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## Recognizing the Rights of Indigenous People to Their Traditional Lands: A Case Study of an Internally-Displaced Community in Guatemala

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# Recognizing the Rights of Indigenous People to their Traditional Lands: A Case Study of an Internally- Displaced Community in Guatemala

By  
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## PROLOGUE

Los Cimientos is a plot of fertile land big enough to support about 1,000 subsistence-farming families and is situated in a remote corner of a region in Guatemala known today as the “Ixil Triangle.” This label in itself—the “Ixil Triangle”—tells the story of the ongoing struggle between the national Army and two indigenous groups (the Ixil and the K’iche) for control of Los Cimientos. This struggle has gained significant international attention, having been reviewed and mediated by the Inter-American Commission on Human Rights. While the dispute ostensibly concerns ordinary property rights to land, it in fact raises complex issues of the rights of indigenous peoples to their traditional lands.

Three municipalities comprise the core of Los Cimientos, where almost all of Guatemala’s Ixil (pronounced “ee-sheel”) live. The Ixil are a small and close-knit group of 60,000 who have only in recent years had significant interactions with the national culture and economy.<sup>1</sup> The three towns in the area—Nebaj, Cotzal, and Chajul—roughly form an equilateral triangle with legs of 20 kilometers which sits between two mountain ranges. Partly because of its remoteness and the ruggedness of the terrain and partly because of the independent traditions of the Ixil community, the region was fertile ground for the popular insurgency movement in the late 1970’s. By 1978, the Guerrilla Army of the Poor (“EGP”) had significant influence in the region. Most notably, the EGP successfully executed the notoriously cruel coffee baron Jose Luis Arenas Barrera, known as the Tiger of the Ixcán, and thereby won respect from many Ixils who had been his virtual slaves.

Army commanders invented the term “Ixil Triangle” in the 1970’s, using it to describe the zone in which they wanted to concentrate their counter-insurgency efforts. During their “scorched earth” operations, these Army commanders displaced 80 percent of the population, destroyed almost all of the region’s 171 villages, and drove the relatively fortunate to seek refuge in the jungle, the capital or in lowland plantations. Their logic was “remorseless”:

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1. For the history of the Ixil region *see* BEATRIZ MANZ, REFUGEES OF A HIDDEN WAR 96-99 (1988) and MYRNA MACK, DONDE ESTA EL FUTURO 117-25 (1992).

Since the insurgents relied on the sometimes reluctant peasants for food and shelter, the army would simply eliminate their villages.<sup>2</sup> The terror was so great that even the local municipalities of Cotzal and Chajul were deserted during this era. Manz comments that the repression in the area was “unprecedented in both scale and cruelty.”<sup>3</sup>

Los Cimientos is located on a remote edge of this “triangle” which was razed by the Army in the early 1980’s. The plot borders the as-yet undeveloped jungles of Guatemala which have been the final refuge for both resistant civil populations and, until the formal peace was signed in December 1996, a handful of guerrillas.<sup>4</sup> Although considered a piece of the “Ixil Triangle,” Los Cimientos was first settled by K’iche Indians whose own traditional lands on the other side of the mountain range were overcrowded and less fertile.<sup>5</sup> Near the turn of the century, a handful of K’iche families began cultivating the unoccupied land, and in 1909 they managed to obtain a legal title to Los Cimientos from President Cabrera as part of a presidential land grant program.<sup>6</sup> The K’iches particular grant was an anomaly since the program was designed to give legal title to *ladinos*<sup>7</sup> who were willing to create plantations in the region and give the national economy a toe-hold in the Ixil region.<sup>8</sup> Nevertheless, the K’iches’ title remains legitimate, and in the 1960s they defeated the Ixils in court when the latter challenged the title, hoping to expand Ixil settlements in the direction of Los Cimientos.<sup>9</sup>

When the Army’s scorched earth campaign ripped through the region, Los Cimientos was not spared. In late 1981, an Army helicopter landed in the prosperous K’iche village. Soldiers rounded the people up, accused them of being EGP sympathizers, and told them to leave immediately before the Army bombed them out. To prove their sincerity, the soldiers cut open two young men “like

2. Edward Hegstrom, *Few in Guatemala Find Hope in Peace/Optimism Clouded by Poverty, Crime*, HOUSTON CHRONICLE, Dec. 22, 1996, available in 1996 WL 11582963.

3. MANZ, *supra* note 1, at 99.

4. Guatemala recently ended this hemisphere’s longest on-going civil war. Prior to the end of the civil war, between 600 and 1,000 armed guerrillas belong to the URNG, a coalition of several branches of earlier resistance movements which began shortly after the U.S.-sponsored coup of the democratically-elected government in 1954. INTER-AMERICAN COMM’N ON HUMAN RIGHTS, FOURTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN GUATEMALA 99 (1993) [hereinafter “IACHR 4TH REPORT”].

5. For background history of the K’iches of Los Cimientos see Center for Human Rights Legal Action, Petition against the Republic of Guatemala for Failure to Respect, *inter alia*, the Right to Use and Enjoyment of Private Property as Guaranteed by Article 21 of the American Convention on Human Rights (1993) (unpublished manuscript, on file with the author) [hereinafter CHRLA Petition].

6. *Id.*

7. Guatemala has essentially three social-ethnic classes. The great minority are persons of European descent—the *criollo* elite. About half (45 to 65 percent) are persons of indigenous descent who identify with indigenous culture. The third class consists of *ladinos*: persons of mixed descent or those of indigenous descent who do not identify with indigenous culture. TOM BARRY, *INSIDE GUATEMALA* 217-18 (1992).

8. MACK, *supra* note 1, at 118.

9. See Holley, Michael, *Los Cimientos: Returnees Remain in Limbo* NCOORD NEWSLETTER, Aug. 1995, at 13; David Stoll, *Guatemala: Solidarity Activists Head for Trouble* (Sept. 21, 1994) (unpublished manuscript).

sheep." Horrified, the K'iches fled that same day, leaving behind their harvests, their farm animals and almost all of their personal possessions. One month later, a few villagers tried to return to salvage what they could, and they found their buildings burned and all their goods gone.<sup>10</sup>

From 1982 to 1988, these K'iches of Los Cimientos lived as internally displaced refugees, scattered in various parts of Guatemala and suffering the most extreme conditions of poverty. By 1988, representatives of the 672 families in the community had gained the civilian government's recognition of their right to return to their land, but the regional military commander prohibited their return because, he asserted, the EGP was still strong in that area.<sup>11</sup>

Finally, in 1990, village representatives were allowed to return to Los Cimientos, accompanied by an Army contingent. Upon arrival, they discovered that their ancestral cemetery had been dug up and an army outpost built in its place. Also, in the heart of the village they found 50 Ixil families living as a "model village" community. "Model villages" were a cornerstone of the counter-insurgency campaign; persons displaced by the destruction of their homes were gathered, "re-educated," trained to serve in militia called "Civil Patrols" and were re-settled in grid-like communities.<sup>12</sup> These model villages served as foci of resistance to insurgent influences. With the Army there to back them up, the 50 Ixil families claimed the right to occupy Los Cimientos, brandishing their militia rifles as well as a colorable ancestral claim to the territory.<sup>13</sup>

Since 1983 and as soon as they were able to re-group following their violent displacement, the K'iches of Los Cimientos have been fighting a legal battle in Guatemalan and international courts to regain their homes and land. While the Guatemalan government has finally recognized that their claim is legitimate,<sup>14</sup> to date it has not supported their return home. With the aid of an indigenous non-governmental organization,<sup>15</sup> the K'iches managed a self-organized return to their land in 1994. Since the Ixil families still occupied the homes and fields and still had their army-issued rifles, the K'iche refugees could not re-enter their lands and instead erected a tight clump of squatter's huts on the edge of the territory. These "temporary" shelters have had to serve as permanent homes for the 100 families that have returned and still expect any day to regain the right to re-occupy their homes and plant their fields. Presently, they live in

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10. Interview with Juan Oxlaj Sarat, local schoolteacher, in Los Cimientos, El Quiche, Guatemala (June 28, 1995).

11. See CHRLA Petition, *supra* note 5.

12. See MANZ, *supra* note 1, at 38-43.

13. As I explain below, they have a colorable claim to the land based on the fact that their ancestors occupied the region surrounding Los Cimientos long before any K'iche peoples came to the region.

14. See CHRLA Petition, *supra* note 5.

15. CERJ, the Council of Ethnic Communities "All are Equal," continues to support the K'iches of Los Cimientos. CERJ was formed in 1988 in order to protest the government's policy of forcing indigenous peasants to participate in Civil Patrols. Since that year it has had considerable success and its founder, Amilcar Mendez, has been recognized internationally for its work and presently serves as an elected Congressman. See generally JOEL A. SOLOMON, INSTITUTIONAL VIOLENCE: CIVIL PATROLS IN GUATEMALA 1993-1994 (1994) and Juan Luis Font, *Perseguido y señalado*, CRONICA, Dec. 4, 1992, at 16.

the most desperate of conditions, fighting rain, cholera and chronic malnutrition.<sup>16</sup>

## I.

### INTRODUCTION: INDIGENOUS PEOPLES AND PROTECTING THE RIGHT TO TRADITIONAL LANDS

Indigenous peoples are increasingly recognized as having an inherent claim to traditionally-occupied land, which they should be able to assert against further invasion by settler societies (i.e., groups which have colonized lands in the last 500 years).<sup>17</sup> The development of the notion that indigenous peoples possess a customary right to their traditional lands has been especially evident in the Americas, where more and more indigenous communities with international support are resisting developers and claiming rights over resources in areas which formerly would have been legally considered “unoccupied.” The case of Los Cimientos both demonstrates the importance of guaranteeing indigenous communities the right to live on ancestral grounds and reveals some potential difficulties of defining and enforcing that right.

An imprecise definition or conception of this right may make it more of a hindrance than a help to indigenous communities. For example, it must be decided who can make a claim to lands which still have not been usurped by settler society. Also, it must be determined under what circumstances a claim is appropriate.

The answers to these questions can have tangible consequences. For example, depending on how one construes the right, there are several potential legitimate indigenous claims on Los Cimientos.<sup>18</sup> The Ixil community can claim the area, arguing that the land was not “unoccupied” land and that therefore the K’iches’ title is illegitimate since the settler government which granted the title lacked the authority to bequeath Ixil lands to anyone. The K’iches of Los Cimientos can claim it, arguing that their ancestors settled it, and that, until driven out by the Army, they lived according to traditional customs and as subsistence farmers on the land. The fifty Ixil families also have a colorable claim. They argue that, in addition to sharing the general Ixil ancestral claim to it, they also possess the inherent rights derived from six years of settling into the area themselves during the absence of the K’iches. Finally, there remains a broader view: that Ixils and K’iches are both sub-classes of Mayan Indians, and it is

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16. *Los Cimientos: una lucha por la sobrevivencia*, REENCUENTRO, Mar.-Apr. 1995, at 11.

17. See *infra* notes 106 through 110 and accompanying text detailing declarations and treaties in support. However, as Robert Williams notes, the “conception of indigenous peoples’ diminished rights and status, derived from the doctrine of discovery, still retains valuable currency in international legal discourse today.” Robert A. Williams, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 667 (1990).

18. In fact, the following arguments are the ones commonly repeated by representatives of the various factions during mediation conferences that turn essentially into battles of the elders, with each side producing elders who testify as to remembering cultivating a certain plot of land and thereby assuming a claim over it. (Interview with Amilcar Mendez, Director of CERJ, in Santa Cruz del Quiche, El Quiche, Guatemala, June 13, 1995).

only the Mayan community as a whole that can claim the right to traditional lands as against the settler society. In this case, recognition of the indigenous right to traditional lands would not solve the disagreement between Ixils and K'iches, but it would suggest the responsibility of the Guatemalan government in respect to the conflict. Since the dispute arose from the Army's massive displacement of various Mayan groups, the government owes them all resettlement on territory comparable to their homeland.<sup>19</sup>

In addition to raising questions about the substance of the emerging indigenous right to traditional lands, the example of Los Cimientos demonstrates that an appropriate procedure for raising and enforcing the right must be developed. In most cases of dispossession today, a Third World state's elite pits itself in direct conflict against a "Fourth World" indigenous nation.<sup>20</sup> Usually under the guise of "development" (or in the case of the Cold War-era Guatemala, more brashly as "anti-communism"), the Third World state terrorizes the Fourth World peoples or "nations," replacing their self-sufficient societies with rapacious industries (logging, mining, agroexport business, etc.) that benefit only the elite.<sup>21</sup> These states conquer an indigenous nation's territory by extorting fraudulent treaties (e.g., Mexico, Brazil), by planting non-indigenous settlers and encouraging developers (e.g., Indonesia), or waging overt and covert wars (e.g., Guatemala).<sup>22</sup>

Since violations of the right of indigenous peoples to traditional lands are usually perpetrated (or at least encouraged) by the state itself, legal enforcement of the right is an especially sensitive and difficult question for the simple reason that a state will be inclined not to recognize a right that cuts against its own interests. Rather, these states will most likely violate the land rights of indigenous peoples, and only recognize them if it happens to benefit the state.

In Los Cimientos, for example, the families have spent over fifteen years displaced and eleven years petitioning the government before even managing to feel that their ordinary claim was secure enough to return to the site and announce their right. In this case, two inescapable realities of life in Guatemala have kept the K'iches displaced for so long: (1) a fundamental conflict between the Army and indigenous peoples; and (2) the lack of a firm and effective rule of law which would allow for decisive decisions in land dispute cases. Where a

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19. In their pleadings before the Inter-American Court of Human Rights, this is essentially what the displaced K'iches contend: their position always argues that the government must re-settle the fifty Ixil families who will be displaced by the return of Los Cimientos. See CHRLA Petition, *supra* note 5.

20. Bernard Nietschmann, *Economic Development by Invasion of Indigenous Nations*, CULTURAL SURVIVAL QUARTERLY, May 1992, at 2.

21. *Id.*

22. A particularly disturbing and recently-uncovered example of this is the massacre of indigenous peasants at Rio Negro, done in connection with the construction of the Rio Chixoy dam. The project, sponsored by The World Bank, called for the flooding of the isolated village of Rio Negro by September 1982. World Bank personnel had supervised the progress of the dam periodically since 1979. Just weeks before the village was to be flooded, soldiers and Civil Patrollers killed all 376 inhabitants of the 400-year-old settlement. Paul Jeffrey, *The World Bank, a Giant Dam and a Massacre*, NATIONAL CATHOLIC REPORTER, Apr. 26, 1996, at 8.

state's relation to its own peoples is so openly exploitative and where there is no impartial and stable court system to appeal to for the protection of basic rights, the formal recognition of any type of indigenous right—whether based on custom or official title—tends to be meaningless. If the indigenous right to traditional lands is not properly enforced, it will serve only to foment popular rebellions, either against the interest of the elite (as evidenced by multiple Guatemalan peasant takeovers of plantations in the name of ancestral rights<sup>23</sup>) or even orchestrated to serve the state (as in the case of Los Cimientos).<sup>24</sup>

The task of creating the proper procedure for enforcing the indigenous right to traditional lands boils down to finding a method that reconciles the needs of the indigenous peoples and the desires of the government (which, for the most part, defends the interests of a small elite). The indigenous peoples need procedures that work immediately in order that they may prevent sudden, forceful dispossession; in short, they need more material resources and institutional support to make their claim known and to preserve their land until a final adjudication of the right may be reached. At the very least, they need legal authorization to act in self-help to prevent their own removal from homes and the despoliation of their lands.

In contrast, the state will be loathe to surrender any degree of its presumed sovereignty over the indigenous peoples living within its borders. To recognize the self-determination rights of peoples too broadly would threaten a state with severe fragmentation and social upheaval. Therefore, states would ideally want to force indigenous peoples to present their claims *post hoc* and before ordinary tribunals.

This essay recommends a set of parameters for the right of indigenous peoples to their traditional lands. In particular, it offers answers to the questions of substance and procedure—who should possess the right and how they should assert it—in light of the specific abuses that continue to be committed against indigenous peoples involved in the Los Cimientos dispute. Part I describes the broad, global need for the recognition of the right and also explains the especially urgent need in Guatemala. Part II explains in detail the situation in Los Cimientos and how it exemplifies a common situation in which a state twists the indigenous right to lands in order to serve its own interests and to more efficiently oppress indigenous societies that attempt to remain independent. In light of the potentially detrimental effects for the intended beneficiaries of this admittedly necessary right, Part III describes the right as it exists today in international treaties and resolutions, specifically analyzing its status as a group or as an individual right. Finally, Part IV asks specific, pragmatic questions about the scope of the right: Who is entitled to land? To what land are they entitled? How do they make their claim? Subsequently, I suggest how the right should be

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23. *In the Wake of the Land Accord*, CENTRAL AMERICA REPORT, May 23, 1996, at 4; *Propuesta de Dialogo para Resolver Invasiones*, INFORPRESS CENTROAMERICANA, Mar. 2, 1995, at 10; *Convulsion en el Campo por Invasiones*, INFORPRESS CENTROAMERICANA, Apr. 6, 1995, at 4.

24. See *infra* notes 77-79 and accompanying text for a full discussion of these possibilities.

defined in order to best benefit the indigenous and avoid the exploitation of the right by the state.

## II.

### THE NEED FOR AN INDIGENOUS RIGHT TO TRADITIONAL LANDS

#### A. *The Worldwide Trend in Displacement of Indigenous Communities*

Indigenous peoples are consistently the poorest members of states because settler societies continue to discriminate against them and, in particular, continue to usurp the lands they have traditionally depended on for survival. Nevertheless, indigenous peoples have traditional claims to approximately 25 to 30 percent of the earth's territory and resources.<sup>25</sup> Most of this territory is within the boundaries of Third World states, since most of the world's 600 million indigenous live within these states.<sup>26</sup> As these developing states struggle for economic stability on an international plane, they are increasingly driven to exploit fresh resources, and tend to respond to that pressure by further dispossessing indigenous peoples of their lands and resources.<sup>27</sup> This type of development does not necessarily maximize overall benefits for those involved; rather, it often effects a transfer of benefits from the needy to the well-heeled. For example, the forest that sustains indigenous Malays in Borneo is being transformed into a heap of disposable chopsticks for Japan.<sup>28</sup> The transfer is made not because it makes people better off overall, but simply because elites in both states benefit from the transaction. The dynamics of international trade put extreme pressure on the indigenous to relinquish their remaining sector of the earth.

Due to this pressure, indigenous peoples desperately need the international recognition of the indigenous right to traditional lands. This right, unlike other proposed indigenous rights, is especially crucial because the dependence of the indigenous on their land makes them particularly vulnerable when displaced.<sup>29</sup> Indigenous peoples need traditional lands for subsistence agriculture, for maintaining customary lifestyles, for religious purposes, for a stable site of nationhood, and finally for preserving their indigenous identity from other peoples and sectors of society.<sup>30</sup> An indigenous person driven from his land quickly loses thousands of years of cultural heritage and most capability of survival; plucked from his community, he becomes an alienated individual, extremely susceptible to exploitation by the wealthy elite, usually of European descent.<sup>31</sup>

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25. Jason W. Clay, *Looking Back to Go Forward: Predicting and Preventing Human Rights Violations*, in STATE OF THE PEOPLES 68 (Marc S. Miller et al. eds., 1993).

26. *Id.* at 64, 66.

27. Nietschmann, *supra* note 20, at 2.

28. Wade Davis, *Death of a People: Logging in the Penan Homeland*, in STATE OF THE PEOPLES 23, 27 (Marc S. Miller et al. eds., 1993).

29. "Even for minor disruptions, the indigenous in developing countries are the segment of the population most affected by displacement." Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U.J. INT'L L. & POL'Y 689, 704 (Spring 1994).

30. Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 137-40 (1991).

31. Consider the fate of the Bushmen in South Africa; their homelands have been purchased and subdivided, the people hunted or forced into slavery. Five years ago, they were "rescued" (in

Michael Cernea describes the “spiral of impoverishments” that besets displaced peoples, emphasizing that the cumulative effect of losing their traditional methods of survival and social interaction is that the “social fabric is torn apart.”<sup>32</sup>

It is well recognized that nineteenth century colonists and elites misinterpreted *uti possedetis juris* in order “to bestow an aura of historical legality to the expropriation of the lands of indigenous peoples.”<sup>33</sup> The “enlightened” contemporary view recognizes that the doctrine of discovery was unjust and actually a euphemism for an outright theft of lands. This shift in consciousness (i.e., the prevailing recognition that “unoccupied” lands are in fact usually used or occupied by indigenous peoples who have a legitimate claim to them) echoes the consciousness of indigenous peoples themselves as to the importance of their land. As Davis notes: “[I]ndigenous organizations know that a continuous and caring relationship with the land is the most important cultural legacy that they inherit from their ancestors, and the foundation of their peoples’ other claims to ethnic identity, cultural and political autonomy.”<sup>34</sup> Since the indigenous people feel their right to land is so vital and since settler communities increasingly recognize that simply taking that land is not legitimate, it seems to be a propitious time to stop the further dispossession of the indigenous. A look at the specific history of Guatemala shows the repercussions of the Spanish conquest and the ongoing violations of indigenous peoples’ rights to territory.

### B. Guatemala: A Case Study in the Need for the Indigenous Right to Traditional Lands

Hunger was once the exception in Guatemala; today it is the rule. There have been other changes too, changes which have brought starvation to this

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the words of the New York Times) and given gainful employment as the star attraction on a game reserve near Durban. They reap a “minuscule percentage of the profits,” sell trinkets to their viewers, and “[o]ccasionally, they are also given a load of donkey meat to eat.” The displaced Bushmen are petitioning the government for the return of a portion of their ancestral lands: “Although Bushmen have always believed the land owns them and not the other way around, [they] are looking forward to holding a deed to a piece of property.” Suzanne Daley, *Endangered Bushmen Find Hope*, N.Y. TIMES, Jan. 18, 1996, at A4.

32. Michael M. Cernea, *Involuntary Resettlement: Social Research, Policy, and Planning*, in SETTLEMENT PROJECTS 188, 195 (1993) (“[U]ntraveling occurs at many levels. When people are forcibly moved, production systems are dismantled. Long-established residential communities and settlements are disorganized, while kinship groups and family systems are often scattered. Life-sustaining informal social networks that provide mutual help are rendered nonfunctional. Trade linkages between producers and their customer base are interrupted, and local labor markets are disrupted. Formal and informal associations or self-organized services are wiped out by the sudden departure of their membership, often in different directions. Traditional authority and management systems tend to lose their leaders. Abandonment of symbolic markers, such as ancestral shrines and graves, or spatial context such as sacred mountains, water courses or trails, severs physical and psychological linkages with the past and saps at the roots of the peoples’ cultural identity. Not always visible or easily quantifiable, these processes are nonetheless real. The cumulative effect of all these processes is that the social fabric is torn apart”).

33. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT’L L. 350, 352 (1995).

34. SHELTON H. DAVIS, *LAND RIGHTS AND INDIGENOUS PEOPLES* 65 (1988).

"land of eternal spring."<sup>35</sup> For the pre-Columbian Mayans, "private and individual ownership of land was as meaningless as private ownership of . . . the weather."<sup>36</sup> In particular, "the K'iche Maya of Guatemala place great spiritual value on their links to the land, links that transcend Western conventions of territorial ownership and management. If the land belongs to anyone, it belongs to the ancestors; the living must care for the earth as the dead did before them."<sup>37</sup> With colonial rule came the imposition of private property regimes and the logic of marketplace production of commodities which dictated that land be concentrated in fewer and fewer hands and be devoted more and more to export crops.<sup>38</sup> In Guatemala, the elite descendants of colonizers have reaped the profits while the Mayans have been mired in misery.

Since Pedro Alvarez invaded with his Spanish troops in 1524, the Mayans have suffered genocide and exploitation, gradually being driven from their fertile lowlands to live in remote pockets in the less fertile highlands and the inaccessible jungles.<sup>39</sup> Despite decimation, Mayans have endured, resisting the increasing oppression at every turn, and today they still comprise a majority of the population.<sup>40</sup> The country remains primarily rural-agrarian, with 54 percent of all Guatemalans living in villages of less than 500 inhabitants<sup>41</sup> and 59 percent of the population working in agriculture.<sup>42</sup> However, peasant farmers cannot grow enough food to survive on. The elite 2 percent of the population controls 72 percent of all tillable lands, receives 90 percent of agricultural loans, and reaps 65 percent of the national income.<sup>43</sup> Meanwhile, 77 percent of the population lives below the poverty line, and 58 percent suffer chronic malnutrition.<sup>44</sup> In short, there is a direct correlation between the concentration of real property and the prevalence of acute misery. Furthermore, under conditions such as these, it is impossible to speak of fundamental rights without including and prioritizing socio-economic rights.<sup>45</sup> Since abject poverty is the greatest threat to a peasant's well-being, the best guarantee of fundamental rights for a peasant farmer is the security of owning familial croplands.

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35. JEAN-MARIE SIMON, *GUATEMALA* 19 (1987) ["In the 1800s a European visitor called Guatemala the 'land of eternal spring.' A century later, Guatemalan essayist and politician Manuel Galich called his country the 'land of eternal tyranny.' For a few, Guatemala is paradise. For most, it is not."]

36. TOM BARRY, *ROOTS OF REBELLION* 5 (1987), quoting David Browning (1971).

37. Christopher H. Lutz and W. George Lovell, *K'iche Maya of Guatemala in STATE OF THE PEOPLES* 227, 227-28 (Marc S. Miller et. al. eds., 1993).

38. BARRY, *supra* note 36, at 21-25.

39. Spain created a *Republica de los Indios* where Indians could live in their own social structures but under the Crown's jurisdiction. In this way, Mayans were able to maintain their cultural heritage while losing almost all of their lands and being forced to do seasonal work as slaves. Torres, *supra* note 30.

40. MANZ, *supra* note 1, at 1-21.

41. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1993 Chapter IV, "Guatemala" [hereinafter "ANNUAL REPORT"], at 411.

42. WORLD BANK, *SOCIAL INDICATORS OF DEVELOPMENT* 139 (1994).

43. ANNUAL REPORT, *supra* note 41, at 410.

44. IACHR 4TH REPORT, *supra* note 4, at 5.

45. *Cf. Id.*, at 409 ("The indivisibility of [socio-economic] rights from civil and political rights is made particularly clear in Guatemala").

The misery suffered in general is even more concentrated amongst the Mayans who are almost exclusively peasant farmers and who must do seasonal work on plantations in order to subsist. The misery of Mayans is even more pronounced than that of the population as a whole: for example, an indigenous person's life expectancy is only 41 years as compared to 59 years for the overall population.<sup>46</sup> While 73 percent of non-indigenous children attend primary school, only 30 percent of indigenous children are able to do so.<sup>47</sup> Their disproportionate misery is effected by a system of "apartheid de facto."<sup>48</sup> Likewise, the elite's agroexport business systematically exploits Mayans in particular because their plantations require cheap seasonal labor. Since Mayans seek to subsist completely from the crops they can raise on their tiny plots in the highlands, the agroexport business elite undermines these subsistence communities, aiming to drive the indigenous from their highland homes in a desperate search for paltry wages.<sup>49</sup>

*C. The 1980's in Guatemala: A New Wave of Dispossession.*

As mentioned, across the globe, the elite of the Third World are waging an expansionist war on the indigenous Fourth World.<sup>50</sup> No contemporary attack has been more savage than the one levied against the Mayans of Guatemala, particularly from 1981-82. As one Mayan activist explains those years: "Indigenous people developed a high level of consciousness and declared that it was time to take our fate into our own hands. The government's response was the widespread massacres and repression that resulted in the destruction of over 440 indigenous villages."<sup>51</sup>

The "destruction" that the activist refers to is a "scorched earth" of destroyed crops, slaughtered farm animals, burnt homes, and the death of anyone suspected of any sort of sympathy for the insurgency movement. Under the pretext of snuffing out a few thousand guerrillas, the state waged total war on indigenous peoples in the highlands. In a country of 8.5 million, 1.3 million people were displaced by the campaign.<sup>52</sup> In the hardest hit regions, up to 80 percent were driven from their homes.<sup>53</sup> In total, there were 140,000 casualties,

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46. MANZ, *supra* note 1, at 48 (citing OXFAM AMERICA, PROJECT REPORT ON GUATEMALA (1984)).

47. Monica Pinto, *Report by the Independent Expert, Mrs. Monica Pinto, on the Situation of Human Rights in Guatemala, submitted in accordance with Commission resolution 1995/51*, U.N. Doc. E/CN.4/1996/15, Dec. 5, 1995.

48. SUSANNA JONAS, *LA BATALLA POR GUATEMALA* 36 (1994). See also, IACHR 4TH REPORT, *supra* note 4, at 33. ("The reality—which the Government openly acknowledges—shows that Guatemala's indigenous people cannot exercise the same rights and do not have the same opportunities that the *ladino* population or the people of European descent enjoy.")

49. Usually \$1-2 per day. BARRY, *supra* note 7, at 101.

50. See *supra* notes 20-22 and accompanying text.

51. Daniele Rossdeutscher, ". . . *We Indians Have Great Revolutionary Potential*," REPORT ON GUATEMALA, Oct./Nov./Dec. 1989, at 13 (interview of Campesino Committee of the Highlands) (Andrea Kuster trans., 1989).

52. Louise Edwards, *Guatemala: Voices from Silent Refuge*, NACLA REPORT ON THE AMERICAS, July 1991, at 4.

53. *Id.*

most of whom were Mayan peasants now acknowledged to have been politically inactive.<sup>54</sup>

To consolidate their gains, the state re-settled the scorched earth regions with a network of "model villages."<sup>55</sup> It systematically corralled displaced persons, "re-educated" them, interrogated and detained them (torturing and murdering suspected subversives), and put them in densely-populated and easily-controlled villages, often several hours walking distance from their own croplands.<sup>56</sup> Also, throughout the countryside, the state imposed a system of Civil Patrols. The Civil Patrols were local militia in which peasants were forced to serve (usually one twenty-four hour stint each week) and which created a channel for state power to pervade even the most remote settlements.<sup>57</sup> Resistance to the Civil Patrols has grown since 1988.<sup>58</sup> As a result of the model villages and Civil Patrols, the deepest schism in the rural populations is between those who favor collaborating with the patrol or military authorities and those who work to preserve their traditional communities and independence.<sup>59</sup>

### III.

#### LOS CIMIENTOS: CASE STUDY OF THE VIOLATIONS OF INDIGENOUS RIGHTS TO LAND

##### A. *The Purposes of Uprooting Mayan Communities*

The massive displacement of Mayans in 1982 was an extremely traumatic event, and its aftermath has forever robbed most Mayans of traditional forms of control over their homelands and their culture. In essence, the invasion largely wiped the slate clean throughout the highlands; it substantially destroyed the enduring indigenous culture and made the peasantry dependent on the state for mere survival. In the chaos following the scorched earth campaign, the Army has rebuilt peasant society in a manner which ensures that it remains pacified, using Civil Patrols and model villages to reach this end. The Civil Patrols have replaced traditional social hierarchies based on Mayan religion and tradition,

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54. Hegstrom, *supra* note 2.

55. Myrna Mack was a Guatemalan anthropologist who did an extensive and sympathetic study of the Guatemalans internally-displaced by the civil war. She was assassinated in 1990 because she was studying the situation of the model villages—an issue so sensitive to the government and army that she had to be quieted. Instituto AVANSCO, *Introduction to DONDE ESTA EL FUTURO*, MACK, *supra* note 1, at i-ii.

56. MANZ, *supra* note 1, at 104-06. ["The residents of the model villages face a multitude of problems, as local officials themselves admit. . . . Overall, traditional cultural and community life appeared undermined by the fusing of different ethnic and community groups into a single village, destroying autonomy and increasing material dependency."]

57. *Id.* at 38-42.

58. In 1988, Amilcar Mendez gathered hundreds of peasants in front of his home in Santa Cruz del Quiche to form the group CERJ and to protest forced participation in Civil Patrols. Despite the assassination of several CERJ members and continual threats, CERJ has continued to grow and gradually some Civil Patrols have been disbanded due to popular pressure. In 1992, due to the unpopularity of the Patrols, the government changed their name to "Voluntary Civil Self Defense Committees" but did not change the nature of their operations. ALICE JAY, *PERSECUTION BY PROXY: THE CIVIL PATROLS IN GUATEMALA* 8-9 (Kerry Kennedy Cuomo et al. eds., 1993).

59. See *infra* notes 76 through 77 and accompanying text.

while the model villages have replaced ancient settlements with state-structured camps for the internally-displaced.<sup>60</sup>

The severing of ties between indigenous peoples and their ancestral lands was the key blow of the scorched earth campaign. Traditional attachments were broken as people were forced to abandon their ancestral homes to save their lives.<sup>61</sup> Even today, a speedy and equitable reassignment of displaced peoples to their traditional lands would go far towards empowering the indigenous and restoring them to a tolerable existence. However, "serious problems" persist with respect to settling the land rights of the refugees and internally displaced persons.<sup>62</sup> Furthermore, according to the Inter-American Commission on Human Rights, the government has not shown any respect for the property rights of Mayans, particularly those who remain peasant farmers.<sup>63</sup>

As part of the Peace Accords with the URNG signed in December 1996, the government has signed separate agreements concerning indigenous rights and land reforms. With regard to land conflicts stemming from the counterinsurgency campaign, the Accords call for measures such as suspending the issuing of titles to land to which indigenous communities claim a right and the waiving of the statute of limitations on cases where indigenous communities seek reparations for the plundering of their lands.<sup>64</sup> Also, the government has promised to consult with indigenous peoples in forming a joint commission on land rights which is to settle the numerous land conflicts.<sup>65</sup> However, the government has not, to date, shown signs that it will comply with these promises. The UN Mission to Guatemala assigned to oversee the peace process most recently reported that the government's initiatives to implement these agreements were "limited" and that "adequate mechanisms for consultations with indigenous organizations . . . were not established."<sup>66</sup>

In short, the scorched earth campaign created regions where settled rights to land were severely disrupted, and it appears that these rights may never be resolved through equitable processes. Rather than being able to seek a legal solution to the disputes and troubles stemming from displacement, the Mayans of the highland areas have been forced to cooperate with the Army. This phenomenon has been particularly common in the Ixil Triangle.<sup>67</sup> In this region, only about 12,000 peasants have thoroughly resisted the pressures to assimilate. This small group has hid in the remote mountains and formed a "Civil Commu-

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60. Centro de Estudios de Guatemala, *Guatemala: Un Pais Militarizado*, 46-52 (1993).

61. R. Andrew Painter, *Property Rights of Returning Displaced Persons: The Guatemalan Experience*, 9 HARV. HUM. RTS. J. 145, 150 (1996). For many years, the government argued that indigenous peasants had legally "abandoned" their property and therefore had yielded any claim to it. *Id.*, at 150-51.

62. IACHR 4TH REPORT, *supra* note 4, at 69.

63. ANNUAL REPORT, *supra* note 41, at 409.

64. Agreement on Land Reform, Mar. 31, 1996, Guat. - URNG.

65. *Id.*

66. *Report of the Director of the United Nations Mission for the Verification of Human Rights and Compliance with the Commitments of the Comprehensive Agreements on Human Rights in Guatemala (MINUGUA)*, U.N. Doc A/50/878, Feb. 24, 1996.

67. See MANZ, *supra* note 1, at 104-18.

nity in Resistance” ( the “CPR-Sierra”). Today, the CPR-Sierra remains an extremely well-organized and tenacious society<sup>68</sup> in which Ixils and K’iches live as next-door neighbors without a hint of racial animus.<sup>69</sup> More than any other indigenous society in Guatemala, these groups have managed to preserve their traditional modes of life and a unique independence from the Army and government.<sup>70</sup>

The majority of the displaced have, however, been forced to radically change their manner of life, becoming much more dependent on *ladino* society. The refugees have either moved to the capital and lived in squatter communities, relocated permanently to the low-land plantations in search of work, or submitted to resettlement in model villages near their former homes.<sup>71</sup>

In the end, this much larger group of Mayans has “chosen” the “strategy for survival.” As David Stoll, a North American anthropologist and expert on the region, concludes, “[t]hey have chosen to cooperate with the stronger side—the Guatemalan Army.”<sup>72</sup> Ixils who wished to regain at least the semblance of a decent life in their homeland region were forced to turn themselves in to the Army that drove them from their homes. First, the Army would interrogate them, winnowing out the “subversives.”<sup>73</sup> Next, it would detain and re-educate the peasants and, while grouping them very roughly in their former communities, would resettle them in model villages which often were near their former homes but now under army surveillance. The re-settled Ixils were forced to participate in Civil Patrols, a burden which completely restructured a community’s internal power relations. The new community leaders in these villages are the men who will cooperate most closely with the Army, the military liaisons (“*comisionados*”) and the Civil Patrol commanders. The Army relies on this entirely new class of Ixil leaders to impose their programs.<sup>74</sup>

The fact of being forcibly uprooted and resettled altered the nature of indigenous societies in the Ixil region. On a theoretical level, it holds true that “[w]hensoever indigenous groups settle on non-indigenous land that may have been granted to them, they become dependent upon the people who control

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68. *Id.* at 3.

69. *Id.*

70. Caba, the central village of the CPR-Sierra is two days by foot from the nearest dirt road. Only in Caba have I witnessed peasants openly and publicly expressing political opinions, e.g., posters proclaiming that the government deprives peasants of education because it wants to keep them powerless, and skits brashly and comically criticizing Rios Montt (a general running for president). Also, the people of the CPR-Sierra, unlike most Guatemalan peasants, seemed indifferent about how much money they could potentially make in the United States. As one CPR peasant told me: “We are content with what we have here. We have earned it.” (Interview with Martin Sacabaj in Caba, El Quiche, Guatemala, July 26, 1995).

71. MANZ, *supra* note 1, at 49-50 and 130-34.

72. David Stoll, “*The Land No Longer Gives*”: *Land Reform in Nebaj, Guatemala*, *CULTURAL SURVIVAL QUARTERLY* (Winter 1992), at 5.

73. MANZ, *supra* note 1, at 137-45.

74. Stoll, *supra* note 72, at 7.

those lands, whether they used to own them or not.”<sup>75</sup> In this specific case, because the source of the Ixils’ present strength (their access to land) comes from their relationship with an external power (the Army), most of the Ixils who have remained in the area are, as a group, much different than they were formerly. Popular organizers and individual peasants agree that the greatest schism that exists in the Guatemalan peasantry today is due to precisely this fundamental change taking place in indigenous rural communities; some peasants want to resist this change and resurrect their former social forms while the others choose to align themselves with the Army.<sup>76</sup> There are numerous documented cases of civil patrollers abusing non-patrollers and non-patrolling communities,<sup>77</sup> and the Army and Civil Patrols are accused of committing the majority of human rights violations in the country. The same is certainly true in the Ixil Triangle which was a focal point of the counter-insurgency campaign. Many resettled Ixils primarily want to cooperate with the Army while persons who remain displaced are widely considered to be “subversives.”

*B. “Playing the Communal Card” to Keep Mayan Peoples Divided*

While the counter-insurgency campaign broke the bonds of indigenous peoples to their homelands, it would not keep the communities from trying to eventually reestablish those bonds. The campaign further aimed to divide indigenous society into patrolling villages and non-patrolling populations (refugees, internally-displaced persons, CPRs). The case of Los Cimientos shows how the government has gone one step further in its effort to ensure autonomous indigenous communities do not reestablish themselves. Like many land disputes in the region, displaced non-patrollers are accusing patrolling peasants of stealing their homes and fields. However, in addition to creating a division between patrollers and non-patrollers, the government has taken advantage of latent yet non-explosive ethnic differences—namely, the fact that the displaced K’iches are a small minority in the Ixil Triangle.

The story of the K’iches’ attempt to return to their homes makes it clear that the government is deliberately setting off patrollers against non-patrollers in such a way as to make it appear to be an ethnic conflict. In Los Cimientos, a self-sufficient indigenous community was driven from their homes, forced to live as transients for fifteen years while fighting to return to their homes, and has had to decide whether or not to cooperate with the Army to regain their land. At one point, the K’iches of Los Cimientos did obtain the Army’s permission to

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75. JOSE R. MARTINEZ COBO, U.N. SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS* 19 (1987).

76. Mario Roberto Morales, *La Guatemala de la Posguerra: Nineth Montenegro, Coordinadora General del GAM*, *CRONICA*, Aug. 19, 1994, at 27, 28 (interview with Nineth Montenegro, General Coordinator of Group of Mutual Support and presently a Congresswoman). This precise opinion was expressed to me by numerous popular organizers (of groups such as CERJ, CONAVIGUA (Widow’s Organization), and *Defensoria Maya*) and by ordinary Guatemalan citizens during personal interviews from May through August 1995.

77. See JAY, *supra* note 58, at 22-31 and SOLOMON, *supra* note 15, at 25-44.

return, yet ultimately could not muster enough families who would agree to form the civil patrol as a condition for their return. When only 18 families, rather than the requisite and projected 40-50 families, agreed to patrol, the Army was dissatisfied, "postponed" their return, and instead (re)settled Los Cimientos with fifty Ixil families who had capitulated to the Army years earlier and already had patrolling experience. In short, the government has intensified the inevitable dispute between the non-patrolling displaced owners and the patrolling occupiers by choosing the latter from a different and majority ethnic group. Moreover, this occupying group belong to the same ethnicity (Ixil) as the new class of co-opted leaders in the area who are leading the fight to keep the K'iches out.

Depending on one's perspective, the Los Cimientos situation can appear to be either an ethnic conflict or a dispute between those that the Army favors and those that it disfavors. Those who only see that the disputing parties wear different clothes and speak different languages, inevitably see an ethnic conflict. Those who see that the parties and their positions are the products of a counter-insurgency campaign, see a dispute fabricated to divide peasants and control the region. It is clear that the government has a strong motive for keeping close control of Los Cimientos. As mentioned, Los Cimientos occupies a critical border of the Ixil Triangle because it is the last firm settlement before reaching the rugged region settled only by the CPR. The (re)settlement of Ixil families is a great way to pressure the CPR into capitulating by surrounding them with army bases and antagonistic, militarized neighbors. On the other hand, if the K'iches were allowed to return, the Army's position would be weakened because that particular K'iche community has refused to patrol and has relatives in the CPR-Sierra.

The situation of Los Cimientos epitomizes a common practical flaw with the idea of creating an indigenous right to traditional lands. Since the enforcement of such a property right ultimately depends on the cooperation of the sovereign state, the right usually will only be enforced in peculiar situations where its enforcement is in the state's own interests. Human Rights Watch has identified and studied this strategy of states, calling it "playing the communal card."<sup>78</sup> In the proper circumstances, like those of Los Cimientos, the state can choose to recognize one ethnic group's traditional and collective right to an area in order to disadvantage another ethnic group which poses some kind of threat to the state.<sup>79</sup> In particular, in Los Cimientos, the elite and the state benefit by favoring the fifty Ixil families over these particular one hundred K'iche families because the former have proven cooperative while the latter, by virtue of their

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78. HUMAN RIGHTS WATCH, *PLAYING THE "COMMUNAL CARD"* xi (1995).

79. For example in Kenya, the government has taken advantage of the shortage of arable lands to divide ethnic groups. It has granted land rights to the Kalenjin and Maasai communities, allowing them to occupy or buy land in the Rift Valley and denying these rights to the Kikuyu who had been supporters of the previous government. Human Rights Watch identifies three motives for the Kenyan regime: to discredit multiparty politics, to punish the Kikuyu, and to consolidate power in Kenya's most important farming region. *See id.*

fifteen years of struggle to regain their homes, have proven to be self-organized and determined to preserve their community.

#### IV.

##### A GROUP RIGHT OR AN INDIVIDUAL RIGHT? WHAT FORM WILL THE RIGHT TO LANDS TAKE?

The indigenous right to traditional lands is still in a relatively early stage of gestation and therefore it has not been established yet when and how the right can be invoked. Most academic debates over the right ultimately turn on the question of whether it should be considered a collective or an individual right.<sup>80</sup> Potentially, if it is a collective right, whole communities would be able to claim local control over traditional territories. By contrast, if it is an individual right, singular indigenous persons would have to present and prove their own cases individually. In the former case, an ethnic group could gain some degree of autonomy within its own discrete territory. In the latter, a traditionally ethnic territory could be whittled away at by the state as it took all immediately "unoccupied" areas and bargained away land rights from individual members of the group one-by-one.

The irony of the situation presented by Los Cimientos is that the state is strengthening its own legal position through an assertion of a particular ethnic group's collective right to traditional lands. By "playing the communal card" in such special circumstances, the state advances two goals. First, it satisfies its short-term desire to achieve a certain political result by co-opting one ethnic group while repressing the other. In the Los Cimientos case, the government increases its hegemony in a critical rural zone by favoring Ixil patrollers over K'iche non-patrollers. Second, it advances its long-term interest in discrediting both the notion of group rights in general and the indigenous right to traditional lands in particular.

Most Western states, and especially Guatemala, have a broad yet tangible interest in restricting indigenous rights to being individual in nature rather than collective. Recognizing an indigenous right to traditional lands would force a state to face essentially the same problem as the one posed by a widespread recognition of the right to self-determination.<sup>81</sup> A state weakens its claim to sovereign power over discrete ethnic groups within its political boundaries, thereby opening the way to secessionist movements by those groups. In short, the problem is one of "balkanization." World-wide, there are over 5,000 separate indigenous groups with a total population of 300 million living within about 160 states.<sup>82</sup> If these ethnic groups are extended the collective right to either

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80. See generally Robert H. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739.

81. For a lucid explanation of the right to self-determination, see generally S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1.

82. Jeff J. Corntassel and Tomas Hopkins Primeau, *Indigenous "sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"*, 17 HUM. RTS. Q. 343, 346.

self-determination or to exclusive use of their traditional lands, a radical splintering of states could result.

For example, in Guatemala an increasing number of indigenous peasant groups who live on plantations are organizing themselves, occupying sections of those plantations, and asserting an ancestral traditional claim to live on the land as subsistence farmers.<sup>83</sup> This movement has drawn a great deal of concern from the land-owning elite who have responded primarily with force, either forceful evictions of the indigenous or assassinations of their leaders.<sup>84</sup> As a result, the state has a substantial interest in undermining the idea of indigenous groups' rights to traditional lands, especially since today these peasants' only weapons are their solidarity and the rhetoric of indigenous rights. Since 1996, in fact, such rhetoric has had an impact on politics at a national level because a progressive political party has won a few seats in Congress and these representatives have vociferously supported indigenous rights.<sup>85</sup> Furthermore, with nineteen distinct ethnic pockets in the country and four widely-spoken indigenous languages,<sup>86</sup> Guatemala as a state could be significantly threatened if various ethnic groups were to demand control of traditional lands.<sup>87</sup> This is particularly a problem in Guatemala, where 60 percent of the total population is indigenous.

The problem of balkanization is substantial and should not be too casually discounted by advocates of indigenous rights. An overly aggressive assertion of local control over lands by ethnic groups would inevitably undermine almost any state's rule of law. According to Peter Jones, the "very widespread agreement in this century that each nation [i.e., distinct ethnic group] has a right to self-determination has frequently done more to promote bloody conflict than international harmony."<sup>88</sup> Nevertheless, the question remains as to what assertion of rights would be "too aggressive." If an indigenous group asserts only limited claim over certain lands, it could avoid posing a threat to the state as a

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83. In 1995, the National Coffee Association said it was "extremely worried" by the series of land occupations by indigenous Guatemalans demanding the return of their land "stolen" over the past century. *Guatemala: Land Takeovers Worry Guatemalan Coffee Growers*, Reuter Newswire, Mar. 1, 1995, available in Westlaw, INT-NEWS Database. See also Cathy Cockrell, *Land Takeovers by Rural Landless, Urban Homeless*, REPORT ON GUATEMALA 8 (SUMMER, 1992).

84. See, e.g., *Controversial participación policiaca en desalojo*, INFORPRESS CENTROAMERICANA, Sept. 1, 1994, at 4 (reporting human rights abuses by police officers who removed workers from a plantation they had taken over in protest of unfair labor practices). See also *Toma de tierras por incumplimiento de fallo judicial*, INFORPRESS CENTROAMERICANA, Aug. 4, 1994, at 7 (quoting the president of the Coordinating Committee of Agriculture, Commerce, Industry and Finances, who responded to the land invasions by saying: "It seems we live in a jungle where the rules of the game are most notable for their absence. Anyone who invades land is a criminal and therefore must be treated as such.").

85. Amilcar Mendez (founder of an indigenous organization), Rosalina Tuyuc (an indigenous woman), and Nineth Montenegro, all human rights activists, were elected to the Guatemalan Congress for the New Progressive Party in 1996. Thomas Long, *Vote Inches Guatemala Forward*, S.F. CHRON., Nov. 16, 1995, available in Westlaw, ALLNEWSPLUS Database.

86. BARRY, *supra* note 7, at 220-21.

87. See, Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69 (1995).

88. PETER JONES RIGHTS 185.

whole, and in this way the specter of balkanization could be dispelled. Nevertheless, because this basic threat of balkanization is so easily raised in connection with the idea of an indigenous right to traditional lands, states have used it repeatedly to criticize indigenous rights. States have particularly opposed the idea that rights could be granted to groups based on their ethnicity and granted to the group as a group, rather than to the group's individual members: "Western governments continue to conflate indigenous peoples and minorities and focus on individual rather than collective rights."<sup>89</sup>

Additionally, states frequently argue that indigenous rights are a sub-category of human rights, and that, as human rights, indigenous rights should be recognized only as inhering in individuals.<sup>90</sup> "According to classical theory, only the rights of human individuals can be 'human rights'."<sup>91</sup> As Brietzke notes, "[i]ndividual rather than collective rights now radiate through international law" and so the individual has become "the subject of almost peevish international concern."<sup>92</sup> Under this approach, even if group rights are "highly desirable,"<sup>93</sup> they cannot be recognized as "human rights" and thus cannot be the subject of international enforcement. This construal of indigenous rights is too formalistic and threatens to turn all declarations and treaties which recognize these rights into dead letters.

Despite the dangers of balkanization by ethnic groups and the tactical playing of the communal card by states, it is better that indigenous rights be developed as collective human rights. To begin with, they should be considered "human rights" in order that indigenous peoples have the ability to appeal to the international community for protection. If they are not so recognized, international organizations, NGO's and other nations will not have the authority to intervene in that state's "domestic affairs," i.e., the way it treats its subjects.<sup>94</sup>

Also, there are several reasons why indigenous "human rights" should be considered collective rights. First, many of these rights can only be exercised in terms of group behavior, such as the right to speak a language or participate in a culture.<sup>95</sup> Second, indigenous persons are frequently attacked simply on the basis of their membership in the group, and therefore the group itself, requires special protection from persecution. For example, when the Army forcefully recruits an individual Mayan youth before he is old enough and beats him when-

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89. Russel Lawrence Barsh, *Indigenous Peoples in the 1990's: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 72-3 (1994).

90. See generally *Report of the Working Group on Indigenous Populations on its Eleventh Session*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter "*Report of the Working Group*"].

91. PAUL SIEGHART, *THE LAWFUL RIGHTS OF MANKIND* 161 (1985) (emphasis added).

92. Brietzke, *supra* note 87, at 89.

93. SIEGHART, *supra* note 91, at 161.

94. Human rights violations are one of few recognized, legitimate reasons for foreign states to interfere in a state's domestic affairs, an exception to the principle of non-interference of the United Nations Charter Article 2(4). U.N. Charter art. 2, para. 4.

95. See JONES, *supra* note 88, at 184.

ever he fails to speak Spanish, the attack is substantially a violation of Mayans and Mayan-ness.

Finally, as the experience in Guatemala shows, indigenous peoples themselves tend to conceive of their human rights as something closely bound up with their group's traditional customs and society, and therefore they find it natural to seek collective protections. According to a 1995 study by a Guatemalan social scientist, indigenous peoples interpret the Western idea of "human rights" as an approximation of their own concept of "*respeto*."<sup>96</sup> While the term "human rights" also imports Western meanings concerning disappearances, economic exploitation, and extrajudicial killings, to Guatemalan peoples, it essentially signifies "*respeto*,"<sup>97</sup> the maintenance of "*the customs of our people*."<sup>98</sup> Thus, to the peoples studied, the quintessential human rights violation is the destruction of their community: their language, their religion, their subsistence economy, and their mutual and self-contained system of honor and respect. Since retaining their traditional lands is essential to the maintenance of their community, the expropriation of their land effectively extinguishes all their *respeto* in one fell swoop. Therefore, it is most appropriate to recognize the right as a group right which inheres to the community as a whole since it is precisely the community which is in peril. The peoples themselves consider the rights (and the goods at stake) to be a collective concern, and they are organized communally to protect those rights, their culture itself being targeted by the military.<sup>99</sup>

In Guatemala, as in many states, when an indigenous person speaks of "human rights," she is automatically labeled a "subversive" by the state.<sup>100</sup> Since actions which promote one's ethnic community are inherently actions to protect "*respeto*," it is *de facto* a "subversive" activity to affirm one's ethnicity. In short, to affirm indigenous status is to subvert, and to subvert is to warrant swift repression. Where oppression is so readily levied on persons based primarily on cultural status and their efforts to preserve that status, it is logical to afford special protections based on that status. Mere emphasis of ordinary civil rights is not likely to restrain such inveterate prejudices and long-settled patterns of violation and exploitation—especially when those usual protections are so weak.

In sum, indigenous peoples are often robbed of their lands *because* they are indigenous. Land-holding indigenous communities are self-sufficient and largely independent of their national economy which operates to maximize profits for a ruling elite in most developing nations. Therefore, states are motivated to dispossess indigenous peoples, at once gaining "new" natural resources (i.e.,

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96. JORGE SOLARES, *DERECHOS HUMANOS DESDE LA PERSPECTIVA INDIGENA EN GUATEMALA* 40 (1995).

97. *Id.* at 65.

98. *Id.* at 50 (author's emphasis).

99. MANZ, *supra* note 1, at 61-62.

100. SOLARES, *supra* note 96, at 53 ["To speak of human rights is to speak of subversion" (quoting a Guatemalan peasant)], and Font, *supra* note 15, at 20 ["They tell us that Human Rights are a branch of the guerrilla. . ." (quoting a Guatemalan peasant)].

that previously belonged to “no one”) plus a dislocated and desperate work force of indigenous persons.<sup>101</sup> Since land expropriation is unjustly aimed at the indigenous as a group, it is logical to afford them protections as a group. While human rights are traditionally enforced on an individual basis, the right to homelands should be recognized to adhere to everyone participating in a distinct indigenous society.

A. *The Legal Foundation of the Indigenous Right to Traditional Lands*

“Mere enactment [of new human rights] may only be a conscience-salver, if not an act of hypocrisy,” comments Michael Reisman.<sup>102</sup> In recent years, the belief has spread that indigenous peoples do have special human rights, particularly to traditional lands.<sup>103</sup> Nevertheless, these rights will merely help to bloat the depositories of “soft law” if the provisions are misapplied to concrete conflicts involving peoples. Since 1987, there has been a rapid proliferation of statements on the rights indigenous people have to land.<sup>104</sup> However, while statements have become more frequent, they have also avoided assumptions that the rights would be collective and belong to groups. This flurry of statements, rather than concrete state practice, is the most common form of support for the existence of the indigenous right to traditional lands. In 1987, the United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo, published the *Study of the Problem of Discrimination against Indigenous Populations* (the “Cobo Report”).<sup>105</sup> This report firmly advanced the view that the right should be collective. However, since that time the consensus has been expressed in ILO 169,<sup>106</sup> the Rio Summit of 1992,<sup>107</sup> the United Nation’s Year of Indigenous Populations of 1992,<sup>108</sup> the UN’s Vienna Conference on Human Rights of 1993, Draft Declaration of the Working Group of 1993,<sup>109</sup> UN Expert meetings of 1989, 1991, and 1992, and the OAS’s Draft of the Inter-American Declaration

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101. Consider that “development” and “efficiency” fail to justify these expropriations. Historically, indigenous subsistence farmers have been deprecated as a drag on the economy while the elite encouraged the formation of a parallel society of subsistence farmers who were dependent, working both as sharecroppers and providing cheap surplus labor for harvests and boom periods, Cobo, *supra* note 75, at 14. This is the case for peoples in general, and the general pattern also applies to African-American ex-slaves in the American South until mostly phased out in the 1960’s.

102. Stanley Anderson, *Human Rights and the Structure of International Law*, 12 N.Y.L. SCH. J. INT’L & COMP.LAW 1, 26 (1991)

103. Barsh, *supra* note 89, at 1, 6.

104. See generally *id.* at 43-58.

105. COBO, *supra* note 75.

106. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. Conv. 169, I.L.O., 76th Sess., art. 13-16. reprinted in 28 I.L.M. 1382 (1989) [hereinafter “ILO Convention 169”].

107. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Annex 1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (1993) [hereinafter “Rio Declaration”].

108. G.A.Res. 164, U.N. GAOR, 45th Sess., Supp. No. 49, at 277, U.N.Doc.A/Res/45/164 (1990) (proclaiming the International Year for the World’s Indigenous People).

109. *Report of the Working Group*, *supra* note 90.

on the Rights of Indigenous Peoples.<sup>110</sup> This article will show that this series of declarations indicates that the indigenous right to traditional lands is at a critical formative juncture because the consent of states to that right, although solidifying, remains imperfect. Depending on forthcoming declarations (from the OAS and UN), the manner in which states apply the right, and the practice of international organizations, the rights could evolve down two distinct paths. They may simply be promulgated as individual rights and thereby eviscerated; alternatively, they will be affirmed as collective rights (as they were originally conceived), and thereby become something more than an “act of hypocrisy.”

The Cobo Report was a forceful argument for the indigenous right to land in a collective form. Essentially, Cobo showed that indigenous peoples are especially dependent on their lands,<sup>111</sup> and so the “dispossession of indigenous peoples from their land and policies of forced assimilation have led to a loss of identity, urbanization and untold social misery.”<sup>112</sup> Cobo concluded that this need and the attendant acute suffering compel recognition that “indigenous peoples have a *natural* and *inalienable* right to keep the territories they possess and to claim the land of which they have been deprived.”<sup>113</sup> Cobo invokes “natural” law here to assert that an immemorial bond is inherently a legal bond.<sup>114</sup> In effect, his argument requires one to accept that peoples have created their own customary norms which pre-date and, since they as an ethnic nation have never willingly submitted to the rule of their elite’s state apparatus, prevail over property laws imposed by that state.<sup>115</sup> Since their collective rights “are not ‘created’ by legislation, neither should they be extinguished by unilateral acts” undertaken by the state.<sup>116</sup> Cobo implies that peoples continue to exist as a nation within the state and that a valid treaty between the two would be required to nullify their customary land claims. Therefore, the right to land, as proposed in the Cobo Report, is firmly grounded in the custom of the community. He therefore proposes a collective right: “Recognition must be given to the right of all indigenous nations or peoples, as a minimum, to the return and control of

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110. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, Inter-American Comm’n on Hum. Rts., 90th Sess., OEA/Ser/L/V/II.90 (1995) [hereinafter “OAS Draft”].

111. “It is also essential to increase understanding of the profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years, is taken away from them. No one should be permitted to destroy that bond.” COBO, *supra* note 75, at 39. “It is essential to know and understand the deeply spiritual relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions, and culture” *Id.* at 16.

112. *Id.* at 42

113. *Id.* at 16 (emphasis added).

114. International Law requires consent of states for any international law to be binding on that state, unless it is a *jus cogens*. Even in that case, state practice by other states is necessary to prove it is an international norm. See generally, MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW (1993).

115. “Millinery or immemorial possession should suffice to establish indigenous title to land, official recognition and subsequent registration, in absence of specifically applicable legislative or executive measures extinguishing aboriginal rights.” COBO, *supra* note 75, at 17.

116. *Id.*

sufficient and suitable land to enable them to live an economically-viable existence in accordance with their own customs and traditions. . .”<sup>117</sup>

ILO Convention 169 of 1991 is the most authoritative existing treaty supporting the indigenous right to land.<sup>118</sup> All of Part Two of the document is devoted to the question of land rights. Article 14 distinguishes between lands permanently inhabited by peoples and those of regular use or passage and affords rights, respectively, to possession and usufruct. Article 16 ensures the right not to be relocated and also specifies that compensation should be paid for dispossessions. ILO Convention 169 is a flexible document in that article 12 provides for enforcement of these rights either as individual or collective rights. This flexibility may possibly be a weakness, however, since it affords states the opportunity to argue that many situations will call for enforcement exclusively as individual rights.

The UN Working Group is currently revising its Draft Declaration on Indigenous Rights. According to its report, the present Declaration guarantees only a “vague and broad” right to land which some Western nations recommended should be reduced to usufruct rights only.<sup>119</sup> However, Rigoberta Menchu, the Guatemalan representative for indigenous advocacy groups, argued in front of the U.N. Working Group that “the right to ownership of land. . . could not become a peripheral issue” and that “[u]nfettered enjoyment of those rights created the very essence of the cultures and societies of indigenous peoples and must be entrenched in the document.”<sup>120</sup> Land rights are at the heart of the dispute that is delaying the passage of the UN declaration.

The 1993 Draft Declaration’s provisions regarding land essentially mirror those of ILO 169.<sup>121</sup> Article 7 of the 1993 Declaration provides rights to prevent dispossession which are collective or individual. Finally, Article 3 affords peoples the most fundamental collective right: the right to self-determination. Self-determination is another heavily disputed ground, exciting the same concerns about balkanization as land rights generally do. Conversely, indigenous peoples insist that the right not be diluted so much that it signifies only that the state is tolerant of cultural diversity.<sup>122</sup>

The OAS has published a recent draft of a declaration of indigenous rights. That draft seems to take a rather moderate approach to the issue of whether indigenous rights should be collective or individual in nature. The OAS Draft opens by saying that indigenous groups “have a special role to play in strengthening the institutions of the State,”<sup>123</sup> thus emphasizing the ultimate sovereignty

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117. *Id.* at 39.

118. ILO Convention 169, *supra* note 106. Signed by Guatemala, Mar. 5, 1996. Celina Zubieta, *Guatemala: Indigenous People Reject Weakened Bill of Rights*, INTERPRESS SERVICE, Mar. 19, 1996, available in Westlaw, 1996 WL 9809471.

119. *Report of the Working Group*, *supra* note 90, at 20-21.

120. *Id.* at 15.

121. See Articles 3, 4, 7, and 10 of OAS Draft, *supra* note 110.

122. Diego Cevallos, *Indigenous Mexico: ILO Convention 169 Protections Limited* INTERPRESS SERVICE, Mar. 14, 1996, available in Westlaw, 1996 WL 9809399.

123. OAS Draft, *supra* note 110, Preamble, para. 1.

of the state. However, in the same Preamble it suggests that for indigenous people to be adequately protected, their own cultural norms concerning land rights must gain some sort of legal authority:

Considering that in many indigenous cultures, traditional collective systems for control and use of land and territory . . . are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the States in which they live.<sup>124</sup>

The preamble of the most recent draft on indigenous rights contains within it the fundamental tension of all declarations to date on the subject. On the one hand, it wants indigenous individuals to remain ordinary subjects of the state. On the other hand, it wants to recognize that the group needs to exercise collective, affirmative rights over land for group members to be able to survive in traditional ways.

The OAS Draft does, nevertheless, offer a formulation for how these two interests may be reconciled: "The States also recognize that the indigenous peoples are entitled to collective rights insofar as they are indispensable to the enjoyment of the individual human rights of their members."<sup>125</sup> The requirement that a need be indispensable is a rather strict one, but the OAS Draft seems to liberally grant collective rights in terms of entitlements to land to individual members of the group. In Section V, Article XVIII, paragraph 3, it proposes that "states shall recognize the titles of indigenous peoples [which arise from rights existing prior to the creation of those States] as permanent, exclusive, inalienable, imprescriptible and indefeasible." Even individual indigenous persons could not legitimately sell "their" own piece of their collective legacy of land. The OAS Draft recognizes that land rights is an area in which collective rights are indispensable to protecting individual rights, and also that the collective right is so important to the welfare of individuals that the usual individual rights must be categorically overridden.

## V.

### DESIGNING THE INDIGENOUS RIGHT TO TRADITIONAL LANDS FOR PRACTICAL APPLICATION.

While it is clear that the indigenous right to land has developed with a collective component, it is still uncertain how firmly this collective (rather than individual) nature will be defined and enforced. Will indigenous peoples be able to assert collective rights rather than complain of individual violations, and will adjudicators assume they have those rights simply based on their ethnicity or will they require that they prove specific discrimination? This question is negotiated around three central questions: (1) Who will exercise the indigenous right to traditional lands? (2) What protections will that right authorize? and (3) When (under what circumstances) should the right be invoked? I will con-

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124. *Id.*, para. 6.

125. *Id.* at Section 2, "Human Rights," para 3.

sider each of these questions, considering the right in both its “pure” individualist and collectivist forms and indicating the present inclination of the international community. Also, I will consider what effect different interpretations of the right would have on a situation, as in Los Cimientos, where the state is trying to use the right as a means of “playing the communal card.”

A. *Who Will Benefit from the Right?*

It is clear that the eponymous “indigenous peoples” will be the beneficiaries, but there remains the tricky task of defining and applying the category “indigenous peoples.” As long as special benefits will accrue to peoples based on their emergent group rights, disputes over the criteria of classification are inevitable.<sup>126</sup>

While in the Americas the task appears easier than in Asia,<sup>127</sup> the category “indigenous” is nebulous because of the widely differing circumstances of contemporary peoples in different countries. Classification is controversial because in the colonization of the Americas there have been great differences in the degree of (1) miscegenation between colonizer and colonized, (2) economic dependence on the mainstream capitalist modes of production, and (3) cultural assimilation of the peoples. A wide spectrum of possible indigenous subjects stretches from the extreme example of Amazon forest-dwelling tribes which had their first contact with Westerners in the 1960s (i.e., the Yanomami of Brazil) to the example of “ladinoized”<sup>128</sup> peasants of a country like El Salvador who have long been reduced to being agricultural wage-laborers throughout the entire country and who do not self-identify as indigenous. The Yanomami are rare, independent of the capitalist economy and culturally distinct; the Salvadoran peasant is commonplace, integral to the capitalist order, and constitutes the mainstream culture. While the tribes are assumed “indigenous” and the peasants are not (although both groups historically suffer from the same theft of cultural and economic legacies), there are scores of cases in between these two poles.

For example, consider the Mayan peoples in Guatemala (a category which includes both Ixils and K’iches). They constitute a majority of the population. They commonly live on infra-subsistence plots on homelands while making seasonal migrations to plantations where they work for wages (like their Salvadoran neighbors). Mayan women retain traditional dress while most of the men do not. They often maintain Mayan religious rituals and power structures while also serving in Civil Patrols and heeding a local military commissioner. To an outsider, the same peoples will appear “indigenous” or “ladino” simply depending on the season, or even on the time of day. For example, the same man may perform religious rituals at dawn wearing his traditional dress, while later that

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126. Barsh, *supra* note 89, at 23.

127. In the Americas, the abrupt and severe invasion by a distinctly different ethnicity makes it easier to distinguish the colonizer from the colonized, whereas in Asia the “indigenous” are usually hill-tribes that are not so readily differentiated from a mere “minority.” Report of Working Group, *supra* note 90, at 20.

128. See BARRY, *supra* note 7.

night be dressed in used American clothes and carrying a rifle put in his hands by the Army which has him protecting the interests of the elite living in the capital or abroad. Thus, the decision as to who is indigenous is highly dependent on who is doing the classification and when it is being done.

Whereas a strong collectivist approach would grant the power of definition to the peoples themselves, an individualist stance would deliver this power to the state. The latter approach favors "colorblind" rule of law and would narrow special status rights as much as possible. The state will be eager to assert its authority to determine who fits into special societies that will receive exceptional treatment vis-à-vis national laws. A state's most judicially sound method of controlling classification would be to establish a set of objective criteria which individuals would have to satisfy to qualify as indigenous, i.e., descending from peoples who have been conquered and oppressed by a foreign colonizer, having only indigenous ancestry, following indigenous religion, using traditional forms of subsistence, and living secluded from dominant society. Under this system, even forest-dwelling tribes such as the Miskito of Nicaragua would fail to gain indigenous status since they are largely descendants of escaped African slaves. Also, in the particular circumstances of a land dispute, a state may require that, to qualify, a threat to lands must be a virtual reenactment of the original violation of the Americas. That is, an indigenous group must be displaced by a clearly non-indigenous invader.<sup>129</sup> This approach would allow states to continue to use indigenous groups as a proxy in displacing others and opening their lands to development as appears to be the case in Indonesia and, on a smaller scale, in Los Cimientos.

Indigenous non-governmental organizations take the collectivist view that the indigenous peoples themselves should be "exclusively competent" to interpret the term "indigenous."<sup>130</sup> Self-definition would allow them to define their group as broadly as possible without destroying the group's own core of identity. In essence, the only real limit to circumscribing the ethnic group would be pragmatic political considerations: When will the group be too large to assert any special treatment in society? When will admission of persons into the class undermine the collective sense of unity? As a practical matter, local political leaders and committees would need to make these classificatory decisions. Necessarily, the state would have to first recognize and label which "peoples" existed within their borders and society, but the decisions about the specific criteria for ethnicity would remain with local authorities. Under this approach, even Salvadoran peasants, whose society has been thoroughly ladinoized, could organize and demand that the state deliver to them, as a class, lands to use for subsistence farming.

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129. The category "indigenous" would be only a negative categorization and depend on the presence of European descendants; indigenous would simply mean "not-European."

130. ORGANIZADO POR LA COMISION INTERNACIONAL DE JURISTAS (CIJ) Y LA COMISION DE DERECHOS HUMANOS DE GUATEMALA (CDHG), TALLER DE CAPACITACION PARA MIEMBROS DE GRUPOS Y COMUNIDADES INDIGENAS 26 (1992).

In effect, the individualist approach would require each benefactor to prove low degrees of miscegenation, economic dependence, and cultural assimilation. The state would retain tight control on the distribution of these rights in society. Conversely, the collectivist approach would allow whatever degree of miscegenation, economic dependence and cultural assimilation that the peoples themselves believed appropriate. Peoples would share in the process of rights distribution and impel social change simply by drawing the boundaries of their self-identity.

At present, the debate over definition inclines toward supporting an individualist or objective approach. While Cobo remarks that self-identification is necessary for census-taking purposes,<sup>131</sup> even he promulgates a detailed definition of "indigenous peoples" in his report which includes, for example, requirements that peoples be non-dominant sectors of society, be determined to transmit their territory to future generations, and have historic continuity with pre-invasion societies.<sup>132</sup> Considering that peoples would enjoy powerful claims to land, it would seem that such criteria are reasonable limits since they ensure that the beneficiaries suffered from the conquests, need reparations, and are dedicated to preserving or recreating the millennial bond violated.<sup>133</sup>

The question of who should be able to assert a right to traditional lands in the circumstances of Los Cimientos is not especially complex. Both parties claiming Los Cimientos, the fifty Ixil families and the one hundred K'iche families, would meet the same objective definitions of "indigenous" since both lived in essentially the same socio-cultural circumstances, at least until 1981. Each party could argue (according to the criteria discussed above) that the other has relinquished its indigenous identity by its behavior since 1981. The Ixils could argue that the K'iches are no longer "indigenous" because many have lived permanently as plantation laborers or even as day laborers in Guatemalan cities and as a result of displacement fewer of them are subsistence farmers and fewer women have retained their traditional dress. Conversely, the K'iches could argue that the Ixils are no longer "indigenous" because their society is ultimately dependent on the favor of the elite's army for its survival and internal hierarchy. Such arguments as to whether a party is truly indigenous are impossible to manage because a bright and consistent line cannot be drawn between indigenous

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131. Cobo, *supra* note 75, at 30 ["... the decision as to who is, or is not a member of an indigenous community, constitutes ... a right which must be exercised exclusively by the community itself"].

132. Torres, *supra* note 30, at 128-29 ["[T]hose which, having a 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 those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existences as peoples, in accordance with their own cultural patterns, social institutions and legal systems"].

133. It should be noted that not all objective definitions are equal; for example, the World Bank definition could just as well apply to a minority group which never suffered expropriation. They all share "a close attachment to ancestral territories and to the natural resources in these areas", heavy reliance on subsistence-level production, distinct languages, and 'characteristic customary social and political institutions.'" Barsh, *supra* note 90, at 23.

and non-indigenous within a society that mixes the two elements in so many different ways and in so many degrees. Injustices will inevitably result if firm objective criteria are demanded. For example, in the Los Cimientos situation, most of the K'iche families are so poor due to their displacement that the women have been forced to start wearing Western clothes.<sup>134</sup> It would be patently unjust to deny the K'iches their indigenous right to traditional lands based on the fact that they no longer wear traditional clothing, while granting the right to the Ixils since they do wear them.

In sum, while an objective definition of "indigenous" is desirable, that definition should not include such strict criteria that a state, in applying the definition, could deny a group the indigenous rights that an essentially similar group enjoys. Specifically, in Los Cimientos, it would be a gross injustice for the state to be able to say the Ixils are authentically indigenous while the K'iches are not. Such close distinctions are not feasibly judicable by a Western court, and, if such decisions do in fact need to be made, then they should be handled by a committee of local indigenous representatives.

#### *B. What Power over Traditional Lands Will the Right Grant to Indigenous Peoples?*

The question as to how much control over traditional lands indigenous peoples will exercise is fundamentally a question of state sovereignty and the right of peoples to self-determination. This right, which is granted by the Universal Declaration of Human Rights and the Covenant of Civil and Political Rights, historically has been limited by the "blue water" concept.<sup>135</sup> However, the specific inclusion of this right in a declaration of indigenous rights implies that the indigenous proponents of the right need not be geographically separate from their colonizer to practice self-determination since that is not the usual condition of indigenous peoples today. In other words, the declaration would announce the death of the blue water concept, opening the way for a truly universal application of the right to self-determination. Decolonization was not so narrow in spirit as to support such an arbitrary exclusion of a whole class of victims of colonization. Accordingly, Reisman opines that the original phase of "[d]ecolonization was really a demand for law and human rights;"<sup>136</sup> in short, it was a call for universal emancipation of the colonized. The "blue water" concept was clearly a notion fabricated by the signatory states to close their own

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134. Western clothes are cheaper than indigenous clothing ("*traje*"), and therefore it is considered an affirmative expression of cultural identity to spend the extra resources to dress in *traje*. It is especially considered important that an indigenous man be able to provide his wife with *traje*, and women themselves consider *traje* an expression of pride in their membership to a particular community. BARRY, *supra* note 7, at 218.

135. The General Assembly's 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples* asserts that to enjoy the right of self-determination a people must be distinct ethnically and/or culturally from the ruling group and geographically separate; the people must be separated from the colonizers by "blue water." This concept excludes indigenous peoples of the Americas, or even of Ireland, from self-determination rights. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/14684 (1961).

136. Reisman, *supra* note 33, at 351.

borders to the spread of law and human rights. Indigenous rights explicitly dismantle that limit to the right of self-determination.

Self-determination is the lens through which the indigenous right to traditional lands will be refracted to determine the right's effective scope. A narrow right to self-determination would imply a correspondingly weak right to land. Assuming indigenous peoples had a broad self-determination right, their right to traditional lands would be correspondingly stronger. According to Jim Anaya, "self-determination includes (1) the right to determine political status and (2) the rights of a group to make meaningful choices in matters of concern to them on an ongoing basis."<sup>137</sup> Accordingly, if self-determination is a strong collectivist right, then the peoples could unilaterally declare traditional lands immune from the state's legal and political powers and enjoy complete control over the land in the future (including powers of collective alienation). Indigenous groups could (1) declare their autonomous status and (2) assert their control over use of the land by evicting all illegitimate occupiers. Indigenous advocacy groups argue for "a right to subjective definition of the right to self-determination" and desire the power to unilaterally resist the imposition of laws by the state.<sup>138</sup> In short, they support a collectivist approach, claiming that the right to self-determination "should be considered a rule of *jus cogens*."<sup>139</sup> Essentially, this group right to traditional land would allow indigenous peoples the power (in respect to homelands) to declare property rights which could be overridden not by national legislation, but rather only through international adjudication or arbitration.<sup>140</sup> The International Court of Justice's *Western Sahara* decision implicitly supports this collectivist approach in that it expressed that the right to self-determination "belongs to peoples, not to States."<sup>141</sup> If peoples can claim this right, their unilateral declarations of ownership will legally require an international rather than a domestic decision to determine their legitimacy.

In contrast, an individualist approach would construe the right to self-determination to apply only to individuals as much as possible. An individual's right to choose a status and make "meaningful choices" would mean simply the right to "choose" status as a normal citizen of the state and exercise usual political liberties. In effect, an extreme individualist approach would reduce the right to traditional lands to simply another recognition of indigenous individuals' right to non-discriminatory treatment and equal protection under the law.<sup>142</sup> Like any other marginalized group, indigenous peoples could organize within their society and assert an adverse possession claim to land through domestic legal procedures. The OAS Draft Declaration would merely reaffirm a state's commitment

137. *Report of the Working Group, supra* note 90, at 19.

138. *Id.* at 17.

139. *Id.* at 18.

140. This is essentially the approach taken by the OAS Draft in terms of social, economic and property rights. OAS Draft, *supra* note 110, Section V, "Social, Economic, and Property Rights," Art. XVIII, para. 3.

141. *Western Sahara*, 1975 ICJ 12 (ICJ Oct. 16, 1975) (No. 61) in *Report of the Working Group, supra* note 90, at 19.

142. OAS Draft appears to take this approach in terms of organizational and political rights. OAS Draft, *supra* note 110, "Organizational and Political Rights," Art. XVI.

to cultural diversity and its willingness to grant usual procedural protections to peoples. As an individual right, the indigenous right to traditional lands would be analogous, for example, to a claim of adverse possession filed by a minority group for lands which they have occupied long enough to consider "homelands."<sup>143</sup>

Ultimately, the declaration of an indigenous right to self-determination implies the scrapping of the blue-water concept, and therefore the approval of the declaration itself implies a strong collective right to lands. Nevertheless, the promise of multiple ethnic groups claiming semi-sovereignty over lands destabilizes the state apparatus. Modern states are grounded in notions of a uniform citizenry, not on the practical recognition that most states resemble a quilt of homelands.<sup>144</sup> Recognition of the right to traditional lands will encourage the recognition that the modern nation-state has never existed, but rather that the state is generally a nexus of power over antecedent, indigenous nations. States, intent on maintaining this traditional power, resist the collectivist approach by raising the specter of balkanization, a multi-lateral ethnic conflict. Therefore, states are resisting the collective view, insisting that "self-determination" be constrained to exercising limited powers over internal matters.<sup>145</sup> Under this approach, peoples could only decide property rights within boundaries already authorized by the state they live in, and claims for homelands would be authoritatively decided by state bodies. This view suggests that the Draft Declaration would not grant new rights but rather simply would recognize that indigenous peoples are viable interest groups with influence within a state's usual decision-making processes.<sup>146</sup>

The current international consensus on indigenous peoples' right to self-determination compromises between a strictly individualist and collectivist approach, featuring a partnership "which implies equality without the secessionist implication of self-determination."<sup>147</sup> The concept of "partnership" still lacks any precise legal meaning, potentially meaning either a government-to-government relation or only a duty of the state to consult with peoples before acting in respect to them.<sup>148</sup> Erica-Irene A. Daes, the Chairperson of the Working Group,

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143. One such example would be if South Carolinian gulla-speaking African Americans claimed the islands they've lived on for centuries.

144. This is true especially given that so many state boundaries are drawn according to the arbitrary lines of colonial conquest. Many of these have resulted in subsequent clashes over territorial boundaries between states, e.g., Zaire, Kuwait, and Belize, to name a few.

145. Denmark, for example, advocates limiting self-determination "to autonomy and self-government in matters relating to their internal and local affairs." *Report of Working Group, supra* note 90, at 16-17.

146. Their rights would be no more extensive than the right "to take part in the conduct of public affairs" as guaranteed by article 25 of the Covenant of Civil and Political Rights. This right was interpreted by the Human Rights Commission in the Mikmaq case in 1992, where it decided that peoples did not have a collective right to block national legislation which amends aboriginal rights. *A.D. vs. Canada*, Report of the Human Rights Committee, 39-U.N.G.A.O.R. - Supp. - (No. 40) at 200, U.N. Doc A/39/40 919840. In other words, usual political and legislative processes override the "legislation" of peoples.

147. Barsh, *supra* note 89, at 6.

148. *Id.* at 9.

has proposed what amounts to a model of partnership in which the state retains ultimate sovereignty but also shoulders an affirmative duty toward peoples: “the existing state has a duty to accommodate the aspirations of indigenous peoples *through constitutional reforms* designed to share power democratically”.<sup>149</sup> If such a duty were fulfilled, it would ensure indigenous peoples a right to land less powerful than the collective right but of greater value than a strictly individual right. For example, the right would neither have the stature of a norm of international law nor would it be like an ordinary domestic law, subject to the vagaries of shifting political currents or biased political processes. Rather, the right would be embedded in supreme national law. In short, the state would assume the duty to permanently yield a degree of sovereignty to peoples by granting them legal rights that the legislature could not readily extinguish. In terms of land rights, this concession most likely would take the form of a good faith effort to demarcate land presently occupied by peoples and to grant limited, local control to them. Also, it would imply a duty to institutionalize a method of returning lands to peoples when possible and guaranteeing equality of material living conditions with the rest of society to compensate for the past destruction of their social fabric.

The Los Cimientos situation emphasizes that indigenous claims to land will most likely be made defensively and only against another party. First, they will tend to be defensive in that they will arise after an attempt is made to change the status quo; that is, when usufruct rights presently enjoyed are suddenly threatened. In this case, indigenous communities in the Ixil Triangle are speaking of a traditional claim to land only as a consequence of the scorched earth campaign. Generally, the Guatemalan indigenous peoples, even the most vocal of community organizers, do not imagine asserting rights over broad areas or proclaiming exclusive sovereignty over any particular homelands.<sup>150</sup> All that the indigenous want is the satisfaction of their reasonable expectation to be able to live on and cultivate the land they were born on and have long gained their sustenance from. The K’iches want to live in the mountain valley that their father and grandfathers tilled, while the Ixils want, at the least, to live in a region traditionally Ixil and amongst Ixils since they too have been dispossessed of their own ancestral territory (apart from the issue of Los Cimientos).

Second, the claims of indigenous peoples will be made relative to another party, the party which is taking their homelands under color of the law. In other

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149. *Id.* at 4 (emphasis added).

150. *See, e.g.,* Morales, *supra* note 76, at 28; Rossdeutscher, *supra* note 51, at 13 [“Presently in Guatemala some sectors of the indigenous population have acted separatist ideas as a result of the repression . . . [they say] when the revolution triumphs, the ladinos will be driven out of the national territory. Or they hold that Guatemala will be divided in two halves, one for the ladinos and one for the Indians. This clearly demonstrates the use of racism as a tool to divide a population that must struggle together. These proposals are very dangerous for us Indians and for all Guatemalans who are engaged in the struggle, since they pit us against other Guatemalan ethnic groups”]; Mario Roberto Morales, *La Guatemala de la Posguerra: Demetrijó Cojtí, Académico Maya*, CRONICA, Aug. 26, 1994, at 25 (interview with Demetrijó Cojtí, Mayan Academic in Guatemala) [Mayans demand partial control over local government and political divisions that correspond to ethnic groups in order to “permit greater integration and cohesion” with the state].

words, their claims will not be absolute and therefore are not so threatening to a state's sovereignty. Like most indigenous peoples, Ixils and K'iches are not concerned with gaining stature as an independent nation on an international plane; rather, they simply feel victimized by the deprivation of their former homes and want the right to farm the lands that their ancestors occupied. Thus, what is needed is recognition that indigenous people have usufruct rights to their traditional lands rather than exclusive property rights to them and, as suggested above, that these usufruct rights be broadly recognized to pertain to anyone with a plausible claim to indigenous status.

*C. Under What Circumstances Should Peoples Be Able to Invoke the Indigenous Right to Traditional Lands?*

Assuming that the right's beneficiary is identified and its scope is clear, it is still uncertain *when* it is appropriate to invoke the special regime of indigenous rights. In a sense, this is the crucial consideration because it is a threshold issue (i.e., it must be answered prior to even considering whether the plaintiffs are indigenous and what type of land right they may have) and therefore must be answered precisely. Also, I argued above for a rather loose and non-exclusive definition of "indigenous" and also for a rather narrow and moderate scope of the right. In essence, I contended that just about anyone with a plausible claim of being indigenous should be accepted as "indigenous" and that just about any rights to land that go beyond usufruct of commonly-used lands should be denied. The broad right of self-definition should satisfy indigenous groups while the narrow right to self-determination should make states more comfortable recognizing collective indigenous rights. The result of a right defined in this manner would be many groups organizing to assert defensive claims to land, asking only that the state and its agents respect their right to remain on land they have been occupying or using in recent history.

As noted in the discussion on the scope of the right, property rights are generally relative: one asserts a property right as against another party, not against the entire world. Thus, the critical question in defining a commonplace property right will be *when* (and, *against whom*) can a party assert the right: When the state wants the land to build a dam? When a consortium wants to buy the land to mine it? When a banana company wants to evict indigenous people who have "squatted" on the company's fallow holdings for fifty years? When indigenous peoples feel entitled to the wealth that settler societies have amassed by taking their lands and devoting them to export crops? These are the crucial questions. If almost any "indigenous" group has a right to maintain its traditionally-used lands, there must be an effective criteria for deciding when and against whom these rights may be asserted.

There are at least five distinct scenarios in which indigenous land rights are currently being invoked:

(1) Secluded peoples request an injunction against intrusion by non-indigenous parties (Paradigmatic Case).

(2) Already-displaced peoples demand the right to return to land from which they themselves were displaced (Return Case).

(3) Already-displaced peoples ask for compensation for land of which they have been dispossessed (Compensation Case).

(4) Absent or already-displaced peoples demand the return of land which other indigenous peoples subsequently settled and now inhabit (Competing Indigenous Claims Case, and the situation in Los Cimientos).

(5) Peoples whose ancestors were dispossessed request compensation for their loss of homelands (Reparations Case).

As listed, the cases form a spectrum of justiciability according to the traditional scheme of adjudication, and so applying the indigenous right to traditional lands is generally easier at the more conventional end of the spectrum (Paradigmatic case). A case is more justiciable when it is clear exactly who the injured and the injuring parties are, and when the remedy is calculable, tangible and politically plausible. When a dispute is over a plot of land, it is most feasible to settle the conflict in court when the plot has not been changed and when one discrete party is claiming a right to it as against another discrete party which has taken or threatens to take the land. For example, a court could readily order an injunction against a particular invader of specific, "untouched" homelands, whereas ordering the non-indigenous sector of society to make sweeping reparations to an indigenous sector for violations committed over a period of five hundred years (Reparations Case) is less feasible.

A decision-maker could reasonably be expected to apply indigenous rights in, at the least, the Paradigmatic, Return and Compensation cases. In these scenarios, a discrete and contemporary violation affects a limited and identifiable group of plaintiffs, and presumably the burden of reparation falls squarely on the party now exploiting the disputed land. In these three scenarios, the land most likely will not have suffered severe alterations before the group asserts its right. Also, the indigenous group acting as plaintiff and standing to benefit from a court decision will most likely be limited to the persons who presently or who within their own lifetimes actually inhabited the land. Finally, assuming corruption is not the deciding factor, it should be politically feasible for a court to declare the relative property rights of one group as against another or even as against agents of the state. A decision-maker need only decide whether or not the indigenous claim trumps the "intruder's" claim.

In contrast, the Reparations Case would be hard for a court to handle. It would be difficult to decide who has been injured and by how much when the person actually displaced was an ancestor and when the land has been radically altered. The example of Hawaiian indigenous peoples who argued for such reparations based on their traditional ownership of lands exemplifies this problem. When settlers took Waikiki, there were relatively few indigenous peoples displaced, and, in the intervening years, the value of the land has changed enormously. This sense that the injured party is remote and that the remedy is difficult to calculate combine to make a court decision to make sweeping reparations less feasible. Such a decision is both more difficult to make due to legal

considerations (the problem of tailoring a proper remedy) and political considerations (the problem of provoking widespread opposition within settler society).

The Competing Claims Case presents the situation of Los Cimientos, the type of situation in which the indigenous right to traditional lands may be both misapplied by the state and blamed for fomenting ethnic conflict. Such cases are not so clearly justiciable or non-justiciable; the injured party is more or less discrete and identifiable, the land has probably not been seriously altered, and unless the ethnic group has great influence in the state government, it would seem politically feasible for a court to decide which ethnic groups can control a finite plot of land. However, when two indigenous groups are claiming group rights to territory, there will inevitably arise special concerns which boil down to the patently non-legal question: Who inherently deserves the land? Since an indigenous group's claim to a plot of land depends on proving that their behavior conforms to indigenous customary norms, the court would be put in the anomalous position of deciding which group's customary grounds for the claim is more compelling. For example, if plot X is used by a nomadic group for about a one year period each decade and the same plot X has been gradually absorbed into the croplands of a sedentary group, the court would have to decide whose system of land use is more legitimate in order to decide who has "always" owned that territory. Conceivably, both groups could have had reasonable expectations to occupy the land at a time in the near future. Here, the state would be forced into a difficult position because favoring one group's claim over another would be like endorsing one form of society over the other (i.e., agriculture over nomadic hunting and gathering).

#### *D. Los Cimientos and the Difficulty of Managing Competing Claims between Indigenous Groups*

Los Cimientos presents the even more sensitive circumstances where the absent indigenous "owners" were displaced by state actors, the state has directed the resettlement of indigenous "occupiers," and the competing claims which emerge from the situation are relatively equally convincing on their face. Such a situation shows why the spectrum of cases covered by the category of Competing Claims Cases covers the most critical and controversial questions in terms of deciding when the indigenous right to traditional lands should be recognized and when it should not be. That is, in the Paradigmatic, Return and Compensation Cases, it should be presumptively valid for a self-identified indigenous group to assert a relative right over traditional lands; and, conversely, in the Reparations Case, it should be presumptively invalid for an indigenous group to assert the same right. By contrast, in Competing Claims Cases, there should not be a general presumption towards recognition or non-recognition; rather, more specific criteria must be developed to decide when to recognize the right. Below, I suggest what these criteria should be, given the experience of Los Cimientos and the effects that raising the indigenous right to traditional lands has had on that conflict within the Guatemalan legal atmosphere.

Los Cimientos demands some authoritative legal standard to settle the complex dispute between desperate peasants. For them, the resolution of the dispute is in fact a matter of life or death. With a secure claim on the land, the prevailing community will inevitably thrive; without a claim and without some satisfactory settlement, the disfavored community will be dispersed and forced to live in the same extreme poverty as other landless indigenous peasants. Also, it is clearly a case where the indigenous right to traditional lands will be invoked since both parties are indigenous groups and both can point to ancestors who claimed the land. While the K'iches have the upper hand in court (based on their state-issued title), the Ixils enjoy the upper-hand in fact because they have a few guns and the implicit support of the local army commander. To allow the *status quo* in Los Cimientos to continue would demonstrate that there is no rule of law in rural Guatemala and would only encourage peasant groups to take whatever land they could by allying themselves with regional strongmen.<sup>151</sup> To re-establish a palatable rule of law in regions that were severely disrupted by civil war and counter-insurgency and where uprooted indigenous communities are scrambling to re-settle themselves, the state must prove it will apply consistent and fair criteria. The state must act as a truly neutral referee especially in cases where the groups have competing claims to traditional lands.

Since the state has the greatest quantum of force in most rural regions, it ultimately will determine in what circumstances the indigenous right to traditional lands is a valid claim. If it responds to such claims, it will engender more such claims. For example, by supporting the Ixils in Los Cimientos on the basis of their ancestral claim, it encourages other groups to make the same sort of claim. However, Los Cimientos is precisely the type of situation where this right should neither be invoked nor recognized because it does not protect indigenous peoples against parties usurping their traditional lands, but rather attempts to settle rights between indigenous groups to lands which, at the time of their settlement, were beyond the effective control of the state. In other words, applying the right here would be to quixotically apply national law to a conflict which pertains only to indigenous peoples. If the K'iche group which settled Los Cimientos in 1909 had not confirmed their ownership with a state title, it would be more clear that the Ixil-K'iche conflict belongs to a situation that indigenous legal provisions do not pretend to regulate, i.e., the settlement patterns of indigenous people in uncultivated lands. Los Cimientos marks a critical dividing line between circumstances wherein the indigenous right to lands is valid and circumstances wherein the right is inappropriate. The Guatemalan government, by encouraging the Ixil claim, is helping to misdraw this line and undermine collective indigenous rights.

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151. Such shifting alliances are becoming common in the Ixcan region where returning Guatemalan refugees are confronting internally-displaced peasants and Civil Patrol communities on "their" lands. See *Special Issue: The Permanent Commissions*, NCOORD NEWSLETTER, July 1996 [The entire issue is devoted to detailing the local politics behind the land disputes affecting returning refugees].

Clearly, the state stands to benefit if the Ixils win. First, it will maintain control over the sensitive region and will have successfully used the rhetoric of indigenous rights to retrospectively excuse its own violent displacement of the K'iche community in 1981. Second, the example of one ethnic group using the right to win lands from another indigenous group will foment ethnic conflict in general, dividing the indigenous society whose interests generally conflict with those of the state. Ethnic groups will be more suspicious of each other and of their potential claims to borderlands. Popular organizations which serve various ethnic communities will suffer internal division over specific issues. For example, CERJ, which supports the K'iches in Los Cimientos because of the community's anti-patrolling stance, has had difficulty maintaining the backing of its Ixil members whom it already has helped to expel the Civil Patrol from their own communities.<sup>152</sup> In other words, the state will have successfully played the "communal card."

Likewise, if the K'iches prevail and are allowed to reoccupy their homes, the victory will be explained as a case of the established state's legal system trumping the fledgling provisions of indigenous rights. That is, it will be said that the K'iches prevailed based on the power of their state-granted title to the land and that the Ixils' indigenous claim was mere rhetoric, lacking in any legal significance. By losing the relatively minor struggle in Los Cimientos, the state will gain a greater and broader victory over indigenous rights in general. Specifically, the state could use a decision in favor of the K'iches offensively both against CPR communities that have occupied "vacant" lands in the aftermath of the scorched earth campaign and against peasant groups that are occupying fallow lands to which plantation owners claim title. In both of those circumstances, the state could point to the precedent of Los Cimientos and claim that state-issued titles are paramount in determining land ownership

Ironically, a small victory for the human rights of the displaced K'iches could be a greater loss for the stature of indigenous rights. The case of Los Cimientos could turn out to be a success in terms of human rights enforcement in Guatemala since the Inter-American Commission on Human Rights has tracked the dispute and threatens to enforce the rights of the K'iches to return to their titled property, over the opposition of the army and the state. However, since the state is mishandling the indigenous right to traditional lands by supporting the Ixil's ancestral claim over the territory, the case promises only to undermine the development of the indigenous right, and therefore of collective indigenous rights in general and the long-term hopes of indigenous communities to self-organize and rally around those rights. In other words, since the state has made the Los Cimientos dispute an "indigenous issue," the indigenous in general only stand to lose from its resolution because regardless of which party, the Ixils or K'iches, wins, the stature of collective indigenous rights will be diminished. Ultimately, the state is the only party that will emerge a winner.

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152. Interview with Miguel Tum, Co-director of CERJ, in Santa Cruz del Quiche, El Quiche, Guatemala (June 20, 1995).

*E. A Proposal for Developing Indigenous Rights in Land Conflicts*

The question of primary importance in developing the indigenous right to traditional lands at this early stage is how to decide when the right may be invoked legitimately. I suggest a three-step approach to the question which would prevent states from hijacking the right and using it to undermine indigenous organization. Additionally, this approach would allow indigenous groups to organize as groups to prevent the kind of theft of traditional lands which continues to this day and is eradicating entire indigenous cultures and peoples.

First, the land disputes should be broadly classified according to the five types of cases I have sketched above in this section. If it is a case of paradigmatic displacement, of the return of displaced persons, or of giving compensation to displaced persons, the displaced or targeted group should be allowed to raise an ancestral claim whenever it is not patently frivolous. If it is a case of reparations made over a period of generations, then the displaced group should not be able to raise the ancestral claim unless it can show that, due to unusual circumstances, the claim is justiciable. Finally, if the situation potentially involves ancestral claims by two antagonistic indigenous groups, their claims must pass further scrutiny to determine how such claims should even be approached.

These Competing Claims Cases must proceed to the second step stage: Does one indigenous group have a prima facie claim? To prove a prima facie claim, the group would simply have to show (a) that they have lived on the land since before the state in its modern form existed, and (b) that they are not claiming a greater degree of control over the land than they have traditionally exercised (i.e., a nomadic tribe asserts only the right to use the preserved area on occasion; or, a farming community does not assert the right to unilaterally exploit oil reserves<sup>153</sup>). If the group has a prima facie claim, then it should be allowed to assert its ancestral claim. In a sense, this is simply taking a cursory look at the claim, estimating whether the indigenous group will prevail, and allowing a group which is likely to prevail to take actions to protect its present holdings. Ultimately, this step ensures that an indigenous group that has an arguable right to the land is not robbed of its chance to raise the ancestral claim simply because the state is savvy enough to use another indigenous group as a proxy to displace the legitimate owners.

Of course, cases will arise in which there is an earnest dispute, revolving in part around traditional practices, yet neither indigenous group can show a prima facie case. In such cases, there must be some criteria for deciding who is the legitimate owner, without ignoring expectations of land ownership based on ancestral practices. Los Cimientos is such a case because both parties can prove part, but not all, of the requirements for a prima facie claim. For example, the Ixils can prove the first prong in that their ancestors occupied the region since before the Guatemalan state existed (either as a Spanish colony or as an in-

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153. However, this rule should not preclude an indigenous group from preventing an outsider from exploiting those reserves since that action could severely alter the indigenous group's ability to use and enjoy their property as they had done formerly.

dependent state), while they cannot prove the second prong in that they did not formerly regularly exercise usufruct rights over the territory (i.e., when the K'iches arrived the land was uncultivated). In contrast, the K'iches can prove the second prong in that they have traditionally cultivated the territory, yet they cannot prove the first prong since their claim dates only to 1909. Under such extraordinary circumstances, it must be acknowledged that ordinary indigenous rights alone will not provide adequate guidance for reaching a legitimate decision. This is especially true since indigenous rights are still in an embryonic phase and therefore not firm enough to draw sharp distinctions between beneficiaries and non-beneficiaries.

In such cases, the state cannot ignore the conflict and simply let the ethnic groups battle it out within state borders; rather, it must settle the dispute. I would propose that the most reasonable approach is for it to apply its own customary principles deriving from its rule of law; namely, the principles of state control over property rights and of democratic representation.

Thus, in a case like Los Cimientos, where one indigenous group clearly has a state-recognized title to the land, the state should be bound to support their titled claim. If neither group has a state title but rather each has only imperfect ancestral claims, then the state should support the creation of a legitimate local governing body which is considered valid because it was formed through a democratic process. This is essentially the solution that non-governmental organizations are encouraging in order to settle land disputes in the Ixcan area of Guatemala where CPR's are fighting to retain the land they have been using for the last decade, land which formerly belonged to untitled peasants who were displaced by the counter-insurgency campaign in the 1980's.<sup>154</sup> In sum, in these cases, the state must maintain peace between the indigenous groups while negotiating with local popular leaders and managing transparent and responsive elections amongst the groups in dispute. This solution may require that an indigenous group will have to submit to the authority of the state, but such submission will only be required in these narrow circumstances. In these cases, it would be a choice of the lesser of two evils since the other choice would be to risk a violent ethnic conflict.

## VI.

### CONCLUSION: TOWARDS THE PROPER PROTECTION OF INDIGENOUS LAND RIGHTS

Over the last five hundred years, the doctrine of discovery and other such rationales excused settler societies from responsibility for the victimization of indigenous peoples. Today, such rationales have been largely debunked, and support is growing for recognition of the valid claims that indigenous peoples have to traditional lands. The case of Los Cimientos demonstrates two critical points about this particular indigenous right in its early stage of gestation.

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154. See generally, NCOORD NEWSLETTER *supra* note 151.

First, this land right is sorely needed. Indigenous people still maintain traditional control over about a third of the earth's territory and resources.<sup>155</sup> Meanwhile, the pressures of the global economic system are increasingly driving states to expand their productivity. As a result, these states turn to the "untouched" resources where indigenous people still live and work. As in Guatemala, many states are waging overt and covert wars against such indigenous peoples. The recognition that indigenous peoples have a presumptive right to maintain present land and natural resource holdings would be an important step in stemming these invasions and dispossessions.

Second, the case of Los Cimientos shows that, while the popular sentiment in favor of indigenous rights is a promising development, the progressive movement may easily be undermined by antagonistic elements in the national government or private sector if the right is not developed with care. As demonstrated, the states which are threatened by indigenous rights may adopt the rhetoric of those very rights in opportune situations such that they effectively divide indigenous populations and make them easier to exploit and dispossess. States may thus play the "communal card"—at once invoking the indigenous right to traditional lands and also discrediting it. That is, states will only translate the popular moral sentiment in favor of indigenous land rights into a legal right where the assertion of the right will disempower, rather than protect, most indigenous communities. In the face of such strategies, the right of indigenous peoples to their traditional lands must be developed gradually, beginning with a narrow right that is responsive only to specific and clearly-defined situations.

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155. Jason W. Clay, *Looking Back to Go Forward*, in STATE OF THE PEOPLES, *supra* note 26, at 64.

