Post-Conflict Rural Property Restitution under Customary Tenure: Legal Pluralism, Displacement, and the Passage of Time

Grace Achieng Ouma[1] & Michael T. Harrington[2]
[1]School of Law, Makerere University, Kampala, Uganda
[2]Department of Political Science and International Development, University of Notre Dame, Indiana, United States

Corresponding Author: Michael T. Harrington

ABSTRACT

Large-scale displacement caused by armed conflict presents profound challenges for property restitution, particularly in rural contexts where land is predominantly governed by customary tenure systems. Unlike voluntary migration, violence-induced displacement disrupts both community-based customary norms and formal state legal-administrative mechanisms, creating complex barriers to restitution upon return. These difficulties are exacerbated by prolonged absences, demographic change, and the absence of written documentation characterising customary landholding regimes. This article examines how post-conflict restitution unfolds under customary law after extended displacement, with a focus on the tensions between local tenure practices and international legal norms on property restitution. Drawing on comparative fieldwork conducted in Uganda, Liberia, and Timor-Leste, the article makes three principal contributions. First, it highlights the diversity of return processes following long-term displacement, demonstrating that timing, generational change, and social reintegration significantly affect restitution outcomes. Second, it shows that the nature of claims recognised within customary tenure systems—often dependent on physical presence, social belonging, and endorsement by community leaders—frequently conflicts with international restitution standards that prioritise formal ownership and abstract property rights. In this context, returnees may be reintegrated into communities with relative ease, while displaced persons seeking restitution without physical return face substantial, and often insurmountable, obstacles. Third, the article explores how conflict and displacement themselves reshape customary law. It argues that customary tenure is neither static nor purely traditional, but evolves in response to violence, demographic shifts, and post-conflict governance interventions. These transformations raise important normative and practical questions about the compatibility of international restitution frameworks with local legal orders. The article concludes by emphasizing the need for restitution approaches that are sensitive to legal pluralism, temporal distance, and the social foundations of customary property rights in post-conflict rural settings.

Keywords: post-conflict restitution; customary land tenure; rural property rights; displacement and return; legal pluralism; transitional justice

Introduction

One of the noted advantages of customary law is its ability to adapt to changing circumstances. Indeed, this is viewed to be a benefit in any legal system, as societies transform in response to technological developments, environmental changes and population growth. There are few more serious shocks to a community than violent

conflict that leads people to flee homes, land and social networks. It alters individuals, family structures and affected communities. In this article we examine the role of customary law and customary tenure systems in the reconstruction of communities after conflict that displaces people for decades. We look explicitly at the return of displaced people to rural areas where customary land tenure systems dominate, and where state titling is limited or non-existent. This article adds to the existing literature in three areas. The first contribution is to raise the issue of the timing of returns to a community. Not every peace is similar. Returns to places of origin after violent conflict can be anticipated and guided by the government and international organizations, or they can be spontaneous and sporadic, occurring through a process punctuated in time and location. Timing is important as conflict can have the effect of resetting the landscape of property claims, and rights to specific plots of land may be contingent upon first-claimant rules. The second contribution of this article is to identify a disconnect between international law and policy regarding the property rights of those displaced by violent conflict and the nature of customary tenure systems which typically require presence in a community in order to reclaim property. Lastly, it offers some observations about ways that customary law changes in post-conflict settings and encourages a different approach to looking at what may be the 'new normal' of a profoundly changed customary system.

We begin this essay with an introduction of the problem of mass population displacement due to violence, addressing the variables affecting the decision to return to place of origin. This is followed by three short case studies of northern Uganda, Liberia and Timor-Leste (East Timor), each of which experienced population displacement due to violence, lasting for up to 25 years. The third section compares these cases in terms of timing and the adaptability of the customary systems. We then identify ways in which we can expect rural customary law to shift after violent conflict. The last section addresses international public policy on property restitution in post-conflict settings and the dissonance between international norms and customary tenure claims.

The questions behind this article and the conclusions reached are informed by field research in Liberia, Timor-Leste and Uganda including interviews and secondary source analysis of these areas. Empirical material coming from situations of conflict and crisis do not, at this point, permit the gathering of comparable, large-scale quantitative data. In addition, customary land tenure systems are highly diverse and complex. As a result, we cannot control for variables or assess differential outcomes in the way we would wish to do. What we do here, as an alternative, is to compare various cases and ask a similar set of questions such as: how resilient are customary tenure systems in accommodating returns after forced displacement? What do returns look like? Are international public policies regarding returns and property restitution helpful in areas with customary law? Fieldwork in post-conflict areas was augmented by a series of interviews in Geneva, Switzerland and the United States with individuals at the International Organization on Migration, United Nations Refugee Agency, Internal Displacement Monitoring Centre and the Brookings Institution.

Violence and Mass Displacement

Civilians are targeted in civil conflicts because of a desire by violent actors to clear an area of its population in order to gain resources, control access and transport routes, interfere with opposition support, or as part of a greater strategy of population monitoring

and control. Both states and violent non-state groups may engage in forced displacement. For example, in Darfur, Sudan, beginning in 2003, the displacement of the population was intentional and strategic (Prunier, 2007; de Waal, 2007). There, the root conflict was land; violence purged the land of its resident population and allowed others to claim it. Now, the ongoing conflict over property rights in Darfur contributes to the difficulties of conflict resolution and population return.

In other settings, displacement has resulted from land acquisitions or from violence that may not be particularly focused on land. In northern Uganda between 1986 and 2006 people were displaced because of violent conflict between the government and the Lord's Resistance Army (LRA), but that conflict was not motivated by the possession of territory or claims to land ownership (Finnström, 2008). Instead, forced migration in northern Uganda was both a household response to localized violence as well as government policy (from 1996) in response to the conflict. Similarly, from the mid-1970s through the 1980s, the East Timorese population experienced both spontaneous migration to survive the conflict between the Indonesian military and the Timorese armed resistance, as well as strategic forced relocation of entire villages, undertaken by the Indonesian government in an attempt to cut off support for the resistance fighters and to enable surveillance of the population (Fox and Soares, 2003).

In customary tenure systems, return requires negotiating local authority structures which are instrumental in the allocation of land and reclaiming of homes. Yet, local authority may be tied to the violence that occurred, with local leaders participating in, or sympathizing with, different factions in the conflict. New post-conflict leadership can be a result of compromise or for the purpose of peacekeeping rather than a return to 'traditional' authorities. Additionally, the state itself can take sides in the conflict in a manner that impedes return, either passively by not providing resources, or actively by preventing returns to a particular area. If displacement has been lengthy, reclaiming of property is not simply a matter of returning to a former home, but rather re-establishing community membership and asserting claims on land for farming as well as new or previous places of residence. Moreover, remote sensing data from northern Uganda demonstrates that when people do return, they often do not have the same types of settlement patterns which they had prior to displacement (Joireman et al., 2012). These findings and the frequency of mass displacement make a further investigation into the ways that customary law adapts to displacement a worthy endeavour.

Customary Tenure and Embodied Authorities

Customary land tenure systems are not the same everywhere, yet customary rules regarding resource allocation are pervasive. Customary land tenure and the customary law administering it exist around the world in places as diverse as Australia, sub-Saharan Africa, Asia, Melanesia and the Western Balkans. Customary law is of particular interest to us here insofar as it controls access to resources in rural areas, such as land, trees, water and sometimes labour.

An important distinction between customary and statutory law is that customary practice is embodied, existing in specific enactment by individuals rather than in a recorded, written form that aspires to be universally applied. A feature of customary law in most places is its ability to shift to accommodate circumstances such as relative social position, wealth, family structure and community harmony. Wherever customary law regulates

resource access, there are traditional authorities who administer, interpret and shape customary law for the community. These people may bear the title of chief or be the recognized leader of a lineage. In most places customary authorities include elders who have lived in the community for a long time and have memory, not just of the members of a community, but also of the land individuals have farmed and even conflicts they have had with neighbours.

In some countries there is a mixing of formal and informal roles among those responsible for allocating resources. In Liberia, for example, local chiefs are responsible for allocating land, and have traditionally held this responsibility. Currently, their role is more than customary, as they are also government employees. In many parts of Timor, there is a clear distinction between authorities who hold ritual and political power in regard to land and other resources. While only political authorities have formal governance roles and titles in state systems, both ritual and political authorities are involved in land allocation, disputes and permissions.

Deciding to Return

The experience of forced migration changes people's lives in profound ways. Displacement entails time spent in communities of refuge or in camps, bringing a set of new experiences into the lives of the displaced: people who were previously farmers may have to find different types of employment; families may be split up; people may be compelled to live close together in under-resourced settings. Some experiencing forced migration report unexpected benefits of their displacement: children may have increased access to education; women's voices may be more fully incorporated into decision-making structures in refugee camps; people may have access to job training that they would not have had in their place of origin. Sometimes, the experience of displacement changes the lives of those displaced to such a degree that they may not choose to return to their place of origin, even when they have the opportunity to do so.

After security issues are resolved, several factors impact people's desire to return to their place of origin, including economic opportunities in their place of origin and their place of refuge, household characteristics, and the length of their displacement (Sert, 2008). Since customary land tenure exists predominantly in rural areas, it is worth noting that some studies have demonstrated a reluctance of people to return to rural settings, after they have experienced life elsewhere (Bascom, 1996; Holt, 1996; Ó Tuathail, 2010). In particular, young people may be attracted to the availability of entertainment, education and jobs in urban areas. Indeed, in one study of people displaced due to violence in Colombia, only 5.8 per cent of the families surveyed wanted to return to their place of origin (Ferris et al., 2011: 139). The rest were content with the lives they had established for themselves in their places of refuge, or wanted to relocate to an entirely new place.

Returning populations may be quite different in terms of numbers of residents, age distribution and social composition than the population that left. Demand for customary land access may not, then, be comparable to what it was prior to the conflict. Rather, even in customary tenure systems, massive displacement due to conflict will lead to a shift in population and a 'new normal' in terms of how the systems are used and administered. Indeed, after returns following conflict displacement in Uganda, Liberia and Timor-Leste, there were reports of a depopulation of the countryside (CAVR, 2006: 7.3; Hopwood and Atkinson, 2013); at the same time, there were numerous conflicts over land claims in these

areas (Barnes, 2011; Corriveau-Bourque, 2010; Hetz et al., 2007; Hopwood and Atkinson, 2013; IRIN, 2010, 2011; Onegi, 2012).

Accommodating Returnees in Customary Tenure Systems

Conflicts over land are often magnified when property rights are insecure, or when documentation is inconsistent. The prevalence of customary land tenure and lack of clear title or certification can become problematic when land values increase. However, in certain respects the lack of documentation can make customary land tenure systems favourable for returnees. There are no legal hurdles to reclaiming land. In the Liberian example below, we see a willingness of communities to grant use rights to returnees from other parts of the country. While not every post-conflict customary setting is as accommodating, it is hard to imagine such a thing happening in a situation with formalized land rights. This point should not be underestimated in terms of its importance. Fitzpatrick et al. (2012) have emphasized the importance of complex customary tenure rules in post-conflict settings as a source of protection of land rights from a predatory government. They argue that community land allocation mechanisms may have an undesirable intricacy when viewed by outsiders, but that complexity serves a purpose in enabling local enforcement mechanisms without relying on the state. This is vital in post-conflict settings where the state may be weak, unpredictable, and simply unable to enforce property rights even if it wants to do so. Given the prevalence of land grabs in sub-Saharan Africa, this additional guarantee is salient only to the extent that the government recognizes the customary tenure rules (Peters, 2013; Wily and Hatcher, 2012).

Authority Structures

Customary tenure arrangements can also pose challenges to returnees in post-conflict situations. Customary tenure is integrally dependent on administration by traditional leaders, and those claiming these roles may shift radically during times of conflict, creating difficulties for returnees. Violent conflict can result in a change of leadership at the state level and at multiple intervening levels between the state and community. However, in most customary systems it is the local-level leadership that is most important for resource access. Leaders may die during conflicts, leave as refugees and never return, or simply lose legitimacy because they are on the wrong side in a conflict.

Traditional leaders can also take advantage of the ambiguity that exists in post-conflict rural settings. They can sell land that they might not have full authority to control and otherwise use their 'office' to engage in rent-seeking behaviour. Peters (2009) warns of an excessively positive interpretation of the flexibility of customary tenure systems as this very feature lays those systems open to manipulation. There are some cases in which the actions of new leaders have been so egregious and counter to the welfare of the community that other institutions have developed to circumvent them. For example, in Liberia, several communities have established locally elected land committees with parallel structures to those of the traditional authorities (who have designated government positions), so that they can limit the ability of the leaders to give away land for purposes of logging or commercial agricultural ventures. Alternatively, people who have no real claims to traditional leadership can set themselves up as such if they happen to be the 'winners' in the conflict. After violence occurred in Côte d'Ivoire, the youth engaged in the

conflict returned to some communities and established their own 'traditional leaders', refusing to recognize the people who had previously been in these positions (McCallin, 2012). Under the customary system prior to the war, youth would have had no role in community leadership.

Designating which authorities control access to agricultural and forest land, with locally recognized power to make decisions about land disputes, is a politically important act. Before Indonesia incorporated East Timor into the Indonesian state in 1975, customary authorities largely controlled land access and management decisions in rural areas. As part of the Indonesian modernization project in East Timor, customary leaders described being systematically and overtly 'replaced' by large numbers of civil servants. Upon Timor-Leste's independence in 1999, a dearth of civil servants (with overnight staff reductions from hundreds to single digits at the district level in agriculture) combined with a nationalistic restoration agenda to undo actions and processes of the Indonesian era (Meitzner Yoder, 2007). This led the nascent government in some districts to formally reinstate the previously displaced customary authorities, even vesting them with powers to make decisions about land. Timor-Leste's official recognition of customary land authorities has waned after its first decade as a nation, with less urgency felt to distinguish state practice from that of the Indonesian era, and the gradual increase in the size of the new national civil service.

Viewed through a different lens, changing authority structures after conflict can have unexpected benefits to some individuals, such as empowering youth, women and others in a society who previously had no say, or limited voice, in community decisions. Liberian women were educated about their rights in the refugee camps and, when they returned, demanded access to customary land (and generally got it, as there was little competition for land resources in the Liberian countryside because of a depopulation of the rural areas). This demand for greater rights came from contact with UN organizations in refugee camps who engaged them in decision making. When they returned to their home areas, they were unwilling to put themselves back under the authority of traditional leaders (Bermudez et al., 2014). Adam Branch reports similar effects of camp life in northern Uganda: 'At the same time that men, and especially male elders, saw their authority and status within Acholi society wane, women, and to a lesser extent youth, saw their authority and status rise precipitously in camps' (Branch, 2011: 138). Yet, these examples are not representative of what happens everywhere. In other settings, women who wanted a greater voice in decision making and access to community resources have had difficulty making claims to customary resources if they are single or heading a household (Bermudez et al., 2014). It is also not necessarily the case that new leaders are better leaders. Sometimes newly minted 'customary' leaders use their control over resources for personal gain to the detriment of the community, such as leasing out or selling customary land holdings.

Timing and Nature of Return: Uganda, Liberia, Timor-Leste

In this section we detail the displacement and return experiences of populations in three post-conflict countries, Uganda and Liberia in sub-Saharan Africa and Timor-Leste in Southeast Asia. Presenting these three short cases together illuminates the different circumstances regarding the timing and nature of return. The cases also serve to identify some of the similarities faced by customary tenure systems in accommodating returnees

after lengthy displacements and adapting to communities changed by the experience of violent conflict. In the case of northern Uganda, after peace was established, most of those who intended to return home did so over a relatively short period of time (three to four years). In Liberia and Timor-Leste return was very different, with people returning to their communities of origin sporadically over many years, often with sojourns at intermediate locations.

Northern Uganda

The conflict between the government and insurgents in northern Uganda began in 1986, with the main rebel group from 1988 being the Lord's Resistance Army (LRA). Violence was centred in the Acholi districts, but sometimes extended into neighbouring areas. It was a conflict in which civilians were not just victims of collateral violence, but specific targets. This was most obviously true of the LRA, but in addition to fighting the LRA rebels, government troops also preyed on civilians; some observers argued that the length of the conflict was the result of a lack of government interest in the area (Dolan, 2009). The LRA gained international notoriety for its extraordinarily malevolent practice of abducting children to serve as soldiers, servants and 'wives'. By 2005, approximately 1.8 million people, including 1.2 million Acholi (90 per cent of the Acholi population) were displaced by the conflict (Pham et al., 2005). There were two main causes of internal displacement. First, people spontaneously fled violence as it began to affect their communities, moving to towns and trading centres close to their homes or outside Acholi, including to Kampala, Uganda's capital, swelling the urban population. Second, beginning in 1996, the government enacted a policy to move people into camps, ostensibly for their own protection and to ensure that they did not provide support to the LRA (The Economist, 2004; Roberts et al., 2008). Indeed, the government forcibly displaced civilians, telling people in some areas that if they did not move to the camps, they would be considered rebels and killed (Branch, 2011: 76).

Life in the over-crowded, under-serviced, disease-ridden and minimally protected camps was horrific. At the height of forced displacement in 2005, the World Health Organization reported 1,000 excess deaths per week in the camps (Uganda Ministry of Health and World Health Organization, 2005). Poor protection and miserable camp conditions inflicted damage on social relationships. Exposure to violence fostered a generation disconnected from traditional norms of living, as roles and expectations shifted dramatically when people were removed from their normal livelihoods and contexts (Dolan, 2009; Nannyonjo, 2005).

Although no final peace agreement was signed and the LRA remains active, if severely weakened, in neighbouring countries to the west, overt conflict in northern Uganda ended in 2006. From that time, although very slowly at first, people in Acholi began returning to their original areas of residence. Encouraged (and pressured) by government to do so, the vast majority left the camps before the end of 2010. Thus, in northern Uganda, return occurred relatively quickly, influenced and guided by a government policy designed to close down the camps. Because most of those displaced by the conflict did not cross an international boundary and were therefore not categorized as refugees, moving back home was easier in terms of transit and facilitated by the fact that some people moved back in family groups or by villages (Rugadya et al., 2008).

Once people returned to their communities of origin, there were a host of anecdotal accounts of conflicts as new actors laid claim to resources (Onegi, 2012); communities engaged in struggles over the boundaries of collective land holdings, and some reports indicated that those who returned first to an area claimed the best land, rather than that which they had previously occupied (IRIN, 2011). In addition, empirical evidence demonstrates significantly different settlement patterns in areas which experienced a high degree of violence (Joireman et al., 2012). Changes in settlement patterns after displacement are likely to generate conflict that can be particularly difficult to resolve in contexts in which local government is not fully re-established.

One of the problems in the reconstruction of communities in northern Uganda has been that the traditional leaders were displaced for so long that there was no longer local knowledge of land claims. 'As people return to their villages, they are confronted with the realization that over a period of 20 years, clan leaders, heads of households and the elderly who would have knowledge of the previous set-up in the villages are no more' (IRIN, 2011). Some of those who returned to their home regions in northern Uganda had been displaced for almost two decades. Ronald Atkinson has noted that 'Numerous concerns have arisen about regaining access to such land after many years of forced displacement, including the death of many knowledgeable elders during those long years of war, and the unprecedented number of widows and orphans produced by the conflict' (Atkinson, 2010: 333).

However, all of these negative assessments regarding the challenges of return and the re-establishment of customary law and tenure institutions are tempered by research suggesting that, just a few years after return, the number of land disputes is declining as customary leadership and dispute resolution systems are re-established. Hopwood and Atkinson (2013) note that 45 per cent of respondents identified customary leaders as the most helpful people in resolving land disputes. This is an intriguing finding as it begs the questions of how long it takes for customary structures to re-establish themselves and how they might be changed by displacement. Interviews in northern Uganda from 2015 suggest that customary leadership is also challenged and actively disputed in some circumstances. There is, thus, a very complex geography of power relationships after conflict in northern Uganda. It is not yet clear how it will all settle and, particularly, how much power over land allocation traditional leaders will maintain into the future. Claims to control over property are claims to authority not just in northern Uganda, but in other contexts with customary leaders (Berry, 2006; Fitzpatrick et al., 2012; Moore, 1998).

While the narrative of displacement and return is still developing in northern Uganda, some conclusions can be noted. Violence and displacement caused an erosion of customary institutions, but these were not totally destroyed and have been recreated over time. Possible explanations for the re-establishment of customary institutions include their moral authority and a lack of alternative adjudicatory mechanisms provided by the central government. A second conclusion that can be reached is that although the resettlement patterns were often different from those prior to the conflict, the customary tenure system seems to have demonstrated considerable ability to adjust and accommodate claims to land. Both of these conclusions affirm the resiliency of customary law and tenure institutions.

Liberia

In Liberia, violent conflict began in 1989 in a struggle for power to replace Samuel Doe. This first civil war ended in 1996 with the election of Charles Taylor as president. Most people displaced after the first civil war went back to their homes in rural areas. However, this was not the end to the violence; conflict resumed again in 1999, with the second civil war ending in 2003. Returns began shortly thereafter and continued sporadically for some time. A cessation agreement with UNHCR, which ended refugee status for the displaced, was signed in 2012.

During the two civil wars, approximately 80 per cent of the population was displaced, either internally or to other countries (Office for the Coordination of Humanitarian Affairs, 2007). Although most Liberians were displaced from rural areas, returnees typically returned first to urban areas. There was no tracking of individual returns within Liberia once people were repatriated, but multiple informed reports suggest a particular step-wise or punctuated manner of return to rural areas in which people moved first to Monrovia, then to larger cities and towns in their home counties as services were re-established, then to their previous residences (Butman, 2009). At each step in this punctuated process, some people decided to stay where they were. This resulted in a shift in the population distribution in Liberia after the conflict. While it is difficult to get accurate statistics for specific areas of the countryside, there are some facts that we do know. In 1974 the population of Liberia was estimated by the government to be 1,503,368 with 14 per cent of the population (204,210) living in Monrovia. In 1984, the government estimated a population of 2,101,628. The 2008 census puts the population of the country at 3,476,608 with about 30 per cent of the population (1,021,762) in Monrovia (Liberia Institute of Statistics and Geo-Information Services, 2009). The great increase in Monrovia's population relative to Liberia as a whole, in both absolute and percentage terms, between 1974 and 2008 strongly suggests that a disproportionate number of returnees came to Monrovia after being displaced. Across the rest of the country, experiences differed; some rural counties of Liberia saw a relative depopulation and a decrease in the percentage of the county population resident in urban areas, while others saw an increase of their urban populations.

Reports from interviews further illustrate the point that repatriation of people displaced by conflict in Liberia did not necessarily mean returning initially to their villages of origin. For example, in Nimba County both Mandingo and Loma people lived intermixed in a town bordering Guinea. During the war, this area saw a lot of fighting and civilians fled the violence. When refugees from the conflict first began to return, they lived in a resettlement town a few kilometres from their place of origin. As they became financially secure and local services were re-established, they moved again, this time back to their original homes. It all took time as people developed the confidence that they could recreate their lives in their communities of origin.

A second example comes from a focus group interview with farmers from Lofa County who were cultivating land just outside Monrovia. Their responses demonstrated a strong attachment to Lofa County and a clear intent eventually to return, but at the same time, an incentive to remain in Monrovia for the immediate future. This group of farmers made a point of going to Lofa County to vote in the local elections. They expressed an intention of returning to Lofa County, but many of them had children in school in Monrovia and the local Bassa community had given them land to farm.

This type of punctuated return process puts different demands on customary tenure systems than a more synchronous return process, such as that which occurred in northern Uganda when camps closed down. If people wait to return until services are re-established in their home areas, then there may be a substantial time lapse between initial repatriation of refugees and return to home villages. This can lead to different waves of property claims on customary tenure systems as first returnees settle in areas they find most desirable, potentially claiming land that previously was occupied by someone else.

We might expect that when people do return to customary tenure areas after being displaced, they will reclaim their former houses and farms. This makes logical sense, particularly for those who were farmers and might have specialized knowledge of a particular area. Some data from Colombia suggest that even when there is displacement due to violence, farmers are more likely to want to return than others who might find gainful employment in their areas of refuge (Deininger et al., 2004). However, when and how people return to their communities of origin appears to be very different across contexts.

Timor-Leste

The country known today as Timor-Leste has experienced successive waves of mass displacement. The current population is just over one million people (National Statistics Directorate and United Nations Population Fund, 2011), most of whom have endured at least one incident of disruption. These incidents include state-orchestrated displacement and widespread, enduring relocation from 1975; both spontaneous and forced displacement, mostly short-lived, that followed post-ballot violence in 1999; and prolonged spontaneous internal displacement following incidents of political insecurity in 2006.

The first mass displacement era followed invasion and occupation by Indonesian forces in December 1975, as Indonesia sought to incorporate East Timor into the state. During the ensuing several years, most of the majority agrarian Timorese population was (primarily internally) displaced from their homes, with a high death rate as people fled their settlements and fields to live in the forested mountains which became the domain of the Timorese Resistance (Aditjondro, 1994; CAVR, 2006). By 1978–79, more than 300,000 Timorese people – approximately half the pre-invasion population – found themselves in Indonesian military-controlled internment camps with freedom of movement severely constrained and inadequate conditions that led to famine (CAVR, 2006: 7.3: 17, 7.9: 24). By 1980, the population of the capital Dili was 120 per cent higher than in 1970 (ibid.: 7.3: 86). Through the 1980s, 'displacement continued to be used as an integral part of the Indonesian counter-insurgency strategy' (ibid.: 7.3: 4), and many experienced successive, strategic relocations to regions distant from their home areas, so they would be separated from resistance forces. In these situations, groups were often resettled onto other villagers' lands, while different communities were settled onto their original land (Fitzpatrick, 2002). Indonesian infrastructure and public services were concentrated in resettlement areas, often along major roads and in the relatively infertile lowlands, facilitating military surveillance. Following independence after 1999, people were freer to relocate, but uprooting to return to rural areas, possibly now inhabited, was a complex decision. Villages took different paths, with many deciding to stay with the houses, trees, gardens and communities in their Indonesian-era resettlement locations, which had been home for up to two decades; smaller numbers sought, or indeed still seek, to return to

ancestral regions. Tensions between groups of original inhabitants and those resettled to a region during the Indonesian period erupted in multiple locations after independence (CAVR, 2006: 7.9: 25), and this historical displacement is at the root of Timor-Leste's most intractable land conflicts to this day (Barnes, 2011).

The second displacement episode occurred after the August 1999 referendum which resulted in national independence, when more than three quarters of the population was displaced as they fled post-referendum violence (CAVR, 2006: 7.9: 27; Fox and Soares, 2003). About 250,000 East Timorese were forcibly taken by land, sea and air to (Indonesian) West Timor where they were detained by militias in makeshift refugee camps; most of the rest of the population fled spontaneously within the Timor-Leste boundary (CAVR, 2006: 7.3: 106). This massive internal and external displacement event was temporary for the majority of the population, with about half those taken to Indonesian West Timor (126,000 people) returned to Timor-Leste within four months of the referendum, by December 1999. Refugee return continued for a period of several years, and more than 98,000 others returned – many with the assistance of UNHCR and International Organization for Migration – before refugee status ended in December 2002. The choice to return involved weighing the likelihood of acceptance and availability of housing, especially abandoned Indonesian housing that had all been claimed by the state. Many remained in West Timor for fear of retribution for acts committed or political differences around the referendum, or for other reasons, including employment. In the years immediately following independence, the nascent government deliberately and officially devolved decision-making power around local, rural land disputes, including those grounded in Indonesian-era forced displacement and post-independence land claims, to the lowest level of customary authorities for initial attempts at resolution – a decision which in practice allowed land access decisions to be framed within communities well aware of an individual's political allegiance and involvements (Meitzner Yoder, 2003; Urresta and Nixon, 2004).

A third displacement episode followed the eruption of civil conflict around the capital city of Dili in 2006. This incident caused housing destruction and security disruptions that resulted in at least 150,000 people being displaced and living in camps within Dili or in the homes of others, with at least 100,000 remaining displaced for more than two years (ICG, 2008). In this instance, civil insecurity drove people rapidly to the cities, and once there, many chose to stay because of the lack of funding to return to their original areas, poor prospects of housing or adequate livelihood possibilities in rural areas and, in some cases, hope for better economic prospects in the capital (ibid.). Return to rural areas for the majority of internally displaced people (IDPs) occurred once government funding was made available to rebuild homes in people's original locations (Lopes, 2009).

In Timor-Leste, successive conflict-based displacements have shaped displaced people's willingness and ability to return to their original homes. In this highly politicized context, past political allegiance and actions are important as individuals and communities make decisions around their return and resettlement. As much as 97 per cent of Timor-Leste's land area remains under customary claim (ICG, 2008), so the matter of post-conflict property restitution is of great national importance.

All three of these cases are consistent with the existing literature on return. In each case, it was necessary for security to be re-established in an area before people would return. Even after security was achieved, return was impacted by the livelihood opportunities

people expected in their place of origin and place of refuge. Health and education services in the community of origin were also important in drawing people back to the countryside. Lastly, all the cases replicated previous observations of displaced populations in that many people chose to remain in urban areas. However, the cases also illustrate a difference in processes of return with Liberia and Timor-Leste exhibiting multiple displacements and indirect returns to places of origin. In comparison, northern Uganda returns occurred directly and over a shorter period of time.

Post-conflict Changes to Customary Law

Customary law and customary tenure systems, at their best, are adaptable and able to accommodate social change. Precisely those elements of customary law that can make it opaque to outsiders – the lack of clarity, uniformity and predictability – can be advantageous in post-conflict settings. Yet, violent conflict changes many social structures and it would be naïve to assume that customary law could endure protracted conflict without change. Observations suggest that in post-conflict settings a number of specific changes in customary law can be expected.

Most obviously, conflict changes traditional authority structures in multiple ways, contingent on such factors as the survival and continued legitimacy of individual leaders, the length of displacement and the nature of the conflict. In post-conflict settings with weak states this is particularly important as traditional structures have more prominence where the reach of the state is limited. Where displaced people have come into extended contact with humanitarian agencies articulating universal human rights, we can expect that a return to their place of origin may shift traditional authority structures towards greater inclusiveness, as women and youth demand representation and a voice in decision making. This implies that exposure to new ideas can change people and institutions, even traditional ones, in ways that bring into relief the property access, use needs, and even leadership potential of a newly broadened spectrum of society. New leaders with no traditional claim on authority can also set themselves up as community leaders.

We can also expect that customary tenure systems will adapt to perceived threats to the appropriation of their resources by outsiders. This may take several forms. In the absence of state intervention, customary rules of resource access may become more complex in an effort to exclude outsiders from control of resources (Fitzpatrick et al., 2012). Additionally, we could see the exploitation of community rules and authority structures to facilitate resource extraction which may benefit leaders. Last, we may see customary rules regarding land access and allocation begin to align more closely with public law.

These observations suggest where we might look for changes to customary institutions in the wake of violent conflict. We know that conflict changes people's choices and incentives. When conflict ends and people return to their place of origin, the structures of customary law must accommodate a different set of needs and, indeed, often a demographically very different group. Moreover, the post-conflict setting provides a strategic moment in which resource grabs may occur from outsiders and rule changes may happen within customary systems.

Post-conflict settings illuminate the resiliency of customary law. Despite tremendous problems after return in northern Uganda and Timor-Leste, customary structures revived and mechanisms of resource allocation and dispute resolution are largely operating. These local institutional structures were re-established, often with little assistance from

government or NGOs. This is particularly interesting where the population that returned is different from that which originally lived in the community. The rapid resurgence of customary law can be read as both testimony to its availability as an alternative where state structures are weak, and an affirmation of the need to re-establish a moral order in the wake of tremendous social upheaval.

Customary Property, Return and International Policy

Now that we have sketched out some ideas regarding the ways in which conflict and displacement change customary law, we would like to turn our attention to the issue of international public policy and post-conflict property restitution. Here we consider four policy documents that influence international policy on property restitution:

1. The Guiding Principles on Internal Displacement (Office for the Coordination of Humanitarian Affairs, 2001)
2. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN, 2005)
3. The Pinheiro Principles (COHRE, 2005)
4. Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests in the Context of National Food Security (FAO, 2012).

This list is not exhaustive as there are regional agreements which also impact state policies on population return and property restitution. We consider these four documents because they have the widest impact and agreement.

The property concerns of displaced people were first addressed in the Guiding Principles on Internal Displacement in 2001. This UN document noted in Article 21.3 that 'Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use' (Office for the Coordination of Humanitarian Affairs, 2001). However, The Guiding Principles, while helpfully addressing property concerns, were developed by a committee rather than negotiated between states, so the document was non-binding. In spite of this, they were later adopted in regional accords on displacement, such as the Kampala Convention (Guistiniani, 2011).

Property protections for refugees and displaced people are also addressed in two later sets of guidelines. The first is the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('The Basic Principles'), which was passed by the UN General Assembly in 2005 and addresses property return as a remedy. The second is the Pinheiro Principles, which establishes property restitution as a right of the displaced, and controversially addresses compensation, noting in Principle 2.1 that 'All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal' (COHRE, 2005: 9). More recently, the Voluntary Guidelines reiterate both ideas of restitution and compensation. In section 14.2 the guidelines specify that, 'Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States

should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all peoples' (FAO, 2012: 25).

These articulations of rights are incongruent with the landholding realities of customary systems. One point of dissonance is the noting of rights to specific and discrete property, rather than a general right to resources. Second, these articulations of rights imply that a person need not be present to have a rightful claim to restitution or the compensation for loss of resources. In customary tenure systems presence and timing are important. Land rights can accrue and diminish over time due to factors including presence, use and family circumstances. Displaced people need to first return home and then make claim to property and, in many places, this need not be the specific property which they previously possessed. If people choose not to return to their community after conflict, no restitution for loss of property is available. Physical presence is necessary to make a claim on the resources of the group. It would not be possible, for example, to claim customary land in northern Uganda without returning there, or to hold that land against other claims to it without some sort of presence.

The mention of compensation in the Pinheiro Principles and the Voluntary Guidelines is also complicated, if compensation means a renunciation of future resource claims by an individual in exchange for monetary payment. In many sub-Saharan African customary tenure systems resource claims are contingent on group membership, e.g. because I am Acholi from a particular lineage, I have the right to farm land in a specific area. If individuals sacrifice resource claims for compensation, what then is their status as a member of that group? If I renounce a land claim in favour of compensation, are my children ever allowed to make a claim? What about their rights and identity as group members? The complexities are numerous.

International law and policy measures are replete with generalizable rights that accrue to each individual as a human being. While there is much to recommend this universal approach, the generalizability of international law can be at odds with customary systems, which are malleable, particularistic, contingent and communitarian. International legal standards place obligations on state actors, while customary land issues are negotiated within specific localities and often in precisely the situations where state involvement is absent. It is a challenge for states to move these legal standards from paper agreements into post-conflict contexts where the reach of the state may be limited or contested.

Does it matter that international public policy regarding post-conflict property restitution does not align with customary law? Given the fact that displacement due to violence frequently occurs in places with customary law, we think it does. UN organizations and aid agencies operate under the Basic Principles and pay attention to international law and standards regarding property restitution. These organizations will seek policy outcomes that are unlikely to be achieved in many customary tenure areas. This may lead to frustration on the part of the organizations or the state and unreasonable expectations on the part of the displaced. Resettlement programmes are likely to be more effective when the expectations of the facilitators align with the nature of possible claims presented by customary tenure systems.

Conclusion

One of the goals of this essay has been to identify the variation in return processes to rural areas after lengthy displacement due to violent conflict. We have used two cases in

which the return process was punctuated by sporadic returns over time and not always to the place of origin (Liberia and Timor-Leste), and one in which return was synchronous and direct (northern Uganda). We have also examined the issue of how customary tenure systems facilitate return after displacement and the attendant question of how violence and displacement change customary law.

As customary law accommodates changing circumstances and the expectations of returnees, we can expect it to transform into a 'new normal'. The manner of this change will depend largely on the experiences of people while displaced and the new leadership structures which are established. Displacement due to violence is an experience of liminality in which people have a heightened awareness of their surroundings and where the expected patterns of behaviour in their home communities are suspended. In these liminal periods the potential for social learning is high.

Lastly, we have indicated several points at which the policies of international organizations regarding the restitution of property to people who have been displaced by violence are at odds with customary law. The idea that people should have the right to restitution of their property even if they do not return to an area does not align with most customary understandings or practices of resource access where the value of land is intertwined with complex and highly localized issues of group belonging, identity and multigenerational use. The universalist approach to the human rights of displaced people is understandable and even laudable, but it is at odds with the communitarian nature of resource claims embedded in customary systems. We do not attempt here to present solutions to these problems, rather the goal of this article has been to make some observations about post-conflict return processes and property claims in rural areas where customary law is dominant. It is our hope that these observations can both increase our overall knowledge and lead to better-informed policy decisions in the future.

References

Aditjondro, G.J. (1994) *In the Shadow of Mount Ramelau: The Impact of the Occupation of East Timor*. Leiden: Indonesian Documentation and Information Centre.

Atkinson, R.R. (2010) 'Afterward: A Perspective on the Last Thirty Years', in R.R. Atkinson *The Roots of Ethnicity: Origins of the Acholi of Uganda before 1800* (2nd edn), pp. 275–335. Kampala: Fountain Publishers.

Barnes, S. (2011) 'Origins, Precedence, and Social Order in the Domain of Ina Ama Beli Darlari', in A. McWilliam and E.G. Traube (eds) *Land and Life in Timor-Leste: Ethnographic Essays*, pp. 23–46. Canberra: ANU E Press.

Bascom, J. (1996) 'Reconstituting Households and Reconstructing Home Areas: The Case of Returning Eritreans', in T. Allen (ed.) *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa*, pp. 66–79. Trenton, NJ: Africa World Press.

Bermudez, M.S., L. Cunial and K. Farmer (2014) 'Life Can Change: Securing Housing, Land and Property Rights for Displaced Women'. Oslo: Norwegian Refugee Council.

Berry, S. (2006) 'Privatization and the Politics of Belonging in West Africa', in R. Kuba and C. Lentz (eds) *Land and the Politics of Belonging in West Africa*, pp. 241–61. Leiden: Brill.

Branch, A. (2011) *Displacing Human Rights: War and Intervention in Northern Uganda*. New York: Oxford University Press.

Butman, M.A. (2009) 'Urbanization vs. Rural Return in Post-conflict Liberia'. MA thesis, George Washington University, Washington, DC.

CAVR (2006) 'Chega! The Final Report of the Timor-Leste Commission for Reception, Truth, and Reconciliation'. Dili: CAVR.

COHRE (2005) 'The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons'. Geneva: Centre on Housing Rights and Evictions.

Corriveau-Bourque, A. (2010) 'Confusions and Palava: The Logic of Land Encroachment in Lofa County, Liberia'. Oslo: Norwegian Refugee Council.

Deininger, K., A.M. Ibanez and P. Querubin (2004) 'Towards Sustainable Return Policies for the Displaced Population: Why Are Some Displaced Households More Willing to Return than Others?'. HiCN Working Paper No. 07. Brighton: University of Sussex.

Dolan, C. (2009) *Social Torture: The Case of Northern Uganda, 1986–2006*. New York: Berghahn Books.

The Economist (2004) 'A Catastrophe Ignored', *The Economist* 22 July. http://www.economist.com/node/2952450

FAO (2012) 'Voluntary Guidelines on the Responsible Governance of Tenure of Land Fisheries and Forests in the Context of National Food Security'. Rome: Food and Agriculture Organization, Committee on World Food Security.

Ferris, E., E. Mooney and C. Star (2011) 'From Responsibility to Response: Assessing National Approaches to Internal Displacement'. Washington, DC: The Brookings Institution.

Finnström, S. (2008) *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda*. Durham, NC: Duke University Press.

Fitzpatrick, D. (2002) *Land Claims in East Timor*. Canberra: Asia Pacific Press.

Fitzpatrick, D., A. McWilliam and S. Barnes (2012) *Property and Social Resilience in Times of Conflict: Land, Custom and Law in East Timor*. Burlington, VT: Ashgate.

Fox, J.J. and C.B.D. Soares (eds) (2003) *Out of the Ashes: Destruction and Reconstruction of East Timor*. Canberra: ANU E Press.

Fussell, E., N. Sastry and M. VanLandingham (2010) 'Race, Socioeconomic Status, and Return Migration to New Orleans after Hurricane Katrina', *Population & Environment* 31(1): 20–42.

Guistiniani, Z. (2011) 'New Hopes and Challenges for the Protection of IDPs in Africa: The Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa', *Denver Journal of International Law and Policy* 39(2): 347–70.

Hetz, P.E., G. Myers and R. Giovarelli (2007) 'Land Matters in Northern Uganda: Anything Grows; Anything Goes. Post-conflict "Conflicts" Lie in Land'. Burlington, VT: Associates in Rural Development, Inc.

Holt, J. (1996) 'Looking Beyond the Towns: Facts and Conjectures about Rural Returnees in the Ogaden and "Somaliland"', in T. Allen (ed.) *In Search of Cool Ground: War, Flight and Homecoming in Northeast Africa*, pp. 143–52. Trenton, NJ: Africa World Press.

Hopwood, J. and R. Atkinson (2013) 'The Land Conflict Monitoring and Mapping Tool for the Acholi Sub-Region'. Gulu, Uganda: United Nations Peacebuilding Programme in Uganda and Human Rights Focus.

ICG (2008) 'Timor-Leste's Displacement Crisis'. Asia Report No 148. Dili and Brussels: International Crisis Group.

IRIN (2010) 'Land-rights Tensions not Abating'. Monrovia: Integrated Rural Information Network. http://www.irinnews.org/report/89149/liberia-land-rights-tensions-not-abating

IRIN (2011) 'Uganda: Escalating Land Disputes in the North'. Monrovia: Integrated Rural Information Network. http://www.irinnews.org/report/91957/uganda-escalating-land-disputes-north

Joireman, S.F., A. Sawyer and J. Wilhoit (2012) 'A Different Way Home: Resettlement Patterns in Northern Uganda', *Political Geography* 31(4): 197–204.

La'o Hamutuk (2003) *La'o Hamutuk Bulletin* 4(5): Part 2. Dili: The East Timor Institute for Reconstruction Monitoring and Analysis. http://www.laohamutuk.org/Bulletin/2003/Nov/bulletinv4n5b.html#refugees.

Liberia Institute of Statistics and Geo-Information Services (2009) '2008 Population and Housing Census: Final Results'. Monrovia: Liberia Institute of Statistics and Geo-Information Services.

Lopes, I. (2009) 'Land and Displacement in Timor-Leste', *Humanitarian Exchange* 43: 12–14.

McCallin, B. (2012) 'Restitution and Legal Pluralism in Contexts of Displacement. Case Studies on Transitional Justice and Displacement'. Brookings-LSE Project on Internal Displacement. Washington, DC: International Center for Transitional Justice.

Meitzner Yoder, L.S. (2003) 'Custom and Conflict: The Uses and Limitations of Traditional Systems in Addressing Rural Land Disputes in East Timor'. A discussion paper prepared for a regional workshop on Land Policy and Administration for Pro-Poor Rural Growth. Dili: Deutsche Gesellschaft Für Technische Zusammenarbeit (GTZ), in collaboration with the Direcção de Terras e Propriedades (DTP) of East Timor.

Meitzner Yoder, L.S. (2007) 'Hybridising Justice: State-Customary Interactions over Forest Crime and Punishment in Oecusse, East Timor', *The Asia Pacific Journal of Anthropology* 8(1): 43–57.

Moore, S.F. (1998) 'Changing African Land Tenure: Reflections on the Incapacities of the State', *European Journal of Development Research* 10(2): 33–49.

Nannyonjo, J. (2005) 'Conflicts, Poverty and Human Development in Northern Uganda'. WIDER Working Paper 47/2005. Helsinki: United Nations World Institute for Development Economics Research.

National Statistics Directorate and United Nations Population Fund (2011) 'Population and Housing Census 2010: Population Distribution by Administrative Areas'. Dili: National Statistics Directorate and United Nations Population Fund.

Ó Tuathail, G. (2010) 'Localizing Geopolitics: Disaggregating Violence and Return in Conflict Regions', *Political Geography* 29(5): 256–65.

Office for the Coordination of Humanitarian Affairs (2001) 'Guiding Principles on Internal Displacement' (2nd edn). New York and Geneva: United Nations Office for the Coordination of Humanitarian Affairs.

Office for the Coordination of Humanitarian Affairs (2007) 'Liberia 2007: Common Humanitarian Action Plan'. Geneva: United Nations Office for the Coordination of Humanitarian Affairs.

Onegi, L. (2012) 'Post-conflict Land Insecurity Threatens Re-displacement in Northern Uganda', *Forced Migration Review* 41: 31–2.

Peters, P.E. (2009) 'Challenges in Land Tenure and Land Reform in Africa', *World Development* 37(8): 1317–25.

Peters, P.E. (2013) 'Conflicts over Land and Threats to Customary Tenure in Africa', *African Affairs* 112(449): 543–62.

Pham, P., P. Vinck, M. Wierda, E. Stover and A. di Giovanni (2005) 'Forgotten Voices: A Population-based Survey of Attitudes about Peace and Justice in Northern Uganda'. New York: International Center for Transitional Justice; Berkeley, CA: Human Rights Center, University of California, Berkeley.

Prunier, G. (2007) *Darfur: An Ambiguous Genocide*. Ithaca, NY: Cornell University Press.

Roberts, B., K.F. Ocaka, J. Browne, T. Oyok and E. Sondorp (2008) 'Factors Associated with Post-traumatic Stress Disorder and Depression amongst Internally Displaced Persons in Northern Uganda', *BMC Psychiatry* 8: 1–9. http://bmcpsychiatry.biomedcentral.com/articles/10.1186/1471-244X-8-38

Rugadya, M.A., E. Nsamba-Gayiiya and H. Kamusiime (2008) 'Analysis of Post Conflict Land Policy and Land Administration. A Survey of IDP Return and Resettlement Issues and Lessons: Acholi and Lango Regions'. Washington, DC: The World Bank.

Sert, D. (2008) 'Property Rights in Return and Resettlement of Internally Displaced Persons (IDPs): A Quantitative and Comparative Case Study'. PhD thesis, City University of New York.

Uganda Ministry of Health and World Health Organization (2005) 'Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda'. Kampala: World Health Organization.

UN (2005) 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law'. General Assembly Resolution 60/147 (16 December). New York: United Nations.

Unruh, J.D. (2009) 'Land Rights in Postwar Liberia: The Volatile Part of the Peace Process', *Land Use Policy* 26(2): 425–33.

Urresta, E. and R. Nixon (2004) 'Report on Research Findings and Policy Recommendations for a Legal Framework for Land Dispute Mediation'. Dili: Timor-Leste Land Law Program.

de Waal, A. (ed.) (2007) *War in Darfur and the Search for Peace*. Cambridge, MA: Global Equity Initiative.

West, H.G. and S. Kloeck-Jenson (1999) 'Betwixt and Between: "Traditional Authority" and Democratic Decentralization in Post-war Mozambique', *African Affairs* 98(393): 455–84.

Wily, L.A. and J. Hatcher (2012) 'Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa'. Washington, DC: Rights and Resources Initiative.