

# THE PROBLEM OF ACCESS TO LAND AND OWNERSHIP IN REPATRIATION OPERATIONS

Inspection and Evaluation Service  
May 1998

<p style="text-align: center;"><b>TABLE OF CONTENTS</b></p> <p><u>I. BACKGROUND AND SCOPE</u></p> <p><u>II. OVERVIEW</u></p> <p><u>III. ACCESS TO LAND IN REPATRIATION OPERATIONS</u></p> <p><u>IV. WOMEN AND OWNERSHIP/ACCESS TO LAND</u></p> <p><u>V. CASE STUDIES</u></p> <p><u>ANNEX : THE QUESTION OF LAND OWNERSHIP IN INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS</u></p> <p><u>BIBLIOGRAPHY</u></p>
--

## I. BACKGROUND AND SCOPE

1. The problem of access to agricultural land for rural returnees has been one of the most difficult issues facing UNHCR in its efforts to organise the repatriation of hundreds of thousands of refugees to their war-torn countries of origin in Africa, Asia and Latin America in the past few years.
2. UNHCR staff planning and implementing repatriation operations to such countries as Cambodia, Mozambique, Rwanda and in Central America (El Salvador and Guatemala) encountered a wide variety of obstacles concerning access to land. Adequate data on the prevailing conditions and land ownership systems in the countries concerned was frequently lacking and it was not always easy to know the intentions of the government authorities regarding land-use, agricultural and development policies.
3. Often the land was unfit for agriculture due to bomb damage, mines, or ecological disasters. In some situations there was endemic insufficiency of land or, even if land was available, its assignment to returnees was the cause of disputes. Practical solutions none the less had to be found to ensure that the refugees could return in conditions of security and dignity. Innovative approaches were required to guarantee the reintegration of returnees who could not necessarily be re-established on their ancestral lands or former properties.
4. Drawing on the experiences of many staff both at headquarters and in the field in a wide variety of situations over the past few years, the Evaluation Unit of the Inspection and Evaluation Service (IES) sought to identify the typical obstacles to land access for returnees, whether physical, legal or political/economic, encountered in a number of

recent major repatriation operations. With a view to assisting those facing similar problems in the future, it also analysed the different land ownership systems existing in various parts of the world where major repatriation of refugees is likely to take place, as well as the main international legal instruments relating to the issue of property ownership.

5. This required extensive research in the fields of international law and national legislation, customs and practices. Reports and other documents concerning several major recent repatriation operations were up-dated by staff currently stationed in the countries and regions concerned. The study was researched and prepared by Michel Iogna-Prat, a UNHCR Legal Adviser seconded to the IES Evaluation Unit. It was adapted and finalised for publication by George Gordon-Lennox, a former UNHCR staff member. Field staff in a number of countries also reviewed and contributed to the evaluation's case studies including Andrew Pendleton, Cambodia; Pablo Mateu, Mozambique and Central America; Paula Worby, Guatemala; and Sylvie Kayitesi, Rwanda. The property issues analysed have been deliberately limited to problems concerning land and property utilised for agricultural purposes.

## II. OVERVIEW

6. UNHCR has had to overcome numerous obstacles in attempting to guarantee access to agricultural land for hundreds of thousands of rural returnees in Africa, Asia and Latin America in the past few years. The UNHCR guidelines on voluntary repatriation clearly identify the Office's responsibilities: "UNHCR must attempt to protect the interests and legitimate rights of returnees with regard to access to land (which may not necessarily mean ownership) through contacts with central and local authorities as well as with traditional leaders who in many countries have a recognised land allocation function at the community level."

7. The difficulties involved were underlined as early as 1993 by Roger Plant in an article in the Review of the International Commission of Jurists<sup>6</sup> : *"Immense practical problems are arising from uncertainties over land rights, notably in conflict and post-conflict situations. Huge numbers of people have been displaced by armed conflicts, as either refugees or internally displaced persons. Often their individual or communal lands have been occupied by others in the meantime, through either spontaneous or government-sponsored settlement programmes. How are the competing claims to be reconciled? What practical measures can be taken to compensate the traditional or new occupiers?"*

8. These and other issues of land access can affect not only the welfare and reintegration of returnees, but indeed the whole process of national reconciliation. Among the indispensable prerequisites for any repatriation operation, therefore, a detailed analysis of the legal, cultural and traditional system(s) and procedures for the ownership or assignment of land in the country of origin, as well as its availability, will be required. This may call for rapid consultation of a wide variety of sources, and different types of expertise may be needed. In anticipation, therefore, it would be useful to build a data-bank of basic information on the land ownership systems existing in different parts of the world where major repatriation of refugees is likely to take place. In many countries, for instance, several land ownership systems may coexist, sometimes peacefully, sometimes in conflict with one another. This may have resulted from colonial domination, or revolutionary changes in legal and/or social systems.

9. Another prerequisite will be an in-depth study of the refugee population, providing precise data on the numbers of rural refugees and their regions of origin, as well as their wishes concerning the places to which they hope to return. Although ideally these wishes should be respected, this may not always be possible. Following an armed conflict, for example, the available arable agricultural land may be insufficient to meet

the needs of all the returnees, many of whom may have been in exile for a number of years, or even generations. Large areas of agricultural land may have been rendered unfit for farming either because of war-damage or because they have been mined. UNHCR must discourage the refugees from returning there, and very probably divert the surplus rural population to other economic sectors. In anticipation, professional training programmes may be launched in refugee camps before repatriation, or later, on return. Returnees may also be provided with financial grants permitting them to establish themselves outside the agricultural sector. Quick Impact Projects (QIPs) developed by UNHCR and UNDP in numerous operations have proven to be an effective tool in this regard.

10. Excessive concentration of land ownership in the hands of a few individuals or large corporations has sometimes been one of the main causes of the conflict. It will only be possible to find a solution for returnees if, in the framework of a global development policy, there is a clearly defined agricultural policy guaranteeing the rights of small landowners, coupled with adequate social security legislation protecting the rights and interests of agricultural workers.

11. When the insufficiency of arable land is endemic, governments must choose the type of agriculture to be given priority. If, for instance, it is intended to favour intensive or industrial farming, ways of protecting the remaining small farms must be found, the absorption of surplus agricultural labourers in other economic sectors must be assured, and the rights of seasonal workers guaranteed. If they have not already done so, States confronted by such situations should be encouraged to accede to the relevant international instruments elaborated in the framework of the International Labour Organisation (ILO).

12. Returnees may also be excluded from access to land because of agricultural policy reforms, or because the land has been occupied by others in the absence of the refugees. Depending on the prevailing legal system of property ownership, either restitution must be made upon their return, or compensation envisaged. In order to ensure that the rights of individuals are guaranteed, such a choice should be based on the legal systems governing land ownership. The political, legal and economic imperatives, as well as ethical considerations, must also be taken into account.

13. Likewise when women, despite their predominant role in agriculture, are excluded from access to land due to traditional attitudes and/or legal obstacles, it is imperative that their rights, including to own and inherit land, be recognised. This would require the elaboration of more equitable standards at the international level, which in turn could be incorporated by governments as mandatory provisions in national legislation.

14. The correct balance will have to be established between the need to protect the individual, the collective rights of returnees, and the imperatives of sustainable development and national reconciliation. Many of these issues involve political choices and therefore touch upon the sovereignty of the States concerned. They must also be seen in the light of international law concerning human rights, which provides a number of general principles, but relatively few concrete guarantees as regards property rights.

15. Indeed the question of land ownership is singularly complex. It is governed by legal principles embodied in the law of each State, and to which international law makes only marginal reference. Although the Universal Declaration of Human Rights of 1948 recognises that each individual has the right to ownership and guarantees this right against arbitrary deprivation, it does not provide for the implementation of this right, which belongs to the sovereign domain of each State.

16. Clearly, for these and other reasons, many of the fundamental issues concerning land use in many countries are far from being solved. They are part and parcel of

reconstruction and development problems, many of which have political dimensions, and go beyond UNHCR's mandate. They are none the less of concern to the Office, as they affect the welfare and reintegration of returnees and indeed the whole process of national reconciliation.

17. Thus the question of access to land in repatriation operations must also be seen in the more global perspective of sustainable development. UNHCR, in defining the specific parameters of the return of the refugees, needs to co-operate actively with the other actors concerned, whether they be the national authorities or other international organisations. Repatriation efforts must be integrated with longer-term planning in a process of consultation and co-operation between the different national and international economic sectors and closer co-ordination of bilateral and multilateral inputs, particularly the other main United Nations agencies concerned. There is a need to define common goals and clarify the complementary nature of actions undertaken in line with their respective mandates, as well as to pool the wealth of relevant data available in their different data-banks.

18. In recent repatriations, practical solutions were found which permitted refugees to return in conditions of security and dignity, and enabled many returnees to become autonomous in a short time. In most cases innovative approaches were developed which now provide useful lessons and models for the future. These operations also demonstrated that repatriation should not be limited to simply ensuring that refugees have gone home. For most rural returnees, successful reintegration will depend on guaranteeing their access to land within a broader framework of reconstruction, sustainable development and national reconciliation.

### **Summary of lessons and recommendations**

1. A detailed analysis of the legal, cultural and traditional systems and procedures for the ownership or assignment of land in the country of origin, as well as its availability, will be an indispensable prerequisite for any repatriation operation.
2. An in-depth study of the refugee population providing precise data on the numbers of rural refugees and their regions of origin should also be made prior to launching the repatriation operation, in order to ensure that returnees have access to land according to recognised practices, and avoid causing conflicts with persons having remained in the country, who may also have a claim to rights to the land.
3. In UNHCR, the technical aspects of this work are at present the responsibility of the Programme and Technical Support Section. The number of available professionals in this section is, however, limited and does not permit covering all the tasks that need to be carried out, often urgently. It would therefore be wise to consider reinforcing this section when launching the studies envisaged above. This could be done, for example, by identifying qualified staff members with the relevant qualifications (agronomists, geographers, economists, lawyers) whose skills could be put to good use in case of need.
4. If, following an armed conflict, the area of arable agricultural land available is insufficient to meet the needs of the returnee population, alternative solutions must be developed permitting the reintegration of the returnees at least temporarily until such time as land is once more available. If large areas of agricultural land have been rendered unfit for farming either because of war-damage or because they have been mined, UNHCR must discourage the refugees from returning there. In addition, infrastructure may also have been damaged, making resettlement of returnees difficult or even impossible. Major infrastructure rehabilitation and demining operations must first be undertaken.
5. When the amount of land available is insufficient for the needs of the rural population, including returnees and internally displaced persons, an effort can be

made to accommodate the greatest possible number by reducing the size of the parcels assigned, or by creating new agricultural zones. Notwithstanding, it may also be necessary to divert the surplus rural population to other economic sectors.

6. These substitute solutions should be integrated with the country's overall reconstruction and development planning and activities. In anticipation, professional training programmes may be launched in the countries of asylum prior to the refugees' return, or on the spot once they have reached home. Returnees may also be provided with financial grants for the creation of small businesses or for the development of income-generating activities. Increased co-operation in this respect between all those responsible for reconstruction and development, notably within the United Nations system, is indispensable. The consultations undertaken by UNHCR with the international financial institutions must also be intensified.
7. When the issue of access to land has been one of the main causes of the conflict, it will only be possible to provide access to land if there is a clearly defined agricultural policy guaranteeing the rights of small landowners. Such an agricultural policy is only conceivable in the framework of a global development policy of the country concerned. An additional prerequisite is the adoption of adequate social security legislation protecting the rights and interests of agricultural workers.
8. Similarly, when the insufficiency of arable land is endemic, government policy choices must be made regarding the type of agriculture to be given priority in the perspective of sustainable development. If, for instance, it is intended to favour intensive or industrial farming, ways of protecting the remaining small farms must be found, the absorption of surplus agricultural labourers in other economic sectors must be ensured, and the rights of seasonal workers guaranteed.
9. In this context, the international community, and particularly the United Nations agencies, must be encouraged to promote accession by States confronted by such situations to the international instruments elaborated by the International Labour Organisation (ILO), and notably Conventions No. 117 of 1962 and No. 169 of 1989 and the adoption by these States of the corresponding national legislation. It is also to be hoped that new international standards will be drawn up and adopted in the fields of social protection and labour law, aimed at providing greater protection to rural workers.
10. Returning refugees may claim the right to restitution of occupied land, which may lead to conflicts with those who have occupied it. Governments must decide whether it is preferable to devolve the land to its earlier owners or assignees, or to maintain tenure for the new occupants, while compensating either in kind or financially those who have been deprived of their land. The choice must be justified in the light of political, legal and economic imperatives, as well as ethical considerations. It must also be measured against the requirements of national reconciliation. It is clear, for example, that the choice between restitution and compensation must be based on the legal systems governing land ownership, in order to ensure that the rights of individuals are guaranteed. If a systematic policy of restitution could gravely jeopardise national
11. reconciliation, it is also clear that a refusal to devolve the land could be perceived as a denial of justice, no matter how generous the compensation offered. The interests of the various groups concerned, as well as the economic and cultural consequences, must therefore be taken into account in an effort to ensure their peaceful coexistence.
12. Women play a very active role in the agricultural economies of developing countries. It is imperative that their rights, including to own and inherit land, be

recognised. More equitable standards should be elaborated at the international level, and governments should be urged to incorporate them as mandatory provisions in national legislation.

13. The inter-relationship between the problems of access to land in repatriation operations and the reconstruction and development of countries devastated by armed conflicts should lead to a broader reflection by all those involved in the various aspects of these issues at the international level. UNHCR should take the initiative of creating a working group bringing together the United Nations Development Programme (UNDP), the Food and Agriculture Organisation (FAO), the World Bank, the World Food Programme (WFP), and the International Labour Organisation (ILO), in order to develop a global approach, to define common goals, and to clarify the complementary nature of the action of the various players as a function of their respective mandates.
14. One of the immediate and practical results of such reinforced co-operation could be the pooling of data. Each of the agencies has set up its own system of collection of the data it needs to attain the objectives defined in its mandate. Such data can also be of use to other agencies. Thus the FAO has detailed information on the various land ownership systems existing around the world as they relate to agriculture, the World Bank has data on economic factors, and the ILO specialises in social security legislation. Sharing this information would be of great importance to those designing policy concerning the repatriation of rural refugees. The pooling of available data would also be very useful for defining the global approach referred to above. The UNHCR Centre for Documentation and Research (CDR) should therefore be charged with creating an interface between the various existing data-banks to permit the rapid collection of essential information when repatriation operations are being set up.
15. The complexity of the land ownership problems in repatriation operations demands more extensive research and reflection within UNHCR. More in-depth in-house analysis could, for example, be undertaken in the framework of the research currently being carried out by the CDR regarding repatriation policies. Studies could further analyse scenarios and elaborate in detail the corresponding solutions.

19. A number of factors can affect returnees' access to land. The area of arable land available or accessible may be insufficient, either because the land is unfit for agriculture for a variety of reasons, or because there is an endemic insufficiency of land. Even if land is available, providing access to returnees may give rise to conflicts. The land may have been occupied by others, or swallowed up in land and/or agrarian reform programmes. If restitution cannot be made, compensation and/or other solutions may have to be envisaged. In any given situation some or all of these factors may come into play, as will be seen in the Case Studies. The following sections analyse these different factors as illustrated by several recent UNHCR experiences, and in the light of pertinent comments by a number of experts who have studied the issues.

### **III. ACCESS TO LAND IN REPATRIATION OPERATIONS**

#### **Availability of arable land**

20. Often insufficient land is available or accessible to returnees. Some of the main reasons for this are as follows:

*The land is unfit for agriculture*

21. In cases where the countries to which refugees return have been ravaged by armed conflicts, their villages of origin may have been wholly or partially destroyed and both infrastructure and housing must be entirely rebuilt. The fields may also have been

devastated by bombs or have been mined. Even if they have been spared, they may not have been cultivated for years, necessitating extensive rehabilitation work before they can be made ready for seeding.

22. Sometimes the refugees and/or displaced persons have returned without there having been a peace agreement and fighting is still going on. When there is danger in certain regions of mines and continuing fighting, it is imperative to prevent, or at the very least discourage, the refugees from returning before appropriate steps have been taken to ensure their security. In many cases, these measures will take years, and it will therefore be necessary to find arable land in other regions, in order to provide returnees a temporary solution permitting them to meet their needs autonomously. Sometimes the only option may be to resettle returnees on land which is marginal for agriculture or undergoing ecological degradation.

23. In such circumstances, well illustrated by the Cambodian example (see Case Study), available and unoccupied arable lands may be insufficient to permit assignment of a parcel to each returnee family. Substitute solutions must therefore be found. In Cambodia, the grant of a sufficient sum of money theoretically made it possible for the refugees to become autonomous and find their own means of reintegration. In other cases, it may be necessary to assist the returnees to find alternative reintegration projects. Short- and middle-term solutions which can make up for the lack of arable land can include: provision, either in the country of asylum before repatriation or on the spot after return, of professional training, so that returnees can be absorbed in activities linked with reconstruction; the granting of financial assistance for launching small businesses or services; the setting up of income-generating projects not requiring previous professional training. Quick Impact Projects (QIPs) developed by UNHCR and UNDP in numerous operations must continue to be an essential element of reintegration policy.

24. It is also essential that these projects are integrated, in the longer term, in a sustainable development policy. This not only calls for consultation and co-operation between the different economic sectors concerned, including the national authorities and international or regional financial institutions, but also closer co-ordination of bilateral and multilateral development operations.

25. These substitute solutions will be all the more necessary when the beneficiaries have been isolated from rural life for very many years and have lost all links with their traditional activities. Some may have been transplanted from a rural to an urban setting, while others were born and brought up in refugee camps where they have been entirely dependent upon international assistance and have become urbanised. As one UNHCR staff member put it. "It was common for refugee children to believe that rice comes from relief trucks and fish comes from tins, as they had never witnessed rice cultivation or seen a live water buffalo." Those who have been settled in rural areas may have learned new agricultural techniques, but even if they can be resettled in their traditional home areas, it will take time for them to re-adapt to their former methods and customs.

26. In a study devoted to the Eritrean refugees in Sudan, for example, Gaim Kibreab<sup>3</sup> underlines: "*One of the most essential skills in most Eritrean farming communities is versatility with techniques of cultivation. Lack of cultivation knowledge is considered not only an economic but also a major social handicap. Since cultivation was purely a man's exclusive domain, male children were trained when they were as young as 12 or 13 years. In all the refugee settlements in Eastern Sudan cultivation is mechanised. In some of the old settlements many of the refugees have no cultivation skills at all, either because they were displaced when they were children or were born in the Sudan. The knowledge of those who knew how to cultivate has also become obsolete because they have been dependent on centrally-managed tractor hire services (THS) for over two and a half decades. In the settlements the planting date is not a decision which is taken by*

*the individual farmers."*

27. Gaim Kibread concludes: "*Upon return not only will the refugees depend on human or animal power to cultivate their farms, but they will also be required to have a detailed knowledge of soils, climate, vegetation species, rainfall and the farming systems in the receiving areas. Only then will they be able to make correct decisions about when, how and what to plant. In the arid and semi-arid regions of the country, the success or failure of a farming system is dependent on such knowledge. These skills are not acquired overnight; they are acquired from childhood.*" (A more positive view, however, comes from one UNHCR specialist, who states that the vast majority of rural refugees remain in rural areas in the countries of asylum and engage in some sort of agricultural activities. As a result, they maintain their farming traditions and their children also learn basic agricultural techniques. There are some exceptions, such as the Guatemalan refugees in the Mexican states of Campeche and Quintana Roo, where younger refugees opted for jobs in the construction and tourism industry in coastal areas of the Yucatan Peninsula. The problem of re-adaptation was not, however, crucial either in Mozambique or in Central America. Indeed, he points out, looking at situations such as that of Malian refugees in Mauritania, refugees gained increased knowledge of agricultural patterns and techniques while in exile. This led to a sedentarisation of formerly nomad societies once they went back to Mali and to an increased interest in agriculture. Refuge has thus served as an enriching experience which is now being applied in their country of origin.)

#### *Endemic insufficiency of land*

28. In situations such as those in Central America (see Case Study), where property ownership, and notably access to land, has been one of the main causes of conflict and population displacements, the concentration of land in the hands of large landowners or companies engaged in intensive or industrial farming has dispossessed small family farmers who have been deprived of their means of subsistence.

29. Even if farm land is not devastated by fighting, there may not be enough to provide each refugee family with its own parcel. The solution to the land ownership question depends entirely on the country's choice of economic and development policies. One option for accommodating rural returnees might be the existence of virgin lands, forest tracts for example, which through certain measures of conversion could be devoted to subsistence agriculture, without threatening the ecological balance of the country. Governments will have to weigh the advisability (or not, as the case may be) of giving priority to agro-industry or intensive farming in order to ensure the development of exports and foreign trade, at the risk of an ever-greater concentration of land ownership. This may imply finding ways to encourage the development of the agro-industrial sector while at the same time controlling it so as to ensure the survival of the traditional agricultural sector.

30. It is evident that the solutions to these problems imply interventionism on the part of the national authorities in the context of their economic, land use and agricultural policies. They cannot necessarily give free rein to the law of the market on the pretext of structural adjustment. The agro-industrial sector can none the less be an important source of employment for landless peasants, on condition that social welfare (security) legislation offers them guarantees that they can earn enough from these permanent jobs to provide decent living conditions for themselves and their families. The small subsistence farming sector must also be protected by a coherent and efficient agricultural policy which at the same time offers a share of the market to local products and guarantees prices. Adequate legislation will be required to prevent abusive expropriations for development purposes of land owned by small farmers, as well as warding off speculative forays by urban developers.



31. The international community, and particularly the United Nations agencies, must promote accession by States confronted by such situations to the international instruments regarding land use elaborated in the framework of the International Labour Organisation (ILO), notably Conventions No. 117 of 1962 and No. 169 of 1989 and the corresponding national legislation. It is also to be hoped that new international standards will be drawn up and adopted in the fields of social protection and labour law, aimed at providing greater protection to rural workers.

*Arable lands are available but their assignment can be the cause of conflict*

32. Distinct from the land ownership disputes between traditional agricultural activities and modern methods, conflicts of interest can also emerge within the traditional sector between sedentary farmers and nomadic pastoralists.

33. A significant example is to be found in Eritrea. It is estimated that 80 per cent of Eritreans practise sedentary farming, of whom 35 per cent are engaged in mixed farming and livestock raising, and 5 per cent are exclusively pastoralists. Mixed farming and pastoralism were traditionally to be found in the lowlands of the west of the country, while crop farming and pastoralism were practised in the coastal areas.

34. The agrarian reform introduced following independence tended to favour crop farmers over nomadic pastoralists and mixed farmers. Many refugees who returned to the country were settled in the coastal areas where they were assigned land under the system of usufruct, in a region where pastoralism had also been traditionally practised. As has been pointed out by Sandra Fullerton Joireman<sup>2</sup> in an article on agrarian reform in Eritrea, as long as the returnees confined themselves to crop farming the risk of conflict between the two groups was minimal, as there was sufficient land area available for both. But once the farmers launched into mixed farming (crop production and livestock raising) in order to diversify their sources of revenue, their need for land became greater, generating conflicts of interest with the pastoralists.

35. Joireman underlines that through agrarian reform, by choosing to favour sedentary farmers, without providing similar guarantees to the pastoralists, the Eritrean Government took the risk of a conflict breaking out between the two groups for both ethnic religion and political reasons, given that the pastoralists were mainly Moslems while the farmers were of mixed religious beliefs.

36. This example illustrates the ambiguity of the agricultural policy adopted by the Eritrean Government. By choosing to favour (sedentary) farmers, it rewarded one population group upon which it had always counted for support during the fight for independence, and at the same time gave precedence to agricultural development over the interests of other population groups. This choice could be fraught with consequences for the future.

### **Problems of occupied lands**

37. The land ownership issue can become a source of considerable difficulties following armed conflicts as will be seen, for example, in the Case Study on Central America. Frequently persons displaced internally due to the fighting have occupied land left vacant by those who chose to seek refugee outside the country. This occupation of land may have been either spontaneous or the result of a concerted policy on the part of the authorities or those who held power in the regions concerned.

38. Organised occupation can be justified by the need to provide the rural population with means of subsistence, and for security considerations, the authorities considering it essential to settle on the abandoned lands people they consider to be loyal or over

whom they can exercise their control. Once the conflict is resolved and the refugees can return, however, they find their land occupied by others who do not necessarily intend to give it up, all the more so if the occupation has lasted many years and thus lost all temporary character.

39. This type of situation can also have other causes. The apartheid regime in South Africa and the conflict which it generated dispossessed black farmers of their land and forced them into exile. When they return to their country, they demand reinstatement of the land rights of which they had been deprived for racial reasons.

40. To resolve the resulting land ownership conflicts the national authorities often opt either for restitution of the occupied land, or for a system of compensation, in cash or in kind, or for a mixed solution combining the two options. The advantages and disadvantages of these solutions are examined below.

41. First of all, however, it should be noted that various criteria – political, economic, ethical – will determine the choice of one or other of these options. Political reasons may well be conditioned by the need to facilitate the policy of national reconciliation. Economic imperatives may include the need to combine the reintegration of returnees with the reconstruction and development of a country left in ruins by war. From an ethical perspective, it is clear that satisfying the demands for justice of former refugees, as targets of discrimination, for the treatment of which they have been the victims, is one of the conditions for national reconciliation. It is none the less true that this may be easier said than done in situations where there is insufficient arable land for all.

#### *Restitution of land*

42. Before implementing any solution involving restitution of occupied land, the legal regime applicable must be considered. It is clear that in a system of private property based on registered titles, restitution would be the only acceptable solution, in that the rightful owner must regain possession of his property. Any other solution would be a negation of the real (tangible) right of ownership.

43. In this type of situation the duration of the absence of the owner and the abandonment of the land is of little importance. The real right to which he is entitled must take precedence, above all if, at the national level, the private property system is maintained. Practical steps should be taken aimed at restitution, without penalising the temporary occupant, if indeed the occupier is in good faith and has invested in improving the land. The length of time having transpired should not be held against the owner or result in the loss of his rights.

44. In certain countries, national legislation may provide that the occupant in good faith of property left vacant or abandoned during a period fixed by law may have his right to enter into possession of said property recognised. This should not, however, be applied to returnees, and UNHCR would be justified in intervening to ensure that they be exempt. Indeed, in so far as the abandonment is justified by armed conflict, violence, or grave acts of discrimination, the holder of a real right has given it up by constraint, against his will. In such conditions the temporary abandonment, no matter for how long, cannot justify the loss of property rights.

45. It cannot be excluded, on the other hand, that the exercise of property rights may be contrary to the public interest and that in consequence it may be necessary to offer compensation rather than restore the rights to the person who had previously enjoyed them. Such a hypothesis could arise in situations where the totality of a country's land resources had been nationalised and agriculture organised along collective lines. The case of Central and Eastern Europe is of interest in this regard.

46. As has been noted by Roger Plant<sup>7</sup> : "*In many of the Baltic and East European countries, land reform and land privatisation programmes since the early 1990's have been based on the principle of restitution to previous owners. In some cases, notably, the Baltic States, the emphasis has been on physical restitution of the lands to which previously landowners lost rights during the collectivisation era, without the payment of compensation to previous landowners, rather than the physical restoration of the land itself. In the Baltic countries, the restitution approach to land reform has proved highly controversial, in particular given the implications for discrimination against non-citizens from other parts of the former USSR who have occupied the agricultural collectives for several decades.*"

47. In this context the claim for restitution of the land was based on the fact that the expropriation was forced and no compensation was paid. Roger Plant questions how far back in time one must go to provide a legitimate basis for these claims. He also queries to what degree and based on what criteria one should resolve the conflicts opposing former owners and present occupants. If it is clear that the dispossessions may be considered to be in violation of national or international law, notably that of human rights, it is less evident how the contradictory interests of the two parties can be combined equitably.

48. It is therefore questionable whether it is admissible to make pure and simple restitution in the face of rights acquired in good faith by the present occupants. Each situation calls for an ad hoc response, which should take into account, in a spirit of justice and equity, the contradictory interests of the groups of persons concerned.

49. In the countries applying the customary systems of law, on the other hand, the problem of restitution of land is more complex, to say the least. The land belongs to the community and its assignment is managed by either the traditional leaders or the local authorities. As is described in some detail in the Annex, tenure of land can be assigned under either the hereditary (or 'usufruct') system, or through a method of temporary assignment in which land is redistributed to members of the community by rotation at regular intervals.

50. Admittedly, under the 'usufruct' or hereditary system, the beneficiary should be able to have his rights restored on condition that the land was abandoned during a reasonable length of time and that the occupation of the abandoned land was spontaneous. As is noted in the Case Study on Rwanda, for example, the Arusha Accords had fixed a period of ten years after which the beneficiaries of a usufruct could no longer claim tenure. In addition, in situations of this kind, the rights and interests of the temporary occupant must be preserved, including the possibility to harvest his crops and be compensated for investments he may have made to improve the land.

51. When the occupation of land has been decided and organised by the authorities themselves, it may be considered that the occupiers have been given a right, the usufruct, equivalent to that which had been assigned to the previous holder of tenure. Consequently a situation exists where two persons claim equivalent rights, and to privilege one over the other could jeopardise the whole policy of national reconciliation.

52. The question is even more complex in many developing countries, notably in Africa, given that the land does not only have economic value but is also highly symbolic, since it provides a link between those who hold tenure and their ancestors. To dispossess a person of the land which had been assigned to him is equivalent to depriving him of his roots. What is more, refugees have not abandoned their land for reasons of personal convenience but rather have been forced to do so for political reasons. It would therefore seem wise in a perspective of reintegration and national reconciliation to recognise the rights of those to whom land tenure had been earlier assigned, and make restitution. In many situations, the difficulty will relate to the economic situation. The

temporary occupants, who themselves have been displaced, will only be able to return to their regions of origin when the land which has been ravaged by war is again fit for cultivation.

53. Situations may also arise where in addition the difficulty is structural, given that the available arable land is in any case insufficient to cover the needs of refugees, displaced persons and the local population remaining on the spot. In such situations, the land ownership/tenure question is without easy solution and it will be necessary to approach the issue of restitution in a spirit of equity, giving precedence to considerations of national reconciliation and efficacy. This could imply, in certain cases, restoring the land to its previous occupants and absorbing the temporary occupants, who have been rendered landless, in other sectors of the economy. In other cases, however, the opposite solution might be preferable.

#### *The problem of compensation*

54. When a person has been deprived of his property rights and the restitution of the property itself proves to be difficult or even impossible, compensation is a wise means of both doing him justice and restoring his rights. Compensation can take various forms: it can be in kind if, for example, it appears inopportune to restore to the original owner property which has been occupied or assigned to others. In such cases, equivalent property can be assigned to him, if possible in the same region, or in another. This is one of the principles included in the agreement on land tenure (ownership) signed between the Government of Guatemala and the United Nations High Commissioner for Refugees (see Case Study).

55. Compensation may also be in cash. The practical modalities of the calculation of this financial compensation may not be easy, particularly when it comes to deciding whether the basic reference value is that of the period when the dispossession took place, or its equivalent at the time of compensation. This raises the issue of who should benefit from the increase in value, or suffer the loss of depreciation. Clearly the amount of compensation should give the beneficiaries the means to start a new life and must therefore meet this objective. A symbolic compensation would only risk depriving them of this possibility, and would undoubtedly increase their feeling of frustration and risk jeopardising any attempts at national reconciliation. UNHCR therefore has an interest in ensuring that such compensation is fair and equitable.

56. The case of South Africa in implementing such solutions is significant. It should be recalled that black South Africans had been able to acquire land legally, either individually or collectively, before the adoption of legislation permitting apartheid in 1913. Some half a million of them were forced off their land by expropriations between 1960 and 1980. Although the policy of forced expropriations ended in 1985, and some had been able to make their claims good to the competent jurisdictions, many of the victims are still today demanding restitution of their property.

57. The land reform of 1991 excluded the principle of restitution, angering the victims and provoking the opposition of the African National Congress (ANC). It is therefore not surprising that this question was again debated during the discussions on the drafting of the Constitution and the Charter of Fundamental Rights. It was recognised that the State could make expropriations in the public interest, provided the intention was to devolve their rights to the victims of forced expropriations under the apartheid laws. It was finally decided that the persons who were thus dispossessed of their land could, according to legislation to be submitted to Parliament, and under mechanisms to be defined, either recuperate their land or obtain compensation, or any other acceptable solution when restitution was not feasible.

58. Compensation may not be the most popular solution for those who feel they have

been victimised by abusive expropriations and demand justice. Even though imperfect or apparently unfair, however, this solution offers real advantages and should be privileged in many situations.

59. The question of restitution also raises other complex issues. To demand restitution of land implies claiming a historic legitimacy over it and excluding other groups from its use, no matter what were the historical circumstances under which they had settled there. It amounts to affirming the existence of an inalienable link between a certain group of human beings and the land it claims, and thereby recognising that it cannot be transferred to others. It should be noted that if this ideology was the basis of the formation of Nation States in modern times, it also serves today to legitimate ethnic cleansing in situations where the concept of Nation State never applied. It serves to give substance to a discourse built on identity in places where heterogeneous populations have always tried, to somehow coexist, and thus to erroneously affirm the rights of one national group over the others.

60. Given that many repatriation operations aim at reassembling the pieces of a multi-ethnic whole, and endeavour to reconcile those who until only recently had confronted and massacred one another, it is clear that to emphasise restitution of land runs the risk of having the opposite effect. In a spirit of pragmatism and efficacy, it may sometimes be preferable to opt for the solution of compensation, even though it may appear unfair to the victims, rather than to seek at any cost to return the land, and eventually run the risk of destroying the whole undertaking.

#### **IV. WOMEN AND OWNERSHIP/ACCESS TO LAND**

61. Chapter 6 of the UNHCR guidelines on voluntary repatriation emphasises the need to take into account the specific situation of women, notably those who exercise the responsibility of heads of family. UNHCR, the guidelines underline, must closely monitor the handling of returnees' access to land and ensure, if necessary through intervention, that returnee women have access to land on the same footing as returnee men. UNHCR is under an obligation to call the attention of the authorities to this point and encourage them to act accordingly. If specific action is not taken in this regard the reintegration of these women and their families would be jeopardised, and this could eventually lead to increased vulnerability and internal displacement.

62. UNHCR's keen interest in "upholding the right of women to inherit and own property" was forcefully stated by the High Commissioner on 16 February 1998 in a statement she addressed to the Inter-Regional Consultation on Women's Land and Property Rights under Situations of Conflict and Reconstruction, "Peace for Homes, Homes for Peace". The statement points out that in many countries women returnees must contend with discriminatory laws which deny them access to resources which would ensure their livelihood and that of their children. By helping returnees obtain citizenship and other documents, by promoting amended legislation recognising women's rights, and by providing legal assistance to women for the recovery of their property, UNHCR has been active in such countries as Liberia, Guatemala, Rwanda and Bosnia.

63. This is an important issue which, it would seem, goes beyond repatriation operations. In general in traditional societies the formulation of land ownership rights has always tended to exclude women and only recognise these rights for men. Yet in most developing countries, notably in Africa, the role of women in agriculture is essential, and it is considered that they ensure some three quarters of the total food production. Furthermore, they have no recognised rights and are therefore put in a very vulnerable situation. Recent reforms of the law of land ownership in Africa south of the Sahara have tried to remedy this situation, notably by guaranteeing for women the transfer of land by way of inheritance. But it has been difficult to translate these often modest reforms into reality, and thereby change the traditional ways. In patriarchal systems, women only

have access to land through their spouse and if he dies their right to the land dies with him.

64. This is not strictly speaking a legal issue, but rather relates to traditional mentalities regarding the enjoyment of land rights. These mentalities will not change from one day to the next. Efforts to include in national legislation the equality of men and women as regards the access to land must none the less be continued. The concerned governments must be urged to adopt the necessary measures to guarantee in their national legislation the principle of equality, and to ensure that it be implemented both on the regional and local levels.

65. A concerted effort must also be made in this regard by international organisations, and notably the international financial institutions. It is particularly noteworthy that structural adjustment policies in rural areas have called for the registration of individual rights (right of ownership, usufruct, right to tenure) in order to give greater security to farmers, to encourage them to invest in their farms and to push them into increasing productivity. It would be advisable that any policy in this regard recognise and guarantee to women equivalent rights to those of men. The establishment of land registry systems should not result in perpetuating the rights of men.

66. The 1979 Convention on the Elimination of All Forms of Discrimination against Women takes a timid approach to land issues. None the less the provisions it contains, modest though they may be, should be actively promoted. States with an important proportion of women in their rural economy should be urged to accede, if they have not already done so, and above all to adopt legal provisions at the national level to translate these obligations into practical and concrete terms.

## **V. CASE STUDIES**

### **The repatriation of Cambodian refugees**

67. Following the Paris Accords and in the framework of a global political solution of the Cambodian crisis, UNHCR was entrusted with the responsibility of repatriating some 356,000 refugees from Thailand to Cambodia. This operation, which started in March 1992, was to be completed in a period of one year in order to permit the refugees to take part in the electoral process.

68. Starting in 1989, UNHCR, in anticipation of a repatriation, had worked on the hypothesis that most of the refugees were of rural origin and would wish, upon return, to resume farming. A study undertaken in 1989 and an inter-agency mission organised in 1990, led to the conclusion that sufficient arable land was available to assign to each refugee family two hectares of land in the region of their choice. The report stated that, according to the authorities, 243,478 hectares of arable land were available in the provinces of Battambang, Banteay, Meanchey and Pursat. The report was careful to note, however, that "around 50 per cent of these regions are known to be infested with mines<sup>12</sup>."

69. The actual repatriation operation was preceded by a further two parallel caseload investigations, intended to facilitate its implementation. The first was aimed at registering candidates for repatriation and ascertaining the region to which they wished to return, as well as establishing a profile of the refugee population living in the border camps. According to this study, complementary to one carried out in 1990 under the auspices of the Ford Foundation, the majority of the refugees claimed they were farmers originating from the province of Battambang (the most productive rice-bowl in the country) and wished to return there, to resume agricultural activities. The second study, carried out in November and December 1991, was intended to identify the agricultural lands available in the north-west provinces, where the majority of the refugees wished to be resettled. At

the same time UNHCR asked the non-governmental organisation HALO to undertake a survey of the potential land-mine problem in the resettlement zones. In 1991, UNHCR also requested the agency Spot-Images to establish satellite maps of the country to evaluate the availability of arable land. The results seemed to indicate a potential of uncultivated land available.

70. From these various investigations, it was concluded that a total of 173,000 hectares were required to satisfy the needs of the returnees and internally displaced persons, without counting land needed for new housing. It rapidly became apparent, however, that most of the land said to be available was either mined or located in front-line areas where security could not be guaranteed. This situation led UNHCR to declare these zones unfit for resettlement ("no-go areas") and to discourage refugees from returning there.

71. In addition, it soon became obvious that the available land fit for cultivation was insufficient to absorb all the returnees. Moreover, some of the land was already occupied and the local authorities were reluctant to oblige the local population to share with the returnees. This was a result of the privatisation policy launched by the Cambodian Government, which had facilitated a rapid resumption of agricultural activities, but also led to considerable land speculation.

72. It therefore became clear from the beginning of the repatriation operations that the goal of assigning two hectares of farmland and a 1,000 square metre building plot to each family was unrealistic and, if it were maintained, would endanger the success of the whole operation, as well as UNHCR's credibility. It therefore became indispensable to find other options. A UNHCR evaluation report noted that<sup>10</sup> : *"In an attempt to resolve the contradiction in UNHCR's objectives, the organisation was obliged to adopt what was described in one telex as "a radical departure from the original concept of linking refugee repatriation to the availability of land". The land offer was not withdrawn, but the refugees were offered four alternative assistance packages. The most popular of these options, eventually selected by around 85 per cent of the returnees, was a cash grant of \$50 per adult returnee and \$25 for each child, paid in US dollars on arrivals in Cambodia."*

73. The introduction of this option had various consequences. First of all, it was popular because fairly large families could receive as much as US\$400, more than twice the annual average income of a Cambodian. In addition, it relieved the pressure of demands for farm land, and encouraged many refugees to change their choice of place of return and give priority to provinces where they thought they could find relatives. Moreover, the grant of a sum of money gave them a sense of responsibility by making it possible for them either to buy farm land in their new area, or start income-generating projects. Finally, this option considerably facilitated the logistic aspect of the operation for UNHCR, as it was not necessary to furnish the refugees with building materials for their houses.

74. Assessing the consequences of this option, the evaluation stressed: *"The new arrivals appear to have exercised that responsibility in a very effective manner, disproving the paternalistic fear that poor Cambodian returnees would not be able to manage such substantial amounts of foreign currency. According to a number of recent surveys, the cash grants have most commonly been used to buy building materials and a housing plot, to establish small businesses and assist their relatives in income-generating activities, to purchase agricultural land, and to move around the country, looking for family members. The cash grant option has also had some positive consequences for the returnees' relationship with the resident population. Because they have been able to move around the country and link up with their relatives, the returnees have spread much more evenly across Cambodia than was originally anticipated, thereby reducing their impact on local communities."*

75. Recent information from the field would tend to temper the optimism of the above report, however. According to the UNHCR Head of Field Office in Sisophon, the cash option was a major contributing factor in UNHCR's ability to fulfil its obligation of completing repatriation in one year before the elections. Nevertheless the speed of the operation created an unsettled returnee population that became transient and loose. "Nearly 40 per cent of all returnees have moved at least once and many for the second or third time. Each of these moves has depleted their resources as they searched for available land and/or livelihoods."

76. Major UNHCR efforts to provide returnees with land titles, often under informal arrangements with local officials under which infrastructure development assistance was exchanged for arable land, had not always been respected. Once the Office phased out, much of this land was taken over by others, often with the alleged complicity of the local authorities. Agencies remaining on the spot say they are powerless to intervene in land disputes. It is no surprise that land litigation is by far the biggest issue facing the Cambodian court system today.

77. Moreover many of the returnees who opted for agriculture were settled on sites in north-west Cambodia along the "fault line" facing Khmer Rouge *de facto* controlled areas. With the re-emergence of fighting in parts of the country, returnees also claimed the military had confiscated their land, or that it had fallen under Khmer Rouge control and could no longer be farmed. This, plus the fact that the settlement sites were often isolated far from the existing villages and contacts with the local population and services were very difficult, has led to an average drop of 40 per cent of returnee populations in these areas.

78. The most productive settlement sites to date are urban, rather than rural. When rural settlement areas did succeed, it was often because returnees were already familiar with the village/area, particularly if they had already lived there, and had found family support in the area. Local officials were much more inclined to allocate land in such circumstances.

79. The apparent success of the Cambodian refugee repatriation operation therefore lay in the very great flexibility and speed with which alternative solutions were offered once the lack of farm land became evident. This flexibility made it possible for UNHCR to respect the time constraints imposed by the Paris Accords. More recent developments, however, would tend to militate in favour of a more prolonged follow-up presence on the part of UNHCR to ensure that short-term solutions are consolidated in longer-term guarantees of returnees' rights.

80. The lessons learned in this operation may not directly apply to other repatriation operations, but they do suggest that a certain number of criteria must absolutely be taken into account. First of all, well before beginning any repatriation operation a very detailed study must be undertaken to establish a profile of the refugee population (place of origin, former professional experience, duration of residence outside the country of origin, occupation/eventual professional training in the country of asylum) in order to determine the needs when they are back in their country of origin.

81. The data obtained from the candidates for repatriation and their needs must be compared with the possibilities offered in the country of origin (availability of land, demographic pressures in the regions of return, anticipated relationships with the population having remained in country). The objective should be to adapt the demand to local possibilities, and not necessarily make freedom of choice of place of return an inviolable principle. In other words, return reintegration must necessarily be combined with the constraints related to national reconciliation and the reconstruction and development of the country.



## The repatriation of Mozambican refugees

82. With the conclusion in October 1992 of a general peace agreement between the parties in conflict in Mozambique, the return of close to two million refugees became possible. The vast majority were of rural origin, and wished to return to their regions of origin. The problem of land ownership is rarely mentioned in the various reports concerning the repatriation and reintegration of the refugees. Indeed the issue of land ownership or tenure was not at the heart of the Mozambique conflict, and it is tempting to conclude that there was no conflict regarding access to land for the returnees. There are nonetheless a number of lessons to be learned from this operation in relation to the theme of access to land and its ownership, and some issues which may still not be resolved.

83. Before the war, Mozambique had a triple system of land ownership. Firstly, there was a traditional agricultural sector where arable lands were collectively owned and tenure was assigned to the residents of the village under the authority of the village chief, the *regulo*. Secondly, a system of vast agricultural properties intended for intensive farming, belonging earlier to Portuguese colonists, was devoted 75 per cent to intensive cropping, and 25 per cent to food production. Finally, there was an agro-industrial sector aimed at export and belonging, for the most part, to foreign investors.

84. With the return of the refugees, use of the customary system of land assignment through the *regulos* was revived. It should be noted that during the period of exile it had never really ceased to function, given that in the countries of asylum the *regulos* continued to exert their authority over the communities for which they were responsible. Once back in their own country, they proceeded to assign lands among the members of the village. When land had been occupied by internally displaced persons because of the war, the *regulos* allowed them to continue farming the land they had occupied until the next harvest, and then decided its reallocation to the person who had earlier had tenure. The dispossessed farmer was then assigned another available parcel. While waiting for his land to become free, the original assignee was temporarily allocated another parcel in order to provide for himself and his family.

85. Perceiving that the land access issue would not be a major problem, UNHCR concentrated its reintegration assistance for the most part on facilitating the rehabilitation of infrastructure, in particular water systems, drainage and roads, and on providing the farming communities with the tools and seed needed for the next harvest. This assistance was intended not only for the returnees but for the whole local population. An important effort was also devoted to demining the land so that it would once again be fit for agriculture. UNHCR, wishing to limit its engagement in Mozambique, did not, on the other hand, undertake any project or activity aimed at supporting personal documentation or land titling, as the Office considered these issues to be secondary to the immediate needs of the returnees. A number of other actors, notably international NGOs such as Norwegian Refugee Council (NRC) and the Lutheran World Federation (LWF), did involve themselves in these issues, keeping UNHCR informed of their progress.

86. It should not, however, be imagined that the situation was perfectly idyllic and that there were no problems. As has been underlined by Joann McGregor<sup>5</sup>, two types of dispute broke out, directly or indirectly involving returnees following the 1992 peace agreement. On the one hand, there were conflicts between the agro-industrial sector and the traditional agricultural sector, and on the other, disputes concerning the charcoal trade, hunting and fishing.

87. As regards the first type of conflict, government policy as it was initiated in 1983 and strengthened after 1992 has been to develop the agro-industrial sector by increasing the

number of concessions granted to foreign companies, notably in the region surrounding the capital. The consequence of the extension of these concessions was the inclusion of small family farms, resulting either in the eviction of the farmers or their resettlement in neighbouring zones where the land was less fertile. What is more, pasture rights allowed to traditional farmers on the lands of certain big colonial farms were challenged by a system of fencing off these farms. This policy resulted in a form of despoilment of traditional farmers of their means of subsistence, and has driven them out of certain regions entirely devoted to agro-industry or intensive farming. Despite the fact that the World Bank and the Department of Forests and Wildlife (DNFFB) urged the freezing of the granting of concessions in the province of Matutuine in anticipation of the elaboration of a land-use plan, their point of view has neither been taken into account nor followed up at central government level.

88. The second conflict, mainly limited to the three Southern provinces of Gaza, Maputo and Inhambane, concerns the exploitation of certain natural resources, such as charcoal production, and the catch of hunters and fishermen. It opposes jobless citizens, demobilised soldiers and returning immigrants, against returnees who had retaken possession of their lands. The contested natural resources represent a complementary means of subsistence for the local farming population, notably in time of drought. Due to the economic situation during the war, many inhabitants of the capital, demobilised soldiers and returning migrant workers who had lost their jobs in South Africa, had taken up these activities in order to survive. Their economic situation was not changed by the peace agreement, and they still rely upon these activities. The returnees, on the other hand, consider that these resources traditionally belonged to them, or at least that they were alone in exploiting them before their departure. They therefore claim a return to the status quo ante.

89. The National Assembly adopted a new Land Tenure Law in mid-1997. The traditional, customary system is respected in the new law, under which the land remains in the hands of the State, with the latter, through government officials, assigning land concessions of 100 years which cannot be "sold" to third parties. It remains to be seen to what extent the rights of the peasants will be respected in the longer term.

90. Reinforcing conclusions already reached in other African experiences (as well as in Central America), the Mozambican experience further emphasises the importance of linking reintegration of returnees, reconstruction, and sustainable development policies. The latter should not necessarily be a pre-condition, but there should be an interplay between these various aspects in the interests of national reconciliation, which is the only guarantee of durable development.

91. This implies notably that at the macro-economic level, the interests of the traditional agricultural sector should not be sacrificed on the altar of intensive farming or agro-industry. The two sectors must be able to coexist and develop along parallel lines, excluding all possibility of absorption of the rural population, which has no other means of subsistence in other economic sectors, particularly if there is already considerable unemployment in urban areas. A clear agricultural policy is required, under which the zones to be devoted to each type of agriculture are precisely defined and the rights of the traditional farmers are guaranteed, in one way or another (perhaps through land registry). Natural resource conservation policies must also take into account the needs of the local population by clearly specifying the conditions under which timber can be cut in afforested areas, as well as through assigning hunting and fishing rights while guaranteeing the preservation of animal life.

### **The return of refugees in Central America**

*El Salvador and Guatemala – similarities and differences*

92. In Central America the problem of land ownership has constituted a central issue and in many ways has been one of the causes of the wars which ravaged the region and caused major population displacements since the 1970s. Countries like El Salvador and Guatemala have essentially rural economies, where two types of agricultural sectors have been opposed, one aimed at food production and based essentially on small farms, and the other consisting of large intensively cultivated farms producing crops for export (coffee, cotton).

93. In the case of El Salvador, the landed oligarchy had a tight control over the economy and politics of the country. As is pointed out by B. Edwards and G. Tovar Siebentritt<sup>1</sup> : *"Historically, land has been the most important natural resource in El Salvador, for access to land means access to productive work and an adequate standard of living. The distribution of land, however, became increasingly skewed as agricultural production shifted from subsistence cultivation to cash crops such as coffee and cotton. Between 1960 and 1980, for example, "landlessness grew from 12 percent of the rural population to an estimated 60 percent, and rural unemployment seasonally affected increasing proportions of the rural labour force."*

94. Faced with this transformation of the agricultural scene, with ownership of the land concentrated in the hands of big latifundists (large landowners), the peasant farmers, dispossessed of their means of subsistence, became radicalised. As the above authors conclude: *"It was during this period that the seeds of rebellion were planted in many rural areas experiencing rapid transformation from subsistence to commercial farming. Conflict became particularly acute in the struggle of tenants to retain fertile land for the cultivation of basic grains for subsistence in the face of the landowner's determination to use these lands for commercial production"*.

95. The Salvadoran oligarchy in its turn sought the support of the army to defend its interests against the angry peasantry, deprived of their land and proletarianised. In response, an armed opposition was constituted and united in the early 1980s in the Farabundo Marti Liberation Front (FMLN). This led to generalised armed conflict. To counteract the policies of the oligarchy, the dispossessed peasants, supported by the Church, reacted by acquiring, wherever it was possible, uncultivated land on which they set up agricultural co-operatives. Under this system, the land is owned by the co-operative, in which the farmers hold shares. The military, for its part, intensified its repression against the co-operators, accusing them of providing active support to the guerrillas.

96. The armed conflicts which became generalised in both El Salvador and Guatemala caused massive population displacements, both within and across borders. In El Salvador, the FMLN rebel forces continued, however, to control large areas to which the bulk of the refugees eventually returned. In Guatemala, on the other hand, internally-displaced peasants took over the abandoned farms of refugees who had left spontaneously. Others were settled on vacant farms through resettlement schemes controlled by the army (which itself played an increasingly prominent political and economic role), with the goal of confronting, neutralising and isolating the guerrillas.

97. When, at the end of the 1980s, the first groups of refugees started to return spontaneously to their regions of origin in the two countries, without any peace agreements having been signed, they found either their villages completely destroyed by the fighting and their land abandoned for years, or, as was particularly the case in Guatemala, occupied by new settlers who did not necessarily take kindly to being expelled. In the latter country, these farming colonies/villages had been organised by the army, which had no intention of relinquishing control over the local population.

98. Although there are many common features in the two cases, there are also considerable differences. In El Salvador, the landed oligarchy utilised the army, but the

latter played no economic role. The fact that Salvadoran refugees started returning to lands occupied *de facto* by the FMLN and out of reach of the absentee landowners was important for returnee assistance, as they had immediate access to land which legally belonged to others and whose ownership became part and parcel of the peace agreements.

99. In Guatemala, the army with its powerful political and economic interests was an additional player to deal with in discussions of the issue of land reform. Having relocated IDPs and peasants sympathetic to them into lands which legally belonged to the refugees, it was able to influence the National Assembly to pass a law which stated that land "abandoned" by its owners for a certain number of years could be occupied and transferred to landless peasants.

100. As was noted by A. Aguilar Zinser<sup>14</sup> in a study of the repatriation of Guatemalan refugees in Mexico: *"Problems in recovering land are often exacerbated by the lack of legal documents to prove ownership, even though land may have been cultivated by a family for many generations. Many of the refugees lost their titles during the conflict, or the public records in towns and municipalities, including those of communal lands, were destroyed. To make matters worse, a law that converts into state property all lands that were 'voluntarily abandoned for more than one year with no justified cause' is being applied to the refugees. Repatriated refugees from Ixcán and other parts of eastern Guatemala noted that the land question, and in particular the application of the 'abandoned land' decree, was their major problem."*

101. It is noteworthy, however, that in the agreement concluded between the Government of Guatemala and the United Nations High Commissioner for Refugees on 13 November 1991, the Government committed itself to facilitating "to those repatriates who were landless when they left the country, fair and legal access to land, under the same terms and conditions granted to their fellow countrymen." For those who had owned or legally settled lands at the moment of their departure, the Government "will undertake all possible efforts to guarantee the recovery and legalisation of such lands, or...the compensation of such lands with others of similar quality and location..." It has been commented, however, that in this wording ("will undertake all possible efforts") the government recognises the former land claims as legitimate, but does not make an absolute, binding commitment to recover those lands for the returnees.

102. Subsequent agreements further spelled out the Guatemalan Government's willingness to help returnees recover and/or be compensated for their former lands as well as to provide new lands for landless refugees, including new families formed during the years in exile. First is an agreement signed in October 1992 between the Government of Guatemala and representatives of organised refugees in Mexico. Later, in June 1994, an agreement was signed between the Government and the insurgent group (URNG) during the peace process which was formally concluded in December 1996. The latter agreement, while weaker in providing concrete guarantees for returnee land access, makes broader commitments providing for development in areas with returnees and internally displaced persons. Both documents refer to the need to recognise women's equal claim to land.

103. Another major distinction between the two countries concerns land titles. Because of the size of the country, Salvadoran land was more adequately titled than in Guatemala. Therefore, the lack of proper land titles proved to be a thornier issue in Guatemala than in the neighbouring country. Because of these distinctions, the issue of land ownership was crucial to any political solution in both cases, but more so for El Salvador. Also, the overpopulation of El Salvador has no parallel in the region. As a result, the Salvadoran peace agreement had land reform as the most important and difficult issue to resolve, while in Guatemala it was one of many.

104. The land section of the Salvadoran peace agreement was not successfully implemented and remains a controversial issue to date. The United Nations Observer Mission in El Salvador (ONUSAL), the multidisciplinary peace-keeping operation entrusted with overseeing the implementation of the 1992 peace agreement, and the Secretary-General's good offices were unable to resolve the deadlock over the land transfer programme foreseen in the peace accords. Among other things, land owners refused to sell the land to the returnees occupying it and the government proved unable to force them to do so. In Guatemala, on the other hand, as has been seen above, land became available for sale, not necessarily in the returnee areas but nearby. This was more a result of land availability than of political will on the part of absentee landowners.

105. In both cases, although UNHCR was not directly involved in land ownership transfer or purchase, it did engage in related matters. Unlike the case of Mozambique, UNHCR, by supporting extensive documentation projects in both countries, provided returnees with the necessary papers for the purchase, transfer and/or basic titling of land. Personal documentation also permitted returnees to actively participate in political activities (such as elections) and to regularise other civil acts (marriages, births, etc.).

106. In El Salvador, UNHCR, through its NGO implementing partners, visited land which was being offered up for sale and advised returnee leaders on land surveying and purchase. Potential donors were kept informed by UNHCR of NGO projects promoting sustainable reintegration through the purchase of land and the implementation of agricultural development projects. Similarly, in Guatemala, UNHCR sponsored visits by refugees still in Mexico to land for sale in their home country. This may, however, have had the negative side effect of increased land prices, since landowners apparently speculated following these visits that the funding for purchases would come from the international community.

*The case of Guatemala – in many ways exemplary*

107. A recent report by the office of the UNHCR Chargé de Mission in Guatemala provides a detailed analysis of the Guatemalan repatriation case in terms of land ownership and tenure, which may well be exemplary. The most pertinent aspects are quoted below:

108. Refugees (in the context of generalised violation of human rights and armed conflict) left rural areas, both "historical"/ancestral indigenous regions or lowlands recently colonised. Most lands left by refugees, however, were of marginal quality and insufficient in size for their own subsistence. Land tenure included those with hereditary rights in collective lands with privately registered titles, provisional titles (not constituting ownership) of national lands, usufruct rights in municipally controlled communal lands and other forms. For those with claims to state lands, the validity of their claim is often compromised by the fact that the corresponding state agency did not maintain up-to-date records through the period of the violence preceding the refugees' flight and/or had not complied with existing administrative procedures to register or award finalised land titles for those who had finished payments (which would have transformed them into private property owners).

109. As in other cases reviewed in this study, returnees (virtually all seeking a rural land-based existence) faced the following problems when seeking their repatriation:

- former lands unoccupied but still under conflict and essentially determined off-limits for access by the government. (Most of this area was subsequently settled as the war wound down and one region was subject to a successful UNHCR-sponsored programme to minimise the risks posed by mines and explosive devices randomly strewn through the area).
- former lands occupied by spontaneous settlers or, more often, as a result of

government/army campaigns in their absence to resettle and re-title these lands with other rural population considered to be potential government allies;

- former lands of insufficient quality and/or extension, especially given larger families;
- former lands or desired lands in areas declared ecological reserves during the years the refugees were in exile;
- former landless farm workers with no wish to return to the exploitative conditions of plantation wage labourers; and
- young families formed by those who had become refugees as children but through the years (now more than 15) began families of their own and with little possibility of sharing their parents' (generally small sized) land claims.

110. Given the fact that the first larger-scale movements of return took place before a final peace accord was in place, the refugees also advocated returning in collective groups in order to minimise their security risks and to attract maximum (mostly international) aid, thus the political mobilisation and protracted negotiation process resulting in the above mentioned October 1992 agreement between refugee representatives and the government. This agreement was unprecedented in terms of the refugees establishing their own terms for their eventual repatriation and one of the most important points contained in the agreement was land access and recovery.

111. The implementation of the land access components of this accord became one of the most polemic points of its implementation and the overall return process. The government in 1992 had made the short-sighted offer of procuring lands for refugees while simultaneously negating the possibility of addressing Guatemala's unequal land tenure situation which remains favourable to large landowners and wealthy families. Given the untenable possibility of expropriating lands or fixing price limits, the remaining solution was

to buy private lands at market prices for refugees. The complicated schemes to get land for refugees that resulted have encountered the following problems:

- lands purchased at high costs, often inflated by owners given the political (and international) pressure on the government generated by the refugees. This has led to, in the cases of some land purchases, perhaps the highest per capita cost world-wide for government-financed land purchases for returnees. The land purchase programme was also mostly unable to attract international aid given the perception that the majority of funds would benefit the vendors, i.e. wealthy landowners.
- inequalities (in terms of their potential economic future) among repatriation groups as some held out until obtaining expensive, more productive lands and others settled for less expensive (and therefore more isolated and less productive) lands. Conversely, the government oftentimes had a direct (financial) incentive to encourage refugees towards less productive or accessible lands and crowd more people together in order to better the investment per family ratio.
- the evolution of an increasingly bureaucratic process for land purchase given the complexity of Guatemalan land records and the ultimate reluctance of subsequent governments to spend large quantities of money on relatively few beneficiaries.
- the impossibility for refugees to pay back the costs of the land in cases where the government wished to impose this condition and the unwillingness of the government to finance loans or other assistance to promote production given the initial investment already made on land alone. This has led to the prevalence of the government condition that the returnees must only "pay back" funds to their

own community revolving fund and not to the government but the communities still are not in a position to comply given their low production and the lack of mechanisms of how the repayment scheme would work.

- resentment and/or increasing demands from other sectors of the population (internally displaced and rural peasants in general) to obtain land under equally favourable conditions, in turn a disincentive to promote reconciliation among different groups.
- lack of administrative mechanisms on the part of government agencies to easily incorporate women as co-owners of lands designated for family use within the context of lands granted to communities or co-operatives. The oversight on the part of the government continued even in the face of women's mobilisation to reclaim this right, sometimes (but not always actively) backed by community men.
- lack of clarity about how land ownership will be definitively passed to repatriated population.

112. Of the 37,000 repatriates to Guatemala registered by UNHCR between 1984 and 1997, slightly more than half came as part of collective returns resulting from the October 1992 agreement and the other half generally recovered their lands and/or returned to their villages of origin on an individual basis with limited support from the government, UNHCR or other actors. Of the 20,000 that came with collective groups, approximately half recovered their own lands or lands in direct compensation and the other half opted for new lands under the land-buying scheme described above.

113. In the cases where refugee lands were occupied (mostly national lands where the refugees' "ownership" was not yet legal), the return process was most conflictive resulting in threats, land occupations and the short term illegal detention of UN personnel as "hostages" to prevent refugee return in one case. The ultimate solutions (product of lengthy mediating sessions with UNHCR's active role) took three forms: the refugees received their land and the new occupants were compensated with other land and/or money, the new occupants remained on refugee land and the latter received other land (after years of negotiation) at no cost, and the returnees and new occupants sharing community land (although other refugees were unable to return home because of this solution).

114. All this being said, the Guatemalan repatriation programme can be considered relatively successful. Unresolved land issues have contributed to economic uncertainties, but nevertheless the future for returnees is probably more promising than for most of their national counterparts in rural Guatemala.

#### *Central America illustrates impact of structural problems on development*

115. As has been seen, the question of land ownership was one of the causes of the conflicts in Central America. The return of the refugees took place without this issue being resolved, and indeed the situation for those trying to recuperate their land was in some instances even worse than before. It is clear that in Central America as elsewhere the issue of land ownership goes far beyond the question of repatriation of refugees. As in other parts of the world covered by this study, it is a structural problem which impacts upon any approach to a sustainable development policy, and in which the following issues must be resolved: firstly, to what degree the two agricultural sectors (traditional and industrial) can co-exist or are incompatible; secondly, how the two systems can be developed and thus permit absorption of unemployed farm labourers; and finally, if this is not possible, how the excess rural workforce can be absorbed in other sectors of the national economy.

116. Some might argue that these issues go beyond the Mandate of UNHCR. This being said, they are issues which must be addressed, and those who are responsible must be

urged to find solutions, if national reconciliation is to be achieved, and new conflicts, having the same causes as before and causing new population displacements, are to be avoided.

### **The return of Rwandan refugees**

117. The land problem has always been acute in Rwanda, due to the fact that the area of available lands has never been sufficient to satisfy the needs of the rural population. The land had been parcelled out in the extreme, and all available land was under cultivation. The Arusha Accords, and notably the Protocol on the repatriation of refugees and the resettlement of displaced persons of 9 June 1993, contained provisions for the restitution to both groups of land and housing, on condition that they had been abandoned for less than ten years. This excluded refugees who had been obliged to flee in the 1950s from any restitution procedures; in compensation, the government would put other land at their disposal and assist them to resettle. Although the Arusha Accords constitute, alongside the 1991 Constitution, an integral part of the Fundamental Law of the Republic of Rwanda, their implementation has proved problematic, due to the sudden and massive return of refugees and the fact that the demand for land far exceeded the supply.

118. There were two waves of repatriation of refugees. First of all, in July 1994, after the FPR forces took power, the Tutsi refugees who had fled Rwanda in the 1950s and '60s, returned and settled on land abandoned by the Hutus. Then the latter also returned to their country: first those who had been exiled in Burundi, starting in mid-1996; then those who were driven from their refuges in eastern Zaire by the conflict which broke out in September 1996; followed finally by those who had sought refuge in Tanzania.

119. Some, upon returning to their villages, found their houses occupied and their land cultivated by others. This raised the problem of restitution of land and buildings to their former owners or assignees. The Rwandan Government took up the issue of abandoned land and its temporary occupation, and in September 1996 issued a Ministerial Instructions referring to the "temporary management of landed estate (land properties)". Abandoned land is entrusted to the municipalities which are given full powers for its management. Land is considered abandoned land if the owner is dead without known descendants, or the owners or recognised assignees are in exile abroad.

120. According to Articles 11, 14, 17 and 20 of this Instruction, any person who wishes to occupy or already occupies a parcel must make a written request to the municipal authorities, who give him/her a temporary authorisation. The Instruction further provides in Article 14 that "The temporary occupation of parcels is granted in priority to former refugees who have repatriated." It also fixes the rights and obligations of the temporary occupants, who have the right to cultivate food crops but not perennial crops. They must also exploit the lent land themselves and may not cut down trees or build on the parcel. They must exploit the parcel himself and may not either rent it out or lend it to third parties.

121. Under article 23, in the case of return of the owner of a parcel which had been lent temporarily to another person, the owner (or his spouse or legitimate children) has the right to immediate restitution, it being understood that the temporary occupant has the right to harvest the food crops he had planted, without this being a justification for him to remain on the spot. If the occupant refuses to restore the land to the owner, the latter must refer the matter within 15 days to the municipal commission which had decided to temporarily assign the parcel. In practical terms, this means that the temporary occupant will be able to enjoy possession of the parcel until the next harvest.

122. According to a Protection report covering the months of December 1996-January 1997, the majority of returnees had little or no difficulty regarding restitution of their land:



"During the period March 1996-January 1997," the report notes, "out of 4,444 families monitored by UNHCR, it was observed that 3,998 (90%) had no problem recuperating their land. Of the 446 families (10%) who found their land occupied, 260 (6%) obtained restitution...the percentage of families which could not recuperate their land over an 11 month period was relatively low."

123. Even if the Rwandan Government had not anticipated the massive return which took place at the end of 1996, it committed itself to apply the provisions of the ministerial decree of September 1996, and so recognised that these returnees would have their property restored.

124. Meanwhile in January 1997, the government issued a provisional Instruction on the rural habitat aimed at regrouping farmers in villages. In the spirit of the Arusha Accords, this Instruction was originally intended to apply to returnees from the exodus of the 1950s, but because of the difficulties emerging with both returnees and the local population it was decided to extend it to the whole rural population. The objective of this arrangement, as opposed to the traditional individual farms, was to arrive at an equitable redistribution of land in a situation where there was insufficient quantity available to satisfy the needs of a large population.

125. This instruction has been the object of various interpretations (particularly concerning its legal effects) and a subject of debate in view of the dimensions of the problem and its economic, social and cultural implications. Some doubt that a provisional instruction can revolutionise a system which has been in place for decades. Others are sceptical because the mode of rural living is directly linked with the question of regulation of land-use. Yet others question whether the Instruction really extends to the whole rural population, which would imply enormous costs for re-housing those who have already found accommodation, or indeed only covers the refugees from the 1950s. These discussions have influenced the pace of implementation of the Instruction, which has not been the same in all parts of the country.

126. In certain regions, notably Kibungu (the only one where the new village system is well advanced), the population has shared out the land following a series of seminars devoted to reconciliation, held in March 1997. It was agreed that the 1996 returnees would cede part of their land to the others, while maintaining the right to first choice of the part to be retained. This redistribution was facilitated by acceptance of the principle that the State holds rights to all property not covered by land titles. A related issue is that of indemnities for buildings, etc., located on land to be shared out. In principle, when a person is displaced from the land he or she occupied, the buildings are expropriated. But in the case of Kibungu, the population agreed that persons having larger properties than the amount allotted for each farmer would relinquish the excess without compensation. It remains to be seen whether the same system can be applied in other areas, in the absence of legislation on land-use.

127. A step in this direction has been taken by the Ministry of Agriculture, Environment and Rural Development, which is drafting projected legislation on land reform. A legal framework document containing the proposed articles of the future law already exists. According to UNHCR officials on the spot, this new law is an absolute necessity, as with the setting up of the new system of villages, the mode of rural community life must be linked to agrarian and land ownership reforms.

128. Whatever the outcome, however, the land issue will undoubtedly pose a serious problem to the authorities, because the demand for land will inevitably be greater than the supply. The problem risks being exacerbated by the situation of the national economy, which has prompted many people who have lost their employment in the towns, and with it their means of subsistence, to return to their villages to take up farming. The problem of land ownership could therefore, in the months and years to

come, become a source of conflicts and disputes between the communities living in Rwanda, adding to the heavy liabilities already facing them, and endangering the process of national reconciliation. It is therefore imperative for the international community, and particularly the specialised agencies of the United Nations system, to encourage and assist the Rwandan authorities to adopt an agricultural and land-use policy which can give maximum satisfaction to the rural population, while at the same time including in their development policy measures aimed at absorbing the surplus labour-force which cannot be employed in agriculture.

## **ANNEX : The question of land ownership in international law and national legal systems**

### **Property law and international law**

1. Legal questions concerning the law of property ownership do not, as such, belong to the field of international law. In so far as they concern the relationship between the State and its nationals or between individuals, they fall into the field of private law, whether it be administrative, civil, commercial or, eventually, private international law, and therefore lie in the sovereign domain of each State. There are none the less a number of either direct or indirect references to property law in international law. Indirectly, certain provisions of international law relating to human rights refer to property rights and consequently to the law of land ownership. Article 17 of the Universal Declaration of Human Rights, for example, states that: "1. *Everyone has the right to own property alone as well as in association with others.* 2. *No one shall be arbitrarily deprived of his property*". Similarly, the 1979 Convention on the Elimination of all forms Discrimination against Women calls upon member States to ensure that women of rural origin can "have access to agricultural credit or loans, equal treatment in land and agrarian reform as well as in land resettlement schemes."

2. It should however be noted that the two International (United Nations) Covenants of 16 December 1966, and notably the Covenant on Economic, Social and Cultural Rights, do not contain any provisions concerning the law of property and therefore impose no obligations on member States to put into practice the right to property in their national legislation.

3. As is underlined by David M. Trubeck<sup>9</sup>, "*There is a linguistic convention in the Economic and Political Covenants that warrants mention. In some cases, the parties "recognise" a given right. In others, they "undertake to ensure" a right*". This semantic distinction undoubtedly has an effect on the obligations of member States. In so far as they recognise these rights, they commit themselves to implementing them through concrete provisions in programmes, bearing in mind that the Covenant on Economic, Social and Cultural Rights lists a certain number of objectives which should be reached in order to fulfil this commitment. As to the second category, member States must endeavour, through concrete measures, to implement a right, but without being obliged to achieve a precise result.

4. The right to property as it is stated in the Universal Declaration, even though it is not alluded to in the Covenant on Economic, Social and Political Rights, can at best be considered as belonging to the second category, without implying any particular obligation on the part of member States. At most they may take any steps they deem appropriate to endeavour to translate it into concrete measures. In addition, it should be stressed that Article 17 (cited above) in no way prohibits depriving a person of his/her property, but only excludes arbitrary deprivation. Consequently, and insofar as it is in the public interest, private property owners may be dispossessed of their rights on condition that this action relates to an objective of general concern, and that they receive just compensation. It might well be said that in the context of international law, the right to property is only declaratory, and that it is not accompanied by any specific provision

aimed at ensuring effective implementation or protection.

5. Some authors claim that in reality the obligations of member States are greater than they might appear at first sight. This would be the result of a combination of various provisions of the Universal Declaration. Thus Article 25 provides that "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security ....*" They therefore deduce that the guarantee of the right to food for persons living in rural areas necessarily implies ensuring and protecting their access to land and/or agricultural employment, which are their only sources of revenue. Consequently, the establishment of the right to an acceptable standard of living, notably as regards food, imposes on member States the implementation of an adequate land policy in order to reach this goal.

6. In a study prepared by the Sub-Committee for Human Rights<sup>13</sup>, it is recommended that the necessary efforts be undertaken to consolidate and further develop existing laws through preparation of a document on the right to food. The study underlines the need to protect the access of vulnerable groups to food resources. The study cites as examples of obligations which should be imposed upon member States with a view to ensuring the right to food: the protection of property rights and usufruct against invasion by commercial speculators; and the adoption of legislation aimed at abolishing the practice of share-cropping, thus guaranteeing the rights to ownership or tenure to those who cultivate the land.

7. Although appealing, this approach, which profoundly influenced movements for agrarian reform and the defence of landless peasants in the 1970s, did not produce the expected results, and it now seems to have been overtaken by a reverse trend. As Roger Plant underlines<sup>6</sup> "*Since the beginning of the 1980s the movement towards land redistribution seems to have disappeared in almost all developing countries although the number of peasants without land has grown and new modes of land concentration have appeared.*"

8. Some international instruments make direct reference to land rights, notably two Conventions of the International Labour Organisation i.e. Convention No 117 of 1962 on Social Policy (Basic Goals and Standards) and the revised Convention No 169 on Indigenous and Tribal Peoples.

9. Convention No 117 in article 4 provides : "*Measures shall be taken by the competent authorities for the promotion of productive capacity and the improvement of standards of living of agricultural producers shall include (c) the control, by the enforcement of adequate laws or regulations, of the ownership and use of land and resources to ensure that they are used, with due regard to customary rights, in the best interests of the inhabitants of the country.*"

10. Convention No 169 devotes an entire section (articles 13 – 19) to land rights as well as the rights of indigenous and tribal peoples to the natural resources of their territories and the obligations of member States to protect those rights. Thus article 14 provides: "*The right of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities*".

11. It can be deduced from these few elements that international law as it relates to the right to property, and particularly the right to land ownership (landed estate), is not very articulate and does not contain normative rules which could influence the conduct of States by obliging them to adopt particular provisions. States are left free to act as they

see fit in the light of their own political and economic interests, despite the great importance these issues have for important part of the population of the planet. As Roger Plant<sup>6</sup> has very rightly stressed: "*Most of the world's population relies on access to land for assuring its subsistence and living conditions. For millions of poor peasants, using and owning land is a predefined condition linked to other human rights. Land rights are not mentioned in legal instruments either regional or international...a number of conflicts are based on the very principle of land rights at a national level.*"

12. Thus the question of land ownership in the context of the repatriation of refugees cannot be resolved on the basis of clear and precise principles, drawn from international law, and which could create obligations for the States concerned. In consequence, each situation must be examined carefully, through in-depth study of the local land ownership system.

### **The different systems of land ownership**

13. The existing systems of land ownership are too diverse to include an exhaustive list in this relatively brief paper. The following section analyses some of the most frequently used and/or significant systems, and provides examples of situations where several land ownership systems coexist in the same country, sometimes peacefully, sometimes in conflict one with another. The two most common systems concern private ownership of land, and collective or State land ownership. These two systems are diametrically opposed, in that one favours the exclusive rights of individuals, while the other gives priority to the rights of the community as a whole.

#### *Private ownership*

14. Under the private ownership system, the rights of an individual to a piece of land are registered in a deed (title), and the cadastral description of the parcel in question must be recorded precisely in a register kept by the public authority or under its control. These rights are conferred upon a specific individual and permit him to use the land, exploiting it himself, renting it out, or selling it as he sees fit.

15. Such rights may, however, be subject to certain limitations. It is not rare in Europe, for example, that laws or regulations prohibit the sale of agricultural land to non-farmers. In order to protect the interests of farmers, in particular against speculation, state or other official bodies have been given the authority, among other things, to pre-empt all agricultural land put up for sale and not bought by farmers, in order to create land reserves, and later resell these available lands to farmers. Similarly, land use is regulated and its purpose is strictly defined in town-planning plans and documents, and changes are forbidden. These plans and regulations will determine which lands in a given region are reserved exclusively for agricultural purposes, which can be built upon, and which can be used for mixed purposes at the discretion of the owner and under the control of the public authorities.

16. In most legal systems, private property is strictly protected by law and no one can be dispossessed except when the public authority determines this to be in the general interest. This none the less implies that the general interest, as well as the procedures involved in the transfer of the property from the individual to the community, be clearly defined, and that just compensation be accorded, if necessary under the control of the judicial authority responsible for guaranteeing individual liberties.

#### *Collective ownership*

17. Collective or nationalised ownership of the land is not a homogeneous category, but can be articulated in various ways. This form of property ownership is above all characteristic of countries with communist or socialist political systems, in which the land

as a means of production cannot be the object of private appropriation, but is the exclusive property of the whole population as represented by the State. This is why when these political systems were introduced, often through revolutionary upheavals, land owners were dispossessed of their properties, which were nationalised and exploited on a community basis through collective farms or co-operatives. The farmers were no longer individual owner/operators but rather wage-earners in operations managed by the community. Agricultural techniques and choice of crops are decided by the public authorities in the framework of agricultural production plans. None the less, even in an exclusively collective system, plots of land may be assigned to individual farmers for their private use for their own subsistence. They do not own the land, nor can they give it away, rent it or sell it. On the other hand, its use can be passed on as a bequest. As this right of tenure of a piece of land is purely discretionary, it can be withdrawn as it was assigned.

18. In numerous developing countries in Africa, Asia or the Americas, land rights belong to a customary or common law system. Under this form of collective ownership, the land belongs to the community and its assignment for use by members of the community is governed by unwritten rules.

19. In sub-Saharan Africa, for example, the system of collective ownership of land is described by Jean-Philippe Platteau<sup>8</sup> as follows: "*essentially, communal ownership or tenure means that there exists a corporate entity (the tribe, the village, the lineage, the extended family) acting as joint ownership unit. This implies that the collective territory of a rural community is actually regulated by an authority that decides the allocation of the available lands, distributes land use rights to the member families, determines the uses to which the land is put, supervises land exchanges (by the way of explicit approvals), and litigates land-related problems. In most of the cases, the territory is divided into several portions according to the nature of the land rights defined over them. At one extreme we find the village commons which are open to all members of the community, and, at the other extreme, are lands that are privately held by individual rights-holders.*" Platteau also underlines that an essential characteristic of the land tenure system in that part of Africa, is that collective ownership of the land results in rights of tenure being exclusively assigned to members of one of the social groups that make up the governing community.

20. This customary system can function according to various modalities and the group of persons entitled to hold land can vary in size. Thus in Eritrea, two systems of land tenure coexisted before independence. The *risti* was a system of communal tenure in which parcels of land belonging to the village could only be assigned to direct descendants of the first farmers to have inhabited the territory of the village. The *risti* was therefore a system based on lineage. Under the *diessa*, on the other hand, land was assigned to farmers residing on the territory of the village, making the domicile the criterion. Parcels were entrusted to farmers for a period of five years after which the land returned to the community to be redistributed, either to the same farmer or another, thus rotating parcels among the members of the community. The assignment of a parcel for such a short time did not encourage the farmers to invest in improvements, since they had no assurance of renewed use of the same piece of land.

21. In customary systems, land tenure can also be based on *usufruct* (life interest). Under this system of assignment in a family context, the farmer to whom land has been assigned may bequeath it to his children, or even lease it (to a third party). In no case, however, may he sell it. The advantage of this system over the preceding one is that it offers more security, in that it perpetuates the assignment of land tenure to a family, which can therefore invest in improving it. The disadvantage is that it is a closed system whose benefits cannot be extended to newcomers.

22. Under certain land ownership systems created in the contemporary period, the

customary system has been adapted to modern circumstances. In Mozambique, for example, the land is publicly owned under the Constitution, the State having replaced the traditional communities. The management and assignment of lands has been entrusted to a state body at the national, provincial and local levels. When land is assigned, the responsible public service issues a certificate of occupation which is duly registered. If the farmer was unable to obtain this certificate and he is already occupying the land, he can obtain a licence for the use of the land. These two documents in no way constitute title deeds but could rather be compared with a lease, albeit of a precarious and revocable kind.

#### *Coexistence of various systems*

23. In Asia identical systems have functioned, some to this day. In Indonesia, for instance, land tenure was governed by a system of customary rights until colonisation, after which a system of private property was superimposed on the existing practice. Roger Plant<sup>7</sup> indicates in this regard: "*In Indonesia, land ownership during the Dutch colonial period was regulated along racial lines. Lands appropriated by Dutch colonists were subject to European agrarian law, with rights of private ownership as defined by the civil code. In contrast, the rights of native Indonesians were governed by customary 'adat' rules and procedures*". Under the *adat* rules, land tenure was assigned to members of the community without being the object of any alienation. It should be noted that the Dutch colonial system did not establish an impenetrable barrier between the two systems, insofar as certain indigenous Indonesians were able to benefit from individual property titles under the European-type law.

24. It should be noted that in general colonisation did not abolish the customary system but rather superimposed upon it one or several others. First of all, in order to accommodate the land needs of the colonists, portions of agricultural land were withdrawn from the traditional communities and assigned to private persons as freeholdings, in accordance with the legal systems existing in the home countries of the colonial powers. Furthermore, in order to validate these private rights, land registry services where titles could be deposited were set up in the colonies. This system of private property often coincided with the development of large agricultural operations devoted to intensive monoculture destined for export.

25. During the same period, certain natural resources were considered to be public property and their utilisation became the subject of detailed regulations regarding their exploitation and the use of surrounding lands. In Mali, for example, during the French colonial period, forests were classed as being in the public domain under the management of an office of forests, and their exploitation was governed by a forestry code. The code fixed the rules for cutting timber and the conditions for assignment and use of neighbouring lands, and the administrative body chose the assignees and supervised its application. The result was that at the same time three systems of land ownership were superimposed: the customary system, private ownership and public ownership.

26. This superimposition was not necessarily abolished upon decolonisation. The new States had the choice of leaving the different systems in place and limiting themselves to assigning privately-owned concerns to new farmers destined to replace the colonial settlers. They could also nationalise these concerns, and manage them as collective or State farms. The public domain was also maintained and managed, often in the same way.

27. In almost all the States having attained independence starting in the 1950s the customary system was retained. Its purview was reduced, however, by the extension of collective farms or large concerns growing cash crops, making the living conditions of the traditional peasant farmers more precarious and obliging them to adapt to new

realities.

28. Jean-Philippe Platteau<sup>8</sup> states in this regard: " *The view according to which Sub-Saharan Africa (SSA) suffers from serious discrepancy between existing land arrangements and the institutional requirement of intensive agricultural growth insofar as it may convey the idea that land tenure arrangements in SSA are essentially static. Quite the opposite appears to be true. Indigenous land practices reveal considerable flexibility. Growing population pressure and increasing commercialisation of agriculture, particularly since colonial times (when commercial crops such as oil palm, cocoa, coffee, cotton and groundnuts were introduced), have given rise to gradual but meaningful changes in land tenure practices in the direction of enhanced individualisation of tenure, larger incidence of land sale transactions, increased use of money in connection with land loans, and shift from matrilineal to patrilineal inheritance patterns.*"

#### *Tradition vs. Efficiency*

29. The diversity of existing land ownership systems has been debated among specialists over the past few years, particularly as regards developing countries. Some question whether the customary system should not simply be done away with, since it gives farmers no real rights to land, nor the necessary security to invest in improving their farms. These factors, they claim, would explain the lack of profitability and efficiency of this form of land use. Some therefore consider that improved management of agricultural resources would best be achieved by privatisation of farm lands and the registration of land titles. Greater security, efficiency and productivity would thus be assured without revolutionary changes to the land tenure system, since private ownership titles would be assigned to those who are already farming the land, and who belong to the community which already had tenure under the traditional system.

30. Other economists argue that on the contrary, the communities which function under the customary systems have sufficient flexibility and adaptability, and that their apparent inefficiency is illusory. Jean-Philippe Platteau<sup>8</sup> remarks in this regard: " *Upholders of the "static" view have ignored or downplayed the dynamic potential of indigenous African land systems partly because they have failed to see that individual tenure can exist under a general system of corporate ownership; that communal arrangements are genuine multi-tenure systems with different land uses calling for different tenures; and that land-use rights, most often to a specific plot of land, are held by individuals or households. Such systems are flexible enough to allow the proportion of lands held under relatively well-secured rights of individual possession to increase as the need arises for agricultural intensification and the accompanying long-term investment.*"

31. Despite their diversity, the various methods of appropriation and use of land resources have a number of common denominators. In numerous developing countries, in view of the symbolic value of the land and its attachment to ancestors, ownership must necessarily be collective and responsibility for its assignment be entrusted either to the traditional leaders or the public authorities. A radical change was brought about by the colonial system, which introduced private land ownership and thereby the right to alienate (dispose of) property. Furthermore, the concentration of lands for the purpose of intensive cultivation entered into conflict with the traditional modes of land tenure. In many cases at the time of decolonisation the land was nationalised and its exploitation collectivised. This does not in itself constitute a radical departure from the traditional system, except as regards the relationship of the individual with his ancestors through the intermediary of the parcel of land, which disappeared. The conflicts have nonetheless not ceased with independence, since the successor States have inherited this double land ownership system and must not only manage it, but even either further develop it or grant concessions.

## **BIBLIOGRAPHY**

1. EDWARDS Beatrice and SIEBENTRITT Gretta Tovar, "The repopulation of rural El Salvador", Places of origin, Lynne Rienner Publishers, London 1991.
2. JOIREMAN Sandra Fullerton, "The minefield of land reform : comments on the Eritrean land proclamation", African Affairs (1996) 95, pp 269-295.
3. KIBREAD Gaim, "Ready and willing ... but still waiting, Eritrean refugees in Sudan and the dilemmas of return", Horn of Africa Series, Life and Peace Institute, Uppsala, April 1996.
4. LUNSHOF Hans, "Land rights of returnees to the Byumba Prefecture" (Rwanda), UNHCR Geneva, December 1996, unpublished.
5. MCGREGOR JoAnn, "Staking their claims : Land disputes in Southern Mozambique", St Anthony's College, Oxford, July 1995.
6. PLANT Roger, "Land rights in human rights and development. Introducing a new ICJ initiative", The Review No 51/1993, ICJ Geneva.
7. PLANT Roger, "Land rights and minorities", MRG Reports, Minorities Right Group, London 1997.
8. PLATTEAU Jean-Philippe, "Reforming land rights in Sub-Saharan Africa. Issues of efficiency and equity", UNRISD Discussion Papers, March 1995.
9. TRUBEK David M., "Economic, Social and Cultural Rights in the Third World : Human Rights Law and Human Needs Programs", in Human Rights in International Law : Legal and Policy Issues, T. Meron Editor, 2 volumes, Clarendon Press, Oxford 1984.
10. UNHCR evaluation report, Jeff Crisp and Andrew Mayne, "Review of the Cambodia Repatriation Operation", UNHCR/EVAL/CAM/13, Central Evaluation Section, September 1993.
11. UNHCR International Protection Handbook, Division of International Protection, Geneva, 1996.
12. UNHCR, "Cambodia, land identification for settlement of returnees in Cambodia", PTSS Mission Report 91/33, Geneva 1991.
13. United Nations Centre for Human Rights, "Right to adequate food as a human right", Study Series No 1, New York, 1989.
14. ZINSER Alfredo Aguilar, "Repatriation under conflict in Central America", Mary Ann Larkin, Centre for Immigration Policy and Assistance and Intertect, Georgetown University, USA 1991, pp.57-114.