

Unfinished business: the IDP land question

by Cecilia Baillet

*The campesino was born with his land; the war took it away.
The land is his destiny - life and death.
We will not stop being displaced until we have a plot
of land to sow and live on.*

Vidal Jutzutz

In 1999 12,000 peasants marched 70 kilometres to Guatemala City to protest lack of government progress in implementing the 1997 Peace Accords. They demanded greater efficiency in issuing land titles, enforcement of labour rights for rural workers and a review of the performance of the Land Fund and the Presidential Office for Legal Assistance and Resolution of Land Conflicts (CONTIERRA), the institutions responsible for providing credit for land purchase and for resolving land disputes. The fact that the number of demonstrators was four times that of the previous protest in 1997 indicates waning faith in the government's commitment to remedying the root causes of the conflict.

A representative from the Land Fund has admitted that only 39 of 500 requests for credit assistance have been approved. The key dilemma facing the Land Fund is the speculative land market which has inhibited donors from financing the programme. While other economic sectors suffer from excessive legal regulations, the land market remains curiously unregulated. Though CONTIERRA concedes that it has been ineffective, it places blame on its lack of human and material resources and the fact that final settlement of land disputes requires provision of alternative land financed by the Land Fund.

In February 1998 the Land Fund entered into an agreement to provide IDPs with access to credit for land purchases but refused to consider restitution. The Land Fund law recognizes three categories of eligibility for assistance: peasants with-

out land, peasants with insufficient land and those living in poverty. IDPs seeking credit are eligible to apply under these criteria, and do not need to apply as IDPs.

As of April 1999, the Technical Commission for the Execution of the Accord on Resettlement of the Populations Uprooted by the Armed Conflict (CTEAR) was processing 20 IDP community claims (each on behalf of between 20-145 families) for credit assistance from the Land Fund. Also under consideration were 30 IDP claims (25-100 families each) for recognition of title to land and three IDP claims (32-80 families each) for compensation. Most IDPs live in dispersed groups and do not know about assistance programmes and procedures for filing restitution claims. The government's failure to advertise its services and the absence of adequate legal aid worsen the problem.

Questionable validity of IDP classification

In 1998 the US Committee for Refugees (USCR) estimated that there were 250,000 IDPs in Guatemala. While organized collectives of IDPs, *Comunidades de Pueblos en Resistencia* (with a total of 15,000 members), have been able to gain international attention and purchase new land, the needs of the much larger number of dispersed non-organized IDPs have not been adequately addressed.¹ The Guatemalan government admits the failure but denies the need to recognize an additional category of protection arguing that "the internally displaced person ... is not in a special situation.

... he is in the same general situation as the rest of the population facing extreme poverty."

UNHCR's Guatemala office maintains the position that there is no longer an IDP problem in Guatemala.² They question 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. Their attitude is shared by IOM and USAID representatives.

The general perspective is that it is a more holistic form of protection to provide socio-economic assistance to marginalized communities composed of diverse groups rather than focus on one category to the exclusion of others. The reality that CTEAR and the various land institutions have lists and files of IDPs, and that additional information is continually being received from applicants, carries little weight with donors. Review of this data, combined with additional investigation, would enable a more accurate determination of the actual number of IDPs dispossessed of land.

Clearly, the Guatemalan state lacks sufficient resources to provide full reparation to all and has to design strategies which are practical to implement. However, I would argue that it is discriminatory to state that the identification of a refugee, which also often entails questions of proof, is somehow more legitimate than that of an IDP. We must not ignore the reality that IDPs were dispossessed of their property in like manner to refugees.

Those dispossessed of their homes deserve either restitution of property or compensation. As long as neither remedy is offered, the infringement on the right to freedom of movement, choice of residence, freedom from arbitrary interference with one's home, equal protection of the law, and right to property has not ceased. As the Inter-American Court of Human Rights has noted, any State which fails to investigate and prosecute human rights violators and does not provide reparation to victims is itself in violation of its duties under the American Convention.³

Practical concerns

Courts and agencies pay heed primarily to formal title to land, not to how land was obtained. There has been little action to explore the validity of titles attained via corruption, theft, fraud or violence. In general, title is recognized at face value. As long as the government is unwilling to expropriate, or litigate for, the return of land illicitly obtained by the elite, it will be difficult to offer restitution of land to those persons illegally deprived of property. CONTIERRA has a mandate to resolve conflicts between various claimants and arrange for the sale/rent of land, issue of usufruct⁴ rights and resettlement of possessors. Intense pressure not to probe corruption

risks making CONTIERRA ineffective. The property registry and cadastral⁵ land registration system supported by USAID, GTZ and the World Bank is considered by some to be the primary vehicle for an ultimate solution to the land problem. Although the majority of handwritten ledgers have been transferred to computers (reducing the risk of tampering and increasing access to information), complaints have arisen about excessive delays in registering new titles. Recognition of title is not equivalent to land redistribution; persons whose title is confirmed may actually be usurpers. Delays in completing the cadastral survey have caused a mismatch between registered and de facto property. There are cases in which private security groups are sent to take possession of a property based on registration, only to find the land claimed by those who argue that the registry refers to another location. Insufficient attention has been paid to customary rights and historic title, the basis of many IDP property claims.

Forced evictions

Forced eviction has been recognized as an element of genocide committed against indigenous populations. During the Guatemalan civil war, indigenous leaders who claimed land rights were

persecuted as communists and subversives. Violent forms of dispossession deprived indigenous people of their means of survival and imperilled cultural traditions. While indigenous rural groups persistently call upon the state to uphold Article 67 of the Constitution (protection of indigenous land), the judicial system routinely recognizes individual claims thus exposing indigenous land to expropriation, sale or break-up. Many indigenous groups retain some form of collective title/claim to the land but divide property into individual family plots in order to prevent usurpation by non-community members. By doing so they lose a collective right to protection. Some indigenous groups have pursued claims to force the state to implement the expropriation clause in the Constitution but found the clause more often used against them. IDPs are deterred from returning to seized land by fear of physical attack by current occupants. Both land-owners and landless peasants have been frustrated by delays in processing cases and investigating acts of violence.

Cessation of IDP status

No international instrument, including the UN Guiding Principles on Internal Displacement, addresses when an IDP ceases to be such. It is curious that an



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instrument designed to plug gaps in international law should omit such an important aspect of protection. Provision of protection to persons as a result of a temporal event requires an analysis of when such action is no longer required. Cohen & Deng recommend a case-by-case analysis and cite various scenarios for cessation 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*
- 3 *Resettlement (including socio-economic integration in another area).*⁶

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

The UN Guiding Principles' definition of IDP includes those "forced or obliged to flee or to leave their homes or places of habitual residence, in particular or as a result of or in order to avoid the effects of ... violations of human rights... and who have not crossed an internationally recognized State border." There is no limitation regarding applicability only to civil and political rights. One may deduce that the general reference includes social and economic rights as well, and the right to property 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 UN Guiding Principles prohibit arbitrary deprivation of property and call for recovery of lost property or compensation/reparation (Principles 21 & 29).

Given that agriculture is the primary form of subsistence in Guatemala, the state's failure to respond to restitution claims by the dispossessed is a form of discrimination which may at best be categorized as promotion of impunity and at worst as a form of persecution threatening the survival of large sections of the rural population.⁷



Campesinos defend occupied land against eviction by Guatemalan police.

Cohen & Deng cite USCR categorization of Cypriots and South Africans as examples of how to determine cessation status. In Cyprus, although IDPs have been resettled for over two decades, the absence of a solution to the conflict, the continued presence of the UN and the desire of many of the displaced to return home are noted as factors for the continued validity of the IDP label.⁸ They consider South Africa to be a different case, despite admitting that a change of government has not resolved land problems resulting from the apartheid era. Their argument that "since the end of apartheid ... the displacement of many is now a land and economics issue"⁹ ignores the reality that land conflicts are often the root causes of displacement. The key difference between an IDP and a person who remained in his or her home is the dispossession of property. The fact that land conflicts are unresolved should not be used as a reason to end IDP status.

Cohen & Deng's suggestion that "displacement across generations" may be a legitimate basis for non-inclusion in the IDP category is at variance with Deng's 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."¹⁰ In the case of the Palestinian refugees the span of time in exile has only intensified demands for restitution. Would it not be discriminatory to deny IDPs the same right to seek restitution?

In short, the current explanations offered for cessation of IDP status seem shaky because they appear to rest on subjective political considerations regarding the regime in power rather than objective legal determinants with respect to IDPs themselves.

A case by case approach may not be advisable for the determination of IDP status because it leads to *ad hoc* responses, which is exactly what the Guiding Principles were intended to avoid. Given that international organizations and states have criticized the IDP label as being vague and hard to apply, failure to explain how to put the IDP definition into practice and failure to define the conditions for terminating IDP status renders the pro-IDP case more vulnerable to those who, like James Hathaway¹¹, dispute the validity of the IDP category.

USCR has noted that, without guidelines, application of cessation status to IDPs is necessarily subjective. When they de-categorized groups of Nicaraguans and El Salvadorans as IDPs, USCR argued that they considered people no longer displaced if a) they "voluntarily returned home to live", b) "the conditions that led them to flee improved sufficiently that most observers considered that the displaced could safely return home" and c) "refugees from those countries repatriated from neighboring states."¹² Inclusion of refugee repatriation among the factors to take into account when analyzing the continuing validity of the IDP label is disturbing. Whereas refugees are organized and have support from

the international community, IDPs are generally dispersed, anonymous and lacking advocates. Refugee return is usually based on protection guarantees and specifically negotiated arrangements. The fact that a group of refugees has been offered the chance to return has no relevance to the situation of an internally displaced population still awaiting a response from a State.

In 1998, a year after USCR had estimated there were 250,000 IDPs in Guatemala, it was decided not to list them. USCR's justification is that "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 with the land and assistance they would need to return home."¹³ Given that the deprivation of access to a domestic remedy is itself a basis for international protection, it is surely inconsistent to argue that such a situation constitutes grounds for exclusion from international protection.

Any argument that IDP numbers have been reduced requires a cogent analysis which explains how human rights violations have ceased, among which is deprivation of the right to property. The complexity of this issue reveals the inherent difficulties with respect to transferring the IDP notion from guidelines to policy on the ground. Worthy of consideration is the suggestion by the attorney Steve Hendrix that Guatemalan IDPs should be entitled to apply for restitution and/or socio-economic assistance for the duration of the implementation of the Peace Accords. The World Bank has proposed that the deadline for the implementation period be extended until 2006.

Restitution

The Commission for Historical Clarification has called for restitution, particularly in the form of land. While the Secretariat for Peace has only \$1.6m available for restitution, claims for damage to cooperatives in Ixcán and Peten alone have been estimated at \$45m. The Commission has found the Guatemalan Army responsible for 85 per

cent of cases of human rights violations, including dispossession of land. Ongoing displacement caused by para-statal narco-military groups goes unchecked. The fact that the government has changed does not mean that the state can avoid responsibility. Lack of sufficient economic and human resources, institutional capacity and political will make it unlikely that significant numbers of IDPs in Guatemala will have property restored.

The process of democratic transition necessitates tackling many of the root

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causes of displacement, reforming the judiciary, addressing socio-economic inequality and removing impunity. These

issues do not require the use of the IDP category, other than in presentation of evidence as to how property was illegally attained.

Increased funding to the Land Fund, CONTIERRA and other related agencies should be combined with improved access to justice and anti-corruption programmes, regulation of the land market, financing of legal aid services, action against unscrupulous lawyers who offer title processing services to the landless but who disappear after being paid, and investigation and prosecution of landowners whose holdings were coercively obtained. Land claims based on customary rights need to be investigated. There should be greater emphasis on retrieving information from CTEAR, investigating claims, disseminating information via radio to dispersed IDPs, and investigating the establishment of a compensation fund for the remainder of the dispossessed. Those dispossessed who choose not to return to rural areas should be able to opt for monetary compensation, alternative urban housing and vocational training. In addition, education reform is of fundamental importance in a country with the highest illiteracy rate in the region (51 per cent of women and 38 per cent of men).

Donors who have financed land programmes for refugees need to consider similar action for IDPs. Reduction of funding, justified by a partial implementation of the Peace Accords, would destroy the reconciliation process. The

measures proposed above would benefit all persons, not just IDPs, and would reduce the sense of injustice harboured by the poor.

Conclusion

Rather than considering the attainment of solutions for refugees as the final chapter, it would be better to view it as the penultimate step in the process of attaining justice for all victims of forced migration in Guatemala. As the international community seeks to promote recognition and categorization of IDPs, it should reflect from the Guatemalan experience whether agreement on a definition has any value in the absence of enforcement strategies and mechanisms. The process of considering when IDP status ceases must include rigorous analysis of ongoing human rights violations, in particular those rights to property restitution. Should such a task prove impracticable, then perhaps the IDP definition should not be utilized at all.¹⁴

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1 Some IDPs have been able to have land restored or received compensation for lost land when their claims were combined with those of a returning refugee population. UNHCR has assisted IDPs in these negotiations.

2 Telephone interview with Paula Worby, UNHCR Guatemala Office, 13 April 1999.

3 Garrido & Baigorria case, Reparations, I/A Court H/R Series C No 39, 1998, para 72; Velasquez Rodriguez Case, Judgment, 29 July 1988, para 174, 176.

4 Legal term defined as "the right of enjoying the use and advantages of another's property short of the destruction or waste of its substance".

5 Legal term defined as "showing the extent, value and ownership of land".

6 Roberta Cohen & Francis M Deng, *Masses in Flight*, Brookings Institution 1998, p37-8.

7 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 Refugees* p54 noting that discrimination may amount to persecution when affecting the right to earn one's livelihood.

8 Cohen & Deng, *ibid*, see footnote 9, p38.

9 *Ibid*, p39.

10 Francis M Deng, 'Dealing with the Displaced: A Challenge to the International Community', in *Global Governance* 45, 51 (1995).

11 Commentary by James Hathaway, in Proceedings of the 90th Annual Meeting of ASIL, 562 (1996).

12 US Committee for Refugees, *Colombia's Silent Crisis: One Million Displaced by Violence*, March 1998, p18.

13 US Committee for Refugees, *World Refugee Survey*, 1999, p266.

14 UNHCR and the University of San Carlos hosted a seminar on IDPs in March 2000.