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INDIGENOUS RIGHTS IN GUATEMALA-
The Observance of the Agreement on Identity and Rights
of the Indigenous Peoples

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Summary

In recent years more attention has been given to the rights of the indigenous peoples. Global awareness has been raised concerning the difficult circumstances under which they live. The ILO Convention No 169 and the UN Draft Declaration will serve as foundations for a new relationship between States and their indigenous peoples, promoting a stronger protection against discrimination and violations of human rights.

Guatemala is probably the Central American country that has suffered the most from civil war and abuse of the indigenous population, consisting of the Mayans, Garífunas and Xincas, representing almost 60% of the Guatemalan population. The underlying cause for the armed conflict was the controversial question of land and natural resources. Guatemala is the only country within its region missing laws concerning land distribution and registration and the agrarian system has kept the country from developing during the last few centuries, with a majority of the population living in severe poverty. The indigenous peoples of Guatemala have held a non-dominant position ever since the Spanish Conquest in 1524 and they have been exploited and abused through out the history. However, in December 1996 the Agreement on a Firm and Lasting Peace was signed between the Government and the armed opposition URNG, which officially marked the end of 36-years of violence and a long process of peace talks. The Agreements signed during the negotiations concern a number of areas of great importance for the Guatemalan people and the development of a strong democracy in the society. Agreements were concluded concerning human rights, the identity and rights of the indigenous peoples, social and economic rights, the role of the army in the new democratic society, the integration of the URNG in the legal society and the returning of refugees and displaced persons. The Agreements contain several governmental obligations to solve the complicated conflicts that continue to jeopardise the peace. The whole process was supervised by MINUGUA (UN) holder of the mandate to verify the human rights Agreements signed during the Peace Process, along with the institutional building and creation of a reliable authority.

The Agreement on Identity and Rights of the Indigenous Peoples (AIRIP) is most likely the one that aims the highest for the development of a stronger protection of the indigenous peoples of Guatemala. It establishes the constituting of five Commissions for the elaboration of proposals for new legislation concerning the position of the Indigenous in fields of education, recognition of Mayan languages, spirituality, participation in the decision-making process and the distribution of land. The Commissions have been established according to the timetable but not all are working as well as expected. The Commission on the Recognition of the Indigenous Languages of Guatemala worked out a proposal, which was presented for the Congress. There are not only two or three indigenous

languages within the State of Guatemala but twenty-three and four of them are so called territorial languages and the rest community languages. The proposition included the recognition of the territorial languages within each region, but it is also followed by huge cost and the issue on how to resolve the problem in practice is still unsolved. The Commission on Spirituality and Holy Places has the mandate to define the holy places and the indigenous administration of the centres of archaeological value. The work is characterised by problems co-ordinating the work of the indigenous organisations and mistrust among the Parties and is not proceeding as well as the other Commissions. The Joint-Commission on Educational Reform finished its work in July 1998, presenting a number of reforms concerning participation, social and ethnic decentralisation and increased investments for the academic efficiency and quality. The following Joint-Commission on Reform and Participation is the holder of the difficult task of assuring the indigenous population their participation rights. It had a very hard timetable to follow and too much work to do, including the overview of proposals presented by other commissions, which slowed down the work. The last Commission, concerning land rights, is still working on a number of issues concerning land registration, administration and distribution of lands and the access to natural resources. The Commission has the most difficult task of all as many of its obligations are established in the Economic and Social Agreement including the developing of an agrarian reform.

The Peace Agreements also established the creation of a Commission on Constitutional Reforms. The Commission worked well and can be seen as the best example of a successful co-operation between the indigenous and non-indigenous parties within the whole implementation process. The 56 propositions for the new Constitution were accepted by the Congress and submitted to a referendum for the participation of all Guatemalans. The number of voters turned out low and the proposals were rejected. Hence, the Guatemalan people have to prepare themselves for the long process still ahead of them.

Abbreviations

AIRIP	Agreement on Identity and Rights of the Indigenous Peoples
CACIF	Chamber of Agriculture, Commerce, Industry and Finance
CEH	Commission for Historical Clarification
CNR	National Commission on Reconciliation
COPMAGUA	Co-ordination of Organisations of the Mayan People of Guatemala
EGP	Guerrilla Army of the Poor
FAR	Armed Rebel Forces
FLACSO	Latin-American Faculty of Social Science
ILO	International Labour Organisation
MINUGUA	The UN Mission for Verification of Human Rights in Guatemala
NOA	New Anti-Communist Organisation
ODHAG	The Guatemalan Archbishop's Office of Human Rights
ORPA	Organisation of the Armed Villages
PAC	Civil Defence Patrols
UN	United Nations
URNG	The Guatemalan National Revolutionary Unit

1 Introduction

Human rights have emerged as an objective and general international legal standard. Consequently, the principles of human rights now constitute a standard, which is external to the individual States but also intrusive. As a result, domestic legal and social values have been submitted to external tests and evaluations.

Lately the international community has given more attention to the rights of indigenous peoples. Specific rights and measures for the protection of the world's indigenous populations are supplementing the instruments protecting against discrimination and granting the fundamental human rights and freedoms. Indigenous peoples are one of the most vulnerable groups in the international community of today. Conflicts rise between the indigenous groups and the dominant populations groups regarding access to power, social norms and land ownership. Very few standards have been established by the international community regarding the status of indigenous peoples and their position as non-participants in our modern society. The question whether indigenous peoples are to be given the status as peoples is highly controversial but it is not possible to have the indigenous peoples frozen in time as the need of economic resources is necessary even for them.

Guatemala has once been called the worst violator of the human rights of the whole continent. Why was the violence, mainly used by government soldiers directed towards civilians and particularly the Mayan people and among them the women? Guatemala is one of the few countries with an indigenous population of 59 %, and is still suffering from one of the strongest discrimination in the world.¹ The indigenous populations lost their dominant position with the Spanish Conquest in the 16th century and throughout the history they have been exploited and deprived their fundamental human right. The term Ladino is often used for persons belonging to the mixed part of the population and who were discriminated in the beginning since they were neither Mayan nor Spanish. Today the Ladinos are the dominant group in Guatemala except from the Spanish. Still the word is sometimes used in a derogatory way to show that they are distinct from the pure Spanish.²

¹ Inter-American Institute of Human Rights, Guatemala; Actualización de 1998 y Enero-Mayo 1999, p.34. According to a World Bank study, 80% of the population live in rural areas and 90% on an income that falls below the poverty line, comparing to 66% poor among the non-indigenous. Promise and Reality, Implementation of the Guatemalan Peace Agreements, p. 37.

² According to Inter-American Institute of Human Rights, Guatemala; Actualización de 1998 y Enero-Mayo 1999, p.34. There are 23 Mayan languages one Xinca and one Garífuna. The majority languages are the Quiché (spoken by 29%), the Kakchiquel (25%), the Kekchí (14%) and the Mam (4%). The remaining 28% use more or less another 18 languages. Whole regions of the territory are considered monolingual. (Alta Verapaz, 95%; San Marcos and El Quiché, 80%; Totonicapán, Sololá, and Huehuetenango, 85%).

In February 1999, the Truth-Commission (CEH) released a report on the violations committed during the 36-years long armed conflict. It is hard to get an exact number of victims, as the numbers vary a lot from different investigations but among the victims registered, 83 % of the fully identified victims were indigenous and 17% Ladino.³ A huge number of children were among the victims and were submitted to executions, disappearance, torture, rape and other violations of their fundamental rights.⁴ State and related paramilitary forces were responsible for 93% of the violations documented by the CEH.⁵ The Guerrilla was responsible for 3% of the violations.⁶ Among the civilians some insurgent groups often representing economic and political powers were considered to be allies with the army. Within the cases registered by the CEH these groups were responsible for 3% of the human rights violations.⁷

The Guatemalan conflict can be seen as a reflection of the colonial history with its cultural, social and economic patterns. The economic structure in Guatemala is in close connection with the anti-democratic system as all the properties are in the hands of a few. After the signing of the Final Agreement on the 29th of December 1996, several intents have been made showing the will of improving the situation for the indigenous peoples. However, the Peace Agreements imply the importance of development in the Guatemalan society, containing several governmental obligations. However, the process is long and has just started. The goal of achieving true national reconciliation has to be sincere for the success and the reconstruction of the society. The Agreement on Identity and Rights of the Indigenous Peoples (AIRIP) was signed on the 31st of March 1995. The Agreement includes constitutional reforms and the establishment of five commissions for the elaboration of these reforms and other issues related to the indigenous populations and their relationship to land, languages, education, holy places and participation rights.

³ The CEH registered a total of 42.275 victims, including men, children and women. 23.671 of these were victims of arbitrary execution and 6.159 of disappearance. Inter-American Institute of Human Rights, Guatemala; Actualización de 1998 y Enero-Mayo 1999, p. 33, CEH, Memory of Silence, I, note. 1, according to the CEH these figures are only the one documented by the CEH so therefor not precise.

⁴ CEH, Memory of Silence, I, note. 28.

⁵ Including 92% of the arbitrary executions and 91% of the forced disappearance. CEH, Memory of Silence, I, note. 15.

⁶ Inter-American Institute of Human Rights, Guatemala; Actualización de 1998 y Enero-Mayo 1999, p.25 .

⁷ Including 5% of the arbitrary execution and 2% of the forced disappearance CEH, Memory of Silence, I, note. 21.

1.1 Purpose of the Study

I have chosen to examine the observance of the AIRIP on the basis of the discrimination that the indigenous peoples of Guatemala have suffered during history. Further to this, the Parties showed great interest for developments in the field during the whole Peace Process and when signing the final Peace Agreement in December 1996 after 36 years of civil war. The purpose of this study is to analyse the protection of indigenous peoples in international law and the recent developments in the field. However, I will focus on the observance of the AIRIP in Guatemala. Further to this I will discuss the implementation of the Commissions established in the Agreement and the proposals made for the full implementation of the commitments established and for constitutional protection. The thesis will therefor take up a number of distinct areas most significant for the recognition of indigenous rights.

1.2 Method and Material

This graduate thesis in international law is based on a Minor Field Study, financed by a scholarship from Sida, carried out in Guatemala during the period of March-April 1999. The method comprises in the analysing of texts and reports from the Commissions and organisations working with indigenous issues in Guatemala, international and national legislation and where relevant also the studying of the case law.

The general part on the international legal instruments is based on literature and articles written in the field as well as reports from the Human Rights Sub-Commission.

There is not much material on the field regarding the specific Guatemalan situation. The process is still in its initial stage and time is still needed for the full understanding and of the effects of the Agreements and obligations set forth therein. The material is therefor mainly based upon international and national legislation, articles, literature, statements and documents from indigenous and governmental organisations as well as the reports from the Commissions.

The latter part of this study, concerning the observance, is mainly based upon documents from Indigenous and Non-Governmental Organisation and among these the reports of the Commissions. Of essential importance are the documents from the Truth-Commission, the United Nation's Verification Mission and the AIRIP.

1.3 Delimitations

The thesis mainly intends to examine the situation of the indigenous peoples in Guatemala and the observance of the AIRIP. Five Commissions were established in the Agreement and another three concerning the rights of indigenous women, indigenous customary law and constitutional reform have been instituted. Consequently I will focus on the three joint-commissions and the two official commissions and will not discuss the work of the remaining three. A short introduction to Peace Agreements signed during the process will be presented but I will focus solely on the observance of the AIRIP. Concerning the Joint-Commission on Rights Relating to the Land of Indigenous Peoples I will not discuss the obligations of the Commission lying under the Social and Economic Agreement. Further to this I will briefly introduce the constitutional reforms and regarding these only the ones concerning pure indigenous issues.

1.4 Disposition

The first part of the thesis is meant to introduce the reader to the history of Guatemala for the understanding of today's situation. Since historical events play a major role in the Guatemalan society today the background has been given significant attention. Then an introduction to the international human rights law applicable on the indigenous populations is presented, including protection against discrimination, minority rights, group rights and the protection against the violations that the Guatemalan people have suffered during the long period of armed conflict. The following part concerns the specific protection of indigenous peoples in international law and the implementation of the international instruments in Guatemalan national law. A short introduction will be made to the Peace Agreements. Then I will solely discuss the observance of the Indigenous Agreement, its content and importance for the indigenous peoples and the work of the commissions. The proposals and results from the referendum concerning constitutional rights must be discussed for the completeness of the verification process and the observance of the Agreement and the development of the Guatemalan society.

2 Historical Overview

2.1 Political Background

The proclamation of independence in 1821 was an action directly prompted by the elite of Guatemala. It developed into a State ruled by racists in its precepts and practises, protecting a minority of the population without including the majority. This pattern runs through the whole conflict directed by the State, excluding the poor and the Mayan, as well as the ones fighting for justice and social equality.⁸

The land conflict started in 1952 when the Government and President Jacobo Arbenz Guzmán, tried to transform the economy by dictating a new law concerning the agrarian reforms trying to restore the land that were not cultivated.⁹ The greatest landowner was the American United Fruit Company cultivating only 15% of the land belonging to it. The Government expropriated 400.000 acres and offered compensation for the land. The law was rather vague concerning the definition of proper use of land, which led to land invasions and violence from the peasants. A liberation army, supported by CIA crossed the border in June 1954 and Arbenz resigned as president and Castillo Armas was installed. There had been a few communists in the Guatemalan Labour Party (Partido Guatemalteco de Trabajo), which made it possible for the United States to intervene in the name of anti-communism. The reforms fell with Arbenz and Armas proceeded with the “revolution” and used the communist label against many supporters of the revolution, especially union organisers and Indian village leaders. 99,6% of the land expropriated during the Arbenz regime was returned to its former owners.¹⁰

The Guatemalan civil war started with the armed military uprising in 1960. 200.000 Guatemalans died during the 36-year long conflict and another 40.000 disappeared. More than 400 villages were totally destroyed and not less than 100.000 escaped to Mexico.¹¹ The Guatemalan history is characterised by terror and paramilitary forces fighting against the regime. The paramilitary forces, FAR, were constructed in 1962¹² as an attempt to protect the interest of the rural poverty and to restrain political opposition against the ruling powers. The main support came from peasants, radical students and army dissidents, all members of

⁸ CEH, Memory of Silence, I, note. 3.

⁹ Dictated on the 17th of June 1952. Also called, Decreto 900. ODHAG, Guatemala nunca más, No. III, p..9.

¹⁰ Armon, Hacia dond  va la transici n? p.23.

¹¹ Armon, Hacia dond  va la transici n? p.23.

¹² ODHAG, Guatemala nunca m s, No. III, p.35.

non-indigenous middle-class.¹³ The idea of FAR was based in the tactics of the Cuban Revolution and seen as a conflict between communism and capitalism supported by Cuban training. The military was given a lot of power and has always been supported by the United States when the situation of controlling the Guerrilla got over hand. The guerrilla movement disappeared in 1966-67 but only for a few years and rose up in the 1970s.¹⁴ The guerrilla activities increased and several fragments were constituted each of them controlling different parts of the territory.¹⁵

When elections were held in 1970 the army took direct hold over the State apparatus and the elections appeared to be free but were not as they were held under extreme terror from the military. During the short but democratic Government of 1974-78 many student and union leaders organised and identified themselves with the armed fight for the freedom of organisation, land rights and democracy. This led to another wave of repression of co-operative supporters in 1977 and a number of assassinations, murder threats and massacres were carried out against union leaders, students, professors, priests and peasants.¹⁶ The guerrilla movement had its climax around 1978-79 with six to eight thousand combatants and up to half a million collaborators operating in the majority of the departments of the territory.¹⁷ The many different guerrilla divisions joined and created the URNG in 1982, but the different fractions remained within the organisation. However, the movement got stronger and more united. The indigenous populations started to get more and more organised out of fear from the disappearance of the Mayan languages and culture.¹⁸ The military leaders used the tactic of the “burned land”¹⁹ as a way of attacking the population. Land and houses were systematically burned down. The military did not look for the participants allied with the Guerrilla anymore. On the contrary it destroyed houses, cultivations and expelled dozens of peasants deemed to fail in their search for survival.²⁰ Soon after this the massacres started to take place. In the beginning the massacres were carried out indiscriminately without making any distinction between children, elderly people, women, men or members of the Guerrilla. In spite of some villages being totally destroyed some were left intact. In some cases the military threatened and warned the population from behaving in a certain way but without massacring or destroying the villages.²¹

¹³ Costello, Patrick, Historical Background, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997, p. 10. Armon, Hacia dond  va la transici n? p.24.

¹⁴ Among others, Ej rcito Guerrillero de los Pobres(EGP), Organizaci n de los Pueblos Armadas(ORPA).

¹⁵ Armon, Hacia dond  va la transici n? p.27.

¹⁶ Armon, Hacia dond  va la transici n? p.27.

¹⁷ Costello, Patrick, Historical Background, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997, p. 13.

¹⁸ ODHAG, Guatemala nunca m s, No. III, p.84.

¹⁹ Emphasis added.

²⁰ ODHAG, Guatemala nunca m s, No. III, p.111, the tactic of the “burned land” started in 1981.

²¹ ODHAG, Guatemala nunca m s, No. III, p.112.

In 1983 an attempt of constructing a democratic regime, led by Oscar Mejía Vítores was enforced. The majority of the massacres continued but it was necessary to replace the terror of former military leader Efraín Ríos Montt and to reinstall a civilian government. Ríos Montt had under one year of governing literary had the objective of depopulating whole Mayan areas where the Guerrilla were operating. The majority displacement and escape took place in these years. About 100.000 persons are estimated murdered or disappeared between 1981-83 and more than half of the massacres took place during the two year period.²² Civil Patrols, (PAC) were constituted in a lead to control the civilians and to create social disintegration among the population All men over 16 were forced to participate in the PACs and to fight the guerrilla movement and all persons fighting the regime. The refusing to do so proved participation in guerrilla activities and several assassinations were carried out as a way of forcing Indian villages to inform their neighbours against the military. In the mid-eighties the PACs had about 900.000 members working as the ears and eyes of the military.²³ According to the CEH hundreds of cases are documented where civilians were forced under gunpoint to rape women, to torture and to mutilate corpses and to kill.²⁴

In 1984 most of the massacres had ended and the army established various institutions to control the rural population. Many peasants were forbidden to return to their home villages and the army could distribute the land without giving it to the rightful owners.²⁵ Elections for Congress were held and a constitution was presented. The new Constitution was approved in 1985. The presidential elections of 1985 were characterised by military interference still working to destroy the guerrilla movements. During the election campaign several organisations had been formed, some of them representing indigenous interests and disappeared and displaced persons and the position of women. However the military was too strong and the Constitution too weak, which resulted in the legalisation of many of the institutions created during the worst years of violence and anti-democratic governing. The PACs were given a new name, Voluntary Committees of Comités of Civil Defence (Voluntarios de Defensa Civil), and according to studies they still had 700.000 members in 1988.²⁶

Mejía had lost the presidential elections in 1985 and was replaced by Vinicio Cerezo Arévalo. Along with the new Constitution in 1985 the Procuradería de los Derechos Humanos²⁷ was created. Arévalo and his Government had failed in

²² CEH, Memory of Silence, I, note. 33, Armon, Hacia dónde va la transición? p.27.

²³ Armon, Hacia dónde va la transición? p.28.

²⁴ CEH, Memory of Silence, I, note. 50.

²⁵ Armon, Hacia dónde va la transición? p.28.

²⁶ Costello, Patrick, Historical Background, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997, p. 16. Armon, Hacia dónde va la transición? p.29.

²⁷ Institute working as an Ombudsperson for Human Rights.

trying to investigate the military violations of human rights. Partly this was due to a demand of amnesty for all the crimes committed by the secret police forces after 1982.²⁸ In 1993 the governmental president of the negotiations made a serious interruption when he suspended the peace talks and announced that the war would be won by military means. Twenty days later President Serrano suspended the Constitution and a new breakout of massacres was feared but this period did not last for long and Serrano was forced to resign after only one month.²⁹ A repressive apparatus replaced the judicial system that served as an illegal and underground system directed by the military intelligence.³⁰

The military offensive produced the escape of all the displaced persons, living in the mountains, fighting to survive without a place to return to or where to sow. The Guerrilla was made responsible for the survival of the displaced population and had to work for the necessary defence and survival of these people.³¹ The Mayans were many times identified as the guerrilla support base or allies. The consequence of these suspicions was massive violence directed towards the indigenous peoples independent of their actual involvement in guerrilla movements.³² The Guerrilla was unable to protect the ones who had supported them which created a broad sense of abandonment, deception and rejection in these sectors.³³ Many crimes were also committed by the Guerrilla such as arbitrary executions of persons before relatives and neighbours.

In the latter years of the 1980s the situation got worse and civilians were used as intent of oppressing the URNG and to succeed whole areas were obliterated. The Guatemalan regime could not defeat the guerrilla movement despite the violence and terror characterising life for unarmed civilians.

Many times have The USA interfered in the historical development of Guatemala. The persons governing the USA disapproved of the political leaders in Guatemala and participated in military coups and the manipulation of elections. The violence constituted the creation of death squads financed by the bourgeoisie operation undercover, such as Mano Blanca, Ojo por Ojo, New Anti-Communist Organisation (NOA), to fight communism and guerrillas with total impunity and beyond official control. Guatemalan officers and counterinsurgency techniques were direct factors in the internal conflict supported by the USA.³⁴

The history is coming back once again, close to the disapproval of the high rates of criminality and poverty. Small private death-squads are appearing but in a

²⁸ Costello, Patrick, Historical Background, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997, p. 16. Armon, Hacia dond  va la transici n? p.30.

²⁹ Armon, Hacia dond  va la transici n? p.31.

³⁰ CEH, Memory of Silence, I, note. 9.

³¹ ODHAG, Guatemala nunca m s, No. III, p.113.

³² CEH, Memory of Silence, I, note. 31-32.

³³ CEH, Memory of Silence, I, note. 35.

³⁴ CEH, Memory of Silence, I, note. 13 and 93.

milder form. Students carry out actions to show their discontent of the Police not fighting thieves and rapists. The conflict in Guatemala was not a one with only two parties, it has to be understood within the framework of the country's social, economic and cultural conflicts. The state deliberately used the military threat of the insurgency and justified it by the concept of the internal enemy. There is a long tradition of military rule in Guatemala and even today, as writing, the military has great presence in the whole of Guatemala with its efficient structure.

The weak country's institutions lost their possibilities of working effectively and suffered a loss of legitimacy since people have lived with the certainty that the army retains effective power in the country for many years. The State policy took advantage of the situation to control the army, population and the society. It was all based upon a political-military strategy violating the constitution, the laws and the human rights. The system depended on a number of informants infiltrating various institutions. The use of illegal detention and illegal detention centres is known and it was not only about deprivation of one's liberty but systematic subjection to interrogation, torture and other degrading treatment. In the majority of the cases the persons were executed or disappeared without judicial procedure.³⁵ Many of the horrible actions committed by the Army and the Special Forces were given high publicity as a way of keeping the fear among the population and to maintain the terror among the Mayan communities.

2.2 The Mayan Communities

During the worst years of the conflict many Mayans were forced to conceal their ethnic identity, manifested in language and traditional dresses. Women were not forced to participate in PACs as the men. Yet the traditional dress could identify the village to which a person belonged, thus many men stopped using the dress to avoid identification. The Mayan Community was badly hurt by the military's aggression towards profound elements for the culture as the killing of their elders, women and children. Through these actions the transmission of the Mayan culture was seriously hurt from generation to generation. Members of the PACs infiltrated the communities and substituted the traditional authorities. The strategy of infiltrating and disturbing the traditional Mayan society caused serious rupture in the oral transmission of knowledge of their own culture, norms, respect and service to the community. Hereby the arbitrary use of power was introduced.³⁶

The estimated numbers of displaced persons in Guatemala varies from 500.000 to one and a half million. The displaced persons, still being within the territory were forced to move constantly to avoid military confrontation and to search for food. The people who looked for refuge in Guatemala City sought anonymity as a way of surviving even though they many times arbitrarily were suspected to work

³⁵ CEH, Memory of Silence, I, note. 37-41.

³⁶ CEH, Memory of Silence, I, note. 62-64.

with the guerrilla. Still many Mayans lack documentation and campaigns are driven to identify them.³⁷

2.3 Negotiating for Peace

Different fractions within the army and the economic sector started to feel threatened by the continuing conflict and started to call for peace. The many years of civil war had started to affect the tourism and their interests were threatened. The search for a solution began in 1987. Violence and impunity were still a part of the daily life in Guatemala though the violence had decreased. Still there were groups that opposed the peace process because of their different interests.³⁸

The first step towards negotiations with the URNG and the National Commission on Reconciliation (CNR) took place in Oslo March 1990 but the agenda was not confirmed until April 1991 in Mexico. The army wanted to end the conflict without changing the political and economical structures of the society. The URNG wanted to exercise a greater political influence and go to the bottom of the elements starting the conflict. The different positions of the two parties influenced the slow process. Fearing that the outside world would block the loans to Guatemala and the Nobel Peace Prize for Rigoberta Menchú Tum furthered the process.

In 1994 the first agreement concerning human rights was signed and international organisations started to take part in the negotiations and the UN had a very important role for the progresses made. The AIRIP was signed in 1995 and the Social-Economic Agreement in 1996. The final Peace Agreement was signed in Oslo on the 4th of December 1996 between President Alvaro Arzú Irigoyen and the URNG and with the participation of the UN. The Accord established certain obligations with high importance for the Guatemalan history.

The Commission for Historical Clarification was established on June 23 1994 through the Agreement of Creation of a Truth Commission concerning the human rights violation and the violence of the internal conflict. It was created in order to “clarify with objectivity, equity and impartiality”³⁹ the criminal actions of the armed confrontation. According to the Agreement the commission shall recommend measures to preserve the memory of the victims and the constructing of a society with mutual respect. In February 1999 the Commission’s report containing conclusions and recommendations was presented. All Parties agree of the importance of the report for a lasting peace.

³⁷ CEH, Memory of Silence, I, note. 65-67 and 70.

³⁸ CEH, Memory of Silence, I, note. 147-148.

³⁹ CEH, Memory of Silence, prologue.

3 Applicable International Human Rights Law

Many hold that human rights are individual rights and not collective by its nature. There are many occasions where group rights have been recognised in national law, as for land rights and indigenous land ownership.⁴⁰ Many group rights do exist in international law, such as rights of women, ethnic groups and protection against racial discrimination. International law further contains some customary laws which are binding for all member states regardless of their ratification, implementation, codification or enforcement. These laws, *jus cogens*⁴¹, in international human rights law and specific instruments regarding indigenous and tribal peoples are regarded with the highest status and are non-derogable. For instance rules regarding the prohibition of genocide, slavery, torture and crimes against humanity.⁴² The constant references made in the UN Charter⁴³ to the principles of fundamental freedoms of human rights and of equality and self-determination underline the status of the Charter in international law, to which all Member States have agreed to.⁴⁴

3.1 Discrimination and Equality before the Law

3.1.1 Introduction to Protection against Discrimination in International Law

Studies have been made concerning the treatment of indigenous peoples and racial discrimination. These studies were not given much importance until the creation of the UN Sub-Commission of Prevention of Discrimination and Protection of Minorities, which was created to develop international standards on indigenous rights and to review the developments concerning the protection of human rights and indigenous peoples. The protection against discrimination is based upon the notion of equality proclaimed in Article 1 of the Universal Declaration of Human Rights.⁴⁵ Together with the International Covenant on Civil

⁴⁰ Example of this the USA recognise collective rights in national law.

⁴¹ Jus Cogens is a rule of international law from which no derogation is possible and which can only be modified by a new rule of the same character.

⁴² The Convention against Torture and other Inhuman Treatment was adopted by Decree 52-89, published on the 26th of April 1990. Ward, Elaine, Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland, p.19.

⁴³ 26th of June 1945.

⁴⁴ Ward, Elaine, Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland, p.20.

⁴⁵ Approved by the UN in 1948, also in force in Guatemala since that date.

and Political Rights,⁴⁶ the two instruments prohibit the distinction or discrimination of the enjoyment of the rights and freedoms stated.⁴⁷ The discrimination in international law relates to the discrimination against a person in the sense of unfair, arbitrary, unreasonable and unjustifiable distinction based upon one individual belonging to a particular group.⁴⁸ The UN Charter's Article 1(3), stating the purpose of the United Nations, mentions the importance of international co-operation towards a greater respect for human rights without discrimination based on race, sex, language or religion.⁴⁹ However, there are many laws that are based upon distinctions between groups, but not every distinction creates discrimination. There is a duty for the State Parties to undertake measures to reassure that national law is in conformity with the International Convention on the Elimination of All Forms of Racial Discrimination⁵⁰ and if policies, laws or regulations create discrimination, that fact alone makes the state responsible.⁵¹ Article 4 clearly states that freedom from discrimination is here far more important than the freedom of speech and association.⁵² It is important to add the importance of Article 14, which still has not been ratified by all Member States. A State can, whenever, declare the competence of the Committee for Elimination of All Forms of Discrimination but without such declaration the Committee cannot receive any complaints from individuals or groups of individuals of a State.⁵³

The right to education is granted in Article 26 of the Universal Declaration of Human Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights. Article 27 of the International Covenant on Civil and Political Rights⁵⁴ states the right to enjoy the culture, language and religion together with

⁴⁶ Articles 2(1), 14(1), 24, 26 and 27 of the International Covenant on Civil and Political Rights. Article 2 and 7 of the Universal Declaration of Human Rights. Ratified by Guatemala on the 11th of September 1992.

⁴⁷ Lerner, Nathan, Group Rights and Discrimination in International Law, p. 25.

⁴⁸ Lerner, Nathan, Group Rights and Discrimination in International Law, p. 25.

⁴⁹ Protection is also states in, among others, Article 14 of The European Convention for Protection of Human Rights and Fundamental Freedoms, Article 1 and 24 of The American Convention on Human Rights (in force in Guatemala since the 21st of August 1987), The American Declaration of the Rights and Duties of Man Article 2(in force in Guatemala since 1948), preamble and The African Charter on Human and People's Rights Articles 2, 3 and 19.

⁵⁰ 21 of December 1965, in force 1969, Approved in Guatemala by Decree 105-82, published on the 6th of January 1984.

⁵¹ A. 1(1) defines racial discrimination as distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. A. 1(4) and A. 2(2) contemplate state taking "special or concrete measures" to redress current or historical inequities.

⁵² Ward, Elaine, Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland, p. 24.

⁵³ Lerner, Nathan, Group Rights and Discrimination in International Law, p. 62.

⁵⁴ The International Covenant on Civil and Political Rights was adopted by Decree 9-92, published on the 11th of September 1992.

others.⁵⁵ The Convention against Discrimination in Education⁵⁶ has an important significance regarding indigenous peoples⁵⁷. Often indigenous peoples are not taught in their mother tongue, nor is their culture reflected in such extension, which can be fundamental for the preservation identity of the group.⁵⁸

When it comes to assessing the discriminatory action, attention is given to the result and not the act, regardless of the government's intention concerning the discriminatory action; it would have to stand responsible for contravention of this convention.

3.2 Minority Rights in International Law

3.2.1 Introduction to the Protection of Minorities in International Law

When the new UN Charter was constituted in 1945 no references were made to the situation of minorities and neither in the Universal Declaration of Human Rights in 1948. Without making references to minority rights they both make a lot to the fundamental human rights of all persons. Article 2 of the Universal Declaration of Human Rights contains a clear statement of non-discrimination. By the adoption of the Declaration of All Forms of Racial Discrimination in 1982, based upon religious discrimination, the UN took one of its first initiatives for the protection of minorities. Many feared that the recognition of minorities would create fragmentation and separatism and undermine the national unity. Concerning the treatment of indigenous peoples and minorities the States are, according to the UN Charter, legally bound to respect human rights and fundamental freedoms in the interest of international solidarity. Article 1(3) of the Charter states the economic, social, cultural or humanitarian problems, which all are in need of international co-operation in order to prevent one State from undermining the whole regime by not participating.⁵⁹ The Charter promotes the strengthening of the respect for human rights and the fundamental freedoms without any distinctions concerning sex, race, language and religion.

⁵⁵ Article 27 only concerns one individual's right to enjoy the mentioned rights and does not contain provisions for groups.

⁵⁶ 14th of December 1960, in force 1962, in Guatemala, through Decree 112-82 on the 20th of December 1982, in force since the 4th of May 1983.

⁵⁷ A.1 (1) defines discrimination to include all types of "distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education".

⁵⁸ Lerner, Nathan, Group Rights and Discrimination in International Law, p. 147.

⁵⁹ Ward, Elaine, Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland, p. 21.

The two International Covenants, concerning economic, social and cultural rights and civil and political rights, were adopted by the UN General Assembly in December 1966. The two Covenants speak about the right of self-determination granted to “all peoples” and the free disposal of their natural resources. The use of the term “all people” without limiting the interpretation, would include indigenous peoples if the spirit of the Covenant were to be respected.⁶⁰ Essential parts are equality before the law, integration of all human beings and the clear prohibition of genocide. The constant intents of defining “peoples” and “minorities” as two distinct concepts is based in the principle of self-determination⁶¹, as only peoples are granted the right of self-determination. One has to keep in mind that the definition of “peoples” is more similar to the concept of state than the concept of population.⁶²

Article 1 in the International Covenant on Civil and Political Rights ensures the development of all peoples in all spheres, giving them the rights to self-determination and the judgement of their own political status.⁶³ Concerning the protection of minorities, the Covenant only protects the minority from being denied the right to enjoy their own culture, religion and language. Article 27 of the International Covenant on Civil and Political Rights⁶⁴ refers to “ethnic, religious and linguistic minorities”. The enjoyment of religious, cultural and linguistic differences is granted and interfering in such enjoyment is prohibited. Indigenous peoples, whose cultures are different regarding language, religious belief and ethnicity must be seen as minorities even if their numbers are greater than the dominant group in the area since oppression of sociological minorities is possible even though the number of people is greater. As an examples of such oppression can the Apartheid System in South Africa and the situation in countries as Guatemala and Peru be mentioned.

The distinction of the terms “indigenous” and “minority” is the source of many complications in international law. Indigenous peoples prefer being called minorities to avoid the problematic term “indigenous”. Only the people concerned can define the term “enjoy one’s culture” but it must be seen as a minimum right of

⁶⁰ Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 26.

⁶¹ For further discussion of self-determination see. Musgrave, Thomas, *Self-Determination and National Minorities*.

⁶² A.1 (1) & (2) of The UN Charter.

⁶³ Article 1 and Article 27 of the International Covenant on Civil and Political Rights. This rule is also expressed in the eight paragraph of the Helsinki Declaration, minorities are not allowed to invoke the right of self-determination. The principle was established to avoid the dissolution of Federal States but in spite of the attempts of separating the concepts many minorities can also be identified as peoples and claim self-determination.

⁶⁴ Stating: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

being free from interference lifestyle.⁶⁵ The Covenant on Civil and Political Rights only demands that the States undertake necessary means to respect and ensure the rights given in the Covenant and that it is done “without distinction of any kind”. This one can easily be limited in the case of public emergency but only in confirmation with other international law.⁶⁶ There is also an optional Article through the optional protocol. In contrast to Article 14 in the International Convention on the Elimination of All Forms of Racial Discrimination the petition right is only for individuals or their representatives and does not include groups.⁶⁷ Thus, the Article does not embody pre-existing customary law nor has it been accepted by many States. The Covenant on Economic, Social and Cultural Rights is stronger as it demands that the States Parties “guarantee”⁶⁸ the rights in the Convention without “discrimination of any kind”.⁶⁹ This one probably demands a higher duty of care, as it would be hard arguing against the survival of the world’s indigenous peoples, including the own, as most of the industrialised countries are quite wealthy. The present Convention can only be limited if determined by law. Article 11(1) mentions the right to an adequate standard of living and the right to be free from hunger. These two paragraphs work together for the right to access food, shelter and clothing and to seek improvement of one’s living conditions. State Parties are committed to work individually or through international co-operation. Another right granted in the Convention is the one of physical and mental health. The enforcement of people having to leave their traditional lifestyle might cause increments of family violence, substance abuse or other serious harm.⁷⁰ One important aspect of all these definitions is that they all require awareness within the minority about their own distinct identity and the desire to preserve it.

In December 1992, the UN General Assembly approved the Declaration of the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities.⁷¹ The Declaration was inspired by Article 27 in the International Covenant on Civil and Political Rights but focused on the establishing of an instrument with a collective perspective. The protection of groups has not had the same status as individual rights in the international legal system. In 1971 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities was appointed to study the problem of discrimination of indigenous peoples, and in 1992 the Declaration on Rights of Persons belonging to National or Ethnic,

⁶⁵ Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 33 .

⁶⁶ A. 4 both Covenants.

⁶⁷ Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 64.

⁶⁸ Emphasis added.

⁶⁹ International Covenant on Economic, Social and Cultural Rights, A.2(2). In force in Guatemala since the 8th of August 1998.

⁷⁰ Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 30 .

⁷¹ Lerner, Nathan, *Las Naciones Unidas y las minorias: A proposito de la Declaración de la Asamblea General de 18 de Diciembre, 1992*.

Religious and Linguistic Minorities was adopted by the UN General Assembly.⁷² The provisions of the Declaration have become part of the international customary law and reaffirms the provisions set out in, among others, the UN Charter, the Universal Declaration on Human Rights, the Convention on Prevention of Genocide and the Convention against Racial Discrimination.⁷³ As the Declaration has been given status of customary law it is valid for States, which have not ratified all instruments in the Declaration.⁷⁴ Among the protection commonly included in the first two categories of treaties were the right to equality of treatment and non-discrimination; the right to citizenship, the use of one's language and the right to establish and control the charitable, religious and social institutions. After the Second World War the protection of minorities has changed for a wider protection of all fundamental rights.⁷⁵

3.2.2 Group Rights in International Law⁷⁶

The recognition of group rights in international law has not been a big issue until recently. The cultural barriers between groups due to racial, ethnic or colour distinctions, religions or languages, have caused innumerable acts of violence. After the Second World War the need for adoption of anti-discrimination rules was mainly based upon racism and religious intolerance. The rule of prohibition of discrimination on the ground of the group-membership is today well-established in international and constitutional law and racial discrimination is considered as *jus cogens*, protected by its strong character.⁷⁷ There is an idea of group rights being a certain type of individual rights.⁷⁸ The group rights are based upon the universal rule of non-discrimination and the recognition of the collective rights of group. Classic human rights law says little about group rights apart from the notion of self-determination. The idea behind the international human rights standards, including the Universal Declaration of Human Rights and the two 1966 Covenants, is that group rights are automatically respected as a result of individual protection and protection against discrimination.⁷⁹ However, the protection of individual rights does not directly lead to protection of groups. The list of different groups submitted to discrimination can be described in three basic groups: the ethnic or racial groups, based upon colour, descent and national groups, religious groups and linguistic or cultural groups. Groups based on religious solidarity are

⁷² Resolution 47/145, 18th of December 1992. In Guatemala since the same date.

⁷³ Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 55.

⁷⁴ Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 55.

⁷⁵ Musgrave, Thomas, *Self-Determination and National Minorities*, p.127.

⁷⁶ Concerning the protection of groups in Guatemala see Chapter 4.2.1 and 4.2.2 on the rights of the indigenous peoples of Guatemala regarding the international and national instruments and legislation.

⁷⁷ Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 24.

⁷⁸ Brownlie, Ian, *Treaties and Indigenous Peoples*, p.29.

⁷⁹ Brownlie, Ian, *Treaties and Indigenous Peoples*, p.36.

often in need of protection of their religious rights.⁸⁰ The religion could easily be changed by a voluntary act unlike the racial, colour, culture and linguistic solidarity, since it states a membership of the believers of a religion to a certain group. However many would probably protest to the easy change of belief.⁸¹ Other grounds of discrimination of groups based on political opinion, social origin, economic conditions, family or other social circles are often followed by persecution and oppression. The nationality of origin, equivalent to the term of citizenship is an example of legal discrimination. The definition of groups previously mentioned, is the best way of covering the spectrum of human beings “entitled to enjoy, individually and collectively, certain basic rights that are indispensable to ensure their preservation, development and effective equality within the general society.”⁸²

The most important instrument for the protection of groups is the International Convention on the Elimination of All Forms of Racial Discrimination. It has had influence on the national legislation and the Committee against Racial Discrimination has worked efficiently but the competence of the Committee requires increased recognition. In addition to this, financial reasons are presently endangering its existence.⁸³ Some group rights are mentioned in the UN Draft Declaration. Among others the right to live in freedom, peace and security, to determine citizenship and membership and the right to uphold the responsibilities for future generations, to develop their identities and characteristics, to use traditional lands and to pursue their self-determination.⁸⁴ The International Covenant on Civil and Political Rights does allow a group of individuals to present similar complaints regarding a violation of their individual rights but does not permit a group presenting a complaint concerning the violation of a collective right.⁸⁵ Group protection is also granted in the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, stating the protection of groups by the State within its territory.⁸⁶ The Declaration guarantees the protection of a group interest and improves the protection of minorities according to Article 27 of the International Covenant on Civil and Political Rights. Furthermore, the provisions concerning the participation rights for the indigenous peoples must be emphasised.⁸⁷ Practically the recognition of group rights usually takes two forms. Firstly the prescription of a basic standard of

⁸⁰ The list of groups can be made long including race, sex, marital status, political opinions, age, handicap, sexual orientation and all the ones that are included in the three main groups above.

⁸¹ Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 32.

⁸² Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 33.

⁸³ Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 69.

⁸⁴ Draft Declaration Articles 3, 6, 8, 9, 11, 12, 25, 26, 32.

⁸⁵ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 67.

⁸⁶ Article 1(1), 1(2), requires that the State undertakes the measures and legislation necessary.

⁸⁷ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 80-81.

equality or non-discrimination.⁸⁸ Secondly, the maintenance of group identity. Hence, for the full protection of group rights, the existence of an efficient and sensitive legal system is immensely important.

3.3 Human Rights Violations in Guatemala

626 massacres have been registered by the CEH and among these 32 were committed by the Guerrilla.⁸⁹ In the majority of the massacres there is proof of multiple acts of savagery, which proceeded, accompanied or occurred after the death of the victims. The cruel methods used were carried out with such aggression that it led to the extermination of whole Mayan communities. Defenceless children were beaten against walls until they died or got thrown into pits where the dead corpses of the adults were thrown later. Many persons had their limbs amputated or were covered in petrol and burned alive. The pregnant women met particular cruelty and were submitted to rape and torture and some even had their wombs opened and foetus pulled out before getting killed.⁹⁰

Young men often under the age of 15 were forced to participate in military actions and hostilities. The forced discriminatory recruitment for the Mayan people was a direct violation of the right to personal freedom.⁹¹ The CEH concludes several violations of international law in Guatemala and the State should take responsibility for the crimes committed before the national and international community.⁹² The State of Guatemala was committed to respect the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man during the armed conflict ever since 1948. This Universal Declaration of Human Rights provides two types of provisions; the first one concerns the prohibition of slavery, inhuman treatment, arbitrary arrest and arbitrary interference with privacy. This in the context of discrimination due to race, colour, sex, language, religion, political or other opinion, poverty, birth, or other status. The second provision regards the right to social security, full employment, fair conditions of work and the rights to an adequate standard of living. Also education and participation in the cultural life of the community is stated. These two parts could be known as political and civil rights and economic, social and cultural rights. The Declaration is not formally binding but is working

⁸⁸ The International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

⁸⁹ Garcia, Oscar, Recuento de una Tragedia, Al Día, 26th of February 1999, Año 3 No 816, p.5.

⁹⁰ Sandoval, Julieta, No Debe Repetirse, Prensa Libre, 25th of February 1999, p.4, CEH, Memory of Silence, note. 85-88.

⁹¹ CEH, Memory of Silence, I, note. 97.

⁹² CEH, Memory of Silence, I, note. 98-99.

as a guiding principle and is also working for the creation of binding engagements in the field of human rights.⁹³

3.3.1 The Crime of Genocide

The Genocide Convention⁹⁴ was created in direct response to the holocaust of the Second World War, and was adopted by Guatemala on the 30 of November 1949. Article 1 states that whether peace or war, genocide is a crime under international law, which shall be prevented and punished. The definition of the crime according to Article 2, in short, states that, all acts committed in order to destroy, in whole or in part, a national, racial or religious group, here including the killing of members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group, should be considered as such.⁹⁵ The Convention does not express any terms of rights but a clear prohibition and individual responsibility and protection of groups. The crime must include at least one of the above listed elements and it has to be intentional. In the context of the UN Draft Convention on the Rights of Indigenous Peoples and its Article 6 the removing of group rights would remove the essence of the crime of genocide.⁹⁶

During the years of Ríos Montt, 1981-83 many Mayan groups were identified as guerrilla sympathisers and were also seen as the internal enemy. The identification went beyond all the normal concepts and ended on the including of civilians from a specific ethnic group.⁹⁷

The crimes consisting of elimination of the leaders, the elderly and minors show the common ground for all the victims that possibly could not be military targets. They belonged to the same ethnic group and the army had the intention of destroying this group in whole or in part. The army used special occasions for the massacres, striking against official gatherings as market-days etc for the surrounding of the community.⁹⁸ The PACs committed many inhuman and degrading actions in the purpose of terrorising the people and to destroy the

⁹³ UD Info, De medborgerliga och politiska rättigheterna, mars 1999, p.6, UD Informerar, Urbefolkningarna, 1993:3, p.8.

⁹⁴ 9th of December 1948.

⁹⁵ Ward, Elaine, Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland, p. 22.

⁹⁶ Lerner, Nathan, IWGIA, Indigenous Affairs, No.1-January/February/March-1996 p. 40

⁹⁷ CEH, Memory of Silence, I, note. 110. Most of the massacres and violations of human rights was carried out in the centre of the territory, in Quiché, Hueuetenango, Alta Verapaz and Chimaltenango. 344 of the 626 massacres documented by the CEH took place in the region of Quiché. Sandoval, Julieta and Argueta, Adolfo, Señalan 626 Masacres, Prensa Libre, 26th of February 1999, p.3.

⁹⁸ CEH, Memory of Silence, I, note. 113.

foundations of social cohesion, especially when persons were forced to witness or execute these acts themselves.⁹⁹ Numerous Mayan groups were submitted to mental or bodily harm and the spiritual and physical destruction of the groups. The communities were many times left without food and harvest, since it all had been burned down. Displaced persons were persecuted during their displacement in one region or even bombed. Persons who had given up continued being victims even though they were under absolute control of the Army.

The CEH stated in its report that the State of Guatemala must take its responsibility as the “product of a policy pre-established”¹⁰⁰ by the State, was the reason for the majority of the crimes committed. Guatemala has also failed with the obligations to investigate and punish the crimes of genocide.¹⁰¹ The Chief of Staff for National Defence and the President of the Republic should be subjects to responsibility and particularly the Presidents before 1986, which had good knowledge of the military strategies and procedures.¹⁰² Also the high guerrilla commanders must have had knowledge of the crimes against international and humanitarian law, and should therefore be held responsible.¹⁰³

3.3.2 Crimes Against the Geneva Conventions and Crimes Committed by Individuals

According to international humanitarian law, containing obligatory rules for armed conflicts and also internal ones, the agents of the State of Guatemala have committed crimes against the Geneva Conventions¹⁰⁴. The State is responsible for the crimes committed against, life and integrity, the rape of women, torture, hostage taking, and other degrading treatment. The army did no distinction of civilians and combatants. Nor was distinction made from active combatants, previous combatants that later had put down their arms or were wounded or sick or between civilian property and military targets. Many of the violations during the armed conflict were severe violations of common principles of international human rights and humanitarian law and of the constitutional rights existing in Guatemala.¹⁰⁵ Thus, the Guerrilla carried out many violations of the Article 3 of the Geneva Conventions. Hostages were taken in order to receive economic foundation. Cruel treatment, torture, violence to life and integrity and executions without trials were systematically taking part. The Guerrilla did not either distinguish between the combatants and the civilians or their property.¹⁰⁶

⁹⁹ CEH, Memory of Silence, I, note. 114.

¹⁰⁰ CEH, Memory of Silence, I, note. 124.

¹⁰¹ Article 4 and 6 of the genocide Convention.

¹⁰² CEH, Memory of Silence, I, note. 126.

¹⁰³ CEH, Memory of Silence, I, note. 142-143.

¹⁰⁴ Common Article 3 of the four Geneva Conventions. Adopted by Decree 881-52, 16th of April 1949.

¹⁰⁵ CEH, Memory of Silence, I, note. 100-104.

¹⁰⁶ CEH, Memory of Silence, I, note. 138-141.

Also individuals committed acts of violence during the armed conflict in order to protect economic interests. These people were in general economically powerful people and were either instigating the actions or participating themselves. In the rural parts of the country many conflicts between peasants and landowners were resolved this way, with support from the State. In the Cities many crimes were committed against trade union members and labour advisers and were normally based in the close co-operation between the powerful business people and security forces, in order to protect their interests.¹⁰⁷

¹⁰⁷ CEH, Memory of Silence, I, note. 144-46

4 Introduction to the Rights of the Indigenous Peoples

International law in the 19th century has circulated round the States as the only Parties with rights and duties. Many members of the positivist school argued that indigenous peoples could not be defined as States and therefore they were not to be considered as subjects of international law. Together with the positivist school international law abandoned the consideration of indigenous peoples being political bodies, with rights under national law. It was argued that the international community was a community of civilised humanity with no space for the uncivilised.¹⁰⁸ Minority rights can, as mentioned above, many times be applicable on indigenous peoples as they both are submitted to violations of their rights and victims of policies of physical destruction.

4.1 Special Instruments for the Protection of Indigenous Peoples in International Law

4.1.1 Definition of Indigenous Peoples

There has been difficulties defining the term "indigenous". Terms as ancestry, culture, language, self-identification, traditional dress and acceptance by an indigenous society are important for the identification. In recent years, indigenous people have been recognised as minorities. The status is easily shown by two cases, *Ivan Kitok v. Sweden*¹⁰⁹ and *Chief Ominayak and the Lubicon Lake Band v. Canada*¹¹⁰. The first case concerned the traditional reindeer herding of the Sámis. The regulation of economic issues are normally a matter for the State but when the economic activity is essential for a group it may fall under Article 27 of the International Covenant on Civil and Political Rights. The second one concerned the relationship between cultural and economic-social activities also including past injustices with present effects. Many times minorities regard themselves as members of an indigenous people rather than a minority, but since the two concepts often overlap indigenous peoples should also have the right to exercise their minority rights.¹¹¹ In the case of *Lovelace v. Canada*¹¹² the Committee did not discuss if the Indian band that Lovelace belonged to was properly categorised as a minority but clearly assumed it was, since it did not consider any other Articles of the Covenant. It must be shown that a restriction

¹⁰⁸ Anaya, James S, *Indigenous Peoples in International Law*, p. 19-23.

¹⁰⁹ UN Doc. A/43/40, Decision of 27 July 1988 concerning communication No 197/1985.

¹¹⁰ UN Doc. A/45/40, Vol II, App.A, Decision of 26 March 1990 concerning communication No 167/1984.

¹¹¹ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 66-67.

¹¹² UN Doc. CCPR/C/DR(XII)/R6/24 (31 July 1983).

upon an individual member of a minority must have “reasonable and objective justification” and it has to be necessary for “continued viability and welfare of the minority as a whole”.¹¹³ The assumption was that the petitioners were members of a minority rather than members of a people. The proposition that indigenous populations are peoples is usually based on that indigenous peoples constitutes nations, so called ‘*native nations*’ and that they possess religions, languages, customs and values on their own, which they seek to maintain in order to preserve their existence, and therefor fulfil the requirements of a people.¹¹⁴ Implicit in these definitions is the assumption that nations and peoples are one and the same¹¹⁵. Indigenous people also argue that they, unlike other “minorities” and “nations”, constitute a kind of *sui generis*¹¹⁶ category, which is entitled to self-determination. The UN Study of the Problem of Discrimination against Indigenous Populations has offered a definition of indigenous peoples.¹¹⁷

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.”

The most significant characteristic might be termed their pre-modern or pre-industrial life-styles, including a communally oriented economic system.¹¹⁸ Indigenous groups generally reject the need for definition on the grounds that only indigenous communities have the right to determine their own members. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). Indigenous people may also be defined as the original inhabitants of a territory who, because of historical circumstances (generally conquest or/and colonisation by other people) have lost their sovereignty and have become subordinated to the wider society and the State over which they do not exercise

¹¹³ Both quotations, Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p. 54.

¹¹⁴ John Howard Clinebell and Jim Thomson, “Sovereignty and self-determination: The Rights of Native Americans Under International law” (1977-78) 27 *Buffalo Law Review* 669.

¹¹⁵ In spite of the difficulties of the definition of peoples as nations.

¹¹⁶ The definition of the term *sui generis* in international law would be that a *sui generis* treaty cannot be divided into any groups of treaties but stands alone within its category.

¹¹⁷ Definition by Special Rapporteur J.R. Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* UN, 1987. UN.Doc. E/CN.4/Sub.2/1986/7/Add. 4, paras.379 and 381.

¹¹⁸ Ex the reindeer herding on foot.

any control.¹¹⁹ Still indigenous peoples have not succeeded to claim the right of self-determination under the International Covenant on Civil and Political Rights.

4.1.2 The ILO Convention No. 169

In 1989 the new¹²⁰ ILO Convention No 169 was adopted.¹²¹ In recent years, important progresses have been made regarding the indigenous situation in the world. Progresses have been made through the Convention 169, the Draft Convention and the 1990s being the Indigenous International Decade. The Convention was the first one where NGOs represented indigenous peoples had the opportunity of stating their opinion and to participate in the drafting of the Convention.¹²² Today the Convention has been ratified by thirteen States and has had an important influence regarding the situation of today's indigenous and tribal peoples.¹²³ Even though several intents have been made, no common definition has been accepted. The subjective term self-identification has a strong importance but an objective one has been asked for. The majority argues that if one identifies himself as indigenous he should be seen as such by others. The terminology in the ILO Convention No 169 strongly points out that no interpretation of the term "people" should be made in accordance with the term "peoples" in international law. The definition of tribal peoples includes peoples with distinct social, cultural and economic comforts without presuming the pre-arrival in the area.¹²⁴

Indigenous peoples and minorities differentiate themselves regarding the indigenous peoples' connection with the land, which they have used for centuries before the dominant group entered. Solutions must be found for the relationship between the indigenous peoples and the natural resources and lands. The Convention refers to the general rights of indigenous peoples as well as land rights, labour rights¹²⁵, vocational training, handicrafts and rural industries, social security and health, education and means of communications, international contacts, co-operation and administrative issues. The Convention contains both rights of indigenous peoples

¹¹⁹ Crawford, James, *The Rights of Peoples*, p. 18.

¹²⁰ ILO started in the 1920s working on the conditions of indigenous workers. Their work led to the adoption of the first international instrument concerning indigenous peoples. Convention No 107 has been criticised for its assimilating bent but worked for the promotion of animation, integration and non-discrimination. Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p.39.

¹²¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169, International Labour Conference, 7th of June 1989. In force 1991.

¹²² Ward, Elaine, *Indigenous Peoples between Human Rights and Environmental Protection: Based on an Empirical Study of Greenland*, p.39.

¹²³ See Supplement A

¹²⁴ ILO Convention No 169 Article 1(3)

¹²⁵ Article 20 regulates the labour conditions, Articles 21-23 the vocational training, handicrafts and rural industries, Articles 24-25 the social security and health and Articles 26-31 the rights to education and media and the elimination of prejudices. Article 28 deals with indigenous languages. All articles from the ILO Convention No. 169.

and obligations of Governments.¹²⁶ The indigenous peoples are recognised the rights to exercise control over the economic development, their identities, their way of life, their own institutions and to develop their language and religions within the framework of the State's territory.¹²⁷ The governments shall have the responsibility for the development of participation and protection of their rights mentioned in the Convention and against discrimination, particularly sexual discrimination, which is mentioned as many indigenous women suffer from double discrimination.¹²⁸ The right of using customary law is granted as long as it concerns a conflict within the community and does not violate the fundamental rights stated in the national legislation or within the framework of the international law. Customary traditions are also to be considered in criminal matters concerning indigenous members and their punishment.¹²⁹ Articles 13 to 19 of the Convention deals with the land questions and the special bond between indigenous peoples and their traditional lands and natural resources. The lands originally possessed by these peoples are to be recognised along with the issues concerning use of land, including the land where not exclusively indigenous peoples are occupying it. This question is the hardest as the recognising of one's land right might violate the land right of another person. The Convention further grants indigenous peoples far-reaching rights of participation in political decision-making. They have a right to freely participate and a right to be consulted through representative institutions in matters concerning special interests for the indigenous communities.¹³⁰

4.1.3 The UN Draft Declaration on the Rights of Indigenous Peoples and other Developments in the Field

In 1993 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted the Draft Convention on the Rights of Indigenous Peoples. The Convention reflects the main concerns of indigenous peoples and also seeks to outline the fundamental rights and freedoms better than any international instrument. The Draft Declaration introduces 19 preambular paragraphs recognising the discrimination, the violations of human rights and the dispossession of lands and natural resources that indigenous peoples have been submitted to. The rights to land, territories and resources are considered necessary for the survival of the indigenous communities, cultures and traditions as well for the development of the indigenous communities in harmony with their own needs and interests.¹³¹ The Declaration mentions the universal fundamental human rights of equality and non-discrimination in the enjoyment of human rights and fundamental freedoms and considers the international human rights laws, the UN Charter and the Universal Declaration of Human Rights applicable on indigenous peoples

¹²⁶ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 147.

¹²⁷ Lerner, Nathan, *Group Rights and Discrimination in International Law*, p. 107-8.

¹²⁸ Articles 2-3.

¹²⁹ ILO Convention No.169 Article 8-9.

¹³⁰ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 149.

¹³¹ Paragraph 5, 6 and 8.

individually and collectively. The right to exercise self-determination is assured as well as the right to determine their political status and social and economic developments as well as the strengthening of their characteristics and the possession of nationality.¹³² The cultural, religious and linguistic rights, media, labour laws, educational rights and the rights to develop indigenous identities are further set to work in the second, third and fourth parts. The Declaration protects against genocide and all forms of violence.¹³³ The rights to political, economic and social systems and the limits of their rights to participate in the decision-making process are some of the more sensitive issues.¹³⁴ Land rights are discussed in the fourth part along with matters relating to land use, ownership, territory, natural resources and the protection of land.¹³⁵

The rights to self-determination, self-government and autonomy, the development of institutions along with issues as citizenship and membership and the rights to conclude binding treaties are clarified in the seventh part.¹³⁶ The enforcement mechanisms consist in two means of ensuring the realisation of the recognised rights. One is the required adoption of legislative measures, conflict resolutions and the providing of financial and technical assistance for development. The other is the responsibility of the international community followed by financial and technical assistance and the establishing of a body competent to ensure the implementation of the Declaration. Minimum standards are set out for the dignity and survival and well being of these peoples and nothing incompatible to the rights stated in other instruments are to be used to abate these rights or to justify actions contrary to the UN Charter.¹³⁷

An important discussion taken place was the one concerning the “s” in indigenous peoples, which would give indigenous populations the status as “peoples” and leading to the right of self-determination. Many States opposed to this definition and therefore only individual rights are recognised by the Draft Convention.¹³⁸ The definition as peoples would also reassure them the collective rights in international law.¹³⁹ The provisions are to be read “indigenous persons or individuals” instead of “indigenous peoples”.¹⁴⁰ The right to self-determination is granted through the affirming of the right to develop a distinct political identity concerning local and internal affairs, to participate in the decision-making process and to perform political activities on an international level. Moreover the right to a

¹³² Articles 1-5, Part I of the Draft Declaration.

¹³³ Articles 6-9 and 11-18, Parts II, III, IV of the Draft Declaration.

¹³⁴ Articles 19-23, Part V of the Draft Declaration.

¹³⁵ Articles 25-30, Part VI of the Draft Declaration.

¹³⁶ Articles 32-34, Part VII of the Draft Declaration.

¹³⁷ Articles 37-45, Part VIII-IX of the Draft Declaration. For the individual rights granted in the Declaration see Articles 2, 5-7, 9.

¹³⁸ Concerning group rights recognised by the Draft Declaration see further Chapter 3.2.2.

¹³⁹ Lerner, Nathan, IWGIA, *Indigenous Affairs*, No.1-January/February/March-1996 p. 36.

¹⁴⁰ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 16.

distinct economic and legal system and other social and cultural rights are granted in the Declaration.¹⁴¹

4.2 Legal Protection of the Indigenous Peoples in Guatemala

4.2.1 Introduction to the International Instruments Ratified concerning the Indigenous Peoples of Guatemala

Several documents have been ratified by Guatemala since the late 1940s. The majority of the international instruments do refer to the protection of indigenous peoples as individuals as well as a group. The conventions and declarations ratified can be divided into five groups. Firstly, those which are giving direct protection to individuals and indirect protection to groups.¹⁴² Secondly, the direct protection of groups and individuals.¹⁴³ The third group is not applicable on individuals, containing the Genocide Convention and only offering the protection of groups. Fourthly, the instruments that protect indigenous populations, tribes and other native groups and the members of such group.¹⁴⁴ The fifth and the last group and the International Covenant on Civil and Political Rights only offering protection to individuals belonging to ethnic, religious or linguistic minorities.¹⁴⁵

4.2.2 The Ratification of the ILO Convention No 169

The ILO Convention 169 was ratified on the 6th of June 1996¹⁴⁶. The landowners strongly opposed the ratification of the Convention saying that it would only encourage further violations against private property.¹⁴⁷ It was concluded that Articles 13 and 14 of the ILO Convention were in concurrence with the Article 67 of the Constitution, establishing the obligation of the State to give special protection to co-operative, communal or collectively held lands. There is also the

¹⁴¹ Myntti/Gayim, *Indigenous and Tribal Peoples' Rights*, p. 32-36.

¹⁴² Universal Declaration of Human Rights, the Geneva Conventions, the International Covenant on Economic, Social and Cultural Rights, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the Declaration on the Elimination of All Forms of Intolerance and Discrimination based upon Religion or Belief and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁴³ The Convention against Discrimination in Education, International Convention on the Elimination of All Forms of Discrimination, the Declaration on Racial Prejudices, the Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities.

¹⁴⁴ Inter-American Charter of Social Guarantees, Article 39, The ILO Convention No 169.

¹⁴⁵ Documentation from IPES, *Protección de los Pueblos Indígenas en el Derecho Internacional*.

¹⁴⁶ In force on the 6th of June 1997, according to Article 38(3).

¹⁴⁷ Zapeta, Estuardo, *Siglo Veintiuno, El Convenio 169: Análisis de Contexto*, 18th of February 1996, p. 12.

recognition of the maintenance of the system of administration of the lands that traditionally belong to the indigenous populations. Article 68 obligates the State to provide State lands for the indigenous communities who are in need of land for their future development. Many indigenous persons have lived on private land for centuries and they are now risking to be evicted but according to the ILO Convention, indigenous peoples should have the right, based on traditional occupation, to claim land.¹⁴⁸ The adequate procedures for the resolving of indigenous land claims are to be established within the national legal system. According to article 39 of the Constitution private property is granted as an individual right and Article 40 of the Constitution states the procedure of expropriation of land for communal use, social benefit or public interest.¹⁴⁹ The Decree 9-96, approving the ratification of the ILO Convention, states that the Political Constitution of Guatemala prevails over the Convention. The Government stated that the Convention should not affect acquired rights, thus including illegally obtained private property nor should it have retroactive effect.¹⁵⁰ This was seen as a demonstration of the power of the private landowners in Guatemala, but the reservation was nullified by Article 46 of the Constitution, establishing the general principle of the superiority of international human rights conventions and treaties over national law. The Decree ratifying the Convention is therefor not contrary to the national law of Guatemala and other international instruments protect the right to private property.

4.2.3 Anti-Discrimination in Guatemalan Law

Through the constitutional Guatemalan history all the anti-discrimination rules have been directed towards all persons without making any distinction between the Mayans or Ladinos. However there has been a clear bond between the violence and the discrepancy based in racism against the indigenous peoples in Guatemala. The Constitution of 1945¹⁵¹ and the following one from 1956¹⁵² declared all discriminatory actions carried out on the ground of sex, race, colour, class, belief or political ideas, as illegal. In the Constitution of 1965¹⁵³ the wording has changed and the Constitution does not declare such actions illegal but prohibits them. Twenty years later the constitutional text has changed once again, now declaring the liberty and equality of all human beings in Guatemala also between men and women. The AIRIP contains a statement against discrimination in its preamble, but because of the not-binding nature of the Agreement it depends on the implementation of discrimination under the Penal Code.¹⁵⁴

¹⁴⁸ See Articles 13-14.

¹⁴⁹ See further Article 44.

¹⁵⁰ Decree 9-96.

¹⁵¹ Article 21.

¹⁵² Article 42.

¹⁵³ Article 43.

¹⁵⁴ See Chapter 5.2 concerning the AIRIP.

Although it is important to bear in mind that it is questionable if the changes in the Penal Code really prevents discrimination as it goes deep to the roots of the Guatemalan society. Daily discrimination is to be seen in all places. It goes from difficulties of getting a job to the way one gets addressed on the street. The main argument in Guatemala today against the recognition of indigenous rights is that by giving the indigenous peoples a special position the discrimination will turn and affect the Ladino population. The recognition of one group does not constitute an attempt of discrimination of another group.¹⁵⁵ The Government undertook, in accordance with the AIRIP, the promotion of the incorporation of the Convention in the Penal Code and the recognition of Article 14 of the International Convention on Prevention of All Forms of Racial Discrimination, and the competence of the Commission.¹⁵⁶

4.2.4 Internal Legislation concerning Indigenous Peoples

The international instruments ratified by national law provide the main protection of the indigenous populations. There has not been any specific national legislation recognising the rights of the indigenous peoples previous to the Peace Agreements. The work has started to create a safer situation with better protection for the indigenous populations. The Constitution grants the rights of all men against discrimination based upon religion, race, colour, class, religious belief, economic or social position or political opinions. Further to this the free profession of all religions, individual guarantees concerning the exercising of religion and the church as a judicial subject is recognised.¹⁵⁷

4.2.4.1 Cultural Rights

The protection of language has been changing a lot depending on each Constitution. The Constitution recognises Spanish as the official language of the Republic.¹⁵⁸ In the 1950s an agreement was signed concerning the adoption of official alphabets of the four indigenous languages, Kaqchiquel, Quiché, Kekchí and Mam.¹⁵⁹ The languages are recognised in the 1985 Constitution stating the recognition of the individual and collective rights and the rights of the communities to their cultural identity according to their values, languages and traditions.¹⁶⁰ Each person is guaranteed the right to participation in the cultural and artistic life of the

¹⁵⁵ Statement by Hurst Hannum regarding the UN Draft Declaration, IWGIA, Indigenous Affairs, No.1-January/February/March-1996 p. 38.

¹⁵⁶ AIRIP, Section, II, C, 1-2.

¹⁵⁷ Articles 21 and 29 of the Constitution of 1945, Articles 42, 50 and 51 of the Constitution of 1956, Articles 43, 66 and 67 of the Constitution of 1965. See further the Chapter concerning discrimination.

¹⁵⁸ Constitution of 1945 Article 4, Constitution of 1956 Article 5, Constitution of 1965 article 4.

¹⁵⁹ Agreement of the 3rd of August 1950, concerning the Alphabets for the Three Indigenous Languages. The 1950 agreements were derogated by Governmental Agreement 1046-87, 23rd of November 1987, where all alphabets of the 21 Mayan languages were recognises.

¹⁶⁰ Article 58, Constitution of 1985.

community.¹⁶¹ The state also recognises, respects and promotes the way of life, customs, traditions, social organisation and use of traditional dress for men and women, languages and dialects.¹⁶²

However, concerning education and languages the 1985 Constitution states that the educational form, in regions where indigenous populations are prevailing, should be bilingual.¹⁶³ The judicial acts should be presented in indigenous languages and interpreters should be available for whenever needed.

4.2.4.2 Civil, Political, Social and Economic Rights

The socio-economic rights are addressed to the indigenous groups and communities and have been so ever since the Constitution of 1945. Article 66 of the present Constitution states that Guatemala consists of a number of ethnic groups and among them the Mayans. The economic, social and cultural improvement of the indigenous communities was considered being a national interest.¹⁶⁴ Hence, specific laws could be dictated for the observance of the necessities of the indigenous peoples. Also the creation of an indigenous institution was established in the Constitution for the dealing with indigenous problems.¹⁶⁵

The typical industries and arts of the Nation are specially protected in the Constitution of 1956 by the State for the maintenance of the authenticity and for the promotion of the production and commercialisation.¹⁶⁶ Furthermore the Constitution provides protection for the archaeological centres and the traditional handicrafts and folklore.¹⁶⁷ Protection is also given to the indigenous agrarian co-operatives and communities that historically have land belonging to them, administrated in a special way, which is granted to continue.¹⁶⁸

¹⁶¹ Article 57, Constitution of 1985.

¹⁶² Article 66. See further the former Constitution of 1945, 1956 and 1965.

¹⁶³ Article 76, Constitution of 1985.

¹⁶⁴ Constitution of 1945, Article 84, Constitution of 1956 and 1965, Article 110.

¹⁶⁵ Constitution of 1945, Articles 84, 87, 94, 96, 137.

¹⁶⁶ Constitution of 1956, Articles 109-110.

¹⁶⁷ Constitution of 1985, Article 61-62.

¹⁶⁸ Constitution of 1985, Article 67.

5 The Peace Agreements

5.1 Introduction

A total of 23 documents¹⁶⁹ have been signed since the first step towards peace was taken in Esquipulas in May 1986 until the twelve final accords put an end to the long conflict in December 1996.¹⁷⁰ The implementation of the Agreements was divided into three phases. The first one included the first 90 days after the signing, starting on the 15th of January 1997. The second one reached until the end of 1997 and the third phase the annual reports of 1998, 1999 and 2000.¹⁷¹ A serial of acts, agreements, declarations and communications opened the path for peace in Guatemala and formed the base of the documents promoting the peace process. The formal process started in 1990, through the Agreement of Oslo, signed by the National Commission on Reconciliation. A request for a moderator was made to the Secretary-General for the assistance of the bilateral negotiations between the Government and the URNG. While negotiating the Agreement of Mexico in 1991, the government assigned direct representatives for the talks for the first time in the process, maintaining the participation of the National Commission on Reconciliation.¹⁷²

The Agreements entered into force through the Agreement on a Firm and Lasting Peace signed on 29th of December 1996 by the Government and the URNG. The Agreements are the basis of an agenda for the overcoming of the causes that started the armed conflict and for the settling of the base for a new development. The Agreements also express a national consensus within and outside the civil society. Furthermore, the Agreements are a product of the Guatemalan society and for the task of reconciliation and perseverance of all Guatemalans. The Parties agreed on the importance of the international verification for the certainty of the observance of the Agreements and for the trust of all participants of the consolidation process. A solicitation was sent to the General-Secretary of the UN for the creation of MINUGUA.¹⁷³

¹⁶⁹ Universidad Rafael Landívar, Instituto de Investigaciones Económicas y Sociales, *Acuerdos de Paz*.

¹⁷⁰ See Supplement B.

¹⁷¹ Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements, 29th of December 1996.

¹⁷² Document from MINUGUA, *La Negociación de la Paz*.

¹⁷³ Document from MINUGUA, *Los Acuerdos de Paz*.

5.2 The Agreement on Identity and Rights of the Indigenous Peoples

The AIRIP was the third Agreement to be signed in the process in Mexico City on March 31, 1995. Though it was signed one year earlier than the Final Peace Agreement it did not enter into force until this one was signed between the Parties.

Here is stated that the recognition of the pluriethnic, multi-lingual and pluri-cultural Guatemalan society is fundamental for its future in peace and the construction of a society with respect for ethnic, religious, political and cultural rights. The different socio-cultural groups¹⁷⁴ are also recognised with their common origin within their particular Mayan Group. The question of rights and identity of the indigenous peoples is fundamental for its history, present and future, as well as the recognition of the discrimination, exploitation and injustice that the indigenous populations have been submitted to. The AIRIP is strongly influenced by the ILO Convention. However Agreement is not formally binding to its legal nature but it is completed by the national decrees concerning the establishing of Commissions and other governmental obligations.

5.2.1 The Identity of Indigenous Peoples

A fundamental issue for the recognition of the identity of the indigenous population is the common respect for all Guatemalans. The Agreement makes a distinction between the identity of the Mayans and the other peoples. Through the Agreement the identity of the Mayan, Xinca and Garifuna peoples is recognised within the unity of Guatemala.¹⁷⁵ The elements for identity of one person as Mayan shall be determined according to a number of criteria. Being direct descent from ancient Mayas, speaking a language from the Mayan language root or the identification with its culture, science, universal view, philosophy or a sense of own identity together with artistic and aesthetic and historical values.¹⁷⁶ All legal provisions preventing the indigenous peoples from having their own communications media for the development of their identity shall be abolished¹⁷⁷

5.2.2 Protection against Discrimination within the Agreement on Identity and Rights of Indigenous Peoples

A joint effort has to be made to overcome the many years of racial discrimination, but it demands a change in thinking, behaviour and attitudes. To be able to

¹⁷⁴ A total number of 21 distinct groups of Maya Indians are recognised and the Xinca and Garifuna peoples.

¹⁷⁵ AIRIP, Section 1, 2-4.

¹⁷⁶ AIRIP, Section I, 2a-e.

¹⁷⁷ AIRIP, Section H.

change the discriminatory situation all Guatemalans need to recognise the reality of the racial discrimination. Due to lack of information about the protection against discrimination and the recognition of the indigenous rights, many Ladinos are misinformed.

According to the AIRIP the Government is to promote to the Congress that the racial discrimination is classified as a crime, and that all existing laws that could have discriminatory implications for the indigenous peoples are abolished. An effective promotion for such rights and education regarding the rights of indigenous peoples shall be taken care of and the effective protection of these rights as well as offices for an effective defence of indigenous rights.¹⁷⁸ Here also including the free assistance in legal matters concerning indigenous issues in regions where the indigenous peoples are prevalent. The rights of women have been given special attention in the Agreement due to the double discrimination of indigenous women that they are subjected to. The Government undertakes the promotion of legislation concerning sexual harassment along with the implementation of Convention on Elimination of All Forms of Discrimination against Women. The constitutional rights to wear the indigenous dress must be respected by all parts and all areas of the society and the discrimination of such use must be prevented.¹⁷⁹ The role of mass media is highly important in the defence and development of cultural values and the transmission of knowledge. The people working within the media sector as well as the Government shall struggle for the respect of indigenous cultures and the elimination of all forms of discrimination.¹⁸⁰

In a lead of achieving a better co-existence the Government undertakes to promote the incorporation of the International Convention on the Elimination of All Forms of Racial Discrimination in the Penal Code. Furthermore, Article 14 of the present Convention and the competence of the Committee shall be recognised. Moreover the ratification of the ILO Convention No 169 as well as the UN Draft Declaration on the Rights of Indigenous Peoples.¹⁸¹

5.2.3 Cultural Rights

Cultural rights are of immense importance for indigenous peoples with the Mayan culture as the main basis of the Guatemalan culture. The development of a national identity and the healing of the armed conflict cannot be made without the recognition of the Mayan culture. The role of the Guatemalan State should be to support the development of the indigenous culture in the territory and the granting of indigenous peoples as participants in the planning and execution of cultural programs.¹⁸²

¹⁷⁸ AIRIP, Section II A, 2.

¹⁷⁹ AIRIP, Section III, E.

¹⁸⁰ AIRIP, Section H.

¹⁸¹ Approved by Decree 9-96.

¹⁸² AIRIP, Section III, note 1-3.

5.2.3.1 Language Rights

The protection of the Mayan languages has been given much attention in the Agreement and the necessity for recovering, protecting and promoting of the indigenous languages. In the lead of protection of indigenous languages the Government shall promote the use of all languages in the educational system and protect and promote bilingual and intercultural education. The use of indigenous languages in the State social service on community level and the translation of important documents into the indigenous language shall be made. The State also undertakes the training of bilingual judges and the opportunities for mass communication through the Academy of Mayan Languages. The Commission on the Recognition of the Indigenous Languages of Guatemala was created for the development of proposals concerning the constitutional reform of Article 143.

5.2.3.2 Spirituality, Temples, Ceremonial Centres and Holy Places

The Governments shall secure the practice of Mayan religions, both in public and in private by means of education, worship and observance of its manifestations. Respect should be given to the spiritual guides and holy places for the practice of the religion. Protection shall be further given to the places of historical value as a part of the cultural, historical and spiritual heritage of the Maya culture. The temples and ceremonial centres of archaeological value are parts of the national cultural heritage and will remain property of the State. However the indigenous peoples should be recognised the right of participating in such conservation and administration.¹⁸³ The Agreement also states the creation of a Commission for the defining of such holy places and for the proposals of administration and participation led by the indigenous groups.

5.2.3.3 The Right to Education

This part of the Agreement is one of the most important ones and states the importance of the realisation of the constitutional right to education directed to the whole population. The Parties agreed that the educational system is the most important method for the transmittal of cultural knowledge and values and that it has to be responsive to the cultural and linguistic diversity of Guatemala. The concept of indigenous peoples has to be recognised in the national school system, including the formal and non-formal education in a lead to strengthen the cultural identity of the indigenous peoples.¹⁸⁴

The Government had to undertake a promotion of educational reforms and to decentralise the system in order to respect the specific linguistic and cultural needs. The families and communities are to be given a greater role in the

¹⁸³ See further, Commission on Holy Places.

¹⁸⁴ AIRIP, Section, G, 1.

development of determining the school calendar and the promotion of the incorporation of indigenous philosophical, scientific, artistic, historical, linguistic and pedagogical areas in the educational system. The right to education shall be realised through an increase of the yearly budget of the Ministry of Education and furthermore for the possible implementation of the educational reform. The goals are to expand and promote intercultural bilingual education including the recruiting and training of indigenous bilingual teachers as well as the scholarship and student grants system. Creation of a Mayan University, the National Council of the Mayan Education and other high education shall be promoted together with the intercultural bilingual education and the strengthening of the national unity and the respect for diversity. The creation of a joint-commission was established for the designing of the reform.¹⁸⁵

5.2.4 Civil, Political, Social and Economic Rights

The protection of these rights will be carried out within the framework of the Constitution and the Government undertakes the promotion of the pluriethnic, pluri-cultural and multi-lingual nation of Guatemala. The reform is well described in this chapter of the Agreement and there is an awareness of the necessary changes in the society for the creation of the nation-state and intercultural relations.

5.2.4.1 Participation at All Levels

The importance of the Mayan and other indigenous communities have had and are continuing to have great importance within the political, economic, spiritual and cultural life, which also is recognised by the AIRIP. The role of the communities is one of the main reasons for the survival and the preserving of its culture and way of living despite the discrimination they have been subjected to. The Government undertakes to promote the participation of the communities in the decision-making process, recognising their right of determining their own priorities in the field of education, health, culture and infrastructure. The participation shall be carried out within the framework of the municipal autonomy and a reform of the Municipal Code is also needed. The State should according to the Constitution recognise, respect and promote the structure of the indigenous organisations and defining the status and legal capacity of indigenous communities and their authorities according to their traditional norms. The reform should consider that the indigenous communities have customary norms for internal conflicts and the definition of the modalities that the communities have of joining together in defence of their rights and the implementation of regional and communal development projects.¹⁸⁶ The

¹⁸⁵ AIRIP, Section, G, 2-5.

¹⁸⁶ See Articles 8-11. The customary commitments in the Agreement on Identity and Rights of Indigenous Peoples are mainly based on the ILO Convention. The customary norms are vital for the maintenance of the cohesion of the communities and will continue to be an important element for the social regulation of their lives. The Government recognises the failure of the national legislation to consider the customary norms and the lack of access by

Government also undertakes the decentralisation and de-concentration of the regional administration of the educational, health and culture services based on the linguistic criteria and the facilitation of community representatives participating in the management of education on a local level in order to guarantee efficiency and relevance.¹⁸⁷

It is recognised that the indigenous peoples have been suffering from exclusion from the decision-making in the political system. In a lead to secure the rights and protection of indigenous rights, a Joint-commission was created to secure the participation of the indigenous peoples and the institutional reforms concerning this matter. The indigenous peoples are recognised the right to freely exercise their political rights and to create and manage their own institutions. The institutionalisation of the indigenous peoples is necessary at all levels in order to secure their participation in the decision-making process. The Commission is to consider reforms in several areas concerning the consultation of the Mayan communities concerning legislative measures likely affecting the indigenous peoples. Reforms in the field of individual and collective participation and the consultative bodies for a dialogue between the distinct organs of the State and the indigenous peoples as well as the creation of institutions defending the interests of the indigenous communities. Free access by indigenous peoples to the public service and administration, such as posts within the local, regional and national governments, especially regarding indigenous concerns is granted.¹⁸⁸

5.2.4.2 Land Rights relating to the Land of Indigenous Peoples

The close link between indigenous peoples and their land constitutes the main basis for the indigenous culture but the question is still highly controversial in Guatemala. The last section of the AIRIP concerns the indigenous situation regarding communal land rights. This part is the most comprehensive and difficult in regulating, including both communal and individual tenure of land. The rights of the indigenous peoples include collective and individual use of land and other resources.¹⁸⁹ Furthermore it is very important for the land reform and the social and economic issues and the agrarian question. The AIRIP only focuses on the communal and collectively held land and natural resources and the issue concerning the protection of land and registration issues are postponed and treated in the Social-Economic Agreement. Legislative and administrative

the indigenous peoples to the judicial system. The Governments undertakes to promote, consulting the indigenous peoples, the development of rules of law which would recognise the right of the communities to resolve internal conflict by applying the customary norms in case of being compatible with the fundamental national and international human rights. The courts, specially concerning criminal matters, must take notion of the norms ruling the community, the training of judges and officers on the customs governing the communities. AIRIP, Section, IV,E

¹⁸⁷ Agreement on Identity and Rights of Indigenous Peoples, Section IV, B-C

¹⁸⁸ AIRIP, Section, IV,D.

¹⁸⁹ Hernández Alarcón, Rosalinda, The Land Issue in the Peace Accords: A Summary of the Government's Response, p. 13.

measures must be taken concerning ownership, possession and other real rights and the use of natural resources by the communities. Both the indigenous population and the non-indigenous have suffered from the lack of protection of rights related to land and natural resources. There has been wide problems in legalising the rights through registration and the lack of access to the legal system has prevented them from the legal defence of that right. This part does not only affect the indigenous population but all the peasants, though the latter part has not been affected in the same extension.¹⁹⁰

The Constitution states the obligation of the State to protect the co-operative, communal and collectively held lands. The rights of the communities to maintain the administrative system of the lands which historically belong to them is recognised and the State shall also provide land for the indigenous peoples depending on it for the development of the communities.¹⁹¹ The AIRIP recognises the special relationship between the land and the indigenous peoples. The communities are guaranteed and recognised the access to lands and resources that are not occupied only by communities but has had a greater importance for the communities historically and spiritually.¹⁹² The communities are recognised the right of participating in use, administration and conservation of their natural resources and in case of exploitation of the very same resources an approval of the communities is to be secured. An expropriation shall be followed by compensation for the suffered deprivation. The Government further undertakes to settle the claims to communal land and to restore or pay compensation for those lands to the victims of land plundering. No supplementary titles will be awarded concerning property that indigenous communities have claimed. In addition to this, the statute of limitations will be suspended when concerning any action that involves the plundering of the indigenous communities and if such statute already is expired ways of compensating victims will be established.¹⁹³

State lands are to be given to the indigenous communities and the legal protection of these lands shall be provided by the increase of the number of courts dealing with land issues, advisory and information services and the providing of free interpreters. Priority is promised to the issues regarding land rights and a legal rule recognising the indigenous peoples the administration of their lands according to customary norms. In addition discrimination against women in matters of land rights, loans and housing must also be eliminated. Hereby was also the Joint-commission on Rights Relating to Land established.¹⁹⁴

¹⁹⁰ AIRIP, IV,F, 1-2.

¹⁹¹ Article 67 of the Guatemalan Constitution. See further Articles 39-40 and 119.

¹⁹² In the Agreement, springs, woodcutting and rights of way are mentioned as examples of these necessities. AIRIP, Section, IV, F3-6.

¹⁹³ AIRIP, IV, F7.

¹⁹⁴ AIRIP, IV, F8-10.

6 The Observance of the Peace Agreement on Identity and Rights of Indigenous Peoples

6.1 Introductory remarks

The legal nature of the AIRIP is, as mentioned above, not legally binding, it is rather a state of will from a people tired of violence and insecurity. Thereby the implementation of the established Commissions is even more important depending on the work of the Commissions. It is most important that the proposals presented before the Congress are signed and thereby also receive a legally binding character. The difficult issues of the process are the civil, political, economic and social rights though the question of autonomy and use of non-communal land were excluded after many discussions. The AIRIP is not only to be seen as an agreement concerning the indigenous peoples of the Guatemalan nation. The participation of the whole population is important for its implementation and requires good co-operation between the indigenous organisations and the Government. Yet for the first time the civil society is recognised as a part in the negotiations.

For the reconciliation and co-operation of all Guatemalans it is highly important to fight the impunity, wherefore the State is to be made responsible for the crimes committed by its public servants and State agencies and for the action of civilians to whom it delegated, including high military commissioners and members of civil patrols. The State must also answer for the breaches in the legal obligations to investigate, try and punish crimes against human rights.¹⁹⁵

6.2 The Role of MINUGUA

The cases of Guatemala and El Salvador are the only ones working with a verification process led by the UN. Still this also creates disadvantages as well as advantages. The work of MINUGUA has been the most efficient in the history of Guatemala.¹⁹⁶ The mandate of MINUGUA is to verify the human rights Agreements signed during the Peace Process. Moreover also the institutional building and creation of a reliable authority. In the reports of the AIRIP, MINUGUA has criticised the Government for the slow publication of the Agreement, the low level of access to the judicial system and the lack of

¹⁹⁵ CEH, Memory of Silence, I, note. 80-82.

¹⁹⁶ Armon, Hacia dónde va la transición? p. 65.

protection of the indigenous peoples.¹⁹⁷ High appreciation was given for the successful approbation of the ILO Convention, but the Mission was not satisfied with the preparation of legal reforms established in the Agreement.¹⁹⁸ MINUGUA's work has been most efficient in fighting the impunity and the breaking with a regime of negligence by recognising the violations of the human rights. MINUGUA also supports the CEH, which creates a weakness in the mandates of the organisation. While investigating the violations committed in the past as well as working close with the truth-commission, MINUGUA also is the holder of the important task of verifying the observance of the Peace Agreements.

In October 1996, a few months before the final signing of the Peace Agreement two men from the Guerrilla kidnapped an elder woman from a rich family for the future finances of the Guerrilla.¹⁹⁹ The Government left the peace-talks, which almost interrupted the negotiations. The security forces captured two men, one was killed in the capturing and the other one was never seen again. The scandal following the incident was that MINUGUA officials were aware of the assassination and that they conspired for the covering of the crime with the purpose of saving the Peace Process. The investigators working on the case were removed from the case on superior orders of the Mission, hence this was a serious hit against the credibility of the institution regarding the verification of the violations of human rights.²⁰⁰

6.3 Agreement on Identity and Rights of the Indigenous Peoples of Guatemala

6.3.1 Introduction to the Commissions Established through the Peace Contracts.

The creation of three joint-commissions²⁰¹ was established through the AIRIP. The Commissions will work and make their decisions in consensus, with an equal number of representatives from the indigenous organisations and the Government.

¹⁹⁷ MINUGUA, Septimo Informe del Director de la Misión de las Naciones Unidas de Verificación de los Derechos Humanos y del Cumplimiento de los compromisos del Acuerdo Global sobre Derechos Humanos en Guatemala, Fortalecimiento Institucional, Septiembre 1997, para.14.

¹⁹⁸ MINUGUA, Quinto Septimo Informe del Director de la Misión de las Naciones Unidas de Verificación de los Derechos Humanos y del Cumplimiento de los compromisos del Acuerdo Global sobre Derechos Humanos en Guatemala, Septiembre 1996, para.217-218.

¹⁹⁹ In Guatemala, referred to as the Mincho Case, Promise and Reality, Implementation of the Guatemalan Peace Agreements, Appendix: the Mincho Case.

²⁰⁰ Armon, Hacia dónde va la transición? p. 66.

²⁰¹ A total of eight commissions were created: the Joint Commissions on Rights Relating to Land of Indigenous Peoples, Educational Reform, Reform and Participation and the Official Commissions on the Recognition of the Indigenous Languages, the Commission on Holy Places the Commission on Indigenous Customary Law, the Rights of the Indigenous Women and Constitutional Reforms.

The ground was set out in the Agreement but more specific rules about the roles of the Commissions were created by the approbation of decrees creating each Commission and specifying the tasks. This is the biggest step taken by the Government regarding the implementation of the AIRIP. Furthermore, two official Commissions were created to discuss the recognition of indigenous languages and the spiritual issues. These are the main commissions concerning the implementation of the Agreement but other important commissions have been constituted for, among others, the constitutional reforms²⁰² and the rights of indigenous women and indigenous customary law. The Commissions have had problems concerning the representation of indigenous peoples in the Commissions due to lack of capacity within the indigenous community, the finding of indigenous leaders and the assurance of the implementation. The many Mayan organisations have further had problems finding consensus with in their umbrella organisation COPMAGUA.²⁰³

6.3.1.1 The Commission on the Recognition of the Indigenous Languages of Guatemala

The recommendations of the Commission²⁰⁴ are the establishment of a linguistic policy including the development of indigenous languages in accordance with the multi-lingual and pluri-cultural Guatemala. The linguistic policy should be implemented through the Academy of Mayan Languages in Guatemala. The Guatemalans who only speak one language should be promoted to become bilingual. The communication media shall support the creation of the multi-lingual society. Centres and universities should support the development together with other State institutions. Furthermore, the proposal includes the creation of institutes for the perseverance of the languages at the border of disappearance, Xinca and Garifuna and the normalisation and planning of these languages.²⁰⁵ The promotion of the indigenous languages in respect of health services, judicial

²⁰² See Chapter 6.4 concerning the Constitutional Reforms.

²⁰³ COPMAGUA represents more than 200 individual organisations. Sieder, Rachel, *Reframing Citizenship: Indigenous Rights, Local Power and the Peace Process in Guatemala*, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997, p. 66-72. COPMAGUA also set up eight permanent commissions for the co-ordination of the different Mayan organisations and to make the participation easier for all communities. The members of these committees do not receive payment for the work carried out within the framework of the commissions. Consequently this limits the searching for qualified persons. The commissions work on the same topics as the three joint-commissions and the two official commissions but also including issues concerning the rights of indigenous women, indigenous customary law and constitutional reform. The Women National Forum presented their report on the 28th of November 1998. In August 1997, the Congress recognising the establishment of mixed tribunals within certain regions approved the reform of the Penal Code. However the discussion regarding the positions of state and customary law remains unsolved and the process will be long.

²⁰⁴ Created by Decree 308-97. The proposal was presented by the Commission on the 23rd of March 1998.

²⁰⁵ MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 19.

matters, education²⁰⁶ and other public services. The Guatemalan State should create institutions for the indigenous peoples where linguistic assistance can be found, promote programs for judges and court interpreters from and into indigenous languages and arrange possibilities for everyone receiving the interpretation necessary into the indigenous languages.²⁰⁷

The problem is that there are not only two or three indigenous languages within the State of Guatemala but twenty-three.²⁰⁸ Four of them are so called territorial languages and the rest community languages. The recognition of the territorial indigenous languages is followed by huge costs and it is hardly possible to recognise them all as official languages. One of the early proposals was to make one of the major languages, Kaqchikel²⁰⁹, official within the national territory to promote the strengthening of status of the indigenous languages. The indigenous organisations decided not to favour one of the languages and established an eight-year process for the documentation of the languages spoken in the distinct communities.²¹⁰

Further to this follows the recommendation of the Commission regarding the Ladino population and that it should at least learn one of the indigenous languages. The Spanish language has deep roots among many of the Guatemalans, some of them with whole families that never have spoken another language since the colonisation in the 16th Century. The Commission has advanced in its work and agreed to the keeping of the Spanish as an official national language and to let the other 23 languages be official within respective territory.

Consequently, the institutions marked out by the Commission should work out an implementation plan. It is fundamental that the important efforts carried out by the commissions, concerning the redefining of the public policies of multi-culture related to the recognition of the indigenous languages, are sufficiently remembered and that they constitute the frame of reference for the initiatives carried out concerning these matters. The very same framework should be respected for the efforts of the co-operation between international and national organisations as well as the prevention of the dispersion of all elements that could disturb the work

²⁰⁶ Scholarships are to be provided for indigenous students, intercultural and bilingual studies and legal interpreters. MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 20.

²⁰⁷ Comisión de Oficialización de los Idiomas Indígenas de Guatemala, p.159-162.

²⁰⁸ Except from Spanish, twenty-one Mayan, one Xinca and one Garífuna are spoken within the Guatemalan territory.

²⁰⁹ Kaqchikel is not the widest spoken indigenous language but the one with the less complicated alphabet.

²¹⁰ URNG, Cumplimiento de los Acuerdos de Paz, Enero-Septiembre 1998, p.15.

of such organisations.²¹¹ Further to this is to be mentioned that the complicated issues on how to resolve the recognition in practice still has not resolved.

6.3.1.2 The Commission on Spirituality and Holy Places

The main objectives of the Commission²¹² are to define the holy places for the indigenous peoples and to propose the administration for the maintenance of the ceremonial centres. The Commission extended its mandate to include the spiritual issues and the ending of persecution of holy spiritual leaders. The Commission has been lost in thematic issues and is not proceeding as well as the other Commissions and had to extend its mandate two times.

Another question is the buying of land for ceremonial centres and its administration, issues strongly related to the indigenous customary law. The Commission is still having difficulties to conclude their tasks. The AIRIP plants a principle that the temples and ceremonial centres of archaeological value²¹³ are the heritage of the State and call for a redefinition of the administration for the granting of the participation of the indigenous organisations. The indigenous part of the Commission considers that the administration should consist of exclusively indigenous and proposes the creation of an autonomous institution. The discrepancy activates the basic question whether the observance and promotion of the rights of the indigenous peoples implicate the creation of pure indigenous institutions or the incorporation of an equitable indigenous representation in the already existing institutions to make them pluri-cultural. It is not easy to resolve these problems; nevertheless when concerning materials that profoundly affects the cultural and spiritual identity as the holy places and ceremonial centres. The members of this Commission have the difficult mandate to co-ordinate the indigenous organisations and the representatives of the State in a very difficult area where it is easy to prosper the mistrust, and should therefore strongly be supported.²¹⁴

The spirituality should be recognised by the reform of Article 66 of the Constitution²¹⁵ as a part of the protection of indigenous groups. The definition of the holy places is not easy, except from the centres of archaeological value there are many places that can be seen as holy from a regional or even personal point of view. Governmental representatives argued that many of these centres were

²¹¹ MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 21.

²¹² By Decree 261-97.

²¹³ According to the institute of Anthropology and History there are 2261 holy places registered. COPMAGUA, Documento sobre definición de los lugares sagrados su régimen de preservación, Guatemala 30th of November 1998, p.2.

²¹⁴ MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 24.

²¹⁵ See further chapter 6.4 on constitutional reform.

not used as such, but it must be kept in mind that the Christian Church and other authorities systematically prohibited the classification of these places as holy.²¹⁶

6.3.1.3 The Joint-Commission on Educational Reform

The Joint-Commission on Educational Reform was the first one to be created, based upon the AIRIP, in March 1997.²¹⁷ The Commission was formally installed in April integrated of a total of ten representatives, five from the Government and five from the indigenous organisations.²¹⁸

The work of the Joint-Commission shows the difficulties of the implementation of the Agreement. The indigenous representatives protested heavily when the Government decided to create a consultative commission for the implementation of the reform, which was created for the review of the propositions made by the Joint-Commission before passing the presentation to the Congress. The consultative commission was composed by a total number of 17, where only 3 were indigenous. Many felt that the Consultative Commission was created to stop the influence from the Mayan society. Clearly this was seen as an attempt from the Government to overlook and control the work of the Joint-Commission. The indigenous representatives withdrew from their positions and threatened to do so in the other Joint-Commissions as well if the number of indigenous representatives in the Consultative Commission was not changed. After negotiation led by MINUGUA another five members were accepted.²¹⁹

On the 20th of July 1998, the proposal of the Commission was finished and presented. The Commission succeeded to overcome the difficulties regarding the opinions of the members of the working group and to formulate a project of the educational system, with the aim of creating a closer bond between the society and the Guatemalan State and to work towards a “unity within the diversity”.²²⁰ The proposition of the educational reform contains social and ethnic decentralisation and participation, the increase of educational investments for the academic efficiency and quality. Moreover, the promotion of educational services based on cultural and linguistic situations and necessities and the construction of democracy, peacekeeping and development. In accordance with the Peace Agreements this proposal was presented to the Consultative Commission for the promotion of implementation.²²¹

²¹⁶ COPMAGUA, Documento sobre definición de los lugares sagrados su régimen de preservación, Guatemala 30th of November 1998, p.3.

²¹⁷ By Decree 262-97, on the 20th of March 1997.

²¹⁸ Joint-Commission on Educational Reform, Diseño de la Reforma Educativa, Guatemala 20th of July 1998, p.11.

²¹⁹ By Decree 748-97, 24th of October 1997. Promise and Reality, Implementation of the Guatemalan Peace Agreements, p. 44.

²²⁰ My translation.

²²¹ MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 22.

6.3.1.4 The Joint-Commission on Reform and Participation

The indigenous peoples of Guatemala have always held a non-dominant position in the society and have been denied full access to the political system. For the compliance of the ILO Convention the State of Guatemala will have to reform the political system as well as the redefining of the territory.²²² In a country like Guatemala where the indigenous population constitutes the majority of the population the concept of self-determination raises a question of autonomy and equal political participation within the State's institutions.

The aim of this Commission²²³ is the elaboration and promotion of constitutional reforms assuring the indigenous peoples position in the decision making process, transforming the political system into a democratic one in a global perspective. The Commission has had difficulties in productive negotiation, six months passed before the internal rules could be defined. In May 1998, COPMAGUA solicited a suspension of the work for an evaluation of the process, later the same year the Commission went back to work. With respect for the complexity of other themes, it is to be mentioned that it is indispensable that this instance is working with the Municipal Code and Laws concerning the Council of Development where it is highly needed and urgent. Further to the constitutional reforms and to the co-operation of the Joint-Commissions, a greater number of indigenous representatives are essential for the proceedings of the transformation of the relations between the State and the society. The credibility of the efforts taken towards a pluriethnic, -cultural and multi-lingual State must increase. The Government should therefore adopt measures for the promotion of the public position as established in the Agreements.²²⁴

One of the major problems that the Commission established to overview the proposals from the Commissions, had was that the timetable they were submitted to follow. The Commission had three months to finish their work and at the same time consider the results of another four commissions before passing it to the Congress. It was seen as a lack of interest from the Government to recognise the work of the Commissions. Even though progresses have been made the indigenous peoples are only allowed to participate officially but in reality they are not integrated in the decision-making process.²²⁵

6.3.1.5 The Joint-Commission on Rights Relating to Land of the

²²² Anaya, James S, *Indigenous Peoples in International Law*, p. 75.

²²³ By Decree 649-97.

²²⁴ MINUGUA, *Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998*, section D, paragraph 25.

²²⁵ Palencia Prado, Tania, *Advocates and Guarantors: Establishing Participative Democracy in Post-War Guatemala, Accord, Negotiating Rights: The Guatemalan Peace Process, 1997*, p. 28.

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The Commission works under the AIRIP but touches the issues under the Economic and Social Agreement and the Resettlement Agreement. It is clear that the economic powers had a great influence in the writing of the Economic and Social Agreement, clearly seen when it comes to the issues of land rights.²²⁶

In accordance with the AIRIP, the Joint-Commission was established composed by an equal number of members representing the Government and the indigenous organisations. The main task of the Commission²²⁷ is the defining and promotion of an agrarian reform concerning the rural development, access to and ownership of land as well as the administration of such property. The issue has been limited to the communal land but the question is still most delicious. An Agenda was agreed to in December 1997. The Government has also started to pay landowners in order to release indigenous land but on a very small scale. Depending on the extent and complexity of this theme, the mandate of the Commission is extended to annual periods and should lay down public reports concerning the advances of the work. On the 15th of July 1998 the Commission presented a draft concerning the law of the “Land founds”²²⁸, revised by the Accompaniment Commission²²⁹. The draft presented the establishment of procedures facilitating the access to land property for those peasants who do not possess such land or poses the land but in an unsatisfactory way in combination with the rural development of the Country.²³⁰ Up to 250 million Quetzales have been invested in the process where 180 millions are dedicated the land buying, 30 millions for productive projects.²³¹ The progress has been slow and not very efficient and in December 1997 the head of the government agency responsible for the resolving of these matters resigned, as he did not have the resources necessary to deal with the problem.²³²

In January 1999, the Commission declared that they would continue to work as usual with the Registration Laws, the Resolution of Land Conflicts, the Laws concerning the Regularisation of the Possession of Land for the Indigenous Communities, the Access to Natural Resources, the Restitution of Land and Compensation of Rights relating to Land and the Construction of an Agrarian Institution Granting the Justice and Certainty of the Property and Possession of Land, regardless the referendum taking place in May.²³³

²²⁶ Amongst the International Instruments is the ILO Convention the one focusing on the protection of land rights. I close relation with other cultural rights.

²²⁷ By Decree 515-97, installed on the 8th of July 1997.

²²⁸ My translation, in Spanish Fondo de Tierras.

²²⁹ This Commission was created as a helping institution for the other Commissions.

²³⁰ MINUGUA, Informe del Secretario General de las Naciones Unidas sobre la Verificación de los Acuerdos de Paz de Guatemala, 1 de Enero-31 de Julio, Octubre 1998, section D, paragraph 23.

²³¹ Hombre de Maíz, No.50, July-August, p.24. Approximately 35 million USD.

²³² Promise and Reality, Implementation of the Guatemalan Peace Agreements, p. 8

²³³ CNP-Tierra, Statement of the Joint-Commission, Siglo Veintiuno, 21st of January 1999, p. 38. Interview with Elisio Perez.

Guatemala is one of the few countries without a complete land register. The Guatemalan Government shall according to the ILO Convention identify the land, which are traditionally occupied by indigenous peoples and guarantee the protection of the rights of ownership and possession.²³⁴ The creation of a national register concerning the land issues is a highly delicate issue. Many of the indigenous persons had to abandon their lands to escape from the military and were displaced within or outside the territory. This opened a way for militaries and landowners to take the abandoned land and register it as theirs. The Economic and Social Agreement provides legal measures for the establishing of an efficient land register system.²³⁵ Yet the AIRIP does not mention a time period for the registration of land and there is a problem to know how far back in time the register will investigate land ownership. The establishing of a proper land register is fundamental for the implementation of the Peace Agreements and without a functional land register there is no possibility of distributing land or to solve the conflicts regarding land. The State is required to safeguard the indigenous peoples' right to participation concerning land issues and natural resources, stipulated in the Article 15(1) of the ILO Convention and Article 6b-c of the AIRIP.²³⁶ The Draft on the Law of Land Found was presented for the Congress in April 1999 but not adopted until May 1999. Moreover the Commission also presented the initial draft for a law concerning land registration and information about such registration.²³⁷ The Guatemalan Constitution recognises co-operative, communal and collectively lands as a belonging of the indigenous communities. Article 40 of the Constitution contains a special procedure offering the indigenous peoples a possibility to recover land traditionally held by indigenous communities even if the land now is registered as private property. Decree 9-96 concerning the ratification of the ILO Convention shows a strong lack of respect for the property of the indigenous peoples. The main provision in the ILO Convention is the Article 14 declaring the rights of ownership and possession over the lands they hold by tradition. The AIRIP declares that the rights relating to land comprehend "both the communal and individual tenure of land, rights of ownership and possession and other real rights, and the use of natural resources...".²³⁸ The issues concerning land and resources shall be treated under the Economic and Social Agreement with the exception of cases in special need for protection regarding the indigenous communal and collective land tenure, regularisation of the land, restitution of communal lands and compensation for lands.²³⁹ However, the Peace Agreements do not contain any special scheme on how to implement the provisions mentioned. The AIRIP has been criticised for following the interests of the big landowners and for not

²³⁴ Article 14(2) of the ILO Convention No 169.

²³⁵ Economic and Social Agreement, Section III, Part G, Article 38.

²³⁶ AIRIP, Section, IV, Part F.

²³⁷ CNP-Tierra, Anteproyecto del registro de Información Catastral, 1999-03-24/25.

²³⁸ AIRIP, Section, IV, Part F, Article 1.

²³⁹ AIRIP, Section, IV, Part F, Articles 2-3 and the Guatemalan Constitution Articles 67-68.

comprehending any land reform, which is fundamental for the changing of the structure in the Guatemalan society. The Arzú government has a strong support among landowners and Arzú himself was the head of the CACIF.²⁴⁰ The land issue was not given as much attention as wanted when debating the AIRIP but both this Agreement and the Economic and Social Agreement correspond to Article 14 of the ILO Convention. It has been argued that there are no state lands available for distribution and most of the land has to be acquired from private landowners financed by international funding.

6.4 The Constitutional Reforms and the Referendum

In October 1998, the Congress approved the constitutional reform of 56 Articles.²⁴¹ The reforms are the product of a prolonged process of negotiations between political parties and also social and institutional actors, among others the universities, indigenous organisations and human rights organisations along with the political institutions of the State. The reforms adopted by the Congress were submitted to a referendum for the participation of all citizens. Consequently are the people the main actors of the peace process and the strengthening of the democracy.

6.4.1 The Propositions²⁴²

The reform of Article 10 states the protection of the persons and the family. The new wording states the Guatemalan Republic as one Nation and within its unity and the integrity of the territory the nation is recognised of being pluri-cultural, pluriethnic and multi-lingual.

One of the most important reforms is the one reforming Article 66 of the Constitution. The Constitution of 1985 stated the protection of ethnic groups and that Guatemala is formed by diverse ethnic groups and among them the groups of Mayan ancestry. Furthermore the Constitution states the recognition and respect of the customs, traditions, languages, dialects and use of traditional dress. Also the respect for their typical lifestyle and social organisation is expressed. The new proposal is far more extensive. The State recognises, respects and protects the right to identity of the Mayan, Garífuna and Xinca peoples and their lifestyles, social organisation, customs and traditions. Further to this are the use of

²⁴⁰ Foundation Myrna Mack, Memoria del seminario taller sobre La realidad agraria y la coyuntura electoral, Quezaltenango, 3rd of September 1995 and the 1st of October 1995.

²⁴¹ Inter-American Institute of Human Rights, Guatemala; Actualización de 1998 y Enero-Mayo 1999, p.23.

²⁴² MINUGUA, Reformas de la Constitución Política de la Republica de Guatemala; Comaparación entre los artículos de la Constitución vigente y el texto reformado por el Congreso. Guatemala, December 1998.

indigenous dress, the different spiritual forms, languages and dialect and the right to transmit the heritage to younger generations recognised. The State also recognises the traditional authorities of the indigenous communities, for the taking root of the unity of the Nation, the integrity of the territory and the divisibility of the State of Guatemala. Nevertheless, protection is offered for the right to use, conserve and develop their art, science, technology as well as the access to holy places for each village under the circumstances that the law is established.

Article 70 concerns “Specific Laws”. The reform of this article concerns mainly the legislation affecting the indigenous peoples directly. The article refers to the laws in the third section, concerning the indigenous communities, second chapter concerning social rights and the second title concerning human rights the law regulates the relevant issues to the material of these sections. When matters foreseen to affect sensible issues directly affecting the indigenous communities, these communities shall be consulted in conformity with other specific laws.

Article 143 concerns the languages of Guatemala. Spanish has always been the official language but the vernacular languages have been recognised as a part of the cultural patrimony of the Nation. The new proposal suggests the Spanish being the official language within the whole of the national territory and the indigenous languages that the law establishes, fastening the field of material application according to the technical, linguistic and territorial criteria within certain regions. The State further recognises, respects and promotes the 21 Mayan, the Garífuna and the Xinka languages.

6.4.2 The Result of the Referendum

On the 16th of May, the referendum was held in Guatemala, asking the people to state their opinions concerning four distinct areas of reform; for the Nation and Social Rights²⁴³, Legislative Organism²⁴⁴, Executive Organism²⁴⁵ and the Judicial Organism and Administration of the Justice.²⁴⁶ The result of the referendum did not turn out as the indigenous organisations had hoped. Only 18.55% voted and among them, only 6% were in favour of the constitutional reforms. The abstention was 81.45%.²⁴⁷ According to the Supreme Court of Election, the reforms were rejected by 50.63% of the voters and 13 districts cast-off and 9 approved to the propositions.²⁴⁸ Women, peasants and illiterates²⁴⁹ did not reach the polling

²⁴³ The result in the whole territory was 43.27% in favour and 48.38% against. *Números finales*, Prensa Libre, 18th of May, p.4.

²⁴⁴ The result in the whole territory was 37.55% in favour and 53.15% against. *Números finales*, Prensa Libre, 18th of May, p.4 .

²⁴⁵ The result in the whole territory was 38.92% in favour and 51.78% against. *Números finales*, Prensa Libre, 18th of May, p.4 .

²⁴⁶ The result in the whole territory was 41.80% in favour and 49.24% against. *Números finales*, Prensa Libre, 18th of May, p.4, *Area de Justicia*, Prensa Libre, 21st of March, p. 6.

²⁴⁷ *NO gana 12 distritos y el SI conquista 10*, Prensa Libre, 18th of May, p. 1.

²⁴⁸ *EU: Es paso atrás*, Prensa Libre, 19th of May, p.4.

stations. Many cases were told about some people having to travel by foot for at least 2 hours.²⁵⁰ Some even had to walk for 8 hour to get to the nearest polling station. The difference, comparing to the general elections, was that no transports were arranged for the referendum, while usually such are arranged for the population living in the more isolated parts of the country.²⁵¹

The result of the referendum is to be seen as a political kind of rejection and can also be interpreted as a rejection of the peace process. According to Francisco Martínez, Director of FLACSO, the rejection of the constitutional reforms shows that the politicians have not succeeded in the dealing with the real problem for the population. Furthermore the questions were not sufficiently explained and they also contained too many “questions”²⁵² which made the people not vote or vote for the safest option, saying no to the reforms. The referendum was not very well presented for the people and a bad analysis was made concerning the developments in the field.²⁵³ The departments of the country that were the most affected once during the armed conflict voted in favour of the reform but the regions where the civil war was not that obvious the rejection was the winning party.²⁵⁴ The politicians have recognised the failure in the transmission of the importance of the adoption of the reforms to the people of Guatemala.²⁵⁵ The population did not understand the connection between the Peace Process and the constitutional reforms.

The reforms concerning human rights were not a product from one single or a few political parties but from all the Guatemalans and the development of a State in democratic development. It also shows the racism from a great part of the Ladino population, not wanting the recognition of the rights and culture of the indigenous peoples. The next government can bring up the reforms, after the elections in November 1999 and the alternatives for the adoption of the reforms rejected in the referendum would be the promulgation of ordinary laws, with the same proposition.²⁵⁶ However the rejection does not mean the suspension of the peace process but that the process will take more time than previewed. The defeat could be seen as a result of the illiteracy, which demands stronger initiatives in the educational field. It has to be kept in mind that the adoption of the reforms would have signified establishment of the main issues in the Peace Agreements regarding the rights of the indigenous populations and the reduction of the military power in

²⁴⁹ According to EU: Es paso atrás, Prensa Libre, 19th of May, p.4, the number of illiterate voters were 35% of the persons called for election.

²⁵⁰ Corado, Julia and Miguel, Gonzáles, Mujeres, Campesinos y Analfabetas se Quedaron en Casa Siglo Veintiuno, Miguel, 17th of May 1999, p.6.

²⁵¹ Interview with Susan Soux, MINUGUA, Guatemala.

²⁵² Emphasis added.

²⁵³ Martínez, Francisco, Es rechazo a clase política, Prensa Libre, 18th of May 1999, p.2.

²⁵⁴ Sandoval, Julieta, No se modifica la Constitución, Prensa Libre, 18th of May, 1999, p.3.

²⁵⁵ Larra, Myriam, Políticos analizan rechazo a reformas, Prensa Libre, 18th of May 1999, p.5.

²⁵⁶ Ruíz, Juan Carlos, Senderos para viejos cambios, Prensa Libre, 18th of May 1999, p. 6.

Guatemala. The elections were, maybe for the first time in the Guatemalan history, carried out without corruption and were clean and transparent.²⁵⁷

The result of the referendum further shows the problems that Guatemala is facing within the years coming and creates a step backwards for the Peace Process. It will not be easy to reform a society characterised by lots of people fearing change, and especially the uncertainty that these changes are producing.²⁵⁸ The whole process is marked by the mistrust of the politicians and of change. In addition to this, the rejection further shows the importance of information and confidence for the political class.

²⁵⁷ EU: Es paso atrás, Prensa Libre, 19th of May 1999, p.4.

²⁵⁸ Martínez, Francisco, Es rechazo a clase política, Prensa Libre, 18th of May 1999, p.2.

7 Conclusions

Taking a look on the aftermath of conquest and colonisation the world's indigenous peoples have suffered plenty and are still suffering inequities in the form of discrimination and the deprivation of their fundamental human rights and freedoms. Today the protection of indigenous peoples in international law has developed to protect the weaker part instead of the strong Nation States. Intents to keep the special characteristic and traditions of indigenous peoples have influenced international law in the development of standards for the peaceful co-existence of all peoples. The international protection of the world's indigenous peoples consist of customary and conventional norms concerning anti-discrimination, integrity, participation and the indigenous peoples rights to land and natural resources.

After 36 years of civil war the Guatemalan society has lost the confidence in the State institutions. The trust in the judicial system has vanished and there is an immense need for the showing of the will of the Government for the support of the Guatemalan people. It is hard to see a solution of the judicial process of the crimes committed in the 1980s without upsetting the national balance and international forces that allowed the signing of the Agreements. Nevertheless, it is necessary to struggle against impunity for the reconciliation of all Guatemalans and for the construction of the new democratic society. The issues concerning the rights of the indigenous peoples are most delicate as they remember of a time surging during the insurrection. The indigenous population still suffers from a high level of poverty and a low level of access to the educational system, health services and economic opportunities. They bore the brunt of the worst cruelties of the conflict and were pressed between different sides. The extent of the cultural damage for the indigenous caused by the long conflict is still unmeasured but presumably very high. Even though many of the political reasons for the conflict have been tackled with, the economic ones still exist without greater changes.

To strengthen the protection of human rights in Guatemala it is of very high importance that the Guatemalan State ratifies and implements the international human rights instruments not yet completed. Along with the ratification the State shall also recognise the competence of the Committees against Torture and for Elimination of All Forms of Discrimination, the Optional Protocol of the International Covenant on Civil and Political Rights and the Additional Protocol of the American Convention on Human Rights for the Question of Economic, Cultural and Social Rights. Furthermore the Inter-American Convention on Forced Disappearance and the Statute of the International Criminal Tribunal should be recognised and it will be necessary to work for the full entering into force of all the international human rights instruments and not only for the look of it. Necessary measures should also be taken against the violations of international humanitarian standards. The Government shall educate the State institutions and

its personnel in the norms of international humanitarian law, especially the Army. As to the national development the adoption of the constitutional reforms and the society's support regarding the elaboration of the Commissions of such proposals are fundamental for the respect of all peoples in the future Guatemala. It is important to bare in mind that there has not been any specific legislation protecting the indigenous peoples in Guatemala except from the Constitution. In addition to this the constitutional protection was constructed by empty words and has not worked in practice.

The language in the Agreements is most general comparing to other settlements, reflecting that the key factor was missing. The indigenous population, the private sector and big parts of the civil society were not represented in the negotiations. The creation of the Commissions was not embraced by the population as a possibility to influence the Peace Process. Many adopted a rather awaiting and observing attitude, watchful for the result. The Government took strong measures for unilateral agreements before and after the signing of the Final Agreement for the establishing of trust among the Guatemalans. Here including changes in high military positions and the naming of competent people in the positions of implementing the Agreements. The AIRIP asserts the lack of recognition of the indigenous as full rights citizens of the nation and that it is necessary for Guatemala to recognise their rights for the achievement of a united nationhood. The indigenous organisation called for a broad change of the educational system, multi-lingual courts, use of customary law, and the consultation of the indigenous groups when concerning matters affecting them. The AIRIP reflects the consensus but it is unlikely that such consensus is shared by the majority of non-indigenous society, yet not confronted with the full implication of the implementation of the Agreements and the shifting of resources. The changing of the low tax burden and the existence of racist attitudes are jeopardising the implementation of the provisions established and will be met by resistance. The Mayan groups within their umbrella organisation have shown a huge lack of consensus and tension between the groups.

If the spirit of the AIRIP is fully realised it may be the most important Agreement of all, re-establishing the Guatemalan nationality as pluri-cultural, multi-lingual and pluriethnic. This would also reshape the relationship between indigenous communities and organisations of the State and greatly reduce the racism and the open contempt that has poisoned the relations among the Guatemalans since the Conquest. The Agreement also seeks to strengthen the material basis for the predominantly impoverished indigenous communities and to empower them for the governing of local affairs according to their norms and traditions. It is not simply a matter of recognising the existence of indigenous groups, already done by the Constitution of 1985, but also of recognising the indigenous as the original part of the nation. The Agreement calls for a wider participation of the State regarding issues of participation, the decentralisation of powers, the respect for customary law and the struggle against discrimination of the indigenous. In many

respects the accord is open-ended, more like a general bill of rights to specify. The full implementation of the provisions established depend on the capacity of the indigenous organisations to organise themselves and to co-operate, for the achievement of the unity among these groups.

Many of the recommendations from the commissions are controversial and are inevitable to cause disagreements. The not making indigenous languages official just because they have few speakers or forcing the public officials to learn indigenous languages will create a lot of fear and anxiety over the loss of jobs and change. The claim for access to Mayan holy places is to create a conflict with the government and the Christian churches as well as private tourism operators. The demand for a national bilingual education program will meet hostility from Ladino parents. The efforts to increase the power of the indigenous are meeting and will continue to meet resistance from the traditionally dominating population, accusing the Mayans from creating a Mayan State within an already existing State. Another problem within the negotiations between the different fractions of the Commissions is the high but unrealistic ambitions of the indigenous representatives. Many indigenous leaders have been accused for not having their feet on the ground, which might be due to the lack of educated indigenous representatives. The Commissions have shown mixed failure and success. The constitutional changes can be seen as the best example of success and at the same time as the worst example of failure. The implementation definitely seems less dramatic than the goals set out in the Agreement, which fosters both frustration and a sense of failure. Sadly, the proposals for constitutional reforms, submitted to a referendum in May 1999, were not approved by the people in the referendum. The reforms were meant to secure the identity and rights of the indigenous peoples and to recognise some of the indigenous languages spoken by nearly 60% of the population.

The strongest call for implementation came and is still coming from international organisations. Donating funds for the post war situation, demanding a full implementation of the budgetary and taxation goals necessary for the compliance of the Agreements. In 1998 the Government backed off from the promise to approve new tax legislation, called for in the Agreements, weighing the political and electoral costs for the sacrificing of international grants in a long perspective against the short perspective of losing voters by raising the taxes. This is an enormous sign that the process still is most vulnerable and shows the mistrust for democratisation called for in the Agreements in a long perspective.

Although, the indigenous participation has been possible for the first time and the army's withdrawal from its dominant position in the political life, the economic structure of the land question is still not resolved in a satisfactory way. The question is whether it will be so even when all the Agreements are implemented. The land conflicts are most complicated for the Peace Process. The Agreements call for recognition of the land conflicts as a serious problem for the displaced

person and refugees. The conflicts have a long history ever since the Conquest but the intention was that the Agreement would resolve these problems. However, land invasions began before signing the Agreements and are still occurring, complaints were presented to the government, evicting the occupiers by force. Yet the problem goes deeper than individual claims. The URNG did not succeed to reach an agreement comparable to the agrarian reform carried out by Arbenz's Government since today's Government is strongly backed by large landholders. Guatemala has a large rural population, a high level of land inequality and very serious rural poverty and insufficient urban employment which affects the basis for the resolving of the land conflicts. The ones that will receive land are but a small proportion of those who need it. The Agreement addresses this bigger problem but in vague terms. The theme is most delicate and the impression I have from interviewing the representatives of the governmental and indigenous parts is their fear of letting anything go and the reluctance to compromise. Another problem is the way the Ladino society sees the indigenous communities and their collective life style. Different opinions are fighting each other and it is hard to know what to believe. Indigenous parts claim that the collective lifestyle is an old pattern among the indigenous groups while some representatives from the Government claim that these forms of living arrived with the Spaniards and therefor is no Mayan characteristic.²⁵⁹

The biggest problem in Guatemala is the one regarding legacy of cynicism and mistrust pervading the society. The voter turnout is low and the political system lacks confidence and tolerance, trust and support from the Guatemalan people. Though Guatemala does show signs of promise and a lot has changed in recent years, but the struggle of the implementation of the Agreements is far from over. However, the Agreements qualify for the fulfilling of the requisites for the compromises even though they will not be as successful as the civil society must have hoped. The faith of the observance of the Agreement will depend on the cultural democratisation and the political will as well as the consciousness of the people for these issues. A fundamental obstacle for the development of Guatemala towards a full implementation of the Agreement is the fear for ethnic division. The need for patience, negotiations and tolerance is greater than ever.

²⁵⁹ Interview with Carlos Cabrera, UTJ, concerning land rights.

Supplement A

Convention No. C169 has been ratified by 13 countries.

Country	Ratification date	Status
Bolivia	11:12:91	ratified
Colombia	07:08:91	ratified
Costa Rica	02:04:93	ratified
Denmark	22:02:96	ratified
Ecuador	15:05:98	ratified
Fiji	03:03:98	ratified
Guatemala	05:06:96	ratified
Honduras	28:03:95	ratified
Mexico	05:09:90	ratified
Netherlands	02:02:98	ratified
Norway	19:06:90	ratified
Paraguay	02:02:94	ratified
Peru	02:02:94	ratified

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Supplement B

The Agreements

The Framework Agreement for the Resumption of the Negotiating Process between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca

A/49/61, S/1994/53, 19th of January 1994

Comprehensive Agreement on Human Rights

A/48/928, S/1994/448, 19th of April de 1994

The Agreement on Resettlement of the population Groups uprooted by the Armed Conflict

A/48/954, S/1994/751, 1st of July 1994

The Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer

A/48/954, S/1994/751, 1st of July 1994

The Agreement on Identity and Rights of Indigenous Peoples

A/49/882, S/1995/256, 10th of April 1995

The Agreement on Social and Economic Aspects and Agrarian Situation

A/50/956, 6th of June 1996

Agreement on the Strengthening of Civilian Power and on the Role of the Armed Forces in a Democratic Society

A/51/410, S/1996/853, 16th of October 1996

The Report of the Secretary-General and Agreement on a Definitive Cease-Fire

S/1996/1045, 17th of December 1996

The Agreement on Constitutional Reforms and the Electoral Regime

A/51/776, S/1997/51, 20th of January 1997

The Agreement on the basis for the Legal Integration of the Unidad Revolucionaria Nacional Guatemalteca

A/51/776, S/1997/51, 20th of January 1997

Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreements

A/51/796, S/1997/114, 7th of February 1997

Agreement on a Firm and Lasting Peace

A/51/796, S/1997/114, 7th of February 1997

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(Caraballeda, Venezuela, 12 de enero de 1986)

Declaración de Esquipulas (Esquipulas, Guatemala, 25 de mayo de 1986)

Acta de Contadora para la paz y la cooperación en Centromérica
(Ciudad de Panamá, 6 de junio de 1986)

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Acta de Instalación de la Comisión Internacional de Verificación y Seguimiento
(Caracas, Venezuela, 22 de agosto de 1987)

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(Guatemala, 11 de septiembre de 1987)

Declaración de Alajuela (Alajuela, Costa Rica, 16 de enero de 1988)

Acuerdo de Oslo (Oslo, Noruega, 29 de marzo de 1990)

Acuerdo de El Escorial (Madrid, España, 1 de junio de 1990)

Declaración de la URNG en Ottawa (Ottawa, Canadá, 1 de septiembre de 1990)

Comunicado del CACIF en Ottawa (Ottawa, Canadá, 1 de septiembre de 1990)

Declaración de Quito (Quito, Ecuador, 26 de septiembre de 1990)

Declaración de Metepec (Metepec, Puebla, México, 25 de octubre de 1990)

Declaración de Atlixco (Atlixco, Puebla, México, 28 de octubre de 1990)

Iniciativa para la paz total de la Nación (Guatemala, 8 de abril de 1991)

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Declaración unilateral de la URNG, de cese de fuego (19 de marzo de 1996)

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