

Researching transnational approaches to IDP protection: a legal perspective

by Cecilia Bailliet

The legal researcher seeks to assess the normative clarity, legitimacy, enforcement potential and empowerment function of the principles created to provide a framework for protection of IDPs.

Because the Guiding Principles on Internal Displacement is a non-binding instrument deriving legitimacy from cross-referencing other international instruments within the field of human rights, humanitarian law and refugee law – there is a need to understand the value of these layers of law. In particular, each right enunciated within the instrument requires such analysis. I have assessed the rights to property, recourse (or remedy) and recovery/reparation (compensation or restitution) in order to understand whether IDPs actually have the necessary framework to assist them regain property upon return at the end of a war.

This review highlights a complete absence of clarity regarding what is meant by a right to property and to restitution. There is disagreement over whether the right to property is a civil and political right covering registered property, as opposed to a socio-economic right applicable to the customary claims of indigenous people/farmers who link the land to their rights to food, housing, work and the right to life itself.

General human rights instruments do not set forth a right to restitution of property and the soft law is vague. There is a lack of clarity between the layers of hard and soft law which render the design of protection strategies complex and leaves open the question regarding the extent to which IDPs are actually empowered. The Guiding Principles grant power of choice over the form of reparation (which may either be compensation or restitution, but without guarantee of getting land back) to the state. The Principles of the International Law Association are unclear. The International Labour Organisation Convention No. 169 grants choice over form of compensation to indigenous people.

Examination of the case law of the Inter-American Court of Human Rights reveals how an evolutionary approach to interpretation of basic human rights provides a framework for stimulating change in how states address responsibilities towards their citizens. In the *Awas Tingi* case the Court consulted members of this indigenous group of Nicaraguans as well as anthropologists in order to understand how to protect their property rights. The Court stated that the tribe's tie to the land formed the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. It reasoned that the tribe's relation to the land is "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." The Court thus elaborated an evolutionary and contextual approach to interpretation of the right to property empowering indigenous people by reflecting their own definition of property. IDPs can draw on this ruling to assert claims based on recognition of their customary holdings.

The *Loazya Tamayo* Case involved a Peruvian university professor who was forcibly detained by the country's anti-terrorism police, held incommunicado, raped and tortured. Forced to abandon her studies, after her release she moved abroad, remained isolated, was subject to economic hardship and suffered physical and psychological harm. She argued that this trauma had interfered irreparably with her 'life's plan', the attainment of personal, family and professional goals. Finding in her favour, the Court cited the emergence of events which "radically alter the course in which life was on, introduce new and hostile circumstances" and thereby impede personal development.

This decision is of direct relevance for IDPs in Guatemala whose 'life's plan' was in most cases intrinsically tied to the land which provided them with nourishment, identity and security. There is a need for provision of restitution of property as a way of restoring IDPs' 'life plan' and recognising the protection continuum from past acts to present and future consequences.

The duty of states to guarantee the right to live in dignity was upheld in the *Villagran Morales* case which involved the killing of five street children by the Guatemalan police. The Court asserted that the State was in dereliction of its responsibility to them even before their murder as it had failed to prevent the children from living in misery. It called for recognition of the indivisibility of socio-economic rights and civil and political rights in order to enable a persons to fulfil a 'life's plan'. This decision could also be used in support of calls for restitution of IDP property needed to guarantee a basic standard of living.

IDP researchers can influence policy and protection strategies. My work has helped to:

- reverse decisions of key agencies to declare an official 'end' to Guatemala's ongoing displacement problems
- get Guatemala onto the Global IDP Database
- assist UNDP to work with donors on how to improve the conciliation agency in Guatemala
- provide information for reports issued by the Centre on Housing Rights and Evictions (COHRE, www.cohre.org)
- stimulate further research on cessation of IDP status.

Hopefully other lawyers will also pursue a multidisciplinary approach to researching internal displacement within the field of law in order to help post-conflict states prevent second-generation displacement. We need a new instrument on internal displacement.

ment to be pursued within the UN's formal law-making processes which will serve to recognise the identity of IDPs (including terms for cessation of such status) and establish criteria to comprehensively guarantee the rights to property restitution as key elements to attaining human dignity and assuring equal participation within

society. Finally, we must be aware that elaboration of emancipatory norms is meaningless if the structural context remains unchanged. No purpose is served by giving an IDP the right to reparation if there is no effective – and adequately funded – land distribution and compensation programme.

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