

1996

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Recommended Citation

Collier, Angela. "Trends: Recent Developments in Compensation for the Violation of Property Rights." Human Rights Brief 3, no. 2 (1996): 2-3.

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TRENDS

Recent Developments in Compensation for the Violation of Property Rights

by Angela Collier

Recently, internally displaced persons in Guatemala have turned to the Inter-American Commission on Human Rights (Commission) to seek redress for government seizure of land during the government's campaign against indigenous peoples conducted in the early 1980s. While many inter-governmental institutions and non-governmental organizations (NGOs) have taken non-legal measures to cope with the internally displaced, no legal instrument in the Inter-American System specifically protects them. Until such an instrument is adopted and enforced, all feasible remedies under the existing legal framework in the Americas must be employed. One possible option is to seek redress in the Inter-American Court of Human Rights (Court), which has the power to grant and enforce damage awards against governments who are parties to the American Convention on Human Rights (Convention) and have recog-

nized the Court's jurisdiction. The *Los Cimientos* case presents one such attempt to obtain compensation for land seizures through the Court.

In 1993, the Quiche people filed a case with the Commission in an effort to assert their property rights to Los

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Cimientos, an area of land in northwest Guatemala to which the Quiche had held legal title since 1909. In 1981, the Guatemalan army had invaded their community and driven the Quiche from their land, later establishing a military garrison and a heavily controlled resettlement village, known as a "model community," in the seized

area. At present, the Commission is attempting to negotiate a settlement between the Quiche people and the Guatemalan government. According to lawyers representing the Quiche community, if a settlement is not reached, then the Commission will submit the case to the Court, which has the authority to award compensation to the Quiche people. In the event that the case reaches the Court, it will most likely base its decision on the Convention, on the issue of derogation, on the Court's own history of damage awards, and on international customary law regarding government land appropriation and compensation.

Under Article 21(1) of the American Convention on Human Rights, property rights are defined as a civil right to the "use and enjoyment of" one's property, which "[t]he law may subordinate . . . to the interest of society." Article 21(2) further directs that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest." Article 21 indicates that monetary compensation is the appropriate remedy for land appropriations where the deprivation served the interest of society. Furthermore, the text of the Convention provides for compensation of illegal land deprivation as well. Article 63(1) commands that the breach of a right or freedom under the Convention must "be remedied and that fair compensation be paid to the injured party." Thus, monetary compensation is appropriate for both legal and illegal land seizures.

Under Article 27 of the American Convention, the government may suspend the property right guarantee during times of war. Suspension must not, however, "involve discrimination on the ground of race . . . or social origin." In addition, the State Party must inform the Organization of American States (OAS) of such a derogation and the date of its termination. In *Los Cimientos*, the Guatemalan government did not declare a suspension. The taking was part of a campaign in which rural indigenous people were assumed

continued on next page

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Violation of Property Rights, continued from previous page

to be guerrilla sympathizers and were targeted on the basis of their race and social origin. The right was not properly derogated from in this case. Even if



the right had been derogated from, however, the derogation would not affect the petitioners' right to damages. Article 27 provides that the government may suspend a right only for the period of time "required by the exigencies of the situation." Guatemala has experienced relative peace since 1991. Thus, any exigency extant at the time of the deprivation has passed and should not deter resolution of *Los Cimientos*.

The Inter-American Court has not yet considered the right to property under the American Convention.

The Inter-American Court has heard and ruled on the merits of only five cases in total thus far, awarding monetary damages in four of them. The Court first awarded damages in two disappearance cases, which were decided concurrently. In *Velasquez Rodriguez* and *Godinez Cruz*, the Court provided for full restitution, which entailed: 1) restoration of the prior situation; 2) reparation of the consequences of the violation; and 3) indemnification of emotional harm. The Court awarded compensation for loss of earnings, including likely future economic activities, and for emotional damages, placing the burden on the government to disprove the victims' emotional trauma. In the *Aloeboetoe*

case, in which members of an indigenous tribe were kidnaped, tortured and killed, the Court raised the possibility of extending damage awards to the community as a whole. The fourth case where damages were awarded, *Gangaram Panday*, involved government violation of the right to personal liberty under the American Convention. In that case, the Court followed earlier precedent and did not provide any new standards regarding compensation.

The Court has not yet considered the right to property under Article 21 of the American Convention. In the above-mentioned cases, however, the Court adopted the legal principle that remedies must accompany rights. Where injunctive relief cannot fully remedy the breach of a legal obligation, the common remedy is monetary compensation. Following the

Court's standard of full restitution, including future earnings and compensation for communities victimized by violations, monetary compensation seems appropriate in cases such as *Los Cimientos*. The government taking resulted in lost crop earnings and emotional trauma resulting from the sudden and violent displacement. Under the concept of restoration of the prior situation, *Los Cimientos* requires the restoration of a viable community. Provisions were made in *Velasquez* and *Aloeboetoe* for rehabilitating the communities, including provisions for college education, a community school and medical facilities. In cases such as *Los Cimientos*, where the displaced community lost its means of survival, restoration of the community's economy is appropriate as well, including, perhaps, some form of agricultural assistance.

The legal principle that rights must entail remedies where property rights are concerned is recognized in other regional systems as well. Under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the government taking of property must "be accompanied by some payment of compensation." Where the government

has failed to meet this burden, the European Court of Human Rights has ordered monetary compensation. In the case of *James and Others*, the European Court distinguished between property taken from nationals and non-nationals. For nationals, legitimate objectives of social and economic policy may justify reimbursement for less than market value, whereas when the property of non-nationals is expropriated the compensation must be "prompt, effective, and adequate." The Inter-American Court can either adopt the "prompt, effective, and adequate" standard for government taking of a national's property, or it may follow *James and Others* and distinguish between takings involving nationals

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and those involving non-nationals. If the Court makes such a distinction in cases such as *Los Cimientos* that involve nationals, the Court could order less than full restitution if it found the taking was justified in any degree under the international law governing armed conflicts.

The people of Los Cimientos have been deprived not only of their property but of their community for fifteen years. Their plight illustrates the possible consequences of government disregard for the right to property. If submitted to the Court, this case could set an important precedent regarding compensation for government violations of the property rights of their nationals. 🌐



William Harrell (center, holding banner), attorney for the Quiché and WCL alumnus, joins in celebrations commemorating the first anniversary of the community's return to Los Cimientos.

Photo courtesy of Will Harrell