. The State’s objective responsibility may stretch beyond the acts of its agents. It is possible that the state apparatus act in such a manner so that the violation remains unpunished or the victim’s rights are not upheld by having tolerated that individuals or groups act freely or unpunished in detriment of the human rights recognized in the (American) Convention.” Victor M. Rodriguez Recia, “Las reparaciones en el sistema interamericano de proteccion de derechos humanos”, in 23 REVISTA INTERAMERICANA DE DERECHOS HUMANOS 129,133 (1996). This indicates the importance of assisting States to develop a strong, independent judiciary to assess whether properties have been attained through fraud, coercion, or violence, thereby rendering them subject to takeover by the State. This system is absolutely dependent on the establishment of peace prior to implementation. Colombia provides an example in which although an expropriation law was passed in order to attain lands from narco-traffickers and distribute them to the displaced, this has thus far failed in practice. Resettled displaced persons were subjected to attacks by paramilitaries in the region. In the absence of a peace accord, attempts to provide land restitution may prove fatal to the beneficiaries. The international community may also finance a compensation fund, although the precedent of the Property Commission in Bosnia reveals a lack of interest among potential donor states which translates into a lack of funds for the commission, thus limiting down its services.

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. 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

Of equal importance, they are lacking a right to participation in the determination of the form of restitution, rather than play a principle role in the design of solutions to their situation; they remain subject to the judgment and will of State actors. The drafters of the Guiding Principles, and perhaps the ILA Declaration of Principles, hope that these instruments will eventually evolve into hard law through customary practice, however this is likely to surpass the amount of time it would have taken to elaborate a hard law instrument and it is possible to draft a stronger standard. In the next section, we assess the rights to property and restitution as pertaining indigenous people- the norms reveal more solid drafting which may positively influence the interpretation of IDP rights as well.

4.3. The Rights to Property & Restitution for Indigenous People within Human Rights

4.3.1. The Right to Property for Indigenous People

Indigenous people, as well as IDPs, are entitled to the relevant guarantees contained in the human rights and humanitarian instruments listed previously and most effectively interpreted by the Inter-American Court of Human Rights to protect indigenous customary rights in the *Awas Tingi* case.²⁷⁴ It provides a ground-breaking precedent of direct relevance and empowerment potential for indigenous people, IDPs, and other marginalized groups seeking recognition of customary rights, thus I address the case in this section, as well as in the Inter-American section. In my opinion, because of the special nature of property, in particular in rural societies, cross-referencing is necessary in order to attain a full understanding of rights both in theory and in context. The Court emphasized the fact that Article 21 does not refer to private property, indeed the preparatory work reveals that this was deliberately discarded. It declared that “the terms of an international human rights treaties have an autonomous meaning for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to

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. . .” Thus, this expands the duty to uphold human rights to private individuals as well as States. See 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).

²⁷⁴ *Awas Tingi Case*, I/A Court H.R. Series C No. 79 (31 August 2001).

current living conditions.” Basing its duty under Article 29 (b) of the American Convention that prohibits restrictive interpretation of rights, the Court held that Article 21 of the Convention “protects the right to property in a sense which includes, among others the rights of members of indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua”. Given that the Guatemalan Constitution also contains provisions calling for respect of indigenous and collective property, this precedent is directly relevant. The Court conducted a cross-referencing analysis with respect to linking an indigenous group’s right to enjoyment of property under Article 21 as being linked to their culture, integrity, spirituality, etc. similar to the analysis of the CCPR in the Lovelace case and linked to its own “transcendental” jurisprudence relating to human identity and experience from a collective and cross-generational perspective:

*“Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that the ownership of the land is not centered on an individual but rather on the group and its community. Indigenous people, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”*²⁷⁵

The failure of the State to provide title to their land was not only a violation of Article 21, but also a violation of the non-discrimination guarantee in Article 1 (1) and duty of State to adopt domestic measures (e.g. legislative acts) to give effect to the rights contained within the Convention (Article 2). Hence, the Court espoused an evolutionary and contextual approach with respect to interpreting this right, thus permitting the elaboration of standard which is empowering to indigenous people because it reflects their own definition of property.

Within the ILO Convention No. 169, Article 4 (1), states “Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.” With respect to land rights, Article 14 highlights the importance of recognizing the legitimacy of customary ownership:

- 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*
- 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*

²⁷⁵ Id. at para. 149.

The first problem with this standard is that it does not guarantee full title to indigenous people; the State may grant only use or possession rights to indigenous people if it deems appropriate.²⁷⁶ The recognition of traditional occupation is particularly convoluted in the case of Guatemala, where there has been a great reluctance on the part of the government in this area. Due to the war and displacement, many communities were dispersed and returned to property which was occupied by others. Hence, the claim of traditional occupation is meddled by the period of absence, as well as the claims of persons asserting more recent occupation rights or even formal titles.

The ILO standard is understood to permit only recent expulsions, more long-standing claims may be considered illegitimate. Because the standard does not require exclusive occupation, indigenous people may claim protection, many engage in shifting cultivation or use the land for hunting, grazing, etc. without living there. The link of property to subsistence and traditional activities is particularly important. For most peasants, access to land is necessary for survival itself; this provision is explicit in drawing the connection. The State is given the duty of protecting and identifying indigenous land; this would imply measurement, demarcation, and protection from alienation. Protection must be effective in practice, as supported by the Inter-American Court of Human Rights in the *Awasi Tingi* Case discussed previously. Within Guatemala, measurement, demarcation, and registry of indigenous land remains stagnated.

Of interest is that the ILO instrument directly addresses abuse by non-state actors. Article 17 sets forth that non-indigenous people shall be prevented from taking advantage of indigenous people's customs or lack of understanding of the law to secure ownership, possession or use of their land. A common problem in Guatemala is the conflicting documents pertaining to property. There has been a rush by indigenous peasants to register their property in order to prevent infringement by outsiders (see Part III on indigenous law). Unfortunately, the process of formalization sometimes results in their dispossession. Communities may assert title granted as far back as the colonial era, or claim municipal titles issued by their mayors, but the formal courts and executive land agencies often consider such titles outdated or irrelevant. The high levels of illiteracy and lack of legal knowledge among indigenous people leave them vulnerable to manipulation from outsiders. They may sign

²⁷⁶ See Manuela Tomei & Lee Swepston, *A Guide to ILO Convention No. 169 on Indigenous and Tribal Peoples* (ILO July 1995).

away rights to land under mistaken belief that that they are processing claims for legalization of property.

Article 18 places a duty on the state to penalize intruders of indigenous lands and prevent such offenses. Hence rather than be passive when faced with infringement by others, the State must assist indigenous people to defend the land against dispossessors. At present, the Guatemalan State does little to protect victims of forced eviction, in part due to priority placed on other crimes, and in part due to the power of the Non-State actors conducting the forced eviction (see Part III on Forced Evictions). The phrasing of this standard suggests the elaboration of mechanism to promote response by the State prior to dispossession, as well as after such action. Were IDPs guaranteed similar provision, it would serve to prevent displacement as well as resolve it.

The San Jose Declaration on Refugees and Displaced Persons, Conclusion 21 calls upon states to take in to account the links which uprooted indigenous people maintain with their lands without further elaboration. The UN Draft Declaration on Indigenous Rights, Article 26, reiterates the reference to traditional ownership:

“Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with alienation of or encroachment upon these rights.”¹

This is an expansive definition of property which includes the totality of the environment traditionally owned, occupied or used by indigenous people as understood by their own customs. It is an empowering standards because it requires definition of what constitutes the property by the indigenous people themselves according to their own norms. The State is given the duty to prevent infringement of the rights

The Draft American Declaration on Indigenous Rights is more complete, as it literally recognizes historic title in Article XVIII, legitimises colonial titles, and places a duty on the state to prevent alienation of such property. Of interest, is that this instrument contains an important guarantee relating to “party participation”: alteration of title requires mutual consent and equality between the indigenous people and the State in terms of knowledge and understanding of the value of the property:

1. *Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use, and enjoyment of territories and property.*
2. *Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.*
3. *i) Subject to 3ii, where property and user rights of indigenous peoples arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.*
ii) Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature and attributes of such property.

The American Draft also places a duty on the State to officially recognize indigenous land and restrict on the freedom of movement of non-indigenous people with respect indigenous property, Section (8):

“The states shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them. The states shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use.”

As mentioned previously, the U.N. Guiding Principles on Internal Displacement, Principle 9, contains a provision which prohibits displacement of “indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands”, also linking freedom of movement (the right *not* to be displaced) with the right to property.

Hence, the right to property as pertaining indigenous peoples appears to enjoy a common understanding within the ILO Convention as well as the Draft UN & American instruments with respect to recognition of customary use of land and the establishment of a duty upon the State to protect this right against violation by non-state actors. One may infer that the instruments would support a call upon the State to resolve conflicts between claims based on freedom of movement, in this case potentially asserted by non-indigenous persons, and claims based on the right to property as espoused by indigenous people in favour of the latter. Thus, in contrast to non-indigenous IDPs, indigenous IDPs’ right to property is more firmly protected by the standard within the ILO Convention No. 169 although there is no guarantee of recognition of full title- thus neither group is guaranteed a right of ownership of land. In addition, as discussed in Part IV and within this Part (see review of CERD & CESC), it is difficult to enforce the ILO standard in practice, its hard law status does not guarantee greater success than the Guiding Principles. The primary benefit of the ILO standard is that

creates a legal basis for holding the state accountable and it is well-drafted: for example, one appreciates empowering elements contained within the call for recognition of legal pluralism, specifically with respect to customary rights to property. This would require definition by indigenous people of the relevant norms and practices and recognition by the State of their validity. Finally, the Draft American Declaration's focus on "knowledge and understanding of the value of the property" on the part of indigenous people as condition for alteration of title is also relevant to IDPs who are often coerced or manipulated into renouncing titles to property by state or non-state actors. Such actions must be identified as being direct violations of IDPs' right to property. The participation of IDPs in property exchanges must be premised on equality in terms of knowledge, often this is not the case as the transfer of ownership is a cause or consequence of forced displacement. These formulations provide models for the drafting a new property standard for IDPs in a future hard law instrument.

4.3.2. The Right to Restitution for Indigenous People

One of the most pressing problems regarding restitution rights as pertaining to indigenous peoples is that in practice, the right of monetary compensation is often recognized over the right of recovery of land, in spite of international instruments citing preference for restitution of land.²⁷⁷ However, given that many indigenous people claim to have a spiritual connection to their land, restitution is preferred over compensation.

ILO Convention No. 169, Article 16 prohibits the removal of indigenous people from their land, unless deemed necessary as an exceptional measure and with the free, informed consent of the people, or pursuant to legal procedures and norms respecting the right of representation of the people concerned. Section 4, contains a solid restitution definition:

*"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."*²⁷⁸

²⁷⁷ See Daes, Erica-Irene, "Preliminary Working Paper on Indigenous People and their Relationship to Land", para. 45, June 20 1997 (UN Doc. E/CN.4/Sub. 2/1997/17).

²⁷⁸ Section (5) notes that "Persons thus relocated shall be fully compensated for any resulting loss or injury. Article 15 (2) contains a "fair compensation" standard for damages linked to exploration of sub-surface resources or other resources on their lands.

This is a high standard, as indigenous people are to be provided with lands of equal quality and legal status to that lost. However, it is not clear as to who determines whether return is possible or what criteria would found such conclusion. Indigenous people are disempowered because they may be denied power of decision of the viability of return. In comparison, the Guiding Principles on Internal Displacement call for participation by IDPs in such decision-making, but the language is hortatory, not absolute:

Principle 28 (2) “Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”

The ILA Declaration emphasizes the right of the IDP and refers to the concept of “free return” implying independence in action, although the clause placing a condition on such action requires the State not to engage in unsafe returns but also leaves open the possibility for assessment by the State which is contrary to that held by IDPs:

Article 5: “1. All internally displaced persons have the right to return to their homes or places of habitual residence freely and insecurity and dignity, as soon as conditions giving rise to their evacuation have ceased.”

In contrast the Guiding Principles place emphasis on the duty of the State to create conditions for voluntary return or resettlement in safety and dignity, although there is a less stringent standard pertaining to reintegration: “shall endeavor to facilitate reintegration”:

Principle 28: “1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.”

The Annex to this Part contains a review of all the instruments pertaining to return. In like manner, as mentioned previously, IDPs are denied decision control as pertaining determination of the impossibility of recovery of property, and are further weakened because they move directly to a less stringent “just reparation” as opposed to full restitution. The ILO sets forth that monetary compensation is presented as an option to be elected by the indigenous people themselves, not the State, as in the case of the non-indigenous IDPs under the UN Guiding Principles on Internal Displacement. Hence, indigenous people formally have greater control over the form of restitution. However, in practice, corruption, discrimination, and misinformation may render this right ineffective.

Indigenous people are guaranteed the right of participation in the use of natural resources tied to land, however with respect to sub-soil natural resources linked to land, such as minerals or oil, Article 15 sets forth that indigenous people are only given a qualified right

to participate in the benefits of such activities “wherever possible”, receiving “fair compensation” (as opposed to full compensation) for damages arising from exploration or exploitation of such. The State may determine that indigenous people are simply not entitled to a share of profits or other gain. IDPs have no provisions addressing this issue, thus there is a gap because many peasants are displaced precisely due to development interests pursuing exploration/exploitation.

The UN Draft Declaration on Indigenous Rights reiterates the preference for restitution of land, but leaves open the possibility of alternative compensation; Article 27, notes:

“Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size, and legal status.”

Indigenous people are formally granted the right to choose between payment in land or money in this instrument as well. Use of their property must be based on their “free and informed consent”, thereby upholding the principle of equal participation. However, compensation is “just and fair” rather than full.

Of interest, the Committee on Racial Discrimination issued General Recommendation XXIII on Indigenous Peoples (18/08/97) which sets forth that restitution of land must be “factually impracticable” in order to favour compensation over restitution:

“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”

The Draft American Declaration on Indigenous Rights, Article XVIII (6) also calls for compensation of land of similar or better quality:

“... compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right of return if the causes that gave rise to the displacement cease to exist.”

However, section (7) is curious in that it states that compensation based on international law standards is acceptable should restitution be eliminated as an option:

“Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or to otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favourable than the standard of international law.”

This clause is rather open, thus it may grant states leeway to declare impossibility of restitution and issue monetary payments instead. The control of choice is not clearly rendered to the indigenous people.

It appears that indigenous people have stronger formal protection than non-indigenous IDPs as pertaining restitution of property under ILO Convention No. 169. As opposed to IDPs under the Guiding Principles, indigenous people explicitly retain a right to direct participation in the choice of reparation under the ILO Convention No. 169 and the UN Draft Declaration (participation must be free and informed, as reiterated in CERD Recommendation XXIII), but not clearly within the Inter-American Draft Declaration. Indigenous rights appear to be influencing the development of IDP rights: The Working Paper on “The Return of Refugees’ or Displaced Persons’ Property” submitted to the Sub-Commission on Human Rights by Mr. Paulo Sergio Pinheiro offers the following conclusion based on a CERD General Recommendation XXIII on the restitution of property to indigenous people:

“The overwhelming consensus regarding the remedies of restitution and compensation is that compensation should not be seen as an alternative to restitution and should only be used when restitution is not factually possible or when the injured party knowingly and voluntarily accepts compensation in lieu of restitution.”²⁷⁹

Hence, in terms of empowering IDPs to play a role, under guarantee of equal participation, in the selection of form of compensation, commentators are relying on the instruments elaborated for indigenous people. This confirms the need to consider the design of a new instrument for IDPs, given that not all IDPs will fall under the indigenous protection category.

²⁷⁹ U.N. Sub-Commission on Human Rights, Working Paper submitted by Mr. Paulo Sergio Pinheiro pursuant to Sub-Commission decision 2001/122 on “The Return of Refugees’ or Displaced Persons’ Property”, E/CN.4/Sub.2/2002/17, para 57-59 (12 June 2002), citing the Committee on Racial Discrimination, General Recommendation XXIII on Indigenous Peoples (18/08/97).

4.4. Is Restitution Enough?

“Restitutio in integrum would be appropriate in facilitating the right of return and integration of those who wish to return. It would include payment of compensation to the victims for injury, loss, damage, or expropriation of property rights upon flight . . . where return to places of previous occupation may not be possible, restitution may apply to provide resettlement and make good the loss of land use, property rights and rights of land ownership, and access to resources based on such land. It would also ensure the acquisition of lands of quality suitable for the needs, future development of a dislocated population, and of legal status at least equal to that of the lands of previous occupation.”

Chaloka Beyani²⁸⁰

The problem presented in Beyani’s analysis is that he advocates the provision of land having at minimum the same legal status as minimum occupation. In countries in which the majority of rural peasants have no more than de facto possession of land with possible claims of adverse possession, customary possession, or historic title, in order to properly address the root causes of the conflict which led to displacement, returning displaced persons may require more than a mere return to the status quo. Registration initiatives and judicial recognition of possession rights would be essential elements of return. He states that IDPs should be able to choose the form of compensation, and that compensation should be paid regardless of whether the relocation was forced, or consent, temporary or permanent.²⁸¹

The discussion as to what standard of compensation is appropriate has not resulted in a clear answer. Benvenisti & Zamir favor an “adequate compensation” standard over full compensation in cases of mass relocation:

“The current value of the property may be influenced by investments, both public and private, that may have increased or decreased its value. At the same time, the value of the property at the time of abandonment could be difficult to ascertain. Moreover, the payment of full compensation could drain the resources of the state and create inability during a delicate transitional period.”²⁸²

They define adequate compensation as a future-oriented remedy which takes into account the rehabilitation needs of displaced persons. Lump-sum compensation is presented as the best mode of compensation. The first option is the setting aside of funds by the state to be distributed to the displaced as needed, rather than based on their prior individual claims, such

²⁸⁰ Chaloka Beyani, “State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law”, in INTERNATIONAL JOURNAL OF REFUGEE LAW: Special Issue OAU/UNHCR Commemorative Symposium on Refugees and the Problems of Forced Population Displacements in Africa Addis Ababa, 8-10 September 1994, 130, 145-146 (OAU/UNHCR Summer 1995).

²⁸¹ Chaloka Beyani, “Internally Displaced Persons in International Law”, 56 (Copy located in UNHCR CDR July 1995).

²⁸² Benvenisti, Eyal & Zamir, Eyal, “Private Claims to Property Rights in the Future Israeli-Palestinian Settlement”, in 89 AMERICAN JOURNAL OF INTERNATIONAL LAW, 295, 331 (1995).

as the Refugees and Displaced Property Fund established in Annex 7 of the Dayton Peace Accords.²⁸³ The Guatemalan Government has embraced a policy of socio-economic assistance to collective groupings, rather than individual claims for restitution (see Part III).²⁸⁴ It is important that to note in Guatemala property rights are often difficult to ascertain given, lack of formal registration, double-titling, and corruption. A restitution mechanism based on individual rights may be difficult to implement if based on formal title evidence. However, if alternative forms of evidence, such as oral corroboration, are permitted, it may be feasible.

4.5 The Right to Remedy

When analysing claims of redress due to a violation of fundamental rights, it is necessary to explore which procedural rights have been confirmed by international law and which procedures are available within the international entities themselves. It should be noted that within the UN, lack of individual standing has hindered redress of violations by its organizations. However, the right to remedy is found within Article 8 of the UN Declaration of Human Rights:

“The right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution of law.”

This highlights the view that individuals should seek remedies for violation of fundamental national norms within their national juridical systems. One must examine the national constitution to understand whether the right to property is deemed to be fundamental or not; in Guatemala the Constitution contains provisions guaranteeing the right to private property (Article 39), cooperative property rights (Article 119), and indigenous property rights (Article 67) thus one may assume that they are considered to be fundamental rights (this is further are discussed infra Part III).²⁸⁵

Article 8 of the UN Declaration is not preventive in nature, given that it addresses remedies for past acts rather than protection from possible future infringement. In addition,

²⁸³ Article XIV of Annex 7 of the Dayton Peace Accords, “The Fund shall be replenished through the purchase, sale, lease, and mortgage of real property which is the subject of claims before the Commission. It may also be replenished by direct payments from the Parties, or from contributions by States or international or non-governmental organizations.”

²⁸⁴ The Land Fund’s guidelines require peasants to organize into committees in order to request land. Similarly land credit subsidy rates are set per family, rather than per individual.

²⁸⁵ The Guatemalan Constitution guarantees the right to remedy in Article 29, i.e. free access to courts, state agencies, and offices when claiming a rights as well as right of defense in Article 12, i.e. opportunity to be heard and trial before a judge when loss of one’s rights is at stake.

there is no explicit guarantee of free legal aid, cost waivers, etc. to ensure access to remedy. Göran Melander has noted that an important factor in adopting this article was that there was no other article in the declaration that could be invoked by an individual against a state if his rights had been violated.²⁸⁶ This article was proposed by Latin American delegates in order to reflect regional jurisprudence. Within Latin America, exhaustion of domestic remedies was viewed as a means to prevent abuses of diplomatic channels and avoiding needless politicisation of legal issues.²⁸⁷ However, the region has also suffered a long history of corruption and lack of accessibility to courts. The Inter-American Court has held that it will waive the requirement of exhaustion of domestic remedies when it has been shown that this was rendered impossible by the State itself.²⁸⁸

If we refer to international norms, the International Covenant on Civil and Political Rights, Article 2, holds that states must effectuate the provisions of the Covenant through domestic legislation and provided an effective remedy for violations and hearing “by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State . . .” Thus it refers to the rights under the Covenant rather than national norms. This also supports the principle of exhaustion of domestic remedies, but extends the concept of remedies to include non-judicial mechanisms including executive and legislative institutions.

In addition, at the international level the enforcement mechanism of the Covenant consists of a reporting mechanism to the Human Rights Committee every five years, and an inter-state complaint mechanism (subject to prior exhaustion of domestic remedies and negotiation) that includes mediation, and reference to an ad-hoc Conciliation Commission. The Report by the Commission is non-binding, with no legal obligation or award. However, it can result in political pressure. The 1966 Optional Protocol to the Covenant provides for individual complaints to the Human Rights Committee, however this is also subject to exhaustion of domestic remedies. Guatemala has recently ratified it. It should be noted that the Committee is not a judicial organ, however, it can declare that a violation has occurred if a State does not provide evidence to the contrary.²⁸⁹

²⁸⁶ See Melander, Göran, “Article 8” in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY, Asbjørn Eide, Scandinavian Press, 142 (1992).

²⁸⁷ This has commonly been referred to as “The Calvo Doctrine”, after its founder.

²⁸⁸ Advisory Opinion of August 10, 1990 OC-11/90, Exceptions to the Exhaustion of Domestic Remedies in Cases of Indigence or Inability to Obtain Legal Representation because of Generalized Fear within the Legal Community (1991) 12 HRLJ 20, holding that lack of access to court on account of indigence is a lack of equal protection under Article 8 of the American Convention.

²⁸⁹ Blair v. Uruguay, 1 Selected Decisions HRC 109, 1982.

With respect to enforcement of the socio-economic rights, the International Covenant on Economic, Social and Cultural Rights has a similar reporting mechanism to the Committee on Economic, Social and Cultural Rights, yet it does not have a right of individual petition. There is a draft Optional Protocol that would provide this.

The International Convention on Elimination of All Forms of Racial Discrimination, Article 6, contains a guarantee that states shall assure effective protection and remedies through the competent national tribunals and other state institutions, “against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . .” This echoes the CCPR and it also has a reporting mechanism involving negotiation, and referral to an ad hoc Conciliation Commission that issues non-binding findings. Finally there is an optional system of individual complaint that also issues non-binding awards. The 1951 Convention on the Status of Refugees, Article 16, guarantees free access to courts, as well as equal treatment regarding access to legal aid.

I examine the reporting mechanisms pertaining to CCPR, CESC, and CERD, as well as the optional protocol to the CCPR further in this chapter to assess the impact on IDP claims to property.

At the regional level, the right to remedy is understood as being set forth in Article 13 of the European Convention on Human Rights (referring to remedy for infringement of rights contained within the Convention itself), Article 7 of the African Charter on Human and People’s Rights (right to have cause heard, right to appeal to competent national organs for acts violating fundamental rights guaranteed in conventions, laws, regulations and customs in force, Art. 1 also calls for legislative measure to give effect to the Charter’s rights), and the American Convention on Human Rights, under Article 8 & Article 25:

Article 8 identifies the tribunal established pursuant to the law as the appropriate mechanism for remedy for determination of any rights and obligations with a guarantee of a hearing which respects procedural justice norms and is conducted without excessive delay:

“1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusations of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.”

Article 25 also identifies the court as the remedial institution and calls for simplicity and promptness. However, it specifically highlights *fundamental* rights either under national law or the Convention itself as being subject of remedy. Of great importance to IDPs seeking to protest dispossession of property on account of a State policy, i.e. military action or development project, the standard permits remedy against acts committed by State officials.

However, like the UDHR, it is not preventive given that it does not seek to inhibit future violations. In addition, it directly calls upon the State to ensure enforcement of decisions, in order to realize the right to remedy in practice rather than merely on paper:

“1. Everyone has the right to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties,

2. The States Parties undertake:

a) to ensure that any persons claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state:

b) to develop the possibilities of judicial remedy: and

c) to ensure that the competent authorities shall enforce such remedies when granted.”

The American Declaration, Article XVIII also includes recognition of the right to remedy for any legal rights, but also calls for a simple, brief procedure where violations affect fundamental constitutional rights. This latter clause refers to the amparo proceeding (see infra Part III), which as utilized at the national level does expand the scope of protection to address future threat of violation, thereby going beyond the standard contained at the international level:

“Every persons may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”

Both of these standards are cited as supporting the elaboration of amparo mechanisms within Latin America (see infra section on Amparos). The Inter-American Court has noted that Article 25 is the “one of the basic pillars, not only of the American Convention, but also of the Rule of Law in a democratic society in the sense of the Convention.”²⁹⁰ It described this provision as being “intimately linked to the general obligation of article 1.1. of the American Convention”, by ascribing protection functions to the internal law of the States Parties.²⁹¹ Domestic procedures must be effective in order to give life to the Convention on

²⁹⁰ Bamaca Velasquez case, Judgment, I/A Court H.R. Series Cno. 70 para 191 (25 November 2000) See also Blake Case, Reparations, I/A Court H.R., Series C No. 48, para. 63 (22 January 1999) citing Castillo Paez Case, Judgment, I/A Court H.R., Series C No. 34, paras. 82-83 (3 November 1997), paras. 82-83, Suarez Rosero Case, I/A Court H.R., Series C No. 34, para. 65 (12 November 1997), Paniagua Morales Case, I/A Court H.R., Series C No. 37, para 164 (8 March 1998), Loayza Tamayo Case, Reparations I/A Court H.R., Series C. No. 42 Reparations, para. 169 (27 November 1998), and Castillo Paez Case, Reparations, I/A Court H.R., Series C No.34 para. 106 (3 November 1997).

²⁹¹ Id.

the ground.²⁹² The State may be held liable for failure to prevent or respond to violations by private or public actors.²⁹³

The Court has defined the duties of State as pertaining prevention, investigation, prosecution, and reparation:

“The State has a legal duty to take reasonable steps to prevent human rights violations, and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment, and to ensure the victim adequate compensation.

If the State apparatus acts in such a way that the violation goes unpunished, and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction.”²⁹⁴

The Court has stated that exhaustion of domestic remedies is not required if rendered impossible due to indigence, fear of the lawyers to represent him, or inability (excessive delay, non-effectiveness, etc.).²⁹⁵ *Amparo* and *habeus corpus* mechanisms may not be suspended. Domestic remedies and due process must always be made available.²⁹⁶ Regarding due guarantees under Article 8 of the Convention, the Court held in Advisory Opinion No. 11, para. 28 that legal representation may be required in non-criminal cases should the facts reveal it necessary to attain justice.²⁹⁷

Hence States are being held accountable for the state of impunity within their territory. Failure to provide effective judicial remedy results in responsibility of the State as it is considered to have in turn violated the Convention.²⁹⁸ The Court held:

“ The absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.”²⁹⁹

²⁹² Judicial Guarantees in States of Emergency, Advisory Opinion No. 9, I/A Court HR Series A No. 9 (1987) para. 24, cited in Davidson, Scott, “The Civil and Political Rights Protected in the Inter-American Human Rights System in DAVID HARRIS & STEPHEN LIVINGSTONE (Eds.), THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 287 (Clarendon Press 1998).

²⁹³ Velasquez Case, Judgment, I/A Court H.R. Series C. No. 4, para. 172 (29 July 1988).

²⁹⁴ Id. At paras. 174 & 76.

²⁹⁵ Advisory Opinion on Exceptions to the Exhaustion of Domestic Remedies, I/A Court H. R. Series A No. 11 (10 August 1990).

²⁹⁶ Advisory Opinion on Judicial Guarantees in States of Emergency, I/A Court H. R. Series A No. 9 (6 October 1987) and Advisory Opinion on Habeus Corpus in Emergency Situations, I/A Court H.R. Series A. No 8 (30 January 1987).

²⁹⁷ Davidson supra note 293, 213,247.

²⁹⁸ Case 11.006 (Peru), IACHR Annual Report 1994, 71, in Davidson in Harris 287.

²⁹⁹ Inter American Court of Human Rights OC-9/87, para. 24

In short, the resort to international tribunals appears to be only way to attain response for human rights victims in societies with widespread impunity problems, unfortunately the amount of victims pursuing these avenues is miniscule in comparison with the actual need.³⁰⁰

The Inter-American Human Rights Commission has also held that States which fail to provide effective judicial recourse in the event of a human rights violation incur international responsibility.³⁰¹ The Commission has held that there is a violation of article 25 when a court refuses to review a case when there are reasonable grounds to do so.³⁰² Finally, the Commission and the Court have held that amnesty laws deny victims the chance to attain a judicial remedy.³⁰³ The Commission considered the effects of the El Salvadoran “General Amnesty Law for the Consolidation of Peace” Decree 486 (20 March 1993) which removed possibility of legal sanction against (penal and civil) and attainment of compensation from persons accused of human rights violations from 1982-1992 thus violating Article 25 and Article 8 of the Convention. The Commission has stated that “The right to due compensation is also intimately linked to the right of judicial protection enshrined in Article 25 of the Convention.”³⁰⁴ It stated that the Amnesty law effectively prevented the identification, prosecution and punishment of offenders and denied civil compensation to victims. The Commission notes that reparation is not mere monetary compensation, but also requires truth.³⁰⁵ It called upon the State to permit the victims to exercise their rights, to investigate, prosecute, punish offenders, and provide just compensation to the victims.³⁰⁶ It should be noted that Guatemala’s Law of National Reconciliation removes penal responsibility for crimes, apart from genocide, torture, forced disappearances or acts not reasonably related to the war. Prior amnesty laws granting amnesty to the military for political crimes committed 1982-86 remain effective. However, should occupation of the land be ongoing, than it may be argued that the crime has not ceased.

The standards contained within the regional instruments highlight characteristics of simplicity, brevity, and effectiveness. Simplicity and brevity are of special importance to marginalized groups and individuals who may lack the resources and knowledge to participate in lengthy complex proceedings. Rather than miss work, incur debt, or participate in a convoluted process, victims may seek to avoid seeking remedy by the state. The regional

³⁰⁰ Theo Van Boven’s suggestion of class action suits is an idea which addresses this concern.

³⁰¹ Case 10.006 (Peru), Inter-American Commission on Human Rights, 1994 Annual Report 71 at 102.

³⁰² Inter-American Commission of Human Rights, Case 9260 (Jamaica) (1988)

³⁰³ Argentina Cases IACHR Annual Report 1992-3 and

³⁰⁴ IACHR, Annual Report 1998, Report No.1/99, Case 10.480 El Salvador 27 January 1999 para. 122.

³⁰⁵ Id at para. 154

³⁰⁶ Id. At Recommendations.

standards also emphasize the importance of non-recognition of immunity defences presented by state officials who violate fundamental rights, and the need for enforcement of such remedies. IDPs in particular would benefit from a standard which specifically dismisses state immunity defences, because very often forced displacement results in conjunction with a military action, development initiative, or other action resulting from a specific state policy.

As pertaining IDPs, the San Jose Declaration on Refugees and Displaced Persons, Conclusion 13 recommends “the full participation of affected populations . . . (including indigenous communities) . . . by encouraging the development of mechanisms which facilitate concerted action in the design and implementation of programmes aimed at resolving situations affecting refugees, returnees and displaced persons.” This is a standard which expands the concept of remedy to include mechanisms and policies beyond courts. It is an empowering standard which calls upon IDPs to actually have a voice in designing solution to their problems. Conclusion 16 calls for access to effective protection by the national authorities, thus this may imply access to a tribunal.

The U.N. Sub-Commission on Promotion and Protection of Human Rights, formerly Prevention of Discrimination and Protection of Minorities, issued Resolution 1998/26 which criticized the implementation of laws which violate property rights thus impeding the return and reintegration of refugees and internally displaced persons and urged:

“. . . all States to ensure the free and fair exercise of the right of return to one’s home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems.”³⁰⁷

The emphasis on dispute resolution in this resolution is one of the few examples of formal recognition of the importance of procedural mechanisms to implement and uphold substantive property rights of internally displaced persons. It contains a wide view of remedy, open to administrative or other proceedings, but requires them to be speedy. In addition, it refers to the principles of fairness and effectiveness in order to ensure due process rights and actual response.

In comparison, the United Nations Committee on Economic, Social and Cultural Rights adopted Comment No. 4 on the Right to Adequate Housing (1991) in which it set forth its view that remedies are needed ranging from injunctions, compensation to victims, complaints against public or private actors, and even class action suits:

³⁰⁷ U.N. Sub-Commission Resolution 1998/26 on “Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons”, adopted at the 35th meeting 26 August 1998.

“ . . . many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies . . . i.a. (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems, it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.”

This is a complete catalogue of the various forms of remedies which are necessary in contexts involving violation of property and housing rights. Guatemalan IDPs, as well as IDPs in general, would benefit from reference to the above-mentioned remedies with respect to their own situation due to the crisis of forced evictions, lack of access to housing or provision of sub-standard housing deprived of basic services (see *infra* Part III on forced evictions).

In contrast, the UN Guiding Principles on Internal Displacement, Principle 7 (f), is brief:

“The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.”

This provision recognizes the formal right to remedy leaving open the use of any institutional mechanism, such as administrative agencies, with right of review to a court at the secondary level. While this grants flexibility to the State to design different remedial mechanisms, it may result in delayed response by the courts to IDP problems which may need immediate action. Because courts are traditionally viewed as the institutions charged with protection of marginalized groups and individuals against abuse by the State or other social actors, there is a need to highlight IDP rights to direct access and relief. The role of the Colombian Constitutional Court in quickly responding to amparo claims based on infringement by official actors of IDPs' freedom of movement is an important example of the need for immediate, speedy recourse to the judiciary.

This standard does not address the impracticalities which may prevent the right from being implemented. Translation facilities, legal aid, cost waivers, etc. are all factors which are not often easily made accessible to IDPs. It is peculiar that an instrument which focused on placing duties on the State with regard to other rights should fail to do so with respect to this right. Noting the fact that land conflicts are the root cause of displacement crises in Guatemala, it is clear that provision of assistance in the legal arena is essential for reaching permanent resolution of violence and migration. Nor is there a reference to enforcement of

decisions by the court. Considering that this is the usually the main area of complication, it would be helpful to include such reference in a new instrument on IDPs.

The ILA Declaration of Principles of International Law on Internally Displaced Persons, Article 8, notes that

*“In the case of a Federal, non-unitary or divided State, internally displaced persons are entitled to the same treatment as is accorded to local permanent residents, particularly in respect to education, public health, housing, public relief, rationing, **access to the courts**, employment and social security.”*

This instrument appears to emphasize the role of the judiciary as the primary recourse mechanism but does not define the characteristics of speedy, prompt proceeding. Thus IDPs, may be subject to delayed response to their situation unless the legal system includes an amparo mechanism available to all residents (Even the amparo may fail to be responsive, see Part III). Alternative dispute resolution mechanisms would most probably be considered acceptable with respect to the Guiding Principles, but not necessarily with regard to the ILA norm unless the right to access the court was guaranteed in some form.³⁰⁸

Thus, there is variety among the different instruments with respect to mechanism to provide remedy, some instruments highlight courts, while others are open to administrative agencies or other institutions. The key concern appears to be that such remedy be effective, regardless of the mechanism utilized. In Parts III & IV as pertaining Guatemala, I examine both administrative agencies and courts to assess accessibility and responsiveness to marginalized groups. The Inter-American documents emphasize the need for speed and simplicity, two characteristics of fundamental importance to IDPs facing forced eviction threats. The document explicitly linking the right to remedy with the issue of IDP property disputes is U.N. Sub-Commission on Promotion and Protection of Human Rights’ Resolution 1998/26 while the most complete with respect to defining forms of remedies is the CESC’s Comment No. 4 on Housing Rights. Most disappointing is the Guiding Principles on Internal Displacement’s failure to identify the specific conditions to effectuate the right to remedy, as it had done with respect to other rights. Should a new binding instrument on internal displacement be adopted, it should contain more comprehensive standards regarding the right to remedy, both prohibiting de facto and de jure limitations on such right in order to guarantee full and fair participation, and highlight the need for speed, simplicity and enforcement. It

³⁰⁸ Right of recourse to courts, legal counsel/legal aid, effective remedies, and compensation have also been cited as an important concerns and included within guidelines for development-based displacement. Commission on Human Rights, Guidelines on International Events and Forced Evictions, Report of the Secretary General, E/CN.4/Sub.2/1995/13 para. 14 (17 July 1995); Commission on Human Rights, Expert Seminar on the Practice of Forced Evictions, E/CN.4/Sub.2/1997/7 (2 July 1997)

should also list the various forms of attaining appropriate remedy against private and public actors and incorporate of a call for non-recognition of state immunity defences.

4.6 The Right to Remedy for Indigenous People

The right to remedy is often unattainable for indigenous people, as well as IDPs, due to lack of access to courts on account of high costs of processing, far-away locations, or lack of translation facilities.³⁰⁹ Standards pertaining to indigenous people are more complete than those pertaining to IDPs, because they address two de facto problems impeding the right to remedy, i.e. language problems and conflict of norms and mechanisms. ILO Convention No. 169, Article 12, guarantees that:

“The peoples shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.”

The instrument requires legal proceedings, although it does not specifically identify courts as the only appropriate mechanism for dispute resolution. It explicitly calls for the provision of interpreters. It does not highlight the importance of legal aid, cost waivers, etc.

The provision of an effective dispute resolution system is supported by Article 14 sets forth that “adequate procedures shall be established within the national legal system to resolve land claims by the people concerned.” There is no establishment of a time limit for claims, hence indigenous people may enjoy greater opportunities for pursuit of remedies. In contrast, as discussed *infra* on cessation clause, IDPs are often given a time limit to file claims and thus often lose the chance of achieving restitution due to procedural conditions which are inappropriate given the context of forced displacement. Article 4 (2) reiterates the call for effective protection: “Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession”. Identification of land requires mapping and measurement, often this is impeded by resistance of persons who have usurped property or indigenous people themselves who fear diminishment of their territory. Effective protection implies response by the State upon violation by other actors.

³⁰⁹ Daes, Erica-Irene, “Preliminary Working Paper on Indigenous People and their Relationship to Land”, para. 42 (UN Doc. E/CN.4/Sub.2/1997/1).

Articles 6 and 15 fulfil the function of upholding the right of participation, by recognizing the duty of governments to consult indigenous peoples on legislative or administrative measures affecting them or the use of natural resources.³¹⁰ Article 7 also sets forth a right of decision, participation, and cooperation regarding development, although control is qualified “to the extent possible” thereby permitting limitation by the State:

“ . . . their priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”

The San Jose Declaration on Refugees and Displaced Persons, Conclusion 21, also calls for direct consultation of uprooted indigenous people and full participation in the planning of durable solutions. Unfortunately, my interviews with indigenous leaders indicated that their perception of “to consult” varied widely from that of the State and even international development organizations. Often, they felt that the State merely informed them of the policy without asking for either permission or feedback. This was reiterated by Armstrong Wiggins who noted that the problem may be a cultural one. He stated that when indigenous representatives listen, they tend to be silent. This silence is not meant to demonstrate agreement, as is often misinterpreted due to lack of immediate objection.³¹¹ The indigenous representatives will listen and then return to the community to discuss and debate the issues after the other party has left. The debate may take place in an informal manner while working, hunting, etc. and families conduct internal consultations. After an accord is reached within the community, the representatives seek to return to the outside party in order to offer a response. Wiggins states that at this point, the development institutions may have already concluded that the consultation was completed previously. Thus rather than guarantee active participation by indigenous people, they were propelled into passive roles with no control over the use of their territory. According to Juan Leon, of the Defensoria Maya, the Guatemalan State has never had a real consultation of the indigenous people. Leon describes a true consultation the following elements are present:

- a) *Parties think about what the other person has said.*
The key element is first to listen, then discuss.
- b) *According to the Mayan Cosmivision, all belong to the same level and this harmony should be maintained during negotiations*
- c) *Reach a Common Thought*

³¹⁰ Article 17 sets forth that non-indigenous people shall be prevented from taking advantage of indigenous people’s customs or lack of understanding of the law to secure ownership, possession or use of their land. Article 18 places a duty on the state to penalize intruders of indigenous lands and prevent such offenses.

³¹¹ Interview with Armstrong Wiggins, Indigenous Legal Resource Center, Washington D.C., 23 January 1998.

He criticizes efforts by international actors to decentralize their approach to consultation by relying on municipal mayors as representatives of communities, given that these local elites also engage in a process of imparting information rather than receiving input.

Of interest, a World Bank paper on consultation included a discussion of communal consensus as perceived by the Mayan population, defined as “the Word”:

“The Word is sacred because it results from consensus, discussion and analysis, and because it represents harmony and balance among the opinions of each and everybody. In the Mayan community there is no greater or smaller person, the voices of all join to express their ideas. The Word is sacred because it represents the effort of giving and taking, until the elements in which all agree are found. . .

Not only because of high illiteracy rates, but basically due to the cultural meaning and responsibilities implicit in the Word, the decision-making procedure of the Mayan people has this privileged instrument at its core.”³¹²

It is noted that the word is said in order to become an action.³¹³ Thus, oral statements may carry the same weight, if not more, for indigenous people as written accords do for non-indigenous persons. Hence the participation of indigenous people in dialogues will incorporate notions regarding the importance of listening to counter parties, reflecting on the offer tendered, and respecting the action of conversing as an end in itself. Conciliation may be protracted by respecting these traditions, but it is important to respect the values and traditions of the parties to a conflict in order to attain final resolution.

With respect to legal pluralism, recognition of customary norms and institutions is contained in Article 8 of ILO Convention No. 169, but it is limited in the sense that they are subordinate to fundamental national rights and human rights:

“1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. . .”

Herein lies the root of many disputes, an indigenous person or community may cite customary use of property against a non-indigenous person who asserts a formal title; should the indigenous dispute resolution mechanism fail to uphold the formal title, the latter alleges violation of his fundamental rights to property and due process, thereby seeking to overturn the judgment in the court (see Part III).³¹⁴

³¹² Juan Martinez & Ian Banonn, “Guatemala: Consultation for the Indigenous Development Plan” 3 (The World Bank June 1997).

³¹³ Id. at 3 footnotes 5 & 6.

³¹⁴ See Also Article 9:

If we turn to *lex ferenda*, the UN Draft Declaration on Indigenous Rights, Article 39, appears to be open to either judicial or non-judicial mechanisms for use in any dispute whatsoever with the State, as long as they are accessible and speedy. In addition, the State is expected to provide effective remedy for both individual and collective rights in general, without limiting application to either national or international law. Of interest is the characterization that the procedure be “mutually acceptable” thus indicating a right of participation by indigenous people in choice of remedy. In addition, the procedures must abide by norms of fairness. It also calls for recognition of legal pluralism by the State, both with respect to consideration of customary norms and procedures³¹⁵:

“Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous people concerned.”

Article 14 contains an important guarantee of translation.

“States shall take effective measures, whenever any right of indigenous people may be threatened, to ensure that this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”

The American Draft Declaration on Indigenous Rights is also open to use of a variety of mechanisms to ensure effective remedy, although it is interesting that it highlights the legislature, as some remedies may be contingent on legislation, e.g. land distribution.

Article II (3) :

“The States shall ensure for indigenous peoples the full exercise of all rights, and shall adopt in accordance with their constitutional processes such legislative or other measures as may be necessary to give effect to the rights recognized in this Declaration.”

“1. To the extent compatible with the legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offences committed by their members shall be respected. 2. Customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.”

³¹⁵ The Draft contains a separate reference to resolution of conflicts regarding treaties to be conducted at the international level, Article 36:

“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.”

It also contains a participation clause, calling for “full representation with dignity and equality before the law”, while also recognizing the need for legal pluralism and the provision of translation:

Article XVI :

- “1. Indigenous law shall be recognized as a part of the states’ legal system and of the framework in which the social and economic development of the states take place.*
- 2. Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.*
- 3. In the jurisdiction of any state, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language.”*

Article XVIII (4) calls for access to an effective legal framework specifically for the protection of property interests³¹⁶:

“Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.

In conclusion, indigenous people have the advantage of ILO Convention No. 169’s specific call for adequate procedures to address land claims, however, as is the case with IDPs, it is not clear what form of mechanism, e.g. court, administrative agency, etc. Each State is free to select a mechanism, as long as it is effective. With respect to the norm of consultation, it is intended to assure participation by indigenous people; however in practice it appears that it has not proved empowering due to disagreement as to what is consultation. The most intriguing standard addressing participation was contained within the American Draft Declaration, as it calls for “full representation with dignity and equality before the law.”

³¹⁶ As in the UN Draft, it contains a reference to the enforcement of international treaties and dispute resolution before “competent bodies” without clarification:

Article XXII

“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and constructive arrangements, that may have been concluded with states or their successors, as well as historical Acts in that respect, according to their spirit and intent, and to have states honour and respect such treaties, agreements and constructive arrangements as well as the rights emanating from those historical instruments. Conflicts and disputes which cannot otherwise be settled should be submitted to competent bodies.”

Although indigenous people have explicit guarantees pertaining to the right to interpretation, there is no specific reference to legal aid or cost waivers in any of the instruments. Recognition of the validity of customary norms is important but consistently limited in all documents due to the requirement of non-contradiction of fundamental national rights or human rights. This standard is common given concerns that total recognition of legal autonomy may subject persons to abuse, particularly in situations involving vulnerable persons, such as women and children. In practice, most property disputes involving indigenous v. non-indigenous individuals or groups are precisely based on disagreement regarding the validity of a customary norm, e.g. historic title, as opposed to a formal norm, e.g. title/private property. Similar difficulties arise with respect to indigenous dispute resolution mechanisms which issue decisions against a person claiming a formal legal right, the decision in itself is often attacked for violating due process norms or simply dismissed by formal appeal bodies.

If we are to utilize the indigenous standards to serve as a model for the elaboration of a hard law instrument on IDPs, I wish to recommend a provision which specifically links the right to remedy to property disputes. This should also include standards relating to access, e.g. translation, legal aid, or cost waivers, in order to guarantee full participation, and grants legitimacy to customary dispute resolution mechanisms as well customary norms.

Remedying Impunity via the Right of Remedy

The UN Special Rapporteur on the Impunity of perpetrators of human rights violations (civil and political), Mr. Joinet, presented a study in 1997, in which he outlined principles to combat impunity.³¹⁷ They focus on the perspective of victims' rights and thus call for the creation of extra-judicial commissions of inquiry, the opportunity for "fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations" via national courts, ad hoc tribunals, the international court, and extradition to national courts of other countries. The report calls for prohibition of prescription with respect to serious crimes, amnesty before victims have attained an effective remedy (Specifically it is noted that the amnesty "must have no legal effect on any proceedings brought by victims relating to the right to reparation"), use of military courts to try human rights violations, etc. It also calls for dissolution of paramilitary groups. Hence, Guatemala's Law on National Reconciliation which effectively grants amnesty to those committing violations during the war should be regarded as an instrument of impunity. Its provisions should be disregarded. Special Rapporteur Mr. El Hadji Guisse specifically considered impunity in the economic, social, and cultural context.³¹⁸ However this document essentially advocates the adoption of an Optional Protocol to the ICESCR, (provision of remedy for violations of this type including restitution of land to the dispossessed), recognition of such violations to be international crimes, and further analysis by NGOs and other actors. This author supports the elaboration of an Optional Protocol in order to end the division between first generation and second-generation rights. The UN Independent Expert on the Right to Property, Mr. Luis Valencia Rodriguez noted that the provision of remedies by national courts would be the most effective guarantee of property.³¹⁹ In my opinion, the existence of international remedial mechanisms is equally essential.

4.7 Conclusion on Rights

Review of the rights to property, restitution, and remedy as pertaining IDPs and indigenous people reveal protection gaps, particularly within the Guiding Principles on Internal Displacement, due to lack of normative clarity and comprehensiveness. These gaps violate the ethic of recognition as pertaining IDPs and leaves them disempowered. The exclusion of property from the CCPR & CESC reflects the contradictions in the understanding of the nature of this right, forms of application and enjoyment, manner of limitation, and

³¹⁷ Commission on Human Rights, Question of the impunity of perpetrators of human rights violations (civil and political), Revised final report prepared by Mr. Joinet, E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997). It is curious that the report does not address more directly the causes of impunity. Although some of the recommendations are described to be preventive in nature, such as that regarding paramilitary groups, it does not provide more detailed suggestions as to how the international community may assist the State in accomplishing such a task. Given the fact that socio-economic inequities are often the root of civil and political violations, the report should have explored the link more extensively

³¹⁸ Commission on Human Rights, Question of the Impunity of Perpetrators of Human Rights Violations (Economic, social, and cultural rights), Final report prepared by Mr. El Hadji Guisse, E/CN.4/Sub.2/1997/8 (27 June 1997).

³¹⁹ Commission on Human Rights, The Right of Everyone to Own Property Alone as Well as in Association with Others, Final Report submitted by Mr. Luis Valencia Rodriguez, E/CN.4/1993/15 at para 234 (18 December 1992).

compensation for violation. The diversion of opinion regarding the right to property as a socio-economic or hybrid norm which requires cross-reference to other rights such as food, housing, culture, etc. as opposed to civil and political norm protecting formal title only is particularly salient within the Guatemalan context. For peasants access to property is the means by which to fulfill the right to life, for indigenous people it is linked to their spiritual life and communal identity, and for large landowners it serves an economic function. Disagreement as to the legitimacy of expropriation to address human needs is the root of the ongoing protracted conflict. Neither IDPs nor indigenous people can claim an absolute guarantee of ownership rights to customary land (ILO Convention No. 169 permits States to grant possession or use rights in lieu of ownership); given that many lack formal titles, they are denied formal protection. In contrast, the Inter-American Court of Human Rights' decision in the *Awas Tingi Case* is empowering to indigenous people because it reflects their vision of the right to property calls upon States to uphold non-discrimination guarantees in this arena. The ILO Convention No. 169 calls for legal pluralism as pertaining customary right to property and places a duty on the State to prevent infringement of property rights by Non-State actors.

Within *lex ferenda*, the draft American Declaration on Indigenous Rights requires consideration of indigenous people's knowledge and understanding of the value of property when altering title, thereby providing a relevant model standard for IDPs who are subject to manipulation and coercion during periods of violence and forced flight. Equally worrisome is the absence of a guarantee of property restitution within the key human rights instruments, including the Guiding Principles which permits the State to choose compensation over restitution and fails to grant IDPs participation rights in determining the form of reparation, as opposed to indigenous people's right to such participation under the ILO Convention.

With respect to remedy within the context of property disputes, it is unclear as to what is the appropriate mechanism, administrative agency, court, or legislature. Unlike IDPs, indigenous people have a specific right to remedy as pertaining property disputes under the ILO Convention. There is a need to create comprehensive standards which address *de facto* and *de jure* criteria to ensure access, what constitutes participation, applicability against actions by Non-State actors, and the need for normative legal pluralism to assure remedy in practice. I delineate criteria for the elaboration of standards which seek to promote empowerment, participation, and responsiveness to these groups to be included within a new instrument pertaining to IDPs in the conclusion to this Part.

Below, I review Guatemala's reports to the U.N. Treaty Monitors, specifically highlighting the observations and conclusions of the CCPR, CERD, and CESC with respect to indigenous & IDP rights to land in order to understand the development of cross-referencing rights and norms as a means of expanding our understanding of the rights to property, remedy, and restitution.

5. Review by U.N. Human Rights Monitors of IDP/Indigenous Rights to Property, Restitution, & Remedy in Guatemala

*"The international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of a violation. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief. However, the role of the international tribunal is important to the integrity of the human rights system and victims of violations, particularly when the state deliberately and consistently denies remedies, creating a climate of impunity."*³²⁰

Dinah Shelton

Although there is no single international mechanism created to investigate complaints regarding internal displacement as a violation in itself, there are mechanisms to address the human rights violations often accompanying internal displacement.³²¹ In September 2000, the International Colloquy on the Guiding Principles on Internal Displacement reviewed the opportunities for review of internal displacement by the UN human rights bodies via the individual complaint procedures as well as state reports.³²² It called for strengthening of the role of these entities in the realm of internal displacement. However, these mechanisms have received significant criticism. Rainer Hofmann has set forth that:

"Notwithstanding the fact that the human rights instruments relevant in situations of imminent or ongoing internal displacements do provide for mechanisms to protect the individuals concerned, it is suggested that such mechanisms, simply due to their structure, fail to offer prompt relief for any

³²⁰ DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 15 (Oxford U. Press 1999).

³²¹ See Maria Stavroupolou, "Displacement and Human Rights: Reflections on UN Practice", in 20 HUMAN RIGHTS QUARTERLY 515, 553 (1998), citing Quaker United Nations Office- Geneva (Tim Wichert), Human Rights, Refugees and Displaced Persons: 1997 UN Commission on Human Rights (1997), recommending the creation of a mechanism to handle displacement complaints.

³²² Brookings Institution, Summary Report supra note 157.

internally displaced person or to avert the root causes resulting in a person becoming internally displaced.

Furthermore, these mechanisms are not structured in such a way as to allow the international community to force a state to remedy situations of or resulting in internal displacements. It is a well-known deficiency of, in particular universal, human rights law that even if the relevant instrument provides for a complaint system available to individuals or other states, the subsequent findings of the bodies called upon to deal with such complaints are of a non-binding character. The efficiency of these systems is, moreover, considerably limited by the very slow and time-consuming character of the procedures to be followed which prevents them from constituting an effective mechanism to avert or to remedy situations of internal displacement.”³²³

In practice, some states, such as Guatemala and Colombia, have recently demonstrated greater effectiveness at providing restitution ordered by international bodies than rendering reparation through local bodies for human rights victims.³²⁴ However, the provision of economic compensation appears to be an easier task than apprehending and sanctioning offenders. Although some governments may show willingness to comply with the few

³²³ Rainer Hofmann, "Internally Displaced Persons as Refugees", in 35 ACTA JURIDICA HUNGARICA 179, 186 (1993). See Also Rainer Hofmann, "Contemporary Challenges Facing International Refugee Law: The Case of Internally Displaced Persons", in Linos-Alexandre Sicilianos, Ed., New Forms of Discrimination, Seminar on the Prevention of Discrimination against Immigrants, Refugees, and Minorities, UNESCO Olympus Greece 13-14 May 1994, 141, 146 (Pedone 1995), stating that "these mechanisms are not structured in such a way as to allow the international community to force a state to remedy situations of or resulting in internal displacements"; See Also Denise Plattner, "The Protection of Displaced Persons in Non-International Armed Conflicts", in INTERNATIONAL REVIEW OF THE RED CROSS, 567, 578 (Nov.-Dec. 1992), stating: "Studies conducted on the situation of persons displaced within national borders have often revealed the absence of any mechanism to ensure compliance with existing rules of law." She cites political will as the primary factor for implementation of protection mechanisms.

³²⁴ It should be noted that the Follow-Up procedures have proved effective with respect to Colombia. Initially, Colombia provided six challenges to Committee findings or late submissions on the merits, two satisfactory replies, one incomplete reply, and one lack of reply. United Nations, Report of the Human Rights Committee, Vol. I, para. 429, General Assembly, Official Records, Fifty-first Session, Supplement No. 40 (A/51/40) (1997) and Report of 1999 para. 461 & 432 (A/54/40). Committee Member Julio Prado Vallejo met with Colombian officials to discuss follow up in 1994 and the Special Rapporteur met with the Permanent Representative of Colombia to the United Nations in 1996. The Human Rights Committee was concerned with the absence of enabling legislation for the provision of monetary compensation to victims of violations of the Covenant in various countries and called for the adoption of such laws. This is a good example of the importance of "legitimizing" international judicial or quasi-judicial bodies by way of domestic legislation. As is the case of the Property Commission in Bosnia, domestic government officials and judges may be reluctant to concede jurisdiction, especially in an area such as property, to a foreign body. Incorporation of the body within the national juridical framework appears an effective way of linking the concerns of the Committee to that of the local actors. Colombia enacted Law No.288 of 1996 giving legal effect to the views of the UN Human Rights Committee by creating a Ministerial Committee to examine the Committee's recommendations regarding compensation. In all cases in which the UN Human Rights Committee called for compensation, the Ministerial Committee reiterated such recommendation and forwarded the cases to the Ministry of Defense which has a budget to provide compensation to victims. Victims need only show proof of identity and judges cannot question their entitlement to compensation, they may only determine the amount of compensation. Guatemala received positive review by the Inter-American Commission of Human Rights due to the State's provision of indemnification to the victims of cases 11.382, 11.554, 11,544, 11.275, 12.199, 12.020, 10.606 and recognition of "institutional responsibility" in cases 11.275 on the forced eviction of workers from La Exacta estate in 1982, 12.199, 11.681, 11.544, 11.254, 12.020. See Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Guatemala, (OEA/Ser.L/V/II.111 Doc. 21 rev. 6 April 2001). President Portillo announced that pursuit of punishment of human rights offenders and provision of remedy to victims would serve to restore confidence of the people in a speedy and effective justice system, as well as strengthen the regional human rights system.

decisions emitted by international bodies in order to preserve international approval and financial donations, it seems that a ripple down effect to the national juridical system is not easily achieved. Hoffman's emphasis on the length of time processing at the international level is valid. In addition, the given the minimal amount of cases processed at the international level, the cooperation demonstrated by the States to implement the views is dwarfed by the failure to establish effective domestic remedies. Further problem is presented by the lack of dissemination of the availability of international remedies to local actors.

For example, during the UN Committee on Racial Discrimination's 1999 review of Colombia's report, it admitted that it had difficulties in advising what could be done amidst the proliferation of military and paramilitary activities.³²⁵ Indeed, most, if not all, of the human rights monitoring bodies seemed perplexed as to what solutions could be offered by the international community to situations involving entrenched impunity, corruption, socio-economic inequity, and violence.

Similar critique at the international community's performance in post-conflict transformation has also been launched with respect its role in Guatemala.³²⁶ MINUGUA was criticized (and criticized itself) for failing to promote compliance with the Peace Accords, particularly within the realm of socio-economic rights which were the key root of land and labor conflicts.³²⁷ Financial limitations and agency rivalry among UNHCR, UNHCHR, UNDP, and MINUGUA were additional problems.³²⁸ It is evident that there remains strong polarization between the State and human rights groups; observe the commentary by Guatemala's representative before the Human Rights Committee's review of Guatemala's second periodic report: "Institutional monitoring and protection mechanisms must be strengthened in order to achieve effective respect for human rights. Unfortunately, human rights organizations, with their persistent anti-State attitudes, continued to widen the gap

³²⁵ "Colombia: Impotencia de la ONU", in INTER-PRESS SERVICE 19 August 1999. In 1999, over one hundred displaced persons took over the UNHCR office in Bogota, Colombia in order to demand "real and immediate" action to resolve their plight. Yadira Ferrer, "Displaced People Occupy UN Offices", INTER-PRESS SERVICE 4 Aug. 1999. In January 2000, another hundred displaced persons took over the Red Cross building in protest of the lack of health care, education, and housing assistance and demanded indemnification of 8,400 USD per family. Maria Jose Llanos, "Cruz Roja suspende tareas ante ocupacion de su sede", INTER-PRESS SERVICE 4 Jan. 2000. In January 2000, another hundred displaced persons took over the Red Cross building in protest of the lack of health care, education, and housing assistance and demanded indemnification of 8,400 USD per family.

³²⁶ Susanne Jonas, "Guatemala Peace Endangered", in The Christian Science Monitor Electronic Edition, 12 June 1999.

³²⁷ Stephen Baranyi, "Maximizing the Benefits of UN Involvement in the Guatemalan Peace Process", in NORTH & SIMMONS, *supra* note 17 at 74, 86. Barayani points out that there was a lack of "well-defined methodological guidelines for verifying economic, social, and cultural rights".

³²⁸ *Id.*

between State and society . . .”³²⁹ In May 2000, one of the negotiators of the Peace Process blamed the lack of implementation of the accords on the ineffective coordination of international organizations, state entities and NGOs, headed by MINUGUA which he describes as having lost prestige.³³⁰ The UN’s experts have been characterized as “Roman Proconsuls” and MINUGUA’s activities have been deemed to have strayed beyond its mandate, e.g. promoting the constitutional reforms, the drafting of national legislation, and the encouragement of civic and syndicate activity.³³¹ Similar criticism has been launched at AID. It is claimed that this type of “beneficent intervention” smacks of colonialism and inhibits the development of an independent state by having policies drafted from the outside. However, commentators also admit that the presence of international observers is due to the prevalence of impunity, violence, and corruption plaguing the nation. The weight of international actors may be one of the only ways to counter the power wielded by the minority elite. Yet, even this may be questionable, as the State has demonstrated a remarkable ability to placate donors without making structural changes.

The selective dissemination of the Guiding Principles may also explain limited implementation of norms. In 1999, upon my visit to MINUGUA staff working with refugees, IDPs, and indigenous people in Guatemala, I found that they did not even have a copy of the UN Guiding Principles on Internal Displacement and claimed never to have heard of them. At the same time, in Colombia, different ministries were designing strategies to implement the Guiding Principles as a result of dissemination by Francis Deng and the Brookings Institution.

This section provides an overview of the human rights monitors and their output as pertaining IDPs, indigenous people, and land rights in Guatemala.

5.1. U.N. Treaty Monitor Committees: CCPR, CERD & CESC

The UN System includes various bodies to oversee the implementation of human rights treaties around the world. States make reports to the committees corresponding to the treaties which have been acceded to: Human Rights Committee, Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural

³²⁹ Commentary by Mr. Alvarado Ortigoza (Guatemala), Human Rights Committee, Summary Record of the 1940th Meeting: Guatemala, Seventy-second session, para. 8 (CCPR/C/SR.1940) 10 August 2001.

³³⁰ Juan Carlos Ruiz C., “Burocracia de los acuerdos de paz”, PRENSA LIBRE 29 May 2000.

³³¹ “Editorial: La justicia bajo la lupa”, PRENSA LIBRE 17 August 1999 and Armando de la Torre, “La presencia nociva de MINUGUA”, PRENSA LIBRE 17 August 1999.

Rights, the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of the Child. Although I consulted all of the reports pertaining to Guatemala, I chose to highlight the CCPR, CERD & CESC because they provided the most relevant commentary pertaining property rights and compensation. Aside from Colombia, I did not consult the committees' review of other countries. All bodies cite problems of delay in reception of State reports, limited human resources, and financial & time constraints as affecting the monitoring aspect of their mandates. In addition, they tend to address the same topics, hence rendering questionable the value of the separate reports.³³² The oral review of the reports are presented as following a conciliatory structure. Hence, they generally do not contain straightforward accusations of human rights violations. As noted by Philip Alston:

*“There is still considerable room for improvement of the quality of concluding observations, especially in terms of their clarity, degree of detail, level of accuracy and specificity.”*³³³

Indeed, the conclusions rarely offer concrete suggestions; more often they state general concern for the problems at hand. Below, I examine Guatemala's reports to the CCPR, CERD, and CESC in order to assess which groups are highlighted as meriting protection and which infringements/problems receive primary attention.

5.1.1. State Reports to the Human Rights Committee

The International Covenant on Civil and Political Rights (1966) requires all State Parties to file reports on the progress and problems regarding implementation of rights.³³⁴ In 1981, the Human Rights Committee issued a decision requiring all States parties to file periodic reports every five years. It is composed of eighteen members who have been nominated by State parties. The Human Rights Committee reviews the reports and offers observations as to what improvements have been made, which areas remain troublesome, and what measures the State Party should take in order to comply with the Covenant. Although these reports are generally oriented towards describing situations rather than individual cases,

³³² Mutua criticizes the ineffectiveness of having multiple reporting and complaint mechanisms within the U.N.; she recommends “down-sizing” to one or two bodies. As of 2002, there is an inter-treaty meeting of committee members to discuss common issues and concerns. Makau wa Mutua, “Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement”, in 4 BUFFALO HUMAN RIGHTS LAW REVIEW 211,217 (1998), citing Philip Alston, Interim Report on Study on Enhancing the Long-term Effectiveness of the United Nations Treaty Regime, UN Doc. A/CONF.157/PC/62/Add.1/Rev.1 (1993).

³³³ E/CN.4/1997/74, para. 109

³³⁴ International Covenant on Civil and Political Rights, Article 40, para. 1

the Human Rights Committee calls upon States to refer to concrete cases in order to assess how the Covenant is implemented in practice. Mutua has described the Committee's role in this process to be performed under a "conciliatory tone which favors the 'dialogue' method", rather than strong condemnations.³³⁵ As a result, she describes state reports to be "largely lackluster and forgettable".³³⁶ Since reports are reviewed only after five years, there is little pressure on states to implement changes. In some cases, elections have taken place in between reports and the state representatives blame the former regime as bearing responsibility for the situation. The Committee also issues general comments directed at all states which are intended to promote better reporting by states and clarify the application and interpretation of the ICCPR rights. State Reports are to include "the measures which they have adopted to give effect to the rights concerned therein."³³⁷

Guatemala has filed twice.³³⁸ In its initial review of Guatemala's report, Committee Member Buergenthal noted that the poorer classes were the victims of human rights abuses and that "(t)heir situation would remain unchanged unless a system of compensation was put into place."³³⁹ In my opinion, this commentary has particular value because it highlights the role of reparation as a means of empowerment. Victims may overcome past repression and aspire to a new life by using such compensation to purchase property and thus assume an adequate standard of living marked by dignity. In response, the Government asserted that it had set aside "considerable sums of money" for social investment and that social expenditure would support socio-economic programs for victims- thus rather than provide individual compensation the state would fund public works benefiting communities at large. In its Concluding Observations, CCPR cited concern that impunity was preventing the payment of compensation to victims.³⁴⁰ Indeed, impunity has prompted complete stagnation with respect to the adoption of restitution legislation for victims. Much to the chagrin of victims, the ex-PAC's have been promised compensation for their services during the war (see *infra* Part III on SEPAZ). Hence, human rights abusers have a greater chance of attaining compensation than dispersed IDPs or other human rights victims.

³³⁵ Mutua, *supra* note 332, at 227, referring to McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 89-90 (1991).

³³⁶ *Id.*

³³⁷ United Nations, *Report of the Human Rights Committee, Volume II, Official Records*: p. 205 Forty-fifth Session, Supplement No. 40 (A/45/40) (1990).

³³⁸ Guatemala's Initial Report: CCPR/C/81/Add.7. (3 April 1995) & Guatemala's Second Periodic Report: CCPR/C/GTM/99/2 (5 April 2000).

³³⁹ Human Rights Committee, Summary Record of the 1491st meeting: Guatemala, CCPR/C/SR.1491 (29 October 1997).

³⁴⁰ Human Rights Committee, Concluding Observations: Guatemala, CCPR/C/79/Add.3, para. 13 (3 April 1996).

Committee Member Evatt wished to know “the extent to which land ownership disputes and attempts to gain possession of land belonging to indigenous groups had been a factor in the conflict in Guatemala and in the problems of resettlement of people and restoration of democracy”, as well as whether “solving questions of land ownership and recognition of indigenous rights was seen by the Government as an important part of measures to restore peace. . .” These questions reveal an understanding of the role of illegal appropriation of indigenous land as a direct cause of the war and its remedy as a condition of peace and social cohesion. The State responded that “the adoption of ILO Convention No. 169 had been seen as legitimizing the Mayan people’s claim to their historic lands.” It stated that a national land registry program, the use of the courts to resolve land disputes, and government purchase of land to sell or grant to refugees and displaced persons were addressing key topics of concern. The State did not mention ongoing problems associated with court ordered eviction, and my review of the Constitutional Court amparo cases involving indigenous claims reveals bias against communal claims (see Part III). In addition, the State has not been forthcoming with provision of title to indigenous lands and the registry legislation remains lacking. By the Second Periodic Report, the Committee made no mention of displaced persons or indigenous people with respect to their property concerns.

The Human Rights Committee has continuously exhibited grave concern for the prevalence of impunity affecting the right to remedy in Guatemala. In its review of Guatemala’s first report Committee Member Prado Vallejo viewed impunity to be “at the heart of the country’s human rights problems and its civil and political crisis.”³⁴¹ Committee Member Lord Colville stated that “The slowness or non-existence of the process of law in Guatemala had made the public lose confidence in the judicial system. . . It was not clear, however, why cases should take so long and who oversaw the judiciary when, as happened, cases were ‘lost’.”³⁴² Committee Member Buergenthal opined that the situation rendered national and international law invalid in practice:

*“No doubt the current Government was committed to living up to its international obligations, but the question was whether it had real power to end the historical, institutional impunity that high officials continued to enjoy in Guatemala. The pervasive impunity was a curse that had prevented Guatemala from enjoying the rights guaranteed by its own Constitution and by international treaties.”*³⁴³

³⁴¹ Human Rights Committee, Summary Record of the 1486th Meeting: Guatemala, CCPR/C/SR.1486, para. 40 (03/06/96).

³⁴² Id. At para. 43.

³⁴³ Id. At para. 52.

Committee Member El-Shafei explicitly linked the problem of impunity to the issue of lack of resolution to displacement, noting that “the Committee had received many reports about violations of the rights of returning refugees, but court decisions ordering the arrests of those responsible had not been carried out. That behavior brought into question the authority of the judiciary and its ability to enforce its rulings.”³⁴⁴ These observations confirm the weakness of the State and the power of elites to diminish the rule of law to the point of rendering the notion of transition to democracy a mere illusion. In Part II, I present statistical data on confidence in the judiciary which supports the Committee’s grim remarks.

In response, the State noted that the President had endorsed a MINUGUA report which showed “that the majority of violations stemmed from action by agents of the State or groups linked to it and were made possible by the failure of the State to provide guarantees . . .”³⁴⁵ The link between impunity and an ineffective justice system was admitted, but no promises of improvement were offered.³⁴⁶

The Human Rights Committee adopted concluding observations which noted that “. . . the absence of a State policy for combating impunity has prevented the identification, trial and punishment if found guilty of those responsible, and the payment of compensation to the victims.”³⁴⁷ A recommendation was issued that the State “take all pertinent measures” to avoid impunity, investigate human rights abuses, bring perpetrators to justice, and assist victims in obtaining compensation.³⁴⁸ Finally, it recommended the adoption of a law on the independence of the judiciary and legislation on indigenous communities.³⁴⁹ As of 1999, the legislation on indigenous communities has not been adopted and MINUGUA reported that human rights violations increased 35% in 1999. However the Law on the Judicial Career, Decree 41-99, was passed in order to guarantee the independence of judges by way of the establishment disciplinary and training institutions. In addition, there is now a Judicial Ethical Code.

³⁴⁴ Committee Member Prado Vallejo noted that the peace talks enabled refugees and internally displaced persons to return home, but that the Civil Self Defense Patrols often hindered this end, *Id.* at para. 39.

³⁴⁵ Human Rights Committee, Summary Record of the 1490th meeting: Guatemala, CCPR/C/SR. 1490, para. 17, (23 January 1998).

³⁴⁶ The State claimed that “Peace was less a matter of the end of the armed conflict than of ongoing social and economic development. Peace must be constructed from within, by addressing the country’s deep-seated problems. Even more basic than the re-establishment of peace was the restoration of a culture of co-existence and non-confrontation.” *Id.* At para. 20.

³⁴⁷ Human Rights Committee, Concluding Observations of the Human Rights Committee: Guatemala, CCPR/C/79/Add.3, para. 13, (3 April 1996). Additional commentary highlighted that “various segments of the population, particularly persons who are or were members of the armed forces or government officials, or who hold economic power, continue to take advantage of a climate of impunity resulting in the most serious human rights violations and has been an obstacle to the rule of law in the State party.” *Id.* at para. 4.

³⁴⁸ *Id.* At para. 25-26.

³⁴⁹ *Id.* at para. 31 and 34.

By the Second Periodic Report, the Human Rights Committee highlighted their impatience with the lack of prosecution of human rights offenders and exhibited concern increased threats to members of the judiciary, lawyers, human rights activists, and trade unionists, calling for preventive and protective measures.³⁵⁰ Ms. Medina Quiroga emphasized the lack of political will to implement the Convention or combat impunity and failure to guarantee the role of law- noting that “the only means by which emerging democracies could consolidate the rule of law was by fostering public confidence in democracy.”³⁵¹ I argue that public confidence in democracy is contingent on establishment of the rule of law. She highlighted contradictory actions in which the State accepted responsibility for human rights violations in some cases, such as the massacre at Las Dos Erres which was subject to friendly settlement via the Inter-American Commission of Human Rights versus the Constitutional Court’s provision of amnesty to the military officer on the ground, the lack of prosecution of other military personnel for violations during the conflict, and grant of immunity against genocide charges pertaining General Efraim Rios Montt, the President of the Congress.

It should be noted that CCPR did not dwell on the IDP problem per se, although references to the situation of returning refugees were made. However, it identified concrete problems that affect IDPs: lack of effective remedies due to the state of impunity, the need for compensation, and the recognition of historic/possession claims to land.

The call for compensation for human rights victims was reiterated by the Committee, in addition to a specific call for restitution of indigenous land during the second periodic review as well.³⁵² Of concern is the fact that once again, no mention was made of internal displacement or the Guiding Principles on Internal Displacement. This may be due to lack of information provided to the Committee on this topic, however the disappearance of the topic from the agenda of discussion relieves the State of a duty to explain the lack of restitution as specifically pertaining IDPs. On the other hand, IDPs claiming restitution indeed form part of the larger category of human rights victims, hence one may argue that the Committee selected a holistic category, in keeping with the perspective of Donors in the field, that this would encompass a broad range of protection categories. In my opinion, given the fact that IDPs suffer violation of many of the rights contained in the CCPR in like manner to indigenous people, the Committee should specifically address the needs and rights of this group.

³⁵⁰ Human Rights Committee, Concluding Observations, CCPR/CO/72/GTM, para. 21 (27 August 2001).

³⁵¹ Human Rights Committee, Summary Record of the 1940th Meeting: Guatemala, CCPR/C/SR.1940 para. 30 (10 August 2001); and Human Rights Committee, Summary Record of the 1942nd Meeting: Guatemala, CCPR/C/SR.1942 para.3 (13 August 2001).

³⁵² Id. at paras. 12 & 29

Below I present a strategy for presentation of claims by IDPs to the CCPR via the Optional Protocol. Because the CCPR does not include the right to property, many victims may assume that they do not have a remedy. However, I highlight cases which reveal possible cross-reference to other rights linked to the right to property which may lead to review by the CCPR.

5.1.2. Strategy for use of the Optional Protocol to the CCPR by IDPs & Indigenous People

The Human Rights Committee has not addressed internal displacement issues to a large extent within the individual complaint mechanism or the state reports. It is believed that two possible factors for the dearth of activity on the part of the Human Rights Committee in the area of internal displacement are the lack of dissemination of this procedural remedy to the affected displaced populace, and the tendency of the UN to refer matters concerning this issue to the UN Special Representative on Internal Displacement.³⁵³ 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 collectivised 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.

Additional reasons offered as to why IDPs do not solicit the international complaints mechanisms include the fact that internal displacement is not generally considered and individual problem, the complaint mechanisms require resources to pay for lawyers and travel costs, filing procedures are lengthy and complicated, and the victims may fear filing a claim against their government while still in country.³⁵⁴ This author would add the concern of exhaustion of domestic remedies. IDPs are unlikely to fulfill this requirement when national

³⁵³ Interview with Markus Schmidt, UNHCHR headquarters Geneva, Sept. 1997

³⁵⁴ Brookings Institute, Summary Report supra note 157.

judicial systems are un-accessible to them due to costs, bias, etc. The U.N. does not provide legal aid to claimants.³⁵⁵ Ghandi has offered similar concern:

*“In the present financial crisis gripping the UN, it is inconceivable that such a scheme would be introduced in the short-term. Accordingly, an author will only receive financial assistance in lodging a communication if there is a provision for it in the domestic law of the State Party concerned. While no oral proceedings are available under the individual communication procedure (unlike under the inter-State communication procedure), the lack of legal aid is unlikely to be a serious handicap, though, of course, it must be appreciated that in some cases the written pleadings may be extraordinarily complex.”*³⁵⁶

Most NGOs operate within the humanitarian realm, obtaining food, water, shelter and medicine for the displaced. There are not many organizations providing free legal services in order to file suits in courts. Those which engage in this activity are often also victims of harassment, threats, and intimidation.

The general criteria precluding case review are:

- 1) *Matters which are being investigated under another international procedure;*
- 2) *Anonymous communications;*
- 3) *Communications which are deemed to be abusive, unsubstantiated, or incompatible with the Covenant;*
- 4) *Communications which have not met the requirement of exhaustion of domestic remedies.*

The final condition rests upon the principle that States are primarily responsible for safeguarding and implementing the rights of the convention at the national level. This requirement is waived by the Committee when the domestic remedies are rendered ineffective or unavailable due to excessive duration or other impediment. Individuals have standing to comment on State written submissions and they are kept informed of proceedings. Decisions are taken by consensus, and the Committee will make a recommendation to a violating State Party to remedy the violation. The identity of parties are kept confidential until the final decision is taken. The views and recommendations of the Committee are printed in the annual report to the General Assembly. The Committee has the power to provide interim protection by advising against immediate actions which may violate the Covenant, such as the death penalty, expulsion, etc. One may conceive that the Committee could be called upon to

³⁵⁵ In contrast, the European Commission on Human Rights grants legal aid, see Resolution (63), 18, adopted on 25 October 1963 by the Committee of Ministers, noted by P.R. GHANDI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION*, 288 & footnote 11 (Ashgate 1998).

³⁵⁶ *Id.*

issue an interim view relating to internal eviction as well, linking it to freedom of movement/choice of residence or arbitrary interference with one's home.

Some weaknesses arise from the fact that the Committee itself has no independent fact finding functions and there are no oral hearings, thus it must base its decision on written information provided by the parties. In contrast, the Committee on the Elimination of Racial Discrimination may call upon parties to participate in an oral proceeding.³⁵⁷ Although commentators have expressed the need to have oral hearings in order to render consideration of a case more effective, the obvious increase in costs for legal representation and travel as well as the Committee's limited time frame make such change unlikely.³⁵⁸ This highlights a problem of procedural justice, in which human rights victims may feel excluded from the processing of their claims, and denied the right to tell their stories in their own voices. Of course this would not be remedied by an oral proceeding which was limited only to the voices of the lawyers.

Communications may be sent by the victim himself or someone acting on his behalf. According to the UNHCHR, the time frame for admission of a case is between twelve-eighteen months, and examination of the merits is between one-two years.³⁵⁹ Ghandi estimates the average length of time between registration of the communication and final views to be approximately four years, noting that "(i)n some cases the delay is unconscionable."³⁶⁰ The Human Rights Committee's lack of resources has been criticized as a ground for delays in processing the expanding caseload.³⁶¹ Review of the Human Rights Committee's performance reveals inadequacies for dealing with the volume of general human rights complaints. As of July 2002, the Committee has received over 1100 communications from individuals in 70 countries. The Committee ruled on the merits in 393 cases and found violations in 304 cases.³⁶² Steiner uses the lamentable statistics to point out that the Committee cannot realize its mandate to offer "hope to wronged individuals after state processes have failed. The humblest and most remote peasant who has been deprived of rights under the ICCPR can secure a remedy".³⁶³ In addition, he points out that the remedies

³⁵⁷ Rule 94(5) of the Rules of Procedure of the Committee on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/35/Rev.3, p.28.

³⁵⁸ GHANDI, *supra* note 355 at 311.

³⁵⁹ Data collected from UNHCHR website, www.unhchr.com (September 2002).

³⁶⁰ GHANDI, *supra* note 355 at 315.

³⁶¹ McGoldrick, Dominic, *The Human Rights Committee 500* (1991), cited in Helfer, Laurence & Slaughter, Anne-Marie, "Toward a Theory of Effective Supra-national Adjudication" 107 *YALE LAW JOURNAL* 273, 347 (1997).

³⁶² Statistics obtained from <http://www.unhchr.ch>.

³⁶³ Henry J. Steiner, "Individual Claims in a World of Massive Violations: What role for the Human Rights Committee", in PHILIP ALSTON & JAMES CRAWFORD(Eds.), *THE FUTURE OF UN HUMAN RIGHTS*

called for by the Committee, such as compensation, “do not threaten state interests sufficiently to bring about prompt compliance.”³⁶⁴ In my opinion, the calls for reparations or compensation are the most valuable aspect of a decision because they may empower victims or their families, beyond merely punishing offenders.

McGoldrick cites the Human Rights Committee’s lack of resources as a ground for delays in processing the expanding caseload.³⁶⁵ Recently, a working group was established to process petitions more efficiently. Yet, the Committee members are employed part-time, and thus meet for only nine weeks per year. Given that the Committee is overwhelmed by general human rights claims, it clearly would not be able to address many of the potential claims of internally displaced persons. However, decisions in a few cases would be instructive to states with internally displaced populations.

Although internally displaced persons undergo a myriad of human rights violations, for the purpose of this thesis, the following section will only address those rights which are related to possible claims to be presented by internally displaced persons who have been deprived of their property or residence and denied access to justice. Rene Cassin identified the rights to privacy, freedom of movement and property as being among “the rights that belong to the individual in his relationships with the social groups in which he participates”, thereby tying it to the notion of social capital.³⁶⁶ Its very nature begets cross-references to other rights in order to complete a comprehensive analysis.

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 eviction or forced migration unless the occupation was deemed to be ongoing. Given the absence of a provision on the right to property in the CCPR, the corresponding provisions of the are: Article 12 (freedom of movement), Article 2 (right to effective remedy), Article 14 (equal protection before the law), Article 17 (non-interference

TREATY MONITORING, 15, 32-34 (Cambridge University Press 2000). He points out further that “for states with systematic breakdowns of the rule of law in which there are no genuine remedies to exhaust, the Committee could become by default the ‘court of first instance’ in whole fields like ordinary crimes or political activities or ethnic violence.”

³⁶⁴ Id. At 39.

³⁶⁵ McGoldrick, *supra* note 361 at 273, 347.

³⁶⁶ Rene Cassin, “La Declaration Universelle et la Mise en Oeuvre des Droits de l’Homme” in RECUEIL DES COURS DE L’ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, vol. 79, 1951 II, 242, 278. He also includes the right to marry, have a nationality, asylum, and religion within this group.

with home, family, privacy, honor, and reputation) Article 26 (equal protection of the law), and Article 27 (right to enjoy one's culture).³⁶⁷ Because the cases often involve multiple claims, violations of other rights are referred to, however the principle focus is the above-mentioned categories. The decisions tended to be brief, with little analysis and primary focus on the facts and restatement of the Convention's standards.³⁶⁸ However, they assist in providing a hint of how Guatemalan IDPs may formulate their claims to this body.

5.1.2.1. Freedom of Movement & Non-Interference with the Home

With respect to the issues addressed within this thesis, within the International Covenant on Civil and Political Rights, a substantive claim could be based on Article 12's guarantee of internal freedom of movement and right to choose one's residence or Article 17's prohibition on interference with the home and family, which have been addressed by the Human Rights Committee in its case law and reports.³⁶⁹ The Human Rights Committee has primarily addressed these rights in cases concerning exile and detention. In this section, we shall examine the "internal banishment" cases.

Mpandanjila v. Zaire, 183/1983 (views adopted on 26 March 1986) concerned a group of ex-parliamentarians who were relocated to other regions with their families by President Mobutu due to their public criticism of his regime. Although an Amnesty was declared in January 1981, they were unable to return home until December. In 1982, they were charged with plotting to overthrow the government and establish a political party. Their trial was not open to the public and there were due process violations. They were sentenced to fifteen years imprisonment but given amnesty the following year. A second "administrative banning measure" was adopted in 1984 and the parliamentarians and their families were once again forced to undergo internal exile. During this period, they suffered from disease, malnutrition,

³⁶⁷ In contrast, the European Court of Human Rights was able to issue a decision holding Turkey responsible for the loss of control of property belonging to a Cypriot national in accordance with Article 1 of Protocol 1 to the European Convention of Human Rights. European Court of Human Rights, Loizidou v. Turkey, No. 40/1993/435/514 (18 December 1996). See also Selcuk and Akser v. Turkey, Mentes et. Al v. Turkey Judgment of 24 April 1998, 71 Reports of Judgments and Decisions 1998-II, Papamichalopoulos et al v Greece (1995)-B Eur. Ct. H.R. (ser.A), Hentrich v. France (1994) 296 Eur. Ct. HR., Adkivar et al v. Turkey, Judgment of 1 April 1998, 69 Reports of Judgments and Decisions 1998-II.

³⁶⁸ See e.g. Steiner, *supra* note 363 at 15, 18 & 39 calling for the Committee justify its decisions, highlight issues, provide reasoned arguments instead of terse and opaque application of norm to facts, and "illuminate and advance understanding of the Covenant rather than apply it summarily case by case."

³⁶⁹ On freedom of movement, see Rosalyn Higgins, "Liberty of Movement within the Territory of a State: The Contribution of the Committee on Human Rights" in YORAM DINSTEIN & MALA TABORY (Eds.), INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE, 325 (Marinus Nijhoff 1989).

and isolation under guard. The Committee found this type of measure to be a violation of Article 12 and called for the state to take effective measures to remedy the violations and provide compensation. The State has not provided any reply as to implementation of the view.

It is of interest that the impact on health of forced exile was cited in the case. It is most relevant to internally displaced persons who undergo physical and psychological harm during the process of forced flight. However, this case has a clear link between the State actor and the act of displacement. In Guatemala, the Commission on Historical Clarification stated clearly that the State was responsible for the majority of displacements, however its report may not be used as basis for a claim, although it may enter as evidence in Court.³⁷⁰

K. Ackla v. Togo, Communication No. 505/1992, concerns the plight of a man who was dismissed from his post as police superintendent, arrested, detained, deprived of his property, and prohibited from entering the vicinity of his village upon order of the President and without judicial review.³⁷¹ Ackla claimed that these actions were based on a personal held by the President, rather than just cause. Although he sent over 40 communications to the authorities, he was not given an opportunity to argue his case. Response from judicial authorities varied from the position that only the President could reinstate him to the fact that administrative court was not open in Togo, “due to lack of qualified judges”.³⁷² He eventually attained his job again, however no restitution was made for the loss of property, as this had been turned over to his ex-wife, and the President issued an order prohibiting him from

³⁷⁰ See Also Mpaka-Nsusu v. Zaire, 157/1983, (views adopted on 26 March 1986) addresses the internal banishment of a presidential candidate. In 1977, Mr. Mpaka-Nsusu sought the presidency of the country as well as leadership of the political party, the *Mouvement Populaire de la Revolution*. His candidacy was rejected and he sought the recognition of another party, the Federal Nationalist Party. In 1979, he was arrested and detained without trial for almost two years on the charge of subversion. Upon his release, he was banished to his village of origin. Although he sought remedies from the Supreme Court, his claim was not considered. The Committee held that the internal banishment constituted a violation of Article 12 and called for effective remedies, including compensation. The State Party has not provided any follow-up replies; See also Bwayla v. Zambia, Comm. No. 314/1988, 14 (11-12) HUMAN RIGHTS LAW JOURNAL (1993). The author ran for parliament on behalf of the People’s Redemption Organization in 1983, but was prevented by the State from participating in the election due to the State’s one party system. He was threatened, fired from his job, and expelled from his home. He left the country but eventually returned and was repeatedly arrested and detained, one period lasting 31 months. He was charged with belonging to an illegal association and for conspiring to overthrow the President. He claimed to have been denied employment, as well as a passport, and subjected to harassment. Although he pursued domestic judicial procedures, including petitioning the Supreme Court, these efforts proved to be of no avail. The Committee decided that because he was never brought before a judge to decide upon the lawfulness of his detention, and because he submitted to continuous intimidation after his release from jail, Article 9 had been infringed. The State party did not deny that it restricted Mr. Bwalya’s freedom of movement and that it has refused to issue a passport to him. The Committee found a violation of article 12 (1). The Committee called for the provision of “appropriate compensation”. The State sent a follow-up reply which remains unpublished.

³⁷¹ Ketenguere Ackla v. Togo, Comm. No. 505/1992, (views adopted on 25 March 1996, fifty-sixth session)

³⁷² Id. at para. 2.4.

returning to his town or its vicinity. He claimed lack of effective remedy and victimization by a “biased and discriminatory judicial system.”³⁷³ Ackla sought restitution of his property and compensation for the lost rent of his home; sanction for his arbitrary arrest detention, and interference with his home, privacy, honor, and reputation; and the guarantee of his freedom of movement.

The Committee declared the claim for restitution to be based on an inappropriate subject matter, due to the fact that the Covenant does not address the right to property. Thus the Committee lacked jurisdiction to address the violation. As pertaining the claims regarding cruel treatment (article 7), arbitrary arrest and detention (article 9), and inhuman treatment under detention (article 10), the abuses occurred prior to the Optional Protocol’s date of entry into force in Togo. However, the prohibition against entry to his village, appeared to still be in force as well as continuous interference with home, privacy, honor and reputation. Hence, the Committee found these issues to merit admission for examination on the merits. The State provided no explanation as to why the restriction on his freedom of movement was enacted or interference with his privacy, home and honor. Hence, the Committee found it to be in violation of Articles 12 and called for effective remedy including “measures to immediately restore Mr. Ackla’s freedom of movement and residence, as well as compensation”. The Committee admonished the State to prevent re-occurrence of such violations. Unfortunately, Mr. Ackla did not pursue adjudication of the interference with his home, privacy, and honor before national courts. The Committee did not find his argument that the legal system was biased to substantiate a claim of lack of access to remedy without evidence of an attempt to pursue this route. On this point, the Committee held that Ackla had failed to exhaust domestic remedies. The State’s follow-up reply remains outstanding, however follow up consultations have been scheduled.

In both cases, the call for compensation is linked to the violation of the freedom of movement. Mr. Ackla’s failure to exhaust domestic remedies regarding the interference with his home serves to demonstrate the importance of pursuing the court mechanism even if the Guatemalan State has created alternative mechanisms to deal with land conflicts. IDPs should take care to pursue formal avenues should the intention be to reach international bodies.

³⁷³ Id. at para. 2.5.

5.1.2.2. The Right to Effective Remedy, Equal Protection Before the Law & Family

Article 2 (3) of the Covenant requires State Parties to guarantee persons the right to an effective remedy for violation of those rights and freedoms recognized within the treaty. Remedy may be granted by “judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State . . .” This provision is of interest to internally displaced persons who have been denied effective remedies for their injuries and losses due to an inefficient, un-accessible court system or the prevalence of impunity. This provision is often combined with Article 14 (1), which calls for the equality of persons before courts and tribunals and a fair and public hearing by a competent, independent, and impartial tribunal when determining one’s rights or obligations in a lawsuit.³⁷⁴ Article 15 prohibits ex post facto penalization but states that its provisions shall not “prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” I support the notion that the right to remedy is a fundamental requirement to guarantee respect for human rights, and its legitimacy is derived from international norms and customs. As noted by Alejandro Gonzalez Poblete:

“ . . . The right to justice for criminal violations of human rights is always valid, is non-derogable, and its principle of legality cannot be opposed based on national law, given that the legal source to assess the criminal character of the acts or omissions are the general principles of law which are recognized by the international community.”³⁷⁵

Access to justice is a significant problem in Guatemala (see *infra* Part III). It may be possible to establish a violation of lack of effective remedy and/or equal protection before the law. It is well-documented that the courts are hindered by bias against indigenous people, corruption, lack of resources and capacity, and excessive delays rendering justice a mere fantasy. The lack of sufficient legal aid also is a significant factor to consider. Yet, in my opinion the most significant barrier preventing Guatemalan indigenous people from enjoying a right to remedy is the judiciary’s bias against indigenous claims to land. Formal courts are more likely to classify property as held under individual possession and thus not entitled to

³⁷⁴ Article 4 permits suspension of derogable rights in exceptional circumstances.

³⁷⁵ Alejandro Gonzalez Poblete, “La Superacion de la impunidad como requisito del Estado de Derecho” in LORENA GONZALEZ VOLIO, PRESENTE Y FUTURO DE LOS DERECHOS HUMANOS: ENSAYOS EN HONOR A FERNANDO VOLIO JIMENEZ 55, 67 (IIDH 1998).

constitutional protection relevant to indigenous property. This is described further in Part III on Amparos.

Thus, I am particularly interested in highlighting precedents which link the right to remedy to historic claims to property. Many Guatemalan indigenous IDPs have been evicted from the lands of their ancestors.³⁷⁶ Guatemalan indigenous people refer to themselves as the children of corn, the earth being their mother. Below, I review a case which addresses the right to remedy in the context of indigenous property rights and in addition provides an interesting link to the concept of family rights.

Hopu & Bessert v. France, Communication No. 549/1993, presents the case of a group of Polynesians who claimed to be the descendents of indigenous population which had been wrongfully dispossessed of its property. In 1961, the first instance civil tribunal of Papeete issued a *jugement de licitation* which awarded ownership of a land tract (4.5 hectares) to the Societe Hoteliere du Pacifique Sud. This company was taken over by the Territory of Polynesia twenty-seven years later. In 1990, plans for the construction of a hotel on the property were drawn up and work commenced. Francis Hopu, Tepoaitu Bessert, and other members of the thirty families living next to the area usurped the land in 1992 in order to protest the construction project. They claimed that the site was actually an ancestral burial ground and in addition, the construction would ruin the fishing opportunities the lagoon located on the site, thus jeopardizing their subsistence. The first instance tribunal issues an eviction order and a fine. The Court of Appeal confirmed this decision. Further appeal to the Court of Cassation was possible, however it was not pursued.

Hopu & Bessert requested the Human Rights Committee to provide an interim protection measure in order to prevent their forced eviction by the High Commissioner of the Republic who called in forces in January 1996. They claimed that they were denied an effective remedy, as guaranteed by Article 2, due to the fact that they were not able to petition

³⁷⁶ In comparison, one group of Afro-Colombian IDPs from Quibdo Choco described their relationship to the land:

“A territory which by tradition is our life. We arrived there after suffering from slavery many centuries ago, after being treated worse than animals. We arrived there seeking refuge for our liberty which a national law pretended to restore. In order to protect our lives from slavery, men and women, children and the elderly or our same blood were received by Mother Nature in Choco. She opened her arms, in her we saved ourselves from those who wanted to hunt us down like animals.

She, Our Mother, is filled with riches and secrets. She has been invaded and violated by the extractors or her riches. That is why we continue to love her faithfully and we do not want to abandon her not for arms nor for any money in the world.”³⁷⁶

The language of the text describes the family constructed by the land and the Afro-Colombian group who present themselves as the land’s children who lovingly assume a duty of care. Similar attitudes are evinced by indigenous groups.

indigenous courts for an effective remedy. Upon its takeover of Tahiti in 1880, France had recognized the legitimacy of traditional indigenous tribunals for review of land disputes.³⁷⁷ However, these courts became defunct, rendering *de facto* jurisdiction of land claims transferred to civil and administrative tribunals. They added that as Polynesians, they were victims of discrimination, because the legislation concerning preservation of cemeteries, natural sites, and excavations was applicable to the *territoire metropolitain*, not them. Violations of Article 17, based on interference with their private and family lives, and Article 27 due to interference with one's enjoyment of one's culture were also cited.

The Committee stated that the appeal to the Court of Cassation would not have addressed the ownership issue, rather it would have focused on the eviction order and the right to oppose construction. It noted that France had never formally repudiated the jurisdiction of the indigenous tribunals and had not offered any evidence countering the charge that the civil and administrative tribunals had illegitimately taken over the subject matter jurisdiction. Hence the Committee held that, in fact, Hopu & Bessert had been denied effective remedies to exhaust.

The Committee did not find that there was a violation of the right to access to an independent and impartial tribunal as guaranteed under Article 14, because the ownership issue had been addressed by the Tribunal of Papeete in 1961. Since no appeals or challenges were made other than usurpation, Article 14 was not infringed.

As pertaining articles 17 & 23, the Committee found that the construction of the hotel on the burial grounds did amount to interference with the right to family and privacy:

*"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. . ."*³⁷⁸

In my opinion, this view is empowering to indigenous people because it takes into consideration their perspectives regarding interpretation of human rights. Four Members of the Committee (Kretzmer, Buergenthal, Ando, and Colville) proved less willing to embrace the indigenous definitions of family as unlimited, hence they issued a dissent:

"However, even when the term 'family' is extended, it does have a discrete meaning. It does not include all members of one's ethnic or cultural group. Nor does it necessarily include all one's ancestors, going back to time immemorial. The claim that a certain site is an ancestral burial ground of an ethnic or cultural group, does not, as such, imply that it is the burial ground of members of the

³⁷⁷ Decree 29 June 1880, ratified by the French Parliament on 30 December 1880.

³⁷⁸ Hopu & Bessert v. France, Comm. No. 549/1993, adopted 29 July 1997, para.10.3.

authors' family. The authors have provided no evidence that the burial ground is one that is connected to the family, rather than to the whole of the indigenous population of the area. The general claim that members of their families are buried there, without specifying in any way the nature of the relationship between themselves and the persons buried there, is insufficient to support their claim, even on the assumption that the notion of family is different from notions that prevail in other societies."³⁷⁹

They rejected the argument of an invasion of privacy, noting that:

*"The notion of privacy revolves around protection of those aspects of a person's life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion. It does not include access to public property, whatever the nature of that property, or the purpose of the access. Furthermore, the mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy."*³⁸⁰

In addition, they viewed the claims regarding the violations of articles 17 & 23 to be unsubstantiated. However, they do not elaborate as to how they came to this conclusion.

Due to the fact that France had made a declaration regarding Article 27 upon its ratification of the Covenant, the majority of the Committee interpreted this to be a reservation and did not consider itself competent to address this issue. However, five members of the Committee (Evatt, Medina Quiroga, Pocar, Scheinin, and Yalden) did not believe that France's reservation was applicable to claims originating from its overseas territories. Hence they issued a partial dissent in which they stated that the Committee should have reviewed the claim relating to Article 27.³⁸¹

The Committee called for the provision of effective remedy for violations of articles 17 & 23 as called for under Article 2. It also noted that the State should ensure that similar violations would not be repeated. France provided a follow-up reply which stated that the construction plan was changed in order to protect the graves next to the sea, including the creation of a retaining wall to preserve them.³⁸²

The Human Rights Committee addressed the special character of burial grounds, however given that many Guatemalan indigenous/minority groups identify all of their lands as having spiritual value, one may envision a claim requesting an expanded view of protection, although thus would be unlikely to succeed.

Olo Bahamonde v. Equatorial Guinea, Communication No. 468/1991, relates the travails of Angel N. Olo Bahamonde who claimed persecution by the President, the Prime

³⁷⁹ Id. at Annex, B, para.4.

³⁸⁰ Id. at Annex B, para. 6.

³⁸¹ For a discussion on the difference between interpretative declarations and reservations within HRC jurisprudence, see GHANDI supra note 355 at 292-298.

³⁸² Report of the Human Rights Committee, Vol. I, General Assembly, Official Records, fifty-third session, Supplement No. 40 (A/53/40), para.495.

Minister, the Deputy Prime Minister, the Governor of Bioko, and the Minister of External Relations. He suffered the confiscation of his passport pursuant to orders by the President and arbitrary detention under orders of the Governor of Bioko. His land was expropriated in 1987 and 1990, the latter action pursuant to decree No. 125/1990 of 13 November 1990. In 1988, his agricultural crops were confiscated as a result of orders by the Prime Minister; two years later his crops were also destroyed by the military and his timberland was exploited. No remedy was provided for these losses. He filed administrative and judicial *demarches* and was given a personal audience with President Obiang, all of which proved to no avail. He stated that the judiciary was not independent because the President directly nominates the judges and magistrates, and the president of the Court of Appeal belongs to the President's security forces. The Committee accepted this argument, noting:

*“ . . . that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1. In this context, the Committee has also noted the author's contention that the President of the State party controls the judiciary in Equatorial Guinea. The Committee considers that a situation where the functions and competences of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1, of the Covenant.”*³⁸³

The Committee held that Mr. Olo Bahamonde had been discriminated against because of his political opposition to the regime, thereby holding the State in violation of Article 26. Violation of Article 9 was also cited due to the failure of the state to guarantee the security of the person, stating that this omission “would render ineffective the guarantees of the Covenant”.³⁸⁴ According to the Committee, the right to security of the persons is not limited to those individuals under arrest and detention. Violation of Article 12 was also found due to the confiscation of the passport and prevention of exit from the country. The Committee noted Article 2 as the basis for its call for guarantee of the security of his person, return of his expropriated property or appropriate compensation, and remedy for his discrimination. The State has not yet provided a follow-up reply although consultations were pursued.

In Guatemala, the FRG party and the Executive Body have indeed influenced the judiciary thus the independence of this body is questionable and the above case provides

³⁸³ Olo Bahamonde v. Equatorial Guinea, Comm. No. 468/1991, para. 9.4 (views adopted on 20 October 1993, forty-ninth session).

³⁸⁴ *Id.* at para. 9.2, citing Delgado Paez v. Colombia, Comm. No. 195/1985, views adopted on 12 July 1990, paras. 5.5. and 5.6; and Bwalya v. Zambia, Comm. No. 314/1988, views adopted on 14 July 1993, para. 6.4.

valuable precedent for marginalized persons denied access to remedy. These issues are explored further in Part III.

5.1.2.3. Equal Protection of the Law (re The Right to Property)

It has been suggested that the non-discrimination clause under Article 2 (1) and the equal protection of the law clause under Article 26 may provide grounds for claims pertaining to property.³⁸⁵ In Guatemala, I assert that there were discriminatory policies pertaining to restitution, as refugees and CPRs were provided with restitution, while dispersed IDPs were not. In Adam v. Czech Republic, Communication No. 586/1994, the author is an Australian citizen of Czech descent who claimed restitution of his father's property which had been confiscated by the Czechoslovak Government in 1949.³⁸⁶ Restitution of expropriated property under the Communist regime was made possible in 1991 by Act No. 87/91 on Extra-judicial Rehabilitation.³⁸⁷

³⁸⁵ See Henckaerts, Jean-Marie, "An Effective Individual Complaint Mechanism in an International Human Rights Context", in *Enforcing International Human Rights Law: The Treaty System in the 21st Century*, Center for Refugee Studies, York University (22-24 June 1997).

³⁸⁶ Josef Frank Adam v. the Czech Republic, Comm. No. 586/1994 (views adopted on 23 July 1996, fifty-seventh session).

³⁸⁷ See also Simunek et. al. v. The Czech Republic, Communication No. 516/1992, para. 11.3 in 17 (1-2) *Human Rights Law Journal* (30 April 1996). It addresses the plight of Mr. and Mrs. Simunek who were forced to leave Czechoslovakia in 1987. Their property was confiscated. After the fall of the communist regime, the couple returned in 1990 to claim restitution of their property. Their property had been auctioned off, destroyed, and transferred to another owner prior to their filing of the claim. In 1991, the Czech government issued legislation which entitled Czech citizens who were forced to flee under the communist regime to receive restitution for lost property on condition of permanent residency in Czech. The legislation rendered the filing of claim in court moot. The couple claims that they lodged complaint with municipal, provincial, and federal authorities but were given no remedy.

Darmar Hastings Tuzilova suffered similar seizure of property upon her emigration in 1974. Although in 1992 the Administration of Housing agreed to transfer 5/18 of her house back, the notary refused to register the transaction and the District Court upheld his action. She appealed to the Supreme Court in 1993, but a year later no decision had been taken. She filed a civil action against the Administration of Houses, but the District Court of Pilsen stated that as an American resident she was not entitled to restitution according to Section 3 (1) of Act 87/1991. Josef Prochazka suffered similar experience.

The parties charged that the Act constituted unlawful discrimination in violation of article 26. The Committee held that although the right to property, as such, is not protected under the Covenant,

"However, a confiscation of private property of the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant." Hence, the Committee held that Act 87/1991 violated the applicants' rights to equality before the law and equal protection of the law. The issue was not the confiscation but rather the denial of remedy. The Committee stated a standard of reasonableness to uphold differentiation. The Committee cited Zwaan de Vries v. The Netherlands, Communication No. 182/1984, para. 13 in *Human Rights Law Journal* Vol. 9 p. 258 (1988). It identified the relevant factors for review of restitution to include "the author's original entitlement to the property in question and the nature of the confiscation."³⁸⁷ The Committee found that the condition of citizenship and residency was unreasonable, noting that the State had failed to provide any grounds to justify it and the fact that the State itself had been responsible for the flight of the applicants and ensuing adoption of new citizenship and residency.

However, Adam's claim was quashed due to the fact that the applicant did not have Czech citizenship and was not a permanent resident in the Czech Republic. The applicant considered this requirement to be a violation of Article 26 of the Covenant. The Committee noted that although the right to property was not covered by the Covenant, the discriminatory aspect of the law was relevant subject matter:

*“ . . . (T)he right to property, as such, is not protected under the Covenant. However, a confiscation of private property of the failure of a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds, in violation of article 26 of the Covenant.”*³⁸⁸

The State claimed that the author did not avail himself of the possibility of appeal to the Constitutional Court, thus it would not restate his property. The Committee deemed the domestic remedies to be “unreasonably prolonged” given the fact that the applicant has spent over 10 years pursuing the claim to no avail. In addition, given that the applicant's claim would fall outside the scope of the law, the Committee doubted the availability of Constitutional recourse. With respect to the reasonableness of the discrimination, the Committee noted that it had to assess the original entitlement to the property and the nature of the confiscation. The Committee stated that restitution legislation “must not discriminate among the victims of prior confiscation, since all victims are entitled to redress without arbitrary distinctions”.³⁸⁹ It was noted that the applicant's claim was based on inheritance, which rendered citizenship irrelevant. In addition, the fact that the State itself had been responsible for the flight of the family, also rendered a citizenship requirement inappropriate. The law was characterized as discriminatory in effect, rather than intent. The State was ordered to provide the applicant with effective remedy, in the form of compensation if restitution of the property were impossible. Finally, it was recommended that the law be reviewed to eliminate discrimination in application. The Committee noted that the Special Rapporteur would seek consultations with the State party in order to pursue implementation of the Committee's view. Consultation were held during the sixty-first and sixty-sixth sessions.

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

The Committee concluded that the failure to provide restitution was a violation of Article 26. As to what form of restitution would be considered appropriate, the Committee held that it “may be compensation if the properties in question cannot be returned.” Thus, it is inferred that full restitution would be preferred but lower compensation acceptable if necessary. The follow-up proceedings revealed that one party received restitution of his property whereas another complained that the State was under-valuing his property to provide compensation.

³⁸⁸ Adam v. The Czech Republic, supra note 386 at para. 12.2

³⁸⁹ Id. at para. 12.5.

applies to the inverse situation, those abroad were granted compensation while those who remained within national borders were excluded. Fear of an avalanche of claims is unwarranted due to the notion that the claims must be based on the original possession, not cumulative claims per additional person. This author queries as to why eyebrows are hardly raised at the Eastern European inter-generational restitution efforts and yet cries of impossibility are shouted within the Latin American context. Although the latter region would undeniably rely more on oral presentations of proof, rather than straight review of documentary evidence, this does not remove the legitimacy of such mechanisms.³⁹⁰

5.1.2.4. The Right to Enjoy One's Culture³⁹¹

It is possible to imagine Guatemalan internally displaced persons claiming that the policies of forced eviction have effectively interfered with their right to enjoy their culture. When the refugees reached Mexico, they were placed in camps which mixed ethnic groups together. Upon resettlement, false communities were created in which members of different groups returned together, the result being that not everyone was able to return to areas of

³⁹⁰ See Also Somers v. Hungary, Communication No. 566/1993, highlights the claim of a family of Hungarian origin who suffered confiscation of their property by the communist regime. The family was not provided with any restitution. Somers claims that the restitution legislation enacted by Hungary in 1991 Law No. XXVI is discriminatory because of its low value, which amounts to partial compensation, rather than full restitution. Hungary argued that full restitution was impossible due to the "huge number of claims and the difficult economic situation of the country." The Committee reiterated that it was not deciding upon the legality of confiscation, but rather the alleged discriminatory effect of the compensation law. It noted that given that the Covenant does not recognize the right to property, it follows that there is no right to restitution, as such The only issue was whether the restitution is applied equally. The Committee found that the law was objective and reasonable. The clause which entitled current tenants of former State-owned property priority in the privatization sale was not considered to be discriminatory because the tenants deserved protection. As long as the original owners received compensation in an equal manner, this was viewed as compatible with the Covenant. No discrimination was found.

³⁹¹ See Also Jose Vicente & Amado Villafane Chaparro et. al.v. Colombia, Comm. No. 612/1995 (views adopted 29 July 1997) addressed the violation of the right to life. The Committee found that the purely disciplinary and administrative remedies were inappropriate given the serious human rights violations, especially highlighting the right to life. The State was held responsible for violations of articles 6, 7, 9, due to the murder, torture, arbitrary arrest of the members of the Arahua tribe. Compensation for loss and injury was called for as well as the recommendation that the criminal proceedings for prosecution of those responsible be expedited. It also reiterated the call to prevent further reoccurrence of this type of violation. No follow-up reply was provided. Under the Colombian Military Code, there are no provisions for victims to institute criminal indemnity proceedings before the military courts due to human rights violations.

It is this author's opinion that there is indeed a strong link between the maintenance of a tribal culture and the preservation of spiritual leaders. Given the oral nature of indigenous traditions, the memory of the elderly serves as the only "libraries" or "databanks" available to indigenous groups. In comparison with Guatemala, one may note that the elimination of the tribal leaders resulted in a decimation of the culture itself. At present, many indigenous groups are struggling to revitalize traditions and norms which were repressed during the war. The explosion of vigilante justice has been wrongfully described as an example of indigenous law when it is actually the result of the absence of indigenous law. Much knowledge regarding religious practice, dispute resolution, and rituals has been buried with the indigenous leaders. The key challenge is to resuscitate the norms and salvage the communities from further destruction.

origin. In the case of the internally displaced, this is even more extreme. Aside from the CPRs, it is very difficult for internally displaced persons to retain a strong sense of community. Because they fear discrimination and further persecution, they generally reject participation in organizations. They become anonymous inhabitants of the areas surrounding the capital or dispersed into various regions.

Lovelace v. Canada, Comm. No. 24/1977, concerned a Maliseet Indian woman who married a non-Indian and thus lost her rights to live on the Tobique reservation in conformance with section 12 (1) (b) of the Canadian Indian Act.³⁹² She contended that the law was discriminatory due to the fact that had she been a man, she would not have lost her rights. The State noted that the discriminatory provision was due to the indigenous patrilineal system which was intricately linked to the preservation of land within the tribe. After her divorce she sought to return to her tribe but found no reinstatement process within the Canadian Indian Act. The Committee did not consider the denial of her right of residency to be “reasonable or necessary to preserve the identity of the tribe”. Thus, this amounted to a breach of Article 27’s guarantee to protect the rights of members of minority groups to enjoy their own culture, religion, and language. The Committee called for this right to be “read in the context of articles 12, 17, 23, 2, 3 and 26.” Analysis of articles 2, 3, 12, 27, 17,23, 24 and 26 were considered to be subordinate to the review of Article 27. There was no call for remedies. Committee Member Bouziri issued an individual opinion which noted the Indian Act’s violations of articles 2,3,23,and 26 of the Covenant, apart from Article 27. Canada amended its legislation to comply with the decision.³⁹³

These cases present a strategy for presentation of claims by IDPs pertaining to property to the CCPR via linkage to other rights. They serve to demonstrate the fundamental nature of property as the source of realization of other rights which are intrinsic to human dignity. Below, I present enforcement problems which may limit the effectiveness of pursuing such action.

5.1.2.5. Enforcement

It has been noted that given that the Human Rights Committee is a quasi-judicial body, not a court, and its views are not legally binding; many countries have ignored the

³⁹² Lovelace v. Canada, Communication No. 24/1977, views adopted 30 July 1981.

³⁹³ Selected Decisions of the Human Rights Committee, Vol. II Annex

Committee's recommendations and failed to respond to communications.³⁹⁴ Helfer & Slaughter noted that the Committee itself has called for States Parties to amend the Optional Protocol to make the Committee's views legally binding.³⁹⁵

Mutua has cited the facts that the Committee's funds, staff, and facilities are provided by the UN; that Committee members may be re-appointed by states parties (thus potentially inhibiting their judicial activism); and the Committee's practice of reaching decisions by consensus, instead of voting as evidence of politicization and weakness within the institution.³⁹⁶ She states that the Committee seems to engage in "the more 'benign' functions of promotion, conciliation, and cooperation as opposed to the more contentious terrain of protection, adjudication, and supervision, which would give it a quasi-judicial or judicial personality."³⁹⁷ Mose & Opsahl espouse a contrary position which criticizes the Committee for not engaging in conciliation during the consideration of the merits of the claim time period in which the State is expected to provide explanations of remedial actions it is taken with regard to the case.³⁹⁸ It is proposed that conciliation at this stage would promote investigation and remedial efforts by the State at the national level in order to achieve a friendly settlement. Thus there is disagreement as to what extent use of soft mechanisms may result in greater efficiency regarding processing of cases.

In 1990, the Committee created a mechanism to keep oversight as to whether States have implemented the final decisions. These measures set forth that the Committee ask the State to inform it as to how it has implemented the Committee's views. The Committee is to indicate in the views what action it considers to be appropriate and set a time limit not to exceed 180 days. All replies and non-replies, in matters relating to implementation, are to be noted publicly within the Committee's Annual Report. That same year, the Committee created the post of Special Rapporteur for follow-up on views, whose activities began in 1991. Between 1991-1994, all follow-up proceedings were kept confidential. It was considered that it would be beneficial to publicize such proceedings in order to prompt implementation of views and enhance the authority of Committee views. In 1994, the Committee decided to publicize follow-up proceedings through inclusion in Annual reports, publication of reminders

³⁹⁴ MARTIN, FRANCISCO, ET.AL., INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, 7 (Kluwer Law 1997)

³⁹⁵ Helfer & Slaughter supra note 361 at 351-352.

³⁹⁶ Mutua, supra note 332. See also Markus Schmidt, "Individual Human Rights Complaints Procedures based on United Nations Treaties and the Need for Reform", 41 INTERNATIONAL COMPARATIVE LAW QUARTERLY 645, 656-658 (1992).

³⁹⁷ Mutua, supra note 332 at 224.

³⁹⁸ Mose & Opsahl, The Optional Protocol to the International Covenant on Civil and Political Rights", 21 SANTA CLARA LAW REVIEW 271, 321-322 (1981), quoted in GHANDI, supra note 355 at 392.

sent to States which have failed to send follow up information, the issuance of press releases once a year addressing follow-up, and discussion of non-implementation at the Bi-Annual meetings of the States parties to the Covenant.

The Committee also adopted Rule 95 establishing a Special Rapporteur with power of review of State implementation actions. It was decided that the full report of State's cooperation would be made public in its Annual Reports. Rule 99 provides that "Information furnished by the parties within the framework of follow-up to the Committee's views is not subject to confidentiality, unless the Committee decides otherwise. Decisions of the Committee relating to follow-up activities are equally not subject to confidentiality, unless the Committee decides otherwise."³⁹⁹ The Committee now requires all States in violation of the Covenant to provide an "effective and enforceable remedy" as well as a follow-up report within 90 days.⁴⁰⁰ Manfred Nowak notes that "Such a remedy may even imply the State party's obligation to repeal earlier amnesty laws in order to carry out official investigations, to identify the persons responsible for gross human rights violations, to enable the author to seek civil redress and to grant him or her appropriate compensation."⁴⁰¹ The Committee has continually voiced its concern for lack of follow-up budgeting by the Centre for Human Rights in order to cover a minimum of one follow-up mission per year.⁴⁰² It stated that its "staff resources to service follow up mandate are inadequate, which prevents the proper and timely conduct of follow-up activities . . ."⁴⁰³

The Committee consistently noted that approximately 30% of the replies received could be categorized as indicating State cooperation in implementation of the Committee Views or provision of remedy, in 2002 this totaled 198 cases.⁴⁰⁴ It stated that:

"Many replies simply indicate that the victim has failed to file a claim for compensation within statutory deadlines and that, therefore, no compensation can be paid to the victim. Other replies cannot be considered satisfactory in that they either do not address the Committee's

³⁹⁹ United Nations, Report of the Human Rights Committee, Vol. I, Annex VI, General Assembly, Official Records, Forty-Ninth Session, Supplement No. 40 (A/49/40) (1994).

⁴⁰⁰ Nowak, Manfred, "The Activities of the UN Human Rights Committee: Developments from 1 August 1992 through 31 July 1995, 16 (No. 10-12) HUMAN RIGHTS LAW JOURNAL 377, 383 (30 Dec. 1995).

⁴⁰¹ Id.

⁴⁰² United Nations, Report of the Human Rights Committee, Vol. I, para. 466, General Assembly, Official Records, Fifty-first Session, Supplement No. 40 (A/51/40) (1997) and Report of 1999 para. 474 (A/54/40).

⁴⁰³ United Nations, Report of the Human Rights Committee, Vol. I, para. 557, General Assembly, Official Records, Fifty-second Session, Supplement No. 40 (A/52/40) (1997).

⁴⁰⁴ United Nations, Report of the Human Rights Committee, Vol. I, para. 522, General Assembly, Official Records. Fifty-second Session Supplement No. 40 (A/52/40) (1997). The same statistic is utilized throughout the reports 1998-2001 see <http://www.unhchr.ch>. Nowak cites the Committee's concern for State non-compliance with its views and he suggests that perhaps another UN body, such as the Commission on Human Rights would be more appropriate for follow-up of Committee views, as the Committee of Ministers does with respect to human rights violations addressed within the European System. Nowak, see footnote 22 at 16..At para. 522-523.

recommendations at all or merely related to one aspect of them. The remainder of the replies either explicitly challenge the Committee's findings, on either factual or legal grounds, constitute much belated submissions on the merits of the case, promise an investigation of the matter considered by the Committee or indicate that the State party will not, for one reason or another, give effect to the Committee's recommendations."⁴⁰⁵

In sum, although pursuit of a case via the optional protocol to the CCPR may not necessarily result in effective restitution of property for IDPs due to enforcement problems, it may have symbolic value and set an example for national courts and administrative bodies.

5.1.3. State Reports to the Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination has an inter-State complaint mechanism, an individual complaint mechanism, and a State report procedure. The inter-State complaint mechanism has never been utilized. Guatemala 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 which have discriminatory roots. The individual communication procedure has not yet addressed internal displacement situations, and neither Colombia nor Guatemala has declared recognition of this mechanism. Regarding the state reports, full reports on implementation of the International Convention on the Elimination of All forms of Racial Discrimination (1965) are presented every four years with updates every two years. The reports are reviewed by the Committee and recommendations and suggestions for improvement are offered in the Concluding Observations. CERD, like CCPR, has early warning and urgent mechanisms to respond to critical situations.

In its review of Guatemala's seventh periodic report, CERD specifically called for compensation of property which cannot be restituted and included inquiries as to land distribution and land conflicts involving IDPs, refugees, and indigenous people.⁴⁰⁶ The State claimed that the Peace Accords recognized right to restitution and compensation for land, however the problem was authentication of property rights and access to procedures for

⁴⁰⁵ Report of the Human Rights Committee, supra note 341 at para. 522-523.

⁴⁰⁶ Committee on the Elimination of Racial Discrimination, Summary Record of the 1190th Meeting, CERD/C/SR.1190 (10/03/97) at para. 18.

upholding those rights.⁴⁰⁷ The State rejected the suggestion of land reform, characterizing it as “arithmetically simplistic and counter-productive”.⁴⁰⁸

Committee Member Wolfrum stated that the State’s position indicated that:

*“It was not intending to apply a programme for the restitution of the land, territory, and resources which had traditionally belonged to or been used by the indigenous people. The programme of economic diversification seemed unlikely to resolve that question, moreover, since indigenous people did not feel concerned by the modernization of the economy. They were, on the other hand, fundamentally attached to the land, which was an essential part of their identity.”*⁴⁰⁹

This statement is a staunch defense of the position that indigenous people are entitled to restitution of land due to their cultural link. He believed racial discrimination to be the root cause of the conflict and that equitable distribution of land was necessary to bring peace to Guatemala. In contrast, the State suggested that the “indigenisation of poverty” was due to lack of access to modernization and attachment to cultural traditions and institutions, thereby blaming indigenous people for their own predicament.⁴¹⁰ It denied that the war had been caused by racial discrimination, citing it to be a peripheral factor. This statement reveals a complete lack of understanding of what is not a past conflict, but rather an ongoing protracted conflict. Racism and its link to inequitable divisions of resources is indeed the primary source of division within Guatemala.

The Committee and the Country Rapporteur exhibited similar concern regarding the right to remedy, given the state of impunity, discrimination within the courts, and problems with lynching. Mr. de Gouttes noted that “the absence of complaints, prosecution, or sentencing suggested ignorance of their rights on the part of the members of the indigenous population, a lack of confidence in the police and the justice system, and perhaps also an indifference in the police force and the courts towards complaints of ethnic and racial discrimination.”⁴¹¹ Indeed, polls taken demonstrate severe lack of confidence in the courts and the police, as well as perception of discrimination by the actors vis-à-vis indigenous people (see Part III). Mr. de Gouttes suggest that this may be an example of impunity, indeed I am in full accord. Mr. van Boven called for access to effective protection mechanisms and remedies for victims, noting that “there could be no genuine reconciliation in Guatemala as

⁴⁰⁷ Committee on the Elimination of Racial Discrimination, Summary Record of the 1191st Meeting, CERD/C/SR.1191 (07/04/97) at para. 27.

⁴⁰⁸ Id. at para. 16.

⁴⁰⁹ Id. at para. 22.

⁴¹⁰ Id. at para. 20.

⁴¹¹ CERD, supra note 407 at para. 38. Mr. Dianconu called for judges to learn indigenous languages.

long as impunity prevailed.”⁴¹² Hence, effective access to remedy is identified as a condition of peace itself.

In its conclusions, the Committee expressed concern for the climate of violence and intimidation which is borne by the indigenous population and the lack of effective protection and remedies due to lack of interpreters and public defenders.⁴¹³ It lamented the state of impunity, vigilante justice, and “despair and lack of confidence of the population in the effective exercise of justice.”⁴¹⁴ I believe that similar criticism could have been made with respect to the denial of the right to remedy for dispersed IDPs.

CERD’s final conclusions also 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.”⁴¹⁵

Hence, the primary focus of protection is category of indigenous people, although specific mention is made regarding returnees. As in the case of the CCPR, the conclusion does not directly address the needs and rights of IDPs. The conciliatory tone prevents direct accusation of violation of the CERD. However, the Committee’s cross reference to ILO Convention No. 169 is positive, due to its more complete provisions regarding indigenous land rights, as a source of guidance for future policy. It called for compensation of property that cannot be restored, thus referring to the standard contained within ILO Convention No. 169. This demonstrates how soft law mechanisms serve to promote implementation of hard law instruments, even those beyond their mandate. However, in practice the State has yet to demonstrate effective response to CERD’s recommendation.

⁴¹² Id. at para. 41. The State noted that MINUGUA, UNDP, and the Inter-American Institute of Human Rights were providing aid to increase legal services in remote areas, provide translation, and develop the police force. Impunity was blamed on institutional under-development and the armed conflict which withdrew the civilian authorities from certain regions, leaving only military.

⁴¹³ Committee on the Elimination of Discrimination, Concluding Observations, CERD/C/304/Add.21, (23/04/97) at para.17.

⁴¹⁴ Id. at para. 18.

⁴¹⁵ Id. at paras. 30-31.

5.1.4. State Reports to the Committee on Economic, Social & Cultural Rights

It has been noted that "Economic, social and cultural rights are often viewed as effectively 'second-class rights'- unenforceable, non-justiciable, only to be fulfilled 'progressively' over time. . . The question is not whether these rights are basic human rights, but rather what entitlements they imply and the legal nature of the obligations of States to realize them."⁴¹⁶ Poverty, malnutrition, homelessness, illiteracy are cited as factors impeding the protection of human rights. Of all the UN monitors, this Committee has provided the most in-depth discussion of the inequitable land distribution in Guatemala. The Committee (composed of 18 members, serving in their independent capacity) receives state reports on the implementation of the International Covenant on Economic, Social and Cultural Rights (1966) once every five years and provides concluding observations regarding the problems and successes in implementation of the Covenant. The Committee is also expected to provide recommendations for improvement. At present there is no formal complaints mechanism, although a draft exists. Indeed, the need for this procedure is clear given the fact that in the absence of such mechanism, the HRC has had to address socio-economic violations by an expansive interpretation of civil and political rights. Exhaustion of domestic remedies is supported by the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, which states that States shall provide effective remedies, including judicial remedies for violations.⁴¹⁷

During discussions regarding Guatemala's initial report, the Committee inquired as to whether there were sufficient resources for reducing land concentration, as there was a need for agrarian reform and redistribution to ensure socio economic and social rights.⁴¹⁸ Suggestion was made as to possible diversion of military funds for housing for the displaced. The imbalance between resources dedicated to defense as opposed to social services and land programs is an issue which remains contentious at present, as the defense budget has swelled two-three fold while social services have been reduced.

The Committee correctly observed that that land tenure was the root of the conflict, but that it was difficult to solve due to reticence from owners of large landed estates and

⁴¹⁶ UN High Commissioner for Human Rights, Fact Sheet No. 16 (rev.1), The Committee on Economic, Social, and Cultural Rights.

⁴¹⁷ Principle 19, E/CN.4/1987/17, annex, approved by a group of experts at Maastricht 2-6 June 1986.

⁴¹⁸ Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.11 (10/06/96) at para. 19.

conservative sectors of society. It stated that proper response depended on two factors: financial means and political will.⁴¹⁹

The State claimed that approximately 1/3 of land in Guatemala could be redistributed, however it opined that “agrarian and rural development involved not so much the introduction of agrarian reform as improvement of the agricultural sectors.”⁴²⁰ The Committee specifically inquired as to indigenous land and forced evictions. The State claimed that it had not examined the question of ancestral lands and would not buy back ancestral land, but rather focus its efforts on bringing the registry up to date to record legitimate owner of land.⁴²¹ It should be noted that in the absence of litigation against current holders of titles attained via corruption, fraud, theft, or violence, there is a risk that the registry program will only legitimize theft. Current World Bank strategies for registry reform place little emphasis on historic title or adverse possession (see Part III on registry).

Committee Member Texier noted the importance of not decreasing aid as was unfortunately done in the cases of Nicaragua and El Salvador. Unfortunately, reduction of aid in Guatemala followed suit due to donor fatigue, frustration with non-implementation of the Peace Accords, and competition from the burning humanitarian crisis in Colombia.

The issue of forced evictions and wide gap in perceptions between State officials and observers regarding the right to property which has resulted in tragic-comic exchanges in Geneva. During CESC’s review of the report, Committee Member Simma was perturbed by the State’s written reply concerning the legal regime governing evictions, specifically querying the use of the term “illegal occupation of property”. The government simply replied that those living in illegal settlements were in houses or shacks built on private property. There was no analysis of the prescription/historic claims vs. the title claims and the State appeared oblivious as to which actor the Committee considered to be the victim. Simma expressed surprise at the State’s detailed description of criminal procedures adopted in such cases, noting that the Committee was actually “more concerned with the protection of the rights of those being evicted. . .”⁴²² This revealed the difference of views, whereas the State

⁴¹⁹ Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.13 (28/05/96) at para. 17. Ms. Taya said there were 470,000 landless rural families and 4 million uncultivated hectares of good land owned by State or private individuals. Thus, she was curious as to whether redistribution was possible. Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.12 (13/05/96) at para. 48.

⁴²⁰ Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.13 (28/05/96) at para. 12.

⁴²¹ Id. at para. 24.

⁴²² Committee on Economic, Social and Cultural Rights, Summary Record, E/C.12/1996/SR.12 (13/05/96) at para. 43.

sought to uphold the civil and political variant of property rights pertaining to formal landowners, the CESC was paying heed to the socio-economic variant linked to the right to housing.⁴²³ However, the government offered to set up a commission to study measures to prevent occupations of land and evictions. As of 2001, no significant advances have been made in this arena, on the contrary forced evictions have increased.

The Committee also addressed concern for the right to remedy via commentary addressing the state of impunity:

*“The continuing difficulties encountered in combating the problem of impunity and the uneven distribution of economic resources has led to a loss of confidence on the part of the civilian population which needs to be addressed in order to secure economic, social and cultural rights, and a return to the rule of law in the country.”*⁴²⁴

In its conclusions, the Committee directly stated that Guatemala would not be able to implement the ICESCR without land reform and implementation of the Peace Accords, thereby linking the ICESCR to the national soft law:

“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 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.”*⁴²⁵

It engaged in further normative cross-referencing by recommending 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

⁴²³ The CESC expressed concern for the eviction of indigenous persons. Committee Member Grissa mentioned the extremely high proportion of people lacking adequate housing and asked whether those living in illegal settlements were subject to expulsion. The State audaciously stated that every eviction was based on a properly drawn up judicial order and was carried out peacefully. The practice is actually the opposite, as noted by the MP and the Attorney General’s Office for Human Rights, such events are often marked by violence (see infra Part III on Forced Evictions) Id. at para. 44 and para. 21.

⁴²⁴ Committee on Economic, Social and Cultural Rights, Concluding Observations, E/C.12/1/Add.3 (28/05/96) at para. 11.

⁴²⁵ Id. at paras.10, 17 & 23.

suggestion, the Guatemalan government has steadfastly denied the possibility of adopting an expropriation program in the interest of land reform (see *infra* Part III).

The Committee prioritized the situation of internally displaced persons sufficiently to highlight it in its conclusions, however no concrete suggestions for how to improve their specific status were proffered:

*“The general situation faced by internally and externally displaced persons remains a serious cause of concern for the Committee”.*⁴²⁶

It would have been helpful if the Committee had called for property restitution for dispersed IDPs. Nevertheless, the sound recommendations regarding land reform would indeed be applicable to them as well as other marginalized peasants.

5.1.5. Conclusions on the Treaty Monitors

The treaty monitor reports serve to highlight the key problems of concern to the international community which are precisely the unaddressed needs of marginalized groups in Guatemala. Within the dialogues with the monitors, the State revealed contradictory tendencies to recognize problems but uphold variable responses dependent on subject matter. The monitors’ advice to enact judicial reform in order to combat impunity was deemed acceptable by the State, although it placed primary responsibility on the society itself to undergo a “cultural change” thereby indicating a protection gap as the latter looks towards the State for re-establishment of the rule of law. In my opinion, it is a shared responsibility of both the State and society; creative solutions must be devised based on joint strategies (see Part III).

In contrast, the suggestion to pursue land reform in order to tackle the socio-economic roots of such impunity was not approved by the Guatemalan State. Hence, the conciliatory approach within the arena of human rights results in some progress but also ineffectiveness due to contrary national pressures and lack of political will. To some extent the reluctance of the Committees to identify concrete violations, instead emphasizing a general need to implement the conventions and highlighting areas for improvement belittles the situation of vulnerable groups.

⁴²⁶ Id. at para. 20.

In terms of identifying protection categories as pertaining land rights, the treaty monitors appear to highlight the special situation of indigenous people. CCPR also called for compensation for poor victims of human rights violations, thus confirming Donor tendencies to identify holistic categories for reparation program (see infra discussion on the SEPAZ program). CERD and CESC did inquire as to the displaced populations, but placed primary importance on the protection category of indigenous people. The creative cross-referencing to other international and national instruments (both hard and soft law) revealed an overlapping strategy intended to strengthen respect for these norms.

In the next-section, I review the positions taken by extra-conventional mechanisms.

5.1.6. Extra-Conventional Mechanisms: Experts, Representatives, Rapporteurs & MINUGUA

5.1.6.1. 1235 Procedure & Independent Expert

The 1235 procedure was established in 1967 in order allow the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine situations “relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid . . . and racial discrimination . . .”⁴²⁷ This consists of a public session debate in which members of the Commission and the Sub-Commission refer to human rights in . Resolutions may be adopted and special procedures may be established. Should persons wish to bring publicity and public monitoring of a situation, this procedure would be appropriate, as it is considered more effective in this way than the 1503 procedure.⁴²⁸ There are no admissibility requirements. There is no

⁴²⁷ E.S.C. res. 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) at 17, U.N. Doc. E/4393 (1967).

⁴²⁸ FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 123 (Anderson Pub. 1990).

The 1503 procedure enables complaints regarding gross violations of human rights and fundamental freedoms to be submitted to a Working Group n Communications of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. E.S.C. res. 1503 (XVLIII), 48 U.N. ESCOR Supp. (No. 1A) at 17, U.N. Doc. E/4832/Add.1(1970). Selection is made of those communications indicating reasonable evidence of a consistent pattern of gross violations of human rights for reference to the Working Group on Situations, which in turn selects communications for referral to the Commission on Human Rights. It is considered to be appropriate to examine situations rather than individual injuries, unless they reveal a pattern or situation of gross violations. Because the procedure was established by way of a resolution of the Economic and Social Council, rather than a treaty, the voluntary cooperation of the State is required. However, it is applicable to all States. Complaints may be filed by the alleged victims themselves or persons/groups having “direct, reliable knowledge of violations”. As with the individual complaint procedure, all domestic remedies should be exhausted unless it can be demonstrated that national procedures would be ineffective or unduly dilatory. It has been noted that “(o)f the

mechanism for review of the communications themselves, however the Commission may examine information and make a thorough study of situations which reveal a consistent pattern of human rights violations and investigate situations or individual cases raised at the annual debate. It has been noted that “(t)here often needs to be bloodshed or great unrest for the 1235 procedure to be implemented in specific cases. Therefore, 1235 may be seen not only as reactive instead of proactive, but reactive at a later stage when the stakes are particularly high.”⁴²⁹

Under this resolution, the Commission for Human Rights may appoint special rapporteurs, special representatives, experts, etc. to review human rights violations in particular countries. In 1979, the Commission sent a telegram to the Government of Guatemala (decision 12 (XXXV), the following year it approved a resolution expressing profound concern (resolution 32 (XXXVI). That same year the Sub.-Commission referred the case to the Commission within the 1503 procedure. In 1981 the Commission requested the Secretary-General to establish contact with the Government of Guatemala (resolution 33 (XXXVII). Finally in 1982, a special rapporteur was appointed to Guatemala. This office remained established through 1985 and a special representative was enlisted from 1986 to 1988.

In 1990, the Secretary General appointed an independent Expert to examine the human rights situation in Guatemala. Mr. Christian Tomuschat served from 1990-1993, followed by Ms. Monica Pinto who served until 1997. The Independent Expert on Guatemala explicitly linked the phenomenon of internal displacement to the struggle for land.⁴³⁰ She was particularly concerned for CPR Sierra land disputes with army and forced eviction of IDPs.⁴³¹ She called for housing and employment solutions for IDPs as well as remedy of legalization

thousands of communications received by the UN only about two dozen may be sufficiently well prepared to be given serious consideration by the Group.” Newman, Frank & Wiessbrodt, David, *INTERNATIONAL HUMAN RIGHTS*, 118 (Anderson Pub. 1990). The process is confidential until a situation is referred to the Economic and Social Council. However, the names of the countries under review are announced. Guatemala was examined in 1981, however the report were not publicized. Howard Tolley speculated that a review of the situation was possibly deemed not necessary due to the simultaneous handling of the issue within the public 1235 proceeding. Tolley, Howard, “The Concealed Crack in the Citadel: The United Nations Commission on Human Rights’ Response to Confidential Communications”, 6 *HUMAN RIGHTS QUARTERLY* 420, 454 (1984). It is not considered to be a dispute resolution mechanism.

⁴²⁹ MARTIN, FRANCISCO, ET.AL., *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 11 (Kluwer Law 1997).

⁴³⁰ Commission on Human Rights, Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, E/CN.4/1997/90 (22 January 1997) at para. 76.

⁴³¹ 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) at paras.102-103.

problems, better land distribution and access to land and titling.⁴³² Hence, the cycle between internal displacement and infringement of property rights is identified, solution of the former being contingent on resolution of latter.

The UN Expert on Guatemala's reports provide an account of faulty administration of justice, due to appointment of under-qualified justices of the peace, appointment by way of influence, shortage of judges, backlog of cases, lack of translation facilities & legal aid resulting in due process violations, lynching, and impunity.⁴³³ "All this results in a justice system which is unable to effectively resolve conflicts within the society."⁴³⁴ Calls for judicial reform and improving access to justice were linked to reduction of poverty and illiteracy, because "(t)he guarantees of justice and security which the country intends to provide must be accompanied by the respect for economic, social, and cultural rights."⁴³⁵ Additional support for affirmative action for indigenous people was offered due to the state of de facto discrimination and exclusion from the legal, political, economic, and social systems.⁴³⁶ Concern was expressed for the fact that indigenous customs not taken into account by the judiciary even though Article 66 of the Constitution calls for the State to recognize such.⁴³⁷ Problems regarding lack of resources in judiciary, backlog of cases, intimidation of members of the judiciary, spread of weapons, "promotes a situation of virtual impunity which is acknowledged on all sides but which nobody has decided to tackle at its roots."⁴³⁸

Although both the problems and the solution was identified early on by the UN Expert, years later the State has failed to implement her suggestions.

5.1.6.2. MINUGUA

In 1994, the United Nations Verification Mission in Guatemala was established to review implementation of the Accord on Human Rights and the Accord on Identity and Rights of Indigenous Peoples. On the one hand it highlights the weakness of democratic consolidation in Guatemala and the need for international oversight, yet on the other hand it has been

⁴³² Commission of Human Rights, Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, E/CN.4/1995/15 (20/12/94) at para. 199.

⁴³³ Commission on Human Rights, Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, E/CN.4/1997/90 (22/01/97) at paras. 17-36.

⁴³⁴ Id. at para. 102.

⁴³⁵ Id. at para. 107.

⁴³⁶ Commission on Human Rights Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, E/CN.4/1994/10 (20/01/1994) at para. 201.

⁴³⁷ Id. at para.62.

⁴³⁸ Pinto supra note 431 at para. 128.

criticized for extending beyond its mandate and hindering the independent development of the State. Its reports have been characterized as being largely descriptive rather than analytical, hence their value is deemed to be questionable.

MINUGUA reports consistently highlight the effect of organized crime on the judicial system thus impeding the right to remedy.⁴³⁹ The Ninth Report on Human Rights (1999) claimed that:

“... (P)rogress in the area of justice has been slow. As far as the protection of human rights is concerned, persistent shortcomings in the system of public security and administration of justice are perpetuating impunity and undermining the effective exercise of the right to security of person and to due process of law. . . Meanwhile, the ineffectiveness of the justice system perpetuates the population’s feeling that it is unprotected and that perpetrators enjoy impunity.”⁴⁴⁰

It asserted that there were cases of due process violations, extra-judicial assassinations, violations of the legal duty of the State to investigate and punish, and that there was “an alarming increase in lynchings”.⁴⁴¹ It concluded that the ineffectiveness of remedies was characteristic of the absence of the rule of law:

“The State’s primary weakness in the area of human rights remains its inability to tackle the crime problem through the administration of speedy and full justice. This inability to tackle the problem continues to encourage people to take justice into their own hands, whether through lynchings. . .”

Of interest, is its recommendation that the State recuperate traditional mechanisms of dispute resolution in order to combat lynching.⁴⁴²

It has cited concern for social conflicts rooted in agrarian problems, as well as forced evictions resulting in death and injuries.⁴⁴³ Specifically, it has criticized the lack of institutional mechanism to respond to land conflicts affecting indigenous population. It declared the peace process to be completely stagnated, in particular with respect to socio-

⁴³⁹ General Assembly, Eleventh Report on Human Rights of the United Nations Verification Mission in Guatemala, A/55/174 (26 July 2000)

⁴⁴⁰ General Assembly, Ninth Report on Human Rights of the United Nations Verification Mission in Guatemala, A/53/853 (10 March 1999) at para. 6.

⁴⁴¹ Id. at para. 10. It cited the existence of illegal security groups which operate “with the tolerance or participation, either direct or indirect, of agents of the State. . .” Id. at para. 67. MINUGUA noted that the internal armed conflict in the altiplano and military organization of people repressed weak state of law structures and indigenous law. Concern is expressed for the inability of organs to apply the law and minimal presence of administrators of justice. Id. at para. 84. Adverse socio-economic conditions were highlighted as favoring violence. Lament was expressed for the incorrect association of lynching with indigenous law. MINUGUA issued a press release in 2001 condemning persecution of human rights activists which indicated an evolution away from peace consolidation.

⁴⁴² Suplemento Al Noveno Informe Sobre Derechos Humanos de la Mision de Verificacion de las Naciones Unidas en Guatemala: Despliegue de la Policia Nacional Civil, Marzo 1999. at para. 70.

⁴⁴³ Sexto Informe del Director de la Mision de las Naciones Unidas de Verificacion de los Derechos Humanos y del Cumplimiento de los Compromisos del Acuerdo Global sobre Derechos Humanos en Guatemala, A/51/790 (31/01/97) at para. 11.

economic guarantees. MINUGUGA has recently elaborated reports on land issues and other socio-economic concerns, unfortunately its mandate runs out in 2003.⁴⁴⁴ It queried its own mandate given that “it is difficult to verify something which is not happening.”⁴⁴⁵ There has been a call by human rights activists for the opening of a UN Office of the High Commissioner for Human Rights.

5.1.6.3. Other Rapporteurs and Representatives



“Parallel groups”, UN Special Representative on Human Rights Defenders, Hina Jilani, before the Guatemalan Presidential Palace after commenting on the existence of clandestine groups threatening human rights activists, lawyers, judges, and peasant/ labour leaders. This demonstrates how Non-State actors are also a threat to international observers.

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⁴⁴⁴ HABITAT formulated a Housing Rights Barometer that may be of use to MINUGUA. See e.g. MINUGUA reports on “Situación 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); MINUGUA, LA POLÍTICA DE VIVIENDA EN EL MARCO DE LOS ACUERDOS DE PAZ (August 2001); MINUGUA “El debate sobre la política de desarrollo rural en Guatemala: Avances entre octubre de 2000 y abril de 2002 (April 2002).

⁴⁴⁵ Statement by Juan Pablo Corlazzoli, MINUGUA spokesman, quoted by Alberto Ramirez, “Desplazados desean vivienda” in PRENSA LIBRE 30 March 2001.

As pertaining rapporteurs and representatives, some have visited Guatemala, however several of those most relevant to the needs of IDPs lacking property restitution/redistribution and remedy have not, these would include: Internally Displaced Persons, Right to Food, Adequate Housing, Human Rights and Extreme Poverty, and Contemporary Forms of Racism. Fortunately in 2002, two rapporteurs conducted field missions to Guatemala: The Rapporteur on Human Rights and Fundamental Freedoms of Indigenous People criticized institutional, structural, and interpersonal discrimination against indigenous people which denies them access to land and justice; and the UN Special Representative on Human Rights Defenders voiced concern for threats made to persons fighting for socio-economic rights, in particular land rights, as well as indigenous people, lawyers, judges, etc.⁴⁴⁶ The Special Rapporteur on the Independence of Judges and Lawyers conducted two field missions to Guatemala but did not address the needs of IDPs in the legal arena as pertaining property rights, although he did call for recognition of the legitimacy of Mayan customary law (as called for by article 8 of ILO Convention No. 169) and deplored the state of impunity (discussed Part III). He criticized the fact that the Guatemalan judges failed to appreciate “constitutional values, the principles of judicial independence and due process . . .”⁴⁴⁷ In addition, he cited concern for discrimination by the courts against indigenous people and lack of interpreters.

He made thirty-two recommendations to the State pursuant to his visit in 1999, including a call for recognition by judges (particularly those of the Constitutional and Supreme Courts) 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.⁴⁴⁸ Unfortunately, Guatemala only implemented four of the recommendations: the establishment of the legislation on the judicial career and judicial civil service as well as a judicial code of ethics, an increase in the budget for judicial reform, creation of a law reform commission, and creation of a standard or procedure for discipline and removal of judges in accordance with the Basic Principles on the Independence of the Judiciary. Otherwise, the State only partially complied with some recommendations and ignored others. Instead, within the year following his visit, violence against members of the judicial system, impunity, vigilante justice, and obstruction of justice actually increased.

⁴⁴⁶United Nations Press Release: “United Nations Expert Expresses Concern over Threats to Guatemalan Rights Defenders, Calls for Government Action” 12 June 2002.

⁴⁴⁷ Commission on Human Rights, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Coomaraswamy, Report on the Mission to Guatemala, para. 147 E/CN.4/2000/61/Add.1 (06/01/2000).

⁴⁴⁸ Id.

Thus, the UN extra-conventional human rights monitors are capable of addressing the principle issues pertaining to restitution and recourse needs of IDPs and indigenous people which were initially identified by the UN Independent Expert on Guatemala, although they may suffer similar problems regarding implementation of recommendations. 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 displacement in order to recommend strategies for housing and infrastructure needs in urban and rural areas. The Rapporteur on Housing has already indicated that there is a link between the provision of property and the attainment of food, hence he appears to be devising strategies for combined action in this area. In addition, the rapporteurs should provide information to the HRC, CERD, and CESC in order to assure follow-up of the issues during Guatemala's next reports. Lack of response by the State to the recommendations of the rapporteurs may be due to lack of political will, institutional weakness, and lack of financial resources. The most important role of the rapporteurs appears to be to highlight ongoing areas of concern, provision of guidelines to the State for the design of solutions, provision of symbolic support to the marginalized groups with whom they meet, and information gathering for the UN system itself. Although solution to inequitable land distribution in Guatemala has yet to be implemented, it is fortunate that the attention placed by the UN on issues related to this structural anomaly has not disappeared. The international community must remind the State that the issue will not simply fade with time, rather focus on the matter should increase as we approach the new deadline of implementation of the Peace Accords.

In the next section, I review the Inter-American Human Rights System.

5. Pursuing the Right to Restitution within the Inter-American System

The regional framework for human rights protection is innovative and inspiring for those concerned with the issue of internal displacement. The Inter-American Commission on Human Rights reviews internal displacement and indigenous issues in its reports and created Special Rapporteurs on IDPs and Indigenous People. In addition, there is the Permanent Consultation for Internal Displacement in the Americas (discussed in 2.5.4.) However, the most creative norms and remedies relevant to IDPs within the Americas appear within the

general regional human rights instruments and mechanisms. Cohen recommended that IDPs be allowed access to an emergency procedure vis-a-vis the Inter-American Commission of Human Rights and be taught how to file complaints with this body, as well as seek advisory opinions from the Inter-American Court of Human Rights.⁴⁴⁹ Hence, one must review the jurisprudence of these bodies to glean the actual possibilities for effective action with respect to IDPs and their property claims.

The Inter-American Human Rights system is founded on the Charter of the Organization of American States (1948) and the American Convention on Human Rights (1969). The Charter's function as a source of human rights protection is linked to the American Declaration of the Rights and Duties of Man (1948). The American Declaration is was not originally intended to be legally binding, however it has evolved to be considered an "indirectly binding legal text" or "normative instrument" due to its characterization by the Inter-American Court as the authoritative interpretation and definition of the human rights referred to in the OAS Charter (Articles 3 & 17), thereby identifying it as a source of obligations for member states.⁴⁵⁰ The American Convention is considered to be a legally binding treaty as pertaining its States parties.

The Inter-American Commission on Human Rights was strengthened by the Protocol of Buenos Aires (1970) that amended the OAS Charter and identified the Commission as an OAS Charter organ. In 1979 a new Statute of the Inter-American Commission on Human Rights was adopted which identified the Commission as an organ intended "to promote the observance and defense of human rights. . .", specifically defining them as the rights in the American Convention on Human Rights as pertaining its States Parties and the rights in the American Declaration on the Rights and Duties of Man in relation to other OAS member states. Buergenthal, Shelton, and Stewart propose that

*"This reference to the Declaration reinforces its normative character and legitimates the authority of the Commission in relation to states that are not parties to the Convention. For these states, the OAS Charter and the Declaration impose human rights obligations which the Commission has the authority to enforce under its Statute."*⁴⁵¹

⁴⁴⁹ Conference on Forced Migration in the Americas 1997.

⁴⁵⁰ David Harris, "Regional Protection of Human Rights: The Inter-American Achievement", in HARRIS & LIVINGSTONE, supra note 238 at 4-6. See I/A Court H.R., Series A Advisory Opinion No.10 stating that the Declaration defines the human rights referred to in the Charter, thus for OAS members it is "a source of international obligations related to the Charter of the Organization". The Court cites Article 106 of the OAS Charter, the revised Statute of the Inter-American Commission of Human Rights, and General Assembly resolutions expressing confirmation of the Declaration as containing and defining human rights in the OAS Charter (Article 3 "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex. Article 17 ". . . The State shall respect the rights of the individual and the principles of universal morality.")

⁴⁵¹ THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 233 (West 2002).

The American Convention also provides for the establishment of the Commission and the Court and delineates their functions, competence, and procedures (Articles 41-73). The Commission is a quasi-judicial body which is composed of seven independent experts who are nominated by OAS member states and elected by the OAS General Assembly. The Commission serves part-time and juggles various human rights promotion and protection duties although limited in staff and resources. It receives, investigates (including on-site), and reviews individual petitions from victims including persons, groups or NGOs acting on their own behalf or on behalf of third persons (legally recognized in one OAS member State) thus permitting transnational actions. In addition, it requests and analyzes human rights information from countries, refers and argues cases before the Court, solicits the Court to take provisional measure to protect persons in matters of urgency, drafts human rights instruments, mediates disputes involving human rights problems, advises and makes recommendations to OAS member states on human rights implementation, and conducts field visits to publish country and thematic reports.

Country reports are conducted pursuant to the reception of information regarding significant human rights violations in a country, as follow up to a prior report, at the request of the OAS entities, or at the request of the State itself. The reports have received the most attention within the Commission, and it appears to be viewed as the primary task. Field visits are conducted and oral and written evidence is received.

6.1 Individual Petitions to the Inter-American Commission on Human Rights

The Commission has an enormous case load. Many cases have stagnated within the Commission in part due to lack of human resources, concentration on dispute of facts, rather than law, and non-cooperation on the part of accused States.⁴⁵² The right of individual petition to the Commission is compulsory upon ratification of the American Convention. Petitions must demonstrate attempt to exhaust domestic remedies (excused in situations of absence of due process, unwarranted delay in provision of remedies, or lack of access to national remedies), file within six months of receiving notice of final judgment, and non-submission of the matter to another international forum. The Commission may address

⁴⁵² Tom Farer, "The Rise of the Inter-American Human Rights Regime: No longer a Unicorn, Not Yet an Ox", in HARRIS & LIVINGSTONE note 238 at 31, 47.

communications presented by a State Party as pertaining another State Party only if these States have recognized the competence of the Commission to act in this arena in a declaration.

Complaints regarding States that are not parties to the American Convention may be based on the American Declaration.⁴⁵³ Complaints may be also be based on the Additional Protocol in the Area of Economic, Social and Cultural Rights (which supplements the American Convention), the Protocol to Abolish the Death Penalty, the Convention to Prevent and Punish Torture, the Convention on Forced Disappearance of Persons, and/or The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in accordance with their provisions, the Statute of the Commission, and the Rules of Procedure of the Inter-American Commission of Human Rights.⁴⁵⁴

In 2001, the Commission was processing 936 cases and petitions but transmitted only 4 cases to the Court, 4 reports were published on the merits, and 8 were resolved via friendly settlement.⁴⁵⁵ Parties must consent to attempt conciliation and show good faith participation, otherwise it may be terminated by the Commission. Both the Commission and the Court may take provisional measures in situations of urgency to protect persons.

The Commission Secretariat decides upon its prima facie admissibility, although this may be reversed by the Commission or the Secretariat based on failure to exhaust domestic remedies. The Commission may also close a case based on dissipation of the original grounds for petition, lack of follow up by petitioners, and even a substantive change of the regime in power. The Commission may conduct a field investigation, attempt friendly settlement between the parties, issue a decision, or submit the matter to the Court. Should a state prove non-cooperative, the Commission may presume the truth of the petitioner's claim if it is considered to be credible, consistent, and specific.⁴⁵⁶ When a friendly settlement is reached, the Commission files a report which is published by the OAS. If a settlement is not achieved, the Commission may continue to process the case. The friendly settlement procedure has not been subject to frequent use in the past, in part due to the fact that "gross human rights violations do not lend themselves easily to mediation or conciliation."⁴⁵⁷ Vivanco and

⁴⁵³ Rules of Procedure of the Inter-American Commission on Human Rights, Article 50 (2000).

⁴⁵⁴ Rules of Procedure of the Inter-American Commission on Human Rights, Article 23 (2000). Harris states that, the Declaration's rights are applied as indirectly binding and considered complementary to the Convention due to the fact that the Declaration addresses socio-economic rights which are not fully addressed within the Convention. Harris supra note 450 at 7. However the Protocol on Economic, Social and Cultural Rights was drafted to address these rights.

⁴⁵⁵ Statistics from <<http://www.cidh.oas.org>>

⁴⁵⁶ Guatemala proved non-cooperative in Report 25/94, Case 10508, IACHR Annual Report 1994, 46.

⁴⁵⁷ Harris, supra note 238 at 1, 3. See for example Report 19/97, Case 11212, Juan CHANAY PABLO ET AL IACHR Annual Report 1996, 447.

Bhansali criticize the Commission for succumbing to political pressures when considering individual petitions.⁴⁵⁸

The Commission deliberates the merits of the cases, examine evidence and arguments, and holds a vote. If the Commission decides that the State is not in violation, it shall publish its decision in a report which is forwarded to the OAS General Assembly. If it finds a violation, it prepares a preliminary report with recommendations to the State for compliance within a set deadline. With respect to cases involving States which have accepted the contentious jurisdiction of the Court, petitioners have one month to present a position to the Commission as to whether or not the case should be submitted to the court. Should the State not abide by the Commission's recommendations in accordance with Article 50 of the American Convention, the Commission forwards the case to the Court, unless there is a reasoned decision by the majority of the Commission to the contrary.⁴⁵⁹ States retain the right to forward cases to the Court. When the Commission refers a case to the Court, it changes from an impartial investigatory body to the opponent to the State. States may declare recognition of inter-state complaint mechanism, although this has yet to be utilized in practice.

According to Article 51 of the American Convention, with respect to States that have not implemented recommendations or cases which have not been forwarded to the Court, the Commission may issue a final report that contains its opinion, final conclusions, and recommendations. This report is sent to the parties, who shall present information regarding compliance within a set time period. The Commission may decide to publish the final report, included it in the Annual Report to the General Assembly, or publish in another manner. Unfortunately, the General Assembly has not proved to be an effective enforcer of the Committee's decisions.

As pertaining land issues, the Inter-American Commission of Human Rights was reluctant to address this subject in a substantial manner.⁴⁶⁰ It is estimated that 70% of complaints before the Commission refer to the right to life. The Inter-American Commission has received many complaints against Guatemala, the majority of which address violations of the rights to life, liberty, and personal integrity. The cases emerging in the latter half of the 90's-2000 address also judicial protection and due process of law, although disappearance,

⁴⁵⁸ Jose Miguel Vivanco & Lisa L. Bhansali, "Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms" in HARRIS & LIVINGSTONE *supra* note 238 at 424-425.

⁴⁵⁹ Rules of Procedure of the Inter-American Commission on Human Rights, Article 43 (2000).

⁴⁶⁰ Interview with Elizabeth A.H. Abi-Mershed, Senior Human Rights Specialist, Inter-American Commission of Human Rights, 16 January 1998.

torture, and assassination remain ongoing themes.⁴⁶¹ However, Guatemalan IDPs seeking to present a property-related claim to the Inter-American Commission on Human Rights will find favorable precedent.

In terms of recent cases, The Commission successfully conciliated a dispute between the Lamexay 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.⁴⁶² The State was not clearly held responsible for the acts.⁴⁶³

With regard to basing a claim on non-interference with the home, the Commission held Peru responsible for violation of article 11 in the American Convention and articles IX & X in the Declaration due to the takeover and occupation of ex-President Alan Garcia Perez's

⁴⁶¹ See e.g. Case 10.588 Isabela Velasquez y Francisco Velasquez, Case 10.608 Ronal Homero Mota et. al., Case 10.796 Eleodoro Polanco Arevalo, Case 10.856 Adolfo Rene & Luis Pacheco del Cid, Case 10.921 Nicolas Matoj et. al, Report No. 40/00 (13 April 2000). Guatemala agreed to accept responsibility for the violations of articles 3,4,5,7,8 and 25 of the American Convention on Human Rights and provide reparation to the families of the victims. See also Case 10.586 et. al. Extrajudicial Executions (13 April 2000). The Commission found Guatemala liable for violating articles 4,8, 25, 5,7, 19, and 1 (1) of the American Convention on Human Rights. Guatemala accepted responsibility and agreed to provide reparations. See also Case 11.275 Francisco Guarcaas Cipriano, Report No. 140/99 (21 December 1999). The Commission concluded that Guatemala had violated articles 3,4,5,7, 8 & 25 of the American Convention on Human Rights and called for reparation. See also Case 9207 Oscar Manuel Gramajo Lopez, Report No. 58/01 (4 April 2001). The Commission concluded that Guatemala had violated articles 4, 5, 7, 8, and 35 of the American Convention on Human Rights. See also Case 9111, Ileana del Rosario Solares Castillo, Maria Ana Lopez Rodriguez, Luz Leticia Hernandez, Report No. 60/01 (4 April 2001). Guatemala was found to have violated articles 4,5,7, 8, 25 and 1(1) of the American Convention.

⁴⁶² The Lamexay and Riachito indigenous communities of Paraguay filed petitions against the State in 1996 who suffered the loss of their land due to the State's sale of their territory to foreigners (1885-1950). The tribe filed claims with the Rural Welfare Institute in 1991-1994 (in part relying on the new Constitutional guarantees regarding indigenous land rights). A court granted an injunction to protect the land while the administrative proceedings were ongoing. The occupants did not abide by the injunction, so the tribe filed criminal charges. Neither the criminal court nor the administrative agency resolved the cases. The tribe claimed violation of rights to a fair trial, judicial protection, property, residence, and benefit of culture in breach of Article 1 requiring States to respect and ensure Convention rights. A friendly settlement was achieved in 1998 which confirmed the State's purchase of the land and transfer of title to the indigenous community (completed in 1999). The State confirmed the community's international and national right to land. The State provided food, medicine, tools, and transportation and removed the occupants in order to guarantee the return of the community. The parties claimed satisfaction with the mediation role of the Commission. Quarterly reports were required to guarantee follow-up. (Case 11.713, Report No.90/99 (Paraguay) IACHR.

⁴⁶³ See also Case No. 7615 IACHR Annual Report 1984-5 at 24-34 on the wrongful dispossession of the Yanomami tribe by miners, peasants, and developers. A petition was filed against Brazil in 1980 in which the State was denounced for violating the Yanomami's right to life, equality before the law, freedom of religion, health, education, legal personality, and right to property. The Brazilian Constitution and other national legislation guaranteed the indigenous group their right to territory as permanent and inalienable in conjunction with exclusive right to their natural resources. The State evicted the tribe upon construction of a highway traversing their territory. The State was to establish a National Park to protect their land, however it failed to do so and developers, peasants and miners invaded the territory thereby resulting in the deaths, displacement, and disappearance of tribe members. The Commission declared that the State had violated the Yanomami's right to life, liberty, personal security, residence & freedom of movement, and health held in the American Declaration due to its failure to protect them against dispossession by developers and other usurpers. The State was advised to demarcate the Yanomami land into a protected Park.

home during Fujimori's dissolution of the legislature and courts and suspension of the Constitution in 1992.⁴⁶⁴

Most directly, the Commission has previously addressed wrongful dispossession of property in the Marin case 10.770, Report No. 12/94, 1 February 1994.⁴⁶⁵ Haydee Marin, Leonor Marin Arcia, Orlando Marin Arcia and Maria Haydee Marin Acia alleged wrongful dispossession of their property by the Junta de Gobierno de Reconstrucción Nacional in 1979 without any form of notice, reference to public utility interest, or indemnification. They alleged lack of links to Somoza, thus claiming that the decrees authorizing expropriation of property belonging to Somoza collaborators were inapplicable to them. In 1990, the family presented a claim to the Attorney General without success. The Attorney General confirmed that the Marin family was not subject to any confiscation decree. Hence, the Commission called for restitution of property due to arbitrary usurpation by the State for over 14 years. The Commission cross-referenced the American Convention, the American Declaration, the Universal Declaration of Human Rights, the Nicaraguan Civil Code (art 617) all of which deplore arbitrary interference with property. They noted that the right to property is "inalienable", hence no State, group or individual should engage in activities which would suppress such. The Commission held that State violated right to property, judicial guarantees, and judicial protection. It called for restitution of property, and indemnification for damages and injuries, and time of usufruct. The report was published due to non-compliance by the State.

The Commission successfully facilitated a friendly settlement between the Guatemalan Government and victims of a forced eviction from finca La Exacta.⁴⁶⁶ However, the most well-known case involving the Commission as pertaining land disputes is the that of Los Cimientos. This involved a K'iche community which had cultivated unoccupied land and obtained legal title from President Cabrera's land grant program in 1909. Ixil families claimed that the land pertained to their ancestors under municipal title prior to the arrival of the K'iches (although they had not cultivated the land). They asserted a historic right to the land and claimed that the K'iche title was invalid because they had not purchased the land from the Ixils. The courts backed the K'iche title and granted orders for the forcible eviction of the Ixils. The K'iches were violently displaced by the Army in 1981 and remained so until 2002.

⁴⁶⁴ IACHR, Annual Report 1994, Case 11.006, Report No. 1/95, 104 (1995).

⁴⁶⁵ 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.

⁴⁶⁶ Case 11.275, the eviction occurred in 1982 see Inter-American Commission on Human Rights, Fifth Report on the Situation of Human Rights in Guatemala OEA/Ser.L/V/II.111 Doc. 21 rev. (6 April 2001).

The Army gave possession of the property to a group of Ixils, “the Chajuls”, who lived in model villages and participated in the PACs for six years. The K’iches called for resettlement of the Chajuls. The government claimed that the dispute was a result of misaligned boundaries rather than title conflict.

Holley argues that this case serves to demonstrate how the State manipulates the concept of indigenous rights to disempower the Mayans. The State deliberately sought to prevent the re-establishment of autonomous Mayan community, thus it chose to support the Ixil customary claim to land over the title held by the K’iches, thereby promoting further subdivision, distrust, and hostility among Mayan groups (The Army was concerned regarding the K’iche’s limited cooperation with it.)⁴⁶⁷ However, the K’iches attained significant international attention and support.

An NGO, CERJ, pursued the case on behalf of the K’iches to the Inter-American Commission of Human Rights. The Commission announced the near settlement of the case which would grant recognition of the K’iche’s title and provision of compensation, prompting criticism by Stoll that this did not reflect the mutual victimization and complexity of interests at stake.⁴⁶⁸ In July 2001 the K’iches (totaling over 300 persons) were violently evicted and forced to flee once more after a group of armed men burned 97 homes, brutalized the men, raped two women, and kidnapped six children. One year later, they remained displaced and lacked housing, food, and medical assistance.⁴⁶⁹ Hence, international mediation efforts proved unable to implement a solution. As correctly identified by Stoll, this appears to be largely due to the perception that instead of promoting impartial consideration of human rights concerns the international community focused on the victimization of the K’iche community but failed to recognize the interests and needs of the Chajuls as mutual victims of war and manipulation by the Army.

Due to their precarious state, the K’iches indicated that they were willing to renounce their claim to the land if the government will provide them alternative property. The State, via CONTIERRA, confirmed the K’iches’ title. However, it was pointed out that there was a clear lack of political will at the local level to resolve the conflict. According to Stoll, the Chajul’s former Mayor expressed fear that the community would consider him to be a traitor to their interests should he relinquish the land. The government finally obtained a new finca,

⁴⁶⁷ Michael Holley, “Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally Displaced Community in Guatemala” in 15 BERK. J. INT’L. LAW 119, 134-135 & 154 (1997)

⁴⁶⁸ David Stoll, “To Whom Should We Listen? Human Rights Activism in Two Guatemalan Land Disputes” in RICHARD A. WILSON, HUMAN RIGHTS, CULTURE AND CONTEXT (Pluto Press 1997).

⁴⁶⁹ “Pobladores de Los Cimientos, Quiche, Fuera de su territorio desde hace un año” in GUATEMALA HOY 24 June 2002.

San Vicente Osuna, located in Santa Lucia Cotzumalguapa, Escuintla to resettle the K'iches. The Mayor of the Chajuls apologized for the injuries suffered by the K'iches, gave them a picture of San Jose and Santa Maria, and signed a final accord. President Portillo unconsciously evoked images of "Alice in Wonderland" by characterizing the accord as "the most significant act of reconciliation in the post-war period."⁴⁷⁰ The outcome was the inverse of the Commission & CONTIERRA's proposed solution due to use of power tactics and prevalence of impunity. However, final peace was attained via provision of alternative land. This case indicates the contradictions within transnational dispute resolution: there are limitations to the effectiveness of international dispute resolution mechanisms which are not sufficiently "embedded" in the local area to understand and address the intricacies of local disputes, and there are also complications at the local level due to the unwillingness of local leaders to make concessions due to fear of loss of prestige, legitimacy before the people, and perhaps pressure from outside interests. These issues are further discussed in Part IV.

The Commission again 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 habeas 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."⁴⁷¹

⁴⁷⁰ "Ponen fin a añejo conflicto por la propiedad de la tierra en Los Cimientos, Quiche" in PRENSA LIBRE 3 October 2002.

⁴⁷¹ *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.

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.”*⁴⁷²

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.⁴⁷³ It noted that the displacement was a direct consequence of the State’s failure to protect the community against these threats.⁴⁷⁴ Thus, here we see a cross-reference analysis, similar to that utilized by CCPR, which reveals the linkages between different rights and interprets them from material and (in the manner specialized within the Inter-American system) as well as transcendental aspects. (I address the right to return in the Annex to this Part).

The Commission held that the lack of processing of the habeus 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”.*⁴⁷⁵

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.⁴⁷⁶ The report was published due to State non-compliance. Most recently, the Inter-American Commission concluded that Guatemala had violated Article

⁴⁷² Id. At para. 60.

⁴⁷³ Id. At para. 61, 64, & 65.

⁴⁷⁴ Id. at para. 72.

⁴⁷⁵ 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.

⁴⁷⁶ Id. at para. 73.

17(4) of the American Convention of Human Rights read in conjunction with article 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women due to the Civil Code's provision granting the husband control over marital property.⁴⁷⁷

The case of Guatemala reveals the contradictions between actions by official State representatives and those of Non-State actors: In 2001, the Inter-American Commission praised President Portillo for recognizing the State's responsibility and granting restitution to six human rights victims who had filed claims with the Commission.⁴⁷⁸ The President noted that he acted in order to guarantee the right to reparation and speedy, effective justice for human rights victims as well as obligate national bodies to abide by these norms. Shortly afterwards, Amnesty International reacted towards a wave of abuses, including an attempted kidnapping of one of their members, instigated by "dark forces" in Guatemala by demanding that President Portillo end impunity, protect human rights workers, members of the press, and actors within the justice system.⁴⁷⁹ One step forward, two steps back.

6.2. Reports of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights issues reports on the human rights situations in the OAS member countries as a means of fulfilling its monitoring function. It refers to either the Declaration or the Convention as the relevant standards depending on whether the State is a party to the latter instrument. The Commission may publish the report if the State does not respond to its request for observations and it may transmit the report to the OAS General Assembly. The General Assembly may discuss the report and issue a resolution regarding its findings.

The reports from the late 1990s-2001 show an improvement in the Commission's treatment of land issues and forced evictions and reveal cross-referencing techniques to

⁴⁷⁷ Id. Inter-American Commission on Human Rights, *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11-625, I/A Court H.R. (OEA/Ser.L/V/II.111 doc. 20 rev. Annual Report 2001).

⁴⁷⁸ The Guatemalan State agreed to abide by recommendations given by the Commission in reports 39/00 and 40/00 13 April 2000, accepting responsibility for extra-judicial executions and forced disappearances, and providing recourse, investigation, prosecution of violators and indemnification. The State recognized its responsibility in cases six cases pending within the commission and agreed to engage in a dialogue with the petitioners with a view to prosecute wrongdoers and provide compensation to victims.

⁴⁷⁹ Amnesty International, News Release: "Guatemala: The United States Must Urge President Portillo to End Impunity" (5/7/2001). The link to property concerns is evident as among the groups Amnesty listed as targeted for threats and attacks were the Shantytown Dwellers Association for Homes and Development as well as pro-justice groups involved in land claims.

national Constitutions as well as other international instruments. With respect to Paraguay, it called upon the State to “Enforce and implement, without delay, the provisions of the Paraguayan Constitution concerning respect for and restoration of the community property rights of the indigenous peoples, and regarding the granting of lands, at no cost, of sufficient extent and quality to conserve and develop their ways of life.”⁴⁸⁰ It also called for the provision of funds for the implementation of the recommendation, the provision of title for community property, and access to land for the Yakye Axa and Exnet communities. As pertaining Mexico, it noted the existence of 300 land conflicts in Oaxaca and called upon the State to combat paramilitaries supported by landowners and protect indigenous IDPs.⁴⁸¹ It called upon Brazil to demarcate and issue title to indigenous lands (particularly the Macuxi), provide federal protection to indigenous lands (in particular the Yanomami), cease of construction projects on indigenous lands in Brazil, and strengthen general land reform policies for the rural poor.⁴⁸² With respect to Colombia, the Commission called for demarcation, recognition, and titling without delay of indigenous and Afro-Colombian lands, consultation of indigenous communities when exploiting natural resources (referring to importance of preserving religious, economic, and cultural identity of the tribes). It also specifically called upon the State and the Non-State actors involved in the armed conflict to observe the Guiding Principles on Internal Displacement. The State was called upon to implement a land distribution policy for IDPs and ensure their voluntary return or resettlement of IDPs.⁴⁸³ Thus, the Commission’s reports may be considered progressive because they address infringements by non-state actors as well as violations occurring within the context of armed conflict. (We may recall an important precedent for such recommendations was the Commission’s call for compensation for property destroyed by the Nicaraguan military after the forced displacement of the Miskito Indians during the war in the 80’s.)⁴⁸⁴

⁴⁸⁰ Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Paraguay, OEA/Ser.L./V/II.110 at 135-136 (2001).

⁴⁸¹ See OAS, Report on the Situation of Human Rights in Mexico, p.46-47, OEA/Ser.L/V/II.100 (24 September 1998)

⁴⁸² See 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.

⁴⁸³ See OAS, Third Report on the Human Rights Situation in Colombia OEA/Ser.L/II.102 (26 February 1999). See also Case No. 1690 (Colombia) on the military attack of the Guahibo indigenous people, the State accepted the government’s reasoning and the Commission discontinued the case.

⁴⁸⁴The Miskito Indians of Nicaragua claimed rights to land in accordance with the 1905 Altamirano-Harrison treaty in which Great Britain recognized Nicaragua’s sovereignty over the territory while the latter agreed to legalize indigenous land rights and provide restitution in the event of dispossession. During the 80’s, the Government placed military in the territory, resulting in the displacement of Indians to Honduras. Fighting between the armed groups was pursued along the borders, the Sandinista air force bombed the Indian communities, killing 60, raping women, imprisoning others and in December 1981, the government moved 42

As pertaining internal displacement, the 1993 Annual Report considered the situation of Refugees, Displaced and Repatriates in the Americas. It reviewed the problems of repatriation in Guatemala. It called for states to adopt a definition of internal displaced person in the national legislation and provide effective protection. It challenged states to recognize that “internal displacement is a matter of international interest which aggravates the possibility of human rights violations.”⁴⁸⁵ Preventive measures including respect for human rights and opportunity for socio-economic development were cited as important goals. The report calls upon the General Assembly to establish working group to study prevention, protection, and assistance to IDPs with regional cooperation, and the creation of a working group to create a code of conduct to oblige States to protect IDPs, including basic minimum protection standard health and nutrition, while legal mechanism would be elaborated. The Commission and Inter-American Institute of Human Rights were called upon to collaborate to bring international attention to protect IDPs.

The Inter-American Commission has examined the situation of human rights in Guatemala in six special reports highlighting concern for refugees, internally displaced persons, the extreme poverty of the indigenous people, racial discrimination, deficiency in the administration of justice, and the inequity of land division.⁴⁸⁶ What is striking is the consistency of the enumerated problems throughout the years. Its 1981 recommendation for a

villages to an area south of the river (8,500 Indians were relocated to camps). Other Miskitos were accused of being counterrevolutionaries resulting in the displacement of 10,000 Indians. Crops were burned, animals slaughtered, and shelter was set on fire in order to provide no refuge or support for the opposing groups. The government enacted an Agrarian Reform law in which it declared that it would grant agrarian titles to villages but denying ownership of the Indian territory in the East coast. The Indians wanted their land recognized as a whole entity, which the government refused to do. The Commission’s preliminary recommendations included recognition of the right of return, family reunification, improvement of conditions and processing for detention, and provision of compensation for destruction of property. It recommended that the relocation be regarded as provisional, limited to the time of emergency, and ending with the right of voluntary return and resettlement. It called for a just solution to the land problem, including compensation for loss of homes, crops, animals, etc. Nicaragua was held liable for violations of the right to life and liberty, but the Commission did not find a violation of the right to residence and movement because it excused the forced relocations due to derogation rights brought about by the state of emergency under the civil war. However it did call for provision of assistance for return, including compensation for lost property. The Commission refused to recognize that the Miskito had any land rights above those of other citizens, and it held that it was not in a position to determine the legal validity of their historic claims thus the State was advised to find “a just solution to this problem as soon as possible, and that it meet both the aspirations of the Indians and the requisites of territorial unity of the Republic.” It did call upon the State to provide compensation for the destruction of property in conformance with the American Convention. No friendly settlement was achieved, and the Commission meekly recommended compromise. This case reveals the limits of soft mechanisms in cases involving hard violations. (OAS Docs. OEA/Ser. L/V/II.62, doc. 10 rev.3 (1983) & OEA/Ser.L/V/II.62, doc. 26 (1984).

⁴⁸⁵ OAS, Annual Report of the Inter-American Commission of Human Rights (1993) p593

⁴⁸⁶ See IACHR, Informe Sobre la Situacion de los Derechos Humanos en la Republica de Guatemala, (OEA/Ser.L/V/II.53 Doc.21.rev.2 13 octubre 1981), (OEA/Ser.L/V/II.61 Doc. 47 3 octubre 1983), (OEA/Ser.L/V/II.83 Doc. 16 rev. 1 June 1993), (OEA/Ser.L/V/II.66 Doc. 16 3 octubre 1985), (OEA/Ser.L/V/II.111 Doc.21 rev. 6 april 2001), see also Report on CPRs in Guatemala OEA/Ser-L/V/II.86 Doc.5 Rev.1 June 1994).

dialogue including all social sectors to resolve the socio-economic problems of the country remains valid at present. In 1986, it issued a resolution calling for reparation to the families of the victims of the military regime; today the society is still waiting for restitution legislation.⁴⁸⁷ The ability of the legislature to stall enactment of bills which have impact in the socio-economic arena is well-known and thus far difficult to remedy. In 1981, it specifically linked the socio-economic disparity to the generalized violence in the country, by 2000 it reiterated this observation with regard to the spread of crime, impunity, and human rights abuses. A call for an end to tolerance of human rights abusers (both State and Non-State Actors), is another ever-present theme in the reports. It criticized violation of indigenous property rights by security forces- “From the standpoint of human rights, a small cornfield deserves the same respect as the private property of a person that a bank account or a modern factory receives. . . .” Forced evictions, and exploitation of seasonal laborers were additional cause for concern.⁴⁸⁸ Throughout the 90’s, concern was exhibited for depletion of forests due to peasants excluded from fertile lands who turn to forest areas to plant crops, often utilizing slash and burn tactics. The Commission 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.⁴⁸⁹

In 1994, it issued a special report on the human rights situation of the Communities of Peoples in Resistance (CPRs), this report catapulted the collective IDPs into the limelight, calling for compensation on account of damage to property, thus explaining why they were provided restitution of property by FONAPAZ.⁴⁹⁰

In 2000, the Inter-American Commission on Human Rights returned to Guatemala for its fifth review of the situation of human rights and issued a report in which it highlighted the

⁴⁸⁷ Res. 225-86- IACHR, Annual Report.

⁴⁸⁸ OAS, Annual Report of the Inter-American Commission of Human Rights 1997, 959, OAS, Annual Report 1993, p. 434. See Also OAS, Fourth Report on the Human Rights Situation in Guatemala, OAS/Ser.L./V/II.83 1 June 1993. See OEA/Ser.L/V/II.83

⁴⁸⁹ OAS, Annual Report of the Inter-American Commission on Human Rights 1993, 466 (1994). Criticism was offered concerning the lack of access to justice, impunity, corruption, lack of resources, and absence of translation facilities which plague the courts. Although the Commission calls upon the State to remedy these problems, it has no suggestions regarding how to combat impunity. Of interest to this thesis, is that it called upon indigenous judicial officials to provide mediation services.

⁴⁹⁰ Inter-American Commission of Human Rights, Special Report on the Human Rights Situation in the So-Called “Communities of Peoples in Resistance in Guatemala” (OAS 1994).

need to provide restitution of property to dispersed IDPs.⁴⁹¹ It offered significant criticism of the limited implementation of resettlement & reintegration guarantees and cited the UN Guiding Principles on Internal Displacement. It highlighted the need to address inter alia the socio-economic reintegration needs of refugees, property demands of dispersed internally displaced persons and title needs of indigenous groups claiming customary rights.⁴⁹² It called upon the state to recognize the historical or secular title of indigenous land and peasants, to purchase property for IDPs, and to reintegrate refugees and IDPs by providing infrastructure, basic services, and development support.⁴⁹³ In addition, the Commission called for the elaboration of a strategy to combat poverty via sustainable development, register land titles, and resolve land conflicts between returnees, IDPs, and other groups.

Hence we see the concerns which were present during the war remain valid in the post-war period. The provision of humanitarian aid did not address the development concerns fully. In addition, the current development programs may not focus sufficiently on the ongoing validity of humanitarian categories, i.e. IDPs. The dialogue which ended the war did not resolve the root causes of the war, thus leaving open the possibility for renewed conflict. It remains to be seen to whether the Guatemalan State will heed the Commission's call for restitution of property to dispersed IDPs as it did with respect to the CPRs.

6.3. Jurisprudence of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights is composed of seven judges nominated by parties to the Convention and elected by members of the OAS General Assembly. The Court meets an average of six weeks per year. The Court may provide advisory opinions or final decisions in contentious cases against State Parties to the American Convention. Since 1987, it has issued 85 decisions addressing preliminary objections, compensatory damages/reparations, interpretation of decisions, and final judgments (15 decisions in

⁴⁹¹ Inter-American Commission of Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, OEA/Ser.L/V/II.111 (OAS 2001).

⁴⁹² Inter-American Commission of Human Rights, Quinto Informe Sobre la Situacion de los Derechos Humanos en Guatemala, (OEA/Ser.L/V/II.111, Doc. 21 rev. 6 abril 2001). It characterizes IDPs who remain outside resettlement programs as being among the most vulnerable of marginalized, poor groups.

⁴⁹³ OAS, Fifth Report on the Situation of Human Rights in Guatemala by the Inter-American Commission of Human Rights, (OEA/Ser.L/V/II.111) Doc. 21 rev., (6 April 2001). OAS, Annual Report of the Inter-American Commission of Human Rights 1997, p.959, OAS, Annual Report 1993, p. 434. See Also OAS, Fourth Report on the Human Rights Situation in Guatemala, OAS/Ser.L/V/II.83 1 June 1993. See OEA/Ser.L/V/II.83

2001).⁴⁹⁴ Since 1982, it has issued 16 advisory opinions. At present the Court may now address reparation issues within the main judgment, thus resulting in more effective processing of cases. The Court may receive cases from the Commission or State Parties. Its jurisdiction falls upon those States that recognized its jurisdiction by declaration or agreement (unconditional, conditioned on reciprocity, restricted to specific period or case). Cases must be processed first by the Commission before reaching the Court. The average processing time for a case from opening in the Court to final decision is estimated to be 28 months. Individuals have a right to participate before the Court, and may present testimony in their own language- subject to translation. Indeed, in the Awas Tingi case and the Bamaca Velasquez cases, witnesses provided testimony in indigenous languages. The processing of a case to the Court is subject to variable rates, the longest time amounting to five years, in part due to the fact that previously the Court re-examined the facts in spite of the Commission's prior analysis. At present, the Court accepts the Commission's tender of evidence as long as both parties were present during the procedure in which said evidence was taken.

Oral proceedings are held and the Court may hear witnesses or experts at the behest of the Commission, the State, the victims, or its own members. Victims are granted standing before the Court throughout the proceedings.

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.⁴⁹⁵ The prevalence of impunity such that a victim is not restored of his rights, results in violation by the State of its duty to assure the free exercise of those rights.⁴⁹⁶ It notes that the State must avoid and combat impunity utilizing all available legal measures (investigate, prosecute, capture, judge, and sentence offenders) in order to prevent the chronic repetition of human rights violations and lack of defense of victims and their families.

Article 63.1 of the American Convention authorizes the Court to call for fair compensation:

⁴⁹⁴ Statistics available at <http://www.corteidh.or.cr>.

⁴⁹⁵ Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No. 39 at para. 73 (27 August 1998); Loayza Tamayo Case, Reparations, I/A Court H.R. 27 Series C No. 42, para. 170 (November 1998).

⁴⁹⁶ Garrido & Baigorria Case, Reparations, para. 73 citing Velasquez Rodriguez, para.174; Godinez Cruz Case, Judgment, I/A Court H.R. Series C No.5, para. 184 (20 January 1989), El Amparo Case, Reparations, I/A Court H.R., Series C No. 28 para. 61 (17 September 1996); Neira Alegria et al. Case, Reparations, I/A Court H.R. Series C No. 29 para.69 (19 September 1996); Caballero Delgado & Santana Case, I/A Court H.R., Series C No. 22, paras. 58 and 69 (8 December 1995); Castillo Paez Case, I/A Court H.R., Series C No. 34 para. 90 (1997); Suarez Rosero Case, I/A Court Series C No. 35 paras. 107 (1997), Paniagua Morales et al Case, I/A Court H.R., Series C No.37 para. 178 (1998).

“If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted a breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

The Court considers this provision to codify the customary norm of state responsibility, which it identifies as “one of the fundamental principles of modern international law”⁴⁹⁷:

*“Upon the occurrence of 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.”*⁴⁹⁸

It recognizes *restitutio in integrum* to include restoration of the prior situation, reparation of the consequences of the violation, and indemnification for material and moral harm.⁴⁹⁹ Reparation may include medical treatment, annulment of administrative measures by the State, compensation, satisfaction, restoration of honor or dignity, indemnification, and non-repetition guarantees.

The Court has excluded punitive damages from the notion of fair compensation.⁵⁰⁰ It noted that it is not a penal tribunal, its purpose is to protect the victims and order reparation for injury, not penalize the guilty parties.⁵⁰¹ Thus the reparation is intended to make the effects of the violation disappear, calculating the material and moral damage. Restitution for material injury is calculated by indirect damage (*daño emergente*) and loss of earnings (*lucro cessante*).⁵⁰² Reparation is not intended to enrich or impoverish the victims or his successors. Herein lies the problem, although reparation is based on the notion that parties are equal and there is a need to restore the injured party to his original position, it may not be sufficient in countries such as Guatemala where the peasants original state was inequitable to begin with. Recognition that a person has been dispossessed of property over which he had only provisional, possession, or historic title may require an order for provision of formal title to

⁴⁹⁷ Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No. 9 para. 40 (1998) Citing Factory at Chorzow Case Jurisdiction, Judgment No. 8 (1927), P.C.I.J., Ser. A, No.9 p.21 and Factory at Chorzow Case Mretits Judgment No. 13 (1928), P.C.I.J. Ser. A No. 17, p.29; Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, page 184.

⁴⁹⁸ Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No. 39 para. 40 (1998).

⁴⁹⁹ Velasquez Rodriguez Case, Compensatory Damages, I/A Court H.R., Series C No. 7 (1989) paras. 6, 25-26.

⁵⁰⁰ Id. at para. 38. See also Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C. No. 39 para. 43 (1998). Godinez Cruz Case, Compensatory Damages, I/A Court H.R. Series C No.31, para. 36 (1989).

⁵⁰¹ Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No.39 at para. 44 citing Fairen Garbi and Solis Corrales Case, I/A Court H.R. Series C No.6 at para. 136 (1989).

⁵⁰² Id. at para. 48 citing Alboetoe et. al. Case, Reparations, I/A Court H.R. Series C No. 15 para. 50 (1993).

secure his future rights, this would go beyond mere restitution. Compensation for material and moral damage is most often called for in monetary form, although parties have also requested remedial measures, reform of national legislature to outlaw violation such as “disappearance”, apology by the State, symbolic reparation (such as the erection of a memorial for the victims), full account of the truth, trial and punishment of offenders (including sanctioning of members of the judiciary and agencies who blocked investigation of the crimes).⁵⁰³ Shelton is of the opinion that such reparation is important as a State’s acknowledgement of its responsibility, satisfaction to the victim, and a message to the society regarding sanction of such wrongs, as did Judge Antonio Cancado Trindade in his dissent of *El Amparo, Reparations*, noting the need for rehabilitation and non-repetition guarantees.⁵⁰⁴ The court has yet to order the erection of a memorial or other such symbolic reparation. However, the Court has held that the issuance of a judgment is itself a form of reparation to the party.⁵⁰⁵ Given that some States acknowledge liability thereby avoiding full merits judgment, provision of an account of the events can be avoided.

The notion of a State’s duty to guarantee and make effective the obligations under the international convention is considered by the Court to be separate from the question of reparation. It describes reparation to be a measure intended to erase the effects of the violation on the person, the notion of investigating and sanctioning such violations is deemed to be the State’s duty to assure respect for Convention rights and freedoms within its juridical order.⁵⁰⁶ The Court has held that its judgments obligate States to investigate the circumstances of violations and sanction offenders due to the notion that such action would constitute the adoption of effective internal measures to assure that the State and its general community guarantee and implement the obligations assumed under the international convention.⁵⁰⁷ It has called for follow-up reports of such measures from the State. As previously mentioned, the Court has noted that the American Convention, Article 25 “constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law in a democratic society . . .”⁵⁰⁸ The Court has held that:

⁵⁰³ *Alboetoe et al. Case, Reparations*, I/A Court H.R. Series C No. 15 (1993), *Garrido & Baigrrria Case, Reparations*, I/A Court H. R. Series C No. 39 (1998); *Loayza Tamayo, Reparations*, Series C No. 42 para. 155 (1998).

⁵⁰⁴ Shelton, Dinah, “Reparations in the Inter-American System”, in HARRIS & LIVINGSTONE, *supra* note 238 at 170.

⁵⁰⁵ See e.g. *Awas Tingi Case*, I/A Court H. R. Series C. No. para. 166 (2001) citing also *Case of “The Last Temptation of Christ”*, I/A Court H.R. Series C No. 73 (*Olmedo Bustos et. Al*) (2001) & *Suarez Rosero Case, Reparations*, I/A Court H.R. Series C. No.51 para. 72 (1999).

⁵⁰⁶ *Garrido & Baigorria Case, Reparations*, I/A Court H.R. Series C No. 39 at para. 72 (1998).

⁵⁰⁷ *Id.* at para. 67 –74; *Blake Case, Reparations*, I/A Court H.R., Series C. No. 48 at para. 59 (1999)

⁵⁰⁸ *Blake Case, Reparations*, *Id.* at para. 63.

*“Reparation of harm brought about by the violation of an international obligation consists in full restitution (resitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.”*⁵⁰⁹

It has also listed satisfaction and non-repetition guarantees as forming part of reparation.⁵¹⁰ However, in some cases, it has noted that restitution may not be appropriate, rather redress for breach.⁵¹¹

It stated that in the event the domestic norms are ineffective, the Court would not recognize them as valid, such as in *Aloeboetoe et. Al*, in which the Court applied the Saramaca tribe’s customary law in place of the formal civil law due to the latter’s lack of effectiveness.⁵¹² The State failed to provide enough registry offices in the interior of the country to facilitate registry of marriage. In addition the tribe practiced polygamy and retained a duty of care by adult children to their elderly parents. Hence many dependents of the victims were not officially recognized by the State and its family law was deemed to be ineffective, regardless of degree of jurisdictional autonomy of the tribe. The Court granted material reparation to the victims successors as identified by the Commission referring to customary norms, but not dependents. However the Court recognized only moral reparation, not material reparation, for those victims’ parents which had not been declared successors. Moral reparation was claimed by the entire tribe, as the tribe considered itself to be one family, the full amount was recognized. Other next of kin were compensated for expenses in seeking information and searching for the victims. One could envision the Court taking similar action with respect to Guatemalan Mayans (see Part III on the legal system and Part IV on CONTIERRA). This is an empowering precedent because the indigenous people’s own norms define the appropriate reparation. 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.⁵¹³

⁵⁰⁹ Velasquez Rodriguez Case, Compensatory Damages, I/A Court H.R. Series C No. 7, paras. 6, 25-6 (1989), quoted in Dinah Shelton, “Reparations in the Inter-American System”, in HARRIS & LIVINGSTONE, supra note 238 at 151, 155.

⁵¹⁰ Blake Case, Reparations, I/A Court H.R. Series C No. 48 at para. 31 (1999), citing Loayza Tamayo, Reparation, I/A Court H.R. Series C No. 42, at para. 85 (1998); Castillo Paez Case, Reparations, I/A Court H.R., Series C No. 34 at para. 48 (1997); and Suarez Rosero Case, Reparations, I/A Court H.R. Series C No. 51 at para. 41 (1999).

⁵¹¹ *Aloeboetoe et. al.* Case, Judgment, I/A Court H.R. Series C No. 12 para. 47 (1991), cited in SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS 216 SYSTEM* (Dartmouth 1997).

⁵¹² Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No. 39 at para. 70 (1998) citing *Alboetoe et al.*, Reparations, I/A Court H.R., Series C No. 15 paras. 58 and 62 (1993).

⁵¹³ 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

With respect to the rights relevant to displacement, the Inter-American Court has not addressed the right to freedom from interference with one's home or family or the right to freedom of movement and residence.⁵¹⁴ However, as previously mentioned in the section on the right to property, the Court upheld findings by the Commission that Nicaragua had violated Article 21 on private property and Article 25 and Article 1(1) on judicial protection due to the State's concessions to logging operations carried out on communal property claimed by the Awas Tingi indigenous community.⁵¹⁵ Nicaragua's formal legal system did not have adequate legal measures for provision of title to land, nor were amparo remedies processed efficiently (The amparo took over a year to process, as opposed to the statutory standard of 45 days. The unjustified delay rendered the remedy illusory).

The Court thereby recognized the legitimacy of communal property, delineating how the tribe was deprived of certainty as to what extent they may use the property, specifically engaging in cross-referencing analysis by noting that indigenous people have a close relationship with their land which is "the foundation of their cultures, their spiritual life, their integrity and their economic survival."⁵¹⁶ The Government issued the following order:

"(A)dopt the legislative, administrative and any other measures required to create an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values, customs, and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding land of the members of the Awas Tingi Community, within a maximum term of 15 months, with full participation by the Community, an taking into account its customary, law, values, customs, and mores. Until the delimitation, demarcation, and titling of the lands of the members of the Community have been carried out, Nicaragua must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the

Court based on violations of socio-economic-cultural rights. See Rodriguez Rescia, *supra* note 275 at 135. 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 to have begun exploring petitions addressing socio-economic rights. See Thomas Buergenthal, "The American Human Rights Declaration: Random Reflections", in K. Hailbonner, G. Ress, 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 HARRIS & LIVINGSTONE *supra* note 238 at 289, 303 (Clarendon Press 1998).

⁵¹⁴ Antonio Augusto Cancado Trindade, "The Operation of the Inter-American Court of Human Rights", in HARRIS & LIVINGSTONE *supra* note 238 at 133,141. In the case of Cesti Hurtado, I/A Court H.R. Series C No. 56 (1999), the Commission asserted that the victim's right to property under Article 21 had been violated due to his imprisonment, however the Court did not consider such contention to be valid, preferring to consider the violations of the guarantees regarding access to justice and judicial protection.

⁵¹⁵ Comunidad Mayagna (Sumo) Awas Tingni Case, Judgment, I/A Court H.R., Series C. No. 78 (31 agosto 2001).

⁵¹⁶ *Id.* at para. 149.

*property located in the geographic area where the members of the Awas Tingi Community live and carry out their activities.*⁵¹⁷

Thus, this decision is empowering due to its call for the adoption of immediate, effective remedies, identifying them as legislative, administrative or other forms to protect property in keeping with the Convention's standard in Article 25. More importantly, it provides participatory and normative empowerment because it also requires the actual participation of the indigenous community in the demarcation, delimitation, and titling and calls upon the State to take into account their customary law, values, customs and mores. Finally, it implicitly adheres to ILO Convention Article 18 (as well as the UN and Inter-American Draft Declarations on Indigenous Rights) which places a duty upon States to prevent infringement by non-State actors upon indigenous land. The community was also granted financial compensation and reimbursement of attorney's fees and the Court declared the judgment itself a form of reparation.

Victor M. Rodriguez Recia argues that a collective group could present a claim based on violations of socio-economic-cultural rights, as well as third generation rights to peace, environment, etc.⁵¹⁸ As mentioned previously, this is an empowering decision which takes into account the traditions and perspective of the indigenous people themselves. It provides a solid precedent for dispossessed indigenous people and IDPs in Guatemala. In like manner, they suffer lack of efficient domestic remedies (see *infra* Part III discussion on *amparo*) and the State has yet to establish laws on provision of title for indigenous land.

Although the Court did not originally award lawyers' costs, its recent judgments reveal a reversal of practice. In *Garrido & Baigorria*, the Court granted an award of costs, a part of which was intended to provide honorary fees to the lawyers representing the victims.⁵¹⁹ The victims had cited costs to include honorary fees to the lawyers, travel costs in search of the missing persons, payment for notary and formal declarations. The Court concluded that the costs expended to accede to the Inter-American Human Rights System (including before national courts, the Commission, and the Inter-American Court) formed part of the reparation due to the efforts made to attain judicial resolution to the violation. The amount of compensation is to be calculated on an equitable basis, considering the proof gathered, the research of international jurisprudence, and other factors which may evaluate the quality of the work. The Court ordered that the reparation be rendered by the State within six

⁵¹⁷ *Id.* at para. 164.

⁵¹⁸ Victor M. Rodriguez Rescia, *supra* note 275 at 135.

⁵¹⁹ *Garrido & Baigorria Case, Reparations, I/A Court H.R. Series C No. 39 at para. 85 (1998); Loayza Tamayo Case, Reparations, I/A Court H.R. Series C No. 42 at para.179 (1998).*

months of notice of the decision. Extraordinary costs due to measures taken in lieu of solicitation of national courts, such as rental of a helicopter to search for the missing persons, have been deemed to be extra-judicial and not fully reparable, compensation in this category is limited.⁵²⁰ The Court seeks to award costs which are considered to be reasonable & necessary in light to the circumstances of the case.⁵²¹

The Inter-American Court of Human Rights provides recognition of the right to reparation that seeks to address transcendental aspects of victimization in the Loayza Tamayo Case, Reparations.⁵²² In the case, Maria Elena Loayza Tamayo, a University Professor, was forcibly detained by officers of the National Counter-Terrorism Bureau of the Peruvian Police in 1993 due her alleged collaboration with the “Shining Path”. She was held incommunicado for ten days, during which time she was tortured and raped. She was subjected to prosecution for engaging in terrorism in both civil and military courts and was held in detention under conditions amounting to cruel, inhuman and degrading treatment until the Inter-American Court of Human Rights ordered her release in 1997. Ms. Loayza Tamayo was forced to abandon her studies. She moved abroad, remained isolated, was subject to economic hardship, and suffered physical and psychological harm. Hence, she asserted this had altered her life so as to interfere irreparably with the attainment of personal, family, and professional goals.⁵²³ The Court recognized the call for reparation based on loss of one’s life plan “*proyecto de vida*” rather than mere *daño emergente* and *lucro cesante*, calculating the calling, circumstances, aspirations, and potential of the person:

“This notion is different from the notions of special damages and loss of earnings. It is definitely not the same as the immediate and direct harm to a victim’s assets, as in the case of ‘indirect or consequential damages.’ The concept of lost earnings refers solely to the loss of future economic earnings that can be quantified by certain measurable and objective indicators. The so-called ‘life plan’, deals with the full self-actualisation of the person concerned and takes into account her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.

The concept of a ‘life plan’ is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.

In the case under study, while the outcome was neither certain nor inevitable, it was a plausible situation- not merely possible- within the likelihood given the subject’s natural and foreseeable development, a development that was disrupted and upset by events that violated her

⁵²⁰ Blake Case, Reparations, I/A Court H.R. Series C No. 48 at para. 49 (1999).

⁵²¹ See also Loaya Tamayo, Reparations, I/A Court H.R. Series C No. 42 at para. 177 (1998).

⁵²² Id.

⁵²³ Id. at para. 152.

human rights. Those events radically alter the course in which life was on, introduce new and hostile circumstances, and upset the kinds of plans and projects that a person makes based on the everyday circumstances in which one's life unfolds and on one's own aptitudes to carry out those plans with a likelihood of success.

It is reasonable to maintain, therefore, that acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual's development. In other words, the damage to the 'life plan', understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a person's prospects of self-development. Thus, a person's life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and satisfy his legitimate interests. ”⁵²⁴

It should be noted that although the Court recognized the existence of “grave damage to the ‘life plan’” of Ms. Tamayo, it was unable to derive method to render an economic value for such damage, thus it calculated material and moral damages and highlighted the recourse to the Court and its judgment as a form of satisfaction for damage to her life’s plan.⁵²⁵

I propose that Guatemalan IDPs’ “*proyectos de vida*” are intrinsically tied to the land. Given that the majority originate from rural areas in which they engaged in farming, their 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. Forced displacement is often characterized by its arbitrary character and the absence of State protection with respect to preventing human rights abuses arising during and after such events. Recognition of the full impact of such events upon IDPs is possible when referring to the notion of “*proyecto de vida*”.

Joint Vote by A.A. Cancado Trindade and A. Abreu Burelli in the Loayza 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).⁵²⁶ They state that such actions are incompatible with State obligations to investigate violations, provide justice and reparation. Cancado Trindade & Abreu Burelli state that the notion of reparation based on

⁵²⁴ Id. at para. 147-153.

⁵²⁵ But see Separate Concurring Opinion of Judge Jackman asserting that the *proyecto de vida* concepts lacks clarity and juridical cogency and claiming that reparation of patrimonial and non-patrimonial (material & moral or pecuniary & non-pecuniary) damages is sufficient pursuant to a fair compensation standard.

⁵²⁶ Id. Joint Vote of Cancado Trindade and Abreu Burelli, at para. 2.

“*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.⁵²⁷ 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 are wrongfully accused of being guerrillas. They are deprived of work, educational opportunities, documentation, hygienic living conditions, as well as sufficient food and water. Although one may place an economic value on the lost property (although this is convoluted by devaluation due to internal conflict, damage, etc.), the trauma of displacement itself is more existential.

In a sense, herein lies an argument for linkage between the Courts and alternative dispute resolution within the reparation framework. Whereas the Court may order the sanction of offenders and provision of reparation to victims, conciliation may have an advantage over a formal judgment because it seeks to re-establish communal harmony, strengthen self-esteem of victims, relinquish psychological trauma, and create a vision for a positive future. In this sense, alternative dispute resolution may prove more effective than the Inter-American Court of Human Rights in addressing re-attainment of at least a part of the once lost “life plan”. Together, the formal and informal judicial mechanisms can offer a more complete reparation (see Part IV on alternative dispute resolution).

Orders for reparations are issued within 16 months and it conducts follow-up itself. Problems relating to follow-up are published in the Annual Report. Notice of the final judgment is rendered to all Convention members. With respect to Guatemala, it accepted the competence of the Court to address matters occurring after 09/03/1987 and has ratified both the American Convention as well as Additional Protocol in the Area of Economic, Social and Cultural Rights. The American Declaration is considered to be legally binding for Guatemala as a member of the OAS. Thus far, the Inter-American Court has issued four decisions pertaining to Guatemala: Blake case, Paniagua Morales et. al. case, Bamaca Velasquez case, and Villagran Morales case. They are presented below in order to highlight how they may serve as precedent for future claims involving IDPs.

⁵²⁷ Id., Joint Vote of Cancado Trindade and Abreu Burelli, at para.15.

Blake Case

Nicholas Chapman Blake was a journalist who traveled to Guatemala in 1985 in order to write articles on the war.⁵²⁸ The Guatemalan Government informed his family that he had disappeared. The family solicited assistance from the American Embassy and the Guatemalan military. It was concluded that the military had authorized a civil patrol group to murder him. Although remains were turned over to the family, these proved to be not identifiable. The family conducted 20 trips to Guatemala in 7 years searching for the body. The State hampered the investigation as well as judicial proceedings. It provided the family with a death certificate but never located his remains. Although the Inter-American Commission highlighted a close connection between the civil patrols and the State, this was denied by the government, specifically noting that “it did not grant members of the patrols any remuneration or social security benefits as it did to regular troops”.⁵²⁹ The Court concluded that the civil patrol group had indeed acted as an agent of the State, hence its actions were imputable to the State:

“ . . . (T)he Court considers it proven that, at the time the events in this case occurred, the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision. A number of human rights violations, including summary and extra-judicial executions and forced disappearances of persons, have been attributed to those patrols.

This institutional relationship was visible in the very decree creating these Civil Defense Committees (CDC), and in the 1996 Guatemala Peace Agreements, which established that the CDC’s, ‘including those previously demobilized, would cease all institutional relations with the Guatemalan Army and would not be reassembled in a way that restore that relationship’ . . .

As a consequence, the Court declares that the acquiescence of the State of Guatemala in the perpetration of such activities by the civil patrols indicates that those patrols should be deemed to be agents of the State and that the actions they perpetrated should therefore be imputable to the State.”⁵³⁰

The Court held that the State violated the Blake Family’s right to judicial guarantees (Article 8.1) due to the State’s obstruction of the clarification of the cause of death and disappearance, as well as excessive delays and hampering of the investigation and judicial proceedings. Because they were denied the right to an independent judicial process within a reasonable time, they were unable to obtain fair compensation. The State also violated the moral and psychological integrity of Blake’s relatives, made evident by the depression suffered by his brother due to the absence of the body (Article 5). It called upon the State to investigate and

⁵²⁸ Blake Case, Judgment, I/A Court H.R. Series C No. 36. (24 Jan. 1998)

⁵²⁹ Id. at para. 74.

⁵³⁰ Id. at para. 76-78.

sanction those responsible for the disappearance and death of Blake and provide just indemnification to the family in the form of monetary compensation for moral harm, medical costs of treatment, extra-judicial costs, and costs of processing to the Inter-American Court of Human Rights. The State claimed to have executed the decision by 2001 and the Court requested a report on implementation by 2002.

IDP who were forcibly evicted from their homes or were denied the right to return to their homes by the civil patrols may be able to pursue a claim due to the precedent establishing a link between these groups and the State. Given that the State is now considering offering ex PAC's reparation for their services to the State to the war, the institutional link between the State and the paramilitary groups is undeniable (see *infra* Part III). Dispersed IDPs have suffered an unconscionable delay in obtaining compensation or restitution for their human rights violations, they have good cause to file complaints within the national courts, and in the event of lack of access to justice, at the international level.

The following case provides further precedent regarding the possibility of demanding restitution from the State on account of actions conducted by Non-State actors.

Paniagua Morales et. al. Case

Ana Elizabeth Paniagua Morales, Julian Salomon Gomez Ayala, William Otilio Gonzalez Rivera, Pablo Corado Barrientos, Manuel de Jesus Gonzalez Lopez, and Erik Leonardo Chinchilla, Augusto Angarita Ramirez, Doris Torres Gil, Jose Antonio Montenegro, Oscar Vasquez, and Marco Antonio Montes Letona were victims of disappearance, detention, and/or murder between 1987-1988.⁵³¹ Detention was established by the Guardia de Hacienda, military institutions, and police. Some of the bodies, with evidence of physical abuse, were retrieved after abandonment in the streets. The Court imputed responsibility to the State based on the common *modus operandi*: kidnapping and detentions where conducted by armed persons using military or police clothing (some in civilian gear), vehicles with light panels, darkened windows, and no effort by the actors to hide their identity (some identified with the Guardia de Hacienda). In addition, the Court concluded that the Judicial Organ failed to act in a diligent and effective manner to judge and sanction the responsible actor. It stated that although it recognized that the violations were not the product of State policy nor did the superior authorities know directly of the actions, this did not prove sufficient to erase

⁵³¹ Paniagua Morales et. al. Case, Judgment, I/A Court H.R. Series C No. 37 (8 March 1998).

the international responsibility of the State to ensure persons the full and free exercise of their human rights. Hence, Guatemala was held responsible for having violated the rights to liberty and personal security, life, physical, psychological, and moral integrity, and judicial protection guarantees. (4,5,7,8 and 25). The Court called upon the State to investigate and sanction the persons responsible and provide reparation to the families. As of 2001, the State had not provided reparations to the victims.

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.⁵³²

The next case reveals increased attention by the Court with respect to socio-economic rights and marginalized groups.

Villagran Morales et. al. The "Street Children" Case

This case addressed the abduction, torture and assassination by the National Police Force of five minors who lived on the streets of Guatemala City and the failure of state mechanisms to provide the families with access to justice. The Court found that at the time of the occurrence of the facts of the case, "there was a systematic practice of aggression against 'street children' in Guatemala carried out by members of State security forces; this includes threats, persecution, torture, forced disappearance and homicide" which was linked to the death of the minors.⁵³³ The Court stated that Guatemala had pursued double-aggression by failing to prevent the children from living in misery, thus depriving them of the means for a dignified life and preventing them from full and harmonious development, as well as violating their physical, mental & moral integrity, and their lives.⁵³⁴ The Court found that the State

⁵³² The Inter-American 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. See also Inter-American Commission on Human Rights, Special Report on the Human Rights Situation in the So-Called "Communities of Peoples in Resistance in Guatemala" (OAS 1994), calling upon the State to provide reparations for destruction of property during armed conflict.

⁵³³ Villagran Morales et. al. Case "The Street Children", I/A Court H.R. Series C No. 63 paras. 189-190 (19 November 1999).

⁵³⁴ Id. at para. 191.

failed to identify and punish those responsible by failing to investigate the crimes of abduction and torture and failing to evaluate or order relevant evidence (lack of proper autopsy, failure to search homes of defendants, failure to summon witnesses, failure to review records, fragmentation and dismissal of probative evidence by the court, etc.).⁵³⁵ The Court referred to both the Convention on Torture and the Convention on the Rights to the Child in order to provide a wide view of the relevant rights; it concluded that Guatemala violated articles 7, 1 (1), 4, 5, 8, 6, and 25 of the American Convention on Human Rights. Guatemala failed to implement the call for reparation within the deadline established by the Court.

In the concurring opinion, Judges Cancado Trindade and Abreu Burelli return to the notion of “proyecto de vida” set forth in Loayza Tamayo case, highlighting the need to emphasize respect for socio-economic rights which are at the root of human dignity:

“We believe that there are distinct ways to deprive a person arbitrarily of life: when his death is provoked dire by the unlawful act of homicide, as well as when circumstances are not avoided which likewise lead to the death of persons as in the cas d’espece. In the present Villagran Morales versus Guatemala (Merits), pertaining to the death of children by police agents of the State, there is the aggravating circumstance that the life of the child was already devoid of any meaning; that is, the victimized children were already deprived of creating and developing a project of life and even seeking out a meaning for their own existence.

The duty of the State to take positive measures is stressed precisely in relation to the protection of life of vulnerable and defenseless persons in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social, and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.”⁵³⁶

This concurrence calls for a merger of moral and legal norms in order to protect human life in the new century: they set forth that those who are subjected to such misery are denied security and integrity of the human persons, experiencing a state of spiritual death, later followed by physical death.⁵³⁷ The existence and destiny of human beings are cited as the pertinent issues for examination under human right law, thereby further expounding the notion of transcendental considerations.

Hence, it is possible to imagine the presentation of a case involving internally displaced persons. In like manner to street children, they suffer persecution, denial of judicial remedies, marginalisation, and deprivation of the basic conditions of human dignity. Repression of IDPs and forced eviction actions are carried out systematically in Guatemala. IDPs are thrust into situations of total abandonment by both the State and international organizations, there does not appear to be a comprehensive strategy to address second-

⁵³⁵ Id. at paras. 229-233.

⁵³⁶ Id. at Concurring Opinion of Judges Cancado Trindade and Abreu Burelli, paras. 3-4.

⁵³⁷ Id. at paras. 8-9 & 11.

generation displacement or unresolved/protracted first generation displacement. The recognition of the fundamental nature of socio-economic rights as the basis for a life with dignity is especially valuable to IDPs. Given that many may not hold formal title to property, their claims are derived from the socio-economic human rights variant of the right to property as opposed to the civil and political variant, indigenous customary norms, or equity principles. As previously mentioned, the right to property for rural peasants is equivalent to the rights to life, food, housing, etc.

In November 1999, the General Assembly of the Organization of American States held a special session to commemorate the 40th anniversary of the Inter-American Commission on Human Rights, the 30th anniversary of the Inter-American Convention on Human Rights, and the 20th anniversary of the Inter-American Court on Human Rights. Antonio Cancado, president of the Inter-American Court on Human Rights, announced that States needed to redirect their focus to economic and social rights:

“Of what use to me is freedom of expression if I don’t have real access to education? Of what use is freedom of movement if I cannot even aspire to decent housing?”⁵³⁸

Indeed the Preamble to the American Convention on Human Rights notes social justice to be one of the principal goals. Hence, it is likely that the Court will prove amenable to examining more claims based on socio-economic rights. Thus, in terms of addressing customary claims to property as well as transcendental aspects of internal displacement, the Inter-American Court may well be the most promising forum to pursue a claim for IDPs at the international level.

In the following case, we move from “proyecto de vida” to the right to the truth. One may recall that the UN Secretary General, Kofi Annan, highlighted reparation, truth about the conflict, and the pursuit of justice for the most serious crimes as the three pillars of durable peace and national reconciliation.⁵³⁹ The case below describes the interrelationship of truth to the other pillars.

⁵³⁸ Nefer Muñoz, “Human Rights-Latam: Today’s Challenges- Social, Economic Rights”, INTER PRESS SERVICE, 16 November 1999.

⁵³⁹ “Annan: Deben escuchar a CEH” in PRENSA LIBRE 2 March 1999.

Bamaca Velasquez

This case addressed the compelling story of Jennifer Harbury's effort to attain the truth about the disappearance of her husband, Efrain Bamaca Velasquez.⁵⁴⁰ Mr. Bamaca Velasquez led a guerilla group called the Organization of the People in Arms; in 1992 he was captured by the Army and detained. In spite of the filing of habeus corpus motions, as well as pursuit of investigations, criminal lawsuits, and exhumation orders, Mr. Bamaca Velasquez's body was never located due to obstruction by the State. Ms. Harbury attained the attention of the media by undergoing a hunger strike demanding response from the Guatemalan State. The Court found that the domestic remedies "were not effective to prosecute, and if applicable punish those responsible, establishing violation of articles 7, 5, 4, 8, 25 (in relation to Article 1 (1) of the American Convention, as well as articles 1,2,6, and 8 of the Inter-American Convention to Prevent and Punish Torture."⁵⁴¹

The Inter-American Commission argued before the Court that the disappearance of Mr. Bamaca Velasquez violated the right to the truth of the next of kin of the victim and of society as a whole- declaring that "the right to the truth has a collective nature, which includes the right of society to 'have access to essential information for the development of democratic systems', and a particular nature, as the right of the victims and of kin to know what happened to their loved ones, which is a form of reparation."⁵⁴² The Commission argued that this new right of society is emerging as a principle of international law, specifically citing articles 1(1), 8, 25 and 13 of the American Convention. The majority of the Court believed that the right to the truth was subsumed in the individual rights to judicial guarantees and judicial protection, thus not directly addressing the collective/social component as this was assumed to be fulfilled by realization of the individual component via investigation, prosecution, etc. However, three judges issued separate opinions which provided further reflection on the right to truth.

Judge Cancado Trindade confirmed the Commission's interpretation of the right to truth without elaboration. Judge Garcia Ramirez calls upon the Court to continue to examine this issue in the future in order to fight impunity:

"In its first acceptance, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically and specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the

⁵⁴⁰ Bamaca Velasquez Case, Judgment, I/A Court H.R. Series C No. 70, (25 November 2000).

⁵⁴¹ Id. at para. 134.

⁵⁴² Id. at para. 197.

right to know the reality of what happened constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this. . .

This is the first time that the Court has explicitly referred to the right to the truth, cited in the Commission's application. The innovation in the judgment contributes on this point could lead to further examination in the future, which would help to strengthen the role of Inter-American human rights jurisprudence as a factor in the fight against impunity. Society's demand for knowledge of the facts that violate human rights and the individual right to know the truth are clearly addressed at banishing impunity, which encourages human rights violations..”

Judge Salgado Pesantes called for a link to be made to freedom of thought and expression, specifically the right to information and highlighted the need to elaborate a doctrine as follows:

“The nature of this faculty or prerogative to obtain the truth is essentially moral, since the conduct opposed to the truth is lying; and has a subjective content that must be defined, so as not to fall into negative subjectivism.

The failure to tell, reveal, or establish the truth may give rise to different degrees of responsibility (unintentional error, premeditation, etc.);

In any case, axiology or legal evaluation must construct a solid doctrine that allows the right to the truth to be included in positive law and at the same time, determines to what extent such a right can and should be applied.”⁵⁴³

If we consider the situation of IDPs, we may consider that they are often denied recognition of the truth about the violations they have been subjected to. As invisible or “disposable” people they are denied their rights to seek recourse and restitution from the State. The society at large may express disinterest in their situation, thus overlooking the truth about the circumstances resulting in their dispossession. In the case of Guatemala, the Commission on Historical Clarification clearly described the extent of forced displacement of the rural population thereby providing the society at large with an account of the truth as pertaining to the IDP population in general, however it deleted the chapter which identified the specific property claims of the dispersed IDPs thereby denying them recognition of truth in individual cases. Some IDPs complained that the CEH only interviewed a selection of dispersed IDPs, hence many people were never able to tell their story. There remains a gap in protection, as dispersed IDPs remain without either acknowledgement of their individual histories or provision of reparation of property. As previously mentioned, donors and international organizations declared the issue of forced migration resolved upon the return of the refugees, regardless of the fact that the IDPs were never provided with land. IDPs who seek recognition of abuses should consider pursuing a claim within the Inter-American system. It may prove favorable to advancing their cause-as analysis may prove comprehensive and thereby expanding the potential for adequate remedy at the regional level, e.g. consideration

⁵⁴³ Id. Separate Concurring Opinion of Judge Hernan Salgado Pesantes.

of socio-economic rights as well as transcendental aspects such as the “proyecto de vida” or the “right to truth”.

6.4. Present Challenges to the Inter-American Human Rights System: Enforcement

Beginning in 1996, the Inter-American Human Rights System embarked upon an “identity crisis” which led to a reevaluation of its effectiveness. Complaints included the Commission’s failure to transmit more cases to the Court, extraordinary delays in processing cases (one case remained pending after 14 years), lack of investigation capacity, politicization of selection of judges and commissioners, lack of transparency, non-implementation of decisions by States, and lack of follow up by the regional system.⁵⁴⁴ The Commission and the Court amended their procedural rules to ensure transfer of more cases between the Commission and the Court, public access to documents, participation by victims, recognition of the Commission’s findings of evidence, and joint address of main decision and reparations, thereby improving effectiveness.

Essentially the root cause of the ineffectiveness of the entire regional human rights system is due to lack of political will among OAS member states to provide more resources to the regional system and to fight impunity by prevention, investigation, and sanction of offenders, as well as provision of compensation to victims.⁵⁴⁵ Thus, the primary problem facing the Inter-American human rights system is linked to enforcement. Article 68.2 of the American Convention requires enforcement of the award by the Court to follow domestic procedures. Given that many member states have not created mechanisms to oversee compliance of the Court’s decisions, enforcement depends on the OAS General Assembly to issue a recommendation of sanctions against non-cooperative members (as was done in the

⁵⁴⁴ The delays were of significant concern, as noted by Buergenthal & Cassell,

“Such delay is unconscionable and inexcusable. Delay compels victims and families to endure years of psychic distress without even moral vindication. Delay allows evidence to grow stale, so that by the time the Commission finally recommends that a State comply with its duties to investigate and prosecute, the practical possibilities of doing so are significantly diminished. And delay undermines the credibility of the system, thereby eroding its deterrent value, discouraging victims from using it, and causing governments to question the competence of those who administer it.” Thomas Buergenthal & Bouglass Cassell, “The Future of the Inter-American Human Rights System” in JUAN E. MENDEZ & FRANCISCO COX (EDS.), “Seminario sobre ‘El Sistema Interamericano de Proteccion de los Derechos Humanos at 539, 543 & 548 (Instituto Interamericano de Derechos Humanos 1998).

⁵⁴⁵ Id. At 539 & 540. See also Pedro Nikken, “Perfeccionar el sistema interamericano de derechos humanos sin reformar al pacto de San Jose”, and Jose Miguel Vivanco “Fortalecer o Reformar el sistema interamericano” in MENDEZ & COX, Id. at 25, 35 & 51, 58, 75-87.

cases of Honduras and Suriname). However, it has been noted the General Assembly has not been an effective enforcer of the Commission and Court's conclusions.⁵⁴⁶

With respect to the Commission, according to Harris, its recommendations, reports, and decisions are not legally binding and may be considered soft law.⁵⁴⁷ According to Cerna, Vivanco & Bhansali, reports pertaining to Article 51 of the American Convention should be considered binding and there is suggestion that recognition of the normative status of Commission's outputs may be based on the Vienna Convention on the Law of Treaties, Article 31 which requires good faith interpretation of the treaty with respect to the context and light of its object and purpose, in this case the Commission is created to address matters relating to the fulfilment of the commitments made by States Parties to the rights contained within the Convention (as well as the Declaration via the Charter).⁵⁴⁸ However, given that the language of Article 51 is vague- referring to "recommendations" and "report" it may be interpreted to constitute secondary soft law which Shelton suggests may actually be harder than primary soft law which declares new standards because it "formulates and reformulates the hard law of human rights treaties in the application of this law to specific states and cases" thereby revealing how "hard law and soft law interact to shape the content of international obligations."⁵⁴⁹ Unfortunately, Buergethal asserts that the General Assembly takes "little interest in dealing with individual petitions" and Davidson asserts that the OAS General Assembly is often reluctant to adopt condemnatory resolutions upon reception of a critical country study by the Commission:

*"More often, however, the outcome is simply anodyne and is represented by a simple statement that the General Assembly notes the report and thanks the Commission for its efforts."*⁵⁵⁰

However, the Commission and the Court have recently begun to place greater emphasis in follow up by creating reporting requirements, establishing special committees/holding hearings, and leaving cases open until the state complies. Both the Court and the Commission publish problems with implementation of decisions/recommendations in the Annual Reports.

⁵⁴⁶ Veronica Gomez, "The Interaction between the Political Actors of the OAS, the Commission, and the Court", in HARRIS & LIVINGSTONE, supra note 238 at 173,200.

⁵⁴⁷ See Harris, supra note 238 citing Caballero Delgado and Santana case, I/A Court H.R. (1995), para. 67 (1996) stating that the Commission's reports and recommendations were not legally binding.

⁵⁴⁸ Cristina Cerna, "The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications" and Jose Miguel Vivanco and Lisa L. Bhansali, "Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms" in HARRIS & LIVINGSTONE supra note 238.

⁵⁴⁹ Dinah Shelton, "Compliance with International Human Rights Soft Law" in EDITH BROWN WIESS (Ed.) INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS 119,141 (ASIL 1997).

⁵⁵⁰ BUERGENTHAL, SHELTON & STEWART supra note 451 at 241 &253; DAVIDSON, supra note 506 at 117.

One of the most difficult challenges to improving implementation of decisions, is the weakness of states before non-state actors. Antonio Augusto Cancado Trindade notes that the current stage of democratic transition in the Americas, human rights violations are often conducted by non-state agents and may stem from corruption and impunity or socio-economic inequities.⁵⁵¹ He cites the importance of access to justice and effective national remedies. The incorporation of human rights treaties and/or standards within national constitutions and their application by the courts is a considerable advance within the region. Although the effects largely remain on paper due to the inefficiency, corruption, and interference with the national judicial systems, such that “they have not constituted valid and credible instances of investigation, abdicating their role of defending the exercise and promoting the expansion of public liberties in the continent.”⁵⁵² The failure of the access to justice on the regional level is directly tied to the crisis within the national justice systems.

It should be noted that although the Court’s efforts to hold States accountable for non-investigation, prosecution, or provision of remedy for human rights violations pressure States to attack impunity, it is not enough. Non- state actor (including narco-traffickers, large landholders, guerillas, and paramilitary groups) increasingly demonstrate more power and resources than States. Weakened state entities may have severe problems in sanctioning offenders, especially given the prevalence of assassinations, threats, and interference with prosecutors and judges. The creation of the International Criminal Court and the increased willingness of national courts of other states to prosecute human rights offenders in their individual capacity may assist new democracies in achieving their goals of sanctioning offenders without risking renewed security crises within their borders.⁵⁵³

Cancado predicted that “In the next few years we will be facing a big challenge in the region: fighting impunity and achieving mechanisms at a national level to enforce the sentences handed down by the international bodies.”⁵⁵⁴ Thus, because we recognise that the

⁵⁵¹ Antonio Augusto Cancado Trindade, “The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of its Mechanism of Protection”, in HARRIS & LIVINGSTONE, supra note 238 at 395,418.

⁵⁵² Jose Miguel Vivanco, “Fortalecer o reformar el sistema interamericano” in MENDEZ & COX, supra note 544 at 51, 53.

⁵⁵³ The Spanish courts received three complaints against Guatemalan military officials, one based on forced disappearance of a writer in 1980, another on a massacre of 200 people in Las Cruces, La Libertad Peten in 1982, and a third based on charges of torture, genocide and terrorism due to the disappearance of Rigoberta Mechu’s family and Spanish priests as well as the death of 39 persons in the attack on the Spanish Embassy in 1980. Pedro Pop Barillas, “Justicia: Dos querellas ante Espana”, PRENSA LIBRE 29 January 2000.

⁵⁵⁴ Nefer Muñoz, “International Jurists Signal Gaps in Inter-American System”, INTER PRESS SERVICE 24 November 1999. See also note 528. A new protocol to present channels to bring cases to the Inter-American Court directly, bypassing the Commission, was proposed for approval in June 2001. Cancado stated that the most significant gap in the Inter-American human rights system was the lack of mechanisms to enforce verdicts

international mechanisms are dependent on national mechanisms for enforcement of restitution rights, I chose to dedicate the remainder of this thesis to undertake a review of the Guatemalan national context and the mechanisms elaborated for dispute resolution of property conflicts. It is hoped that such pursuit will allow one to more fully understand the challenges pertaining to access to justice for IDPs seeking restitution of property in post-settlement situations.

7. Conclusion to Part II

“Indeed, Central America has been considered the most effective ‘laboratory’ for attempts to address post-war situations involving uprooted populations.”

*Cohen, Deng & Sanchez-Garzoli*⁵⁵⁵

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.⁵⁵⁶ Uprooted persons remain in Guatemala regardless of donor fatigue, termination of programs, and closure of the UNHCR 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 crime.⁵⁵⁷ 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, corruption, and the state of impunity. Reluctance to address the fundamental problems involving land distribution and restitution claims is resulting 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

handed down against member states. Roberto Cueller, executive director of the Inter-American Human Rights Institute is quoted as characterizing the problem as an “abyss” in the legal system.

⁵⁵⁵ Cohen, Deng & Sanchez-Garzoli, *supra* note 148 at 17.

⁵⁵⁶ Guatemala is a good example of a transition situation which “fell off the global map” and suffered loss of assistance. See Inter-Agency Standing Committee, *Guidelines for Field Staff for Promoting Reintegration in Transition Situations* 5 (2001 UNDP).

⁵⁵⁷ 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 plaguing Guatemala that negatively affect aid programs.

reexamine prevention strategies after the return phase in order to remedy incomplete restitution and reintegration efforts and hinder a reemergence of new migratory cycles.

One key problem is the emphasis on humanitarian emergency as the trigger for a UN-coordinated IDP response. Post-conflict countries may be prematurely deemed to no longer have an IDP problem, in spite of the fact that IDPs are not always included in reintegration programs which target refugees. The tendency to focus on immediate humanitarian crisis is discriminatory in practice. As long as the international system fails to require Guatemala to recognize restitution rights of IDPs, or even disseminate information on the new Guiding Principles on Internal Displacement in the country, it is unlikely that state agencies will be likely to adopt a new policy. One can measure the inverse relationship between the level of attention given to Colombian IDPs versus Guatemalan IDPs. While the UN and NGOs send financial and human resources to Colombia, Guatemala's IDPs remained ignored in spite of the fact that they never attained a durable solution. The international community promotes a myth of solution to forced migration problems in spite of evidence to the contrary. Such strategy allows the UN to limit the distribution of resources to "hot" countries. Unfortunately, neglect of the reintegration needs of IDPs promotes further conflicts which invariably lead to new cycles of violence and displacement. As previously mentioned, I contend that the international community and the State's failure to address the issue of land distribution as pertaining IDPs in Guatemala is one of the factors for the flood of land conflicts overwhelming the nation and inhibiting peace consolidation. Ironically, a recent article by Julia E. Sweig in *Foreign Affairs* highlights the need for land reform, institution-building, and return of internally displaced persons as being among the key elements of attaining peace in Colombia, none of which are prioritized under the current anti-terrorist policy.⁵⁵⁸ Thus, the flight of donors and international monitors to humanitarian hot spots does not mask the exigency to address structural inequities at the root of conflicts, on the contrary it reinforces the need to elaborate coherent strategies to remedy them.⁵⁵⁹

Humanitarian agencies cannot simply cast the burden of unresolved return and reintegration situations linked to property restitution upon development agencies without a clear agreement of assumption of responsibility and a definite strategy to accept IDPs as a valid protection category capable of implementation in practice. I am concerned at the lack of clarity with respect to transition from an IDP targeted category under the mandate of UNHCR

⁵⁵⁸ Julia E. Sweig, "What Kind of War for Colombia" in FOREIGN AFFAIRS 122-141 (September-October 2002).

⁵⁵⁹ The OCHA IDP Unit recognized the need to address customary land claims in its field mission in 2002.

or an NGO to a member of a community seeking development assistance from UNDP. For UNHCR to point the finger at UNDP, the World Bank, or USAID is a simplistic approach to addressing the protection gap. Development agencies should continue to utilize humanitarian protection categories, including IDP, as long as reparation claims remain un-addressed and humanitarian agencies should reconsider the practice of premature declarations of success which delusively legitimize their withdrawal. I conclude that the IDP protection category remains relevant and legitimate until actual reparation in the form of property restitution, compensation, etc. is provided. The unwillingness of donors and international organizations to fully support the issue of property restitution for IDPs or indigenous people in post-conflict situations has resulted in unchecked impunity, those who illegally appropriated themselves of land during the conflict maintain control of this property.

This Part sought to describe the international protection framework for internally displaced persons. In order to highlight the need for pursuit of an ethic of recognition as pertaining Guatemalan IDPs and indigenous people's rights to restitution of property and remedy, I highlight protection gaps utilizing the criteria of norms, party participation, and output:

Norms: Remaining Protection Gaps

The incongruity of voices within the international plane renders the definition of internally displaced persons an uncertain protection category. Review of the evolution of this category reveals countervailing tendencies: due to the energetic promotion by Francis Deng, the Brookings Institute (Roberta Cohen in particular) as well as the Norwegian Refugee Council through its Global IDP Database, the definition included within the Guiding Principles on Internal Displacement has gained relevance. This is in spite of serious reservations by some Refugee Law scholars as to the validity of such category, as well as rejection by various humanitarian and development protection/assistance officers in the field due to practical implementation problems and lack of clarity as pertaining scope of mandate. By granting them status as a category meriting international attention as well as protection by the State, IDPs are recognized as having a particular identity which is based on their forced flight.

However, the lack of a binding instrument specifically pertaining IDPs and accompanying enforcement mechanism has left implementation of the IDP category largely up to the will of individual governments and partly subject to the dissemination preferences and capacity of the UN, Brookings Institution, and NGOs, thus we have an ad hoc practice.

The Special Representative on Internal Displacement, the IASC Special Coordinator and the OCHA IDP Unit have limited financial and human resources, therefore their role is primarily directed at devising strategies for cooperation among the UN agencies and the State to address internal displacement situations rather than responding to individual complaints. IDPs in Guatemala has not received attention by either one of these representatives, and thus have not been emancipated by the elaboration of the soft law norms or related offices.

The lack of normative clarity pertaining to the rights to property and restitution of such supports a call for the elaboration of a new hard law instrument for IDPs containing comprehensive standards. Neither the CCPR nor the CESC contain the rights to property or restitution of property, reflecting disagreement within the international community as pertaining its limitations and appropriate forms of compensation. ILO Convention No. 169 does not guarantee the right to ownership of property, as the State may only recognize use or possessory rights. It provides a clear standard with respect to recognition of customary use of property and the establishment of a duty upon the State to protect indigenous people against violation of their property rights by non-State actors. If we consider the case of Guatemalan IDPs we may be inclined to recommend pursuit of claims based on indigenous identity rather than IDP. Indeed, as previously mentioned commentators are referring to indigenous standards to support improved protection of IDP property. However, given the protection gaps within these instruments, the argument for elaboration of a new instrument for all IDPs is further strengthened.

ILO Convention No. 169 legitimizes legal pluralism by recognizing the validity of customary norms. In practice, complications arise with respect to conflict of norms in Guatemala (as discussed *infra* in Part III) formal courts are hesitant to recognize the legitimacy of a customary norm, particularly if considered to negatively affect a non-indigenous person asserting a right recognized under formal law. The key dilemma is when the formal law becomes a tool of oppression; recognition of customary law is then presented as a means of emancipation.

Within the Inter-American instruments we find the socio-economic variant of the right to property in the American Declaration, and the civil & political/hybrid variant within the American Convention (both of which could be used to support customary claims to property by IDPs and indigenous people). The problem is that civil & political standard is often utilized to uphold inequitable divisions of resources, thus there is a pressing need for creative interpretation/drafting of norms to emancipate those repressed by the law when used as a tool

of exclusion. The latter could also support expropriation for land redistribution to meet the needs of those lacking land, including IDPs.

Unfortunately, the Guiding Principles on Internal Displacement appears to support the civil and political version; although the lack of the mention of “private property” and the principle recognizing the special tie of peasants, pastoralists, and indigenous people to land may permit expansive interpretation in accordance with the Inter-American Court of Human Rights in the *Awas Tingi* case. The commentary on cessation determination by the experts who drafted the instrument reflects a civil-political bias which may leave IDPs disempowered in terms of property and restitution, particularly those in protracted displacement situations. Given the fact that access to property is considered the means of immediate emancipation from marginalisation, via realization of the means by which to secure and adequate standard of living, including food, housing, work, etc. (long-term initiatives would include education). The current bias against socio-economic rights, explicit within the ILA Declaration and within the commentary provided by the creators of the Guiding Principles diminishes the value of these instruments as they ignore the root cause of ongoing violations against IDPs as well as the link to past un-remedied civil and political violations. The majority of IDPs lack formal title and thus require references to socio-economic or hybrid variants of the right to property and corollary rights, food, housing, culture, etc. which will provide them with the means of attaining an adequate standard of living.

The conservative approach to defining property and restitution rights may possibly be due to caution on the part of the drafters not to provoke rejection by States due to accusations of infringement of sovereign interests, interest in reaffirming the existing standards contained in human rights and humanitarian law instruments, and/or lack of contextual assessment of the protection needs of IDPs in reality as opposed to theory. The latter factor may indicate insufficient inclusion of IDPs in the drafting process; a further example being the absence of a provision addressing coercive sales of property.

Should a new convention on IDPs or additional protocol to the 1951 Convention be elaborated, it should contain cessation clauses in order to improve utilization within protection and assistance programs. However, such cessation clauses should uphold a holistic understanding of protection, rather than limiting its scope by utilizing socio-economic rights as grounds for termination of protection instead of inclusion.

The right to compensation of property for IDPs within documents specifically addressing them retain a non-binding character and have been drafted in a manner which does not explicitly guarantee choice over the form of reparation, there is no guarantee that peasants

will be given restitution of land as opposed to cash or other form of reparation. In contrast the ILO Convention No. 169 guarantees the right of participation in choosing the form of reparation.

We are also left with the question as to whether IDPs should be entitled to damages, above restitution or compensation value, due to loss of property as a consequence of displacement. States emerging from internal conflict have limited resources, hence it is unlikely that they would be willing to pay for additional damages, given that they often assert inability to pay even basic compensation.

With respect to the right to remedy, the instruments vary with respect to mechanisms, some highlight courts while others appear open to use of administrative agencies or other institution. Nevertheless, the mechanism must be effective. In theory, courts are understood to fulfill the role of protecting marginalized groups and individuals from abuse by the State or Non-State Actors. Thus IDPs may have an interest in having a specific guarantee of access to courts. However, some remedies are best implemented by other entities, for example the legislature may enact a land distribution law, or an executive agency may establish financial compensation program. Hence, I am in favor of a broad understanding of remedial mechanisms as long as use of an administrative agency does not impede access to a court if deemed necessary by the IDP. (In Parts III & IV, I examine the use of administrative agencies and courts in Guatemala in order to assess to what extent these mechanisms provide remedies to IDPs involved in land disputes.)

At the regional level, the Inter-American instruments highlight the need for speed and simplicity of remedies, as well as the importance of non-recognition of state immunity defenses. These factors are of central concern to IDPs contesting their forced eviction/displacement. Thus, far only the U.N. Sub Commission on Promotion and Protection of Human Rights Resolution 1998/26 explicitly links the right to remedy with the right to property as pertaining IDPs. In like manner, the ILO Convention No. 169, Article 14, links access to procedures and land claims as pertaining indigenous manner.

Examination of the UN treaty-monitoring committees' dialogues with Guatemala revealed that although they themselves are "soft entities" when addressing norms beyond their mandated covenants, they referred to hard law, such as ILO Convention No. 169. CERD & CESC did refer to IDPs but primarily highlighted indigenous people as the main category for property restitution pursuant to the Convention, and the CCPR referred to the poor as a whole. Their interesting approach to cross-referencing the ILO Convention No. 169, the Guatemalan Constitutional provision on expropriation, and the Peace Accords revealed a strategy intended

to justify and prompt substantive land reform by the State. In spite of this effort, the State has proved reluctant to embark upon such action.

It should be noted that of the three committees, only CCPR has reviewed Guatemala's report in the period after the introduction of the Guiding Principles on Internal Displacement to the international community, but it did not refer to this instrument and in the second periodic review there was no mention whatsoever of IDPs and their property concerns. In contrast, women's rights were explored in depth in part reflecting the growth of the NGO network addressing these issues. It is unlikely that CCPR, CESC and CERD will refer IDPs or the Guiding Principles in future dialogues with the Guatemalan State as other vulnerable groups receive increased attention.

The Inter-American Commission of Human Rights has proved to be the most progressive, as it refers to the Guiding Principles in its fifth report on Guatemala and specifically highlights the need for restitution of property for both IDPs and indigenous people. Response by the State remains to be seen. The Inter-American Court of Human Rights has not yet referred to the Guiding Principles in its decisions.

Other international actors, such as Donors, may wield greater influence than human rights monitors, as they may threaten to withhold aid should progress not be achieved within human rights/development/peace programs. Unfortunately, there appears to have been a silent collusion between the international community and the State to sweep un-addressed restitution concerns under the rug due to financing limitations, lack of political will, and fear of promoting further divisions within the nation. It is essential that an ethic of recognition be adopted specifically within the context of reintegration of victims of forced migration, failure to do results in neglect of the original causes of war and increase the risk of recurrence of violence and displacement. The reluctance of Donors to utilize the IDP category, instead preferring holistic categories, reveals dichotomies within the international system.

Proposal for a New Convention on IDPs

In conclusion, transnational soft law-making processes revealed weakness in the elaboration of norms due to legitimacy, enforcement, and normative clarity and comprehensiveness which indicates that traditional, formal law making processes may actually be preferable. The drafters of the Guiding Principles in some respect may have proved even more cautious than formal law-makers due to the fear of accusation of illegitimacy. In contrast, one may consider the innovations within the Rome Statute

establishing the International Criminal Court, drafted under a traditional process, which widely expanded the definition of persecution to address gender, as well as other categories not covered by the 1951 Convention on the Status of Refugees thereby indicating that formal law-making processes may indeed prove progressive. Indeed the retreat indicated by reference to the Guiding Principles as an “Advocacy Framework” is curious considering that it was launched specifically with the intention of eventually forming customary law. Marginalized groups may not be effectively liberated by transnational soft law initiatives, indeed they may suffer greater isolation due to States’ resistance to what they deem to be “political agendas”. In order to create a framework for the ethic of recognition, there is a need for a specific convention addressing IDP concerns and addressing provision of restitution and remedy provisions as a specific condition to measuring a State’s fulfilment of protection duties. The value of pursuing the elaboration of a new hard law instrument within a traditional process would possibly be an improved focus on the language determining rights and duties of IDPs and States. The speed at which the International Criminal Court achieved the necessary ratifications indicates that scepticism pertaining the difficulties of realizing hard law initiatives may be overblown. Traditional forms of law-making in which governments are included to participate in the drafting of legal language and design of enforcement mechanisms in the long run may be more effective than rapid soft law initiatives created by an elite group of experts to the exclusion of the States upon which such norms are intended to apply. Inclusion begets legitimacy, exclusion results in suspicion and rejection. I suggest that there is a need to create new standards for IDPs which would incorporate:

- 1) Direct reference to the indivisibility of human rights, requiring interpretations which consider linkage and impact of rights upon each other*
- 2) Definition of the right to property as a socio-economic right or hybrid/cross over right essential for realization of an adequate standard of living as well as a civil and political right with equal right of enforcement*
- 2) Recognition of customary possession rights to property with accompanying right of title*
- 4) The right to restitution of property, including IDP choice of form of reparation, based on full information pertaining the value of the land and without duress*
- 5) Right to direct participation in decision making as pertaining viability of return to one’s property*

- 6) *Prohibition of coerced sales of property, alteration of title must be based on free and informed consent*
- 7) *Non-recognition of abandonment as grounds for nullification of a prescription possession claim, when such abandonment is a result of forced displacement*
- 8) *Identification of the State's duty to prevent and remedy infringement of IDPs' right to property by both state and non-state actors*
- 9) *Invalidity of state immunity defenses presented within the context of violation of IDP property rights*
- 10) *Right to legal aid, translation, and cost waivers when pursuing a claim seeking restitution of property*
- 11) *Right to effective, simple, speedy remedy with guaranteed right of appeal to the court. Participation in remedial proceedings must uphold IDPs' dignity.*
- 12) *Recognition that the Legislature or the Executive may serve as the appropriate remedial mechanism in the event a land reform program based on expropriation of property is utilized to provide restitution to IDPs.*
- 13) *Right to utilize customary dispute resolution mechanisms to resolve property disputes with right of appeal to the formal courts*

The international community must not prove too cowardly to design appropriate mechanisms to respond to expectations of transnational access to justice. Furthermore, although I am in favour of an elaboration of a binding instrument on internal displacement, I believe that it is imperative to dedicate future efforts and resources towards new strategies designed to combating structural inequities and impunity at the national level which inhibit the rule of law, be it hard or soft, national or international. This is the true challenge.

Party Participation:

IDPs have low levels of party participation at the international level. Like other individuals and groups, they are denied standing before the Human Rights Committee due to the lack of oral proceedings during consideration of individual claims. This is particularly detrimental to persons asserting customary claims to property whose credibility may be contingent on direct oral testimony. The preference for documentary review of evidence and arguments may present a bias against poor, illiterate persons in successfully pursuing claims

before this body. However, at the regional level, i.e. the Inter-American Court, victims, their next of kin, or their representatives are granted *locus standi in judicio* in all stages of the Court's proceedings and may address the Court in their native languages with the aid of interpreters. IDPs should be guaranteed the right of participation in processes determining restitution for violations.

It is essential that legal aid programs be developed to allow IDPs the chance to pursue claims at the national level, and when necessary at the regional and international levels. Yet, national NGOs themselves become subject to attacks and threats. Thus far, in Guatemala CALDH is the lead NGO pursuing property claims within courts. Unfortunately its office has been ransacked and its staff subject to threats.

Unfortunately, IDPs themselves appear to play a peripheral role with respect to their own protection, as they lack sufficient direct voice in the implementation of the Guiding Principles. As previously mentioned, review of the instruments addressing restitution revealed that only the instruments addressing indigenous rights provided standards pertaining to choice of form of reparation (Both ILO Convention No. 169 and soft law) and the criteria of free, informed, voluntary consent (The UN Draft Declaration and CERD recommendation XXIII focus on the two former characteristics). However, under the ILO Convention indigenous people are not guaranteed the right of direct participation in determination of whether return to the original property is viable. In comparison the Guiding Principles on Internal Displacement does contain a hortatory call upon the State to make special efforts to include full participation of IDPs in decisions regarding return or resettlement, thus it is not drafted to be an absolute guarantee. With respect to designing the form of reparation, the IDP instruments are vague, thereby potentially enabling the State to take charge of this matter. The IDP instruments also leave the issue of coerced sales of property or alteration of title unaddressed.

With respect to aspects of party participation within the right to remedy, the American Draft Declaration on Indigenous Rights provided an inspirational reference to "full participation with dignity" with respect to remedy, and the indigenous people have the rights to interpretation and consultation under ILO Convention No. 169. However, there is disagreement as to what constitutes consultation. In addition, according to the ILO Convention No. 169 indigenous people may utilize their own dispute resolution mechanisms. Nevertheless, as previously mentioned, formal courts may prove unwilling to recognize the legitimacy of such entities. The most common limitation on realization of the right to remedy in Guatemala is lack of legal aid, financial costs, need for translation, and physical distance to

courts (see *infra* Part III). The IDP instruments do not contain norms which explicitly make reference to these factors.

Apart from the UN Special Representative on Internal Displacement and the Rapporteur on Internal Displacement for the Inter-American Commission for Human Rights, who meet with IDPs on their field missions, IDP experts themselves reflect little comprehensive knowledge of the field and rely on national NGOs to provide them with information. Thus, a complaint may be made that the experts may be honestly well-intentioned but may be perceived as arrogant in their pursuit of determining what is best for IDPs due to their lack of direct contact with IDPs on the ground. IDPs may remain passive and disengaged with respect to participation in the design of policy, even after the elaboration of new norms.

Recent efforts to combat the image of exclusionary practice has resulted in “symbolic” appearances by IDPs or refugees at workshops and conferences involving the UN Special Representative on Internal Displacement and/or the IASC Special Coordinator on Internal Displacement. I witnessed such appearances in the Workshop on Implementing the Guiding Principles on Internal Displacement in Bogota, Colombia (1999) as well as at a conference on Lessons Learned and International Mechanisms for Internal Displacement in Oslo, Norway (2001). Their presence is intended to remind international actors and experts whose interests are actually at stake and give IDPs an opportunity to provide testimony before an interested audience while receiving information as to how to use the Guiding Principles to lobby the State or other actors for protection. In the conferences I attended, participation was very brief, as the discussion was largely dominated by the experts and representatives of NGOs, the State, and international organizations.

There is a need to expand direct, substantive participation by IDPs in meetings, conferences, and strategy sessions involving international, State, and NGO actors who design responses to internal displacement situations. International actors must assist dispersed IDPs to organize in order to strengthen their participation in such events, and more importantly at the national level with respect to placing demands on the State, for example with respect to property restitution, otherwise their input is easily ignored. In the *Awas Tingi* case, the Inter-American Court called for indigenous participation in delimitation, demarcation, and assignment of title of land thereby empowering them fully. It is extremely important that

IDPs be assisted to do more than only provide testimonies to the experts abroad, otherwise there is a risk of treating them as passive victims.⁵⁶⁰

Although it is important that the linking capital serves to assist international human rights monitors advocate the needs of IDPs, they must take care to promote and support recognition of IDPs own voices as well. As mentioned previously, Deng himself has noted some resistance by certain governments on account of fear of infringement of sovereignty to the point where he was not permitted to hold workshops or have access to the internally displaced people.⁵⁶¹ Ironically, one of the principle reasons why the Guiding Principles on Internal Displacement and specialized monitors were created in the first place was to remedy the fact that this population was largely ignored by the international organizations. As described previously, the intervention of the refugee at the conference in Oslo appeared to be unplanned and startled the international experts due to his direct reclamation of the international community for being non-responsive to the needs of the displaced- what good are dialogues between the State and international actors if they do not result in concrete results, e.g. the provision of property to IDPs to ensure their survival?

It is ironic that the UN itself conducted a census which verified a significant population of IDPs in Guatemala and then claimed that they no longer existed, in spite of the fact that officials within the land agencies insist that they have endless files pertaining to IDPs. We are left with the query as to why didn't the international actors use the census and other information to help organize the dispersed IDPs to improve response by the State? By turning their backs, the people have not disappeared, indeed a percentage of them have radicalised. One may consider that in 2001-2002, hundreds of IDPs participated in marches in Guatemala demanding housing, restitution, property, and an end to forced evictions. Given the lack of attention by donors and other international actors, they have taken the matter into their own hands.

⁵⁶⁰ See Mertus, *supra* note 80 at 455: "A related element of a transformative strategy would be for the more powerful agents of transnational civil society to listen to and value the experiences and wisdom of their less powerful counterparts. While this may be a goal of many human rights advocates, rarely is it carried out in practice." She cites Diane Otto, "Rethinking the Universality of Human Rights Law", 29 COLUM. HUM. RTS. L. REV. 1, 38 (1997) calling for non-elite groups to have control at international meetings for agenda setting, identification of questions, and processing of meetings according to own procedures.

⁵⁶¹ See Commission on Human Rights, Report of the Secretary-General on Internally Displaced Persons, Mr. Francis Deng: Addendum Report on the Mission to the Sudan, E/CN.4/2002/95/Add.1 (1 February 2002).

Output:

The lack of identification of one organization as responsible for IDPs is a fact which limits effective response to IDP needs. The recent elaboration of an IDP Unit within OCHA is intended to coordinate UN agencies and assure long-term solutions for IDPs. However, I am concerned about the lack of clarity with respect to transition from IDP targeted group under UNHCR or NGO mandate, to member of a development community seeking assistance from UNDP. I fear that there may be a protection gap with respect to restitution claims by IDPs. IDPs may lose their status before attaining such restitution. I propose that IDPs be permitted to retain IDP status until their restitution claims are resolved.

In addition, the transnational approach to operational protection is in part due to downsizing of the UN and response to corruption/non-responsiveness within States. Decentralization of responsibility among NGOs, displaced persons, and other actors is presented as a means to recognize the voices of diverse actors in design of solutions to crises. I support empowerment of IDPs, however I fear that the weakness within the UN system as well as the scattering of protection responsibility among different actors may unintentionally promote further division between the State and society may actually weaken IDPs due to the lack of accountability of NGOs and potential fragmentation of interests. The UN requires additional financial support in order to address IDP needs directly, and programs should focus on strengthening linkages between the State and society.

The human rights oversight mechanisms on the international level identify the problem of internal displacement but primarily choose to address the contextual and structural causes which victimize all, such as: socio-economic inequity, impunity, corruption, a malfunctioning judiciary, endemic racism, etc. (discussed further in Part III) However the international human rights monitors have also recognized both the root causes of displacement and identified land restitution, compensation, and redistribution as the necessary solution in Guatemala. The Guatemalan State does not appear to have paid heed to these recommendations. The international system has been unable to enforce implementation of its conclusions on structural problems although ironically achieving friendly settlement with respect to individual cases.

With respect to individual communications to the Human Rights Committee, the effect of returning to a conciliatory structure on the international level after having exhausted courts on the national level may result in a mixed bag of delayed processing, but may serve as symbolic reparation to all IDPs and the eventual evolution of a customary standard regarding

reparation. Hence, I suggested a strategy for use of the optional protocol to the Human Rights Committee based on cross-referencing the rights to equal protection of the law, equal protection before the law, freedom of movement & choice of residence, effective remedy, enjoyment of one's culture, and non-interference with the home and family. Such approach reveals the role of property as a condition for full enjoyment of other fundamental human rights. As voiced by rural peasants in Guatemala, access to property is equivalent to realization of the right to life as well as the rights to food, housing which compose an adequate standard of living.

There is a glimmer of hope with respect to continued pursuit of soft mechanisms: The importance of having UN human rights monitors directly addressing legal inequities affecting distribution of resources and control of property is revealed if we consider the progress made by women in Guatemala as pertaining property rights. Prior to 1999, the Guatemalan Civil Code vested power over control of property to men. The husband was identified as the legal representative of the couple; the woman assuming such control only in the event of incapacitation/abandonment by her husband.⁵⁶² The husband was also considered to be the administrator of the marital property whereas the woman retained control over property which is registered only in her name.⁵⁶³ The Assistant Attorney General for Human Rights filed a complaint in the Constitutional Court of Guatemala requesting that these provisions be declared unconstitutional based on women's rights to freedom and equality as guaranteed in Article 4.⁵⁶⁴ In addition to the Constitution, the Convention on the Elimination of Discrimination Against Women was invoked. The Constitutional Court did not appear to be affected by the arguments, and rejected the claim:

*"There are certain general premises which should be taken into consideration in the present case, among them, that the Guatemalan legislation considers marriage to be a social institution in which there is a role for each one of the spouses, determined by the state in consideration of traditional Guatemalan values and the diversity of national concepts, customs, and beliefs on marriage."*⁵⁶⁵

It is curious that the Court did not consider the notion of *potestad marital* to be a direct violation of the principle of equality, as this has been repealed in a number of countries within

⁵⁶² Civil Code of Guatemala, Decree No. 106, Articles 109 & 115.

⁵⁶³ Id. at Article 131.

⁵⁶⁴ Constitution of Guatemala, Article 4: "In Guatemala, all individuals are free and equal in dignity and rights. Men and women, whatever their personal status, have equal opportunities and responsibilities. No individual can be subjected to servitude or other condition that undermines his dignity. Individuals must display brotherly behavior vis-a-vis each other." See also Article 47 guaranteeing the equal rights of spouses.

⁵⁶⁵ Corte Constitucional de Guatemala, Sentencia 24.6.93 (Exp. 84-92), quoted in Instituto Interamericano de Derechos Humanos (IIDH), GUIA SOBRE APLICACION DEL DERECHO INTERNACIONAL EN LA JURISDICCION INTERNA, 110 (IIDH 1996).

Latin America precisely on that basis. This decision provoked due concern by the UN Committee on the Elimination of Discrimination Against Women, made evident in its review of Guatemala's initial and second periodic reports to the entity.⁵⁶⁶ A consequence of the Committee on the Elimination of Discrimination Against Women's direct criticism of the Guatemalan Supreme Court's decision upholding the Civil Code's *potestad marital* over property prompted a successful trans-national initiative to enact legislative reforms in the Congress abolishing this principle. As the Guatemalan court seemed to indicate that the proper arm of the government to lobby for the law reform was the legislature, the National Office for Women drafted reforms for the Civil Code and sent them to the Congress for review. These reforms were approved and the gender bias was remedied.⁵⁶⁷ One is inspired to imagine the possibility of a similar achievement as the right to restitution of property of internally displaced persons; heightened international pressure may prompt legislative changes at the national level. The key is strengthening their transnational linkages to attain response, otherwise IDPs will remain forgotten as yesterday's victims as made evident in the review of Guatemala's second periodic report to the CCPR.

In the long run, the creation of an International Human Rights Court would be of undeniable worth to IDPs around the world. I would specifically favor the establishment of jurisdiction over contentious cases presented by individual or collective groups (class action) claims which would be of benefit to IDPs, rather than mere advisory jurisdiction.⁵⁶⁸ In addition, the international community should establish compensation fund for IDP property claims.

In the meantime, we may consider resort to the Inter-American system. The Inter-American Court's decisions in the *Awas Tingi*, *Loayza Tamayo*, *Villagran Morales*, *Blake*, *Panigua Morales*, and *Bamaca Velasquez* cases produced important precedents which may prompt States to respect indigenous rights to land, socio-economic rights of all persons, the rights of restitution and recourse, as well as transcendental aspects of human life-such as the right to a "*proyecto de vida*" and the right to truth. Most importantly, with respect to

⁵⁶⁶ See Committee on the Elimination of All Forms of Discrimination Against Women, Concluding Observations: Guatemala, A/49/38, paras. 38-87 (12/04/94). See also the Inter-American Commission of Human Rights in *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11-625, Inter-Am. C.H.R., OEA/Ser./L./V/II.111 doc. 20 rev. (2001) (Annual Report 2000) it found this policy in violation of the American Convention of Human Rights.

⁵⁶⁷ Decree No. 80-98.

⁵⁶⁸ See Thomas Buergenthal, "A Court and Two Consolidated Treaty Bodies" and Anne F. Bayefsky, Conference Rapporteur, *Enforcing International Human Rights Law. The Treaty System in the twenty-First Century*, York University, Toronto, Canada, June 22-24, 1997 in ANNE F. BAYEFESKY(Ed.), *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* (Kluwer Law International 2000).

Guatemala it has recognized the link between the human rights and humanitarian violations of civil defense patrols and the State, thereby opening the door for more claims. The presentation of a case involving IDPs to the Inter-American Court would provide an opportunity to address all of these themes. The Guatemalan State has adopted legislation which requires implementation of decisions by international bodies (jurisdiction recognized by the State) which call for reparation to victims, thereby indicating the possibility of effective recourse at the regional and international level. However, the expiration of due dates for implementation of the Inter-American Court's decisions in two of the cases pertaining to Guatemala indicates that hard law mechanisms may face similar enforcement problems as those facing soft law mechanisms.

As of yet, there is no concrete example of any of the international monitors having an immediate impact on the provision of effective restitution or redistribution of property to dispersed IDPs or indigenous people in Guatemala. Dispersed IDPs were denied the chance to have their individual stories told in terms of identification of property destroyed and calculation of specific restitution owed, instead general reference to the problem was publicized in the CEH. IDPs, as well as other victims from the war, have been deprived of prompt, adequate, and effective restitution by the State. IDPs were dispossessed as a result of illegal actions by the State and Non-State actors during the war as well as afterwards. Because refugees and CPRs were provided with restitution and compensation, I accuse the State of engaging in discriminatory practice.

IDPs and indigenous people may have attained symbolic or general reparation via the publication of the report by the Commission on Historical Clarification, however they still deserve and demand specific restitution of property in order to attain a chance at a life with dignity. In contrast, refugees and collectivized IDPs (CPRs) managed to attain restitution in part due to the advocacy of the UNHCR on behalf of former and the Inter-American Commission on Human Rights on behalf of the latter. Their situation remains precarious due to lack of development assistance and ongoing land disputes with IDPs and other peasants.

The weakness of the international system is based in part on its "soft" powers, lack of resources, and inconsistency in policy with respect to adoption of new protection categories in the field offices and by Donors. There is great concern regarding the difficulties facing the UN human rights monitors when facing situations in which the state of law is non-existent at the national level. Conciliatory mechanisms which refer to human rights norms as their foundation have little chance of success in a climate of total impunity. Indeed, as noted in a conference, "The dialogue is pointless for states in which there is no respect for the rule of

law.”⁵⁶⁹ One may add that this may be especially true when the key violators are Non-State Actors not present in the room. Weak States may share the UN’s exasperation at the situation resulting in a complete accord of opinion which is impotent to remedy the problem at hand. To some extent, the UN human rights monitors may appear to be designed for use by those States in which the rule of law is well-established. In spite of this, reports may serve symbolic value and exert some pressure on the State. Thus, I suggest that the Special Representative on Internal Displacement and the Special Coordinator on Internal Displacement pursue issues pertaining to long-term reintegration needs of IDPs in post-settlement stages. They may consider joining the Rapporteur on Housing and conducting a mission to Guatemala. Findings may be reported to the Treaty Monitors for follow-up during review of state reports.

After having presented the framework for international protection for IDPs and indigenous people as pertaining restitution of property and remedy rights, I turn to the national level. In the following parts, this thesis will reveal whether IDPs or indigenous people in Guatemala receive recognition of their rights to restitution and remedy by executive agencies, the Constitutional Court, or the alternative dispute resolution mechanism for land disputes. The next part will explain the background context of inequitable land distribution and in Guatemala as upheld by the political, economic, and legal systems of the nation. The practice of the executive land institutions and the Constitutional Court is examined in order to understand whether there are exclusionary tendencies as pertaining IDPs and indigenous people and their norms.

⁵⁶⁹ Id. at 321.

Annex on the Right to Return

The Implicit Right to Return under Human Rights Law- Freedom of movement

The right to return in safety and dignity to one's home is a principle which forms the keystone towards the reconstruction of a broken state and society after a displacement crisis. The UNHCR noted that "there is no general rule that affirms the right of internally displaced persons to return to their original place of residence or to move to another safe place of their choice."⁵⁷⁰ The right or return can be "deduced from the freedom of movement and the right to choose one's residence."⁵⁷¹ The first concept to address is that traditionally, the right of return has been expressed in regard to persons outside of their countries, whereas freedom of movement has applied to persons within their States.⁵⁷² The Universal Declaration of Human Rights (1948), article 13 sets forth that:

⁵⁷⁰ UNHCR, INTERNATIONAL LEGAL STANDARDS APPLICABLE TO THE PROTECTION OF INTERNALLY DISPLACED PERSONS: A REFERENCE MANUAL FOR UNHCR STAFF, 63 (1996). See ASIL/International Human Rights Law Group, INTERNALLY DISPLACED PERSONS AND INTERNATIONAL LAW: A LEGAL ANALYSIS BASED ON THE NEEDS OF INTERNALLY DISPLACED PERSONS, 102, 98 (The Brookings Institution October 1995), which notes that "Other than the rights to freedom to choose one's residence and freedom of movement, there is no general rule that affirms the right of internally displaced persons to return to their original place of residence or to another safe place of their choice. However, such a right could be derived by implication from the right to return and the right to freedom from unsafe return recognized in human rights and, where applicable, refugee law" quoting Sub-Commission Res. 94/24, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Geneva, 1-26 August 1994, U.N. Doc. E/CN.4/1995/2-E/CN.4/Sub.2/1994/56, Oct. 28, 1994, para. 2 reaffirming "the right of refugees and displaced persons to return, in safety and dignity, to their country of origin and/or within it, to their place of origin or choice."; see also Kölin, Walter & Goldman, Robert Kogold, "Legal Framework" in COHEN & DENG, MASSES IN FLIGHT, 106 (The Brookings Institution 1998)

⁵⁷¹ Id.; see also Kölin, Walter, "Protection in International Human Rights Law", in Lavoyer, Jean-Philippe, INTERNALLY DISPLACED PERSONS: REPORT OF THE SYMPOSIUM, Geneva 23-25 October 1995, p. 19 (ICRC 1996). The UN Compilation and Analysis of Legal Norms pertaining to Internally Displaced Persons went further in stating that IDPs' right of voluntary return is "*inherent* in the freedom of movement". Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights Resolution 1995/57, Compilation and Analysis of Legal Norms, UN Doc. E/CN.4/1996/52/Add.2 para 257 (1995). It should be noted that the UN Compilation was composed of an edited merger of two studies completed by the Ludwig Boltzmann Institute and the ASIL/International Human Rights Law Group. The former categorized the right to return as «*implied*» in the latter right of freedom of movement, thus correlating with the UNHCR's position. Ludwig Boltzmann Institute, Compilation and Analysis of International Legal Norms, UN Doc. E/CN.4/1995/CRP.1 page 15 (1995). In addition it notes that "(f)urthermore, persons may neither be forcibly resettled if not for compelling reasons and with due regard to their security nor be expelled from their own countries." The ASIL study concurred by noting that: "In the absence of any specific human rights provision guaranteeing displaced persons the right of return to their place of origin or residence, such protection *must necessarily be inferred* from the aforementioned right to freedom of movement and residence and/or by analogy from the right of refugees to return to their own country." ASIL study, Id. at 102. The World Conference on Human Rights called for "finding lasting solutions to questions related to internally displaced persons including their voluntary and safe return and rehabilitation." World Conference on Human Rights, "The Vienna Declaration and Programme of Action, para. 23 (25 June 1993), quoted in Ludwig Boltzmann Institute of Human Rights, Compilation of International Legal Norms Applicable to Internally Displaced Persons, UN Doc. E/CN.4/1995/CRP.1 p. 15 (1995).

- “1. Everyone has the **right to freedom of movement and residence** within the borders of each State.
2. Everyone has the right to leave any country, including his own, and the **right to return to his country.**”

The right to freedom of movement in the first section has been characterized as “a right to freedom of movement within the borders of a particular State, which may be referred to as ‘the freedom of (internal) movement’.”⁵⁷³ Grahl-Madsen notes that

*“As a general rule, freedom of movement is simple enough. Everybody lawfully within a given territory may move about freely within that territory, without let and hindrance, and without having to ask the permission of the authorities or having to justify his/her presence in any particular place.”*⁵⁷⁴

The same standards apply to freedom of residence.⁵⁷⁵ However, other commentators cite general welfare concerns, such prevention of overcrowding, limited land availability, etc. as valid interests in limiting internal movement rights.⁵⁷⁶ This is a significant issue in Guatemala, where certain areas, such as Ixil, have a shortage of arable land and a large population presenting demands.⁵⁷⁷

The UN Declaration of Human Rights contains the following limitation clause:

*“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the **general welfare in a democratic society.**”*⁵⁷⁸

⁵⁷² Grahl-Madsen, Atle, “Article 13” in ASBJØRN EIDE, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY, 203 (Scandinavian University Press 1992), noting the right of return to one’s country as “the right of return” or “the right of remigration”. It is clear that he is referring to trans-border movement. But see Dowty, Alan, “Return or Compensation: The Legal and Political Context of the Palestinian Refugee Issue”, WORLD REFUGEE SURVEY 1994, 26, 28, noting that “(t)he plain wording of the key documents does not go beyond return to one’s country, but there are also arguments- including again the thrust of relevant General Assembly resolutions-in favor of the view that the return to one’s home is implied or understood.”

⁵⁷³ Grahl-Madsen, Id. at 203.

⁵⁷⁴ Id. at 206.

⁵⁷⁵ Id. at 209

⁵⁷⁶ Higgins, Rosalyn, “Liberty of Movement within the Territory of a State: The Contribution of the Committee on Human Rights”, in Dinstien, Yoram (Ed.), INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTI ROSENNE, 332 (Martinus Nijhoff 1989). Referring to the Second Periodic Report of Rwanda, submitted to the Human Rights Committee in June 1987 describing the procedure for relocation including application to the municipality of destination for approval and return of one’s identity card to the original municipality, Higgins notes that although “(f)rom a Western perspective this might be a paternalistic view of freedom of movement . . . (b)ut it is hard, given the reality of limited food resources in Africa, to insist that such provisions are necessarily violative of Article 12.”

⁵⁷⁷ See Stoll, David, “Human Rights, Land Conflict and Memories of the Violence in the Ixil Country of Northern Quiche, in Rachel Sieder, Ed., GUATEMALA AFTER THE PEACE ACCORDS, (Institute of Latin American Studies (London) 1998).

⁵⁷⁸ Article 29, section 2.

The limitation clause is applicable to the freedom of internal movement and choice of residence. Freedom of movement is also enshrined in the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, the African Charter, Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the American Declaration on Human Rights of the Rights and Duties of Man, the Convention on the Elimination of Discrimination Against Women, the Declaration on the Elimination of Discrimination Against Women.⁵⁷⁹ Given the similarity of the protection of this right within these documents, we shall focus on the International Covenant on Civil and Political Rights, Article 12, which states:

⁵⁷⁹ The International Convention on the Elimination of all Forms of Racial Discrimination, Art 5 (d) guarantees: “(i) The right to freedom of movement and residence within the border of the State; (ii) the right to leave any country, including one’s own and to return to one’s country.”

The African Charter, article 12 (2) states:

“1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

2. Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”⁵⁷⁹

Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms protects freedom of movement in Article 2:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own.

2. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ‘ordre public’, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interests in a democratic society.

Article 3, section 2 addresses return «No one shall be deprived of the right to enter the territory of the State which he is a national.”

The American Convention, article 22 (5):

“1. Everyone lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights and freedoms of others.

4. The exercise of rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest. 5. No one can be expelled from the territory of the states of which he is a national or be deprived of the right to enter it. 6. In no case may an alien be deported or returned to a country, regardless of whether or not it is in his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions”.⁵⁷⁹

The Convention on the Elimination of Discrimination Against Women, Article 15, section 4 states:

“States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.”

The American Declaration on Human Rights of the Rights and Duties of Man, Article VIII, states:

“Every person has the right to fix his residence within the territory of the State of which he is a national, to move about freely within such territory, and not to leave it except by his own will.”

The Declaration on the Elimination of Discrimination Against Women, Article 6 (1) (c) guarantees women “the same rights as men with regard to the law on the movement of persons.

1. *Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. *Everyone shall be free to leave any country, including his own.*
3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre publique), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
4. *No one shall be arbitrarily deprived of the right to enter his own country.*”

Jagerskiold describes the internal component of freedom of movement as an intrinsic part of “an important human right and an essential part of personal liberty”.⁵⁸⁰

One problem with right to freedom of movement is that it is derogable. Thus, since internal displacement crises are often linked to internal conflicts or other disturbances of public order, the principle right pertaining to their option of return will often be restricted. It should be noted however, that “if the survival of the people concerned is threatened, at the same time the (non-derogable) right to life applies and no restrictions on the freedom of movement are admissible.”⁵⁸¹

With respect to the limitation clause, UNHCR indicates that “the requirement of necessity calls for a narrow interpretation of this limitation clause.”⁵⁸² Nowak states that the reference to necessity “stems from the need to limit objectively the authority of the national legislature to provide for interference with the right to freedom of movement.”⁵⁸³ He states that the test for legitimacy is “not when the State concerned believes that it serves one of the listed purposes for interference but rather when it is necessary for achieving this purpose.”⁵⁸⁴ As pertaining to satisfying the “necessary” condition, Jagerskiold identifies this as bearing “a reasonable relation to an enumerated state interest.”⁵⁸⁵ He also notes the conditions of consistency with the other rights in the CCPR and non-discrimination as preserving justice.⁵⁸⁶ Jagerskiold comments that the requirement of “provided by law” is met by:

“ . . . a general rule, usually announced by the legislative branch. It excludes bureaucratic caprice and administrative fiat, and other measures taken under executive authority, unless

⁵⁸⁰ Stig Jagerskiold, “The Freedom of Movement” in Louis Henkin, Ed., THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, 171 (1981). See also Nowak, Manfred, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, 198 (1993), noting that freedom of movement occupied “a central position in the liberal concept of liberty from State dominance at the time of the French Revolution and that it was “an essential component of natural law”.

⁵⁸¹ Ludwig Boltzmann Institute, Compilation of International Legal Norms, supra note 567 at 15.

⁵⁸² Id. at 64.

⁵⁸³ Nowak, supra note 580 at 211

⁵⁸⁴ Id. At 211.

⁵⁸⁵ Jagerskiold, supra note 580 at 173.

⁵⁸⁶ Id.

*authorized by law and necessary for the execution of the law.*⁵⁸⁷

Nowak identifies law as:

“. . . to be understood in the strict sense of a general-abstract parliamentary act or an equivalent unwritten norm of common law, which must be accessible to all those subject to the law. Mere administrative provisions are insufficient. A restriction on freedom of movement by way of an administrative act is only permissible when this follows from the enforcement of a law that provides for such interference with adequate certainty.

*This result- interference with the right to freedom of movement must be provided for with adequate certainty in a law in the formal sense-is confirmed by the historical background and by an interpretation in light of the object and purpose of this provision pursuant to Art. 31(1) of the VCIT.*⁵⁸⁸

The other international instruments contain similar limitation clauses; however the American Convention Article 22 (5) adds a clause reserving the right of states to issue legal restrictions “in designated zones for reasons of public interest” and “to prevent crime” (the latter category also noted in Protocol No. 4 of the European Convention).

With regard to national security, Nowak notes that it “is endangered only in grave cases of political or military threat to the entire nation.”⁵⁸⁹ Jagerskiold notes that with respect to national security concerns, “permanent or long-term restrictions on the movements of a substantial part of the population, however, could not normally be justified on security grounds.”⁵⁹⁰ He notes that security zones cannot “restrict access to substantial parts of a state’s territory”.⁵⁹¹

Public order is a notion which may appear rather vague and subject to exploitation, however, Nowak states that the standards of “necessity (proportionality) of the interference and on its compatibility with the other rights of the Covenant (especially the prohibition of discrimination)” keep it in check.⁵⁹² Public order restrictions are identified as traffic regulations, public safety measures, and valid criminal punishments valid under the Covenant.⁵⁹³ Jagerskiold also points out that internal exile cannot be imposed where

⁵⁸⁷ Id.

⁵⁸⁸ Nowak, supra note 580 at 209, original italics. He states that the restrictions must be «foreseeable and based on the rationale peculiar to a law (usually, one enacted by a democratically elected parliament).»

⁵⁸⁹ Id. at 212.

⁵⁹⁰ Id. at 174.

⁵⁹¹ Id.

⁵⁹² Id. at 213.

⁵⁹³ Jagerskiold, supra note 580 at 174. See also Nowak, supra note 576, at 213, “Permissible restrictions on freedom of internal movement and residency to protect public order include all restrictions associated with the lawful deprivation of personal liberty and all common provisions for the regulation of traffic, as well as special measures (such as blockades) to maintain public safety. Customary State regional planning policies and construction prohibitions in grasslands represent a permissible interference with freedom of residence in the interest of public order. Far-reaching measures of nature, landscape and environmental protection. (e.g. access restrictions in afforestation areas or bird sanctuaries, prohibition of vehicles in nature reserves or recreational areas, on lakes, etc.) are generally justifiable. The same applies to restrictions on freedom of movement for

imprisonment would be invalid, e.g. an attempt to cleanse a region of political or social groups.⁵⁹⁴ Göran Melander is more explicit: “To force a person into an ‘internal displacement alternative’ should be considered persecution.”⁵⁹⁵

Nowak notes that Art. 47 of the CCPR establishes that all rights contained within the Covenant are

“to be interpreted consistent with the right of all peoples to utilize fully and freely their natural wealth and resources. Restrictions on freedom of movement, therefore, must in no case impair the right of individual peoples to enjoy and utilize their natural resources, as has been, e.g. the case in South Africa.”⁵⁹⁶

Jagerskiöld makes an assertion which appears rather controversial:

“Restrictions on internal movement in favour of the rights and freedoms of others are based primarily on respect for private property rights. Although the right to own and enjoy private property and not to be arbitrarily deprived of its use are not explicitly mentioned in the Covenant, they are declared in the Universal Declaration. The freedom of movement does not guarantee the right to go on or through private property.”⁵⁹⁷

Nowak counters Jagerskiöld’s interpretation and espouses a position which supports pursuit of social welfare interests:

“Accordingly, the stiffest limits on the freedom of internal movement and residency result in practice from respect for the private property (real estate) of others. Since the right of property normally entitles a person to prevent others from entering his or her land, the freedom of internal movement and residency is limited to those areas that are publicly owned. In States whose territory is largely distributed among private owners, this may lead to the situation where restrictions on the right of internal movement and residency become the rule and real opportunities to exercise this right becomes the exception.

Since such a skewed relationship between the right and its limits contradicts the purpose of Art. 12 in light of its historical background, the question arises as to whether State Parties are obligated pursuant to Art. 12(1) to ensure the actual enjoyment of the freedom of internal movement and residency through positive measures. Because the right of property is not ensured by the Covenant, this question is, at least in extreme cases, to be answered in the affirmative. Therefore, protection of the freedom of internal movement obligates the States Parties to ensure that interference in favour of private owners is proportional, i.e., remains at a level that the public can tolerate. . . Even though freedom of residence-as well as the right to respect for the home under Art. 17-does not obligate the State to provide all citizens with adequate housing, it may not be excessively restricted in favour of large landowners; that is the majority of the population may not be compelled to meet the

reasons of safety (e.g., in an earthquake, volcanic, landslide and avalanche zones, but also in the event of internal unrest or threats of terrorist attacks). Larger disturbances also justify the imposition of a limited, night-time curfew in the interest of public order.” With respect to public health, he cites quarantine measures, and restriction to areas contaminated from catastrophe or health dangers, and areas important for maintaining public health such as water conservation areas. Also municipal planning to control over population. (215) Public morals addresses prostitution, red light districts, and nude bathing.

⁵⁹⁴ Jagerskiöld, supra note 580 at 177.

⁵⁹⁵ Melander, Göran, “Rötten att röra sig fritt”, in 1 (3) MENNESKER OG RETTIGHETER, at 42 (1985). (translation by the author). See also Stravopoulou, Maria, “Legal Aspects Relating to the Protection against Arbitrary Displacement”, in Report of the Representative of the Secretary-General, Mr. Francis Deng, IV (5), February 11 1998 (UN Doc. E/CN.4/1998/53/Add.1)

⁵⁹⁶ Nowak, supra note 580 at 210.

⁵⁹⁷ Jagerskiöld, supra note 580 at 175.

fate of landless farmers, who are able to reside only on the edge of large highways or are forced to enter into servitude with large landowners under slavery-like conditions or move to the cities."⁵⁹⁸

This is a particularly salient issue with respect to the return process, in which persons discover that their former homes and land are now occupied by other persons claiming property rights as a barrier against relinquishment to the displaced. In the absence of significant resettlement options, as in Guatemala, many people resort to land usurpation in an attempt to retake the land which their families have lived on, occupy other land as a means of survival, and call attention to State inaction in land reform. This has resulted in a stinging debate between various sectors of Guatemalan society. Some call for the embrace of the right of private property as "the fundamental basis of civilization", blaming land usurpations for a climate of legal instability and ensuing lack of investment in Guatemala.⁵⁹⁹ Others, such as pastor Andres Giron who calls rural peasants to participate in land usurpations with a megaphone, feel that these acts are justified given the severe social inequities. He states frankly that in the battle of rights, the rural peasants' interest in staying alive outweighs other concerns.⁶⁰⁰

Protocol II to Geneva Convention IV Relating to the Protection of Victims of Non-International Armed Conflicts prohibits arbitrary displacement:

"The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."

The right to return is not explicit in general human rights law. It emerges explicitly when reviewing legal instruments applicable to IDPs and indigenous people. Below, we examine the instruments specific to IDPs, those relevant to indigenous people are examined further in.

⁵⁹⁸ Nowak, supra note 580 at 216-17. See also Alfredsson, Gudmundur, "Article 17", in EIDE supra note 568 at 260 (Scandinavian University Press 1992) noting: "Property rights have been criticized as standing in the way of progress: from the owning of slaves to the exploitation of others through apartheid and transnational corporations. The importance of property rights is often deemed to pale against the background of other problems, such as hunger, poverty and misery. Unequal distribution of wealth tends to follow the lines of sex and race, especially affecting indigenous peoples, other groups in minority situations, rural workers and small farmers. The overall concentration of most of the world's property in the hands of a comparative few, especially in times of population growth and scarcity of resources, makes property rights seem more a part of the problem than an interest entitled to protection." He cites land reform and permanent sovereignty over natural resources as examples of the international community's new priorities.

⁵⁹⁹ Coronado Silva, Marco Tulio, "Ataque a la propiedad privada", Opinion section, SIGLO XXI, 16 June 1997; see also Diaz-Duran A., Marta Yolanda, "Vida o Propiedad?", Opinion section, SIGLO XXI, 12 June 1998.

⁶⁰⁰ Barrios, Lucy; "Giron invita a la invasion", PRENSA LIBRE, 1 July 1998.

The Right to Return for IDPs

Standards for IDP return are based by analogy to UNHCR standards for voluntary repatriation. The first condition of repatriation/return, is that it should be **voluntary**. This is based on the non-refoulement principle in which persons may not be forcibly returned to a country in which their lives or freedom would be threatened.⁶⁰¹ According to the UNHCR, «the principle of ‘voluntariness’ must be viewed in relation to both: conditions in the country of origin (calling for an informed decision) and the situation in the country of asylum (permitting free choice.)» This test can be applied to IDP’s with regard to their locations of origin and refuge within a state. Thus, the first standard is whether there has been a substantive resolution of the initial causes of displacement, such as violence, internal strife, disasters, etc.

The second standard is that the displaced person does not face dissuasion for return by persons seeking to maintain hold over their land, etc. The dissuasion may be achieved through threat, misinformation, or other method. Given that IDP rights are often not guaranteed by the State in practice, nor are they recognized within an international convention, they are often left in survival situations which violate every minimum humanitarian norm. After several months in ad hoc camps which lack food, water, and proper shelter, the impulse to return may not always be freely assumed. In Colombia, although many of the displaced have voiced clear objection to returning for fear of being subjected to further violence by paramilitary groups or guerrillas; at present some groups prefer returning to their areas of origin, in spite of danger, due in part to the abhorrent conditions within the areas of refuge.⁶⁰²

It is interesting that the UNHCR admits that the free will of refugees cannot be determined if they have not been formally recognized as refugees (given that their rights are not sufficiently protected). It also admits that the IDP rights are not protected by the State in practice in spite of being somewhat protected in national constitutions and international

⁶⁰¹ 1951 Convention Relating to the Status of Refugees, Article 33. See UNHCR, HANDBOOK ON VOLUNTARY REPATRIATION: INTERNATIONAL PROTECTION, 11 (1996). See also OAU Convention, article II (3) and the Cartagena Declaration on Refugees, para. 5. See also UNHCR Executive Committee Conclusion No. 6 (XXVIII) NON-REFOULEMENT (1977), EXCOM Conclusion No. 25 (XXXIII) General (1982), and EXCOM Conclusion No. 15 (XXX) Refugees without an asylum Country (1979), quoted in UNHCR, International Legal Standards Applicable to the Protection of Internally Displaced Persons: A Reference Manual for UNHCR Staff, footnote 74 (1996).

⁶⁰² In 1995, the Colombian Episcopal Conference found that “63.76% of the displaced did not want to return to their regions of origin citing the continued presence of violent factors which obligated them to leave.” (translation of the author). Conferencia Episcopal de Colombia, DESPLAZADOS POR VIOLENCIA EN COLOMBIA, 79 (1995). But see, interview with Turid Lægveid of the Norwegian Refugee Council November 1997 on conditions in IDP camps in Colombia.

human rights treaties with enforcement mechanisms which may not be appropriate for emergency flux situations. Yet the UNHCR does not consider it necessary to extend the additional protection of an international convention to these vulnerable people. If a refugee who is in a UNHCR camp may be subject to enough pressure as to nullify his act of «free will», then there can be no doubt that an IDP, whose camp may not enjoy the benefits of full international assistance, has even less of a chance of making a “voluntary” decision.

Hence, the existence of physical, psychological, material, political, and security pressures as factors to consider when determining “free will”.⁶⁰³ Priority must be given to positive pull-factors in the area of origin over the negative push-factors, such as threats to property.⁶⁰⁴ The principle goal is achieving an end to forced migration and preventing cycles of conflict and flight from repeating themselves. Hence return must not be under duress. In the case of refugees, their legal status is determined by the presence of a subjective “well-founded fear of persecution”. The fear should be dissipated before repatriation is effectuated.⁶⁰⁵ With respect to IDPs, the right to return incorporates the same voluntary characteristic as repatriation, however given that there is no reference to a “well-founded fear of persecution” within the UN and IOM IDP definitions, this latter notion is inapplicable to the internally displaced. The CIREFCA and Permanent Consultation on Internal Displacement in the Americas’ definitions utilize the terms “endangered” in the case of the former and “rendered vulnerable or is threatened” in the case of the latter, both of which may be interpreted objectively.

Although the following instruments contain explicit references to the right to return, they also list freedom of movement separately. The Permanent Consultation on Internal Displacement in the Americas’ Proposed Legal Principles on Internal Displacement, Principle 2 (e) calls for “freedom of transit and movement.” The UN Guiding Principles on Internal Displacement recognizes freedom of movement in Principle 14:

“1. Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence.

2. In particular internally displaced persons have the right to move freely in and out of camps or other settlements.”

⁶⁰³ UNHCR HANDBOOK ON VOLUNTARY REPATRIATION, 11.

⁶⁰⁴ Id.

⁶⁰⁵ The 1951 Convention Relating to the Status of Refugees, Article 1, sets forth the presence of a “well-founded fear of persecution” as a condition of recognition of refugee status.

The ILA Declaration of International Law on Internally Displaced Persons, Article 4, states:

- “1. Freedom of movement, including the right not to be arbitrarily displaced, shall be respected to the fullest extent possible in accordance with international law*
- 3. No one shall be compelled to leave his or her home or place of habitual residence due to persecution or discrimination based on race, colour, sex, gender, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or any other similar criteria, or subject to such persecution or discrimination subsequent to displacement.*
- 4. Measures aimed at deliberate alteration of the demographic composition of a given region (e.g. “ethnic cleansing”) or at genocide are strictly prohibited.”*

This provision moves beyond the traditional freedom of movement in order to highlight the elusive right not to be displaced, implicit in the main human rights instruments, but explicit in indigenous and humanitarian law.⁶⁰⁶ The only explicit mention of the right to return is found in Article 1 of Annex 7 (1) of the Dayton Agreement which states that:

“All refugees and displaced persons have the right freely to return to their homes of origin. . . .”

This Accord not only recognizes the explicit right of displaced persons to return home, but it also places a duty on States to ensure their safety and guarantee their choice of destination.

The right to return has been affirmed by the UN Security Council and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁶⁰⁷ The ILA Declaration of Principles of International Law on Internally Displaced Persons, Article 5, has a different approach:

“1. All internally displaced persons have the right to return to their homes or places of habitual residence freely and in security and dignity, as soon as the conditions giving rise to their evacuation have ceased.

⁶⁰⁶ Stravropoulou, Maria, “Legal Aspects Relating to the Protection against Arbitrary Displacement”, in Report of the Representative of the Secretary-General, Mr. Francis Deng, IV (1) (UN Doc. E/CN.4/1998/53/Add. 1, 11 February 1998). See also Stravropoulou, Maria, “The Right Not to Be Displaced, 9 (3) THE AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLICY 689 (1994).

⁶⁰⁷ United Nations Security Council resolution 876 (1993) of 19 October 1993 on the situation in Abkhazia “affirms the right of refugees and displaced persons to return to their homes” the Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolutions 1994/24, para 2, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, Geneva, 1-26 August 1994 UN Doc. E/CN.4/Sub.2/1994/56, 28 October 1994 at 67; and resolution 1995/13 para 2, “affirms the right of refugees and displaced persons to return, in safety and dignity, to their country of origin and/or within it, to their place of origin or choice”, Report of the Sub-Commission on its Forty-Seventh Session, Geneva, 31 July-25 August 1995, UN Doc. E/CN.4/Sub. 2/1995/51 at 43, quoted in UNHCR, INTERNATIONAL LEGAL STANDARDS APPLICABLE TO THE PROTECTION OF INTERNALLY DISPLACED PERSONS: A REFERENCE MANUAL FOR UNHCR STAFF, 64 (1996) (hereinafter UNHCR International Legal Standards).

2. Internally displaced persons shall not be detained or placed in an area which exposes them to the dangers of armed conflict and/or internal strife.”

Here the emphasis is placed on the active right is placed on the displaced person, rather than the duty of the State to provide for return. In addition, return is based primarily on removal of impetus for flight. Long-term reintegration factors are not cited.

The Cartagena Declaration highlighted the need for voluntary return, in addition to specifying the right to return to one’s home, beyond mere return to one’s country:

“To reiterate the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin.”⁶⁰⁸

The “voluntary nature of return” standard was reiterated with respect to internally displaced persons in the San Jose Declaration on Refugee and Displaced Persons, Conclusion 16 (d), and in the Permanent Consultation on Internal Displacement in the Americas’ Proposed Legal Protection Principles for Displaced Persons, Principle 2 (c).

It is of special interest that the UN Guiding Principles does not contain express declaration of a right of return, rather an identification of a duty on the part of state to support the process. Principle 28 states

*“1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special Efforts should be made to ensure full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.”*

The emphasis is placed on the state’s obligation to create the conditions for voluntary return, utilizing the same standards of safety and dignity present in voluntary repatriation of refugees. The key concern appears to be the promotion of State action in situations often characterized by non-response. Their return to their places of origin or previous residence should be conducted under conditions of safety and dignity.⁶⁰⁹ This is defined by the

⁶⁰⁸ Cartagena Declaration, Conclusion 12 (22 November 1984).

⁶⁰⁹ EXCOM No. 40 (XXXVI)- 1985 Voluntary Repatriation. “The repatriation of refugees should only take place at their freely expressed wish; the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin, should always be respected.” See also Regional Conference to address the problems of refugees, displaced persons, other forms of involuntary displacement and returnees in the countries of the Commonwealth of Independent States and relevant neighboring States (CISCONF/1996/5 11 June 1996) Geneva, 30-31 May 1996 p.14 “Return remains the most desirable solution for internally displaced persons. States should respect the individual right and freely expressed wish of the persons concerned. Internally

UNHCR as conditions of legal safety (non-discrimination, freedom from fear of persecution, etc.), physical security, and material security (access to land or means of livelihood), full restoration of rights, and acceptance by national authorities.⁶¹⁰

This clause would imply the State's duty to provide transportation to the displaced, securing peace in the area of return, etc. The final sentence focuses on reintegration, which may be interpreted to include socio-economic and cultural rights which determine the viability of the community. This is the stage in which the humanitarian needs cross over into development issues. Here we encounter such problems as the provision of running water, sewage, roads, housing, schools, agricultural development, job training in urban areas, and conciliation sessions with other persons inhabiting the same area. However, the corresponding duty is only "shall endeavour to facilitate", rather than an absolute guarantee. This permits States to define the amount of support within the time framework it considers fit. What is most worrisome, is that this approach is short-sighted. The reintegration stage is crucial given that it is a unique opportunity to remedy past socio-economic inequities, conciliate opposing groups, and create a new civic culture. Most importantly, if carried out correctly, it may well be the most effective measure of prevention against reoccurrence of forced migration. Should programs such as housing, land redistribution, creation of schools, agricultural assistance, etc. be postponed indefinitely, there can be no doubt that the State risks facing another migration crisis.

The standard calls for full participation of IDPs in the decision making regarding return or resettlement, this is an empowering standard which gives voice to them.

displaced persons should be able to leave the host region safely and return in conditions of safety and dignity to their places of previous residence, or to any other location within the country."

⁶¹⁰ UNHCR HANDBOOK ON VOLUNTARY REPATRIATION at 12.

Return is not considered to be voluntary when the displaced are relocated to hostile areas or their essential services are reduced.⁶¹¹ It should be emphasized that the right of return is not met upon physical relocation, rather it must be measured by the viability of reintegration.⁶¹² This is highlighted in the San Jose Declaration which calls for the right to achieve the possibility of “a dignified and safe solution to his situation of displacement” noting property rights and documentation as “essential for survival, security, and dignity”.⁶¹³ The PCDIA Proposed Legal Protection Principles for Displaced Persons, 2 (h) claims the right of displaced persons to “enjoy the same basic economic, social, and cultural rights (such as the right to housing, food, health, work, social security, education, etc.) as the rest of the population”. The Andean Declaration on Displacement and Refuge issued the following Recommendation:

*“In relation to the options of return or integration of the displaced, it is essential that government policies be based on the full respect of voluntary choice, and the assurance of adequate conditions, including security, planning and financing of programmes of return, reintegration, rehabilitation and reconstruction in order to prevent new crises and displacements.”*⁶¹⁴

The final problem involves remedies. Given that the freedom of movement is a human rights norm, it is only binding on State actors unless the domestic law holds the State responsible for action by a third party. In terms of displacement, the IDPs would have to prove that the State was responsible by action or omission for violation of their right to return.

Much of the impetus for expansion of protection to persons falling outside of the traditional refugee definition originated in Latin America. The displacement crises within Central America and the Andean states revealed new causes for flight and called for innovative strategies for return. In 1994, in celebration of the Cartagena Declaration’s Tenth Anniversary, a second Declaration was adopted which extended Cartagena’s principles to internally displaced persons. One of the San Jose Declaration on Refugees and Displaced Persons’ primary contributions to the protection of internally displaced persons is its call for the termination of cycles of violence and forced migration by noting the importance of development-oriented government programs of reinsertion in Conclusion 14:

“To propitiate that solution to the problems of forced displacement by created in an integrated manner, particularly return and voluntary repatriation, within the framework of concerted efforts which guarantee, in addition to the security and dignity of the beneficiaries, the durability of the

⁶¹¹ Id. At 29.

⁶¹² Cohen, Roberta, IMPROVING INSTITUTIONAL ARRANGEMENTS FOR THE INTERNALLY DISPLACED, 13 (The Brookings Institution/ Refugee Policy Group October 1995).

⁶¹³ Conclusion 16.

⁶¹⁴ Adopted in Lima, 3 June 1993 by the participants in the Consultation on Displacement and Refuge in the Andean Region, sponsored by the International Council of Voluntary Agencies.

solution. In this regard, reintegration and rehabilitation efforts should be linked to programs of sustainable development in the medium and long term seeking to alleviate and eradicate the extreme poverty, to satisfy human needs and to strengthen human rights, with equal attention to the civil, political, economic, social, and cultural rights.»⁶¹⁵

This is the problem Guatemala is confronting at present. The return of refugees and displaced persons and demand for land, housing, and schools is a pressing problem which is slowly being addressed. The National Commission for Attention to Repatriated, Refugees, and the Displaced (CEAR) published a report in which it found the majority of uprooted persons suffering from lack of running water, electricity, or access to a health facility.⁶¹⁶ Many families earn below or at poverty line levels and are illiterate.

The Right to Return for Indigenous People

Freedom of movement as pertaining to indigenous people may be gleaned from the traditional human rights instruments, as noted in ILO Convention No. 169, Article 3 (1):

“Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”

Under the CCPR, the right to freedom of movement and residence of others may be restricted to protect indigenous people’s territory.⁶¹⁷

Indigenous people themselves retain the right to come and go from the territory. Nowak notes that “should these restrictions represent a detriment to members of the minority concerned, then they require a special justification.”⁶¹⁸

Because forced resettlement has been a significant problem to indigenous peoples, ILO Convention No. 169, Article 16 contains a restriction:

“1. Subject to the following paragraphs of the Article, the peoples concerned shall not be removed from the lands they occupy.

⁶¹⁵ See also Conclusion 6: “To encourage governments to find, within a harmonized framework, humanitarian solutions to problems involving refugees and displaced persons due to events having already occurred, or about to be surmounted, reinforcing programs of voluntary repatriation and reinsertion in the place of origin; and also considering, where possible, programs which facilitate local integration, offering essential documentation or regularizing the migratory condition of these persons, with the goal of avoiding that such problems be converted into new sources of tension and instability.”

⁶¹⁶ Comision Nacional para la Atencion de Repatriados, Refugiados y Desplazados (CEAR), LA POBLACION DESARRAIGADA EN GUATEMALA: CIFRAS ACTUALIZADAS Y SITUACION SOCIOECONOMICA, 60-63 (Guatemala May 1997).

⁶¹⁷ Jagerskiold, supra note 580 at 175.

⁶¹⁸ Nowak, supra note 580 at 203. Nowak notes the case of Sandra Lovelace v. Canada, Communication No. 24/1977, (formerly R.6/24). Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII, in which the Committee stated that “freedom of movement associated with the protection of minorities must be reasonable and objective and, above all, not discriminatory.” at 217.

2. *Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.*”

Guatemala has a long history of forced relocations of indigenous peoples, and the potential for claims of redress is significant.

The UN Draft Declaration on Indigenous Rights, Article 1, also refers to the relevance of international human rights instruments:

“Indigenous people have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

Article 7 (c) prohibits “any form of population transfer which has the aim or effect of violating or undermining any of their rights”

Article 10 states:

“Indigenous people shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned . . .”

The American Declaration on Indigenous Rights, Article II (1) contains a clause referring to regional human rights instruments:

“Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights law . . .”

It also restricts forced transfer, Article XVIII (6):

“Unless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples . . .”

Many of the key conflicts involving indigenous transfer are based on the disagreement over whether actual “informed consent” was attained. (Expand discussion)

The UN Guiding Principles on Internal Displacement, Principle 9, contains an innovative clause:

“States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”

This passage moves beyond highlighting the importance of protecting indigenous people, to address other vulnerable groups as well. In Colombia, a large number of IDPs are Afro-Colombians, whose minority status is not covered by indigenous instruments, thus linkage to their land interests in other instruments is fundamental. Socio-economic categories which are of special significance within Latin America are also recognized. One of the greatest problems in providing protection is the requirement of categorizing people in need. In some instances, this serves the interests of overburdened governments and protection organizations which need a means to limit distribution of resources and staff. However, within Guatemala, many peasants are reluctant to identify themselves as indigenous, or even internally displaced. They feel that a more general reference such as “campesino” (peasant) is preferable, given that it carries less negative connotations within their society. The inclusion of these categories is a tremendous advantage for protection purposes.

Thus, it should be noted that indigenous persons have a stronger basis in international law than other IDPs for a claim based on the right not to be arbitrarily displaced as a basis for compensation.

The right to return is established within ILO Convention No. 169, Art. 16 (3):

*“Whenever possible, these people shall have **the right to return** to their traditional land as soon as the grounds for relocation cease to exist.”*

The qualification of “whenever possible” weakens implementation. However, it should be noted that indigenous people have greater protection in this regard than non-indigenous IDPs. The latter are only granted an implicit right to return in *lex lata*, and an explicit right in *lex ferenda*. Indigenous people have the benefit of a convention’s legal weight when presenting a claim for the right to return.

The draft UN Declaration on the Rights of Indigenous Peoples, Article 10, has a qualified right to return:

*“Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, **where possible, with the option of return**”*

It is conceivable that the State may present any number of reasons why return may be impossible and force indigenous people to accept compensation. There is no restitution standard in this passage, so the State may offer “just and fair” monetary compensation rather than lands of equal value to those lost.

The American Declaration on the Rights of Indigenous Peoples, Article XVIII (6) has stronger wording with respect to return:

*“Unless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, but in all cases with prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with **guarantee of the right to return if the causes that gave rise to the displacement cease to exist.**”*

In this instrument, the restitution of land is explicitly mentioned, as is the right to return conditioned only on the termination of causes for forced migration. This limits the State’s ability to prohibit return and choose mode of compensation

Part III

Summary of the Previous Part

In the previous part I examined the notion of transnational lawmaking as linking social capital with respect to the elaboration of soft law norms for internally displaced persons and the policy of international human rights monitors and donors as pertaining IDPs in Guatemala and their rights to remedy and restitution of property. I found protection gaps related to legitimacy of norms, lack of normative clarity, uneven dissemination in the world, and enforcement problems. However, I highlighted the possibility of pursuing claims via the optional protocol to the CCPR, using a cross-referencing strategy to other rights. I also emphasized the progressive precedents within the Inter-American system, at the very least for symbolic purposes and in the hope of evolving a customary standard pertaining to property restitution. Given the interrelationship between the international human rights system and the nation-state, I now seek to describe the structural background context of Guatemala.

Part III. Structural Background Context in Guatemala

1. Macro Social Capital & the Social Systems

As noted in the introduction, the macro level of social capital is composed of the type of regime, participation in policy formulation processes, the rule of law, and the legal framework, thus it is possible to form a link to discussion of the interplay social systems.⁶¹⁹ In this Part, I seek to demonstrate that the state of inequality of indigenous people and IDPs is due to the failure of the State to espouse an expansive view of what are the legitimate norms in society (thereby expanding the legal framework to include recognition of indigenous customary law and international human rights law), what forms of participation are acceptable, and failure to understand the urgency of provision of substantive output, i.e. land restitution/distribution. This situation results in diminished confidence in the State's institutions' role of providing effective, objective dispute resolution of conflicts and remedying structural inequities thereby promoting the risk of renewed conflict.

With respect to the political regime, I first provide brief overview of the political evolution from the colonial period through the signing of the Peace Accords. The Peace Accords may be considered norms which were intended to promote social cohesion in the post-settlement period by formulating standards representing the demands of marginalized groups for inclusion in the social systems. As a result of the creation of these norms, there was a surge in expectations, particularly pertaining land redistribution, as evinced by increased solicitations to the executive land agencies. I assess the practice of these agencies- specifically addressing whether the needs and demands of the internally displaced persons were met, in order to measure the degree of responsiveness of the State to marginalized groups.

I review formal participation in the political system, i.e. elections, associations, constitutional reforms, in order to understand to what extent these

⁶¹⁹ Bain, K. and Hicks, N. "Building Social Capital and Reaching Out to Excluded Groups: The Challenge of Partnerships", paper presented at CELAM meeting on "The Struggle Against Poverty Towards the Turn of the Millennium" (Washington D.C. 1998), cited in Anridh Krishna & Elizabeth Shrader, "Social Capital Assessment Tool", paper prepared for the Conference on Social Capital and Poverty Reduction (The World Bank Washington D.C. 22-24 June 1999). Decentralization is an additional category of macro social capital.

options are deemed to be legitimate and effective modes of pursuing demands and resolving social conflicts. I juxtapose this data to the degree of informal participation, i.e. marches and land invasions. I explore the link between structural inequities and low levels of confidence in political actors by consulting data by Latinobarometro and other public opinion polls.

With respect to the legal system, I address problems impeding access to justice and the provision of remedy and restitution/redistribution of property to marginalized groups. As pertaining the legal framework, I review the key potentially empowering provisions in the civil code and Constitution pertaining to land rights and discuss how peasant groups have pursued claims based on these norms (including labour rights). I highlight the challenges regarding the maintenance of the rule of law. Most importantly, I assess the extent to which norms may serve to repress social capital by analysing the inherent bias within the formal norms against peasants pursuing customary possession or asserting rights based on human needs, i.e. the penalization of possession via usurpation charges and the practice of forced evictions.

I propose that improvement of access to courts and recognition of legal pluralism may be considered means of enhancing social capital, the former due to strengthening participation rights within the legal system and the latter due to the validation of the norms and values of the people. John Griffiths defines legal pluralism as “the state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs.” He further elaborates the definition as such:

“Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. ‘Legal pluralism’ refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping, ‘semi-autonomous social fields’, which, it may be added, is in practice a dynamic condition. A situation of legal pluralism-the omnipresent, normal situation in human society- is one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities which may support, complement, ignore or frustrate one another, so that the ‘law’ which actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like”⁶²⁰

I proceed to discuss the practice of indigenous customary law in the area of property, comparing procedural advantages with substantive complexity. The question of which norms are considered to be legitimate reveals the existence of two systems

⁶²⁰ Griffiths, John, “What is Legal Pluralism?” in 24 JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW (1986). See also Sally Engle Merry, “Legal Pluralism” in 22 (5) LAW & SOCIETY REVIEW 869-896 (1988), “What is legal pluralism? It is generally defined as a situation in which two or more legal systems coexist in the same social field.”

which run parallel to each other but are largely autonomous from each other, rendering the society in disagreement as to which system is truly reflective of its values.

I also assess enforcement of human rights at the national level by reviewing *amparos* to the Constitutional Court pertaining to property disputes, targeting the discussion towards assessing the hierarchy of norms and responsiveness of output towards dispossessed persons. In order establish the link between lack of legal pluralism and responsive output to negative consequences pertaining social capital, I refer to the decreasing levels of confidence in the legal system as calculated by Latinobarometro.⁶²¹

2. Social Indicators for Guatemala

Guatemala has a surface area of 109 thousand sq. km. Its population is calculated at 12.9 million persons, of which 61.02% are indigenous and over half live in rural areas and work in agriculture at subsistence level outside the monetized economy.⁶²² Women compose only 26% of the labor force.

The uprooted population included returnees and repatriates (65, 957), dispersed internally displaced persons (242,386), and the *Comunidades de Pueblos en Resistencia* (15,844 persons). Approximately 50% of the uprooted population are located in the Quiche.

The principal religions are divided between the Roman Catholic and Protestant churches, as well as the traditional Mayan cosmovision. In terms of ethnicity, Guatemalans are divided between indigenous people and “ladinos” who are composed of mixed European and Indian persons as well as Westernized Mayans. As pertaining languages, the official embrace of Spanish clashes with the local usage of 23 different indigenous dialects (including Quiche, Cakchiquel, Kekchi).

Guatemala has one of the highest rates of inequality in the world (Gini coefficient .55) which plays a factor in stagnating development and maintaining

⁶²¹ One may consider Maloney, Smith & Stoker’s call for research addressing the causes, consequences, and cures of weak civic participation. William A. Maloney, Graham Smith, and Gerry Stoker, “Social Capital and Associational Life” in STEHPEN BARON, JOHN FIELD & TOM SCHULLER, SOCIAL CAPITAL: CRITICAL PERSPECTIVES 212, 225 (Oxford University Press 2000).

⁶²² U.S. Department of State, Background Note: Guatemala (May 2002).

Guatemala in a state of poverty which does not correspond to its resources and income.⁶²³ In 2000 it was estimated that over 64% of the population lives in extreme poverty, earning less than 2 USD per day.⁶²⁴ Over 89% of the indigenous population lives in poverty and 79.9% of the national population is living in poverty.⁶²⁵ Poverty appears to be linked to rural areas, as 69% percent of the total population lives in rural areas (of which 90% live in poverty).⁶²⁶

In terms of percentage share of income by persons ranked by per capita income, the highest 10% controls 46.6% of income and the highest 20% controls 63%, whereas the lowest 10% attains only 0.6% and the lowest 20% has 2.1%. The Gini index which measures distribution of income in terms deviation from equity based on perfect equality (0 = perfect equality, 100 = perfect inequality) is measured at 59.6. Adult illiteracy is among highest in the region, 51% of women and 38% of men cannot read or write. Less than half of the population has access to health services. The fertility rate is measured 4.5 children born/woman. The average years of education is 5.5 (the lowest in Latin America), and 46.4% of the population is suffering from malnutrition. Over 65% of homes lack sewage and electricity.

Agriculture produces 23% of the GDP and 75% of exports.⁶²⁷ By 2002 the fall of the price of coffee in the international market resulted in a severe food crisis and massive lay-offs.⁶²⁸

3. Overview of the Political-Economic System in Guatemala

In the case of Guatemala, it is possible to chart the political system before the war, during the war, prior to the establishment of the Peace Accords, and the present environment during the post-settlement period. An ever-present issue throughout these epochs is the continuous cycle of forced eviction/displacement and clamour for

⁶²³ UNDP, GUATEMALA: LA FUERZA INCLUYENTE DEL DESAROLLO HUMANO 46 & 49 (2000) (hereinafter La Fuerza Incluyente).

⁶²⁴ Inter-American Development Bank, Poverty in Guatemala” (May 2000), cited in Myriam Larra, “Guatemala, el pais de la eterna pobreza”, PRENSA LIBRE 29 May 2000.

⁶²⁵ In 2000, UNDP calculated that 6 million persons (57% of the total population) lives in poverty while 2.8 million (27%) live in extreme poverty.

⁶²⁶ MINUGUA, SITUACION DE LOS COMPROMISOS RELATIVOS A LA TIERRA EN LOS ACUERDOS DE PAZ (May 2000).

⁶²⁷ U.S. State Department, Background Notes: Guatemala (May 2002).

⁶²⁸ UNDP, EL ROSTRO RURAL DEL DESAROLLO HUMANO (1999) available at <http://www.pnud.gt.org>.

land rights. It has been recognized that the forced eviction of indigenous people from their land began during the Spanish conquest and has yet to cease.⁶²⁹

Unequal land distribution has been the norm in Guatemala ever since the conquistadors introduced the *encomienda* system in which labour and tribute were rendered by the mestizo and indigenous populace to the *encomenderos* who had been granted large land holdings as reward for their service to the King of Spain. This evolved into the *latifundio-minifundio* system which peasants were granted small land holdings to grow subsistence crops in return for their provision of seasonal labour on the larger estates. William Thiesenhusen notes that the system was held together by “a measure of mutual convenience and, more important, by coercion, racist ideology, and support from the Catholic Church.”⁶³⁰ Political battles involved the Liberal and the Conservative parties’ diverse positions on issues such as free trade and reduced Church power (both favoured by the former party).⁶³¹ In terms of property interests, the Liberal party pursued the dissolution of indigenous communal lands (recognized by the Crown) as well as Church properties. Hence, land reform initiatives in 1825 and 1871 resulted in the transfer of these lands to the elites and growth of the coffee economy. In 1877, communal lands were nationalized and exempted from registration thus resulting in manipulation and coerced sales of land to export growers. These “reforms” are one of the primary sources of the land conflict that continue to this day.⁶³² Further legal reforms, such as the adoption of the Law against Vagrancy in 1934, required landless peasants to work in fincas at least 150 days per year. This provided the export growers with guaranteed labour in a neo-feudal state and restricted freedom of movement and choice of residence.

The marginalisation of mestizo and indigenous farmers from fruitful lands continued until the election of Juan Jose Arevalo in 1945. A new constitution was established which noted the duty of the State to guarantee that the agricultural harvests should benefit those who worked the land, and several laws were passed expanding rental opportunities and recognition of title through prescription.

⁶²⁹ UNDP, GUATEMALA: LA FUERZA INCLUYENTE supra note 5 at 2.

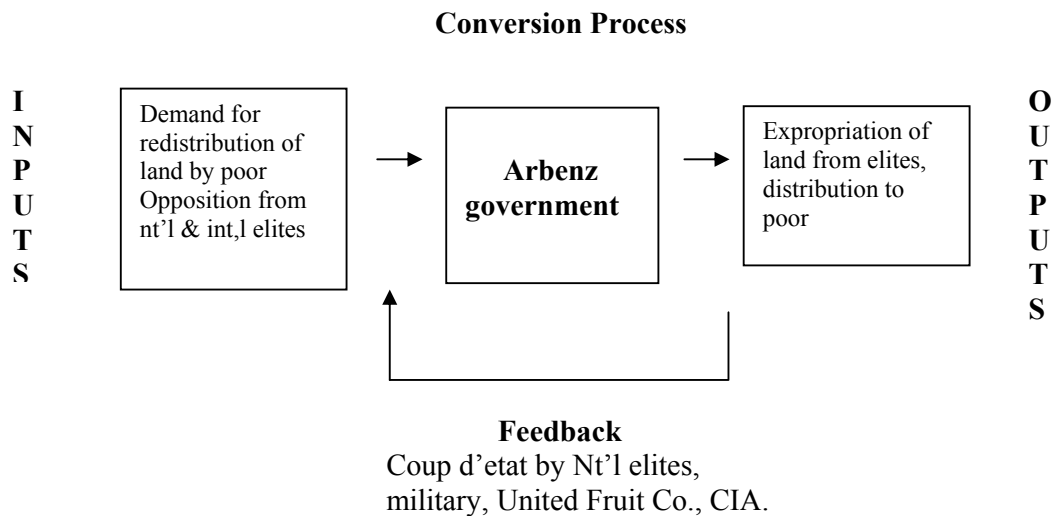
⁶³⁰ THIESENHUSEN, WILLIAM C., BROKEN PROMISES: AGRARIAN REFORM AND THE LATIN AMERICAN CAMPESINO, 70 (Westview Press 1995) citing JONAS, SUSANNE, THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS AND U.S. POWER (Westview Press 1991).

⁶³¹ Id.

⁶³² Martinez, Francisco Mauricio, “Anuncian dialogo sobre problematica de tierra”, in PRENSA LIBRE (September 22, 1997).

However, it was President Arbenz's land reform initiative in 1952 that received international attention and interference. The Agrarian Reform Law (Decree 900) sought to eliminate feudal estates and expropriate large land-holdings that were not under cultivation for distribution to the landless and land poor.⁶³³ Approximately 138,000 families received 615,000 hectares of private land and 280,000 hectares of national lands.⁶³⁴ Colchester stated that the expropriation did not extend to cultivated lands and did not affect properties under 90 hectares.⁶³⁵ Compensation was provided to property owners based on their declared tax values.

This initiative, although moderate, angered the established elites, as well as the United Fruit Company (U.S.A), thereby resulting in a CIA-backed counter-revolutionary coup in 1954.



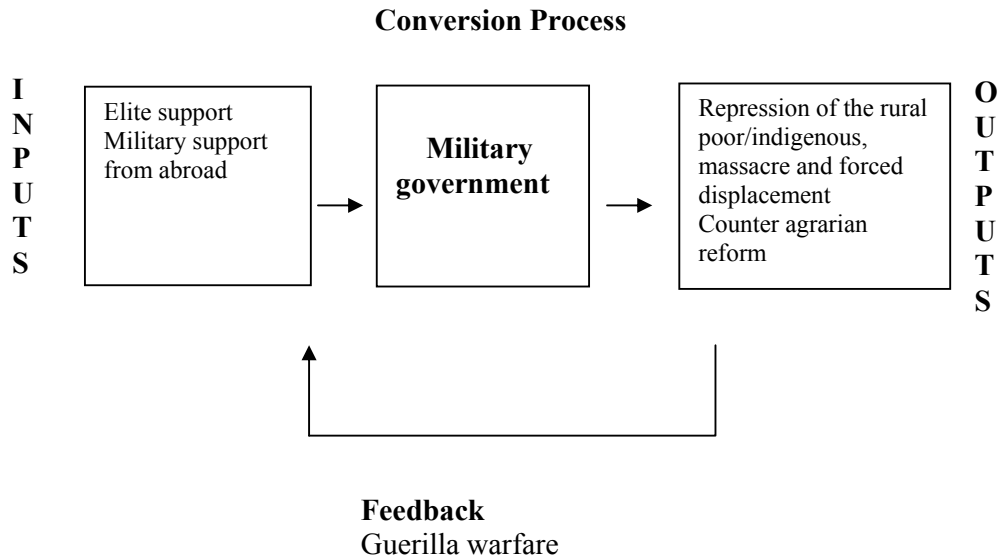
The new government returned the lands to the former owners and the mestizos and indigenous people found themselves once again without the means to provide for their families. Further demands were met with repression and violence, prompting the civil war and ensuing forced migration. Left wing movements supported by indigenous and mestizo farmers fighting against further dispossession by the elites were crushed by severe human rights abuses by the military that prompted the eruption of a civil war which began in 1960 and lasted for thirty years. Many indigenous people were massacred while the general rural populace was repressed

⁶³³ THEISENHUSEN, supra note 12 at 76.

⁶³⁴ UNDP, GUATEMALA: LA FUERZA INCLUYENTE, supra note 5 at 30.

⁶³⁵ Marcus Colchester, "Guatemala: The Clamour for Land and the Fate of the Forests" in 21 (4) THE ECOLOGIST (July/August 1991).

into silence. In effect, the removal of mechanisms to place demands for land and conflict resolution on the State resulted in the radicalisation of the peasantry into guerilla movements which expressed demands through combat.⁶³⁶ Hence there were two extremes of political participation, total exclusion or extreme participation via violence.



Military support from abroad proved extensive as a war against communism devastated the nation; the demand for land was equated with left wing ideology. The war had brutal effects, destroying hundreds of villages, displacing over 1 million people internally and 151,000 externally, as well as murdering an estimated 200,000 persons, the majority highland Indians.

The Historical Clarification Commission (CEH) criticized the scorched earth tactics as being the main cause for the displacement of thousands of Guatemalans in attempt to save their lives.⁶³⁷ Eighty percent of the population of Quiche, Huehuetenango, Chimaltenango, and Alta Verapaz were forced to flee.⁶³⁸ CEH notes that the majority of the displaced during the war were of Mayan descent.⁶³⁹

⁶³⁶ It was noted that the realm of conflict included procedural violations (such as due process, access to courts or state administrative entities, etc.) as well as violation of substantive rights. UNDP, GUATEMALA: LA FUERZA INCLUYENTE, supra note 5 at 106.

⁶³⁷ The CEH concluded that “. . . numerous persons suffered violations of their freedom of movement and residence, upon being objectively forced to abandon their homes and place of work, due to a campaign related to the internal armed conflict.” Comision de Esclarecimiento Historico, Guatemala: Memoria del Silencio, Annex I, Volume I, Illustrative Case No. 1, Ejecuciones, Torturea y Desplazamiento Forzado en la Ribera del Rio Usumacinta, Peten, Conclusiones, (<http://hrdata.aaas.org/ceh/mds/spanish/anexo1/vol1/no.1.html>) and Capitulo II, Volumen 3, Violencia Contra la Ninez, para. 154 (hereinafter CEH).

⁶³⁸ The CEH declared the policy of forced displacement to be unjustified by a claim of protecting the common good of the nation, due to the arbitrary manner in which it was conducted. Id., Capitulo II: Volumen 3, Desplazamiento Forzado, para. 614.

⁶³⁹ Given the extent of harm undergone by the displaced due to malnutrition, exposure, disease, and recurring physical violence, the CEH listed “death on account of forced displacement” as a serious human rights violation within the Guatemalan context. It documented 1,933 deaths on account of displacement. It was noted that children constituted the majority of victims of this violation, some of whom fell victim to accidental smothering by their mothers in an effort to stifle their cries so as not to be discovered by their pursuers. CEH, supra note 19 at para. 631.

Internally displaced persons left the regions of Quiche and Ixcán as a result of repression brought about by land conflicts involving ranchers or landowners backed by the Army.⁶⁴⁰ Many owned or possessed land which they were forced to abandon or coerced into renouncing or selling to others. Their property was either taken over or abandoned to destruction of homes, crops and animals by armed forces. The National Institute for Agrarian Transformation (INTA) declared the lands abandoned by the former owners, and issued new titles. Internally displaced persons fled to the Southern Coast where they became a source of seasonal labour, easily subject to exploitation by the owners of the sugar, coffee, and banana plantation owners due to lack of labour protection. At one point this floating population composed 1/3 of the rural population, estimates for migration to the Southern Coast alone ranged from 250,000 to 500,000.⁶⁴¹ Peasants also fled to the mountains where they underwent extreme conditions, collective groups formed the Comunidades de Pueblos en Resistencia (CPRs) (15,844 persons) which were able to attain international assistance. Others fled to urban areas where they settled in the periphery where continue to be subject to precarious housing, unemployment, food insecurity, and lack of services.

In 1982, the Government offered amnesties to displaced persons, many of whom turned themselves in on account of hunger in the mountains. The Army denounced them as being insurgents. Many peasants were arbitrarily executed due to accusation of being guerillas or on account of occupation of their land by others during their absence.⁶⁴² Others were resettled into development poles where they were forced to participate in civilian patrols; in this manner they were tightly controlled by the Army in order to destroy any notion of ethnic or other group identity. Some of these poles served as human shields against the guerillas, given that they were located in front of the military bases.⁶⁴³

The CEH concluded that 83.33% of the violations they registered for the period 1962-1996 were committed against indigenous people.⁶⁴⁴ Scorched earth tactics which resulted in murders, burned houses and crops, and destruction of villages were deemed to be probative acts of genocide.⁶⁴⁵ Indigenous leaders who claimed lands and labor rights during the war had been labeled and persecuted as communists, guerillas, or subversives.⁶⁴⁶ The specific targeting of indigenous leaders was deemed to be a direct strategy to break group cohesion. The effect of this tactic

⁶⁴⁰ SANTIAGO BASTOS & MANUELA CAMUS, *SOMBRAS DE UNA BATALLA*, (FLACSO 1997).

⁶⁴¹ See UNDP, *GUATEMALA: EL ROSTRO RURAL DEL DESAROLLO HUMANO* (1999) available at <http://www.pnud.org.gt>. (hereinafter *Rostro Rural*)

⁶⁴² CEH, *supra* note 19 at para. 648.

⁶⁴³ In 1987, massive bombing of the CPR Sierra forced between 6-10,000 to descend and join the population under military control in the Ixil triangle. Landless peasants and IDPs were relocated onto land abandoned by refugees and subjected to control by the Army. This type of resettlement was actually used in the colonial period to watch over indigenous groups and prevent revolt. The poles tend to be located on disputed territories.

⁶⁴⁴ CEH *supra* note 19 at para. 545.

⁶⁴⁵ CEH *supra* note 19 at para. 552.

⁶⁴⁶ CEH *supra* note 19 at para. 541. The Panzos Massacre of 1978 in which 53 people were killed is characterized as an example of how the Army defended plantation owners' claims to indigenous land.

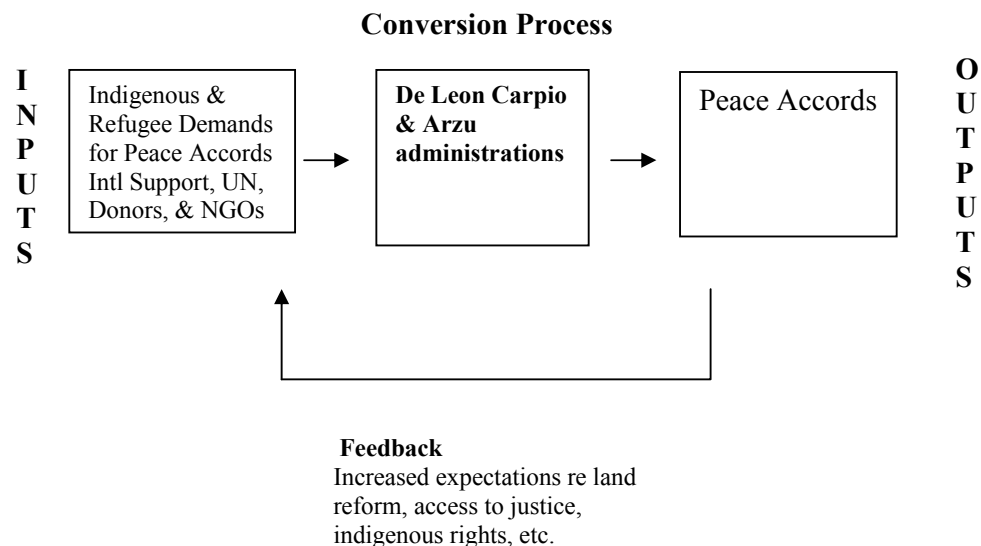
was devastating from a cultural and peace perspective as well as a human rights perspective; the death of indigenous leaders resulted in the loss of traditional conflict resolution mechanisms which were passed on orally from one generation to the next. Persecution also extended to the general indigenous population as a whole, as they were accused of providing food to the guerillas or targeted in effort to dispossess them of their land. In some cases, indigenous people were forced to make false declarations about being guerillas in order to facilitate the appropriation of their land. Forced eviction from lands is cited as a key element of the ethnocide, given the violation of the Mayan perception of the Mother Earth as the source of family unity, and the effects of exploitation of landless indigenous people who were forced to become seasonal workers.

Support from the international community for the State eventually diminished in light of the massive human rights abuses. In 1983, the Army deposed Brig. General Efraín Ríos Montt, a constituent assembly was formed, a new constitution was drafted, and general elections were held. Vinicio Cerezo (Christian Democratic Party) assumed the presidential office in 1986 commencing the transition to democracy with legal reforms, including the adoption of amparo procedures and the establishment of a Human Rights Ombudsman. The Central American Peace Accords of August 1987 (Esquipulas II) resolved the war in Nicaragua, and set the foundation for peace negotiations in El Salvador and Guatemala. Cerezo was followed by Jorge Serrano in 1991 (Movement of Solidarity Action) who began direct negotiations with URNG, utilizing Msgr. Quezada Toruño as conciliator. However, Serrano attempted an auto-coup which was nullified by the Constitutional Court, and thus replaced by the Human Rights Ombudsman Ramiro de León Carpio (elected by the Congress).

Negotiations were stalled until 1994 when the UN emerged as the moderator (previously it had been an observer) and a framework accord was elaborated to recognize the role of the “Group of Friends”- Norway, Spain, Mexico, the United States, Venezuela and Colombia in facilitating peace negotiations as well as creating a mode of participation by organizations within the society. The inclusion of such organizations resulted in the expansion of issues for discussion to move beyond traditional cease-fire topics (favored by elites) to addressing the socio-economic

inequity and racism which lay at the core of the conflict.⁶⁴⁷ With international support, refugees were able to present their demands to the State in order to play an active role in the elaboration of the Peace Accords. Indigenous people also received similar attention by the international community and presented concrete demands.

During this period, the Accords on Human Rights (1994), Resettlement of Displaced Persons (1994), Historical Clarification (1994), and Indigenous Rights (1995) were signed with URNG. In 1995, the Central American Parliament sponsored the Contadora Agreement which resulted in a guarantee by URNG that they would cease military activity during the elections in exchange for commitment by the political parties that the Accords would be upheld. All parties agreed, and in 1995, Alvaro Arzu of the National Advancement Party was elected president. He signed the Accord on Socio-Economic and Agrarian Issues and the Strengthening of Civil Society and the Role of the Military in a Democracy in 1996. It should be noted that Donors played a key role in prompting the adoption of Peace Accords due to their threat to withdraw assistance & trade benefits if not accomplished, at present time they have adopted the similar tactic in response to non-implementation of the Accords.



⁶⁴⁷ See SUSANNE JONAS, OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS 43 (Westview 2000).

3.1. The Elaboration of Norms for Social Cohesion: The Peace Accords

It has been noted that war does not generate tension “so much as prohibit groups from voicing complaints about existing conflicts.”⁶⁴⁸ Jonas states that the participation of diverse civil sector groups in the negotiation of the peace accords enabled them to “democratize an exclusionary system and to make some changes that would have been impossible or highly unlikely under any other circumstances.”⁶⁴⁹ The Peace Accords were unique because they extended beyond traditional cease-fire arrangements to address the link between human rights, development, and peace. Some considered them to be a platform for the future, as they touched upon the root causes of the conflict. They were heralded as the starting point for a renewed social contract between the State and society. The Accords may constitute a type of structural social capital given their status as norms intended to restore social cohesion by seeking to reduce the levels of inequality and exclusion of marginalized groups, i.e. indigenous people and refugees. As the fruit of negotiation, they were intended to promote the elaboration of institutions to implement the new goals and values contained within the instruments and thereby bridge different sectors of society and the state together in order to attain reconciliation and development. The Accords were thus cited as the source for a new culture of “conflict transformation” to be promoted by international organizations and Donors.⁶⁵⁰

However they do not carry the force of law, nor do they create legal rights.⁶⁵¹ In this manner, they are similar to the Guiding Principles on Internal Displacement, they constitute national soft law and face problems regarding enforcement and

⁶⁴⁸ “USAID Project Promotes Conflict Resolution”, in Siglo News, p. 4 February 4 1998, citing sociologist Carmen Cigaroa.

⁶⁴⁹ JONAS, supra note 29 at 96.

⁶⁵⁰ In particular, the concept of conflict transformation is the keystone of the OAS/PROPAZ program, and it is this institution that has elaborated and supported the implementation of this notion in Guatemala.

⁶⁵¹ The failed attempt to reform the Constitution in 1999 was an effort to transform some of the Peace Accords’ guarantees into law.

legitimacy. The establishment of the Peace Accords and their dissemination among marginalized groups has resulted in the creation of expectations regarding newly recognized rights and increased freedom to express demands.

One of the most important themes within the Accords is the need for greater access to land. Below I provide a summary review of the Agreement on Socioeconomic Aspects and the Agrarian Situation, the Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, and the Agreement on Identity and Rights of Indigenous People in order to understand how they strengthened the expectations of rights to remedy and restitution of property. (The Comprehensive Accord on Human Rights is referred to separately in the section on impunity.)

The Preamble of the Agreement on Socioeconomic Aspects and the Agrarian Situation signed between the Guatemalan Government and the Guatemalan National Revolutionary Unity (6 May 1996) sets forth the idea that access to land is a criteria for development, reconstruction of national cohesion, conflict resolution, and security. In addition, it presents the precept that people have a right to effective response to their demands in the socio-economic arena:

“(S)ocioeconomic development demands social justice, as one of the basis for national unity and solidarity, as well as sustainable economic growth, as a condition to respond to the peoples’ social demands. That an overall strategy is necessary in rural areas to facilitate the peasants’ access to land and other productive resources, which promotes legal security and favors the solution of conflict.”⁶⁵²

Herein lies the core of this study’s focus, the linkage between adequate dispute resolution mechanisms, land reform efforts or lack thereof, and reconstruction of the nation’s cohesion. The Agreement cites the importance of creating mechanisms for people’s participation in decision-making and the attainment of social consensus at the national, departmental, and community levels as a means of strengthening democracy. It cross-references the Constitution’s provision requiring non-

⁶⁵² Agreement on Socioeconomic Aspects and the Agrarian Situation signed between the Guatemalan Government and the Guatemalan National Revolutionary Unity (URNG) in Mexico City on 6 May 1996, section E, FBIS-LAT-96-095, 15 May 1996, CENTRAL AMERICA. See also the Accord on Strengthening the Role of the Civil Power and Role of the Army within a Democratic Society, Article 8, which states that the system for the administration of justice is “one of the great structural weaknesses of the Guatemalan State.” Article 9 states “one priority in this regard is reform of the administration of justice, such that inefficiency is reverted, corruption is eradicated, and free access to justice, impartial application of justice, judicial independence, ethical authority, and the integrity of the system in its totality and its modernization are guaranteed.”

discrimination in the area of social rights, including those rights pertaining to property: work and housing.

Chapter III of the Agreement addresses the Agrarian Situation and rural 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 State is identified as “law maker . . . advocate of social unity and solution to conflicts”. The government committed itself to offer credit systems, processing & marketing, agrarian legislation, legal protection, registry improvement, labor relations, technical aid & training, agrarian resources, and organization of the rural population. It sought to provide a secure legal framework pertaining to land ownership, including simple, accessible procedures for registry. The Land Fund and FONAPAZ are identified as institutions charged with repurchase and distribution of national uncultivated lands and other national land, including property which was illegally distributed in settlement zones. The creation of a land market is also identified as central goal. The absence of reference to a more expansive expropriation to promote a full-scale land reform is a clear indication what the agrarian policy is not intended to include. This proved faulty, because the State repurchased property from persons who had obtained it illicitly during the war. Thus, criminals profited from their acts of dispossession. The lack of espousal of extensive land reform rendered this Accord illegitimate in the eyes of the rural groups. Credit services, technical aid, and labor relations remain lacking in terms of follow-up. I provide an overview of the land institutions in the next section, however none of them provided effective restitution to dispersed IDPs.

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 anomolous and unjustified manner through mechanisms involving abuse of authority. ” Regarding compensation, specific restitution legislation or directives were never adopted during the course of this study. As pertaining “swift procedures”, I assess the hybrid conciliation mechanism, CONTIERRA in Part IV.

A separate agreement was drawn up to address the needs of the uprooted population, Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict (17 June 1994). Uprooted people were defined to include refugees, returnees, and internally displaced persons. The agreement calls for full respect of the human rights and constitutional rights of this group. It calls for recognition of the 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 were to participate directly in decision making of return and development. With respect to land rights, the Accord calls for a reversion of the INTA policy to declare land “voluntarily abandoned” by the uprooted, which enabled it to turn over property to others. The State was to provide restitution and/or compensation for property lost under this practice. In addition, the State was expected adopt a strategy for legalization and award of land titles. With respect to the INTA transfers of titles, there are many peasants who have been unable to attain a reversal of the transfer of title, and not all have been given compensation for property lost under this practices. Initiatives to award titles and legalize property are proceeding at a snail’s pace.

Most interesting is the call for the construction of social capital at the horizontal level via reconciliation between the resettled population and those already living in the resettlement areas based on mutual tolerance, reciprocal respect, participation, and common interests.



CONTIERRA technician in front of refugee "housing". IDPs have occupied land which has been designated to the refugees. Because they cannot enter the land, they live on the side of the road.

Photo by Cecilia Bailliet



Refugee waiting to resolve
land dispute with IDP
Photo by Cecilia Bailliet

Stepputat asserts that the return of Guatemalan refugees was conducted in coordination with international agencies and NGOs, avoiding control by the state and “representing a kind of trans-or post-national space where state control is challenged or subverted.”⁶⁵³ The donors were able to elaborate the establishment of FORELAP, a fund in which credits were repayable to the same community, and thus purchase lands for the refugees. However, UNHCR claims initial intervention by the State, the military in Ixcán, and the Chamber of Agriculture (with respect to the fertile lands of the Southern Coast), resulted in crowded resettlement on unsatisfactory land and later non-intervention by the State left them without access to basic services, infrastructure

⁶⁵³ Finn Stepputat, *Repatriation and Everyday Forms of State Formation in Guatemala*, in RICHARD BLACK & KHALID KHOSER, *THE END OF THE REFUGEE CYCLE?* 210, 213 (Berghahn Books 1999).

and living amenities. The government was slow to produce credits to purchase land for returnees (in some cases it took years). Lack of regulation of the land market led to speculation, and refugees paid high prices for land (some actually purchased from military officers who illicitly obtained the land during the war).⁶⁵⁴ In addition, refugees were placed in new territories which required farming, forestry, or ranching skills not retained by the populace.⁶⁵⁵ Violent attacks by the military as well as rivaling peasants (culminating in the Xaman massacre of October 1995 in which 11 refugees were killed and over 30 wounded by soldiers) rendered the notion of “return in safety and dignity” mere fiction.

As noted by Andrew Painter, “(t)housands of land conflicts have arisen between aspiring returnees and those who occupied their lands during their absence, constituting the most significant challenge to peaceful integration”⁶⁵⁶ In 1999, the Guatemalan government announced that the return of the refugees was finally completed. A total of 36 fincas (measuring 1,250 caballerias) had been provided to 41,670 repatriated refugees via FORELAP programs for compensation, soft credits, and revolving credits repayable to the community. Approximately half had repatriated collectively, of which an additional half received restitution of their original land or alternative land while the rest purchased new land. Eight returnee communities received land titles with INTA, three communities secured land with aid from the Land Fund, four communities attained land as compensation, and 23 communities formed part of the FORELAP program. Some of the repatriate communities included IDPs, hence they were able to obtain land by merging with the refugee group. The process of refugee return is heralded as being the basis for the reconstruction of the nation. Although the collectivized IDP groups (CPRs- 20,000) were also provided with resettlement assistance, the needs of the dispersed internally displaced who were estimated to total circa 250,000 have yet to be addressed in a substantive manner. As previously mentioned, between 2000- 2002 the international community was disturbed by the decision of refugee families to travel back to Mexico, as they lacked proper socio-economic support and basic infrastructure (18% lacked land), and were

⁶⁵⁴ Brian Egan, “‘Somos de la Tierra’: Land and the Guatemalan Refugee Return”, in LIISA L. NORTH & ALAN B. SIMMONS, *JOURNEYS OF FEAR: REFUGEE RETURN AND NATIONAL TRANSFORMATION IN GUATEMALA* 95, 105 (MCGILL-QUEEN’S UNIVERSITY PRESS 1999)

⁶⁵⁵ LIAM MAHONY, *RISKING RETURN: NGOS IN THE GUATEMALAN REFUGEE REPATRIATION*, 57 (Life & Peace Institute 1999).

⁶⁵⁶ Andrew Painter, “Property Rights of Returning Displaced Persons: The Guatemalan Experience”, in 9 *HARVARD HUMAN RIGHTS JOURNAL*, 145, 151 (Spring 1996).

subject to ongoing land conflicts with IDPs and locals, referring generally to what they deemed to be “economic persecution”.⁶⁵⁷

Although the government has argued that IDPs are no different than other poor persons, the CEH noted that in spite of common root causes of despair, IDPs undergo aggravated circumstances:

*“Before being displaced, the majority shared the common problems of the Guatemalan rural peasant: lack of sufficient & good quality land, border problems, lack of documentation to establish the communal right to land, as well as the right of inheritance for the children. Displacement precariously aggravated this situation.”*⁶⁵⁸

Regarding IDP claims it was noted that the single biggest problem facing IDPs is their inability to organize to place demands.⁶⁵⁹ CONDEG has not been very effective in organizing, and the radio and press should be utilized to promote greater organization. According to the National Commission for Attention to Repatriates, Refugees, and Displaced Persons (CEAR), not one case has been presented to the tribunal soliciting the return of land to a refugee.⁶⁶⁰ This is probably due to the lack of legal aid, limited financial resources of IDPs, and the fact that the Government sought to attend to land claims outside of the judicial system. As pertaining participation, dispersed IDPs claim that only refugees and CPRs were granted a direct voice in return. They permitted the refugees to speak on their behalf. Attempts to attain similar right to restitution of property as gained by refugees, was turned down by the State. The claims of dispersed displaced persons have been handled separately as individual cases by the administrative land institutions including FONAPAZ, INTA, the Land Fund, CTEAR, and CONTIERRA (see next section).

Indigenous People may refer to the Agreement on Identity and Rights of Indigenous Peoples. Indigenous people are identified as being victims of discrimination, exploitation and injustice, thus the Agreement intends to “create, expand, and strengthen the structures, conditions, opportunities and guarantees” regarding their participation. The State promised to create legal offices for the defense of indigenous rights, including the Defensoria Maya in the Institution of the

⁶⁵⁷ See e.g. Maria De Jesus Peters, “Inicia regulacion migratoria de ex-refugiados guatemaltecos” in PRENSA LIBRE 18 November 2000. In response, the EU and FONAPAZ established Offices for Productive Reintegration to tackle socio-economic development concerns.

⁶⁵⁸ CEH, supra note 19 at Capitulo III, La Ruptura del Tejido Social: Desplazamiento y Refugio at para. 408.

⁶⁵⁹ Interview with Luis Rodriguez Ibañez, CTEAR, 10 May 1999.

⁶⁶⁰ Letter from Lic. Hugo Rene Rivera Castaneda, Director of Negotiations (CEAR), 29 September 1998.

Human Rights Ombudsman and the Office for the Defence of Indigenous Women's Rights. These policies have been implemented by the state but the offices lack resources.

The State also was expected to hire more interpreters and create free legal aid offices in municipalities of significant indigenous population. Although some progress has been made, there is still a need for more interpreters and legal aid. Specifically in the arena of land conflicts, legal aid was to be made available and indigenous communities were to receive information regarding land rights and legal mechanisms. Many indigenous people and peasants lack legal knowledge; they may be unaware of the progressive provisions within the Civil Code, Constitution, and human rights instruments which may serve to uphold their land claims. Hence, these provisions may be regarded as "empowerment" provisions which call upon the State to provide information to indigenous people so that they may identify their rights and access state institutions to implement them.

The Accord also declares that legal rules would be adopted to recognize the right of indigenous communities to manage their internal affairs in accordance with customary norms, provided they were not incompatible with human rights. Decentralized justice administration centers, the designation of justices of the peace, and the creation of a Commission on Indigenous Affairs within the Supreme Court were established in order to implement this provision. The Accord also called for provision of education to members of the judicial branch regarding customary norms; a course on indigenous law has been created at the University of San Carlos and seminars have been held addressing this topic.

Regarding land rights, the Accord reveals a certain degree of influence from ILO Convention No. 169, in some respects it goes beyond the convention. Cross-referencing the Constitution, it calls for recognition of communal, collective, and individual tenure and rights of ownership and possession. It calls for award of title (not merely recognition of possession or use), protection, recovery, restitution, and compensation, for those rights. These guarantees have yet to be implemented.

In addition, the State was 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. There was to be a suspension of prescription terms regarding actions which would result in forced eviction of indigenous people. Thus, similar to the standard held in ILO Convention No. 169, the

State is expected to assist indigenous people counter occupation of their property by outsiders. It is a common phenomenon in Guatemala that the courts uphold the right of prescription claims asserted by ladinos over indigenous property. In addition, many indigenous people lost their property because the Institute for Agrarian Transformation issued supplementary titles to other groups brought in by the Army. The Accord sets forth that supplementary titles were to be suspended when addressing property claimed by indigenous people. Suspension of the statute of limitations in plundering cases was to be upheld, where the statute had expired compensation should be provided. The State was to provide national lands to indigenous people, however it notes that it may not detrimentally affect peasant landholdings- thus indicating potential conflict between those claiming peasant identity and those claiming indigenous identity, both with equal need to property.

With respect to participation, indigenous people were to be engaged in the use and administration of natural resources on their land. They were to be consulted prior to exploitation of natural resources on their land and be granted “fair compensation” for losses. Cross-referencing the Constitution, the Accord sets forth that the Government was to adopt legal rules to recognize the right of indigenous communities to administer their lands in accordance with customary norms. There are several cases in which the formal courts challenge the legitimacy of indigenous dispute resolution institutions to make decisions regarding property, particularly when affecting a ladino claimant (see section on Amparos).

As pertaining the rights to remedy and restitution, the Government was to provide proceedings to settle claims of communal lands and provide restitution or compensation. 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, etc., neither is there a date for validity of restitution claims.⁶⁶¹

The State was expected to promote the use of courts to address land cases and provide expedited procedures for settlement, instead it opted for a hybrid ADR mechanism, CONTIERRA, discussed in Part IV. Hence, this Accord was far-reaching in scope; unfortunately, these provisions remain largely unfulfilled.

⁶⁶¹ Demetrio Cojti Cuxil, “Estudio Evaluativo del Cumplimiento del Acuerdo Sobre Identidad y Derechos de los Pueblos Indigenas”, in CARLOS ALDANA, JUAN QUIÑONEZ SCHWANK & DEMETRIO COTI, *LOS ACUERDOS DE PAZ: EFECTOS, LECCIONES Y PERSPECTIVAS* 53, 71 (FLACSO 1996).

A Bi-Partisan Commission on Indigenous Land Rights was created and a report was drafted, its conclusions included: inventory of municipal, national, and communal lands, identification, provision of title, and juridical protection of indigenous lands, registry and catastro program, an Attorney General's Office for Land Conflicts, restitution and compensation of land, and the creation of an agrarian and environmental tribunal, and expedited resolution of land conflicts. Except for the registry program in Peten, the other recommendations have yet to be implemented.⁶⁶²

The Peace Accords were intended to provide a framework for social cohesion via promotion of social justice initiatives linked to land distribution. However, the slow implementation of the Accords and the ensuing failure to translate the standards held in the Accords into hard law via reform of the Constitution revealed the limitations of law (hard and soft) in practice (See *infra* section on the Constitutional Reform).

In the following sections, I present the institutional framework for addressing land issues in Guatemala, created in response to the Peace Accords. I seek to highlight the key problems facing internally displaced persons, and other rural peasants seeking remedy and/or restitution from the executive agencies and programs.

⁶⁶² Comision Nacional Permanente Sobre Derechos Relativos a la Tierra de los Pueblos Indigenas (CNP Tierra), Documento Informativo (January 1999), on file with the author.

3.2. Executive Remedies addressing Land Issues & Displacement: The “Horseshoe Commission”

The Accord on Socio-Economic Aspects and the Agrarian Situation prompted the creation of the “Horseshoe Commission” which was established to address the land issue in Guatemala.⁶⁶³ These institutions include:

- 1. Institute for Agrarian Productive Development*
- 2. IUSI- Immovable Property Tax (Implementation now stalled)*
- 3. Register and Catastre*
- 4. Ministry of Public Finance*
- 5. Ministry of Agriculture*
- 6. SEPAZ- Secretariat for Peace*
- 7. FONATIERRA (Land Fund)*
- 8. CONTIERRA (Resolution of Land Conflicts)*
- 9. BANRURAL (Program for Rural Investment)*
- 10. IGN (National Geographic Institute)*

These institutions were conceived to attack inequitable land distribution through comprehensive reforms of substantive and procedural aspects within the agrarian arena without embarking upon expropriation.⁶⁶⁴

In summary they focus on investment and development of small farms, issuance of loans to rural peasants to promote land acquisition, reform of the property tax, and the creation of an ADR mechanism particular to the agrarian arena. They suffer from lack of coordination, low financial and human resources, and political pressure. In the following sections, I give a brief overview of the key agencies: FONAPAZ, FONATIERRA (the Land Fund), INTA, the Registry Program, as well as the Technical Commission for the Execution of the Accord on Resettlement of the Populations Uprooted by the Armed Conflict (CTEAR), the Sub-Commission on

⁶⁶³ The institutional commission is referred to as the “Horseshoe” on account of the shape of the diagram delineating the member institutions. Financial support is provided by the international community, including USAID, the World Bank, IOM, the Inter-American Development Bank, OAS, EU, and UNDP.

⁶⁶⁴ See Ley de Reforma Agraria, Decreto No. 900, 17 Junio 1952; see also CARCAMO, GUILLERMO PAZ, GUATEMALA: REFORMA AGRARIA (FLACSO 1997) for a discussion of agrarian reform in Guatemala.

Land, the Secretariat for Peace's Reparation Program. CONTIERRA and MAGA are discussed separately in Part IV.

3.2.1. FONAPAZ

With respect to IDPs in particular, The National Fund for Peace's (FONAPAZ) mandate extended to collective groups of IDPs, i.e. *Comunidades de Pueblos en Resistencia* (CPRs) and refugee returnees, not dispersed IDPs in general. CPRs received international attention from the OAS and were able to attain land via FONAPAZ in 2 ½ years. The CPR Sierra attained three fincas composing 64 caballerias and additional animals, coffee, cardemom, and agricultural machinery. The CPR Peten attained 70 caballerias. The CPR Chajul had occupied land belonging to other displaced persons, but they were resettled in order to allow the displaced to return to their land. Unfortunately the CPR got *caballerias*, whereas the dispersed IDPs only received *cuerdas*. CPR Ixcan resolved their land problem by themselves with Assistance by the Church and international aid organizations. In total, by 2000, organized IDPs had received aid to purchase 10 fincas, while 3 were under negotiation, representing a tiny portion of actual need.⁶⁶⁵

FONAPAZ indicated that IDPs would receive more attention from the State after the refugees and CPRs were settled, however due lack of financial resources and political will, this was never realized.⁶⁶⁶ Contrary to the position taken by representatives of the international organizations and higher state officials, FONAPAZ's staff admitted having no problems with identification of IDPs, due to CTEAR's list of IDPs.

⁶⁶⁵ MINUGUA, SITUACION DE LOS COMPROMISOS RELATIVOS A LA TIERRA EN LOS ACUERDOS DE PAZ (May 2000).

⁶⁶⁶ Interview with Hector Oliva, FONAPAZ, 26 April 1999.

3.2.2. The National Institute for Agrarian Transformation (INTA- now defunct)

The National Institute for Agrarian Transformation was given the mandate of legalizing national lands to the landless⁶⁶⁷ Criticism arose due to its lack of provision of development assistance to follow-up land grants to the peasants, and extreme corruption in titling. INTA files mysteriously disappeared leaving great confusion as to land claims.

Internally displaced persons had three categories of ranging legitimacy for INTA titles. The first category, of lowest legitimacy, is that of persons who lack documents and claim land via prescription. They entered into negotiations with INTA for title recognition which were left pending. The second category is composed of those have attained provisional titles from INTA, final titles to be issued upon full payment by INTA. Many of these people suffered usurpation of their land during their war as INTA declared the lands to be abandoned under Decree 1551 (now revoked) and granted title to other groups. The third group is those who have attained full title from INTA. Even this group suffered, as corruption was so high in INTA, that the staff itself admitted so to the press. INTA was accused of rendering invalid titles to rural peasants and illegally transferring private property to rural peasants.⁶⁶⁸ There was a strong alliance between the military, now landowners, and INTA.

In 1999, INTA was finally shut down and a special commission was created to review the enormous backlog of files (89,000 files) then its mandate was transferred to the Land Fund, which now issues titles (in the name of both husband & wife to support gender equality).⁶⁶⁹ For some time, peasants were left without a mechanism for continuing payments for the land over they wish to attain title. New title claims lay dormant while the Land Fund set up decentralized offices. Delays on account of lack of human and financial resources, irreparable loss of documents, etc. have resulted in criticism. It is estimated that there are 300 *baldios* occupied by peasants which need title, however the financial resources would only cover the costs of 30

⁶⁶⁷ Interview with Osvaldo Aguilar, INTA, 10 May 1999.

⁶⁶⁸ "Colom: INTA recibio dinero para legalizar esas tierras", in *Siglo Veintiuno*, p.4, January 31 1998;"Petén: entrega de tierras violó la ley", in *Siglo Veintiuno*, February 6 1998; and "Títulos de Petén: Procurador propone expropiar tierras", in *Siglo Veintiuno*, p. 3 February 22 1998.

⁶⁶⁹ Ley de Fondo de Tierras, Decree 24-99 and Ministry Resolution 1-99, 23 December 1999.

titles.⁶⁷⁰ The Land Fund has begun to issue new titles in an effort to end land conflicts, however the next sub-section describes problems facing this institution.

Example: Cyclical Displacement- Violence and Development: Comunidad Maribach Cahabon, Alta Verapaz

Cyclical displacement in which multiple factors are at play, such as violence and development, is an increasingly common phenomenon. During the armed conflict in the beginning of the 80's, 163 members of the Maribach community in Alta Verapaz fled their homes which were located on national property. The Army had massacred 45 persons, including children, via torture and burning them alive. After the land was abandoned, Colonel Gustavo Alonzo Rosales Garcia took over the property and utilized it for grazing. In 1995, the community returned only to receive renewed threats by the Colonel and INTA. Eventually, the Colonel abandoned the property only to be replaced by the communities of Chix and Secaja who claimed to have been brought there by the Colonel. The Maribach community approached INTA to attain title to the land. INTA claimed inability to render title due to plans to construct a hydroelectric dam which would flood the land. The community would have to be relocated.

3.2.3. FONATIERRA (The Land Fund)

The Land Fund was intended to pursue a market-assisted or negotiated land reform in lieu of direct expropriation. According to the World Bank, market assisted land reform is presumed to be more efficient, less costly, and less conflictive than government-administered land reforms. However, the distribution of property in Guatemala is based on a neo-feudal structure which inhibits the development of a land market. Irregularities in the land market and lack of sufficient funding render success impossible. Because the land market is not regulated landowners charge speculative prices which are difficult for the government to meet. Land value should be determined by access to markets and roads, water, services, fertility of the land, size of the property, infrastructure, etc. Landowners set extremely high prices on land, given the perception that the international community will assist the government in meeting the prices. Thus, international donors are hesitant to provide financial

⁶⁷⁰ MINUGUA, SITUACION DE LOS COMPROMISOS RELATIVOS A LA TIERRA EN LOS ACUERDOS DE PAZ, (May 2000).

support to a program which may only serve to reward land speculators.⁶⁷¹ UNHCR noted that this has proved to be “perhaps the highest per capita cost world-wide for government-financed land purchases for returnees”.⁶⁷²

The Bi-Partisan Commission on Land complains that landowners and landless often form nefarious alliances in which the owner wishes to make an extraordinary profit by selling to the State, hence landowners promises “the sky and the earth” to the landless. The landless peasants are easily overwhelmed by the promise of open space and reject any negative conclusions of agricultural studies regarding productive capacity conducted by the State. Because the negotiation is conducted directly between the peasants and the landowner, as if they were equal parties, there are no measures to address power or knowledge imbalances. The illiteracy and low education level of the peasants allows them to be easily manipulated, as they do not understand debt, interest rates, capitalization, or default principles. They are concerned with attaining a property regardless of whether or not they can actually afford it.

Thus, they assert their ability to pay and demand the State to finance the purchase in spite of the State’s reluctance to pay for low quality land which will risk default and repossession by the State. Thus, they prove to be unwilling collaborators of the landowner’s speculative interest. Landowners range from those who demand extraordinary prices from the State to those who are reluctant to offer property for sale because they are afraid of prompting usurpation once notice is spread. The Land Fund receives pressure from both sides, receiving blame for the failure to find an adequate solution when it rejects the offer in spite of the peasants’ acceptance. It has not yet had to repossess land. Legal problems due to conflicting claims to land, usurpation attempts, double titling can make sale/purchase of land impossible.

Although the Land Fund is presumed to be capacitated to handle IDP claims, initially in practice it did not.⁶⁷³ At present, it is believed that a significant percentage of applicants are dispersed/unorganized IDPs who did not receive assistance from CTEAR. This results in a bizarre situation in which the State is aware of the presence

⁶⁷¹ This is similar to the situation of the Property Commission for Bosnia Herzegovina which has been unable to attain funds from either the international community or parties to the Dayton Agreement, Marcus Cox, “The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina” in 47 INTL. COM.L.Q. 599, 611 (1998).

⁶⁷² UNHCR, THE PROBLEM OF ACCESS TO LAND AND OWNERSHIP IN REPATRIATION OPERATIONS 27 (Inspection and Evaluation Service May 1998).

⁶⁷³ Interview with FONAPAZ staff member February 1998.

of IDPs and accepts their solicitations for land credits, but, in conjunction with key international actors, does not formally recognize them as an identifiable group with a right of restitution. In February 1998, the Land Fund entered into an accord with CONDEG in which it agreed to provide IDPs access to credit for land purchases rather than grant them restitution for the loss of property and displacement.⁶⁷⁴ This would correlate with the Land Fund's services for the general poor. In essence, IDPs are expected to pay for their dispossession.

Government staff note that IDPs can pursue land claims if they apply as peasants, thus the IDP label is considered unnecessary. However the 1998 accord between CTEAR and the Land Fund on the acquisition of land for the uprooted noted that internally displaced persons would be given priority for assistance.⁶⁷⁵ CONDEG is satisfied with the agreement with the Land Fund, but does not believe it is sufficient to meet the actual need of the internally displaced and that it is being slowly implemented.⁶⁷⁶ Although CONDEG wanted to address reparation needs, the Government refused to discuss the matter in the drafting of the agreement. The ACPD Technical Commission selects the beneficiaries. This was reiterated in the draft Land Fund law, but the final version of the law refers to uprooted persons in general.⁶⁷⁷

The new Land Fund Law declares eligibility for assistance to be based on the following criteria:

1. *Rural peasants without land*
2. *Rural peasants with insufficient land*
3. *Rural peasants living in poverty*⁶⁷⁸

Internally displaced persons would classify under these criteria, hence they need not seek assistance by way of a special accord oriented towards them. In spite of this, the new Land Fund Law highlights uprooted persons as preferential beneficiaries and internally displaced persons may choose to remain within the framework of the

⁶⁷⁴ Convencion Marco de Cooperacion Conjunta y Asistencia Tecnica para la Negociacion de Creditos para Adquisicion de Tierra y Produccion de la Poblacion Desarraigada por el Enfrentamiento Armado, signed by the Land Fund and the Technical Commission for the Implementation of the Accord on the Resettlement of People Uprooted by the Armed Conflict (CTEAR), 4 February 1998.

⁶⁷⁵ Fifth paragraph, Accord between CTEAR & Land Fund on the Acquisition of Land for the Uprooted (1998), on file with the author.

⁶⁷⁶ Telephone Interview with Manuel Peres, CONDEG, 16 April 1999.

⁶⁷⁷ Article 20, Draft Land Fund Law (1998), on file with the author.

⁶⁷⁸ Decree No. 24-99, Article 21.

prior special accord.⁶⁷⁹ The Land Fund is expected to provide IDPs with subsidies and access to development aid. Given that the effectiveness of the Land Fund is directly correlated to the amount of political pressure, IDPs will continue to have problems due to their general lack of prioritisation. It is no coincidence that many of applicants to the Land Fund live in Alta Verapaz, Huehuetenango, Peten, and Quiche—exactly the areas most affected by the war and/or forced migration linked to access to land.

As of 1999, CONDEG was negotiating 4 fincas with the Land Fund and had visited 8 fincas for potential purchase. In total it presented 16 solicitations to the Land Fund in Peten, Escuintla, Coban, Puerto Barrios, Huehuetenango, and Quiche. CONDEG states that most IDPs opt for resettlement rather than return, thus there are many dispossessors who retain control of the property they attained illegitimately. It is concerned that the Government does not prioritize the internally displaced as it should, because they are the most abandoned. CONDEG also states that the Government requires too much proof for provision of land. Many IDPs lack the necessary documents, and little regard is given for their oral testimonies. Given the fact that many registries were burned, as well as the customary practices among rural presents, the Land Fund should take into account oral evidence.

The Land Fund should incorporate equity values to determination of the price of the land. In cases in which the peasants have worked and improved the land, their efforts should reduce the price of the property. Because landowners refuse to recognize historic titles, prescription claims, or other informal land rights, the Land Fund is expected to be the sole solution to the majority of land conflicts. At present, this appears unfeasible. Another problem is that some peasants allege that the Land Fund will not assist persons who have title to land, even if they have been dispossessed of it. This denies title-holding IDPs effective remedy.

After a series of land marches, the Minister of Agriculture, the Director General of the Land Fund, the Executive Director of CONTIERRA, and a representative of the Bank of Rural Development were called before the Congress to explain the lack of progress in the land conflict arena. The officials all claimed lack of economic resources as the source of inefficiency. With respect to issuance of land titles, performance improved from 1998 in which 1,436 titles were issued to 2000 in

⁶⁷⁹ Decree No. 24-99, Article 47.

which 5,949 titles were issued.⁶⁸⁰ However, with respect to credit assistance, the Land Fund admitted that it had only approved 39 out of 500 requests for credit assistance. It requested Q 500 million to execute its programs. The Executive authorized Q 100 million to purchase land for organized rural groups, this was received well by the rural groups but CNOC noted that the government should recuperate land taken by the military during the armed conflict.⁶⁸¹ By 2002, the Land Fund announced that it only had 93 million Quetzales to finance the purchase of 15-18 fincas. The Land Fund has 526 claims which would require 1,800 million Quetzales. It claimed to have purchased 142 properties and wished to purchase 120 fincas.⁶⁸² Its budget was set at Q 270 million. To make matters worse, Land Fund staff members resigned after being implicated in a corruption scandal. It was later revealed that the Land Fund purchased properties which were overvalued and unsuitable for farming due to lack of access to water, undefined boundaries, lack of access to roads, and occupation by other groups.⁶⁸³ Some of the properties were purchased from financiers and FRG associates. According to CNOC, this will result in a wave of forced evictions, as peasants will be unable to pay their debits to BANRURAL due to the inability to collect harvests.⁶⁸⁴

Example: Land Speculation & Compensation Claims Case of Panaman and Buena Vista, Uspantan, Quiche

Eighty families purchased land in Uspantan, Quiche to which they received provisional titles from INTA in 1975. During the armed conflict, they were displaced to Aguacatan and INTA declared the land to be abandoned. The land was sold and registered to another group. They claimed compensation and were referred to the Land Fund. Although they selected the finca San Isidro Las Pacaya, municipality of San Cristobal, Alta Verapaz (25 caballerias), the Land Fund considered the price of 6.615.000 Quetzales to be too high. Hence, they are trying to find an alternative finca.

⁶⁸⁰ USAID: FY2003 Guatemala R4 Documentation, available at <http://www.dec.org.partners>.

⁶⁸¹ Jennyffer Paredes Diaz & Ericka Escobar, "Q100 millones a compra de tierra" PRENSA LIBRE 18 October 2000.

⁶⁸² Julieta Sandoval y Maite Garmendia, "Crisis Agraria sin eco" in PRENSA LIBRE 14 Mayo 2002.

⁶⁸³ "Fonatierras compra fincas sobrevaloradas y no aptas para la siembra", in GUATEMALA HOY 24 June 2002.

⁶⁸⁴ Commentary by Daniel Pascual, CNOC, 1999.

3.2.4. The Technical Commission for the Execution of the Accord on Resettlement of the Populations Uprooted by the Armed Conflict (CTEAR) & the Sub-Commission on Land

The Technical Commission for the Execution of the Accord on Resettlement of the Populations Uprooted by the Armed Conflict (CTEAR) is not an executing agency, it is a network agency which transfers cases to FONAPAZ and the Land Fund. Its officials cite concern for lack of funding, lack of political will to compensate IDPs, dilatory institutional proceedings, and the ongoing land speculation market. They suggested that the international community establish a compensation fund for IDPs. As of 1999, (CTEAR) was processing twenty IDP community claims (each claim representing between 20-145 families) for credit assistance, thirty claims (25-100 families each) for land titling, and three claims (32-80 families each) for compensation.⁶⁸⁵ The compensation claims include the community of San Jose la 20 in Ixcán, Quiché (which includes IDPs in the sense that they are refugees who became IDPs upon return due to double titling of their land by INTA preventing their return and some IDPs mixed with the group), the community of Santiago Ixcán, of Ixcán Quiché (which lost its land after fleeing due to turn over of their property by the Army to other persons and declaration by INTA that the land had been voluntarily abandoned), and the community of Finca Panamam Buena Vista, Uspantán Quiché (which claimed provisional title to property declared to be voluntarily abandoned by INTA during the war). CTEAR claims that the government has not addressed the IDP issue fully nor has it been entirely supportive of ADR in the land arena, however it was pointed out that there has been some action in both arena rather than none at all.⁶⁸⁶

The Land Fund, INTA, FONAPAZ, MAGA, CONTIERRA, GRICAR, MINUGUA, FGT, a delegate from the Uprooted, and the Technical Commission for Resettlement of CTEAR formed a Sub-Commission on Land which met once a week to discuss land claims presented by ACPD. They discussed all matters regarding census of the population, title searches, quality of land, leadership divisions within communities, speculative prices, measurement, etc. The group was interesting

⁶⁸⁵ CTEAR documents on file with the author, received May 1999.

⁶⁸⁶ Interview with Carlos Valladares, CTEAR, 3 May 1999.

because of the diverse perspectives and high-level experience with refugees, displaced, and landless peasants. They were very careful in processing claims and seek to ensure that compensation will provide a viable, durable existence. Unfortunately, the Sub-Commission encountered problems due to political pressures from the outside, non-coordination between the different institutions, and limited resources in a speculative market.

Example: The IDP-Refugee- IDP cycle: Comunidad San Jose La Viente

*“Un pueblo sin casa, un pueblo sin paz
Un pueblo sin tierra, un pueblo sin paz
Un pueblo con hambre, un pueblo sin paz”*

*“A community without a home, a community without peace
A community without land, a community without peace
A community with hunger, a community without peace.”*

Refugees who do not attain a durable solution upon their return become IDPs. Although the State claimed to have finalized return in 1999, some groups were left pending. The community of San Jose La Viente, of Ixcán Playa Grande, Quiché (131 families) is such a case. This community was forced to flee during the war on account of the scorched earth tactics and massacres committed by the Army. They left their finca which had cardemom, coffee, plantains, coconut, coffee, horses, cattle, pigs, chickens, etc. They became IDPs, seeking refuge in the mountains where their children died and later crossed the border into Mexico becoming refugees. They returned only to find their land (to which they had been granted provisional title by INTA) usurped by others, hence they became IDPs once again. They pursued claims with the government but had not attained a solution. They were afraid that the Peace Accords were mere words. In a letter to President Arzu, they proclaimed their frustration:

“We are treated like puppets, not people. They have violated our rights. We do not want war, that is why we do not fight for the land which we had. However, if you do not buy us alternative land, we will return to our property, even if we have to die for it.”⁶⁸⁷

CTEAR concluded that they merited compensation, although this appears to be based on their returnee status, rather than IDP status. The community agreed to accept another finca, as well as cows and sheep as restitution. The 23 original plot owners would receive land (20.85 caballerias) as direct restitution from FONAPAZ. Of this group, 19 had documentary proof of title and 4 had oral witnesses. This is in contrast to the Property Commission in Bosnia which does not accept oral evidence. Their children (20-30) would attain credits from the Land Fund to pay for additional plots (18 caballerias) as they were not deemed to have the right to restitution. CTEAR would conduct a census and study the quality of the land before finalizing the purchase.

⁶⁸⁷ Letter from San Jose La Viente to President Alvaro Arzu, on file with CTEAR.

3.2.5. SEPAZ

*“The armed confrontation has left deep wounds in individuals, in families and in society as a whole. Due to this undeniable fact, making the Peace Accords a reality and achieving true national reconciliation will be a long and complex process. The immediate key tasks that will facilitate Guatemala’s full transition to reconciliation and the rule of law in a democratic State are: furthering the demilitarization process of both the State and society; strengthening the judicial system; opening up of greater opportunities for effective participation and ensuring reparations for the victims of human rights violations.”*⁶⁸⁸

Commission for Historical Clarification

The CEH clearly describes the concept of reparation as a mechanism by which to strengthen structural social capital, i.e. the rule of law, as well as bridging social capital between different groups and individuals. Compensation and restitution are specific variations of reparation which pursue these ends. It has been claimed that “Compensation is often used to bring vengeance to a conclusion. . . compensation entails not merely the end of hostilities, but the beginning of an alliance.”⁶⁸⁹ Hence, discussion of the value of reparation mirrors that of conciliation: it is lauded for being a key to transforming relationships between victims, victimizers, and others.⁶⁹⁰ In like manner, according to the Archbishop’s Office on Human Rights, restitution should not only be considered as a form of reparation, but also a means of preventing new conflicts.⁶⁹¹ The CEH called for reparation to victims and their families (available both individual and collective claims) to be based on “the principles of equity, social

⁶⁸⁸ Commission for Historical Clarification, GUATEMALA: MEMORY OF SILENCE, Conclusions Recommendations, para. 150.

⁶⁸⁹ ROULAND, NORBERT, LEGAL ANTHROPOLOGY, 279 (Stanford U. Press 1994).

⁶⁹⁰ Martha Minnow noted that: “They can meet burning needs for acknowledgement, closure, vindication, and connection. Reparations provide a specific, narrow invitation for victims and survivors to walk between vengeance and forgiveness. The ultimate quality of that invitation depends on its ability to transform the relationships among victims, bystanders, and perpetrators.” MARTHA MINNOW, BETWEEN VENGEANCE AND FORGIVENESS, 106 (Beacon Press 1998).

⁶⁹¹ OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, GUATEMALA: NUNCA MAS, INFORME PROYECTO INTERDIOCESANO DE RECUPERACION DE LA MEMORIA HISTORICA, VOLUMEN I: IMPACTOS DE LA VIOLENCIA 282 (Arzobispado de Guatemala 1998) (hereinafter Nunca Mas). Other commentators state that it is necessary to look beyond the land as the primary means of economic support for the population. Expansion in tourism, industry, and services should be pursued in order to draw people away from rural subsistence level existence. It is estimated that over half of the labor force works in agriculture whereas less than one-fifth is placed within industries. Yet, the State has not adopted substantive programs in this arena and given that the illiteracy rate is the highest in the region, 51% women and 38% men, a prerequisite of educational reform must first be embarked upon.

participation, and respect for cultural identity”); thus the framework based on the notion of empowerment of marginalized groups.

The foundation for reparation is found within the Comprehensive Accord on Human Rights 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 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. 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.

A 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 programs under SEPAZ: including communities in Alta Verapaz (SEPAZ support alone), Rabinal, Baja Verapaz (UNDP-UNOPS support), Chimaltenango and Quiche (USAID support). Thus the programs provide community development initiatives rather than specific restitution per se.

It noted that victims of the war called for reparations in order to prevent reoccurrence of the abuses, to remember those persons who were destroyed by violence, and to permit recuperation of lost property.⁶⁹² Hence, the call for restitution

⁶⁹² Frank La Rue calls for economic restitution to victims by the State because of its value as “explicit recognition” of harms endured by the populace. Comment by Frank La Rue in SIEDER, RACHEL, ED., GUATEMALA: AFTER THE PEACE ACCORDS, 202 (1998).

may be also viewed as a form of expression for previously voiceless victims, such as IDPs. As mentioned previously, in spite of the fact that CONDEG lobbied for restitution for IDPs, the government flatly rejected this. In July 1997 they issued demands to the Guatemalan government regarding the failure of the State to respond to their needs regarding the right to return as guaranteed in the Peace Accords:

*“On the contrary, we internally displaced persons have systematically confronted the indifferent and evasive attitude of the government institutions which seek to ignore our demands and proposals. Invariably, these institutions have shifted responsibility from one to another, and have not given an effective answer to our proposals.”*⁶⁹³

The Commission for Historical Clarification stated that 1.6 million U.S. dollars had been made available for reparations to victims who have testified; however it was not clear initially how much would be available to internally displaced persons or whether the act of displacement in and of itself would be sufficient grounds to submit a claim. This amount is insufficient to provide for even a small portion of potential reparation claims. In addition to the lack of funds, there is also a lack of institutional capacity, human resources, and political will to implement the reparation program. It called for restitution of land and other material losses, such as housing, furniture, clothing, tools, animals, seed, etc. in order to reestablish persons in the position they were before the violence.⁶⁹⁴ Damage to cooperatives and plantations in Ixcán and the Peten alone was estimated at 45 million dollars.⁶⁹⁵ The average costs estimated for the damages which were denounced is 1 ½ million Quetzales.⁶⁹⁶

IDPs, indigenous people and rural peasants have called for the return of lands expropriated by the Army, institutionally or personally, and paramilitaries. The government has engaged in conciliation with the Ministry of Defence and some

Thus, the clamor for reparation is characterized as respect for human rights, reestablishment of social harmony, revelation of the truth, attainment of justice, fight against impunity, espousal of peace, demilitarization, implementation of necessary social change (reduction of poverty, land reform, etc.), and restitution for victims. Oficina de Derechos Humanos del Arzobispado de Guatemala, NUNCA MAS supra note 72 at 263.264 (hereinafter *Nunca Mas*). Although the Church states that it considers it to be an error to deny reparation to IDPs, it fears that individual reparation is impossible due to lack of resources by the State. A curious statistic is that a higher percentage of men, 19.1% as opposed to 14.3% women, cited the reestablishment of social consciousness and harmony as a key priority for preventing reoccurrence of abuses.

⁶⁹³ Asamblea Consultiva de las Poblaciones Desarraigadas (ACPD), “Planteamientos de los desplazados internos aglutinados en la asamblea consultiva de las poblaciones desarraigadas al gobierno de Guatemala” 25 June 1997, on file with the author.

⁶⁹⁴ CEH, supra note 19, Recomendaciones, Medidas de Reparacion, para.9.

⁶⁹⁵ CEH, supra note 19 Los Costos Economicos para.565.

⁶⁹⁶ There is a need to examine what can be claimed (cases of coerced sales of property), who can claim it (heirs), communal vs. private property, should reparation be provided to current occupants of property? How to avoid new cycle of displacement of current occupants?

military officers, but no litigation is foreseen. As noted in the international section, the Inter-American Court of Human Rights considers States responsible for failure to sanction offenders and provide reparation to human rights victims in conformance with their international duties under the relevant conventions (see Part II). In the case of IDPs, the failure of the State to abide by its responsibilities to provide reparation and sanction their dispossessors calls for criticism and review of responses. The Law on National Reconciliation absolves responsibility for criminal acts may stymie persons seeking to pursue penal remedies from the courts for their eviction during the war.⁶⁹⁷ 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.⁶⁹⁸ The CEH found that out of all the testimonies it had received, only one case resulted in investigation, judicial processing, and the provision of reparation for the harm caused.⁶⁹⁹

In the absence of increased contributions by donors and a change in political will by the State, it does not appear likely that many internally displaced persons will attain restitution for their dispossession. Land conflicts are increasing in number and intensity. SEPAZ's promotion of public works as reparation is insufficient to meet the need for specific restitution by the victims of the armed conflict. In addition, there is a dilemma present due to the fact that some groups indicate that they wish to abandon their victim status as a way of breaking away from dependency.⁷⁰⁰ The problem is that the provision of restitution or compensation is intended to make a person "whole" again. It is a form of empowerment. In my opinion, abandonment of victim status will result in loss of claim to specific reparation and thus may limit opportunities for true emancipation from the effects of repression. Rather than encourage victims to relinquish their claims in the hopes of moving on, donors should focus their efforts on pushing the state to uphold its duty to provide reparation as well as increase their own financial contributions to such programs.

⁶⁹⁷ 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.

⁶⁹⁸ 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).

⁶⁹⁹ CEH, *supra* note 19 at Capitulo II, Volumen 3: Denegacion de Justicia, para. 285, citing case CI 005. Agosto 1993. Huehuetenango.

⁷⁰⁰ See Hans Petter Buvollen, "National Reconciliation and Civil Society in Guatemala, An Empirical Approach" paper presented at PRIO Conference (12 December 2001) available at <http://www.prio.no>.

In 2002, Donors, MINUGUA, and various national NGOs criticized the government for stalling implementation of the reparation program for victims of the armed conflict as well as the land redistribution program, instead announcing a generous compensation scheme for the ex-PACs. Given the fact that this group was identified as being responsible for many of the violations of human rights and humanitarian law during the war, in particular forced displacement, the compensation package appeared to support the pro-military stance of the government, conveniently prior to elections. President Portillo went so far as to characterize the ex-PACs as the “bastion of peace” and the compensation package a lesson for the world in tolerance, dialogue, and peaceful dispute resolution.⁷⁰¹ For IDPs and other human rights victims, this was the ultimate act of impunity. Restitution of property to displaced peasants and indigenous people would serve as a symbol government recognition of the special connection of indigenous people and rural IDPs to their land.⁷⁰² The lack of provision of such restitution is thus a denial of recognition which promotes further marginalisation of these groups. Due to the lack of restitution, a crucial element of the rule of law is unfulfilled and the society remains fractured. As mentioned in Part II, many war victims, particularly IDPs, have been deprived the right to specific truth of the violations they endured (the CEH and Archbishop’s reports serve as general truth). When considered in combination with the lack of prosecution of offenders and provision of restitution, none of the three pillars of national reconciliation and durable peace exist.

⁷⁰¹ Pavel Arellano & Rigoberto Escobar Lopez, “Portillo Elogia a ex PAC y promete solucion”, in PRENSA LIBRE 5 August 2002. He added that reparations to human rights victims and provision of greater financial resources to the Land Fund would also be given priority the following year. The Chamber of Commerce reacted negatively to Portillo’s plan to increase the national debt via the establishment of 250 million dollars in eurobonos in order to finance the programs, particularly given the past experience of loss of funds via state corruption. Danilo Valladares, “Rechazan emision de bonos para ex PAC” in PRENSA LIBRE 10 August 2002.

⁷⁰² See BARKAN, ELAZAR, *THE GUILT OF NATIONS* 37 and 122 (W.W.Norton & Company 2000) commenting on restitution of small landholdings in Eastern Europe, particularly Hungary. He notes that “. . . the combination of financial and moral restitution is the sine qua non of restitution movements everywhere . . .”

Of interest, the CEH calls for reference to justice and equity when granting benefits. Aside from the identification of damage to property and forced displacement, the Commission on Historical Clarification also called for indemnification or economic compensation for grave injuries and damages which were a direct consequence of the violations of human rights and humanitarian law. The penultimate aspect of reparation called for was rehabilitation and psychological assistance, including remedial and mental aid, as well as legal and social assistance. The final aspect was moral and symbolic reparation (such as apology) to restore human dignity.

“. . . the combination of financial and moral restitution is the sine qua non of restitution movements everywhere . . .”

3.2.6. Registry

USAID, GTZ, and the World Bank has sponsored the creation of a property registry and catastro regime within the Peten in conjunction with its support of CONTIERRA's Peten office. As mentioned previously, although registration is needed, there is concern that the program is not sufficiently focused on exploration of fraudulent titles, prescription rights, and historic title. The registry initiative has been criticized for legalizing land but not resolving the problem, as it is a formalistic solution to a dilemma immersed in socio-economic inequity. 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.⁷⁰³ The World Bank needs to ensure that the titles issued will not include territory within the Mayan Biosphere, which is an ecologically protection area. The conciliators are expected to be independent and impartial, in addition to demonstrating a solid command of registry, catastro, law, the workings of the various land institutions, and the customs, traditions, social characteristics and language of indigenous peoples. Although the registry has managed to successfully transfer the majority of handwritten books to secured computer programs in order to diminish tampering and increase access to information, complaints have arisen with respect to excessive delays in registering new titles. In addition, the completion of the catastro itself, as well as national legislation on registry & catastro are delayed. Thus, there remains a lack of correlation between the properties which are registered and the de facto holdings. It is important to remember that registry does not equal land redistribution. Persons attaining title may actually be rewarded for their usurpation, and the landless left more vulnerable.

⁷⁰³ See UN Committee on Economic, Social, and Cultural Rights, General Comment No.7 on Forced Evictions calling for provision of alternative housing, resettlement, or access to productive land, para 17 (E/C.12/1997/4)

3.2.7. Conclusion on Land Institutions

The land agencies suffer from lack of coordination, disorganization, inefficiency, lack of financial and human resources, and in some cases corruption. The Land Fund fails to incorporate equity analysis when determining the purchase price of property, particularly with respect to property traditionally worked on by peasants. Neither does it take into account the needs of dispossessed IDPs who may have title to the land but are prevented from occupying it. The SEPAZ program is significantly under-funded and does not target directly dispersed IDPs for compensation of land, rather it supports public works. Ironically, the ex-PACs appear to have more of a chance of attaining compensation than IDPs. The exclusion of dispersed IDPs from a restitution program made available to the refugees and CPRs has resulted a failure to reintegrate the majority of those displaced under the war. The registry system does not appear to have sufficiently addressed the question of customary possession by indigenous peasants or others nor has it addressed titles attained by illicit means.

In sum, the land agencies and relevant programs are largely non-responsive to the needs of IDPs and indigenous people for recognition of customary property rights, restitution rights, redistribution needs, and effective remedy. Perhaps the most discouraging aspect of the policy against recognition of dispersed IDPs as a category meriting restitution of property is that it blocks the formation of social networks among them as well as in relation to state and international agencies, thereby reducing their possibilities of helping each other or receiving effective institutional assistance. Formation of group claims may be the best for IDPs to attain response, as individual claims have received little response given that they are rendered invisible due to immersion within the general peasant claims divided among hundreds of Pro-Land Committees. Hence, we see how the careful drafting of the Land Fund law and selective policies of the land institutions inhibit the formation of strong, viable social capital at the horizontal level which in turn inhibits the creation of effective linking social capital vis-à-vis the State.

3.3 Failure to Implement the Peace Accords

“Within the impoverished Guatemala of today, democracy cannot be viewed as an issue of norms and procedures, rather it is a goal linked to the living conditions of the population. The entire system crisis is due to the isolation of the public powers from the social reality; the invalidity of our institutions is expressed in the inability to respond to the people’s legitimate aspirations and demands: work, health, housing, education, and justice.”⁷⁰⁴

Victor Ferrigno



Fourth Anniversary of the Peace Accords-
President Portillo and Rios Montt at the
celebration-”I’m sorry, this is a private party”
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The Peace Process is not considered to have solved the problems of inequity and oppression, however it opened spaces for discussion of the link between conflict prevention and solution strategies.⁷⁰⁵ As previously noted, the Peace Accords were far-reaching as they went beyond cease-fire provisions and highlighted root causes of the conflict linked to socio-economic inequity and development needs. However, sufficient resources and political will were lacking, thus the Peace Accords, in

⁷⁰⁴ Victor Ferrigno, “Cabildo abierto, pacto social y constitucion”, Opinion Piece in PRENSA LIBRE 10 June 2000.

⁷⁰⁵ Interview with Sotero Sincal, COINDE, 2 February 1998.

particular the land provisions, remain largely unfulfilled.⁷⁰⁶ As noted by the ex-president of the National Reconciliation Commission, Bishop Rodolfo Quezada Toruño, “The Accords generated expectations, which could not be implemented in reality.”⁷⁰⁷ In May 1999, the Director of the Peace Secretariat (SEPAZ), Raquel Zelaya, sent shock waves throughout the country upon declaring that she believed that the signing of the peace accords was a mistake due to the inability of the population to reap benefits from them.⁷⁰⁸ Her comments correlated with the publication of a UNDP study which determined that **32%** of those polled did not consider the peace accords to have brought any important change to their communities, while **27%** declared that the peace accords had affected them negatively.⁷⁰⁹ In 2000, the FRG party was criticized for having not prioritized the Peace Accords, polling results revealed that only **6%** of Guatemalan considered the Accords to have continued

⁷⁰⁶ Five years after the Peace Accords, the Peace Research Institute of Oslo (PRIO) hosted a commemorative seminar in which observers from MINUGUA, UNDP, URNG, NGOs revealed concern for the precarious position of Peace Accords which had yet to be implemented in a substantive manner. According to Rodrigo Asturias of the URNG, there is more need for support now than during the elaboration of the Peace Accords. In hindsight, observers stated that they proved impossible to implement in the short-term- hence they were doomed to failure. Many donors have been frustrated by the failure to implement the Accords, hence it appears likely that the Accords will be declared null and abandoned for other programs. See Hilde Salvesen, “Guatemala: Five Years After the Peace Accords: The Challenges of Implementing Peace”, (PRIO March 2002) at <http://www.prio.no>.

⁷⁰⁷ Celina Zubieta, “Guatemala: Proceso a paso lento, a dos años de la firma de paz.”, Inter-Press Service, 3 January 1999. Specifically, the socio-economic aspects of the Accords, especially regarding the land issue “have been disregarded or emptied of content”.Id., quoting sociologist Miguel Angel Sandoval.

⁷⁰⁸ The former president for the National Commission for Peace, Hector Rosada, highlighted that the government has met only its formal commitments in order to appease the international community but that “the structure of the ownership of land, for example, remains intact.” Because the Accords were the result of negotiations between unequal parties of which the stronger felt little incentive to sacrifice its power, the goal of land redistribution was sacrificed as a compromise, thus rendering the Peace Accords a mechanism for temporary settlement rather than permanent resolution. See also Christopher Mitchell, “Necessitous Man and Conflict Resolution: More Basic Questions about Basic Human Needs Theory” in BURTON, JOHN, (ED.) CONFLICT: HUMAN NEEDS THEORY 149, 150-51 (MacMillan 1990), characterizing genuine resolution of conflict as:

“1. *Complete*, in that issues in conflict disappear from the political agenda and/or cease to have any salience for the parties to the agreement.

2. *Acceptable*, generally, to all the parties to the dispute, not merely to one side, or to elite factions within adversaries.
3. *Self-supporting*, in that there is no necessity for third-party sanctions (positive or negative) to maintain the provisions of the agreement in place.
4. *Satisfactory* to all the parties in the sense of being perceived as “fair” or “just” according to their value systems.
5. *Uncompromising*, in the sense that the terms are not characterized by the sacrifice of goals as a part of a compromised, “half a loaf” solution.
6. *Innovative*, in that the solution establishes some new and positive relationship between the parties.
7. *Uncoerced*, in that the adversaries freely arrive at the solution themselves without any imposition by an authoritative (but perhaps non-legitimized) outside agency.”

⁷⁰⁹ Carlos Ajanel Soberanis, “Zelaya: Fue un error haber firmado la paz”, SIGLO XXI 2 May 1999.

importance, whereas as 69% stated that they had forgotten about the Accords, and 43% claimed that the Accords only benefited the URNG and the Government.⁷¹⁰ The deadline for implementation of the Peace Accords was extended to 31 December 2004.⁷¹¹

By March 2001, MINUGUA declared the peace process, in particular the socio-economic guarantees, to be completely stagnated. Indeed, the Attorney General for Human Rights, Julio Arango Escobar, accused President Portillo's regime of lacking a social benefit policy and violating the people's economic rights-characterized by some observers as upholding a state of "economic violence".⁷¹² Examples include the issuance sub-standard housing to the poor and temporary residences, which are not provided with water or sewage services due to fear that the people will not leave the property if provided with such services. As characterized by a representative of CONAVIGUA: "We are not being killed by bullets- we are being starved to death." Hence, illiteracy, poverty, and malnutrition serve as primary evidence of failure to implement of the Peace Accords and consolidate democracy. Because basic human needs are the subject matter of international human rights, the attainment of equal citizenship for all is indeed contingent implementation of such norms. Social cohesion requires not only on respect for civil and political rights, but also implementation of socio-economic rights which are essential to human dignity and elaborate the notion of equality of citizenship. As a consequence, there has been an upscale in insecurity.

The Archbishop's Office for Human Rights highlighted the relevance of human rights in the reintegration process:

*"Respect for human rights is a basic condition for social reintegration. In a climate of polarization and division as a consequence of the war and political repression, respect for human rights assumes a character of reconstruction of social harmony in the communities. The consequences of the division, extreme polarization, and ideologies to which a large part of the population has been submitted, place a value on rescuing knowledge and mutual respect above that of authorities or dominant groups."*⁷¹³

⁷¹⁰ Miguel Gonzalez Moraga, "FRG no priorizo la paz en su agenda", PRENSA LIBRE 29 December 2000.

⁷¹¹ According to the *Comision de Acompañamiento de los Acuerdos de Paz*, the government should present a concrete proposals regarding reparation to victims of the conflict, support for the Land Fund, the registry system, and strengthening dispute resolution mechanism for agrarian conflicts during this time period "Acuerdos pendientes en la agenda de la paz" in PRENSA LIBRE 8 November 1999.

⁷¹² It was noted that the peace accords had not been implemented and the poor were living under a climate of "economic violence." Comment by Mario Polanco, Grupo de Apoyo Mutuo, quoted in Pedro Pop Barillas, "Preocupa retorno a Mexico de refugiados", in PRENSA LIBRE 21 August 2000.

⁷¹³ OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, NUNCA MAS supra note 72 at 268.

In the first nine months of 1999, MINUGUA reported that human rights violations had increased 35% as compared to the year before.⁷¹⁴ The Attorney General for Human Rights reported an increase of complaints received (16,754 in 1999 as opposed to 11,892 in 1998) stating that “The conditions for a harmonious life with full respect of human rights does not yet have a sustainable base in Guatemala. Some actors note that significant improvement is not expected to be attained in the short term, it has been stated that it may require two –three generations living under democracy before the goals of the Peace Accords are met.”⁷¹⁵

The claim of a strong counter- agrarian reform movement is a recurrent theme among commentators.⁷¹⁶ Hector Rosada stated frankly that aspirations of national reconciliation were meek:

“We Guatemalans have lost the opportunity to transform the national structures. The fact that the Accords have not been recognized as the commencement of transformation; that they have not been visualized as the diagnostic of national problems, and that they have not been understood as the synthesis of multi-sector proposals, resulted in the loss of the vision of a national agenda.

This occurred because during the last stage of negotiation, an environment of conciliation and consensus was not established. Now, the owner of the finca cannot come to ask for forgiveness, because neither conciliation nor consensus is the gracious concession of an authoritarian power. They are slow processes, which lack much credibility, and that path was not set out. As a result of this, the possibility of conciliating the Guatemalan Family was lost; but not that of reconciliation, because we have never been conciliated.”⁷¹⁷

⁷¹⁴ “Aumentan violaciones a los DDHH, según la ONU”, PRENSA LIBRE 15 October 1999.

⁷¹⁵ Interview with Juan Leon, Defensoría Maya, 10 February 1998. According to the Defensoría Maya, after five years, the Accord on Indigenous Identity and Rights remains “null and inoperative . . . given that the laws continue to favor a social group” and the indigenous interest figure at the bottom of the national agenda. Política y Poderes, “A cinco años de la firma del acuerdo sobre identidad y derechos de los pueblos indígenas”, in PRENSA LIBRE 1 April 2000. Remaining issues of concern included the recognition of indigenous customary law and their rights to communal, collective, and individual land rights. CNOC identified the transition process as being fraught by “. . . difficulties and setbacks given the reality of a divided, fragmented, confrontational society . . . a situation which is aggravated by economic policies which have impoverished the Guatemalan population, principally the rural peasant.” Coordinadora Nacional de Organizaciones Campesinas (CNOC), *Hacia Una Nueva Etapa de Nuestra Lucha Por la Tierra y el Desarrollo* (Documento Final y Resoluciones del II Congreso Nacional Campesino) (18 July 1998). The need to resolve land conflicts was highlighted as imperative, given the consequences of confrontation, bloodshed, and loss of human life brought about by forced evictions, usurpation, etc. CNOC calls for *inter alia*, restitution of lands, improved registration, regularization of the land market, protection of labor rights, credits, and greater use of dialogue to avoid forced evictions

⁷¹⁶ The study “Un Estado en tiempos de paz” by the Center for National Economic Research (CIEN) also is quoted as noting that the State “is weak and complacent with respect to pressure groups and economic and political power, which complicates progress in the implementation of the Peace Accords and democratic consolidation.”

⁷¹⁷ Lucy Barrios and Julieta Sandoval, “Paz: Entre los aplausos y criticas”, PRENSA LIBRE, 28 December 1998.

This statement contains an implied reference to the negative impact of the dysfunctional economic system. Guatemala follows a Neo-Marxist vision of the state as being non-neutral; rather than balancing the demands of the various groups in society, it is “the vehicle by which one class maintains its rule over another. . . The economic structure of society is ‘the real foundation’ on which a legal and political superstructure-the state-rises and out of which develop definite forms of social consciousness.”⁷¹⁸ The State is thus weak and fails to establish independent policy, as the dominant socio-economic sector intervenes by placing pressure in favour of its own interests. The strength of this sector limits the effectiveness of international actors which seek to pursue their own objectives within national institutions. The lack of correlation between the law and the economic system is blatant.

Lizardo Sosa presented a paper at the VII Seminar on National Reality, (Asociacion de Investigacion y Estudios Sociales, November 1991) in which he highlighted the interconnection between the political, economic, and legal systems in Guatemala and the need to strengthen all of them rather than relying on only one:

“ . . . (T)he solution to the country’s economic problems and the possibility that the economy will fulfill its task with respect to satisfying the needs of the entire collectivity, are beyond the economic ambit and are found in the political and social ambit. Hence, as is easily understood, one cannot expect an economic system to function adequately if limitations arise from the other orders- legal, social (education, mentality, traditions), etc.- which do not permit its normal development. Therefore the actions to overcome the economic problem cannot remain within the field of economic policy, rather they should include greater degrees of social participation, the establishment of general non-discriminatory rules, the full application of the rule of law, the strengthening of the administration of an independent and integral justice, the expansion and improvement of education and health, and the construction of a social protection network which would incorporate the poorest groups to benefit from economic growth and social development. ”⁷¹⁹

⁷¹⁸ Theodore J. Lowi & Edward J. Harpham, “Political Theory and Public Policy, Marx, Weber, and a Republican Theory of the State”, in KRISTEN RENWICK MONROE, CONTEMPORARY EMPIRICAL POLITICAL THEORY 249, 256 (University of California Press 1997).

⁷¹⁹ Lizardo Sosa, “Regimen Economico-Microfinanciero y tributario Responsabilidad nacional y solidaridad internacional”, paper presented in VII Seminario Sobre La Realidad Nacional, Asociacion de Investigacion y Estudios Sociales, 101, 103 (November 1991). Sosa claims that there is no effective oversight by the judiciary or the public. This has resulted in a high concentration of wealth among the elites, growth of black market, high unemployment, and extreme poverty. He is concerned for the dehumanizing characterization of the general populace as a means to an end, rather than an end in itself, given the society’s value of them as producers (objects) of products rather than subjects who produce. He advises the joint pursuit of efficiency and social justice through stimulation of a more open market which would permit fairer wages and prices, greater competition and participation, reduced monopolies, lower concentration of wealth among the elites, etc. However he also calls for the adoption of norms and polices which would ensure equitable development through clear rules of conduct and legislation, increased organization and education of labourers, consumers, greater access to credit, training for small-medium size business owners, etc. On the international level he questions the legitimacy of international aid provided to the “traditional patrons” sometimes benefiting the elites and even the donors more than the society at large. He claims that rather than help the nation become more self-reliant, the infusion of funds often promotes passivity, delay of changes, and corruption on the part of the government. The lack of openness of the world market, e.g. banana wars with the EU, also complicates economic development.

The economic system of Guatemala is extremely politicized, centralized, unstable, patron-client oriented, protectionist, corrupt, and subject to rents.⁷²⁰ As previously mentioned, the primary curiosity is the land market in which the State has no regulations regarding price, and thus this is subject to excessive speculation favouring the landowning elite. In essence, the agrarian economy remains a clear example of the prevalence of neo-feudalism. The political and economic systems proved to be completely non-responsive regarding demands based on socio-economic rights or group identity claims. In terms of social justice, **62%** of the Guatemalan people considered the poor to be worse off than five years ago and **80%** considered the distribution of wealth to be unfair or very unfair.⁷²¹ Thus, the innovations within the legal and political arenas (including the Peace Accords) have yet to demonstrate a positive impact upon the society within the socio-economic arena. The function of these systems appears to be to maintain neo-feudal structures upon which the elites amass their wealth. Ironically, Alfonso Portillo, prior to becoming the current President, attended the seminar and provided commentary in which he called for increased consensus among the people, noting that the interests of elites clashed with those of the general populace. In terms of social development, he cited the observation that many businessmen were negative to literacy campaigns due to the favor of “creating problems”, i.e. peasants would become aware of their rights and increase formulation of demands for change.⁷²² He stated:

*“I don’t understand an economy which only serves one sector of the society. I don’t understand why there are only solutions for one part of society . . . or the solutions are for the conglomerate and its ensemble, or they are not solutions.”*⁷²³

⁷²⁰ Sosa notes that the State has curtailed the development of new businesses due to excessive regulations, estimated between 3000- 30000 legal provisions pertaining to the economic field which are often manipulated by interest groups and thus driving outsiders to black market activities and skewing macroeconomic balances.

Indeed the U.S. Department of State characterized the Guatemalan economy as lacking transparency and plagued by bureaucratic complexity. U.S. State Department, Guatemala: Report to the Senate Committees on Foreign Relations and on Finance and to the House Committees on Foreign Affairs and on Ways and Means (31 January 1999),

⁷²¹ Latinobarometro 2001. According to UNDP, 79.9% of the Guatemalan population is currently living in poverty, among the indigenous population this figure rises to 89.5%. In terms of education, 51% of women are illiterate (80% of rural women), as well as 38% of men. UNDP, Situacion de Pobreza del Pueblo Maya de Guatemala (October 1998). As of 2000, the Inter-American Development Bank calculated that 64% of the population live in extreme poverty, earning less than 2 USD per day. IDB, Poverty in Guatemala (May 2000). UNDP had different figures for the same year: 6 million persons live in poverty (57% of the population) while 2.8 million (27%) live in extreme poverty.

⁷²² Supra note 101 at 130.

⁷²³ Id.

Rather than blaming the state for inefficiency, it is criticized for its selected efficiency for the benefit of a minority. After taking office, polls reflected little support by the populace on account of Portillo's failure to implement changes. Instead, the socio-economic status of the general population as well as civil security was deemed to have worsened under his regime.⁷²⁴ Within the Latin American region in total, 52% of those polled in 2002 indicated that they considered economic development to be more important than democracy.

Only 12.2% of Guatemala's total current revenue in 1998 was composed of tax revenue, thus limiting investment in social welfare.⁷²⁵ Although tax reforms are being pursued, there is strong resistance within social sectors due to lack of confidence in the State. The government's expenditure extended to general public services (15.4%) health (12.5%), education (18.2%), social security & welfare (8.2%), housing and community services (10.9%), defense (6.0 %), internal security (3.8%), and economic services (18.5%).⁷²⁶ For 2001, its GDP was calculated at 20.0 billion

⁷²⁴ Concurrent action by financial institutions, such as the IMF, calling for structural adjustment, downsizing of state institutions, can diminish the effectiveness of the very state entities recently created to prompt reintegration and development. For example, the Minister of Education announced that budget cuts would effectively result in reduction of support to NGOs responsible for forming educational committees to teach children in the rural areas. In January 2001, the US Ambassador criticized the Guatemalan State's unwillingness to invest in public education, noting that it prompted the international community to question the use of its resources. In spite of Portillo's prior statement of support for literacy programs as a mode of improving civic participation, in June 2000, the National Literacy Committee announced that it had only half of the resources it needed to meet its target of teaching 500,000 people to read and write. Luisa F. Rodriguez, "Educacion: Conalfa sin dinero para alfabetizacion", in PRENSA LIBRE 19 June 2000.

Susanne Jonas aptly warns of the ominous result of non-concessions by the State to the dispossessed populace:

*“ . . . (T)he peace accords as implemented have **not** led to sustainable development in Guatemala . . . in the likely continuance of dysfunctional development – that is , if there is no tax reform to finance the social goals of the peace accords and no peace dividends in the form of land, jobs, or basic services- the only recourse for thousands of Guatemalans will be the transnational solution they have chosen in the past two decades: migration to the United States.”* JONAS, supra note 29 at 225 .

Indeed, I reviewed the INS data pertaining to illegal immigration to the United States. The total Guatemalan population residing illegally in the US was considered to be the third largest illegal community in the nation. In 1999 a visit by President Clinton demonstrated the irony of current approaches to post-conflict migration rather than addressing the causes of flight, the he requested implementation of more stringent immigration laws by all of the Central American countries, a clear effort to mimic Europe by creating a "Fortress America". These immigrants may well be old displaced persons in new categories, or the children of old displaced persons seeking socio-economic security due inattention in the post-return/resettlement phase.

⁷²⁵ Julieta Sandoval & Olga Lopez, "Cuestiona aumento de fondos para el Ejercito" in PRENSA LIBRE 23 December 2001.

⁷²⁶ International Monetary Fund, Guatemala: Statistical Annex (February 2000)

USD; the GDP per capita was estimated to be 1,642 USD.⁷²⁷ The expenditure for defense (although already high) was actually more than doubled in December 2001, and received additional transfers from other ministries in 2002. Internal security received transfers intended for the Constitutional Court and other judicial institutions, thus there is an imbalance between the Executive and the Judiciary that is particularly worrisome given the heavy influence of the military upon the former. Rather than strengthening oversight mechanisms intended to uphold the rule of law via provision of remedies to marginalized individuals, the government is supporting institutions that are characterized as repressing marginalized groups due to their classification as threats to internal order. In contrast, social services, education, etc. underwent significant cuts. MINUGUA protested that these actions contravened the spirit and letter of the Peace Accords.

Jonas asserts that the government counted on the international community to finance the social programs, thereby leaving the elites free from making any sacrifices, including tax reforms:

*“Muddling through in this way means maintaining a dysfunctional state-that is, a state designed to be weak, to deliver no services, to defend privilege, and to obstruct access except for the elites . . . the resistances to tax reform and socioeconomic redistribution could become the Achilles’ heel of Guatemala’s peace accords and eventually undermine democratic gains. For example, ongoing and worsening poverty is one of the major factors contributing to an increase in social violence and common crime; this in turn has sparked calls for maintaining army involvement in internal security- a most definite threat to democratic gains.”*⁷²⁸

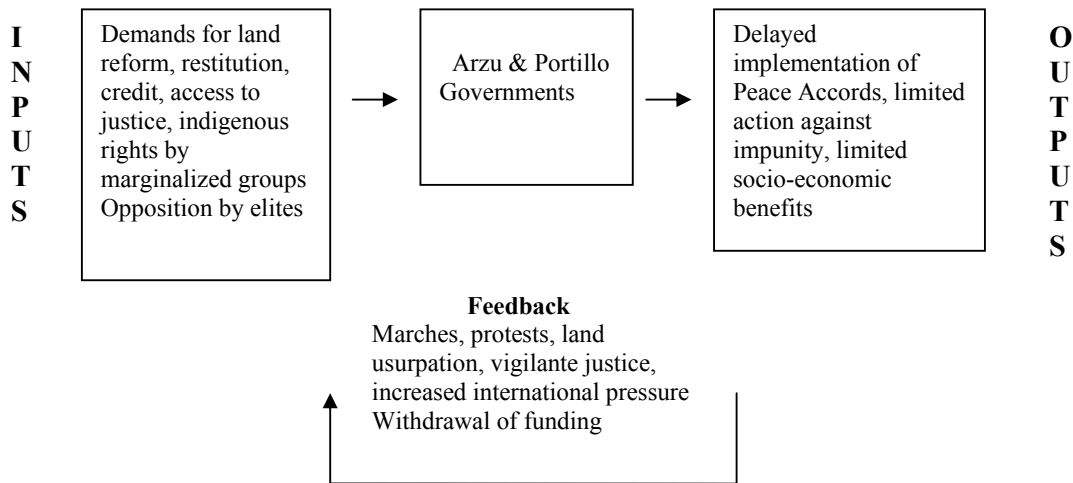
To some extent, the international actors may deepen the gulf between marginalized groups and the rest of society as well as the State by relieving the latter of responsibility over the former. CONIC’s spokesperson, Juan Tiney, states that the socio-economic conditions render conciliation within society difficult, as “(o)ne cannot negotiate poverty.”⁷²⁹ The citizenry has no faith in the state; as a result, marches, crime, and violence increased and donors threatened to withdraw funding

⁷²⁷ U.S. Department of State, Background Notes: Guatemala (May 2002). See also Freedom House, Freedom in the World-2001-2002, Table of Social and Economic Indicators, <http://www.freedomhouse.org>.

⁷²⁸ JONAS, supra note 29 at 169, 177 and 98 The battle for redistribution of wealth continues to the present time, consider the repeal of the property tax *Impuesto Unico Sobre Inmuebles* (IUSI) in 1998 and failure to raise % of GDP from taxes from a low 8% to 12%.

⁷²⁹ Interview with Juan Tiney, CONIC, 16 February 1998. CONIC’s legal advisor, Lic. Antonio Arguetta cites silence as the only concept which is democratically applied to all.

and declare the Peace Accords dead. The failure to implement the norms of social cohesion has left the State and the society polarized from each other.



We have reviewed the failure of the elaboration of national soft law norms, i.e. the Peace Accords, and implementing executive institutions to exemplify successful structural social capital due to lack of political will, insufficient resources, disorganization between institutions, and resistance by elites to change. Given that the international community had supported the Peace Accords as norms which would establish the basis for democracy, its non-implementation signals a failure to consolidate democracy. We may surmise that one of the main reasons for the lack of improvement of confidence in the State, in addition to the reign of insecurity and impunity (discussed infra section on impunity), is the government’s failure to enact substantive reforms within economic system so as to improve the welfare of the general populace. From the perspective of the rural peasants, socio-economic rights are the fundamental core of peace and democracy.

In my opinion, what is most tragic is the adoption of the view by Donors and international observers that perhaps the Peace Accords were indeed too extensive; had they been limited to a cease-fire they might have had a chance to be deemed a greater success. This view is unfortunate because it demonstrates an acceptance of the perspective promoted by the Guatemalan elites which argued in favor of traditional cease-fire agreement in order to avoid promoting any structural changes. In addition, it reveals the preoccupation of international actors of their own interests, i.e. success of the UN or of the Group of Friends as peace brokers in the immediate sense rather than committed peace builders which requires long-term efforts to dismantle the structures which repress of the poor.

The government continues to be considered the hand-maiden of elites as well as a pawn of the military. In the following sections, I review how the State's lack of responsiveness to the needs of marginalized groups has prompted rejection of formal mechanisms for placement of demands, increase in use of informal mechanisms, which in turn has resulted in a loss of support from international donors.

3.4. Confidence in the Government & Social Trust

Latinobarometro's calculations regarding Guatemalans' confidence in government institutions for 2000 are quite disturbing. I provide comparison to the 1996 figures, however it is important to take into consideration that the 1996 figures only included two categories: confidence or no confidence; whereas the 2000 figures included four categories: a lot of confidence, some confidence, little confidence, or no confidence, thus I merged the 2000 categories.

53% have little (33%) or no (20%) confidence in the President (1996 figure for government: 57% No confidence)

58 % have little (31%) or no (27%) confidence in the Congress (1996 figure: 52% No confidence)

50% have little (29%) or no (21%) confidence in the Army (1996 figure: 54% No confidence)

60% have little (36%) or no (24%) confidence in the police (1996 figure: 59% No confidence)

Although comparison of these figures demonstrated a slight improvement for the President and the Army in 2000, and a retrogression for the Congress and the Police, another poll revealed a significant decline of faith in the President, Head of Congress, and FRG political party by 2002:

Vox Latina revealed that **93%** of those polled did not trust the FRG party (1996 figure for distrust of all political parties was 62%), **92%** did not trust the Head of the Congress Rios Montt (strongman behind the President, deemed by 61% to retain the most power in the government), and **92%** did not trust President Portillo (deemed by only 12% to have the most power in government).⁷³⁰ Thus, there has been a significant deterioration with respect to civic faith in the president. The fact

⁷³⁰ It conducted a survey of 1,217 persons including indigenous people and ladinos, men & women, and rural and urban backgrounds. The margin or error was 0.02%. PRENSA LIBRE, "La poblacion desconfia de Rios Montt y el FRG" and "Encuesta: 82% reprueba la gestion de Alfonso Portillo" publishing poll results of Vox Latina (14 January 2002) at <<http://www.prensalibre.com>>

that Portillo is considered to be a mere puppet of Rios Montt reveals that democracy is deemed to be illusory.

Of primary concern, the Latinobarometro survey concluded that **61%** of Guatemalans stated that they were not very satisfied or not at all satisfied with democracy.⁷³¹ Examples of the society's waning faith in the government have been highlighted by editorials mocking the intervention by the FRG party in the Constitutional Court, the illegal alteration of legislation (*ley de bebidas*) by the Congress, and Portillo's appointment of former military officers with histories of violations of human rights to be in charge of internal security and law enforcement. Additional evidence is provided by the demands for an end to impunity and corruption, as well as a call for transparency in government in recent protest marches by the poor and human rights activists.

The State is considered to be fundamentally corrupt, elitist, and subject to excessive influence by the military (see *infra* on impunity). Diminished confidence in the State may be linked to low levels of social trust. Harris suggests that the degree of generalized social trust will rise when people consider State institutions to be legitimate and have confidence that the values and norms pertaining to them will actually be implemented in practice.⁷³² People are more likely to trust each other even in situations of uncertainty, e.g. in negotiations between individuals pertaining to different ethnic/class groups or communities or strangers, when they know that the State will enforce incentives and sanctions in the event of non-performance by a party.⁷³³ Further in this Part, I describe the legal system in Guatemala, indicating that there is a view that the formal law is non-inclusive of the norms of the indigenous people and contains provisions which serve to repress peasant actions seeking possession of land. The courts, executive agencies, and police are considered to be alternatively non-responsive or biased against the poor. Thus, the State does not provide the society with back-up incentives or sanctions in the event of breach of trust.

⁷³¹ Latinobarometro 2001. The rate of satisfaction among the seventeen Latin American countries only totalled **25%** responded that they were satisfied with democracy.

⁷³² JOHN HARRIS, *DEPOLITICIZING DEVELOPMENT: THE WORLD BANK AND SOCIAL CAPITAL* 121 (Left Word 2001).

⁷³³ *Id.* at 40 citing research by Brehm & Rahm referred in M. Foley & B. Edwards, "Is it Time to Disinvest in Social Capital?" 19 (2) *JOURNAL OF PUBLIC POLICY* 141-73 (1999); Harris also refers to the initial chapters (1-5) of ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY*, (Princeton University Press 1993).

As of 2001, the level of interpersonal trust declined to a lamentable level of **11%** and remained below the total rate within the Latin American region which was also disturbingly low: **17%**. By 2002 the Guatemalan figure raised somewhat to **14%** while the total average in the region was calculated at **19%**.⁷³⁴ However, the level remains highly deficient.

It has been suggested that low levels of interpersonal trust are associated with low levels of civic engagement. Thus corruption and ineffectiveness in the State not only result in loss of confidence in the State and other members of society, but also diminishes participation in policymaking processes, thus we witness a cycle that weakens democracy. Below, I review data pertaining to formal and informal participation in policy processes. The increased gap between the State and the Society reflected by the latter's complete disengagement in formal civic engagement.

3.5 Civic Participation

In this section, I review the extent of participation in the political system, by formal means, as exemplified by elections, membership in associations, and the constitutional reforms as opposed to informal means, e.g. protests, marches, and land invasions.

Guatemala has a large segment of the society which was traditionally parochial, many were repressed into subjects while others were provoked into violent participants during the war. At present, some are embarking upon a movement towards greater participation, although there remains a strong tendency among the majority to refrain from political activity. Rachel Sieder notes that:

*“. . . (T)he majority of the population enjoys, at best, a limited and subordinate local citizenship, which is often manipulated by powerful actors and which falls far short of the rights and duties or either national or universal conceptions of citizenship. . . The specific forms this exclusion has taken are the product of the exercise of coercive control by the state, and also, paradoxically, of the absence of the state, which facilitates other forms of dominion and exploitation . . . ”*⁷³⁵

⁷³⁴ Latinobarometro 2001 and press release for 2002.

⁷³⁵ Sieder, Rachel, "Rethinking Democratization and Citizenship: Legal Pluralism and Legal Reform in Guatemala", 5, paper presented at conference States of Imagination, Centre for Development Research, Copenhagen 13-15 February 1998. See Also Rachel Sieder, "Customary Law and Local Power in Guatemala", in RACHEL SIEDER, ED., GUATEMALA AFTER THE PEACE ACCORDS (University of London, Institute of Latin American Studies 1998): "Indeed, after more than a decade of democratization throughout the region, the formal political attributes of citizenship are now largely in

There is also a powerful minority which remains interested in retaining authoritarian political and economic control, under a guise of democratic structure in which certain civil rights, such as freedom of speech and assembly, were originally extended to marginalized groups as a palliative while others regarding social and economic rights continue to be repressed. As remarked by Evans freedom of peaceful assembly and association may be interpreted as norms promoting social capital because they center upon networking between individuals and groups in order to present organized demands upon the State.⁷³⁶ Unfortunately, Guatemala's hierarchical state structure supports policy making as a process to be fulfilled at the top by the political elite with little participation from voices below. This clashes with the growing culture of civic debate, exchange of information, and perception of a right to engage in policy making from below.⁷³⁷

Elites underestimated the power of freedom of expression, freedom of peaceful assembly, and freedom of association. They became concerned upon witnessing the emergence of thousands of peasants marching in the streets demanding land. As formulated in Article 19 of the CCPR, freedom of expression may be viewed as norm promoting social capital, in this case particularly transnational linking social capital, because enjoyment of this right may be contingent on linkages to other people, near and far:

“...this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”

Thus, marginalized groups may exchange information on rights with each other in order to plan organized strategies for approaching the State. In addition, thanks to the technological

place, but civil rights are far from consolidated and the socio-economic dimensions of citizenship appear even more unattainable for the majority.” P103.

⁷³⁶ Peter Evans, “Government Action, Social Capital and Development: Reviewing the Evidence on Synergy” in 24 (6) WORLD DEVELOPMENT 1119-1132 (1996) citing research by Jonathan Fox, “How Does Civil Society Thicken? The Political Construction of Social Capital in Rural Mexico” in 24 (6) WORLD DEVELOPMENT 1089-1103 (1996) and Patrick Heller, “Social Capital as a Product of Clas Mbilization and State Intervention: Industrial Workers in Kerala India” in 24 (6) WORLD DEVELOPMENT (1996).

⁷³⁷ Sieder, Rachel, “Derecho consuetudinario y transicion democratica en Guatemala, 16-17 (FLASCO 1996).

Indigenous and rural worker groups can help create democracy by voicing their concerns, suggesting policy reform, and following the policy making process from creation to implementation. Indigenous participation has increased in the 1993, although it remains stronger at the municipal level.. In the 1993, municipal elections, out of 148 mayoral offices, 92 were won by indigenous people. Demetrio Cojti Cuxil, “Governabilidad democratica y derechos indigenas en Guatemala”, in SIEDER, RACHEL (Ed.), GUATEMALA: AFTER THE PEACE ACCORDS, 63,70 (1998). Within the Congress, there are six indigenous deputies out of a total of eighty. In February 1999, 500 indigenous representatives adopted the Declaration of Solola in order to promote increased civic action by the indigenous population, noting that engagement in political action is a way of developing the culture of a nation. In Guatemala, these groups have been instrumental in educating the people about their rights under the Peace Accords, and the political/legal structure. Their participation ranges from organizing marches in demand of land to publishing cartoon books to educate persons about the Peace Accords. However, the extent of information and participation varies tremendously according to region. Olga Lopez Ovando, “Crean el escenario civico politico maya” in PRENSA LIBRE 28 February 1999.

achievement of the email, national NGOs, human rights activists, or organized groups also provide instantaneous, comprehensive information regarding the stagnation of the Accords as well as diminishment of the rule of law to those in a position to penalize the State financially (Donors) or provide criticism before other States (UN, International NGOs).

3.5.1. Formal Participation

3.5.1.1. Elections

Susanne Jonas aptly points out that electoral politics in Guatemala do not correspond to democratic standards:

“Virtually all political arrangements from 1954 until the mid-1990s were dominated by the coalition between the army and economic elites; they were based on an explicit rejection of reformist options and political exclusion of the majority of the population. . . even the return of elected civilian government in the late 1980s did not signify a return to democracy in any meaningful sense, nor did it address any of the glaring socioeconomic disparities. Hence, the popular and indigenous majorities of the population were not able to seek redress of grievances through electoral means, instead they pressured through extraparliamentary (mainly unarmed) organizations, which the army and government deemed ‘subversive’ and subjected to levels of repression unmatched anywhere in Latin America.”⁷³⁸

As the years pass the manifestation of civic faith appears to be quite low, although there are 11 political parties. In May 1998, only **39.81%** of the electorate in Guatemala voted in the legislative elections. Part of the reason for the low turn-out may be the fact that voting centers are usually placed in municipal capitals, which are often not easily reached by the rural population. In February 1999, the Supreme Electoral Tribunal sent a draft law for approval by the Congress which would establish voting centers in smaller towns and offer free transportation to these sites in order to facilitate voting by rural peasants. In addition, it recommended changing the date for elections so that the farm laborers would be able to vote before they were occupied with the harvest. Unfortunately, the Supreme Electoral Tribunal was unable to complete such reforms allegedly due to its need to address the Constitutional referendum. The reforms were not adopted. Concern for civic participation had

⁷³⁸ JONAS, supra note 29 at 17-18 (Westview Press 2000) Participation in elections is usually cited as an indicator of civic faith in the democratic process. The elections of 74, 78, and 82 are dismissed as fraudulent. In 1984, transition to democracy was embarked upon by the election of a Constituent National Assembly and drafting of a new Constitution (entry into force 1986). The following year, over 70% of registered voters participated in the first presidential election since the military rule, electing Vinicio Cerezo of the Guatemalan Christian Democratic Party. This election was considered to be “severely restricted and unrepresentative of large sectors of the population, as only rightist and centrist parties that had reached agreement with the military were allowed to participate.” Jonas characterizes this regime as a “a civilian version of the counterinsurgency state” which limited pluralistic politics. He was followed by Jorge Serrano Elias who was elected with 70% abstention rate, no opposition parties participating. Serrano later removed by the Army after he had committed an auto-coup by suspending the Constitution and shutting down the Supreme Court, Congress, and Attorney General’s Office (1991-93). The successive elections are also considered to be non-representative of the political populace. In 1984, transition to democracy was embarked upon by the election of a Constituent National Assembly and drafting of a new Constitution (entry into force 1986). Jonas characterizes the civilian regimes from 1986- mid 90’s as allowing the army to rule from behind the scenes, and limiting their own autonomous action.

been previously expressed by State officials during review of its Initial Report on the International Covenant of Civil and Political Rights to the Human Rights Committee of the United Nations. Referring to previous elections, the State itself observed that:

“The low voter turnout in Guatemala was largely attributable to the population’s total lack of confidence in government institutions. In addition, faith in elections and democracy had been severely dented when Guatemala’s first freely elected civilian Government had failed to address the real needs of the people.”

In December 1999, the first presidential election since the signing of the Peace Accords was held; the abstention rate totaled **58.93%**.⁷³⁹ Alfonso Portillo, of the Frente Republicano Guatemalteco (FRG) received 68.29% of the vote as opposed to the Partido de Avanzada Nacional (PAN) party’s candidate, Oscar Berger, who received 31.71%. Portillo’s election provoked some concern among donors due to his link to the FRG and its leader, General Efraim Rios Montt who was blamed for the creation of the civil self-defense patrols (PACs) which committed gross human rights abuses during the civil war. Portillo presented himself as concerned with the PAN’s inability to remedy the socio-economic inequities within the nation, however some commentators fear that the vote was in favor of a return to repression of criminal activity which risks increasing human rights abuses. Patrick Costello provided warning of such action in 1995 when he noted:

*“The question pending is whether the agro-export elite and their military allies will allow the peace accords to be implemented, which would mean giving up a significant amount of power, or whether they will obstruct the process, generating such a level of social chaos that the electorate will turn to Rios Montt as a candidate of law and order.”*⁷⁴⁰

The elites feel increasingly threatened by increased kidnappings, usurpation, robbery, and other activities which some link to the poverty and social exclusion brought about by lack of land reform, hence they call for a return to authoritarian tactics. Portillo himself admitted having killed two persons 17 years ago, allegedly in self-defense in Mexico, and fleeing afterwards due to fear of an unfair prosecution. Ironically, rather than dampen his popularity, it raised support among people tired of rampant crime, and ineffective justice system, and increasingly accustomed to vigilante justice. After taking office, Portillo received criticism regarding the legitimacy and autonomy of his office vis-a-vis the legislature, which now had Rios Montt as its President. Some claim that it is an oligarchy disguised as populism. In

⁷³⁹ Grupo Política y Poderes, “Alfonso Portillo es el nuevo presidente”, PRENSA LIBRE 27 December 1999.

⁷⁴⁰ Patrick Costello, “Guatemala: Displacement, Return and the Peace Process, para 4.2. (WRITENET APRIL 1995) available in <http://www.unhcr.ch/refworld>.

2001, 300 indigenous people filed a complaint with the Public Ministry, charging Rios Montt for having engaged in genocide.

The UNDP published a study on the civic culture in Central America, based on the findings of the Latinobarometro. It revealed that **49%** of the Guatemalan populace did not believe that their vote would be able to improve the future situation.⁷⁴¹ In addition, there appears to a lack of faith in the procedural mechanism of voting, given that **48%** of the people believed that the elections were fraudulent.⁷⁴² A total of **79%** of Guatemalans did not believe that the politicians were concerned with the same issues as themselves while **80%** indicated that politicians offered few or no solutions to the country's problems.⁷⁴³ Regardless of the causes, the effects demonstrate the limited advances in the perception of state procedures as being objective, responsive, or democratic. Thus participation via formal channels remains insignificant due to the State's illegitimacy, lack of transparency and lack of accountability. Daniel Pascual of CNOG noted that in his opinion the rural peasants are indifferent to whether the left or right wing parties, as long as the government comes forth with a resolution for the land problem. Given the failure of the key parties to prove responsive to the needs of marginalized groups, the populace has diminished interest in voting.

⁷⁴¹ UNDP, EL DESAFIO DEMOCRATICO: REFLESIONES DE LAS SOCIEDADES CENTROAMERICANAS ANTE EL RESULTADO DEL LATINOBAROMETRO 1996, 24 (1997).

⁷⁴² Id.

⁷⁴³ Id. at 29-30.

3.5.1.2. Associations

As noted by de Tocqueville, the organization of the citizenry into associations is a fundamental mode of promoting greater political participation within a nation.⁷⁴⁴ Guatemala may be classified as a multiethnic society lacking sufficient inter-ethnic (ladino-indigenous) civic associational engagement to promote peace.⁷⁴⁵ Guatemalans have a low rate of engagement in civic associations. The majority participate in religious groups, and very few participate in political parties, indeed this correlates with the fact that the people have far more confidence in the Church (67% high level of confidence) than in political institutions (see sections on confidence in the Government and Judiciary)⁷⁴⁶:

Participation in Organizations

58% *Religious organization*

9% *Community organization (8% in 1996)*

4% *Artistic organization*

4% *Unions (3% in 1996)*

9% *Environmental organization*

12% *Professional Organization*

11% *Youth Organization (an increase from 6% 1996, which may reflect donor support of youth groups)*

20% *Sports Clubs (an increase from 12% in 1996)*

3% *Political Party (1% in 1996)*

0% *Other organization*

22% *Does not participate in any organization*

It has been claimed that there is a paradox given that **76%** of the people believed that participation in organized actions helps to resolve community problems

⁷⁴⁴ de TOCQUEVILLE, ALEXIS, DEMOCRACY IN AMERICA 189 (Anchor Books 1969).

⁷⁴⁵ See generally ASHUTOSH VARSHNEY, ETHNIC CONFLICT & CIVIC LIFE 299 (Yale University Press 2002).

⁷⁴⁶ Figures from Latinobarometro 2000. The 1996 poll also included mothers' groups (**3%**) and volunteer associations (**5%**). Latinobarometro 1996, cited in UNDP, EL DESAFIO DEMOCRATICO 58 (1997).

and **72%** believed the same with respect to national problems.⁷⁴⁷ Indeed, in terms of contacting institutions, Latinobarometro found that as of 2001, **76%** of Guatemalans had never contacted local authority, **92%** had never contacted a government official, **95%** had never contacted a Congressman or a Senator, **94%** had never contacted a political party, **79%** had never contacted an NGO, and **89%** had never contacted the media.⁷⁴⁸

Many of the present-day organizations representing workers, peasants, IDPs, widows, etc. appeared during the initial peace negotiations and were an effort by society to combat repression by the State which itself stimulated the nefarious forms of organization under its control- the PACs.⁷⁴⁹ According to AVANSCO, there are three types of organizations. The first type includes organizations which are recognized by the State via the grant of legal personality (totalling over 4.000) such as:

- a. *civic associations (This includes ca. 3/4 of the total organizations, including those identified by religious affiliation, social assistance, peasant workers, Mayan ethnicity, social movements, women's groups, research institutions, etc),*
- b. *committees, cooperatives, foundations, unions (forming ca. 11% of organizations), and political organizations (ca. 5%).*

These pursue union, political, religious, social, cultural, professional or other interests. Their activities target economic production (agriculture, services, savings & credits, consumption, etc.), basic development concerns addressing human needs not met by the State (35% of total activity), revindication of specific interests (worker's rights, indigenous rights, human rights, IDP and Refugee rights, women's rights, environmental protection, etc.), and proselytising politics or religion.

The second group is not legally separated from first level groups- they include combinations of the first groups into federations (forming over 90% of the total second level groups), unions, coordinators and chambers. The third level (totalling 0.3% of total organizations) includes second level groups which are coordinated at a higher level, including confederations (over 73% of the third level) and coordinators. Thus, the overwhelming majority of organization is composed of local groups.

AVANSCO concluded that there is a reason to be concerned about the tendency of the social groups to atomise and engage in disperse activities which would ideally require joinder in order to attain effective results. In addition, it added

⁷⁴⁷ Id. at 59.

⁷⁴⁸ Latinobarometro 2001.

⁷⁴⁹ AVANSCO, Las organizaciones sociales en Guatemala (AVANSCO August 1997).

that the focus of many groups on local development initiatives oriented towards meeting elemental human needs promotes particularistic or privatized solutions to issues which should be resolved by the State and in turn prevents attention from being placed on more advanced issues. In other words, the groups may be distracted from addressing “the big picture” regarding structural inequities at the national level or other concerns pertaining the maintenance of a democratic system. From a systems perspective, the local activities may actually inhibit joined actions to present collective demands directly to the state in a manner which would prompt response. However, in the section on informal participation I present the strategies pertaining protests which demonstrate increased awareness of the strength of unity among social groups.

I confirm the supposition that the inequitable structural background in Guatemala inhibits civic engagement because the people’s basic needs are not met and they remain imprisoned by social exclusion. As discussed in the section on the Constitutional Reforms, in the aftermath of the failure of these reforms donors and representatives of the international organizations lashed out against the society for showing weak engagement by failing to participate in the referendum. Much to my shock, UNDP and MINGUA representatives, albeit speaking in their individual capacities, blamed the society’s own weakness for the failure of Peace Accords rather than the network of elites which promote the exclusion of marginalized groups.⁷⁵⁰ In spite of the fact that the peasants have increased the amount and size of their participation in protest marches and land invasions as a way of presenting their demands on the State to enact substantive land distribution, the speakers ruefully noted that the society was not sufficiently organized and “The possibility of articulating the national demands with regard to implementing the Accords is negligible.”⁷⁵¹

⁷⁵⁰ I am reflecting on commentary made to me by donors and international organization officials both in Guatemala in 1999 and later in 2001 at a conference hosted by PRIO in Oslo, Norway. See papers by: Dr. Edelberto Torres Rivas (UNDP), “Have the Peace Accords in Guatemala been a Success?”, Juan Pablo Corlazzoli (MINUGUA/UNDP), “UN Involvement in the Peace Process from Negotiator to Verifier”, and Ana Maria Tello (MINUGUA), “What Lessons from Peacebuilding in Guatemala are applicable to other Internal Conflicts?” papers presented 12 December 2001 at PRIO Conference “Guatemalan. Five Years after the Peace Accords.” available at <http://www.prio.no>. Frank La Rue, of the NGO CALDH, responded to the string of arguments presented by the speakers by listing all of the corrupt acts conducted by the President and his allies in only the past few months of 2001.

⁷⁵¹ See Ana Maria Tello, Id.

One speaker highlighted the positive use of spaces at the local and departmental levels for presentation of demands, thus promoting the current view that “decentralized strategies” are preferable, even if they are unable to demonstrate any impact at the national level. This view is in direct contradiction of the AVANSCO study’s conclusions and thus demonstrates a complete lack of understanding of the negative aspect of the concentration of marginalized groups in local activities which inhibit true emancipation due to distraction from the larger structural issues that lie at the root of their exclusion. Hence, these speeches pursued Robert Putnam’s conception of social capital as primarily based on horizontal, voluntary associations as well as formal participation in elections and referendums. They failed to appreciate the obvious increase in informal participation which revealed that society was actually more engaged than otherwise admitted, in the sense that they seek a national solution to their problems, i.e. land reform.

Thus, it would appear that the peasants are forgoing use of formal mechanisms for participation because they do not have sufficient confidence in the State as pertaining its norms and implementation of them or its responsiveness to their needs. An additional factor includes the fact that they often lack the means by which to participate, either physical such as transportation, or cognitive such as literacy. Other people may forego political participation because they remain scarred due to the loss of family members or friends who were assassinated, tortured, imprisoned, etc. for expression of political views. The experience of severe repression, which remains ongoing according to the UN Representative on Human Rights Defenders, may promote passivity on the part of surviving relatives and friends. In other words, weakness of social capital is a symptom of exclusion not a cause. Putnam himself recognizes that disadvantaged areas lack social capital, but whereas he advocates an infusion of social-capital intensive strategies (although admitting that they will be challenging to pursue), I would advocate combating poverty itself.⁷⁵²

We may recall Putnam’s description of slavery:

*“ . . . a social system designed to destroy social capital among slaves and between slaves and freemen. Well-established networks of reciprocity among the oppressed would raised the risk of rebellion, and egalitarian bonds of sympathy between slave and free would have undermined the very legitimacy of the system.”*⁷⁵³

⁷⁵² ROBERT D. PUTNAM, BOWLING ALONE 317 (Simon & Schuster 2000).

⁷⁵³ Id. at 194.

In Guatemala, the neo-feudal economic system and racist social structures repress the development of solidarity among marginalized groups and maintains elites and the poor peasants polarized from each other, thus there is little linking social capital.

I sought unstructured interviews with members of politically active associations, specifically CONIC, CUC, CNOC, CONDEG, and CONAVIGUA. Below, I present their views on their function and possibility of influencing policy change (I do not present CONAVIGUA and CNOC in this section, although I refer to their input in different parts of the study). Of interest CONAVIGUA has received the most recognition at the international level, perhaps because they appear innocuous as widows, in contrast to the more threatening males within the peasant organizations (CUC's insignia is composed of a raised fist). Fortunately, CONAVIGUA has become quite strong in sending the message to the international community for the need to address socio-economic rights; consider Rosalina Tuyuc's frank observation before the FAO in June 2002:

*"Nobody notices the deaths of indigenous people in Guatemala due to starvation. There is no investment to fight hunger. I believe that there is more investment in the world and in Guatemala for military affairs than for fighting hunger."*⁷⁵⁴

The disproportionate distribution of the Guatemalan National budget with respect to the Military as opposed to social welfare is well-known to Donors and a key point of frustration (recall the commentary by the CESC infra Part II).

The positions taken by the selected associations reflect only the views of an active minority, although their interests may in theory be shared by larger sectors of the general populace. It is important to understand the role of the associations representing marginalized people which actually place demands on the State and respond to its policy output. These groups are weak not only due to low membership, but also because they suffer from scarce resources and are often subject to attack and threats by non-state and state agents. I interviewed members of some of the principal associations addressing land and displacement issues in order to ascertain how they viewed their function vis-a-vis the construction of policies regarding dispute

⁷⁵⁴ "Mujer Campesina vive en la miseria" in PRENSA LIBRE 13 June 2002.

resolution of land conflicts. I request the reader to also read the section on land protests in order to understand the extent of their organized actions.

CONDEG

The National Council for Displaced Persons, Consejo Nacional de Desplazados (CONDEG) was established in December 1989 to unite the dispossessed within Guatemala and identify their human rights violations. It represents the dispersed displaced who did not organize in the mountains as the Comunidades de Pueblos en Resistencia (CPRs). As mentioned previously, the State and the international community have unfortunately neglected IDPs by providing primary efforts of identification and assistance to refugees.⁷⁵⁵ CONDEG's communities are presently located in the Peten, Quiche, the Southern Coast, and Guatemala City. Its membership totals approximately 35,000 persons, although the actual number of displaced is considered to be as high as 250,000. The Government, international community, and many researchers have primarily focused on land conflicts in the Peten, which includes lands held by the military. CONDEG itself is more interested in the Southern Coast. It states that this is fertile land, dedicated to coffee and crops, which remains largely in the hands of private landowners and agricultural entrepreneurs whose titles may be of dubious legitimacy. The majority of the displaced in this region belong to Quiche and Mam ethnicity. In general, they are in constant pursuit of land and tend to engage in short term agricultural production (by single season or year) due to repetitive evictions.

CONDEG hopes to eventually convert into a general peasant organization once the problem of displacement is solved.⁷⁵⁶ Its aspiration correlates with the government's view that displacement is a transitory problem in Guatemala. Natalio Santos of CONDEG claims that "The people are tired of war", providing evidence of a type of "social kinesthesia" which moves towards the abandonment of policies of strong action in favor of those exhibiting patience and tolerance, thus providing a respite for the actors. It should be noted, however, that Santos admits that significant

⁷⁵⁵ Interview with Gordon Hutchinson, Project Counselling Service Costa Rica, 27 February 1998. See Also UNDP/UNHCR: CIREFCA: An Opportunity and Challenge for Inter-Agency Cooperation 11 (1987).

⁷⁵⁶ Interview with Natalio Santos, CONDEG, 9 February 1998.

change has yet to be achieved. Thus the demonstrations, protests, and land usurpation are likely to continue in spite of the organization's own voiced desire to pursue dialogues.

The government is accused of not accepting the internally displaced communities. It rejected a proposed Document of Understanding between CONDEG and the Government. CONDEG complains that the Government does not want to identify the internally displaced as a group in order not to discriminate against other peasants. It labels them to be "economic IDPs" in order to de-legitimise their claims.

IDPs complain of lacking the same rights as returnees. Other organizations criticize CONDEG for being too passive and thereby relinquishing its right to vindication. CONDEG's political participation consists of negotiation with the government, formulation of strategy with refugee and peasant organizations, marches, assistance in filing land claims (see *infra* discussion on land institutions), and referral of disputes for conflict resolution by the State, international agencies, or NGOs.

CUC & CONIC

Comite de Unidad Campesina (CUC) is an organization which seeks to promote the advancement of the position of the rural peasant and has been active within the realm of land rights. CUC representatives expressed deep frustration over land distribution issues. They are willing to give alternative dispute resolution a chance in the interest of promoting peace, however they warn that if no substantive advances are made, their organization shall return to violent measures. As of February 1998, CUC registered 39 cases with CONTIERRA, 15-20 cases with the Land Fund, and had engaged in 30 marches.⁷⁵⁷ Coordinadora Nacional Indigena y Campesinas' (CONIC) membership includes 6000 peasants, primarily of Mayan descent, who constitute fewer than 5% of the total rural population. Its current activities involve the defense of colonos facing evictions from lands, which they claim to have lived on for many generations and placing demands for better land distribution. It demands the restitution of unpaid wages to rural workers and the provision of alternative lands and housing. In general, CONIC's present strategy is to negotiate with the State and landowners. As of 1998, CONIC claimed to be engaged in 29 conflicts involving

⁷⁵⁷ Interview with Daniel Pascual Hernandez, CUC, 4 February 1998.

15,000 hectares of land and 3500 families. The court is turned to only as a last resort, due to lack of resources and frustration with the judicial system. CONIC accuses the judges of being paid off by the finca owners. CONIC registered twenty cases in court which have languished an average of two-three years on the dockets without resolution. It views the law as being subject to racism, corruption, and impunity in application. Their stance is a bit confrontational, noting further that “Dialogue without conflict is not dialogue”.

CONIC estimated that there were approximately 90 conflicts within the nation which involve a combination of land and labor rights and was involved in ca. 60 land invasions. It turned over 35% of these cases to CONTIERRA. Although CONIC claims that it would like to turn over all cases to CONTIERRA it is concerned that the institution is too small to handle all the cases.

The State accuses CONIC of engaging in land usurpation, however CONIC defines their actions as “land recovery”. The finca owners are accused of having false titles, which at times the judiciary seems to validate over the claims of peasants as to possession based on past colonization. Of interest is that CONIC has never attempted to base a claim on the right of prescription as recognized in the Civil Code. Thus they lack knowledge as to how to use the law to legitimize their claims, although they may indeed have lost hope due to their lack of success when pursuing claims based on Constitutional guarantees of indigenous land rights. With respect to internally displaced communities, as of 1998 they represented 25 such communities. The peasant organizations have expressed their increased use of the law by way of education and lawsuits. They remain suspicious of the law as biased and call for legal reform. The court system remains dilatory, and CUC suspects apprehension on the part of judges to create precedents which will result in more complaints demanding land. Both CONIC and CUC form part of CNOC, the National Coordinator of Peasants which organizes marches, participates in negotiations with government officials and landowners, and determines strategies for political, legal, and extra-legal actions.

These associations are presently facing intimidation tactics including threats, violence, assassination, kidnapping, and formal prosecution of leaders in courts for participation in usurpation actions. There is a strategy to repress organized groups in order hamper concessions by the State resulting from international and domestic pressure. Peasants are permitted to express themselves, as long as their voice is not

too loud. We may consider the example of the failed Constitutional Reforms which provides a case study in the clash of norms, forms of participation, and failed output.

3.5.1.3. Constitutional Reforms

“Among the chief reasons for drafting a constitutional text is the hope of reducing conflict”.

*Walter Murphy*⁷⁵⁸

In this section, I provide a detailed account of the debate surrounding the elaboration of the constitutional reforms and the ensuing referendum. It is presented as a case study in order to reveal the key problems regarding the complexity of defining what are the legitimate norms of a multicultural society and forms of participation.

Constitutions are often viewed as socializing factors in the sense that they condition people to accept the laws and processes of the system. When the system is viewed as illegitimate, call for constitutional reforms may be pursued in order to change the laws or processes. The Commission for the Strengthening of Justice issued recommendations for constitutional reforms regarding the administration of justice. It stated that the administration of justice “is directly linked to the growth and stability of the democratic system” and that the Constitution contained obstacles to its reform.⁷⁵⁹ The Constitution was drafted in 1985 and includes a section delineating

⁷⁵⁸ Walter Murphy, “Civil Law, Common Law, and Constitutional Democracy” in 52 LOUISIANA LAW REVIEW 91, 126 (1991)

⁷⁵⁹ Comision de Fortalecimiento de la Justicia, Informe y recomendaciones sobre reformas constitucionales referidas a la administracion de justicia, 11 (Magna Terra Ed. Jan. 1998). The Commission also cited the following areas of concern, which are more directly linked to the institutional framework of the Judiciary:

1. *Clear definition of the jurisdiction of the Supreme Court.*
2. *Establishment of conditions for election to of the Supreme Court.*
3. *Reform of the Administration of Justice as headed by the President of the Supreme Court and increase in the provision of funds to the Judicial Organ and Public Ministry.*
4. *Reform of the Council of the Judicial Organ*
5. *Reform of professional standards for participation in the judiciary*
6. *Limitation of the jurisdiction of the military justice system to judge crimes and misdemeanors committed by military personnel.*
7. *Establishment of the National Civil Police as the only armed police*

human rights and declaring the primacy of international law. However, it was considered to be incomplete regarding indigenous rights, civilian control over the Army, and structural aspects regarding the three branches of government. On the part of the donors, the reforms were viewed as an effort to translate the provisions of the non-binding Peace Accords into formal law. To some extent it seemed a bit grandiose to have sought so many reforms in the most fundamental body of law, it would have been more practical to pursue each issue in separate legislation. However, the difficulties encountered by the lobby groups in attaining new laws may have led to frustration with the normal process. For example, draft bills have been deferred to the point of disappearance or have been subject to such significant tampering so as to lose much of the language originally intended. To call for a constitutional reform may be viewed as a way of bypassing legislative politics and taking the matter more directly to the people. However, it remained extremely politicized at the level as well.

It should be noted that constitutional reforms are sometimes viewed suspicion, when considered to be a mere symbolic recognition of rights to the oppressed who are expected to render their support, and subordination to the regime.⁷⁶⁰ Indeed, during the debates, the reforms came to serve as symbols for opposing interest groups within the society. In my opinion, one of the most divisive issues within the debate on the Constitutional reforms was recognition of indigenous law. The Commission advocated reform of the Constitution to include recognition of the validity of indigenous norms as forming a legitimate part of the legal system:

“ . . . A norm recognizing the existence of the principles, criteria, and procedures which the indigenous peoples develop to resolve conflicts between members of their community, as well as the validity of their decisions, on condition that they do not violate rights which have been recognized in the Constitution and within international human rights treaties.”⁷⁶¹

In addition, recognition of the “multiethnic, multicultural, and multilingual character of the country as a guarantee before the administration of justice” as identified within the Agreement on the Identity of the Indigenous Peoples, the right to utilize one’s own language within the justice system, the provision of legal aid to the poor, and the

*forces acting under national authority.*⁷⁵⁹

⁷⁶⁰ Capelletti, “Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice” in 35 CATHOLIC UNIVERSITY LAW REVIEW at 219 (1985).

⁷⁶¹ Id. at 23 (version from October 1997).

adoption of alternative dispute resolution mechanisms were cited as relevant issues to be addressed within the debate for Constitutional reform.⁷⁶² Draft reform article 203 stated:

*“The State recognizes indigenous law, understood as the norms, principles, values, procedures, traditions and customs of the indigenous peoples for the regulation of their internal harmony; as well as the validity of their decisions, as long as subjection to such is voluntary and does not violate the fundamental rights defined by the national legal system, international human rights treaties and covenants accepted and ratified by Guatemala, nor shall it affect the interest of third parties.”*⁷⁶³

It was drafted very carefully to limit the reach of indigenous law. Its “internal jurisdiction” and conditioning on voluntary participation was highlighted. The limitation set by the national and international legal system as pertaining fundamental rights is clear and in keeping with similar provisions in other constitutions, for example Colombia. Newspaper opinion pieces engaged in fierce debates as to what effects the recognition of indigenous law would have on the society in the future.⁷⁶⁴ There was evident fear by the minority to give special recognition to the oppressed majority. The creation of a dual system of laws was viewed as possibly threatening national unity and territorial integrity. In addition, some considered that a dual system of laws may well undermine the legal structure without a clear system for resolving conflict of laws and setting forth the *lex superior*.⁷⁶⁵ However, given that the proposed provision does indicate that indigenous law must not contravene the fundamental rights set forth within the national legal system & human rights instruments it could be argued that the principal problem lies in the definition of what is considered to be a fundamental right and what type of action would constitute a violation. This has been the case within the jurisprudence of Colombia’s Constitutional Court, and it is likely to arise within Guatemala in the future.

In November 1998, a Gallup poll was conducted to measure the extent of knowledge among the population regarding the upcoming constitutional reforms. It indicated low levels of knowledge pertaining the Constitution, the reforms, and the physical location of the voting centers (the statistics are based on 1,200 interviews):

⁷⁶² Id. at 28.

⁷⁶³ Myriam Larra, Logran acuerdos acerca del Derecho Consuetudinario”, in PRENSA LIBRE, 10 September 1998.

⁷⁶⁴ See for example Cristy Lopez-Ibanez, “Identidad y derechos del pueblo guatemalteco” in Siglo XXI, 17 October 1998; Franciso Villagran Kramer, “Dos sistemas de justicia?”, in Siglo XXI, 8 October 1998. Noting the possibility of complicating the administration of justice by accepting indigenous law as a possible means of derogating from written law.

⁷⁶⁵ Kramer, Id.

“Have you ever heard of the Constitution?:

Yes 61% No 39%

Have you ever heard of the Constitutional reforms?:

Yes 51% No 40% No response/ Don't know 9%

Do you agree that the Constitution should be reformed?:

Yes 37% No 32% No response/ Don't know 31%

Do you know where you can vote in order to ratify the reforms?

Yes 36% No response/Don't know 64%

How would you vote in February?

Yes to the reforms 27%, No to the reforms 9%, No response. /Don't know 54%”⁷⁶⁶

A fierce debate emerged regarding the procedures for approval of the constitutional reforms. Some critics asserted that the drafting of the reforms was conducted in a secret, exclusionary manner which prevented input by certain sectors of the society.⁷⁶⁷ Others claimed that it represented the interests of the “*ex-guerrillas*”.⁷⁶⁸ The discussion began in the Congress, carried over to a Multi-Party Proceeding, and finally to a Party for National Advancement (PAN) commission composed largely of members of the Executive. It was argued that the Congress did not discuss the proposed reforms presented by the social sector, in violation of Article 277 of the Constitution.⁷⁶⁹

⁷⁶⁶ Fernando Dieguez, “El Si ganaria la consulta popular”, in PRENSA LIBRE 30 Novembver 1998. Estuardo Zapeta, “Acuerdos de paz no son superiores a la Constitucion”, in Siglo XXI, 9 October 1998. Of special significance is that these interviews were not conducted in the Peten or Alta Verapaz, precisely the regions which have a significant indigenous population living under severe poverty.

⁷⁶⁷ See for example, Victor Ferrigno, “Cabildo Abierto: Democracia y Consitucion”, in PRENSA LIBRE, 12 January 1999; Villagan Kramer, “Reformas pueden conducir al fraccionamiento del pais”, SIGLO XXI, 9 October 1998; SIGLO XXI, “Editorial: Confusion en la reforma consitucional”, SIGLO XXI, 10 October 1998.

⁷⁶⁸ Estuardo Zapeta, “Acuerdos de paz no son superiores a la Constitucion”, in Siglo XXI, 9 October 1998.

⁷⁶⁹ This article states that the people may propose amendments to the Constitution by way of a petition signed by at least 5,000 citizens to the Congress which in turn “must address without delay whatsoever the issue raised”. Article 280 of the Constitution requires an amendment initiative to receive an affirmative vote by a vote of two-thirds of the total number of Congressional deputies and to be subjected to a referendum called by the Supreme Electoral Tribunal on the initiative of the President of the Republic or the Congress for the approval by the citizenry. The Constitution states that the referendum procedure must involve “all citizens”, but it does not state

Others argued that there was significant participation by the justice sector, in the form of the Commission for the Strengthening of Justice, which included the President of the Judicial Organ, judges, the legal advisor to CACIF, the deans of the law schools of the University of San Carlos and the University Rafael Landivar, the legal advisor to Mayan Organizations, the Director General of the PNC, the legal advisor of the Public Ministry, and other prominent attorneys.⁷⁷⁰ The Coordinator of the Mayan People, COPMAGUA, and the Assembly of the Civil Society also participated in constructing the reforms. Thus, these groups claimed to represent diverse interests, including indigenous people and even the displaced.

A further issue was when to hold the referendum. The Newspaper Siglo XXI stated that it would be better to hold the referendum on the same day as elections, in order to minimize abstention.⁷⁷¹ Other groups were concerned that holding the referendum on the same day as elections might be seen as a lobbying effort for the PAN. PAN officials expressed their support for separate voting days, however the president of the Congress stated that the party wished to implement the referendum in 1999.⁷⁷² The Vice President of the Republic indicated that this eagerness was a result

whether voting should be mandatory. Article 173 governs the referendum procedure and its procedural guidelines are rather broad:

“Political decisions of special significance will have to be submitted to the referendum procedure involving all citizens. The referendum will be called by the Supreme Electoral Court on the initiative of the President of the Republic or the Congress of the Republic, which will determine precisely the question or questions to be submitted to the citizens.”

In 1994, another referendum regarding the reform of 45 articles of the Constitution resulted in an abstention rate of 84.13%. This reform involved nine different subject matters and was formulated as a single “Yes or No” question. The Constitutional Court was asked to render an Advisory Opinion and did not find fault with the formulation of the question. The Congress argued that this established a precedent. However, the Constitutional Court did not consider it to be a binding precedent given that it was an advisory opinion issued in response to the fact that the Supreme Electoral Tribunal had drafted the question rather than the Congress, when the responsibility fell to the latter entity. Thus, the issue at hand was not the number of questions, but rather discerning which institution was responsible.

⁷⁷⁰ Serfio F. Morales A., Sintesis, Reforma constitucional, PRENSA LIBRE, 11 January 1999. Lucy Barrios, “Constitucion: Nuevos vicios”, in PRENSA LIBRE, 12 January 1999. Siglo XXI, “Editorial: Confusion en la reforma constitucional”, in SIGLO XXI 10 October 1998. Id.

⁷⁷¹ Siglo XXI, “Editorial: La consulta popular debe ser por temas”, in SIGLO XXI, 13 January 1999. Michelle Garzaro & Juan Carlos Perez, “Consulta popular: El congreso presento alegato contra amparo”, in SIGLO XXI, 14 January 1999.

⁷⁷² Olga Lopez Ovando & Julieta Sandoval, “Consulta Popular: Otra Impugnacion” in PRENSA LIBRE 28 January 1999.

of the party's interest in "the celebration of civic activity" and thus was making "all possible efforts to achieve it."⁷⁷³

The third issue was whether to present the constitutional reforms for approval by the society as a package or require votes on each individual reform. One commentator noted that:

"To realize a popular consultation in which each question merits a response, may be utilized in order to manipulate the results and impose the criteria of the most powerful, closing the doors to the aspirations of other groups. Exclusion was the foundation of the internal armed conflict."⁷⁷⁴

Great concern was that the interest groups would approve the package in order to attain their particular interest, disregarding other reforms, which may be of dubious construction.

The newspaper Siglo XXI reported that in addition the Congress inserted additional articles to proposed reforms after they had already been approved.⁷⁷⁵ It stated that in contrast to the principle that "a nation's fundamental law should only be reformed on a rare occasion and in an extraordinary manner", the Guatemalan Constitution had been reformed more than twenty times. It contended that reform should be "the product of a wide national debate on a small group of specific norms" in order to reflect popular will.⁷⁷⁶ The creation of a large package of reforms vastly widespread in subject matter and degree of legitimacy was viewed as "the same old politicians getting their hands on the proposed new constitutional text, with the sole purpose of obtaining advantages for them and their groups . . ."⁷⁷⁷ Observers noted that the 50 reforms were so complicated that even well-educated professionals, including lawyers, could not understand them; hence how could illiterate peasants?

On 30 December 1998, The Center for the Defense of the Constitution (CEDECON) filed an amparo claim against Article 2 of Legislative Decree 41-98 in the Constitutional Court, attacking the formulation of a single question for 50 reforms addressing a wide array of topics.⁷⁷⁸ This case would essentially test its function as a

⁷⁷³ Michelle Garzaro & Juan Carlos Perez, "Consulta popular: El congreso presento alegato contra amparo", in SIGLO XXI, 14 January 1999.

⁷⁷⁴ Id.

⁷⁷⁵ Siglo XXI, "Editorial: Confusion en la reforma constitucional" in SIGLO XXI 10 October 1998.

⁷⁷⁶ Id.

⁷⁷⁷ Id.

⁷⁷⁸ The Center for the Defense of the Constitution (CEDECON) announced that the Congress had committed vices by not explaining why it had rejected certain proposed reforms. Nor had it revealed the origin and reasons for emitting the 50 amendments which it approved in October 1998. The Court has jurisdiction in actions of unconstitutionality charged against laws, in amparo claims against the Congress, Supreme Court, President, or Vice-President of the Republic, amparo appeals, etc.

means of recourse by the society to prevent procedural injustice by another government entity.

On 5 January 1999, the Constitutional Court issued a provisional decision placing an injunction on the implementation of the referendum, holding that a single question is not the appropriate means for approval of 50 constitutional reforms involving so many different subjects. It is noted that at the very least the presentation of a small number of reforms, arranged by topic, would be more in keeping with democratic standards.

In response, the president of the Congress, Rafael Barrios Flores, and the National Attorney General, Carlos Garcia Regas, sought an audience before the Constitutional Court to request a dismissal of CEDECON's action against the referendum and removal of the injunction. Mr. Flores stated that Article 173 of the Constitution authorizes the Congress to decide upon how many questions a referendum should include. He added that "To consult the people on the reforms by way of a 'Yes or No' is the most adequate, due to the high level of illiteracy."⁷⁷⁹ This statement proved to be a shocking oxymoron which highlighted the fact that there had been absolutely no effort to disseminate the reforms in indigenous languages, or even in Spanish, to the populace. However, shortly after Mr. Flores' presentation, he was replaced by Leonel Lopez Rodas who announced that the Congress would willingly change the procedures for the referendum, independent of the proceeding before the Constitutional Court, in order to carry out the referendum as soon as possible. MINUGUA & the Supreme Electoral Tribunal initiated a dissemination program in order to educate the public on the content of the reforms.

On 14 January 1999, indigenous and peasant organizations blocked five highways demanding revocation of the injunction against the referendum by the Constitutional Court. In addition, they called for the adoption of the draft law for the Land Fund which had also been stalled by procedural measures.⁷⁸⁰ Members of the Coordinator of Mayan People Organizations of Guatemala (COPMAGUA) stated that "It is lamentable that in order to be heard we have to resort to protest actions".⁷⁸¹ The URNG expressed its support for this type of "peaceful resistance" whereas the National Agricultural Coordinator (CONAGRO) criticized the action for "violating the Guatemalans' freedom of movement". President Alvaro Arzu reiterated the latter perspective noting that:

⁷⁷⁹ Myrium Larra, "A favor de la consulta" in PRENSAL LIBRE, 14 January 1999.

⁷⁸⁰ Julio Lara, Arnulfo Chiapas & Raul Barreno, "Bloquean cinco carreteras" in PRENSA LIBRE 15 January 1999.

⁷⁸¹ Julieta Sandoval, "Copmagua: Solo asi nos atienden" in Prensa Libre 15 January 1999.

*“There are small groups which have taken the highways. They may demonstrate, because it is constitutionally permitted, but they should not block the right of other persons.”*⁷⁸²

On 22 January, the President announced that security forces would be sent in to guarantee freedom of movement within the country.⁷⁸³ This demonstrated the ongoing conflict of rights, i.e. freedom of speech/association v. freedom of movement, divided along socio-economic class. COPMAGUA withdrew its protesters, asserting that they would desist from further action until the Constitutional Court issued a final decision. A vigilance was held in front of the Constitutional Court but roadblocks were initiated again soon after.

The president of Liga Pro Patria Association called for separate votes for each reform, stating that “It is a constitutional trick, an endeavor to make the citizen believe that by voting “yes or no” he is freely exercising his right to suffrage upon approving the reforms, which treat different subjects.”⁷⁸⁴ The Public Ministry revealed a counter view, responding that the one question formulation did not violate civil liberties “because the citizens are free to participate or not in the referendum.”⁷⁸⁵ It is clear that the Association is not merely concerned with preservation of procedural justice, rather the claim was filed due to substantive concerns over the proposed recognition of indigenous law. According to the Association’s spokesperson, such action “would provoke chaos among the people.”⁷⁸⁶ One PAN Congressional deputy, Annabella de Leon, accused the groups of being racists who wished to polarize the indigenous people and the ladinos.⁷⁸⁷

An interesting development was that the Attorney General for Human Rights opined that the three groups which filed claims in the Constitutional Court were acting against the Peace Accords.⁷⁸⁸ This argument pitted the legitimacy of the two instruments against each other, prompting people to choose which document they felt was more in keeping with views and values of the society at large. It was a divisive

⁷⁸² Julieta Sandoval, “Apoyo de la URNG” in PRENSA LIBRE 15 January 1999.

⁷⁸³ Julieta Sandoval & Olga Lopez Ovando, “Consulta: protestas van a la CC” in PRENSA LIBRE 22 January 1999.

⁷⁸⁴ The Congress insisted that all of the reforms were interrelated. In addition, Liga Pro Patria reiterated the request for a postponement of the referendum until 2000, given that 1999 is an election year and might subject the people to manipulation. Ovando & Sandoval supra note 153.

⁷⁸⁵ Olga Lopez Ovando, “Vista Publica: Unidos por la Consulta” in PRENSA LIBRE, 2 February 1999.

⁷⁸⁶ Ovando & Sandoval supra note 153

⁷⁸⁷ Juan Carlos Perez, “Tercer Recurso Contra Reformas a la Constitucion” in SIGLO XXI 28 January 1999.

⁷⁸⁸ Ovando & Sandoval supra note 153.

statement which only served to attack the Constitution itself. It is this author's opinion, that although the appeals were not initiated by groups representing the interests of marginalized groups, their legal arguments are a solid defense of procedural justice, which in turn is a fundamental democratic guarantee.

Although the principal end may not be laudatory; it appears equally dangerous to sacrifice procedural guarantees in the name of substantive reforms. Procedural guarantees are meant to preserve democracy and prevent abuse by interest groups. The counter argument is that the legislature is not truly representative of the society, thus "bending the rules" is the only way to achieve justice. However, in this case, it is the legislature itself which approved the reforms, thus its staunch defense of the unusual referendum procedure should be taken with a grain of salt by those groups which have traditionally been excluded or repressed by the government.⁷⁸⁹ This type of "democratic despotism" is to be prevented by judicial intervention.⁷⁹⁰ Walter Murphy states that:

*"Framers of constitutions do not operate behind a Rawlsian 'veil of ignorance. They understand their social and economic positions and can make reasonably informed guesses about how particular constitutional arrangements will directly and intimately affect their fortunes."*⁷⁹¹

The obvious state of corruption in the Congress has spread to the other branches, such that the very concept of a democratic framework is tenuous at best.

On 9 February 1999, the Constitutional Court handed down its decision which ordered the Congress to formulate the referendum stating that although it would not set an exact number for the Congress, it identified six topics:

1. The Guatemalan Nation and Social & Political Rights

⁷⁸⁹ See Cappelletti, "Repudiating Montesquieu", supra note at 16, noting "Our century, however was to teach us yet another lesson: that the Rousseauian idea of the infallibility of parliamentary law is but another illusion, for even the legislative, not only the administrative branch might abuse its power; that this possibility of legislative abuse has grown tremendously with the historical growth of legislation in the modern state; also, that legislatures might be made subservient to uncontrolled political power, and that legislative and majoritarian tyrannies can be no less oppressive than executive tyranny." . . . Cappelletti cites the importance of preserving fundamental rights in order to uphold access to the judicial and political system as the principle democratic entitlement, "Thus constitutional justice, far from being inherently antidemocratic and antimajoritarian, emerges as a pivotal instrument for shielding the democratic and majoritarian principles from the risk of corruption" at 27.

⁷⁹⁰ See Murphy, Walter, "Civil Law, Common Law, and Constitutional Democracy" in 52 LOUISIANA LAW REVIEW 91, 107 (1991), citing James Madison, "In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." Letter to Thomas Jefferson, October 17, 1788, in M. MEYERS, THE MIND OF THE FOUNDER: JAMES MADISON 206 (1973).

⁷⁹¹ Id. at 123.

2. *Legislative Organ*
3. *Executive Organ*
4. *Judicial Organ*
5. *System of Development Councils*
6. *The Guatemalan Army & Civil Security Forces*

The Court stated that this would guarantee the citizens' right to transparent referendum. Rural organizations, including CNOG, CONIC, as well as the URNG considered the judgment to be a politically biased "provocation of the people" and thus threatened to engage in protests to demonstrate their dissatisfaction with the "ill-fated decision" through "peaceful resistance", including highway blocks and a national strike.⁷⁹² The Assembly of the Civil Society (ASC) characterized the decision as "the product of strategies of groups with economic, military, and political power, in addition to conservatives and radicals within the country."⁷⁹³ Rigoberta Menchu also denounced the decision as endangering the Peace Accords, echoing the Attorney General for Human Rights' previous risky characterization.⁷⁹⁴ The Church responded by calling for peace and noting that it was indeed important to remedy procedural errors in order to preserve the just and legal development of the referendum itself.⁷⁹⁵ This principle appears not to have been understood or accepted by the general populace. This may be due in part to a lack of education as to the importance of upholding procedural justice or misinformation by interest groups.

In spite of the Constitutional Court's recommendation, the Congress concluded that it would formulate only four questions based on the following themes:

1. *The Nation and Social Rights*
2. *Legislative Organ*
3. *Executive Organ*
4. *Judicial Organ*

⁷⁹² Carlos Castanaza Rosales & Edgar Leonel Arana Paredes, "CC: Consulta con mas de una pregunta" in SIGLO XXI, 18 February 1999.

⁷⁹³ Arnulfo Chapas Perez, "Amenaza de paro nacional para aprobacion de reformas", in PRENSA LIBRE 11 February 1999.

⁷⁹⁴ Ishan Bouabid, "Rights: Peace Prize Winner Counters Critics" in INTER-PRESS SERVICE 12 February 1999.

⁷⁹⁵ Lucy Barrios, "CEG pide no jugar con fuego" in PRENSA LIBRE 10 February 1999.

Incredibly, the total reforms to be presented were initially reduced by the legislature to 47 proposals without explanation, thus prompting renewed criticism by CEDECON. The legislature reissued the draft to include all 50 reforms. The voting sheets were color coded according to topic and contained shapes (circle & triangle for yes & no) in order to assist illiterate people vote. The date for the referendum was set for 16 May 1998, however, out of a total population of 11 million less than half were registered to vote.

As mentioned previously, USAID and the EU were interested in the aspect of reforming the Constitution in order to transfer the Peace Accords into a juridically binding document which would be applicable to future regimes. There appeared to be a fear the Peace Accords would be abandoned by successive administrations, due to their non-binding status. USAID and EU funded advertisements and workshops in order to promote participation in the referendum. Although these efforts were intended to be neutral, many people suspiciously viewed them as renewed intervention in domestic affairs. However, some people indicated to me that they had actually made up their minds based on what the people on the radio advised.

The State itself further complicated the matter by not providing special transportation to the voting centers, thus limiting access by many rural inhabitants. However, even in those areas most proximate to a voting center, there appeared to be little interest in the event. I witnessed the people of Comalapa (majority indigenous) dedicate themselves to selling and buying wares in the local market, only a few of which crossed the square to vote. The referendum proved to be a complete fiasco as **81%** of the electorate abstained from participation and the initiative was rejected. It should be noted that the departments which demonstrated a majority vote in favor of the reforms had a primarily indigenous population: Peten, Alta Verapaz, Baja Verapaz, Quiche, Huehuetenango, San Marcos, Tonicapan, Solola, and Chimaltenango.⁷⁹⁶ The departments with a higher percentage of ladino inhabitants voted in rejection of the reform: Izabal, Zacapa, Chiquimula, El Progreso, Jalapa, Jutiapa, Santa Rosa, Guatemala, Sacatepequez, Escuintla, Suchitepequez, Retalhuleu, and Quetzaltenango. It is likely that the law was considered to be something which does not affect the society in terms of everyday life, thereby evincing the polarization between the State and society.

⁷⁹⁶ Edgar Leonel Araña Paredes, "El No es Definitivo" in SIGLO XXI, 18 May 1999.

The rejection of the Constitutional reforms which called for recognition of indigenous rights was in part based on a fear by elites and ladinos of strengthening the cleavages in the society. Advocacy of one system of rights for the whole population was espoused, in spite of the fact that the legal system has yet to be applied equally to all and that there is a clear need to demonstrate to the indigenous population that their cultural norms, identity, demands, and needs will be respected in order to grant greater legitimacy to the system itself as representing the values of the entire society.

Van Boven's classification of constitutional reforms and strengthening the independence of the judiciary as primarily preventive measures against recurrent cycles of violations indicates that should these be the only measures taken, remedy may not be complete in terms of supporting reintegration of human rights victims. Indeed, in the case of Guatemala, the proposed constitutional reforms of 1999 regarding indigenous law were viewed by many indigenous and rural groups to be important changes to prevent future discrimination and abuse. However, upon the failure of the initiative, these groups returned to the crux issue of agrarian reform, which had yet to be properly addressed. The attempt to obtain preventive measures within the Constitution to some extent distracted the actors from their primary goal to attain land, several demonstrations regarding the proposed Land Fund Law were cancelled in order to concentrate on the Constitutional reforms. However, it should be noted that the recognition of indigenous law may have implied a recognition of historic title, which would render the reform no longer preventive, but rather reactive and active to the clamour for land. The President of the Constitutional Court, Rueben Homero Lopez Mijangos, admitted to me after the referendum that he believed it to be entirely undemocratic to have only four questions for the reforms, he personally would have preferred ten questions, however the Court did not suggest what amount would be acceptable.⁷⁹⁷

2.5.1.3.1. Conclusion to Constitutional Reforms:

In 2000, a new round of discussion regarding Constitutional reforms was initiated. The newspaper Prensa Libre sponsored a survey in which it was revealed that **93.5%** of those polled considered that priority should be given to solving the problems of

⁷⁹⁷ Interview with Rueben Homero Lopez Mijangos, President of the Constitutional Court, 13 May 1999.

poverty, economy, and violence over reforming the Constitution.⁷⁹⁸ Rather than achieve structural changes in one action, the process will take a long time. Resort to support for individual legislative bills, anti-poverty programs, and increased focus on ADR are being pursued as alternative methods of conflict resolution and prevention.

The failure of the constitutional reforms disheartened international and national actors who hoped to change the structural inequities of the State and strengthen the Peace Accords. The society rejected participation in the referendum, in large part due to its lack of confidence in the State. International donors responded negatively to this apathy, and considered it to be a slap in their faces. As a result, they reduced funding for future programs, arguing that the society remained too weak to render implementation Peace Accords feasible. The feeling was “If they do not want to help themselves, why should we?” This reaction appears to be fundamentally immoral to me, as the levels of malnutrition and illiteracy in Guatemala are among the worst in the region. How can one expect persons in such conditions to understand or even be interested in referendums, particularly those as complex as the Guatemalan example? In addition, there was little mention of the lack of transportation to voting centers. Cutbacks will only solidify the structural conditions which promote both civic passivity and disengagement on the part of some actors and radicalisation of others. Instead of reevaluating the misplaced focus on formal participation as a sign of civic engagement, ignoring the significant upscale in informal participation, i.e. marches, as indications of the priorities of the rural community: land reform, social services, etc. and loss of faith in the State as a responsive entity. In fact, the contrasting levels of civic passivity also serves to highlight the lack of confidence in the State.

Social capital cannot be transformed overnight and the reforms were incorrectly timed. While the people remain deprived of their basic socio-economic needs, they are unlikely to demonstrate much interest in the elaboration of less immediately tangible civil and political rights. Donors need to re-examine their focus on voting as the first step of building democracy. The fast-track approach to democratic consolidation cannot work in a neo-feudal society. Long-term initiatives which address structural problems such as construction of schools, provision of solid sources of good nutrition and health care, land distribution, etc. should be a pre-condition to

⁷⁹⁸ Miguel Gonzalez Moraga, “Guatemaltecos rechazan cambios a la Carta Magna” in PRENSA LIBRE 19 June 2000.

measures of civic participation such as referendums. Programs should be tied and tracked to the development of a generation of children, rather than five-year programs. Guatemala is experiencing a devastating food crisis which is not only linked to the drought and soil erosion, growing population, but also to the inequitable land distribution and the fall of coffee prices on world markets which resulted in layoffs and wage cuts. Over 45% of Guatemalans are chronically malnourished and 2/3 of the rural populace is food insecure.⁷⁹⁹ The next generation is literally dying, of those who survive many are likely to suffer from cognitive deficiencies due to malnutrition which will limit their ability to participate in civic activities or pursue development opportunities. Rather than blame the society for failing to vote, donors and the State should blame themselves for failing to sufficiently address the structural inequities which are the root of civic passivity.

Independence of the Constitutional Court

The Newspaper Siglo XXI, issued an editorial in which it characterized the public's abstentionism and "No" vote to the constitutional reforms as a similar act in defense of the Constitution⁸⁰⁰. The newspaper stated that the Congress had violated the Constitution through its processing of the amendments, accusing the Congress of pursuing them in order to guarantee an influx of international aid by donors who wished the terms of the Peace Accords to be concretized in a more binding document. It noted that many of the reforms could be accomplished by way of simple legislation initiatives. At present, many NGOs are returning to this mode of initiating change.

The Constitutional Court's independence was tested once again during the effort to reform the Constitution. The Association of University Students (AEU) criticized Constitutional Court Magistrate Jorge Arturo Sierra for having voted against position of the AEU in favor of CEDECON's claim⁸⁰¹. This organization opined that the magistrate should have based his decision on the position of the University, given that he had been appointed by the University. This argument is extremely dangerous because it suggests that the Constitutional Court should respond to the views of certain interest groups rather than uphold an objective position. The only magistrate to have voted against upholding CEDECON's amparo claim was Conchita Mazariegos who was nominated by the Executive Branch. Her analysis set forth that the reforms should be considered a unit which may be subject to one question referendum according to the discretion of the Congress, in keeping with the PAN party position. At the time, the Executive Branch was headed by the PAN party which also has the majority in Congress. Although the correlation of positions may prompt insinuations of political influence, this only amounts to speculation without further proof. However, it should be underscored that the Constitution sets forth that the Constitutional Court judges are to serve five years. There is no provision prohibiting re-appointment, as compared with European counterparts who may serve an average of one period lasting ten

⁷⁹⁹ Greg Brosnan, "Malnutrition Emergency Hits Guatemalan Children" in REUTERS (15 February 2002) and FAO.

⁸⁰⁰ Siglo XXI, "Editorial: El Pueblo Defiende su Constitucion" in SIGLO XXI 18 May 1999.

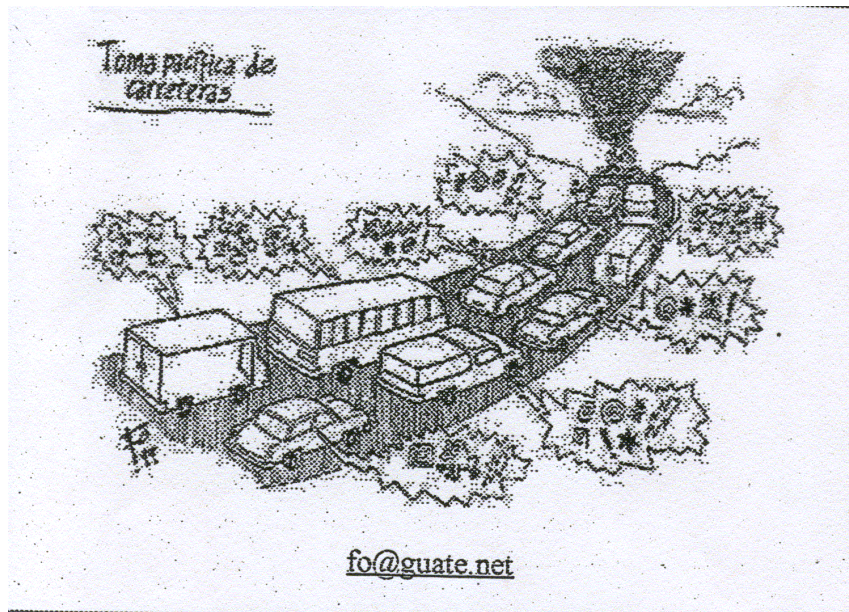
⁸⁰¹ "AEU contra Resolucion de magistrado de la CC" in SIGLO XXI 17 February 1999.

years.⁸⁰² *The Guatemalan judges may be re-appointed, indeed, Magistrate Alejandro Maldonado Aguirre has served two terms. Unfortunately, this risks rendering the institution vulnerable to political influence, thus compromising its independent status. The next year, The Pro-Justice Movement criticized the FRG-controlled Congress for seeking to negatively influence the Constitutional Court by calling for a reduction of the budget and salaries of the Court and its judges. Judicial elections were held in 2001, prompting attention for the need for transparency in the process.*⁸⁰³ *The Pro-Justice Movement requested the Congress, the Supreme Court, the President, the Superior Council of the University of San Carlos, and the Assembly of the College of Lawyers to release information regarding its candidates. The Supreme Court of Justice published each of its candidates' CVs and requested public feedback, the Congress and USC also published its lists. The Supreme Court conducted a transparent election in which the winning candidates were considered to be well-qualified for the positions due to their professional and academic backgrounds (the acting judge had formerly been a substitute in the Constitutional Court). The College of Lawyers elects their candidates directly. It chose two former deans of the USAC law school (one as acting judge, the second as substitute), receiving positive review. The USAC has 41 electors charged with selecting their candidate (The rector, 10 deans, 10 teachers' representatives, 10 student representatives, and 10 college representatives forming a University Superior Council). Much to the shock of civic groups, the Superior Council elected Cipriano Soto Tobar who has been accused of trafficking influences, sale of exams and degrees. Civic groups denounced the selection as indicating that the Court would be a mere puppet of Rios Montt and the FRG. However, given that the electoral process was deemed to transparent and free, the groups did not seek to challenge the choice. The Congress created a commission dominated by the FRG and the President of the Republic was also expected to select a candidate based on party alliance. The Pro-Justice Movement bemoaned the fact that this body faced a risk of losing its independent nature.*

⁸⁰² My warmest thanks to Professor Eivind Smith for commentary on this issue.

⁸⁰³ Mario Antonio Sandoval, "Este resultado despierta esperanza" in PRENSA LIBRE 5 March 2001.

3.5.2. Informal Participation: Protest Marches & Land Invasions



Pacific takeover of highways. There is a fire burning at the end of the road.
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Given the society's tendency to disengage from formal civic participation, it was necessary to assess informal means of participation. The rise in unemployment, food crisis, and frustration with non-implementation of the Peace Accords resulted in an explosion of demands directed at the State utilizing methods that gained the attention of media as well as international observers.⁸⁰⁴ William Evan proposed that when there are high levels of social conflict due to social inequality, the people turn to non-legal modes of dispute resolution.⁸⁰⁵ When the level of social conflict is low or moderate, recourse to non-legal mechanisms is contingent on the functioning of the legal system. Excessive delays, corruption, or non-response by the legal system to

⁸⁰⁴ The slow implementation of the Socio-Economic Accord is interpreted as a lack of political will or backlog by the State, thus prompting land usurpations as a "measure of last resort" to challenge the government's non-response. OEA/PROPAZ,, "Las relaciones intersectoriales en la conflictividad sobre la Tierra en Guatemala", p.4 (OEA/PEOPAZ, October 1997).

⁸⁰⁵ WILLIAM EVAN, SOCIAL STRUCTURE AND THE LAW: THEORETICAL AND EMPIRICAL PERSPECTIVES, 226 (Sage 1990).

demands by the people may prompt conflicts and recourse to non-legal conflict management systems. On the other hand, should the legal system assist in “legally redefining statuses and by redistributing wealth and resources”, it may serve to remedy those conflicts and instill faith in the judiciary. I review the legal system infra section 4. The failure of the State to engage in responsive action has promoted rejection of its channels and escalated the search for alternatives.

Specifically, the continued absence of an effective land distribution and restitution program resulted in a return to protest marches and land takeovers. These marches are organized by the National Coordinator of Campesino Organizations (CNOOC). Peasants walk over 70 kilometers to protest before the Land Fund, CONTIERRA, the Supreme Court, the Congress, and the presidential palace. They claim that the purpose of the marches are to force “ the government to receive the rural delegation and **listen** to rural communities.”⁸⁰⁶ This is a clear call for the State to espouse an ethic of recognition. The fact that the people feel that the state institutions do not hear their demands is symptomatic of the waning confidence in the democratic system. The common practice of the State when faced by protesters is to concede their failings and promise to set up working groups between CNOOC and the government to examine the issues.⁸⁰⁷ CNOOC warned that should the authorities fail to

⁸⁰⁶ Statement by Rigoberto Monteros, CONIC, quoted in Celina Zubieta, “Rights-Guatemala: Massive Rural March Extracts Gov’t Promises”, INTER PRESS SERVICE, 13 October 1999.

⁸⁰⁷ The Land Fund admitted that it had not been very efficient in responding to the needs for land credits, only 39 requests had been met out of a total of 500. By 2000, CNOOC accused the Land Fund of retaining 620 cases while CONTIERRA was processing 390 cases and the Ministry of Agriculture retained 200,000 files of claims for regularization of title. Statement by Harvey Taylor of the Land Fund, quoted in Miguel Gonzalez Moraga, “Masiva marcha campesina”, PRENSA LIBRE, 13 October 1999. In June 2001, the Permanent National Commission on Land Rights relating to Indigenous Peoples stated that the Land Fund received 700 credit applications and thereby requested the Congress to add 100 million USD to the credit program. CONTIERRA promised to bring their demands to the higher authorities in order to address them. The Vice Minister of Ranching, Jose Lopez, former director of CONTIERRA, agreed to set up a working group with CNOOC to review with the case files which were stalled in CONTIERRA, the Land Fund, and the Ministry of Agriculture. The Minister of Labor, Felipe Linares, established another working group with CNOOC to address violations of minimum wage and other labor rights. Promises regarding greater support to victims of Hurricane Mitch and other natural disasters were also made. President Arzu received a document from CNOOC calling for legal titles for peasant lands, better salaries for rural workers, respect for labor rights, and review of the Land Fund and CONTIERRA operations. President Arzu

implement their promises, the rural peasants would continue to return to the streets “until they listen to us”; evidently they have yet to be heard because the marches continue and have intensified.⁸⁰⁸ In addition to protest marches, peasants have engaged in blocking streets and highways, as well as taking over fincas and the state institutions themselves (including the land agencies).⁸⁰⁹ The takeovers of fincas and state offices may be interpreted as extreme forms of forcing the state and the landowners to recognize the peasants. CNOC declares usurpation to be a legitimate form of placing demands on an unyielding elite: “The rich never cede their properties, thus there is a need to invade.”⁸¹⁰ By physically occupying properties and refusing to leave, it is impossible for the State to ignore their plight or even deny their existence. The forcible presence of malnourished families in government offices serves to prompt coverage by media and attention by the international organizations located within the capital.

Although the Latinobarometro estimated that **95%** of those polled never participated in strikes or protest marches, the size of marches has significantly grown since I commenced the research. On 24 September 1997, 3,000 peasants marched to the presidential palace shouting “Land, Land, Land! A *campesino* without land is a *campesino* without Peace.”⁸¹¹ Dialogues were established between the rural organizations and the Executive Office. Unfortunately, in spite of the clarity of the peasant demands regarding a better land distribution, the need for cessation of forced evictions, improved conflict resolution, and respect for labor rights the government was slow to respond. As time passed and the Peace Accords remained unfulfilled, marches multiplied, the latest in 2001 totaling 50,000 peasants reiterating the call for

stated that it was difficult for him to solve problems which have existed for more than 500 years in one term of office.

⁸⁰⁸ Statement by Pedro Esquina, CNOC, quoted in PRENSA LIBRE, Id.

⁸⁰⁹ As noted by Patrick Costello: “The ability of any government in Guatemala to manage the demands for land is going to be limited by the sheer scale of the problem and the historic refusal of landowners and the military to consider the kind of land reform that would be necessary to resolve the conflicts.” Patrick Costello, “Guatemala: Displacement, Return and the Peace Process (WRITENET April 1995)(available in <http://www.unhcr.ch>). Other fincas owned by the military, a state owned banana company, foreign entities, or unknown owners have also been taken over. Daniel Pascual of CNOC claimed that 100 fincas have been taken over. Teresa Lopez & Nery Morales, “Campesinos continuan en fincas”, PRENSA LIBRE (13 Oct 2001).

⁸¹⁰ Rodolfo Zelada, “CONIC incito a los invasores de la Finca La Perla”, SIGLO XXI 28 November 1998.

⁸¹¹ Nuria Maldonado, “Campesinos protestan en capital y paralizan transito en carreteras”, PRENSA LIBRE, 25 September 1997.

land exclaiming “Peace without food is not Peace”. Calls for implementation of the Peace Accords and basic human rights formed the basis of protests, always in conjunction with demands for land redistribution.

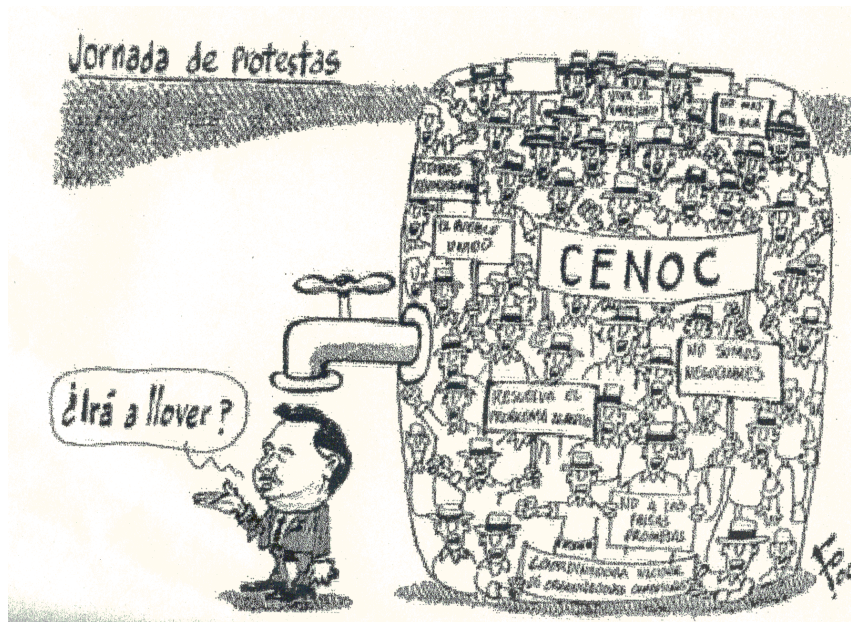
Other socio-economic concerns are also addressed as there are calls for education possibilities, development programs, access to health, housing, and basic services. In addition, as mentioned previously, protesters specifically called for an end to impunity and greater transparency in the government also form the basis of protest marches. The area of indigenous rights has also received greater attention, as protestors called for conversion of the Accord on Indigenous Rights into law and its implementation, the recognition of Mayan customary law within the Constitution, approval of an Agrarian Law which would recognize indigenous and peasant use of lands, amendment of article 39 in the Constitution on private property, and application of ILO Convention No. 169.⁸¹²

The participation of women and children also increased proportionately (from 25% women in 1999 to 40% in 2000). The presence of children does not appear to have much effect on the government. When 200 schoolchildren presented their petitions to President Portillo requesting land distribution and support to schools, Portillo wryly noted “The children ask for land, but I don’t have any, not even (dirt) in my ears.”⁸¹³ This statement proves to be especially disturbing in light of the fact that in 2002 Portillo himself “purchased” a finca at a symbolic price of only 3000 Q from the Banco del Nordeste, revealing that land is indeed available if one has the right connections.⁸¹⁴

⁸¹² Indeed, the marches in October 2000 were held in order to commemorate Mayan Resistance under the call of “Shout of those Excluded”. They issued petitions to the Supreme Court, Congress, and the President calling for the above demands as well as agrarian reform including respect for the Mayan cosmosvision and women’s rights and respect for the equality and freedom principles (especially freedom of association) contained in the Constitution. Unfortunately, aside from the Supreme Court, none of the other government bodies would receive them.

⁸¹³ Claudia Vasquez, “Niños demandan del Gobierno mas y mejor educacion” PRENSA LIBRE 11 October 2000. He also claimed inability to pay for construction of schools on the need to pay down the debt, in spite of the millions of aid money pouring into the country every year. Previously that month, 30 children had demonstrated on the streets to request housing and complain of their fear of forced eviction.

⁸¹⁴ Grupo Política y Poderes, “Donacion de finca es poco etica” in PRENSA LIBRE 16 March 2002.



Day of Protests- President Portillo-”I wonder if it will rain?” In this case, the parade rained on him
 Reprinted with permission of Prensa Libre

In August 2000, the Bi-Partisan Commission on Land Rights presented its report to the President in which it advocated the creation of an Attorney General’s Office for Conflict Resolution, protection of indigenous lands, the establishment of an agrarian jurisdiction and a National Agrarian Institute. The new timeline for implementation of the Peace Accords calls for the establishment of compensation mechanisms to facilitate the resolution of land conflicts. Thus far, none of these proposals have been implemented.⁸¹⁵ Rumors of a coup attempt were spread and the newspaper warned that there would be a state of anarchy should a dialogue not be embarked upon between the party in power and rural and human rights groups. The marches initially appeared to have an impact, as the government created a commission to analyze the agrarian problem, including national peasant and indigenous groups, as well as UN agencies. Unfortunately, by January 2001, the Commission was declared a failure, as no settlement was reached. Of special interest was CNOIC criticism that the Commission’s “soft powers” limited its effectiveness as it was

⁸¹⁵ However President Portillo authorized the Land Fund to invest 100 million Quetzales for the purchase of property for peasants. Acuerdo Gubernativo 473-2000. See Jennyffer Paredes Diaz & Ericka Escobar, Q100 millones a comprar tierra”, in PRENSA LIBRE 18 October 2000.

unable to make final decisions or implement accords.⁸¹⁶ CNOC's leader, Daniel Pascual warned again that the peasants “. . .will always be organized and ready to engage in actions outside the law (*medidas de hecho*) when necessary.”

Thus, the culture of conflict transformation is increasingly viewed by marginalized groups as a mode of avoiding the elaboration of immediate measures to respond to demands by marginalized groups.

3.5.3. Conclusion on Participation in the Political System

The principle conclusion is that low levels of participation in formal policy making processes correlated with low levels of confidence in state institutions which in turn is a result of severe structural dysfunction within the political and economic systems. Political participation in the post-settlement period is marked by contrasting high levels of informal participation via protest marches and land invasions as opposed to civic engagement in associations and voting. Many local associations are unable to focus on national problems due to their orientation towards remedy of basic human needs. However, participation in protest marches often allows joiner of different organizations which have similar development interests, e.g. land distribution or combating impunity. In this manner, aggregated voices in informal processes are broader and possibly more effective than the formal, disparate voices contained in formal processes that are easily ignored by the State. The political institutions proved non-responsive to the needs and expectations of marginalized groups, and IDPs in particular, due to failure to implement the Peace Accords and socio-economic rights. Given that these norms were deemed to be the framework for social cohesion and realization of the right to participation in society under equal citizenship, non-implementation confirmed the maintenance of inequitable structures that would maintain marginalized groups in a state of permanent exclusion. I further address the issue of asymmetrical evolution within and between social systems in the final conclusion to this Part.

At present the UN and the OAS are supporting the creation of “Inter-Sectoral Dialogue Tables” around the country in order to encourage social sectors and state

⁸¹⁶ Jennyffer Paredes Diaz, “Gobierno, sector campesino y empresarial con dialogos, pero a medias” PRENSA LIBRE 9 January 2000.

actors to meet and design governance strategies to tackle national problems such as rural development, justice, culture of peace & reconciliation, security & human rights, and defence.⁸¹⁷ The goal is to form networks of linking social capital in order to enable the state and society to work together to attain peace and development. This seems to recognize the error of placing too much emphasis on participation in voting (given the debacle of the Constitutional Reforms) as the basis of democracy, and instead explores models based on dialogue forums, as proposed by Galtung, which may be more appropriate in collective-oriented societies.⁸¹⁸ Although such procedural innovations may prove positive in terms of increasing communication between the State and society, effectiveness is undeniably contingent on substantive structural reforms within the economic system to remedy inequitable division of resources.

In the next section, we turn to other central aspects of structural social capital, i.e. the rule of law and legal framework that are of particular relevance to this thesis. I examine the legal system in order to assess the ability of IDPs and other marginalized groups to attain remedy and/or restitution of property rights with respect to formal norms, customary norms, and human rights norms.

⁸¹⁷ “Naciones Unidas y OEA Inician Proceso Para Crear Mesas de Dialogo” in GUATEMALA HOY (14 October 2002).

⁸¹⁸ Johan Galtung, *The Third World and Human Rights in the Post-1989 World Order* in TONY EVANS, *HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL* 211,224 (Manchester 1998).

4. The Legal System

Guatemala's legal system is divided into several subsystems which remain distinct from each other in their evolution and degree of legitimacy. It is composed of a formal civil code system implemented by the State, an informal customary collection of norms espoused by the indigenous majority, and international human rights standards awaiting implementation.⁸¹⁹ The additional quandary of which subject matters pertain to the formal system and which relate to the informal system is also a contentious matter.

This chapter presents a review of how property issues are handled within the formal legal system and the indigenous customary system. It seeks to highlight the key problems encountered as pertaining access to mechanisms, consideration of the hierarchy of relevant norms, responsiveness, and implementation of solutions. Of primary concern is the fact that there are not only asymmetrical developments between the legal sub-systems, but also within the sub-systems themselves. None of the sub-systems demonstrate coherence or unity in practice, thus my perception of law in Guatemala is that of a mosaic of perplexing composition. I seek to describe the need for interplay of the different legal norms, and explain why the creation of an overarching framework of unity for these sub-systems is difficult. I first describe inherent biases within the formal legal system which inhibit access to justice by marginalized groups and problems. I also assess the weakness of the rule of law due to problems regarding corruption, impunity, and vigilante justice. I then provide an overview of the indigenous customary system to support claims for recognition of legal pluralism. In Chapter 5, I examine the possibility of enforcement of human

⁸¹⁹ As noted by Sieder:

"Far from the idea of legal equality, in practice republican Guatemala has been marked by an ethnicised and discriminatory rule of law which has its roots in the colonial period. Since its very constitution under colonial rule, the legal system has been characterized by legal pluralism: the colonial Ley de Indios created one law for indigenous people and another for the dominant criollo sector. Seider, Rachel, "Customary Law and Local Power in Guatemala" in RACHEL SIEDER (ED.), GUATEMALA AFTER THE PEACE ACCORDS 99 (University of London, Institute of Latin American Studies 1998).

rights claims linked to property at the national level by studying *amparos* to the Constitutional Court.

4.1. The Formal Legal System

“For the rule of law to have any real meaning for Latin America’s rural poor, at least two things have to be achieved. First, governments must have the political will and the means to eradicate violence against the rural poor by landowners and the armed bands employed by them, and even by elements of the state’s own security forces. But second- and equally important-the rural poor who, as a result of the economic and political trends referred to above, simply do not have access to a subsistence livelihood, must feel that there is some scope to improving their situation through use of the legal system.”

*Roger Plant*⁸²⁰

The formal courts in Guatemala include the Supreme Court; the Constitutional Court; the Courts of Appeal; contentious-administrative courts for cases involving the public administration; the Second Instance Court of Accounts; military courts, first instance courts; justices of the peace; and community justice centers which address penal matters and may utilize customary norms (on condition of non-contradiction of national law).⁸²¹

The boundaries of law retain different characteristics according the perspective of those queried: international lawyers, indigenous peasants, national elites, etc. The primary issue which provokes concern is the law’s possible impact upon the socio-economic distribution of resources such as land rights, thus there is divergence regarding the legitimacy of progressive v. conservative standards.

The judicial process is characterized as a public process of dispute resolution in which the actors represent the values of the society.⁸²² There is an imbalance when the formal structure reflects the values of the elite minority when judging a member of the oppressed majority. Although the elites refute the need for the recognition of

⁸²⁰ JUAN E. MENDEZ, GUILLERMO O’DONNELL & PAULO SERGIO PINHEIRO, *THE (UN)RULE OF LAW & THE UNDRIVELEGED IN LATIN AMERICA* 101 (University of Notre Dame Press 1999).

⁸²¹ An effort to increase access to justice resulted in the creation of 400 justices of the peace at the local level, the newest entities include justices of the peace who speak indigenous languages and may utilize ADR to resolve cases.

⁸²² CHRISTOPHER MOORE, *EL PROCESO DE MEDIACION* 34 (Ediciones Granica, Buenos Aires 1995).

“special” rights for the indigenous people due to existing *de jure* equality among all citizens, in practice the indigenous protest that they have yet to enjoy true citizenship. Because the judiciary is generally composed of *ladino* members of the upper-middle classes trained in formal law, the notion that this body will espouse the cause of repressed individuals and groups to assert claims based on equity or historic traditions is unlikely. In this section I examine the normative framework, highlight problems affecting the rule of law, review the process of dispute resolution, and explain the need for legal pluralism.

4.1.1. The Civil Code

Guatemala’s national law contains provisions which are supportive of customary claims to property. The Guatemalan Civil Code, Art. 620, recognizes the right of prescription (usucapion) requiring possession based on just title (registry of possession lacking ability to sell or transfer land to another), acquired in good faith, in a continuous, public, and pacific manner for ten years.⁸²³ After such time, possession will be registered as ownership. It prohibits the recognition of acquisition of immovable property by mere occupation.⁸²⁴ Legitimate possessors may bequeath their possession rights to their successors. It does not appear that many peasants are aware of this provision in the Civil Code, thus they assume that the law provides no protection for their customary holdings. The existence of double-titles or multiple documents complicates the determination of rights to land. Unfortunately, both courts and police are more likely to turn to the provisions of the penal code on usurpation when addressing disputes regarding possession rights. There is a need for dissemination of “legal knowledge” to peasants in order to assist defense of their rights.

Although the Civil Code states that abandonment of property for more than one year (or less if the person expresses intent not to retain possession) breaks the chain of possession, one may argue that the circumstances of the war and related violence/coercion would render strict interpretation invalid (art. 630).⁸²⁵ Bad faith possession, defined as lacking any title

⁸²³ Código Civil y sus reformas, Decreto No. 106, (1998). State land may not be attained via prescription, processing must be transmitted by an administrative agency.

⁸²⁴ Id. at Art. 589.

⁸²⁵ See Andrew Painter, “Property Rights of Returning Displaced Persons: The Guatemalan Experience”, 9 HARVARD HUMAN RIGHTS JOURNAL 145,173 (Spring 1996): He argues that the secondary occupiers of land claiming prescriptive rights to land abandoned by displaced persons during the war should not prevail over the prescriptive claims of the displaced themselves as the “voluntary”

whatsoever, is subject to relinquishment of the property to its rightful owner, as well as restitution of gains and payment for loss or damage to the property attributable to the possessor, chance or force majeure. (Arts. 628- 629). Violent possession, characterized as involving force, moral or material coercion is prohibited. (Art. 631). Many properties were attained via such action during the war; it is likely that many displaced persons have claims based on such violations.

The Civil Code also recognizes the right to remedy specifically with the context of property rights. Property owners have the “right of defense of one’s property” by legal means and not to be disturbed from it in the absence of citation, the opportunity to be heard, and a judicial decision against him.⁸²⁶ This is a “due process” clause which forms the basis of many complaints submitted to the judiciary. It often forms the basis of a challenge against decisions made by indigenous dispute resolution entities as well as state entities (see *infra* section on Amparos). Property owners also have the right to re-vindicate their property from other possessors.

4.1.2. The Constitution

A question presents itself as to whether the demand for better land distribution or recognition of historic title is a demand for a legal right, as contained in the Constitution and international human rights treaties, or an “expectation of a right” deemed to have mere political value until formally recognized by the State, at which point it attains juridical merit. Under the expectation theory, the demand would be the pressure of outside systems (socio-economic and political) on the legal system. Should the demand be characterized as legal, the legal system remains “closed” as the demand is of the same nature as the system which it is placed upon. The Constitution places a duty upon the State to protect persons, realize the public good, guarantee life, liberty, justice, security, peace and integral development of the individual (Articles 1 & 2). Human rights treaties ratified by the State have precedence over municipal law (Article 46), however this is contradicted by the provision which states that tribunals shall give primacy to the Constitution over other treaties (Article 204) there is division of opinion regarding the primacy of the Constitution over human rights treaties. International pressure to abide by the Vienna Convention on the Law of

aspect of abandonment is questionable, the displaced had no means to legally contest dispossession during their flight, and were unable to return due to fear of repression. He states that the violent eviction of the displaced should be imputed to the secondary occupiers. Noting that many secondary occupiers purchased land in good faith from INTA, he advocates payment of compensation by them to the original possessors while allowing secondary occupiers to keep the property.

⁸²⁶ Decree No. 106, Civil Code of Guatemala, Title II, Chapter I, article 468 (1998).

Treaties is prompting recognition of the primacy of international instruments. The Constitutional Court has issued the opinion that the Constitution is supreme over human rights treaties, whereas other scholars and magistrates argue in favor of the inverse.⁸²⁷

The right to property is covered by 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 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.”

The linkage of individual success to the development of the nation is different from the standards contained in previous version of the constitution which emphasized the need to address the social interest in order to achieve progress, however it remains a hybrid variant which may permit expropriation to address the needs of the nation. In addition, Article 118 declares the economic and social regime to be based on principles of social justice and equitable distribution of the national income. Although this article only refers to individual property rights, collective property rights are recognized under Article 119 placing a duty on the State to promote and assist cooperatives and Article 67 on Native Lands:

“The lands of the cooperatives, native communities, or any other forms of communal possession or collective of 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.”

This standard calls upon the State to protect communal properties and explicitly recognizes the link between ownership of property and “improved quality of life” thereby referring to an adequate standard of living. In this respect it goes beyond international standards. It also calls for recognition of historic title. The State is given a duty to provide lands for the indigenous people (Article 68), but it retains subsoil rights. An individual wishing to dispose of his share of collective property covered by Article 67 would have to refer to the relevant national legislation (Article 70 calls for the creation of such law), which remains absent. Hence many collective lands have been subdivided and sold as individual plots due to lack of knowledge regarding juridical norms. Article 23 guarantees the inviolability of the home of individuals, requiring a judicial order for such action.

One of the alternatives explored by peasants is presenting a call for expropriation of under-used land. Marcus Colchester identifies two legal concepts as the core of land reform legislation in Latin America:

⁸²⁷ See e.g. Lic. Ricardo Sagastume Vidaurre, “Aplicacion del Derecho Internacional en el Ambito Interno Guatemalteco”, in Lic. Ruben Homero Lopez Mijangos, Recopilacion de las Conferencias Dictadas en los Seminarios de Difusion, Divulgacion y Actualizacion de la Justicia Constitucional, 280 (Corte de Constitucionalidad 1998).

- 1) *Land may be owned as private property, but it should be used for the benefit of the community.*
- 2) *Idle lands should be expropriated in order to fulfill a social function.*⁸²⁸

These principles formed the juridical background for President Arbenz's expropriation of 603,615 hectares of private lands under the Agrarian Reform Law of 1952. Article 40 of the Guatemalan Constitution calls for the provision of appropriate compensation in the event of land expropriation, however there is no reference to idle lands as subject to such action. The State has a right to expropriate property for the welfare of the general populace on condition of provision of compensation based on consideration of actual value:

“In specific cases, private property can be expropriated for reasons of duly proven collective utility, social benefit or public interest. Expropriation will have to be subject to the proceedings mentioned by the law, and the expropriated property will be appraised by experts taking their actual value into account. Compensation will have to be made in anticipation and in legal tender, unless another form of compensation is agreed upon with the interested party. Only in cases of war, public disaster, or serious disruption of law and order can there be occupation or interference with property or expropriation without prior compensation, but the latter will have to be done immediately following the end of the emergency. The law will establish the procedures to be followed with enemy property. The form of payment of compensations for the expropriation of idle land will be determined by law. In no case will the deadline to make such payment effective exceed 10 years.”

In addition, Decree 1551 (1961) authorizes expropriation of idle lands of over 100 hectares, however, this provision has never been utilized since its enactment. However, Article 114 of the Decree states that property “voluntarily” abandoned for over one year will automatically revert to the state.⁸²⁹ This clause was frequently used to takeover properties left behind by refugees in order to distribute to rural peasants and internally displaced persons who were to form development poles and model villages under Army control. Hence, the notion of expropriation in Guatemala was eventually interpreted inversely to remove smaller properties and turn them over to large landholders. The challenge is to reverse this action.

At present, the process of redistributing large landholdings by way of expropriation is best exemplified in Brazil, where this has been established in its Constitution:

⁸²⁸ Marcus Colchester, “Guatemala: The Clamour for Land and the Fate of the Forests”, in 21 (4) THE ECOLOGIST 177, 183 (July/August 1991).

⁸²⁹ See Steve Hendrix, “Land Tenure in Guatemala”, in GIS LAW Vol.3 No. 4, p. 8 (Winter 1997).

*“Article 184. It is incumbent upon the Republic to expropriate for social interest, for purposes of agrarian reform, rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds . . .”*⁸³⁰

The Constitution states that owners of single units of small and medium sized rural properties shall not be subjected to expropriation, nor shall owners of productive properties which prove to be of “rational and adequate use”, preserve the environment, and comply with the labor law.⁸³¹ This program appears to met with some success in Brazil, given that 7,321,270 hectares of fallow lands, properties dedicated to marijuana, and lands which worked by slave laborers were expropriated between 1995-1998.⁸³² The Government claims that it was able to combine this policy with other credit programs and thus redistribute 9 million hectares to resettle 287,539 families. The Gini coefficient measuring the equity of land distribution fell from .82 in 1992 to .78 in 1999 (0= total equality, 1= total inequality). This is not to say that that the agrarian situation is harmonious in Brazil, in 1999 the state reported 390 land usurpations and 26 murders related to land conflicts.

In spite of Brazil’s positive view of the expropriation process, this is unlikely to be espoused by the Guatemalan government in the near future. Although it is estimated that half of the farms over 50 hectares could be good candidates for redistribution, due to under-use, they are not relinquished by landowners, in part to maintain a system of low-cost labor. As a result, the small subsistence plots are exhausted. CONIC and CNOC advocate reform of Article 39 to call for recognition of the social function of land, however this is strongly opposed by the elites. Constitutional scholars indicate that regardless of reform of Article 39, Article 40’s wording places the social interest in property above that of the individual. According to peasant activists, given that many people in Guatemala can claim historic title to land, the appropriate response by the State should be expropriation of these lands from the formal titleholders and return to the people.⁸³³ CNOC calls for expropriation of property attained by military actors during the war. However, CNOC claims that the State will not expropriate for fear of setting a precedent. There is great resistance by the elites and the Army, and the memory of Arbenz’s downfall remains present.

⁸³⁰ See also Mexican Constitution, Article 27 legitimizing expropriation of *latifundios*.

⁸³¹ Constitution of Brazil, Articles 185-186 (5 October 1998), English translation found at http://www.uni-wuerzburg.de/law/br00000_.html.

⁸³² Figures provided by the Instituto Nacional de Colonizacao e Reforma Agraria at http://www.incra.gov.br/_serv/ing/_serv/placar/balanco/desap.htm.

⁸³³ Interview with Lic. Antonio Argueta, COJUPA, 16 February 1998.

In theory, persons who were deprived of their property during the war have a right to compensation and their need may justify expropriation of property held by dispossessors. However another constitutional provisions is in conflict with this principle, as it notes that "The right of ownership in any form cannot be restricted on account of political activity or any crime." (Article 41). It is conceivable that an effort to expropriate property from war criminals in order to compensate victims will be complicated by the above provision as many received formal titles from INTA. The key will be to first prove the illegitimacy of the INTA titles.

Regarding the right to remedy, individuals are granted free access to courts, state agencies, and offices when claiming a right (Article 29). In practice, many people are limited by the de facto lack of legal aid. All persons are entitled to the right of defense, defined as summons, opportunity to be heard, and trial in a legal proceedings before a judge or a court when loss of one's rights is at stake (Article 12). These standards emphasize free access to the various remedial mechanisms, but also prioritize the court as the source of remedy when addressing violation of a fundamental right.

4.1.3. Alternative Strategy: Labor Law

”Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”

*John Locke*⁸³⁴

The peasants’ most ingenious strategy is to push for land reform is to utilize the labour code.⁸³⁵ Given that many peasants do not have formal titles, the labour code may well be their best offensive weapon. CONIC and FESOC educate rural workers as to their labour rights, and as result peasants engage in protests, usurpation, and other actions. Rural workers also file formal complaints against the landowners who have not paid them appropriate wages or granted them vacation time as accorded by the labour law. Landowners who are unable to provide monetary compensation to their rural workers offer land instead. In the case of Finca Buenos Aires, costs due to rural workers totalled 2,243,696 Quetzales.⁸³⁶ Given the landowner’s unwillingness to pay this sum, he agreed to turn over 8 ½ *caballerias* to the peasants. This proved satisfactory to the rural workers and provided an invaluable education to all parties regarding domestic legal protections. Thus far, it claims to utilized this strategy in Huhuetenango, El Quiche, San Marco, Solola, Retalhuleu, Alta Verapaz, Izabal, Zacapa, Baja Verapaz, and Suchitepequez. This process involves bilateral negotiations as well as mediation by the Inspector General of Workers, in the Fincas Argentina, Buenos Aires, and Los Alps in Coban, Alta Verapaz. There have been complaints that the government mischaracterizes land conflicts as labour conflicts. The Ministry of Labour was accused of labelling all but 4 of the 92 land usurpations in Alta Verapaz in 1999 as labour conflicts. MINUGUA reported that several conflicts in the export-crop fincas have resulted in threats, dismissals, violence and death of workers.⁸³⁷ Unfortunately, the judicial system has been largely non-responsive to abuses of the labour code and does not appear to seek to implement the ILO Conventions which have been ratified by Guatemala (including Convention 87

⁸³⁴ Locke, John, ”The Second Treatise of Civil Government”, para. 27 in TWO TREATISES OF GOVERNMENT, (Hafner Press 1947)

⁸³⁵ Interview with Lic. Argueta, COJUPA, Legal Advisor to CONIC, 16 February 1998.

⁸³⁶ See Finca Buenos Aires Case (1995), on file with CONIC.

⁸³⁷ UNDP, GUATEMALA: EL ROSTRO RURAL DEL DESAROLLO HUMANO (1999).

on freedom of association and Convention 98 on Right to Organize), thus U.S. State Department has characterized this area to be characterized by acts of impunity.⁸³⁸ It should be noted that the lack of de facto labour protection renders peasants' income too low to promote consumerism to develop service or industry, which are often presented as possible alternatives to land reform- hence peasants are caught in a catch-22. Unfortunately, as mentioned in Part II, the ILO is severely understaffed so there is insufficient oversight of this issue.

4.1.4. Access to Justice

One of the central goals for states attempting to consolidate peace and democracy is the construction of institutions and policies which will assure the citizenry access to justice. The legal system in Latin America has received much criticism for lacking legitimacy. As noted by Allan Brewer-Carias:

*“The judicial power, in general in almost all of our countries, appears to be incapable of guaranteeing efficient resolution of conflicts in order to respect individuals' rights and protect the fundamental rights. It is not always effective, it is not speedy; on the contrary, justice is slow and delay in judicial matters results in the opposite, i.e. injustice.”*⁸³⁹

Court systems which are characterized by corruption and inertia result in a lack of access to justice which plagues all members of society, not only displaced or indigenous persons.⁸⁴⁰ Cappelletti, Garth & Trocker highlight the following central issues for the examination of access to justice in a country:

1. *Who is seeking access to justice ?*
2. *Is the legal issue masking the problem of power politics?*
3. *How can alternative dispute resolution assist in preventing excessive legalism?*⁸⁴¹

⁸³⁸ U.S. Department of State, Country Reports on Economic Policy and Trade Practices (Bureau of Economic and Business Affairs 2000).

⁸³⁹ Allan Brewer-Carias, “Hacia el fortalecimiento de las instituciones de proteccion de los derechos humanos en el ambito interno”, in LORENA GONZALEZ VOLIO (ED.), PRESENTE Y FUTURO DE LOS DERECHOS HUMANOS: ENSAYOS EN HONOR A FERNANDO VOLIO JIMENEZ 5, 15 (IIDH 1998).

⁸⁴⁰ See Report by the Independent Expert, Mrs. Monica Pinto, on the situation of human rights in Guatemala, UN Doc. E/CN.4/1997/90, p.7.

⁸⁴¹ See Mauro Cappelletti, Bryant G. Garth & Nicolo Trocker, “Access to Justice: Variations and Continuity of a World-Wide Movement” in 54 (2) REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 221 (1985).

With regard to the first point, it is noted that in most cases it is the lower socio-economic classes which seek a “redistribution of rights”. Specifically, within Guatemala, it is marginalized groups, such as indigenous people, rural peasants, and displaced persons who lack legal recognition of their rights, usually based on socio-economic human rights or indigenous rights which are not fully recognized by the State. The second problem underscores cases of weak political will and limited economic resources on the part of the State which may limit the ability to implement legal reforms as the elites are reluctant to relinquish any power to other social groups. Weak states are not autonomous and do not objectively conciliate among the different classes.⁸⁴² Instead, official actors within the system are called by the elites to emit policy output to maintain their interests rather than uphold the expectations of the general populace based on the *de jure* mandate of the system. The legal system often exhibits bias in practice, thereby it risks losing legitimacy and destabilizing the democratic system due to a loss of civic confidence. The political and economic systems impose a function on the legal system to preserve the inequitable distribution of resources and power. The Guatemalan elites (in particular, para-political groups such as the Chamber of Agriculture and the Military) retain the highest degree of power, thus state actors consider it to be in the interest of the system to respond to this group above that of marginalized groups who represent the majority of the population. Values regarding maintenance of inequitable land distribution, cheap agricultural labor, and continuing divisions between classes (related to ethnic divisions) result in legal norms which uphold formal private property rights and reject customary possession claims without review of background injustice. Common individuals and groups are viewed as passive members who fulfill the mode of production within the society rather than asserting active stances as transformers of the system, whose choices and interests count.

There is insufficient legal aid available, thus the poor remain excluded from accessing the courts. There is a clash of values and norms between those espoused by the marginalized majority which call for restitution of dispossessed land, consideration of customary rights, and enforcement of the Peace Accords versus those of the elites who seek to maintain the status quo and uphold formal legal rights, particularly that of private property, above all. As previously mentioned, in

⁸⁴² EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE at 192 (Univ. of Chicago 1965)

Guatemala the right to private property is referred to with the same reverence as freedom of speech is in the United States, it is viewed as the foundation of the society. Challenge of this right is deemed to be taboo.⁸⁴³ The inclusion of this right within the Constitution is intended to remove it from the tenacious realm of politics, however in practice this is not the case. Legal proposals may be presented as a palliative rather than a true reform which would require altering the political-economic structures.

The third concern is especially relevant in the Latin American context, as there has been a tradition of insulating the judicial system from addressing the socio-economic issues. During transition to democracy, this is challenged by the society which generates high expectations regarding social justice and demands immediate action. Initiatives to provide an accessible dispute resolution system are presented as a means by which to address social justice concerns in a non-formalistic manner. Thus, the linkage between the maintenance of a stable, democratic society and the effective administration of justice is a topic of eminent concern to the society.

In March 1997, the Guatemalan Government established a Commission for Strengthening Justice (as well as the Commission for Modernization of Justice) which was to seek to “facilitate simple and direct access to (administration of justice) by large sectors of the country that do not manage to reach the justice system or appear before it in diminished conditions.”⁸⁴⁴ It was noted that the lack of access to justice by the general populace resulted in impunity, high levels of conflict, and social violence.⁸⁴⁵ In essence, there is a need to achieve *de facto* legal equality rather than *de jure*. A five-year plan was published which reviewed the existing problems affecting the administration of justice and suggested ways of overcoming these deficiencies.⁸⁴⁶ The preface of the report indicates that the crucial challenge is to implement the plan in order to form “a renovated Guatemalan society, in that it is to be constructed without exclusions; a society which ‘belongs to everyone and exists for the good of all.’”⁸⁴⁷ The study found that **88%** of people interviewed considered the

⁸⁴³ Id. at 106-107.

⁸⁴⁴ Comision de Fortalecimiento de la Justicia, Informe y recomendaciones sobre reformas constitucionales referidas a la administracion de justicia, p. 3 (Magna Terra Ed. January 1998). The Commission is composed of twelve members who are Supreme Court/Court of Appeal judges, lawyers from prominent NGOs, deans of the University law schools, and lawyers from the Police and Public Ministry. All serve in their personal capacities.

⁸⁴⁵ Id. at 21.

⁸⁴⁶ Comision de Modernizacion del Organismo Judicial, Plan de Modernizacion del Organismo Judicial 1997-2002, Corte Suprema de Justicia y Organismo Judicial (Guatemala, August 1997).

⁸⁴⁷ Id.

administration of justice in Guatemala to be “inadequate” and **75%** described these problems to be “very serious”.⁸⁴⁸ Indigenous people remain suspicious of the Guatemalan juridical framework, regarding it biased against their people- “The law is not made for indigenous people, the law belongs to *ladinos*.”⁸⁴⁹ In sum, it is considered to be a racist and discriminatory system. Among the different complaints, references to corruption, slowness, and inefficiency within the judicial branch as well as difficult access to justice provided a common thread.⁸⁵⁰ The latter factor is linked to the small number of courts available to the population at large and the exclusionary costs of litigation.⁸⁵¹ Other problems, some of which are identified as being linked to socio-economic development, include:

1. *The lack of translation in court for ethnic groups which do not master a command of Spanish. (No lingua franca in Guatemala)*
2. *Poor transportation and communication options, which hinder travel to courts.*
3. *Extreme poverty of the population preventing access to courts.*
4. *Lack of resources on the part of the State to strengthen institutions.*
5. *No coordination between institutions within the judicial system.*⁸⁵²

By emphasizing the importance of addressing social and economic factors, the Commission admitted that the law itself cannot bring about the necessary changes within the society. The President of the Judicial Organ, Angel Alfredo Figueroa, announced that:

⁸⁴⁸ Id. at 15. The Commission interviewed one thousand people from different areas of the country.

Rachel Sieder studied the Alta Verapaz region and found that “(t)he fincas still maintain a preponderant presence in the department. . .and constitute a legal sphere at the margin of the national legal order. In effect, they operate under conditions of ‘extra-territoriality’, they have their internal norms and are not often penetrated by international and national norms, e.g. human rights,” Rachel Sieder, *Derecho consuetudinario y transición democrática en Guatemala*, p. 72-73 (FLACSO, 1996).

⁸⁴⁹ Interview with Sotero Sincal, COINDE, 2 February 1998.

⁸⁵⁰ Examination of the judicial process found delays in the delivery of notice, schedule dates for hearings, and issuance of final judgments. Causal factors included the excessive volume of work and low professional level of the judges and magistrates. Id. at p. 16. See also Montes Calderon, Ana, “Diagnostico del Sector Justicia en Guatemala”, Inter-American Development Bank (September 1996) for a complete analysis of the Judicial System’s key problems.

⁸⁵¹ The Inter-American Development Bank noted that the ratio of judges to population is 1 per 21,809 and in the rural zones which have a high concentration of indigenous people it is 1 per 24,601. Inter-American Development Bank, “Apoyo al Programa de Reforma Judicial”, GU-0092 (Aug. 18 1997). The Commission found that 118 municipalities did not even have a justice of the peace. Commission, footnote 226 at 23.

⁸⁵² Commission, supra note 226 at 20

“The lack of economic resources to pay a lawyer, the lack of courts in the interior of the country, and the lack of communication in one’s maternal language, are factors which render approximately 50% of the Guatemala population without equal access to justice.”⁸⁵³

Thus, one should not place false aspirations on a program for justice reform to breathe life into the new “rights” listed in the Peace Accords. Without simultaneous efforts in the development arena, the reforms may well remain revolutionary only on paper.

The Commission concluded by calling for the creation of agrarian courts, the use of arbitration and conciliation, decentralization of justice, and the creation of bilingual courts. There was a call for the establishment of a constitutional right to legal assistance for defense in the case of indigence, the recognition of the multi-cultural and multi-ethnic character of the country as a guarantee before the administration of justice and the right to use customary practices as a means of dispute resolution, training of legal actors and assistants in the languages of the indigenous communities for in-court translation, and the creation of principles, criteria, and procedures for intra-communal dispute resolution/ADR. These recommendations helped formulate the policy for access to justice within the arena of land conflicts. As of 2002, there have been no agrarian courts; however there has been some progress in decentralization of courts, training in indigenous languages and/or norms, and ADR (including reference to customary law) at the local level.⁸⁵⁴ As discussed in the section on Constitutional Reforms, the initiative to recognize the legitimacy of indigenous law at the national level failed.

In the next section, I examine the state of impunity which remains the most significant impediment to access to justice.

⁸⁵³ “El 50% de la poblacion no tiene acceso a la justicia, dice Figueroa”, in PRENSA LIBRE, 29 December 1997. Calderon calculated that justices of the peace were located in only 66% of municipalities. See Part I, footnote 75 at p.30. . A further report stated that “The impossible achievement of pacific resolution of conflicts by the indigenous peoples has its roots in the language barrier and situation of poverty which impedes them from defending their rights.” “Comision propone al Congreso reformas para llevar justicia a pueblos indigenas” in PRENSA LIBRE, 12 September 1997.

⁸⁵⁴ The World Bank has supported reforms including increasing the budget of the judiciary, the adoption of anti-corruption measures, hiring new judges and justices of the peace (50% of all judges), increasing the number of regional courts, the adoption of a judicial ethics code, the establishment of a website for persons to file claims without requiring physical transportation (although I am curious as to how many peasants actually have access to the internet) and an electronic database for members the judiciary to exchange information. USAID supports reform of the criminal justice system (efficiency, transparency, gender concerns, and education), local justice centers to address penal issues in informal proceedings, public defenders in rural areas, and the Attorney General. UNDP provides support for the judicial reforms, the Attorney General, justices of the peace, and the Defensoria Indigena. Additional aid is provided by the Nordic countries, the EU, and Japan. Some progress has been made, however on the whole Donors are discouraged by the weakness of the rule of law and the lack of political will on the part of the State to follow-up reforms or provide supportive legislation.

4.1.5. Impunity

“The persistence of impunity is the principal obstacle to the attainment of full validity of human rights in the country. This phenomenon debilitates the institutions which have to impose law and justice and are in turn nourished by this debility.”

*Leonardo Franco*⁸⁵⁵

“Throughout the continent, impunity is virtually assured for those who commit offenses against victims considered ‘undesirable’ or subhuman.’ Most frequently, peasants, rural workers, and indigenous persons fall under this classification and do not have access to guarantee of the rule of law.”

*Paulo Sergio Pinheiro*⁸⁵⁶

“Impunity denies the principle of equality before the law, one of the foundations of democracy and the rule of law. Impunity destroys the confidence of citizens in the authority and role of the state and in its ability to protect their rights. . . Impunity thus engenders social frustration, despair, resignation and apathy, while feeding aggressiveness, violence, the collapse of moral restraints and the rejection of values on which a cohesive society relies. It fosters a culture of violence devoid of ethical principles.”

*Genevieve Jacques*⁸⁵⁷

It has been noted that transition to democracy in Latin America has been largely illusory, given the growth of impunity and violence and exclusion of persons from enjoyment of the civil and social rights contained in their national constitutions, thereby signaling the emergence of “democracies without citizenship”.⁸⁵⁸ The challenge of reestablishing the rule of law as the basis for the society through the enforcement of rules for equal participation and protection is one that has proved both

⁸⁵⁵ ”Entrevista a Leonardo Franco, Director de MINUGUA, in VOCES DEL TIEMPO, No. 16, October-December 1995, p.68, cited in Carlos Aldana, Juan Quinonez Schwank, and Demetrio Cojti, LOS ACUERDOS DE PAZ: EFECTOS, LECCIONES Y PERSPECTIVAS 3 (FLACSO 1996). In May 2000, the European Parliament adopted a resolution calling for support to the Guatemalan State to protect witnesses, lawyers, and human rights defenders at risk due to their legal actions against offenders, in order to reverse the current state of impunity.

⁸⁵⁶ MENDEZ et al., supra note 202 at 7.

⁸⁵⁷ GENIEVE JACQUES, BEYOND IMPUNITY: AN ECUMENICAL APPROACH TO TRUTH, JUSTICE AND RECONCILIATION, (World Council of Churches 2000).

⁸⁵⁸ Paulo Sergio Pinheiro, “The Rule of Law and the Underprivileged in Latin America: Introduction”, in MENDEZ et al. supra note 202 at 2.

daunting and unavoidable. According to figures by Transparency International, Guatemala's corruption score is placed at 2.5 (10- highly clean 1-highly corrupt), rendering it among the top twenty most corrupt nations in the world.⁸⁵⁹ Indeed the lack of an independent judiciary or impartial enforcement of the rule of law would qualify Guatemala to be what the Economist deems a "phony democracy".⁸⁶⁰ These entities deceive the international community by engaging in reforms superficial enough to attain political support, foreign direct investment, and foreign aid while at the same time infringing upon the rights of the citizenry. The World Bank calculated Guatemala's application of legal norms to rank above only 13.5% other countries in the world.⁸⁶¹

The Comprehensive Accord on Human Rights (1994) called upon the State to combat impunity via the prevention, investigation and punishment of human rights violations. In addition, the State was to eliminate illegal security groups that conduct such violations. Violations of the accord would include infringement of the rights to life, personal integrity and security, liberty, freedom of movement, freedom of expression, freedom of association, right to due process, freedom to participate in political activities and processes, and protection of human rights defenders. These provisions have not been implemented, in fact repression of organized actions by marginalized groups and attacks on human rights defenders, lawyers, witness, judges, and political activists have escalated in the post-settlement period. Frank La Rue of the NGO *Centro de Accion Legal para los Derechos Humanos* (CALDH) reported having received death threats and the robbery of his office computers which contained the archives of cases involving peasant land claims. Other activists involved in peasant and indigenous rights, including Rigoberta Menchu, reported similar threats. In 2002, four members of CUC were kidnapped and assassinated, allegedly upon orders issued by landowners. This supports Evans' observation that "the 'rule of law' is particularly important as a complement to the efforts of less privileged groups to organize themselves." The severity of repression is intended to force marginalized groups to abandon expression their demands.⁸⁶²

⁸⁵⁹ [Http://www.transparency.de/documents/cpi/2002](http://www.transparency.de/documents/cpi/2002).

⁸⁶⁰ "Phoney Democracies", in THE ECONOMIST, 24 June 2000.

⁸⁶¹ "Governance Matters II: Updated Indicators for 2000-/01 (January 2002) at <<http://www.worldbank.org/wbi/governance/govdata2001.htm>>.

⁸⁶² Peter Evans, "Government Action, Social Capital and Development: Reviewing the Evidence on Synergy" in 24 (6) WORLD DEVELOPMENT 1119-1120 (1996).

Mr. La Rue aptly noted that the Portillo regime was cannibalizing itself on account of the extremity of its corruption. It is impossible for the people to faith in democracy when the politicians have no respect for its founding principles. Thus, social actors blame the diminishment of the rule of law on misconduct by State actors. Consider the commentary by Daniel Pascual of the National Coordinator for Peasant Organizations (CNOC) in reaction to the revelation that military personnel had enabled the escape from jail of ex-PACs condemned for murder of rural peasants: “We will respect the law when the State respects it”. This refers to O’Donnell’s identification of horizontal effectiveness of the legal system- to what extent are public officers subject to legal controls with respect to the lawfulness and appropriateness of actions?⁸⁶³

The most symbolic cases highlighting the extent of impunity against human rights defenders include the assassination of Monsignor Juan Gerardi Conedera on 26 April 1998, after his presentation of a detailed report describing human rights abuses committed by the military, and the assassination of the anthropologist Myrna Mack Chang on 11 September 1990 (she studied the actions of the State vis-a-vis internally displaced communities). The judicial system’s inexcusable delay in the prosecution of these murders provides evidence of the linkage between the themes they explored and the reticence of the State to properly embark upon a reconciliation process.

The full processing of the Mack case, driven by dedication of the victim’s sister Helen Mack, took 12 years and 22 days, resulting in the sentencing Colonel Juan Valencia Osorio and acquittal of General Edgar Augusto Godoy Gaytan and Colonel Juan Guillermo Oliva Carrera. The acquittals prompted Helen Mack to appeal to IACHR, but observers considered the decision a partial victory.⁸⁶⁴ With respect to the Gerardi case, efforts to prosecute those responsible resulted in a wave of death threats against the lawyers and judges involved in the case, promoting their immediate exodus from the country. Five years after the murder, a Court of Appeal

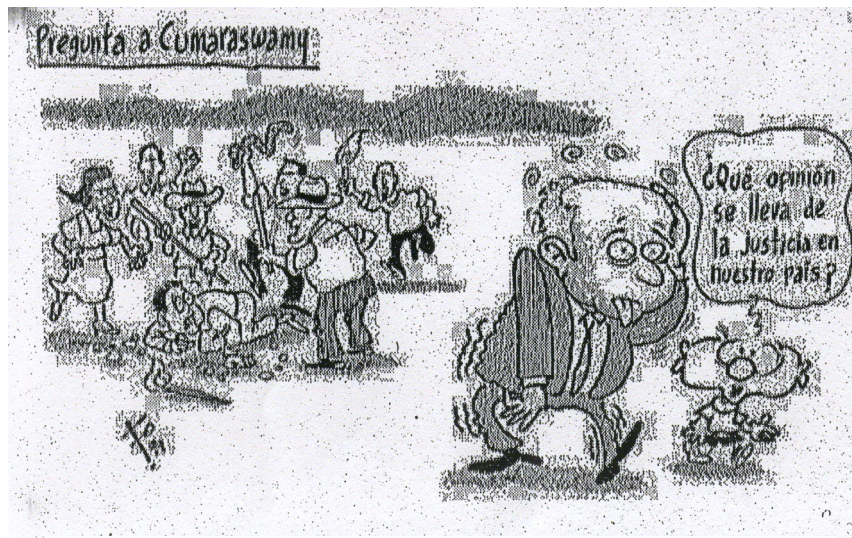
⁸⁶³ Interview on 5 May 1999. See Guillermo O’Donnell, *Democracy, Law and Comparative Politics* 38 (Institute of Development Studies 2000).

In June 2001, 11 indigenous communities filed a complaint with the Public Ministry charging Rios Montt with having committed genocide composed of three massacres in Baja Verapaz, two in Ixil, Quiche, three in Huehuetenango and three in Chimaltenango in which over 1,400 persons were tortured and killed during his period as Head of State. In May 2000, a charge was filed against the government of Romeo Lucas Garcia for 10 massacres 1981-82. The European Parliament requested the Guatemalan authorities to prosecute those responsible for planning, instigating or fomenting genocide.

⁸⁶⁴ Elder Interiano & Claudia Mendez Villaseñor, “Caso Mack: Valencia culpable; 2 absueltos” in *PRENSA LIBRE* 4 October 2002.

annulled a decision against the alleged intellectual authors of the crime: military personnel Byron Miguel Lima Oliva, Byron Disrael Lima Estrada & Jose Obdulio Villanueva Arevalo. This prompted the Public Ministry and the Archbishop's Office to file an amparo and observers lamented the Court's action to be a step backwards.

At present, human rights violations may involve private security groups representing narco-traffickers, large landowners, demobilized soldiers, as well as the military and even the police. Although many victims include marginalized groups and their defenders, elites themselves are increasingly subject to violence; President Portillo himself sent his mother, sister, sister-in-law, and two nephews into exile in Canada after receiving threats from a criminal gang which sought retaliation for the execution orders issued against two of their members. There was much criticism given the supposed access to security of the President as opposed to the common citizen, thereby highlighting the hopelessness of the situation. Adding to this grim view, MINUGUA's former legal advisor, Luis Pasara remarked "Even if a family member is kidnapped, the landowners can afford the ransom."⁸⁶⁵ Elites appear to prefer to adjust to increased violence within society rather than take action to resolve the structural inequities which lie at the root of the violence.



Question to UN Rapporteur on the Independence of Judges & Lawyer, Mr. Param Cumaraswamy: "What opinion do you have of the state of justice in our country?"
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⁸⁶⁵ Luis Pasara, "The Guatemalan Peace Process: The Accords and their Accomplishments", Kroc Institute for International Peace Studies Occasional Paper #21 (December 2001).

The removal of repression by the Army without increased intervention by the State in civil disputes has resulted in an explosion in crime which solidified a state of insecurity in Guatemala. One consequence is the increase in dispute resolution by lynching. The Public Ministry reported that over 123 lynchings were registered in Guatemala from 1997-1998, between 1998-2001 the figure rose to 170.⁸⁶⁶ The Public Ministry report noted that the majority of lynchings occurred in the Western departments of the country which “have a majority indigenous population and which tend to apply the laws themselves.” This statement does reveal the clear absence of State actors in these regions, however it may also have been an attempt to incite fear of recognition of indigenous law under the proposed Constitutional reforms. MINUGUA claimed that the 85.7% of lynchings occurred in rural areas and that 67% involved alleged crimes against property of low value.⁸⁶⁷ According to sociologist Carlos Guzman:

“The lynchings are a product of a people which consider their expectations to attain justice via tribunals to be lost . . . As long as the judicial system does not change the lynchings will continue. The idea of impunity prevails in the collective conscience. It is precisely these acts of impunity combined with the misapplication of justice which promote the loss of control of public order.”⁸⁶⁸

These actions are a reflection of and response to what is perceived to be an unjustified absence of the judicial system from areas in which conflict arise, as well as deliberate manipulation of the justice system by powerful political actors. Until the State can successfully implement reforms to render the legal system decentralized, effective, and autonomous from political pressures, the people will continue to reject and ignore the standards incorporating the formal rule of law. Ad hoc vigilante justice replaces the formalized legal system, rendering procedural justice non-existent.

As of 2002, the Supreme Court has developed a national plan to reduce lynchings in Guatemala, however MINUGUA is no longer involved in the project,

⁸⁶⁶ “Mas de cien lincahdos en dos anos”, Siglo Veintiuno, 9 November 1998.

⁸⁶⁷ Thalif, Deen, “Rights: UN Revolted by Public Lynchings in Guatemala”, INTER-PRESS SERVICE, 22 June 1998.

⁸⁶⁸ Erick Campos, “Sin Justicia, habra linchamientos”, in PRENSA LIBRE, 1 February 1999.

thus the program may be limited in resources. The Court highlighted that its study revealed that lynchings occurred in areas of suffering isolation, low economic resources, lack of communication with outside actors, and lack of job opportunities.⁸⁶⁹ Hence we are once again reminded of the need to address socio-economic rights as a means of ensuring respect for civil and political rights.

I attended the NFU Annual Conference in September 1999 during which Mark Duffield, of the International Development Department, University of Birmingham (UK), declared that World War III had already commenced but that no one was aware of it due to the primary actors being Non-State Actors engaged in narco-trafficking, arms trade, money laundering, etc. Indeed, within Latin America, the shift of power to such groups is undeniable and has corrupted States to the point where the basic pillars of democracy are teetering on the brink of collapse. The UN has noted that the top crime organizations gross 1.3 trillion dollars per year, a staggering amount which render developing state budgets miniscule in comparison. According to the UNDP, narco-trafficking alone accounts for 400 billion dollars profit, which is ten times more than the aid distributed to developing countries.⁸⁷⁰ Of the twelve largest narcotics cartels in the world, twelve are located in Mexico and four are in Colombia. The explosion of narco-trafficking has produced four drug cartels in Guatemala which provide a bridge service for drugs passing from Colombia to the United States: one in Sayaxche, Peten and in Izabal by the Gulf; a second in Zacapa; a third in the South; and the fourth in the centre which is run by narco-military groups.⁸⁷¹ It is estimated that approximately half of all the cocaine entering U.S. market is trans-shipped via Guatemala, ca. 200-300 metric tons.⁸⁷²

There is an unusual link between narco-trafficking and land distribution/displacement issues. These groups are accused of renewing cycles of displacement due to violent threats and attack.⁸⁷³ In light of the immense crisis in Colombia, this cannot be taken lightly. In 1992, Guatemalan peasants filed a petition with the U.S. Embassy in Guatemalan, claiming that four Army colonels killed nine persons and evicted them from their farms in order to build runways for incoming

⁸⁶⁹ Elder Interiano, "Jose Quesada-'Es problema de Estado'", in PRENSA LIBRE 19 September 2002.

⁸⁷⁰ Abraham Lama, "Increased Threat of Narco-trafficking in New Millennium" in INTER-PRESS SERVICE 24 November 1999.

⁸⁷¹ Julio F. Lara, "Narcotrafico: Nuevas rutas de la droga", in PRENSA LIBRE 20 February 2000.

⁸⁷² Frank Smyth, "Guatemala's Narco-military", in IntellectualCapital.com, 18 November 1999.

⁸⁷³ Ramon Hernandez, "Pobladores huyen de aldea por presencia de narcotraficantes", PRENSA LIBRE 16 August 1999.

planes carrying drugs. The colonels were never brought to justice.⁸⁷⁴ Similar forced evictions occur at present time. There are various fincas of vast territory which would appear viable for redistribution, but are closely guarded by owners due to the illicit nature of such use of their properties.⁸⁷⁵

In March 2000, the Supreme Court approved the creation of tribunals for prosecution of organized crime, including assassination, kidnapping, bank robbery, auto theft, and narco-trafficking. Jurisdiction would encompass Chiquimula, Zacapa, Izabal, Quetzaltenango, San Marcos, Huehuetenango, Solola, and Retalhuleu. Of significant concern is the fact that the Supreme Court found that the departments which registered the highest complaints of irregular conduct within the courts (Izabal, Peten, Escuintla, and Jalapa) were precisely those in which there was a strong presence of narco-trafficking or other substantial economic interest.⁸⁷⁶ In spite of the fact that the Army was granted authority to provide 10,000 personnel to support 16,000 police to fight crime, observers noted little improvement in security. In fact, observers fear that the re-militarisation of the State places human rights activists in even more precarious positions.

In spite of demobilization efforts, the provision of arms to the State has increased. The US Government has raised its assistance to the Guatemalan Anti-narcotics Department from 1 million USD in 1997 to 4.5 million USD in 2000 while the Guatemalan State downsized its land and housing programs by cuts ranging from 10% to 33%. One is left to query how development will ever be achieving when resources are streamlined to battle notorious, violent Non-State Actors. Although the official war is over, the drug war retains many of the same characteristics and actors. Ironically, the construction industry is flourishing due to drug money, but this primarily benefits the fine apartment dwellers and restaurant/bar milieu in Zone 9 rather than the poor in the shantytowns.

These examples reveal the limited ability of legal mechanisms to provide remedies for problems deep-rooted in political and economic anomalies. The rule of law remains weak, thus one of the key components of structural social capital is lacking in Guatemala. Apart from radical actions such as legalization of drugs, large

⁸⁷⁴ Frank Smyth, *supra* note 254.

⁸⁷⁵ It is estimated that over 1600 hectares is dedicated to cultivating illicit crops, rendering yearly profits of 5,500,000. Figures from the U.S. Drug Enforcement Agency, cited in Alvaro Contreras Velez, "Cacto Apuntes para la historia: Del "descubrimiento" del narcotrafico en las zonas agricolas", in PRENSA LIBRE, 1 May 2000.

⁸⁷⁶ Oneida Najarro, "Corrupcion: Juzgados de cuatro departamentos son los mas denunciados", PRENSA LIBRE 11 January 2000.

scale land reform, or extradition of narco-military elites & war criminals for prosecution, it is difficult to conceptualise any measures which may have a significant impact on the state of impunity in the short term. Focus must then be placed on long term measures which seek to evolve social capital as well as the performance of State actors, in particular judiciary. This includes the process of judicial reform which is being pursued, although slowly, as well as consideration of alternative dispute resolution mechanisms, discussed *infra* Part IV.

Below, I turn to the formal process for dispute resolution of land conflicts which is characterized by observers as providing a forum for acts of impunity.

4.1.6. Dispute Resolution of Land Conflicts: The Formal Process; Usurpation & Forced Eviction

“Legal prescriptions are less of an influence on behavior than they are a reflection of it.”

*David Easton*⁸⁷⁷

The current challenges to the legal system are in part derived from defects within the political and economic system and in part due to inherent inconsistencies, such as dualistic subsystems of norms. Corruption and inequity which plague the political and economic systems affect the legal system. Rather than develop a state of equilibrium between the different systems, the legal system appears to be undergoing dominance from the political and neo-feudal/capitalistic economic systems, thereby affecting its own performance and legitimacy, as well as prolonging destructive interaction.

It has been proposed that under a democratic system, judges are supposed to act independently, associate the law with the concept of justice, uphold the Constitution and human rights, understand their role as a control over the State, and realize the social function of judgment.⁸⁷⁸ Courts are to ensure that minorities and individuals are not repressed by the majority, or in the case of Guatemala that the vulnerable majority not be harmed by the ruling minority.⁸⁷⁹ Conflict arises when the

⁸⁷⁷ DAVID EASTON, *THE ANALYSIS OF POLITICAL STRUCTURE*, 102 (Routledge 1990).

⁸⁷⁸ CESAR BARRIENTOS PELLECCER, *LOS PODERES JUDICIALES: TALON DE AQUILES DE LA DEMOCRACIA* 51-52 (Magna Terra Ed. 1996). He cites the Inter-American Institute for Human Rights which asserts that “The credibility and trust en the judicial power are the basic elements to ensure that the common citizen fell that his fundamental rights are really protected. . .”, IIDH, *EL JUEZ Y LA DEFENSA DE LA DEMOCRACIA* 12 (IIDH 1993).

⁸⁷⁹ MINUGUA sets forth that the basic elements of a functioning justice system are its ability to resolve social conflicts effectively and legitimately and control the exercise of power. MINUGUA,

courts fail to uphold this duty and reflect the will of the power elite section of society via non-response to violations against the poor or issuance of punitive measures against them. Judges and lawyers in Guatemala are predominantly *ladinos* and are considered to side with the interests of their class thereby rendering the legal system as biased against the indigenous population.⁸⁸⁰ Instead of serving as the “immune system” of society, the judiciary becomes a tool of repression.⁸⁸¹

Rules are constructed to govern relationships and affect the ability to change them. They are adopted to reflect the empirical structures upon which they are based, hence in Guatemala the rules reflect dominance and exclusion. This runs counter to expectations which are intrinsically tied to democratic theory, such as legitimacy, fairness, and accessibility. If we examine the relationship between the courts and the legislature vis-à-vis the elites as opposed to marginalized groups, bias is clearly established in favor of the more powerful group.

Alejandro Rodriguez described the state of affairs with respect to impunity as deriving from a complete manipulation of penal law by the elites. Penal law is intended to limit the State’s use of violence against its citizens, however in Guatemala it is twisted into a means of maintaining minority control over resources. He claims the existence of a parallel underground penal system composed of State and paramilitary actors which engage in crimes in order to terrorize citizens from formulating political demands and thus maintain the status quo:

“Hence, impunity in Guatemala appears to be a structural problem derived from the economic, social, and political situation. To the extent that the resources and wealth of the country are concentrated in the hands of a few, to the extent that a minority sector of the

FUNCIONAMIENTO DEL SISTEMA DE JUSTICIA (Suplemento al decimo informe sobre serechos humanos de MINUGUA) (1999).

⁸⁸⁰ In March 2000, the Law School of the University of San Carlos hosted a forum in which indigenous law experts were brought together to assess its application as an alternative to the judicial system. Rather than be labeled an alternative, it should be characterized as a complement. Indigenous law is now taught at the law school and scholarships are being made available to indigenous students to complete a legal education.

⁸⁸¹ Consider the statement by Anne-Marie Slaughter: “*Judges are both agents and shapers of domestic and transnational civil society. They are the curbers of the State, creating the breathing space for individuals and groups to flourish; but they are also the agents of individuals, resolving disputes, stabilizing expectations. The definition of an ‘independent judiciary’ is a judiciary that is not the handmaiden of State power, that answers to the law rather than to the individuals who make it. Such a judiciary can set itself against the State, but can also regulate a realm in which the State does not intrude.*” Anne-Marie Slaughter, “International Law in a World of Liberal States”, in 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW, at footnote 18 (1995).

*population exploits the great majority; to the extent that the unjust socio-economic system generates hunger, disease, and ignorance among the majority, we face a case of structural violence, seated upon a regime which has to practice institutional violence. . . Thus, while the aspiration of penal law is the affirmation of human rights, the Guatemalan underground penal system represents its total negation; such that no obstacle shall interfere in the maintenance of an economic and social situation of exploitation which excludes almost two-thirds of the population from the minimum needs for a dignified life.*⁸⁸²

The reform of the penal code to significantly increase penalties for usurpation may be interpreted to be a form of “legitimization” of impunity by penalizing the actions of those engaged in protesting the extreme socio-economic inequity and non-responsive state. The limitation of forms of political expression is intended to repress to the voice of the exploited populace. There is a certain degree of hypocrisy exhibited by the selective prosecution of crimes, white collar crimes such as tax evasion, although widespread, are rarely pursued, while those committed by marginalized persons receive more attention and serve to promote the stereotype of the poor as a threat to social order.⁸⁸³ Rather than classifying land disputes as labor or civil matters and creating effective procedures for such matters, they are treated as a penal matter via criminalisation under usurpation provisions.

Rodriguez decries the use of violent forced evictions, often conducted by private security forces, and which result in the deaths of peasants. He characterizes the use of private violence by the minority landowners against the majority landless, as “a source of impunity of primary magnitude” which is conducted in the name of a “alleged legitimate right to defend one’s property.”⁸⁸⁴ There are links between private security forces and the State given the support and/or acquiescence of the latter towards the actions of the former against the peasants.

The Penal Code recognizes four types of criminal property intervention:

1. *Usurpation*
2. *Aggravated Usurpation*
3. *Alteration of boundaries*
4. *Disturbance of possession*

⁸⁸² Alejandro Rodriguez, *El Problema de la impunidad en Guatemala*, 3-4 (Fundacion Myrna Mack/AVANSCO May 1996).

⁸⁸³ See Paulo Sergio Pinheiro, “The Rule of Law and the Underprivileged in Latin America: Introduction”, in MENDEZ et.al. *supra* note 202 at 5.

⁸⁸⁴ Rodriguez, *supra* note 264 at 7.

Usurpation is defined as: 1) The dispossession or attempted dispossession of a property with the intention of gaining possession/occupancy of said property, engaging in illicit exploitation, or obtaining a right attached to it, 2) The illicit invasion and occupation of a property for any purpose.⁸⁸⁵ The police, Public Ministry, and judge are given the obligation to order or carry out, according to function, immediate eviction of usurpers in order to prevent further consequences of the act. The penalty of usurpation is set at 1-3 years in prison.

Due to the increased frequency of violence in usurpation cases, the Penal Code was amended to include the additional category of aggravated usurpation.⁸⁸⁶ It includes a higher penalty of 3-6 years in prison and is also applicable to 1) Those who instigate, propose, force, or induce others to commit such act, or 2) Those who cooperate in the planning, preparation, or execution of usurpation. This is intended to apply to activists such as Pastor Andres Giron who encourages usurpation based on the notion that the peasants need to assert their socio-economic rights as well as the right to life. Many State actors are skeptical of the argument “Need = Right” as a defense for such actions, especially those resulting in injury to persons or property. Aggravated usurpation may contain any of the following additional characteristics: 1) More than five persons commit the act, 2) The usurpers remain on the property for more than three days, 3) The usurpers have evicted or intimidated the possessors or owners so that they were forced to abandon the property, 4) The usurpation is brought about by hostage taking, disorder, violence, swindle, abuse of trust, secrecy, or intimidation, or 5) There is a charge of damage or injury to the property, its crops, installations, access roads, or natural resources. Hence, the negative ingenuity of the design of the crime is that it seeks to limit protest actions of the landless who takeover land as a desperate attempt to get the State to respond to their demands.

The third category is that of alteration of borders.⁸⁸⁷ It is defined as the alteration of borders or markers with the intention of gaining possession or illicitly exploiting all or part of a property. The penalty is set at imprisonment for six months to one year, unless it is committed with violence, in which case the penalty is increased to one-two years.

⁸⁸⁵ Article 256, Penal Code of Guatemala, Decree No. 17-73 (1998).

⁸⁸⁶ Article 257, Penal Code of Guatemala, (1998).

⁸⁸⁷ Article 258, Penal Code of Guatemala, (1998).

The final category is disturbance of possession.⁸⁸⁸ It includes any violent disturbance of possession or occupancy of property which is not included in the above categories. The sanction is one to three years of imprisonment.

The Penal Code provides a clear indication of how the law seeks to stem demands for increasingly scarce resources. Landowners find that the costs of maintaining such inequity in land distribution is extremely high, because they engage private security groups to guard their properties and remove occupiers. Penalizing such action is an attempt to transfer the burden of dispute resolution to the State. The law is drafted in response and as a mirror to a complex reality. Rather than seek to remedy the causes of frustration, the State espouses rules to punish those who take extreme acts. The implementation of these provisions has not been an easy matter. The eviction process is often a violent one in which the landowners, police, human rights observers, and usurpers may be injured or killed.

In 2000, it was estimated that 5,992 families were forcibly evicted from their homes.⁸⁸⁹ The juxtaposition of the empirical behavior of the populace as opposed to the codified rules reveals complete disconnection between the two. According to staff members from the Attorney General for Human Rights Office, the eruption of land conflicts tends to follow a routine

When a landowner seeks to evict persons living on the property which he alleges pertains to him, he submits a complaint with the Public Ministry, providing registry information. The Public Ministry visits the property to see if the people are actually present. The people are then invited to a conciliation session at the Public Ministry offices, however most often the usurpers are reluctant to appear. If the people lack proper documentation, they are requested to leave the property thus demonstrating a clear policy of favoring formal title. The landowner may petition to the court for an eviction and arrest order. The judge may initiate another conciliation session or directly issue a decision for arrest, fine, and/or eviction which is turned over to the police. The police will then call the Attorney General for Human Rights' Office to witness the eviction. This office seeks to ensure that due process is respected (which is rarely the case) and often serves as a mediator between the Police, the Property Owner, and the People facing eviction. There are no court precedents

⁸⁸⁸ Article 259, Penal Code of Guatemala (1998).

⁸⁸⁹ Frente de Pobladores de Guatemala, cited by MINUGUA, *LA POLITICA DE VIVIENDA EN EL MARCO DE LOS ACUERDOS DE PAZ* (August 2001).

rewarding land to non-registered land to claimants, and the State does not recognize alternative forms of tenancy, only registry.⁸⁹⁰ Once the Human Rights Office verifies the legality of the eviction, it asks the people to leave voluntarily. Sometimes the eviction process becomes violent because people would rather die than leave the land. Many peasants, police, and landowners have died in these conflagrations. The Public Ministry expressed its disappointment for international oversight mechanisms, stating that MINUGUA usually arrives after the police have been killed.

As to its own inefficiency, Public Ministry officials admit that they are overwhelmed with cases involving homicide, rape, and kidnapping. Land usurpation simply does not receive a high priority, thus the average time of action in such cases is between 6-8 months.⁸⁹¹ Landowners prefer to utilize the courts rather than alternative dispute resolution mechanisms, due to the fact that their formal title entitles them to assistance by the state. Most of the lower tribunals I contacted were disorganized and unsure of how many land cases they received, rather than statistics they provided general verbal assessments, such as “many”. However, the tribunal of Zacapa reported a reception of 140 complaints regarding land conflicts in 1998 which provides a good example of the prevalence of such conflicts.

Land usurpation may be considered to be the highest cost endeavor as it sometimes incurs violence, death, & destruction of property. According to Ury, Brett & Goldberg violence “creates new injuries and new disputes along with anger, distrust, and a desire for revenge.”⁸⁹² In the context of Guatemala, usurpation may freeze the situation as the title-holder cannot sell the land and the possessors cannot attain formal recognition of their possession. Release of tension in this setting may be taken to the extreme. There is no mechanism under land usurpation to tone down fervor in order to conduct a dialogue which may lead to a solution, however rural groups often utilize the land usurpation as a means to coercing the title-holder to negotiate. When this fails, outside parties, such as the police, are brought in to resolve the conflict. This is not effective, because the authorities claim that the peasants engage in cyclical usurpation (this is discussed further in the section).

A forced eviction is not a permanent solution. The State does not make a concerted effort to provide evicted persons with alternative housing, resettlement, or

⁸⁹⁰ Interview with USAID representative, on condition of anonymity 10 April 1999.

⁸⁹¹ Interview with various officials within the Public Ministry, 17 February 1998.

⁸⁹² URY, BRETT & GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 15 (The Program on Negotiation at Harvard Law School 1988).

access to productive land as called for by the UN Committee on Economic, Social, and Cultural Rights.⁸⁹³ 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.”⁸⁹⁴ 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.

Impunity and lack of access to justice intertwine to complicate resolution of the crisis. Both formal titleholders and possessors are negatively affected by these factors. On January 24, 1997, Rosa Chub Pec a fifty-seven year old woman, was killed during a land eviction in El Estor, Izabal carried out by landowner Luis Alfredo Ponce. He claimed that the land she and her community lived on was his, whereas the community claimed that a church group donated the land to them in 1996. A warrant issued in February 1997 for the arrest of Ponce was not carried out a year later.⁸⁹⁵ The failure to apprehend the landowner serves to convince peasants that the rule of law is biased.

However, titleholders themselves have been victims of arbitrary justice. In 1996, the landowners belonging to the Chamber of Agriculture threatened to sue the authorities for failure to carry out eviction orders issued by the courts.⁸⁹⁶ The President of the Chamber of Agriculture announced that “Here are demonstrations of non-fulfillment of justice, contempt of the courts, damage, injury, and disobedience because judicial resolutions have been handed down but not executed.”⁸⁹⁷ He noted that the government does not uphold the law due to political inconvenience. Although an arrest order should be carried out within 48 hours, he complained that no usurpers

⁸⁹³ UN Committee on Economic, Social, and Cultural Rights, General Comment No. 7 on Forced Evictions para. 17 (E/C.12/1997/4) (1997). See Also World Bank Operational Directive 4.30 on “Involuntary Resettlement”. Both instruments call for compensation

⁸⁹⁴ Statement by Moises Cardona quoted by Miguel Gonzalez, “Petición: Campesinos salieron de Belice”, in PRENSA LIBRE, 6 March 2001.

⁸⁹⁵ “No Focus on Land Disputes”, The Siglo News, p. 3 Vol. 2, No. 78, 18 February 1998.

⁸⁹⁶ Carlos Canteo, “Finqueros amenazan con procesar a funcionarios por incumplir desalojos.” SIGLO XXI 28 November 1996.

⁸⁹⁷ Id.

had been imprisoned. Frustration leads to vigilante justice, in which evictions are sometimes carried out without a judicial order resulting in resistance, death, injury, or disappearance of the actors.

In April 1996, a group of peasants occupied land in the finca Amberes, in Entre Rios, Puerto Barrios claimed to be owned by Rafael Castillo. In 1998, they extended their occupation claiming to be occupying state lands and Mr. Castillo their sought eviction by the Court. The Second Court of the First Instance of Puerto Barrios issued an eviction order in March 1997 and again in October, however the police did not carry out the order, thus exhibiting what O'Donnell characterizes to be a lack of vertical effectiveness within the legal system.⁸⁹⁸ Fear of reprisal extends to the police themselves. In short, the lack of a mechanism by which to assure peasants of a means of survival through the provision of alternative lands or socio-economic support transforms disputes into what is perceived to be a violent battle to preserve one's life or historic link to the land.

A wave of marches and land invasions in 2002 prompted the filing of charges by the Chamber of Agriculture to the Attorney General's office against six leaders of the CNOC, CUC, and CONIC (including Daniel Pascual, Juan Tiney and Rosario Pu) for instigating usurpation of plantations based on their commentary to the media. The leaders countercharged that the landowners were attempting to repress their rights to free speech in order to attain response by the State to their needs for social justice.

⁸⁹⁸ "Campesinos amplian area de finca invadida", in *Siglo Veintiuno*, 61 2 February 1998. See O'Donnell supra note 245.

International Perspectives on Forced Eviction

The Commission on Human Rights issued Resolution 1993/77a on Forced Evictions in which it characterized such action as being a gross violation of human rights, in particular the right to adequate housing.” It urged governments “to confer legal security of tenure on all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based on effective participation, consultation and negotiation with affected persons or groups.” It called upon governments to provide immediate restitution, compensation and or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups.” Hence their participation is a necessary part of protection.

Different types of tenure such as title ownership, possession, usufruct, adverse possession, customary, historic title, usurpation, etc. are given different degrees of validity within the formal and informal dispute resolution mechanisms. In spite of this, the Committee on Economic, Social and Cultural Rights issued General Comment 4 (1991) which stated “Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.” Forced evictions is sufficiently tied to the rights to housing, to remain, freedom of movement, privacy, security of the home, security of tenure, equality of treatment, adequate standard of living, security of the person and other human rights, such that the Sub Commission noted that it is a gross violation of such.⁸⁹⁹ The Committee noted that forced eviction is prima facie incompatible with the CESC.⁹⁰⁰ States are called upon to prevent such actions through participating, consulting, and negotiation with potential victims. Finally, governments are advised to grant title to dwellers provide “immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups.” Right of recourse to courts, legal counsel/legal aid, effective remedies, compensation (including land, not restricted to cash payment), restitution, and return have also been cited as an important concerns and included within guidelines for development-based displacement.⁹⁰¹ It has been noted that forced evictions may result in internal displacement, such that the two issues cannot be treated separately (noting common concerns of use of force, movement, suddenness, violence, violation of human rights, and insecurity of compensation. Yet, it was pointed out that not all cases of forced evictions lead to internal displacement and not all internally displaced persons are displaced due to forced eviction.⁹⁰²

The Commission on Human Rights noted that “forced evictions and homelessness intensify social conflict and inequality and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society.”⁹⁰³ It noted that although forced evictions may be conducted by a variety of actors, the ultimate legal responsibility for prevention of such action falls upon the government.

Regarding the wrongful occupation of property and forced eviction, should the occupation be ongoing, the violation has not ceased. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities issued resolutions addressing

⁸⁹⁹ Sub Commission Resolution 1992/14 27 August 1992. See also Sub Commission on Prevention of Discrimination and Protection of Minorities resolution 1995/29 & Resolution 1998/9 20 August 1998.

⁹⁰⁰ See Scott Leckie, “Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice” in 19 (2) REFUGEE SURVEY QUARTERLY 46 (2000), citing General Comment No. 7 on Forced Evictions(1997)..

⁹⁰¹ Commission on Human Rights, Guidelines on International Events and Forced Evictions, Report of the Secretary General, E/CN.4/Sub.2/1995/13 para. 14 (17 July 1995); Commission on Human Rights, Expert Seminar on the Practice of Forced Evictions, E/CN.4/Sub.2/1997/7 (2 July 1997)

⁹⁰² Commission on Human Rights, Forced Evictions, E/CN.4/1994/20 7 December 1993 para. 18.

⁹⁰³ Commission on Human Rights Resolution 1993/77 10 March 1993.

victims of forced evictions.⁹⁰⁴ The Committee on the Elimination of Racial Discrimination issued a similar recommendation.⁹⁰⁵

Regarding Forced Evictions, the Commission on Human Rights issued a resolution 1993/77 calling for governments to provide “immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes or needs, to persons and communities that have been forcibly evicted, following mutually satisfactory negotiations with the affected persons or groups.”

In addition guidelines on development-based displacement were adopted by the Expert Seminar on the Practice of Forced Evictions, Geneva 11-13 June 1997 which recognized the right of “persons, groups and communities subjected to forced evictions have the right to, but shall not be forced to return to their homes, lands or places of origin” as well as compensation for land, property, including rights or interests in property not recognized in national legislation. It also recognizes the right to a fair hearing before a competent, impartial and independent court or tribunal, legal counsel, legal aid, effective remedies, and appeal.

4.1.7. Legal Fraud, Expert Usurpation & Self-Imposed Displacement

The absence of legal aid has produced a myriad of opportunities for abuse, not only are the displaced prevented from filing complaints against their dispossessors, there have been cases of peasants who have been solicited by unscrupulous lawyers to pay for the processing of title to the land which they have occupied. Once payment is rendered, the lawyers disappear and the claim remains unprocessed.⁹⁰⁶ This highlights the need for legal aid services and sanctions against unethical members of the bar.

Another problem is what has been named “expert cyclical usurpation”. It is claimed that in some cases persons consistently engage in usurpation of property as a means of attaining free land or earning money.⁹⁰⁷ The State provides a family with title to the plot of land in recognition of their possession. The family, in turn, gives the plot to a son or sells it to another peasant, and the remaining family members proceed to another plot. It is believed that it is more profitable to engage in this activity than to settle on one plot permanently and dedicate oneself to farming. There are also profiteers who charge other peasants “processing fees” for filing land claims

⁹⁰⁴ UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Resolutions 1997/6 & 1998/9 both on “Forced Evictions”. See also Resolution 1997/29 on “Freedom of Movement and Population Transfer”, calling for the right not to be displaced and the right to return to their place of origin or choice and Resolution 1997/31 on “The Right to Return”

⁹⁰⁵ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXII (49), adopted 16 August 1996.

⁹⁰⁶ Edgar Octavio Giron & Arnaldo Marroquin, “Invasores desalojan finca pacificamente”, in PRENSA LIBRE 18 February 2000.

⁹⁰⁷ Interview with various staff members of the Attorney General’s Office for Human Rights, 4 February 1998.

with the state institutions although the procedures are technically free of cost. “Land Coyotes” exploit the poor by selling land in territories which may be subject to landslides, violence, or rival title claims. Increased inflation, lack of opportunities in the rural area, demographic growth, high rents result in a growth of precarious urban settlements. It is believed that approximately 1 million people live in such situation.⁹⁰⁸ Because of this, the Housing Fund (FOGUAVI) is one of the few institutions which openly admits it has a mandate over dispersed displaced persons, although they are identified under the law as “poor” rather than IDP.⁹⁰⁹ FOGUAVI is charged with legalization of urban property, relocation of families to safe areas, and arrangement of services such as water, electricity, and sewage. They claim to place emphasis on the safety of settlements, noting “We can’t sell graves.” Some donors are wary of FOGUAVI’s beneficent position, claiming that there have been accusations of corruption. FOGUAVI is quick to note that it does not engage in conflict resolution nor does it wish to promote usurpation. Hence legalization is only available to those who usurped properties as of 1995. However, because they have been unable solve the housing shortage, this cut off date was extended. These actions have incurred a negative response by the Ministry of Agriculture which is hesitant to promote any programs which would directly or indirectly reward peasants utilizing such strategies. Staff members of the various land institutions are sometimes wary of applying “victim” labels to claimants, due to past experiences of fraud. They grow suspicious of that claim that “Need renders a right” which, in their opinion, has been misapplied to justify destruction of property, theft of crops, and usurpation. Land usurpations have increased significantly as a result of non-implementation of the Peace Accords.

⁹⁰⁸ Interview with Ricardo Goubaud, FOGUAVI, 14 May 1999.

⁹⁰⁹ See Law 120-97, establishing FOGUAVI.

The Right to Non-Interference with the Home and the Right to Housing

Hernando Valencia Villa recommends «the inclusion of the right to the home and the plot of land or the home town as a fundamental liberty on the constitutional and international levels. . .» as a possible legal response to displacement crises. The International Covenant on Civil and Political Rights, Article 17: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.” The Human Rights Committee issued a General Comment which supports the linkage of the right to housing to the IDP situation: «(T)he right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head. Rather it should be seen as the right to somewhere to live in security, peace and dignity.»¹ The Committee further noted security of tenure, availability of services, affordability, habitability, accessibility, location, and cultural adequacy as factors determining appropriate housing. In regard to security of tenure, the Committee calls for «legal protection against forced eviction, harassment, and other threats» in all cases, regardless of the type of tenure held. Craven notes that the Covenant does specifically not provide for a limitation to one’s right to housing due to another’s property interest, rather it is subject to limitation in the interest of general welfare. Given that the right to property is not included in the Covenant, the right to housing is prioritised, and limitations must be strictly justified.

The Human Rights Committee has actually recommended property law reform in cases of severe unequal distribution. The Committee held in the Simma Case that forced eviction without provision of legal aid, in violation of domestic procedures is a violation of the Covenant.¹ Within the international arena, guarantees are provided against «arbitrary or unlawful interference with the home» in Article 17 of the CCPR and Article 12 of the UN Declaration of Human Rights. The latter states that «(e)veryone has the right to the protection of the law against such interference or attacks». Both treaties guarantee «the right to protection of the law against such interference or attacks.» The Human Rights Committee has upheld the right of privacy and security of the home in conjunction with the right to housing against forced evictions.

The American Convention on Human Rights, Article 11, section 2, defines the violation as «arbitrary or abusive interference» with one’s home. In addition it states that «(e)veryone has the right to the protection of the law against such interference or attacks.» The American Declaration of Human Rights, Article IX, conforms that «Every person has the right to the inviolability of the home.» The Inter-American Commission of Human Rights held Peru responsible for violation of this right due to the takeover and occupation of ex-President Alan Garcia Perez’s home during Fugimori’s dissolution of the Legislature and Courts in 1992. (IACHR Annual Report 1994, Case 11.006, Report No. 1/95 (1995). P.104. The European Convention on Human Rights, Article 8, contains a guarantee of the right to «respect» for one’s home and that: “2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

On the economic and social level, one must recall the right to housing, The International Covenant on Economic, Social, and Cultural Rights guarantees this in Article 11. The Race Convention addresses this in Article 5. The American Declaration Article XI, guarantees the right to the preservation of one's health through sanitary and social measures relating to housing, etc.

Attention to the housing problem climaxed in December 1998 as Hurricane Mitch devastated the shantytowns surrounding Guatemala City. 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.⁹¹⁰ The State claims to have returned 54,195 victims to their homes or alternative homes.⁹¹¹ 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 there were delays in actual provision of homes. 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%.⁹¹² There are over one million persons in the nation illegally occupying 365 properties in precarious zones.⁹¹³

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 (Peten, Alta & Baja Verpaz, Chimaltenango, Quiche, Solola, San Marcos, Huehuetenango, and Totonicapan).⁹¹⁴ Housing projects in Alta and Baja Verapaz alone are expected to benefit 30,000 families.⁹¹⁵ In addition, the National Federation of Housing Cooperatives (FENACOVI) has been granted Q100 million in order to provide housing for uprooted and demobilized persons.⁹¹⁶ One month after the declaration, four hundred displaced persons and

⁹¹⁰ UNDP, EL ROSTRO RURAL DEL DESAROLLO HUMANO (<http://www.pnud.org.gt> 1999).

⁹¹¹ MINUGUA, LA POLITICA DE VIVIENDA EN EL MARCO DE LOS ACUERDOS DE PAZ (August 2001)

⁹¹² Miguel Gonzalez Moraga, "Demanda Habitacional: FOGUAVI sin dinero" in PRENSA LIBRE, 4 March 2001.

⁹¹³ 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 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)).

⁹¹⁴ 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.

⁹¹⁵ Byron Dardon, "Presentan la nueva politica de vivienda" in PRENSA LIBRE, 9 March 2001.

⁹¹⁶ 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

demobilized soldiers representing 5,500 families protested the lack of implementation of housing promised to them in the Peace Accords and other official acts.⁹¹⁷

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.⁹¹⁸ In March 2001, 400 IDPs and demobilized soldiers representing 5,500 families marched in demand of construction of housing as promised them the month before by President Portillo. The President had announced that he would dedicate Q200 million for housing construction. CONDEG announced that the government was in violation of the Peace Accords due to its inaction in this area. The continuous vision of undernourished children and adults willing to stand in front of buildings days on end, waiting for a response to their demands for a plot of land or housing by the President, Congress, or the various land/housing agencies (including CONTIERRA) is a heartbreaking testimony of the devastating effects of government inaction. By August 2001, two thousand peasants marched from the Supreme Court to the Public Ministry to demand an end to forced evictions and the creation of housing for the poor, noting that not one poor person had received housing during the year.⁹¹⁹

Environmental Concerns



Soil degradation
Photo by Cecilia

Land usurpations have spread within the Mayan Biosphere. Many persons forced from their lands move North and enter the Biosphere in the hopes of starting anew. The protected areas are significant, encompassing 12.3% of the total land areas, however they may be considered to be an emergency measure, given that Guatemala has lost 50% of its national forest since 1959. Many are evicted from the Biosphere before they can claim possession rights. Others receive “good faith covenants” from CONAP, which permit them

was accused of corruption involving the developers and the banks, resulting a subsidy scheme for middle-income families that would render a profitId.

⁹¹⁷ Alberto Ramirez, “Desplazados desean vivienda”, in PRENSA LIBRE, 30 March 2001.

⁹¹⁸ Alberto Ramirez, “Quieren casas para los pobres”, in PRENSA LIBRE, 10 August 2001.

⁹¹⁹ Id.

to use the land as long as they preserve it, but do not grant actual title. AID attained 80,000 hectares for people with historic title to the forest in the Mayan Biosphere, however its staff considers that the State should find alternative lands to exchange for usurpers promise to leave the Biosphere. In March 2000, the Parliamentary Environmental Commission announced that it would request a loan of 23 million USD from the World Bank in order to purchase lands for usurpers, noting that these persons had no other alternatives.⁹²⁰ Some usurpers stated that they would be willing to become park rangers in exchange for training and provision of salary. The State had previously claimed that there is no alternative land. Ironically, although the law limits ownership of land in the Peten to 1 caballeria maximum, this is not upheld as there are ranchers whose property extends hundreds, even thousands of caballerias. Alternative land without external financing would require expropriation from these landowners. Some have links to narco-trafficking, and if we are to consider the experience of Colombia, in which such action was halted due to assassination and physical attack on state officials and new possessors, it should progress with due care.

There are increased reports of peasants venturing into territory claimed by Belize in search of fertile land, prompting increased tension between the two states. The border between the two countries is not clearly marked, hence the validity of the peasants' claims remains a point of dispute. From 1999-Jan. 2000 soldiers from Belize killed two Guatemalan peasants and confronted others.

In January 1999, a group of peasants occupying land within the Mayan Biosphere and archeological areas of the Peten sent a letter to the President Arzu stating that they would commence to deforest the area and cultivate the land if the Government did not enable them to purchase alternative lands by the end of the month.⁹²¹ The peasants were hoping to purchase 8 fincas, however the Land Fund informed them that purchase of those particular fincas was impossible because the purchase rate was 160 –180 thousand Quetzales per caballeria, as opposed to 30-60 thousand Quetzales in other areas of the Peten. Fondo de Tierras called upon the peasants to refrain from engaging in illegal actions and to attempt to find another solution. Ironically, the State seemed to espouse a different opinion regarding the maintenance of ecological reservations when it granted licenses to two foreign oil companies to engage in exploration within two blocks incorporating 330 thousand hectares within the Mayan Biosphere.⁹²² The year before, fourteen petroleum concessions were considered to violated the environmental protection regulations.

Victims of natural disasters, such as Hurricane Mitch, flooding, and volcano eruptions also place claims for housing resettlement to FOGUAVI but complain that they are not attended to properly, indeed, in one case in Chinautla, 180 families were evicted by judicial order supposedly to secure their safety during the Hurricane, only to remain abandoned in 2000.⁹²³

⁹²⁰ Juan Carlos Ruiz C., Diputados demandaran que Ejercito cuide Biosfera Maya, in PRENSA LIBRE 21 March 2000.

⁹²¹ Ramon, Hernandez, "La biosfera Maya peligra", in Prensa Libre, 6 January 1999.

⁹²² Ramon Hernandez, "Campaña: No a petroleras en Biosfera Maya" in PRENSA LIBRE 16 February 1999.

⁹²³ Hugo Rafael Chacon, "Ciento dieciocho familias abandonadas" in PRENSA LIBRE 18 February 2000.

4.1.8. Confidence in the Justice System



”The Arm of Justice: UN Rapporteur on the Independence of Judges & Lawyers Mr. Param Coomaraswamy diagnosing a multiple fracture
Reprinted with permission of Prensa Libre

A society’s level of confidence in the legal system is directly linked to its legitimacy and effectiveness. In Guatemala, the legal system is considered to serve elites and biased against indigenous people thus there is a loss of legitimacy. In turn, delays in processing of cases, lack of presence in rural communities/inaccessibility to rural peasants, and inability to enforce decisions also reveal a lack of effectiveness. The influence of the FRG party upon the judiciary, most obviously the Constitutional Court, has reduced the institution’s legitimacy. Because this Court is considered the means by which to hold the executive and the legislature accountable to the public, its de-legitimation negatively affected public opinion of the democratic system itself. Thus, regardless of some judicial reform efforts there has been a significant decline in faith in the justice system. According to the Latinobarometro 2000 & 2001, **72%** considered that there are no equal opportunities for access to justice, **73%** stated that

there was no equality before the law (indicating a degeneration from 1996, in which **60%** of the people did not believe they were equal before the law). Over half believed that the courts discriminated against indigenous people. There is a perception that the courts are incapable of exhibiting impartial, objective determination of claims. Indeed, **52%** exhibited little or no confidence in the judiciary (approximately on par with the 1996 figure of **51%**).⁹²⁴ It is deemed to be a weak institution, only **10%** identified the judiciary as being one of the most powerful entities in the nation, thus there is no perception of a balance of powers. Given that the judiciary is considered to be the remedial mechanism for marginalized groups and individuals, its weakness reflects the vulnerability of those who depend on its functioning.

It is interesting that within the Latin American region as a whole, as of 2002 only **10%** identified equality and justice as the meaning of democracy, while only **3%** identified the rule of law as its definition.⁹²⁵ Thus, there is an increasing discrepancy between the society's perception of the role of law and its institutions in building democracy as opposed to the view held by international monitors. Marginalized groups appear to focus on equity within the socio-economic sphere as the basis of democracy as opposed to political/legal equality. The lack of interest in the legal system may in part be derived from either a lack of awareness that international human rights and constitutional rights do address socio-economic rights, and/or the understanding that the state institutions rarely implement these rights in practice. In addition, the judicial reforms have not addressed the poverty issues which lie at the root of access to justice problems. Thus, there is an increase in resort to placing demands pertaining social justice via political channels, i.e. protests, rather than filing claims in the courts or administrative agencies.

An interesting juxtaposition is the data regarding rights and duties, while **59%** described Guatemalans as being quite or very demanding of their rights, only **25%** characterized Guatemalans as being conscious of their rights and duties (a deterioration from 1996 in which **53%** to have little or no understanding of their rights). Thus the people admit lack of knowledge about the law and failure to do their part to implement the law with respect to abiding by duties. This reveals an issue of primary relevance to social capital. Without knowledge of legal rights, marginalized groups are limited in their ability to call upon the State to be accountable for violation

⁹²⁴ Data collected from Latinobarometro 2000 and 2001.

⁹²⁵ Latinobarometro 2002 press release.

of international human rights instruments or even the Constitution. Exposure to human rights promotes networking among marginalized groups and links to NGOs or international actors which may assist them in placing demands or formulating solutions.

The society appears to share blame for the predicament of the justice system, with respect to upholding the law, **87%** considered Guatemalans to be only a little or not at all law abiding (indicating a degeneration from 1996, in which **67%** of the people held such opinion). In sum, the society's lack of concern for adapting its behaviour in conformance with the law may be explained in part by the lack of legitimacy of the law itself as well as the institutions charged with its implementation: a total of **81%** felt little or no protection whatsoever by the labour law. Thus, norms are deemed to be unenforceable in practice and the legal system is identified with the interests of the dominant social groups divided along ethnic/class lines.

4.1.9. Conclusion on Formal Law: The Need for Legal

Pluralism

It was pointed out that the most significant inadequacy of the Judicial Branch was its failure to properly address indigenous issues.⁹²⁶ The imposition of a formal written juridical system on an oral culture hindered justice. The two systems were compared: "indigenous law is agile, oral, immediate, free, local, and conciliatory" whereas the current system was excessively formalistic, dilatory, expensive, adversarial, and not accessible to most people. In Guatemala, it is estimated that processing of a case within the courts will average five years and the resolution rate is a mere 2%.

The formal legal system is characterized as being adversarial in nature, whereas the indigenous legal system is viewed as being conciliatory. Indigenous dispute resolution is based on the principles of respect, reciprocity, and restitution rather than coercive power.⁹²⁷ The State tends to be viewed as a negative actor since it may remove resources from the community by sending someone to jail or fining

⁹²⁶ Comisión de Fortalecimiento de la Justicia, *Una Nueva Justicia para la Paz: Resumen Ejecutivo del Informe Final de la Comisión de Fortalecimiento de la Justicia*, at 24 (Magna Terra Ed. Abril 1998).

⁹²⁷ See Sieder, Rachel, *DERECHO CONSUECUDINARIO Y TRANSICION DEMOCRATICA EN GUATEMALA* 98 (FLASCO 1996).

him. In contrast, within indigenous customary law, restitution is sought so that the resources benefit the community.⁹²⁸

The Commission declared that the challenge was to transform the judicial organ from an inquisitorial entity of punishment and sanction to one of reparation and solution for persons experiencing violations of their basic rights.⁹²⁹ Given that the idealized characteristic of reparation is identified as a fundamental aspect of indigenous law, the formal system sought to move towards or incorporate part of the traditional system. Such action would pursue Moore's dispute resolution theory, which calls for the identification of a super-ordinate goal in situations involving value conflicts characterized by different ways of life, ideology or religion.⁹³⁰ The evolution of a reparative, conciliatory norms reflects a search for a framework of harmony and trust within communities where persons remain in contact with each other, in contrast the adversarial process functions best in large societies where persons may choose to be disconnected from each other. Countries undergoing post-conflict transitions seek to re-establish communal harmony within the entire nation. Incorporation of reconciliatory norms within the legal system itself may be pursued to diminish the adversarial component of dispute resolution and build a culture of peace.

The Archbishop's Office on Human Rights called for the need to reconstruct the social network of the different Mayan communities by promoting the Mayan

⁹²⁸ Klaus-Friedrich Koch comments on the importance of recognizing traditional procedural norms:

"With the increased bureaucratization and professionalization of the law, gaining access to justice has become a cumbersome, protracted and costly matter. Ignorance of one's rights, inability to get legal advice, and hardened language barriers are conspicuous features of a general legal disenfranchisement, although this malaise affects especially the poor and the powerless. As a consequence of the lethargic and unresponsive operation of courts and regulatory government agencies many grievances remain without redress . . . when changes in a socio-economic organization brought about by 'development' and by innovations imposed by colonial or national governments bent on modernizing a country's justice administration disturb the traditional legal system, people may find their access to justice impeded." Koch Klaus-Friedrich, "The Anthropological Perspective Patterns of Conflict Management: Essays in the Ethnography of Law" in ACCESS TO JUSTICE Vol. IV, 2, 3 (Sijthoff and Noordhoff-Alphen Aan Den Rijn Dott A. Giuffre Ed. Milan 1979).

Yet, Sieder warns against romanticizing indigenous conciliation functions due to the fact that the peaceful nature of indigenous dispute resolution may in part be a reaction to the fear of repression from the exterior and that it may also prove exclusionary towards women. Sieder, Rachel, DERECHO CONSUECUDINARIO Y TRANSICION DEMOCRATICA EN GUATEMALA 51 (FLACSO 1996), citing Collier, LAW AND SOCIAL CHANGE IN ZINCATAN, 56 (Stanford University Press 1973). It may be also be argued that the need to promote harmony and share resources under conditions of extreme poverty may have promoted the establishment of conciliatory norms.

⁹²⁹ Comision de Fortalecimiento de la Justicia, supra note 308 at. 13.

⁹³⁰ CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 60 (Jossey Bass 1996).

authorities and recognizing their administration of justice.⁹³¹ This was reiterated by the Commission for Historical Clarification which called for “respect forms of conflict resolution characteristic of their cultures” in response to the disrespect and attempts by authorities to eliminate them in a constant manner from 1980 until the end of the armed conflict.⁹³² These positions seek to revert the tradition of “scorn and nullity” that the national legal system has conferred upon the traditional Mayan legal system and which has been characterized as constituting part of ethnocide committed against the indigenous population.⁹³³ In short there is a call for the adoption of an ethic of recognition of norms as linked to the identity of indigenous people.

Thus, return to traditional dispute resolution mechanisms is presented as a form of achieving reconciliation by recognizing the identity of indigenous people and their norms. Such recognition appeals to those seeking internal self-determination for their people. The Commission called for respect for recourse to indigenous law “as autonomous law or parallel to the official law, or if it is to be considered as a simple alternative mechanism for dispute resolution, which will always have a positive effect, hence, upon practice, will achieve social peace”.⁹³⁴ Recommendation was made in favour of documentation of indigenous dispute resolution mechanisms and non-intervention by the state in their practice.⁹³⁵ However, codification of substantive customary law is generally discouraged as being contrary to indigenous tradition.

The Bipartisan Commission on Indigenous Land Rights conducted a study on “Determination of Policies, Criteria, and Procedures for Agrarian Conflict Resolution

⁹³¹ OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, NUNCA MAS, VOLUMEN IV: VICTIMAS DEL CONFLICTO, 539 (1998).

⁹³² CEH, *supra* note 19, Recommendations, paras. 49 & 75.

⁹³³ Comision Nacional de Reconciliacion, Comision de Grupos Etnicos, “Extracto del Informe Final 25 de mayo 1989-junio 1990” in Villagran Garcia & Villagran Garcia, GUATEMALA: UN PAIS POR DESCUBRIR, 129 (Universidad Rafael Landivar 1997).

⁹³⁴ *Id.* at 79. Customary law in Guatemala refers to the juridical customs of the Mayan, Garifuna, and Xinka peoples. In comparison, New Zealand’s Treaty of Waitangi recognizes the right of indigenous people to utilize traditional mechanisms for tribal controls.

⁹³⁵ *Id.* at 80. See Also Rolando Lopez Godinez, “Los Derechos Indigenas y los derechos humanos en Guatemala”, in CENTRO DE ESTUDIOS DE LA CULTURA MAYA, DERECHO INDIGENA: SISTEMA JURIDICA DE LOS PUEBLOS ORIGINARIOS DE AMERICA, 193, 195 (1994). He highlighted the right to be judged in one’s own language or dialect by judges from one’s own community and ethnicity as a fundamental guarantee which should be set forth within the UN Draft Declaration on Indigenous Rights. The *Asociacion de Investigacion y Estudios Sociales* (Association for Social Research and Study- ASIES) published a study on the Administration of Justice in 1995 and recommended “incorporating conflict resolution mechanisms based on indigenous customary law.” ASIES, *Administracion de Justicia*, p. 13, September 1995. It added that “(I) t is necessary to transcend the monocultural application of justice, thus this requires the creation of indigenous defenders and free legal aid offices in Mayan speaking municipalities, as well as the training of bilingual judges and legal interpreters.”

related to the Land of Indigenous Peoples”.⁹³⁶ It defined indigenous law as “characterized by a group of norms and rules transmitted from generation to generation by way of oral tradition. It is a system of norms which serves a conciliatory and reparative function in conflict resolution.” Thus, the most accessible aspect of indigenous law appeared to be its procedural mechanisms.⁹³⁷ Unfortunately, with regard to sources, the study was unable to find concrete definitions of the procedures, principles, and practices of the indigenous communities, hence rather than one model, there appears to be a significant degree of variety of practice and understanding.

Some commentators state that the lack of the use of precedent within indigenous customary law deprives it of the stability and cohesion present in Anglo-Saxon customary law.⁹³⁸ There are misgivings that it has an ad hoc approach to dispute resolution would render the society devoid of structure.

However, recent studies of the formal legal system reveal similar problems of ad hoc reasoning. MINUGUA sponsored a review of the lower courts, which provides quantitative and qualitative analysis of 500 cases addressing family, penal, civil & commercial, minors, administrative, constitutional and labour disputes on the first and second levels as well as justices of the peace.⁹³⁹ The principal criticisms as pertaining judgments were the following:

- 1) *Lack of clarity, precision, and order,*
- 2) *Lack of reference to material facts or superficial analysis of such,*
- 3) *There was a lack of reference to the legal norms used to arrive at a decision,*
- 4) *Cases were treated according to a set formula instead of recognizing individual variances*
- 5) *Cases were decided in spite of lack of sufficient proof or in the opposite case not decided in spite of evidence of sufficient proof meriting examination,*

⁹³⁶ COMISION PARITARIA SOBRE DERECHOS RELATIVOS A LA TIERRA DE LOS PUEBLOS INDIGENAS, DETERMINACION DE POLITICAS, CRITERIOS Y PROCEDIMIENTOS PARA LA RESOLUCION DE CONFLICTOS AGRARIOS RELACIONADOS CON LAS TIERRAS DE LOS PUEBLOS INDIGENAS, (Noviembre 1998). (No page numbers or paragraph numbers included in the report.) They found no bibliographic sources on agrarian conflicts and indigenous law. Its own field research concluded that indigenous communities utilized their own customs in mediation of border disputes.

⁹³⁷ See Rachel Sieder, “La Transicion democratica y la constuccion de un estado de dercho plualista en Guatemala: Notas para la investigacion del derecho consuetudinario” in POLEMICA Revista Centroamericana de Ciencias Sociales No. 2 , 73 (July-Dec. 1996).

⁹³⁸ Mario Alberto Carrera, “El derecho consuetudinario occidental y el derecho consuetudinario indigena” in Siglo XXI, December 8, 1998,

⁹³⁹ Luis Pasara, Las decisions judiciales en Guatemala (MINUGUA 2000).

- 6) *Lack of reference to constitutional norms due to lack of understanding of their validity,*
- 7) *Lack of reference to legal doctrine or jurisprudence,*
- 8) *Lack of reference to international standards contained within instruments ratified by Guatemala,*
- 9) *Literal application of the law without consideration of innovative or creative interpretation*
- 10) *Judges were deemed to be lacking sufficient qualification for their jobs,*
- 11) *Judges act without regard for the real situation, e.g. problems regarding provision of notice result in non-appearance in court, and*
- 12) *Judges assumed passive stances which result in formal application of the law rather than resolution of conflicts.*

Hence, the formal system has yet to guarantee coherent application of standards, uphold principles of justice and fairness, or provide effective dispute resolution. Resort to legal forums is intended to regulate conflicts so as to protect the political system from stress.⁹⁴⁰ The bias of the legal system against customary claims initially served to secure it from input overload regarding land claims or disrupting elite interests, thereby it served a stabilizing value. Eventually, it resulted in an excessive backlog of demands which remained deprived of channels, and thus lost enough support so as to lose legitimacy in the eyes of the international community, local NGOs, and general population. When the legal system fails to fulfill either elite or general interests, e.g. inability to carry out eviction orders or prosecute acts of violence committed during the eviction process, the system loses a significant degree of support and is subject to calls for reform. Such reduction of support is common during transitory epochs, yet Easton points out that due to apathy, inertia, or inadequate leadership, unless there is a counter group capable of prompting changes, the status quo can continue indefinitely.⁹⁴¹ Usurpation, marches, reluctance to submit cases to the courts, vigilante justice, and violence proved to be the response of the society to the legal system's failure.⁹⁴²

In the diagram below, I categorize the conversion process in the formal courts. Demands range from eviction orders by formal title-holders to claims for recognition

⁹⁴⁰ EASTON, DAVID, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 264 (The University of Chicago Press 1979).

⁹⁴¹ *Id.* at 224.

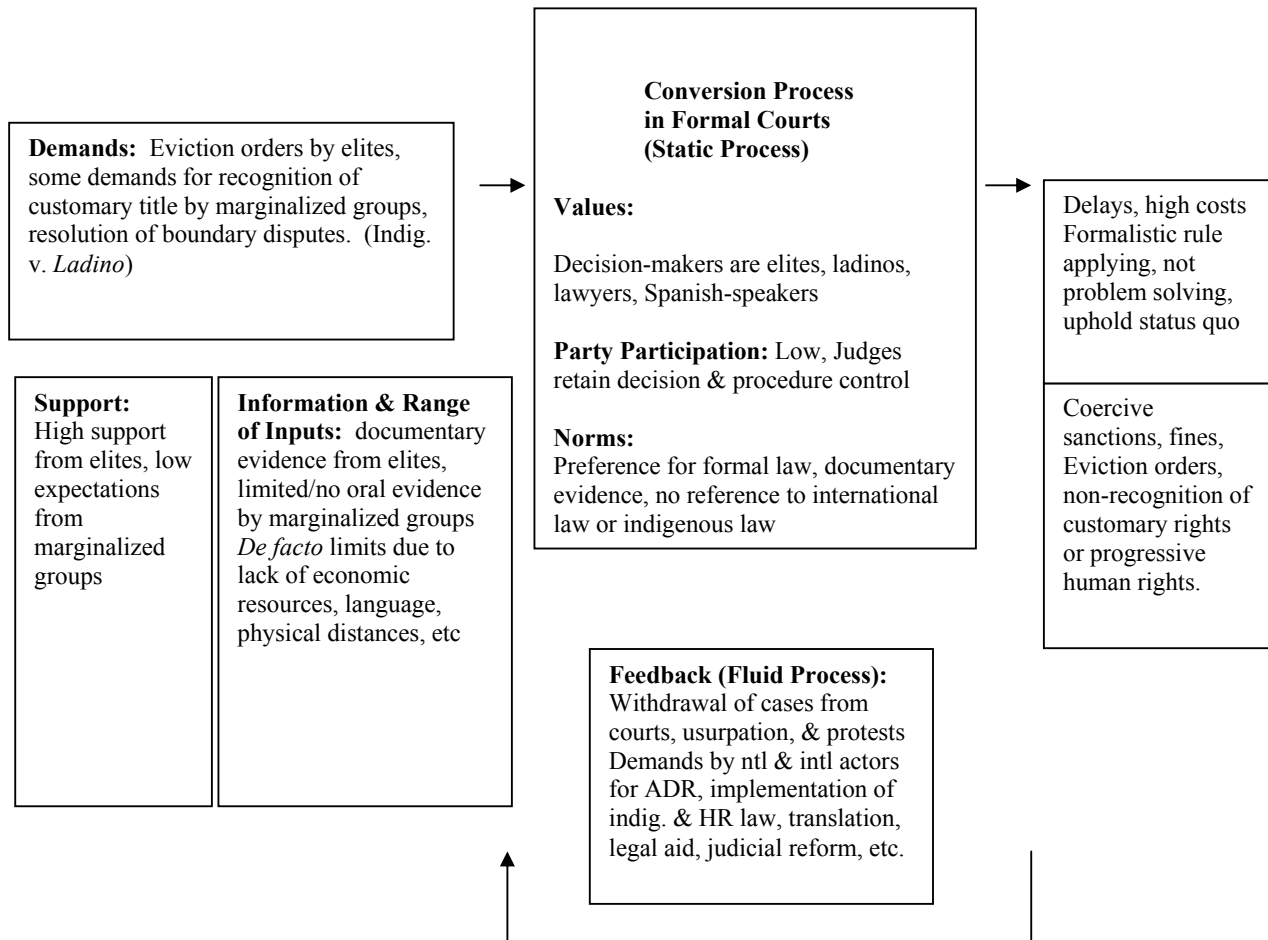
⁹⁴² *Id.* at 122.

of customary possession rights or historic title by marginalized groups, such as indigenous people. As previously mentioned, the latter groups have low expectations as to the responsiveness of the courts. Courts are considered to be biased and non-responsive to norms and needs of marginalized groups. In terms of participation, marginalized groups may be limited in providing any input whatsoever due to economic limitations, language barriers, etc. As pertaining norms, elites rely on documentary evidence, marginalized groups may wish to provide oral testimony. Judges tend to be linked to the elite class, are largely ladinos, and speak Spanish. They are trained in formal law and exhibit preference for documentary evidence over oral evidence. They make little, if any, reference to international human rights or indigenous norms, thereby maintaining autonomy within the system.

With respect to output, decisions they tend to be issued after extraordinary delays at high cost to parties. They are formalistic decisions which uphold formal legal norms rather than resolve concrete problems. Decisions are punitive: there are coercive sanctions such as fines, eviction orders, etc. hence they run counter to indigenous norms on reparation.

Feedback results in an avoidance of courts by marginalized courts, withdrawal of cases, and participation in extralegal actions such as protests and usurpation actions. International actors and local NGOs call for judicial reform, recognition of legal pluralism, and the use of ADR as a mode of improving access to justice.

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In the next section, I present a brief overview of the indigenous customary system and dispute resolution of property conflicts.

4.2. Dispute Resolution of Land Conflicts within Indigenous Communities

”Indigenous law in our language . . . let us translate it to be the search for justice, the search for solution, the search for reconciliation, the search for resolution with equality . . .”

*Rosalina Tuyuc*⁹⁴³

*“Consensual approaches to resolving differences-often involving the use of natural resources-are a part of the way tribes, families and communities have traditionally worked out their differences. The reliance on elders or community leaders to assist in the reconciliation of differences is quite common. Westerners may think that they have invented mediation, and believe it is a social technology that ought to be shared with the rest of the world. We would do well, however, to study indigenous dispute handling procedures in the contexts in which they evolved to see what the West can learn from these experiences, rather than teach.”*⁹⁴⁴

Susskind & Secunda

With respect to land, under the Mayan tradition tenancy is held in common in order to preserve the concept of “Mother Earth” which extends its value beyond commercial factors, rather it is the foundation for spiritual and material culture of man. The focus is not on using the land for economic gain, but rather as sustenance for the family and community, a source of life itself. An indigenous axiom sets forth the inherent contradiction between the indigenous and ladino property systems:- “We belong to the land, the land does not belong to us.”

Indigenous people in Guatemala largely claim possession rights to property, only a minority claim formal title. Many hold municipal documents which are not recognized by the State; properties may be owned by the municipality itself or retain another type of communal holding.⁹⁴⁵ Review of the literature on indigenous law in

⁹⁴³ Interview with Rosalina Tuyuc, Comalapa, 16/08/98, cited in Comision Paritaria sobre Derechos Relativos a la Tierra, Determinacion de Politicas, Criterios y Procedimientos Para la Resolucion de Conflictos Agrarios Relacionados con las Tierras de los Pueblos Indigenas (November 1998).

⁹⁴⁴ Susskind, Lawrence & Secunda, Joshua, “Environmental Conflict Resolution: The American Experience”, in CHRISTOPHER NAPIER, ED., ENVIRONMENTAL CONFLICT RESOLUTION, 41 (Cameron May 1998).

⁹⁴⁵ The *Instituto de Investigaciones Economicas y Sociales*, of the Universidad Rafael Landivar conducted a study of the Mayan juridical system as experienced by the K’iche, Ixil, Mam, and Poqomchi’ communities. Property ownership in this department was found to be privately held in possession, a smaller percentage held in title. Other properties were owned and administered by the municipal officials. The remainder was found to be held in communal form and administered by the *Alcaldia Indigenas*, which are not recognized by the official system. Neither does the official system

Guatemala does not address whether or not indigenous people are allowed to sell their plots to non-community members. Although some indigenous communities have municipal ownership (Ixil, K'iche, Mam, and Poqomchi' communities) or communal ownership (Ixil and K'iche), all have forms of individual or private property norms. Municipal and communal lands may be utilized for purposes such as collection of wood or other natural resources and grazing of animals. Conflicts arise when demographic pressures result in takeovers of the common lands by individual families. The appearance of ladinos and returned displaced persons claiming property rights based on formal titles issued by state entities prompted indigenous people to prevent their eviction via written formalization of their land rights. Hence, many disputes remain within or between indigenous groups or other rural peasants who suffer from the same problems related to poverty and exclusion.

In those indigenous communities which assert the communal ownership of land, tenancy is considered to be usufruct, rather than ownership. Indigenous communities choose a representative to determine borders and assign the usufruct rights to the different families. Land is distributed by municipal concession, membership in a community association, purchase by oral act in front of witnesses familiar with the history of the land or written act, or inheritance through oral transmission or written act.⁹⁴⁶

Municipal Mayors often formalize the sale of land in an act which includes witnesses who know the history of the land. Some communities have Land Committees which are authorized to approve or reject land sales and resolve land

recognize documents registering possession rights which have been issued by the Municipal Mayor's Office. The study noted that resolution of inheritance conflicts was conducted within the family, "many times under the guidance of older brother or uncle", before neighbors who serve as witnesses. Should this fail, they turn to the Alcalde Auxiliar, then to the justice of the peace, and so on. The respondents claimed that the judges did not understand or apply their customs, discriminated against them, and did not often recognize decisions tendered by Mayan authorities. They cited lack of transportation, illiteracy, lack of legal aid, high costs, language problems, fear of excessive fines or sanctions, corruption on the part of the judiciary, and duration of juridical proceedings as factors against recourse of the official system. Registration of property must be sought from a judicial authority, notary, etc. The IIES report claimed that border disputes were preferably resolved between the parties themselves, calling neighbors as witnesses regarding the history of the land tenancy. Should this fail, they turn to the Alcalde Auxiliar, then the Alcalde Municipal. All of these forums utilize oral proceedings in the form of conciliation, emphasizing the importance of listening to each party's version and the historical accounts of neighbors. The primary focus is the search to restore harmony between the parties, calling for restitution if necessary, instead of sanctions such as imprisonment which may not serve such purpose. Instituto de Investigaciones Economicas y Sociales, EL SISTEMA JURIDICO K'ICHE': UNA APR OXIMACION, 34-35 (Universidad Rafael Landivar 1999). IIES, EL SISTEMA JURIDICO MAYA: UNA APROXIMACION, anexo 4 (Universidad Rafael Landivar 1998).

⁹⁴⁶ Instituto de Investigaciones Economicas y Sociales, Universidad Rafael Landivar, EL SISTEMA JURIDICO MAYA, 51-52 (Universidad Rafael Landivar 1998).

conflicts stemming from inheritance matters, boundary disputes, etc. Others have a Council composed of the oldest men in the community who remember the history of the land. The K'eqchi appoint a "Father of the Land", who is credited with for being the first to occupy the land. In some cases the Municipal Mayor may not accept the validity of a notarized act issued by the State, while the State will not always recognize the validity of a municipal document.⁹⁴⁷ Thus, many conflicts may be classified as data disputes, due to conflicting documents alleging possession or ownership rights to land.

Ironically, indigenous groups have proved to be strong advocates of the registry reforms promoted by the World Bank. They claim the need to have a clear ownership regime, but not much concern is exhibited for the registry program's priority handling of formal titles over other documents, equity considerations, or informal claims to land; as well as the mismatch of the registry with the actual location of properties. Many indigenous communities are unaware that that they have a communal title, while others lack the ability to understand the worth of their titles, or the consequences of straying away from communal claims, due to illiteracy, poor education, and lack of legal aid.⁹⁴⁸ "Conflict" is considered to be the lack of harmony within a family or community which should be remedied by way of consensus, conciliation, and restitution. Hence, a land conflict is explained as a community or individual's effort to regain the Mother Earth in order to restore the harmony and well being within the community.⁹⁴⁹ Forced evictions removes indigenous people from their culture which is directly linked to the land.⁹⁵⁰

There is a wide gap between the official dispute resolution mechanisms of the State and those of the local population due to language, costs, and distance factors.⁹⁵¹

⁹⁴⁷ See Instituto de Investigaciones Economicas y Sociales, *EL SISTEMA JURIDICO IXIL*, 33-34 & 66 (Universidad Rafael Landivar 1999).

⁹⁴⁸ Shelton Davis found that the q'anjob'al of Santa Eulalia utilized both indigenous and State law in inheritance and use of land. Shelton Harold Davis, *Estudio de la herencia y tenencia de la tierra en el altiplano de Guatemala*, (Centro de Investigaciones de la Regionales de Mesoamerica 1997), quoted in EDGAR ESQUIT & IVAN GARCIA, *EL DERECHO CONSUECUDINARIO, LA REFORMA JUDICIAL Y LA IMPLEMENTACION DE LOS ACUERDOS DE PAZ 23* (FLASCO 1998).

⁹⁴⁹ *Id.*

⁹⁵⁰ *Id.*, citing Juan Tiney, CONIC, as cited by MACLEOD, MORNA, *PODER LOCAL, REFLEXIONES SOBRE GUATEMALA*, (OXFAM 1997).

⁹⁵¹ The analysis of dispute resolution within Guatemala would be incomplete were it to follow a strict analysis of the juridical framework itself. Although Simon Roberts' field is legal anthropology, his analysis is directly relevant to systems theory as he states that it is difficult to isolate legal factors from other normative orders. He presents three areas to be addressed when studying developing countries, highlighting

Previous to the war, indigenous peoples utilized their own conciliatory practices in the absence of courts. Repression of their culture during the war resulted in a loss of these traditional norms and replacement with a norm of dispute resolution by way of violence and imposition of power. In spite of the fact that indigenous law is practiced widely throughout the country, the decimation of the population, fracture of communities, and ensuing displacement complicates our identification and understanding of indigenous law. The Bi-Partisan Commission on Indigenous Land Rights found that many communities were not ethnically homogenous due to the war, migration, lack of work on the plantations, and lack of access to land. Different ethnic groups banded together to form a rural association. Another change is due to religious influence of evangelists and other protestant sects which organize and sometimes divide indigenous communities. As an example of the variable relevance of property disputes from an indigenous perspective, the Ixil community identified land usurpation to be a serious matter which affected the communal harmony, whereas the Mam community cited alteration of borders and inheritance problems to be small matters of no significant effect on the community.⁹⁵²

What is of particular relevance in this section is Roberts' identification of "the interaction of lack thereof between the society's settlement procedures and state institutions" as a factor affecting the juridical system of a state.⁹⁵³ It may be argued that these two systems run parallel to each other, with little engagement. On the one hand, this results in greater conflicts due to multiple claims to land based on the decision of different forums that do not recognize each other, on the other hand, parties may pursue different avenues for dispute resolution. Current initiatives to

in particular "societies in which a national legal system has been superimposed on the normative systems of several diverse ethnic groups":

1. *The interaction or lack thereof between the society's settlement procedures and state institutions*
2. *The effect of power in dispute resolution in terms of advancing party interests*
3. *Whether the rules accepted, ignored, or manipulated by the society*

ROBERTS, SIMON, ORDER AND DISPUTE, 204-205 (St. Martin's Press 1979).

⁹⁵² Instituto de Investigaciones Economicas y Sociales, EL SISTEMA JURIDICO K'ICHE': UNA APROXIMACION, 34-35 (Universidad Rafael Landivar 1999). IIES, EL SISTEMA JURIDICO MAYA: UNA APROXIMACION, anexo 4 (Universidad Rafael Landivar 1998).

⁹⁵³ ROBERTS, supra note 333 at 204-205.

promote justice of the peace and community justice centers to apply both types of law reveal an evolution towards greater interaction.

Conciliation of land disputes, including eviction, usurpation, border disputes, right of passage, etc. is conducted within indigenous communities.⁹⁵⁴ Given, the absence of the State in much of the country, it is important to review the indigenous framework for conflict resolution. In general there are different stages to conflict resolution within indigenous communities. The stages increase in degree of linkage to the state and element of coercion, corresponding to the difficulty of attaining conflict resolution:

1. *Resolution is attempted within the family*
2. *Intervention is sought by a godparent, friend, a person held in high esteem, the council of elders, Mayan priests, etc.*
3. *The auxiliary mayor (sometimes identified as indigenous mayor), assembly committee within the community, NGO, municipal mayor, or the owner/administrator of the finca is called upon.*
4. *Finally, resort is made to the justice of the peace or other judicial organ entity.*⁹⁵⁵

Conciliation is a collective oral process conducted in the maternal language. Although indigenous communities have had a variety of actors within dispute resolution, many of them have been severely weakened through the passage of time. The principal institution of interest is that of the auxiliary mayor, which although linked to the State utilizes indigenous norms in practice. It dates back to the colonial period and was in charge of resolving local conflicts. It preserves local customs through the use of indigenous language and reference to indigenous norms. The auxiliary mayor is considered to be a responsible person, of a good reputation, and a proven capacity as a conciliator within the community.⁹⁵⁶ In many cases, the auxiliary mayor's office is considered to be protected by a patron saint. Sanctions applied by these institutions follow indigenous norms.

⁹⁵⁴ ASOCIACION DE INVESTIGACION Y ESTUDIOS SOCIALES (ASIES), MEMORIA SEMINARIO-TALLER Y FORO PUBLICO "LA CONCILIACION EN LA SOLUCION DE CONFLICTOS EN LA ADMINISTRACION DE JUSTICIA EN LOS PUEBLOS INDIGENAS", 2-3 July 1997, p.78 (1997).

⁹⁵⁵ Id. at 79.

⁹⁵⁶ ASOCIACION DE INVESTIGACION Y ESTUDIOS SOCIALES (ASIES)/ MAYEN, GUISELA, DERECHO CONSUETUDINARIO INDIGENA EN GUATEMALA, 16 (ASIES 1995).

Guisela Mayen found that community participation in indigenous dispute resolution tends to be quite active, incorporating conciliatory and/or court functions depending on the nature of the conflict.⁹⁵⁷ “Arbitration” may be provided by respected members of the community who are active in dispute resolution. Procedural rights include the right of all parties to a conflict to present their perspectives, the right to present evidence, and the right to bring witnesses. In terms of remedies, conciliation, indemnification, restitution, apology, or sanction (*calabozo*) may be requested. The community does not require payment for its services in dispute resolution. Midori Papadopolo explains the factors affecting the choice of law by indigenous people:

“When there are conflicts between members of an indigenous community, the affected parties generally prefer to utilize their own norms, i.e. indigenous law. On the other hand, when a conflict arises between an indigenous person and a non-indigenous person, then it is preferred to use the national institutions. This distinction is sometimes also supported by the legislation itself or indigenous practice. Due to the amount of abuses which they are subject to, the indigenous people tend to avoid, whenever possible, resort to mestizo or ladino tribunals. However, there are also cases in which persons turn to courts with the goal of maintaining a conflict or because one of the parties to conflict believes that he will obtain an advantage by proceeding in this manner.”⁹⁵⁸

Indigenous dispute resolution of land conflicts has been characterized as the search for consensus based on an exploration of social norms regarding proper conduct and communal values.⁹⁵⁹ Conflicts between two indigenous communities is resolved by way of negotiation between the *Consejo de Ancianos* (in those groups which have such institution, or *Alcalde Auxiliar*, *Comite de Tierras*, *Alcaldia Indigena*, *Cofradia*, “*Padre del la Tierra*”- first person to occupy land, *General Assembly* etc.) which may not be abandoned until a resolution is found. The elderly apply indigenous law because the young are not seen as capable of persuasion and understanding to resolve conflicts. Sanctions for non-reparation to a victim may include shunning, non-cooperation with sowing and harvesting, etc.

In contrast, the judicial process is described as resting upon an unequal division of power between the parties, in which differences in religion, political party,

⁹⁵⁷ Id. at 20.

⁹⁵⁸ PAPANOLOPOLO, MIDORI, EL NUEVO ENFOQUE INTERNACIONAL EN MATERIA DE DERECHOS DE LOS PUEBLOS INDIGENAS, 59 (Universidad Rafael Landivar IIES 1995).

⁹⁵⁹ Shelton Davis, LA TIERRA DE NUESTROS ANTEPASADOS, 93 (CIRMA 1997). He claims that the use of the courts did not become widespread until the 1950's.

leadership rivalries, and economic disparities are highlighted and affect the outcome.⁹⁶⁰

Mayen conducted a special study on indigenous dispute resolution mechanisms in the municipality of Totonicapan which concluded that “the majority of problems involve land and family matters; they prefer to resolve almost all of them within their community because they believe that ‘it takes a lot of money to attain solution in the court.’”⁹⁶¹ She asserts that the community perceives municipal judges to be corrupt and thus turn to the president of their most important committee and the auxiliary mayor for conflict resolution.⁹⁶² Should these persons prove unable to resolve the problem, they refer the matter to the Indigenous Mayor of the Municipality. If this also fails, they turn to the Departmental Governor, the Municipal Mayor, the Church, and the Office of Human Rights, the Military Commissions, and Lawyers. The Judicial Organ is the final stage.⁹⁶³ Even if the authorities are turned to for intervention, conflicts may resume with new intensity. Land conflicts are characterized as being “problems which are so serious that it is very difficult to meditate.”⁹⁶⁴ The above authorities attempt to mediate the problem between the parties, and the dialogues can be extremely lengthy.

Siegal contradicted Mayen’s study by noting that although indigenous people tended to resolve most conflicts according to their own norms, there were certain problems which could not be addressed within the community itself; e.g. homicides, serious physical harm, serious harm to property, and agrarian conflicts. She states that “(t)here was a general perception that such problems did not fall under the jurisdiction of communal authorities, rather they should go to the regional mayor, the courts, or INTA.”⁹⁶⁵ This may indicate that in practice the flexible conciliatory

⁹⁶⁰ Id.

⁹⁶¹ Mayen, Guisela, INVESTIGACION BASICA SOBRE DERECHO CONSUECUDINARIO EN TRES COMUNIDADES MAYAHABLANTES DE GUATEMALA 40 (ASIES Sept. 1992).

⁹⁶² Mayen noted that in the municipalities of Coban and Tecpan, parties first turn to Mayan priests, elderly people, brotherhoods, military commissions, health/development promoters, teachers, pastors, the Catholic Church, etc.

⁹⁶³ Id. at 41-42.

⁹⁶⁴ Id.

⁹⁶⁵ Sieder, Rachel, “Derecho Consuetudinario y Transicion Democratica en Guatemala”, 107 (FLASCO 1996). In affirmation of the above position, David Stoll presented the following view of the rural population’s concern for state involvement in disputes:

“Guatemalan peasants do not just want a state strong enough to repress common criminals. They also want a state strong enough to deal with the conflicts they face, often over land and with each other. The peasant delegations making trip after trip to the capital to make the rounds of government

process of dispute resolution may not be considered adequate to address land conflicts which evoke intense feelings of antagonism. Thus, it would then appear ironic that the State would embrace a process to apply to land disputes which the people themselves considered inadequate.

My own field research confirms the perspective that indigenous people sought outside intervention in land disputes, as I met several groups of rural workers waiting outside of the FONAPAZ, CONTIERRA, and INTA offices every day in the hopes of attaining resolution in their cases.

Of note, one indigenous NGO, the Defensoria Maya, claims to have trained 600 people in indigenous law. If a local conflict cannot be solved, it is sent to the central office of the Defensoria Maya. It claims to have resolved over 5,000 cases utilizing indigenous practices, thus saving the State money which would have been spent in the court system.⁹⁶⁶ It contrasts its resolution rate of only 1-3 days to the State's average of five years, thereby claiming greater efficiency. However, since it is an oral process, there is no written registry. It seeks formal recognition of the legitimacy of this system in accordance with judicial reform. The central position of the Defensoria Maya is that the people should be allowed to choose which system of law they wish to follow, indigenous or Guatemalan.

A key problem is that the official courts do not recognize the decisions reached by indigenous bodies. Non-resolution at the indigenous community level leads to transference of the conflict to the official forums which only apply National Law. The principle of justice would require that indigenous people be judged by their peers, not merely accorded translation facilities. Given the fundamental differences in cultural values and beliefs, indigenous people need the guarantee that they will not be subject to judgment by "foreign perspective".

The counter perspective focuses on the need to protect "*ladino* rights" or the importance of not creating any special status for any persons whatsoever. The concept that "one nation should have one system of law" receives much support among *ladinos*. One commentary suggests that to amend the Constitution to

offices are not just humbling themselves before state power. They also want the state to intervene in local disputes, effectively and on their own side, even if it usually does not." David Stoll, "Human Rights, Land Conflict and Memories of the Violence in the Ixil Country of Northern Quiche", in SIEDER, RACHEL, ED., GUATEMALA AFTER THE PEACE ACCORDS, 42, 44 (1998). Stoll identifies demographic pressure, multiple claims to the same property, and the application of formal property law to indigenous communities as the principle factors in heightening land conflicts in Ixil.

⁹⁶⁶ Interview with Juan Leon, Defensoria Maya 1999.

recognize Maya, Garifuna, and Xinca special rights to dress, language, and culture without offering such protection to non-members of these groups is in direct violation of the non-discrimination clauses within the principal human rights instruments.⁹⁶⁷ Another commentator offers the view that to implement this clause would be “to institutionalize ethnic discrimination.”⁹⁶⁸

Concern for recognition of rights to a population which is not limited in number, and actually represents a majority of the population, highlights the problem of recognizing what are normally perceived to be “minority rights” to a “majority”. As pointed out by Asbjørn Eide, “It is not always the numerical majority that oppresses the minority.”⁹⁶⁹ This precept is also explored by Philip Viciri Ramaga: “The term ‘minority’ is intrinsically relative, at least numerically . . . hence the requirement that minority groups be non-dominant.”⁹⁷⁰ He notes that the theory of democracy rests on minimizing oppression of the majority by the minority, thus “A minority’s lack of influence or power vis-a-vis the rest of the population is what distinguishes it from the numerically inferior but dominant group.”⁹⁷¹ The indigenous population of Guatemala is composed by Mayans, Garifunas, and Xincas which constitute 61.02% of the population.⁹⁷² Although the groups form a numerical majority, they are the most marginalized groups in terms of socio-economic development.⁹⁷³

In the case of the black majority in South Africa during apartheid, this has been described as a “reversed” minority.⁹⁷⁴ Acts such as forced population transfer or utilization of the legal framework to enforce economic inequity are measures which may transform a majority into a figurative “minority”. However the protections

⁹⁶⁷ Kramer and Lopez-Ibañez (the latter stating “Is it not discriminatory to create a special laws for indigenous groups when rights should be universal?”, *Id.* This view is also shared by a Mayan commentator, Estuardo Zapeta, “RE-formas constitucionales o venganza etnica?”, *Siglo XXI*, 23 October 1998.

⁹⁶⁸ Lopez-Ibañez, *Id.*

⁹⁶⁹ Eide, Asbjørn, “New Approaches to Minority Protection, *Minority Rights Group*, 5 (December 1993).

⁹⁷⁰ Vuciri Ramaga, Philip, “Relativity of the Minority Concept”, 14 *HUM. RTS. Q.* 104 (1992).

⁹⁷¹ *Id.* at 113.

⁹⁷² Juan Carlos Ruiz, “Sumidos en la pobreza”, *PRENSA LIBRE*, 13 October 1998.

⁹⁷³ UNDP, “Situacion de Pobreza del Pueblo Maya de Guatemala” (October 1998), cited in Juan Carlos Ruiz, “Sumidos en la pobreza”, *PRENSA LIBRE*, 13 October 1998.

⁹⁷⁴ Emorca, “The Protection of Minorities before the United Nations”, *Rec. Des Cours*, 182, 284 (1983) quoted in Thronberry, Patrick, *International Law and the Rights of Minorities*, 9 (Clarendon, 1991). See also Asbjørn Eide, “Minority Protection and World Order: Towards a Framework for Law and Policy”, in PHILLIPS, ALAN & ROSAS, ALLAN, *UNIVERSAL MINORITY RIGHTS*, 89 (1995)

needed may amount to a general implementation of human rights or a recognition of the right to self-determination, rather than special minority protections. As noted by Raquel Yrigoyen:

*“This is not only about the vindication of certain ‘minority’ rights to a power quota, but rather the right of a society in its entirety to diversity, and that it be recognized, protected and reflected in a democratic structure of the State, law, and justice.”*⁹⁷⁵

It may be argued that the indigenous people are “minorities by will” as they seek to “maintain their distinctive cultures, languages or religion”.⁹⁷⁶ Although not all minority groups may be indigenous, Thornberry notes that “most indigenous groups easily satisfy definitions of “minority”.”⁹⁷⁷

Thornberry notes that in contrast the UNESCO Declaration on Race and Racial Prejudice, Art. 5, guarantees “all groups” the right to a cultural identity” and that this “may simply ensure the continuation of a de facto dominance”.⁹⁷⁸ This appears to refer to concept that affirmative action should not amount to the creation of separate rights as noted in the Convention on the Elimination of All Forms of Racial Discrimination:

⁹⁷⁵ Yrigoyen, Raquel, Un nuevo marco para la vigencia y desarrollo democrático de la pluralidad cultural y jurídica: constitución, jurisdicción indígena, y derecho consuetudinario (Comisión Episcopal de Acción Social de Perú, mimeo, no date) quoted in Sieder, Rachel, DERECHO CONSUECUDINARIO Y TRANSICION DEMOCRATICA EN GUATEMALA 18 (FLASCO 1996).

⁹⁷⁶ Thornberry, id. at 10 citing Laponce, The Protection of Minorities, 5-22 (University of California Press, 1960).

⁹⁷⁷ Id. at 331. Both commentators note that in their view, all rights and laws should be universal and neutral. The International Covenant on Civil and Political Rights, Article 27 specifically refers to minorities:

“In those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), Article 1:

“1. States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

2. States shall adopt appropriate legislative and other measures to achieve those ends.”

It could be argued that the proposed constitutional amendment could well be the implementation of Article 1, as called for by section 2.

Article 2 of the Declaration states that minorities have the right to enjoy their own culture, religion, language without discrimination. It also recognizes their right to participate effectively in cultural, religious, economic, and political life, as well as in decisions on the national (and regional where appropriate) level on matters concerning them. Article 3 sets forth the principle that their rights may be enjoyed in either individual or collective forms.

⁹⁷⁸ Id. at 296.

*“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”*⁹⁷⁹

In the eyes of the indigenous people, the ladinos fear losing power and would prefer assimilation strategies to those granting greater autonomy.⁹⁸⁰ Other groups respond that there can be unity within diversity and thus the recognition of multi-ethnic rights should not be feared. One official within the Public Ministry stated that perhaps indigenous people would have more respect for the law if it were designed and implemented according to their norms.⁹⁸¹ Sieder opines:

*“The recognition of indigenous norms and practices is an essential part of democratizing the legal structures of the pluri-cultural nation-state, but it is a component of the rule of law, not an alternative to it.”*⁹⁸²

Yet, recognition within the formal law is only a first step. The true test will be implementation of the norm in practice. There is endemic racism in Guatemala which appears to be partly based on the ladinos’ fear of losing power. One government official laughed when posed a question as to the legitimacy of indigenous law and stated that if indigenous law were to be recognized, they (the ladinos) would have to return to Europe. Thus, resistance to indigenous law is a form of maintaining a system of socio-economic and political exclusion.

Santos questions the very notion of a primacy of State law, suggesting that the state “never obtained the monopoly of law”.⁹⁸³ Rather the supra-state and infra-state systems of law, lacking a territorial base, coexisted alongside of the national law, even if the latter was denied the quality of law by the state. In order to fulfil the “the emancipatory potential of modern law”, he argues that it is necessary to recognize the plurality of legal orders, “uncoupling the law from the nation state”. In his view, indigenous law transcends the nation state due to its international recognition and

⁹⁷⁹ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1 (4) 600 U.N.T.S. 195, (March 7, 1966).

⁹⁸⁰ Interview with Sotero Sincal, 1998.

⁹⁸¹ Interview with various Public Ministry officials, 17 February 1998.

⁹⁸² Rachel Sieder, “Rethinking Democratization and Citizenship: Legal Pluralism and Legal Reform in Guatemala”, paper presented at conference States of Imagination, Centre for Development Research, Copenhagen 13-15 February 1998, p.11.

⁹⁸³ Id. at 95.

local practice, thus it forms local-transnational legal linkages.⁹⁸⁴ The resistance of states to recognize the legitimacy of indigenous law and its collective claims is due to fear of “creation of internal legal competition, a challenge to the state monopoly of production and distribution of law . . . undermining the survival of the nation state itself.”⁹⁸⁵ Hence, we are struck by the illusory existence of false nation states, exemplified by Guatemala, where the indigenous are the majority, and yet their legal system is only beginning to be recognized. Their demands for recognition are a critique of the state itself as being illegitimate and non-representative of the society. Although Guatemalan elites react negatively to the notion of “special rights”, they do not address the fact that the formal law is not applied equally to all citizens.

Santos suggests that the indigenous claim is to create a neo state and neo community which will unite pre-modern, modern, and post-modern elements, linking local with international and ancestral obligations.⁹⁸⁶ Indeed, such are the demands placed by the Guatemalan indigenous people to the elites in power, rather than seek separation from the State, they wish for its transformation.

4.2.1. Conclusion on Indigenous Customary Law

The indigenous customary system provides a high degree of party participation due to its conciliation and arbitration mechanisms. However, these mechanisms appear to function best within intra-community disputes or intra-ethnic disputes, in part due to acceptance of customary norms. They are not often utilized within inter-ethnic disputes on account of non-recognition of the validity of customary law by outsiders and bias in favor of formal law. We are left with the concern that the present understanding and practice of indigenous law in Guatemala reveals diversity, gaps, inconsistencies which complicates reference by non-indigenous people. There is a lack of clarity as to what indigenous law is – practice varies widely among different local communities, and its oral nature preserves flexibility but inhibits dissemination among non-indigenous people. The loss of

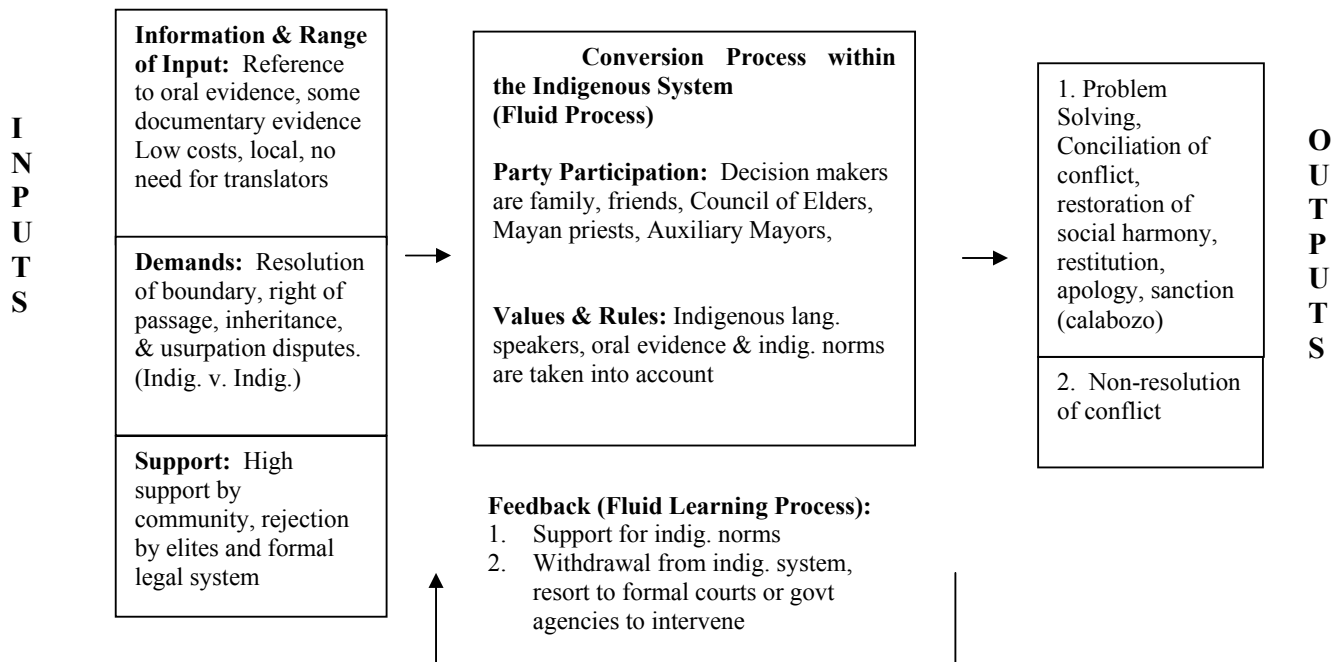
⁹⁸⁴ Id. at 325.

⁹⁸⁵ Id. at 317-318.

⁹⁸⁶ Boaventura de Sousa Santos also advocates a communal view of property. See also ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (Oxford U. Press 1999) discussing a “neomedieval” system of multiple and overlapping legal authorities made up of ethnic communities, regional organizations, and international groups.

indigenous leaders and elders during the war resulted in a loss of knowledge pertaining indigenous law.⁹⁸⁷

Below is a diagram describing the conversion process within the Indigenous Legal System. Demands largely remain on the horizontal level, as disputes are between indigenous people, they address boundary conflicts, inheritance issues, possession rights, etc. Oral evidence is rendered and recognized as legitimate by the decision makers, e.g. family, friends, Council of Elders, Mayan priests, or auxiliary mayors. Documentary evidence may also be tendered, but recognition of the validity of a State issued document over a municipal document is not always guaranteed. Decisions or accords seek to restore communal harmony and favor restitution over coercive solution, although calabozo is possible. This output may not be recognized by formal courts. In terms of output, indigenous people claim to have resolved hundreds of disputes, thereby saving the State resources. However, the subject matter of property disputes is not always conducive to conciliatory proceedings as practiced by indigenous people. In the event of a non-resolution of the conflict, parties may turn to formal courts or state agencies.



⁹⁸⁷ There is a misperception that the growing problem of vigilante justice in rural areas is an example of indigenous law. However there are many areas which have lost indigenous dispute resolution culture as a result of the war, migration, etc., thus conflicts are resolved by force rather than consensus. This explains the mischaracterization of vigilante justice as a form of indigenous law. Instead, it should be considered an example of the lack of indigenous law.

What is most worrisome is the fact that the indigenous legal system and the formal legal system are largely autonomous from each other. In particular, the lack of recognition by the formal legal system as pertaining decisions and documents issued under the indigenous system and vice-versa, results in proliferation of disputes based on conflict of laws and jurisdiction.

A positive development is the current efforts to promote a class on indigenous law within the University of San Carlos Law School and publication of books on the topic. In addition, justices of the peace and other local courts are referring to indigenous law, albeit limited by the principle of non-contravention of the national law. New justices of the peace and first instance penal tribunals were installed in Alta Verapaz, Quiche, Suchitepequez, Quetzaltenango, Tecpan, Chimaltenango, Jutiapa, Zacapa, El Progreso, and Peten.⁹⁸⁸

In 1998, five community justices of the peace were established in Solola, Huehuetenango, Peten, Totonicapan, and San Marcos. They were given the mandate to resolve penal matters by use of conciliation and reference to customs, equity, and the general principles of law as long as the decisions do not violate the Constitution or laws (hence, it retains a subsidiary character).⁹⁸⁹ In relation to land conflicts, they receive boundary and forced eviction disputes.⁹⁹⁰ MINUGUA concluded that the

⁹⁸⁸ However, David Stoll noted that the first instance court in Nebaj has been overwhelmed with land disputes and that: "The new judge is said to have become so frustrated that he nearly resigned (although he denies it), because the litigants rarely have the documentation he needs to reach a decision. Instead he must try to persuade the parties into splitting the tract in dispute." David Stoll, "Human Rights, Land Conflict and Memories of the Violence in the Ixil Country of Northern Quiche" in Rachel Sieder, Ed., *Guatemala after the Peace Accords*, 42, 53 (1998).

⁹⁸⁹ Decree 79-97 September 1997, amending article 552 of the Penal Procedure Code.

⁹⁹⁰ USAID was concerned by the "severe 'weakness of legitimacy' of the legal and political institutions, due to the insufficient 'credibility and confidence' of the Guatemalan citizens in these institutions which play a significant role for the efficient administration of conflicts which logically arise in the process of a society in transition. Hence it has developed programs for the development of alternative dispute resolution mechanisms in the departments of Retaleleu, Quezaltenango and Zacapa. Although originally intended for penal cases, this program evolved to encompass civil cases, including boundary and property disputes, as well in order to create a better link between the civil society and the State. From a substantive point of view indigenous law is not recognized, however from a procedural perspective the conciliation training seeks to maximize their traditional techniques. In opposition to what is termed to be authoritarian norms, such as reliance on the Council of Elders to arrive at a solution, the conciliation process seeks to respect traditional norms by allowing the community to select the mediator but assuring that said party will engage in conciliation rather than arbitration, in order to allow greater participation by the parties themselves. AID focuses on the young as well, stating that dialogue is

introduction of these institutions in areas which had suffered a lack of state judicial authority served to improve the opinion held by the indigenous population vis-à-vis state justice.

There has been some resentment regarding the State's training of community justice centers' staff in Guatemalan law rather than indigenous law. Some commentators fear that indigenous people trained in Guatemalan law will become even more formalistic than their *ladino* counterparts and will not refer to traditional norms, thus breaking the community structure. Ideally, community justice centers should offer expertise in both indigenous and Guatemalan law. Nevertheless, such a dualistic approach may distort indigenous law, as experienced in the two-track justice systems in Africa.⁹⁹¹ It has been asserted that "transfers of law from modern to traditional societies are unlikely to be fully accomplished without serious repercussions".⁹⁹² The concept of a stripping of the legal culture is a valid concern. Within sub-Saharan Africa, it was found that the registry of land suppressed traditional property law.⁹⁹³ However, the utilization of adversarial court systems may be interpreted to be the result as a weakness of customary system in a particular arena as set forth by Robert Seidman:

*"Using courts to protect property demonstrates at once the importance of complicated economic rules in societies of specialization and exchange, and those societies' alienation and fragmentation. Diffuse public sanctions can work only in a relatively unified society that constitutes a genuine community, with deeply internalized norms. That courts and not the community at large administers sanctions arises because ruling elites, far from merely enacting law that 'reinstitutionalizes custom', impose most law upon the society and its members. . . If courts enforce direct sanctions in part because society cannot sanction these norms in a general, diffuse and public manner (the hallmarks of custom), then the law exceeds custom. If so then the law must originate in the creative activity of lawmakers. Unless we believe in schoolroom myths about governors as philosopher-kings, the self-interest of the law-makers and their allies must colour the law they write. At least in the main, governors impose law upon the governed. The very existence of courts as a sanctioning system contradicts the notion that law merely reflects custom."*⁹⁹⁴

impossible in an authoritarian context. Many boundary disputes have been presented to the mediation centers, some referred by the Public Ministry. Oral and documentary evidence may be presented. Approximately 60% of the accords are implemented, however given that the conflicts tend to be intra-class rather than inter-class as is the case of CONTIERRA's cases the risk of failure is lower. Follow-up service is provided. Those cases which are not resolved are due to non-appearance by parties or pursuit of other avenues.

⁹⁹¹ ROULAND, NORBERT, LEGAL ANTHROPOLOGY, 304 (Stanford U. Press 1994).

⁹⁹² Id. at 299.

⁹⁹³ Id. at 303.

⁹⁹⁴ SEIDMAN, ROBERT, THE STATE, LAW & DEVELOPMENT, 215 (St. Martin's Press 1978).

In some cases the community justices of the peace work in parallel to traditional indigenous authorities, allowing for a harmonious coexistence of dispute resolution options. The single most important aspect of the justices of the peace is the use of indigenous language in oral proceedings (although registry is completed in Spanish); this has increased access to justice and allowed for a dissemination of respect for the oral word and a spirit of consensus inherent in indigenous traditions.

MINUGUA noted that the justices of the peace stated that the amalgamation of customary and formal norms made the identification of a normative frame of reference difficult, which was further complicated by the lack of reasoning in the decisions. One must keep in mind that similar criticism is made of the formal courts as well, thus both sub-systems suffer from internal discrepancies and lack of cohesiveness which render their application inconsistent. On the other hand, given that formal law is considered by many to be at worst the bastion of repression by the elite or at best an inaccessible forum, the diversification of institutions to incorporate some customary procedural norms are creating a bridge between the once polarized State and society. This reveals an evolution in which a system of norms which was traditionally refused recognition as forming a part of the State's legal system, is now granted legitimacy and incorporated into the system at large. Thus, the legal system becomes pluralistic in response to the needs and demands of the society. The law and its interpreters develop in order to reflect the norms of the people such that their decisions are more often accepted as fair. Instead of representing the values of a minority elite, expands to reflect those of the vulnerable majority. Such evolution may provide hope that vigilante justice will be diminished.

There appear to be general norms within indigenous law pertaining to reconciliation and reparation, which are recognized by various ethnic groups and which may support the use of modern ADR as reflective of the merger of indigenous and formal norms. A key element to be gleaned is that there is a tradition of conciliation and arbitration procedures, respect for norms pertaining to listening to counter-parties and consultation of the community. This indicates that the people may be positively inclined to participate in dialogue-based forums due to prior exposure.

Below, we review the amparo mechanism in order to understand the extent to which human rights are monitored the national courts.

5. Monitoring Implementation of Human Rights at the National Level: Amparos to the Constitutional Court

Dissatisfaction with the malfunctioning lower courts left many with the hope that they could bypass this level and achieve access to justice at the higher level. In order to glean an understanding as to whether the legal system was able to offer effective remedy and restitution to marginalized groups facing eviction/displacement, I reviewed *amparos* to the Constitutional Court. The *amparo* is a procedural mechanism designed to provide remedy for violations (or threat) of human rights. Human rights inherently contain elements of social justice as they are intended to uphold the basic dignity of each human being and ensure that he/she will not be a victim of oppression. Hence a legal system which seeks to uphold human rights is engaging in responsive action. Within this section we shall review whether the *amparo* mechanism is an effective mechanism to protect persons facing dispossession. Specifically, I seek to explore whether the Court engages in legal pluralism by recognizing claims based on indigenous customary norms or human rights and whether it addresses forced evictions effectuated by non-state actors or the State (including the judiciary itself).

5.1. Overview of Human Rights Instruments acceded to by Guatemala

Guatemala has acceded to the following conventions: the Convention against Torture (entry into force 04/02/90), the Convention on the Elimination of Discrimination Against Women (entry into force 11/09/82, it signed the optional protocol on 07/09/2000), the Convention on the Rights of the Child (entry into force 02/09/90), the Convention on the Elimination of Racial Discrimination (entry into force 17/02/83), the American Convention on Human Rights (accession 25/05/1978, acceptance of jurisdiction of the Court 09/03/1987), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (06/10/2000), the Covenant on Economic, Social, and Cultural Rights (entry

into force 19/08/88), all of the ILO Conventions including No. 169 (05/06/199), and the Covenant on Civil and Political Rights (entry into force 05/08/92, it acceded to the Optional Protocol effective 28/02/2001).⁹⁹⁵ In addition, the American Declaration of Human Rights is considered to be legally binding with respect to Guatemala, as well as the other members of the OAS.⁹⁹⁶

Guatemala is *de jure* a monist legal system according to the Constitution, Article 46- Pre-eminence of International Law:

“The general principle that in the field of human rights treaties and agreements approved and ratified by Guatemala have precedence over municipal law is established”

However, the judiciary appears to pursue dualism in practice. This issue is discussed within this chapter.

5.2. The Constitutional Court

It has been claimed that the creation of constitutional courts is the organic expression of the principle of the supremacy of the Constitution and that the Constitutional State of Law can only be achieved by way of subjecting the public power to the jurisdiction of constitutional courts.⁹⁹⁷ The essential function of the Constitutional Court is set forth in article 268 of the Constitution: it must guarantee and defend the Constitution and interpret its text. The Guatemalan Constitutional Court has the jurisdiction to decide whether specific laws or governing provisions violate the Constitution, receive *amparos*, and emit advisory opinions on whether treaties, covenants, executive vetoes, or draft laws are unconstitutional. It also may determine its own competence to act in certain matters, issue decisions regarding draft

⁹⁹⁵ Regarding the State’s accession to the Optional Protocol to the CCPR, Guatemala made a declaration recognizing the competence of the Human Rights Committee to consider communications relating only to acts, omissions, situations or events occurring *after* the date of entry of the Optional Protocol. Hence, Guatemalans seeking remedy for forced eviction/displacement occurring prior to 2001 would be unable to access the CCPR, unless the occupation was considered to be ongoing. Guatemala made a similar declaration with respect to the competence of the Inter-American Court of Human Rights, cases must have occurred *after* 09/03/1987.

⁹⁹⁶ See Inter-American Court of Human Rights, Advisory Opinion oc-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A., No. 10 (1989), paragraphs 35-45.

⁹⁹⁷ Epaminondas Gonzalez Dubon, LA EFICACIA DE LA JUSTICIA CONSTITUCIONAL: EL GOLPE DE ESTADO DEL 25 DE MAYO 1993 Y LA SENTENCIA DE LA CORTE DE CONSTITUCIONALIDAD, 11 (Corte Constitucional 1994), citing Manuel Garcia Pelayo.

constitutional reforms, propose constitutional reforms, issue rules for its own organization and functioning, and resolve jurisdictional or competency disputes.

The Guatemalan Constitutional Court is a body composed of five judges (and five supplementary judges) who are singularly appointed by the Supreme Court of Justice, the Congress, the President of the Republic, the University Council of the University of San Carlos, and the General Assembly of the College of Lawyers respectively. Judges are supposed to be chosen from among Guatemalan persons of recognized honor who are active lawyers (members of the College of Lawyers), with at least fifteen years of professional experience (preferably in public administration, magistrates, professional practice, and university teaching). The magistrates serve for five years and may be reelected; this has proved to violate the independence of the body.

During the 1999 attempt to reform the constitution, members of the University Council made a public statement expressing anger due to the fact that the judge they had appointed voted contrary to the opinion of the Council. By 2001, the Court suffered a severe blow to its legitimacy after the newspaper PRENSA LIBRE and several NGOs accused three of the elected magistrates to be mere puppets of the FRG party.⁹⁹⁸ Because the FRG controlled both the Congress and the Executive, they were able to select judges considered to be responsive to the party's positions. In addition, the FRG was accused of having influenced the University to select its preferred candidate. Hence, the FRG claimed the majority of seats on the Court in the hope of restraining this body's control function. Its function as an oversight mechanism and defender of the rule of law and fundamental rights is dissipated. For many observers, it proved to be the symbol of the "imprisonment" of democracy by the FRG, one of the primary mechanisms by which to maintain the accountability of the State vis-à-vis the society as well as uphold the balance of power among the other branches of government was disturbed.

These events stand in stark contrast to the Court's action on 25 May 1993 when, acting in defense of the Constitutional Order, it declared null *ipso jure* President Serrano Elias' auto-coup d'état by decree. The decree dissolved the Congress, ordered the removal of the Supreme Court Magistrates, derogated 20 articles of the *Amparo* Law, left 40 articles of the Constitution without effect, and

⁹⁹⁸ See PRENSA LIBRE, "Editorial: Finaliza ano malo para Guatemala", (31 December 2001) at www.prensalibre.com.

granted the President legislative powers. The Court's bravery in the face of authoritarianism set a precedent for the return of balance of power among the different branches.

5.3. The Remedial Background

The Guatemalan legal framework recognizes the normative value of the Constitution, requiring all three branches of government to uphold its provisions. Three remedial mechanisms are guaranteed by the Law on *Amparo, Exhibicion Personal y de Constitucionalidad*, which is deemed to have a constitutional status due to its adoption by the Constitutive Assembly: 1. *amparo* against arbitrary actions by authorities which threaten to violate Constitutional rights, 2. personal exhibition against violation of individual liberty, and 3. declaration of unconstitutionality of laws, regulations, and other general provisions in concrete and general cases.⁹⁹⁹ This law declares its objective to be the development of guarantees and defense of the constitutional order and rights inherent to the person as protected by the Constitution, the laws, and the international covenants ratified by Guatemala.¹⁰⁰⁰ The first mechanism, the *amparo*, is the focus of this section, given its special significance as the procedural guardian of rights. The latter mechanisms are not reviewed in this study due to the fact that personal exhibition is only applicable to infringements of the right to liberty and personal integrity, e.g. arbitrary detention, and declaration of unconstitutionality of laws appears not to have been utilized to a significant extent in the cases involving forced eviction issues.

5.4. Amparo as a Human Right

Amparo is one recourse within a judicial and executive system of mechanisms for dispute resolution. However, due to its mandate, it provided an interesting area of study of procedural justice. Vasquez Martinez defines *amparo* as being “specialized

⁹⁹⁹ Ley de Amparo, Exhibicion Personal y de Constitucionalidad, Decree No. 1-86 (8 January 1986). In addition, *amparo* is supported by the Law of the Judicial Organ and the *Codigo Procesal y Mercantil*.

¹⁰⁰⁰ Ley de Amparo, article 1.

in human rights”.¹⁰⁰¹ In comparison, the Vice-President of the Colombian Constitutional Court, Eduardo Cifuentes, claims that the Constitution requires the State to assume the function of making human rights effective and that the right to *amparo* is based on what he deems to be a “primary right to a Constitution”. He asserts that without such mechanism the Constitution itself would be subject to violation and hence cease to exist.¹⁰⁰² This is true to the extent there are not other remedial mechanisms.

The dissemination of information regarding human rights as guaranteed under the Peace Accords and the Constitution has resulted in increased attempts to seek recourse of the courts in order to uphold these guarantees. Constitutional rights are deemed to be the equivalent of international human rights at the national level, and the design of fast-track mechanisms to provide speedy assistance to victims of violations of such rights, e.g. *amparo*, in 1986 eventually received the attention of persons involved in land conflicts involving forced eviction. The Law on *Amparo* sets forth that the *amparo* protects persons against threats of violations of his/her constitutional or legal rights or restores such rights when the violation has already occurred.¹⁰⁰³ There is no ambit which is not susceptible to *amparo*, and thus such claim will proceed as long as the authoritative acts, resolutions, provisions, or laws imply a threat, restriction, or violation of those rights guaranteed by the Constitution and laws.¹⁰⁰⁴

The *amparo* has manifold characteristics: it is regarded to be a **right** to judicial power to obtain respect for constitutional rights, a **recourse** as it calls upon the State to declare an act illegitimate, and a **remedy** as it grants restitution of rights.¹⁰⁰⁵

The *amparo* was first incorporated into the Mexican Constitution of 1857 and later appeared in the constitutions of 13 Latin American countries.¹⁰⁰⁶ In Guatemala it

¹⁰⁰¹ Edmundo Vasquez Martinez, EL PROCESO DE AMPARO EN GUATEMALA 11 (Procurador de Derechos Humanos 1997).

¹⁰⁰² Dr. Eduardo Cifuentes, Vice President of the Constitutional Court of Colombia, “Amparo contra sentencias judiciales”, in LIC. ROMERO LOPEZ MIJANGOS, RECOPIACION DE LAS CONFERENCIAS DICTADAS EN LOS SEMINARIOS DE DIFUSION, DIVULGACION Y ACTUALIZACION DE LA JUSTICIA CONSTITUCIONAL, 60, 64-66 (Corte de Constitucionalidad 1998).

¹⁰⁰³ Ley de Amparo, Art. 8.

¹⁰⁰⁴ Id.

¹⁰⁰⁵ Vasquez Martinez, supra note 383 at 10, espouses a dual view of *amparo*: 1) It is a human right which permits persons to obtain juridical protection of one’s rights as recognized by the Constitution and the law; 2) It is a process by which the State, prompted by the *amparo*, protects human rights.

was initially incorporated in 1921 and is present in the current Constitution, Article 265:

Amparo is instituted for the purpose of protecting individuals against the threats of violations of their rights or to restore the rule of same should the violation have occurred. There is no area which is not subject to amparo, and it will always proceed whenever the acts, resolutions, provisions, or laws of authority should imply a threat, restraint, or violation of the rights which the Constitution and the laws guarantee.

The amparo is believed to be strengthened by the right of recourse/remedy adopted in the American Declaration of Human Rights, Art. XVIII, the Universal Declaration of Human Rights, Article 8, the American Convention on Human Rights, Article 25, and the CCPR, Article 2. The applicable sources of law for the amparo are the Constitution, the laws, human rights conventions and pacts ratified by Guatemala, and the jurisprudence of the Constitutional Court itself. The Inter-American Court of Human Rights has identified amparo as one of the judicial guarantees deemed to be indispensable for human rights and inherent in the rule of law.¹⁰⁰⁷

Ayala Corao states that within Latin America, a human right to amparo has been established which guarantees judicial protection of human rights, constitutional and other legal rights.¹⁰⁰⁸ He defines this right to consist of the following guarantees:

- 1. A simple, rapid, and effective recourse*
- 2. Before independent, competent judges or tribunals*
- 3. The violation may stem from private or public acts (claiming that this distinguishes the Latin American amparo from the European model which requires public act)*
- 4. The amparo applies to the rights in the Constitution, laws, or international instruments (in the case of amparo as defined by ACHR, art. 25.)¹⁰⁰⁹*

¹⁰⁰⁶ Argentina, Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela, similar mechanisms were adopted in Brazil, Chile, and Colombia.

¹⁰⁰⁷ I/A Court HR, OC-8-87

¹⁰⁰⁸ See Carlos M. Ayala Corao, "Del amparo constitucional al amparo interamericano como institutos para la proteccion de los derechos humanos", in *Memorias: VI Congreso Iberoamericano de Derecho Constitucional*, Santafe de Bogota, Colombia, April 1998, Vol. I 569, 572 (Universidad Externando de Colombia 1998).

¹⁰⁰⁹ *Id.*, Ayala Corao addresses the Inter-American *amparo*, Specifically under the American Convention, Article 25:

"1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws or the state concerned or by this Convention, even though such violation many have been committed by persons acting in the course of their official duties.

2) The States Parties undertake:

- a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;*
- b) to develop the possibilities of judicial remedy; and*
- c) to ensure that the competent authorities shall enforce such remedies when granted."*

5. *Effectiveness of amparo is measured by the reparation of the violation by way of implementation of the judgment*
6. *States have a duty to develop recourse mechanisms*

Review of Guatemalan *amparos* demonstrates that Ayala Corao's third criterium is not recognized in Guatemalan jurisprudence. The Guatemalan Constitutional Court will not always provide *amparo* to violations stemming from private actors (Cases 414-92, 151-91 & 172-91). This is particularly worrisome given the fact that many forced evictions are conducted by private security groups. Exception is made for private law entities and organizations which have been recognized by the law, such as political parties, associations, syndicates, cooperatives, etc. which technically may be subject to a complaint of *amparo*.¹⁰¹⁰

The Guatemalan Law on *Amparo* sets forth that this mechanism is intended to protect human rights and that with respect to human rights, those treaties ratified by the State shall prevail over internal law.¹⁰¹¹ The Guatemalan Constitutional Court did not refer to international human rights instruments in the cases I reviewed. Rather, following a dualist tradition, it addressed their national equivalents within constitutional rights, as well as other national legislation such as the civil code. These judges may be unaware that they have the jurisdiction to hear such claims or incorrectly cite Article 44 of the Constitution:

*"Laws and administrative directives or any other decree that reduces, restricts, or distorts the rights guaranteed by the Constitution are void 'ipso jure' as grounds for favoring the national legal right claim."*¹⁰¹²

He points out that the Colombian Constitutional Court has referred to international human rights and humanitarian instruments when issuing decisions based on violations of fundamental rights. Hence, one may argue that the Guatemalan Constitutional Court should refer to the property and compensation standards contained in the American Convention of Human Rights, Article 21 when addressing such claims: 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. (See also the socio-economic variant of the right as contained in Article XXII of the American Declaration: 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 the home.)

¹⁰¹⁰ See Article 9 Ley de Amparo.

¹⁰¹¹ See Articles 3 and 10 (b) Ley de Amparo.

¹⁰¹² MYNOR PINTO ACEVADO, LA JURISDICCION CONSTITUCIONAL EN GUATEMALA, 68 (Corte de Constitucionalidad 1995) stating that should a provision of an international treaty contradict a constitutional right, the latter would take precedence according to article 44.

The view of the Court is that the international treaties assume a middle status, ceding to the Constitution but prevailing over other national legislation. This was strongly opposed by national human rights NGOs as well as international scholars who cited the Vienna Convention on the Law of Treaties, Article 27 which prohibits a State from invoking its internal law to avoid its international obligations. However, Guatemala's representatives to the UN Human Rights Committee reiterated the position that the CCPR could not override provision of the Constitution.¹⁰¹³ International pressure may result in an eventual shift towards monism; indeed an ex-magistrate of the Constitutional Court, Alejandro Maldonado Aguirre, delivered a lecture in honor of the XV anniversary of the Constitutional Court in which he advocated recognition of the primacy of international human rights treaty over conflicting internal law.¹⁰¹⁴ In comparison, the Constitutional Court of Colombia has referred to international soft law, including the UN Guiding Principles on Internal Displacement, in its decisions as a means of expanding its protection of vulnerable groups within its territory.¹⁰¹⁵

Another reason why the Court has not recognized a claim of unconstitutionality based on the violation of an international treaty, is the view these rights "have a special nature which transcends the national state ambit" and have their own international mechanisms.¹⁰¹⁶ This is an incorrect analysis which ignores the fact that access to international mechanisms often requires exhaustion of domestic remedies. This position would require international bodies to declare that access to domestic remedies is impossible, which in the case of IDPs claiming restitution of property may actually be possible. It is not unlikely that an attempt to curtail the Constitutional right to property based on a human rights argument would not be well-received by the court.

As demonstrated in the previous chapters, national legislation on usurpation has been deemed to be an instrument to repress the landless, while in this chapter we

¹⁰¹³ Comment by Mr. Arenales Forno (Guatemala), Human Rights Committee, Summary Record of the First Part of the 1942nd Meeting: Guatemala, (CCPR/C/SR.1942), para. 16 (13 August 2001).

¹⁰¹⁴ Alejandro Maldonado Aguirre, "Recepcion del derecho internacional de los derechos humanos", XV anniversary of the Constitutional Court of Guatemala, cited in Eduardo P. Villatorio, "Palabras de papel: Derechos Humanos" in PRENSA LIBRE 7 August 2001.

¹⁰¹⁵ See Corte Constitucional (Colombia), Sentencia T-227/97, Expediente T-116357, Brigadier Roper Mora y otros (5 mayo 1997).

¹⁰¹⁶ Id. At 70.

witness the misinterpretation of constitutional norms regarding indigenous land rights so as to result in further dispossession.

The procedural remedy of *amparo* is rarely granted to a claimant in spite of being based on the national equivalent of international human rights in national law: constitutional rights, by the Constitutional Court's tendency to state that the cases should have proceeded via ordinary procedures.¹⁰¹⁷ The Constitutional Court's rejection rate of *amparos* is extremely high, in 1996 it totaled 81% and during the period of January –July 1998 it rose to 91%.¹⁰¹⁸ In part, this reflects the misuse of this mechanism for appeals, very few cases are deemed to actually address constitutional violations. Another former president of the Constitutional Court, Lic. Epaminondas Gonzalez Dubon, stated that the *amparo* had been abused by parties seeking revocation of a judicial order or intending to delay judicial proceedings.¹⁰¹⁹ Even MINUGUA cited the use of the *amparo* mechanism as a dilatory measure.¹⁰²⁰ There are various cases in which parties who have been dispossessed file *amparos* instead of seeking recourse of ordinary procedures, although this may be due to lack of good legal aid, it may also be the result of frustration with the slowness, ineffectiveness, and bias inherent in pursuing ordinary measures.¹⁰²¹ However, in 1993, the Inter-American Commission of Human Rights cited concern that the Cjola indigenous group was denied *amparo* to the court after they had been forcibly evicted from their land while their opponents were granted such remedy, noting “The Commission must point out that members of the judiciary must not discriminate against indigenous people, who must be accorded all the legal guarantees to which they are entitled.”¹⁰²² Hence the Constitutional Court is being overwhelmed by

¹⁰¹⁷ *Amparo* has been defined to by the ex-president of the Constitutional Court, Mynor Pinto Acevedo, to be a “subsidiary and extraordinary means of defense”, hence parties should pursue normal procedures when possible rather than establish a parallel system. It cannot be implemented to revise a court judgment or decide upon issues of fact within a proceeding in the absence of a constitutional violation. The Court is very frustrated by the incorrect assumption that the *amparo* may be utilized as an appeal mechanism. Mynor Pinto, Acevedo, LA JURISDICCION CONSTITUCIONAL EN GUATEMALA, 83 (Corte de Constitucionalidad 1995).

¹⁰¹⁸ Statistics compiled by Licda. Carmen Maria Gutierrez de Colmenares, Magistrate of the Constitutional Court, “El Amparo experiencia Guatemalteca”, in LIC. RUBEN HOMERO LOPEZ MIJANGOS, RECOPIACION DE LAS CONFERENCIAS DICTADAS EN LOS SEMINARIOS DE DIFUSION, DIVULGACION Y ACTUALIZACION DE LA JUSTICIA CONSTITUCIONAL 170, 183-4 (Corte de Constitucionalidad 1998).

¹⁰¹⁹ Dubon, supra note 376 at 15.

¹⁰²⁰ Sixth Report, Id. at para. 176.

¹⁰²¹ See e.g. Expediente 1269-96, 8 January 1997, Gaceta de la Corte de Constitucionalidad and Expediente 1318-96, 17 January 1997, Gaceta de la Corte de Constitucionalidad.

¹⁰²² IACHR, Report on the Situation of Human Rights in Guatemala, (OEA/Ser.L/V/II.83 Doc. 16 rev 1 June 1993).

claims which are a result of systemic failure of the justice system at the lower level. Pursuit of such amparo claims to the Constitutional Court are really calls for the elaboration of other recourses specifically designed for land conflicts. Thus, the Constitutional Court is suffering from demand overload, much of which is linked to land issues. Rather than address the cases, the Court rejects the majority. Since there are no speedy, special tribunals to address dispossession, parties are left without remedies.

Types of Amparo

Amparo serves to declare an official act invalid in concrete cases on account of being contrary to human rights or nullify a non-legislative Congressional resolution due to its violation of constitutional rights.¹⁰²³ One may seek amparo against the Public Power, including decentralized or autonomous entities, entities supported by State funds or delegated tasks by State organs via contract, concession or other regimen.¹⁰²⁴ As mentioned above other entities retaining a legal mandate or recognized by law, such as political parties, associations, societies, syndicates, cooperatives, etc. may also be subjects of an amparo claim. Other functionaries, authorities or employees of other fora may also be subject to an amparo.¹⁰²⁵

One may also utilize this recourse to attain a remedy against regulations, accords, or resolutions which result from an abuse of power or excess of legal power by any authority and which may cause harm not subject to reparation by other means of defense.¹⁰²⁶ It is applicable against illegal or unreasonable administrative orders, or in the absence of a suspension remedy, as well as in the case of failure by the administrative authority to resolve a case within the legal time period or accept a petition for review.¹⁰²⁷

In political matters, amparo may be utilized when legal rights (as well as those rights recognized by political organization and electoral statutes) are injured.¹⁰²⁸ Within the judicial and administrative arenas, amparo may proceed if the threat, restriction, or violation of rights remains ongoing after exhaustion of legal recourses.¹⁰²⁹

Courts may order provisional amparo in order to prevent irreparable harm/ loss or to cease illegal action on the part of an authority or actor. The threat or violation may be physical or moral, however it must directly affect the claimant and no other recourse must exist.

The Public Ministry and the Attorney General for Human Rights may submit amparos in order to protect the interests under their mandate. Oral solicitation may be presented by poor, uneducated, minors, and those incapacitated who lack legal assistance.¹⁰³⁰ In these cases, courts must issue a copy of the act to the Attorney General for Human Rights so that this Office may assist the victim. In spite of this, lawyers are needed for proper processing of an amparo. In comparison, the Colombian amparo mechanism, called tutela, may be utilized

¹⁰²³ Ley de Amparo, art. 10 b and c. The act may be a law, a regulation, resolution, etc.

¹⁰²⁴ Ley de Amparo Art. 9.

¹⁰²⁵ Ley de Amparo, art. 14 e.

¹⁰²⁶ Ley de Amparo, art. 10 d.

¹⁰²⁷ Ley de Amparo, art. 10 e and f.

¹⁰²⁸ Ley de Amparo, art. 10 g.

¹⁰²⁹ Ley de Amparo, art. 10 h.

¹⁰³⁰ Ley de Amparo, art. 27.

as an emergency procedure, the court required to respond immediately to oral presentations without requiring written documentation, also in cases involving illiterate persons claiming threat of violation of their rights (even of non-emergency nature). In situations involving threat of forced eviction under violence, the emergency nature requires immediate remedy.

The Amparo Process

In Guatemala, first instance judges, Courts of Appeal, and the Supreme Court may receive the amparos, according to the category of the denounced authority. The Constitutional Court receives the appeals of these amparos from these tribunals and retains the right to modify, revoke, or confirm the prior decision. Should a party choose not to appeal, the Constitutional Court does not review the decision, although Pinto Acevedo, former president of the Constitutional Court, recommended amendment of the law to make review obligatory in order to assure uniformity of interpretation.¹⁰³¹ The Constitutional Court's decision is final. With respect to amparos against the Supreme Court, the Congress, the President and the Vice-President, the Constitutional Court receives them directly.¹⁰³² Amparos against the Supreme Electoral Tribunal, the State ministries, the Courts of Appeals, Martial Courts, Second Instance tribunals, administrative-contentious tribunals, the Fiscal General of the Republic, the Attorney-General for Human Rights, the Monetary Junta, ambassadors abroad, and the National Council for Urban and Rural Development are presented to the Supreme Court.¹⁰³³ Amparos against the State vice-ministries, general directors, first instance judicial officials, mayors, municipal corporations, leaders or councils of decentralized, autonomous entities, general assemblies of the professional colleges and political parties, regional or departmental development councils, governors, and the Attorney General are presented to courts of appeal.¹⁰³⁴ Amparos against rent administrators, lower judges, police, mayors, and municipal corporations, private actor entities, and other authorities, employees, or officials of previously mentioned entities are presented to first instance ordinary courts.¹⁰³⁵

In order to present an amparo claim, a person must have legal capacity (as provided under the Civil Code), in other words be subject to substantive and procedural legal rights and obligations. Both physical and legal persons have the legal capacity to present amparo claims.¹⁰³⁶ In addition, the person must be, have been, or facing imminent danger of being directly harmed by the violation of the constitutional right. The harm may be to a patrimonial interest, a prejudice against a person, etc. Persons deemed to be legal incapacitated from a procedural perspective in spite of having substantive legal rights, may be represented by legal actors or the Public Ministry.

An amparo is to be filed within 30 days of notice of the injurious act or omission, it is to be processed by courts the same day of reception, and parties should supply necessary documentation within 48 hours (plus travel time to the court).¹⁰³⁷ Parties are to submit the facts of the case, evidence, and refer to the relevant constitutional or other legal norms which are/have been/ will be violated. The court should provide an initial audience to parties for presentation of evidence, a second audience is granted for issuance of the decision. Evidence may be examined within eight days. The court must examine the facts, analyze evidence, and consider applicable legal foundations (regardless of whether the parties raised them or not).¹⁰³⁸ Thereafter the Court grants the parties and the Public Ministry an audience.

¹⁰³¹ Pinto Acevedo supra note 396 at 90.

¹⁰³² Ley de Amparo, art. 11.

¹⁰³³ Ley de Amparo, art. 12.

¹⁰³⁴ Ley de Amparo, art. 13.

¹⁰³⁵ Ley de Amparo, art. 14.

¹⁰³⁶ Constitution, Art. 265 and Ley de Amparo, arts. 8, 10, and 21 c.

¹⁰³⁷ Ley de Amparo, Article 33.

¹⁰³⁸ Ley de Amparo. Article 42.

Decision should be issued within three days of processing (the Constitutional Court may issue the decision within 5 days). Appeals may be filed by the parties, the Public Ministry, or the Attorney General for Human Rights. The Court should hold hearings or other necessary evidentiary proceedings within three -five days depending on whether it is an order or a decision being appealed (auto v. sentencia). Decision is to be rendered within 36 hours in the case of an appeal of an order or three days in the case of a decision.¹⁰³⁹ The Court may impose costs, fines, and sanctions on the parties and lawyers (in the event of frivolous, inappropriate filing of amparo the fine is Q50,000).¹⁰⁴⁰ Recognition of the amparo claim may result in suspension of the law, regulation, or act which caused the injury, and restoration of the juridical situation of the applicant.¹⁰⁴¹ The Court may order the actor to cease the delay or implement an act ordered by the court.¹⁰⁴² With respect to amparos based on an omission of the part of the authority in emitting a legal regulation, the Court may refer to general principles of law, custom, precedents, analogy to other regulations, and equity.¹⁰⁴³ Should the injury prove irreparable, the Court must address civil and penal responsibilities.¹⁰⁴⁴ Implementation of the judgment should be rendered within 24 hours, unless the Court states otherwise.¹⁰⁴⁵ Failure to implement the judgement incurs a financial penalty of Q4,000, the Court may set damages for delays in implementation.¹⁰⁴⁶ Parties who claim that a court is not abiding by the law or decision regarding the amparo may submit a complaint to the Constitutional Court.¹⁰⁴⁷

5.5 Amparo & Property Disputes

Land disputes overwhelm the judicial branch and some have reached the Constitutional Court.¹⁰⁴⁸ Regarding the right to property, as of 1999, over 400 claims (the majority non-amparo, thus demonstrating that the majority of lawyers do not attempt to link property disputes to constitutional/human rights violations) had been presented to the Constitutional Court, as pertaining registry claims (also non-amparo), they totaled 200. This section reviews a selection of amparos presented and reviewed prior to April 1999. In total, I selected and reviewed twenty-six cases based on reference to property disputes, elements of potential or actual forced eviction, and/or reference to customary, indigenous, or prescription claims to property. Of these, I considered seventeen cases as being of particular interest to this study. Alleged breach of constitutional rights on the protection of indigenous lands (article 67), right to defense of property (article 12), and right to private property (article 39)

¹⁰³⁹ Ley de Amparo, articles 65-66.

¹⁰⁴⁰ Ley de Amparo, articles 44-48

¹⁰⁴¹ Ley de Amparo, Article 49 a.

¹⁰⁴² Id. Article 49 b.

¹⁰⁴³ Ley de Amparo, Article 49 c.

¹⁰⁴⁴ Ley de Amparo, Article 51.

¹⁰⁴⁵ Ley de Amparo, Article 52.

¹⁰⁴⁶ Ley de Amparo, Article 53 and 59.

¹⁰⁴⁷ Ley de Amparo, Article 72.

¹⁰⁴⁸ Interview with the President of the Constitutional Court of Guatemala, Ruben Homero Lopez Mijangos, 13 May 1999.

were the central basis of most claims.¹⁰⁴⁹ In essence the principal characteristic of these decisions is not the analysis itself, but rather the gaps in analysis, i.e. the issues which are not discussed. Decisions are very brief, ranging from 1-3 pages of which the Constitutional Court's own discussion and analysis, when present, may be limited to a couple of paragraphs. This may be due in part to the time constraints placed upon this recourse. However, the amparos present an indication of how lower courts have treated this issue, as the Constitutional Court summarizes their findings.

Because party participation within the formal courts is low, as lawyers present the arguments and judges render decisions (nor did I have access to transcripts of proceedings), this part assesses the hierarchy of norms and output function of the court. Below, I present a selection of amparos to illustrate the problems pertaining to hierarchy of norms and the need for protection against forced eviction sanctioned by lower courts and/or conducted by non-state agents.

¹⁰⁴⁹ I found one case in which the parties filed an *amparo* based on the right to housing, guaranteed within the Constitution, article 105: Workers' housing "Through specific entities, the State will support the planning and construction of housing projects, establishing adequate systems of financing that would make it possible to involve different programs so that the workers may opt for adequate housing and meet health requirements. . . ." See also Article 119 (g) Obligations of the State on the Economic and Social Regime- "To promote on a priority basis the construction of popular housing through systems of financing so that a large number of Guatemalan families may have title to it . . .". (Expediente 394-93, 22 December 1993, Gaceta de la Corte de Constitucionalidad.) No reference was made to CESC article 11.1, CERD article 5(e)(iii), CEDAW article 14(2) or CRC Article 16.1. This case involved 150 families who took over land belonging to the National Housing Bank after it had refused to assist them to purchase housing. The Bank filed a usurpation charge and requested the Penal Tribunal to issue an eviction order. Before the Tribunal had rendered a decision, the families filed an *amparo* with the Court of Appeals which was denied on account of the fact that the Tribunal had not resolved the case under its own proceedings. They turned to the Constitutional Court which upheld the lower court's decision noting that no constitutional right had been violated and that due process rights had to be upheld with respect to the ordinary proceedings. This case highlights the need for an emergency procedure for application in eviction proceedings. Although the families should have waited for the tribunal to issue its decisions, they probably feared that the eviction would be implemented before they would have a chance to file the *amparo*. In any case, they filed prematurely and hence were unable to attain a remedy.

5.6. Table of Amparos

Case	Parties	Type of dispute	Constitutional norms	Output
1. 1250-96 & 892-95	Individual v. Congress	Congress expropriated Ms. Garcia's land, she claimed violation of State duty to protect indigenous communal lands	Art. 67 (Indigenous Land)	First amparo recognized due to violation of procedural norms on expropriation, charge on violation of Art.67 denied in both first and second amparos
2. 422-95	Individual v. Supreme Court	INTA declaration of abandonment of property by Mr. Matias, subsequent sale to Mr. Ahilon. Mr. Matia attained revocation of INTA order; Mr. Ahilon unsuccessfully sought recourse of the Supreme Court which failed to recognize the exception clause of Decree 1551	Art. 12 (right to defense of property)	Amparo denied based on lack of evidence of violation of constitutional right and wrongful use of amparo as an ordinary appeal mechanism.
3. 756-95	Individual v. Court of Appeals	Mr. Orozco was evicted from property via order by the Court of Appeals as a result of action brought by Mr. Soveranis. Although the first instance court considered Soveranis' documents to be legally invalid and deemed there to be a lack of proof of ownership, the Court of Appeals approved the eviction.	Art. 12 & Art. 39 (right to private property)	Amparo denied due to use of amparo as an illegal third instance

4. 1269-96	Individual v. justice of the peace	Mr. Mayen was evicted from shantytown housing in “La Limonada” via order by the justice of the peace without use of the local dispute resolution mechanism.	Art. 12	Amparo denied due failure to exhaust ordinary remedies
5. 1318-96	Individual v. First Instance Penal Judge	Ms. Ramirez was evicted from settlement upon order by the Judge without personal appearance and prior to final decision regarding a charge of usurpation brought by the National Housing Bank.	Art. 12	Amparo denied due to failure to exhaust ordinary remedies
6. 689-94	Municipality v. Congress	Boundary dispute between municipalities, Congress revoked decree recognizing measurement of boundaries and issued new decree which called for a new measurement.	Arts. 12, 39, 67, 68 (Lands for Native Communities), 171 (Congressional Powers) & 175 (Constitutional hierarchy)	Amparo denied based on inappropriate use of amparo as an appeal mechanism, recognition of Congress’ legitimate use of power
7. 394-93	Community v. Penal Court	150 families usurped land belonging to the National Housing Bank which sought an eviction order from the Court, the families defended themselves based on the right to housing	Art. 105 (right to housing)	Amparo denied based on lack of constitutional violation, no discussion of Art. 105
8. 57-93	Community v. Municipality	Municipality sought to divide land among individual possessors, neighbors who rented land were excluded and sought to nullify action as illegal prescription	Art.260 (municipal property)	Amparo denied based on late filing

9. 440-92	Individual v. Justice of the Peace	Mr. Ochoa evicted based on order by the justice of the peace referring to another property	Arts. 12 & 39	Amparo denied based on failure to exhaust ordinary remedies. Dissent noted that there was a palpable threat to a constitutional right
10. 104-90	Individual v. Junta Directiva	Junta directiva of the Indigenous Community of the municipality of San Carlos Alzate, Jalapa forcibly evicted Mr. Esteban from property he claimed to have possessed with Ms. Perez for 23 years. She died and her heirs contested his possession as illegitimate. Mr. Esteban argued that the Junta Directiva could not expropriate or dispossess indigenous land.	Art. 67	Amparo denied based on inappropriate use of amparo as an appeal mechanism
11. 172-91	Individual v. Individuals and Private company	Private police service named Vigilancia e Investigaciones Privadas (VIP) accused of usurping property upon which Mr. Ovalle claimed right of usufructuario vitalico, ownership retained by his children. Private guards prevented his use of property, based on confusion with another property	Arts. 12 & 39	Amparo denied based on lack of mandate over acts committed by non-state actors
12. 151-91	Individual v. Mayor	Mayor accused of sending men to usurp Mr. Orive's property, destroy walls, boundary markers, trees, gardens, etc. in order to	Arts. 5 (freedom of action), 12, 39, 40 (expropriation),	Amparo denied due to failure to link state actor to non-state actors

		construct highway on the shore of Lake Atitlan.	44 (inviolability of the home)	
13. 117-89	Individual v. President of Republic	Mr. Trujillo rented land to Mr. Cordero who initiated and received title claim to the land via resolution by the Ministry of Public Finances. Mr. Trujillo was not granted an audience during the proceedings.	Arts. 39 & 12 & possession (civil code)	Amparo denied based on lack of act of authority upon which to base the amparo. The Executive is deemed to have acted in a contractual manner (buyer-seller), rather than unilateral, hegemonic, or coercive manner.
14. 186-93	Individual v. Court of Appeals	Mr. Hernandez evicted from property via court order referring to another property based on action brought by Mr. Bolanos. Judge announced to the press that the usurpers would be evicted.	Arts. 12 & 14 (presumption of innocence)	Amparo was upheld due to the Court of Appeals' abuse of power of issuing protective order.
15. 433-92	Individual v. Municipality	Mr. Camacho was denied permission by the Municipality to construct a tourist resort in the finca "El Jaibal" Usurpation. Camcho claimed that he was not granted an audience.	Art. 12	Amparo recognized based on violation of Article 12
16. 414-92	Individuals v. First Instance Judge	Mr. Santos et. al. was evicted from property pursuant to court order of capture against another person. Armed men linked to the military occupied the land and denied entry.	Arts. 12 & 39	Amparo denied based on lack of linkage between state and non-state actor

5.7. Hierarchy of Norms: Expropriation of Indigenous Land: Individual Possession vs. Communal Title

The Court has the potential to address violations of property rights which are based on racial discrimination against indigenous people by referring to international human rights norms, such as ILO Convention No. 169 or the Constitution itself

Although the Guatemalan Congress ratified ILO Convention 169 in 1996, I could find no reference to its standards in the cases I reviewed in the Constitutional Court (aside from the advisory opinion in which it affirmed that the convention did not violate the Constitution).¹⁰⁵⁰ As previously mentioned in Part II, Article 14 of the convention calls for recognition of the ownership and possession rights of indigenous peoples' lands which they have traditionally occupied and safeguard of those lands which they have had traditional access for subsistence and traditional activities. Article 17 sets forth that indigenous customary norms for transfer of land rights shall be respected and that persons not belonging to their groups shall be prevented from taking advantage of their lack of understanding of the formal law to obtain their land. Claims filed are based on Article 67 of the Constitution which calls for State protection of indigenous land and may be regarded as the national version of the Article 14 of ILO Convention No. 169.¹⁰⁵¹

Indigenous groups claim that this provision places a duty on the State to uphold their communal possessions and recognize their historic claims. None of the cases revealed substantive analysis regarding Article 67. In practice, the State recognizes only the formal registry, in spite of its failings due to double-titles and mismatched properties. Without formal title, customary claims to land are not respected. The judiciary has demonstrated an inclination towards recognizing the right

¹⁰⁵⁰ Expediente 199-95, Corte de Constitucionalidad, 18 mayo 1995.

¹⁰⁵¹ Art. 67: "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."

of prescription when it entails individual possessors claiming collective indigenous land (Case 57-93).¹⁰⁵²

Internal divisions also complicate matters. In 2001, the State agreed to adopt measures to provide formal titles for indigenous lands in accordance with municipal reports on land tenancy. Part of the reason why registry efforts are delayed is the resistance of local communities to have their land measured. However, there are many cases of municipalities involved in conflicts with individual families or other municipalities regarding boundaries; hence, the municipalities encounter difficulties when trying to survey the land.¹⁰⁵³ Peasants refuse to grant permission to technicians to enter the property to conduct the measurement. Often, due to demographic pressures, families usurp additional property to provide for their children, hence they fear that a survey will reveal the occupation and leave them dispossessed. Rather than make a prescription/adverse possession claim, they assume a defensive position and block any measurement whatsoever of their holdings. In addition, there are increasing amount of land conflicts rooted inheritance disputes. As the rural population increases, the demand for land multiplies while the supply decreases, prompting rifts between heirs. Although such conflicts tend to remain at the local level, some cases have reached the Constitutional Court.¹⁰⁵⁴

¹⁰⁵² See Expediente 57-93, 10 May 1993, Corte de Constitucionalidad, Gaceta de la Corte de Constitucionalidad.

¹⁰⁵³ The complexity of land disputes is heightened when National actors, such as the Congress intervene in local disputes. The following case reveals the State's limited ability to resolve inter-community boundary conflicts via measurement of land. In the department of Huehuetenango, severe boundary disputes resulting in physical injury to persons had erupted among the municipalities of San Juan Ixcay, Todos Santos Cuchumatán, la Villa de Chiantla and the ranching community of Chancol. The Boundary Department of the Military Geographic Institute measured the land in order to determine the boundaries between the municipalities. The Congress issued Decree 41-94 which definitively established the boundaries but later derogated this act by way of a second decree. The Congress claimed that the reason for the derogation was the receipt of many complaints by the municipalities and residents who disagreed with the terms of the first decree. In view of the fact that the conflict seemed to have increased rather than decreased as a result of the decree, the Congress revoked the initial decree and approved Decree 48-94 which called upon the Executive to issue a new study in consultation with the municipalities within 90 days which would end the matter definitively. The Municipality of Villa de Chiantla which was obviously pleased with the original measurement and filed an *amparo* with the Constitutional Court claiming *inter alia* violation of the constitutional rights to defense, private property, and protection of indigenous land by the Congress' derogation. The Constitutional Court stated that the Congress had acted within its power in conformance with article 141 of the Constitution and that the Decree did not violate any legal right. There is absolutely no discussion whatsoever of Article 67. In addition, the Court stated that the *amparo* was the inappropriate mechanism, as the Municipality should have filed an *impugnación* action against the law. In this case, the Municipality was not charged costs and the lawyer was not fined. See Expediente No. 689-94 (12 July 1995), Gaceta de La Corte de Constitucionalidad.

¹⁰⁵⁴ See Exp. 104-90, 25 June 1990, Gaceta de la Corte de Constitucionalidad.

Below, I present a selection of cases in order to reveal the key problems in pursuing claims based on customary rights or human rights pertaining to property disputes.

5.7.1. Case of Sarceno Garcia

The Constitutional Court's review of the case of Maria Orbelina Sarceno Garcia v. the Congress is presented below in order to demonstrate how the formal court system misinterprets indigenous tenure of land.

Maria Orbelina Sarceno Garcia claimed possession over a plot of land registered and administered by the indigenous community of the municipality of Jutiapa. The Secretary of the indigenous community certified her possession right, which she inherited from her father. The Congress sought to expropriate a portion of this property via issuance of Decree 77-95.¹⁰⁵⁵ Ms. Garcia filed two amparos against the Congress, citing Article 67 of the Constitution (protection of indigenous land). However she did not cite any other Constitutional provisions which would be relevant to her individual claim.¹⁰⁵⁶

She claimed that the Congress was abusing its power and overstepping its legal boundaries. The Congress's strategy was to characterize the property as "individual" instead of addressing its own legitimacy to expropriate property for collective use.¹⁰⁵⁷ The Public Ministry also countered the allegation of communal property, characterizing Ms. Sarceno Garcia to be "the legitimate possessor of the

¹⁰⁵⁵ Expediente 892-95, 27 August 1996, Gaceta de la Corte de Constitucionalidad and Expediente 1250-96., 30 July 1997, Gaceta de la Corte de Constitucionalidad.

¹⁰⁵⁶ No reference was made to the spiritual value of the land, possibly protected by freedom of religion (as guaranteed under article 36) or custom (articles 57 and 66). For many indigenous people, the value of the land is not economic, but rather spiritual. This characteristic is not limited to specific places of worship or burial sites, rather it extends to the territory as a whole. Hence, it might have been interesting for Ms. Garcia to cite such factors in her claim.

¹⁰⁵⁷ See Also Article 40 of the Guatemalan Constitution:

"In specific cases, private property can be expropriated for reasons of duly proven collective utility, social benefit, or public interest. Expropriation will have to be subject to the proceedings mentioned by the law, and the expropriated property will be appraised by experts taking their actual value into account. Compensation will have to be made in anticipation and in legal tender, unless another form of compensation is agreed upon with the interested party.

Only in cases of war, public disaster, or serious disruption of law and order can there be occupation or interference with property or expropriation without prior compensation, but the latter will have to be done immediately following the end of the emergency. The law will establish the procedures to be followed with enemy property.

The form of payment of compensations for the expropriation of idle land will be determined by law. In no case will the deadline to make such payment effective exceed 10 years."

property . . .” It was also pointed out that the expropriation was intended to benefit the same indigenous community and that indigenous communities may not claim privileges which would limit the opportunities of the rest of the community. It claimed that the community was not being deprived of the land, which it traditionally administered, indirectly referring to the concept of good faith.

The Constitutional Court agreed with the Public Ministry’s analysis that Ms. Sarceno Garcia’s individual possession disqualified the notion of the land being of communal character, thereby rendering Article 67 inapplicable.¹⁰⁵⁸ 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 held by individuals under common law and thus could be transfer to non-indigenous people.¹⁰⁵⁹ The Court did not provide an analysis of whether Ms. Garcia is allowed to sell her possession right to *ladinos* or whether she is limited to selling to other community members.¹⁰⁶⁰ There was no exploration by the Court as to the background of individual possession within indigenous communities holding title to the land. No anthropologists appear to have been consulted to explain the indigenous customary system to the Court, of course given the time constraints this would be difficult. In comparison, the Colombian Constitutional Court has solicited the assistance of anthropologists when addressing indigenous matters. The Inter-American Court of Human Rights also received testimony from experts in anthropology and indigenous law (as well as a member of the community) in the *Awas Tingi* case in order to understand the notion of property rights from an indigenous perspective.¹⁰⁶¹ However, it is strange that a legal culture which places such high regard on private property would suddenly prioritize the right of possession over that of title.

¹⁰⁵⁸ IAN, BROWNLIE, *TREATIES AND INDIGENOUS PEOPLES*, 5 footnote 7 (Clarendon Press 1991).

¹⁰⁵⁹ In New Zealand, the Treaty of Waitangi established a duty of good faith which the Waitangi tribunal interpreted to mean that indigenous tribes may not be deprived of lands which are essential to their existence. See Brownlie, *Id.* at 20.

¹⁰⁶⁰ One may compare with the norms set forth by ILO Convention, Article 17 which states that the peoples’ own procedures for transmission of land rights among their members shall be respected and Article 8 which calls for due regard of indigenous customs when applying national laws and regulations. Unfortunately, the Court did not refer to such standards.

¹⁰⁶¹ See ESTHER SANCHEZ BOTERO, *JUSTICIA Y PUEBLOS INDIGENAS DE COLOMBIA* (Universidad Nacional de Colombia 1998) for a review of the Colombian Constitutional Court’s case law in this arena; see also *Awas Tingi Case*, I/A Court H.R., Series C No.79 (31 August 2001).

It is ironic because many indigenous communities seek to register the individual possession of the land in order to facilitate assistance by the State in matters such as rental, sales, inheritance, etc. and to prevent further dispossession by outside actors. They consider ownership to be held in common in order to preserve the Mayan concept of the Mother Earth as the source of life and spiritual culture of the family and community. To condition communal protection on communal possession would be to imply that the actual practice of these communities is null and void. Indigenous conformance with state standards results in the dissolution of what could perhaps be their strongest legal defense. If the judiciary fails to understand the actual practice of the indigenous people, it will be unable to protect their rights to land and thus violates the ILO standards which requires due regard of indigenous customs (Article 8) when applying law.¹⁰⁶²

As previously mentioned, the majority of indigenous people achieve individual possession by way of issuance of a municipal document (which is not recognized by the official legal system, but is recognized by the community), or mere possession (also recognized by the community). The Municipal Mayor's documents have the value which the community tenders to it. Thus it may be assumed that the sale of possession to a plot of land by an indigenous person would indeed be subject to some form of review or approval by the community. Hence, should the persons sell outside the community, it would probably first have to be accepted by the community. Failure to abide by communal wishes may be interpreted as an act of bad faith which potentially render the validity of the sale vulnerable to attack. This may diminish the individual characteristic of the possession and challenge the Congress' and Court's interpretation of such tenancy.

This case provides an excellent example of the lack of understanding of indigenous practices with respect to land. Rather than recognize indigenous land use as implemented by the indigenous communities themselves, the Court imposes an outside definition which appears more linked to the notion of cooperatives in general rather than indigenous norms. Thus, we may glean the fundamental problems of a formal legal system which does not recognize customary norms held by the majority indigenous population. The Court would have benefited from conducting an analysis

¹⁰⁶² Brownlie states that "(i)n the case of the protection of group rights, precisely because a very delicate balance of interests is called for, the existence of an efficient and sensitive legal system is immensely important." He calls for "inter-communal equity" based on human rights, group rights, and self-determination Brownlie, supra note 437 at 40 & 53.

which cross-referenced ILO Convention No. 169, took equity considerations into account, and empowered the indigenous community by allowing them to explain their practices regarding possession and ownership of land. In essence, their land tenure system is completely misinterpreted and discredited, thereby fomenting rather than resolving land conflicts. This decision may be considered to run contrary to rights to property and restitution contained in Article 21 of the American Convention and Article 14 and 16 of ILO Convention No. 169, as well as the right to remedy contained in Article 25 of the American Convention, Article 12 of the ILO Convention No. 169 and article 7 which requires participation of indigenous people in development policies.

Almost all the indigenous communities claim that their communal lands are being diminished. Due to the high costs of litigation, lack of legal aid, adversarial strategies within the courts, and the obvious bias against their norms, few indigenous communities feel that they have access to justice regarding their land rights within the formal legal system. Hence, they are deprived of the right to remedy.

The recent call by the UN Rapporteur on the Independence of Judges and Lawyers for recognition of the legitimacy of international human rights law and indigenous customary law may provide pressure to the Court to approach future cases in a more responsive manner.

5.7.2. Case of El Jaibal San Sebastian

One of the most famous cases regarding indigenous communal lands in Guatemala is that of “El Jaibal” of San Jorge La Laguna, municipality of Solola.¹⁰⁶³ The use of the amparo in this case is cited by indigenous commentators as an example of bias within the judicial system. Conflicts arose within the community of San Sebastian, Department of Alta Vista, between an indigenous community (Kaqchikel) (which claimed historic title from 1580 based on a document noting the payment of tributes by indigenous people, registering 111 tributaries and their families in El Jaibal) and the formal title-holder, Luis Alfonso Saravia Camacho. Mr. Camacho traced back his title to a Presidential issuance of title in 1878 which was a period of liberal reform described by COJUPA as constituting a wave of “legalized evictions”.

¹⁰⁶³ Exp. 433-92, 18 February 1993, Gaceta de la Corte de Constitucionalidad.

In March 1992, Mr. Camacho announced plans to transform the property which bordered Lake Aititlan into a tourist attraction. In response the community occupied the territory and was subject to an eviction order from the court. On April 4th, the ensuing eviction attempt included tear gas, paralyzing gas, destruction of property, and battery. Seventy-four peasants were imprisoned and nineteen were wounded. The Sub-director of the National Police, the Departmental Governor, the Public Ministry, and the Attorney General's Office for Human Rights sent observers to the eviction but they were unable to prevent the violence. The Community denounced the eviction attempt and requested the government to expropriate six *caballerias* of land for them. They decried repression by the State, the absence of the rule of law, and the need to implement human rights:

*"The brutal aggression which we have suffered, from which we still feel the physical wounds, and from which we will not be able to recover the material losses for a long time, given that we are poor people, has allowed us to become a 'State of Law'. Its legality is concretized in bombs and bullets against the people, but it has not been able to diminish our unbreakable strength and dignity. Rather, it permits us to know better the face of a 'democracy' which is estranged from the civil society and which seeks 'solution' to community problems. This government is supported by oppressors of force, it is only 'democratic' in the way it silences the public. What is 'democratic' is that we are forced to respect those laws which are not our own and we must accept that human rights do not exist."*¹⁰⁶⁴

The law was presented as being an instrument of coercive pressure of immoral worth and lacking legitimacy. The statement begets consideration of relevance of the American Declaration Article XXIII classification or right to own property to meet the "essential needs of decent living". Furthermore, we are reminded of the Inter-American Court of Human Rights' precedent in *Awas Tingi* recognizing the need for expansive definition of the right to enjoyment of property as a means of securing collective culture, integrity, spirituality, etc., as well as the call for consideration of the right to live in dignity with full respect for economic and social rights in the *Villagran Morales* case.¹⁰⁶⁵ Apart from denial of the right of remedy, one may identify violation of Article 27 of the CCPR and Article 12 on freedom of movement and choice of residence.

A mediation commission was formed including Church representatives and representatives from the Attorney General's Office for Human Rights in Solola. The

¹⁰⁶⁴ Open Letter by the Community of San Jorge, 4 May 1992, on file with COJUPA.

¹⁰⁶⁵ *Villagran Morales et.al. Case, "The Street Children"*, I/A Court H.R. Series C No. 63 (1999).

title holders offered to provide the peasants with drainage, sewage, and electricity services which had hitherto been denied to them and refrain from violent expulsion attempts on condition that the State buy alternative land for the peasants within six months.

In June 1992, 3,000 peasants marched in protest of the development project and the Mayor agreed to prevent the construction in defense of the environment. A town meeting was held, in which the village people of San Jorge La Laguna and the community of Solola expressed concern that the proposed development would contaminate Lake Aititlan and promote disease and drug addiction. The Municipality of Solola issued a prohibition on construction.¹⁰⁶⁶ The formal title holders filed an *amparo* with the Court of Appeals claiming a violation of their due process rights on account of the municipality's alleged failure to grant an audience to them in order to challenge the claim, thereby violating their rights to defense and property.¹⁰⁶⁷ They argued that the Municipality had usurped powers belonging to the National Commission of the Environment, pursuant to Decree 68-86. The Municipality responded that its code included a *reposicion* procedure for persons contesting its resolutions, which the Mr. Camacho had not utilized, and thus had failed to exhaust ordinary remedies. In addition, it pointed out that the town meeting had been open to the public, hence Mr. Camacho had been free to attend had he been interested. The Court of Appeals issued a decision in favor of the formal titleholders based the Municipality's lack of legal mandate, noting that the Municipality had acted with "notorious illegality, evident abuse of power, and manifest incompetence" upon emitting the act. The owners were declared to have been denied an opportunity for an audience to defend their interests, and the act was characterized to be a "*via de hecho*" (measure outside the law), thus the prerequisite of exhaustion of domestic remedies was not required in this case. This point is of particular interest, as it runs contrary to the tradition of the court to steadfastly adhere to exhaustion of domestic remedy norms in other cases involving official abuse of power. The Court of Appeals ordered restitution previous to the emission of the act.

The Municipality appealed to the Constitutional Court. It claimed that the act did not refer specifically to the Tourist Center of the Finca El Jaibal and that no solicitation had been presented to it. The Constitutional Court set forth the principle

¹⁰⁶⁶ See Municipal Act # 057-92 (Solola), on file with COJUPA.

¹⁰⁶⁷ Amparo by Luis Camacho, Sala Novena de Apelacion, Solola No.9/925 on file with COJUPA.

that the right to an audience was fundamental, as the authority must hear parties to be affected by a resolution and allow them to present proof to seek recognition of their rights. The deprivation of the right to audience was indeed a violation of article 12. The *amparo* was deemed to be the appropriate remedy to provide restitution for the injured party. The municipality was charged with hearing only one of the parties, i.e. the neighbours, and not the owners of the finca who were directly interested in the matter. This violated the principle of equality as well as defence. The Court noted that given that there was no legal norm prohibiting the construction of tourist sites in the area, the resolution threatened Camacho's rights. The *amparo* was upheld, the municipal resolution rendered null, and restitution ordered.

COJUPA provided assistance to the community, seeking to establish a precedent which would transform a historic claim into a legal right by having the State expropriate the land in order to preserve its indigenous status. The community cited the State's duty to protect the lands of indigenous communities and claimed that the expropriation would uphold their right to development while maintaining their traditional, agrarian lifestyle. It sought to base its action on the right to communal possession of land as recognized under the Constitution, article 67.

The Expropriation Law, Decree No. 529, authorizes the Congress declare expropriation of property for "public utility or necessity, or social interest", which refers to all collective needs, either material or spiritual.¹⁰⁶⁸ Municipalities may submit expropriation requests to the Congress when deemed necessary. The Municipality of Solola remitted an expropriation request to the Congress on 27 October 1992. The formal titleholders countered based on Article 39 of the Constitution, citing the duty of the State to protect private property:

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

Of special interest is the phrasing of the State's combined duty to balance an individual's interest in improvement with that of the nation. Hence, the title-holders sought to demonstrate their commitment to development, stating that that the creation of a tourist complex would create jobs which would benefit the community.

¹⁰⁶⁸ Article 19, Decree No. 529, Expropriation Law of Guatemala.

On 4 August 1993, the Congressional Commission of Government issued a recommendation which denied the historic claim and recognized the formal title claim. It cited the lack of registry by the peasants, identifying them as usurpers, and noted that the land was better suited for tourist development rather than agriculture. The Municipal Act was criticized for not having considered the needs of the formal title-holders. One member of the Commission dissented noting that the Commission never visited the site, nor did it conduct a socio-economic study assessing the impact on the ethnic groups in the area. The President of the Congress rejected the recommendation and asked for a revision based on reality, suggesting an actual visit to the property by the Commission.

In 1994, the formal title-holders initiated a new *amparo* claim with the Constitutional Court based on due process violations by the Congress.¹⁰⁶⁹ The Constitutional Court issued a provisional injunction against the Congress. The peasants unsuccessfully appealed to the President of the Nation. Hence, in this case the *amparo* remedy served to preserve the interest of the elite party. In the meantime, legislative elections were held and the Commission received new members who were not familiar with case. At present, the Commission has not issued a decision as required under article 39 of Decree #63-94 of the Organic Law of the Legislature. The *amparo* claim was dropped, and COJUPA claimed it was nothing but a stalling tactic. According to Argueta, expropriation is considered a viable option if the end is the construction of a highway or a football field. However, as a means for resolving land conflicts involving rural communities, it is not favorably viewed by the government.¹⁰⁷⁰

This case revealed the discrepancies in the application of the *amparo* mechanism, including procedural inconsistencies regarding exhaustion of ordinary remedies as well as substantive inconsistencies in interpretation of the hierarchy of possession vs. title claims to land. This resulted not only in procedural injustice (denial of the right to remedy under Article 12 of the ILO Convention No. 169 and Article 25 of the American Convention, see IACHR *Awas Tingi* case), but also substantive injustice (violation of the rights to property and restitution under Article 21 of the American Convention, as interpreted by the IACHR in *Awas Tingi* and

¹⁰⁶⁹ Amparo of Anabella Fuentes Tejada de Garcia, Constitutional Court, Exp. No. 412-94 sec 3 (12 Aug 1994).

¹⁰⁷⁰ Interview with Lic. Antonio Argueta, COJUPA, 16 February 1998-

article 14 & 16 in ILO Convention No. 169). *Amparo* is regarded the tool of the wealthy against the poor, far from being a vehicle to fairly resolve disputes regarding indigenous claims to land, it serves to uphold the status quo.

There appears to be an inherent bias within the *amparo* mechanism against indigenous norms, regardless of their legitimacy within human rights and even the Guatemalan Constitution itself. In part this may be due to lack of exposure within legal education. Because parties have little opportunity for direct participation, the conversion process of inputs reflects the value system of the judges themselves and their perception of what are legitimate rights. As in the previous case, the Court may have proved more responsive to the community had it conducted an analysis which cross-referenced ILO Convention No. 169 and equity concerns. One must keep in mind that Article 67 of the Constitution appears to be even more far-reaching than the international convention because it calls for actual recognition of title to indigenous land, whereas ILO Convention No. 169 permits the State to grant only possession rights or use instead of title. Hence, even if we only reference national law, there is a need for acceptance of the legitimacy of the progressive provisions, such as Article 67, rather than neglect of their existence.

Below, we examine outputs by reviewing cases involving complaints against the judiciary itself and non-state actors.

5.8. Output: *Amparo* Against the Judiciary

The Constitutional Court has been wary of recognizing *amparos* filed against courts, thus its jurisprudence reflects a reluctance to overturn judgments based on the argument that the link to a breach of Constitutional rights is lacking or failure to exhaust ordinary remedies.¹⁰⁷¹

5.8.1. Ochoa Case

In the department of Escuintla a conflict arose after the justice of the peace of the municipalities of Palin and San Vicente Pacaya attempted to relay the decision of the First Instance Civil Judge of the Department of Guatemala granting possession of

¹⁰⁷¹ See also Expediente 422-95, 5 January 1996, Gaceta de la Corte de Constitucionalidad.

property to Juan Valdez Cubas and calling for the eviction of Ms. Barillas Martinez.¹⁰⁷² The Justice of the Peace, accompanied by police and Mr. Cubas' lawyer, a neighbor, and an engineer, encountered Ms. Martinez's son, Jose Gerardo Aycinena Ochoa, working in the fields. He claimed that the land was his property, indeed the property was registered as two fincas "Londres" and "Piedras Cuaches". As he did not have the documents on his person, possession was rendered to Mr. Cubas. Mr. Ocha believed that the Justice of the Peace confused his property with another.

He filed an *amparo* against the Justice of the Peace with the First Instance Civil Tribunal of the Department of Escuintla, claiming that his rights to defense and property had been violated, citing Articles 12 and 39 of the Constitution.¹⁰⁷³ The Tribunal denied the *amparo*, stating that the Justice of the Peace had not exceeded her jurisdiction, and that given that issues had arisen regarding the right to property and possession "our ordinary legal system shall determine the pertinent vindicatory measures, to provide restitution for any wrong which affects real rights, specifically being the Civil Code, not the *amparo*, the established process for this process."

Mr. Ocha appealed to the Constitutional Court which in turn denied his claim, stating that the issue appeared to be a dispute based on facts and confirming that the appropriate jurisdiction would be the ordinary channels, not the *amparo*. In effect, the Court claimed since the judge claimed to have issued a possession claim over an entirely different property, Mr. Ocha's legal rights to his own property remained intact. What remained was a border, possession, or property dispute which the Court stated should be addressed via the ordinary tribunals. Mr. Ocha could present his legal right to the property to a court and request that it be recognized, hence the *amparo* was denied.

It is obvious that Mr. Ocha had little faith in the competency of the ordinary courts, given that their mistakes had resulted in his forced eviction. Magistrate Rodolfo Rohmoser Valdeavellano responded to this concern and issued a dissent in which he stated that the Court should have granted the *amparo* due to the continuing

¹⁰⁷² Expediente 440-92, 9 March 1993, Gaceta de la Corte de Constitucionalidad.

¹⁰⁷³ 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 nor through proceedings that are not legally pre-established.

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 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.

threat to Mr. Ocha's right to property. Mr. Ocha's status as a third party status to a legal dispute which did not directly pertain him left him vulnerable. He had not been cited nor vanquished in court, hence the constitutional Court should have protected him:

"In theory the ordinary jurisdiction is sufficiently efficient to protect individual rights. However, when in reality it is proved that the protection is only theoretical, then, as in the case under analysis, the damage to the individual's constitutionally guaranteed right is palpable; hence the constitutional jurisdiction should grant amparo."

This opinion correlates directly with the jurisprudence of the Inter-American Court and the UN Human Rights Committee which require that remedies be effective in practice.¹⁰⁷⁴ Indeed, in this case the judiciary had actually been instrumental in Mr. Ochoa's dispossession. The failure of the Constitutional Court to respond to such abuse provides evidence as to why the populace has little faith in the justice system. The *amparo* is of little worth to those concerned with remedying forced evictions if it is not applied to the very body which orders evictions. Although the Court's jurisprudence is steadfast in upholding the notion that the *amparo* is not a parallel remedial measure, it does not address the fact that the ordinary mechanisms are in fact insufficient.¹⁰⁷⁵ In particular, given that the judge was physically present during the

¹⁰⁷⁴ IACHR, OC-9/87, para. 24; and *Olo Bahamonde v. Equatorial Guinea*, U.N. Human Rights Committee, Comm.No. 468/1991 (1993).

¹⁰⁷⁵ See also Expediente 1318-96, 17 January 1997, *Gaceta de la Corte de Constitucionalidad*. This *amparo* was filed by Sandra Patricia Ralda Ramirez against the First Instance Judge on Penal Matters which had followed the request of the Public Ministry and issued an order of forced eviction of persons occupying two settlements called "*Las Torres*" and "*El Cerrito*" in the department of Guatemala. The order was issued without citing the accused parties for appearance in the hearing in order to allow them opportunity to defend, challenge, or be heard. In addition, the order was issued in spite of the fact that the ultimate determination of the usurpation charges brought against her by the *Banco Nacional de Vivienda* (National Housing Bank) had not been completed by the Judge. Ms. Ramirez claimed violation of her right to due process and to defense. The Court of Appeals stated that the evicted parties did not have a right or possession nor had the Bank given them permission to reside there. No evidence of violations of due process, defense, or other Constitutional rights was found. The Court of Appeals held that "by not proving to be the legitimate owners of the occupied plots, nor holders of possession rights, they have acted at the edge of the law. They taint the nature of the *amparo* through such conduct by suggesting that it provide them with protection for acts which are not sanctioned by the law." The *amparo* was denied, Ms. Ramirez was charged procedural costs, and her lawyer was fined. Ms. Ramirez appealed to the Constitutional Court which in turn denied her claim, stating that she should have first filed a *reposicion* claim as established in article 402 of the Criminal Procedure Code.

eviction, regardless of the fact that the order refers to another property, reveals a de facto miscarriage of justice. The judiciary should not hide behind formal technicalities in the face of such obvious erroneous action. Failure to address this type of eviction results in a denial of remedy to victims, violating Article 25 of the American Convention on Human Rights.

5.8.2. La Isla Case

The present case provides an exception in which the lower court was sanctioned for excessive use of power resulting in forced eviction. Federico Rene Arevalo Bolanos asserted ownership rights over the property “La Isla”, in Villa Canales, department of Guatemala, and commenced a penal proceeding against the occupants in order to attain their eviction through a protective order.¹⁰⁷⁶ The First Instance Penal Tribunal initially denied the request stating that such action is not within the jurisdiction of that judicial power, rather there is a specific civil procedure to pursue such action, it is not within the penal law. In addition, various persons to be affected by the order were not heard, and it was not clear what possession rights those persons had.

A second claim was filed with the First Instance Penal Tribunal and denied again, however this was reversed by the Court of Appeals. Mr. Hernandez states that the claim is groundless due to the fact that the families occupying the property for the past 30 years did not attain the property via violence, usurpation, swindle, clandestine action, etc. No claims over the property had been presented previously. Hence the families claimed possession rights as guaranteed under the civil code, not the penal code.

Mr. Hernandez filed an amparo against the Court of Appeals, claiming violation of his rights to defense, presumption of innocence, and due process, articles 12 and 14 of the Constitution. The Supreme Court granted provisional amparo but concluded that the Court of Appeals had not violated Mr. Hernandez’s due process rights nor had it abused its power in reversing the lower judgment. Eviction was founded on article 297 of the Code of Penal Procedure: “Judges are given the faculties to decree protective measures in order to prevent the effects of the offence,

Expediente 1318-96, 17 January 1997, Gaceta de la Corte de Constitucionalidad. See also Expediente No. 756-95, 29 March 1996, Gaceta de la Corte de Constitucionalidad; see also Expediente 1269-96, 8 January 1997, Gaceta de la Corte de Constitucionalidad.

¹⁰⁷⁶ Exp. 186-93, 19 July 1993, Gaceta de la Corte de Constitucionalidad.

guaranteeing the syndicate, persons, and goods belong to third persons”. Hence, the amparo was denied.

Both Mr. Hernandez and the Public Ministry appealed. The registry documents indicated that Mr. Bolanos’ property was not “La Isla” but rather another property located in Villa de Guadalupe. Hernandez claimed that the Supreme Court did not take into consideration the First Instance Penal Court’s decision. The amparo produced irregularities and vices for nullification, such as publication of the decision to the press before notice to the parties. In the newspaper PRENSA LIBRE, a First Instance Penal Judge warned “the usurpers” that public force would be utilized to implement the eviction order issued by the Court of Appeals. Hernandez claimed that they feared physical, material and moral damage due to the threat of forced eviction. The Constitutional Court did not consider the proclamations in the newspaper to be an act of authority composed of coerciveness, unilateralism, or hegemony. Hence the statements by the judge were not deemed to threaten the right of defense of the people and this amparo was denied.¹⁰⁷⁷ In my opinion, the proclamation by the judge to the press was an outrageous abuse of power specifically intended to intimidate the victims.

On the substantive issue of forced eviction, the Constitutional Court stated that the Court of Appeals had indeed extended its mandate, as dispossession under article 297 of the Code of Penal Procedure referred to movable property and personal measures, not eviction from immovable property. In addition the Court stated that these measures should be taken without exceeding their discretionary use and without affecting the parties’ right to defense and due process. The Court stated that the eviction order did not take into consideration that the act originating the proceeding had not attained a definitive qualification, hence the forced eviction appeared to resolve the substantive issue. In addition, it appeared likely that the matter retained a civil character which would require processing under the relevant civil courts. The eviction order against the possession did not have the characteristics of an immediate usurpation, rather a prior occupation. The Court concluded that the Court of Appeals exceeded its powers of issuing protective orders, thus violating Hernandez’s rights to defense and due process. The amparo was upheld and the eviction order overturned.

This is important as an example of how the amparo may protect individuals from abuse by the courts. The Court’s recognition of importance of providing remedy for claims involving possession rights establishes a valuable precedent for marginalized peasants lacking formal title. Because forced evictions are a chronic

¹⁰⁷⁷ Exp. 45-93, 27 April 1993, Gaceta de la Corte de Constitucionalidad.

problem in Guatemala, and many evictions are the result of court orders, there is a need for a speedy, remedial mechanism against error by the judiciary. It is unfortunate that this case appears to be an unusual precedent for the Court. In contrast, Argentina, Uruguay, Costa Rica, Panama, El Salvador, Honduras, and Nicaragua explicitly prohibit the use of amparo against court decisions. Hence, Guatemala's potential sphere of application is actually more progressive in theory when compared with these countries. We may recall the precedent offered by the Inter-American Court of Human Rights in the Blake case which confirmed the denial of an independent judicial process within a reasonable time.¹⁰⁷⁸ There is great need for the Constitutional Court to provide greater oversight of the lower courts in order to ensure the right to remedy.

5.9. Non-State Agents- Forced Eviction

Non-state agents are key elements of the state of impunity in Guatemala.¹⁰⁷⁹ The difficulty in linking their acts to the authorities render the attainment of justice almost impossible. The increasing use of private security forces to “resolve land disputes” has also increased forced evictions. Unfortunately, the Constitutional Court decided that the amparo is inapplicable in situations involving such actors. Mexico, Brazil, Panama, El Salvador and Nicaragua fully prohibit filing of amparos against

¹⁰⁷⁸ Blake Case, I/A Court H.R. Series C No. 36 (24 January 1998).

¹⁰⁷⁹ A private police service named *Vigilancia e Investigaciones Privadas* (VIP) was accused of usurping the property upon which Flavio Anibal Gramajo Ovalle claims to have right of *usufructuario vitalicio*, ownership retained by his children. Pursuant to a summary judgment granting eviction obtained by Lucido Fernandez Caseres and Edgar Rene Cardillo Chavez, armed guards were placed on Ovalle's property, preventing his entry, and interfering with the property. Mr. Ovalle claimed violation of his rights to defense and private property. He stated that his property was registered in Quetzaltenango (registry no. 48588, folio 297, book 127 of Retalhuleu) and that the eviction was a result of confusion with another property located elsewhere (registry no. 6292, folio 249, book 35 of Retalhuleu). The Judge of Champerico, department of Retalhuleu, recognized that Mr. Ovalle's property was being usurped by armed men who admitted that they were guarding a property registered no. 48588, not no. 6292 which had attained the eviction order. Mr. Ovalle filed an amparo with the First Instance Tribunal of the Department of Retalhuleu, based on articles 12 and 39 of the Constitution. The First Instance Tribunal denied provisional amparo. Lucido Fernandez Caseres stated that Mr. Ovalle had not exhausted ordinary remedies and denied interfering with his right to property or defense. The First Instance Tribunal concluded that the facts leading to the amparo were illicit actions which had never been reported or subject to charges raised by Mr. Ovalle to ordinary penal authorities. Since ordinary procedures had not been exhausted, the *amparo* was denied. Mr. Ovalle appealed to the Constitutional Court. Mr. Chavez claimed that Mr. Ovalle should have pursued ordinary remedies to clarify the title dispute, indeed a nullification action was in the Court of Appeals. The Constitutional Court denied the amparo based on the fact that Mr. Ovalle had filed against Mr. Chavez, Mr. Caseres, and VIP, none of whom exercised legal authority (VIP being a service company). Hence the acts could not be remedied by *amparo*, rather other procedures under ordinary jurisdiction. Costs and fine were charged. Expediente 172-91, 3 October 1991, Gaceta de la Corte de Constitucionalidad. One would think that VIP would be registered under the law and thus fall within *amparo* jurisdiction according to the national law.

private actors. Costa Rica and Colombia have limitations similar to that of Guatemala. The terrible truth is that violations of human rights (and constitutional rights) are indeed committed by private actors, Guatemala should consider amending its amparo law to apply to such actors.¹⁰⁸⁰

Non-state agents involved in forced evictions have been linked to the military, and hence may be characterized as para-state groups. The reluctance of the courts to address the responsibility of State actors for authorizing, tolerating, or encouraging such actions reveals a serious protection gap.

5.9.1. Finca Maria del Rosario Case

Eusevio Efrain Reyes Santos, Ramiro Abigail Santos Arreaga, and Roberto Maximiliano de Leon Calderon rented plots of land contained in the finca “Maria del Rosario”.¹⁰⁸¹ The local judge of Champerico, department of Retalhuleu, appeared in the finca, accompanied by Arturo Manuel Escriu Ruiz, Edgar Rene Cardillo Chavez, and armed men who claimed to be from the Military Bases of Retalhuleu, San Marcos, and Cuyotenango, department of Suchitepequez. The judge claimed to be carrying an order of capture issued by the First Instance Judge of the Department of Retalhuleu against several residents of the property, without specifying whom exactly was under arrest. They were forcibly evicted from the property and warned not to collect their harvests, as the Military would do so. The capture order was issued against the man who rented the land and sub-let the property to the claimant on the charges of usurpation and disobedience.

Mr. Ruiz and Mr. Chavez, accompanied by unidentified men, took over the crops and denied them entry to the finca. Mr. Reyes, Mr. Arreaga, and Mr. Calderon presented an amparo against the First Instance Judge of Department of Retalhuleu from the Court of Appeals, stating that their rights under articles 12 and 39 of the Constitution had been violated. The Court of Appeals did not consider the judge to have violated the rights of the persons, as he followed the penal procedure. The

¹⁰⁸⁰ See UN 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, General Assembly Resolution 53/144 (A/Res/53/144) (8 March 1999), Article 10: “No one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so.”*

¹⁰⁸¹ Exp. 414-92, 4 May 1993, Gaceta de la Corte de Constitucionalidad.

Commander of the Military Zone 1316 of the municipality of Cuyotenango Suchitepequez indicated that the judge did not act against the persons claiming amparo. The amparo was denied and costs and fines were charged. The claimants appealed.

The Constitutional Court stated that the claimants' charge that individuals had appropriated their crops did not prove that the judge violated their rights, nor did they establish the existence of a reparable wrong because the actions could not be attributed to the cited authority. The Court stated that there was no connection between the act and the authority. Hence the Court deemed that it could not order the judge to suspend the reaping of the harvest, as he had not ordered nor was conducting the action. The claimants were told to pursue ordinary judicial procedures against the responsible individuals, as amparo was incorrect. This decision is disturbing because it appeared that the individuals had indeed acted under color of authority of the judge and the armed forces. As in the Ochoa case, the judge was physically present during the eviction, thus we are left with the impression that the judiciary is indeed a prime actor in this arena. The lack of exploration of the nature of these acts renders its analysis weak and indefensible. I suggest that failure to sanction lower courts for violations not only is a violation of the right to remedy, but may also be interpreted as a violation of the right to the truth about the function of the judiciary and the role of Non-State actors in promoting impunity. The limited jurisdiction provides a cloak over the very institution which is intended to uphold the rule of law, thereby weakening democracy.¹⁰⁸² While such limits may be understandable in contexts in which judiciaries have attained true independence and function objectively, in contexts in which corruption, elitism, and intimidation tactics are the norm there is a need for greater oversight of the courts and the provision of mandate over non-state actors who wield control of the State.¹⁰⁸³

¹⁰⁸² On the right to the truth see *Bamaca Velasquez Case*, Judgment, I/A Court H.R. Series C No. 70 (25 November 2000).

¹⁰⁸³ One may refer to the Human Rights Committee in *Olo Bahamonde v. Equatorial Guinea*, Communication No. 468/1991 (1993) or the Inter-American Court of Human Rights in *Blake Case*, Judgment, I/A Court H.R. Series C No.36 (1998) on independence of the judiciary.

5.9.2. Orive Case

Displacement on account of development projects is a common phenomenon. Non-state actors have been utilized to assist “clearing” land intended for development projects.

Mr. Luis Alberto Beltranena Orive claimed a prescription right to property due to his possession in good faith, public manner, and uninterrupted time period. Orive received notice from the Mayor of San Antonio Palopo, department of Solola, that the Central Government had authorized the construction of a highway on the shore of Lake Atitlan which would affect his property.¹⁰⁸⁴ Mr. Orive complained to the Departmental Governor of Solola. He claimed that the Mayor had directed over 300 men to usurp the property, destroying gardens, walls, boundary markers, and trees. The Departmental Governor failed to prevent these acts in spite of his forewarning. He claimed violation by the Mayor of his constitutional rights to *inter alia* private property and inviolability of the home.¹⁰⁸⁵ He claimed damage of 6.800 Quetzales.

The First Instance Tribunal of the Department of Solola granted him a provisional amparo. The Guatemalan Tourism Institute intervened as a third party. The Mayor noted that the highway was not a project emanating from the municipality, rather it originated from a Governmental Accord being executed by the Ministry of Communications and Public Works. He denied any instigation of illegal destruction of property or violent acts. He claimed to have actually suspended the destruction by way of dialogue. The Mayor stated that Mr. Orive’s property never had trees or crops which he claimed to have lost. In addition, given that Mr. Orive was only a possessor and not an owner, his amparo should be denied due to failure to pursue ordinary proceedings to recognize his right. The First Instance Tribunal stated that Mr. Orive failed to prove either the Mayor’s responsibility for the expropriation or participation in the destruction of property and denied the amparo, charging him costs and fining the lawyer.

Mr. Orive appealed to the Constitutional Court. The Court stated that an important aspect of the amparo, is the nexus between the injurious act and the

¹⁰⁸⁴ Exp. 151-91, 3 September 1991, Gaceta de la Corte de Constitucionalidad.

¹⁰⁸⁵ Article 23 –Inviolability of the Home. The home is inviolable. No one can penetrate someone else’s dwelling without the permission of the resident living there, except by written order of a competent judge in which the reason of the proceeding is specified and never before 0600 and 1800 hours. Such a proceeding will always be carried out in the presence of the interested party and his representative.

responsible authority. Given that the authorization for the construction was issued by the Government of the Republic and not the municipality, and the witnesses did not link the mayor to the impugned act, such a nexus was not established. In addition, the usurpation and destruction by the crowd of men was characterized as “illicit acts” which did not form the subject matter of the amparo, but rather that of ordinary tribunals. Hence, the appeal was denied and the lower decision upheld.

The Court demonstrated a clear reluctance to address the use of non-state actors or the notion of state responsibility due to its approval, acquiescence, encouragement, or omission to provide protection from such actors. In this manner it fails to heed the jurisprudence of the Inter-American Court which requires the state to prevent, prosecute, and provide remedies for infringements of human rights by non-state actors and has been specifically applied in the Paniagua Morales case against Guatemala.¹⁰⁸⁶

5.10. Further Protection Gaps

The Constitutional Court showed consistent gaps in analysis, for example in Case 422-95, it did not address the failure by the Supreme Court to apply the exception clause of Decree 1551 as a possible violation of due process/defense. In Case 756-95 it refused to determine whether the Supreme Court had failed to consider the alleged violation of the rights to defense and private property, questioning whether there had been a personal wrong or violation of a right by the Court, regardless of the fact that the consequences of eviction could indeed be interpreted as a personal wrong, given the loss of crops and property is the means of livelihood and survival.

The Court has a tendency to utilize the principle that amparo is an extraordinary mechanism as a shield for not addressing the failure by lower courts to complete an analysis of violation of constitutional rights. For example, in case 1318-96, the Court of Appeals indicated a clear bias against a group of settlers who were subject to forced eviction without a hearing and without a final usurpation charge by a judge: “By not proving to be the legitimate owners of the occupied plots, nor holders of possession rights, they have acted at the edge of the law. They taint the nature of the amparo through such conduct by suggesting that it provide them with protection

¹⁰⁸⁶ See Velasquez Case, Judgment, I/A Court H.R. Series C No.4, para 172 (1988); and Paniagua Morales et. Al. Case, Judgment I/A Court H.R. Series C No.37 (8 March 1998).

for acts which are not sanctioned by law.” The Constitutional Court overlooks the evidence indicating procedural inequities as well as substantive violations and calls upon the lawyer to resort to ordinary mechanisms. The Constitutional Court itself fails to implement international norms regarding the rights to remedy and equal protection of the law. The Court should reevaluate its policy pertaining claims based on property rights (both customary and formal rights) in order to guarantee equal access to courts for all citizens.

5.11 Conclusion on Amparos

Similar to the experience of European countries undergoing transition from authoritarian rule, Guatemala espoused constitutional justice remedies as a means to repel state repression of fundamental liberties.¹⁰⁸⁷ Courts are essential to recognize individual and collective rights, penalize wrongdoers, and limit abuse of power by the State over the citizenry. In sum, review of cases demonstrates that the judiciary has demonstrated a bias in cases which has the negative effect of removing protection of indigenous lands and contribute to upholding elite dispossession tactics. The Court failed to implement the rights to remedy, property, and restitution via responsive jurisprudence on account of the following factors:

- 1) *Preference for formal title/law v. customary law or intl. human rights*
- 2) *Preference for individual possession v. collective ownership*
- 3) *Preference for black letter interpretations v. equity considerations*
- 4) *Refusal to engage itself in what it deems to be a socio-economic issue*
- 5) *Lack of mandate over non-state actors*
- 6) *Reluctance to address injustice by the judiciary itself.*

The *amparo* has proved to be a largely unsuccessful mechanism by which to address forced evictions and land disputes. The Constitutional Court tends to refuse to address the constitutional right violations addressed in property disputes, but rather characterized actions to be more oriented to ordinary civil and penal proceedings.

¹⁰⁸⁷ See Cappelletti, *supra* note 141 at 7, citing the examples of Germany, Austria, Italy, Turkey, Cyprus, Malta, Greece, Portugal, & Spain. See also the constitutional court of France.

The Court did not recognize customary claims related to indigenous law, nor did it refer to human rights, hence it rejected legal pluralism and thereby failed to espouse an ethic of recognition as pertaining marginalized groups and individuals. ILO Convention No. 169 did not appear to be cited as relevant source of law in cases beyond the Advisory Opinion which ironically recognized its validity. Lack of mention regarding international and national standards regarding the right to housing is revealed in case 394-93. However, in case 186-93, the Court did appear to support the notion of provision of remedies for cases involving claims based on possession rights contained in the Civil Code, thus establishing an important precedent for other claims by marginalized peasants lacking titles. Concern remains due to the fact that the judicial system practices *de facto* dualism, but formally requires exhaustion of domestic remedies on account of its *de jure* monist structure. Hence enforcement of human rights at the national level requires processing of constitutional violations. Refusal to process human rights cases accordingly inhibits access to justice as the right to remedy is incapable of implementation.

The Court needs to render decisions which address claims based on human rights, both civil and political, as well as socio-economic standards. Because marginalized groups in Guatemala experience violations which affect their basic human dignity, e.g. loss of property affects the right to food, housing, culture, etc. Courts should address them accordingly in keeping with the cross-referencing technique utilized by the U.N. treaty monitors as well as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (see Part II). If we consider the concurring opinion of Judges Cancado Trindade and Abreu Burelli of the Inter-American Court of Human Rights in the Villagran Morales Case, the judiciary should expand its interpretation of rights to promote the understanding of interrelation and indivisibility of human rights, the Constitutional Court's pursuit of bifurcated analysis weakens human rights protection in practice.¹⁰⁸⁸ In addition, the Court should become familiar with international standards pertaining to forced eviction, the right to housing, internal displacement, and indigenous rights in order to incorporate it within analysis of cases. Lawyers pursuing human rights cases in Guatemala should form claims based on violations pertaining to the loss of property, and in addition, request property as the form of reparation offered to peasants by those

¹⁰⁸⁸ Villagran Morales et. Al. Case, I/A Court H.R., Series C No. 63 (1999).

who violated their rights. They should refer to the international human rights instruments, including ILO Convention No. 169, and the relevant principles applicable to internal displacement and forced eviction when drafting complaints and making arguments. In addition, the IACHR's jurisprudence pertaining customary rights to property (Awas Tingi case) provides an important precedent to be followed by the Court.

The Court should also become more familiar with indigenous customary law and practice, in particular when considering the grounds for individual possession which also defers to communal/collective ownership. In keeping with its own advisory decision on ILO Convention No. 169 and Article 67 of the Constitution, it should recognize the legitimacy of indigenous claims to land and refrain from upholding infringement of such rights. Given the inequitable background context of most property disputes, the Court should take equity considerations where relevant. Should the Court expand its definition of what are legitimate norms pertaining to property cases, it is likely that marginalized groups will retain more faith in the court as an institution of justice.

It is of concern that the *amparo* does not apply to non-state actors (see Case 172-91), nor is it sufficiently granted with respect to abuse by the judiciary itself (see Cases 440-92, 756-95, 1269-96, 1318-96, 394-93, 433-92 & 422-95). In spite of the evidence indicating procedural and substantive violations, the Constitutional Court did not address these factors revealed a weak analysis. Reform of the *amparo* law to address Non-state actors these actors is advisable. The lack of remedy leaves a protection gap. Greater efforts will have to be made to link responsibility of the State for the private actors by way of its tolerance, acquiescence of such acts, or omission to protect the victims from violation of their fundamental right. In addition there is a need to adopt a law recognizing the liability of private actors for violation of human rights, in keeping with the UN Declaration on Human Rights Defenders.

From a systems perspective, *amparo* appears to have resulted in overload of the judicial system. Rather than streamlining cases, the new mechanism prompted filing of many claims, the majority of which were rejected. Rather than respond to the raised expectations of marginalized groups, *amparo* adhered to the autonomy of the court system as well as the primacy of formal legal norms.

The Guatemalan Constitutional Court's tendency to revert to dualism combines with its tendency towards autonomy. The fact that the claimants have no

faith in ordinary judicial procedures to address their equity concerns is not considered by the Court. The law is to remain autonomous and isolate itself from political concerns, hence ordinary procedures are intended to uphold the black letter of the law rather than mend social inequities. The people filing claims firmly believe that the Court should change the rules and thereby prove responsive to their interests. In contrast, the Court seeks to uphold its autonomy and rejects arguments seeking responsive action. Although such position will assist in de-politicising the judiciary, it will do little to change the claims of the oppressed groups for recognition of their basic rights. It refuses to engage in social engineering via judicial activism. It does not seek to be more responsive to marginalized groups and individuals. One may argue from the outset that the amparo is an inappropriate recourse for property disputes as its extraordinary nature impedes it from being able to resolve the conflict. A third former president of the Constitutional Court, Ruben Homero Lopez Mijangos, claimed that in his opinion treatment of the land issue should primarily be handled by the Executive and Legislative branches. Indeed, the President of Guatemala receives many letters by peasants requesting attention to their need for land. Other letters seek protection from infringement on their land by other actors, including other governmental institutions. Peasant families and entire communities have travelled to the capital to stand in front of the Presidential Building in order to attain a response to their unanswered demands. The vision of the malnourished children and adults waiting for hours, and sometimes days, for some reply is disturbing evidence of the severity of the inequitable land distribution. At times the Presidential office itself is accused of being the source of violation.¹⁰⁸⁹

It may well be that the issue of inequitable land distribution may well extend beyond the capacity of the courts to remedy, thus the Legislature or the Executive body may be the appropriate remedial mechanism. However, due to the lack of political will, land reform initiatives are not likely to be pursued by either the Executive or Legislative bodies. In this regard, the courts may indeed be expected to counteract abuses by repressive or status quo minded actors within the Legislature, Executive, and general society. The Judiciary has received protests due to its non-responsiveness to marginalized groups; indeed, in August 2001 thousands marched in front of the Supreme Court demanding an end to forced evictions. The expectations

¹⁰⁸⁹ See Expediente. No. 117-89, 21 August 1989, *Gaceta de la Corte de Constitucionalidad*.

of parties to land conflicts are that the judiciary will be able to remedy inequitable acts that are rooted in a wider context of socio-economic injustice and racism. In essence, the disputes form part of the larger protracted conflict, which in turn is a result of a lack of recognition by the State of the legitimacy of the need of indigenous people and internally displaced persons for land as affirmation of identity and means of survival.

The Constitutional Court should sanction lower courts which wrongfully evict peasants from properties. Paying deference to other judges under guise of respecting ordinary procedures in cases involving blatant violations of human rights/constitutional rights cannot be characterized as anything other than the maintenance of impunity. The Court has a duty to ensure that the lower courts uphold the Constitution in its entirety, including the provisions relevant to indigenous land, defense of property, and private property. Given the extent of forced evictions in Guatemala, it may be advisable to elaborate a specific forum with a mandate to address forced eviction cases effectively.

Furthermore, I believe that courts may have a significant impact should they order return of land wrongfully expropriated by military officers during the war or illegally occupied by other powerful actors. Only by prosecuting those who amassed properties through forced eviction, forced displacement, coercion, and corruption will it be possible to assert that justice has been achieved.

The key is finding judges and lawyers brave enough to pursue such action in the current climate of impunity. In addition, further strengthening of the judiciary via human rights education, additional resources, and inclusion of indigenous judges is necessary. It is undeniable that the courts are dominated by ladino lawyers with close ties to elites. Hence, until the judiciary itself reflects the general populace, i.e. includes more indigenous judges and lawyers, it may be unwise to seek recourse of the courts for cases involving social justice ramifications.¹⁰⁹⁰ Until then, it is unlikely that any responsive action regarding marginalized groups will be taken by the judiciary; as the conversion process will reflect bias in the interpretation of norms due to the personal background of the judges and the formalistic approach to the law.

¹⁰⁹⁰ Murphy, *supra* note 140 at 110. Murphy warns that just as unlimited legislature may interpret their own interests to reflect those of the general populace, so can un-elected officials composing a constitutional court. This is even more obvious in the case of Guatemala's Constitutional Court that is composed of elected judges.

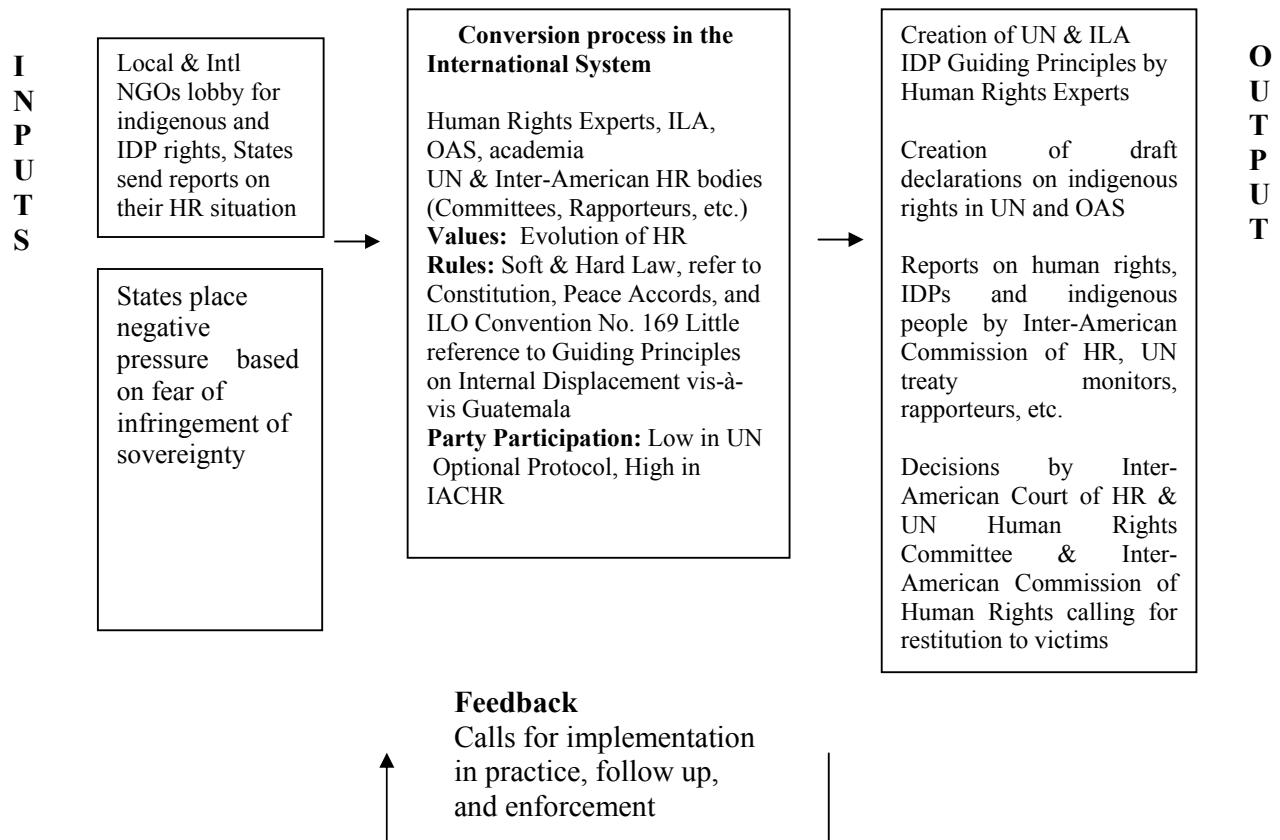
As mentioned in the section on indigenous law, the establishment of justices of the peace and community justice centers which refer to indigenous law is a first step in changing the makeup of the courts, as they have hired more indigenous lawyers.

Below are diagrams demonstrating the influence of the State and the International Human Rights System on each other. Local and international NGOs form a transnational lobby which pushes respect for human rights (including indigenous and/or IDP rights) by sending information and demands (input) to the UN, OAS, academic bodies, etc. States provide additional input in the form of reports on their efforts to uphold their obligations under international covenants and contrary pressure based on fear of infringement of sovereignty by international bodies. The international entities refer to their values pertaining to the evolution of human rights and the relevant standards within soft and hard law instruments. Their output consists of the elaboration of new instruments applicable to specific groups/topics, e.g. IDPs or indigenous people, reports/conclusions on country situations or specific themes, and decisions or views in individual cases calling for restitution to victims. The NGOs provide feedback in the form of calls for implementation of the output in practice and follow-up by international actors.

In turn, the State receives the international output as input in the form of requests, recommendations, or orders to uphold rights pertaining to a group or specific person, which are also pursued by NGOs and national organizations. The State also receives input from Donors financing peace/development programs which ranges from strong pressure due to frustration of non-implementation of accords to weak pressure due to fear of charges of infringement of sovereignty. Some State actors espoused values which rejected the legitimacy of international actors and norms as influences upon the nation, and resistance to changing economic distribution and improving civil rights may be based on allegiance with status quo minded elites. Thus, we witness national courts refer to formal rules contained within its national codes over international human rights or customary norms. There is a failure to respond to international demand for recognition and utilization of such norms.

The State sought to respond to demands for access to justice by pursuing some judicial reforms, expanding the use of ADR, and recognizing the legitimacy of reference to indigenous customary law (contingent on non-contradiction of formal law) in local justice centers. However full recognition of indigenous law within the Constitutional reforms was rejected. In terms of substantive redistribution of land,

delays have been too excessive, in fact, as previously mentioned there has been no change whatsoever in land distribution in Guatemala since before the war. Although the State has implemented some restitution orders from the Inter-American System, others are delayed. The national restitution program consists of public works projects rather than specific restitution to victims. Feedback by the public have assumed the form of protests and lowered expectations of the State, while international actors are increasing pressure via direct criticism and reduction of funding. In part the latter occurrence is also due to donor fatigue and competition from the humanitarian crisis raging in Colombia.



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Human Rights Experts, Int'l & Nt'l NGOs demands for indigenous or IDP rights
Decisions, Conclusions & Reports by UN & Inter-American Systems

Donors vary between strong input due to concern for impunity, inequity, and problems of implementation of Peace Accords, weak input due to fear of accusations of infringement of sovereignty,



Conversion Process in the State
(Hybrid Fluid/ Static Process)

Values: Concern for infringement of sovereignty, resistance to agrarian reform and recognition of indigenous/IDP rights due to identification with agrarian elites

Rules: Preference for national legal norms over international & customary norms

Party Participation: Low in formal courts



Feedback:
Increased protests, lowered expectations by public, increased criticism by int'l actors, withdrawal of funding based on donor fatigue & competition for resources



Procedures:
Establishment of ADR, limited recognition of customary procedural law (must conform to ntl law)

Substance: Delays in agrarian credits, conflict resolution, etc. No distribution of land
Collective reparation program addressing public works no specific restitution
Court judgments upholding status quo
Compensation to victims in response to judgments and decisions within the Inter-American system or delayed implementation

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6. Conclusion to Part III

“What difference would recognition of the right to property make to those who possess nothing, or the right to vote if its exercise is ineffectual in changing the situation of social exclusion?”

Eduardo S. Bustelo¹⁰⁹¹

Assessment of Guatemala’s structural background in the post-settlement period indicates various areas of concern which reveal infringements of the rights to remedy and restitution that solidify differentiation among citizens thereby impeding development and modernization. The political, legal, and economic systems of a modern society ideally are separate yet inter-connected due to communications between them.¹⁰⁹² Within a modern, democratic nation, the autonomy of each system is more clearly defined and the transparency between these systems provides a framework to ensure the protection of individual rights and liberties. Basic values such as equality among citizens, individual freedom, and the right to participate in a democracy form the foundation for the establishment of a social contract between the citizenry and the State. In contrast, societies that are emerging from a heritage of endemic ethnic/class divisions and/or internal conflict, such as Guatemala, have vague boundaries between their social systems resulting in further destabilization. The lack of democratic tradition and ongoing division of the polity implies that there is no unified concept of citizenship, rather a significant sector of the society is denied the *de facto* benefits of such, in spite of constitutional guarantees to the contrary. Citizens are segmented as a result of discrimination and exclusion enforced by the opaque, undifferentiated systems. Indigenous people and internally displaced persons are excluded from equal participation within the social systems, as exemplified by their deprivation of access to property to sustain basic human needs as well as access to justice.

¹⁰⁹¹ Eduardo S. Bustelo, “Expansion of Citizenship and Democratic Construction: Contemporary Challenges and New Paradigms” in WILLEM VAN GENUGTEN & CAMILO PEREZ-BUSTILLO, *THE POVERTY OF RIGHTS: HUMAN RIGHTS AND THE ERADICATION OF POVERTY* 3,5 (Zed Books 2001).

¹⁰⁹² GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Blackwell 1993); See also DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 26 (The University of Chicago Press 1979), systems have engagements which traverse each other’s boundaries and affect each other.

One may argue that in Guatemala at present there are competing neo-feudal regimes: The first may be identified by the co-existence of international, national norms, and indigenous norms which seek to provide pluralistic responses to conflicts and demands but are limited due to problems regarding legitimacy, enforcement, and normative clarity. The social systems are rendered unstable due to an increased number and diversity in the range of inputs but also because of their lack of responsiveness in number and nature of outputs. The impact of demands and expectations among marginalized groups due to the creation of the Peace Accords (and dissemination of international human rights) revealed the positive link between norms and social capital.

The second is the rise of repression by non-state actors such as narco-traffickers, black marketeers, etc. who seek to promote a widespread system of anarchical impunity.¹⁰⁹³ Due to the increased power of non-state actors over the land and the persons who live on it and co-option of the State as an instrument of repression, the attainment of the rule of law and social justice has been unfulfilled. The contradictory economic pressures placed by neo-feudal landowners served to inhibit responsiveness by the State to the demands of marginalized groups. This reveals the state of crisis to within the social systems due to their limited abilities to adapt to a dichotomous environment in which modern, traditional, and neo-feudal goals clash.

The legal system is an incoherent system of which its primary failings may be attributed to its lack of independence from the malfunctioning political-economic system seeking to uphold a neo-feudal social structure in which power and wealth are

¹⁰⁹³ BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW COMMON SENSE, 58 (Routledge 1995) Boaventura de Sousa Santos characterized feudal society as espousing radical legal pluralism due to the plethora of norms (*i.e.* canon law, seigniorial law, royal law, manorial law, urban law and *lex mercatoria*) affecting individuals with no perspicuous form of determining subject matter applicability. He described the system as being "complex, cumbersome, chaotic and arbitrary", resulting in irregular clashes between the officials of the different orders.

Although he condemns the violations committed by private non-state actors, he does not suggest any solutions. The rise of narco-trafficking in the region is signalling the emergence of neo-feudal regimes in which certain groups assume control over the land and the peasants in order to exploit both.

See also Louise Diamond, "Multi-Track Diplomacy in the 21st Century", in EUROPEAN CENTRE FOR CONFLICT PREVENTION, PEOPLE BUILDING PEACE, 77 (1999) warning that the 21st Century will be characterized by the immense power of non-state actors engaged in globalized violence, e.g. narco-traffickers, arms traders, black marketeers, etc.

dominated by the elites.¹⁰⁹⁴ We are struck by the vision of a legal system in crisis. Rather than achieve equilibrium, corruption and inequity that plague the political and economic systems dominate and negatively affect the legal system. The legal system contains a melange of weak, “autonomous”-repressive characteristics (“autonomy” is pursued by courts in order to deny responsive action to marginalized groups via judicial activism in social engineering, thereby paradoxically upholding the interests of elites in a form of indirect repression; direct repression is evidenced by the use of the penal code against marginalized groups).¹⁰⁹⁵ There is a marginal movement towards legal pluralism, but this remains mostly at the local level. Demands placed by indigenous groups for recognition of their customary norms as supported by human rights are in fact calls for responsive law. They seek legitimacy for their historic claims to lands as well as their dispute resolution norms. Failure by the State to recognize the legitimacy of a pluralistic-transnational-responsive state of law results in continued disempowerment and exclusion of marginalized groups, in particular indigenous people and IDPs.

Another problem is that polls revealed primary concern for realization of socio-economic rights above civil and political rights. The people are demanding food, housing, health care, education, and property in its socio-economic variant. As previously mentioned, these demands form the basic needs which are the foundation an adequate standard of living, and from the perspective of the rural peasant, the right to life. From the perspective of the poor, the Donors’ focus on civil & political rights, e.g. voting, as a marker of democratic progress was indicative the lack of contextual assessment of what type of norms the populace considered to be relevant to support civic engagement. With respect to the State’s neglect of socio-economic demands, this was presented as a direct strategy of repression deliberately intended to reduce a rise of social capital among marginalized groups by denying them education, nutrition, and the means by which to achieve economic independence (The latter two linked to access to property).

Specifically, the failure of the State to adopt laws on restitution to victims of the war, grant property titles to indigenous people, and provide restitution of property to dispersed IDPs and indigenous people demonstrates systems failure. It also reveals the triumph of the “dark side of social capital” (elite groups support bonding ties with each other and exclude others), those who illegally appropriated themselves of property during the armed conflict and/or sought to preserve labour pools for the

¹⁰⁹⁴ See Anne-Marie Slaughter, Andrew S. Tulumello, and Stepan Wood, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship”, in 92 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 367, 375 (1998).

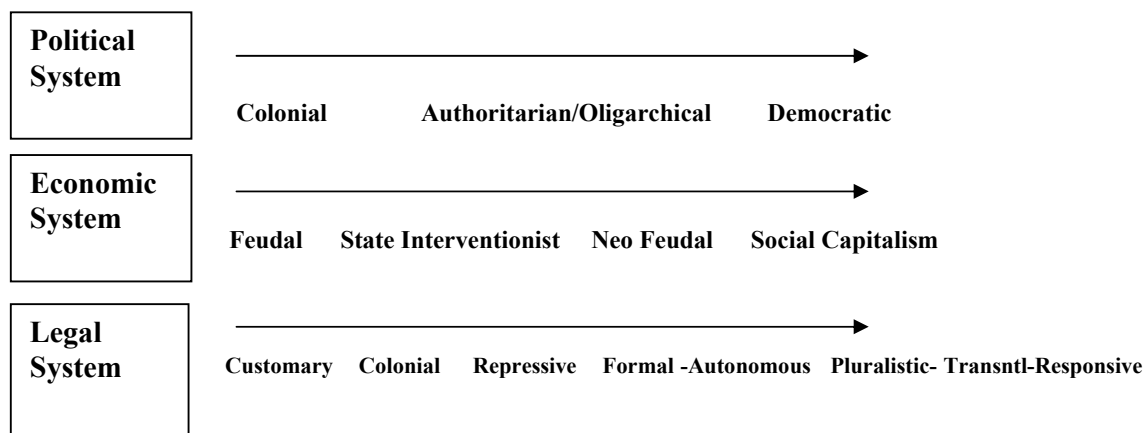
¹⁰⁹⁵ PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION, TOWARD RESPONSIVE LAW*, at 14 (Harpur & Row 1978).

export-crop fincas uphold their neo-feudal control of resources.¹⁰⁹⁶ Demands of marginalized groups are purposefully ignored as the State serves the interests of elites.

Cognitive social capital indicators relating to feedback and input functions demonstrate low levels of confidence in state institutions, a dominant perception that there is no equal treatment before the law, little knowledge of the law, and low tendencies to abide by the law. The law and the institutions applying it are considered to be supremely ineffective and illegitimate; thus they are deemed not to serve any protection function whatsoever as pertaining marginalized groups and individuals.

This further stimulates a culture of lawlessness and privatized-violent dispute resolution, evidenced by the steady increase in lynchings and use of private security agents to conduct forced evictions.¹⁰⁹⁷ Thus, participation in formal mechanisms is increasingly rejected while participation via informal mechanisms is rising only to be met with repression by the State and elites, thereby evincing the authoritarian/oligarchical character of the State. Elites remain un-reconciled with marginalized groups as institutions uphold the status quo.

The diagram below identifies the evolution of the political, economic, and legal systems in Guatemala and presents the varying stages of internal and external asymmetries, the arrow demonstrates how far each system has evolved.



¹⁰⁹⁶ Ironically, due to the fall of the price of coffee on the international market, the fincas have produced massive lay-offs resulting in further displacement of peasants.

¹⁰⁹⁷ See Guillermo O'Donnell, "On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries" in 21 (8) WORLD DEVELOPMENT 1355-1369 (1993).

The dysfunctional evolution of the social systems maintains a persistent state of inequality and insecurity which is fomenting a strong potential for renewed conflict. There is a need to address the demands of the marginalized groups and reduce the dominance of the State by elites. In order to diminish authoritarian-oligarchical tendencies within the political system, neo-feudal practices within the economic system, and formalistic “autonomous” practices which repress the poor, the State must restore the rule of law (e.g. prosecute those responsible for dispossession of dispersed IDPs), regulate the land market, adopt legislation on restitution and redistribution of land, and recognize the legitimacy of customary norms and human rights. Such actions would serve to restore legitimacy and transparency to the social systems while at the same time fulfilling the principle of equality for all citizens.

However, the search for collective harmony, peace, and a recognition of a common good in a country divided by war also requires mechanisms beyond that of the formal juridical system. As aptly noted by Juan E. Mendez, “. . . true reconciliation cannot be imposed by decree; it must be constructed in the minds and hearts of all members of the society by way of a process which recognizes the value and dignity of each human being.”¹⁰⁹⁸ In the next part, we examine the use of the Guatemala’s official alternative dispute resolution mechanism (CONTIERRA) which provides conciliation of property conflicts. To what extent is this mechanism more successful than formal courts in providing increased access to justice for marginalized groups, such as IDPs and indigenous people, both from procedural and substantive perspectives? Can it provide a peace building function and improve social capital in a society undergoing a protracted conflict? The need for conciliation may be considered a response to the failure of the legal system, however it also portends potential failure of conciliation as it is expected to rely on formal law, human rights law, and customary law, which remain internally fragmented as well as largely autonomous from each other, and function within a structural background which is inimical to the promotion of micro social capital.

¹⁰⁹⁸ Juan E. Mendez, “Responsabilización por los abusos del pasado”, in LORENA GONZALEZ VOLIO (ED.) PRESENTE Y FUTURO DE LOS DERECHOS HUMANOS 75, 93 (IIDH 1998).

Part IV

Summary of the Previous Parts

In the previous parts, I examined the recent initiative to create linking social capital between IDPs and experts at the international level by the elaboration of soft-law norms that identify internally displaced persons as a protection category. I identified problems relating to a bias against socio-economic rights as a basis for protection, the lack of cessation clause in the Guiding Principles on Internal Displacement, lack of one organization responsible for IDPs, and a general policy directing resources and attention to countries experiencing humanitarian emergency situations rather than post-settlement nations. I highlighted remaining protection gaps in the relevant human right law pertaining the rights to property, restitution, and remedy. I assessed the function of human rights monitors in confirming the need for land distribution and property restitution, in particular with regard to internally displaced persons and indigenous people in Guatemala, but limited in enforcement possibility. Criticism was also offered due to the lack of substantive opportunity available to IDPs themselves to participate directly in design and implementation of policy and rights pertaining to them. I outlined a strategy for use of optional protocol of the CCPR by cross-referencing other rights linked to property, as well as possible pursuit of cases within the Inter-American system due to direct precedence on restitution of property, recognition of socio-economic rights, and recognition of transcendental rights such as “proyecto de vida” and the right to the truth.

Due to the international system’s interrelationship with the national system, I then addressed the structural context of social capital within the Guatemalan State. In particular I identify a quasi-democratic/repressive political regime upholding neo-feudal system which retains marginalized groups within a cycle of exclusion and inequality. In particular, I review the performance of the executive land & restitution agencies and highlight the unwillingness or inability of the State to uphold the socio-economic guarantees contained within the Peace Accords by limiting the opportunity for land distribution and property restitution for internally displaced persons and other marginalized groups. There is no legislation promoting large-scale land distribution via expropriation. As a consequence, confidence in the State is extremely low. Civic engagement may be characterized by weak participation in formal mechanisms, such as voting, but stronger engagement in informal mechanisms, such as protests.

The legal frameworks are divided between two sub-systems. First, there is a formal legal framework that retains explicit bias against marginalized groups claiming possession of land, via penalization of those engaging in usurpation or abetting such action. It is plagued by problems regarding impunity, vigilante justice, and institutional weakness that render the rule of law meaningless and diminishes real opportunities for access to remedies. The society does not consider there to be true access to justice on account of costs, language barriers, distance to courts, and discrimination within the judiciary.

Second, there is an informal indigenous customary system which itself is fragmented, complex, and denied legitimacy by the formal legal system. Thus, the society is divided with respect to acceptance of both frameworks of norms and mechanisms. Similar problems exist as pertaining the application of human rights at the national level. Study of the case law of the Constitutional Court revealed non-recognition of international human rights standards. Furthermore, it rejected customary claims, indicated preference for individual possession v. collective ownership, and preference for black-letter interpretations v. equity considerations. Its refusal to engage itself in “socio-economic” issues, reluctance to address forced evictions processed by the judiciary, and lack of mandate over Non-State actors highlighted the need for the creation of a specific dispute resolution institution to address land cases.

The failure of the legal system to address the needs of marginalized groups resulted in the elaboration of a hybrid alternative dispute resolution entity- CONTIERRA- to address the explosion of land disputes in the post-settlement period. In the next part, I assess the performance of CONTIERRA in order to understand whether it was able to resolve property disputes and/or empower marginalized individuals in order to prevent new outbreaks of violence and second-generation displacement via stimulation of social capital.

Part IV Alternative Dispute Resolution of Land Conflicts at the National Level

1. Introduction to Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) procedures such as negotiation, arbitration, conciliation, etc. are measures which have been practiced within societies for centuries and are currently heralded as neo-modern means of avoiding formal adjudication of a conflict. The court system is often presented as a world dominated by complex legal codes and elite judges and lawyers who remain estranged from the general populace.¹⁰⁹⁹ As discussed in Part III, marginalized groups often lack access to courts due to poverty, geographical distance, discrimination, etc. ADR may be considered a means by which to resolve conflicts according to more flexible and informal norms and permit greater participation by communities in the resolution of disputes. In addition, it is considered to be speedy, non-adversarial, effective low cost, cooperative, and future-oriented. It may be open to oral evidence and presentation of equity concerns. It may also seek the attainment of outcomes that serve the community at large beyond the immediate issue at hand.¹¹⁰⁰ In contrast, formal courts are seen to be time-consuming, adversarial, formalistic, expensive, and past event oriented. They tend to rely on written documentation and thus are legalistic, focusing on uniform rights rather than background issues. Courts seek to resolve a particular dispute, irrespective of other factors, such as inter-party respect, communal harmony, etc.¹¹⁰¹ They are also criticized for lacking expertise in particular

¹⁰⁹⁹ MARINES SUARES, *MEDIACION: CONDUCCION DE DISPUTAS, COMUNICACION Y TECNICAS* 25 (PAIDOS 1997).

¹¹⁰⁰ LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS*, 2 (WEST PUB. 1997).

¹¹⁰¹ See ROQUE J. CAIVANO, MARCELO GOBBI & ROBERTO E. PADILLA, *NEGOCIACION Y MEDIACION: INSTRUMENTOS APROPIADOS PARA LA ABOGACIA MODERNA*, 41 (AD-HOC 1997): "However the law and litigation have their dark sides. On occasion, the judicial road is un-accessible, above all by persons of low resources. Litigation, by its eminently adversarial and adjudicative nature, accentuates feelings of hostility, lack of trust, rivalry, and egoism. Once a conflict is framed within adversary, an aggressive competition is produced which destroys the reciprocal empathy which might have existed between the parties. The autonomy of the parties, their protagonism, their capacity, ability or responsibility to manage their differences, fade away until they

matters which ADR teams may be specifically trained for, e.g. land conflicts. Finally, courts may be unable to grant the remedy needed should it require creative or alternative formulations, as is the often the case with disputes rooted in socio-economic inequity. As noted by Siedman:

*“Institutions that can impose only punishments with rigid, complex and slow procedures, that can only institute incremental change, subject to rules in legalese, always at overload, and lacking expertise to deal with technical matters, will not implement many development rules. These characterize at best, rule-applying institutions, not problem solving ones. Development, however, requires change-oriented, problem solving institutions to induce new behavior in a wide range of clients.”*¹¹⁰²

Countries undergoing transition from authoritarian military governments and feudalistic economies to democracy and modern economic and social structures undergo a crisis as there is a division of opinion regarding the legitimacy of certain procedures and a call for the establishment of new rules to implement changes in distribution of resources. We may recall the observation by Charles Sampford:

*“A society in the process of social change is a disordered one, with different institutions emerging both as the battleground for the interests of rising and falling classes and once won, as attempted instruments for one class to use against others.”*¹¹⁰³

Thus, the examination of ADR institutions in post-conflict periods requires a multidisciplinary, contextual approach.

Examples in which mediation has been applied to property disputes are Nicaragua, South Africa, and Mexico (the latter two are discussed *infra* 2.3. in addition to the Property Commission in Bosnia, *infra* 2.4.).¹¹⁰⁴ I was particularly interested in exploring the connection between the movement towards improving access to justice for marginalized groups via use of alternative dispute resolution and the search for prevention and resolution strategies as pertaining forced displacement.

are totally hidden behind the idea that once the conflict is deposited in the tribunals, the decision- and thus the problem- belongs to the judge. Thus, the parties cede a vital space to maintain control of the case. While the legal process advances, the possibility of recuperating the protagonism and finding a consensual solution becomes more and more distant.”

¹¹⁰² SIEDMAN, ROBERT, *THE STATE, LAW AND DEVELOPMENT* 218 (St. Martin's Press 1978) However, in terms of attaining economic restitution or establishing penalties, the courts would be more appropriate.

¹¹⁰³ CHARLES SAMPFORD, *THE DISORDER OF LAW: A CRITIQUE OF LEGAL THEORY*, 219 (Basil Blackwell 1989)

¹¹⁰⁴ With respect to Nicaragua, see Timothy Lytton, “La Mediacion en Nicaragua: Avanzando por el Camino de Paz y Justicia” in 11 (5) *DE LO JURICICO* (Organo de la Asociacion de Juristas Democraticos de Nicaragua 1995)

Lack of access to justice is a phenomenon which plagues all members of society, not only displaced persons. However, a link may be established to forced migration issues due to the fact that the absence of a functioning judicial system stimulates forced evictions and denies the possibility of remedy to those who have been dispossessed of their land. Review of internal displacement crises within Latin America reveals a factor which is linked to both the cause and effect of the phenomenon: there appears to be a lack of effective, objective dispute resolution mechanisms to handle property conflicts which are often linked to inequitable land distribution.¹¹⁰⁵

Often the population most in need of judicial remedies is wary of the concept of formalized justice, given the extreme polarization between the social classes and the dominance of the upper class over the legal system. In countries engaged in post-settlement transition to democracy, reform of the judicial system increasingly incorporates diversification of conflict resolution measures through the espousal of ADR norms. While judiciaries undergo long term reforms, such as improved education of officials, enforcement of ethical standards, higher wages, increased translation facilities, and financing of new offices in rural areas, ADR mechanisms may be quickly adopted in order to respond to the immediate demands for conflict resolution mechanisms at the local level.

ADR services may be provided by the public entities such as courts or administrative agencies, local communities, commercial associations or private entities to preserve confidentiality, as well as religious institutions NGOs and international organizations, etc. These institutions may provide a range of different options to a society which has undergone a long period of exclusion or repression under the formal legal system. This has been characterized as “heterogenous justice” made available by modern, democratic states.¹¹⁰⁶ ADR comes in a wide variety of forms: for example, it may be composed of conciliators selected within the local

¹¹⁰⁵ The Inter-American Commission on Human Rights warned that ongoing land rights disputes are «a dangerous potential for social conflict». OAS Doc. OEA/Ser.L/V/II.83 March 12, 1993. Cohen & Deng have highlighted that: “Indeed, societal tensions actually may heighten in the post-conflict phase, especially if the displaced return to find their homes, land and personal property taken by others and no functioning judicial system in place to resolve disputes. . . Providing longer-term protection means the inclusion in reintegration and development programs of support for . . . judicial institutions that can resolve property and land disputes.” COHEN, ROBERTA & FRANCIS DENG, *MASSSES IN FLIGHT* 287, 289 (Brookings Institution 1998).

¹¹⁰⁶ GLADYS S. ALVAREZ & ELENA I. HIGHTON, “Desafios actuales del movimiento de resolucion alternativa de disputas”, L.L., 7-VIII-1996, supplement to *Resolucion de Conflictos*, by Maria Ines Burns, at.5.

communities on account of personal character, previous “peacemaking” roles, elderly status, etc. The third parties may be chosen by the parties or the community itself. In the alternative, they may be selected and receive training by outside agencies.

ADR mechanisms may be voluntary proceedings, as opposed to courts which are considered to be involuntary. However, there are “compulsory” court-annexed arbitration or mediation addressing specific subjects such as family disputes. Courts seek to promote settlements and thus avoid litigation of the case, however parties may retain the right to trial *de novo*. Individual ministries or administrative agencies within national governments, as well as private institutions may conduct similar “mandatory” negotiation, conciliation, or arbitration within certain fields, for example labour disputes, commercial or trade disputes, etc.

Negotiation incorporates consensual bargaining between parties with no intervention by third parties. The process is usually informal- parties may present any evidence and arguments themselves without limit, but some choose to participate with the assistance of lawyers. Final agreements are determined by the parties themselves under their own conditions which may address needs or interests, rather than legal rights.

Conciliation/Mediation provides an impartial third party to assist parties resolve a conflict based on their own criteria without having a decision imposed from above (thus the parties retain both procedural and decision control).¹¹⁰⁷ Decisions may be based on the parties own needs or interests, rather than determination of legal rights. The process may be informal with a lesser degree of structure than courts. Parties may present evidence and arguments themselves without restrictions. As occurs in negotiation, parties usually conduct the discussion themselves, but some may participate while accompanied by lawyers. They may or may not choose the third party, however the agreement is formulated according to mutual compromise. Parties seek to achieve a “win-win” situation for each other, they ideas to attain restorative solution rather than punishment of one side. Conciliation may be centralized, e.g. sessions are conducted in the capital, or decentralized, e.g. sessions occur in local villages. Both negotiation and conciliation accords may be enforced as contracts, however the lack of basis on legal precedent or absence of legal reasoning may render recognition and enforcement by a judge shaky.

¹¹⁰⁷ Third parties may be experts in particular fields, members of the community, or persons of particular regard.

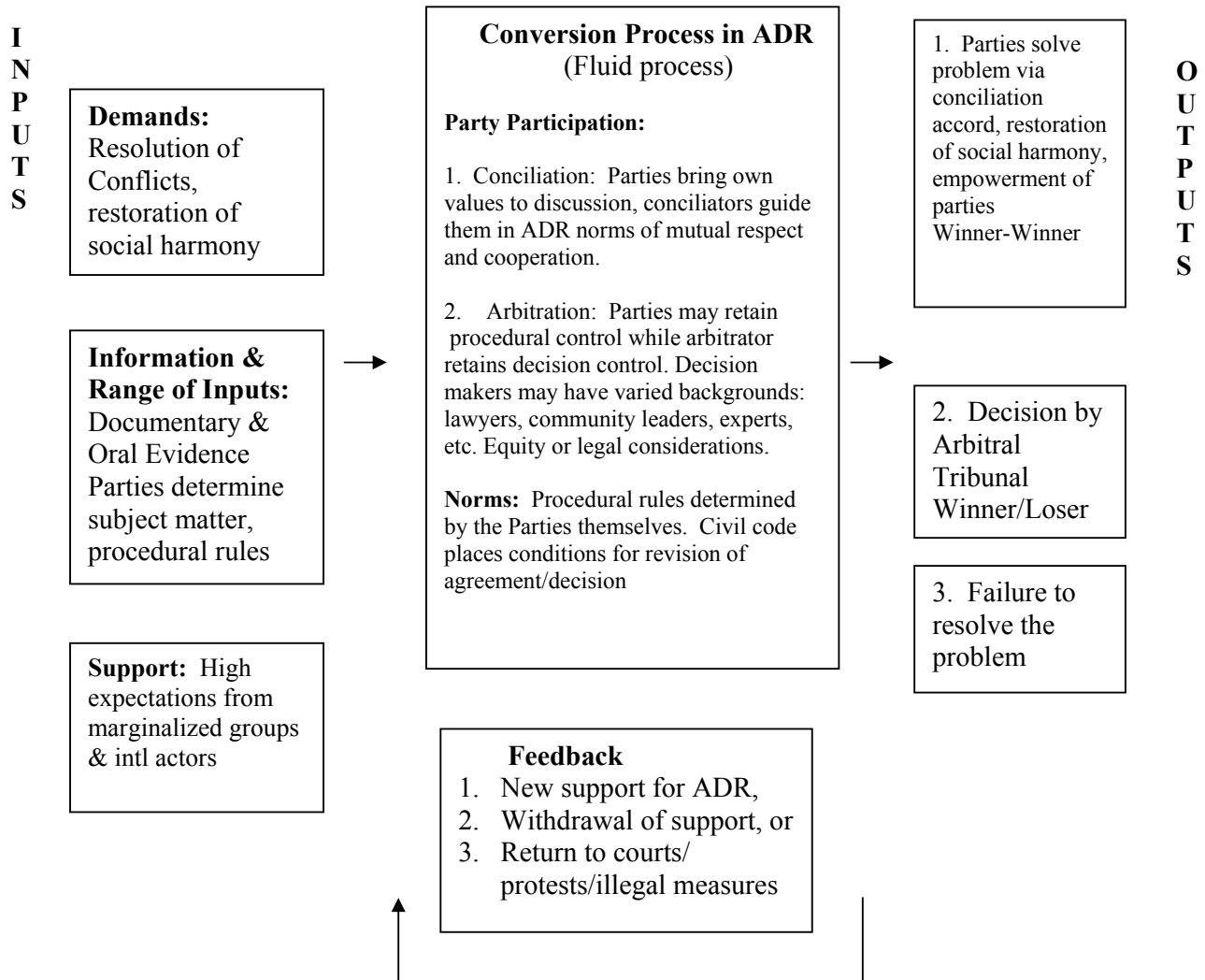
Arbitration renders decision control to the impartial third party who may base the decision according to law or equity standards, while the parties retain procedural control.¹¹⁰⁸ Parties may present evidence and arguments themselves, however some may choose to be backed up by their lawyers. Arbitrators may be lawyers, special experts, or persons of “high moral character”. The arbitrator may or may not be chosen by the parties. The decision may include articulated reasoning based on law, or may simply issue a compromise solution addressing needs or interests according to equity. Decisions by arbitration tribunals may be considered binding and thus subject to enforcement according to national arbitration laws but may be reviewed by courts in some circumstances.

In contrast, **courts** follow a formal, highly structured process. Rules of procedure and substantive norms utilized by the court are those previously established by the legal system. Parties are permitted to submit evidence and arguments via lawyers who are in turn subject to control by the judge. Judges are neutral third parties who have been officially authorized by the legal system to resolve cases; parties may not choose the judge. Thus judges retain both procedural and decision control. Unless the court itself is specialized, judges have a general, legal training as opposed to a specialized expertise. Decisions tend to be rendered according to determination of the parties’ rights as a matter of law, and may sanction a losing party. The decisions are binding but may be appealed to a higher court. Courts are usually centralized institutions, although there are many initiatives to support decentralized courts, such as justices of the peace.

It is helpful to visualize the ADR mechanisms as a sub-system of the legal system or separate system which may mimic its function to some extent and potentially assist performance by assuming part of the case load. Demands range from resolution of disputes to restoration of social harmony. Inputs may take oral or written form, while high expectations may stem from marginalized groups seeking recognition previously denied in the formal arena. International actors may provide support for ADR as part of judicial reform initiatives and peace consolidation. Parties may pursue full participation by incorporating their own procedural and substantive values within conciliation. Output may take the form of resolution of the dispute, restoration of social harmony, empowerment of parties, or non-resolution of the

¹¹⁰⁸ However parties may retain indirect influence over the decision because they may select the arbitrators themselves, although the arbitrators arrive at a decision independently.

dispute. In the event of solution, ADR as well as the legal and political system may receive increased support as feedback. In the case of non-resolution, parties may return to the formal courts or seek alternative measures, such as protests.



Abel warns that ADR mechanisms sometimes appear as "backlash" to rights explosion?¹¹⁰⁹ Conflicts which risk resulting in protests regarding the inaccessibility,

¹¹⁰⁹ Abel, Richard, "Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice", 9 INT'L J. SOC.LAW 245 (1981) cited in Richard Delgado, Chris Dunn, Pamela Brown,

inefficiency, or unresponsiveness of formal courts or executive agencies are controlled by the state via diversion to conciliation procedures. Rather than receive large, collective claims by IDPs, indigenous groups, or rural workers, these issues are broken down within ADR into a multiplicity of personal disputes.¹¹¹⁰ Processing of cases in this manner may inhibit the recognition of new protection categories and prevents redress for their victimization. Hence, ADR is often criticized for excluding social justice concerns.¹¹¹¹ Instead of enabling structural changes within the state and its dysfunctional systems, they become vehicles for systems maintenance upholding the status quo division of power and resources by breaking up what is essentially a class/race struggle against inequality into a multiplicity of individual disputes. Rather than engaging in conflict resolution, it is considered conflict suppression.

There is an inherent struggle between providing substantive justice, e.g. arriving at an outcome which redistributes resources, and granting procedural justice, which would guarantee fairness presentation of evidence, efficiency, non-bias, increased participation to those traditionally excluded from such activity. An area of concern is the ability of ADR to provide both forms of justice. Would success in one arena excuse failure in the other? Does one have a higher value than the other? Indeed, within post-conflict context, demands are placed to address substantive needs and provide procedural voice to marginalized groups and individuals. These actions form part of reconstruction and healing.

On the other hand, it is also essential to retain realistic expectations as to what the use of ADR mechanisms may actually achieve, e.g. it has been noted that mediation is limited in its ability to solve racial or class inequities.¹¹¹² The most difficult challenge of a State focus on procedures is the danger of manipulating these changes in order to disguise inaction regarding the substantive issues which remain

Helena Lee & David Hubbert, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" in *WISCONSIN LAW REVIEW* 1359 (1985).

¹¹¹⁰ Abel cites concern for ADR's maintenance of exploitative structures via transference of political movements for redistribution of property to personal disputes.

¹¹¹¹ For discussion of the negative impact of ADR on marginalized groups due to negation of certain rights and lack of attainment of social justice see: Galtung, Johan, "Violence, Peace and Peace Research" in 6 (3) *Journal of Peace Research* 167-191 (1969); Dugan, Marie, "Nested Theory of Conflict" 1 *Leadership Journal: Women in Leadership: Sharing the Vision* 9-20 (1996); Jeong, Ho.Won, "Research on Conflict Resolution" in JEONG, HO-WON (ED.), *CONFLICT RESOLUTION: DYNAMICS, PROCESS AND STRUCTURE* (Ashgate 1999); Rubenstein, Richard, "Conflict Resolution and the Structural Sources of Conflict" in JEONG (Ed.) (Id.); Delgado et. Al. supra note 11; Richard Abel supra note 11; Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargarda" in 12 (1) *LAW & SOCIETY REVIEW* 5 (1977).

¹¹¹² Carrie Menkel-Meadow, "Book Review: The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" in *NEGOTIATION JOURNAL*, 217-242, 240 (July 1995), reprinted in CARRIE MENKEL-MEADOW (ED.), *MEDIATION: THEORY, POLICY & PRACTICE* (Ashgate Dartmouth 2001)

the cause of conflicts, e.g. socio-economic inequities evidenced by way of land distribution, illiteracy, etc. As noted by Jacinta Paroni Rumi one must be wary of:

“ . . . apparent reform activity is mainly symbolic, more theater than reality. It helps to provide psychological benefits to diverse groups and to preserve social equilibrium, but it may not result in social change. Numerous new laws and procedural changes give the illusion of political transformation, but real reform may not come without a sustained political commitment to in fact accomplish change.”¹¹¹³

Hence, the query is whether land disputes are appropriate for conciliation, specifically with the intention of preventing renewed cycles of conflict and forced migration/forced eviction? Is the purpose to resolve land disputes, in the alternative to attain greater understanding between differing parties/communities, or both? If so, is there a limit to its effectiveness within the context of post-settlement/protracted conflict, or does this vary with each individual case? Can CONTIERRA serve as a mechanism by which to pursue an ethic of recognition of rights and norms as pertaining reintegration of marginalized groups, e.g. IDPs and indigenous people, in the context of a protracted/post-settlement situation?

¹¹¹³ Paroni Rumi, Jacinta, 7 *Sociologia del diritto* 149,159 (1980) quoted in Mauro Cappelletti, Bryant G. Garth & Nicolo Trocker, "Access to Justice: Variations and Continuity of a World-wide Movement", in 54 no. 2 *REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO* 221, 225 (1985). See Also Röhl, Klaus F. & Machura, Stefan, Eds. *PROCEDURAL JUSTICE*, 1 (Dartmouth Pub. 1997). Röhl & Machura analyze the role of procedural justice in the context of distributive justice: "For, on the one hand, it has proven to be the case that participants and observers evaluate procedures as more or less just or fair independent of their outcome, and that this estimation is quite relevant to whether the distribution resulting from a procedure is viewed as just. On the other hand, modern societies lack objective or generally agreed upon standards for the just distribution of life's chances and risks. In many cases, it seems easier to agree on a procedure than on distribution itself. As a result, material distribution standards are replaced by procedures."

See also David Wasserman, "The Procedural Turn: Social Heuristics and Neutral Values", in Röhl & Machura, Id., at 38. He warns that procedural focus on politeness, respect, and neutrality may be perceived as benevolence on the part of authorities while sometimes serving to guise suboptimal distributive justice. See also Cappelletti et. al, Id., warning that given the focus on achieving an accord rather than vindicating the right of a party and the inability to temper balance of power issues, conciliation may prove to be "a way to prevent the real change that rights enforcement might have accomplished for the weak." citing Sarat at 1919 (incomplete cite)- See also CARRIE MENKEL-MEADOW, Id. at pp. xv & xix (Ashgate Dartmouth 2001) "*Critics are concerned that, in mediation, important social and legal conflict is muted, significant public matters are privatized, power imbalances skew results and disempower the already subordinated and that the mediation process encourages unjust compromises of principles or rights that require sharp demarcations and enforcement. . . . mediation and ADR are contradictorily claimed to be 'divisionary' justice for the disadvantaged who seek a day in court and 'private' justice for those who can afford to 'buy' their way out of courts and seek party-chosen procedures and rules.*"

Hence, it has been noted that there has been a division between social justice theories which focus on resolving root causes of conflicts and conflict settlement theories identified with ADR that do not necessarily tackle underlying basis of disputes, but rather focus on procedural justice.¹¹¹⁴ Schoeny & Warfield suggest that this distinction is artificial given the need to implement and govern agreements within a democratic framework, thus they call for integrative approaches which will engage in a long-term combination of systems maintenance and social justice methods by institutional, individual, and group actors.

Specifically, I examine problems arising with respect to party participation and the use of neutrality strategies in inequitable contexts and/or power imbalances between parties, hierarchy of norms with respect to pluralistic demands, and definition of successful performance, i.e. resolution of disputes vs. empowerment/peacebuilding function. These issues center upon the debate regarding the legitimacy of ADR in situations involving weak parties, some theorists argue that ADR imposes “coercive harmony” and deprive weak parties of protection by courts whose very function is to protect weak persons from abuse, whereas others argue that ADR mechanisms are empowering precisely to those deprived of participation in decision-making.¹¹¹⁵ Considering the fact that the Guatemala court system has demonstrated an inability/unwillingness to protect weak individuals (see Part III on the legal system and amparos), this issue becomes more complex as there are no clear alternatives.

In terms of addressing the background for the application of ADR in Guatemala, it should be noted that rejection of the formalized system of dispute resolution in Latin America was not originally brought about by the rural

¹¹¹⁴ Mara Schoeny & Wallace Warfield, “Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution” in *NEGOTIATION JOURNAL* 253 (July 2000).

¹¹¹⁵ Presenting the arguments against ADR involving weak parties, see Trina Grillo, “The Mediation Alternative: Process Dangers for Women” in 100 *YALE L. J.* 1545-1610 (1991); Laura Nader, “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology” in 9 *OHIO STATE J. ON DISPUTE RESOLUTION* 1-25 (1993); & Sally Engle Merry, “The Social Organization of Mediation in Non-industrial Societies: Implications for Informal Community Justice in America”, in RICHARD L. ABEL, *THE POLITICS OF INFORMAL JUSTICE*, Vol. 2: Comparative Studies 17,28 (Academic Press 1982). On ADR as a mechanism for empowerment see ROBERT A. BARACH BUSH & J.P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (Jossey Bass 1994).

community.¹¹¹⁶ Rather, it was enforced by will of the businessmen who tired of corruption and endless court delays. The business community prompted the adoption of alternative means of dispute resolution, including arbitration and conciliation. The interest in ADR further expanded to the middle and lower class civil sector by way of programs designed to improve access to justice in marginalized areas and establish a culture of peace within urban and rural areas plagued by violence. Hence, ADR support is found to span cross-sections of Guatemalan society. The institutions listed below reveal variable degrees of success. Some are very speedy and effective, others are more dilatory. In the former cases, persons appreciate ADR initiatives for giving them a low cost alternative to courts, a forum in which they may express themselves in their own voices, and opportunities to incorporate customary conciliatory norms. In the latter cases, the people become exasperated and loss faith in ADR, calling for a return to protests, land invasions, or other extraordinary action.

With respect to the legal framework, Guatemala has a new arbitration law which recognize the legitimacy of alternative dispute resolution, including arbitration and conciliation.¹¹¹⁷ Guatemala has incorporated conciliation into its criminal procedural code, labour law, and granted a conciliation mandate to the justice of the peace and conciliation/mediation centers registered by the Supreme Court.¹¹¹⁸

There has been a veritable explosion of ADR services by a variety of actors, for example: The Archbishop's Human Rights Office has established a conflict resolution program which seeks to "strengthen a culture of dialogue, reconciliation, and respect for human rights" by way of mediation training and services, with a special focus on youths. The emphasis on children and adolescents is intended to create a new culture by evolving new values of conflict transformation to the younger

¹¹¹⁶ Tim Wichert lists three factors for determination of the appropriateness of ADR models in conflict and post-conflict situations:

1. *Are there components of society which support ADR?*
2. *Are there laws which require or allow ADR?*
3. *Are there existing efforts and is there existing capacity to develop ADR?*

He explains that the first factor is based on the notion that the society must have a positive opinion towards ADR, ascribing effective and impartial characteristics to this mechanism. The second factor concerns the need for a structural framework in order to legitimize the use of ADR and permit enforcement of decisions. The third factor addresses the importance of training models, traditional or modern, for implementation of ADR. Wichert, Tim, "Property Issues in Displacement and Conflict Resolution", in 16 (6) REFUGE, 22, 26 (December 1997). I believe that Wichert's criteria provide only a general overview of background factors to take into account when considering implementation of ADR in post-conflict situations.

¹¹¹⁷ The Guatemalan Arbitration Law is contained in Congressional Decree No. 67-95.

¹¹¹⁸ Decree No. 79-97, Congress of the Republic of Guatemala, reforming the Code of Criminal Procedure, article 7 by adding article 25 Ter, article 8 by adding 25 Quater, and article 446-477.

generation. In addition, OAS, USAID, and IDB provide assistance to the government in order to hire outside ADR consultants to expand training and exposure to ADR techniques to different sectors of the state and society.

As mentioned in Part III, USAID has sponsored the establishment of conciliation centers in Quezaltenango, Retalelu, and Zacapa to enable the use of traditional indigenous dispute resolution mechanisms and strengthen access to justice in these areas.¹¹¹⁹ Although originally intended for penal cases, these centers address civil conflicts as well. Because they have intra-class disputes, they tend to have a high settlement rate. There are less power imbalances between parties. In addition, USAID has paired up with IOM to establish a program called “Activities in Support of Conciliation in Conflict Area”. They provide conciliation services for targeted communities such as displaced persons, demobilized soldiers, poor, marginalized groups.

The Guatemalan Chamber of Commerce has a Center for Conciliation and Arbitration, primarily oriented towards commercial disputes. The Supreme Court sponsored a Pilot Center for Mediation which has a mandate for family disputes, penal, civil, and labour matters. The Ministry of Labor’s Inspector General of Workers mediates and arbitrates conflicts between rural laborers and finca owners. The Mesa de Resolucion de Conflictos of Alta Verapaz provides mediation for rural peasants and representatives from the agribusiness community. Other actors include the Rafael Landivar University, the Instituto Guatemalteco de Metodos Alternos de Solucion de Conflictos, and the Private Center for Dictamen, Conciliation and Arbitration. Finally, as of 2000, there were eighteen bufetes populares in Guatemala, staffed by law students, in which penal, civil, family, labor, and administrative disputes are conciliated (also financed by USAID). Thus, there is a growing ADR network which addresses a wide span of subject matters and target groups.

The Guatemalan Government constructed a hybrid entity- CONTIERRA- to offer conciliation services to address the explosion of land disputes in the post-settlement period. It is an arm of the Executive Branch of government, but conducts conciliation sessions in the rural villages. Its mandate refers to plural sources of law.

¹¹¹⁹ USAID/Guatemala, Plan Anual Operativo Componente “Fortalecimiento de los Canales No Formales de la Administracion de Justicia”, Proyecto Apoyo a las Reformas del Sector Judicial, Proyecto: USAID/G No. 520-0407, Periodo Sept.1997-Nov.1998, (May 1998).

It was intended to resolve land disputes, decongest the courts and executive land agencies and increase access to justice for the rural populace

The framework of analysis centres upon whether CONTIERRA upheld an ethic of recognition as pertaining the rights to remedy and restitution of marginalized groups, including IDPs and indigenous people:

- 1) Was there reference to **norms** beyond the formal legal system, i.e. customary rights, international human rights, equity interests? Was there bias in selection of norms?
- 2) Were marginalized groups/individuals empowered via significant **party participation** in conciliation, i.e. formulation of arguments, agenda, treatment?
- 3) Was remedial **output** provided, i.e. restitution/redistribution of land for former/actual/potential IDPs, indigenous people (thereby recognizing their human needs)?

It is hoped that by highlighting these factors, the study will provide empirical evidence of the possible problems and success of use of state-sponsored conciliation mechanisms for property disputes in post-settlement situations.

Because conciliation may result in benefits falling outside of systems theory or legal analysis, it was necessary for me to highlight social capital indicators. CONTIERRA is intended to promote cooperation, and consensus among social actors, as well as improved confidence in the State. Specifically, it is expected to stimulate social capital by promoting trust and networks within communities, between different communities and groups, between social groups/communities and the State, and between the agribusiness sector, represented by the Chamber of Agriculture, or other corporate entities. The next section provides an overview of the social capital approach.

1.1 Conciliation as a Mechanism to Promote Social Capital

“Alternative legal services should promote democratization of the society by way of full exercise and demands on the part of the citizenry, i.e. vindicating and propelling principal civic participation in the definition of public policy as the fundamental basis for advance towards a participatory democracy.”

Renato Pardo Angles¹¹²⁰

“The State must be considered as more than ‘the government’. It is the continuous administrative, legal, bureaucratic and coercive systems that attempt not only to structure relationships between civil society and public authority in a polity but also to structure the many crucial relationships within civil society as well.”

Alfred Stepan¹¹²¹

Conflict resolution may have multi-faceted goals that extend beyond ending disputes and may be considered intangible. The influence of conflict resolution theory (originating from international affairs) within the context of elaboration of national peace accords germinated interest in ADR for local disputes. Although modern ADR has been most successfully implemented in countries with a sufficient degree of democratic stability, there is a renewed initiative to apply ADR to countries undergoing reconstruction of the society after a prolonged war or ongoing protracted conflict. The legacy of the 36-year civil war in Guatemala is a deeply embedded culture of distrust, hostility, and tendency to maintain conflicts rather than resolve them. The extent of repression, social inequality and exclusion has fomented a culture

¹¹²⁰ Renato Pardo Angles, “Servicios legales alternativas y la cuestion indigena” in Comision Internacional de Juristas, Comision Andina de Juristas y el Centro de Asesoramiento Legal y Desarrollo Social, DERECHOS HUMANOS: DERECHOS DE LOS PUEBLOS INDIGENAS 105, 110 (CIJ 1996).

¹¹²¹ ALFRED STEPAN, THE STATE & SOCIETY: PERU IN COMPARATIVE PERSPECTIVES, p.xii (Princeton University Press 1978, cited in Theda Skocpol, “Bringing the State Back In: Strategies of Analysis in Current Research”, in PETER EVANS, DIETRICH RUESCHEMEYER & THEDA SKOCPOL, BRINGING THE STATE BACK IN 7 (Cambridge University Press 1985).

of suspicion within and between local communities as well as vis-a-vis state actors.¹¹²²

The reestablishment of the rule of law requires an evolution away from the culture of violent confrontation to a culture of peace. Within post-conflict situations (or rather latent conflict based on ongoing exclusion), ADR is presented as one of the vehicles by which to end polarization, violence, and estrangement engendered during war. Although the central key to permanent resolution of conflicts is undeniably land distribution, it is also necessary to examine the element of procedural empowerment of individuals and groups.

IDPs are characterized as being worse off than the general indigenous community in urban areas but avoid return to the rural place of origin due to fear of repression by new local political elites. The consequence is the diminution of social capital:

“Restructured power elites have managed to instil a negative perception of those who have left in the people who remained (In these cases, opposition to the process or reintegration is coming from former neighbours, a very difficult problem to solve.) This destruction of old social relations is one of the most important effects that the institutionalized violence has had and will continue to have.”¹¹²³

The resettlement of population in abandoned land was sometimes spontaneous but other times part of a specific state policy to divide communities and break ethnic or other group identification. Development poles were populated by mixed ethnic groups. Similar experiences were present in the refugee camps and the CPR communities (collectivized IDP groups). Upon return, new communities were formed by diverse groups. Those who returned to occupied lands were sometimes accused of being guerillas and refused re-admittance. To this day, displaced persons complain that they are still accused of being guerillas, even if they had no part in the movement.

The military support of polarization between returnees, IDPs, and those who remained served to prevent a unified voice in the period of “reconstruction” after the war. Communities and social organizations remain fragmented, weak, and lacking cohesive articulation of their needs in contrast to solid alliances between the ruling

¹¹²² The rise of evangelism has provoked a divide with Catholic members of communities. UNDP estimates that 35-40% of the population are evangelists. UNDP, GUATEMALA: EL ROSTRO RURAL DEL DESAROLLO HUMANO (1999) (<http://www.pnud.org.gt>).

¹¹²³ Gisela Gellert, “Migration and the Displaced in Guatemala City in the Context of a Flawed National Transformation”, in LIISA L. NORTH & ALAN B. SIMMONS (Eds.), JOURNEYS OF FEAR: REFUGEE RETURN AND NATIONAL TRANSFORMATION IN GUATEMALA 196 (McGill-Queen’s University Press 1999)

elites. Rather than blaming only the elites, they blame each other for presenting competing demands for scarce resources. Instead of working together to resolve their common plight, they fight each other engaging in social cannibalism. They require a remedy which is able to address the sociological consequences of displacement.

The destruction of trust between communities and the state during the civil war is cited as the basis for impeding development during the transition phase. Colletta & Cullen call for strengthening social cohesion in transition countries by improving social capital.¹¹²⁴ They suggest that social capital can combat social fragmentation and violent conflict, and one may add displacement as well. ADR is often proposed as a vehicle to provide horizontal links within and between different communities (providing bridges for groups divided by socio-economic, ethnic, and religious divisions). The reader may wish to refer to the Introduction of the thesis to review the forms of social capital, e.g. macro v. micro, and bridging, bonding, & linking variations. This Part relates to structural social capital due to the fact that I am examining the performance of a state institution which seeks to promote bridging and linking social capital within the society. However I examine the problems encountered by CONTIERRA with respect to micro social capital, i.e. low levels of social trust (in part due to structural inequity and the “dark side of social capital” among elites) and confidence in State institutions.

I considered whether CONTIERRA may serve as a possible vehicle for strengthening social cohesion via the development of social trust within and between different communities and improving confidence between the society and the State. Such benefits may be instrumental for the success of the regime and consolidation of peace and democracy, thus providing a link to systems theory.

The response by the populace and international community to output by the State feeds back into the systems prompting new output which diminishes or increases pressure on the systems accordingly. It is the system’s ability to receive feedback and respond to it which enables it to survive periods of change.¹¹²⁵ It is precisely this area which has received a call for further research; Evans suggests that even within authoritarian regimes, certain “reformist” actors within the state may support the

¹¹²⁴ NAT J. COLLETTA & MICHELLE L. CULLEN, *VIOLENT CONFLICT & THE TRANSFORMATION OF SOCIAL CAPITAL*, 3-5 (The World Bank 2000).

¹¹²⁵ DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 32 (University of Chicago Press 1979) (hereinafter *SYSTEMS*).

promotion of social capital.¹¹²⁶ This counters the view espoused by researchers that the success of a state ADR mechanism in empowering marginalized groups was contingent on the progressive nature of the State itself.¹¹²⁷ Thus, I was prompted to explore whether CONTIERRA's staff exhibited greater empathy than political elites towards marginalized groups and promoted concrete reforms.¹¹²⁸ Could they improve linking and bridging social capital, even if elites proved resistant to such action? Is it possible to rebuild state-society relations even when the State has not undergone revolutionary change? Hence, I was interested in examining whether CONTIERRA was able to combine remedial solutions with promotion of confidence in institutions and social trust, thereby supporting democratic consolidation.¹¹²⁹ I sought to understand the impact of the levels of social trust and confidence in state institutions had upon each other.

One may call to mind Santos' classic study on popular justice in Pasargarda. Much like Brazil in the 1970's, the Guatemalan State is characterized as oppressing the poor and the legal system serves as "one of the instruments of class domination." Whereas Santos chose to study the community dispute resolution mechanisms operated by the poor, I chose to study the official ADR mechanism for land conflicts, CONTIERRA. Specifically, given that CONTIERRA cited Mayan law as a relevant source of law, I was interested in learning whether this entity would in fact implement legal pluralism in practice.¹¹³⁰

Rather than accept the division between the State and the society, I believe that it is important to continue to explore the connective networks between them. A paradox arises from the fact that the entrenched feelings of mistrust between social

¹¹²⁶ Evans, Peter, "Government Action, Social Capital and Development: Reviewing the Evidence on Synergy." 24 (6) *WORLD DEVELOPMENT* 1119-1132 (1996).

¹¹²⁷ ABEL, RICHARD L. (Ed.), *THE POLITICS OF INFORMAL JUSTICE, VOL. 1 THE AMERICAN EXPERIENCE* 13 (Academic Press 1982).

¹¹²⁸ Within systems theory, Easton calls for research on the role of empathy in political relationships. See EASTON, *SYSTEMS*, supra note 27 at 440.

¹¹²⁹ It may be argued that ADR mechanisms which focus on teaching parties to exhibit mutual respect, trust, and empathy towards each other stimulate reconciliation between and within communities and thus form a part of peace consolidation. There is a link between the implementation of peaceful dialogue between individuals and groups and the establishment of a culture of peace by State actors and group interest leaders as well. See Marc Howard Ross & Jay Rothman, "Issues of Theory and Practice in Ethnic Conflict Management" in MARC HOWARD ROSS & JAY ROTHMAN (EDS.), *THEORY AND PRACTICE IN ETHNIC CONFLICT MANAGEMENT: THEORIZING SUCCESS AND FAILURE*, 1, 3 (St. Martin's Press 1999) citing Herbert C. Kelman, "Contributions of an Unofficial Conflict Resolution Effort to the Israeli-Palistinean Breakthrough" in 11 *NEGOTIATION JOURNAL*, 19-27 (1995).

¹¹³⁰ Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargarda" in 12 (1) *LAW & SOCIETY REVIEW* 5 (1997).

groups and state actors may imperil successful implementation of new institutions designed to respond to society's demands for greater access to the State. Impatience on the part of the society may prompt rejection of initiatives before they have had a chance to demonstrate results. Walter Murphy underscores that it is difficult for cultures evolving from "en masse opposition through political strikes, mass protests, or riots - - all in the context of revolt. This legacy of docile obedience or bared fangs does not translate easily into democratic processes of negotiation and compromise."¹³¹ It is important to keep in mind the structural background context described in Part III in which CONTIERRA operates when assessing its success.

1.2. Methodology & Outline

My field research consisted of two visits in the Spring semesters of 1998 and 1999. I selected and reviewed twenty-three case studies from the files of CONTIERRA and CTEAR. Selection was made according to relevance to displacement or eviction, hence the material addresses non-displaced persons as well as displaced persons. Although CONTIERRA's mandate is broad enough to encompass inter-class disputes, many property disputes occur within the same class, ethnic group, and even local community or family. Thus the severity of fragmentation, distrust, and animosity extends deep within the society, permeating social divisions, racial identities, and even the most intimate forms of group identification.

I interviewed the conciliators in charge of the cases as well as two directors of CONTIERRA and staff of the Ministry of Agriculture, the Land Fund, INTA, FONAPAZ, and CTEAR. I was permitted to attend those conciliation sessions pertaining to six cases (indicated with a *) that were ongoing during my visits. Because CONTIERRA was only able to conduct one field visit per month, it was impossible for me to review firsthand the progression (or lack thereof) of the cases. The conciliators were very generous in providing me with updates via telephone, email, or fax in-between my field trips. The principal case, FUNDACEN, was the case which had demonstrated the most progress at the time of my visits, and thus it

¹³¹ Murphy, Walter, "Civil Law, Common Law, and Constitutional Democracy" in 52 Louisiana Law Review 91, 125 (1991).

has the most extensive profile. CONTIERRA began to resolve more conflicts via conciliation after it decentralized its offices. Many cases which were finalized recently dated back to 1997-98, thus the rate of resolution amounted up to five years, unfortunately equivalent to that of the formal courts. Hence, my study is limited in the sense that data was collected in the inception stages of CONTIERRA.

I begin by providing a general overview of CONTIERRA's cases. I then proceed to assess CONTIERRA's ability to assure equal party participation by first considering factors pertaining to access: criteria for admission of cases, the public nature of cases, geographic mandate, and jurisdictional issues. I review procedural options, i.e. bilateral negotiations and conciliation, as well as the provision of legal aid and technical assistance. Although I present the voices of the parties themselves in the dialogues, I also pay particular regard to the role of conciliators, lawyers, and observers. Regarding processing itself, I discuss problems relating to neutrality vs. passivity, in particular addressing cases involving fraud, corruption, and coercion (e.g. dispute transfer). I also pay heed to the tension between a temporal focus on the future vs. claims of past victimization.

The second section addresses the conversion process of claims by addressing the hierarchy of norms and values of conciliators. I study the background of the conciliators, language and evidence factors, and the impact of indigenous customary law and human rights. Investigation was directed at discovering whether CONTIERRA recognized customary norms, international norms, and equity standards relevant to identity groups, i.e. IDPs and indigenous people. Because one may infer that recognition of these norms is a form of recognition of group identity, assessment of the extent to which CONTIERRA permitted the application of an expansive view of relevant norms would reveal the actual opportunities for empowerment by utilizing a hybrid ADR framework for dispute resolution as opposed the court. With respect to human rights, I juxtapose civil and political rights to socio-economic rights. Given that property disputes often include accusations of violations of constitutional or human rights, e.g. property, due process, security of person/tenure, housing, non-interference with the home, choice of residence, etc., I queried whether it is inappropriate to utilize conciliation in these contexts?¹¹³²

¹¹³² See Owen Fiss, "Against Settlement?", *YALE LAW JOURNAL*, Vol. 93. 1073. 1082-87 (1984) arguing against the use of mediation in cases involving constitutional rights, cited in Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" in 1:7

The third section addresses output by assessing the amount of accords, recognition (or lack thereof) of restitution rights and needs for redistribution. I also review the impact of time delays, lack of resources and coercive powers, as well as the enforceability of accords. The demoralization and downsizing of the staff is discussed in addition to the role of the international organizations in supporting CONTIERRA.

In the fourth section, I seek to understand CONTIERRA's peace-building/democratic consolidation role by examining social capital. After having demonstrated the macro-structural inequities which are the root cause of weak social capital in Guatemala in Part III, I now examine two of the key micro-obstacles inhibiting the growth of social capital: intra-community divisions, "anti-social capital" and prevalence of authoritarian heritage, i.e. the "dark side of social capital". These obstacles are direct consequences of the structural background described previously. I refer to quantitative statistics on interpersonal trust, once again linking it back to the deficiencies within the legal system, as it lacks legitimacy and responsiveness with respect to the marginalized groups, thus it does not provide them with a back-up of incentives or sanctions in the event of breach of trust between parties. I then proceed to identify indicators of CONTIERRA's ability to generate social capital by empowering marginalized groups and restoring communal harmony via observation of cases. This section is limited due to the lack of actual solution of many disputes and the short-term duration of the study (measurement of social capital requires long term observation). However, it is hoped that identification of the issues presented here will stimulate further research in this arena.

HARVARD NEGOTIATION LAW REVIEW 7-51, footnote 4(Spring 1996), reprinted in CARRIE MENKEL-MEADOW *supra* note 14.

2. CONTIERRA

“Land conflicts are a human problem, it is not about land-it is about people.”

Alvaro Colom (creator of CONTIERRA)¹¹³³

The focus of this part is the Presidential Office for Legal Assistance and Resolution of Land Conflicts (CONTIERRA). This is the official conciliatory mechanism for land conflicts established by the State and thus is considered its primary structural response to demands for effective dispute resolution to land conflicts in Guatemala in light of an absence of agrarian courts. There are other institutions that also offer mediation services and have been utilized in land conflicts; however given that CONTIERRA’s mandate is specifically focused on land conflicts and its caseload is the largest, I choose to concentrate on this entity. Most importantly, it takes on all the cases that were unable to be resolved by mediation institutions run by NGOs, communities, etc. Given its status as a national response mechanism, I believe that conclusions regarding its performance are valuable in the sense that they explain how the State succeeded and/or failed to live up to the people’s demands and expectations pertaining to conflict resolution through use of a structural coupling.

Its mandate to promote conciliation of land conflicts by way of decentralized, participatory dialogues is proposed to promote access to justice and establish positive social capital via the stimulation of trust and networks 1) Within local communities, 2) Between different individuals, communities and groups; 3) Between the rural society and the State, specifically the executive land agencies; and 4) Between the peasants and the Chamber of Agriculture (composed of the agribusiness sector). Analysis of its structure and practice will reveal the benefits and drawbacks of implementing ADR innovations in post-settlement societies which maintain grave

¹¹³³ Interview with Alvaro Colom, 13 May 1999. He is a man of curious identity, although he is a ladino he has been granted recognition as a Mayan Priest. He designed the interdisciplinary approach to conflict resolution, but intended CONTIERRA to be an independent, decentralized institution such as an NGO, not a State entity located in the center. However the government proved negative to this idea. Colom left because he was not allowed to address the imbalance between parties to conflicts or their true causes. He calls for an investigation of the history of land appropriation, but the government is not interested in exploring corruption, fraud, or other similar problems. He doesn’t believe that the donors can resolve these problems either.

socio-economic inequities and political exclusion. One of the principal goals of alternative dispute resolution is to:

“...contribute to democratization of justice, dismantling the negative effects brought about by the official legal system; such as the reproduction of power relationships which generate social, economic, and cultural discrimination, causing the great weight of the law to bear heavily on the most vulnerable social sectors, such as the indigenous people.”¹¹³⁴

Thus, conciliation is intended to reverse the coercive application of the law by the State to the community to a construction of justice from the community towards the State.¹¹³⁵ CONTIERRA is a specific attempt to incorporate such practice within the arena of land conflicts.

2.1. Typology of Cases

Case	Parties to land dispute	Type of dispute	Applicable law
*1. Sommer (CONTIERRA)	community v. titleholder-community	Mr. Sommer promised a portion of property to his workers which has been usurped by a community. boundary dispute	Formal law & customary law
*2. FUNDACEN (CONTIERRA)	intra-community group v. development agency	Sub-group within the community is in default on payments for land to a development agency which is accused of having cheated them via corrupt practices	Formal law
* 3. Tampur (CONTIERRA)	intra-community division displacement	A community divided over a dispute over boundaries resulting violence and internal displacement. possession v. title	Formal law & indigenous law
4. Santa Victoria, Concepcion Solola (CON TIERRA)	municipality v. family	Indigenous Municipality seeks to define boundaries, one family has occupied property thus there is a boundary dispute	formal title, indigenous law, prescription rights
*5. Comunidad Bijolom, Quiche (CONTIERRA)	community v. individual	A man fled to the mountains during the war, upon his return his wife had sold the land to a community brought in by the Army. He seeks adequate restitution.	formal law
6. Canton Batzabaka, Nebaj (CONTIERRA)	individual v.IDP individual	A man fled to the mountains during the war, upon his return another man had taken his land, there were double titles	formal law
*7. San Antonio Panacte Chiol (CONTIERRA)	community v.IDP community	Colonel seeks to sell land to one community which is possessed by another community.	formal law
8. Playa Grande de Ixcan, AV (CONTIERRA)	community v. IDP community	150 families claim possession of land registered by Mr. Matus. Private persons promote usurpation of property, burning ranches & houses, destroying crops, another community claims	formal law & customary law

¹¹³⁴ Pardo Angles, Renato, "Servicios legales alternativos y la cuestion indigena", in Comision Internacional de Juristas, Comision Andina de Juristas y el Centro de Asesoramiento Legal y Desarrollo Social, DERECHOS HUMANOS: DERECHOS DE LOS PUEBLOS INDIGENAS.105, 110-111 (CIJ 1996).

¹¹³⁵ Giraldo Angel, Jamie et al., CONFLICTO Y CONTEXTO: RESOLUCION ALTERNATIVA DE CONFLICTOS Y CONTEXTO SOCIAL, 15 (Tercer Munco 1997).

		rights to same land	
9. Piedra Parada, San Marcos (CONTIERRA)	community v. titleholders	Formal title holder seeks eviction of community claiming historic title	formal & indigenous
10. Sesaqkar Cahabon, AV (CONTIERRA)	IDP community v. individual	possession of state baldio	formal law
11. Comunidad Maribach Cahabon, AV (CONTIERRA)	community v. individual	163 people displaced by Army, Colonel took over their land displacement and dispossession	formal law
12. El Ranchito, Cahabon (CONTIERRA)	IDP community v. community	boundary dispute	formal law
13. Panaman y Buena Vista, Uspantan Quiche (CTEAR)	IDP community v. community	Eighty families became IDPs during the war, INTA gave their land to another community based on the abandonment of land held under provisional title, now they seek restitution in the form of alternative land	formal law
14. San Jose la Viente, Ixcan (CONTIERRA & CTEAR)	refugees turned IDPs v. community	Refugees became IDPs upon return, INTA gave their land to others and they sought restitution in the form of alternative land	formal law & customary law
15. San Pedro de la Esperanza, Uspantan (CTEAR)	IDPs	Twenty five families became IDPs seek INTA titles and compensation	formal law
16. Santiago, Ixcan (CTEAR)	IDPs and refugees	Thirty-two families became displaced, lost land under provisional INTA title, upon return seek restitution in the form of alternative land	formal law
17. Los Cimientos, Chiul Quiche (CONTIERRA & CTEAR)	dispersed IDPs v. CPRs v. two local communities	CPRs wished to return to land, as do dispersed IDPs, land possessed by community brought in by the Army Need to measure land, possession/restitution/historic title	formal law & customary law
18. La Colonia, Uspantan (CTEAR)	IDP community v. IDP community	Two IDP communities seek compensation in the form of financing for land, infrastructure, technical assistance, etc.	formal law
19. Estrella Polar (CONTIERRA)	land owner v. IDPs	Workers claim historic title, sought restitution for unpaid wages, fear of forced eviction by formal title holder	formal law & indigenous law
20. La Perla (CONTIERRA)	land owner v. workers	Peasants claim historic title & municipal title to land subject to eviction by private landowner boundary dispute	formal law & indigenous law
21. El Aguacate, Chacula, Campam Salamy (CONTIERRA)	community v. refugee community	Community opposes measurement of boundaries of land purchased for returned refugees	formal law
22. Chajwal I Cahabon, AV (CONTIERRA)	community v. titleholder	Labour conflict: Owner seeks eviction of laborers to whom he owes wages	formal law
23. San Jorge La Laguna, Solola (CONTIERRA)	community v. individuals	Indigenous community claims historic title to land, individuals claim formal right and wish to develop tourist resort on property	formal law & indigenous law

The Presidential Office on Legal Assistance and Resolution of Land Conflicts, known by its acronym "CONTIERRA", was formally created on 4 June 1997.¹¹³⁶ The description of its function identifies the need to create new interaction between the State and the society:

¹¹³⁶ Acuerdo Gubernativo No. 452-97 4 June 1997.

”CONTIERRA . . . assumes a historic responsibility in the national agenda, oriented towards the search for negotiated solutions based on the participation and presence of various sectors involved in conflicts related to the agrarian issue, surmounting the roots of conflict, favoring the articulation of the Guatemalan efforts to reach a democratic coexistence which will lead the country on the path of development.

This Office shall have the jurisdiction to promote the development of a culture of dialogue for the search of consensus alternatives by way of participation and direct involvement of the State Institutions and the Civil Society in the resolution of land conflicts.”¹¹³⁷

These statements contain an implied recognition of the fact that the civil society has been excluded from participation in land issues and that the traditional means of dispute resolution have been unsuccessful. The key objective presented by CONTIERRA is to promote dialogue among the various social sectors as a means to transform the agrarian conflict into ”democratic coexistence with social justice”.¹¹³⁸ Thus, there is a clear intent to present ADR as a means by which to improve horizontal social capital as well as vertical social capital (due to involvement of state institutions). CONTIERRA’s values proved very positive as they incorporated mutual respect advocated by indigenous communities and modern ADR theory, human rights, and peace. It claims that by supporting social reconciliation this will help bring about a ”modern, realistic, just, and efficient land policy which will favor rural development.”¹¹³⁹ CONTIERRA’s guiding principles are identified to be the Search for the Common Good, Neutrality, Honesty and Transparency, Legality, and the Participation of all persons involved in land conflicts. These are terms that correlate with the Commission on the Strengthening of Justice’s findings indicating the qualities that the Guatemalan Justice System was considered to be lacking. Hence, CONTIERRA is designed to be a response to the people’s demand for fair and effective dispute resolution. One advantage is that State has constructed its own dispute resolution mechanism without having it imposed from the outside.¹¹⁴⁰

¹¹³⁷ Dependencia Presidencial de Asistencia Legal y Resolucion de Conflictos Sobre La Tierra, CONTIERRA: Estructura Organizacional, p. 1 (Guatemala, October 1997).

¹¹³⁸ Id. at 4.

¹¹³⁹ Id. at 5.

¹¹⁴⁰ For a discussion of legitimacy problems regarding the Property Commission in Bosnia Herzegovina due to its mixed international background, see Marcus Cox, “The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina” in 47 INTERNATIONAL COMPARATIVE LAW QUARTERLY 599 (1998). For a general discussion of the theory behind the participation of developing agencies in law reform in the Third World, see Maxwell O. Chibundo, ”Law in Development: On Tapping, Gourding and Serving Palm-Wine”, 29 CASE W. RES. J. INT’L L. 167 (1997).

CONTIERRA is intended to remedy the gross polarization and extreme distrust between communities and social groups germinated by the civil war. Rather than view each other as individuals or groups sharing personal problems and concerns, parties often have pre-fixed notions of the other as simply “the enemy”. CONTIERRA’s goal is to teach people to recognize one another as human beings by pointing out common concerns and establishing a communication based on mutual respect.¹¹⁴¹

CONTIERRA’s Partners and Board of Directors

CONTIERRA coordinates with the rural community, the Church, the business community, local NGOs, associations, international agencies (MINUGUA, OAS, UNDP, The World Bank), and the other State entities, such as FONAPAZ, INTA (now defunct), the Public Ministry, the Ministry of Agriculture, the Ministry of Finances, the Ministry of Government, SEPAZ, the Congressional Land Commission, the Attorney General’s Office for Human Rights, the Institutional Commission for the Strengthening and Development of the Ownership of Land, the Supreme Court, and COPREDEH.

CONTIERRA’s Board of Directors is composed of representatives nominated by the President from the Agro-Business sector, the unions, the rural peasant organizations, cooperatives and the Government. This forum permits discourse between a diverse range of voices in the hope that CONTIERRA’s actions will respond to the needs and expectations of the society at large. Although the inclusion of members from different socio-economic spheres in Guatemala may appear to “democratize” the body, the disproportionate distribution of power among the higher echelons may actually prevent true implementation of policies proposed by rural and union groups. Appointment by the President implies close screening of the voices, which will actually have say in CONTIERRA’s policies. Both internal staff and

¹¹⁴¹ The Commission on Historical Clarification defined its own mission “to foment a culture of mutual respect and observance of human rights which will restore the dignity of the Guatemalan society and, in particular, that of the victims.” CONTIERRA’s mandate may be viewed a further implementation of this vision.

outside observers cited political pressure as a key factor, which stagnates CONTIERRA's development.

2.2. Party Participation: Access to the CONTIERRA Mechanism

ADR varies from courts in terms of direct party participation, thus it serves a democratic function. Conciliation has aspirational goals- e.g. achieving equality between parties, encouraging mutual respect, reconciliation, and cooperation. As mentioned previously, parties exhibit a high degree of procedural control by expressing their views, presenting questions and demands, considering alternatives, making decisions, deciding upon the topics to be addressed, drafting agreements, and engaging in discussion and resolution of the problem.¹¹⁴² Lande claims that “. . . mediation truly offers a distinctive opportunity for parties to exercise responsibility over their own disputes and their own lives. This is an important social value that other dispute resolution processes generally do not promote.”¹¹⁴³ Conciliation strives for party empowerment via recognition of the rights to self-determination, autonomy, and equality.¹¹⁴⁴ In this manner, empowerment is a goal of procedural justice. Thus, conciliation is considered the “humane” alternative to courts: parties’ voices are considered to be the bedrock of the process. Because both parties design the final accord, they are able to attain a sense of satisfaction from the conclusion and improve their relationship to each other. It also has a value beyond the accord, which is its empowerment and recognition characteristics as parties are encouraged to understand, care, and relate better to themselves and each other:

“Mediation’s transformative dimensions are connected to an emerging, higher vision of self and society, one based on moral development and interpersonal relations rather than on satisfaction and individual autonomy. . . Mediation offers a potential means to integrate the concern for right and justice and the concern for caring and interconnection. In short

¹¹⁴² This promotes civic training. MARINES SUARES, supra note 1 at 23.

¹¹⁴³ John Lande, “Toward More Sophisticated Mediation Theory”, in JOURNAL OF DISPUTE RESOLUTION, 321, 325 (2000).

¹¹⁴⁴ See Barach Bush, Robert A., “A Study of Ethical Dilemmas and Policy Implications” in JOURNAL OF DISPUTE RESOLUTION (1994); Rothman, Jay, Rothman, Randi Lane & Schwoebel, Mary Hope, “Creative Marginality: Exploring the Links Between Conflict Resolution and Social Work” in 8 (1) PEACE AND CONFLICT STUDIES (May 2001).

mediation presents a powerful opportunity to express and realize a higher vision of human life."¹¹⁴⁵

Much attention has been given to the notion of how much autonomy parties should retain in conciliation/mediation proceedings; examination of the role of the mediator as a facilitator vs. evaluator highlights the implications of the varying degrees of procedural control by the third party.¹¹⁴⁶ In this study, initial assessment is made as to the extent to which CONTIERRA empowered parties belonging to marginalized groups, e.g. internally displaced persons and indigenous persons, via their inclusion/participation in conciliation. In particular, I reviewed the treatment of cases involving fraud, corruption, or coercion in order to understand to what extent CONTIERRA remedied background injustices which provoke imbalances among parties.

The case of internally displaced persons is quite relevant to the empowerment process offered by ADR; in addition to losing their homes, they undergo a loss of self-esteem, isolation from their community, and total abandonment by the State. This requires a remedy which is able to address the consequences of displacement in a complete manner. Unlike refugees, Guatemalan IDPs did not receive instruction as to human rights or civic actions, instead their isolation and repression bred a culture of fear which in turn left a legacy of distrust of the State as well as persons belonging to other community and even one's neighbours.¹¹⁴⁷ I first examine input access to ADR by reviewing the mandate of CONTIERRA in order to understand whether it addresses the population in need of conflict resolution of property disputes, i.e.

¹¹⁴⁵ ROBERT A. BARACH BUSH & JOSEPH FOLGER, *supra* note 17. See Also John Lederach, "El Desarrollo de una infraestructura estrategica para la construccion de la paz", (OAS/PROPAZ 1996). He describes conciliation as a form of conflict transformation, in which the dispute evolves from a destructive track to a constructive one. He emphasizes gaining an understanding of the conflict, including the disparity in socio-economic resources and needs of the parties, as well as psychological factors such as self-esteem, perceptions, power relationships, fears, and ability of parties to make decisions. These factors affect the equity of the situation leading to the conflict and the ability to attain justice. A conciliation process may assist parties to talk *to* each other rather than *about* each other.

If we consider the situation of Guatemala, due to the heritage of extreme polarization rooted in the internal conflict, parties often have little understanding of each other's needs or motivations. Through dialogue they are able to gain a new perspective of conflict and its causes in order to work constructively towards a solution. They are given opportunities to tell their stories, be listened to, or have their views actually considered by other actors, including state authorities. Hence, parties may gain self-esteem, change their perceptions of the counter party, and engage in cooperative communication in pursuit of a solution. At such stage, the conflict is deemed to be transformed.

¹¹⁴⁶ *Id.* In arbitration (as well as courts), parties are given the opportunity to present evidence and make arguments. However, in courts, lawyers play a greater role in such activity.

¹¹⁴⁷ See e.g. CLARK TAYLOR, *RETURN OF GUATEMALA'S REFUGEES: REWEAVING THE TORN* (Temple University Press 1998).

former, actual and potential IDPs. I then examined the processing of cases through direct observation and review of case files.

Mechanisms which enable IDPs to tell their story, regain communal ties, and attain a renewed sense of self have a positive value during democratic transition. Fair treatment, mutual respect, neutral consideration of claims & rights, and the opportunity to be heard are significant procedural norms for all persons, but especially those whose previous conflict resolution experiences have been marked by marginalization, exclusion, bias, and repression. The voice of landless, displaced, poor, and indigenous people was previously ignored, deemed insignificant, or labelled as contrary to the interests of the regime; inclusive mechanisms were non-existent. For many, the chance to tell their story in an ADR forum may be the first time they have had a chance to express themselves openly and be received with respect.

2.2.1. Applicant & Dispute Categories, Limited Inputs

CONTIERRA was designed in order to minimize and prevent conflict eruptions. Conflicts that are not dealt with pacifically result in forced evictions and other forms of displacement. Maria Stravropoulou proposes that:

*"The term 'displacement of persons' should be used as tautological with 'population transfer' and 'forced eviction.' The key factors determining the existence of a situation of displacement should be the element of movement of persons and the element of force. Although important in developing a legal analysis of each case, the causes and the extent of state involvement should not be elements of definition."*¹¹⁴⁸

The notion that a person may be a potential IDP is founded on the fact that should the conflict not be resolved, the person may be subject to forced eviction and hence become displaced. Thus, it may be argued that persons seeking its services can be regarded as "former IDPs", "current IDPs", or "potential IDPs" from a theoretical perspective, however legally they are entitled to services based on their status as Guatemalan citizens. Thus, it is intended to be widely inclusive. The IDP status is most relevant with regard to clarifying the circumstances of property abandonment during the proceeding, however CONTIERRA does not recognize special rights

¹¹⁴⁸ See Stravropoulou, Maria, "Displacement and Human Rights: Reflections on UN Practice", 20 HUM. RGTS.Q. 515, 519 (1998).

pertaining to property restitution for IDPs or indigenous people.¹¹⁴⁹ This is of particular concern given that the absence of national programs and norms implementing restitution rights for these groups inhibits resolution of property disputes.

There is an express condition regarding access to CONTIERRA that there is no charge of usurpation. Compromise decisions are preferred for people with ongoing relationships, but a decision which sanctions is often selected upon the breach of a legal norm. Hence, usurpation cases in Guatemala remain within the exclusive realm of the courts as elites do not wish to support any compromise, lest the norm of private property rights be diminished in favor of recognizing customary rights.¹¹⁵⁰

This condition is deemed by rural groups to be discriminatory and illegitimate, as most rural groups are accused of engaging in usurpation when making a claim on land based on historic or prescription rights. Given that many disputes involve usurpation charges, they are effectively denied ADR processing opportunities. In practice, CONTIERRA has addressed usurpation cases upon invitation by the parties; it seems to be understood by all that land usurpation is usually the most effective means to force a landowner to the negotiating table. Thus, although the government officially condemns this action, it actually takes advantage such action as a bargaining tool to bring the formal title owner to the conciliation. As long as there are unwanted

¹¹⁴⁹ A clear example of the possible problems may be gleaned from the Colombian Land Institution's determination that access to land will be based on four criteria, including the amount of time displaced. (INCORA Accord 06 of 1996) Those who have been displaced most recently will be given priority, under the false assumption that those suffering displacement the longest amount of time will have somehow found alternative means of survival and thus have a lesser need for agrarian assistance. In practice, internally displaced persons may remain destitute for several years, inclusive generations. One need only visit the shantytowns surrounding the cities to mark the illusory value of such criteria. It is inappropriate to set a time limit for assistance that does not correspond to the reality of forced migration. Indeed, some claims date back hundreds of years.

¹¹⁵⁰ See Siedman supra note 4 at 215: "*Diffuse public sanctions can work only in a relatively unified society that constitutes a genuine community, with deeply internalized norms. That courts and not the community at large administers sanctions arises because ruling elites, far from merely enacting law that 're-institutionalizes custom', impose most law upon the society and its members. . . . If courts enforce direct sanctions in part because society cannot sanction these norms in a general, diffuse and public manner (the hallmarks of custom, then the law exceeds customs. If so the law must originate in the creative activity of law makers. Unless we believe in schoolroom myths about governors as philosopher-kings, the self-interest of the law-makers and their allies must colour the law they write. At least in the main, governors impose law upon the governed. The very existence of courts as a sanctioning system contradicts the notion that law merely reflects custom*"

occupants on the land, the landowner will not be able to find a buyer. The National Institute for Agrarian Transformation (INTA, now defunct) Procedure for the Sale of a *Finca* required full registry of the property and a legal declaration that the *finca* is not under usurpation by other persons. In addition, the Land Fund also holds that peasants who engage in usurpation will not be granted beneficiary status under the credit program.¹¹⁵¹ CONTIERRA's policy of refusing cases involving usurpation should be reformed to take into consideration indigenous law, in order to accept occupation cases it would otherwise exclude from its mandate.¹¹⁵² Indeed, it may be argued that the very concept of CONTIERRA does not make sense as long as it does not address land usurpation cases.¹¹⁵³ CONTIERRA may risk losing legitimacy by not having a mandate over land usurpation. These cases reveal parties who are interdependent due to the circumstances and are in dire need of resolution of the problem. Ironically, CONTIERRA's closed mandate is directly in line with what the *Instituto de Apoyo Juridico Popular* noted as a longstanding negative tradition within Latin American judiciaries:

"The judicial system . . . was implanted as a closed, homogenous institutional space which for centuries has resisted profound social changes, as if the growing social complexity and subsequent conflicts were alien to it. By tying itself to the archaic liberal culture, the judicial system is rendering impossible a break from the atomizing sophism which falsely makes technical that which in reality is political. That fact impedes it from recognizing social conflicts by transforming them into individual conflicts (interpersonal), and thereby linking concepts of citizenship to a stratified system of norms and bureaucratic positions. In addition, the ineffectiveness of the judicial system reveals itself in the rigidity of its formal logic, based on the distinction between legal and illegal, which does not respond to changing

¹¹⁵¹ Peasants must be organized into a Pro-Land Acquisition Committee:

1. The group should include a minimum of 25 families.
 2. The owner of the desired land should be consulted so that he may offer his land for sale.
 3. In pursuance of Article 133 of Congressional Decree 1551 "Law on Agrarian Transformation", peasants who usurp land before it has been adjudicated will **not** be provided land by Fondo de Tierras.
 4. The government will cover 10% of the cost of purchase as assistance.
 5. The debt period will be 10 years.
 6. No interest will be charged.
- Agricultural assistance will be provided to the peasants by INTA.

¹¹⁵² The URNG has also called for CONTIERRA's mandate to be expanded so that it may formally take on the land usurpation cases at will. It expressed the belief that CONTIERRA was responding to wishes of the Agro-Exporters by excluding itself from land usurpation cases. URNG, IV Informe sobre el Cumplimiento de los Acuerdos de Paz, Section on Socio-Economic Aspects, Rural Development & Land (January-September 1998). "La URNG y CNOC critican a CONTIERRA", in *Prensa Libre*, 15 September 1997.

¹¹⁵³ Interview with Daniel Pascual Hernandez, CUC, 4 February 1998.

*social relations, nor does it reach the heart of the conflicts. Consequently what should be a social function is transformed into subtle strategies of discrimination and exclusion”.*¹¹⁵⁴

The former coordinator of the CONTIERRA Board, Jose Angel Lopez, noted in reference to its official policy of non-interference in land usurpation cases that “We cannot interfere in the judicial system—we are a dependency of the Executive and have to respect the separation of powers.”¹¹⁵⁵ This reveals the complexity of utilizing structural couplings to perform quasi-judicial functions while restrained by the executive branch and left without effective tools of operation (i.e. a land distribution law) by the legislature. Traditionally, ADR is linked to the judiciary in order to relieve that entity’s caseload. In this case, ADR was selected primarily to relieve the caseload of the Executive land agencies; relief of the judiciary was an additional benefit. In addition, under the Executive it would be subject to greater oversight by the center. It has been suggested that there could be a constitutional issue given that CONTIERRA was created by the President without consultation of the Supreme Court and remains linked to the office of the President.¹¹⁵⁶ Because, ADR is a quasi-judicial function which should be conducted with full neutrality, concern arises the possibility of CONTIERRA staff in utilizing their conciliatory role to pressure a certain outcome in a dispute which would be favorable to Executive Policy.¹¹⁵⁷

The Bi-Partisan Commission asked for CONTIERRA to address indigenous land conflicts involving issues beyond border disputes, e.g. inheritance, expropriation of land, forced eviction from settlements, sale of fincas which have indigenous settlements, lack of recognition of indigenous possession, use of natural resources (land, forest, and water), labor conflicts involving claim to land as compensation, etc. These issues are the source of many disputes which require intervention by the State due to the inability of the community to resolve them utilizing internal norms, the threat of violence, and the lack of immediate, responsive procedures within the courts.

¹¹⁵⁴ Instituto de Apoyo Juridico Popular, “Derechos Humanos, Administracion de Justicia y Otros Organismos del Estado” in Organizacion Holandesa para la Cooperacion Internacional al Desarrollo, 212 The Hague 1993.

¹¹⁵⁵ Kati Suominen, “Policy Vacuum: Land Disputes Vex CONTIERRA’s Interlocutors”, in THE SIGLO NEWS, July 1, 1998.

¹¹⁵⁶ Interview with Steve Hendrix, Attorney, in Guatemala, February 5 1998.

¹¹⁵⁷ However, it should be noted that the Supreme Court has called for greater use of alternative dispute resolution (ADR) in order to decongest the courts and make conflict resolution more efficient. See Comision de Modernizacion del Organismo Judicial, Plan de Modernizacion del Organismo Judicial 1997-2002, p.50 (Guatemala, August 1997).

However, CONTIERRA has not expanded its mandate, in part due to insufficient staff to handle these claims.

2.2.2. Withdrawal of Cases from the Judicial Branch

CONTIERRA will not take on a case which is being handled by the Judicial Branch, until both parties have agreed to withdraw the case and attempt conciliation. CONTIERRA does at times approach parties involved in a legal dispute which has already subject to legal proceedings in order to invite them to withdraw the case from the court dockets and initiate alternative dispute resolution. Given that the traditional court system is viewed as having a somewhat repressive character, conciliation is presented as an alternative where no one will risk official reprimand.

Some parties have complained that although the principle land case may be withdrawn, auxiliary suits sometimes remain on the dockets that may continue to pressure the parties in direct contradiction of the spirit of good faith. This was made evident in the FUNDACEN case. Parties may formally request the termination of these suits as a condition of continued participation in the conciliation process, however CONTIERRA has not acted to enforce response to such requests.¹¹⁵⁸

2.2.3. Public Nature of Cases

Because CONTIERRA is a government agency, the conciliation accords are open for review by the public. Indeed, MINUGUA recently financed the creation of database, so that all information regarding the land conflicts treated by CONTIERRA are accessible to the public. This prevents challenge that CONTIERRA is a mechanism by which to conceal the form by which land conflicts are resolved. This runs against the norm of confidentiality characteristic of ADR programs, however one may argue that land disputes are a matter of public concern.

CONTIERRA places no time limit as to how far back claims can reach, as long as the conflict is ongoing.

¹¹⁵⁸ Of interest, is that the National Commission for Displaced Persons (CONDEG) claims to have lost faith in CONTIERRA due to these limitations. As of April 1999, they sent three cases to CONTIERRA, two of which did not qualify for intervention. With respect that the case that did qualify, CONDEG thanked CONTIERRA profusely for its intervention.

Solicitations to CONTIERRA are presented by:

Communities (42%)

Individuals, cooperatives, & associations (may include NGOs) (32%)

CNOC (17%)

Governors (5%)

Mayors (4%)¹¹⁵⁹

2.2.4. Geographic Mandate & “Jurisdiction”



CONTIERRA’s geographic mandate is divided into five areas:

1. **CONTIERRA North:** *This includes the departments of Alta and Baja Verapaz, the municipalities of El Estor and Livingston within the department of Izabal, the municipalities of Uspantan, Chicaman and Ixcán within the department of Quiché.*

¹¹⁵⁹ CONTIERRA, Situación Actual de los Casos presentados a la dependencia presidencial de asistencia legal y resolución de conflictos sobre la tierra, Abril 14, 1998.

2. **CONTIERRA West:** *This includes the departments of Huehuetenango, Quetzaltenango, Totonicapan, San Marcos, Retalhuleu and Suchitepequez. Land disputes are linked to indigenous historic claims.*
3. **CONTIERRA Center:** *This includes the departments of Guatemala, Sacatepequez, Chimaltenango, Solola, Quiche, and Escuintla. The sub-office in Nebaj addresses land disputes in Ixil which are largely linked to the armed conflict and ensuing displacement. The root causes of disputes are reduction of community lands, displacement of communities and sale of indigenous land to third persons during the armed conflict, occupation of land by the State using development poles, lack of knowledge about agrarian law by communities, and lack of a regional catastro.*
4. **CONTIERRA East:** *This includes the departments of Zacapa, Chiquimula, el Progreso, Jalapa, Jutiapa, Santa Rosa and the municipalities of Puerto Barrios, Morales, and Los Amates within the department of Izabal. The most difficult cases in this region are those linked to the indigenous communities of Jalapa and Jutiapa, as well as those linked to the municipalities of Morales and Los Amates. This region has a high incidence of the use of violence.*
5. **CONTIERRA Peten:** *This covers only the department of Peten and is considered to be a decentralized zone given the sheer size of the territory and the intense level of conflict.¹¹⁶⁰ Thus, this office retains more independent functions. (This region was originally administered by a special Commission, however its functions were turned over to CONTIERRA) Disputes in this area are linked to location of boundaries, access to land, and conflict of rights.*

Although originally it was not decentralized, it has recently opened offices in the Peten, Coban, Huehuetenango, and Nebaj. In 2002, it opened four new offices in the remaining regions. This has enabled the staff to follow-up cases more often. It should be noted that because my field visits occurred prior to decentralization, I was unable to explore the extent to which this further promoted Evans' notion of "embeddedness" (public servants who are in close relationships with the local society under rules to ensure proper conduct support ties which promote development).¹¹⁶¹ This would be an interesting topic for future research.

¹¹⁶⁰ CONTIERRA, Informe Anual de Labores Junio 1997-Junio 1998, p. 6 (1998).

¹¹⁶¹ P. Evans, "Development Strategies Across the Public-Private Divide in 24 (6) WORLD DEVELOPMENT (1996).

The departments which have the highest percentage of land disputes (79.1% totaling 1,143 cases) are Peten, Alta Verapaz, Izabal, Huehuetenango and Quiche.¹¹⁶² CONTIERRA forms part of a new Land Forum (Foro de Tierras) together with the Secretariat of Strategic Analysis (SAE), the Secretariat of Peace (SEPAZ), the Land FUND, the Attorney General's Office for Human Rights, and the departmental governors. This forum permits the elaboration of high level, inter-institutional strategies to resolve the most difficult cases. It has addressed the historic cases of Chemal-Chancol and Los Cimientos.¹¹⁶³

It has the "jurisdiction" to intervene in conflicts between individuals, communities v. individuals, municipalities v. communities, communities v. state entities, and individuals v. State entities. Most land conflicts are handled by CONTIERRA (55%).¹¹⁶⁴ As previously noted, as opposed to other ADR institutions, CONTIERRA's cases are often inter-class rather than intra-class disputes, thereby resulting in a lower rate of resolution due problems regarding party imbalances as pertaining power, resources, etc.. In addition, CONTIERRA receives cases which have been ongoing for a long time, in many cases dating back to the war or even colonial times, and have thus achieved a level of antagonism which complicates conciliation. These cases have exhausted regular channels of resolution within the community and/or the courts, as well as violence. Because property disputes address the means of survival for rural peasants, and that land is both the source of subsistence and cultural identity, they are prone to highly charged discourses which reveal extreme anger, distrust, and polarization. Rural peasants have little resources, so there is almost no potential for parties to make exchanges.

Land conflicts in Guatemala have been categorized as follows, *i.a.*:

1. *Land usurpation claiming legitimacy through social justice, historic title, uprootedness, etc.*
2. *Adverse possession due to effective abandonment of property by the title-holder.*
3. *Occupation of National Uncultivated Lands (Peten).*
4. *Repossession of land abandoned by refugees (Ixcan, Quiche, Huehuetenango), conflicts with rural poor and IDPs.*
5. *Occupation of municipal lands.*

¹¹⁶² Statistics provided by CONTIERRA, "Casos Atendidos por CONTIERRA en 2001" (2002).

¹¹⁶³ Id.

¹¹⁶⁴ Statistics provided by CONTIERRA, "Situacion Actual de los casos presentados a la Dependencia Presidencial de Asistencia Legal y Resolucion de Conflictos sobre la Tierra", (April 14, 1998).

6. *Sale of title to land actually located in different geographic area.*
7. *Sale of land rights via private documents which are not registered. Formal ownership remains with the original title-holder, but peasants are not evicted from the property.*
8. *Boundary disputes*
9. *Existence of double titles, double payments, etc.*
10. *Land speculation, corruption & inefficiency within state institutions*
11. *Labor conflicts in which back payment is requested in the form of title to property*
12. *Invasion of urban housing by the dispossessed*
13. *Inheritance disputes*

The above cases inherently involve claims for recognition of property related rights, remedies for violation of such rights or ongoing socio-economic injustice, and calls for prevention of similar future actions via structural reforms. Permanent resolution of such conflicts obviously goes beyond the ADR realm. The Executive land agencies divide the caseload between them. CONTIERRA utilizes the following categories for cases presented for assistance:

<i>Dispute over land rights</i>	37%
<i>Demand for land</i>	29%
<i>Request for legalizaton of land occupancy</i>	16%
<i>Land Usurpation</i>	4%
<i>Community boundary dispute</i>	9%
<i>Municipal Boundary disputes</i>	4%
<i>Labor service dispute</i>	1% ¹¹⁶⁵

The Land Fund receives demands for land credits (20%). The National Institute for Agrarian Transformation (INTA) handled land titling issues, however after facing charges of corruption and gross inefficiency, it was replaced by a special Commission which at present is dedicating itself to organizing and filing past claims rather than issuing titles (17%). Uprooted persons originally presented their land claims to the now defunct CEAR (3%) and the ever-present FONAPAZ (3%). FONAPAZ had delegated its caseload, excluding those cases involving the *Comunidades de Pueblos en Resistencia* (CPRs), to one person.¹¹⁶⁶ One person clearly could not handle

¹¹⁶⁵ CONTIERRA, Informe Anual de Labores, Junio 1998, p. 11. It has been a strategy of the rural workers to request land as payment for agricultural services rendered. See Finca Buenos Aires case (1995), case on file with CONIC. Landowners are thus encouraged to relinquish land so as to meet the requirements of the Labor Code rather than the Agrarian Transformation Law.

¹¹⁶⁶ The Comunidades de Pueblos en Resistencia are communities which fled to the mountains during the war and resisted falling under Army Control. There are three groups from Ixcán, Peten, and the Sierra.

investigation, mediation, and follow-up proceedings alone. Thus the staff member and his caseload was transferred to CONTIERRA. The Congress and the Ministry of Government address 5% of cases through direct negotiation, mostly dealing with community and municipal boundary disputes.

None of the other institutions have a set conciliatory methodology for dispute resolution. Indeed, the mediation initiatives taken on by CEAR and FONAPAZ regarding large groups of refugees and displaced persons proved lengthy and difficult to resolve. One CEAR representative expressed his frustration at the delayed process and proclaimed that the only hope would be the enactment of a mandatory arbitration law.¹¹⁶⁷ CONTIERRA representatives complain that they are limited in both staff in funds, thus they are unable to take on all land-related cases. Hence, CONTIERRA initially did not seek active advertising of its services for fear of inability to meet the demand. This is a reason why CONTIERRA's existence is not known to many persons who could potentially be interested in seeking its services. Nevertheless, CONTIERRA's decision to establish decentralized offices was based in part on the need to disseminate information as to their services. Given that its caseload has reached over 600 conflicts; this is a clear indication that more people are aware of its services.

2.2.5. Process

When a solicitation is accepted by CONTIERRA as falling under its mandate an investigation is conducted of registry and title, given the common problems of double-titling and conflicting rights to land. An on-site exam of the land in dispute is provided and a social analysis is completed taking into account the cultural, economic, and social status (such as housing, school, nutrition, ethnicity, etc.) of the parties in dispute.

Its services include negotiation, conciliation, and facilitation. In general, parties come to CONTIERRA after their local dispute resolution mechanisms and courts have failed. Arbitration was initially considered and included within the Organizational Manual, but eventually discarded in practice due to the perception that

¹¹⁶⁷ The CEAR representative spoke with me on condition of anonymity.

it would prove expensive and due to lack of familiarity with its operation.¹¹⁶⁸ No attempt was made to train the conciliators in arbitration in order to offer such services themselves as part of free service. Parties who may have wished to utilize arbitration were to be provided legal assistance by CONTIERRA upon request. However, given that there are only two arbitration centers within the entire country, both of which are private, commercial entities, this was considered to be impracticable. The choice of procedure varies according to party interest and the extent of politicization or radicalization of the conflict. Participation in CONTIERRA procedures has thus far not been subject to set costs to the parties. The methodology is as follows:

Phase 1: Investigation of case history- analysis of facts

Phase 2: Identification of key actors

Phase 3: Selection of preferred dispute resolution mechanism

Phase 4: Review of alternatives presented by the parties through their direct participation

Phase 5: Follow-Up: Post-conflict resolution actions

The initial phases require direct negotiation which is a fluid process which varies according to the characteristic of the population. Informal approaches are initiated to the mayor of the community, group leaders, etc. The investigation phase is considered to be the longest. The follow-up phase is the most crucial in order to legitimise the process and prevent ancillary conflicts from unravelling the accord. Unfortunately, since so few cases had been resolved via conciliation, at the time of my field visits follow-up has not been often effectuated. The withdrawal rate is roughly estimated to reach approximately 3%, hence the overwhelming majority of parties retain their conflicts within the CONTIERRA process. In part, this may be due to the fact that other avenues were previously exhausted or discarded.

2.2.5.1. Bilateral Negotiations between Peasant Organizations and the Chamber of Agriculture

¹¹⁶⁸ Dependencia Presidencial de Asistencia Legal y Resolucion de Conflictos sobre la Tierra, CONTIERRA: Estructura Organizacional, 15 (Guatemala, October 1997), offering arbitration as an alternative. Should arbitration have been chosen, CONTIERRA would have had to provide legal assistance upon request. At present, CONTIERRA does not retain sufficient funds for such service. In addition, the only arbitration centers in Guatemala are institutions geared towards commercial arbitration. The arbitration fees are expensive.

Negotiation is defined as the discussion of a problem between parties in which the parties bring the resolution of the conflict about themselves. In order for a negotiation to succeed, a third party must not radicalize the conflict, as the parties engage in direct dialogue sometimes with minimal moderation.

By 1999, CONTIERRA had established thirteen discussion rounds between the National Coalition of Campesino Organization (CNOOC) and the Chamber of Agriculture (the primary association of landowners representing the agribusiness sector). In spite of this, land conflicts within Guatemala involving rural peasants have multiplied from 300 in 1999 to over 1,000 in 2001. Tensions erupted due to land usurpations on the part of rural peasants and forced evictions on the part of the landowners. These actions have often resulted in violence and death on both sides. The bilateral discussions resulted in an accord in which both sectors agreed to respect private property, uphold the dignity of persons, and resort to the formal institutions created by the Peace Accords to resolve land disputes in a peaceful manner. The roundtable was not intended to actually resolve concrete cases, rather to establish a framework of mutual respect for future engagement. In the opinion of the peasants, this is a euphemism for a stalling tactic.¹¹⁶⁹

It has been suggested that the Chamber of Agriculture actually supports uncertainty rather than action which may prove negative to its interests, hence there is a tendency to refrain from arriving at a final solution.¹¹⁷⁰ The peasants have viewed these dialogues to be largely fruitless, due to lack of interest in compromise by the Chamber of Agriculture and reluctance to engage in discussion at all on the part of the Ministry of Agriculture. One Committee of Peasant Unity (CUC) representative noted that the Ministry of Agriculture representatives would sometimes neglect to show up at the negotiation sessions or claim lack of authorization to reach an accord on behalf of the Ministry of Agriculture, thus defeating the very purpose of the meetings.¹¹⁷¹ The Chamber of Agriculture's representatives asserted the same inability to negotiate for the individual landowners, hence CNOOC withdrew on

¹¹⁶⁹ URNG, *Cumplimiento de los Acuerdos de Paz, Mayo-Agosto 1997*, p. 28 (Sept. 1997). The URNG notes this medium has only attained partial success, leaving risk of recurring violence. It observed that although has helped to create spaces for dialogue between the peasant groups and the Chamber of Agriculture, in some cases "these spaces have been transformed into dilatory processes or measures." URNG, *IV Informe sobre el cumplimiento de los Acuerdos de Paz, Section on Socio-Economic Aspects, Rural Development & Land (January-September 1998)*.

¹¹⁷⁰ Interview with Rodolfo Rohrmoser, Director Centro Privado de Dictamen, Conciliación y Arbitraje, 10 February 1998.

¹¹⁷¹ Interview with Daniel Pascual Hernandez, CUC, February 4, 1998.

account of the Chamber's lack of legitimacy. As a result of a protest march in October 2000, the government committed itself to sending high-level representatives to negotiate with full authority. This initiative failed and another protest march the following year prompted the establishment of a negotiation team to address all aspects of Peace Accord implementation which also failed.

CONTIERRA admits that it has been unable to establish trust between the rural peasant organizations and the Chamber of Agriculture. It fears that the rural peasants have lost faith in the process of negotiation itself, describing it as "murky". The OAS reported that the agricultural entrepreneurs, government, and rural organizations "have a tendency to maintain an indirect communication through the press, which is emotionally heavily charged" and sustain polarized positions which make alternative dispute resolution difficult to implement.¹¹⁷² It is clear that the land issue is extremely volatile, and in most cases it does not appear that negotiation would be the best strategy for conflict resolution in this arena, especially given the power imbalances between the parties. In spite of this, CNOC pursues separate bilateral negotiation rounds with the individual landowners and participates in the Mesas de Resolucion de Conflictos (Conflict Resolution Tables) around the country, with which CONTIERRA collaborates.¹¹⁷³

¹¹⁷² OEA/PROPAZ, "Las relaciones intersectoriales en la conflictividad sobre la tierra en Guatemala", pp. 3, 5. (Oct. 1997).

¹¹⁷³ The Conflict Resolution Table in Alta Verapaz is located in a region which is engulfed by labor conflicts pertaining to abuse by large finca owners. Given the intensity of the situation, the Table was created to provide a local opportunity for conciliation. Rural workers, indigenous communities, and other peasants meet with representatives from the agribusiness community, the Attorney General's Office for Human Rights, COPREDEH, and the Inspector General of Workers. CONTIERRA provides legal research assistance, clarifying registry disputes and other concerns regarding titles. Some criticism has been offered regarding the inconsistent participation of State institutions. In terms of methodology, the conciliators are trained by OAS and they follow the basic tenets of allowing all parties to present their views, via translation, and exhibiting tolerance and respect for each other. When an accord is reached, an act is signed. However, should an accord depend on assistance from the State, such as the Land Fund, the case is transferred to that body. In that sense, the Table faces the same problems as CONTIERRA. The OAS actually considers this body to be more efficient than CONTIERRA in establishing peace, due to its independence from the State and donors. The rural people have trust in the institution. Nevertheless, there are cases which it cannot resolve, and these are transferred to CONTIERRA. CONTIERRA provides further support to other dispute resolution tables in Nebaj, Coban, Izabal, Sayaxche, Poptun, Santa Helena and Huehuetenango.

2.2.5.2. Conciliation

As described previously, conciliation is the intervention of an impartial third party to help the parties reach consensus. This procedure is particularly useful when there is a degree of distrust or anger between the parties, as the conciliator may help temper the emotional blocks which break down conflict resolution capability. Conciliation's key strongpoint is its emphasis on retaining harmony among the parties. The goal of attaining a "win-win" outcome was of tremendous interest to CUC, and thus prompted their participation in conciliation. Ury, Brett & Goldberg note that there are three ways to resolve a dispute:

- 1) *Reconcile their underlying interests*
- 2) *Determine who is right*
- 3) *Determine who is more powerful*¹¹⁷⁴

Interests are described as being the intentions behind the tangible claim or demand. Rights are characterized as based in law or equity standards. Power is the element of coercion ranging from economic fines to physical aggression. It is contended that these three factors are interrelated and affect the evolution of the dispute resolution process. Within the context of Guatemala, this is exemplified by the land owners who attain eviction orders from the courts based on their legal titles but are unable to implement them due to the police's fear of attack by the peasants. The opposite case of peasants claiming prescription rights but are forced off the land by the authorities or private security forces is also a recurring event. These situations reveal an absence of interest-based dialogue, instead reliance is placed on the use of power.

The introduction includes identification of the principal actors, interested third parties, and observers, such as the Attorney General's Office for Human Rights, MINUGUA, and local NGOs. Each party is then asked to present his/her version of the problem at hand in front of the other party. The conciliators attempt to inspire trust in the parties. They accomplish this through an interesting use of language. They ask

¹¹⁷⁴ William Ury, Jeanne M. Brett & Stephen B. Goldberg, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT*, 4-5 (The Program on Negotiation at Harvard Law School 1988).

parties to "seek Peace, as God wills" and emphasize the importance of "exhibiting mutual respect . . . and listening to each other as human beings." This quasi-religious manner is very much appreciated by the parties. Indeed, they repeat these phrases when it is their turn to speak. The CONTIERRA staff is always very observant of the parties' behavior, forms of communication, reactions, and perceptions. Parties are requested to speak calmly and to address each other with tolerance and a discourse of peace is established. CONTIERRA seeks to facilitate the direction and to measure the "temperature" of the dialogue. They correct misunderstandings and calm down emotions. They take each party aside in order to caucus with them so as to de-escalate hostility and work towards improved dialogue. Breaks are called when the conciliators feel that the parties need to reflect on their position. The conciliators also listen to party oral presentations without offering an opinion. The conciliators are careful to always summarize each presentation for clarity and work to create spaces for dialogue.

Parties to land conflicts often have a long history in which they have run the gamut of alternative actions, including court action, violence, threats, avoidance, etc., all of which failed, leaving them very hostile, distrustful, and polarized. There is concern that many land conflicts have been ongoing for too long, the degree of hostility escalated to the point where conciliation has little chance of being effective.¹¹⁷⁵ In addition, because rural peasants have little resources, they are unable to make exchanges, especially regarding property, which in turn is largely unavailable.¹¹⁷⁶ Because land conflicts may often be a single-issue dispute, conciliation may not be the appropriate mechanism as there is little possibility of compromise.

For many rural farmers, this is the first time that they have been given an opportunity to present their case in their own words and be heard. The process can be emotionally draining. The presentation of their history may recall episodes of severe victimization by way of violence, threats, and corruption. The mere process of telling their story allows them to release their feelings of frustration and anger. Having exposed the past, they are more willing to look towards the future. Indeed, CONTIERRA staff always tries to guide the dialogue towards the future, espousing a

¹¹⁷⁵ See James A. Wall, Jr., John B. Stark & Rhett L. Standifer, "Mediation: A Current Review and Theory Development" in 45 (3) JOURNAL OF CONFLICT RESOLUTION 370, 384 (June 2001).

¹¹⁷⁶ Id. At 383.

“problem-solving” approach which casts aside past wrongs in order to work towards an accord. This presents a problem as it is important to consider the parties’ past behavior, given that an abused party cannot participate equally.¹¹⁷⁷ This issue is further explored in the case summaries.

Both procedures and outcomes are deemed to reveal “broader social attitudes whose significance goes far beyond the case or disputants.”¹¹⁷⁸ Within CONTIERRA, the focus on politeness, respect, and neutrality initially serves to gain the trust of parties and places a brake on the escalation of conflict. It also contributes to the enactment of partial accords based on human rights, such as freedom of movement, non-aggression, and physical integrity. For many these accords implement the national Peace Accords at the local level and guarantee the basic need for security.

The next phase includes the creation of a common framework. The different aspects of the problem are dissected and presented for review. Parties are encouraged to transcend references to “You” and “I” and begin utilizing the term “We”, in order to highlight that both parties share the problem and are jointly responsible for its resolution. Parties recommend the order of discussion in an agenda, and topics are assigned an order of priority. This exercise is important because the parties’ participation in the creation of the framework teaches them to cooperate before the substantive issues are discussed in depth.

Finally, parties seek to resolve the problem. At this stage, parties engage in direct negotiation, while conciliators try to advance the discussion. According to CONTIERRA, the principle goal is to constantly work towards consensus between the parties through stimulation of dialogue based on respect. Without consensus, the situation tends to radicalize

It is the stage of concessions that appears to be especially problematic as the conciliators face tremendous resistance by parties. The training manuals do not address this issue and it appears that the conciliators have difficulties prodding the stronger parties to concede or pointing out the defenses a weaker party might have or equity concerns. In direct parallel with indigenous customary law, CONTIERRA

¹¹⁷⁷ Vidmar, Neil, “Procedural Justice and Alternative Dispute Resolution”, in Röhl & Machura, supra note 15 at 124.

¹¹⁷⁸ David Wasserman, “The Procedural Turn Social Heuristics and Neutral Values” in Röhl & Manchura. supra note 15 at 51.

staff notes that it is impossible to establish a set structure as to how land conflict cases evolve within conciliation, each case is unique.

In the conclusion phase, the parties sign an agreement and the conflict is deemed “transformed” through the reconciliation of the parties. The rural farmers particularly value the signing of the agreement because it is usually the first official document in which the other party recognizes some of their terms. At present, the majority of these agreements are partial, given the need for issuance of land credits, title, or provision of alternative land by outside institutions such as the Land Fund in order to resolve the issue in a permanent manner. Herein lies the quandary: the attainment of assistance by the other agencies entails a new process of application and procedural review. The Land Fund may take several months to assess the application, during which the accord may have fallen apart due to frustration between the parties. Another scenario is that the Land Fund rejects the claim, thus rendering moot the CONTIERRA accord. The Land Fund’s staff claim that they are not in the business of conflict resolution and are tired of CONTIERRA utilizing it as an escape valve. CONTIERRA staff respond with complaints about the delays in the Land Fund’s processing and non consideration that the central issue at hand is the provision of land.

In the case of failure to achieve conciliation, CONTIERRA offers legal assistance to file a claim with the Attorney General, pursue registry initiatives, or in an extreme case to file a case within the court. However, few parties return to the courts due to excessive costs and delays.

2.2.6. Legal Aid & Technical Assistance

CONTIERRA's mandate includes the provision of legal & technical assistance, however this has been provided in the form of registry investigation as to whether occupied territory is owned by the State or by a private person, as well as measurement to determine municipal and community borders. The multiple layers of claims to lands, institutional disorganization, and questionable documentation renders certainty of possession/ownership rights a complex goal. In spite of clear need, provision of free legal representation has not been fully provided due to the high cost of contracting lawyers for this function. It should be noted that Article 29 of the Constitution guarantees individuals free access to courts, state agencies, and offices when claiming rights. The article also requires exhaustion of domestic remedies, thus emphasizing the importance of having an effective judicial system. Hence, legal aid is one of the greatest needs the rural peasants have regarding access to justice. The failure to provide free or low cost litigation means that the lack of legal assistance is a significant factor in the marginalization of the rural people. Although the law schools have recently offered legal aid services, until this is expanded to cover most of the Guatemalan territory, there will be a protection gap which will remain un-addressed in spite of CONTIERRA's activities.¹¹⁷⁹ The absence of legal aid has produced a myriad of opportunities for abuse, not only are the displaced prevented from filing complaints against their dispossessors, there have been cases of peasants solicited by unscrupulous lawyers to pay for the processing of title to the land which they have occupied. Once payment is rendered, the lawyers disappear and the claim remains unprocessed. Other persons offer to file claims with the land agencies which are free

¹¹⁷⁹ There are eighteen *bufete populares* in Guatemala, located in the capital, Amatitlan, Antigua, Escuintla, Chiquimula, Cuilapa, Jutiapa, Jalapa, Coban, Xela, Coatepeque, Retalhuleu, Mazatenango, Totonicapan, San Marcos, Nebaj, Huehuetenango and Santa Cruz de Quiche. The USAC law students receive training by MINUGUA to conduct conciliation in the bufetes. Cases are penal, civil, family, labor, and administrative matters. In 1998, the Nebaj bufete handled 255 civil cases and 103 penal cases, of which 75% related to land conflicts. Written and oral evidence is received, as it is believed that witnesses who understand the history of the land conflict is essential to attain a full picture of the problem. (This is a stark contrast to the Property Commission of Bosnia which only reviews written documentation.) The bufete has a time limit for cases, if the matter is not resolved within three meetings, it is sent to the courts or CONTIERRA. The law students only serve for six months, so the turn over may affect the processing of cases. The bufete receives cases which the indigenous communities or auxiliary mayors have not been able to resolve. Most of the bufete's case load may be classified as conflicts between individuals of the same socio-economic background. (CONTIERRA takes on the cases involving imbalance of power and socio-economic disparities, such as those involving landowners v. landless, etc.)

of cost, for a fee. Because the peasants are unaware that the agencies are free, they are easily manipulated.

Parties of higher economic resources send lawyers to participate in the conciliation, whereas the rural groups often represent themselves thereby resulting in an imbalance. Many peasants are illiterate and the differences in educational background reveal themselves in the conciliation process. Some rural organizations, such as FESOC or CONIC, provide some coaching in political and legal arguments, often educating the peasants in the Peace Accords and their corresponding rights. However, CONTIERRA staff expressed fear that these groups politicize the discussion, thus inhibiting reconciliation. It is interesting that groups advocating recognition of socio-economic rights, guarantees contained within the Peace Accords, and human rights are deemed to be political activists, whereas lawyers invoking the civil code's provisions on formal property rights are described as acting within the legal sphere. Given that the Guatemalan Civil Code itself refers to prescription rights and the Constitution calls for respect of indigenous land, it is curious that there was rarely a discussion of these norms as the substantive basis of discussion.

Another factor to consider is the fact that the public and private rural development organizations only accept applications for assistance by groups that have attained legal personality. This highlights a link between horizontal and vertical social capital. The State needs the society to organize itself in order to present demands which may be processed efficiently within official institutions. Many peasants are unfamiliar with the process of legal recognition and are in need of juridical assistance for this purpose. CONTIERRA has thus far been unable to provide such support due to lack of financing. This complicates dispute resolution, because if the solution to the conflict is contingent on the provision of credits for the purchase of alternative land attained by the Land Fund, then as long as the peasants remain legally unorganized, they are unable to access such aid. Thus, the conflict remains unresolved.

2.2.7 Neutrality v. Passivity

Review of recent ADR literature reveals a divergence of opinions regarding the role of the conciliator and the neutrality principle.¹¹⁸⁰ The debate has centred upon the espousal of the facilitative technique in which conciliators do not intervene in the discussion or elaboration of accord versus the evaluative technique in which conciliators intervene to offer an opinion on what an appropriate settlement would be and may press parties to accept it. A central query is whether and to what extent should a conciliator intervene to address background inequities which result in procedural injustice (as well as substantive injustice)?¹¹⁸¹

The facilitation technique is cited as the mode by which to promote party empowerment- parties are in charge of framing the discussion, raising evidence, and elaborating the accord. According to Lande, facilitative conciliators are to support the self-determination of parties by eliciting their opinions and allowing them to decide upon a preferable settlement option without interference.¹¹⁸²

Evaluative conciliators offer their own opinions on what the appropriate settlement would be and may press the parties to accept them. There is a trend within ADR theory towards supporting greater intervention by conciliators in the form of provision of procedural, substantive, or decision-making assistance. Greater activism for conciliators is considered to be appropriate in situations in which parties are experiencing intense emotions, lack expert competence in the subject matter or procedures, are subject to asymmetries in power, knowledge, etc., or have reached an

¹¹⁸⁰ See e.g., Linda Mulcahy, "The Possibilities and Desirability of Mediator Neutrality- Towards an Ethic of Partiality?" in 10 (4) SOCIAL & LEGAL STUDIES 505 (December 2001); see also MAYER, B. THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE (Jossey-Bass 2000), cited in Jay Rothman, Randi Land Rothman & Mary Hope Schwoebel, "Creative Marginality: Exploring the Links Between Conflict Resolution and Social Work" in 8 (1) PEACE AND CONFLICT STUDIES (May 2001). See also Sara Cobb & Janet Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" in LAW AND SOCIAL INQUIRY no. 16, pp.35-62 (1991); Laura Nader, "Harmony Models and the Construction of Law" in Kevin Avruch, Peter W. Black, and Joseph A. Scimecca, CONFLICT RESOLUTION: CROSS CULTURAL PERSPECTIVES (Greenwood Press 1991). Baruch Bush & Folger present the theory of mediation as a form of oppression, in which powerful actors take advantage of the weak. Due the informality of the process and absence of procedural and substantive norms, mediation may aggravate power imbalances and promote coercion and manipulation on the part of the stronger party. Indeed, they cite the principle of "neutrality" as being used to excuse the inaction of mediators who fail to prevent such action. Hence, the result may be unjust and disproportionately favorable to the stronger party. They note that the failure to refer to other similar cases or to the public interest, effectively privatizes issues which may be of public concern. This serves to prevent the weak from organizing collectively to present demands, as their common concerns are fragmented into numerous private disputes.

¹¹⁸¹ Tschentscher, Axel, "The Function of Procedural Justice in Theories of Justice", in Röhl & Machura, see footnote 15, at 104-119.

¹¹⁸² John Lande, *supra* note 45 at 322-323.

impasse.¹¹⁸³ Some commentators advise mediators to take on an active role in assisting parties with low-level negotiating skills to attain all relevant information, identify their own concerns, explore options and weigh their consequences.¹¹⁸⁴ Mediators are to explain to parties that such action is not taken due to partisanship, but rather in the interest of upholding equity within the process. In addition to cases of inequitable accords, intervention is called upon in situations in which there is a potential of act of violence.¹¹⁸⁵ All of these factors are relevant to many ongoing land disputes.

On the other hand, Lande indicates concern that use of an evaluation technique “. . . risks perpetuating adversarial dynamics and entrenchment of positions. Of even greater significance, mediator evaluation risks creating injustice through heavy-handed pressure tactics and questionable evaluations by the mediators.”¹¹⁸⁶ He disputes that evaluative conciliators will uphold fairness, as they may side with more powerful parties.¹¹⁸⁷ Another possible concern is that intervention by conciliators prolongs the retention of a “victim identity” by marginalized persons due to the

¹¹⁸³ Christopher Moore, *El Proceso de la Mediación*, 72 (Ed. Granica 95). It is suggested that that the mediator “has the obligation to originate just accords and thus should help to confer power or authority to weaker party, so that a fair and just accord is reached.” Moore cites Laue, J & Cormick, G. “The Ethics of Intervention in Community Disputes” in G. Bermont and others (Eds.), *THE ETHICS OF SOCIAL INTERVENTION* (New York: Wiley 1978); Suskind, L., “Environmental Mediation and the Accountability Problem”, *VERMONT LAW REVIEW*, 1981, 6 (1), 1-47; and Haynes, J. *DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS*, New York: Springer, 1981. This may include participation by the conciliator in the formulation of the final accords to assist the party lacking adequate representation, education, knowledge, or experience and hence are vulnerable to manipulation by the counter-party.

Susskind & Secunda studied the use of ADR in environmental conflicts and noted that this “may be unsuitable in situations involving dramatic asymmetries of power; only rights-based forums (i.e. courts) can adequately protect the interests of the powerless. Indeed, it is possible that the absence of counselors/lawyers may disadvantage less sophisticated stakeholder groups in negotiations with other, more sophisticated parties.” Admitting that weak parties may be prejudiced in court due to lack of recourses, procedural complexities, and the lack of focus on interests and relationships as opposed to rights, they recommend that mediators train parties in conciliation and establish a code of conduct which will require the mediator to withdraw in the event of severe power imbalances which inhibit the evolution of “meaningful dispute resolution”. Susskind, Lawrence & Secunda, Joshua, “Environmental Conflict Resolution: The American Experience”, in CHRISTOPHER NAPIER, ED., *ENVIRONMENTAL CONFLICT RESOLUTION*, 39 (Cameron 1998). See also Kolb, D, *THE MEDIATORS*. MIT press 1983, cited in Moore at 83. See also Gary L. Welton, “Las Partes en conflicto: sus características y percepciones”, in KARNE GROVER DUFFY, JAMES W. GROSCH, & PAUL V. OLCZAK, *LA MEDIACION Y SUS CONTEXTOS DE APLICACION: UNA INTRODUCCION PARA PROFESIONALES E INVESTIGADORES*, 141, 143 (Paidós 1996).

¹¹⁸⁴ Albie M. Davis & Richard A. Salem, “Dealing with Power Imbalances in the Mediation of Interpersonal Disputes”, reprinted in CARRIE MENKEL-MEADOW, *MEDIATION: THEORY, POLICY AND PRACTICE* 362, 366 (Ashgate 2001).

¹¹⁸⁵ Moore, supra note 85 at 84.

¹¹⁸⁶ Lande, supra note 84 at 325-326.

¹¹⁸⁷ The theory of non-intervention to preserve impartiality is also espoused by Stulberg, J. “The Theory and Practice of Mediation: A Reply to Professor Suskind”, 6 (1) *Vermont Law Review*, 85-117 (1981) cited in Moore, see footnote 85 at 74.

limitations placed on their ability to freely formulate demands and design accords. The chance to participate in conciliation “as if” the parties were equals may prompt an increase in self-esteem in spite of background inequities. Should the conciliators intervene, background injustice may be remedied but marginalized parties may continue to feel dependent on others for their wellbeing. CONTIERRA is expected to assist marginalized parties to achieve greater equality through participation in activities which serve to promote future civic actions, e.g. negotiation, design of strategies and accords, presentation of an agenda and demands, and organization of communities into a legal personality for future development assistance.

Neutrality is one of CONTIERRA’s guiding principles, following the American neutrality model promoted by Lederach and included within CONTIERRA’s training modules provided by the OAS. The fact that the Guatemala courts have been continuously accused of exhibiting bias may be another factor favoring the adoption of a neutrality strategy. In this section, I present three cases in which I analyze CONTIERRA’s proclaimed adherence to the neutrality principle and its use of a facilitative technique within contexts involving background inequity. I examined the role of the conciliators, the role of lawyers, the role of observers, and the significance of the parties’ background. I explored whether it is actually possible to uphold neutrality in such situations and what are the consequences of use of such tactic.

2.2.7.1. Sommer Case- Dispute Transfer



Rodrigo Sommer and workers with CONTIERRA
Photo by Cecilia Bailliet

The German immigration to Guatemala in the 1800's is an important chapter in the study of agrarian issues. The Sommer case presents the story of the decedent of a German landowner whose property originally incorporated 72 fincas averaging 30 caballerias each. Due to inheritance disputes, the land was eventually sub-divided among the heirs and the lawyers. One descendent, Rodrigo Sommer, is a walking testimony to the influence of the German culture within Guatemala. Unlike many of the landowning descendents of the Spanish who often consider indigenous languages unworthy of study, Sommer speaks q'eqchi fluently. In part because of this and his kind, caring demeanor, he has earned the absolute devotion and trust of the indigenous people working on his finca. A conflict arose on his property because he offered a portion of his land to the rural workers who discovered that there was another group of 25 families usurping the land. Sommer called CONTIERRA to see if the matter could be settled and prevent further usurpation.

At the initial meeting, the rural workers (men, women, and children) surrounded him, bought him a cool drink, and literally flicked an intrusive fly off of his shoulder. Sommer explained his plight to CONTIERRA, stating that he did not know that there was another group living there and he had already promised the land to his workers. CONTIERRA staff listen carefully and promise to follow-up the matter. Privately, they inform me that they are a bit wary of Sommer's supposed naivete. They have seen many cases in which land owners wish to rid the property of usurpers, however they do not wish to approach the possessors themselves due to fear of violent attack (in some cases the landowners themselves have illegally appropriated property, and the "invaders" are actually the people who claim original customary possession). By promising other rural families the same land, the conflict is transferred to them. The rural workers are often oblivious to such manipulation and assume that the principal motive behind such generosity is the landowner's honest desire to help them. Should the landowner speak their language, they may wrongly assume that he shares some cultural bonds with them, including respect for the significance of an oral promise. The notion that there may be another meaning or intention behind the words may not be obvious to the community. CONTIERRA states that it cannot disclose this issue because it would harm the conciliation. This raises ethical questions, as CONTIERRA shields the imbalance of power. As long as the landowner understands the situation more than the rural workers, they may be further exploited.

To what extent can CONTIERRA address the underlying interests without harming the dialogue? Indeed, should the rural workers lose faith in the landowner there would be little interest in pursuing conciliation. Yet, as long as the root cause of the conflict is not addressed, a true solution may never be found. CONTIERRA conciliators' remarkable astuteness, immediate awareness of background issues and ulterior motives assists them to understand the conflict and design strategy. Their reluctance to voice their observations limits their value. One of the purposes of CONTIERRA is to create "bridges" between heterogeneous groups in order to break down exclusionary social structures (see *infra* on social capital). A problem arises in the fact that such connections are inherently delicate and may require significant support in order to succeed. The peasant may be psychologically empowered by being treated "as if" he is equal to the landowner when negotiating, however should this result in non-recognition of his right to property, such empowerment is only

temporary. In order to create a true connection between parties that may result in improved communication in the short-term and promote social inclusion in the long term, it is necessary to support the weaker party by remedying inequities based on lack of knowledge, information, etc., thereby attaining true equality in participation. The construction of connections requires both transparency and understanding- thus each party should be illuminated as to the relevant background information and factors relevant to a case. Because claims by peasants are often linked to customary or progressive human rights, conciliators and parties need to become educated in these norms in order to recognize their validity when presented in negotiations (see *infra* norms).



Rodrigo Sommer, workers, and their family
Photo by Cecilia Bailliet

2.2.8. Role of Conciliators

In order to further understand the function of conciliators, as well as interplay between values and norms affecting the processing of cases, I examined admission of the background of the staff. The conciliators have a variety of backgrounds including: law, political science, anthropology, psychology, history, agricultural engineering, civil engineering, economics, etc. Their broad span of subject matter expertise allows them to analyze cases from a variety of variety of perspectives and stimulate discussion utilizing different approaches. Conciliation teams consist of three persons, always including one lawyer, thus preventing criticism of lacking adequate background. At the time of my field research, there were three female conciliators, one of whom was described as by her male colleagues as being the most effective at rescuing a dialogue run amuck due to excessive antagonism on the part of the parties. CONTIERRA will rotate conciliators in cases, in order to prevent personalization of the institution. Parties are to have trust in the organization, rather than a single person. CONTIERRA admits that sometimes parties may initially lose confidence in the process if a particular conciliator does not return to a session, however this is considered to be a minor drawback compared to possible corruption of the institution. However, in the FUNDACEN case, the peasants expressed that the personal dedication of the conciliators is what promoted their confidence in CONTIERRA.

Some of the staff has had extensive experience working with reintegration of refugees, indigenous groups, and reconciliation with other marginalized groups within local communities who may resent the return of those who left. Their prior work for FONAPAZ and INTA assists them to understand the background of psychological and physical torment previously endured by some of the parties in conflict and the dynamics of reconciliation between communities. Many of the techniques they use to heal old wounds and move on are gleaned directly from the refugee reinsertion experience.

It should be noted that the CONTIERRA staff itself is composed of persons of a middle-lower economic background (unlike judges). They are familiar with the mode of communication of the rural farmers. They are very adept at using the vocabulary and modes of address of the parties themselves. This is in direct contrast with the complex vocabulary often encountered within the traditional court system and enables the conciliators to gain the confidence of the parties.

I found the conciliators to be personally dedicated to their mission, they truly believed that their work was necessary to rebuild the social fabric of Guatemala. In contrast to the indifference demonstrated by political elites, the conciliators initially approached their work with commitment and idealism, and parties responded positively. They demonstrated genuine concern for peasants who had been traumatized by events during the war, as well as those traumatized by hunger and poverty. Because they are native Guatemalans, rather than foreigners, they instinctively understood the dynamics affecting inter and intra-group communication. I wanted to explore whether the good will and social consciousness of the conciliators proved strong enough to promote recognition of legal pluralism to achieve social justice, despite the repressive nature of the State's elites.

In spite of the fact that the conciliators themselves are from a middle-lower social class, and some have indigenous background (including the conciliator in this case), indicating possible bias in favor of marginalized parties, they adhered to the neutrality principle. This issue is further discussed in the cases below.

2.2.9. Temporal Focus on the Future v. Claim of Past Victimization and Inability/Unwillingness to explore background corruption/coercion issues

2.2.9.1. Case Study: FUNDACEN

Background:

The case involved a domestic development foundation, Fundacion del Centavo (The Penny Foundation, FUNDACEN), which had purchased land in the Southern Coast using AID funds and sold it to rural peasants in order to encourage rural development. The relationship between the peasants and FUNDACEN was all-inclusive. The communities sold their coffee and pineapples to the FUNDACEN and bought their fertilizer and seed from it as well. Due to harvest problems, a fall in the price of coffee, and accusations of financial mismanagement both on the part of the FUNDACEN and the communities' own representatives, some of the peasants defaulted on their payments. The primary concern was that they had been paying

sums equivalent to the value of 50% of their harvest and yet still could not manage to pay the debt. Although the peasants are not IDPs, the threat of forced eviction classifies them as potential IDPs and hence are relevant to this thesis.

In 1992, the peasants in the fincas of Las Victorias, Conayagua, San Juan Monte Real, San Nicolas, Venecia, El Pino, La Concha, San Antonio Nueva Vista and El Chocolate organized into a Pro-Land Committee and asked AID to request FUNDACEN to cancel their debts and adopt a non-intervention policy for the administration of the fincas. In addition, they peasants called upon the Public Ministry to investigate the FUNDACEN's misuse of AID funds. In November 1993, a march was organized before the AID office, in which 800 people participated.¹¹⁸⁸ In November 1993, FUNDACEN issued the following proposal to the Pro-Land Group:

1. *Total forgiveness of the accumulated interest applicable to the land, agriculture, and house.*
2. *The capital debt would not accumulate interest for 3-5 years.*
3. *The Foundation promised not to exploit or administer the parcels which had been fully paid by the peasants, however those not fully paid would still be subject to administration by the Foundation.*

The Committee responded by soliciting total forgiveness of the agricultural and land debt. It sought termination of illegal actions regarding the takeover of property or threatening of peasants. It stated that the peasants would also desist in taking illegal actions when FUNDACEN provided a written agreement to resolve the problem. Finally it asked that with respect to finca La Concha, 205 caballerias of land be distributed to every man, wife, and son of adult age.

In reply, the FUNDACEN stated that it would forgive the interest on the land and agricultural debt, however total forgiveness of the agricultural debt was not possible given FUNDACEN's agreements with donor entities. It noted that it would stop legal action on condition that the Pro-Land desist in its usurpation of property. Distribution of land to each member of a family rather than to the family as a whole was regarded as contrary to FUNDACEN's policy of distributing land to the greatest possible number of peasants.

¹¹⁸⁸ Reported in Siglo XXI, page 6, 10/11/98.

Later that year, the peasants refused to pay their debts, broke their dialogue with the Foundation and stated that they would only negotiate with AID. The same year a technical assistant employed by FUNDACEN was held hostage in finca San Nicolas. There were complaints that the organized peasants were threatening other peasants who would not join their movement. The National Federation of Peasant Workers (FESOC) and CONAMPRO provided assistance in forming arguments against debt repayment: the principle being that in many cases the peasants claimed to have already paid above and beyond the original price of the land. FESOC claimed that the parcels cost an average of 6,000 Quetzales but that the FUNDACEN had charged the peasants 60,000 Quetzales through corruption.¹¹⁸⁹ The FUNDACEN's staff who purchased their crops and sold them seed and fertilizer was accused of cheating the peasants, as were their own cooperative representatives who distributed payment checks. These factors were cited as causes for the inability to pay the debt. FESOC noted that FUNDACEN promised to capitalize the purchase price of 75% of the harvest in favor of the peasants' debt. There were over fifty-four meetings including the peasants, CONAMPRO, MAGA, CNOC, AID, INTA, the Attorney General's Office, the Attorney General Office for Human Rights, the Inspector General of Labour, etc. The case became extremely politicized and resulted in land usurpation and violence in which one peasant was seriously wounded.

In 1994, the Pro-Land Committee petitioned the FUNDACEN to assume the debt of the nine fincas. FUNDACEN denied this request. The peasants claimed that the FUNDACEN had sent men to burn a bodega in Finca Victoria in order to intimidate the peasants.¹¹⁹⁰ The fincas sent 100 people to protest in front of the Supreme Court in order to denounce the act. The peasants also complained of physical threats to their beings by the anonymous men.

In January 1994, Inspector General of Labour's Office conducted a mediation session in which the Pro-Land Committee, the Foundation, the town mayors, the Ministry of Agriculture, the Attorney General's Office for Human Rights, and AID attended. The Pro Land Committee's requests were the following:

1. *The Foundation should stop repressive legal and extra legal acts against the peasants.*

¹¹⁸⁹ Id.

¹¹⁹⁰ Reported in La Republica, 10 August 1994.

2. *The total debt and interest should be cancelled.*
3. *Land titles should be provided to the peasants*

FUNDACEN's position included:

1. *Willingness to cancel the accumulated interest.*
2. *Willingness to renegotiate the payment schedule.*
3. *Unwillingness to discuss the capital debt.*
4. *Willingness to provide title to those peasants who have paid off their debts.*

The Pro-Land Committee accepted the abrogation of the accumulated interest and agreed to participate in further conciliation to renegotiate the debt payment. A partial accord was finalized.¹¹⁹¹

Within the Finca Venecia, a community of 81 beneficiaries to the Foundation's development program, divided into two groups, those in default (25) and those not in default (56). In an open letter, the latter group blamed the defaulting parties for being "a group of scoundrels who provoke the stagnation of our country and take away the opportunity for the provision of a better future for our children who are the future of Guatemala."¹¹⁹² They noted that FUNDACEN had provided them with 4 manzanas of land, residential lots, technical assistance, financing for working the land, fertilizer, pesticides, and tools. They claimed that the Pro Land Group rejected an offer by a Japanese company to help establish a health clinic as well as aid by the National Reconstruction Committee. In addition, they were concerned that the group prevented the entry of FUNDACEN's technical staff, thus hindering such assistance to the community. This letter was forwarded to Attorney General's Office, the Attorney General's Office for Human Rights, the Catholic Church, the Secretary General to the President, the Ministry of Government, the Ministry of Defense, and the Public Ministry. A bulletin was also distributed further denouncing the Pro-Land group:

"This group is composed of a minority sector of bandits who are assisted by syndicates which have dedicated themselves to holding us hostage, robbing us, and in general forcing us to abandon lands which we purchased legitimately with our sweat exposed to the sun. It must be understood that they are usurpers of private property and descendents of

¹¹⁹¹ Inspector General of Labour, Adjudication No. 3118/94, Jan. 28, 1994.

¹¹⁹² Open Letter by a section of the community of the finca Venecia, identified as the "Peasant Front in Defense of Private Property", 23 September 1994, on file with CONTIERRA.

CAIN who were incapable of working the land and wish to scare us with death threats . . . We do not want anything extreme because we are honorable people and not wolves in sheepskins . . . They take advantage of the garbage they encounter to contaminate the fincas and push people to invade other's property . . . We are Christians, we believe in God above all things, we respect human rights, we love liberty in its diverse manifestations: freedom of movement, freedom of assembly, and freedom of speech. We believe that riches are only gained through sound work."¹¹⁹³

The reference to religious and human rights principles is intriguing because CONTIERRA as well as the Pro-Land group itself also refer to them as being the basis for actions. The Pro-Land Committee is described as being indolent, violent, and linked to associations which are viewed as the source of destabilization in the area. The Pro-Land Committee responded by accusing FUNDACEN of engaging in development policies that proved lucrative and opportunistic only for the Foundation itself. It also stated that FUNDACEN was engaging in manipulative strategies by prompting division among the communities by spreading lies about the Pro-Land Committee. It stated that:

*"The Government has never created a policy in order to resolve the agrarian situation of the country. It does not exert pressure on the landowners to act in accordance with the laws established in the Constitution and by the Ministry of Labour."*¹¹⁹⁴

It requested the Guatemalan Government and AID to resolve the conflicts. In November 1997, CONTIERRA was requested to intervene in order initiate conciliation proceedings. The Pro-Land Committee requested the suspension of all civil and penal suits against their members in the courts.

CONTIERRA conducted an initial investigation that concluded that the interests were considered to be too high. In addition, the price of coffee had been low and production rates had fallen due to climactic changes. These factors resulted in the accumulation of interest and the inability to cover the interest through payments. Land usurpation and the lack of a mechanism to render title to adverse possessors on untitled land were other recurring problems in the fincas.

The Conciliation Session: Finca Venecia

The CONTIERRA conciliation team was welcomed to the finca Venecia on 9 February, 1998, with signs hung on bushes and trees expressing support and gratitude

¹¹⁹³ Bulletin 100, on file with CONTIERRA.

¹¹⁹⁴ Pro- Land Committee Document, on file with CONTIERRA.

for its appearance. The conciliation forum was an open meeting area which had a roof but lacked walls, so that the entire community could observe the proceedings. CONTIERRA also stated that the reason for holding the conciliation session in the local forum is to permit the parties to feel more comfortable, as they are at home, in order to freely express the wrongs they perceive.

The peasants are physically small, dark, haggard, and prematurely aged due to malnutrition and severe lifestyle. Several of the committee members are illiterate. Their lack of basic education is evidence of the linkage of violations of basic social rights to the continued progression of land conflicts. Their inability to interpret contracts, agreements, and simple checks facilitates corruption and exploitation of their rights. This in turn prompts them to retaliate through *medidas de hecho* (illegal measures) which essentially infringe the rights of other persons, resulting in an unfortunate cycle of abuse and counter-abuse. The peasants appeared greatly traumatized by their poverty, and they did not seem to be emotionally or psychologically stable during the conciliation. There was a great similarity between the haunted looks and painful expressions of this group and the internally displaced I met with at CONDEG. The finca's countryside superficially appeared quite fertile, coconuts were plentiful, and the fields seemed lush. However, the animals on the finca were emaciated, both pigs and cows displayed their ribs as they wandered through the town. During the conciliation session the peasants stated that they considered their lives and bodies to be used up and that their principal concern was to attain a better opportunity for their children. FUNDACEN sent two lawyers of *ladino* descent (light skinned, Caucasian features).

The conciliation session revealed a dearth of proper information, rendering the achievement of an accord impossible. The peasants did not know the amount of debt and interest and FUNDACEN did not bring the proposed repayment schedules to the meeting. Apart from the "good faith" principle, there are no discovery or evidence rules for the conciliation session itself, and the focus on discussion may inadvertently lead parties to dispense with documentation which is actually central to the conflict.¹¹⁹⁵

¹¹⁹⁵ This is similar to David Stoll's critique of the courts, see David Stoll, "Human Rights, Land Conflicts and Memories of Violence in the Ixil Country of Northern Quiche" in RACHEL SIEDER (ED.) GUATEMALA: AFTER THE PEACE ACCORDS 42 (University of London Institute for Inter-American Studies 1998).

However the CONTIERRA staff noted that the initial meetings primarily serve to exchange information between the parties and introduce principles of mutual respect through guided dialogue. The idea is to “de-judicialize” the cases.

The session is opened by reminding the parties the importance of listening to each other. The parties and observers are introduced. The Pro-Land Committee is composed of men. The women sit at the sidelines, however they take notes and offer commentaries to the men during breaks. A serious problem arises due to the existence of factions within communities that inhibit the presentation of a unified voice within the conciliation sessions. As previously mentioned, the finca Venecia had been divided into two groups, one which was in default and favored debt re-negotiation, and the other which was not in default and advocated continued payment without negotiation. The former group formed a committee in accordance with State requirements and entered into conciliation. The latter group feared that the defaulting parties were bringing about further problems for the entire community, and thus they continually denounced their actions. The defaulting parties believed that FUNDACEN had pressured the rest of the community in order to divide it in two. The accusation was that the agency had pursued a deliberate strategy to diminish the level of unity and trust within the community in order to weaken the strength of the group. FUNDACEN stated that other community members noted that the community leadership (Junta Directiva) was fair, thus the corruption issue did not need to be explored. Juan de Jesus feared that FUNDACEN was plotting with the other members of the community against them. The Committee responded that the other members of the community wanted them to leave or die. The extreme polarization and state of aggression within the community revealed that this case would prove very difficult to resolve. At the same time, there was obviously a great need for use of a technique to restore community harmony.

The leader of the group against the defaulting parties stood near the conciliation session in order to observe the session. Although she remained silent, she was an imposing figure of large stature who seemed to intimidate the men. She was eventually asked to leave in order not to inhibit the parties. The CONTIERRA staff was very concerned that intra-community divisions would foster further divisions and offered to provide intra-community conciliation in order to restore harmony at a later date.

Setting the Agenda

The parties are then assisted to dissect the problem into its different components, including legal concerns, social issues, financial matters, etc. The parties established the Agenda as follows:

1. Discussion of Land
2. Negotiation of Capital
3. Parcelization

CONTIERRA asks for the good will of the parties during the discussion. The parties are reminded that no one will lose the conciliation, both sides are expected to gain. The Pro-Land Committee is concerned with ownership of the common areas, including the school, the health clinic, and the recreational area. FUNDACEN advises the group to take on a legal personality and pay their debts. Once they are recognized by law as the representatives of the community, title to the common areas may be transferred to them. The key problem here is that within the Venecia Community, the Pro-Land Committee is a minority. In other words, it is more likely that the opposing group will attain legal recognition. Indeed, this group has a separate negotiation with the FUNDACEN. The peasants state that FUNDACEN is more powerful than the Committee and they voice concern over the inequity. They are afraid that FUNDACEN will sell the common areas to outsiders. FUNDACEN promised not to do so.

The Pro-Land Committee's leader Juan de Jesus, is a memorable personality. Although he is quite small in stature, he is missing half of one finger as well as the front top and bottom teeth. The former characteristic adds a certain fierceness to his appearance, while the latter provides him with a slight lisp. He has an aggressive, crafty manner of speaking. Mr. de Jesus states that they are frustrated with the legal system as they have a concurrent lawsuit in the courts which is being managed by a lawyer who does not have significant contact with the community. He wishes for a "true conciliation". CONTIERRA points out that the important thing is to preserve peace and to reunite the entire community. The conciliators points out that both parties are interested in negotiating. They continuously

highlight common points which they share. The language employed by the conciliators is caring. They refer to the leader of the Pro-Land Committee as “Don Juanito”, implying both respect through the formal title and familiarity through the use of the first name in the diminutive.



Juan De Jesus – “Don
Juanito”
Photo by Cecilia Bailliet

Presentation by FUNDACEN:

FUNDACEN notes that the finca Venecia began to be populated in 1985. The following year, it issued credits to people under ten year contracts. In 1993, FUNDACEN offered to cancel the interests, 67 people accepted but 18 refused. There are 63 persons who have paid off their debts in full or in part. There remain 18 who have not paid.

Juan De Jesus requests a recess so that he may consult the people of his community on the process of the conciliation. This is a very important part of the conciliation strategy because it provides the party a chance to collect his thoughts, consult the community, and discuss strategies for conciliation.

Presentation by the Pro-Land Committee

One of the peasants expressed his deep frustration at not being able to provide his children with meat, claiming that their diet primarily consisted of tortillas with salt. He stated that he was willing to pay only what he has eaten, not what he has not eaten. He alleged that someone cashed his check and robbed him of his earnings. Other persons claimed not have received receipts for their payments. They stated that they were coerced into signing blank checks because they were starving. FUNDACEN collected 75% of their coffee crop, leaving 25% to the peasants. They assert that the community's own representatives (Junta Directiva) did not distribute FUNDACEN funds to them and only distributed 8% of the necessary insecticides.¹¹⁹⁶

As mentioned previously, this type of fraud may be common within villages, due to the vulnerability of the rural people. Many peasants are illiterate (a significant number of peasants sign documents with thumbprints) and are easily confused in matters of commercial paper. This case presents a glimpse of the link between corruption and poverty. FUNDACEN responded by stating that it could not be held responsible for corruption on the part of the community's representatives. FUNDACEN lawyers state that it is important to look towards the future instead of focusing on the past. This is an important factor because by laying aside the corruption element, the entire issue of indemnification is sacrificed. Although the

¹¹⁹⁶ The *Junta Directiva* is a committee elected within the village to take charge of political and economic affairs for the community.

community representatives may bear some of the responsibility for exploitation of the peasants, there is a strong possibility that FUNDACEN may have shared some responsibility as well. By focusing on dispute resolution, instead of justice, the conciliation would thus mimic one of the key faults pointed out against the formal court system in Guatemala (see Part III, section on amparos discussing cases involving forced evictions). Although it is important to strive towards a better future, it is not always appropriate to bury a past which may require remedies.

The CONTIERRA staff did not explore this issue at all. They stated that the Junta Directiva's wrongs are not relevant to the actual discussion because although the corruption was tragic, it is not possible to hold the FUNDACEN responsible. Instead, CONTIERRA pointed out that the peasants should take responsibility and forget the past. Twelve years of fighting have damaged the community, thus they are encouraged to forget broken promises in order to be able to live in peace. On the one hand, the peasants did seem to want to move on from the trauma related to the conflict. However, the right of indemnification remains a thorn in their side which may prevent true reconciliation. Although the intention may be benevolent, this was a light treatment of the subject. I believe it would have merited further analysis and/or consultation of the Attorney General Office for Human Rights or the Public Ministry. (However, given the lack of effective response by courts, CONTIERRA may have assumed that there was little chance for remedy via formal channels. I do think that the staff may have been able to refer to the appropriate provisions within the law as pertaining corruption in order to encourage FUNDACEN to grant concessions. As discussed later on, CONTIERRA eventually pursued an equity analysis for such purpose.) In addition, it appears that CONTIERRA upheld the notion that the conflict centered on the contract itself, rather than circumstances surrounding its implementation. This would be excessively formalistic and a contradiction of the principle of neutrality, as it would appear that CONTIERRA was siding with FUNDACEN by dispensing with the actual context of the agreement.¹¹⁹⁷

Juan De Jesus asked FUNDACEN to demonstrate good conscience. One of the conciliators asks the parties to "Show trust, we are among family. We would like to hear proposals in order to find the solution to the problem." Juan claims that FUNDACEN has already cancelled his interests. CONTIERRA allows Juan De Jesus

¹¹⁹⁷ See Lytton; Timothy, "La Mediacion en Nicaragua: Avanzando por el Camino de Paz y Justicia", in 11 DE LO JURIDICO, 5,7 (Organo de la Asociacion de Juristas Democraticos de Nicaragua 1995).

sufficient time to find the letter he received from the FUNDACEN in 1993 offering to cancel the interests. Each member of the group received such letter.

FUNDACEN says that the letter conditioned the offer on acceptance by August 1993. Since Juan De Jesus never came to the office, the offer was revoked. FUNDACEN now uses this fact as negotiating tactic. It fully intends to cancel the interest, but it insists on including it as part of the negotiation, in order to not have to sacrifice more of the debt payment.

CONTIERRA calls for a break, meets with each party in private, hears their concerns, and offers suggestions. The peasants do not understand the legal terminology of offer, condition, and acceptance. They assume that the interest has already been forgiven. Thus, this discussion creeps at a sluggish pace. The leaders of the Pro-Land Committee were negative and assumed radical positions, often counter-acting their stated good will to negotiate. The CONTIERRA staff admitted that they feared that the group had ulterior motives of which they were unaware.

CONTIERRA reiterated that the key element is to listen, because the solution will often come from the parties themselves. Negotiation is viewed as a subjective process. Given that every person is different, is essential to learn about the individual's concerns and demonstrate understanding of their particular perspective. The conciliators' past experience with returning refugees is most helpful here. The team works harmoniously together, each conciliator contributing to guiding the discussion through varying strategies of soothing language, stern request for good faith participation, and reminders as to the importance of attaining a harmonized resolution to the problem.

CONTIERRA asks the parties to find an equilibrium. Once again, the peasants are encouraged to think of the future for their children. One of the conciliators described to me the example he often used when reconciling returning refugees and the receiving community: "Perhaps your daughter will fall in love with his son, would it not be better to make peace? Forget the past and look towards the future." The focus on the children is an important aspect to consider, as the life expectancy in Guatemala is relatively short (65.6 years), parents often conclude that their own lives are nearly past and due consideration must taken for the future generation. This leaves them open to manipulation, they may be prompted to

surrender their rights in the interest of attaining a solution.¹¹⁹⁸ This tactic has received particular criticism by Trina Grillo who states that persons are often encouraged to give up their rights for the children, thereby establishing what Laura Nader deems to be “coercive harmony.”¹¹⁹⁹ After further deadlock, CONTIERRA finally states that the negotiation is stalled. Juan de Jesus requests another recess. CONTIERRA asks God to help the negotiation.

Juan de Jesus returns to the discussion by stating that the group cannot possibly pay the interest due to drought, as well as the costs of farming and paid labour. CONTIERRA notes that Juan’s group is justified in requesting cancellation of the interest. It asks for a concrete proposal. The FUNDACEN initially offers to reduce the interest amount to 5% due to their problems, but eventually agrees to cancel the interest. CONTIERRA makes notes that the parties have just reached a partial accord. With respect to the payment of the capital, Juan states they are willing to pay 5%. FUNDACEN finds this proposal to be unrealistic and a waste of time. The FUNDACEN lawyers accuse the Committee of bad faith negotiation. Juan then raises his offer to 15%. The Foundation points out the interest forgiveness alone reduces the debt 56%. The Committee views a payment of 40% of the capital as a loss. CONTIERRA takes each party aside to speak in private. They state that big advances have been made and asks them to be calm and negotiate. The Committee agrees to pay 100% of the value of the houses at no interest. FUNDACEN agrees and another partial accord is reached.

Regarding the payment of the land, FUNDACEN offers to reduce the capital debt 7% and reiterates that the Committee should confront its own *Junta Directiva*. The Committee does not want to repay payments that they have already made, even though they did not get receipts. They declare that “The only Owner is God.” The Committee reiterates that their coffee crop died. FUNDACEN noted that it paid taxes on the peasants’ land, and hence have provided economic support for them. The Committee reminds them that FUNDACEN’s technical advisors were corrupt and skimmed off the profits from the agricultural sales in collusion with the *Junta Directiva*. They declared that they could never make profits as long as the middlemen were corrupt. Don Juan’s final statement rings out: “These are the words of men, not of kings.” CONTIERRA determines that the discussion has reached a block and states

¹¹⁹⁸ See Note 17.

¹¹⁹⁹ See Note 17.

that if there are no other proposals, they would suggest to sum up the accorded points. CONTIERRA closes the session. The Committee asks "Why should the poor lose? Why is the Foundation not supposed to lose?" They complain that their sweat renders free profits for the Foundation. The partial accords are summed up in an act.

Thus, the first conciliation session revealed a corruption issue which merited further analysis and could have been utilized as a pressure tactic to prompt concession by FUNDACEN (due to possible referral to the Public Ministry or the court). The peasants correctly identified a degree of injustice in the proceedings.

Finca Las Victorias, Negotiation Day #2

The next session was conducted at Finca Victorias, located near a breathtaking valley. The people are very clean and appear to be healthier than those of Finca Venecia. The perfume of flowers permeates the air.

The first session ended badly, because FUNDACEN stated that the peasants' payments only went toward the interest, not the capital debt. This devastated the peasants as they claimed to have paid approximately three times the value of the land itself. The peasants had been angered by FUNDACEN's performance the day before, so instead of signs welcoming CONTIERRA, there were signs declaring "FUNDACEN loaned us centavos (pennies), now it is asking for Quetzales back." They noted that these signs were in response to an article in which FUNDACEN stated that they had loaned the peasants Quetzales, and had received only centavos back. FUNDACEN representatives felt intimidated and threatened to leave the negotiation. CONTIERRA asks the peasants to show good will and look towards the future. The conciliators told me that they considered an important aspect of art of negotiation is to stop the party from discussing extraneous issues or past wrongs and redirect the conversation. An exchange of views on the past may be extremely time-consuming, especially given the amount of wrongs committed. As mentioned previously, it seemed ironic that the signature of a contract in the past was considered to be legitimate, but the occurrence of fraud which may have directly affected the terms of the contract is not given weight.

In spite of the clear poverty of the community, the wives of the rural farmers prepared a large stew for lunch and served it to the negotiating teams and the CONTIERRA staff. The opposing parties enjoyed a meal together, a ritual of obvious

symbolic value. The provision of food and drinks by the family of the rural farmers was a gesture of hospitality towards the opposing party which served to humanize the dialogue. At the heart of land conflicts is the fate of entire communities whose existence depends on the germination of the land. By conducting the conciliation session on the plantation itself, instead of a courtroom, the opposing party is exposed to plants, flowers, trees, and animals which compose the community's environment.

CONTIERRA staff opened the session with a prayer- "Thank you for our daily bread, we hope that we will find guidance for resolution of our problems." The peasants are asked to seek resolution of the conflict by making concrete proposals. One of the peasants stated that he is upset over the fact that FUNDACEN is consistently late to the meetings in the fincas, noting that this demonstrates a lack of will to reach an accord, given that there are only two negotiation days per finca. They reiterated frustration that FUNDACEN will not take into consideration past experiences. The Committee declared that they were willing to pay the value of the land as long as the agricultural debt was forgiven. FUNDACEN offered a 10% reduction on that debt. Of particular significance is that FUNDACEN suggested that CONTIERRA should make an evaluation of the situation and offer an opinion. This indicated the fact that the party is frustrated with the degenerative condition of the conciliation sessions and would like greater intervention on the part of the neutral third party. Indeed, this case probably would have benefited by the use of expert evaluations, a feature often available in ADR cases involving specialized issues. The peasants fear that FUNDACEN will withdraw from the negotiation, thus they declare that they do not want stay in the same situation. FUNDACEN challenges them to offer a proposal.

The peasants reiterate the point that they would like to address the past payments and losses they suffered. They do not think it is fair to pay several times worth the value of the land and are frustrated with corruption. However, they declare that their most immediate interest is cessation of violence. They remind FUNDACEN that as a result of this conflict, one of their comrades was shot in a violent confrontation and has been rendered an invalid. They do not want to be persecuted and seek to live in peace. The peasants conclude that they would also like CONTIERRA to analyze the situation. CONTIERRA asks that the parties turn over written proposals. The peasants state they are afraid for their lives and would like a solution to be reached today. They accuse FUNDACEN of sending men disguised as

police to hunt them at night. It should be noted, however, that on 3 March 1997 a criminal court found some of the community members to be guilty of usurpation and subjected them to observation by the national police for two years.¹²⁰⁰ Thus, the men “in disguise” may well be actual police officers, although the description of the approach at night provided an element of potential illegitimacy. However, CONTIERRA did not investigate the issue, hence it may have left the peasants vulnerable to intimidation/coercion and upheld a skewed balance of power within the discussion. At the very least, CONTIERRA should have made an inquiry with the police or discussed possible protection strategies with MINUGUA or the Attorney General’s Office for Human Rights, given that the peasants were essentially asking for protection. It should be noted that the Guatemalan police are not entirely trusted by the people, they have been accused of serving powerful interests or not responding to protection needs.¹²⁰¹

CONTIERRA states that an agreement cannot be reached that day given the fact that the proposals are so far apart and the need to consult high-level FUNDACEN officials regarding the agricultural debt. The peasants resent FUNDACEN’s refusal to compromise, noting “We live in misery, we have paid extraordinary amounts . . . we have paid in pain . . . and now FUNDACEN is asking us to pay even more.” The peasants accuse FUNDACEN of instigating usurpation actions against them in court and fear that they will be prosecuted eternally. They describe the cycle of their existence: they work the land, a usurpation action is initiated, they are evicted, they move to new land, and another usurpation charge is initiated. They feel that FUNDACEN negotiates with threats. They ask FUNDACEN to dismiss the court actions against them. FUNDACEN states that that type of decision is made by its Board of Directors, again limiting the ability to successfully engage in conciliation. CONTIERRA does not request FUNDACEN to suspend ancillary cases, and hence allows this pressure tactic to continue.

The FUNDACEN lawyers state that they are not authorized to negotiate further and that regardless, it is clear that the peasants do not intend to abide by their written agreements. FUNDACEN makes a final offer of 15% reduction of the capital debt. The peasants reject the offer. They point out, rather astutely, that FUNDACEN

¹²⁰⁰ Letter from fincas Venecia & las Victorias to CONTIERRA, 19 January 1998.

¹²⁰¹ According to Latinobarometro, in a survey taken in 2000, 60% of those polled exhibited little or no confidence whatsoever in the police.

should not have sent persons lacking authorization to negotiate, as there should be no limit to dialogue. Conciliation cannot succeed when the parties lack the will or power to negotiate. CONTIERRA agrees to submit the matter to its Board of Directors which in turn will meet with the FUNDACEN's Council. The peasants request AID's presence, indicating a need for advocacy by the international organization in charge of issuing funds to FUNDACEN. The peasants do not feel capable of continuing the conciliation without outside assistance.

The Committee offers to pay 50% of the agricultural debt. FUNDACEN demands 93%, as they claim to have been supporting the peasants for twelve years. They note that the majority of the peasants have managed to pay their loans, thus if this group cannot work the land, they should leave. FUNDACEN declares that "responsible land laborers do well", echoing the open letter of the opposing community group. It states that it has been tolerant, however it is not willing to support them always.

The Committee returns to the issue that they never received receipts for the coffee they sold to CAMEC. In addition, FUNDACEN has sued them for placing people in a house which FUNDACEN states did not belong to them. CONTIERRA warned the Committee not to open old scars, preaching that both parties have undergone pain. They encourage the parties to avoid hate by moving on and seeking solutions. This issue should be resolved so that they could have a chance to leave something to their children. A logistical problem is that the CONTIERRA staff is seated next to the FUNDACEN and across from the Committee. This gives the impression that the CONTIERRA is on the same side as the FUNDACEN in both a literal and figurative sense.

The peasants become distrustful of the situation and surround the negotiating table, announcing that no one shall leave until a resolution is achieved. They are clearly frustrated by the FUNDACEN's resistance to compromise. Together with the signs expressing disapproval of the counter party's bargaining strategy this served to politically charge the discussion. The conciliators realize that that the peasants intend to hold them hostage. They ask the peasants to step away from the table. The fact that the peasants have their machetes which they use in the fields by their sides, proves to be a rather intimidating factor. FUNDACEN requests that the signs against it be taken down, as the representatives feel intimidated.

CONTIERRA conciliators state that their strategy entails stopping the conversation for redirection when it begins to be led astray; in this case it appeared to be a matter of survival. The espousal of an environment of frankness, honesty, and transparency is considered to be primordial for effective dispute resolution. In this case, the dialogue had evolved into threats and fear. In theory, conciliators may offer suggestions for resolution of a crisis without compromising neutrality. It is precisely at this point that the active intervention of a third party is crucial for redirecting the dialogue back to a peaceful premise. However, the conciliators feared that there was no hope of return to peaceful dialogue that day. The peasants agreed to remove the hostile signs and disperse the crowd of peasants which had encircled the conciliation table. Neither side is willing to cede its position, thus the session is ended in a high degree of stress on the part of the parties, conciliators, and observer.

2.2.9.1.1. Role of Observers

Observers range from international organizations, state human rights entities, and national NGOs representing peasants, demobilized soldiers, IDPs, or indigenous people. The NGOs sometimes serves as counselors for the marginalized groups in inter-ethnic/class disputes. Observers from MINUGUA and the Attorney General's Office on Human Rights provide an important role as they skillfully interrupt sessions to offer solutions or suggestions at impasses. For example, in the case of Fundacion del Centavo, a MINUGUA observer was able to interrupt the heated discussion to suggest that FUNDACEN be allowed to prepare a written statement delineating the exact amount of debt and proposed repayment schedule for each person in order to permit the peasants to review the proposals more thoroughly at the next meeting. As mentioned previously, this was important given that the peasants did not know how much their debts amounted to, thus negotiation was not feasible in practice. This fact is not surprising given that a previous study in 1991 found that:

"Few FUNDACEN beneficiaries know the total amount of their debt, how much they have already paid, what they still owe, the interest rates . . . The reasons why the FUNDACEN beneficiaries are not aware of the state of their debt are various; among those which stand out is the lack of updated figures within the Foundation on this sort of information (rarely is it up to date on its beneficiaries' credit). Perhaps also due to negligence, periodic information is not submitted regarding the debts and payments to the

beneficiaries. Finally, the educational deficiencies of the beneficiaries play an important role in the beneficiaries' lack of understanding of some of the concepts related to the credit."¹²⁰²

This suggestion satisfied the peasants and permitted the parties to reach a partial accord and end the day's session in peace. It should be noted however, that the lack of documentation may have prevented the enactment of a final accord that day. CONTIERRA should be faulted for failing to require FUNDACEN to bring the necessary documentation to the conciliation session. It is absurd to renegotiate a debt without a statement indicating how much is amount. CONTIERRA should establish some guidelines on the provision of written information and proposals for conflict resolution in order to promote more effective discussion of cases.

2.2.9.1.2. Role of Lawyers

CONTIERRA became very concerned about the progress of the case as FUNDACEN was not willing to negotiate the capital debt amount and that both parties were too radicalized to engage in conciliation. The negotiation extended one year as the peasants retained *Federacion Sindical Obrera Campesina* (Peasant Worker Union Federation FESOC) lawyer, Roberto Tobar, to negotiate on their behalf. He is a thin, wiry man of tremendous exuberance and dedication to the plight of the rural poor. The CONTIERRA conciliators strongly resented his hard line advocacy style as having a negative effect on the conciliation process. They considered him to be overly antagonistic, indeed confirming a common characterization of trial lawyers. In defense of Mr. Tobar, his strong stance was probably necessary to counter FUNDACEN's stubborn disinterest in conceding. CONTIERRA should have advised the peasants to attain legal counsel from the beginning, once FUNDACEN presented its lawyers at the meetings, or in the alternative require that both parties refrain from utilizing legal counsel.

The conciliators finally engaged in evaluation by recommending that the FUNDACEN should reduce the capital debt due to the abuses by their technicians, hence revealing an equity analysis. They also noted that the peasants should be made aware that they have lived on the fincas for more than ten years without paying their share. These two points demonstrate the strategy espoused by CONTIERRA to

¹²⁰² Pedroni, Guillermo & Porres, Alfonso, POLITICAS AGRARIAS, PROGRAMAS DE ACCESO A LA TIERRA Y ESTRATEGIAS DE COMERCIALIZACION CAMPESINA, 36 (FLASCO 1991).

pressure the radical parties into compromise. Both parties were encouraged to leave the past behind and move towards the future. CONTIERRA convinced FUNDACEN to refrain from pursuing further lawsuits against the peasants in the future and to negotiate existing ones.

One year later, the fincas realigned their payment schedules with FUNDACEN and vowed to reestablish communal harmony. FUNDACEN agreed to forgive the past interest accumulated over the land, houses, and agrarian debt. The Pro-Land Committees of the fincas agreed to pay 70% of the agrarian debt and 100% of the balance of the land and housing within 15 years commencing the year 2000. FUNDACEN agreed to turn over the communal areas upon community attainment of legal personality. FUNDACEN also agreed to drop all auxiliary civil and penal proceedings against the Pro-Land Committee members, however given that this good will came at the end of the conciliation its value appeared hollow. The leaders of FESOC and agreed not to initiate new proceedings except in the case of non-compliance with the accord. The common green areas would be titled once the communities attained legal personalities. Considering that this conflict had evolved from usurpation actions, threats to third parties, kidnapping, violence, destruction of property, and endless litigation, the resulting accord was truly a surprising event.



Don Juanito conferring with FESOC's
lawyer Mr.Tobar
Photo by Cecilia Bailliet

Termination of Conciliation

A question arises as to whether it was ethical of CONTIERRA to continue the conciliation. According to Davis & Salem, mediation should be terminated when any of the following situations arise:

1. A party is unwilling to uphold the mediation's basic guidelines
2. A party does not fully understand the mediation process
3. A party lacks the ability to identify his interests and weigh the consequences of an agreement
4. A party is so seriously deficient in information that any agreement would not be based on informed consent
5. A party enters into an agreement out of fear of the other party
6. One or both parties wish to end the session¹²⁰³

Mediators are to withdraw from conciliation sessions that will result in unconscionable results based on illegality, severe power imbalance, gross inequity, false information, or bad faith negotiation. Poorer parties may have problems evaluating information, they may be eager to accept immediate indemnification, even if insufficient.¹²⁰⁴ CONTIERRA worked to remedy misunderstandings and provide sufficient information to all parties, however it lacks the capacity to end conciliation sessions that demonstrated severe inequities, as this often proved to be the case in the majority of the conflicts. Were CONTIERRA to refrain from offering its services to cases involving background inequity, it would have to be shut down. As previously discussed, Guatemala is a society which is characterized by exclusion of groups, rural and indigenous people, from equal participation in civic, cultural, and economic arenas. Many of CONTIERRA's cases involve parties who may be distinguished from each other by their degree of social exclusion.

CONTIERRA withdraws temporarily from cases involving severe antagonism to give breathing spaces to volatile parties, however the time span between meetings proved too lengthy to maintain a fluid dialogue. In the case of FUNDACEN, CONTIERRA could have opted to end the conciliation due to imbalance of power between the parties, threats, and lack of information on the part of the peasants. Yet, this would have left the peasants with no other alternatives, given prior exhaustion of formal and extra-legal measures. CONTIERRA attempted to remedy the lack of information, however it did not sufficiently resort to collaboration with the Public Ministry or courts to remove ancillary pressures due to related lawsuits or threats of violence. Hence, CONTIERRA requires a design of specific strategy

¹²⁰³ Davis & Salem, *supra* note 85 at 370.

¹²⁰⁴ Gary L. Welton, "Las Partes en conflicto: sus características y percepciones", in KARNE GROVER DUFFY, JAMES W. GROSCH, & PAUL V. OLCZAK, *LA MEDIACION Y SUS CONTEXTOS DE APLICACION: UNA INTRODUCCION PARA PROFESIONALES E INVESTIGADORES*, 141, 143 (Paidós 1996).

addressing when to terminate cases, but additional focus should be placed on providing support to the weaker party to balance the discussion and continue the negotiation.



Peasants divided, some offer to give up a piece of land, others remain suspicious
Photo by Cecilia Bailliet

The Miracle of Love

CONTIERRA, FUNDACEN, and FESOC visited the fincas in May 1999 in order to finalize the accords. It seemed that there were a few matters which needed resolution before the accords could be signed. Mr. Tobar agreed to help convince the peasants to make some additional concessions in order to prevent the forced eviction of some families who had occupied land within the fincas. He told the community of San Nicolas that since FUNDACEN had made significant concessions, it was now their turn to do so. Carlos Sosa (CONTIERRA), an engineer by training, was shocked at Mr. Tobar's sudden reversal of negotiation technique, from aggressive to conciliatory, according to interests. Mr. Tobar opened the session by announcing that there was good news for everyone, on 20 May 1999 the accords would be signed and the conflict ended. However some minor matters remained present. It appears that within the finca, there were three families who lacked rights to a parcel of land. In order to prevent their forced eviction, the community is requested to sacrifice a

portion of their land to these persons. The community was very suspicious; some claimed that they needed all of their land for their children. One man offered to give a portion of land that he could not work to another who could in order to end the conflict.

Mr. Tobar invoked the Peace Accords to promote cooperation; he calls for solidarity in place of selfishness. He drew an analogy to the war that used up money that could have been spent on development. On the local level, the conflict with FUNDACEN had similar effects. The goal was to reunify the community of San Nicolas. He expressed the hope that they will recover from the injuries and scars left in their hearts and assume a posture of forgiveness. In order to start upon a path of development they needed to work together as a group and reconcile. Hence, the provision of development assistance is contingent on the reestablishment of social trust, acceptance of communal norms, as well as existence of linkages to and confidence in the State. Aid & service providers (State & Non-State) require an identifiable unit of interaction, i.e. a unified community with chosen representatives. The community is characterized as being a “co-producer” of peace and development.¹²⁰⁵ It is worrisome that FUNDACEN initially helped break up the communities in order to pursue the conflict, but now was seeking to reunite them to prevent forced eviction. Mr. Tobar pointed out that they had one thing in common: they were all poor and needed land to survive. He initially asked them to use their heads and not their hearts, as their hearts may betray them, indirectly referring to the need to release resentment due to past actions during the conflict.

The people remained unmoved and he changed tactics and asked them to “Show the Love of God- help the families. Don’t show a hard heart. We are all children of God. Remember that once we did not have land, but thanks to FUNDACEN we attained land.” He stated that should those families be evicted, the community should consider itself responsible. Another community member offered land, and Tobar congratulated him for helping to resolve the problem. He requested that community grant FUNDACEN permission to move the borders in order to incorporate the new plots issued to the families. Some community members were afraid that the measurement will favor the usurpers. FUNDACEN promised them that

¹²⁰⁵ See Peter B. Evans, “Re-envisioning the Reform Process: A State-Society Synergy Perspective” in *IBEROAMERICAN: NORDIC JOURNAL OF LATIN AMERICAN AND CARIBBEAN STUDIES*, Vol. XXVIII: 1-2, pp.223-242 (1998).

they could keep the crops they have planted. The community relented and Mr. Tobar assumed the posture of a preacher, exclaiming: “God bless us to finish this miracle of love!!!” Another case involved a widow and her children facing eviction. The community accused the widow of not abiding by community norms. Mr. Tobar pointed out that everyone wanted to live in peace. He called upon them not to “be bad”, claiming dismay at a position which only extended misery: “We don’t eat and we don’t let others eat!”

One community member requested that the families sign an accord in which they agree to work with the community. Mr. Tobar agreed, noting that “A people without a government is anarchy! We need to establish rules of the community and work towards development. United we live badly, but divided we live worse.” The community member was concerned that not all people abide by community norms, in other words there was a call for strengthening micro structural social capital.¹²⁰⁶ Mr. Tobar agreed that they should elect a new Junta Directiva and assured them that the three institutions would help them organize community leadership driven by consensus. Hence, CONTIERRA would help them achieve organization at the local level. It was noted that the community should be founded on the mutual rights and duties of all of its members, thus calling for a “democratic” basis for the achievement of social order.

A peculiar strategic alliance between FUNDACEN and Tobar developed after Mr. Tobar initially suggested that the community vote to approve the concessions. FUNDACEN realized that the majority of the community was against the concessions, hence they advised him not to call the vote. He heeded their advice and merely announced the achievement of cooperation and end to the dispute. The community agreed to provide a plot for the widow as long as she agreed to abide by community norms. He ended the session exclaiming “God Bless You”, to which the community responds with applause. A formal act was drawn up immediately because there was fear that the community members would change their minds. On the way back to the capital, Carlos Sosa burst out laughing at the notion of the aggressive lawyer’s verbal embrace of the “miracle of love”. However, he conceded that Tobar deserved kudos for his skillful guidance of the polarized group to make concessions

¹²⁰⁶ Interview with Roberto Tobar, FESOC, 12 May 1999.

for the most vulnerable members of the community in order to achieve a lasting peace.

The second finca visited was that of Venecia. Upon arrival, everyone was disappointed to see that only a few members of the community were present. FUNDACEN had to retrieve the missing members in order to resolve the final matters. Mr. Tobar asserted a preacher's posture once again:

"I know that you have resentment and distrust in your hearts. However, you must show respect for one another in order to live in harmony. Help yourselves, you are a small community. Maybe Guatemala will not achieve peace, but let Venecia achieve peace! If someone wants to throw wood on the fire, then let another throw water on it to put it out!"

To my surprise, he cites my presence as providing witness to the accomplishment of peace:

"She came last year at the height of the conflict, now she has come back this year to see an accord. Let her come back next year to see how you live in harmony!"

He reminded them of the importance of thinking about the future.

"We are old, but we fight for our children. We fought for land, now we have to grow coffee to sell. I'm not saying that we will be rich, but we will be able to survive."

The peril of continued disharmony was pointed out:

"Si estamos divididos, todos estamos jodidos!" "If we are divided, we are all screwed!"

In this manner, he reminds them of the excessive length of the dispute and ensuing lack of improvement of their situation, as well as the fact that they have the power to achieve peace as well as development. Tobar himself refers to the future as a technique for attaining a final accord. In contexts in which the dispute has become entrenched as the way of life of the community, it is difficult for parties to break out of the cycle of non-concessions and antagonism. Parties who dwell on past wrongs and present inequities have problems imagining an improved future, due to their severe victimization, there is suspicion that injustice will continue and a certain degree of passivity regarding taking efforts to change a situation. Hence, there is a need to strike a balance between the interest in addressing past corruption and the interest in breaking the cycle of distrust.

There were four unresolved matters which needed solution. Utilizing the same techniques as in Finca San Nicolas, Tobar managed to bring about a conclusion to the

problems. In the first case, the owner of a plot agreed to divide the property with a usurper. The second and third cases were resolved by having the parties exchange lots with each other. The final case was solved by having the owner of the lot agree to sell the lot for 5000 Quetzales to the usurper. Although land conflicts are driven by the notion that there is a scarcity of this resource, the communities were able to “stretch the land” to include those most vulnerable. Such examples stand in stark contrast to the absolute reluctance of large landowners to relinquish land to the rural poor. In the above cases, the property owners are poor, malnourished rural peasants who are willing to exhibit generosity with the little they have for the sake of peace. It is a shame that the large landowners are unable to learn from the selfless example provided by those they repress.

Tobar calls upon the peasants to live in a democracy, elect new leaders, establish community rules, and collaborate to solve common problems. FUNDACEN indicates its support for reunification of the group it once helped divide exclaiming “Let there be one community, it is the only way to advance.” They noted that they would no longer only speak with one part of the community, they would consult all. However, they never apologized for their role in breaking the community apart. This shift in tactic seemed entirely utilitarian, when negotiating for repayment FUNDACEN found it favorable to create divisions among the peasants to prevent a united front. After conflict resolution, unity among the peasants would help them enforce the new repayment schedule. FUNDACEN’s promise of development aid served as an effective “carrot” to lead the parties to the accord. This action pursues a strategy of addressing future interests and needs, rather than stagnate in an endless cycle of conflict. The peasants respond to this message, confirming that the conflict has been terrible and noting the need to cooperate for a better future. FUNDACEN does appear to have manipulated the peasants using alternate threat and bribe tactics. It is undeniable that it acted unethically, on the other hand the severity of this conflict and its extreme length also indicates that it would be very difficult to attain solution through discussion alone. The difficulty of the use of “carrots” is further discussed in the Tampur case.

Tobar states that the conflict was not actually about private property, but rather corruption. He states that it is important to forget who was pro-FESOC, pro-FUNDACEN, Evangelist, or Catholic . . . it did not matter. This case demonstrated how intra-community divisions may be prompted by outsiders such as development

agencies, syndicates, rural groups, political parties, etc. They also may emerge spontaneously in disagreement to a leader's position.

Carlos Sosa spoke and noted that the process of conciliation had been difficult, but that they enjoyed the few moments of success. He defined it as a product of negotiation, tolerance, and dialogue. The accord was the fruit of a dialogue conducted by the people themselves.

I later spoke with Tobar to inquire as to his views regarding the conciliation process. He stated that he utilizes different strategies according to context.¹²⁰⁷ In court, he founds his arguments in law but is reluctant to utilize the formal system because he considers it to be biased against the poor. He states that when peasants appear in court, the peasants are charged with usurpation and are denied their claims. "We are lawyers who do not believe in courts." FESOC also limits court appearances due to lack of resources and extraordinary delays in proceedings; in essence it declares that the courts are "closed" with respect to the peasants. In conciliation sessions, he addresses the moral issues and calls for a "human touch". He refers to the deaths and injuries of parties and attempts to find political weaknesses in the counter party. He states that conciliation is not always effective due to hindrance by powerful groups utilizing repression and popular groups using "*medidas de hecho*" (measures outside the law, such as usurpation). FESOC itself admits to utilizing "*medidas de hecho*" as a last resort.

Mr. Tobar states that he is not pleased with how the corruption issued was dealt with by CONTIERRA. He noted "Everybody wants forgiveness without punishment." CONTIERRA furthered this principle by not permitting FESOC to name the corrupt technicians, some of who allegedly still work at FUNDACEN. In this respect, CONTIERRA eerily mirrors the national amnesty law, thus provoking similar criticism by victims that the State prevents proper reparation for past wrongs. On this point, it is evident that CONTIERRA's conciliation training was complicated in practice given the context of corruption. This brings to mind the observation:

*"To the extent that mediation ideology does suggest a forward-looking, blame eschewing form of 'moving forward', it erases the pain of past wrongs and harms that the more formal legal system is designed to compensate for. To the extent that mediation forces 'harmony' where there is none, or where important moral and legal issues are irreconcilable . . . the animating purpose of mediation 'to reorient the parties is not appropriate.'"*¹²⁰⁸

¹²⁰⁷ Interview with Roberto Tobar, FESOC, 12 May 1999.

¹²⁰⁸ CARRIE MENKEL-MEADOW, *supra* note 14 xxii (Ashgate Dartmouth 2001) citing Laura Nader and Trina Grillo's conclusion that "mediators have too much power to enforce a culture on the

The Final Accord

The signing of the final accord was conducted in the CONTIERRA office. In contrast to the assertive stances during the conciliation, the parties assumed very modest postures referring often to God's intervention. Maria Antoineta Torres, CONTIERRA, thanked the parties for providing the opportunity to achieve the transcendental accord. She noted that it had not been an easy road, but that in contrast to the courts which would have left only one side pleased, all parties were now satisfied. Don Juanito stood up and thanked God for the "unimaginable end to years of battle by way of dialogue in conformance with the Peace Accords." This statement identifies a link between the reestablishment of community harmony and the maintenance of peace at the national level. He expressed his appreciation to FUNDACEN, CONTIERRA, MINUGUA, PDH, and the other peasants. United they would now seek development assistance from the agencies. FUNDACEN thanked the peasants. FESOC recognized the moment as a historic event and thanked FUNDACEN, CONTIERRA, MINUGUA. With respect to CONTIERRA in particular, FESOC noted that "Sincerely, without their intervention, it would have been impossible to reach an accord." It said that CONTIERRA had fulfilled its mandate and convinced FESOC that dialogue could be effective. This was an important statement, because FESOC had entered the process with suspicion, given its experience with past state institutions. One of FESOC's representatives stated privately that in his opinion, the success was due to the personal dedication and good will of the individuals within CONTIERRA. Rather than respond as an anonymous institutions, the conciliators had gained the trust of FESOC because they showed that they personally cared about the situation.

Finally, FESOC expressed appreciation to the divine: "Thank God for shining light on the negotiation and illuminating the minds of those in conflict." CONTIERRA's director, Arnaldo Aval, reiterated this point, "Thank God, the Architect of the Universe, without His presence we would have been unable to reach

disputants that requires them to compromise, give up rights and principles, eschew anger and blame for past events while blissfully marching forward into the future 'with the best interests of others' (usually children) blocking out any concerns about the past pain they have felt. Women and other subordinated groups are particularly endangered without economic and legal strength." Menkel-Meadow cites Laura Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology", 9 OHIO STATE JOURNAL ON DISPUTE RESOLUTION, 1-25 (1993) and Trina Grillo, *supra* note 16 and reprinted in her book.

this accord.” He thanked the parties for allowing CONTIERRA to fulfill its mandate, highlighting that neither illegal nor formal legal methods were able to solve the conflict, rather ADR proved successful. He noted that the lesson learned was that without dialogue and negotiation conflicts cannot be resolved. Conciliation was described as the building bricks of peace, as the formerly warring parties were now partners working towards development.

Don Juanitio expressed to me his wish to transcribe his version of the conflict; in essence he desired reparation via commemoration.¹²⁰⁹ The oral process undergone during conciliation prompted a desire in him to express himself in a permanent manner. Mr. Tobar has decided that FESOC will publish an account of the conflict in order to set forth the truth regarding the origin of the conflict and the corruption within FUNDACEN, thereby referring to a reparation aspect that was not met within the conciliation agreement. He believes that the corrupt staff absconded money from FUNDACEN and FUNDACEN sought to have the peasants pay for the loss. CONTIERRA’s failure to report FUNDACEN for prosecution may have been decided in the interest of neutrality, conflict resolution, or political pressure. Regardless of cause, it is clear that the failure to address the issue in a significant manner left the peasants feeling unsatisfied. It may be an interesting idea for CONTIERRA to support written testimonials.

By 2000, Finca El Chocolate had paid off its debt in full and several families from the various fincas were processing transfer of title. Both sides exhibited respect for the terms of the accord, with the exception of two or three cases involving families that had usurped 1-2 extra manzanas. However, these cases were being negotiated. FUNDACEN sent technicians to commence development projects within the fincas and FESOC sent new cases to CONTIERRA thereby demonstrating its faith in the system. Both parties thanked CONTIERRA for eliminating the polarization between them. A local NGO highlighted the importance of the existence of CONTIERRA by noting that the NGO itself would not have been able to serve as mediators because they were not viewed as being impartial given that they worked with demobilized guerillas and are perceived to be political actors. This demonstrates the importance of supporting and strengthening State dispute resolution institutions, because provision

¹²⁰⁹ See UN Draft Basic Principles and Guidelines on the Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law (2001) noting the provision of an account of violations as a form of reparation.

of objective forums is an expected function of the State. The current decentralization fever espoused by aid agencies and donors in response to bias within the State may overlook the fact that NGOs or even international institutions may also prove to hold their own preferences and interests which may negatively impact the perception of impartiality and thus complicate dispute resolution.

In sum, this case is important because it highlights the complexity of pursuing conciliation in an inequitable context: the corruption charges brought up by the peasants against the FUNDACEN officials who paid them for their coffee were not cited by CONTIERRA as a matter requiring significant analysis although the peasants seemed to feel it was directly linked to their inability to pay their debt.¹²¹⁰ The disparity of bargaining power between the parties was not remedied within the conciliation process. It was not until the peasants attained a FESOC lawyer that they were able to progress in their negotiations against the Fundacion del Centavo lawyers and attain some degree of evaluation by CONTIERRA. Parties who are represented by lawyers have greater control in the dialogue than those lacking such representation. In this manner, ADR has been accused of potentially concealing manipulation and coercion.¹²¹¹ Lawyers take over the “voice” in the process, use of them may increase the chances of marginalized persons to defend their rights; however they lose the experience of autonomously engaging in negotiation and drafting the terms of an accord. In this respect, use of lawyers both empowers and disempowers parties.

A dilemma arises from the need to establish a culture of peace within a nation emerging from 36 years of conflict and the need to empower marginalized groups and individuals to assert their rights. The promotion of vocabulary espousing norms including mutual respect, peace, tolerance, etc. serve to teach parties how to listen to each other and seek harmony, yet it may actually be an effective method by which to temper the demands of victims. The FUNDACEN case revealed that the peasants were to some extent empowered through participation in conciliation, they gained new skills at drafting demands and partial accords, cooperating, pursuing negotiation strategies, and designing the final accord. In addition, the chance to tell their story

¹²¹⁰ These charges included low payment for the coffee, lost checks, sale of bad quality seeds, misinformation provided by the agricultural engineer, etc. This issue was further complicated by the Fundacion’s counter-charge that the primary corruption was due to the community’s own elected representatives who were in charge of all financial matters, stole from the community and then left the area.

¹²¹¹ Penny Brooker, “The ‘Juridification’ of Alternative Dispute Resolution”, in *ANGLO-AMERICAN LAW REVIEW* 1, 7 (1998).

and be heard was obviously appreciated. Finally, they indicated faith in the State as successful mediator between the peasants and the corporate sector (FUNDACEN) as well as between community members themselves. The conciliation session did open new communication channels for the peasants vis-à-vis each other and FUNDACEN, thus improving social capital.

Gender Concerns

During CONTIERRA proceedings, the wives and children of the farmers gather together and observe the dialogue, providing silent evidence as to whose interests are at stake. The women offered criticisms and commentaries at breaks regarding how they viewed the opposing party's conduct and their community's strategic tactics. The Ministry of Labour's own conciliators confirmed this type of indirect or disguised participation, noting that often men would consult their wives after a meeting and return the next day with a rejection to the proposal based on the concerns of the wives.¹²¹² In one case, the offer of land for growing corn was rejected on account of the fact that there was no additional space for chickens and ducks. Given that the woman is in charge of these animals, she did not feel her needs for her source of support were addressed, hence she instructed her husband to refuse the offer. The lack of their direct participation in the discussion itself may be explained from a cultural and legal standpoint. It should be noted that in many indigenous communities, the most important aspect of dialogue is listening to the other party, rather than speaking. Hence, what may be considered to be a passive act from the outside may well be an important active process from the local perspective. The posture of silence as manifested by women may have various effects.

In the Fundacion del Centavo, the leader of the third party was an imposing woman whose mere physical presence in the vicinity of the conciliation managed to disturb a party to the point of halting the discussion until she withdrew. She had not uttered one word during the entire time, but somehow had managed to psychologically shake up the primary party to the negotiation so as to jeopardize the negotiation.

FUNDACEN's practice has been to issue titles to the representatives of the households, which according to the previous Civil Code was the husband. At present, the Civil Code has been reformed and the gender bias has been removed.¹²¹³ Fundacion Arias found that only 1.2% of FUNDACEN beneficiaries were women.¹²¹⁴ Within the State's own

¹²¹² Interview with Manuel Luna, Hugo Morales Tello, and Victor Davila, Inspector General of Workers, Ministry of Labor, 15 April 1999.

¹²¹³ Decree No. 80-98.

¹²¹⁴ Fundacion Arias/Terra Viva, *El Acceso de la mujer a la tierra en Guatemala*, 186 (1993), cited in Worry, Paula, "Organizing for a Change: Guatemalan Refugee Women Assert their Right to be Co-owners of Land Allocated to Returnee Communities", paper prepared for the Kigali Inter-Regional

Land Fund programs, female solicitors for credit assistance are believed to total approximately 5%.¹²¹⁵ Men are traditionally regarded to be heads of families and committees, hence the Land Fund recognizes them as being in charge of solicitations. The Land Fund's new criteria give priority to single women and widows for the next ten years.¹²¹⁶ It is hoped that dissemination of these criteria will provoke greater participation among rural women. The Agreement on Socioeconomic Aspects and the Agrarian Situation (1996) calls for granting women access to equal opportunities to housing, access to credit, and adjudication of land.¹²¹⁷ The Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict (1994) declares that reintegration shall include the:

“Elimination of any form of de facto or de jure discrimination against women with regard to access to land, housing, credits and participation in development projects. The gender based approach shall be incorporated into the policies, programs and activities of the comprehensive development strategy.”¹²¹⁸

This is also reiterated in the Accord on the Identity and Rights of Indigenous People.¹²¹⁹ Unfortunately, upon the return of female displaced persons to the land of origin, the assertion of property rights was complicated due to the fact that they were not always considered to be the de jure or de facto owners of land. Prior to 1999, the Guatemalan legal framework had been formulated so as to vest power over control of the property in men.¹²²⁰ The Civil Code set forth that the husband was the legal representative of the couple, the woman assuming such control only in the event of incapacitation/abandonment by the husband

From a cultural perspective, within indigenous communities primary interest in conducting property affairs is often recognized as being vested in the men:

“The woman is considered to be the Queen and owner of the land and the man its administrator; they are opposite pairs night-day, aridity-humidity”¹²²¹

A study by the National Center of State Courts (CNCE) and USAID noted that “the participation of the indigenous woman in conflict resolution is null on account of being considered an object and not a subject of law.”¹²²² Similar practice may be found within

Consultation on Women's Land and Property Rights Conference under Situations of Conflict and Reconstruction, 16-19 February 1998, footnote 2 page 2 (Paper Revision 14 July 1998).

¹²¹⁵ Interview with Harvey Taylor, Land Fund, 11 May 1999.

¹²¹⁶ Decree No. 24-99, Article 21.

¹²¹⁷ I.B.13.a.

¹²¹⁸ III.8.

¹²¹⁹ IV.F.9.viii.

¹²²⁰ Fundacion Arias, EL ACCESO DE LA MUJER A LA TIERRA EN GUATEMALA, p. xii (Fundacion Arias 1993).

¹²²¹ Mayan priest, quoted in Fundacion Arias, Id. at 72.

¹²²² Centro Nacional de Cortes Estatales (CNCE)-USAID/Guatemala, Plan Anual Operativo Componente Fortalecimiento de los Canales No Formales de la Administracion de Justicia, Proyecto Apoyo a las Reformas del Sector Judicial 9 (USAID/G No. 520-0407) (Period: Sept. 1997-Sept. 1998) (November 1997). See also Mayen, Guisela, ASIES INVESTIGACION BASICA SOBRE DERECHO

rural ladino groups. One indigenous woman noted that “In the case of land, the women participates as a witness, but does not come up with the solution . . . her roles is primarily that of a mediator or a witness.”¹²²³ It should be noted however, that the OAS has prompted dissemination of the value of the language of “care” by supporting conciliation training workshops for women in the Peten. USAID has also established alternative dispute resolution training programs with special focus on women in Quetzaltenango and Zacapa. Women have often been characterized as being natural conciliators due to cooperative skills, non-adversarial tendencies, solidarity, creativity, and search for alternative solutions. Of course these attributes vary according to each individual’s background and interest. In spite of individual variability, it appears to be advisable to support ADR training for women within post-conflict development programs in order to stimulate a culture of dialogue and peace making within communities. CONTIERRA conciliators noted that the cases in which women engaged actively in discussion often were located in areas in which international organizations had provided gender-oriented programs. Hence, the involvement of the international community was slowly but surely helping to evolve cultural norms regarding gender roles in dialogue.

UNHCR helped to sponsor the reform of the INTA regulation in order to permit women to attain co-title holder status to lands attained by way of INTA. The men proposed the provision of land to their wives, incorrectly assuming that this would mean the issuance of twice as many parcels to the family. FUNDACEN rejected this, stating that such action would limit their ability to distribute land to the greatest number of peasants. The issue of co-titling was not brought up. Finally, on March 8, 1999, the National Women’s Forum delivered a series of proposals to the President which called for recognition of women’s socio-economic rights, including the right to land. It advocates the creation communal banks offering credit and an office to provide legal, commercial, and technical assistance to women. This is an area expected to undergo much evolution in the future given the urgent need for attention. The Land Fund, which has taken over INTA’s titling role, now issues titles in the names of both husbands and wives.

2.2.10. Corruption Involving the State

The corruption of State agencies serves to uphold the illicit takeovers of property by military, ranchers, narco-traffickers, illegal loggers, etc. Amnesty

CONSUECUDINARIO EN TRES COMUNIDADES MAYAHABLANTES DE GUATEMALA
INFORME PRELIMINAR 41 (ASIES Sept. 1992)- “las mujeres no participan en la toma de decisiones sobre conflictos”.

¹²²³ Interview with Rosalina Tuyuc, San Juan Comalapa, 16/08/98 cited in Comision Paritaria sobre Derechos Relativos a la Tierra de los Pueblos Indigenas, Determinacion de Politicas, Criterios y Procedimientos para la Resolucion de Conflictos Agrarios Relacionadaos con las Tierras de los Pueblos Indigenas (Nov. 1998).

International refers to the existence of a “Corporate Mafia State” in Guatemala, in which state actors, e.g. the police or military, assist non-state actors by failing to prosecute crimes, covering up crimes, and threatening witness, lawyers, and judges.¹²²⁴ The case below reveals the inappropriateness of use of conciliation in situations involving such actors.

2.2.10.1. Case Study: Corruption involving the Military- San Antonio Panaecte Chiol

A group of families in San Antonia began payments for parcels of land located in Finca San Francisco El Rio from INTA. They claimed to have receipts and a document for which they paid 3000 Quetzales to draw up but which they doubted had any legal value. INTA’s backlog and the theft of their lawyer’s car (allegedly containing the titles) had prevented some of them from receiving their titles. The lawyer was now deceased and the peasants claimed that they could not afford legal aid. Although they declared that they had lived on the land prior to his arrival, a military colonel, Gustavo Alonzo Rosales Garcia, appeared to claim title over the same land. He initiated sale of land to another group of peasants, leaving the community with only 34 manzanas. The community stated that it would accept the presence of the other peasants but that they were now seeking legal recognition of the property they had left. They paid the Colonel 192.000 Q for the 34 manzanas. CONTIERRA noted the land was national land, hence the Colonel should return their money. Although INTA originally claimed that the land belonged to the state, and measured it for division, its representatives later told the community that the Colonel had stolen the land. The latest INTA position was that the land it belonged to the Colonel. The role of INTA supporting illicit appropriation of land by military actors is well-known and forms a reason for the institution’s demise. CONDEG was approached for assistance, and it in turn solicited help from CONTIERRA. CONTIERRA was asked to investigate the INTA documentation and seek conciliation with the Colonel. Although this case signals possible fraud, coercion, corruption and theft, no mention of referral to the Attorney General’s Office for litigation was made. CONTIERRA staff told me that in their opinion, they did not

¹²²⁴ AMNESTY INTERNATIONAL, GUATEMALA: GUATEMALA’S LETHAL LEGACY: PAST IMPUNITY AND RENEWED HUMAN RIGHTS VIOLATIONS (28/2/2002)
<http://www.amnesty.org>.

have a duty to refer cases for prosecution if the wrongdoer is not the State. There was no analysis of the Colonel's linkage to the State nor was there discussion of INTA's potential malfeasance. The Colonel does not wish to speak with peasants, he wished only to deal with the government itself, so the peasants are left with no access to direct dialogue. CONTIERRA agreed to investigate the matter.

This case highlights the limitations of conciliation in contexts involving criminal acts. The ongoing land dispute is the direct repercussion of a failure to prosecute military actors who wrongfully appropriated property during and after the war via corruption of institutional representatives, coercion, or outright violence. Impunity prevails and, apart from refugees, there is no substantive redistribution or restitution of property to the victims of forced displacement/forced eviction. The extent of impunity in Guatemala is so vast that it inhibits an exploration of the corruption, fraud, and coercion that is behind much of the land titles in existence. The steadfast adherence to the recognition of title at face value creates an illusion which inhibits the ultimate resolution of the conflict as the true causes of the conflict are never addressed. Given the tendency in conciliation to refuse "to assign blame or establish guilt or innocence", party power imbalances are intensified by the non-exploration of past victimization.¹²²⁵ Juan Alfonso de Leon, former Executive Director of CONTIERRA, claimed that his exit was due to feeling "choked" by the PAN political party, as he was not allowed to look at the true causes of the land conflict, including corruption and theft.

CONTIERRA does not generally refer cases to the Prosecutor, thus it possibly may deprive itself of a means to prod title-holders to be more flexible in seeking solutions and granting concessions.¹²²⁶ One may consider that its "soft" approach may well be inappropriate in this "hard" arena. A special commission was established consisting of representatives of CONTIERRA, INTA (now defunct), the Prosecutor's Office, and the Human Rights Prosecutor in order to engage in conciliation of cases involving fraud. Conciliation would not appear to be the correct means of dispute resolution in cases involving illegal actions.

¹²²⁵ See G. PAVLICH, *JUSTICE FRAGMENTED: MEDIATING COMMUNITY DISPUTES UNDER POSTMODERN CONDITIONS* (Routledge 1996), cited in Mulcahy, *supra* note 79. See also Vidmar, *supra* note 79 at 124.

¹²²⁶ My thanks to Steve Hendrix for clarification of this point.

Ironically, when the informal dispute resolution mechanisms lose their legitimacy, a return to the traditional court system may be preferred.¹²²⁷ Courts are usually deemed to be the suitable mode of protecting those who are vulnerable due to lack of power. Nevertheless, this is not the case in Guatemala where the judicial system is accused of being biased, inaccessible, ineffective, and corrupt (see Part III). In particular, review of the amparos to the Constitutional Court revealed a lack of mandate over non-state actors (Expedientes 172-91, 414-92 & 151-91) and reluctance to address human rights violations committed by the judiciary (See e.g. Expediente 440-92 & 186-93) thereby limiting the right to remedy in practice. One may juxtapose these decisions to those of the Inter-American Court of Human Rights (Panigua Morales & Blake Case) in order to understand the existence of protection gap as pertaining these actors.

There has been some investigation of litigation possibilities against military officers who received land during the war, however this has yet to be unveiled. However, given the pervasive impunity, it might be difficult to find lawyers and judges willing to risk their lives in pursuit of justice. According to Amnesty International, since late 2000, eight lawyers, judges and witnesses have been killed and six have fled in exile.¹²²⁸ CONTIERRA staff admit that they would benefit from a direct linkage to the court in order to refer cases, but it seems that political pressure may have hindered this type of development.

Strengthening the judiciary, in part by upholding the independence of lawyers and judges is the key to providing a mechanism for resolving such cases. As long as national tribunals are unable to uphold justice, international processes must be made available to prosecute offenders and obtain remedies for victims. The importance of establishing the International Criminal Court is highlighted by this situation.

2.2.11. Conclusion on Party Participation

The establishment of CONTIERRA is an initiative by the State to extend public spaces of intervention that provide marginalized groups access to an official forum promoting fair dispute resolution. It may be considered a mechanism which is intended to realize the right to remedy among marginalized groups and individuals who traditionally have been excluded from participating in official dispute resolution mechanisms due to financial costs, distance, language problems, etc. Because of these factors, disputes between marginalized persons and landowners or between different marginalized groups have long been treated as private disputes that were resolved

¹²²⁷ Klaus Röhl, Procedural Justice: Introduction and Overview” in RÖHL & MANCHURA supra note 15 at 15.

¹²²⁸ AMNESTY INTERNATIONAL, supra note 126.

according to power imbalances with little intervention by the State as provider of objective dispute resolution. Given that CONTIERRA is free, the conciliation teams travel to the villages, and the parties may utilize their own languages in proceedings, some of the factors linked to exclusion are reduced. However, CONTIERRA's has limitations with respect to financial resources, access to vehicles, and human capital (specifically conciliators who speak indigenous languages); there is much room for improvement. These issues are discussed further in the sections on hierarchy of norms and output.

If we consider the situation of Guatemala, due to the heritage of extreme polarization rooted in the internal conflict, parties often have little understanding of each other's needs or motivations. Through dialogue they are able to gain a new perspective of conflict and its causes in order to work constructively towards a solution. They are given opportunities to tell their stories, be listened to, and have their views actually considered by other actors, including state authorities. Parties evinced self-respect, gained legal & civic knowledge via drafting of partial accords referring to human rights (see section on norms), changed their manner of communication with the counter party, and sought to cooperate to pursue solutions.

Thus, the principal benefit of the conciliation process is the opportunity to present their cases in their own voices, rather than relying on proxies, be heard and be treated with respect. Every story is particular to the individual/community involved and thus deserves specific recognition. The drafting of general reports addressing broader categories of victimization are important for the design of solution strategies for national social problems, however there remains a need for expression of individual/local community voices as a complementary aspect of reparation and reconciliation. If we consider the notion of a violation to one's "*proyecto de vida*" or "life's plan" recognized by the Inter-American Court of Human Rights in the Loayza Tamayo Case (see Part II) within the context of Guatemala, it is possible to draw parallels between the Court's identification of the victim's participation in the process and the Court's own formal recognition of such violation within the judgment as a forms of reparation with the attributes of participation in the CONTIERRA process. The fact that one is given the chance to tell his/her story and be heard by state officials is a form of recognition that has a value beyond material restitution of property. For many participants, there is a need to attain such recognition of past

victimization in order to move on and formulate new personal goals and relations with others.

On the other hand, societies lacking a “culture of peace”, such as Guatemala, risk sacrificing the attainment of a comprehensive discussion of future goals on account of an extreme focus on past wrongs and inequities. This intensifies polarization between parties and actually inhibits reconciliation, thereby explaining CONTIERRA’s preference not to dwell on the past. Hence there is a tension between the role of the past, present and future in party participation, and it is difficult to strike a balance that will address concerns pertaining to fairness, justice, reparation and reconciliation as they sometimes conflict with each other.

Just as important as the opportunity to be heard is CONTIERRA’s provision of an opportunity to listen to others. In contexts involving prolonged antagonism, parties often have a tendency to “close their ears” to counter arguments or concerns. CONTIERRA teaches them the importance of listening to others as a means of identifying common points in order to work towards a potential solution. In this respect, it also has a value beyond the case as parties may utilize this “social knowledge” in other settings. CONTIERRA’s efforts to prompt parties to demonstrate mutual respect places a duty upon participants to recognize each other’s basic human dignity, thus they are empowered to observe and practice human rights norms pertaining to equality.

CONTIERRA further stimulated empowerment via promotion of party participation in the determination of the topics to be addressed, their order, and design of strategies for resolution. Parties are not treated as passive victims; instead their capability of acting and thinking autonomously is promoted, albeit paired with a joint strategy to promote cooperation and respect for others.

The benefits of alternative dispute resolution is particularly relevant to internally displaced persons who have undergone dehumanizing experiences: separation from one’s community and environment, anonymity in shantytowns, loss of one’s original vision of the future, decreased self-esteem, an accrued sense of vulnerability, and loss of the means by which to provide nourishment to one’s family resulting in disease and death. For many, this process is exacerbated by the loss of land, it is the place of historic and spiritual links to ancestors, the provider of food and water, the wellspring of collective bonding, and the primary form of occupation in rural economies. The end to the forced migration experience is often considered to be

the return to the land that provides the source of life in its various manifestations. Through conciliation, parties are encouraged to imagine the life ahead and that of their children. Whereas as the experience of living in anonymity and uncertainty prevents the emergence of a conceptualization of future goals; conciliation stimulates such activity. In short, it encourages persons to take a psychological step forward that may be replicated in action. In this respect, we must keep in mind that reservations regarding future-oriented tactics may not be completely applicable with respect to IDPs, as they actually have a need to envision a future.

Yet, this sometimes backfires and prevents resolution of the dispute. Within a post-conflict setting; due to the psychology of victimization, parties fear that counter parties may engage in further aggression by denying past injustices.¹²²⁹ As long as past injustices are not addressed, it may be difficult to attain the level of inter-party trust necessary to engage in conflict resolution.

CONTIERRA's conciliation style follows the path of "neutral" dialogue facilitation with a smaller degree of expressive evaluation of the merits and reasonableness of party positions. The proceedings permit greater party participation in the form of uninterrupted narrative opportunities, however parties are limited by CONTIERRA's passivity when faced with background injustice, coercion, or imbalance of power, knowledge, education, and socio-economic resources. Their general pursuit of a facilitative strategy serves parties to engage in full emotional release in their presentations, but is not always appropriate when there are imbalances between parties regarding knowledge of issues, understanding of problems, or skill at making proposals or considering their fairness etc. Within this context, it appears impossible to uphold a neutrality principle without resulting in injustice. Moore claims that "mediators are the defenders of a fair process, not fixed settlement."¹²³⁰ CONTIERRA is not always able to either guarantee a fair process or a settlement; this results in stagnation of cases.

¹²²⁹ See Ho-Won Jeong, "Research on Conflict Resolution", in HO-WON JEONG, *supra* note 13 at 24.

¹²³⁰ CHRISTOPHER MOORE, *supra* note 85 at 76. He identifies the following situations in which the mediator has an ethical responsibility to raise critical questions about substantive options under consideration by the parties: 1) Cases in which the agreement appears to be extremely inequitable to one or more of the parties, 2) does not look as if it will hold over time, or seems likely to result in renewed conflict at a later date, 3) or where the terms of settlement are so loose (or confining) that implementation is not feasible, 4) where cases involve violence or potential violence to one or more parties, either primary or secondary.

Hence, it seemed that the CONTIERRA staff espoused passivity disguised as “neutrality”. Whether their tempered approach is a result of misapplied lack of training in conciliation techniques or rather due to pressure on the part of the higher authorities remains unclear. It may well be a combination of all factors. It is of concern that CONTIERRA failed to utilize its own local knowledge regarding dispute resolution and instead prioritised an imported strategy that could not be appropriately applied in the local contexts. CONTIERRA staff should consider adopting different strategies based on power, class, and educational differences between the parties. Lederach asserts that “It is imperative to assure that the process is adequate and just . . . Sometimes the conciliator has to assert the rights of a group with less power which may signify a position not totally neutral.”¹²³¹ Without such intervention, the final accord may not be just or equitable.¹²³² CONTIERRA’s general reference to good faith participation on the part of the parties may justify such a policy.

In the sessions I observed, the party with the formal title to the land was adamant in resisting concessions. The CONTIERRA staff, claiming neutrality, seemed reluctant to prod the party to concede. Nonetheless, they did point out that the land could not be sold as long as it remained usurped. In spite of their statements to the contrary, they appeared more assertive in prodding the weaker party to concede. The conciliators did not consistently point out the defenses that the weaker party had. CONTIERRA made good use of breaks to confer with each party privately in order to advise on improvement of negotiating style, clarify misunderstandings, or simply “lower the temperature” of a heated discussion which became too antagonistic. CONTIERRA’s conciliators did identify some issues linked to injustice and power imbalances, but there appeared to be little action taken with respect to remedying the situation. In this manner, CONTIERRA’s “neutrality” strategy achieves precisely the opposite effect.

On the other hand, increased intervention by CONTIERRA staff in the hopes of achieving a quick resolution would also risk being labeled manipulation of the parties and may lead to dissatisfaction with “coerced accords”. My critique may well be a result of my Western orientation, as CONTIERRA claims that the slow, neutral

¹²³¹ John Paul Lederach/ OAS/PROPAZ, “Culture of Dialogue”, (Year omitted.)

¹²³² Laue, J. and Cormick, G. “The Ethics of Intervention in Community Disputes.” In G. Bermont, *The Ethics of Social Intervention*, (Wiley 1978), cited in Christopher Moore, *supra* note 85, at 73. See also Albie M. Davies & Richard A. Salem, *supra* note 8617-26 (1984) reprinted in CARRIE MENKEL-MEADOW, *MEDIATION: THEORY, POLICY & PRACTICE* (Ashgate Dartmouth 2001) calling for mediators to correct power imbalances by being more active

process is necessary due to the delicacy of the cultural context. Given that the society has a strong degree of distrust of the State after the war (see Part III, Confidence in State Institutions), it takes time for CONTIERRA to gain the confidence of parties. This leaves CONTIERRA especially vulnerable to accusations of deviation from impartiality (see for example the Tampur case) and in part explains its reluctance to expand in the direction of greater intervention and its steadfast adherence to the neutrality principle.

In these cases, there was a substantial difference in education, social class, and resources between parties. To apply the same neutral role in both inter-class and intra-class conflicts may promote procedural and substantive injustice and prove ineffective when applied within societies in which there is great inequality among citizens. Developing countries which have yet to erase the effects of racist policies introduced during the colonial period should not promote mechanisms which require a base level of equality for proper functioning.

One may suggest that perhaps a more progressive view towards activism by conciliators would promote greater effectiveness and fairness in achieving accords. Considering CONTIERRA's broad subject matter expertise, the conciliators have the capability to solid evaluation of issues, proposals, and settlement strategies.

Studies have shown that in high-conflict cases, parties prefer to have process control while tendering decision control to a neutral third party.¹²³³ The notion is that in high conflict situations, an authoritative figure is needed to resolve the dispute. Process control is desired in order to assure the opportunity to fully present one's case. However, Vidmar cites the example of a case in which one party based his claim in equity and the other in law. The former preferred limited third party control, whereas the latter selected greater third party control. This would correlate with the situation in Guatemala, where the parties holding formal title tend to seek the courts, whereas the non-titled peasants seek negotiation. This assures them that they have been allowed the possibility to present "their side", thus procedures are considered to be fair. In traditional litigation, both decision and process control are controlled by the court in accordance with the legal rules; thus parties often feel that they were not able to present their views. Hence, the trial is often perceived as unfair, irrespective

¹²³³ Vidmar, *supra* note 79 at 125.

of the decision. Return to a tribunal situation may provoke reaction by the populace based on feelings of procedural exclusion.

A considerable point of concern is the fact that the agency is controlled by the Executive, thus it may be argued that the conciliators have been pressured to uphold the status quo and not engage in social engineering. Because there is a volatile political situation, the conciliators are afraid of a closure of the institution, thus they seek to avoid angering the Executive Branch. Thus, even if CONTIERRA were to engage in greater evaluation strategies, unless the international donors and observers provide sufficient counter-pressure to the Executive branch's status-quo agenda, it would not result in much change. The conciliators have called for CONTIERRA to receive a mandate via legislation; in that manner it would achieve greater stability and independence. The very fact that CONTIERRA continues to exist is due to its espousal of the neutrality principle. Were elites to perceive that CONTIERRA was promoting social justice concerns, the institution would be shut down immediately. The fact that CONTIERRA has had some success at restoring communal harmony and resolving disputes reveals that perhaps it is better to have CONTIERRA around, in spite of its imperfections, than not at all. In spite of the fact that there is also a need for independent, non-state ADR mechanisms, post-conflict societies need the State to engage in dispute resolution. When it is perceived to be capable of reestablishing peace and maintaining social order it gains strength in the eyes of the society. ADR mechanisms provide a forum for closer contact and collaboration between the society and the state in pursuit of implementing local "peace accords" community by community.

Within the context of imbalances between parties in terms of knowledge, power, and resources, as well as general background inequity CONTIERRA's neutrality strategy seems inappropriate and counterproductive to the principles of fairness and justice. The emphasis on leaving past wrongs in the past renders it impossible to claim rights of restitution. As noted by Trina Grillo-

"Rights assertion cannot take place in a context in which discussion of fault and the past are not permitted, for recognition and assertion of rights are ordinarily based on some perceived past grievance, as well as on some notion of right and wrong . . . If mediation

creates a sense of disentitlement, it will interfere with the perception and redress of injuries in cases where they have in fact occurred."¹²³⁴

Hence, in order to guarantee a just resolution of land disputes, it is essential for CONTIERRA to recognize the restitution rights of those who have been dispossessed of their property. This is further discussed in the sections on norms and output. Donors and international observers should consider counter-acting elite pressures by conditioning funding, technical support, and positive review on the adoption of initiatives to address background and procedural inequities within the CONTIERRA process.

Nevertheless, we must take into consideration the price of truth. In situations in which exposure of the truth will result in further violence, repression, and polarization- such pursuit may endanger peace-building/social capital initiatives. The decision not to pursue full exposure of past harm may in part be a preventive strategy intended to avoid renewed acts of hostility and vengeance. Although this perspective is valid, I believe that the failure to provide restitution to victims of human rights violations amounts to impunity that in itself is a threat to peace and stability.

In addition to un-addressed background inequity and non-consideration of substantive factors which affect the law, CONTIERRA's fairness is called into question due to its bias in favor of formal title. The following section discusses how the hierarchy of norms and values within CONTIERRA inhibits the achievement of social justice.

2.3. Hierarchy of Norms & Values

"... (M)ediation is commonly directed, not toward achieving conformity to norms, but toward creation of the relevant norms themselves."

*Lon L. Fuller*¹²³⁵

The post-conflict period within a State is often an epoch of creative initiatives within the transnational legal sphere. Input is derived from the following actors: 1) International actors and NGOs promoting implementation of international human rights norms, 2) Formerly marginalized groups seeking equality of citizens, protection

¹²³⁴ Trina Grillo, *supra* note 17 at 1567.

¹²³⁵ Lon L. Fuller, "Mediation-Its Forms and Functions", in 44 *Southern California Law Review* 305-39, 308 (1971), reprinted in *CARRIE MENKEL-MEADOW*, *supra* note 14.

rather than non-responsiveness or repression by the State, and recognition of their customary norms, and 3) Reform-minded national practitioners wishing to transform arcane mechanisms into effective and modern processes. Concurrently, resistance is presented by elites in favor of maintaining the system of status quo that sustains their wealth.

In multicultural societies undergoing renewal of state structures, there is often a call for a widened definition of what are the legitimate substantive legal norms. The evolution of the legal system in Guatemala reveals pluralistic manifestations that result in asymmetries. This includes a formalistic civil code system espoused by the elites, customary indigenous norms utilized by the majority, as well as human rights norms supported by an international community which is limited by its own inherent contradictions and the hybrid political/legal character of enforcement mechanisms (donors, NGOs, international organizations, etc.) Elites adamantly cite the Constitution and civil code's protection of formal property rights, while indigenous peasants refer to constitutional norms, human rights, and customary norms in defense of their historic claims to land. International entities are important to counter balance elite power, yet given their own lack of resources, division of voices, and inhibitions due to charges of intervention, international pressure is not always strong enough to promote substantive change. Demands for recognition of customary and international rights challenge the stronghold of the formal system as the approach towards modernization both pluralistic and neo-traditional (indigenous norms are interpreted to be modern). Contrary pressures placed by national elites seeking to preserve the economic, political and legal status quo may inhibit the success of reforms by rendering them "cosmetic" or subjecting them to lethargic or slipshod implementation (given that elites hold the greatest degree of economic and political power.) This results in a temporary stabilization of the systems by diffusing pressure without altering the structure.

Thus, the asymmetrical developments within the legal system may be considered to harbour a two-fold function: 1) An input source of specific conflicting claims to land, e.g. indigenous groups claiming customary rights (in turn legitimised by international law and national law, e.g. ILO Convention No. 169 and the Constitution, versus landowners with formal title, and 2) The general environmental context in which the procedural mechanisms for dispute resolution operate. While the current inequitable land distribution is upheld by a penal code which criminalizes

occupation of land by those lacking formal title, the growing body of soft law principles within human rights calling for provision of property to victims of forced displacement indicates a movement towards legitimising social justice claims. However, the fact that these principles are not considered legally binding (particularly as pertaining property restitution) renders actual implementation difficult, expectations based on the norms are thus described as political expectations, rather than legal.

The creation of hybrids (or structural couplings) such as ADR and community justice centers which refer to indigenous norms, and use of fast-track constitutional procedures (amparo) are intended to provide improved procedures for solution to pluralistic demands. In terms of sources of law, ADR mechanisms may refer only to the formal laws of the nation, or instead engage in legal pluralism by referring to international norms (such as human rights), customary law, or equity standards based on general concepts of fairness and justice as opposed to written law. The latter two options prove appealing to persons who deem the formal law to be an instrument of exclusion and seek emancipation via trans-national approaches to dispute resolution. I propose that ADR may be viewed as providing an opportunity to expand the perception of what are legitimate legal norms and thereby empower marginalized groups whose claims are based on other sub-systems of law and equity.

2.3.1. Language & Evidence

In the Western part of Guatemala, many indigenous people speak Spanish. However other regions have a variety of 23 languages which require translation. The lack of translation capacity is cited as one of the key problems affecting access to justice in Guatemala. As of 1999, CONTIERRA had only three staff members who spoke indigenous languages and translation is made available to the parties when needed. The mobile teams also utilized local people who speak Quiche and Mam, in some cases the parties themselves translate, which slows the proceeding. The lack of sufficient staff fluent in indigenous languages limits CONTIERRA's effectiveness. The conciliators admitted that it would be advisable for CONTIERRA to have more indigenous staff in order to more adequately represent the nation's viewpoints and address cases, particularly in the Western part of Guatemala. There have been times

when the indigenous staff were unable to attend a meeting, leaving the *ladino* staff dependent on the parties themselves to translate the dialogue. In effect, in these cases it was impossible for CONTIERRA to correct misunderstandings or control the discussion because they don't understand what is said. Carlos Sosa, a *ladino* conciliator, described it as "A fight against the wind and the waves." On the other hand, parties are able to present their views in their own language thus there is an empowering function. The fact that the teams generally only had one member who is fluent in the indigenous language actually may have given a degree of freedom to that conciliator to adapt to local norms without criticism from non-indigenous colleagues.

Unlike the formal court system, CONTIERRA does not have intricate evidence rules. There is a good faith requirement for participation in conciliation. Parties are requested to sincerely express their will to resolve the conflict by way of conciliation. In addition, party representatives must provide all necessary records and documentation related to the conflicts and attain backing of the community in conflict in order to guarantee legitimacy. Evidence problems arise in the form of double titles, titles attained illegally, and the lack of recognition of historic title. Following the axiom "The first to register is the first to own", preference is given to titles based on registry over alternative forms of ownership or use. Given the aforementioned problems with the registry it is still difficult to assess the validity of the various documents presented by parties.¹²³⁶ Parties often approach CONTIERRA requesting assistance for verification of the validity of their documents. The CONTIERRA staff assesses the documents and conducts separate studies in order to better understand the situation from a legal, socio-economic, and anthropological perspective. Priority is given to written evidence, such as registry documents, however there are often contradictory documents, hence CONTIERRA must determine which document has greater legitimacy. In practice, many peasants and indigenous parties offer oral evidence, recounting the history of the property as they remember or as told to them by their forefathers.

CONTIERRA requires parties to "sincerely express their interest and will to resolve the conflict by way of conciliation".¹²³⁷ The party representatives are expected to be backed by the population in conflict in order to guarantee legitimacy

¹²³⁶ See Jennifer Bauduy, "CONTIERRA's Docket of Land Disputes Gets Longer" in THE SIGLO NEWS March 18, 1998 stating that "Currently, noting that these books weigh between 40 to 50 pounds."

¹²³⁷ CONTIERRA, Estructura Organizacional, p.4 (October 1997).

within the negotiation process (this is discussed further in 2.5.1.1.). In practice, this condition is not always met. Some participants have ulterior motives and hidden agendas which complicate the dialogue, thus CONTIERRA is careful to consult the community at large and permit their participation in the dialogue. CONTIERRA should enforce this provision more effectively, by withdrawing from cases which do not abide by it, in order to attain greater cooperation.

2.3.1.1. Case Study: Indigenous Claim to Land: Finca Santa Victoria



Council of Elders explaining the historical background of the conflict
Photo by Cecilia Bailliet

In a meeting in regarding the Finca Santa Victoria, La Vega, in Concepcion, department of Solola, the owners of the finca requested the Mayor of Concepcion for permission to measure the land. Although the municipality had title to land extending past the boundaries of the finca (dating back to 1909), the Council of Elders stated

that their ancestors sold part of the land in exchange for cusha (alcohol). According to registry information, the land belongs to a private San Sebastian Co., but the municipality claims that the documents have forged signatures. After intervention by CONTIERRA, with observation by CONIC and MINGUGUA, a partial accord was achieved in which the San Sebastian Co. agreed to respect the people of the municipality's right to access to water from the river Patzusun within the finca. Unfortunately, the municipality became angered because the company engages in logging; in spite of the accord it cut down trees on the disputed land and denied them access to water. This created problems for the municipality because it had rented land to a group of peasants to sow crops and they were unable to do so.

The Mayor invoked the Peace Accords and ILO Convention No. 169 to assert the legitimacy of their communal claim to land. They were willing to accept a diminution of the municipality in half, from 6 caballerias to 3 caballerias. The municipality has been assisted by the Defensoria Maya and CONIC, while the Finca owners sent a lawyer to all meetings. The Finca owner has offered to sell land back to the Municipality by way of financing by the Land Fund. The Municipality does not understand why it had to purchase its own patrimony. In addition a border dispute case erupted between one of the indigenous families and the indigenous municipality. In essence, the Juracan family appeared to have purchased land from the community which may form a part of the finca, but failed to register it. It also usurped additional land pertaining to the community at large. Growing demographic pressures within the community and the family prompted a dispute, each side fearing that their youth would have to emigrate to the city in search of work should the land not be granted to them.

At one meeting, CONTIERRA was unable to send a conciliator fluent in the local dialect, hence the conciliator had to render control of the dialogue to the local mayor. During the conciliation session the Council of Elders of the community began to quarrel with the eldest member of the family in dispute, each side presenting its version of the historical placement of boundary markers, possession, and land use. This would correlate with the community norms regarding settlement of a conflict, as well as CONTIERRA's methodology. CONTIERRA tried to congratulate the parties for showing "*respeto mutuo*" (mutual respect) to each other, and surprisingly this Spanish term reappeared consistently amidst the dialogue conducted by the parties in their native language.

What shocked me was that there was absolutely no discussion of the central issue at hand which is the de facto possession of the family and its potential prescription rights. CONTIERRA wished to measure the land in order to verify the holdings and the actual title, but the family was adamantly opposed to this measure, lest their usurpation be proved. CONTIERRA sought to discuss the matter with the family alone in order to see if any concessions could be attained. Much to the surprise of CONTIERRA and myself, the mayor of the community locked us in the room and then left during the discussion. CONTIERRA interpreted this to be an act of bad faith which was probably intended to pressure the family. This act appeared to be an attempt to remind the family that their internal loyalty and attachment should not override the dispute resolution norms of the community at large; the family's resistance to evolving the amicable dialogue was seen as disrupting the mayor's ability to retain internal order precisely at a time when the community's authority was challenged by outsiders.¹²³⁸

Use of pressure tactics affect CONTIERRA's spirit as well. Although the staff is often well-received they have at times been subjected to threat, detention, and verbal attack by antagonistic parties. For CONTIERRA, "lowering the temperature" of parties in disputes is a formidable task which can prove very frustrating.

This case not only reveals the dilemmas of language, but also that of norms. Although the Mayor invoked both the Peace Accords and ILO Convention No. 169, the records did not contain any assessment of the validity of the indigenous claim to land over that of the formal registry. The statement by the Council of Elders regarding the sale of the land for alcohol only served to confirm the preference for reference to the formal registry, no assessment was made of the elements of coercion in such handling. In the section below, discussion of the impact of, or lack thereof, indigenous norms on the conciliation process.

¹²³⁸ This may be identified as an attempt to quash "amoral familism" in which familial attachments are so strong that threat members are discouraged from pursuing development, migration, or peaceful dispute resolution with outsiders. See Michael Woolcock, "Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework", in 27 THEORY AND SOCIETY 151, 171 (1998), citing EDWARD BANFIELD, THE MORAL BASIS OF A BACKWARD SOCIETY (Free Press 1958).



CONTIERRA conciliator surrounded by the community in front of the Municipal Building where we were locked up.
Photo by Cecilia Bailliet



CONTIERRA with the Juracan family accused of usurpation
Photo by Cecilia Bailliet

2.3.2. The Impact of Indigenous Law on CONTIERRA: The Need of Identity

CONTIERRA's structural framework may be considered a hybrid as it is composed of political instruments such as the Peace Accords, including the Agreement on Socioeconomic Aspects and the Agrarian Situation, the Agreement on Resettlement of the Uprooted Population Due to Armed Conflict, and the Agreement on the Identity and Rights of Indian Communities which themselves refer to human rights. The Accords refer to the Convention on All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention No. 169. Thus, there is a significant degree of cross-referencing among the various instruments pertinent to CONTIERRA's mandate that provide the possibility for application of legal pluralism. Its mandate is also derived from Accord 452-97 of June 4 1997 (this does not carry the weight of a law passed by Congress, hence this renders the institution vulnerable to dissolution by the Executive at will), and, most interesting, Mayan Indigenous Law.¹²³⁹ This is intriguing because it suggests that CONTIERRA will serve to recognize the identity of indigenous people by incorporating their customary norms. In practice, indigenous law on the substantive level, including historic titles, is not considered to be relevant to land disputes according to oral statements by CONTIERRA staff.¹²⁴⁰ One may consider whether CONTIERRA may be engaging in symbolic appropriation of superficial value.¹²⁴¹ CONTIERRA's lawyers referred to the formal law, in part because that is what they were trained to analyze within the law schools, although some conciliators attended classes on indigenous law at the University of San Carlos and/or were themselves of indigenous ethnicity. In the words of one conciliator- "We are a national institution, so we uphold the national law."

We may consider the case of Chemal-Chancol in Huehuetenango, which dates back to 1834 when the government issued 360 caballerias of land to Joaquin Mont, ignoring the historic possession rights of the Man community in Chemal.¹²⁴² The

¹²³⁹ CONTIERRA: Estructura Organizacional, p.9 (CONTIERRA October 1997).

¹²⁴⁰ Interview with Juan Alfonso de Leon, Adjunct Executive Director of CONTIERRA, 5 February, 1998.

¹²⁴¹ See Sally Engle Merry, "Legal Pluralism" in 22 (5) LAW & SOCIETY REVIEW, 869, 881 (1988).

¹²⁴² The summary of this case was obtained from UNDP Guatemala, <http://www.onu.org.gt/pnud>.

community never registered their land and were accused of infringing upon the ranching interests of the ladino community residing in Chancol. The Chemal community associated itself with the revolutionary movement while the Chancol community formed part of the PACs. Violent confrontations resulted in dozens of injuries and deaths. CONTIERRA completed a registry analysis and determined that since Chancol had formal registration, their rights superseded the historic possession rights of Chemal. Chancol threatened to forcibly evict the Chemal community which responded that they had already paid for the land with their blood and the land was their mother. CONTIERRA mediated the conflict (assisted by USAID & MINUGUA) for four years, in the end attaining an accord in which Chemal agreed to buy 20 caballerias of land from Chancol via credits provided by the Land Fund. Thus, this case is considered to be a success because peace was restored, but the issue of negation of validity of historic possession was not sufficiently addressed in spite of the intervention of the international agencies. As long as historic possession rights are considered invalid, indigenous people will continue to be forced to pay for their patrimony. Similar to dispersed IDPs, they fund their own restitution.

One problem is the oral nature of indigenous law, tenets are not written down in order as a matter of tradition and in order to preserve its flexible nature, evolving to meet the needs of each case in a just manner.¹²⁴³ It is considered that to write them down would be alter the system, thus estranging it from the cultural norms in which they have their roots. Thus, it is difficult to elaborate “indigenous legal standards” without being accused of trampling upon the legitimacy of the system itself.

The variety of indigenous groups in Guatemala, each with its own norms also complicates reference to this system. The devastating impact of the war and ensuing forced migration resulted in a loss of the human “databanks” of indigenous law, much of this history and knowledge is irretrievable. Many returnee communities are composed of persons from diverse ethnic backgrounds and language, hence there has been a loss of homogeneity. Identification of common norms and traditions is not always possible when people have been separated from each other and relocated in new territories. To some extent there is a lack of clarity and cohesiveness in the understanding and application of indigenous law within Guatemala at present. One positive note, is that this gap reveals the possibility of promoting acceptance of norms

¹²⁴³ Interview with Armstrong Wiggins, Indigenous Legal Resource Center, Washington D.C., 21 January 1998 and interview with Juan Leon, Defensoria Maya, Guatemala, 10 January 1998.

based on human rights standards, however it is sad that this is in part linked to the devastation of indigenous communities and their traditions.¹²⁴⁴

However the procedural aspect of indigenous conflict resolution mechanisms and its basic premise of equality and mutual respect between parties are considered to be more easily adaptable to the CONTIERRA system. In fact, the principle of mutual respect, which is the central focus of indigenous dispute resolution, has been adopted by CONTIERRA as the foundation of all proceedings.

Some of the conciliators attended a course on indigenous customary law at the law school of the University of San Carlos. One of CONTIERRA's conciliators, Marco Antonio Curricuc, is a Mayan priest who often notes that he views conciliation with a "Mayan perspective".¹²⁴⁵ He claims to utilize CONTIERRA's procedures when conducting the conciliation and states that he has never cited indigenous law to be a possible source of support for a land claim. Given that the conciliation is conducted in the indigenous language, it was impossible for me or any of the other CONTIERRA conciliators to assess to what degree the conciliation followed "CONTIERRA" methodology, and to what extent it diverted to incorporate local norms. It is clear that the staff would be reluctant to admit any serious deviation for fear of losing their jobs. Cucurric stated that he did attempt to amalgamate indigenous and legal perspectives from a procedural perspective. As noted by CONTIERRA staff, if a dispute occurs between indigenous people, their common conceptual framework prompts conciliation. If the dispute is held between a *ladino* land owner and an indigenous group it is difficult to attain a shared perspective of the situation, the *ladinos* tend to exhibit more scepticism to conciliatory processes.¹²⁴⁶ One of the CONTIERRA staff members admitted that the lack of recognition of indigenous law is problematic. However, there is potential for bridges between different cultural backgrounds; given that formal title owners tend to wish to avoid violence and the fact that most peasants would prefer to die than leave their land, the

¹²⁴⁴ Although some argue that an evolution towards a multicultural, diverse nation is positive, particularly when returnees come back with new knowledge about human rights, in particular women's rights, imparted to them by international organizations, others argue that this knowledge may not actually result in substantive changes upon return due to the lack of evolution of division of labour in practice. See Kristi Anne Stølen, *Creating a Better Life: Participatory Communitarian Development Among Guatemalan Returnees* (Centre for Development and the Environment University of Oslo 2000).

¹²⁴⁵ Various interviews with Marco Antonio Curricuc, CONTIERRA, February 1998.

¹²⁴⁶ See Edgar Esquit & Ivan Garcia, *EL DERECHO CONSUETUDINARIO, LA REFORMA JUDICIAL Y LA IMPLEMENTACION DE LOS ACUERDOS DE PAZ 129* (FLACSO 1998).

road to conciliation is presented as a preferable alternative. One of the only three indigenous members of CONTIERRA stated that the indigenous personnel should be expanded in order to appropriately assess land conflicts in Western Guatemala. The Bi-Partisan Commission on Indigenous Land Rights reiterated this notion.¹²⁴⁷

CONTIERRA's Board of Directors is not considered to be especially pro-indigenous interests. One indigenous activist, Rosario Pu, formed part of the Board but eventually withdrew. Until greater indigenous representation is achieved, the Board is unlikely to fully pursue the concerns of the indigenous people. Although CONTIERRA's mandate recognizes Mayan Law as a source of law, in practice it only grants it procedural recognition at most, rendering its substantive value null.

The Bipartisan Commission on Indigenous Land Rights concluded that CONTIERRA does not utilize indigenous law in its practice, noting that although indigenous leaders participated in the conciliation, the resolution of the conflict was not conducted in accordance with the traditions of the communities.¹²⁴⁸ However, it was admitted that the majority of the cases referred to CONTIERRA were exactly those which the communities had proved unable to resolve themselves according to their norms. CONTIERRA's cases more often involve indigenous communities vs. medium or large landowners, rather than intra-community disputes; hence it has not established a special methodology for the latter type case. The Commission called for a greater use of sociological, historical, economic, and anthropological tools and the elaboration of a manual on indigenous law in reference to land conflicts. As a final point, it expressed concern for the fact that indigenous parties were often the weaker parties.¹²⁴⁹

Support for CONTIERRA diminished with the perception that its practice sought to uphold formal legal norms regarding property rights. Comparison may be made with the Office for Conciliation and Arbitration of Land Conflicts in Mexico which faces similar issues in its practice:

¹²⁴⁷ Comisión Paritaria sobre Derechos Relativos a la Tierra de los Pueblos Indígenas, Determinación de Políticas, Criterios y Procedimientos para la Resolución de Conflictos Agrarios Relacionados con las Tierras de los Pueblos Indígenas (November 1998).

¹²⁴⁸ *Id.*; see also Interview with Eliseo Pérez Mejía, COPMAGUA, 14 May 1999 calling for greater use of indigenous law within CONTIERRA proceedings. He also criticized CONTIERRA's lack of true legal aid.

¹²⁴⁹ In addition, further complaints were issued regarding the measurement of borders which delayed the conciliation sessions, the transference of cases to the Land Fund for purchase of land held in possession (claiming historic title), and the referral of labor disputes to the Ministry of Labor (landowner sells land, forcibly evicts workers who request indemnification in the form of land title).

2.3.2.1. Office for Conciliation and Arbitration of Land Conflicts in Mexico

In 1992, the Mexican Constitution was reformed to recognize the territorial integrity of indigenous people and establish an autonomous agrarian juridical system composed of:

- 1) *Agrarian tribunals, including first instance tribunals (Tribunales Unitarios Agrarios) and one second instance tribunal (Tribunal Superior Agrario)*
- 2) *Conciliation, arbitration, expert opinion services, and*
- 3) *Ombudsman facilities to resolve land conflicts.*

Parties may voluntarily choose to pursue conciliation, arbitration, or directly submit their cases to the agrarian tribunals. The legal services are free and parties may present oral evidence. In the event that a non-judicial authority violated individual rights of a person calling into question the constitutionality of his act, the person file an indirect amparo claim before the district courts.

Although the agrarian tribunals are autonomous, parties may seek review of decisions by filing a direct amparo claim in the circuit courts and review of resolutions (non-definitive sentences) by district courts. The Office notes that this measure promotes delays in the achievement of final resolution of land conflicts.¹²⁵⁰ Legal representation is provided for parties before the agrarian tribunals and the courts in the event of amparo claims.

In 1998, the Office provided legal representation to parties filing claims in the agrarian tribunals in 19,198 cases, of which 9,889 received a final decision. With respect to direct amparo claims, 2,088 received legal representation, resulting in 874 decisions. Indirect amparo claims received legal representation in 1,466 cases, of which 704 were concluded. The office states that the ideal time period for resolution of a land conflict by the agrarian tribunals is 158 days. In the event of an action for revision of the decision within the agrarian jurisdiction, the time period extends to 186 days.

¹²⁵⁰ Letter from Lic. Armando Herrera Cuervo, Director General of the Subprocuraduria General, Direccion General de Conciliacion, Arbitraje y Servicios Periciales, 24 February 1999, on file with the author.

Conciliation does not have a set time period for resolution. The presentation of a request for conciliation by a party prompts review by the office, and if the case is considered to be capable of conciliation, an invitation is extended to the other party. In general, meetings are conducted within 15 days resulting either in the establishment of an accord or the decision to resolve the dispute by other means. However, there are some cases, especially involving indigenous claims, in which the time period for conciliation is difficult to measure, due to the complexity of the problems.¹²⁵¹ This echoes the commentary offered by CONTIERRA staff on the same issue.

Conciliators are not required to be lawyers, hence guidance may be provided by persons espousing different perspectives and viewpoints on land rights. In 1998, the office conducted 26,458 conciliations of which 18,566 reached a final accord. This is a large caseload with a high success rate, compared to CONTIERRA and the Land Claims Commission of South Africa.

Arbitration is not the preferred means of dispute resolution. The Office notes that the agrarian tribunals are considered to be effective, thus rendering the arbitration tribunals redundant. In addition, the arbitration award must be confirmed by the agrarian tribunals in order to achieve the same legitimacy as a court decision. The procedure is more formal than conciliation, the provision of proof is expected within 15 days after filing a claim, and the issuance of an award should be rendered within 15 days after the audience in which proof was presented. Arbitrators are required to have law degrees, hence the perspective of the decision makers is also more formalized. In 1998, only 15 arbitration decisions were handed down.

Of particular interest is that the Mexican Constitution, article 4 requires that in all agrarian law suits and procedures to which indigenous people are party, their legal customs should be taken into account. Such condition would be beneficial for adaptation to Guatemalan legislation. Formally, CONTIERRA's mandate implies a similar requirement, in practice it pays no heed to indigenous law.

Although the Mexican system appears to be more advanced in terms of legislation and in effectiveness of procedures than the Guatemalan model, this is also tempered by the institutions own admission that conciliation with indigenous peoples are complex, lengthy processes which may indicate a disharmony between

¹²⁵¹ Id.

implementation of the norms on paper as opposed to in practice. The continuous events in Chiapas provide sad testimony to the difficulty of attaining peaceful dialogue in the arena of land conflicts.¹²⁵² The Inter-American Commission on Human Rights conducted a Report on the Situation of Human Rights in Mexico which claimed that paramilitary groups were conducting murders on behalf of landowners in Chiapas and with the approval of the local authorities.¹²⁵³ The Commission called upon the State to provide due reparation to indigenous victims of State agents or actors condoned by the state and to disband the private armed groups. It reported a massacre of a group of internally displaced persons in 1997 and called for the State to “protect and adequately provide for indigenous populations which have been internally displaced by conflict.”¹²⁵⁴ In addition, in the state of Oaxaca alone there were over 300 unresolved land disputes linked to violence.¹²⁵⁵ Of particular interest is the Commission’s note that many believe that the government is utilizing “land disputes as a means of social control, to keep dissidents out of power.” This is relevant to the situation in Guatemala as well, intra-and inter-communal divisions tend to occupy the attentions of the rural inhabitants thus inhibiting their ability to concentrate on regional and national issues.

¹²⁵² For literature on Chiapas see Womack, John, *Rebellion in Chiapas: An Historical Reader*, (The New Press 1999); Collier, George & Lowrey Quaratiello, Elizabeth, *Basta! Land and the Zapatista Rebellion in Chiapas* (Food First Books 1994); Harvey, Neil, *The Chiapas Rebellion*, (Duke University Press 1998); Ravel, Philip, *The Chiapas Rebellion*, (Mexican Resource Center 1995); and Michael Renner, “Chiapas: An Uprising Born of Despair”, in *World Watch*, Vol. 10 No.1 (January February 1997).

¹²⁵³ Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Mexico*, 37 (OEA/Ser.L/V/II.100) 24 September 1998.

¹²⁵⁴ *Id.* at 165, para. 747.

¹²⁵⁵ *Id.* At 46

2.3.3. The Impact of Human Rights on CONTIERRA

It has been argued that actual implementation of international law within the Guatemalan national territory has yet to be seen.¹²⁵⁶ The Guatemalan State regards the right to property only as a civil right as opposed to a socio-economic right or hybrid/cross-over right. Land claims in Guatemala are intrinsically linked to demands for recognition as human beings entitled to basic dignity which requires provision of essential human needs, such as food and shelter.¹²⁵⁷ The successive regimes have consistently failed to implement a progressive vision with respect to raising the

¹²⁵⁶ Interview with Sotero Sincal; COINDE, 2 February 1998 and interview with Juan Leon, Defensoria Maya, 10 January 1998. Juan Leon of the Defensoria Maya remains suspicious of non-indigenous conciliation, viewing it as geared towards resolution of the problem rather than restoration of communal harmony. Regarding the State's preference to hire conciliation consultants from the United States instead of seeking advice from the indigenous community, Leon claims that the ladinos will never accept that the indigenous people have riches to offer. He states that judges within the formal system do not receive sufficient training in conciliation, rather they merely replicate what they do in the normal forum. Dismay was also expressed that a ladino law professor from Mexico was brought in to teach Indigenous Law at the University of San Carlos' Law School, instead of utilizing the Defensoria Maya's staff or other local experts in indigenous law. Donors claimed that the well-respected professor was chosen because of his objective expertise in the subject and the desire not to convert the class into a forum for political stances. The Defensoria Maya's role as an advocate for Mayan Rights may well have been viewed as too subjective for a neutral discussion of the topic. Currently, Guatemalan indigenous legal experts, including one of the CONTIERRA conciliators, have signed on to assist teaching the class.

¹²⁵⁷ See Dov Ronen, "Ethnic Conflict and Self-Rule: On a New Approach to the Study of Conflict Transformation", in KUMAR RUPESINGHE, CONFLICT TRANSFORMATION 31, 41 (St. Martin's Press 1995).

See also the American Declaration of the Rights and Duties of Man, 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.*

According to the Inter-American Commission and Inter-American Court, this Declaration imparts legal obligations on OAS member States. See Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights, July 14 1989, Ser. A. No. 10 (1989), paras. 35-45; IACHR, James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, September 22, 1987, Annual Report 1986-87, paras. 46-49; Rafel Ferrer-Mazorra et. Al. v. United States, Report No. 51/01, Case 9903, April 4, 2001. See also Article 20 of the Statute of the Inter-American Commission on Human Rights. (<http://www.cidh.oas.org/Basicos/basic1.htm> at footnote 11) *See also* the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights "Protocol of San Salvador", Article 12 (ratified by Guatemala): *1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional, and intellectual development.*

quality of life, including adequate food and housing, for the majority of the populace.¹²⁵⁸ Although parties belonging to rural backgrounds referred to the link between property and their right to food, housing, and the right to life itself, counter parties and CONTIERRA staff upheld the view that discussion of property rights should adhere to formal discussion of ownership. Hence, there was little room for responsive action. CONTIERRA staff granted recognition to registered property, referring to the guarantees in the civil code and the Constitution regarding respect for private property. Some staff considered the Constitutional provision regarding respect for indigenous land to be relevant, however in practice it was never given a higher status than the counter provision on private property. The Civil Code's reference to the right of prescription was not referred to in the cases I reviewed either.

In my opinion the failure of the Guatemalan State and the international actors to promote the right to property in its socio-economic or hybrid variant in terms of requiring land redistribution for landless and poor peasants (including IDPs) as well as its civil & political equivalent as pertaining restitution to dispossessed IDPs may be classified as passivity amounting to persecution. Because most IDPs are rural peasants who formerly depended on land for survival, denial of restitution, compensation, or redistribution has proved to be a key cause of their current state of malnutrition, unemployment, cultural separation, loss of autonomy, and devastation.

In comparison, we may consider the cases at the international and regional levels presented in Part II which expand our understanding of the right to property to reach beyond registered title and provide empowering precedents relevant for IDPs who have been dispossessed: First, the decisions in the *Awas Tingi* case, the *Villagran Morales* Case, and the *Loayza Tamayo* Case issued by the Inter-American Court which call respectively for recognition of the right to property of indigenous people as linked to culture and integrity of the group, the indivisibility of socio-

¹²⁵⁸ See International Covenant on Economic, Social and Cultural Rights, Article 11:

“1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. . . .

2. The States Parties to the Present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed;

- a. To improve methods of production, conservation and distribution of food . . . by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources
- b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

economic and civil & political rights when addressing the right to live in dignity, and the right to a “proyecto de vida” (life’s plan to fulfil personal development, which I argue implies access to land in a rural context); second, the Inter-American Commission’s linkage of property to the right to choice of residence in the Marin Case (in addition it specifically called for restitution to dispersed IDPs in the Fifth Report on the Situation of Human Rights in Guatemala); and third, the CCPR’s cross-reference to freedom of movement (*Mpandanjila v. Zaire & Ackla v. Togo*), family life (*Hopu & Bessert v. France*, culture (*Hopu & Bessert v. France*, *Lovelace v. Canada*) and equal protection of the law (*Adam v. Czech Republic*).

Several peasants indicated that they considered CONTIERRA’s conciliation services to be a fulfillment of some of their rights under the Peace Accords. In addition, the value of the partial accords should not be underestimated as they often include commitments to respect the human rights of the parties, including freedom of movement, physical integrity, and non-aggression guarantees. These norms address the need for security, an essential basis of successful reintegration of displaced persons as well as the foundation of peaceful co-existence among disputants. The establishment of partial accords is an example of the building blocks of conflict resolution; parties feel that they are accomplishing the construction of peace.

2.3.4. Lack of recognition of customary/possessory rights

Denial of recognition as a person entitled to basic rights or as group espousing special rights due to circumstances, such as restitution of property on account of forced eviction or forced displacement, may be considered a form of violence. This violence may be described as both physical (because freedom of movement/right to residence is impeded, and the right to food and shelter may be affected) and psychological due to the negation of experiences or characteristics which mark the individual or group.¹²⁵⁹ Both indigenous persons and internally displaced persons were treated inhumanely during the war, forcibly displaced from their homes, labeled as subversives, and excluded from voicing demands to the State. They were robbed of control over their destiny and aspirations, deprived of their human dignity, threatened with violence, and denied access to justice as well as social justice. Part of

¹²⁵⁹ Johan Galtung, “Violence, Peace and Peace Research” in *JOURNAL ON PEACE RESEARCH* (1969).

the process of consolidating democracy requires restoration of a sense of identity to those deprived of such during the war.

The underlying concern is whether land disputes which are linked to demands for recognition of human needs, including survival and recognition of identity are appropriate for conciliation? Can the use of conciliation in this context prevent renewed cycles of conflict and forced migration/forced eviction and thereby serve a peace building function? Although human needs theory may be analyzed separately from conflict transformation theory, I prefer to consider these approaches jointly.¹²⁶⁰

Rothman categorizes ethnic self-determination, communal security or “sense of self” as non-negotiable need.¹²⁶¹ Conflicts addressing such needs are not considered to be appropriate for straight compromise strategies, as the probability of concession is null.¹²⁶² Certainly in the case of internally displaced persons, indigenous people, and other marginalized groups, property conflicts are enmeshed with repression of group identity and social, political, and economic exclusion. CONTIERRA would benefit from prompting parties more concretely to identify needs and interests, identified by Rothman as composing “reflexive dialogue”.¹²⁶³ Such approach would entail revealing party concerns for individual or collective identity, right to dignity, and definition of self. This technique is related to party participation because it allows parties to identify the root causes of their frustration, engage in reflexive dialogue leading to empathy for the counter-party, and then cooperate to find a solution which will further their needs for identity, justice, safety, etc. It is intended to stimulate parties to “collaborate in setting new goals and restructuring their relationship on the basis of changes in, and more positive definitions of themselves.”¹²⁶⁴ As mentioned previously, this links back to the Inter-American Court of Human Right’s recognition of the value of restoring one’s “proyecto de vida” or life’s plan after experiencing violations, see Loayza Tamayo Case in Part II. Whereas the court may be unsure as to how to go about restoring

¹²⁶⁰ Marc Howard Ross supports combining structural perspectives with a psycho-cultural perspective, MARC HOWARD ROSS & JAY ROTHMAN, *supra* note 31 at 215.

¹²⁶¹ JAY ROTHMAN, *FROM CONFRONTATION TO COOPERATION: RESOLVING ETHNIC AND REGIONAL CONFLICT*, 38 (Sage 1992).

¹²⁶² *Id.* at 39.

¹²⁶³ ROTHMAN, J., *RESOLVING IDENTITY-BASED CONFLICT: IN NATIONS, ORGANIZATIONS AND COMMUNITIES* (Jossey-Bass 1997).

¹²⁶⁴ Rothman J., Randi Land Rothman & Mary Hope Schwoebel, “Creative Marginality: Exploring the Links Between Conflict Resolution and Social Work”, in 8 (1) *PEACE AND CONFLICT STUDIES* (May 2001).

one's life's plan, conciliation may prove to be an appropriate means to embarking upon such action. The partial accords served to uphold a certain degree of identity interest, as parties agreed to respect each other's basic rights pertaining to security, movement, etc.

One of the key attributes of conciliation is its focus on the de facto party interests at hand framed as part of a mutual problem, rather than setting parties against each other by referring primarily to the formal legal claims.¹²⁶⁵ In theory, CONTIERRA is an attempt to return to a discussion of interests. In practice, it upheld a rights-based orientation in spite of attempts to reveal interests and was unable to limit exertions or threats of use of power. CONTIERRA's training materials reveal that they have received some instruction on needs and interests. However, in practice party presentations are unstructured, and the parties themselves have had no prior training regarding such definitions. There appeared to be no recognition of the indigenous or IDP identity as having a positive value.

We must recall the General Comment issued by the UN Committee on Economic, Social and Cultural Rights "Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."¹²⁶⁶ Should one turn to international law to buttress reliance on historical equity claims presented by indigenous tribes, further quandaries arise. Brownlie notes that the international conventions "do not relate to the particular problem of historical equity and it is not easy to forecast to what extent a creative use of the concept of equality would produce a justification for the revision of land titles."¹²⁶⁷ He further states that human rights standards may possibly limit such revision, based on an imbalance between the potential benefit to the indigenous tribe and to the scope of harm to be imposed on the present occupiers. Indeed, current possessors may claim innocence regarding the initial dispossession, and hence a new injustice will be committed in order to provide

¹²⁶⁵ *In comparison, the Ethical Code of the Instituto Argentino de Negociacion, Conciliacion, y Arbitraje calls for conciliators to work towards the procurement of equity and balance the division of power. The conciliators must choose to focus on a pure discussion of interests, with minimal discussion of rights, or confirm the peasant's possession rights as being of tangible weight.*

Article 15, Code of Ethics of the Instituto Argentino de Negociacion, Conciliacion y Arbitraje, reproduced in MIGUEL ANGEL MARTIN, MANUAL DE MEDIACION, CONCILIACION Y ARBITRAJE, 27 (Master Ed. 1997).

¹²⁶⁶ CESCR General Comment No. 4 (1991)

¹²⁶⁷ IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES, see footnote at 25.

restitution for the past crime.¹²⁶⁸ Such means may be deemed disproportionate to the proposed end. Minnow disputes this claim, stating “after the expropriation of the native peoples, none of the subsequent settlers should be described as wholly innocent. All of them benefited from the expropriation.”¹²⁶⁹ However, she states that evicting the current owners without charging intervening owners would indeed be unfair. She advocates holding the larger society responsible for compensating the original owners or buying out the current owners. Land claims can be categorized, some have economic value, others have spiritual value- it is necessary to address these factors “social and religious meanings rather than economic values lie at the heart of reparations.”¹²⁷⁰ Minnow highlights burial grounds or religious sites as meriting restitution. It is implied that compensation or other form of reparation may be offered for other types of land.

In Guatemala, given that many indigenous people claim a spiritual link to the land, regardless of the presence of a burial site, it may not be considered fair to limit their claims to the specific category selected by outsiders as meriting special significance. Indeed, as previously mentioned, in the Awas Tingi Case (presented in Part II), the Inter-American Court of Human Rights recognized the value of indigenous property as pertaining to their culture, integrity, spiritual life and economic survival without limiting it to burial sites. Indeed, the order for reparation required indigenous participation in demarcation, delimitation, and titling thus proving particularly empowering. Specifically with respect to Guatemala, the Inter-American Commission called for recognition of historic title of indigenous land in the fifth report on the situation of human rights in Guatemala (see Part II). However, given that ILO Convention No.169 leaves open the possibility for recognition of possession rights over title to lands traditionally utilized by indigenous people, it is unclear to what extent the views of the regional bodies will be respected. Possession rights are considered secondary to full title, because this is the root of many conflicts in Guatemala, recognition of possession rights alone may not be sufficient.

Although there has been mention of possible litigation against owners of illegal land holdings as a means of financing restitution to victims of the war, this has yet to be unveiled. As long as such action is not taken, victims of forced eviction will

¹²⁶⁸ Waldron, “Superceding Historic Injustice”, 9 quoted in MINNOW, MARTHA, BETWEEN VENGEANCE AND FORGIVENESS, 108 (Beacon Press 1998).

¹²⁶⁹ MINNOW, Id. at 108.

¹²⁷⁰ Id. at 110.

remain homeless while their dispossessors reap the fruits of impunity. The key to remedying the state of inequity is implementing expropriation, ironically the original cause of the war. At present there is absolutely no political will to embark on such action. If progress will be made, it will be primarily based on granting titles to those lands currently occupied by indigenous people and provision of alternative lands in other areas. Hence, the dispossessors are profiting from their actions as they are paid by the peasants themselves (via Land Fund credits), charging speculative prices for land appropriated illicitly. Peasants are indebted and risk forced eviction should they be unable to pay.

Cases processed in the courts via the *amparo* mechanism focused on an a pure assessment of rights, the query was whether the ADR mechanism would prove more effective by addressing underlying party identity concerns and essential needs. For example, parties may wish to attain peace, harmony, and mutual respect, while others seek basic recognition of their identity and needs or apology for past injustice (thereby merging rights with interests). The cases I reviewed revealed that CONTIERRA tended to mimic the courts by placing priority on a review of registry rights. Indeed, the Cimientos Case mediated by both the Inter-American Commission of Human Rights and CONTIERRA (presented in Part II) revealed disastrous consequences of prioritisation of registered title. Although socio-economic and historical assessments were completed, only the Tampur cases revealed a strategy which directly sought to address background housing and food interests/needs.

As pertaining recognition of IDP and indigenous rights to restitution of property, this was not evident in the cases I reviewed. Non-recognition of customary rights limits the possibility of achieving an accord. Although in theory, parties to conciliation are supposed to be empowered to elaborate their own decisions, the conciliation body studied in Guatemala was reluctant to recognize the legitimacy of certain claims against the parties holding formal title. As noted by Siedman, “Requiring outputs to conform substantially to existing law, for example, prohibits radical decisions.”¹²⁷¹ In his view, “development requires problem solving, not rule applying.”¹²⁷²

Thus, the tendency of CONTIERRA to respect title without review of alternative claims to land, such as prescription rights, historic title, etc. leaves many

¹²⁷¹ Id. At 196.

¹²⁷² Id.

peasants defenseless in the fact of counter parties claiming formal rights. Until CONTIERRA explores the issue of de facto possession and equity considerations more fully, the conciliation sessions will be affected by an imbalance due to recognition of disparity in rights. The State calls for a return to the rule of law, however when the law is unfair it clashes with principles of justice and a state of repression remains. CONTIERRA should be permitted to act in pursuit of equity. It is rather unusual that the conciliators would shy away from the flexibility usually associated with ADR by adopting a formalistic stance, in essence it mimics the court system. In the case below, CONTIERRA does confirm possession rights which were documented.

2.3.4.1 Case Study: Comite Pro-Tierra Ixcan Playa Grande Case- Dispute Transfer

In October 1998, CONTIERRA received a letter from 150 families belonging to the Pro-Land Committee of the finca San Francisco del Rio, department of Alta Verapaz. They requested a legal investigation of their possession rights over the finca, which they claimed to extend back over 20 years. They claimed to have been declared the heirs ab intestato by the first instance civil court in Coban, Alta Verapaz. Another IDP Pro-Land Committee from Playa Grande, Ixcan received a promise of sale of the Finca San Francisco. Two months before the community of San Francisco sent the letter to CONTIERRA, three men recruited people to engage in usurpation of their finca, charging a participation fee of 400,000 Quetzales. They engaged in burning houses and ranches, destroying crops, fences, and intimidating the people. They stated that they had the support of the army and threatened to continue destruction. The families alleged to have paid for the finca and that they “are not willing to abandon this finca and wish to avoid the spilling of blood.” They wrote letters to CONDEG, the Commission of Human Rights, and the President of the Republic. They also wrote to the President, invoking the Peace Accords and citing the disparity in socio-economic distribution:

“We know that powerful people own the land and that peasants have no chance of receiving small properties to grow crops, sustain the family, and attain a minimum roof to provide refuge.”

At the conciliation session, CONDEG appeared with the Pro-Land Committee from Ixcán (indigenous-ladino), the Pro-Land Committee of the Finca (ladino-indigenous) appeared with its own lawyer, and the formal landowners (ladinos), led by Don Leonel represented themselves. CONTIERRA concluded that they had public documentation of their purchase of possession rights. However the processing of probate was not finalized, hence there was no registry. CONTIERRA agreed to assist the community in the finalization of the probate matter. CONTIERRA advised the Pro-Land Committee of Ixcán to find another finca to buy since San Francisco had so many legal problems and that it was pointless to endure further conflict with the occupying families. The lawyer for the San Francisco community who bought the possession rights asked that the principal owner, “Don Leonel”, whom they respect as a man of honor, show reciprocal respect to their payment and guarantee non-eviction. He asked that everyone speak with sincerity and avoid civil or penal consequences. His community had been displaced during the war and he did not understand why they should be displaced again during peacetime. He highlighted the case of his own son as example of those who loved the land: he had rejected the study of law and decided to be a farmer as he “prefers the breath of a cow over that of a judge.” The landowners repeat the notion that “*Lo legal es lo que manda*” (That which is legal rules).

Don Leonel stated that he did not want further conflict hence he decided to annul the offer of sale to the second group, given that this was conditioned on clarification of the legal status of the land, and respect the possession rights of the original community. He wished to clarify the possession status legally, hence he would pursue a formal legal investigation. In a bizarre twist of roles, the other minor owners state that they wished to respect the rights of those who have possessed the land for over 20 years. One stated “My father always said that the land belongs to he who works it!” to which the lawyer for the community replied that this was a ridiculously idealistic statement, as the land belonged to Don Leonel. The community lawyer requested CONDEG to find alternative land for the other group, as “*No se puede desvestir a un santo para vestir a otro*” (One cannot undress one saint to dress another). CONDEG demonstrated its anger towards the landowner for creating the conflict in the first place by offering occupied land. CONDEG thanked CONTIERRA for its assistance and stated that it would refer further cases to it.

It is obvious that the fact that the community had actual documentation of their possession rights facilitated resolution of the dispute. The community made no reference to equity arguments, as the documentation alone was sufficient. Unfortunately, many possessors lack such documentation and instead rely on arguments based on equity, customary law, or rights granted under the Peace Accords. *Contrast may be made with the Land Claims Court of South Africa which has established a framework for balancing equity interests in land cases:*

2.3.4.2. Land Claims Court of South Africa

The South African Constitution calls for the provision of restitution of that property or to equitable redress (alternative land, cash compensation, participation in development programs, etc.).¹²⁷³ to persons dispossessed of land as a result of past racially discriminatory laws or practices. Persons seeking restitution of their land rights may file claims with the Department of Land Affairs. The Land Claims Commission (now integrated within the Department of Land Affairs) investigates the claim and attempts to mediate a settlement between the parties. The Commission then refers the claim to the Land Claims Court which will confirm the settlement, thus recognizing legal status to the negotiated agreement. If a settlement has not been achieved, the Court will adjudicate the matter. As of February 1999, approximately 40,000 claims had been filed with the Land Claims Commission. However, the Court received only 100 claims, of which 23 attained final orders. It has been noted that the main causes for delays in processing are insufficient documentation, which requires rectification by the parties, and, of special interest to this thesis, the use of conciliation and mediation prior to action by the Court.¹²⁷⁴ As in Guatemala, negotiations on land issues tend to be protracted.

Due to delays, reform legislation was passed to change the procedures. Parties may now choose to file the claim with the Court directly, bypassing the Commission's mediation process. It should be highlighted that the party filing the claim must then assume the burden of proving his claim and pay costs; however legal aid is available and parties maintain the right to represent themselves. Should the Land Claims

¹²⁷³ See Geoff Budlender, "Restitution of Housing and Property Rights- Some Lessons from the South African Experience", in 19 (3) REFUGEE SURVEY QUARTERLY, 224 (2000).

¹²⁷⁴ Letter from Ms. H. Van Niekerk, Registrar of the Land Claims Court of South Africa, 15 February 1999, on file with the author.

Commission file the claim itself and prosecute it, the party represented by the Commission bears no costs. The opposing party is responsible for his costs. One may imagine the implementation of such reform in Guatemala as well, should frustration with the conciliation process reach a climax. As noted by Röhl, a reverse trend towards formalism could result as the society seeks more tangible “results” than those offered by a malfunctioning ADR process.

The South African system permits oral testimony, however it is clear that the Court places emphasis on formal, documentary evidence. Of special interest is the fact that the Restitution of Land Rights Act recognizes the right of parties to present:

“a. Hearsay evidence regarding circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession.

b. Expert evidence regarding the historical and anthropological facts relevant to any particular claim.”¹²⁷⁵

In comparison, CONTIERRA permits parties to present any type of oral evidence, including hearsay, however it seems to favor formal documents in practice. Yet, it utilizes its own anthropologists and historians to assess relevant factors.

With respect to customary norms, it should be noted that the Constitution, Article 211 (3) states:

“The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

This does not specify agrarian conflicts in particular, but it may be interpreted as applying to such issues.

The South African Land Claims Court is also progressive due to the fact that it is instructed to consider the following factors when determining a claim:

“a). The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;

b) The desirability of remedying past violations of human rights;

c) The requirements of equity and justice

(i) If the restoration of a right in land is claimed, the feasibility of such restoration;

d) The desirability of avoiding major social disruption;

e) Any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or

¹²⁷⁵ Restitution of Land Rights Act 22 of 1994, assented to 17 November 1994, date of commencement 2 December 1994, provision 30.

categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination;

f) The amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of dispossession

(i) The history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land; (ii) In the case of an order of equitable redress in the form of financial compensation, changes over time in the value of money;

g) Any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular section 9 (on equality) of the Constitution.”¹²⁷⁶

This list is extremely relevant to the Guatemalan context as well. Forced evictions are rarely treated under equity considerations. This is further regulated within South Africa by a separate law on the matter. In the case of Albertyn & Nwanedi Estates v. Bhekaphenzulu et. al. Case No. LCC6R/99 (25 January 1999), the Land Claims Court set aside and remitted the decision of the Magistrate’s Court, Paarl which had recognized the eviction of the respondents. The crucial error was that the Magistrate’s decision failed to consider the following factors when deciding whether is just and equitable to grant an eviction order, as required by Section 11 (3) of the Extension of Security of Tenure Act, 62 of 1997:

- a. The period that the occupier has resided on the land in question;
- b. The fairness of the terms of any agreement between the parties;
- c. Whether suitable alternative accommodation is available to the occupier;
- d. The reason for the proposed eviction;
- e. The balance of interests of the owner or person in charge, the occupier and the remaining occupiers of the land.”

In comparison, Guatemala has no such listing of equitable standards to consider the legitimacy of eviction orders. Indeed, at present it appears that the courts heed formal titles or fail to respond as a result of threat, intimidation, or corruption. CONTIERRA addresses these issues informally and indirectly within the conciliation process.

The Land Claims Court is composed of five judges, all of whom have law degrees. The Court’s orders carry the same weight as an order of the High Court and are subject to enforcement by the Deputy Sheriff or by way of contempt proceedings. Thus far, parties have willingly abided by the decisions and enforcement measures have not been utilized.¹²⁷⁷

¹²⁷⁶ Id., provision 33.

¹²⁷⁷ In addition to these institutions, there is also a National Land Reform Mediation & Arbitration Panel which is only accessible to government officials. Since its

2.3.5. Conclusion on Norms

CONTIERRA proved to exhibit similar qualities to the formal courts as pertaining the hierarchy of norms. Rather than refer to relevant international human rights law and cases pertaining property as a socio-economic right, or cross-reference other rights such as housing, food, culture, and restitution/compensation rights pertaining indigenous people and IDPs, CONTIERRA gave priority to formal title as recognized in the registry. Little reference was made to prescription rights as contained in the civil code or the Constitution's provision on the protection of indigenous land. Although parties referred to the Peace Accords and ILO Convention No. 169, these instruments did not appear to legitimise their claims during discussions. The partial accords I reviewed made no mention of socio-economic rights, such as food or housing although peasants did refer to them during the conciliation sessions. The Guiding Principles on Internal Displacement were unknown to the conciliators. Although the conciliation accords do not refer to the international conventions themselves, the references to particular rights reveal the influence of international law on national conciliation practice. Lack of direct reference to specific treaties may merely be due to the wish to preserve a non-legalistic flavour to the accords, emphasizing the language utilized by the parties themselves, or it may be due to lack of human rights education of the conciliators themselves.

It is undeniable that the conciliators are pressured from above to adhere to the formal law, however it may well be that the international organizations and donors who observe and provide resources to CONTIERRA have failed to educate the conciliators as to how they may legitimately refer to human rights and customary law

inauguration in December 1995, as of February 1999 it has received approximately 145 cases for mediation, of which half achieved a final written agreement. Although one request was received for arbitration, it was later determined that mediation would be more appropriate. The majority of evidence is presented orally. Although the costs are covered by the institution itself, claimants may seek legal aid. As admitted by the institutional staff itself, one of the greatest problems with the mechanism is the lack of implementation of the mediated agreements. The Department of Land Affairs is charged with enforcement, however this does not appear to have been too successful. Hence, the South African model confirms many of the same problems encountered within CONTIERRA as pertaining the use of conciliation.

without violating formal law. CONTIERRA did refer to primary civil and political human rights, such as security of the person in the partial accords.

Indigenous law was considered to be relevant only for procedural purposes, not for substantive consideration of a claim. To some extent, one could argue that the oral nature of indigenous law as well as the decimation and dispersal of indigenous communities, resulting in return communities composed of plural identities and loss of “human databanks” regarding indigenous law, renders actual implementation of indigenous law difficult. However, difficulties cannot override the need to achieve a level of legal pluralism that goes beyond mechanisms and incorporates norms. Otherwise, even procedural gains may be lost due to the interrelationship between substantive justice and procedural justice.

In order to pursue an ethic of recognition in reintegration situations, it is also necessary to recognize the concept of identity as a basic human need within the context of conflict resolution in Guatemala.¹²⁷⁸ The indigenous people and internally displaced persons’ claims for access to justice and social justice (e.g. restitution, redistribution of land, and recognition of customary rights to land) are linked to their need for recognition of their identities.¹²⁷⁹ In theory, IDPs who also are of indigenous descent may have greater chance of recognition of their restitution right should they

¹²⁷⁸ J.W. BURTON, *CONFLICT: HUMAN NEEDS THEORY* (MacMillan 1990), cited in Ho Won Jeong, *Conflict Resolution, Dynamics, Processes and Structure* 2 (1999).

¹²⁷⁹ It has been suggested that there is a need for investigation of “how group processes are linked to structural conditions.” Thus because the identity group is a correct unit of analysis when discussing protracted social conflicts, this study selected internally displaced persons and indigenous persons for reference when discussing interpersonal-intercommunal disputes. Ho-Won Jeong, *Id.* at 4. See ILO Convention No. 169, Article 4 “Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.” With respect to land rights, article 14 notes: “The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”

See also the Guiding Principles on Internal Displacement, principle 9 “States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands & principle 21: “No one shall be arbitrarily deprived of property . . . Property and possession left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.”

focus on the latter characterization due to the possibility of cross-referencing ILO Convention No. 169. In practice, it does not appear that either group has attained significant restitution of property. I submit that one of the reasons for the lack of legitimization of collective identity; in particular indigenous people and internally displaced persons, is the view that it would lead to recognition of correlative rights, including restitution of property. Assertion of demands under the label of “indigenous rights” and “IDP rights” conflict with State efforts to establish norms applicable to all citizens equally. The failure by the State to recognize the identity and corresponding right of restitution of property of Guatemalan indigenous people and IDPs may be considered one of the primary reasons why Guatemala has been unable to achieve stability.

True solution to the protracted conflict requires addressing its causes, i.e. basic human needs tied to land. The problem is ranking the degree of one’s connection to land, should historic title outweigh actual possession? This study cannot resolve such dilemmas, instead it can only highlight the unavoidable task of having to deal with them in practice. Straight recognition of formal title upholds the pre-war status quo which invariably will lead to a renewed cycle of conflict and forced migration. Recognition of alternative claims to land in order to provide restitution or compensation is necessary in order to provide a real chance of attainment of a basic standard of living.

The fact that indigenous people and rural peasants have attained knowledge and understanding of human rights results in a stimulation of expectations which are ignored by both the formal or informal mechanisms, thus they are resulting in rejection of the State and an increase in protests and instability. The tragedy is that one may not only accuse the State and elites of not recognizing these rights, but as mentioned previously, the international community appears to have been lax about pursuing implementation of such rights within executive agencies. Given the fact that the peasants will retain their knowledge of rights, it is not likely that they will give up their claims. The key is attaining international and national alliances in pursuing fulfillment of those rights.

The use of ADR in protracted conflict situations should incorporate human rights norms as well as customary norms utilized by parties to land disputes in order to fulfil the empowerment function of ADR as pertaining marginalized groups and individuals. The failure to recognize the validity of these norms effectively removes

control of the dispute from weaker parties and grants it to the counter party and the conciliators themselves. The State should be required to demonstrate incorporation of human rights analysis, in particular ILO Convention No. 169 and the UN Guiding Principles on Internal Displacement, as well as consideration of equity norms and the national provisions regarding indigenous land and prescription rights when evaluating the merits of each party's claim. Future funding should be made conditional on achievement of such goals.

One positive factor is the presence of national NGOs and international organizations (such as MINUGUA and AID) at conciliation sessions. This provides sources of information to peasants regarding international norms and relevant rights. Hence, conciliation forums have served to disseminate international human rights among marginalized groups. In this manner, we see how ADR may provide a forum for "transnational connections" between marginalized groups and international human rights monitors. This is in reference to Boaventura de Sousa Santos' criticism that community ADR mechanism for property disputes in Brazil upheld structural political and economic inequities. Although CONTIERRA shares similar problems, its recognition of the value of including human rights norms within provisional accords as well and human rights monitors in the proceedings reveals a potential for future evolution of the legitimacy of claims within ADR as well as in other forums.

Indeed, Santos himself calls for the creation of transnational linkages to emancipate marginalized groups. To some extent, CONTIERRA attempts to serve such function.¹²⁸⁰ Besides the dialogue between the parties, there are ancillary dialogues between parties and human rights representatives. The verification by human rights actors that peasants do have legitimate claims which are backed by human rights law, empowers them to assert recognition of this fact within the provisional accord. Once documented in a partial accord, peasants receive a boost in self-esteem as their basic human dignity is recognized by the counter party as well as the State conciliators. In this sense, ADR appears to be more open to influence by international human rights norms than the formal court system in Guatemala which rarely refers to international norms or invites NGOs or international organizations to provide evidence or information on such.

¹²⁸⁰ See Boaventura de Sousa Santos, *supra* note 32 at 5 and SANTOS, *TOWARDS A NEW COMMON SENSE*, (Routledge 1995).

In theory, one may argue that the NGOs and international organizations have the potential to provide a counter-weight to the CONTIERRA bias for formal property rights and misplaced neutrality strategies by promoting human rights and equity arguments. However, in practice they did not appear to demonstrate any significant impact in this arena. In part, this may be due to fear of being excluded from the sessions due to “excessive intervention” on the part of observers. As noted previously, given the fact that international organizations are consistently referred to as “Roman Pro-Consuls”, their reluctance to tread on the State’s feet is understandable. Unfortunately, it is the marginalized groups which must pay the price for this form of comity.

2.4. Output: The Measure of Success

“Better distribution of land constitutes not only a form of reparation but, above all, prevention of new problems and social conflicts . . . Restoration of the significance of the law means readjusting the rules of social harmony and re-establishing communal relationships which have been broken by violence.”

Archbishop’s Office of Human Rights¹²⁸¹

Cora Shaw of the World Bank points out that “It is difficult to measure effectiveness without defining success.”¹²⁸² If we are to follow the traditional lineal model developed by Harvard, success would be largely measured by the achievement of accords achieved rather than evaluation of developments in relationships. In addition, one may consider whether the accord addressed all of the issues in dispute in a clear manner, whether this was done in a manner so as to benefit both sides, and whether the parties felt that the accord was their own.¹²⁸³ Review of the cases demonstrated that in several instances, a bias in favor of formal law may have disowned parties of their conflicts, as they were unable to pursue discussion of claims based on socio-economic rights, indigenous rights, etc. However, FUNDACEN revealed use of an equity analysis which led to the signing of an actual accord.

One study has found that the immediate satisfaction of achieving an accord did not guarantee long-term success.¹²⁸⁴ However, immediate satisfaction with the

¹²⁸¹ Oficina de Derechos Humanos del Arzobispado de Guatemala, *Nunca Mas: Informe Proyecto Interdiocesano de Recuperacion de la Memoria Historica*, 282 & 275 (Arzobispado de Guatemala 1998).

¹²⁸² Telephone Interview with Cora Shaw, Agricultural Economist, The World Bank, 15 Dec. 1998.

¹²⁸³ Peter J. Carnevale, Linda L. Putnam, Donald E. Conlon, & Kathleen M. O’Connor, “La Conducta y la Efectividad del Mediador en la Mediacion Comunitaria”, in DUFFY, GROSCH & OLCZAK, *LA MEDIACION Y SUS CONTEXTOS DE APLICACION* 167 (Paidos 1996).

¹²⁸⁴ Pruitt, D.G., Peirce, R.S., Zubek, J.M., Welton, G.L. & Nochajski, T.H., “Goal achievement, procedural success, and the success of mediation”, *INTERNATIONAL JOURNAL OF CONFLICT*

management of the audiences and good will to ratify the mediation predicted long-term success.¹²⁸⁵ When parties felt that the procedures were fair, they were more inclined to abide by the accord and improve relationships in the long term. Another important factor was the extent to which the underlying problems were brought to light. In the cases where they were openly addressed, compliance was high. It should be noted that although the peasants' lawyer was not happy with the treatment of the corruption issue in the FUNDACEN cases, he and the peasants approved of the conciliators' personal dedication to the case and they appear to be complying with the accord. The section on output is limited due to the fact that I was unable to conduct a long term follow-up of the FUNDACEN case due to the restricted research period as well as the inability of CONTIERRA to solve the other cases I examined via conciliation during the time period, hence there was nothing to follow up. Future research could focus on follow-up on the cases resolved in the most recent period.

I define success in terms of both quantity and quality. I examine the amount of final conciliation accords, as well as resolution by alternative means. Because property disputes are material issues, I reviewed the quality of the accords by exploring to what extent did the parties attain substantive justice via restitution or redistribution of land. In addition to a material result, I sought to understand whether parties considered the procedures to be fair, whether group identity and human needs were identified as legitimate concerns linked to rights and relevant values, and whether the underlying issues were revealed. In addition, I examine the internal dynamics within the CONTIERRA structure itself in order to highlight factors affecting output, such as: time delays, demoralization of staff, lack of resources, lack of coercive powers & enforcement problems, lack of coordination with other land agencies, and problems related to the role of international agencies in provision of appropriate feedback/support. I address non-material success factors relating to party empowerment, peacebuilding, and reduction of violence in the section on social capital.

2.4.1. Amount of Accords

I reviewed CONTIERRA's achievement of conciliation accords in order to determine whether there was correspondence between input and output. The majority of cases handled by CONTIERRA by way of conciliation have resulted in partial

MANAGEMENT vol. 1, 33-45 (1990) cited in McGillicuddy et. al., in DUFFY, GROSCH & OLCZAK, Id., 177,187.

¹²⁸⁵ Id.

accords. In terms of concrete resolution of actual disputes by way of conciliation only, during my field research period, by December 1998, CONTIERRA had only achieved five conciliation accords out of total of 238 cases.¹²⁸⁶ After my research period, by 2001, CONTIERRA had achieved forty-one conciliation accords, however this is a very small number as compared with an increased total caseload of 1,103 cases. Hence, the success of conciliation in terms of quantity remains limited.

CONTIERRA's strategy has shifted from emphasizing conciliation to technical and legal assistance as a means of finding solutions. CONTIERRA had resolved cases by way of of legal or technical assistance, i.e. registry investigation, measurement of boundaries, or direct negotiation. Other cases were transferred to the land agencies, i.e. the Land Fund, and a few were withdrawn by parties. The majority of cases had been processed since the beginning of CONTIERRA in 1997, revealing a resolution rate of five years, unfortunately equivalent to that of the formal courts. Hence, one may argue that there is a denial of the right to remedy due to excessive time delays which limit its effectiveness. Of interest is that the most difficult cases to resolve were located in Chajul, Quiche the primary origin of forced migration during the war.¹²⁸⁷

Year	#Cases	Cases closed via legal assistance, transfer, conciliation, etc.
2000	553	89
2001	1103	332
2002	1368	600

The number of cases is growing, as is the rate of conclusion, however very few of these cases are concluded through conciliation. The fact that CONTIERRA continues to receive an extraordinary amount of cases may be interpreted as an indication that the rural populace *wants* ADR to be effective. The absence of efficient procedures within the court leave little alternative. The unwillingness of the State to provide

¹²⁸⁶ CONTIERRA , Informe Anual de Labores, p. 11 Junio-1997-Junio 1998. It concluded 51% of its caseload of 238 cases, however this was achieved by negotiation not following conciliation procedures, technical or registry assistance, etc.

¹²⁸⁷ Julieta Sandoval, "Mil 103 conflictos de tierra" in PRENSA LIBRE 8 July 2001. Rodolfo Flores Garcia, "Palma Lau asume direccion de Contierra", SIGLO XXI, 8 March 2000.

additional conciliation staff and lack of backing of either restitution legislation or a substantive land distribution program means that CONTIERRA will continue to suffer from demand overload. It will not be able to process claims efficiently or provide output which will alter the distribution of property in Guatemala. It is important to keep in mind that CONTIERRA's lack of a high success rate may actually indicate its resistance to adopting an overly coercive practice.¹²⁸⁸ The sections below highlight key problems affecting output.

2.4.2. Qualitative Results: Equity concerns & Lack of restitution

After having determined whether the mechanism proved effective in terms of quantity, it is then necessary to address the quality of the accords. I examine whether the CONTIERRA's accords proved responsive to demands of marginalized groups, such as internally displaced persons, by resulting in tangible output, e.g restitution or redistribution of property. This will reveal whether substantive justice (and/or social justice/distributive justice) was achieved.

Property restitution may be considered to be a means of diminishing the socio-economic exclusion which is the root of the conflict and thereby promoting reconciliation. Although CONTIERRA's mandate is indirectly derived from international human rights instruments, I found no direct reference to international standards regarding substantive property restitution or remedy in any of the case files or in the conciliation dialogues. The key problem is the State's adamant refusal to accept IDP and indigenous people's right to restitution of property lost on account of forced migration or forced eviction. With respect to CONTIERRA's interpretation of national law, there appeared to be a focus on the registry, with little or no discussion of prescription rights as recognized in the Civil Code or the Constitutional standard on protection of indigenous land (Art. 67). This was equally evident in the review of the amparos to the Constitutional Court as in CONTIERRA's cases. As pertaining the amparos which involved indigenous or poor persons, the majority were denied without reference to international standards or even the Constitutional standards themselves as pertaining indigenous land, housing, etc. (in one case the indigenous community which filed an amparo was rejected while the counter-party's amparo (a

¹²⁸⁸ See BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION* 218 (Jossey-Bass 2000).

ladino) was upheld). As long as the State is unwilling to implement the relevant human rights standards pertaining to restitution, the nation will remain in a state of protracted conflict. CONTIERRA's conversion process fails to take inputs based on socio-economic claims, restitution demands of IDP or indigenous groups and reformulate them into legitimate legal claims based on human rights or even formal law (protection of indigenous land, prescription rights, etc.)

CONTIERRA's bias for formal law impedes the ability of parties to draft accords which recognize the legitimacy of claims based on alternative sources of law. As stated previously, for an ADR mechanism to succeed in a post-conflict/protracted conflict situation it is necessary that recognition is given to customary rights, equity standards, and international human rights, both socio-economic and civil and political variants, as well as special rights pertaining to IDPs and indigenous people.

Although we may highlight the elites who took over property during the war as the main opposition to such implementation, it is important to remember that many poor peasants also engaged in occupation of land during the conflict. Hence, resistance to restitution initiatives pervades the entire society.

CONTIERRA was given the mandate to suggest forms of compensation or restitution to campesinos and communities who have been subject to dispossession. In practice, it merely refers victims to the various land agencies. Compensation may form an aspect of the final accord although it is not labeled as such, given the fact that it is a no-fault proceeding. For example, one may consider the case of Finca Samaria, located in Puerto Barrios Izabal, which fifty families were facing eviction by the formal title holder. During the conciliation session, CONTIERRA was asked to request the Land Fund to purchase land for them. In cooperation with the Land Fund which provided alternative farming land, the owner agreed to donate the portion of land where the families lived, and the families were not dispossessed. In the majority of cases, CONTIERRA was unable to redistribute resources, hence substantive justice was not achieved.

It has been suggested that when analyzing legal conflicts which are enmeshed in social struggles, procedural satisfaction may be quelled as the legal system may prove unable to resolve the underlying social issues, despite the high expectations of

the parties.¹²⁸⁹ Some critics state that CONTIERRA's inability to address the underlying root cause of ethnic conflict rendered its methodology superficial.¹²⁹⁰

Below, in the case of Piedra Parada, the accord fell apart and disputes reoccurred when the case was transferred to the Land Fund for further processing. Failure to attain financing for land purchase or delays in processing prompted new altercations. Hence, CONTIERRA cannot always guarantee a durable solution. Because the conflicts require provision of property restitution, compensation, or recognition of customary claims, failure to offer such solutions leaves the underlying cause of the conflict un-addressed. In essence, it then becomes a form of *conflict mitigation* rather than *conflict resolution* given that it lowers the level of violence but it fails to eliminate the causes of the dispute.¹²⁹¹ The level of social inequality remains the same. In short, conciliation of individual cases became a stalling tactic, in which parties and the government colluded to ensure non-resolution of individual conflicts and non-aggregation of demands.

CONTIERRA has been unable to develop a strategy to combine human rights/equity/customary rights analysis with that of formal law evaluation. In this respect, parties lose ownership of their dispute as there is insufficient recognition of the alternative bases of claims and thus dispute resolution stalls. CONTIERRA's legitimacy is called into question by the peasants because of its formalistic tendency; although the FUNDACEN case revealed an equity analysis, other cases adhered to formal law without recognition of alternative bases of claim. Ironically, the large landowners are also suspicious of CONTIERRA to the point where the Chamber of Agriculture has accused CONTIERRA's director of promoting land invasions by the peasants. Hence, CONTIERRA's efforts to find a middle way are complicated by the severity of polarization among the populace.

¹²⁸⁹ Bussmann, Kai D., "The Procedural Justice Approach in the Context of Systems Theory: The Theoretical Impact of Law as a Symbolic Generalized Medium of Communication", in Röhl & Machura, *supra* note 29 at 70.

¹²⁹⁰ Comment by Carlos Camacho, MINUGUA, 26 April 1999.

¹²⁹¹ See KEVIN AVRUCH, *CULTURE & CONFLICT RESOLUTION*, 26-27 (United States Institute of Peace Press 1998) "Resolution aims somehow to get to the root causes of a conflict and not merely to treat its episodic or symptomatic manifestation, that is, a particular dispute."

2.4.2.1. Case Study Piedra Parada

The case of Piedra Parada involved twenty-seven families of Mam descent who claim to have historic title to land in Piedra Parada. They formed a Pro-Land Committee in accordance with the law and sought title to the land which they alleged had been illegally appropriated by Marco Tulio Quezada Diaz and Victor Raul Navarro. In 1992, the latter sold the land Demetrio Juarez and Horacio, Santiago & Maximiliano Gonzalez who promptly sought eviction of the families residing on the land. Suit was brought in the first instance court of San Marcos, accusing the twenty-seven families of usurpation and wrongful bearing of arms. In February 1996, the community sent a letter to the justice of the peace claiming that on 20 February 1996, Victor Raul Diaz Navarro attempted to burn their houses in order to force them to leave the land. The Chief of Police of San Marcos cited Victor Raul Diaz Navarro for the crime of coercion and threats.¹²⁹²

The community wrote a letter to CONIC stating that they were *colonos* dating back 100 years.¹²⁹³ They had constructed their houses four years before on twenty cuerdas of land. The alleged owners tried to evict them unsuccessfully. They entered into negotiations and asked for compensation of their labour through 5 cuerdas of land where their houses stood. The petition was not favorably received and they were pressured to abandon the land. They did not have enough resources to buy the land, yet they did not want to leave as they claim that their ancestors have been born there. They requested NGO and governmental support for purchase of the land.

In February 1997, a conciliation session in the home of Jacobo Augustin Gabriel Juarez, the community leader, was conducted. An accord was reached, however the conflict continued. CONIC and the Unidad de Trabajadores Estatales y Sectores Populares (UTESP) accused the Gonzalez brothers of threatening several of the community members with death. They claimed that the brothers stated that they had been sent by Marco Tulio and Victor Diaz in retaliation for the prior citation. CONIC issued the following demands:

1. *The intervention of competent authorities to avoid threats against physical integrity of persons.*

¹²⁹² Public Ministry Process No. 1259-96 Piedra Parada v. Mr. Victor Raul Diaz Navarro.

¹²⁹³ Letter from the Community of Piedra Parada to CONIC, 30 June 1996, on file with CONTIERRA.

2. *The Attorney General for Human Rights should uphold the right to life of all persons*
3. *MINUGUA should investigate the acts and denounce them as human rights violations.*
4. *The Public Ministry should initiate actions against the human rights violators*
5. *CONIC denounces Marco Tulio, Victor Diaz, Santiago Gonzalez, and Marco Gonzalez as responsible for any injuries to the community members.*

In 1997, the community sent a letter to CONTIERRA which demonstrated a conceptual link between their dispute and the national peace process as well as their frustration with the lack of response by the State:

“We do not have more land than that which we have been occupying for years with our families. It is unfair that they leave us with nothing; we believe it is an assault on our inherent rights to have a place to live. In addition, this situation is in contradiction to the peace process which has been initiated in our country. Since 1992, we have voiced our problem to FONAPAZ, INTA, the Congress of the Republic, and the Inspector of Labor and Social Prevision. Unfortunately they have not paid heed to our claims.”¹²⁹⁴

The community requested a hearing, the recognition of their right to remain in Piedra Parada based on their historic title and the right to live in one’s home, and the verification of their right to the land. Demetrio Franciso Juarez et. al. filed a charge with the Fiscal Agent of the Public Ministry of the Department of San Marcos (No. 358/97) charging the community of Piedra Parada of usurpation, threats to authorities, detention of a justice of the peace against his will, damage to buildings, violence. They requested judicial action.

CONTIERRA met with the formal title owners in order to hear their perspectives. The formal title landowners claimed that the community did indeed own a piece of the land (130 cuerdas), however they claimed that some members of the community sold their land and usurped other property which does not correspond to them. It was asserted that fourteen houses were built on this latter property. The landowners claim that one of the community members went as far as selling the rights to a source of water. In addition, they claimed that the community destroyed the

¹²⁹⁴ Letter from the Pro-Land Committee of Piedra Parada on CONIC stationary, signed by Jacobo Augustin Gabriel to CONTIERRA, 23 July 1997, on file with CONTIERRA

football field as well as piece of land ceded for the construction of a school (The 65 children in the community did not have a school) and that they rejected a teacher who was to instruct the children. They also asserted that CONIC was manipulating the Piedra Parada community. It should be pointed out that complaints against NGO activity in land conflicts are quite common, as previously noted, they are often accused of politicizing the debate, yet at the same time they often provide the only source of guidance as to legal rights, strategies, and defenses for the poor. CONTIERRA asked the landowners not order the arrest of any members of the community as a measure of good faith in order to facilitate the attainment of a viable solution.

In September 1997, CONTIERRA called the community leader, Jacobo Augustin Gabriel Juarez, CONIC, the Attorney General's Office for Human Rights, MINIGUA, and one of the formal title landowners, Victor Raul Diaz to a meeting. Mr. Gabriel Juarez admitted lack of documentation but asserted ancestral title as well as colono rights. Mr. Diaz countered charged the community for deforestation of the property. Evidence included a document registering the transfer of title to the current owners.

Socio-Economic Report:

CONTIERRA conducted a socio-economic report in December 1997.¹²⁹⁵ The community of Piedra Parada was described as having "scare economic resources" and thus clearly lacked the ability to purchase the land. There was no access to public services and no provision of basic hygiene and medical assistance. Health problems included diarrhea, coughing, and cholera. In terms of the number of dependents, the families proved rather large: 33% of the families included ten or more dependent members, 12.5% totaled six dependent members, 4.16% had five dependents, 16.67% totaled three dependents, 16.6% supported two children, and the remainder varied between 0-1.

Access to education was completely lacking as there was no school in the community. The closest school is located in the community of Felicidad, however this was not available to them as the two communities were in conflict.

¹²⁹⁵ CONTIERRA, Socio-Economic Report for Piedra Parada, 9 Dec. 1997, on file with CONTIERRA.

Families live in their own houses which were constructed of an adobe mix, with only dirt floors and weak roofs. The houses have no electricity, water, or drainage. The community lacks recreation and sports areas. Development opportunities were non-existent, and no financial assistance was provided to the family. Each family depended on farming of potatoes, corn, and beans as the sole source of income. The families did not appear to have set monthly incomes. The community was divided into 75% retaining ownership of land and 25% asserting adverse possession. They cultivated between 12-25 cuerdas of land.¹²⁹⁶

In sum, the community was found to live under deplorable hygienic and educational conditions. It was deemed to lack a proper physical and social infrastructure and retain an unfavorable economic situation which hindered development.

The socio-economic analysis of the title landowners found that they tended to live in different communities than the properties held. Two title owners lived in the village of Santo Domingo, four lived in La Felicidad, and one in the village of Santa Teresa. Their families ranged from 4-9 members. They had access to basic health services and water. Health problems included the flu and diarrhea. The educational level extended to the sixth grade as access to local school is possible. Five title-holders own their homes, one rents. The houses are also constructed of adobe, however they have sturdy roofs, cement floors, basic water and electricity networks. Some families had a phone, access to public or private mail service, and shopped in supermarkets. Recreation areas are available to them.

The registered title-holders depended on two forms of economic activities-agriculture and salaried work. None of these families received technical or financial assistance for their agricultural activities. They cultivate between 5-40 cuerdas of land and sell both on the local and departmental levels. Some used hired help. They appeared to have monthly incomes as they were able to meet payments of monthly electricity and water bills. These families were deemed to have a more favorable social and economic situation than the opposing parties, but they were by no means wealthy.

In November 1997, CONTIERRA called a meeting with the Departmental Governor, the purchasers of the land, the owners and their lawyers. The meeting was conducted in the Governor's office. One lawyer claimed that he had arrived with the

¹²⁹⁶ One *cuerda* equals approximately 40 meters.

judge and the national police, and that they had been attacked with sticks. He warned that should no accord be reached, a legal eviction would be pursued. CONTIERRA noted that the community of Piedra Parada had neglected to appear. Both the lawyers and the Governor requested new meetings in the hope of avoiding violence.

CONTIERRA's own documents revealed that the Piedra Parada community did not have "any legal or solid substantive evidence" demonstrating their ancestral ownership of the land as CONIC claims. However, there was a document of donation dating back to 1898 which demonstrated a transference within the family of title from Juan Orozco Pascual Gabriel to Martin Narcisso Babriel Perez. The document was not considered to be legally valid, however it could serve as a reference dating back 100 years as the community stated. It was pointed out, however, that indigenous people tended to transmit property orally, rather than in written form. The legitimacy of the document was brought into question. CONTIERRA considered it necessary to find out whether the heirs had registered this right in order to make their rights as heirs legitimate. In addition, a technical analysis of the documentation was ordered. CONTIERRA noted that other public documents may exist which were not registered, thus rendering the calculation of the exact area of the finca rather difficult.

It was stated that only one of the registered owners, Victor Raul Diaz, was willing to negotiate, the rest preferred to utilize the formal judicial process. CONTIERRA also concluded that the possessors should consider solution alternatives, given their lack of documentation. This final decision reflects the institution's allegiance to the formal registry system of property rights.

In December 1997, as second meeting was conducted in the Departmental offices of San Marcos including ten title holders, ten representatives of the community of Piedra Parada, and two members of CONIC. The people of Piedra Parada were given an opportunity to present their case. CONIC gave a historic account of the conflict and presented the community's proposal which included indemnification for labor, preferably in land, and the negotiation of the sale of the rest of the finca. This represents CONIC's basic strategy in most land dispute cases.

In January a third meeting was held in which Mr. Marco Tulio Quezada, speaking on behalf of the title holders, stated that the families occupying the land never had any labor relationship with the title holders, thus indemnification was not called for. This point is extremely important because although it may well be that in this case there was no labor relationship, in many cases title holders permit peasants

to work on the unused portions of their property without entering into a contract, thereby limiting the peasants' ability to assert labor rights. As "voluntary workers", they tend to be subject to gross underpayment and repression.¹²⁹⁷ CONTIERRA did not present any written evaluation of the exact nature of the relationship between the parties. In the interest of equity, it probably would have merited greater exploration.

In addition, Mr. Quezada stated that the majority of the finca had already been sold in small plots to other persons of poor economic resources, thus indemnification was also not possible. He also noted that prior to the sale of the finca he offered 3 cuerdas of land to each family which was rejected as the families demanded 30 cuerdas each. At present, he offered only what was leftover after the sale of the Finca Matriz. Mr. Victor Raul Diaz stated that he owned 222 cuerdas of land and that he was willing to sell 100 cuerdas. In addition, they promised to respect the ownership rights of those families which had legitimately purchased their plots. He later offered 200 cuerdas of land.

The community of Piedra Parada requested indemnification for labor in the sum of five cuerdas of land per family, negotiation of the sale of the rest of the finca, and guarantee of mutual respect between the parties. The community asked for 400 cuerdas of land to be purchased with economic assistance by the Land Fund. Mr. Marco Tulio Quezada stated the following conditions for the sale of land:

1. *Access to the water source by all families*
2. *Free use of the football field by all.*
1. *Respect for physical integrity of those who will measure the land*
2. *Free entry for all persons owning land in Piedra Parada.*
3. *Mutual respect between the parties.*

CONIC's demands were the following:

1. *Mutual respect between the parties*
2. *Respect for private property*

Thus it is evident that what is at issue is not only the distribution of land but also the attainment of harmony and peace within and between communities, given that both sides called for mutual respect. The accords reached on the community level represent the practical implementation of the National Peace Accords. In January

¹²⁹⁷ CONSEJO DE INSTITUCIONES DE DESAROLLO (COINDE), DIAGNOSTICO SOBRE REFUGIADOS, RETORNADOS Y DESPLAZADOS 24 (1993).

1998, the parties concluded a partial agreement which included the following provisions:

1. *The community of Piedra Parada agreed to renounce the indemnification claim on condition that the title holders sell them 400 cuerdas instead of 100 cuerdas.*
2. *The parties would respect the common use of the football field.*
2. *An act would be signed which would guarantee the right to physical integrity of all persons entering Piedra Parada. All those committing physical acts of aggression are to be punished with full force of the law.*
4. *Mr. Victor Raul Diaz Navarro agreed to bring the offer of the sale of land, including registry and map to the Departmental Governor as soon as possible.*

In April 1998, Mr. Victor Raul Diaz presented his offer of 400 cuerdas of land at 3000 Quetzales per cuerda to CONTIERRA for financing from the Land Fund. The Land Fund considered the offer to be too high, stating that the land was only worth 800 Quetzales per cuerda. Marco Tulio originally offered to sell the land directly to the peasants, excluding the Land Fund. The peasants refused his offer but remained on the land. He threatened them with eviction but eventually offered to rent the land at a rate of 35 Quetzales per cuerda per year to the peasants with an option to buy in the future. Although both the Land Fund and CONTIERRA considered this to be a reasonable solution, given that it avoids forced eviction and land speculation, the peasants rejected the offer as they claimed their principal goal to be land ownership. Hence, the conflict remains ongoing. In essence, rent would appear to suspend the land conflict temporarily. Until the speculative land market is controlled, permanent solution seems far-fetched. This case reveals how calls for restitution or indemnification are not properly addressed by CONTIERRA. Rather than conduct an examination of the relevant restitution norms within international law relevant to historic title or national norms pertaining labor compensation, CONTIERRA promoted a compromise which would dismiss such argumentation.

2.4.3. Lack of redistribution: Non-coordination/cooperation with other land agencies

“Los que tienen no sueltan” (Those which have, don’t let go)

Guatemalan expression

Due to the fact that quite often the land disputes can only be resolved by way of issuance of land credits, restitution, title, or compensation in the form of provision of alternative land, the ultimate solution of the conflict depends on other land institutions, such as the Land Fund, FOGUAVI (Low Income Housing), and INTA (National Institute for Agrarian Transformation, now defunct, replaced by a Commission). Delays and non-coordination in these institutions further complicate solution to conflicts. Response is often dependent on the level of political interest in the case. Each institution blames the other, and the peasants are submitted to an eternal round of ping-pong. Thus, the most challenging problem facing CONTIERRA is the fact that the substantive success of its procedures is largely dependent on the substantive provision of land. CONTIERRA alone cannot remedy the structural distribution of land in Guatemala. As long as the government fails to embark upon a substantive land distribution program which fully addresses the restitution needs of dispersed internally displaced persons, and educational/vocational training alternatives, land conflicts will not dissipate. This problem was foreseen and enunciated in the preamble of the Agreement on Socioeconomic Aspects and the Agrarian Situation:

*“That an overall strategy is necessary in rural areas to facilitate the peasants’ access to land and other productive resources, which promotes legal security and favors conflict resolution.”*¹²⁹⁸

The number of successful agreements concluded by CONTIERRA is contingent on improvement of the services provided by the other executive land agencies, as well as action by the legislature and judiciary. The attainment of social justice is a task which goes beyond the possibility of CONTIERRA’s mandate.

The Ministry of Agriculture’s (MAGA) official policy is that the government will not distribute a large quantity of land because it does not want to reward usurpation.¹²⁹⁹ The newspapers are filled with reports of peasants usurping land and placing demands on the State to legalize their possession in order to allow them the possibility to receive services such as potable water, electricity, and agricultural assistance.¹³⁰⁰ The Ministry fears that CONTIERRA considers the Land Fund to be an escape valve. It considers the Land Fund to be an institution designed to address

¹²⁹⁸ Agreement on Socio-economic Aspects and the Agrarian Situation. (CITATION incom)

¹²⁹⁹ Interview with Julietta Calderon, Ministry of Agriculture, 17 February 1998.

¹³⁰⁰ See e.g. “Suchitepequez: Campesinos luchan por tierras”, PRENSA LIBRE 5 November 1999; and “Sin luz, agua, ni casa en Peten”, PRENSA LIBRE 3 November 1999.

poverty in the long term, rather than resolve immediate conflicts based on land usurpation. MAGA is supportive of CONTIERRA's conciliation function and states that in the future a National Dialogue on Land can be constructed based on CONTIERRA's model for the Chamber of Agriculture and peasant group discussions. In short, MAGA considers both CONTIERRA and the Land Fund to be emergency measures, the true answer to the land issue being the registry and catastrofe system. This reveals a bias for strategies which will hold formal property rights and dismiss approaches based on social justice, customary rights, or historic claims. It does not appear encouraging that MAGA refuses to consider CONTIERRA to be a permanent form of dispute resolution. As noted previously, land conflicts are not likely to disappear in the future and it appears that there is a great need for a committed effort towards the establishment of effective procedural mechanisms for conflict resolution.

URNG noted that "The complexity and time which the installation of the Registry and Catastrofe system requires should not serve as a pretext to avoid concrete responses to urgent land conflicts"¹³⁰¹ In their view, this would include both the provision of credits and subsidies for land purchases by the State as well as the strengthening of dispute resolution mechanisms.¹³⁰²

Harvey Taylor, of the Land Fund, states that CONTIERRA lacks a mechanism for finding actual solutions to conflicts.¹³⁰³ He describes the CONTIERRA process as one which seeks to bring about a willingness to sell land on the part of the title holder and a willingness to buy land on the part of the claimant, which of course would require assistance from the Land Fund. Hence, CONTIERRA is deemed to transfer unresolved cases rather than resolved cases. The Land Fund itself is a dilatory process which hinders efficient resolution. Mr. Taylor believes that conciliation is needed in land conflicts in order to reduce aggression between parties. In addition, the failure of the State to recognize historic, equity, restitution, or prescription claims complicates matters, because most landless people feel entitled to direct compensation/provision of land and do not want to pay/assume debt for it. As

¹³⁰¹ URNG, "Cumplimiento de los acuerdos de paz, periodo abril-diciembre 1997", p. 37 (January 1998).

¹³⁰² Shelton Davis is of the position that an improved registry system will not resolve intra-community conflicts, such as those resulting from inheritance disputes; he fears it may worsen disputes. He calls for the recognition of indigenous modes of dispute resolution, training of indigenous lawyers, judges, & interpreters, the adoption of a General Indigenous Law, and legal reforms to implement the Accord on Indigenous Peoples and ILO Convention No. 169. SHELTON DAVIS, *LA TIERRA DE NUESTROS ANTEPASADOS*, p. xxiv (Centro de Investigaciones Regionales de Mesoamerica 1997).

¹³⁰³ Interview with Harvey Taylor, Land Fund, 11 May 1999.

mentioned in Part III, I believe that the Land Fund should take into consideration the social cost of the conflict although it does not. The State needs to explore alternative solutions and address the background issues behind the land claims.

Given that these institutions also lack funds and have been subjected to outside pressures, it is no surprise that the process is stagnated. It has been noted that peasants engaged in a negotiation process to purchase land from the government may encounter delays of approximately 2-3 years from the time of initiation of discussions to implementation of a concrete agreement.¹³⁰⁴

Given the length of time to find an adequate property, determine the boundaries, make a title search, and negotiate the price; peasants lose hope of ever attaining assistance. As mentioned in Part III, it does not help that the land market is subject to speculation and lacks transparency. The Land Fund resents CONTIERRA's transference of cases to it, noting that: "We are not in the business of conflict resolution." However, CONTIERRA feels that the Land Fund should understand that its services in many cases are the only answer.

2.4.4. Time Delays & Lack of Resources

CONTIERRA lacks direct funding; all of its funds are processed through FONAPAZ/Land Fund. Thus, this promotes delays in financing the provision of vehicles and equipment, hinders the hiring of adequate staff to address a greater number of cases, and prevents advertising of its services to the general populace. Most peasants are unaware that CONTIERRA exists. In addition, at the time of my research, CONTIERRA was limited to conduct an average of one field visit per month for each case due to human and vehicle resource limitations and given the lack of decentralized offices. This presented a dilemma in which delicate high-conflict cases require constant attention which CONTIERRA is unable to provide on account of limited accessibility to parties. The strong emotional context of land disputes in Guatemala render resolution unlikely to occur in the short term. Conciliators are often forced to end meetings with a call for leaving unresolved matters for the next session. Unfortunately, the accords which were reached in the initial meeting may

¹³⁰⁴ Interview with Sotero Sincal, COINDE, 2 February, 1998.

have fallen apart by the time the parties were reunited with CONTIERRA the following month.

CONTIERRA staff should be permitted to conduct intensive conciliation sessions with strong follow-up when necessary. In such manner, CONTIERRA would be able to promote greater confidence in its efforts and disseminate conciliatory norms more effectively. The peasants needed greater contact with CONTIERRA, rather than less, in order to learn how to make peace among themselves. In short, relations between this state institution and the society must be strengthened in order to strengthen the society itself.¹³⁰⁵ CONTIERRA has since attained decentralized offices and is trying to remedy this problem.

A related issue is the lack of time pressure placed by CONTIERRA on the parties to resolve matters. On the one hand, it preserves the right of parties to design their own solutions according to their own criteria. Yet on the other hand, it may also prompt parties to arbitrarily stall such resolution, provoking needless costs and loss of time on the part of the State and the counter parties. Whereas land is considered to be a limited resource in Guatemala, time has no bounds. In part, this is a cultural characteristic. CONTIERRA staff note that conflicts in Guatemala are delicate matters placed within a highly antagonistic culture, the slow process is necessary in order to prevent the dialogue from falling apart. Although this point is well taken, there should be a balance, as some parties do lose faith in the process due to lack of final solution in an immediate manner. In addition, some scholars suggest that in highly emotional situations, it is preferable to adopt a strategy in which the information, time, consideration of alternatives, and problem attributes utilized are limited.¹³⁰⁶ In Guatemala, the time delays allow for re-escalation of the conflict. Since the conciliators only visit once a month, by the time that they have come back the parties have returned to a pattern of hostile antagonism, avoidance, and non-cooperation. Hence, each visit results in a rebuilding the prior consensus which was lost. Instead of increasing the chance of settlement, it dissipates due to the reemergence of conflict.

¹³⁰⁵ See Peter Evans, *supra* note 28.

¹³⁰⁶ Bettman, J.R., E.J. Johnson, M.F. Luce & J.W. Payne, "A Componential Analysis of Cognitive Effort in Choice" in 19 *ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES* 111 (1993), cited in James A. Wall, Jr., John B. Stark, & Rhett Standifer, "Mediation: A Current Review and Theory Development" in 45 (3) *JOURNAL OF CONFLICT RESOLUTION* 370-391 (June 2001).

2.4.5. Lack of Coercive Powers & Enforceability of Accords

“*Si no es por mal, no llega*” (If it is not done by force, it doesn’t get anywhere)

Guatemalan Expression

As an alternative dispute resolution mechanism, CONTIERRA does not have coercive powers. Should a party refuse to abide by a conciliation agreement, recourse to the court must be sought. CONTIERRA itself will not take the agreement to the tribunals, because that action is considered to be outside of its mandate. Hence parties must fund such action themselves. CONTIERRA has been unable to force parties to appear at meetings, and this has been a factor in the slow processing of cases. The lack of coercive powers is also a problem when parties engage in tactics involving threats or violence. Although one may envision the possibility of community pressure supplanting CONTIERRA’s lack of coercion powers vis-à-vis appearance by parties, good faith participation, or enforcement of accords, the fragmentation of society within Guatemala renders this unlikely¹³⁰⁷

A conciliation agreement is considered to be subject to legal recognition by a court according to the Arbitration Law of Guatemala.¹³⁰⁸ This carries a risk of rejection due to certain bias against ADR. The Center for Conciliation and Arbitration of the Guatemalan Chamber of Commerce would like to reform the law to recognize the conciliation agreement as *res judicata* and binding. Persons engaging in ADR retain the right to submit a claim for revision of an arbitration award or may contest a conciliation agreement in court. Thus due process rights are technically preserved, although this is questionable in practice given the problems within the formal justice system.

The case below highlights the link between CONTIERRA’s lack of coercive powers and the limited ability to attain final accords.

¹³⁰⁷ See ABEL, *supra* note 29 at 278.

¹³⁰⁸ Ley de Arbitraje, Decreto Numero 67-95, 3 October 1995, Chapter IX, article 50, noting that a written, notarized conciliation agreement should be legally recognized by a court or arbitration tribunal.

2.4.5.1. Case Study: Comunidad Bijolom II- Avoidance Strategy



Gaspar Velasco - The significance of this picture is who is missing from the picture: Comunidad Bijolom
Picture by Cecilia Bailliet

The case of Gaspar Velasco v. Comunidad Bijolom II of the aldea Saquil Drande, Nebaj, Quiche is characterized by the silence of Gaspar's wife. During the war, Mr. Velasco abandoned his wife and children and fled to live with the CPR Sierra. In 1988, the community of Bijolom II (30 persons) was brought in by the Army and took over Velasco's land (amounting to 80 cuerdas). Velasco's wife, Magdalena Hermosa, requested the Justice of the Peace of Nebaj to declare her husband to be deceased in order to officially sell the land to the community. She sold the land at the remarkably low price of 25 Quetzales per cuerda but kept 6 cuerdas for herself and her children. The Army subdivided the land into individual parcels. Upon Velasco's return after the war, he claimed his wife's actions to be illegal as pursued under duress and he sought the return of the land. Calling upon the Peace Accords, he sought restitution of his property by approaching the Bufete Popular of Quiche, PDH. MINUGUA, MP, etc. The Bufete was unable to negotiate an accord with the occupants, so the case was forwarded to CONTIERRA. Velasco first requested that the occupants abandon the land and houses voluntarily. He then relented and stated

that if they refused to leave then at least they should pay a just price for the land, 5000 Quetzales per cuerda. In response, the community offered 100 Quetzales per cuerda. Velasco lowered his demand to 1000 Quetzales but the community would not raise its counter-offer. Instead, they claimed that the temperature of the region was too cold to grow crops and offered to sell it back to Velasco for 20.000 Quetzales per lot, noting that they were entitled to compensation given that they had constructed the town, school, health center, court, and church. They claimed to have invested in the crops, setting in electricity, and obtaining potable water in the area. Velasco stated that if they were so unwilling to negotiate then they should just abandon the land. In addition, if the temperature of the area was too cold then the asking price could certainly not amount to 20.000 Quetzales. He offered to recognize the amount paid by them to his wife previously. The community finally offers 250 Quetzales per cuerda. CONTIERRA considers this to be a reasonable offer of compensation, given the poverty of the community. Velasco stated that he would accept 600 Quetzales.

The wife never admitted to coercion by the Army or other actor, although some in the community stated that the Army had influenced her. Others denied the existence of duress. However, she refused to participate in the dialogue with the peasant community. Whether her silence was due to fear of reprisal by the military or community members, a form of punishment for her spouse due to his abandonment, unwillingness to hamper her husband's pursuit of restitution, embarrassment over the situation, or a steadfast determination that she did what she needed to do to maintain the children alive during his absence is unknown. What is clear is that her silence complicated understanding of the history of the conflict and its eventual resolution. The day before a new conciliation meeting was to be conducted, a part of the community (led by the Evangelical pastor) left to work during the season in the Southern Coast. The Evangelists felt that they bought the property legally and did not owe Velasco anything, whereas the Catholic community was willing to pay additional funds for the property. CONTIERRA was angry to discover Mr. Velasco standing alone in front of the schoolhouse. The staff had borrowed a vehicle from FONAPAZ, hired a driver, and traveled four hours to reach a meeting that would never occur. The community's non-appearance was a clear message to Velasco that they were not willing to discuss the matter anymore and a signal to CONTIERRA that it should refrain from intervening in local matters. CONTIERRA stated that the aversion strategy was an act of bad faith, and that CONTIERRA would not return until the

community signed an act in the Municipal office confirming their good faith intention to conduct conciliation.

Velasco would have to request the Court to nullify the court order declaring him dead, as well as the sale transaction, and evict the community. Such action is liable to be time consuming and expensive. In addition, if the community is evicted then they will become internally displaced people, as they have nowhere to go. This is similar to the situation in Bosnia, when the refugees came back there were displaced persons in their homes. Eviction is difficult as long as the IDPs have no alternatives.¹³⁰⁹ In Guatemala, the absence of a land reform policy and deficiencies in alternative housing render the actual attainment of a just solution to property disputes highly unlikely, in many cases disputes remain ongoing due to a zero sum analysis.

Ideally, Velasco should seek compensation from CTEAR. However he is not likely to be given much attention given that he still retains 6 cuerdas, and hence has not been totally dispossessed. Prosecution of the Army is unlikely, especially given his wife's steadfast refusal to address the issue.¹³¹⁰

The lack of coercive powers in a setting in which there is a long tradition of dispute maintenance is a key weakness. One may argue that CONTIERRA should be provided with the means of enforcing party appearance once parties have commenced the process, however this would sacrifice the voluntary nature of conciliation and render it more like a court. Design of a dispute resolution mechanism in a post or protracted conflict context in which there are high levels of distrust and antagonism among the parties requires the empowerment of the mediator as well as the parties. The mediator must attain the respect of the parties in order to assure good faith participation.

¹³⁰⁹ In the Balkans, local judges initially refused to recognize documents recognizing property rights issued by the Property Commission. They deemed the entity illegitimate, hence refugees were left with paper instead of property.

¹³¹⁰ We may also consider the case of Canton Batzabaka, Nebaj El Quiche: A similar predicament was experienced by Agustin Chuchil Corio. Like Mr. Velasco, he abandoned his property during the war and joined the CPR. He had title to ½ cuerda in Canton Batzabaka, Nebaj, El Quiche. His sister, Maria Cobo, was encouraged by her son to declare her brother dead before the Justice of the Peace of Nebaj. As sole heir, she distributed the property to her children. Upon Mr. Corio's return he discovered Mr. Diego Perez living on the property. Because the solution would entail nullification of documents, CONTIERRA advised the parties to turn to the court system. They did not consider this matter to be a traditional land conflict.



The valley at stake
Picture by Cecilia Bailliet



One of the community children
standing by the schoolhouse:
occupants include the innocent as
well as the guilty
Photo by Cecilia Bailliet

2.4.6. Demoralization & Downsizing of CONTIERRA STAFF

CONTIERRA's staff was always aware that land conflicts involve complicated histories involving inequitable land division, hidden agendas, leadership divisions, deep-rooted hatred and sorrow, and other factors rendering solution beyond short-term. On my second field visit I found the staff to be demoralized and lacking energy. They claimed that although CONTIERRA had made some progress, it had been slow. The continuing low profile, minimal resources, and lack of credibility hampered its work. In addition, they continued to be understaffed. MINUGUA described its lack of human, technical, and financial resources to be "chronic".¹³¹¹ It accused the staff of not having the ability to establish the nature of the conflict and its structural complexity, instead embarking upon resolution strategies based on superficial and partial considerations. Hence the results in turn are deemed to be temporary and precarious. This author disagrees with the criticism based on my discussions with the conciliators who I found to be profoundly aware of the intricacies of the land conflicts. I submit that the lack of progressive action addressing background concerns is more probably due to political pressure from above, and incorrect use of the neutrality principle, rather than lack of understanding of the nature of the cases. The conciliators lack independence from the elites to pursue substantive justice. The political pressure gravely affects the capability of CONTIERRA to utilize its experiences in resolution of land conflicts given that the more experienced conciliators leave the institution.

By 2001, of the original group of conciliators I observed: one was fired in order to make room for a member of the FRG political party; another resigned in frustration on account of the pressure not to explore corruption issues; a third resigned due to a substantial pay cut which he claimed "deprived him of his dignity"; and the fourth, fifth, and sixth did not have their contracts renewed, based on budgetary concerns as well. It was disheartening to witness persons who had dedicated themselves to promoting post-conflict healing subjected to humiliation and driven from jobs which they had hoped to serve people in need. In addition, CONTIERRA was losing its "human databanks" of expertise in conflict resolution in the land arena, as the lessons learned from cases were lost with the persons who had played a part in

¹³¹¹ MINUGUA, SITUACION DE LOS COMPROMISOS RELATIVOS A LA TIERRA EN LOS ACUERDOS DE PAZ (May 2000).

their investigation, strategy evolution, and resolution design. None of the conciliators I observed during my field visits are working for CONTIERRA.

At present, CONTIERRA retains only 20 conciliators, in spite of having over 600 conflicts, thus there is a clear need for more staff. It has increased other staff, such as lawyers and technical experts to pursue registry investigation and measurement of borders. Thus, the current emphasis is on establishing clarity pertaining to documentation of property rights, with less emphasis placed on discussion of social justice or recognition of historic claims. It is disturbing to have witnessed the evolution of an institution from one espousing idealistic goals of reconciliation and peacemaking to one performing the practical function of affirming property rights, as supported by the World Bank and AID. The current position of Donors is that registry of property rights provides clarity which in turn may diminish disputes, hence they favor the elaboration of a system to uphold property rights via formalization. However, if the registry fails to recognize the validity of customary claims and human rights claims regarding property rights, it will only preserve the status quo and risk more aggressive disputes in the future. Already, there has been an increase in marches and land invasions.

As mentioned previously, ironically, MINUGUA has sponsored the creation of a computerized Documentation Center on Agrarian Conflicts within CONTIERRA. Although it is extremely valuable to access the files, studies, and reports regarding the land conflicts, there are many aspects of conflict resolution which are never recorded on paper. True understanding of the background and dynamics of each dispute would require oral commentary from those who handled the cases. CONTIERRA was left as a mere shadow of itself. Of interest is that some of these conciliators quickly attained positions within the international agencies, transferring their “human capital” to alternative justice & community programs which could provide a more independent working environment. The problem is that the State institutions remain lacking in personnel to effectively develop their programs and hence their legitimacy is questioned. The severe budget cuts and downsizing inhibits the institution’s ability to follow-up disputes.

International agencies benefit from the internal brain drain, and the society may well gain from programs more removed from direct national political influences. Of special concern is the fact that the percentage of middle-lower class persons educated in law, psychology, agricultural engineering is very low in Guatemala. It will be very

difficult to replace the staff. Rural peasants are unlikely to trust a staff which varies significantly from their own background and experiences, indeed one of the key attributes of the original CONTIERRA conciliators was their natural affinity for the parties.

2.4.7. Role of International Organizations

“The need to restore normal patterns of life, and to ensure the economic survival and social well-being of displaced persons, and to reconstruct civil society amongst internally displaced persons is a matter of urgency for the affected States. Where it is beyond the capacity of the distressed States to put such measures in place, the international legal system should provide a method of response to assist such States on the basis of the principles of international cooperation following agreed criteria.”

*Chaloka Beyani*¹³¹²

The international community is being confronted by a gray zone known as “transition to peace” which was not quite easily categorized as falling under the traditional mandates of either the humanitarian or development agencies.¹³¹³ One of the key actors in this arena has been the Organization of American States, which is actively promoting the concept of “conflict transformation” in Guatemala through its PROPAZ program. The central notion is that conflicts are natural occurrences within all societies, which can never to be eliminated, but rather transformed from antagonistic, polarized, violent exchanges to discussions based on mutual respect and willingness to cooperate in order to reach a solution. The OAS/PROPAZ program provided CONTIERRA with two training courses (each of two days duration) in conciliation and a one-day discussion of arbitration with the Center for Legal Opinion, Conciliation, and Arbitration in 1997.¹³¹⁴ Concern for the cost of arbitration and lack of familiarity with its operation resulted in the exclusion of this type of mechanism from actual implementation. The short duration of the training programs may have influenced the rejection of arbitration in practice and the inability to promote a more active conciliatory role in disputes. The OAS itself did not observe the CONTIERRA conciliation mechanism in action during its first year which prevented follow-up. MINUGUA was the only international body to regularly send observers to the sessions, however, it was not charged with financial or technical assistance. USAID provides technical assistance. The OAS points out that CONTIERRA itself proved reluctant to dedicate more hours to training, claiming its heavy work load as an excuse. Review of the OAS materials reveals that the materials are derived from general American mediation theory, thereby lacking

¹³¹² Chaloka Beyani, “Internally Displaced Persons in International Law”, 20 (Copy located in UNHCR, CDR, July 1995)

¹³¹³ Interview with Dr. Rafael Flores, Human and Social Development Group, World Bank, January 26, 1998.

¹³¹⁴ OEA/PEOPAZ, Informe del Periodo Agosto de 1996.October 1997 (OAS Dec. 1997).

materials directly addressing ethnic, religious, and community leadership divisions which prevail in the local land conflicts. Much ADR theory has been developed within the context of private, commercial conflicts. It is obvious that CONTIERRA could have benefited from observation of its disputes in the field in order to design a training mechanism best oriented for the domestic context. In addition, CONTIERRA has a wealth of expertise within its own walls. The conciliators of the different sections should meet together to discuss their experiences, draw common conclusions, and help design in-house strategies based on their own observations. They also should request feedback from parties on their intervention in order to properly assess their successes and failures. As of yet, these measures have not been taken. The OAS states that it considers CONTIERRA to be a good idea in general terms, but that the lack of resources prevents it from fulfilling its mandate.

Donor representatives indicated that there appears to be a problem with programs involving earmarked funds, as is the case of CONTIERRA. One UNDP official stated that its support of CONTIERRA consisted primarily of transference of donor funds, rather than provision of technical training or supervision of the dispute resolution process.¹³¹⁵ One exception was UNDP's financing of a visit by an Argentine ADR institution, Fundacion Libra, to provide additional training. Since UNDP does not have any role in determining how funds are to be spent, there is little interest on its part for follow up. Donors incorrectly assume that the channeling of funds by way of UNDP will guarantee automatic follow-up, but this is not always the case, as UNDP may in turn believe that this duty falls upon the donors themselves. A representative from the Ministry of Foreign Affairs of Denmark stated that although she considered UNDP to be a trustworthy institution, the goals are not always achieved under the fund transfer format.¹³¹⁶

Another major problem is the donor concern for accusation of intervention in domestic affairs. Given that the State elites do not exhibit concern for CONTIERRA's resource problems which limit the implementation of its mandate, one might suggest that donors should grant more funds to the institution in order to free it from domestic political pressures. Donors claim that a problem is that when funds are offered for a certain program which is not prioritized by the State, it often suggests that the funds be utilized for another institution. This leads to a bizarre cycle

¹³¹⁵ Telephone interview with Andrew Russell, UNDP Headquarters New York, September 8, 1998.

¹³¹⁶ Interview on condition of anonymity 3 July 1999.

of status quo investment, unless the Donors condition funds on change in a particular area and provide follow-up.¹³¹⁷

Unfortunately, staff members state that there was political opposition to CONTIERRA's creator, Alvaro Colom, thus there was great interest in weakening CONTIERRA. Thus the government feared further growth of his popularity through successful policy implementation. They allegedly impeded effective coordination of CONTIERRA's actions with those of other governmental institutions. Colom grew so frustrated by the resistance that he resigned from his office, as did his successor shortly afterwards. CONTIERRA staff members state that he was not willing to merely perform "cosmetic surgery" while the government failed to attack the intrinsic socio-economic problems. In addition, the State's failure to address the counter-agrarian reform movement, as evidenced by the derogation of a bill establishing a new property tax in February 1998, further complicated his work. Although Colom no longer directs CONTIERRA, it has been suggested that the Ministry of Agriculture continues to deny CONTIERRA proper support regardless of its statements to the contrary.¹³¹⁸ A concern arises that the land institutions continue to be kept financially weak, understaffed, and lacking technical support in order to prevent significant advances in this arena. A Ministry of Agriculture representative stated that the true objective is to streamline the institutions so that they would not become excessively bureaucratic.¹³¹⁹ It may be questionable as to how valid this argument is given that at the time of research CONTIERRA only had a staff of nineteen persons to handle 193 cases, and the number of conciliators remained the same although the caseload grew to include ca. 600 cases.¹³²⁰ There is clearly a strong counter-agrarian reform effort.

In February 2000, a Governmental Accord 69-2000 (31 January 1999) set forth that CONTIERRA was transferred from SEPAZ to MAGA in order to better coordinate the land institutions. Miguel Perez of CONIC, felt that this change was superficial given that CONTIERRA's functions had not been changed, both the Land Fund and CONTIERRA played "ping-pong" with the peasants, thus no benefit could

¹³¹⁷ In April 2000, the UN Economic Commission for Latin America and the Caribbean called for the adoption of alternative justice programs to increase citizen participation in conflict resolution.

¹³¹⁸ Interview with Rodolfo Rohrmoser, Director of Centro Privado de Dictamen, Conciliacion y Arbitraje, 10 February 1998.

¹³¹⁹ Interview with Julietta Calderon, Assistant to the Minister of Agriculture, February 18, 1998.

¹³²⁰ CONTIERRA, Informe Anual de Labores, Junio 1997-Julio 1998, p. 11. This figure includes all staff: conciliators, secretaries, drivers, etc.

be expected.¹³²¹ Thus, the State is accused of giving the appearance of organizing the land institutions, rather than actually improving their performance. Rather than establish a synergy with the movements within the society to organize demands, the State engaged in superficial reforms that instilled no civic confidence among the people.¹³²²

Due to budget cuts and delays in issuance of contracts, the CONTIERRA staff continued to feel vulnerable and uncommitted. A fourth director was appointed in March 2000, Pedro Pablo Palma Lau, former commander of the Organization of the People in Arms (a guerilla group). In short time, he received criticism for noting that the land conflicts were difficult to resolve in the short term, sounding much like previous party-line directors rather than an ex-guerilla. Ironically, two years later the Chamber of Agriculture accused him of inciting peasants to engage in usurpation actions.¹³²³ The unwillingness of elites to allow CONTIERRA to pursue full exploration of corruption issues or recognize the legitimacy of claims based on equity standards, indigenous/IDP rights, or other alternative grounds backfired as peasants lost faith in ADR as a possible vehicle of inclusion. Hence, loss of legitimacy comes from both sides. In essence, the institution is caught in a catch-22, when parties are so polarized there are problems arriving at recognition of a middle way.

One important value that CONTIERRA has is its ability, as a state institution, to network with international agencies, other state entities, national development institutions, and NGOs in order to devise creative solutions to problems. Its status as a state institution gives it a degree of importance which may serve to stimulate cooperation among the different entities. This was demonstrated to some extent in the FUNDACEN case, as well as the Tampur case.

However, there are problems present in the conceptualization of ADR as a structural coupling between the legal and political systems. ADR institutions which are linked to the executive branch are subject to political pressure, thus as an alternative to courts which suffer accusations of corruption and bias, there may not be much to gain. ADR institutions which are more independent, such as those established as NGOs which may be financed by international agencies, may have greater legitimacy due to independence from domestic political pressure. On the

¹³²¹ Edgar Rosales, "Burocracia crece: Crean mas viceministerios", SIGLO XXI, 2 February 2000. CONIC claimed to have only resolved two cases through CONTIERRA/Land Fund intervention.

¹³²² See Peter Evans, *supra* note 28.

¹³²³ Pedro Pop & Rocio Bonini, "Acusan a Gutierrez y a Palma" in PRENSA LIBRE 23 April 2002.

other hand, they may then suffer attack as instruments of international intervention. Hence, ADR's effectiveness is fundamentally linked to the context in which it is placed and the possibility of trust by the people utilizing it. Consider the case of the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina:

2.4.7.1 Commission for Real Property Claims of Displaced Persons and Refugees

The Commission for Real Property Claims of Displaced Persons and Refugees was established in March 1996 in accordance with Annex 7 of the Dayton Peace Agreement. Its mandate is to assist persons reclaim properties lost during the war and return to their homes or seek compensation instead. It is a hybrid institution in the sense that it is composed of three international members, appointed by the President of the European Court of Human Rights, and six national members, four of whom are appointed by the Federation of Bosnia and Herzegovina and two by the Republika Srpska. Regional offices were opened in Bosnia and Herzegovina, Yugoslavia, Germany, Sweden, the Netherlands and Norway. Claims are presented to the regional offices and are verified by legal experts who in turn provide the Commissioners with draft decisions. Approval of the claim results in the provision of a certificate confirming the claimants' right to his/her property and right to return or claim compensation. The Dayton Peace Accord is unique in the sense that it is the only international document to recognize refugee right to return to their homes:

“All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities.”

(Traditionally, the right to return refers to the country of origin, not specifically one's home, this clause is unique due to its expanded right.) By December 1998, the Commission had received over 121,000 claims in Bosnia and had issued 29,000 decisions.¹³²⁴ Unfortunately, the Commission has been largely unable to enforce practical implementation of its decisions as it lacked an enforcement mandate. Local

¹³²⁴ Commission for Real Property Claims of Displaced Persons and Refugees, Background Information on the CRPC, (Date of publication omitted).

government officials and judges claimed not to recognize the legitimacy of the Commission, and preferred to abide by what they view to be national juridical norms. The lack of alternative housing for those to be evicted was also cited as a factor for non-compliance.¹³²⁵ The fact that the Commission nullifies sales of property made under duress meets with rejection on the local level. The environment of ethnic discrimination and resentment also complicates compliance. Because the Commission did not have a sanctions mechanism, it is unable to force the local authorities to recognize the certificates. In response to this problem, the Office of the High Representative recommended amending national legislation to refer to Commission, thereby incorporating it within the domestic juridical framework. The Law on the Cessation of the Application of the Law on Abandoned Apartments and the Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens were issued in Bosnia and Herzegovina. These call for decisions of the Property Commission to be recognized as final and binding, having the same legal force as a decision of any other competent authority in accordance with the laws.¹³²⁶

However, the reform of the law on paper does not guarantee a change in practice. The fact that these actions occurred three-four years after the creation of the Commission was lamentable, because the Commission's inability to attain local acceptance meant that it was unable to achieve its goals for enabling refugees to return. Aida Miljevic, the Commission's representative in Norway, noted that additional legal reform is needed, in the form of a law requiring all local authorities to comply with the Commission's decisions, providing clear instructions as to how to implement the certificates, and a deadline of 30 days for performance.¹³²⁷ Additional legal reforms were adopted in 1999, and the CRPC noted a rise in implementation although no set figures were made available.¹³²⁸ The strategy of denying international

¹³²⁵ Madeline Garlick, "Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina", 65, 77, REFUGEE SURVEY QUARTERLY, Vol. 19, No.2 (2000).

¹³²⁶ Law on the Cessation of the Application of the Law on Abandoned Apartments, Article 14, Official Gazette of the Federation of Bosnia and Herzegovina 11/98, and Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, Article 14, Unofficial translation made available by the Office of the High Representative, (<http://www.ohr.int/property/>).

¹³²⁷ Interview with Aida Miljevic, CRPC representative in Norway, 13 July 1999.

¹³²⁸ See Garlick, *supra* note 227 at 79, footnote 32. See 12 January 2000, Decision of the High Representative establishing clear authority for implementation of CRPC Decisions within the RS Ministry for Refugees and Displaced Persons; 27 October 1999, seven decisions of the High

aid until the certificates have been abided by has been one strategy expected to generate enforcement. However, the local officials make oral promises to amend their practices but rarely do in reality. They cite bureaucratic tangles as explanation for inaction. The certificates may be of value to persons in the future for sale of land, however at present it has little value for repossession.

The Commission does not have any conciliation mechanism and it may well be that this is another factor impeding implementation of the decisions. A decision which is reached without full discussion with the adverse party renders its acceptance by said party difficult. There is no oral proceeding, as documentary evidence is the only proof accepted. There are no attempts to allow the parties in conflict to suggest alternative solutions or compromises. The fact that parties are not seated together at a table to discuss their differences themselves promotes greater estrangement between them. In short, they perceive each other to be anonymous threats rather than human beings in search of reconciliation.

One of the positive developments of the Commission is that it is creating a property database to provide registry information and remedy the destruction of property records during the war.

In its 1998 Mid-Year Report to Donors, the Commission stated that one of the key problems was the fact that there are 800,000 displaced persons occupying properties believed to belong to refugees or other persons.¹³²⁹ Refugees were unable to reclaim their properties and forced to cohabit with other families under precarious situations. Their return has been deprived of dignity and the basic socio-economic guarantees necessary for reintegration. It appears that there is a division between refugees and IDPs, instead of being brought together they are becoming more polarized. Additional criticism has indicated that international aid was generated at reconstructing damaged property instead of building new homes to relocate the displaced in order to enable the return of refugees.¹³³⁰ This may be due to fear of supporting ethnic cleansing through construction, or due to fear of investing in an

Representative harmonizing the property legislation between the RS and the Federation and addressing application; 27 October 1999, decision on the recognition and implementation of CRPC decisions in the Federation; 27 October 1999, decision on the recognition and implementation of CRPC decisions in the RS.

¹³²⁹ Commission for Real Property Claims of Displaced Persons and Refugees, Mid-Year Report and Appeal to Donors for the period 1 January to 30 May 1998, (<http://www.crpc.org.ba/english/text/news/other/1998-05.htm>).

¹³³⁰ Interview with Aida Miljevic, CRPC representative in Norway 13 July 1999.

insecure region. The UNHCR had prioritized minority returns and reconstructed Serbian apartments, only to witness the Serbs sell the apartments shortly after arrival.

If refugees and IDPs were to seek remedy through the court system, the action would potentially take five years, due to appeals. This is a relatively long process, however it does not appear that the Commission has proved more effective due to its lack of enforcement. At present, people are exchanging properties themselves, without bothering to register.

The compensation scheme also met with problems, given resource problems and difficulties in finding a property value determination system which would be acceptable to all. In addition, parties seemed to believe that they could choose between permitting return or providing compensation to the displaced, hence imperiling the right of return.¹³³¹ The Commission was forced to place this option aside. Miljevic admitted that she was more skeptical of the Commission at present than at its inception. She stated that the Commission had not been able to fulfill its mandate, thereby rendering its existence questionable.

Thus, the international identity of the institution limited its potential for enforcement of its output.

2.4.8. Possible Error in Institutional Design

To some extent, CONTIERRA's problems may have been preordained.¹³³² It is important to consider its organization as a State entity instead of local or international institute. CONTIERRA emerged as a structural coupling, its birth centred within the Executive branch of government. A caveat must be highlighted that within Guatemala, community structures may lack historical weight due to the

¹³³¹ Marcus Cox, "The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina" in 47 INTL. COM.L. Q. 599,664 (1998).

¹³³² One need only consider Merry's identification of criteria for successful mediation, all of which CONTIERRA fails to meet:

- a. *ADR should be based on existing community structures rather than appended to the legal system*
- b. *ADR should address disputes between relative equals*
- c. *ADR should be utilized in future-oriented disputes in which people feel a need to settle*

Sally Engle Merry, "The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America", p.40 in RICHARD L. ABEL, THE POLITICS OF INFORMAL JUSTICE, VOL. 2 Comparative Studies, (Academic Press 1982).

negative impact of forced migration, genocide, and resettlement of new groups. The decision to construct a national ADR mechanism rather than community programs may be criticized for catering to the wishes of political elites to control the resolution of land conflicts via a centralized mechanism, however it does practically respond to the fact that many communities in Guatemala are relatively mixed after the war and include a diversity of backgrounds, values, future aspirations, and even language, thus there are weak levels of horizontal social capital. The loss of traditional homogeneity due to forced migration, or ethnic, religious, political divisions, etc. may render community ADR mechanisms ineffective, indeed the research revealed a high degree of internal divisions and distrust at the local level.¹³³³ For example, limited access to sufficient land or water for a growing population results in a multiplicity of inheritance disputes within and between families, families versus the municipality/community etc. Nor is it certain that community mechanisms would be able to attain a higher degree of independence from influence by State elites or powerful Non-State agencies than CONTIERRA or the courts.

The role of the Church, NGOs, and international organizations in sponsoring other ADR mechanisms in Guatemala is important as a complement to State-sponsored conflict resolution mechanisms, but not as a total replacement. It should be possible to pursue a variety of initiatives in order to have a network of support, strategy making, and transnational oversight to ensure respect for human rights norms and democratic principles. Those who may advocate use of an international dispute resolution mechanism should recall that in the case of Bosnia and Kosovo, there was an insufficient degree of local political support for UN/international dispute resolution of property conflicts.¹³³⁴ In East Timor, the National Cabinet advised UNTAET not to establish a land claims commission without a democratic mandate by the East Timorese people.¹³³⁵ Because control over property is a traditional function of sovereignty, states and social actors are reluctant to cede control of such matters to international bodies and may refuse to implement its decisions or recognize its accords.

¹³³³ See Sally Engle Merry, *Id.*

¹³³⁴ UNITED NATIONS CENTRE FOR HUMAN SETTLEMENTS, HOUSING & PROPERTY RIGHTS IN KOSOVO, (March 2000) <http://www.grid.unep.ch/btf/mission/habitat/> cited in Daniel Fitzpatrick, "Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor", (UNHCR Working Paper No. 58 February 2002) at <http://www.unhcr.ch>.

¹³³⁵ Fitzpatrick, *Id.*

Furthermore, many cases submitted to the national ADR mechanism are precisely those cases that the communities were unable to resolve within their own procedures. Although use of decentralized, independent dispute resolution mechanisms are needed, this cannot completely replace similar mechanisms within the State. Official ADR mechanisms are expected to play a part in fulfilling the State's function of maintaining social order in a positive manner. State agencies may be seen as complementing local groups' efforts to resolve problems, particularly when promoting a conciliatory process which encourages full participation by marginalized groups and individuals.¹³³⁶ In addition, they may be considered a mode by which to promote improved communication and interaction between State and Society. Finally, training of staff in ADR theory and techniques serves to transfer new values relating to peace, mutual respect, and dialogue to the State itself. Promotion of ADR within the State thus may transform the State itself as well as parties in disputes. It is necessary to continue to explore State-society networks in pursuit of a co-evolution towards democratic norms. In an age of successive state implosions around the world, attention must be paid to the danger of rejecting initiatives which pursue state-society interaction. Excessive reliance on parochial networks or international institutions may further weaken the State.¹³³⁷

¹³³⁶ See JOHN HARRISS, *DEPOLITICIZING DEVELOPMENT: THE WORLD BANK AND SOCIAL CAPITAL* 65 (LeftWord Books 2001) also citing Peter Evans, "Development Strategies Across the Public-Private Divide, 24 *WORLD DEVELOPMENT* 6 (1996).

¹³³⁷ Studies have demonstrated that collective actions which focus on securing particularistic interests may prove mutually exclusive and result in patronage politics. This weakens the State through demand overload and reliance on parochial alliances. See Patrick Heller, "Social Capital as a Product of Class Mobilization and State Intervention: Industrial Workers in Kerala, India", in 24 (6) *WORLD DEVELOPMENT* 1055-1071, 1057 (1996), citing JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD* (Princeton U.Press 1988). Almond & Verba identify three types of political culture: **Parochial, Subject, and Participant**. A Parochial Political Culture is one in which there are no specific political roles within the society as they are congruous with religious and social roles. Most importantly, they note that the parochial culture "implies the comparative absence of expectations of change initiated by the political system. The parochial expects nothing from the political system." Examples given are African tribal societies which are far removed from the central government. A Subject Political Culture is one in which the people are very aware of the State, and have strong feelings/opinion for or against it and its policy output; however they have limited knowledge of the policy creation process and their own input/feedback participation is almost non-existent. The Participant Political Culture is one in which people are aware of the political structure and processes (creation and implementation), and have active roles in such activity. Responses of approval or disapproval of political policy range from legal to illegal actions, such as voting, engaging in protests, etc. Almond & Verba state that these cultures can be combined within individuals and that nations often include more than one culture. Hence they note that "The 'citizen' is a particular mix of participant, subject, and parochial orientations, and the civic culture is a particular mix of citizens, subjects, and parochials." GABRIEL ALMOND & SIDNEY Verba, *THE CIVIC CULTURE*, (Sage Publications 1989).

It has been suggested that one strategic error in CONTIERRA may be its design which is based on an American model.¹³³⁸ CONTIERRA staff are presented as neutral third parties. This is criticized as clashing with the Guatemalan culture which in general does not accept the notion of a neutral, impartial mediator when that person is unknown to the community. Instead, it would perhaps be preferable to use conciliators who are chosen from the community itself and thus have the trust of the people. Although this point is well-taken, my observations revealed that the parties to the FUNDACEN case exhibited a great deal of trust in the CONTIERRA staff due to separation from both groups and their obvious dedication to attaining resolution to the case. In addition, the communities in the FUNDACEN case, like most of CONTIERRA's cases, were too polarized to be able to pick a neutral party from within. Many communities lack historical unity and homogeneity due to the consequences of war, forced displacement, and resettlement. It is difficult to select impartial mediators from communities which have undergone decimation and repopulation in the context of violence. The recommendation to train community members for future use in conciliation is a solid one that should be implemented, but only as a complement to CONTIERRA's activities, not as a replacement. Such training would require resources which CONTIERRA lacks. Additional international support would be required. Given that the conciliators themselves have received an average of only three-day training sessions themselves, the training of community members would require a longer period that may not be easily supported by the State. Mandatory conciliation training for parties before commencement of the dialogue may be an effective way to reduce lag time because parties are taught how to listen and present opinions in a neutral setting before embarking upon contentious issues.

2.4.9. Conclusion on Output

CONTIERRA suffers from system overload due the enormous quantity and vast complexity of land conflicts which overwhelm the small staff. It has largely failed to produce output that corresponds to input in terms of number and responsiveness. In terms of quality of output, the principal problems relate to non-coordination with the land agencies, the absence of a substantive land reform policy,

¹³³⁸ Interview with Michael Brown, OAS.

lack of coercive powers, limited staff and resources, and unwillingness/inability to explore background issues involving corruption, coercion.

At the time of my research, CONTIERRA appeared to be struggling to engage in dynamic persistence, which would require undergoing transformations in response to demands and pressures from inter and intra-system environmental actors. Both the FUNDACEN and the Tampur case revealed flexible approaches, the use of equity analysis in the former case, and an attempt to provide development assistance via coordination with other international and state agencies. However, in large part, CONTIERRA proved unable to substantively effectuate change. In short, its actions largely mimicked the formal legal system's tendency to uphold the status quo. Ironically, ADR is most often accused of being applied to conflicts which do not challenge existing structures, in this case it was selected to address precisely those conflicts rooted in structural imbalances, although the jurisdictional limitations and formal legal bias effectively exclude the strongest challenges, such as indigenous customary claims to land.

CONTIERRA's attempt to limit inputs by exclusion of cases involving usurpation, labor, inheritance, indigenous possession, and sale of fincas on indigenous land automatically delegitimizes the institution in the eyes of the rural society which consider these cases to be in pressing need of solution. Neither has this attempt to limit inputs proved effective in streamlining CONTIERRA's caseload for processing. In spite of the limited mandate, CONTIERRA's cases have increased significantly beyond the capacity of the staff.

In terms of support, limited financial resources by the State and pressure not to explore corruption/coercion issues severely hamper CONTIERRA's ability to implement its mandate. The international donor's inability/unwillingness to pressure the elites in favor of the individual conciliators reform perspectives resulted in isolating and inhibiting these actors. In part, this may be due to a communication gap. Donors speak to the high level officials, rather than mid-level conciliators in the field. Thus, the source of information is tightly controlled and donors are unaware of the problems regarding implementation of the mandate, especially when the problem comes from above rather than below. Support by international institutions was

tempered by reluctance to interfere too much in a national institution and lack of follow-up, thereby inhibiting feedback to stimulate the system.¹³³⁹

As pertaining norms, problems arose from its de facto interpretation of its rules in which the conciliators preferred formal titles (regardless of the dubious origin of such titles) over indigenous or customary claims, in spite of the fact that its mandate clearly grants legitimacy to Mayan law. Reference to human rights addressed primarily civil/political security guarantees on freedom of movement, personal integrity while ignoring discussion of relevant restitution rights or property rights from a socio-economic perspective. The FUNDACEN case achieved an accord due to incorporation of an equity analysis which recognized the peasants' hardships due to corruption. This indicates the importance of adhering to an ethic of recognition as a means to promote solution in situations involving victimization. Recognition of the legitimacy of claims based on customary rights and international human rights is necessary fairly address the majority of ongoing land disputes. Given that many parties seek restitution of some sort, this requires verification of a right and proof of its violation. In this regard, CONTIERRA does not appear to be oriented towards enforcement or progressive rights or recognition of human needs, particularly indigenous claims or new rights, such as IDP rights. Its bias for documentary evidence as opposed to oral evidence further inhibits recognition of progressive rights.

To the extent that CONTIERRA was able to achieve agreements addressing respect for basic civil & political human rights guarantees, e.g. freedom of movement and the right to physical integrity, it has been able to accomplish an element of "rights-oriented" substantive justice which is not always is not attributed to ADR mechanisms.

In other cases, failure to recognize claims based on socio-economic rights, customary rights, or special rights pertaining to IDPs or indigenous people as bearing equal merit to claims based on formal national law endangered CONTIERRA's legitimacy. It was perceived by some peasants as retaining the same formal bias as the national courts. In practice, it may be difficult to refer to indigenous law due to the fact that its fluid, oral nature renders compilation difficult. Of course, similar criticisms have been launched at the jurisprudence of the formal courts which does not appear to have attained a coherent system of respect for precedents, on the

¹³³⁹ OAS offered more training to conciliators, but CONTIERRA staff were too overworked to accept the offer.

contrary decisions appear to be ad hoc in nature. (As previously mentioned, another factor to consider is the impact of the war resulted in decimation of indigenous communities, many leaders were killed and their knowledge and memory is lost forever. Of those who migrated, many formed part of groups organized by UNHCR who returned as heterogenous groups with different language, traditions, and customs. The application of indigenous law may not be possible in all circumstances due to these factors.)

What is needed is an evolution of a legal culture based on equity and justice, rather than excessive formalism. The preservation of the dichotomy between the level of acceptance of substantive and procedural aspects of indigenous law will be difficult to sustain in the future, as the recognition of indigenous land rights through ILO Convention No. 169 is a part of national law due to ratification of the treaty by Guatemala and in full conformance with the Constitution, as confirmed by the Constitutional Court.¹³⁴⁰ The legitimacy of both the informal and formal mechanisms for dispute resolution are being called into question for being non-responsive to demands for recognition of customary norms in a substantive manner.

With respect to party participation, although parties are expected to retain procedural and decision control, in CONTIERRA's cases party participation was restricted by CONTIERRA's emphasis of the legitimacy of the formal law as pertaining registry. Conciliators should pursue fairness and justice within proceedings, particularly when parties represent marginalized groups such as indigenous people or displaced persons who may be subject to manipulation by stronger counter parties.¹³⁴¹ CONTIERRA's application of a neutrality strategy within a fundamentally inequitable context failed to permit equal participation of the parties, there was a clear imbalance of power, resources, and knowledge in the cases. CONTIERRA's lack of coercive powers proved to be a liability within a context prone to use of avoidance strategies by parties.

CONTIERRA's process tended to avoid discussion of past events that form the central basis of these disputes. Whereas CONTIERRA sought to focus on the future, peasants wished to discuss past wrongs pertaining to property expropriation or occupation. Hence there was a mismatch between mechanism and cases.

¹³⁴⁰ Expediente 199-95, Opinion Consultiva Relativa al Convenio 169 Sobre Pueblos Indigenas y Tribales en Paiese Independientes, Corte de Constitucionalidad, 18 May 1995.

¹³⁴¹ See CHRISTOPHER W. MOORE, *supra* note 85 at 75.

CONTIERRA receives cases that have been ongoing for a long time, in many cases dating back to the war or even colonial times, and have thus achieved a level of antagonism that complicates conciliation. Many cases have exhausted regular channels of resolution within the community and/or the courts, as well as violence. Because property disputes address the means of survival for rural peasants, and that land is the both the source of subsistence and cultural identity, they are prone to highly charged discourses that reveal extreme anger, distrust, and polarization. Parties found it difficult to overcome a tradition of dispute maintenance in favour of settlement, in part this may be due to hardened positions formulated over a long time as well as focus on winning rather than settling.

CONTIERRA enters disputes at a late stage; for this very reason it is unlikely to achieve successful conciliation sessions without requiring parties to participate in pre-conciliation training to attain listening and bargaining skills, as well as a therapeutic process given the background history of many parties. Many parties have a long history of repetitive negative behavior, misperceptions, and poor communication that results in a relationship conflict linked to the underlying structural conflict.¹³⁴² On the other hand, the late entry is in part due to the fact that landowners are usually reluctant to engage in negotiation until after peasants have asserted their power via mobilized actions such as usurpation, protests, etc.¹³⁴³ In addition, these actions resulted in attention, assistance, or information from local NGOs or international agencies as pertaining their rights, the possibility of ADR, etc. Many peasants enter the CONTIERRA process after having already exerted extralegal influence over the counter party and were thus potentially more empowered than if they had not engaged in such actions.

As seen in the FUNDACEN case, there are also data conflicts due to lack of information, misinformation, or conflicting information (such as double titles, conflicting possessory documents, etc.) and value conflicts due to indigenous traditions versus ladino norms.¹³⁴⁴ Thus CONTIERRA needs to adopt a multiple level approach to dispute resolution to tackle the different layers present in a land dispute. At the time of the research, CONTIERRA appeared to pursue strategies to

¹³⁴² Id. at 60.

¹³⁴³ Id. at 95.

¹³⁴⁴ Id.

remedy relationship conflicts by promoting mutual respect between parties during dialogue and data conflicts via registry searches.

However, it appeared limited in its ability to address interest conflicts pertaining to possession of property that in turn are rooted in the underlying structural conflict pertaining to inequitable distribution of land. It is an unavoidable fact that, in the absence of land reform strategy, land remains a limited resource. Rural peasants have little resources, so there is almost no potential for parties to make exchanges, and the absence of an effective land distribution program further complicates this issue. Given that property disputes may be considered single-issue disputes, solution requires the provision of alternative land; hence restitution, compensation, or distribution of land is an essential component that has yet to be implemented. The difficulties attaining cooperation by the Land Fund and CONTIERRA's lack direct link to the courts for processing of cases involving fraud, coercion, etc. prevent the attainment of permanent solutions that meet the needs of both parties.

Thus, parties choose dispute maintenance because solution would most probably result in a win-lose formula involving displacement of a party. This characteristic in itself indicates that conciliation alone may not be the appropriate strategy in order to achieve substantive solutions to property disputes.

Many observers state that Guatemala is plagued by a culture of conflict and violence and a complete absence of a culture of peace. Settlement is viewed suspiciously, as a form of losing, rather than winning. This was further complicated by the lack of a deadline or time constraint to stimulate a final compromise. Although one may be inclined to recommend abandoning the use of CONTIERRA in property conflicts due to the absence of a base level of inter-party trust and the prevalence of power inequalities between parties, the following factors favour its application, first, parties appear to have interdependent interests due to the fact that they usually live next to each other and are likely to interact with each other in the future, second, lack of resolution of the dispute will only prolong a situation of insecurity, violence, and even underdevelopment, and third there do not appear to be viable alternatives either within the formal court system or other arena. As is further discussed in the following section, in order to complete the measure of success, we must assess the impact of CONTIERRA on social capital.

Below is a chart describing the conversion process in CONTIERRA.

**Conversion Process
in CONTIERRA
(Hybrid Fluid/Static Process)**

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Demands: Possession/ownership, boundary, access to land
Free of cost, local, (Indig.v. ladino, indig v. Indig, ladino v. ladino, comm v. State, etc.)

Demands not accepted:
Disputes re: inheritance, expropriation, forced eviction, labor disputes, indig. possession claims, & sale of fincas on indig. land

Information & Range of Inputs: Registry documentation, oral evidence, socio-econ study
NGO support of Intl Human Rights Norms & Peace Accords guarantees

Pressure by Executive Branch not to explore corruption background

Support by intl. Comm., marginalized groups, high expectations. Limited resources rendered by the State



Values: Conciliators are anthropologists, sociologists, psychologists, agricultural engineers, historians, lawyers, etc. Middle-lower socio-economic background. Some speak indig. languages, most speak Spanish. Mutual Respect, Human Rights, Peace,

Party Participation:
Middle: Parties retain procedural control and decision control, however failure to remedy power imbalances and norm bias limit span of decision range

Norms: Formal title bias, no recognition of indigenous claims or international human rights



1. Problem Solving: Solution via conciliation, restoration of social harmony

2. Non-resolution due to delays by the Land Fund, INTA, non-coercion capacity, inability to explore background issues

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Feedback (Fluid Process): 1. Support for CONTIERRA, State, ADR mechanism. 2. Rejection of CONTIERRA, State, resort to marches, protests, court system, & renewed land usurpation



2.5. Conciliation & Social Capital

“Nuestra raza por naturaleza es desconfiada” (Our race, by nature, is distrustful)

Commentary by mediator from the Ministry of Labour

2.5.1. Obstacles to Social Capital

CONTIERRA was conceived as a mechanism to promote both inter and intra communal linkages as well as linkages to State entities and the corporate sector (bonding, bridging and linking social capital), however it faced serious difficulties fulfilling either function as a result of the lack of a substantive land redistribution program or property restitution legislation. Thus when reviewing the obstacles to social capital below, it is important to keep in mind that these are not causes but rather consequences of the inequitable structural background within Guatemala (see Part III).

2.5.1.1. Intra Community Divisions , “Liderazgo”, and Anti-Social Capital

Although it is often assumed that intra-community disputes may be easily resolved due to an underlying basis of common norms, background, and network, a common phenomenon in Guatemala is low levels of trust at the community level. One of the most prominent complication affecting CONTIERRA’s conciliation proceedings is the prevalence of intra-community divisions. After 36 years of war, the society is in dire need of mechanisms by which to restore community harmony. Conflicts have divided villages, groups, and families. Specifically within the context of displaced persons, such groups are often treated as outcasts: either traitors who left the community, former subversives, or persons espousing new social norms or old claims which threaten the local order. The low levels of trust at the communal level

is largely due to extreme competition for land to meet subsistence needs, as well as diverging goals within the community and external influences.

We may recall that the level of interpersonal trust in Guatemala in 2001 was calculated at only **14%**.¹³⁴⁵ This data highlights the importance of not overestimating the ability of the society to engage in dispute resolution activities separately from the State, NGO, Church, or international organization. When a society suffers from fissures at the community level, strategies for reconstruction of social capital may require assistance from outside actors. The goal of restored harmony requires forgiveness and inclusion, both characteristics prompted by ADR, as well as substantive justice in the form of a large-scale land distribution to diminish competition for survival which inhibits cooperation.

Yet, the lack of social trust is an impediment to conciliation by outside actors. Sub-divisions within groups may be prompted by the counter party as a means of moving the negotiation in his/her direction, or by third parties who have an interest in the dispute. Examples include persons with rival land claims or political parties seeking to prove CONTIERRA ineffective; this was especially true in 1999 on account of the elections. In addition the emergence of a new community leader (political, social, or religious) seeking to assume control of the group may also provoke separation. Division may be evinced by sudden refusal to cooperate, reversal of position, dilatory tactics, and aversion strategies (i.e. non-appearance on scheduled meeting days). This phenomenon is not unique to Guatemala, similar problems occur in Colombia as well as other countries undergoing protracted conflicts in which there is competition over resources at the heart of disputes.

In some cases (such as Tampur), CONTIERRA is initially unable to identify the source of fragmentation and further investigation is required. In other cases (Santa Victoria), CONTIERRA utilizes the division as a tool, in order to pressure a leader from within to grant concessions to the other party or to allow the measurement of the territory in dispute in order to attain a final solution. This contradicts the institutions aforementioned non-intervention strategy. In general, CONTIERRA's conciliators were very committed to consulting communities as a whole and avoiding strategies which focus on leaders because of their awareness that a leader's interest may well be in direct contrast to that of the community at large. In this respect, the

¹³⁴⁵ Latinobarometro 2001.

conciliators sought to uphold democratic principles which empower all individuals within a community.

In contrast, AID/IOM conciliation mechanisms created “Power Maps” which identified community leaders for targeting of conciliation discussion and development. Targeted actors included those who have more power, who are most objective for decision-making, and who are believed to demonstrate willingness to negotiate. By focusing on the leaders, they hope to reach the whole group. In some cases leadership divisions can extend to the women and children of a group, the wife of one leader antagonizing the wife of his rival. Leaders assume that they will hold authority until their death or replacement by an internal coup, but IOM/IDEAS seeks to teach them about democratic choice within the community. CONTIERRA conciliators seemed bemused by this policy, given its obvious flaws when considered contextually. They note that leadership is a complicated, illusory notion, sometimes the leaders are invisible and there are a myriad of sub-divisions in every group. In some cases, the leader's interest is contrary to that of his people as he may be motivated by personal gain. If they were to only listen to the leaders they may obtain a false perspective of the conflict and the needs of the community. CONTIERRA states it is important to work on inter-personal relationships.

In many cases, groups sub-divide as an indirect result of the excessive delays in resolution of their conflicts. The transference from one institution to another is a frustrating process which prompts people to blame each other, lose hope, and seek other directions. Excessive delays in processing cases open the door for opportunists to combat accords they are not in favor of. In various cases, an accord signed in CONTIERRA but stalled in the Land Fund would be disavowed by parties and result further fractioning within the community. One factor to consider is the inability, or rather unwillingness, of the state to organize the land agencies in such manner to effectively respond to demands for land credits (as well as the lethargy in adopting reparation legislation) and results in diminishing social capital. Peasants have no incentive to organize themselves into committees to apply for land credits (let alone restitution), or even explore conciliation mechanisms, if they know that the State's own institutions remain inoperatively tangled in a bureaucratic mess.¹³⁴⁶

¹³⁴⁶ See Peter Evans, *supra* note 28.

The case below provides a good example of how low levels of social trust and confidence in the State form a cycle of distrust, as exemplified by the severity of intra-community division and suspicion of a State initiative to resolve the case by innovative methods.

2.5.1.1.1. Case Study: Tampur Panzos, Alta Verapaz

“La peor cuña es del mismo palo”, “The worst chock is from the same piece of wood.”

Guatemalan expression



The River Polochic: An idyllic scene:
children bathing
Photo by Cecilia Bailliet

Intra-community leadership divisions have not been sufficiently explored in internal displacement literature. In Guatemala, it is a major cause of conflict and forced eviction. The case of Tampur, near La Tinta/Panzos, department of Alta Verapaz provides an interesting example of how such problems evolve and serve to block conflict resolution initiatives. The case reveals the heritage of years of violence

as composed by a deep level of lack of social trust combined with a lack of confidence in the State as well as international organizations

Panzos was the site of a terrible massacre in 1978 in which the q'eqchi peasants protested against usurpation of their communal property by powerful landowners by way of supplementary titling. The peasants were never consulted and they lacked knowledge and resources to attain a proper legal defense. The landowners solicited the assistance of the governor of Alta Verapaz who in turn requested the assistance of the Army. On 29 May 1978, hundreds of men, women and children gathered in the main plaza of Panzos to protest their dispossession. The Army deemed the peasant protests to be engaged in guerrilla activity (an incorrect conclusion according to the CEH) and the soldiers fired upon the crowd which responded using their machetes; a total of 53 people died. The military remained in control of Panzos and repressed all leaders seeking restitution of land. The river Polochic was continually filled with bodies and no new protests were held until 1996. The Commission for Historical Clarification characterized this case as a patent example of the judicial system's inability to protect the q'eqchi peasants' right to property and the landowners use of the State, including the armed forces, to resolve land disputes in their favor by way of terror.¹³⁴⁷

After the end of the war, property disputes remained ongoing. A q'eqchi community of 210 families had been granted collective title to land by INTA near the River Polochic. They worked the land for twenty years. In December 1996, the Junta Directiva hired an NGO to measure and divide the land into individual plots, thus commencing a "*liderazgo*" scandal which would bring ruin to the community. The Junta Directiva was accused of engaging in corruption and taking the best plots for themselves. The Tampur community broke into two groups, each following a different leader. Three hundred persons forcibly displaced part of the population by setting fire to their homes and attacking them with weapons. Four houses were burned and three other homes were destroyed by machete. The sub-group of 45 families (Tampur II/Cantiha) fled to the highlands and the remainder (Tampur I) took over their property and animals and planted corn on the land. The PDH was contacted and the police responded, but they could not enter the property because Tampur I

¹³⁴⁷ Comision de Esclarecimiento Historico, GUATEMALA: MEMORIA DEL SILENCIO, Chapter II: Volume 3, "Denegacion de Justicia", para. 337, and Annex I, Volume I, "Illustrative Case No. 9: La Masacre de Panzos" (<http://hrdata.aaas.org/ceh/mds/spanish/html>).

threatened to attack them with arms. Violent attacks between the two groups continued for years. Tampur II offered to sell their plots to Tampur I in order to attain some compensation for their eviction. Tampur I refused the offer because the Land Fund would not finance their purchase. Tampur II then tried to sell their plots back to INTA, which responded that the plots had been issued to a collectivity, hence it was their duty to return to the land. Tampur II stated that they would only return if they attained full restitution of all of their property. Tampur I asserted that this was impossible as part of the property had already been distributed to the younger generation. At one point, Tampur II verbally renounced their titles to the land. Although under formal law this is not necessarily binding, it should be remembered that under indigenous law oral statements are enforceable. This may well be one factor why the court was avoided, and conciliation pursued, although may not necessarily have paid much heed to the oral promise. INTA tried to reconcile the groups, but these efforts proved fruitless. It called upon the displaced to return to the land, and noted that neither group right of indemnification.¹³⁴⁸ It stated that Tampur I would be allowed to keep its crops which it planted and Tampur II would return. The communities were called to “observe good conduct, peaceful living, and social participation.” Tampur II wrote to CONTIERRA in January 1998 in order to seek solution to the conflict. They stated that their time in displacement had worsened their state of “misery, hunger, nudity, and uncertainty”. They claimed to be subjected to intimidation and threats. They requested recognition of their legal title to the usurped land, the need for aid in order to build houses, and attain economic development. They also wanted protection from the community of Tampur I. Although CONTIERRA responded positively, the conciliators did not visit Tampur I because Tampur II warned them that they learned that Tampur I was planning to hold them hostage for one month without food. When a meeting was eventually called, Tampur I did not show up.

In 1998, the wrath of God appeared to have descended in the form of Hurricane Mitch, leaving the evictors without roofs for their houses and resulting in further displacement due to the flooding of the River Polochic. Tampur I suffered from disease, lack of adequate shelter, and lost crops and animals. Symbolically their source of contact to other communities was eliminated, as the bridge over the River

¹³⁴⁸ INTA Act. No. 21-97, 19 Nov. 1997, on file with CONTIERRA.

Polochic had been destroyed. They eventually wrote a letter to CONTIERRA in which they claimed repentance for the displacement of Tampur II and indicated willingness to allow them to come back. They admitted that Tampur II had a legal right to the property. In view of the national calamity, they sought to espouse serenity and unity in order to survive. They promised to cease engaging in acts of violence and resentment. The extreme degree of animosity between the parties seemed irremediable, however the natural disaster served to coerce the stronger party to reconsider and make some concessions. One is left to wonder whether this may be characterized as a case of “divine conciliation”.

Unfortunately, Tampur II was unmoved by Tampur I’s new found revelation. Tampur II was suffering from even more severe malnutrition, disease, and illiteracy. At the second meeting, Tampur II decided to avenge itself for the disrespect Tampur I exhibited previously and they flatly rejected the offer to negotiate.

Further meetings were pursued. In compensation for the lost land, Tampur II requested alternative land by the mountain. Tampur I refused the request. The conciliation was highly charged, as the parties accused each other of engaging in intimidation, material damage, and disrespect. Tampur I offered to give back the land in exchange for roofing materials in compensation for the measurement and improvements they made on the land. Tampur II requested crop seeds and oil. As a part of the negotiation strategy, CONTIERRA requested CEAR/FONAPAZ to provide roofing and seeds to the respective groups as a form of compensation for their hardships and in an effort to embark upon a new beginning. IOM offered to pay for the roofs. This was a shift away from the traditional non-coordination between the various state institutions. Because rural peasants have little or no resources to bring to mediation, their capacity to reach an agreement may be limited. This particularly true in the case of land conflicts which are often single issue disputes in which it may be difficult to make exchanges due to the lack of available property or other resources.¹³⁴⁹ CONTIERRA sought out the resources of other agencies and international organizations in order to increase the chance of settlement.

At the time of our visit, the children appeared to be diseased, malnourished, and visibly aged by poverty. None attended school, they spent most of the day sitting in the square of the town surrounded by flies or swimming in the river. The

¹³⁴⁹ See Wall, Stark, and Standifer, *supra* note 73 citing R.A. Whiting, “Family Disputes, Nonfamily Disputes, and Mediation success” in 11 *MEDIATION QUARTERLY* 247 (1994).

communities were encouraged to understand that there is a link between their conciliation and the access to state resources for development, thus highlighting the a link between the establishment of a base level of social trust and access to a network of support at the vertical level to emerge from poverty.

CONTIERRA believed that inter-organization cooperation would be the only way to achieve an integral, definitive solution to the problem. At the time, CONTIERRA North only had 4 conciliators and 63 cases, thus it began to approach cases through inter-institutional strategies in order to improve its effectiveness. The PDH, MINUGUA, IOM, etc. all provide assistance in tempering disputes. Indeed, the signing of an accord may be temporary measure if it is not buttressed by agricultural development assistance provided by MAGA.



Tampur I collecting roofing materials provided by
CEAR/FONAPAZ

Photo by Cecilia Bailliet



CONTIERRA conferring with member of Tampur I
Photo by Cecilia Bailliet

Although an accord was reached in December 1998, complaints regarding arson, theft of crops, and threats continued to be received. Ironically, upon delivery of the roofs and the seeds, the groups began to bicker about what each had received. Each group believed that the other received the better end of the deal, even though they had been given exactly what they had requested. They surrounded CONTIERRA staff and inappropriately accused them of corruption. It appears that a byproduct of their distrust of each other was increased suspicion of State's intentions, thereby revealing the negative impact of weak social trust on linking initiatives by the State.

The CONTIERRA staff was devastated by the response but considered it to be the possible intervention by a manipulator who wanted to assume leadership over the community by disparaging CONTIERRA. The resolution of a conflict by outsiders can have profound implications on actual or potential leaders who feel that they have been usurped of their role in the community or who somehow have something to gain from the continuity of the conflict. Sometimes, these persons may be "invisible" leaders, hence it is difficult for outsiders to understand where the influence is coming from. It certainly did not help that this was an election year, in which political parties have much to gain by disgracing the current regime's institutions. Thus CONTIERRA is reluctant to pursue a leader focused strategy.

The conciliators note that there are so many sub-divisions within communities, a leader-focus strategy will only further politicize the conflict. In their opinion is better to meet with all members of a community. CONTIERRA staff stated that they believed that both Tampur I & II are in dire need of psychological counseling to rid the deep anger and resentment they have towards each other. IOM offered the opinion that they needed basic human rights education in order to recuperate lost human dignity, balance their self-esteem, remove notions of superiority/inferiority, and understand that human rights includes duties towards each other.¹³⁵⁰ CONTIERRA was forced to withdraw from the case due to threat of violence and coercion by the peasants.

Eventually, the local mayor was brought in to resolve the case. His success highlighted the importance of a decentralized approach to conflict resolution at the local level. Local entities who understand the underlying political/economic interests and have daily interaction with the parties at hand are more likely to attain sufficient trust of the people in order to elaborate a solution.¹³⁵¹ One the important aspects of this case is the fact that the physical and psychological isolation of the Tampur communities, in particular Tampur II which was displaced, inhibited the elaboration of social trust. Each community retained internal cohesion based on their distrust and fear of the other community, thus evincing “anti-social capital” which complicated conciliation.¹³⁵² This is also linked to the notion of “amoral familism” apparent in the Finca Santa Victoria case.¹³⁵³ The inability of the communities to exhibit trust towards each other relegated them to a prolonged experience of social exclusion. They proved reluctant to help each other improve their mutual situation, and in turn were unable to elaborate a viable link to the State and international agencies sent to

¹³⁵⁰ Interview with Mario Hernandez, IOM, & Jorge Mario Galicia, IDEAS, 28 May 1999.

¹³⁵¹ As a comparative note, one may refer to UN Transitional Administration in East Timor’s proposed Land Dispute Mechanism which was to utilize local community members as mediators, thereby espousing a decentralized approach to conflicts. Michael Brown, formerly of OAS and now part of UNTAET, had criticized CONTIERRA for lacking legitimacy due to its centralized approach to conflicts. It is clear that he advocated not repeating similar mistakes in East Timor. See Jean du Plessis & Scott Leckie, *Housing, Property and Land Rights in East Timor: Proposals for an Effective Dispute Resolution and Claim Verification Mechanism* (United Nations Centre for Human Settlements 31 May 2000)

¹³⁵² On anti-social capital, see Catherine Campbell, “Social Capital and Health: Contextualizing Health Promotion with Local Community Networks” in STEPHEN BARON, JOHN FIELD & TOM SCHULLER, *SOCIAL CAPITAL: CRITICAL PERSPECTIVES* 182, 194 (Oxford University Press 2000).

¹³⁵³ Situations of amoral familism involve strong ethnic loyalties and familial attachments inhibit peaceful dispute resolution with outsiders, there are no links outside the group. See Woolcock, *supra* note 284.

assist them rise above their extreme poverty. The problems regarding internal leadership divisions and lack of social trust inhibited the attainment of improved confidence in the State on the part of the community. The result was rejection of a genuine effort on the part of the State to provide reparation support in order to permanently resolve the dispute and improve their standard of living.

In conclusion, the Tampur case demonstrates that there should be a base level of social trust in order to effectuate successful State intervention or interaction. Because this is rarely present in post-settlement situations, the ability of ADR to combat anti-social capital and promote a growth of social capital may well be limited in the absence of an accompanying land distribution program to meet the basic needs of those competing in order to survive.

There is a tendency to reject the State as the appropriate actor to intervene due to its limitations on account of elite pressures, lack of resources, etc. As mentioned previously, I believe that there is a need to pursue State-society initiatives given that many peasants expressed the desire to see the State to fulfil their democratic expectations as the source of maintenance of stability within the society. The State should not be totally excluded from the field of dispute resolution, because it remains an essential component of its very function.

In addition, Harriss warns that the calls for civic engagement, “self-help” by marginalized groups deflects the need to look at structural inequities and raises additional concerns:

*“ . . . that ‘local associations’ and NGOs, which are brought into such a focus . . . are not necessarily democratically representative organizations, nor democratically accountable, and might be attractive because although they appear to offer the possibility of a kind of democracy, through ‘popular participation’, but without the inconveniences of contestational politics and the conflicts of values and ideas which are a necessary part of democratic politics. The ‘anti-politics machine’ sits in the wings . . . ”*¹³⁵⁴

Such programs may allow local elites to meet their own needs over the weaker members within the community.¹³⁵⁵

¹³⁵⁴ JOHN HARRIS, supra note 238 at 8-9. He criticizes civic engagement initiatives as sometimes appearing to expect “. . . the most disadvantaged people to pull themselves up by their own bootstraps, in a way which is remarkably convenient for those who wish to implement large-scale public expenditure cuts.”

¹³⁵⁵ However it is important to keep in mind that the weakness of the state also permits repression to be pursued by local actors, as aptly pointed out by Trygve Bendiksbj: “Repression in Guatemala is a complex pattern of local power balances and patron-client relationships, which cannot be reduced to an emphasis on the will and shortsightedness of the Guatemalan elites.” Trygve Bendiksbj, Justice and Cultural Diversity in Guatemala: An Analysis of the Rights of Ethnic Groups in Guatemala Based on Two Liberal Approaches to Justice in Multicultural Democracies 21 (NUPI 2000). The range of actors

Hence, support by Donors of NGO or local associations may be based more on a wish by donors to avoid transferring funds to a State plagued by corruption than genuine knowledge that the NGO or local association is truly representative of the needs and interests of all or even most of the marginalized groups and individuals. Regardless of the existence of community associations and NGOs, there is a need to improve transparency and accountability within the State in order to engender realization of function as protector of the society, settler of disputes, etc. The State cannot and should not be replaced by the society.¹³⁵⁶ Greater emphasis should be placed on pursuing networks between the State, international organizations, NGOs, the Church, etc. to improve the design of joint strategies for conflict resolution. In addition, international donors must improve their follow-up of the institutions they sponsor; fear of receiving charges of interference does not justify inaction in the face of an institution's corruption, failure to fulfil its mandate, or lack of capacitation. CONTIERRA's conciliators appear to have a genuine interest in attaining a final solution and require the support of international donors to pressure the elites to allow them to pursue their jobs effectively. It is important to keep in mind that joint actions between international and State entities may be insufficient to address the background context of power divisions at the local level, thus in some cases actual solutions will be the opposite of that envisaged by the State or the international community, e.g. Los Cimientos case presented in Part II.

IOM has joined AID to establish a program titled "Activities in Support of Reconciliation in Conflict Areas", which also pursues conciliation efforts in various regions within the country. Although not specifically targeted for land conflicts, these efforts complement CONTIERRA's actions. Targeted communities contain displaced people, high affliction from the war, demobilized, high poverty, low state presence, and limited application of justice. In some cases, such as the Community of Pinares in Alta Verapaz, the community is composed of widows, IDPs, and ex-soldiers (victims and victimizers) all living together. The application of Decree 1551 assigned parcels to ex-soldiers, the widows returned and forced to face their husbands' killers. The decomposition of the social network is extreme, and the need for reconciliation is great. IOM establishes workshops and provides follow-up to CONTIERRA

which benefit from preserving the power balance status quo is vast, covering military officers, landowners, and local leaders who fear loss of economic resources as well as social importance in the event of change. Aggressive stances trickle down from the capital to rural outbacks. Hence, the need to create mechanisms to enhance a culture of dialogue and mutual respect is rendered particularly urgent.

¹³⁵⁶ See Robert Putnam, "The Strange Disappearance of Civic America" in 24 THE AMERICAN PROSPECT 34-48 (1996) cited in HARRIS, supra note 256 at 28.

cases. IOM does not claim to offer solutions, rather it seeks to reduce conflict. Given the absence of the State, IOM seeks to teach the people to assume civic responsibility and replace the Army in community control. This is an important step in transforming people from parochial to active citizenship, they are taught to feel comfortable making decisions themselves without referring to an authority figure. The people are taught to organize and establish consensus through projects.

As of 1999, IOM, MINUGUA, and IDEAS have six cases of conciliation in Coban, and ten in Alta Verapaz as a whole. They have three conciliators who conduct exercises and workshops in civic participation, popular education, and anthropology. They also provide socio-economic support to communities in order to establish conditions for dialogue. They formulated a methodology which includes investigation of the origin of the populations in dispute, ethnic/cultural differences, religious divisions, forms of leadership, and training/experience in democratic participation v. authoritarianism. This is intended to allow them to understand the social dynamics of the groups in order to create a conciliation strategy tailored to the situation. They engage in training of the parties to encourage active participation in dialogue and seek inclusion of gender and multi-cultural perspectives. The conciliators are encouraged to explore together with the parties the perceptions of the conflict and their vision of solution. Community leaders are interviewed to attain a history of the conflict, the parties are requested to list their demands. The workshops are held to sensitize the actors to engage in conciliatory dialogue, communitarian projects, and cooperation techniques. Consensus is sought for solutions based on respect for all persons and needs of each group. They view the key problems to be authoritarianism and paternalism which has created a passive, submissive culture. The training they provide is intended to reverse this tendency. The conciliation training provided by IOM/IDEAS teaches people how to speak to one another. Although this may seem elementary, it is no small feat in a country devastated by thirty years of extreme polarization and antagonism. This is a key difference from CONTIERRA which provides no prior training, rather parties are plunged into dialogue without preparation and carrying full hostility. The training is conducted during the conciliation itself, which of course explains the slow progress of the dialogue. CONTIERRA might benefit from incorporating such pre-dialogue training facilities rather than forcing parties to discuss the most contentious matters without preparation. Some mayors support their activities, others oppose it, possibly due to fear of losing stature within the community. They state that there is a strong need to address socio-economic needs, otherwise land conflicts will worsen. In their view arbitration should be used for inter-community disputes involving usurpation, however in intra-community disputes they advise the use of conciliation.

2.5.1.2. Prevalence of Authoritarian Heritage & the “Dark Side of Social Capital”¹³⁵⁷

The authoritarian military regimes installed a thirty-year “democracy of silence” and removed all decision-making powers from the rural communities. In addition to violent intimidation, they were denied education and civic activities, repressed into passivity and subjected to manipulation. As a consequence, parties to a conflict often do not feel comfortable designing solutions to their problems and call upon

¹³⁵⁷ On the Dark Side of Social Capital see JOHN HARRISS, *supra* note 256 at 10-12 (LeftWord 2001). He attributes the expression to Elinor Ostrom and James Putzel.

CONTIERRA to do so. CONTIERRA considers the dissolution of the authoritarian heritage to be one of its key challenges. At present, CONTIERRA attempts to reverse the passive tendency by developing the self-esteem of the people in order to gain confidence in their ability to find responses to their own problems. This is a lengthy process but one that is necessary to transformation to democratic culture.

Some peasants are unsure as to how to strengthen micro structural social capital and what is the possible value of such action. In the case of Santa Victoria, I observed that the family expressed its wish to call upon the owner of the neighboring finca to resolve their border dispute with the Municipality instead of dealing with the matter themselves. This echoes the authoritarian heritage of the past and reveals the strength of the ongoing clientelistic/patron networks that inhibits cooperation at the horizontal level. This type of deference is dangerous, as some landowners may use it to their advantage.

Hence, one of the most obvious forms of social capital is “the dark side of social capital”, as exemplified by powerful landholders with dubious links to state and non-state actors. One may consider the cases pertaining to fincas Estrella Polar and La Perla, as exemplifying how negative social capital may obliterate efforts to improve both micro social capital and linking social capital. The fincas’ owner, Mr. Enrique Arenas Menas, is characterized as wielding a high degree of power. This was starkly made evident to me by Alvaro Colon’s (then the 1999 presidential candidate for the progressive ANN party) expression of fear that he may one day be assassinated upon order of Mr. Arenas Menas. Mr. Arenas Menas’ reliance on power tactics may be in part due to the influence of Luis Arenas Barrera, the “Tiger of the Ixcán”, who demonstrated severe repression of the Ixil workers on his fincas, resulting in his execution by the Guerilla Army of the Poor in 1975.

In the case of Estrella Polar, seventy families claimed to have lived on the land for over one hundred years. They stated that they had been repeatedly subjected to forced eviction attempts, and had lost 96 family members in a massacre during the war. In 1995, CONIC assisted the peasants in organizing themselves horizontally in order to present claims to the court (thus pursuing linking social capital) for indemnification of property in exchange for past labour; however these actions failed. Instead, Mr. Arenas continued to conduct forced evictions.

The international community entered the dispute in order to balance the power between the parties. IOM placed pressure on the State to resolve the matter. The

Land Fund and FONAPAZ responded with initiatives to provide food, housing, and aid to the peasants. Forty-nine peasants were identified as IDPs and were offered credits to purchase alternative land, e.g. finca El Caracolito, as the landowner had set too high a price for land within the finca Estrella Polar. The offer was rejected by the peasants due to the fact that the alternative property lacked access to water and sources of firewood; in addition it was insufficient in size to meet the needs of the family. These complaints are very common with respect to alternative properties offered by the State to peasants.

Mr. Arenas Menas enjoyed a coup de grace by manipulating the peasants with a new offer, which resulted in their rejection of alternatives offered by the State. Given that the State is unable to meet the landowner's stated price, it is likely that the peasants will continue to live and work on the property without any security regarding property rights, labour rights, or even physical integrity. In spite of international intervention, negative social capital outweighed both micro and linking social capital initiatives.

In the case of La Perla, the community of Ilom (totalling 2,500 persons of Ixil ethnicity) is composed of part-time rural workers who claimed historic title as well as municipal documentation of their right to 100 caballerias of land. They (along with other communities who have registry documents) were displaced during the war. When they returned, they claimed that the military had given their land to the owner of La Perla. Mr. Arenas Menas was accused of threatening them with violence, denying them access to water, use of grass, wood, or land to sow crops. He set up wire fences and fined the peasants 200 Q per animal if their animals crossed over to their property. The peasants claimed that his full-time workers (composed of ladinos, Ixils, and Kanjobals who sided with Mr. Arenas and formed part of the PACs) stole their animals and moved the fences to encroach further upon their land. Continued actions would leave them without a source of food. The Army and PACs were called in to conduct forced evictions. In 1996, one man was assassinated, three were injured, and four disappeared. When CONTIERRA requested permission to measure the land to verify the landholding, Mr. Arenas Menas refused. As long as the measurement is not conducted it is impossible to verify whether he has taken over the community's land.

Both these cases were referred to CONTIERRA's higher officials for discussion at a political level. Given the extreme power imbalance, these cases are unable to be

resolved by conciliation. The problem is that it is not only the peasants who suffer from the authoritarian structure of the society, CONTIERRA is subject to it as well. Mr. Arenas Menas is more powerful than CONTIERRA itself. As discovered in the prior case by CONIC, it is unlikely that any court action against Mr. Arenas Menas will succeed. Further pressure by the international community is needed, however the issue remains contingent on Mr. Arenas Menas' own will. Since Mr. Arenas Menas (as well as other large land owners) is determined to prevent any redistribution whatsoever of the property, the peasants remain in a situation of exclusion and misery with little opportunity for escape.

2.5.2. CONTIERRA's Potential Impact on Social Capital: Restoration of Community Harmony & Empowerment of Marginalized Groups and Individuals

"Is conflict resolution about ending disputes, building peace, achieving social justice, or transforming relationships?"

*Bernard Mayer*¹³⁵⁸

Carlos Sosa, of CONTIERRA, stated that many commentators erroneously focus on case resolution. He highlighted the importance of giving peasants the opportunity to talk openly and at length, stating that "Nobody has ever listened to them before, let them speak."¹³⁵⁹ Hence, from a procedural perspective, CONTIERRA has increased party participation (although limited due to misapplied neutrality strategy and bias for formal law) and understanding between peasants, landowners, etc. In this respect, it has focused more on party empowerment and therapeutic relief than actual dispute resolution. In terms of promoting a culture of dialogue and trust between different classes and communities and promoting social harmony it may be stated that CONTIERRA has enjoyed only a minute degree of victory.

CONTIERRA's staff has at times proved that outsiders can be neutral, and that the State can be impartial (although not nearly as often nor as much as it should),

¹³⁵⁸ BERNARD MAYER, *supra* note 190 at 108.

¹³⁵⁹ Interview with Carlos Sosa, CONTIERRA, 19 February 1998.

which would perhaps positively change the civic culture. The participants in the FUNDACEN case claimed to be satisfied with the outcomes observing that the terms of the accord were fair. In addition, they stated that CONTIERRA had improved communal harmony by teaching them how to engage in peaceful dispute resolution and end divisions between neighbors. Restoration of social harmony appeared to have been achieved, thereby resulting in a feedback of increased support to CONTIERRA by involved parties and NGOs.

In spite of the fact that CONTIERRA appeared to promote a small degree of horizontal and vertical social capital, the prevalence of a dark side of social capital, i.e. the network of corrupt, powerful, and/or violent non-state and state actors prevented CONTIERRA from being more effective (La Perla & Estrella Polar Cases), as is the case with the formal courts. In addition, the absence of a base level of social trust within local communities inhibited the implementation of confidence in the State (Tampur Case). The prevalence of “asocial capital” and “amoral familism” (Tampur Case & Finca Santa Victoria Case) limit the ability of the State to conduct dispute resolution, on account of the absence of inter-group linkages and trust.

The most important factor limiting CONTIERRA’s ability to create strong inter-community linkages is the structural background limiting redistribution of property. Because groups are unable to make exchanges there is little chance that they will be able to attain a successful solution to their problem (see Piedra Parada case). However, the fact that CONTIERRA provides a forum for individuals and groups of different ethnicities (ladino v. indigenous), languages (Spanish v. Mayan), socio-economic class (landowner v. landless), or sectors (corporate or State v. community, e.g. FUNDACEN case & Chamber of Agriculture negotiations) to meet, present concerns, and listen to each other preforms a “bridge-making” function, regardless of whether or not an ultimate solution is attained (See Comité Pro-Tierra Ixcán Playa Grande).

It is obvious that we may wish to accuse CONTIERRA of being a means to tranquilize oppressed peasants without substantive sacrifice, however, it is important to recognize that given the context of post-war trauma and antagonism, increased participation, therapeutic exercise, and inter-party understanding is actually a key element of peace consolidation. While there is undeniably a need to turn to concrete modes of providing social justice for those deprived of land, i.e. land reform, this would not justify a complete abandonment of the conciliation mechanism. The use of

ADR in property disputes deserves to be developed and improved for continued use in the future.

The post-settlement society remains highly fractured and each successive regime has failed to espouse a progressive vision regarding distribution of resources and recognition of rights. Thus, it may be in the interest of the society *not* to make conciliation more effective, in order to prevent individualization of fundamental problems. The need for substantive justice requires a radical change in policy by the State, one that goes beyond the will of elites and the capacity of the present institutions. Because CONTIERRA is a structural coupling of the legal and political systems (which in turn are dominated by the economic system), it suffers from similar dysfunctional qualities suffered by these systems. As discussed in the previous section, CONTIERRA is not permitted to disturb the hierarchical orders established within the land arena as established by the legal order. It is obvious that there is a need for a holistic approach by the legislature or the executive branch of government that will treat the common issue of land distribution underlying the majority of the claims, rather than treating each dispute as a unique, private matter.

The FUNDACEN case demonstrated the possibility of elaboration of social trust, micro structural social capital, and linking social capital via conciliation and assistance by the State. The State's offer to assist the community in organizing a committee in order to receive development aid, and its support for the community call for respect local norms indicates that vertical mechanisms can be useful in setting up horizontal networks. The effort to end intra-communal fragmentation was identified as being the key to attainment of a better standard of living for the peasants and their children in the future. State institutions, such as CONTIERRA, provide forums for dialogue and cooperation, while international and national development organizations to provide tangible incentives for compromise. In turn, the positive response by the communities in the FUNDACEN case indicated that such efforts could indeed result in greater support for the State. CONTIERRA proved its legitimacy through its commitment to assisting the peasants establish peace in their community.

In contrast, the Tampur case proved that the high level of internal division further stimulated distrust of the State and international actors, resulting in rejection of both and eventual resort to the local mayor to achieve cooperation. Nor did there appear to be much chance of success in the Bijolom case, as the Evangelist sub-

community so vehemently disagreed with the Catholic sub-community's recognition of a duty of reparation Mr. Velasco to the point where they physically left the area to avoid discussion of the issue. These cases revealed how the application of linking social capital may actually be contingent on the existence of a base level of social trust.

Aside from restoration of communal harmony, conciliation serves an empowering function. Baruch Bush and Folger describe the theory of the attainment of social justice via mediation:

“Mediation offers an efficient mode of organizing individuals according to their common interests, and in this way creates more solid communitarian links and structures. . . . Due to its capacity to reformulating issues and concentrating attention in the common interests, mediation can help individuals who consider themselves to be adversaries to perceive a wider context in which they confront a common enemy. As a result, mediation can provide strength to the weak to facilitate the creation of alliances between them.

In addition, due to its capacity to help parties resolve problems themselves, mediation diminishes dependency on far away organisms and prompts self-help, including the formation of effective, base communitarian structures. Finally, mediation treats legal norms as only one of a series of elements which may help define issues and evaluate possible solutions to disputes. Thus, mediation can provide more strength to parties than formal judicial proceedings to argue in defense of their interests. . . .”¹³⁶⁰

They espouse the notion of mediation as a transformation mechanism in which individuals can acquire self-respect and faith in their own powers to resolve problems (a type of self-determination) as well as understanding and concern for others.¹³⁶¹ Mediation generates “empowerment and recognition” among parties so that they learn to understand, care, and relate better to themselves and each other. In their view, the moral and social development of the parties to the conflict is given greater value than that of achieving an actual accord. Modern mediation practice is criticized for incorrectly focusing on final settlement over transformation.

Thus, from this perspective what is significant is the transformative conciliation session's success at empowerment of the participants, regardless of the attainment of a final solution. As mentioned previously, for IDPs and other war victims, there is a strong need for elaboration of connections with other people and strengthening of self-esteem. Displacement results in isolation, feelings of helplessness, unworthiness, and despair. The return phase requires a reversal of such

¹³⁶⁰ R.A. BARUCH BUSH & J.P. FOLGER, *supra* note 17 at 43-44.

¹³⁶¹ *Id.* at 46-47.

emotional and psychological damage in order to reintegrate and rehabilitate them while creating a stronger civic culture for the transition to democracy.

A positive aspect of CONTIERRA's mode of operation is that the conciliators travel alone to the site of the conflict. Although they may not be able to achieve social justice by attaining alternative land or restitution, they appeared to have a large degree of freedom regarding procedural empowerment of parties during the conciliation sessions. The conciliators were able to call upon parties to show each other mutual respect, speak freely, and listen to each other. In the Santa Victoria case, we observed indigenous parties adopt the Spanish term "*respeto mutuo*" and utilize it frequently throughout the dialogue. In the Ixcan Playa Grande case, the peasants sat at the table with the landowners "as if" they were equals, the dialogue proceeded to the point that the landowners themselves adopted argumentation in favor of the peasants' right to land. As witnessed in the FUNDACEN case, parties did appear to gain skills pertaining to communication, formulation of demands, cooperation, and strategic thinking as well as knowledge pertaining to the Peace Accords and human rights. These types of benefits have a value which carry on past the conciliation meeting itself. Parties may utilize these skills to deal with other community or family disputes, solicit the State for provision of services, etc. As noted by Robert Garrett, participants learn to control their own circumstances rather than depend on a coercive institution, such as the judiciary, police, etc.¹³⁶²

Thus the conciliators provide them with tools to strengthen their civic activity and communal harmony. On the other hand, there appeared to be no or little empowerment of parties in the Comunidad Bijolom case (highlighted by Mr. Velasco's total isolation), or in the Sommer case (due to non-disclosure to the peasants by CONTIERRA of possible alternative motives of the finca owner).

CONTIERRA's conciliators believe that individuals and communities see their problems as unique and thus require a unique solution, rather than following uniform rules. In this author's opinion, given the enormity of the land distribution problem, the conflicts facing CONTIERRA may not necessarily be classified as unique. The solution may require a holistic approach, such as a land reform program. Hence there is a clash between a central goal of procedural empowerment via

¹³⁶² Robert D. Garrett, "Mediation in Native America", in DISPUTE RESOLUTION JOURNAL 39, 41 (March 1994). See also MARINES SUARES, *supra* note 1 at 23. Parties gain civic training via participation in conciliation proceedings, as they prompted to express their views, present questions and demands, consider alternatives, make decisions, collaborate with others, and draft agreements.

individual participation in dispute resolution versus the interest of substantive justice which would require a general land reform. Support for strategies to expand land distribution is essential for remedying past inequities and providing a foundation for democratic consolidation. However, it is important to ensure that the treatment of substantive problems will not overshadow the development of procedural justice. There is a need to allow rural peasants greater participation in dispute resolution and appreciate this as an end in itself. Guatemala sought an alternative model which would demonstrate State recognition of the importance of hearing individual “voices”. The provision of a forum in which individuals are treated with respect, dignity, and neutrality while engaging in direct conciliation of a dispute is intended to help establish social cohesion and civic support. The degree of participation by the citizenry in dispute resolution is an indication of how much they are valued by the State. It is obvious that the mere adoption of a law is not enough to create a democracy, transformation is a long-term endeavor which requires the establishment of participatory institutions which allow citizens to provide inputs in general and specific cases.

In spite of CONTIERRA’s failings, it is undeniable that its capacity to support reconciliation within communities is very valuable in post-conflict societies. CONTIERRA is practical in that it focuses on peace creation village by village. It may be possible to measure small advances within communities, brought about through the “words of men, not of kings.” The goal in conciliation is to re-establish peace in a community and teach people to resolve their problems through dialogue. Parties undergo an increase in self-esteem and are positive towards direct participation. Thus, there is often a greater issue than the mere demarcation of a border in the bilateral conflict. The entire community has an interest in the dialogue process, apart from the end result. As mentioned previously, the release of malevolent feelings and frustration allows persons to focus on the creation of a new social compact. For a society undergoing transition to peace, this strategy is essential. Given that the end goal of conciliation is restoration of communal harmony, not merely the achievement of an accord, it may address equity needs which are not met in the formalistic framework of courts.

The lack of structure and presence of balance of power problems may prevent CONTIERRA from resulting in speedy resolutions (although court decisions are also noteworthy for their extraordinary delays). In addition, there may be concern that

CONTIERRA is an illusion, offering *campesinos* the psychological benefit of participation in conciliatory dialogue without real possibility of substantive resolution of their land conflicts. Herein lies the dilemma, what should be prioritized in a post-war setting- the need to provide therapeutic relief and participation skills to oppressed groups, such as rural peasants, or the need to achieve concrete resolution to ongoing land disputes? Is it possible to achieve both? Rather than abandon the model, it is important to recognize that there is value in the provision of a “voice” in procedures, which may be separated from the decision aspect. It is possible to remedy the substantive aspect of land conflicts through increased support of the Land Fund, regulation of the land market, and the adoption of a solid restitution program while maintaining procedural gains. However, this is contingent on a radical change in political will.

2.5.3. Suggestions for Improvement of CONTIERRA’s Methodology

Within Guatemala, there is extreme polarization between parties to land disputes; parties define their identities by their fear and distrust of each other, thereby upholding “anti-social capital” (see Tampur case). This context is inimical to conciliation. Parties tend to have pre-fixed notions of each other as simply “the enemy” rather than recognize the similarity of problems and concerns that they share. As noted by CONTIERRA’s director, Arnaldo Aval, “Parties don’t know each other, or if they do, they know each other incorrectly.” CONTIERRA seeks to humanize the dialogue, point out common concerns, and re-establish communication. Yet, without party training, what is accomplished during a conciliation session may be undone afterwards by contradictory party behavior. In FUNDCEN case, parties complained of repressive tactics during the night, and signaled a potential for use of weapons as a form of intimidation. CONTIERRA would probably benefit from the adoption of party training prior to commencement of the dialogue. Parties may be more likely to participate in a productive manner if they received training prior to the commencement of dialogues.

Given that parties are unfamiliar with conciliation techniques and often espouse confrontational or evasive traits that run counter to the goals of conciliation,

parties should learn how to speak and listen to each other in an ambiance of respect prior to entering a substantive discussion of the problem at hand. Such technical training may limit stagnation during the actual dialogue, which is currently a problem due to the fact that parties have been learning as they proceed in a highly emotional context. The Bi-Partisan Commission on Indigenous Land Rights called for CONTIERRA to become involved in conflict prevention, i.e. training people in areas of potential conflict to avoid entering into difficult situations by opting instead for dialogue. It should be noted that the time frame of the conciliation could potentially be reduced if CONTIERRA trained the parties in negotiation before commencement of the sessions so that they will become familiar with the process of compromise.¹³⁶³ At present, CONTIERRA lacks human and financial resources to undergo such capacity-building actions.

Although mediation is not a form of therapy, at present, the CONTIERRA process may be described as rendering a therapeutic benefit due to its encouragement of release of emotion.¹³⁶⁴ However on account of the severity of distress experienced by some participants, follow-up counseling would be advisable in order to allow healing to take place. Provision of psychotherapy sessions by a separate mental health institute may be another alternative which may assist CONTIERRA to avoid impasses in discussions.

We must also consider that espousal of a therapeutic dialogue that expands issues for discussion within a facilitative framework may limit the actual possibility of achieving an accord, as parties are more likely to refer to broader root causes of conflict such as poverty or other structural inequalities.¹³⁶⁵ The high degree of antagonism in land conflicts due to the perception that there is a conflict of rights or social justice rather than interests calls for the assumption of active intervention by conciliators, including authoritative or power role-taking.¹³⁶⁶ Indeed, a strategy based on practical bargaining in which conciliators narrow the topics for review and control

¹³⁶³ See JAMES A. SCHELLENBERG, *CONFLICT RESOLUTION: THEORY, RESEARCH AND PRACTICE*, 33 (State University of New York Press 1996), citing Druckman, Daniel, "Compromising Behavior in Negotiation: A Meta-Analysis", in 38 *JOURNAL OF CONFLICT RESOLUTION* 507-56 (1994).

¹³⁶⁴ See Jay Rothman, Randi Land Rothman & Mary Hope Schwoebel, "Creative Marginality: Exploring the Links between Conflict Resolution and Social Work", in 8 (1) *PEACE AND CONFLICT STUDIES* (May 2001).

¹³⁶⁵ Susan S. Silbey & Sally E. Merry, "Mediator Settlement Strategies", 8 (1) *LAW & POLICY* 7-32, 26 & 29 (January 1986), reprinted in *MENKEL-MEADOW*, supra note 14.

¹³⁶⁶ *Id.*

the dialogue by relying on private meetings with each party rather than inter-party direct negotiation may have a higher chance of achieving an accord within such contexts. The key problem is that it is not a mere perception that most land disputes are rooted in a conflict of rights and social justice issues; they actually *are* based on such problems.

A further suggestion is that a time limit should be adopted in order to prompt parties to reach a compromise. Parties may be less inclined to engage in dilatory tactics based on power if CONTIERRA threatened to abandon the process. However, this risks antagonizing parties who remain suspicious of the state and may question its legitimacy in spite of their voluntary submission of the conflict to its process. A curious factor is that the threat of litigation or renewed intervention by the State does not appear to play a significant role in prompting parties to engage more enthusiastically in the dialogue. This may well be explained by the lack of effectiveness of the State, and the judicial system in particular.

Another variation is that of preventive tertiary intervention, in which parties call upon a third party (in this case the conciliator) to enter the negotiation as a direct participant (incorporating his/her own interests) in order to prevent the escalation of the conflict. The basis for such action is when one or both parties is too inexperienced in a technical subject matter (in the case of land, e.g. debt, interest rates, rights of possession v. ownership) or negotiation tactics, the economic value of the matters at hand is high, and assistance is required of someone with greater expertise in these areas. The tertiary intervention may consist of direct negotiation, proposing strategies for resolution, or arbitration of the issues which could not be accorded by the parties.

Due to the prevalence of an authoritarian heritage which impedes effective decision-making by parties, it may be valuable to consider the implementation of a mediation-arbitration hybrid variant in which the conciliators would render a decision in the event the parties are unable to. This may be binding or non-binding. Hence parties retain some decision and process control, increasing chance of implementation of the decision. In some cases, the mediator assumes the role of the arbitrator in the event of failed conciliation. In other cases a new arbitrator is selected in order to prevent favoritism by the mediator. One study found that parties acted more responsibly and communicated more effectively when they knew that the mediator

would evaluate their behavior in the event of arbitration.¹³⁶⁷ Other studies on med/arb state that parties are quick to reach an accord due to fear of losing decision control during arbitration.¹³⁶⁸ In addition, they seemed more satisfied by the results of such process. It may be advisable for CONTIERRA to consider adapting its services to this model as the CONTIERRA conciliators may prove more adept at resolving the conflict due to their lack of emotional ties to the matter. Yet, this may also prove to be a mere dilatory mechanism as the losing party may be inclined to reject the decision. CONTIERRA may consider making the issuance of the decision binding. Another possibility is final offer arbitration, in which parties present offers to the arbitrator who selects that which he/she thinks is best. However, given the severe polarization between parties in Guatemalan land disputes this option would probably fail, as the offers would be extremely divergent from each other. This would have the advantage of preventing the conciliation process from extending endlessly in time, on the other hand it may continue the tradition of passivity by causing parties to become lazy in the search for solutions during conciliation given the knowledge that they may defer at the end to the conciliators.

However, in the specific case of Guatemala, there remains a significant degree of mistrust of government institutions (as made evident in the Tampur case). Hence one may question how likely the local populace would accept a solution offered by CONTIERRA. On the other hand, the FUNDACEN case demonstrated that the conciliators attained a significant degree of trust among the parties. There has to be a base element of confidence in the institution, or rather its staff, for use of such strategy. In addition, the conciliators must be free from influence from powerful actors who harbour ulterior motives or interests; hence ADR posits the same problem as the courts.

2.6. Trends for the Future

¹³⁶⁷ William A. Donohue & Mary J. Bresnahan, "Cuestiones comunicacionales de la mediacion en conflictos culturales", in JOSEPH P. FOLGER & TRICIA JONES (EDS.) NUEVAS DIERCCIONES EN MEDIACION: INVESTIGACION Y PERSPECTIVAS COMUNICACIONALES 189, 206, (Paidos 1997), citing McGillicuddy, N.B., Welton, G.L., & Pruitt, D.G., "Third Party intervention: A field experiment comparing three different models", JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, VOL. 53, 104-112 (1987).

¹³⁶⁸ Neil B. McGillicuddy, Dean J. Pruitt, Gary L. Welton, Jo M. Zubek & Robert S. Pierce, "Factores que afectan al resultado de la mediacion: El comportamiento de la tercera parte y el disputador", in GROVER DUFFY, GROSCH, & OLCZAK, supra note 85 at 177, 178.

Peasants queried why government officials expressed fear in response to their demands for expropriation of land, but not in response to their state of misery, characterized by hunger and fear of forced eviction.¹³⁶⁹ Neither ADR nor the *amparo* mechanism were able to suppress the rise of pressure on the State. What is interesting is that the rural peasants consider ADR, the courts, and protest marches/land invasions to be alternative actions best employed simultaneously. Instead of only engaging in protests, they also pursue options within the framework of the State, thus indicating a hope for the “democratic potential inherent in systems maintenance”.¹³⁷⁰ In essence, the peasants want the courts and ADR to be responsive; they would prefer not to return to violence. The marches may be considered to be a “warning” to the government as to their waning patience in the face of State inaction and the need for substantive changes.¹³⁷¹

In 2001, as a result of the marches and pressure by five US senators, international organizations, human rights NGOs, and donors, the State immediately established a new negotiation round, however the peasants cited that this was a mere stalling tactic. It should be noted that every president since 1985 had attempted such conciliation in vain. In addition, the rural organizations are tired of engaging in discussions with persons who claim lack of authorization to enter into a binding agreement. Nevertheless, dialogue was heralded as the last option to avert a return to violence. This initiative appeared to pursue the notion that solution depends on the identification of reform minded elites within the State and society who might be willing to cooperate.¹³⁷²

President Portillo met with peasant leaders but offered little concessions, as he claimed that at the moment the country did not have the “political, economic, or social conditions to conduct an agrarian reform”, indicating that such action would result in

¹³⁶⁹ PRENSA LIBRE, “Bloquean rutas en todo el país” (13 October 2001).

¹³⁷⁰ Mara Schoeny and Wallace Warfield, *supra* note 16 at 266.

¹³⁷¹ CUC warns that the peace process will be hurt if the peasant position radicalizes. Should the land issue remain unresolved, violence will result once again. Interview with Daniel Pascual Hernandez, CUC, 4 February 1998. CNOC suggests that some progress has been made given that previously the peasants did not have an identifiable voice and were thus deprived of participation. Currently, their “voice” has been recognized and they are allowed greater participation in the political process. On the other hand, there is uncertainty as to the validity of the political regime, given its lack of responsiveness. Of special interest is that at the II *Congreso Nacional Campesino* held in 1998, CNOC specifically called for increased support for CONTIERRA and the process of conflict resolution via dialogue as an alternative to violence brought about by forced eviction. Interview with Daniel Pascual, CNOC, 5 May 1999.

¹³⁷² See generally Jonathan Fox, “How Does Civil Society Thicken? The Political Construction of Social Capital in Rural Mexico” in 24 (6) *WORLD DEVELOPMENT* 1089-1103 (1996).

a “conflict of large dimensions”.¹³⁷³ The key problem is that the State remains dominated by the Military (officers have wrongfully appropriated land, and thus would be targeted by expropriation) as well as Non-State actors who yield tremendous power due to connections to economic interests ranging from ranching to narco-trafficking. Although Portillo expressed a commitment to social justice prior to becoming President, upon assuming power he was deemed to be a mere puppet of ex-General Rios Montt (the president of the Congress now the subject of genocide complaint). The concessions were as follows:

- 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*

Peasant leaders and newspaper editorials characterized the promises as insufficient responses intended to buy time and stall implementation of substantive policies. By February 2002, President Portillo confirmed that although the government would elaborate an agrarian development policy, it would not pursue agrarian reform or expropriation.¹³⁷⁴ The government indicated that expropriation would require constitutional reform, hence it would be better to create a Secretariat for Agrarian Affairs and an Inter-Sectoral Dialogue Table on Rural Development, both headed by CONTIERRA’s director to combat exclusion. The new entity absorbed CONTIERRA and includes a Unit for Prevention of Conflicts, thus re-emphasizing the need to approach the land problem from a preventive peace building approach in conjunction with conflict resolution perspective (although CONTIERRA also engaged in preventive strategies). Peasants characterized the Presidential Commission for the Resolution of Land Conflicts as yet another attempt to exhaust the parties via endless negotiation. As noted by one peasant engaged in a land usurpation action: “We don’t

¹³⁷³ PRENSA LIBRE, “Editorial: Las Promesas a los campesinos”, 15 Oct 2001.

¹³⁷⁴ Miguel Gonzalez Moraga, “Prognostican un ano dificil para el camp: Baja de precios, sequia y demanda de tierras agravaran crisis” in PRENSA LIBRE 11 February 2002. See also ACAN-EFE, “Gobierno descarta expropiacion de tierras” PRENSA LIBRE 22 March 2002.

want to negotiate; we want titles, not words.”¹³⁷⁵ Land invasions multiplied on daily basis, resulting in a total occupation of 60 fincas by landless persons. The Chamber of Agriculture conducted eviction actions and filed complaints with the Public Ministry’s Office against indigenous and peasant leaders for instigating usurpation actions. A total of seven peasant leaders were assassinated. CONIC retorted that such actions would only result in a national uprising. The peasants called for an increase of the Land Fund’s budget to Q1200 million (up from Q270 million), passage of the law on registry and catastre, and investigation of the assassination of peasant leaders.¹³⁷⁶

The increase in land invasions is due to frustration at state inaction in response to demands and the ongoing hunger crisis in the rural area. As previously discussed, according to the peasants the demand for property is equivalent to a demand for food, they simply wish to feed their families. They question the legitimacy of a government which protects the interests of the elites over the well-being of the general populace, i.e. engaging in a skewed system of property distribution which has no correlation to need. Large amounts of land are left idle or utilized for purposes unrelated to feeding the domestic population. A fall in the international price of coffee, as well as drought and other natural disasters, has worsened the situation. Ironically, there appear to be an increase in supply of fincas, as many coffee-growers no longer wish to continue in a business which has experienced so much failure. Commentators are concerned that the FRG will attempt to distribute fincas to peasants in order to attain votes in the next election, but will fail to provide durable assistance to promote development beyond subsistence farming. The question is how large (or how violent) the movement must become before the State is willing to enact structural changes.¹³⁷⁷

Easton suggests that diffuse support may be sufficient to override initial disappointments due to lack of response by the State to the specific demands of some of its members. Nevertheless, should output failure continue over a significant amount of time, the system will weaken in the absence of a rise in diffuse support to compensate.¹³⁷⁸ If one is to consider the case of Guatemala, although some diffuse

¹³⁷⁵ In April 2002, 150 peasants occupied the Land Fund in protest to its failure to issue credits, the Land Fund stated that due to lack of funding, its hands were tied. Aroldo Marroquin & Rocio Bonini, “Tension en toma de finca San Luis” in *PRENSA LIBRE* (27 February 2002).

¹³⁷⁶ Martin Rodriguez P. & Crista Kepfer, “Bloqueo carretero hoy, en demanda de tierras” in *PRENSA LIBRE* 21 August 2002.

¹³⁷⁷ Ho-Won Jeong argues that escalation is necessary for conflict transformation when the context is marked by political oppression and economic exploitation. Ho-Won Jeong, *supra* note 13 at 21

¹³⁷⁸ EASTON, DAVID, *A FRAMEWORK FOR POLITICAL ANALYSIS* 126 (Prentice Hall 1965).

support is being stimulated by international and national actors, the democratic structures remain fragile due to the ongoing effects of corruption, impunity, and exclusion of marginalized groups. Both the general populace and the international community remains suspicious of the State, questioning its legitimacy and growing impatient on account of delays in output implementation. Sacrifices made in the name of “Peace” will become meaningless in the absence of any improvement in the basic lot of the common person over time. The inability of the agrarian oligarchy to exhibit concern for the deplorable sufferance of the rural population reveals the lack of a concept of a common good. The country is divided so severely that dialogue is needed to educate the actors as to the interests, needs, and wants which foment conflict. Recognition of the legitimacy of the call for an equitable land reform program and property restitution programs appear to be the unavoidable key to permanent resolution of disputes.

The use of CONTIERRA may have had a mixed effect on confidence in the state and civic participation. In the many cases which were not resolved due to delays or problems within the Land Fund (such as Piedra Parada Case), its own non-coercion capacity (Bijolom Case), inability to explore background issues (Sommer case), etc., feedback took the form of rejection of the State agencies via renewed marches, protests, return to the court, land usurpation, or simple withdrawal/aversion. On the other hand, it also possible to interpret the rise in participation in protest marches as an example of CONTIERRA’s success in improving peasant awareness of rights and stimulating interest in presenting demands. CONTIERRA may have played a role in increasing the level of participation by peasants in the political system, albeit outside of formal channels.

Another perspective requires consideration of the possible consequences of CONTIERRA’s non-existence. Would the society have experienced a greater increase in violence, unrest, land invasions, and protests due to the absence of CONTIERRA? One may suggest that CONTIERRA may indeed have “lowered the temperature” of the protracted conflict by giving the peasants an outlet for presentation of demands before state representatives, members of the corporate sector, other social groups (diverse and similar or inter and intra ethnicity/class). In addition, CONTIERRA teaches them how to listen, cooperate, formulate demands, etc. Such action may serve a peace building function as states and societies require a base level

of stability to pursue in development. However, to be fully effective, it must be combined with an effective land distribution system to guarantee substantive justice.

3. CONCLUSION TO PART IV

“ . . .(T)he more unequal the distribution of wealth and income is, the more this presents a hindrance to relations of mutual respect and trust, and equality of communicative competence among citizens.”

Simon Szreter¹³⁷⁹

This thesis was elaborated in response to the failure of the State and the international community to espouse an ethic of recognition as pertaining internally displaced persons in Guatemala. I sought to assess the use of conciliation as a mechanism by which to resolve ongoing property disputes to promote reintegration and inhibit the creation of new cycles of violence and migration. Specifically, my query addressed whether conciliation could serve as a means to empower former, potential, and actual IDPs by providing them with a voice and setting a foundation for their future development via realization of the right to remedy and provision of property restitution/redistribution.

In addition, I explored whether such mechanism may promote social capital, thereby strengthening democratic consolidation and peace-building actions through the promotion of “local peace accords”. Although the study of CONTIERRA revealed a small degree of success as an institution for preventive peace building, specifically pertaining to improvement of party participation and stimulation of social capital, it also revealed substantive problems fulfilling its mandate.

The first factor to consider is that the background context of the conciliation mechanism characterized by asymmetrical developments within dysfunctional social systems which stratify the citizenry by way of exclusion via structural inequities (law, economics, and politics). Institutional innovations, such as structural couplings like ADR are part of what Teubner characterizes to be procedural mechanisms forming

¹³⁷⁹ Simon Szreter, “Social Capital, the Economy, and Education in Historical Perspective”, in STEPHEN BARON, JOHN FIELD, AND TOM SCHULLER, SOCIAL CAPITAL: CRITICAL PERSPECTIVES 56, 67(Oxford University Press 2000).

“reflexive law”.¹³⁸⁰ They are intended to be utilized in societies whose political and economic structures have undergone significant evolution to post-modern realities and norms (based on democratic foundations). When such innovations are placed within a society in which the economy remains within the tight grip of neo-feudal structures, the political system retains repressive influences, and the legal system retains formalistic fidelity to upholding the status quo vis-a-vis property rights, etc.; the ADR institution appears to be a bizarre anachronism, appearing before the environmental context can provide the necessary support and conditions for successful implementation. According to Teubner, reflexive procedural mechanisms cannot alone assume responsibility for substantive outcomes, hence actual resolution to the problem may rest within the economic, political, or legal systems. Each system is separate but interdependent on the other systems. Thus, in order to be truly reflexive, the procedures must take account of inequities (such as power, economic resources) and provide a means by which to correct such imbalances during discussions.¹³⁸¹ I propose that the adoption of an ethic of recognition as pertaining equal party participation, pluralistic norms, responsive output provides a framework for effectuating reflexive law in practice when utilizing ADR in post-settlement situations.

I review these and other problems pursuant to the criteria of party participation, norms, and output. Because of the parallels between the problems within CONTIERRA and that of the formal courts, I make some comparison to the case law within the Constitutional Court as well.

Party Participation:

In terms of party participation, the socio-economic background context in Guatemala, as in many other ex-colonial countries, results in many cases which are characterized by inequalities between parties in education, resources, knowledge, etc. Parties in both intra and inter-community disputes did appear to experience some empowerment on account of having the opportunity to tell their story, be heard, draft partial accords, and be treated with respect (See FUNDACEN, *Comite Pro Tierra*

¹³⁸⁰ Gunther Teubner, “Substantive and Reflexive Elements in Modern Law”, 17 *LAW & SOCIETY REVIEW* 239-285 (1983).

¹³⁸¹ *Id.* At 256.

Ixcán Playa Grande, and Santa Victoria cases). Thus, conciliation may help to recognize the voice of persons previously ignored, oppressed by the society at large or the state, such as IDPs. Rather than rely on experts abroad to speak for them, they are able to express demands in their own words. However, CONTIERRA appeared before the society had evolved the sufficient degree of equality to utilize conciliation effectively to secure substantive justice. This was made evident when examining the negative impact of the use of a neutrality strategy in specific cases (see Sommer case). This approach actually limited party participation.

ADR mechanisms must not adopt neutrality strategies in inequitable contexts resulting in power, knowledge, or resource imbalances between parties. Conciliators must be allowed to intervene in order to remedy imbalances and in extreme cases, refer cases to courts for processing in the event of fraud, coercion, etc. Consideration of alternatives such as med-arb variants may be positive in such contexts.

If we consider this matter specifically within the context of internal displacement, complications arise from the need to assist IDPs to regain the ability to imagine future goals after having been subjected to an existence where such action was rendered impossible and the desire to prosecute those who robbed them of their lands. It would appear that a combination of “conflict transformation” activities to empower IDPs to envision themselves as authors of their destiny and an adversarial mechanism to sanction those who instigated their flight and retain their property is needed.

Both CONTIERRA and the courts upheld formal legal protections regarding private property, regardless of the disorganization, inequity, corruption, and coercion upon which many titles are based (See Estrella Polar, La Perla, San Antonio Panacte, Comunidad Bijolom, FUNDACEN, Canton Batzabaka, Comunidad Maribach Cahabon cases). Such bias diminished peasants’ faith in CONTIERRA and the State as a whole, given the appearance of supporting impunity. One would wish to recommend that CONTIERRA establish direct coordination with the courts as well, to ensure referral of cases involving fraud, coercion, or corruption. However, we must keep in mind that the Constitutional Court’s case law on forced evictions revealed a reluctance to address relevant human rights violations, in particular those conducted by the judiciary or non-state actors (See amparos 440-92, 151-91, 414-92 & 172-91. But see amparo 186-93, in which the Constitutional Court did sanction the lower court).

ADR and the Courts need to adopt activist approaches to combating the consequences of the “dark side of social capital” by denouncing property titles attained via corruption, coercion, fraud, or other illicit means-support for prosecution and reparation initiatives are necessary. Donors and international monitors should support initiatives to pursue prosecution and investigation of these cases (see also recommendation on output). The dense network of military, State officials, and landowners acting with impunity is the strongest threat to peace consolidation, strategies to restore the rule of law will require addressing this issue in a concrete manner.

The absence of a substantive legal aid program within the nation limits the ability of marginalized groups and individuals to assert claims or negotiate with success. The provision of legal assistance in the form of conducting a title search is insufficient, peasants, indigenous people, and IDPs need lawyers to help identify possession rights based within formal law, human rights law, and customary law. As seen in the FUNDACEN case, only when the peasants enlisted the assistance of a FESOC lawyer were they able to conclude an accord. The State and Donors should provide greater financing for legal aid programs, specifically addressing the needs of marginalized groups and individuals, such as indigenous people and IDPs, involved in property disputes

Most of CONTIERRA’s cases were ongoing disputes in which party positions had hardened due to past acts of violence and revenge. Parties seemed suspicious of settling or making concessions, as if this meant losing as opposed to winning. Other parties preferred to keep the conflict ongoing, rather than risk a solution which may require a sacrifice of some sort. Indeed, this confirms the theory that conflicts involving non-negotiable needs such as identity or the means of survival are difficult to treat utilizing bargaining approaches. Thus we are left with a “chicken and the egg” scenario, ADR is needed to promote basic trust and communication among polarized individuals and groups, but parties may actually be too estranged and antagonistic to each other to able to engage in a productive discussion. In particular, dispersed IDPs may be more likely to exhibit “asocial capital” defined by their fear and distrust of others due to their isolation, repression, and neglect. The absence of a base level of social trust is made evident by the plethora of intra-community divisions (see Tampur case and Comunidad Bijolom case), in turn negatively affected the stimulation of confidence in state and international institutions. It is important to keep in mind that

this is a consequence of the inequitable structural background and the armed conflict, not a cause. Thus we must assist the society regain unity rather than blame it for its weakness due to internal fissures. Reduction of donor aid will only punish those who are already marginalized.

In such cases, one may consider party training and promotion of community networks, such as USAID-IOM's program on reconciliation.¹³⁸² Had CONTIERRA sought to strengthen community networks prior to engaging in conciliation it may have had more success in reaching solutions. Although great emphasis has been placed on the importance of creating inter-community linkages, given the extent of internal divisions in Guatemala, the construction of intra-community linkages are equally essential. As seen in the FUNDACEN case, parties were encouraged to engage in intra-community conciliation during the sessions and create community structures after an accord was reached. The strengthening of community networks is essential for the effective implementation of both State and community ADR mechanisms. The establishment of a base level of social trust is a necessary precondition for any project designed to improve confidence in the State as well. As stated previously, I am in favour of supporting state dispute resolution institutions (in addition to community or NGO institutions) in order to assist the elaboration of a culture of peace and dialogue within the State itself, as well as strengthening weak states by increasing their networks with society. "Asocial capital" may be best tackled by a holistic approach which combines top-down initiatives focusing on poverty, inequality, discrimination, etc. and bottom-up projects promoting empowerment via participation in dispute resolution and development which also strengthen intra-community and inter-community linkages.¹³⁸³

¹³⁸² See also ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE* (Yale University Press 2002). But see Michael Ignatieff, "Nation-Building Lite" in *THE NEW YORK TIMES* 28 July 2002 at <http://www.nytimes.com>: "The U.N. nation-builders all repeat the mantra that they are here to 'build capacity' and to 'empower local people'. This is the authentic vocabulary of the new imperialism, only it isn't as new as it sounds. The British called it 'indirect rule'. Local agents rant the day -to-day administration; local potentates exercised some power, while real decisions were made back in imperial capitals."

¹³⁸³ See Michael Woolcock, "Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework" in 27 *THEORY AND SOCIETY* 151,175, 179 6 187 (1998) calling for promotion of social ties "(i) within their local communities, (ii) between local communities and groups with external and more extensive social connections to civil society; (iii) between civil society and macro-level institutions; and (iv) within corporate sector institutions." also citing Norman Uphoff, *Learning from Gal Oya*, 273: "paradoxical though it may seem, "top-down" efforts are usually needed to introduce, sustain, and institutionalise "bottom-up" development. We are commonly constrained to think in 'either-or' terms-the more of one the less of the other- when both are needed in a positive-sum way to achieve our purposes."

CONTIERRA encountered problems when attempting to establishing trust between the peasant organizations, e.g. CNOC, and the agribusiness sector, e.g. Chamber of Agriculture. As previously mentioned, in the recent period, there has been an increase in polarization between the peasants and the landowners, prompting a return to protest marches and land invasions by peasants and filing of criminal complaints against peasant and indigenous leaders by the landowners in response. However, the success of the FUNDACEN case indicated a positive development in construction of trust and networks between rural group and a corporate entity, thus we may have to retain hope that advances may be made on a case by case basis as well as within the Inter-Sectoral Dialogue Tables.

Another factor is the need for recognition of that both inter-community and intra-community disputes often require immediate output in the form of land distribution and other resources to alleviate human needs (see section on Output in this Part and Los Cimientos case in Part II), thereby reversing the process: the provision of substantive justice may actually be a pre-condition to embarking on procedural developments such as improved communication, mutual respect, trust, etc. Parties are more likely to trust each other if they are not competitors for scarce survival resources, such as property.

Norms:

A principle concern is the need to reconcile formal state law with the customary norms practiced by the indigenous population as well as international human rights. Within Guatemala, the movement towards modernization developed a twist, recognition of the rights of the indigenous people to refer to their traditional cosmovision, norms, and traditions when resolving conflicts was considered essential to establish a true democracy. Recourse to hybrid institutions which bypass formal laws to refer to moral norms of mutual respect found within indigenous consultation practices and ADR demonstrate that formal law alone is not enough in multicultural societies. Rather, there is a return to traditional customs in order to establish a more legitimate system of dispute resolution. ADR should be a link between modern and traditional customary practices: it should form a bridge between different cultures which may help unify participants in their search for solutions. For inter-community dispute resolution to be successful, one must incorporate an ethic of recognition as

pertaining customary and human rights norms. Indeed, CONTIERRA's failure to adhere to such ethic resulted in non-implementation of its very mandate and may be a factor in its limited degree of success (See Santa Victoria, Comite Pro Tierra Ixcan Playa Grande, Piedra Parada, Estrella Polar, La Perla, and San Jorge cases). There was a bias in favor of formal law over relevant norms within customary law, equity or international law (in particular socio-economic rights and restitution rights pertaining IDPs and indigenous people). In addition, the bias in favor of documentary evidence as opposed to oral evidence disempowers indigenous and illiterate peasants. In like manner, The Constitutional Court failed to espouse an ethic of recognition as pertaining rights based on indigenous law (see e.g. Amparos 1250-96 & 892-95 pertaining to Ms. Garcia and Art.67 on indigenous land and amparo 433-92 on El Jaibal), equity norms, or international human rights norms in inter-communal disputes (see e.g. Amparo 394-93, pertaining a community claim to Art. 105 on housing). The irony presented by the argument that recognition of indigenous law would be divisive whereas the national formal law preserves national unity rings empty when the majority of indigenous people are denied equal citizenship rights (both civil and political as well as socio-economic) in practice, in part due to bias within the latter system. The focus on educating marginalized groups as to their human rights without educating State actors responsible for dispute resolution resulted in a protection gap as well as systems failure due to the lack of correspondence between output and input. The inability and/or unwillingness of either the court or ADR to address the underlying poverty, historical injustice, and exploitative labor relationships or validate customary claims rendered these mechanisms a means by which to delay actual conflict resolution.

Strategies must be designed to promote the evolution of the State and society to guarantee equality among all citizens as pertaining civil and political rights, such as the right to remedy, equal protection of the law, non-interference with the home, right to choose one's residence, etc.; as well as socio-economic rights, such as the right to food, housing, livelihood, security of tenure, etc. in practice. As discussed in review of the international cases and the national cases, these rights are all linked to property issues, it is inappropriate to address property disputes without addressing the impact on human rights. Conciliators should receive human rights training utilizing these instruments, as well as equity and customary norms so that they can refer to these standards during conciliation session. Recognition of oral evidence and indigenous

customary norms (where possible) is essential to guarantee basic principles of justice and fairness. Although CONTIERRA did manage to empower some marginalized groups and individuals by providing them with a forum to tell their story, be heard, and be treated with respect, it would have attained greater success had the parties been given access to information regarding property-related international human rights (both general, and specific for IDPs and indigenous people).

Donors should follow up remedial institutions, including ADR, and condition funding on effectiveness, including attainment of solution addressing social justice needs and adherence to relevant human rights standards. Conciliation should be continued as a complement to other initiatives including tribunals, land distribution programs, and restitution programs.

Certainly, effort may be pursued at “internationalizing the domestic courts” via human rights education and dissemination of UN output. However, this would also require “domestication” of the international actors, ensuring that they approach field visits as a necessary part of their work and strengthen linkages to national NGOs as a source of information. There is a need to establish greater interaction between human rights remedial entities, such as CCPR, and ADR institutions. International monitors should request information on the output of ADR institutions in state reports and promote disseminate international norms to them.

The Constitutional Court (as well as lower courts and executive agencies) should uphold its own Advisory Opinion and refer to ILO Convention Nr. 169 when reviewing property disputes which address indigenous customary claims to land. State staff should receive education in indigenous customary law. Primacy of the provisions of all human rights treaties should be respected over conflicting constitutional provisions. Courts and state agencies require training in CESC’s General Comment on Forced Evictions, the Guiding Principles on Internal Displacement (in particular principles 28 & 29), and the CCPR & CESCR. Although I am aware of the risk of granting legitimacy to soft law norms elaborated by a group of experts, rather than drafted via a democratic process, it may well be that the interest of equity requires an expansive use of norms.

Legislative reform should be pursued to remove punitive provisions, such as imprisonment on account of engaging or supporting usurpation, which target marginalized groups and individuals. The international community must improve its oversight of labour standards in order to diminish the modes of exploitation which

play part in maintaining thousands of peasants landless and thus a continuous source of seasonal labour.

Strengthening the judiciary and establishment of the rule of law is a necessary contingent in order to provide a proper legal framework to support ADR initiatives.

Output:

An institution which is intended to engage in preventive peace building must address the root causes of conflict, often related to unfulfilled human needs. In the case of Guatemala, inequitable land distribution is one of the factors resulting in an ongoing food crisis affecting the rural population. As previously mentioned, land conflicts are often characterized as single-issue disputes; final solution requires the provision of alternative land to a party (see Piedra Parada & Comunidad Bijolom cases). In spite of CONTIERRA conciliators' genuine interest in attaining permanent resolution of property disputes, they proved unable to produce effective output in the majority of cases due to the lack of political will on the part of elites to promote land redistribution or restitution and the lack of resources to fund such programs in a land market marked by lack of regulation and excessive speculation.

As the war did not result in an overthrow of the landowning elite body, neo-feudal structures within the rural area remain intact.¹³⁸⁴ Because the economic elites wish to retain their hold on both land for export crops and cattle as well as cheap labor, they are antagonistic to any initiatives to change land distribution. Large landowners (see Estrella Polar and La Perla cases) suspect redistribution as a threat to their livelihood, given that peasants who attain enough land to feed their families and provide some income will no longer work as seasonal workers paid under minimum wage. Given the adamant refusal of the state to engage in expropriation of under-used properties or properties obtained illegitimately prior to, during, or after the war, and the impact of deforestation of forest land, soil degradation, etc. there is a scarcity of

¹³⁸⁴ Although Salvesen suggests that an effort should have been made to implement legislative reforms soon after the Accords were signed in order to act on political momentum and existing international will; I question whether it actually would have been possible. The Congress demonstrated particular adeptness at stalling and irregularly amending almost all legislative initiatives which would have an impact on economic distribution of resources. This has prompted USAID to terminate certain programs related to implementation of the Peace Accords. See Hilde Salvesen, "Guatemala: Five Years After the Peace Accords: The Challenges of Implementing Peace 32 (PRIO March 2002) at <<http://www.prio.no>>

alternative land to stimulate exchanges. In addition, the lack of resources of rural peasants render their ability to participate in exchanges almost null. From the outset, such a setting would objectively be considered unlikely to successfully apply ADR.¹³⁸⁵ Rather than blame ADR or courts for being ineffective, it is necessary to remedy the structural inequities which render completion of its mandate difficult.

In addition, I take issue with the criticism offered by international donors and monitors that the failure of the Peace Accords may be attributed to the weakness of society as evidenced by the lack of participation in elections and referendums. It appears that the failure of the Peace Accords is largely due to lack of political will and resources made available by the State and the international community to enact structural changes, e.g. redistribution of land, to remedy the severe inequity which inhibits civic participation/social capital. One may consider the conclusion offered by Steven Holtzman, a social scientist within the Post-Conflict Unit of the Social Development Department at the World Bank: “. . . (transition) requires a flexible outlook as to how to best facilitate a sustainable integration of displaced populations without expecting them to return to a pre-conflict status quo.”¹³⁸⁶ In practice, the transition policy pursued within Guatemala appeared to have no effect whatsoever on land distribution or the situation of dispersed IDPs.

CONTIERRA was limited in its ability to stimulate trust between the rural society and the State, due to the lack of land reform and the limitations of the executive land agencies, inefficiency, lack of coordination, and insufficient resources. This signals that the institution which is capable of realizing IDPs right to remedy and restitution is not the court nor CONTIERRA, but actually the legislature. The reluctance of the State to implement extensive land distribution/restitution programs has left peasants feeling particularly betrayed due to their raised expectations pursuant to the Peace Accords. Such trust required substantive output beyond mere promises, because demands were unfulfilled the peasants have radicalized. Many peasants now

¹³⁸⁵ Recommendations by elites include punishment of usurpers, reeducation of peasants on forms of presentation of demands in a State of Law, fulfillment of the registry system, and definition of the alternatives to be pursued by the State and the landowners. This perspective seeks to uphold the formal legal system, in particular the right to private property thus leaving little room for the change of the status quo. Danilo Rodriguez, “Movimiento Campesino y Estado de Derecho”, SIGLO XXI 14 April 2000. In his opinion, “CONTIERRA is a tiny sailboat trapped in the middle of a giant storm”. Workshops should be set up in all land conflicts in order to “neutralize the great confrontation that is coming”.

¹³⁸⁶ Steven Holtzman, “Rethinking ‘Relief’ and ‘Development’ in Transitions from Conflict” (The Brookings Institution Project on Internal Displacement 1999).

characterize the process of negotiation as a mere stalling tactic intended to wear down the poor, hence they turn to measures outside the law, land invasions, road blocks, and protests as “effective presentation of demands”.

Development agencies must recognize that support for market-assisted land reform in a neo-feudal context marked by speculation, lack of regulation, low resources, and gross inequities between the negotiating parties (peasants vs. landowners) is bound to fail and only promotes a rise in rural violence. The Land Fund should abandon the model of direct negotiations between landless peasants and powerful landowners given that has proved to be nothing more than a forum for manipulation due to power and knowledge imbalances between parties. Regulations should be adopted in order to establish a functioning land market and eliminate speculation. Equity interests in land on account of labour on the land, historic title, customary possession should be recognized and given a value to be calculated when determining the purchase price of property. Donors should provide more funding to the Land Fund, CTEAR, and related agencies. CTEAR’s lists of IDPs should serve as a basis to form a reparation program for IDPs. Given the lack of social trust and civic confidence among IDPs on account of their isolation, past experiences, etc., a strategy must be designed to locate and reintegrate IDPs within stable communities with access to support to services offered by the State or international agencies. Such strategy would allow dispersed IDPs to create social networks in order to cooperate with each other as well as vertical institutions.

In spite of its clear resistance to the idea, the government and donors must re-evaluate the resistance to expropriation of under-utilized land in order to establish an effective property redistribution program. Peasant organizations are calling for recognition of their call for redistribution via expropriation and restitution of property wrongfully distributed by INTA during the war.¹³⁸⁷ It is important for international donors to dismantle the neo-feudal structures founded on the inequitable distribution of property by promoting effective restitution/redistribution to internally displaced persons, indigenous people, and landless peasants in conformance with the relevant civil, political, and socio-economic human rights norms. The past is linked to the present: the current increase in land invasions at present is due to the unresolved clamour for land which was one of the root causes of the civil war. Thus, conflict prevention is needed due to failed conflict resolution.

¹³⁸⁷ See CONGCOOP & CNOC, FONTIERRAS: Structural Adjustment and Access to Land in Guatemala (The World Bank 2002).

Prosecution of those persons who have egregiously violated rights via scorched earth tactics during the war and illegitimate takeovers of land is essential for the reestablishment of the rule of law and the triumph of justice within the nation. Those who amassed properties during the conflict must provide reparation to the dispossessed. Unless those who wrongfully appropriated land are required to return the property to their rightful owners by way of court action, or convinced to do so through a compromise solution, internal displacement will remain an ongoing problem. Resistance to expropriation initiatives and prosecution of those who illegally appropriated themselves of land during the war actually supports the neo-feudal structure.

Modernization of justice programs should promote the adoption of responsive action by courts in order to combat inequitable actions conducted by State and Non-State actors amounting to violations of human rights. Legislation should be adopted to grant the judiciary mandate over cases involving violations of human rights conducted by non-state actors. Lower courts should be held accountable for upholding forced evictions. It may be beneficial to consider the creation of specialized tribunals to receive cases pertaining to forced evictions. In view of the pressures placed on the national legal system ratification of the Rome Statute establishing the International Criminal Court may increase the possibility of attaining justice.

One is left with the concern that the Guatemalan State's elaboration of ADR in the land arena coincided with the rise of demands by displaced persons, indigenous groups, landless peasants, and rural workers based on claims linked to violation of their human rights (e.g. forced eviction, coerced sale of property during the war, remuneration for labor, the need for recognition of customary land claims, etc.) The state became inundated with claims it was unable or unwilling to redress. The international community and marginalized groups clamored for improvements in the justice system precisely at a time when expectations for redress for violation of civil and political rights as well as socio-economic inequity multiplied as a result of the Peace Accords. As time passes, demands are increasing and CONTIERRA is as overwhelmed as the courts. Plans for creation of agrarian tribunals reflect the traditional cycle of return to formal mechanisms when informal mechanisms are unable to resolve demands effectively. However, the creation of remedial legal or quasi-legal mechanisms requires reforms within the economic and political systems to succeed.

Part V

PART V: Final Contemplations

"However, the need for justice goes well beyond the confines of the system of criminal justice. If 'right' relations are to be restored among individuals within a community or between communities, many other aspects must be taken into account. Structural injustices which keep rich and poor divided must be eliminated. Economic and social systems which exclude some 'for the benefit of the whole' must be reformed. Mutual respect and tolerance, forgiveness and repentance must be elevated to primary social values."

Genieve Jacques¹³⁸⁸

This study arose as a result of a differentiation between victims of forced displacement as pertaining their rights to remedy and property restitution. The pursuit of a policy by the State and the international community which purposefully ignored the majority of displaced persons, i.e. dispersed IDPs, proved to be a time bomb which threatens the consolidation of peace in Guatemala. The principle of equality is one of the founding principles of democracy, when such notion is violated at the inception of transition; it is an indicator that ensuing reforms may prove illusory. The reestablishment of social cohesion in nations emerging from conflict requires dismantlement of structures that were elaborated to exclude certain groups and individuals from enjoyment of basic rights and liberties, among them the right to property. In a rural context, the concept of attainment of life with basic dignity or an adequate standard of living is contingent on property restitution for the dispossessed as well as equitable land distribution for the landless. Denial of recognition of IDPs and their correlative rights to restitution may be considered an extension of persecution which leaves them dispossessed and vulnerable.

The Special Representative on Internal Displacement's promotion of the notion of sovereignty as responsibility, indicating respect for human rights as an attribute of sovereignty, serves to draw a parallel duty as pertaining the mandates of international actors. Where discriminatory practices occur, e.g. preference for refugees over IDPs, bias for countries undergoing humanitarian crises over post-

¹³⁸⁸ GENIEVE JACQUES, BEYOND IMPUNITY: AN ECUMENICAL APPROACH TO TRUTH, JUSTICE AND RECONCILIATION, 35 & 44 (World Council of Churches Publications 2000). She calls for "restorative justice", identified as re-creation of relations by remedying the structural economic injustices (e.g. via agrarian reform) which are the root causes of conflict and oppression.

conflict/transition situations, bias for civil and political rights as opposed to socio-economic rights in designing protection norms and strategies, this weakens the legitimacy of the international human rights system as a whole.

Examination of efforts to elaborate new guidelines pertaining to IDPs revealed limitations due to lack of legitimacy, normative clarity, comprehensiveness, and enforcement capability. By taking a closer look at the normative language within hard and soft law instruments relevant to IDPs, it was revealed that they are drafted cautiously and leave open protection gaps regarding the root causes and solutions to many internal displacement situations linked to dispossession of land. Because of these factors, I believe there is a need for the creation of a new instrument on internal displacement to be pursued within the formal law-making processes within the UN which will serve to recognize the identity of IDPs (including terms for cessation of such status) and establish criteria to comprehensively guarantee the rights to property (in the expanded socio-economic/hybrid sense), restitution, and remedy as key elements to attaining human dignity and assuring equal participation within society.

Nevertheless, it is clear that the elaboration of emancipatory norms are meaningless if the structural background context remains unchanged. The juxtaposition of quantitative social capital indicators to qualitative case studies at the micro level serves to highlight the fact that norms do not function in a vacuum. What purpose may an IDP's right to reparation serve if there is no effective land distribution program or no financing for the compensation program? Implementation of international human rights standards is contingent on the existence of national social systems (politics, law and economics) that promote equality in terms of access and participation of all citizens. In countries in which social systems are dysfunctional, as evidenced by their lack of transparency and corruption, the law becomes an instrument of repression of marginalized groups, instead supporting inequitable divisions of resources and power within societies. I sought to highlight the importance of designing strategies to address the symptoms of state failure and internal conflict- inequitable distribution of resources, inequality, and absence of the rule of law in order to successfully prevent second-generation violence and displacement. In Guatemala, the low levels of confidence in the political and legal systems reflect the situation of impunity and corruption plaguing the State as well as discriminatory practices within the courts. Without responsive institutional mechanisms at the international and national levels, marginalized groups such as IDPs

may be limited in their ability to attain true emancipation due to denial of equal rights; hence attainment of social cohesion is sacrificed. Loss of faith in democracy itself is also tied to the severity of socio-economic inequity and corresponding increase in insecurity, all of which highlights a complete failure to satisfy the criteria for conflict prevention. The situation may be characterized as “structural violence” due to the inequity in distribution of resources, lack of provision of education, health, exploitation of rural peasants, etc.¹³⁸⁹ The Peace Accords marked the end of armed conflict, however a true return to peace would require remedying the structural inequities, i.a. via land reform.

What is curious is that discussion of the function of State and its impact on marginalized groups within society occurs precisely at time at which we are witnessing a battle between “black” and “white” transnational non-state actors. The former promotes illicit interests and has successfully infiltrated the Guatemalan government to the point where it is more characterized by its dubious links to narco-traffickers and the military rather than pursuit of democratic principles. The latter is composed of NGOs, churches, and other groups espousing humanistic values intended to restore morality within nations by assisting marginalized groups attain a base level of human dignity. However, these groups face increased repression as a consequence of the weakness of the State in battling impunity. Some allege that this phenomenon is indicative of the gradual demise of the Westphalian state system.¹³⁹⁰ Critics warn that a consequence of the erosion of the principle of sovereignty is greater destabilization, violence, and polarization between the “haves” and the “have-nots”, made evident by the rise in terrorist actions in New York, Moscow, Bali, etc.¹³⁹¹ Migration provides an additional measure of this evolution: we witness increased attempts to emigrate from developing nations due to protracted conflict and the absence of opportunities to partake in life with security and dignity, as well as countering restrictive immigration policies among developed nations that has

¹³⁸⁹ Galtung, Johan, “Violence, Peace and Peace Research” in JOURNAL ON PEACE RESEARCH (1969).

¹³⁹⁰ As I write this the United States is advocating the use of pre-emptive strikes against Iraq on account of its threat to U.S. national security. Previous actions in Yugoslavia, Kosovo, Somalia, Haiti, etc. were based on the premise that humanitarian interests outweighed sovereignty, thus advocates of intervention referred to UN Charter provisions on the international responsibility to promote respect for human rights and resolve international problems, i.a. of a humanitarian character, Article 1, to support intervention, while detractors referred to Article 2 on restriction of the use of force against states and non-intervention in internal matters.

¹³⁹¹ On “haves and have-nots” see Prem Shakar Jha, “Welcome to a Nightmare” in HINDUSTAN TIMES.COM (02 August 2002).

increased the amount of internally displaced persons in the world (as opportunities to attain asylum have been greatly reduced). At the national level in Guatemala, the forced evictions by landowners and the land invasions by the landless provide parallel examples of such tendencies.

As a response to influence of the “black” Non-State actors upon governments that are deemed to be unaccountable, corrupt, and non-responsive to infrastructure needs (including health and education), USAID announced that it will now direct funds to the “white” Non-State Actors, i.e. NGOs and church organizations.¹³⁹² The Guatemalan State is likely to experience further reduction of aid in order to encourage a change in its policies, e.g. collect taxes to pay for social welfare programs, prosecute human rights offenders, combat corruption, etc. However, as mentioned in Part II, I remain concerned about the accountability of NGOs and other Non-State actors as well as the ability to apply the principle of equality to beneficiaries. How can we ensure that funds delivered to them do not result in arbitrary differentiation among potential beneficiaries as occurred between refugees and IDPs within the UN-State-centered program? Although the Catholic Church in Guatemala is considered the most trustworthy institution and has the highest percentage of engagement of the society, there are also many divisions between and within communities based on religious identity. Donors should strengthen society but, as pointed out by Evans, this is best accomplished when accompanied by the formation of links to reformers within the State.¹³⁹³ Ironically, inaction by international actors with respect to supporting mid-level staff against high officials catering to elites is precisely due to respect for the sovereignty principle, thus there is a contradiction given that the international community appears hesitant to implement the “expanded mandate” in practice, thereby unconsciously furthering status quo policies and practices.

The creation of a hybrid ADR mechanism, CONTIERRA, was intended to be responsive in the land arena. Consideration of its achievements and limitations demonstrate that the effectiveness of this mechanism is contingent on the existence of a comprehensive land distribution legislation and responsive courts to follow-up cases involving corruption, illegal appropriation, and accompanying restitution claims linked to dispossession of property. ADR may be considered a *complement* to the

¹³⁹² Barry James, “U.S. Outlines Shift in Criteria for Providing Development Aid” in INTERNATIONAL HERALD TRIBUNE 26 October 2002.

¹³⁹³ Evans, Peter, “Government Action, Social Capital and Development: Reviewing the Evidence on Synergy” in 24 (6) WORLD DEVELOPMENT 1119-1132 (1996).

formal justice system, not a replacement. ADR programs can promote restoration of community harmony, psychological release for victims, empowerment via increased self-esteem and knowledge about rights and strategies, and a sense of value and connection with respect to other social sectors and state actors. This in turn may buttress confidence in the State, including its judiciary. This does not negate the fact that there is also a need to recognize past human rights infringements, prosecute violators (lest Non-State Actors be given unchecked control of resources wrongfully appropriated), and provide restitution to victims; however both approaches are necessary for achieving true reconciliation. The choice to sacrifice justice by providing immunity and/or failing to prosecute those who displaced peasants and appropriated their property has not resulted in peace and reconciliation. On the contrary it has solidified the state of inequity in the rural regions. Although the court may sanction offenders, nullify adverse laws, and order restitution, it is not designed to prompt cultural transformation by encouragement of peaceful dialogue among adversaries. In this respect, ADR may supplement the judiciary in order to provide a more complete form of reparation and reconciliation. However, true empowerment requires fulfillment of basic needs, both material and transcendental; in the rural context both aspects are linked to land. A strategy that combines such initiatives may eventually reveal progress, although its success will be hard to measure in the short term.¹³⁹⁴

As noted by Lederach, it is unlikely that the restoration of peace can be expected to occur in less time than it took to conduct the war.¹³⁹⁵ Indeed, Galtung suggests that conflicts are rarely solved, rather they re-emerge in different forms.¹³⁹⁶ One may argue that the situation in Guatemala is one of wave progression, in which there are a few improvements, followed by some backward steps, only to be hopefully followed in the future by improvements in relations.¹³⁹⁷ Others may contend that it is a mere state of ebb and flow indicating no substantive change whatsoever, or even

¹³⁹⁴ The IDB is presently promoting the creation of agrarian courts in Guatemala; it would be beneficial if conciliation services were offered at the first level.

¹³⁹⁵ John Paul Lederach, "Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Framework" in KUMAR RUPESINGHE, *CONFLICT TRANSFORMATION* 201, 214 (St. Martin's Press 1995).

¹³⁹⁶ Johan Galtung, "Conflict Resolution as Conflict Transformation: The First Law of Thermodynamics Revisited" paper presented at International Peace Research Association Conference, Kyoto, Japan 27-31 July 1992, quoted in Carolyn Nordstrom, "Contested Identities/Essentially Contested Powers", in RUPESINGHE, *supra* note 12, at 93, 105.

¹³⁹⁷ See Louis Kriesberg, "Paths to Varieties of Intercommunal Reconciliation" in HO-WON JEONG, *supra* note 13 at 115, 111 (Ashgate 1999).

worse a steady state of deterioration risking the re-emergence of violence. Hence, this study is unable to draw final conclusions; rather it provides an assessment of the progress and problems encountered by the conciliation mechanism thus far.

Because remedying structural inequities is a long-term endeavor, it is necessary to engage in “conflict management” strategies to prevent re-emergence of violence.¹³⁹⁸ The shift from a repressive military rule in which a few interest groups were allowed to place demands to the transitional democratic state in which a plethora of interest groups are voicing themselves, is a destabilizing factor as much as it is a necessary part of evolution.¹³⁹⁹ Thus, the achievement of long-term systemic stability requires the adoption of reforms and new goals, such as land reform, in order to accommodate the growth of demands after the signing of the Peace Accords. The query is which other measures may be adopted to ensure stability of the State? Ideally, the goal of ADR is to replace repressive and exclusive mechanisms with rights-enhancing and inclusive mechanisms that are responsive “to social needs and aspirations”.¹⁴⁰⁰ Such mechanisms must demonstrate a renewed concept of authority based on inclusion of the whole population, rather than a part, and effectiveness in

¹³⁹⁸ Ho-Won Jeong, *supra* note 13 at 23.

¹³⁹⁹ Some studies have demonstrated that collective actions which focus on securing particularistic interests may prove mutually exclusive and result in patronage politics. This weakens the State through demand overload and reliance on parochial alliances See Patrick Heller, “Social Capital as a Product of Class Mobilization and State Intervention: Industrial Workers in Kerala, India”, in 24 (6) *WORLD DEVELOPMENT* 1055-1071, 1057 (1996), citing JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD* (Princeton U.Press 1988). Almond & Verba identify three types of political culture: **Parochial, Subject, and Participant**. A Parochial Political Culture is one in which there are no specific political roles within the society as they are congruous with religious and social roles. Most importantly, they note that the parochial culture “implies the comparative absence of expectations of change initiated by the political system. The parochial expects nothing from the political system.” Examples give are African tribal societies that are far removed from the central government. A Subject Political Culture is one in which the people are very aware of the State, and have strong feelings/opinion for or against it and its policy output; however they have limited knowledge of the policy creation process and their own input/feedback participation is almost non-existent. The Participant Political Culture is one in which people are aware of the political structure and processes (creation and implementation), and have active roles in such activity. Responses of approval or disapproval of political policy range from legal to illegal actions, such as voting, engaging in protests, etc. Almond & Verba state that these cultures can be combined within individuals and that nations often include more than one culture. Hence they note that “The ‘citizen’ is a particular mix of participant, subject, and parochial orientations, and the civic culture is a particular mix of citizens, subjects, and parochials.” GABRIEL ALMOND & SIDNEY Verba, *THE CIVIC CULTURE*, (Sage Publications 1989).

¹⁴⁰⁰ See PHILIPPE NONET & PHILIP SELZNICK, *LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 16-18 (Harpur & Row 1978) note that the legal system undergoes an evolution in relation to the political social order in which three stages are passed: repressive law is characterized by the subordination of law to power politics, autonomous law separates the two systems and concentrates on procedural fairness, and responsive law would integrate legal and political aspirations, blending powers, and seeking substantive justice.

practice in order to be regarded as legitimate. They must be designed to remove domination by elites rather than mask or pursue the retention of power by such groups. We are left with the following question- how may one create an institution that will enable marginalized persons and groups to participate in the resolution of disputes as subject actors engaged in transformation rather than objects of a status quo oriented system?

I submit that the adoption of an ethic of recognition as pertaining pluralistic norms (indigenous customary law, international human rights, and formal law), equal party participation, and responsiveness of output provides a basic framework for action. Criticism of ADR proponents' argument that "the means is an end in itself" as diverting attention away from the failure to provide substantive justice is valid, however one should refrain from completely disregarding the value of the process itself as a peace building mechanism in the post-conflict setting. Rather than utilize black or white analysis, it is important to recognize the complexity of the background and purposes of ADR within a specific context. What is clear is that ADR strategies for countries undergoing protracted conflicts cannot be simply imported from the U.S.; mechanisms must be designed within the context in which they are placed, albeit with a transnational perspective reflecting local and international perspectives. It is hoped that this study provides lessons for application in other countries embarking upon transition to peace and seeking to prevent second-generation displacement.

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