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LAND RIGHTS AND PEACEBUILDING: CHALLENGES AND RESPONSES FOR THE INTERNATIONAL COMMUNITY

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Abstract
Rectifying land rights in war-torn settings are among the most daunting challenges of peacebuilding. War-torn land tenure situations are unique settings in their combination of a weakened and chaotic formal (statutory) system, vigorous but very fluid informal tenure activity, along with the presence of political demands regarding land, and international actors that have a large interest and influence in the success of any improvement or recovery. While this combination carries risks, it also represents real opportunity for practical and policy reform in the formal and customary land tenure sectors of countries recovering from armed conflict. In this regard the statutory tenure reorganization and reform efforts supported by the UN need to assess how the development of informal tenure institutions, problems, and processes are proceeding 'on the ground,' so as to draw legitimacy from these processes into reformulating national tenure structure, policy, law, and enforcement; thereby contributing to durable peace. This has the advantage of working 'with the grain,' and building on what has already been learned, disseminated, and accepted within the informal tenure system as the formal legal system is being reformed and implemented—as opposed to expecting people to disengage from binding customary obligations involving land when improved formal laws are finally enacted and enforced. Without this purposeful connection, tenure institutions at different levels risk evolving in different directions, with considerable difficulty and volatility later on for any attempts to reconnect them. With such a connection however, new policy can support what people are already doing, and engage in on-going issues of disputing, resettlement, restitution, proof of claim, and the role of land and property in economic development. In post-crisis settings, new laws have the opportunity to address land and property issues in the context of what people are already doing 'on the ground', with a view to moving from the fluidity of crisis situations to a more solidified and peaceful social and legal environment as an outcome. Positive examples exist, and several of them are presented in this paper. The article discusses the primary challenges regarding land rights in war-torn settings and then includes both practical and policy options for overcoming them. The paper draws on the author's land tenure experience in 15 war-torn countries.

Introduction

Secure rights to land is important to the development of economic activities, capital accumulation, food security, and a wide variety of other socioeconomic benefits. It is generally thought that secure land rights lead to increased investments in land and as a result, greater agricultural production and subsequent wealth generation and development. However, most civil institutions cannot endure the stresses of large-scale

unresolved land conflicts in society. Countries affected by or threatened by such problems usually lack the political and institutional capacity to resolve such a magnitude of land rights problems. This is especially the case where rural land rights issues are a fundamental unresolved problem in society. If not dealt with, such problems can lead to an accumulation of aggressively confrontational ways of dealing with land rights problems which then emerge from an increasingly divided society. The result is a build-up of competition, inequity, confrontation, grievance, resentment and animosity; with no legitimate, fair way to manage all of these through a country's legal system. While there are a variety of factors that can be a part of a land rights contribution to periods of crisis (such as resource scarcity, poor land access, governance and political problems, identity, geography, history, ethnicity, grievance, religion), many countries are able to establish legitimate and fair institutions[1] to manage these; while those countries that are affected by very large numbers of unresolved conflicts are not able to do this. For such conflict-affected countries the problem is more complicated and difficult because alternative informal institutions and approaches (such as warlord or mafia forms of land tenure, or extremist religious approaches to land rights) can emerge from the absence of effective, legal institutions. These alternatives are able to operate within the fluidity, confrontation, and grievances of land conflict-ridden situations. Such crisis-based alternative informal institutions, which often belong to specific segments within a population, usually do not function in a fair manner in the context of broader society, and so ideally should be replaced or reworked. But because such crisis situations[2] are very different than land tenure situations in stable, well functioning peaceful settings, land tenure solutions in such situations are also different. What may work well in stable, peaceful settings have proven extremely difficult to implement and operate in societies affected by or threatened by pervasive unresolved land conflicts. In such difficult contexts, different interventions are needed in order to be able to: 1) work within a conflict-prone setting; 2) meet short-term land rights security needs; 3) use land rights as a tool in recovery or improvement[3]; and 4) transition to more stable and conventional land rights arrangements. This article considers the role of large-scale conflictive land rights situations and how these are both problems and opportunities for conflict affected countries. The paper focuses on the most commonly encountered problems associated with societies prone to conflict over land. The article provides an indication of what interventions are most appropriate for certain types of problems, and provides examples of these.

Framework of Challenges and Approaches to Land Rights in Conflict Settings

This section provides an overview of the primary challenges and associated approaches to land tenure in conflict scenarios, which are then elaborated in more detail in the subsequent sections of the paper. The overview takes the form of a general outline framework so as to be able to consider the challenges together with the approaches to resolving them. For each of the primary challenges, the crucial elements are briefly listed, followed by a similar listing of relevant approaches.

Formal statutory rights

Challenges

- Poor statutory arrangements can contribute to the cause of conflict;
- Can be crippled, dysfunctional, corrupt, low capacity, of questionable legitimacy;
- Land disputes not resolved;
- Out of date laws;
- Grievances, discrimination.

Approaches

- National land policy reform;
- Legal actions (decrees, rulings) targeting specific problems;
- Institutional reform.

Customary rights

Challenges

- Can exist in a state of considerable tension with statutory and other customary forms of tenure;
- Lack of institutional approaches to resolving tenure problems leads to a search for alternatives, including violence, and insurgent, warlord, and radicalized politics;
- Undergoes profound change due to armed conflict: disarray, inability to provide services, segmentation and internal distrust.

Approaches

- The need to avoid re-imposing pre-war problematic statutory land laws where customary tenure is re-emerging and working effectively;
- The need to avoid downgrading customary law so as to promote statutory approaches in their stead;
- Avoidance of overt support for warlord forms of tenure and their authorities;
- Avoidance of spatially explicit forms of support—favouring one or a few villages or communities in disputing.

Legal Pluralism

Challenges

- The breakdown of institutions, and formation of multiple alternative ways to do land tenure;
- Forms of legal pluralism that are opposed, incompatible, confrontational, competing, or add confusion, can detract from peacebuilding;
- How are forms of legal pluralism which emerge and change quickly

during and after war to be connected with the slower moving statutory tenure reform;
- The large roles of grievance and legitimacy in the emergence of legal pluralism.

Approaches
- The opportunities in 'forum shopping';
- Utilizing natural change in legal pluralism—from forum shopping to forms of appeal.

Land Disputes

Challenges
- The evidence problem;
- Statutory vs. customary disputes;
- Private property disputes;
- Disputes involving public lands;
- Historical injustice.

Approaches
- Relaxing formal evidence rules for claims and disputes;
- Incorporate customary forms of evidence into statutory approaches;
- Deriving workable forms of evidence for claims and disputes;
- Avoidance of third party intervention in land disputes—taking sides;
- Addressing capacity imbalance;
- The role of mediation.

Peace Agreements

Challenges
- The importance of third party mediators being well versed in the country-specific land issues;
- Reintegration of lands into a national tenure system;
- 'Parking' certain land issues until after a peace agreement;

Approaches
- The role of valuable lands in peace negotiations;
- Including mechanisms and timeframes for reintegration of areas held by insurgent forces;
- Parking issues in land commissions: third party support, 'unpacking' land issues into those to be dealt with in an accord and those to be parked until later.

Primary Land Rights Challenges in a Conflict Context

This section describes the most prevalent challenges facing war-torn countries attempting to reconstitute land and property rights systems. Prior to the examination of these however it is worthwhile to list some of the factors which are influential in determining the nature of these challenges. While a discussion of the factors which determine the nature of tenure systems in war-related settings is beyond the scope of this paper, having been previously extensively covered (Leckie, 2008; Unruh, 2002; Unruh, 2006; Unruh, 2008), the listing here is intended to provide an indication of the type of factors important in determining the post-war land tenure situation generally. In brief these determinants include: the large-scale dislocation and then return of refugees and internally dislocated persons; the destruction of properties and the boundaries, documents and other features important to claim recognition; the partial or complete collapse of both customary and formal tenure systems and the services they provide due to the inability of most civil institutions to endure the stresses of armed conflict; identity-related attachments to specific land areas which may be connected to the current conflict or not, with the fluidity of armed conflict often offering 'open moments' or opportunities for groups who desire to redress historical injustices involving land; large changes in the existence, value and workability of forms of evidence and proof for claims; and disappointment or distrust in the way a post-war state handles land issues. Finally, the spatial aspect of both armed conflict and land tenure and the reality that both are about spatial-social relations, often results in profound change in forms of tenure and its constituent parts: claim, allocation, inheritance, transfer, demarcation, restitution, and adjudication.

Formal (statutory) Land Rights in Conflict Contexts

The variety of poorly functioning state (otherwise known as 'formal') land tenure institutions and processes that cause land conflicts is significant. These range from legalized forms of eviction, discriminatory policies, land confiscations, land speculation, crowding, acute tenure insecurity, and corruption in court procedures and court access. Often the accumulation of land-related grievances, the lack of legitimate and workable alternatives, and the presence of weapons combine to provide for violence as an alternative way to resolve land disputes. Such a situation can also lead to a land tenure contribution to armed conflict. The reduction of state power, legitimacy and institutional ability can lead to a search for order. Such was the case with the eventual emergence of Shari'a courts in Somalia, and, arguably, the emergence of the Taliban in Afghanistan. Both were able to field their own mechanisms of enforcement for a variety of institutions, including land tenure (Unruh, 2002).

Such dysfunctional statutory land tenure systems in developing countries can be rife with micro-level generic disputes that do not get resolved, and are often highly

discriminatory. At times they can constitute, as in the Balkans, formal policy support of ethnic cleansing. In Liberia prior to the war, the statutory tenure system generated an accumulation of rural underclass land related grievances that resulted in a crisis of agrarian institutions (Richards, 2005). At the same time poor governance precluded the peaceful derivation of alternative, legitimate, and equitable institutions and approaches (Sawyer 2005). Over time, land grabbing in Liberia by powerful urban and rural elites operated within an out-of-date, neglected, and discriminatory statutory tenure system. Coupled with the inability of the non-elite (primarily disaffected youth) to acquire and maintain control of land, the result was the production of deep animosities regarding land that were not resolved by the signing of the peace accord that officially marked the end of the Liberian conflict. As a result land disputes in the country continue to be volatile (Unruh 2009).

In a wide variety of developing countries the statutory land tenure system is crippled and is thus exposed to abuses and non-compliance. This in turn can produce a 'black market' in land and properties, which essentially functions as its own tenure system. The corruption, and low-capacity of state land and property institutions, government organizations, and personnel, results in a reduction of resources, the departure of personnel, and the degradation of the institutions which are responsible for conducting and enforcing formal land rights procedures. In countries threatened by factional conflict, insecurity in parts of the country can further reduce the capacity and legitimacy of the formal tenure system at a time when land tenure security problems are a growing concern for large numbers of people over extensive areas. The legitimacy of the formal land tenure system can be further reduced in war-related situations because of the system's connection to the state if the government is part of the war—which is very often the case. In post-war Zimbabwe, local distrust of the state was significant even when the insurgency won and went about establishing a government and policies regarding land, because local chiefs were purposefully left out of the new state due to their alliance with the Rhodesian administration.

The resulting post-war land tenure situation, especially in high value resource or important areas, is one where, a) the formal tenure system can be used by elite land interests to gain access to land that is, b) also allocated under customary tenure systems to smallholders, but that can, c) also be occupied by large numbers of migrants, IDPs, and ex-combatants seeking to legitimize their occupation either temporarily or permanently. As these different groups use different evidence (forms of proof, or reasons for claiming lands) that are often attached to the different sides in the war, such evidence is also often incompatible or opposed. The result is a lack of land conflict resolution institutions able to handle these different forms of evidence.

Yet another problem is that in countries with poorly working or dysfunctional land tenure systems, conditions are such that the state will, in many cases, be weak and of questionable legitimacy in the eyes of many in civil society. As a result, the informal non-state rights and obligations that have been created and used to facilitate land and property transactions, inheritance and etc., can be much stronger than any current or even any new statutory laws. This is especially true when the state attempts to disseminate and

enforcing such laws with agrarian, semi-literate, crisis-weary populations.

Informal (Customary) Land Rights in Conflict Contexts

Customary land tenure (also known as traditional, indigenous, or tribal land tenure) in many areas of the developing world frequently exists in a state of substantial tension because it often operates in conflict with other forms of tenure. Often customary tenure can develop to resist, evade, or oppose other forms of tenure—statutory, international, religious, and other forms of customary tenure (i.e., one tribe's tenure system versus another). Divisive tenure relationships between customary and other tenure forms, with no institution to resolve them legitimately, can cause or contribute to acute conflicts because alternative informal ways of resolving land rights problems are then sought, including violent means. An additional problem is when customary tenure itself degrades, collapses, or becomes abusive and there is a reaction to this by the wider customary population. This was a primary contributor to the wars in Sierra Leone and Liberia.

Whatever its state prior to a crisis in a country -such as war, natural disaster, political/policy problems- customary tenure during almost inevitably undergoes change as a result of the crisis. The effects of dislocation, battlefield gains and losses, alliances with one side or another in a larger conflict (forced or voluntary), changes in power relations within customary society, food insecurity, deprivation, and desperation all bring change. The effect after a crisis can then be a customary tenure system in severe disarray, with little ability to provide for the institutional land needs of a customary population. And again, there can emerge a wide variety of alternative or hybrid approaches to claiming and securing lands after a national crisis. These can often be less directly connected to customary tenure systems, and instead more connected to the crisis-related experiences of squatters, refugees, IDPs, migrants, combatants, the impoverished, the evicted, alternative authority structures (i.e. warlords, Islamic law), and opportunists in and outside of government. To the extent that a recovering customary tenure system sees itself as competing or confronting these post-crisis tenure alternatives, serious problems can emerge in reconstituting effective rule of law with regard to land tenure, with repercussions on both customary and statutory tenure.

Legal Pluralism in Conflict Contexts

The breakdown or lack of institutions able to effectively handle land rights issues can allow for opportunities to reconfigure certain land tenure arrangements to more closely suit the needs of particular groups and situations. The confusion, competition, confrontation, and yet importance of seeking secure access to rural lands in situations of low state and/or customary capacity or during periods of crisis results in the emergence of many norms or 'ways' for attempting to legitimize and defend land access, land claim, land use and resolve disputes. This creates what is known as 'legal pluralism' (different laws—statutory and customary—for different peoples) about land to become very developed--with different sets of rules regarding land, property, and territory bound up in

the reasons for a crisis itself. This will especially be the case where land issues are a big part of the cause and maintenance of a crisis. In such a situation, legal pluralism for rights to land that are incompatible, opposed, or add confusion and tenure insecurity to a population can seriously jeopardize any attempts at improvement or recovery.

The development of legal pluralism for land tenure is very common after periods of armed conflict for example. Forms of legal pluralism are developed 'on-the-ground' and 'as needed' by the population at large (often relatively quickly), and are connected both to wartime and pre-war experiences and group membership (tribes, religious groups, etc.). The end to a war can see legal pluralities regarding land brought together in competition and confrontation in a peace process. This occurs as the postwar activities of large numbers of people become focused on reaccess to properties and land very quickly. This heightened interaction can result in a very fast development of legal pluralism. As access to land is attempted with a great deal of urgency during this time, competing claims can result in people abandoning features of pre-existing tenure systems (laws, norms, dispute resolution institutions) because the very large number of disputes and the lack of legitimate mechanisms to resolve them have made such features unworkable, or they believe there is little point in following tenure rules that others are not following. In contrast, statutory legal land and property reform after armed conflict is costly and time-consuming, because numerous institutions must be rebuilt, personnel trained, and law-making pursued in ways that presumably encourage legitimacy among the population at large. The problem becomes how to connect this comparatively slow-moving process (statutory legal recovery) with the much quicker and more fluid behaviour of the formation of norms, or informal 'legal fields' for doing land tenure (Figure 1).

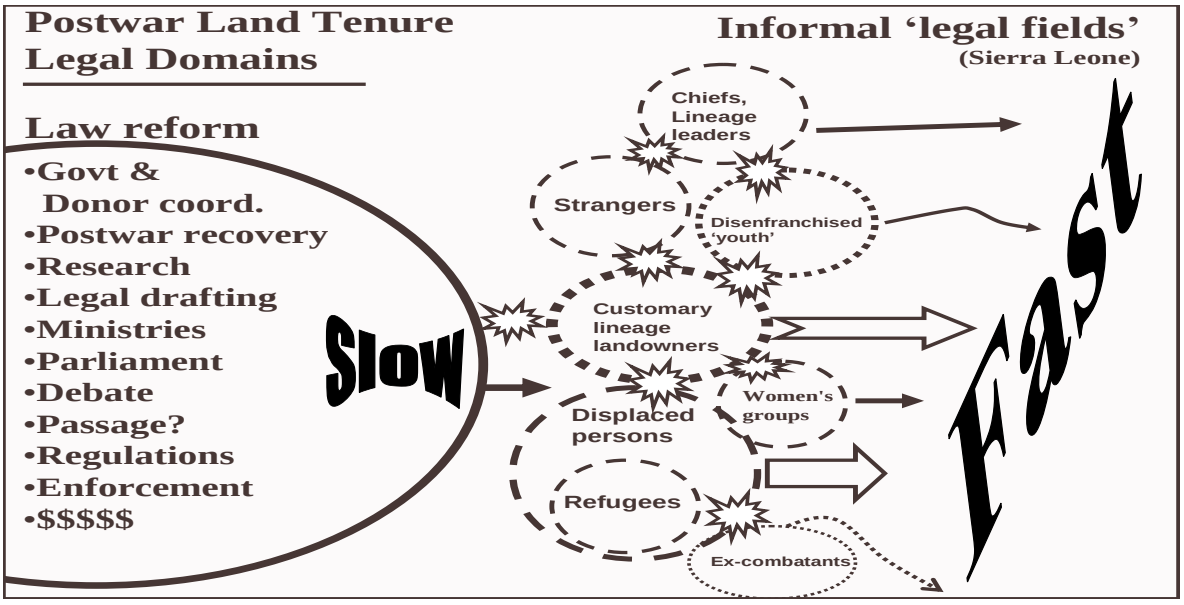

Figure 1. Legal pluralism in post-war land tenure: formal and informal. Formal law is represented on the left by the solid line (and the processes contain within). Informal legal fields are represented on the right by the various dotted lines, comprised of people with similar experience. The 'spark' symbol represents confrontation between legal fields.

In general the derivation of legal pluralism in land and property rights in conflict contexts can occur: (1) as a need to derive an arrangement that works locally in the absence of functioning state institutions, (2) in the context of a resurgence in the use of traditional norms in certain groups (frequently tied to identity such as tribes or clans), (3) as areas taken over by an opposition group purposefully pursue approaches different from or opposed to the state, and 4) as a response to grievences about how the state handles land tenure. During Mozambique's RENAMO war, the considerable reduction in the capacity of the state to administer land allowed not only the RENAMO opposition, but also a variety of groups to exert alternative approaches to land access and use. Several commercial interests with international backing also derived their own approaches to land tenure by obtaining official land documents from the government, then making separate arrangements with the RENAMO insurgency for access to tracts of land, and provided their own paramilitary enforcement of this access. This included taking over land occupied by customary groups. At the same time, many communities in Mozambique who were not dislocated refocused their attention on their own traditional ways of land access, dropping any recognition of state land administration that existed prior to the war. In some cases this allowed the occupation, or re-occupation, of lands formerly seized by the state or commercial interests.

The role of legitimacy in legal pluralism

The importance of the legitimacy[4] of land claims and tenure systems influences the creation of legal pluralism in four ways, and again armed conflict and a peace process provides a good example. First, there can be a reduction in the legitimacy of the formal statutory land tenure system for much of the population. While this can be particularly true for those belonging to or sympathetic to insurgent factions, the reduction in legitimacy for those either neutral or sympathetic to the state is primarily tied to the state's reduced capacity to administer the formal tenure system (Unruh, 1997). Second, notions of legitimacy for claims to land can combine with identity and involve the justification of claims based on historical occupation which can be supported by oral histories about how various peoples came to exist in an area and in the world (Comaroff and Simon, 1977; Unruh, 1997). Such justification can gain renewed strength during armed conflict or other forms of crisis, so that the pursuit of a 'return' to historical lands or territory - from which groups were expelled or departed recently or long ago - can become a priority. In some cases, such a situation can be seen as a rare opportunity to regain historical lands prior to the solidification of peace. Third, forms of land tenure may be created which are directly connected to an armed opposition or insurgency which is then made legitimate by direct military occupation of lands and military strength (Vines, 1996; Unruh, 1997; Hanlon, 1991). Mozambique provides an example where the RENAMO insurgency, during the war and the subsequent peace process, both reallocated land to local people as a way to gain support and at the simultaneously turned away those who had been issued land concessions by the FRELIMO government, regarding these as

illegitimate. RENAMO reallocated land to smallholders for the purpose of its own food supply and issued its own concessions for timber and other resource extraction activities, which of course were not regarded as legitimate by the FRELIMO government. In Zimbabwe's liberation war (Alexander, 1992), the process of the formation of legal pluralism for land was very strong. In this case, the insurgents provided guaranteed land access, an end to land taxation, and political and economic autonomy.

Fourth, legitimacy in a tenure system can come about as a reaction to the insecurity generated during armed conflict or other crises and the desire for the return of some form of legitimate order in society. As noted previously the Shari'a courts in Somalia (UNDP-EUE, 1999) and the emergence of the Taliban in Afghanistan are examples.

The role of grievance in legal pluralism

The role of grievance in contributing to legal pluralism is important. An accumulation of grievances in a population about 'unjustness' in the way the state deals with land rights, can constitute an important force in the reduction of state capacity in land issues. Such grievances can range from simple disappointment to distrust of the state and its ability, willingness, or bias in handling land issues to the perception of the state as the enemy. The latter can be especially powerful if an accumulation of land-related grievances exist against the state due to land alienation and discrimination, corruption, or state intervention in agricultural production, dislocating agricultural and/or population programs, and heavy-handed approaches to enforcement of state decisions about land issues. Such an accumulation can result in what Ranger (1985: 1) calls a "historical consciousness of grievances" with land rights issues, which can become especially acute if such grievances merge with other issues not necessarily related to land. In such cases, plural land tenures, once developed, can persist with considerable stubbornness, by justifying themselves with appeals made to perceived historical wrongs done to certain groups (Merry, 1988). For example, land grievances had been at the core of Salvadoran friction since the colonial era and constituted some of the primary causes of the conflict in the 1980s. This was also the case in Zimbabwe's liberation war regarding land expropriations by the Rhodesian state. In both Mozambique's RENAMO war and Ethiopia's Derg war, significant grievances surfaced as a result of government villagization programs. Variations of such grievance-based conditions also occurred in the wars in Central America and problems in southern Mexico, and in the way the land issue has been handled over the course of the conflict between the Palestinians and the Israelis (Cohen, 1993). In the latter example, land confiscation and the way it occurs for Israeli settlement-building has been a significant grievance-based feature of the overall problem (Holbrooke, 1998; Cohen, 1993). This has also been a fundamental part of the situation in Somalia, where disputes over resource access such as grazing lands and water resources merged with a history of perceived wrongs done to clans and sub-clans on issues not necessarily related to land. And animosities tied to historical events also have played a fundamental role in the ethnic cleansing of lands in the Balkans.

The overall effect of such mistrust or grievance, together with a low capacity government, is the fairly rapid emergence or return of a variety of alternative forms of doing land and property rights, with the speed and direction of this emergence connected to the type of grievance felt by a particular group and how this intersects with land tenure needs. Large-scale disappointment in government can manifest itself in different forms of local land administration, particularly when the ideology, mobilization, and aspirations of acutely felt land tenure needs and grievances become acute in the minds of many, and a state administration can find that it has limited influence (Alexander, 1992).

Land tenure disputes

The evidence problem

Many land dispute problems in the developing world often begin with a more fundamental evidence problem between formal and customary tenure systems. Formal land dispute resolution used by the state favors claimants in possession of some form of documentation- which most smallholders do not have, especially in crisis or low capacity state administration contexts. Instead, smallholders use an array of locally derived customary evidence which connects them to a community and to community land, with history of occupation and physical signs of occupation being among the most common evidence for this connection. Further, this evidence is communicated (attested to) orally and not with a state issued document, and the source of customary evidence is the local community or lineage, and not the state. Customary approaches for land dispute resolution value membership in local lineages, tribes and communities as the most valuable forms of evidence. Thus, testimony from lineage and community members about the history of land use and land occupation is very valuable customary evidence. This is evidence that statutory or 'outside' parties to a dispute do not have. However, formal legal decisions in a land dispute often must be based on the evidence presented. While documents are commonly admissible forms of evidence, oral testimony usually is not admissible, or if it is then it is of secondary value. Thus, based on admissible forms of evidence, formal dispute resolution decisions are often made in favor of documentation. Such a seemingly unfair and illegitimate approach to land dispute resolution, from the perspective of customary smallholders, can produce serious risks of instability.

Statutory versus customary disputes

One of the most common types of disputes in developing countries is between people belonging to customary tenure systems versus those belonging to statutory tenure systems. Apart from the evidence problem noted above, both of these systems will likely be quite disrupted during and after a crisis or in situations of low administrative and institutional capacity. In crisis situations those in positions of power can try to take advantage of these disrupted systems to initiate and win in a land dispute. Generally the

biggest problems of this dispute type will be about the numerous forms of incompatibility between the two types of land tenure systems, and the non-recognition and non-workability of evidence and institutions for delivering fair outcomes and the enforcement of outcomes.

While incompatibility between customary and formal tenure systems is common even in non-crisis situations in many countries, it is especially difficult in countries that are in crisis. The incompatibility between statutory and customary land tenure systems is based on very different logical ways of doing institutional, authority, legitimacy, legal, and claim aspects of land tenure. Not recognizing the tenure system that is not one's own can be a large part of this incompatibility and has to do with not recognizing claims, sources of authority, or institutions which administer land in other tenure systems. For example, customary claims are frequently not recognized by statutory authorities, and the reverse is also common. This is complicated by the breakdown of institutions within both customary and formal tenure systems during a crisis, along with the loss or change of forms of evidence to support claims, including loss of documents, loss of clear customary land markers, non-occupation of customary locations, and lack or absence of customary and statutory authorities.

Private property disputes

The breakdown of statutory land tenure institutions and procedures during times of crisis or low government capacity leads to specific problems for private property. This occurs primarily as, 1) dislocated customary populations attempt to re-access lands, try to access new lands, or retake historical lands which also have claims based on documented title, 2) land and property speculation and fraud able to take advantage of the crippled formal tenure system occurs-this can include reselling the same land numerous times, and alteration, destruction, copying, and falsifying deeds, titles, or other property documents.

Particular types of disputes in this context can result from:

1. destruction, loss, or deterioration of land and property survey documents,
2. fraud by falsification of documents or alteration of documents,
3. destruction or neglect of boundary markers,
4. the introduction of alternative forms of evidence for claim,
5. certain inheritance outcomes,
6. legitimized violent evictions or violent claims to lands.

These causes of disputes can also involve opportunities to retake private land that was previously sold, engage in private property claims that were not possible under pre-crisis conditions, and to establish or re-establish new boundaries under contested or unclear circumstances. Often problems can be less if private property claims have been held for a long period time prior to a crisis, or if they were occupied or otherwise protected during the crisis, or very quickly reoccupied subsequently. However if the way

that private property was acquired or administered prior to the crisis period was seen as broadly unjust, or the areas or numbers of holdings were large and they displaced previous inhabitants on a large scale, then the reasons for non-title or deed holders to take or retake private holdings during and after a crisis can be many and acutely felt. In such circumstances the opportunities for quickly and fairly resolving numerous disputes like this can be few, or take a long period of time. This highlights the valuable role of prevention, or in otherwords attending to the underlying aggravating causes noted above, before they become a widespread problem.

Disputes Involving Public Land

Public lands can be particularly vulnerable to disputes and claims during and after a crisis due to,

1. the government instead of certain groups or individuals having previously claimed it,
2. a weakening of the government and its ability to enforce its claims during and subsequent to a crisis,
3. the use of public lands as IDP locations during the war,
4. the perceived opportunity to retake lands by those groups and communities who feel they were unjustly displaced or deprived of lands that ended up under the state's control.

At the same time public lands can be one of the first locations where post-crisis development, recovery, peacekeeping, diplomatic, and commercial interests can be placed, and this can be facilitated by government assertions that such lands are state controlled. This can clash with those attempting to retake lands or claim such lands through squatting, adverse possession, or due to gains made by one group or another during the crisis, particularly if the crisis was armed conflict.

Historical injustice

The pre-crisis grievances of the 'unjustness' in the way the state deals with land rights for portions of a population can constitute an important aggregate force in aggressive, confrontational and violent means to correct perceived wrongs. Pre-war ideas of injustice regarding land and property can become especially difficult if they became connected with other issues, serving to further decrease the state's influence in a crisis period. As noted earlier, this was a fundamental part of the decline of the Somali state in the early 1990s, when disputes over access to grazing and water resources connected up with a history of perceived injustice perpetrated by the state on particular clans. Also noted previously was the role that animosities tied to historical injustice played in ideas about who had legitimate access to what lands and properties in the Balkans, versus who needed to be 'cleansed' from certain areas. The social fluidity of a country rife with land conflicts then allows for the opportunity to act, with outcomes resulting in considerable

volitility

Land Rights Issues in Peace Agreements

In post-war scenarios, unresolved land tenure problems can result in a large upsurge in land disputes and aggravated tensions and confrontation over land. Such problems can cause considerable volatility, and not attending to them can make a peace process and recovery much more difficult. If well considered however, there are opportunities in war-affected situations for using land tenure as a peacebuilding tool, and for making improvements over what existed prior to the war. This is not to imply that land allocations necessarily be given to combatants or their leadership to encourage their participation in negotiations, however this has been known to occur.

How land issues interact with peace agreements

Land issues can play a large role in peace agreements and in the run-up to peace negotiations. Often there can be a surge in battlefield activity in the run-up to peace negotiations because the ceasefire that frequently precedes negotiations can stipulate the different sides in the war will retain control (for an undetermined period of time) over the land areas they occupy at the time of the ceasefire. As a result, the land controlled by the different sides, for how long, the resources they contain, and their reintegration and governance, become by necessity, topics in peace negotiations and agreements. In this regard, third party peace mediators can view land issues or certain land areas (especially those containing valuable resources) as 'bargaining chips' that can be used and negotiated away if need be, in order to allow compromises to take shape. The other role land can play, particularly lands taken through gains in battle, is that of insurance. Armed factions can often be unwilling to participate in peace negotiations without some form of 'insurance.' This insurance is essentially something that can be used advantageously if the negotiations or the agreement fails. In this regard the different parties in a negotiation usually desire to keep either their weapons or the land they have come to occupy. While complete disarmament, particularly for light weapons, is usually always a failure, the disarmament and demobilization process is a very high priority in a peace process, such that having combatants keep the land they occupy at the time of negotiation, can be seen as the less difficult option. Bringing such lands back into a national form of governance and land tenure system during the years after a peace accord is then a significant challenge.

Certain powerful interests can spoil peace negotiations if they believe they will lose control over certain high value land resources as a result of a peace agreement. As the reason for derailing a peace negotiation can be based on greed, the public reasons for scuttling negotiations may have little to do with the real reasons—which are control over lucrative lands or land resources.

Due to the complexity associated with attempting to bring successful conclusion to an array of land and property issues during peace negotiations, third party negotiators can

think of these as too difficult to include in what are already sensitive, lengthy and tense negotiations. This can especially be the case where third party peace mediators are more familiar with issues of ceasefires, the clearing of land mines, and proposing future forms of governance (Leckie, 2008) than they are with a country's land and resource tenure issues. As attempting to sort through such issues in negotiations can be seen as too risky, or because the individuals at the negotiating table themselves are known to have vested interests in the outcome, land issues can sometimes be left out of the negotiating agenda, often with volatile consequences. However, peace agreements can provide a unique opportunity to include solutions, and the current trend in peace agreements is to have land and property issues included, as Leickie (2008) notes:

> [a] range of contemporary peace agreements – the Dayton Accords (Bosnia-Herzegovina), the Arusha Accords (Burundi), and agreements concerning Guatemala, El Salvador, Kosovo, Liberia, Mozambique, Sierra Leone, Sudan, Tajikistan and others - explicitly address HLP [Housing, Land and Property] issues and, increasingly HLP rights. Conversely, agreements that in hindsight definitely should have included specific HLP provisions, but did not - in particular the 1991 Cambodian peace settlement - have been criticized for this serious oversight.

Practical Responses to Challenges

Statutory system of property rights in conflict contexts

In many cases land related laws must undergo some form of reform in situations of low state capacity or in crisis in order to effectively deal with land problems. There are two reasons for this. First as noted above problematic land tenure laws often contribute to the onset of a crisis, and so need to be reformed. Second, even well functioning and just land and property laws are usually not able to handle the particular problems that a country in a crisis context (including crisis of governance) must endure, and so old laws are amended, or put on hold, and new laws are enacted.

There are three primary reform responses to land and property problems connected to the statutory system,

1. broad national land policy reform,
2. legal actions aimed at specific problems,
3. institutional reform.

Land policy reform

Land policy reform includes a broad-based process of consultation with affected communities and sectors (villagers, ex-combatants, IDPs, refugees, commercial interests, government, etc.) and is usually undertaken by a consortium of donors together with a government who does not have the capacity to undertake such an endeavour itself. Land policy reform after crises (and especially after wars) is an involved process, needing a

good deal of capacity building, coordination, political will, donor involvement, money, and often a good deal of time (usually years). It is generally beyond the mandate of the UN to carry out such a multi-faceted reform process alone, and collaborators in the international community are usually sought for both capacity and financing, i.e. World Bank, USAID, CIDA, etc. Since this is significant legal reform and national capacity is frequently quite low, expatriate staff are often used for a period of years.

Legal actions aimed at specific problems

This approach is much quicker than land policy reform, and more easily achievable with UN in-country support—albiet with less scope than national land policy reform. Specific legal actions which are able to attend to certain land problems in a crisis context are quite useful for management of such problems until a broader land policy reform can be considered. Examples of such actions include:

a. **Legal decrees** that focus on specific society-wide land issues and are quickly derived, disseminated, enforced, and then terminated when the objective is obtained. East Timor has had some success in working with decrees prior to the implementation of post-war land and property laws. Decrees can be used to temporarily manage land speculation, evictions, and to validate or invalidate specific forms of claims that are proving destabilizing. Decrees and their effects are largely seen as temporary, to be replaced by more robust forms of law later.
b. **Legal rulings** that resolve specific but potentially volatile problems for certain post-war communities. Liberia's experience with the problem of adverse possession (uncontested occupation for a period of time results in legal ownership) dealt with the question of whether or not the war-time and post-war periods should count as part of the period of 'uncontested occupation' needed for ownership claims via adverse possession. This affected squatters in long-term occupation situations but also returning commercial interests and individuals with titles to valuable real estate who fled the war early on and were returning. In such a situation, if there is no clear legal ruling on the issue, then powerful interests can seek to violently evict squatters who are claiming, or may be about to claim, ownership under adverse possession.
c. Rendering **legal decisions that affect or resolve an entire category** of land and property claims and/or dispute problems. Both Liberia and Mozambique have had positive experiences with this tactic. The Sirleaf administration in Liberia cancelled all of the forestry concessions as a legal decision due to pervasive fraudulent acquisition and the societal instability this causes. And Mozambique dealt with whole categories of problematic land claims issued before and after its war; involving 1) whether or not Portuguese colonists or their descendents would be able to return to lands, 2) the need for concession holders to reapply under new rules that included more adequate interaction with local communities, and 3) the cancellation of certain categories of concessions due to fraudulent acquisition.

d. **Application of specific articles of existing law** in order to contribute to the resolution of immediate problems. The application of specific articles of existing law can include certain articles that are part of pre-crisis laws that on the whole are unjust. In Sierra Leone, the extreme avoidance of agricultural renting arrangements by the landowning lineages (who control all rural land in the country) was due to a fear that such renting would turn into permanent forms of ownership claim by the tenant, and that the lineages would be unable to get their land back at the end of the rental agreement. The overall result in the country was a serious food insecurity problem due to the large areas of unrented land going uncultivated. In such a case, the simple 'right of reversion' is a specific article of law found in many countries (including pre-war Sierra Leone) and could be applied specifically and quickly to the landholding lineages as a first step in assuring them of the return of any rented land. This would have the effect of the landholding lineages being in a tenure 'secure enough' position so as to feel little risk in renting out land. While enforcing a single article of law for some segments of a population and not others might be problematic in a stable setting and even be seen as the state being partial to one group, in a conflict context, speed, capacity and enforcement problems, acute land and food security problems, makes this option a viable consideration.

Institutional reform

Institutional reform attends to the issue of violence being an easy alternative with which to pursue land issues because state institutions to deal with such issues are crippled, corrupt, not legitimate, or nonexistent. In such a situation, working to purposefully include customary institutions which are able to garner legitimacy from a local population, in the statutory legal system, can be a very worthwhile consideration. At the same time, providing forms of state legitimacy to certain customary institutions can be a shortcut to setting up workable institutions. Ethiopia has had particular success with this approach in its restive Regions. In the Somali Region of Ethiopia, specific customary institutions of elders and leadership were provided with state legitimacy as a way to resolve a variety of societal issues, including those involving land. Increased recognition of customary institutions by the Ethiopian state as national policy has meant that the Guurti, a traditional council of Somali elders, was instituted formally at different levels in regional government. An official Guurti comprised of elders has been instituted at the regional level (36 members), at the zonal level (seven members), and at the smallest administrative unit, the wareda level (three members). These council members receive salaries from the government and are to advise on policy. There are varying opinions of this move from the larger Somali community in Ethiopia. Some local inhabitants believe this is an attempt by the regional government to get more input from elders and more recognition of local customary institutions; while others believe that this is a way to co-opt the Guurti with salaries and positions in order to control communities. In reality the issues of recognition, co-opting, and erosion or not of local authority structures in Somali

Region of Ethiopia are likely to be constantly negotiated by government at different levels, the Guurti, and communities. Such negotiations will depend on the context, issue at hand, and capability of the individuals involved, with the topics and outcomes of such negotiation variable over the vast expanse of the Region. In parts of the Region, there is now significant interaction between local customary dispute resolution institutions regarding access to commons, and regional and state authorities. In a large part, this has to do with the local state authorities being from the area and connected locally, and hence they have an understanding and interest in customary institutions.

Also in Ethiopia, the Afar people have experienced institutional improvement positively impact a situation of armed confrontation over grazing access. The Ethiopian state has provided the Afar with realistic opportunities to attempt new approaches which fit changing circumstances occurring inside their administrative areas (Gadamu, 1994). Afar traditional authority and customary law (Afar-madaa) have revived significantly with the recognition afforded by the Ethiopian government and the subsequent establishment of the Afar Regional State in 1991- whereas under previous policies the state appointed non-Afar administrators to govern areas occupied by the Afar (Kassa, 1997). According to the Afar themselves, the high costs associated with armed conflict together with recognition by the state, are to a large degree responsible for Afari attempts to derive workable rules aimed at resolving armed conflict over grazing commons with the Issa, a neighboring group. One important aspect of such recognition has been that regional administrative officials and Afar ethnic elders are often now the same people, or have very close connections. The creation of institutions legitimate to both the Afar and the state (and hence applicable to outsiders) also has considerable utility to the state. This occurs as both the federal and regional administrations now have an avenue to institutions considered legitimate to the Afar, which can be used to assist the government to resolve problems and pursue development programs (e.g., health clinics, schools, donor programs). What is noteworthy in this example are the ingredients that facilitate institutional improvement in the context of armed conflict over land resources, and in particular the willingness on the part of the state and the Afar to take advantage of experimentation involving a mix of customary and state arrangements.

> An additional example is that of the Karamojong Cluster, which covers the border areas of southwest Ethiopia, northeast Uganda, southeast Sudan, and northwest Kenya. Cattle raiding and conflict are common in these areas, and have worsened considerably with the prevalence of light weapons from the surrounding armed conflicts, together with the erosion in the ability of local customary institutions to handle local conflict issues, particularly as they pertain to commons lands used for grazing by the different groups. Traditionally, effective communication and rules of interaction among elders allowed for conflicts over land and cattle to be effectively dealt with through customary institutions (Ocan, 1994). However, more recently traditional punishments, sanctions and controls have been ignored as pastoralists no longer obey regulations for use of grazing commons (OAU-IBAR,

1999c). Instead, armed confrontation over access to common grazing resources has become the prevailing approach to group interaction (Frank and Paz-Castillo, 1999). The Inter-African Bureau for Animal Resources (IBAR) of the (then named) Organization for African Unity (OAU) had been working through its Pan African Rinderpest Campaign Partners to develop coordinated animal health services for the past 12 years in the Karamojong Cluster rangelands, including the development of community-based animal health delivery systems in southern Sudan, northeast Uganda, and southwest Ethiopia. These programs have experienced significant success and are quite popular. Through this overall effort, OAU/IBAR and its Participatory Community-Based Vaccination and Animal Health (PARC-VAC) project held, over a period of six months in 1999, a series of cross border meetings between elders of pastoral communities (Waithaka, 2001). In these meetings the issue of violent conflict over grazing commons and cattle raiding, and the impact these have on pastoralism were raised repeatedly by elders, to the degree that a subsequent set of meetings was initiated to look specifically at the issue of violent conflict (Frank, 1999). These conflict meetings, initially called the 'Expanded Border Harmonization Meetings' and organized by PARC-VAC, included elders from different pastoral communities in Ethiopia, Sudan, Kenya, and Uganda, as well as government officials from Ethiopia, Uganda, and Kenya, and representatives from development agencies, as well as local community and political leaders. These and subsequent meetings developed to be called 'peace and reconciliation meetings' by the pastoralist communities, to the degree that the PARC-VAC vets were labelled 'peacemakers' (Grace, 2001; Minear, 2002; OAU/IBAR, 1999a 1999b; Waithaka, 2001). The outcomes of the meetings resulted in the elders agreeing to adopt the following:

a) the establishment of rules between groups involved in armed conflicts regarding when to use specific range resources and who can use them;

b) the derivation of ways of improving access to drought reserves in their common areas;

c) to encourage communication and dissemination of agreements and conflict resolution decisions among community members, and improve overall information flow;

d) to conduct smaller peace meetings with immediate neighbours with the objective of working out land access and cattle stealing issues, followed by larger meetings with representatives of national governments, churches, NGOs, and international agencies in order to witness acceptance of new rules, and to have conflict settlements formally recorded;

e) to disseminate the results of meetings with their respective communities.

Additional less formal recommendations also emerged for the Karamajong Cluster.

a) that village committees be formed to regularly review the situation and deal with any problems,

b) that an NGO should be encouraged to pay a small incentive when committees meet in order to keep the affair separate from either the Ethiopian or the Kenyan governments.

c) to provide elders with radio communication equipment, allowing them to communicate when tensions or other issues arose,

d) that a committee of elders be constituted to reintroduce forms of controlled grazing, including the protection of dry season grazing.

As well the elders outlined what they would like from national governments in order to effectively deal with conflicts over grazing commons. These included:

a) civil authority enforcement of infractions in addition to enforcement by local communities;

b) the institution or reinstitution of group sanction by government;

c) significantly improved interaction between states and local communities;

d) greater interaction between state authorities and pastoral communities prior to state organized migration of outsiders into pastoral areas;

e) a larger role of the state, NGOs, and churches in the derivation of cooperative approaches to grazing on common rangelands (OAU-IBAR, 1999b, 1999c).

Customary tenure in conflict contexts

The practical reality in situations of low government capacity in land administration, or after a crisis, is that customary and other forms of informal tenure will be the prevailing form of tenure for the majority of the population. Even if a significant percentage of a national population participated in statutory tenure prior to a crisis, the degradation, corruption or collapse of state institutions and organizations and the reliance on in-place, informal and customary ways of accessing and claiming land often brings a

variety of different types of customary and informal tenure to fill the void for large numbers of people. In this context, a few things should be avoided.

1. At a minimum, humanitarian and UN actors should not try to insist on, impose, or attempt to re-impose debilitated or corrupt statutory law arrangements into situations where customary law is re-emerging, and administrative and dispute resolution decisions regarding land are being made.
2. At the same time there should not be an attempt (except in highly abusive circumstances where re-starting armed conflict is a possibility) to downgrade customary law so as to promote statutory law in practice. Statutory land laws after crises and in degraded institutional situations often have little ability to be enforced, they are very open to corruption, and in many cases will have contributed in some fashion to the cause of the crisis. Attempting to downgrade customary law, when statutory law cannot easily, quickly, and robustly step in to fill the vacuum, creates extremely difficult situations where other forms of tenure can emerge, such as warlord tenure, tenure security that relies on possession of weapons, and corruption and other arrangements that favour the well placed and disadvantage many rural dwellers. Statutory land laws and enforcement of these take significant time to re-institute after a crisis or in a low capacity institutional situation, and is best left to a policy process that can carefully gauge a rate and timing of re-emergence.
3. An occurrence of some frequency is the situation where armed individuals have emerged during war to become the primary local authorities after war, replacing customary elders and other institutions which may or may not have effectively dealt with land issues prior to the war. If such individuals are still armed and asserting themselves as local authorities in land issues, care should be taken to refrain from overt support of such new authorities, as post-war scenarios can move quickly and their position can quickly degrade as peace to prevails, and significant segments of a local population can desire to return land and property institutions back to customary authorities.
4. While it can be appealing to provide support to customary authorities within one's specific project area, this should be done carefully, with considerable effort taken to understanding the local situation, what claims are being made over lands that adjoining or absent groups (or individuals) outside of a project area may also have on the lands or properties in question, and what such claims are based on. For the UN or other outside actors to be seen as 'taking sides' in land conflicts can cause more problems than are solved.

Legal pluralism in crisis contexts

Forum Shopping

With a weakened state, and often inadequate legislation to resolve important land

and property rights issues (or slow moving reform), engaging legal pluralism during a recovery period is often a consideration. In this context, previous experiences with what is called 'forum shopping' (Figure 2) can be useful. Forum shopping occurs when individuals and communities choose which institution to go to in order to resolve land rights problems – disputes, claims, restitution, squatting, eviction, etc. Where legal pluralism is present, there can be a variety of authorities, rules, and institutions to choose from, including forms of customary law, informal wartime norms, formal law, hybrids of these, as well as the perceived legal capacities and institutions associated with humanitarian organisations, donors and NGOs and the objective third-party presence such actors may offer. The UN and other outside actors can find they have very limited ability to change such a situation.

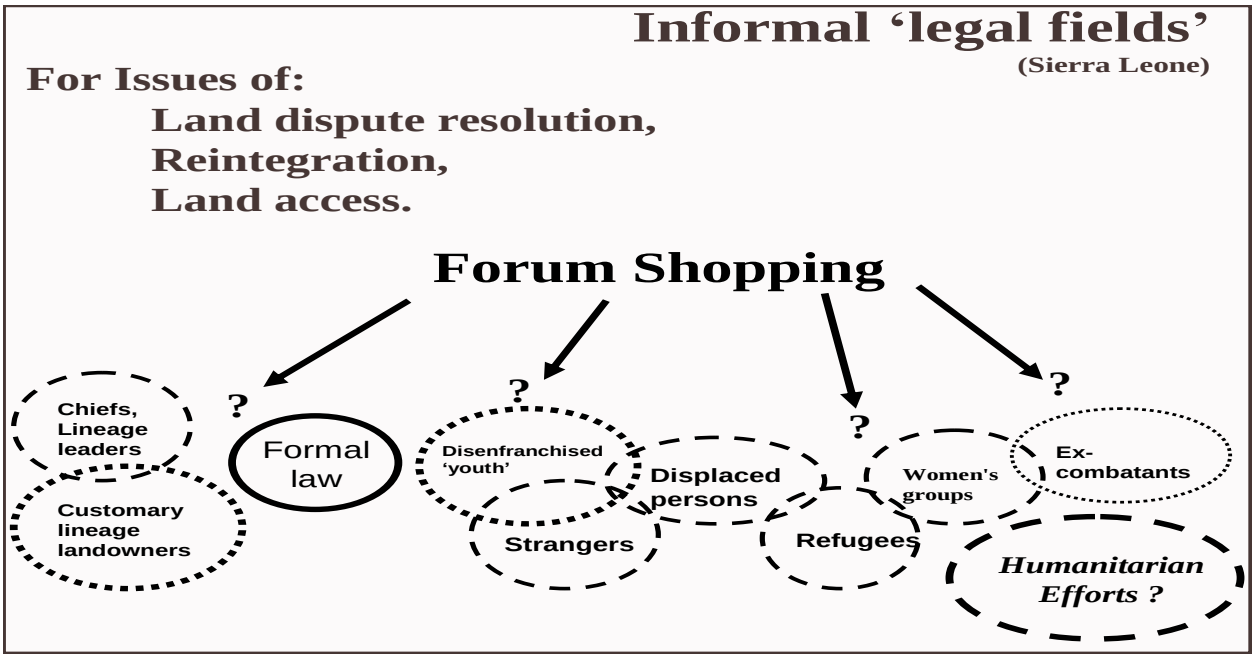

Figure 2. Forum shopping in situations of legal pluralism. Claimants are able to choose which legal field to pursue land issues with, including formal law and humanitarian, donor and NGO entities.

While messy, forum shopping can offer room for manoeuvre or negotiability, potentially reducing violence in a degraded state administrative situation, crises, or a recovery process if claimants feel that there are no rigid, uncompromising legal structures of questionable legitimacy confines their options. Many disputants in the developing world, even in stable situations, commonly select fora from any sector – local, traditional, state, etc. – applicable to their own local needs and political agendas (Galanter, 1981; Lund, 1996). In Ethiopia, for instance, such form shopping is common, where a mix of state, clan, religious, village and regional actors provide a wide choice of arenas in which to pursue land issues, peacefully. Some caution is warranted however, because there is the prospect of forum shopping leading to tensions as those in charge of the competing

vie for legitimacy. Such actors can attempt to use the UN, EC, and other outside actors so as to legitimize themselves. This can potentially become tricky for external agencies when they are unaware of such attempts.

Change in legal pluralism

Legal pluralism is known for its changing nature, and it is common for a good deal of change to take place as different approaches to doing land tenure interact with each other in difficult circumstances. Thus, while at the onset of a recovery process there can be multiple formal and informal approaches to land and property administration and problem solving, over time, the relationship between the different approaches change. In a number of cases, forum shopping has changed over fairly short periods of time (from months to years) into a relationship between approaches which operate more as forms of appeal (Figure 3). This realignment of legal fields, from several choices at once (Figure 2) to a sequence of choices (Figure 3), can come about when authorities within some legal fields become overwhelmed with dispute resolution requests, and in response state that they will only consider hearing disputes after one of the 'lower-level' legal fields have first attempted to resolve the matter. Recognised legitimacy can thus be given by one legal field to another when some of the more popular or visible legal fields (e.g. district courts, chiefs courts) become overloaded by the volume of cases – which is inevitable after a crisis – and seek to decrease the number of cases they must consider by insisting that the first disputants try a 'lower level' forum. In Sierra Leone, some district courts insist that smallholders first pursue their claims in chiefs' courts at different levels, prior to bringing them to a district court.

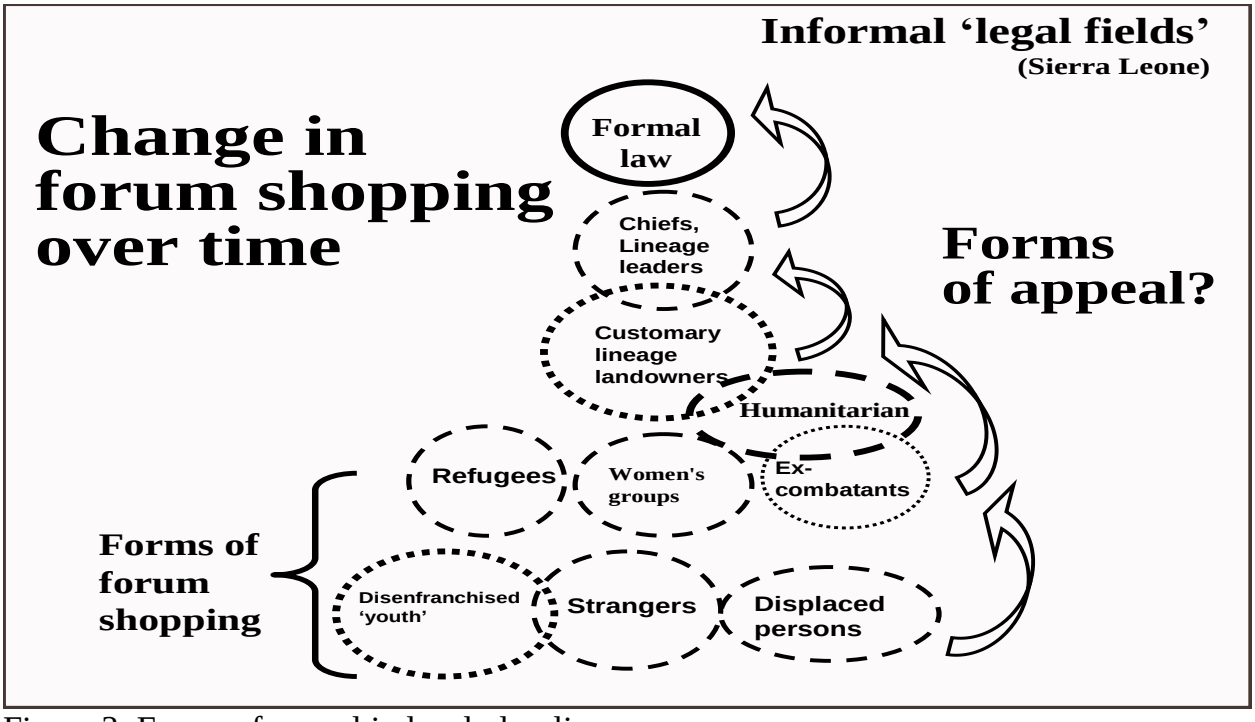

Figure 3. Forms of appeal in legal pluralism.

The state, the UN, NGOs and humanitarian organisations can contribute to such a realignment of legal fields by also requiring that parties to a land dispute wishing to engage such organizations in dispute resolution, or use them as an objective third party, first visit a different informal forum. For the state, this gives legitimacy to (re)emerging customary approaches to resolve disputes, thus engaging with an administrative structure and population-wide service which the state would not itself be able to mount in any case, while also saving the state money and capacity for other purposes. For the UN, NGOs and humanitarians organizations, their mere presence can often times constitute an additional legal field (Figure 3), even if the specific project they are pursuing is not about land tenure or dispute resolution. Local communities can see outside actors and projects as a third party able to be objective, as well as having the perceived connections to or influence with the state, international organisations and local leadership. Thus, by first requiring that claimants visit one of the other local customary or formal institutions for dispute resolution (such as local leaders, women's groups, IDP councils, local government), outside organisations encourage local people to move towards an appeal approach (Figure 3). At the same time, for cases that are dealt with by outside organisations (such as in the case of mediation), the communication of outcomes of what institutions or legal fields are perceived to be 'higher level' (district/provincial state representatives for formal law, or chiefs and clan leaders) would further encourage such a realignment.

Land tenure disputes

The evidence problem

While different types of land disputes present different challenges, broadly, the issue of proving rights to land claims in a way that is legitimate to claimants, authority structures (state and customary) and potential counter claims, becomes very important. In this regard, the evidence which proves or argues for claim to lands have a primary role in dispute resolution and importantly, in preventing disputes. While it can be assumed that evidence must have effective dispute resolution institutions in order to be effective, this is actually not the case in many instances where land administrative capacity is lacking. Where effective, legitimate institutions are lacking, the use of certain forms of landscape-based evidence can be particularly strong in order to prevent disputes, especially evidence which connects with both customary and statutory definitions of claim such as 'occupation' (Unruh, 2006). Purposefully planted economic trees are a good example of this due to the very clear connections made between people and the land upon which such trees are planted. Such trees are notable for their pervasive role as legitimate evidence for claim within customary systems, and their strong connection with formal legal notions of long-term occupation or presence. The informal role of tree planting as evidence in asserting land claims in the contested lands of the Middle East by

both Palestinians and Israelis, given that legitimate institutions to resolve claims between these two groups are lacking has become quite powerful (Cohen, 1993). Similarly, purposely planted 'marker' trees on farmlands were used in both post- Idi Amnin Uganda, and post-war Liberia as evidence for reclaiming lands for returning IDPs, as were cashew trees in post-war Mozambique (Unruh, 2002).

Purposefully planted trees for land claim and demarcation is widespread. Serious consideration should be given to advocating for such powerful forms of customary evidence to be used, or admitted in statutory court proceedings, by working with domestic lawmakers and law-making processes, and advocating for their inclusion in laws and evidence rules. While planting economic trees can be one way to make an argument for claim, clearing land is more widespread as a means of creating visible evidence of occupation and thus claim in situations where institutions for adjudication are lacking, weak, or one-sided. This practice is also of great concern for environmental conservation. Deforestation as a form of evidence is widespread partially because it is so effective. Thus, the more local to national institutions lack the ability to adequately deal with evidence (claim, dispute resolution), the greater the need will be to make a strong visible argument for claim, in order to pre-empt the likelihood of a counter-claim and therefore, the need for an institution to resolve a dispute (Unruh, 2006). What tree planting and 'clearing to claim,' have in common in a low capacity or crisis tenure situation, is that they can come about due to the absence, degradation, collapse, or mistrust of effective institutions that are able to manage land disputes, or where such institutions are weak or engage in discrimination. However, caution should be taken in advocating that 'clearing to claim' be included in statutory law and proceedings, given the ease with which clearing is done without planting crops, and the significant damage to natural resources needed to sustain livelihoods, however insecure, illegal, or precarious they may be. 'Clearing to claim' is an extremely easy, destructive and conflict-prone form of evidence to obtain, and extreme care should be taken when considering acting to legitimize it as a form of evidence for claim. In post-war Liberia the decrease in the value of the deed as evidence resulted in the comparative rise in perceived value of other forms of evidence, including land clearing (Unruh, 2009a).

Important to the issue of evidence in land dispute resolution is the degree to which smallholders are able to respond to the presence of land disputes by deriving or 'forming up' workable forms of evidence. In other words, to what degree are smallholders able to 'translate' aspects of their daily reality into evidence for use in dispute resolution, especially where institutions for dispute resolution are absent, weak, or corrupt. Outside actors can assist here, by looking at what local communities use as evidence in disputing when their members have a dispute amongst themselves and then seeing if this can fit into state law.

Avoid taking sides

Certain practical responses to the challenge of land disputes must be approached with some caution by international actors, given that such actors do not have positions of

either state or customary authority. Overt and highly visible intervention in land disputes can be seen as 'taking sides' often with unfortunate repercussions. However, at the same time, many in a local population can request that the UN or other international actors act as an objective third party, often in the form of judge or adjudicator in land disputes, and this should be avoided. While third party involvement can have positive contributions, an international actor as adjudicator carries a significant legitimacy problem and risks subsequent accusations, problems regarding sovereignty, and a collapse of agreements. A better approach for the UN and outside actors is as the role of a mediator, or to provide support via designation and financing of venues for dispute resolution, or support of institutions for dispute resolution—given that these are seen by all parties as equally legitimate. In this regard the UN learned a valuable lesson in East Timor. In post-war East Timor the UN instituted 'Directive no. 1', which stated that until East Timorese land and property law came into effect, the pre-existing Indonesian law would prevail. Such an arrangement could have favoured those with Indonesian issues land documents however. Due to the sharp reaction on the part of the East Timorese to an issue, and an area of law-making they saw as a matter of national sovereignty, and hence not something the UN should be involved in, the UN withdrew its efforts along these lines and did not implement its directive (Marquardt et al, 2002).

Capacity imbalance

Where the capacity to gather and effectively understand and use evidence is significantly unequal for parties involved in land disputes, as they often are, the tendency can be for the lower capacity party to resort to ideology or violence to pursue or defend their interests, with the Palestinean – Israeli conflict as an example of this. UN personnel can assist in such a situation with ways of defining, presenting, and arguing forms of evidence that can assist disadvantaged parties. This can include very basic forms of support for mapping, demarcation, surveying, installation of cadastre systems, training, description of histories of land use, burial sites, agreements with neighbouring groups, and forms of corroborating oral history which attest to occupation of the lands or area in question. It is important to note that while such an exercise would be important in state adjudication settings, it is also very important where customary authorities or even warlords are in de facto control of areas. However, again, caution is needed with regard to the perception of taking sides in land disputes. In the Darfur conflict, the lower capacity of the rebel armed factions (compared to government) on land issues, and the technical prospects for achieving their objectives with regard to land rights, led the UN to contact the author regarding the prospect of advising certain armed factions during the peace negotiations in Doha, Qatar.

Mediation

Prior to armed conflicts or other crisis periods, attempts at mediation of land disputes can often take place without the benefit of formal law as a legal backing to any final resolution or agreement. Mediation efforts depend on the goodwill of the disputants

and the ability of the mediation process to cultivate, purchase, or otherwise encourage, coax, or coerce such goodwill. This arrangement can lead to situations where, although good progress appears to be made in the mediation of specific disputes, final agreements often fail or are postponed, or negotiation resumes, or new issues suddenly emerge. This can occur because the different parties to a land dispute can see value in participating in the process of mediation, but not in an ultimate resolution, given the possibility that they may obtain a more favourable decision once formal or customary law is re-established. While this can be disappointing for the outside actors running a mediation effort, the value for society is that such mediation buys time in a non-violent way.

This was the case in East Timor along the volatile West Timorese border subsequent to the conflict. A foreign NGO had pursued mediation as an alternative dispute resolution approach for a complicated land dispute, but the effort stalled at the last minute and no resolution was reached.

Rather than disengage, humanitarian agencies and NGOs should realise the important role such 'open-ended' mediation efforts play, not only in buying time, but also for the positive exposure and interaction between forms of land tenure that can be achieved.

Disputes between constituents of insurgent groups vs. Government

It is difficult to employ viable mechanisms for resolving disputes explicitly between ex-insurgents and their sympathizers vs. government interests, because such special arrangements between only these two groups and excluding the general population would likely result in considerable animosity on the part of the larger population, and perhaps cause encouragement of claims of membership in insurgent groups. More prone to success would be to take insurgent issues into consideration in the determination of population-wide mechanisms for resolving disputes and claims between customary and government claimants regardless of membership or affinity with an insurgent group, some of which are noted above—e.g., relaxing evidence rules, forms of restitution, dealing with certain tenure problems in batches with decrees, laws, and regulations which address insurgent related issues. However, there are arrangements between government and belligerent groups that can be part of peace negotiations and agreements which allow such groups and their constituencies tailored arrangements with regard to land access, ownership, etc. These are covered below in the section on 'Peace Agreements'.

Peace agreements

Being well versed in the land issues

The practical responses to land issues in peace agreements are several. First, for the UN and other organizations involved in a peace agreement as a third party, it is

particularly important to become well versed in the land issues about the specific country and those involved in the conflict. With the various sides in peace negotiations (particularly the leadership of militias) wanting to solidify battlefield gains and control over lands in the negotiations so that they can be assured of a favourable personal arrangement after an accord is reached, they can pursue negotiations with this in mind. In other words, they can want particular lands allocated to them or to their groups in exchange for their participation in a peace process—essentially buying peace with land allocations going to specific individuals or groups involved in conducting the conflict. This can become a problem if the same lands are also claimed by returning IDPs, title holders, or indigenous groups. Unless the UN negotiators are aware of what lands are valuable for what reasons, to whom, where these lands are, and the prospect for multiple claims over such lands as peace negotiations get underway, then dubious or unworkable arrangements can be unknowingly made in the negotiations. Such unawareness by negotiators also produces the notion that the various parties at a negotiation seem to be wanting to negotiate about issues that from a UN perspective are outside of the scope of the negotiations, or trivial or irrelevant. The conclusion by the UN in such a case can be that the parties at the negotiating table are naïve, or are not knowledgeable with regard to what the negotiation 'should' entail. In reality the belligerents usually know the land areas and land resources very well, because they have been fighting over them, or have occupied them, and can seek to negotiate (in many cases indirectly) a beneficial arrangement for themselves in a post-war phase.

Reintegration of lands into a national tenure system

A related issue is that of land areas gained in battle being held in an ongoing way by the various sides in the conflict as an outcome of a peace accord. If there is no plan in the peace agreement to subsequently integrate these areas into the national administration, then these areas can solidify as separately governed areas. This was the case in Mozambique subsequent to the RENAMO – FRELIMO war, where RENAMO continued to hold areas years into the peace process, with very difficult problems emerging regarding a variety of administrative, institutional, and political issues. Such problems can detract from the overall peace process—particularly with regard to apprehensions about the conflict being easily reignited from such areas. UNEP describes findings from a retrospective analysis of intrastate conflicts over the past sixty years, and found that conflicts associated with natural resources (most of which are land-based) are twice as likely to relapse into conflict within the first five years.

Thus a practical response is to include in peace agreements the mechanisms and time-frames necessary for reintegrating areas held by the different parties into a national administrative, institutional and political structure. One disadvantage to including such mechanisms and timeframes in a peace accord can be reluctance on the part of insurgent groups to participate in negotiations if they foresee a future where other parties may not live up to their end of an accord, and at the same time such groups have been disarmed, in addition to losing the prospect for controlling land. However, the example of South

Sudan whereby a referendum on separation is to be held after a set timeframe, is an illustration that there are a wide variety of possible constructs for dealing with such an issue in peace negotiations.

'Parking' certain land issues until after an agreement

In negotiations where land issues are deemed too sensitive, volatile or complicated to include in peace negotiations, one practical response is to 'park' the issue until after the agreement has been reached. In essence, agreeing to look into the matter later. An accord, however, should provide the precise means and timeframe for doing this. For example, an accord can establish or mandate the establishment of a land commission, comprised of representatives from the different sides in a conflict, often with third party support, and with the organizational capacity to engage the issues and come to agreement on land problems at later date. This is what occurred in the accord between the Sudanese government and the SPLA, which, to date has largely unsatisfactory results—although it did contribute to the conclusion of the accord itself. In cases where serious consideration of land issues risks destroying an accord, an additional practical response is to 'unpack' land issues into those that can be more easily dealt with in an accord (easily agreed upon), versus others that will need to be dealt with subsequently. Such 'unpacking' can be useful—even if only minor land issues can be dealt with in an accord—in order to reduce the size, or volatility of land issues to be considered later. However, there should be an awareness of the possibility that such attention on the easier aspects of land issues may limit solution building later when the difficult issues are worked on.

Policy Responses to Challenges

Statutory and customary systems of property rights in crisis contexts: What to avoid and what to consider

Important policy responses to statutory and customary tenure in a context of low capacity and crisis include what to do and what not to do on the part of the UN and other outside actors. Outside actors can be in a difficult position with regard to moving forward on the policy front with land tenure issues in a crisis and low capacity situation. There is the risk of generating a good deal of domestic resistance and ill-will by what can be seen as meddling in a sovereignty issue (land), especially if identity, independence, colonial legacy, or other outside actors, were or are large factors in the crisis.

A further complication in crises connected to armed conflict, is that the UN command structure in any particular peace process (particularly early on after an accord) is driven first by military priorities. Civil affairs efforts within the UN are secondary. The problem is that if a civil affairs effort in land tenure causes tension, or needs assistance (i.e., evictions) from the military component, often the UN military response is for the civil affairs exercise in land tenure to cease the activity, with security concerns usually

being the reason. Such internal misalignment of near term priorities should be resolved. The UN military structure needs to become better informed and achieve greater capacity with regard to the tensions inherent in recovery processes, and find ways to better integrate UN civil affairs priorities with military priorities.

There are important examples where domestic statutory and statutory/customary combinations are home-grown, have a great deal of potential, and should be identified, analyzed and potentially supported or 'scaled up' by the UN. The Colombian government has perhaps the most capable approach regarding proactive measures for land and property reintegration when its current war with FARC ends. With approximately four million people displaced over the course of the long civil conflict in Colombia, the country faces an enormous problem in the reintegration and return of large populations of rural inhabitants. To facilitate this, the government has instituted a program where those who become dislocated, or believe they could become dislocated have the opportunity to register their land with a specialized program, so as to facilitate their return when hostilities end. Given the enormity of the dislocation, and the land tenure problems that normally result during and after prolonged conflict, this approach will likely prove very useful in return and reintegration.

Ethiopia provides examples where combinations of statutory and customary opportunities buried latent within conflict scenarios were used for peacebuilding. The example of the Afar noted earlier is one of these. The overall reaction of the Afar to the emergence of resource degradation, reduction of grazing land access, and the presence of outsiders seeking to occupy and use Afari grazing commons, together with an erosion in their ability to effectively apply rules of exclusion (particularly to non-Afars), has resulted in a response that favored armed confrontation to be the preferred approach in attempts to exclude non-Afar people from their lands (Kassa, 2001; Markakis, 2003). Armed confrontation however comes with significant cost to the Afar. Loss of people, land access, livestock, and possessions over time were devastating to Afari communities and individuals, and made preservation of a way of life difficult. Also, fatigue and exhaustion regarding the high ongoing costs of conflict, and the realization that "we were destroying ourselves" as an Issa elder claimed (Michaelson, 2000) has played a large role in the emergence of incentives for deriving conflict mitigation institutions between the Afar and the Issa, a neighboring pastoralist group with whom the Afar have engaged in armed confrontation for some time. With the definition of administrative boundaries along ethnic lines in Ethiopia and decentralization of certain powers and responsibilities regarding the creation and use of regional and local institutions, the Ethiopian state has provided the Afar with certain opportunities to attempt new approaches to circumstances occurring inside their administrative areas (Gadamu, 1994). Afar traditional authority and customary law (Afar-madaa) have revived significantly with the recognition afforded by the Ethiopian government and the subsequent establishment of Afar Regional state in 1991- whereas under previous policies the state appointed non-Afar administrators to govern areas occupied by the Afar. According to the Afar themselves, the high costs associated with armed conflict together with this recognition by the state, are to a large degree responsible for Afari attempts to derive workable rules and institutions aimed at

resolving conflict over grazing commons access and use with the Issa. One important aspect of such recognition has been that regional administrative officials and Afar ethnic elders are often now the same people, or have very close connections (Michaelson, 2000).

The Somali Region in Ethiopia is another example of the combination of statutory and customary approaches to attend to conflict explicitly over land access. Large areas of grazing resources are essentially off limits to use by pastoralists because they are hotly contested, and venturing into such areas means significant risk to life and livestock. As well, established trading networks are disrupted as travel, security of goods traded, and contact and contractual arrangements with others are disrupted. Increased recognition of customary institutions by the Ethiopian state as national policy has meant that the Guurti, a traditional council of Somali elders, is being instituted formally at different levels in regional government. Council members receive salaries from the government and are to advise the government on policy. In parts of the Region there is now significant interaction between local customary dispute resolution institutions regarding access to lands, and regional and state authorities. In a large part this has to do with the local state authorities being from the area and connected locally, and hence they have an understanding and interest in customary institutions (Unruh, 2005b).

Moreover, there are further principles to governing situations where both formal statutory and customary tenure systems are present together. The process of broad-based consultation noted above in the land tenure or land policy reform process can be aimed at the inclusion of aspects of customary into statutory law. This can include forms of customary evidence deemed legal under statutory law, or having the statutory tenure system accept and make legal, the decisions made by customary leaders regarding land issues (disputes, allocations, etc) in their own areas, even though the statutory system does not understand how such decisions are made. This connects well with the change in legal pluralism toward an appeal format noted above, whereby the statutory system can encourage or require that disputants, claimants, and land allocation requests within the customary system first take their case to the relevant customary authority before approaching the statutory system.

Mozambique has had relative success with what it calls its ‘open border model’, whereby both local communities and outside investors are able to access and use the same area. This occurs by both legally recognizing the boundary around a rural community and its lands, together with ‘open’ character of the boundary which encourages investors, including foreign investors operating from the statutory system, to negotiate an arrangements regarding the precise nature of use rights by a commercial interest within the boundary (Tanner, 2002; Unruh, 2005a). Such innovation, and allowing for such innovation to become incorporated into statutory law as a general principle, holds considerable potential for governing land regimes where both statutory and customary tenure systems exist in the same country.

The consultation approach noted above within the process of land policy reform has an additional valuable principle for governing across formal and informal tenure systems. The process of consultation between formal and informal systems, facilitates the much needed exposure between these systems, allowing these to respond and adapt to the

social and economic changes and innovations and practices taking place elsewhere in the country and the world (LRC, 2004). This was seen to be a primary problem in post-war Sierra Leone (LRC, 2004). Such exposure is important to cross-system interaction, and fundamental to the broader 'adaptation paradigm' in which the two systems co-evolve in the process of moving toward a more unified tenure system (Bruce and Migot-Adholla, 1994). Such co-adaptation is particularly important to postwar settings because during and after conflict as well as the preceding crisis period, there is a profound tendency toward non-exposure between systems and instead an inward focusing on known ways that protect kin.

Commercial interests vs. community needs: politics and priorities

A particular difficulty for post-war governments is how to deal with the often competing priorities of commercial interests for access to land resources vs. local community needs for lands for meeting livelihood, identity, and food and other forms of security needs. While examples do exist (such as for Mozambique described above) where the interests of both are accommodated, often there is a difficult balancing of these two priorities, with the politics aligned to one priority or the other operate from the local to the international scales. One the one hand, local communities and individuals within them who were sympathetic with, or participants in an insurgent group during the war can, with the former insurgent leaders exert significant political pressure to attend robustly to local community land rights. As well national and international NGOs and other political interests (embassies, donor organizations, the UN) can likewise exert considerable political pressure including conditioned international assistance on a national government to give priority to local community land rights needs, so as to attend to the question of durable peace, refugees, and humanitarian objectives. On the other hand, national and international commercial interests can exert political pressure connected to financial capital, which can appeal to a war weary government and individuals within government.

While Mozambique is a case where community priorities were held to be roughly equal to that of commercial interest, this did not come about without considerable political maneuvering by the international community, domestic NGOs and mobilized local communities. In Angola in contrast, this is not the case and commercial interests clearly prevail over community needs for land resources. This is perhaps linked to the presence of high-value resources including fertile lands, diamonds, and oil, such that the government is perhaps not as open to politics connected to international assistance. Liberia, through a robust political debate involving domestic and international NGOs and the donor community, has derived a forestry law that comprises what is referred to as the 'Three Cs': commercial timber, community forestry, and nature conservation (RLFDA, 2006), in which the Liberian Forestry Initiative dealt with the politics of an array of foreign and Liberian agencies to delimit the entire country into zones designed to meet the objectives of the commercial, community, and conservation objectives as laid out in the forestry law.

Legal pluralism in land conflict contexts

The 'realignment' from a horizontal to vertical arrangement of legal fields mentioned earlier can provide the opportunities for support from international actors. Zimbabwe was an example. Earlier in its history, Zimbabwe experienced considerable success in eventually managing customary land disputes after its independence war. After initial resistance by chiefs, 'land boards' were instituted, comprising leaders from different segments of the population, who were responsible for overseeing disputes, allocations and use in their areas. Their decisions were then seen as and made legal by formal law. The activities and decisions taken by the board were then seen as legal and binding by the state thereby establishing a relationship between chiefs, land boards, and the state. Such boards can be supported by humanitarian organisations in a number of ways, including providing information, legal and otherwise, advocacy and organisational capacity (Unruh, 2009b).

State recognition of a legally pluralistic informal land and property situation in a crisis context can be an important advantage to a weakened or low capacity state. Such recognition can be encouraged as a policy response to crisis situations by UN personnel in their interactions with host country national policy-makers. In El Salvador's Chapultepec peace agreement, as in the Mozambican peace accord and subsequent legislation regarding land, state recognition of legal pluralism has contributed to the success of the peace process, particularly considering the large role that land issues played in these conflicts. In both cases, recognition was a primary vehicle to facilitate the reintegration of much of the population into productive activities. Sierra Leone provides a different variation of how such recognition could have happened. After the war in Sierra Leone there was considerable separation between the country's two land tenure systems (formal and customary), as well between the many forms of customary tenure practiced in its 149 chiefdoms. This was a serious obstacle to efforts to harmonise tenure rules, attract investment, and promote the rule of law, equity and reintegration. The Law Reform Commission (whose purpose was to find approaches to modernize laws dealing with the commercial use of land, particularly in the provinces where customary law predominates), saw as the primary problem the low level of exposure, contact and communication between customary structures and leaders, coupled with a lack documentation and publication of customary and formal land tenure decisions. Had such communication and exposure occurred, chiefdoms may have been able to learn about tenurial decisions made elsewhere, thereby promoting the informal harmonisation of important aspects of land tenure, as opposed to a multiplication of isolated pluralistic approaches. Ethiopia provides a different, and more formalized example. Ethiopia's constitutional article 78 (5) now accords full recognition to non-state customary, and religious courts of law and their legal guarantee is ensured. In Ethiopia significant room appears to be allowed for litigants to 'forum shop' where customary and religious courts only hear cases where contesting parties consent to the forum (Unruh, 2009b).

Types of land resource tenure disputes

Land commissions are frequently derived after a crisis to 1) handle the very large volume of land disputes after a crisis, 2) take the large burden off of a recovering court system, and 3) bring particular expertise (foreign and national) to bear on difficult land issues. Such commissions usually intend to become obsolete as the recovery process matures and court systems (formal and customary) are more able to handle cases. Some analysts argue however that land commissions are not the best way to handle the large surge in land disputes, because to staff them takes away capacity and money from rehabilitating the state's court system. While this may be the case, the urgency with which many land issues need to be dealt with during and after a crisis, together with the volume, and the need to communicate to the populace that the recovering government is quickly attending to the many thorny land issues, are primary considerations as well. International actors can support such commissions and mititgate the negative effects on the recovering court system by providing financing, expertise and training to commissions, as well as assist with its operation.

Conclusions

As the international community presence in crisis and post-conflict settings is often much larger and much more empowered than in other developing country contexts, it can have much more influence than it might otherwise. The result can be a significant effort, pushed by the international community, to resolve important or contentious land rights issues, including supporting the derivation of land laws which support livelihoods of the poor. Thus, positive reform of formal structures pertaining to land can take place within an opportune period subsequent to crisis-a period in which input from the rural informal sector can be influential. This is a significant component of what the rural poor can participate in, and which can be supported by the UN and other outside actors. This can occur via a broad-based consultation process with UN assistance in disseminating the need for and type of consultations with rural communities as input into the formal law-making process, and by facilitating communication between groups of smallholders themselves. This is also how smallholder capacity can be improved in order to gain understanding and utility of land laws that can provide land rights.

While all societies experience land conflict, ultimately what is important is equitable access to legitimate land tenure institutions able to embrace issues that exist between groups or between individuals who may view land resources very differently, possess profoundly different evidence with which to pursue claims, and may have participated or sympathized with different sides in highly conflictive settings.

Notes

1. Institutions here defined as sets of rules, formal or informal
2. Including the gains made by certain groups and individuals during war, the desire for retribution, fear of returning to one's land and property, etc.

3. Use of land rights as a tool in a peace process or recovery is not meant to imply that land should simply be given to individuals in order to 'buy' their participation in the process; but rather that land law, policy and institutional recovery be made widely known to the general population, so as to encourage their engagement.
4. In other words the degree to which people believe and trust an authority, process, or institution to work fairly and inclusively.

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