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Case Studies on Transitional Justice and Displacement

Restitution and Legal Pluralism in Contexts of Displacement

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Transitional Justice and Displacement Project

From 2010-2012, the International Center for Transitional Justice (ICTJ) and the Brookings-LSE Project on Internal Displacement collaborated on a research project to examine the relationship between transitional justice and displacement. The project examined the capacity of transitional justice measures to respond to the issue of displacement, to engage the justice claims of displaced persons, and to contribute to durable solutions. It also analyzed the links between transitional justice and other policy interventions, including those of humanitarian, development, and peacebuilding actors. Please see: **www.ictj.org/our-work/research/transitional-justice-and-displacement** and **www.brookings.edu/idp**.

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The Brookings-LSE Project on Internal Displacement was created to promote a more effective response to the global problem of internal displacement and supports the work of the UN Special Rapporteur on the Human Rights of Internally Displaced Persons. It conducts research, promotes the dissemination and application of the Guiding Principles on Internal Displacement, and works with governments, regional bodies, international organizations and civil society to create more effective policies and institutional arrangements for IDPs. For more information, visit: **www.brookings.edu/idp**.

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Introduction

Housing, land, and property disputes are a frequent cause of conflict and a very common occurrence in post-conflict contexts. Populations displaced by conflict leave behind their lands and homes, which are often either destroyed or occupied. When the conflict ends, disputes frequently erupt between displaced persons trying to return and occupants refusing to vacate the land. This situation not only represents an obstacle to durable solutions for displaced persons but also constitutes a significant threat to the consolidation of peace, particularly if the allocation of land and housing has been deliberately used by warring parties to seek social and political support.

Recent years have seen an increased recognition of the need to address the housing, land, and property (HLP) rights of displaced populations in post-conflict situations. At the practical level, the growing number of peace agreements that include provisions for the resolution of land and property disputes as well as the multiplication of HLP restitution programs in post-conflict situations exemplify this trend. At the normative level, two sets of principles, the Principles on Housing and Property Restitution for Refugees and Displaced Persons, and the Basic Principles and Guidelines on the Right to a Remedy,[1] adopted respectively in 2005 and 2006, have contributed to the consolidation of a right to HLP restitution. Restitution is key to durable solutions to displacement but can also play a significant role in transitional justice processes aimed at providing remedy to violations committed during periods of conflicts and dictatorship.

The success of HLP restitution programs is closely linked to the capacity of institutions and the political will of authorities to design and implement them adequately. It is therefore important to examine the functioning of institutions and their necessary reform when envisaging a restitution process. Despite recent guidance and an increasing number of restitution programs in post-conflict situations, results have been uneven. Challenges have ranged from a lack of political will to the fragility of the rule of law and state institutions. The fact that in most countries affected by internal displacement access to land is regulated under customary law and held under informal tenure constitutes a conceptual and practical challenge to restitution for two main reasons: first, customary bodies addressing HLP disputes rarely result in integral restitution; second, legal pluralism, which

is the coexistence of different forms of authorities and dispute resolution mechanisms drawing on overlapping or conflicting statutory, religious, or customary laws, adds another layer of complexity to restitution processes and to transitional justice efforts.

This paper examines the value and limitations of HLP restitution in contexts of customary land tenure and legal pluralism and examines the role that customary justice can play as part of a transitional justice process. It argues that actors involved with restitution and broader efforts to reinstate justice, the rule of law, and democracy in post-conflict and transitional contexts should engage, albeit under certain conditions, with nonstate justice mechanisms. For the overwhelming majority of populations in developing countries, which is where most internally displaced persons (IDPs) live, customary justice is the only accessible form of justice. Engagement with it is essential to improving access to justice and to reforming or influencing its rules and processes in accordance with the human rights and democratic principles promoted by transitional justice.

The first part of the paper will examine the relevance of HLP restitution to the achievement of durable solutions for IDPs and describe the limitations of restitution programs in contexts of informal land tenure and possible alternatives or complementary approaches to it. The second part will look at the specific challenges that legal pluralism and customary land rights pose to HLP restitution and the reform of the rule of law. The third section will discuss the reasons why national and international actors concerned with HLP restitution and transitional justice should engage with customary justice and other forms of alternative dispute resolution mechanisms in order to improve access to justice and facilitate the achievement of durable solutions. Criteria and modalities of cooperation between the state and customary institutions will be proposed as well as supportive or corrective activities that can be led by national and international actors.

Property Restitution as a Remedy and a Key to Return of Displaced Persons

The return of properties confiscated, abandoned, or occupied during a conflict has increasingly been recognized as an essential element of peacebuilding and the protection of civilians. The 2007 report of the UN secretary-general on the protection of civilians identifies the need to address the impact of conflict on HLP as one of the four challenges affecting protection of civilians.[2] Numerous peace agreements[3] have included provisions for property restitution, and restitution programs have been established in many post-conflict settings, such as Bosnia and Herzegovina, Timor-Leste, Kosovo, Iraq, and Turkey. Restitution contributes to peace by addressing property disputes arising from the conflict that, if left unattended, could represent a threat to stability.

The relatively recent focus on property restitution for displaced persons is the result of two parallel evolutions: an increased focus on return by international actors and the consolidation of restitution as a right to a remedy. Restitution of property being key to a sustainable return, it progressively became an integral component of the right to return. The right to return to one's country progressively

evolved into a right to return home. The UN Sub-Commission on Human Rights, the Security Council,[4] and numerous peace agreements[5] have referred to the right of displaced persons to return to their homes and linked this right to property restitution.

The interest in return and HLP issues also coincided with the development of the right to a remedy and restorative justice, which aims at restoring the victims to the situation they were in before their rights were violated.[6] 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 (hereinafter the Basic Principles), adopted by the General Assembly in 2006, reaffirm the rights of individuals and groups to have access to justice and obtain reparations for harm suffered. Restitution is one of the reparation measures provided by the Basic Principles along with compensation, rehabilitation, satisfaction, and guarantees of nonrepetition. The Basic Principles specifically refer to return to one's place of residence and return of property as some of the forms that restitution can take.[7]

In the context of displacement of refugees and IDPs, property restitution provides a remedy to both dispossession and forced displacement. Many different causes of displacement allow the classification of IDPs as victims of violations of human rights or humanitarian law. These include arbitrary displacement, forced evictions, and violations of property rights or housing rights. Restitution of property contributes to redressing conflict violations and facilitates the achievement of durable solutions for displaced persons by giving them the opportunity to return to their homes and land. Restitution of homes and land provides returnees with shelter and improves their ability to be self-reliant, particularly in rural areas where land and property are the main, if not the only, source of livelihood. While HLP restitution alone may not be sufficient to allow durable solutions for IDPs, it is often considered a precondition to it.

The Principles on Housing and Property Restitution for Refugees and Displaced persons[8] (also called the Pinheiro Principles) elaborate on restitution rights in displacement situations. Contrary to the Basic Principles, which put restitution on an equal footing with other reparations measures, the Pinheiro Principles present restitution as a preferred remedy to compensation. The reason is that property restitution has the advantage of restoring the victim to the situation he or she was in before the violation was committed, which compensation does not. Restitution allows displaced persons to choose from a range of durable solutions, while compensation is less favorable to return.

The Pinheiro Principles build on existing international standards to confirm the right of displaced persons to housing and property restitution. One innovative aspect of the Pinheiro Principles is that they expand the scope of restitution to housing rights, which are more widely covered by international human rights instruments than property rights. The Pinheiro Principles also reaffirm the right to restitution of indigenous people and people with special attachment to land already established by ILO Convention 169. By introducing the concept of "housing, land, and property," the Pinheiro Principles underline that restitution extends to other possessory rights such as tenancy rights and informal land rights. The inclusion of non-owners within the scope of restitution is particularly relevant in countries where informal land tenure prevails and where very few property title deeds exist in rural areas. This is the case in most countries where internal displacement is currently taking place

and concerns the vast majority of the population. In Africa, for instance, 90 percent of rural land is not registered and is held under informal land tenure.[9] In such contexts, access to land and resolution of disputes are addressed by traditional authorities in parallel to statutory institutions. Informal land tenure may be a source of land disputes. The absence of official records concerning people's land rights may lead to land grabbing in cases of political or economic pressure over land.

Although customary land rights are subject to restitution according to the Pinheiro Principles, it might in some cases be difficult to implement in practice due to the lack of formal evidence and/or the length of displacement. In the absence of title deeds, alternative types of evidence have to be identified to confirm possessory rights. The existence of multiple possessory or access rights (such as cultivating or grazing rights) on the same plot of land greatly complicates restitution processes that attempt to respect various existing rights. Specific techniques adapted to informal land tenure can be used to confirm the existence of land rights in case of disputes. The use of witnesses is a common technique. Community mapping is another one and consists of community members and neighbors working together to collectively redefine the respective locations of various plots and the identity of the land user. However, this is difficult to put in practice when the population is dispersed by displacement.

The longer displacement lasts, the more difficult it is to establish land rights and implement restitution, as memory fades with time and potential witnesses may have died or been dispersed. Because traditional land rights are usually not recorded or recognized by statutory institutions, the formal justice system is ill-equipped to address this type of restitution claim. When it does, the coexistence of two concurrent systems of authorities, one formal and one informal, dealing with resolution of HLP disputes and restitution creates a risk of inconsistent or even contradictory decisions that may seriously affect not only restitution but equal access to justice, elements at the heart of transitional justice. The design of a restitution mechanism in such cases should then determine the scope of the restitution claim (are customary land rights subject to restitution?) and the institutions responsible, as well as possible relations between them.[10]

Legal Pluralism's Challenges to Restitution and Transitional Justice

In post-conflict situations, HLP disputes increase drastically in number and represent the overwhelming majority of cases addressed by customary bodies. It is therefore essential for transitional justice processes promoting restitution and the reform of rule of law institutions to consider how to relate to customary bodies. This section presents the challenges posed by customary dispute resolution mechanisms, and the following section addresses the reasons why national and international actors concerned with HLP restitution should engage with customary justice. The ways in which transitional justice or other initiatives to reinstate or build the rule of law engage with such bodies can have a significant impact on displaced persons' access to justice and opportunities to achieve durable solutions. Criteria and modalities of cooperation between the state and customary institutions are proposed as well as supportive or corrective activities that can be led by national and international actors. While

the challenges presented below also exist in non-conflict situations, the post-conflict period presents a window of opportunity for transitional justice and reform due to the interest of international actors in consolidating long-term peace as well as the availability of funding.

A Challenge for the Rule of Law

Legal pluralism exists where different sources of authority (traditional, religious, or statutory) considered legitimate by social actors coexist, and regulate and solve disputes on similar matters. Legal pluralism is extremely widespread and exists in most developing countries. In these countries, traditional dispute resolution mechanisms are the expression of legal pluralism and represent the only access to justice for some 80 percent of the population,[11] which is unaware of the formal justice system or reluctant to use it. Traditional authorities, also called nonstate justice systems, usually deal with civil matters, including family affairs and land disputes. This paper will only examine the role of traditional authorities in relation to land and property disputes, not their role in addressing serious crimes.

The definition of the rule of law provided in the report of the UN secretary-general on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* gives the full measure of the challenge that legal pluralism represents for the restoration of the rule of law:

> The rule of law . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[12]

Many characteristics of traditional authorities do not match the above description. Traditional, customary, or religious authorities make decisions based on their understanding and interpretation of customary or religious law, the principles of which are usually transmitted orally, seldom written, and evolve over time with societal changes. The accountability of traditional leaders to customary law is therefore difficult to measure. Even within the same customary system, decisions can vary significantly on similar cases from village to village depending on the chief's understanding of customary law and his appreciation of what best maintains the cohesion of the community. Such characteristics do not facilitate legal certainty, fairness in application of the law, avoidance of arbitrariness, or procedural and legal transparency.

Although different levels of interactions and recognition between formal and informal justice systems exist, states, in particular in post-conflict situations, have very little capacity to monitor the decisions of traditional authorities, which de facto operate independently from the formal system and often with very little knowledge of statutory law. Decisions of traditional dispute resolution bodies may therefore frequently contradict national law or international human rights standards, and hardly any notion exists of holding traditional authorities accountable to publicly promulgated laws and international standards.

Absence of Participation

The legitimacy of traditional authorities is rarely based on democratic designation but rather on the lineage of an individual or his social status within the community.[13] The designation mode and the unlimited duration of the mandate do not contribute to the accountability of traditional authorities to the community and the evolution of practices. With little challenge to their authority, leaders tend to perpetuate existing power imbalances and discriminatory practices against those who are socially marginalized,[14] such as women and outsiders to the community. Traditional authorities are typically exclusively men, which limits their sensitivity to women's claims. In relation to disputes over land, while customary systems will usually try to provide land to a landless widow, they will deny her the right to inherit the land from her husband or to keep a share of the land in case of divorce if she does not have male children. In post-conflict situations where many men are dead or missing, displaced widows or women heads of household will often face significant problems reclaiming the land of their husband before customary authorities. The frequently discriminatory attitude of customary or religious systems to outsiders is also based on another function of these authorities, which is to preserve the cultural identity and the values of the community against internal and external threats. Because family matters and land issues are central to the cultural identity of the group, traditional authorities play an essential role in these issues.[15]

A Challenge to HLP Restitution

A Different Notion of Land and Property Rights

The approach to land prevailing in many customary systems creates conceptual obstacles to land restitution. Land issues are usually considered an integral part of a community's spiritual and cultural identity. This central role of land in rural communities derives from the fact that land is the main means of subsistence and a central element of the community's survival. In many customary systems, land is not a commodity that can be sold; it belongs to the community, which can sell a right of use of the land to outsiders but cannot alienate the land, which will always remain "owned" by the community. The role of customary authorities in these circumstances is to be the guardian of the land and preserve it for future generations. As expressed by Elias Olawale, "the land belongs to a huge family, many of whose members are dead, some are alive and most of whom are yet to be born."[16]

Outsiders will frequently be sold a right to use the land but with some restrictions symbolically reaffirming the inalienability of the land to the community. For instance, in Cote d'Ivoire and Liberia, outsiders (considered to be and called "foreigners" although they may well be citizens who have simply migrated within the country) who buy a right of use owe allegiance to the member of the community who sold them the right. This materializes through presents given to the "stranger-father"[17] or guardian of the land. An Internal Displacement Monitoring Centre (IDMC) report on Côte d'Ivoire describes the notion of guardianship:

> Guardianship is a very common practice in West Africa which allows the transfer of land rights between indigenous owners and outsiders to be regulated. Guardianship also permits the integration of these individuals by granting them a status and a duty of gratitude towards the guardian who has allowed their use of the land. The periodic renewal of gifts of gratitude aims

> to remind the user of the guardianship relationship and of the fact that the guardian is the true owner of the land. For the same reason, certain customs prohibit outsiders from developing perennial crops such as rubber or cocoa, and restrict them to seasonal food crops, to avoid tensions due to users developing a sense of ownership of the plantations.[18]

This conception of the land and its link with the identity of a community explains how difficult it may be for outsider tenants to defend their interests and claim restitution of their user's right to the land before traditional authorities in the midst of post-conflict tensions.

Because land is so integral to the community's subsistence, the right to land is tightly linked to the use of it.[19] Therefore, it is not necessarily negatively perceived if land left unattended by displaced persons is used by other people. The longer the displacement lasts, the more difficult it will be for returnees to argue that the land should be given back to them, as the returnees themselves also culturally accept the logic that the land has to be used. As a result, returnees are usually ready to compromise and share the land with the new occupants with or without compensation, instead of full restitution. This is the case in Burundi, where population density and the length of displacement, which lasted several decades, made restitution practically impossible as multiple occupants succeeded each other in properties and acquired land rights over time. In Burundi, traditional mechanisms (as well as statutory ones) focus on conflict resolution and compromise rather than restitution and suggest almost systematically that the land be shared between the parties. This suggestion is usually accepted for lack of better options.

While the conciliatory approach to land disputes facilitates return and coexistence between the returnee and the occupant, in a country such as Burundi, where very little land is available, it has often resulted in cases where the shared plot is too small to address the needs of both the returnee and occupant's respective families. This situation has a negative impact on the sustainability of return, but neither sharing nor integral restitution is the solution. The much broader problem is that over 90 percent of the population lives in rural areas where all economic activities derive from agriculture. The solution in this case is a mid- to long-term one and aims at developing nonagricultural economic activities. When there is no shortage of land, new allocations of land can be considered to the benefit of either the returnee or the occupant, depending on the level of investment made by the occupant and the length of occupation.

The necessary link between the right to a certain plot of land and the use of it makes it difficult for customary systems, as well as states where land is administered customarily, to accept the notion defended by the Pinheiro Principles that restitution of HLP rights should take place independently from the claimant's return.[20] This would mean that a displaced person would repossess the community land he was previously using, but would leave it empty. While this might be easy to understand in a context of private individual property, it is more problematic for customary land rights. The title of the Great Lakes Protocol on Property Rights of Returning Persons[21] gives a first indication of this as it seems to acknowledge property rights only for those of the displaced who return. The protocol does, however, refer to the Pinheiro Principles as a useful tool when addressing property disputes. Although it seems to recognize the need for redressing HLP violations only to returnees, the protocol makes an exception for groups such as pastoralists "whose mode of livelihood depends on special

attachment to their lands." In cases where return is impossible for such groups, land allocation or compensation is envisaged.[22] One key question is how extensively the notion of people "with special attachment to land" will be interpreted. In countries where most livelihoods are based on access to land, it could be argued that this does not refer only to indigenous people and that the overwhelming majority of the population could qualify.

The clash between the traditional/customary conception of land and the Western conception of individual property rights adopted in some developing countries is one of the typical problems of legal pluralism and a significant source of conflict. It is therefore essential to understand the nature of customary land rights and its relation to the statutory conception of property to identify the causes of land tensions and the appropriate ways to address disputes. In Côte d'Ivoire, for instance, land issues played a central role in the conflict that displaced hundreds of thousands of people between 2002 and 2007. Disputes between native communities and migrants over land control were at the heart of the conflict and were fueled by contradictions between statutory and customary land rights. For decades, the government of Côte d'Ivoire, in order to develop its exports, encouraged both citizens and foreigners to migrate to fertile areas of the country by putting pressure on customary authorities to give land to migrants. President Houphouët Boigny proclaimed in 1963 that "the land belongs to those who use it," confirming the link between use and land rights but disregarding the notion of ancestral land and its ontological link to, and ownership by, the community. When economic recession hit the country, some native members of communities tried to reclaim their land. They invoked customary rule and the inalienability of land to reclaim their plots, arguing that what had been sold was a right of use. Migrants resisted, claiming they had bought the ownership of the land according to the president's statement. The ambiguity over the nature of the sale was probably instrumentalized by both parties to the conflict: natives had an interest in making buyers believe that they were buying ownership to sell at higher price, and buyers, while not ignoring the customary practices forbidding sale of land, would often base their ownership claim on the president's statement.[23] After the conflict ended in 2007, no restitution mechanism was put in place, and the only way for the displaced to repossess their property remains either to approach customary mechanisms, which tend to favor native claimants, or to use the rural land law to have customary rights recognized and then transformed into title deed. However, this law has hardly been implemented and so does not represent an effective remedy.[24]

A Different Notion of Justice

Traditional or religious authorities provide an alternative to statutory justice. While far from presenting the procedural guarantees of statutory justice, customary justice does provide very accessible, fast, and decentralized access to land dispute resolution mechanisms, which can be particularly useful in contexts of mass displacement. Unlike state institutions, customary authorities exist within each community, which facilitates the rapid processing of numerous claims. However, the capacity of customary leaders to deal with land claims may have been affected by displacement: they may be separated from their community or may have seen their legitimacy enhanced or reduced because of their role and attitude during the conflict. Their contribution to addressing land disputes will therefore vary greatly depending on the circumstances of the conflict and displacement.

Customary justice rejects litigation approaches, which are commonly perceived as antagonistic. In customary settings, going to court is perceived as a way to seek revenge more than justice. On the

contrary, traditional authorities tend to favor non-adversarial approaches such as mediation and arbitration as well as compromise solutions between the parties. The notion of justice is dominated by conciliation, and the emphasis is on moral, symbolic, and material reparation through gifts and rituals rather than punishment, which is secondary.[25] This conciliatory approach can be explained by the fact that the authority of customary bodies is often based on their capacity to maintain the cohesion of the community and peace between its members. In situations of post-conflict and displacement, traditional authorities will often organize reconciliation ceremonies or rituals between different ethnic groups to address resentment, facilitate the reintegration of returnees into the community, and rebuild its cohesion. They therefore present similarities with some aspects of transitional justice, which can be an entry point for cooperation between transitional justice actors and customary bodies.

The same approach is adopted for land disputes. Even if a dispute involves only two individuals, it is analyzed in terms of it impact on the community: the parties belong to certain families or groups, so their dispute and its solution is a concern to the whole community. As a result, traditional authorities look at the interests of both parties and attempt to address them through compromise solutions where both parties acknowledge, even symbolically, each other's interest. Instead of integral restitution in a case of land dispossession, traditional authorities tend to value reconciliation and collective interest rather than individual rights, adopting a "negotiated approach to property claims, in which occupiers of abandoned property are allowed to retain possession of some of the land in exchange for ceding the rest back to displaced owners or lawful users."[26]

Some would consider this approach unfair, but it is in line with the customary nature of land rights as belonging to the group and not to an individual, according to which the interest of the entire group should be considered when making a decision on whether land should be restituted or not. Similarly, since customary land rights are linked to the use and possession of land, the decision to share between the user and the displaced person is justified, particularly if displacement lasted for a long period of time and if the occupant had no knowledge of, or no direct involvement with the forced displacement of the original user. The sharing actually shows that, despite this general principle of use, the forced nature of the displacement and the right of the original user are recognized to a certain extent since he or she receives part of the land back. However, in some cases, as in the Democratic Republic of Congo, for example, customary authorities may disregard the forced nature of displacement and deny or limit the land rights of returnees on the basis that they left the land unoccupied.

Like authorities designing restitution mechanisms at the statutory level, customary leaders have to balance reconciliation and justice. The priority given by customary bodies to the cohesion of the community is not necessarily to the detriment of justice, even if it favors sharing over restitution. However, customary justice, as administered by traditional dispute resolution bodies, exhibits several characteristics that conflict with the exercise of impartial and democratic justice. The conciliatory approach, for instance, sometimes masks power dynamics that hinder the impartiality of decisions. Traditional leaders usually solve disputes addressed to them through mediation and arbitration.[27] Mediation refers to cases where a third party attempts to arrange a settlement between the two sides; as the decision has to be agreeable to both parties to be effective, the parties can therefore control the outcome of the process. Arbitration is where disagreeing parties agree to be bound by the decision of an independent third party. Both mediators and arbitrators are supposed to be freely agreed upon by

the parties, which is one of the advantages of collaborative dispute resolution mechanisms over the litigation process. Mediation and arbitration also have the advantage of being faster and enjoying a more simplified process than litigation, thus making them more accessible to victims of violations.

In practice, however, the parties to a dispute often have a limited choice of mediators or arbitrators within customary bodies. In addition, social pressure and the social status and moral authority of traditional authority often turns mediation into arbitration, which means that the parties do not genuinely have the capacity to refuse the solution proposed by the mediator. The acceptance of such decisions may be the result of a cultural acceptance of the value of reconciliation, but it may also be the result of existing power relations that the weaker party does not feel he or she can change and that customary dispute resolution mechanisms consolidate. Customary tenure does not necessarily grant equal land rights to all. In Southern Sudan, for example, land allocation corresponds to a hierarchy of rights defined by rules of descent and ethnicity.[28] Another downside of the conciliatory approach is that it sometimes fails to act as a deterrent to the repetition of acts such as occupation, and may even encourage encroachment as the encroacher knows his wrongdoing may be rewarded by a decision granting him a share of the occupied land.[29]

Resistance to Reform

The moral authority of traditional bodies is such that their decisions usually do not require any specific enforcement mechanisms in order to be implemented. Social pressure is strong enough for the parties to abide by the decision. Even those tempted to approach the formal system to challenge a customary decision usually renounce it out of fear of being rejected by the community for doing so. There is therefore little incentive for traditional authorities to reform themselves on their own initiative, for instance, to accommodate the rights of women or outsiders. This is particularly the case "where the dispute resolver faces a tension between maintaining the local social significations that maintain his authority and generating (more ontologically and culturally neutral) rules that accommodate outsiders."[30] Whether reform takes place or not depends on the support or the obstruction of various interest groups and their assessment of the benefits or loss the reform will bring.[31]

Customary dispute resolution mechanisms have also demonstrated extreme resilience when faced with the attempts of several statutory systems to challenge or even deny their role in the allocation of land and the resolution of related conflict. In many French-speaking African countries, the influence of the civil code and written law of the former colonial power has led to statutory laws that largely ignore or deny the role of customary justice, notably on land issues.[32] This was the case in Côte d'Ivoire, where, since the colonial era, customary land transfers were denied any recognition—but without any impact on customary practices. Indeed, land remains held and transferred and disputes regulated under customary systems in the overwhelming majority of cases. It is only since 1998 that the law has accepted a transitory recognition of customary land rights, and only to transform them into private land titling. To date, this law has barely been implemented, and customary authorities continue their practices unchanged. However, exceptional circumstances such as a conflict may sometimes create opportunities to accelerate changes.

Transitional Justice as an Opportunity to Engage with Customary Systems and Regulate Legal Pluralism

Conflicts and displacement significantly affect the delivery of both statutory and customary justice for practical reasons but also as a result of the deep social transformations that often accompany such upheaval. Paradoxically, these changes can create a propitious context for reform and transitional justice efforts. Post-conflict delivery of justice is materially affected by the destruction of infrastructure, such as roads, bridges, and public buildings, which disorganizes institutions and makes the population's access to justice more difficult. The exercise of customary justice is also affected by the dispersion of the community: leaders may have been killed or displaced, and if displacement lasts for a long period of time, they may have lost knowledge of some customary practices as well as the recollection of how various plots were attributed in the place of origin. Physical boundary markers such as trees or stones may also have disappeared, making restitution rights more difficult to determine.

The violence and trauma of conflict also modifies social relations within and between community members. For example, resentment over the failure of both statutory and customary authorities to protect the community from the effects of war has the potential to destabilize their legitimacy. Both the conflict and post-conflict phases tend to create new allegiances to emerging forces that acquired legitimacy and authority during that period. During displacement or upon return, communities may also be confronted by other communities with different customary laws.[33] This encounter of competing land tenure systems may also create an incentive for some to challenge their customary leader or system if it is less favorable to them. All of this affects the legitimacy of traditional authority and creates opportunities for forum shopping, where disputing parties decide to take their problem before one body or another depending on their interest and perception of which body will give them a favorable outcome. While forum shopping sometimes positively improves access to new and more adapted dispute resolution mechanisms, it can also contribute to tension and confusion.

In Côte d'Ivoire, the post-conflict phase saw the authority of customary leaders seriously challenged by groups of youths who established competing dispute resolution mechanisms in some regions to address land issues according to their interests. In addition, the state encouraged the creation of administrative and NGO-led dispute resolution mechanisms to deal with reconciliation and land issues. This resulted in a situation of legal uncertainty, where decisions provided by one body could be contradicted by several others, which delayed the resolution of the dispute[34] and increased land-related tensions.

The social changes and restructuring of power relations as a result of the conflict and post-conflict phases offer an opportunity for reform, which can facilitate transitional justice efforts to restore or establish the rule of law and redress conflict violations, thereby contributing to the achievement of durable solutions to displacement. Similarly, the combined weaknesses of both statutory and customary systems as a result of conflict and displacement create an incentive for engagement and cooperation between the two systems in an effort to reinforce or recover their respective legitimacy. This, however, raises the question: considering all the shortcomings of customary systems, why engage with them?

Why Engage?

Customary dispute resolution mechanisms should be integrated into or associated with the development of transitional justice measures because they are the reality of many post-conflict societies where transitional justice has to operate. Their role in maintaining harmonious relations within their community, as well as their mediatory approach, puts them in a key position to facilitate (or complicate) the reintegration of returnees and contribute to reconciliation efforts. It is precisely to avoid the potential negative role of customary leaders that they should be engaged by transitional justice efforts. Similarly, legal pluralism and the relations between statutory and other forms of traditional justice should be taken into account to ensure a comprehensive and sustainable approach to justice reform. Ignoring customary systems would also run the risk of indirectly supporting the perpetuation of discriminatory practices.[35]

While some characteristics of traditional justice (such as gender bias, discrimination against outsiders, and the perpetuation of existing power dynamics) pose a threat to the fair delivery of justice and redress of human rights violations, others may fit more easily with some aspects of transitional justice. For instance, the customary notion of justice that tends to highly value the maintenance of harmonious relations within the community in the resolution of disputes may align with the transitional justice-related aim of reconciling individuals and groups. The challenge is to find the right balance between respect for national and local culture and respect for human rights, and to "establish the relationship between principle and context in such a way that principles stand, that they can offer guidance, without being blind to context."[36] When compromises have to be made, they may be worth it if they allow a move in the right direction. Progress made through involvement with traditional justice, as slow and gradual it may appear, could have a more tangible impact on people and customary practices than efforts resting solely on distant state institutions that people have very little access to and knowledge of.

The accessibility and social legitimacy of customary systems are among their main strengths, which makes them a key potential entry point for transitional justice efforts. In surveys done in Afghanistan[37] and Liberia,[38] people interviewed overwhelmingly preferred the informal to the formal system, considering it much more accessible in terms of proximity, cost, language used, and processes adapted to their culture and literacy level. Traditional systems are also considered faster, less corrupt, and fairer than formal systems. However, fairness is perceived in terms of the degree of participation and the opportunity for the parties to express their views rather than the nature of the outcome.[39] People feel more comfortable expressing their concerns and defending their interests in such systems because they know them better and are more familiar with customary rules and values, while they often are often ignorant of the content of statutory law. Interestingly, the Liberia survey points out that female-headed households are less likely to agree that customary decisions should prevail over formal ones. The few women taking cases to statutory courts express preference for the outcomes of the formal system,[40] which likely reflects their dissatisfaction with the way gender-related issues are treated by traditional justice.

The social legitimacy enjoyed by customary systems as compared to formal ones indicates that grounding reform in local realities and values, while still defending human rights and principles of rule of law, is more likely to have an impact than a narrow focus on state institutions or the imposition

of values perceived as foreign.[41] Efforts to engage with customary justice should take advantage of their strengths while trying to reform its problematic aspects. Customary law and practices provide a form of accessible justice that is a prerequisite to the right to a remedy. They are socially embedded and have demonstrated extreme resilience to efforts of statutory systems to marginalize them. The most efficient approach is to try and reform traditional systems from within by convincing its main actors of the relevance of the changes. This approach is supported by UN institutions. Indeed, the report of the UN secretary-general on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* recognizes that customary justice is an essential component of people's access to justice and acknowledges the need to build on national capacity and culture when designing rule of law and transitional justice programs.[42]

How to Engage?

Efforts of transitional justice to remedy human rights violations, including violations of HLP rights, should be envisaged and developed as an integral part of wider efforts to reinstate the rule of law and address displacement. Measures to ensure the accountability, efficiency, and fairness of customary institutions are therefore directly relevant to the delivery of transitional justice, and contribute to creating an environment favorable to achieving durable solutions to displacement. A brief review of the interactions between statutory systems and traditional dispute resolution mechanisms will help to identify appropriate supportive or corrective actions either through existing institutions or the creation of new ones.

Legal pluralism is characterized by numerous interactions between the statutory system and different dispute resolution mechanisms. These can range from de facto interactions such as the cooptation of traditional leaders by state authorities or by individuals combining both statutory and customary functions, to legal recognition of customary decisions by statutory courts and referral between the two systems. Such interactions reflect both the genuine recognition by the formal system of customary justice and an attempt to extend its power at the local level through improved control of traditional authorities. It is essential to understand the nature of the relations between the two systems to determine the activities required to improve overall access to justice in situations of post-conflict and displacement. Four main types of interactions can be identified:[43]

- Abolition refers to situations where the state refuses legal pluralism and considers nonstate justice systems abolished. This is a situation prevailing in several former French colonies and is defended in the name of modernization and the building of a nation-state.
- Nonincorporation characterizes a situation where formal and informal justice coexist but operate independently without strict jurisdictional boundaries.
- Customary systems are fully integrated and operate according to specific rules defined by the state.
- In cases of partial incorporation, both systems operate relatively independently while accepting compromises in their mutual interest. For instance, the state devolves administration of local justice in defined areas under certain conditions, such as respect

for national laws, while customary justice may in return obtain recognition of its decisions before courts and obtain support from the state.[44]

Recognition by the state of the role of non-state justice is the first step toward defining respective roles and responsibilities between the two systems. Since the state remains the primary duty-bearer in relation to human rights, it has a responsibility to define the rules and conditions under which it allows nonstate justice systems to address disputes. The devolution of responsibility by the state to customary bodies supposes rights and obligations on both sides to ensure accountability and coherence in the delivery of justice. Prima facie recognition of customary justice's decisions without review of conformity to state law or systematic referral to customary justice on certain matters may actually limit access to justice by delaying the opportunity to complain before the formal system or by consolidating through legal recognition some discriminatory practices.

Afghanistan is a typical example of partial incorporation. State officials can choose the members of the jirgas, traditional arbitration bodies that use a mix of local custom and Islamic rules to render their decisions. Courts almost systematically refer land disputes and family matters to jirgas. In such cases, jirga decisions are then recognized and registered by courts,[45] although without any review of their conformity to national law and international standards. Consequently, in some cases the statutory system ends up endorsing practices and decisions that violate its own legislation. It also leads to different treatment of those who obtained a jirga decision after referral, which can therefore be legalized, and those who approach jirgas without referral, as these are not entitled to legal recognition.[46] In Afghanistan, interactions between formal and informal justice are frequently loosely regulated and face three main obstacles: the lack of state capacity to ensure that customary systems abide by the rules defined by legislation; the lack of awareness of statutory law among traditional authorities and the population at large; and the limited understanding of customary law by the statutory system.

These obstacles contribute to confusion between the two systems and result in legal uncertainty and lack of accountability. In contexts of political and institutional transition, activities to address these obstacles and improve dispute resolution mechanisms should be directed at the state, customary bodies, and civil society in general. The principles of action below can be applied in situations of post-conflict and displacement when reforming institutions:

1. *Link recognition to review and monitoring*: Recognition of customary decisions should be linked to the review and monitoring of decisions to ensure conformity to national legislation and international human rights standards. Such monitoring should ideally be performed by formal institutions, as is the case in Bhutan, where decisions of traditional authorities are reviewed by a magistrate.[47] It can also be done by national human rights institutions, civil society organizations, and NGOs.[48]

2. *Raise awareness of statutory law among traditional authorities*: Respect for statutory law and international human rights standards should be a basic precondition of customary decisions' legal recognition. However, it may be difficult for many traditional leaders to respect this obligation as they may have little knowledge of statutory law, and should therefore be trained by the state or other actors. Such training would complement and facilitate the monitoring and review of customary decisions and improve their quality.

3. *Raise awareness of statutory law among the population*: The lack of knowledge of the rules and processes of the formal system discourage many from using its services. Activities aiming at training paralegals or providing legal aid to the population improve access to justice, as people become aware of alternatives to customary justice and receive support to use it. Such activities contribute to making formal and informal systems more accountable to their citizens. In Papua New Guinea, the state established village courts to marginalize traditional tribunals and harsh punishment. The monitoring work of NGOs and awareness raising efforts in various communities has made the village courts successful where they operate.[49]

4. *Clarify content of customary principles*: One of the main characteristics of customary law—and also one of its strengths—is its capacity to adapt to the social and economic transformation of the community. The aim then should not be to codify customary law into fixed rules, but rather for the community and its leaders to identify the principles to apply in resolution of disputes and improve transparency and accountability. In the context of its legal-assistance support to displaced persons in Uganda, the Norwegian Refugee Council (NRC) assisted traditional leaders of a specific region to define the principles they were using when addressing land disputes. The NGO organized several workshops during which the traditional leaders were presented with certain typical case scenarios of land disputes involving displaced persons as identified in NRC practice. Consultations between the traditional leaders resulted in the identification of principles agreed upon by all and resulted in a booklet published in English and the local language. The booklet was distributed to both traditional leaders and the population. This initiative was warmly supported by traditional leaders, who felt supported by the exchange of views and the resulting guidance for their mediatory function. It also opened the door for more transparency and accountability as both internally displaced persons and occupants had a clearer idea of the rules that would apply to them.

5. *Improve representation of different ethnic or social groups in dispute resolution mechanisms*: One of the main downsides of traditional justice systems is the lack of representation and consideration of socially marginalized groups, such as women and outsiders. Efforts should focus on mobilizing and supporting such groups so that they can better formulate their grievances and recommendation for change. Such support would prepare the ground for their constructive participation in non-state justice systems. The design of specific dispute resolution mechanisms for the purposes of transitional justice is an excellent opportunity to initiate this participation. While traditional authorities would probably resist the participation of representatives of the population (such as victims of violations and marginalized groups) in traditional structures, they might object less if this participation concerned a newly created body and was considered a temporary arrangement. In practice, though, it is likely that people who would benefit from this opportunity to express their views would want to make this arrangement permanent. Transitional justice mechanisms can therefore be a way to initiate good democratic and participatory practices in addressing HLP disputes through restitution or other means.

6. *Legal empowerment*: Legal empowerment can be defined as activities and reforms intended to allow disadvantaged groups to defend their interests and rights through knowledge and use of law, whether it is statutory, customary, or religious. The initiatives mentioned above,

> aimed at informing civil society of its rights under statutory and customary law through legal aid or training, allow individuals or groups to become active participants in public life. They empower by increasing "the influence that members of the group can exert over their own lives, over social conditions and processes and over politics and governance."[50] Legal empowerment is key in all societies but particularly in legally pluralistic systems, where citizens are in an ideal position to hold the statutory and customary systems accountable to their rules. This is only feasible if such rules are known and people are aware of the alternatives to customary justice. Knowledge is the beginning of participation, which is then the beginning of ownership.

Statutory law has little impact unless it is known and owned by a population. In transitional contexts, reform of the rule of law and customary practices requires the participation of traditional leaders and civil society to ensure the adequate fit of justice and law with the social-economic and cultural characteristics of a society. This approach greatly increases the likelihood of success of reform. The following section gives examples of how an NGO operating exclusively in situations of displacement can contribute to legal empowerment of traditional authorities and the rest of the society.

NRC[51] Practice with Alternative Dispute Resolution Mechanisms Dealing with Land[52]

The Norwegian Refugee Council provides legal aid in several countries affected by conflict and displacement. The majority of cases it addresses are related to property disputes in countries of legal pluralism. The NRC assists its clients to present their claims before the formal system, but when considered more efficient, it also engages with traditional justice mechanisms. A quick review of the NRC's practice with collaborative dispute resolution mechanisms will illustrate the various types of engagement that can be used to improve land restitution and the resolution of land disputes.

In most cases, the NRC facilitates mediation delivered by traditional authorities by providing training and advice on legal standards to the authorities, gathering facts and evidence in support of claimants, and monitoring the outcome of cases. In Afghanistan, the NRC represents its clients before jirgas or facilitates mediations through discussion with traditional leaders to encourage the delivery of decisions in line with human rights principles. As previously mentioned,[53] one of the ways to do this is to use principles known to the community, such as some provisions of Sharia law compatible with international standards. The NRC also monitors the process to better support the interests of their clients.

In Sudan, the NRC tries to influence the outcome of decisions through training of traditional authorities promoting good practices, international legal standards, and gender equality. It also facilitates the process by gathering evidence and defending the clients' rights. The NRC also engages in a similar way with noncustomary mediation as provided by legislation. One of the most frequent causes of dispute is the encroachment of land by powerful military actors. In Yei, where the NRC operates, an increasing number of military land grabbers have been summoned to courts, a first dent in the impunity they were enjoying. Beyond the numbers of people who could benefit from this assistance, the value of the program resides in its contribution to building the capacity, confidence, and legitimacy of both formal and customary adjudicatory bodies.

In Liberia and Burundi, the NRC mediates directly between the parties without using customary authorities. This approach was dictated by the fact that customary authorities had been weakened by the conflict or were considered corrupt or politically manipulated and partial. The parties approach the NRC voluntarily and accept its mediation role, which consists of a structured communication process for resolving land disputes. This includes provision of legal counseling, document analysis and surveys, and fact finding work to support negotiations between the parties. In Liberia, although the NRC mediates directly between the parties, it works in close cooperation with statutory and customary authorities. Agreements often result in a written memorandum of understanding signed between the parties and the customary and/or statutory authorities. The document indicates the terms of the decision as well as the location and size of the land plot at stake after an official boundary demarcation facilitated by the NRC. This prepares the ground for future land titling, although such titling hardly ever takes place in practice. The endorsement of the NRC's mediation efforts by authorities in the form of a written document aims at ensuring sustainability beyond the presence of the NGO, and at giving a stronger sense of commitment to the decision, although strictly speaking the document is not legally binding.

In the Democratic Republic of Congo, the NRC facilitated the creation of new dispute resolution bodies called Commissions of Welcome and Reconciliation. The originality of these bodies lies in their inclusion of representatives of displaced persons and refugees in addition to customary and local leaders in charge of mediation. The NRC refers cases to the commissions and assists by carrying out background research on facts, supporting the follow up of cases, and documenting decisions once an agreement has been reached. The commissions are created following a two-day seminar with salient members of civil society and administrative and customary authorities. The NRC decides on the relevance of a workshop based on several criteria, such as the number of returns and the prevalence of land conflicts in the area. The seminar gives those participating a basic understanding of land conflict, dispute resolution systems, and conflict management, and is usually concluded by the creation of a commission whose president is elected by the members. The NRC strives to ensure inclusion of various ethnic groups and women in the commission, but while they are always part of the seminar, very few women become member of the commissions. These innovative NGO approaches should, however, be complemented by efforts of national authorities and transitional justice and rule of law actors to ensure a broader and more sustainable impact.

Conclusion

The state remains the primary duty bearer in relation to human rights and should be at the heart of a human rights analysis of plural legal orders. Nevertheless, when state capacity and presence is limited at the local level, improving the functioning of customary HLP dispute resolution mechanisms is essential, as they represent the main and often only access to justice for the overwhelming majority of displaced persons who lose their HLP assets. Engaging with customary bodies on HLP restitution and on rule of law reform should therefore be considered a key component of efforts to pursue transitional justice and provide durable solutions for displaced persons. Linking customary bodies to transitional justice processes can also enhance the impact on the population by providing information and implementation at the local level throughout the country.

Working with customary bodies to address HLP requires coordination of a wide range of actors in order to have a consistent and comprehensive approach to the issue. HLP is at the junction of early recovery and development. It is part of early recovery, as it usually is implemented in the immediate post-conflict phase to facilitate the return of displaced persons and as one measure of transitional justice. HLP also relates to development, as it is a component of wider efforts to restore the rule of law and to improve land administration and governance. As such, HLP restitution should not be envisaged in isolation from other long-term measures such as land reform to address the structural causes of imbalances and land disputes. While HLP restitution can greatly contribute to peacebuilding by resolving land disputes resulting from the conflict, it does little to address the root causes of land disputes that are based on unequal land distribution or insecure tenure. Where land disputes have played a significant role in the conflict and displacement, actors supporting transitional justice processes and addressing displacement should consider including land issues not only under the restitution perspective but also as part of discussions taking place in truth and reconciliation commissions to help build consensus on existing problems and form a solid basis to design appropriate solutions.

The conceptual and practical challenges faced by HLP restitution in countries characterized by legal pluralism are rather daunting. However, transitional contexts offer an opportunity for change, thanks to efforts to seek accountability for violations committed during the conflict and to reform the rule of law, which can help clarify and redefine the relations between statutory and customary justice in accordance with democratic principles. In this endeavor, civil society should be considered an essential actor of change, making legal empowerment key to the building of democracy. This combination of redress and rebuilding of rule of law in turn contributes to the achievement of durable solutions to displacement by helping displaced persons to come to terms with past violations and resume a normal life in a social and institutional environment based on democratic and human rights principles.

Notes

1 United Nations General Assembly, Resolution 60/147, "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 Doc. A/RES/60/147, March 21, 2006.

2 United Nations Security Council, "Report of the Secretary-General on the Protection of Civilians in Armed Conflict," UN Doc. S/2007/643, October 8, 2007.

3 In 2006, 17 peace agreements contained provisions for the resolution of land and property disputes; Internal Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2006*, April 2007, 82.

4 Rhodri C. Williams, "The Contemporary Right to Property Restitution in the Context of Transitional Justice" (Occasional Paper Series, International Center for Transitional Justice, New York, May 2007).

5 Such as Cambodia, El Salvador, Liberia, Rwanda, Tajikistan, Sierra Leone, Ethiopia and Eritrea, Sudan, Mozambique, Guatemala, Bosnia and Herzegovina, and Kosovo. See Scott Leckie, ed., *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials* (New York: Cambridge University Press, 2007).

6 For an analysis of the evolution of restorative justice, see Williams, "The Contemporary Right to Property Restitution."

7 Ibid.

8 UN Sub-Commission on Promotion and Protection of Human Rights, "Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro," UN Doc. E/CN.4/Sub.2/2005/17, June 28, 2005.

9 United Nations Development Programme, *Land Rights Reform and Governance in Africa: How to make it work in the 21st Century?*, October 2006.

10 For more information on restitution, see Rhodri Williams, "Protection in the Past Tense: Restitution at the Juncture of Humanitarian Response to Displacement and Transitional Justice," in *Transitional Justice and Displacement*, ed. Roger Duthie (New York: Social Science Research Council, 2012).

11 Deborah Isser, "Re-Thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009), 13.

12 United Nations Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," Report of the Secretary-General, UN Doc. S/204/616, August 23, 2004, para. 6.

13 Ewa Wojkowska and Johanna Cunningham, "Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor," in *Legal Empowerment: Practitioners' Perspectives*, ed. Stephen

Golub (Rome: International Development Law Organization, 2010), 98.

14 Matt Stephens, "Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009), 143.

15 Vijay Kumar Nagaraj, "Human Rights, Legal Pluralism and Conflict: Challenges and Possibilities—Some Reflections" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009).

16 Quoted in IDMC, *Whose Land Is This? Land Disputes and Forced Displacement in the Western Forest Area of Côte d'Ivoire*, October 2009, 13.

17 Norwegian Refugee Council (NRC), *Confusions and Palava: the Logic of Land Encroachment in Lofa County, Liberia*, 2010, 10.

18 IDMC, *Whose Land Is This?*, 13–14. See also: Jean-Philippe Chauveau, "La réforme foncière de 1998 en Côte d'Ivoire à la lumière de l'histoire des dispositifs de sécurisation des droits coutumiers" (paper presented at "Les frontières de la question foncière," Montpellier, May 17–19, 2006), 17; Oumar Sylla, "Les structures coutumières dans la gestion foncière dans le Nord de la Côte d'Ivoire" (Rapport de stage dans le cadre du projet du recherche, "Loi et Coutume," APREFA–LAJP– CIRAD, 2002), 13. On the same issue in Liberia, see NRC, *Confusions and Palava*, 10.

19 The NRC report on land issues in Liberia describes very well the link between the right to land and the use of it: "The Chief went on to explain that under 'traditional law,' claims on land are made by the ability of an individual to build on and use a particular parcel. . . . Unused spaces are perceived as unclean due to the rapid overgrowth of 'bush' that would occur on the lot. . . . Therefore, through the frontiers, a mentality upon which individuals and groups assert their rights over a particular piece of land by the suppression of the wilderness, the reservation of house-spots for previous owners is perceived to be incompatible with that particular development based logic, providing a basis for the occupation of (or encroachment on) 'vacant' land." NRC, *Confusions and Palava*, 14.

20 Pinheiro Principles, Principle 2.2: "The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non return of refugees and displaced persons entitled to housing, land and restitution."

21 International Conference on the Great Lakes Region, Protocol on the Property Rights of Returning Persons, November 30, 2006. The protocol is part of the Pact on Security, Stability and Development in the Great Lakes Region, which was ratified by 11 states and entered into force in June 2008.

22 Great Lakes Protocol on the Property Rights of Returning Persons, art. 7.

23 IDMC, *Whose Land Is This?*

24 In the Democratic Republic of Congo, a similar clash of logic contributed to increasing tensions over land between "foreigners" who claimed that they had received land from the colonial administration and that it was now their property, and natives of the community who argued that land could not be given away. Ana Palao, "Presentation: Information, Counselling and Legal Assistance in the Democratic Republic of Congo," Norwegian Refugee Council, Democratic Republic of Congo, 2010.

25 Chidi Anselm Odinkalu, "Le Pluralisme et l'Accomplissement de la Justice en Afrique" (Africa Governance Monitoring & Advocacy Project, Open Society Institute, July 2005).

26 Brookings Institution–University of Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, October 2008, 177.

27 And negotiation, but as this is not relevant to the focus of this paper it will not be covered here.

28 Sara Pantuliano, "The Land Question: Sudan's Peace Nemesis" (HPG Working Paper, Overseas Development Institute, December 2007).

29 NRC, *Confusions and Palava*.

30 Varun Gauri, "Customary Justice and legal Pluralism in Post-Conflict and Fragile Societies" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009), 119.

31 Bilal Siddiqi, "Customary Justice and Legal Pluralism Through the Lens of Development Economics" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009), 122.

32 Manfred O. Hinz, "The Ascertainment of Customary Law: What Is It and What Is It For?" (paper presented at "Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies," United States Institute of Peace, George Washington University and the World Bank, Washington, DC, November 17–18, 2009), 134.

33 John Unruh, "Humanitarian Approaches to Conflict and Post-Conflict Legal Pluralism in Land Tenure," in *Uncharted Territory: Land, Conflict and Humanitarian Action*, ed. Sara Pantuliano (Rugby: Practical Action, 2009).

34 IDMC, *Whose Land Is This?*

35 Wojkowska and Cunningham, "Justice Reform's New Frontier," 103.

36 Pablo de Greiff, "Theorizing Transitional Justice," in *NOMOS LI: Transitional Justice* (New York: New York University Press, 2012), 63.

37 Norwegian Refugee Council ICLA Herat (Afghanistan), *Building Linkages Between the Formal and Informal Justice Systems in Afghanistan: A Review of Collaborative Approaches in the Province of Herat*, August 2009 (copy on file with author).

38 Siddiqi, "Customary Justice and Legal Pluralism," 121.

39 Wojkowska and Cunningham.

40 Siddiqi, "Customary Justice and Legal Pluralism," 124–125.

41 This was the approach adopted in Afghanistan by the legal aid teams of the Norwegian Refugee Council. When interacting with the jirgas (customary justice mechanisms), the NGO emphasized the aspects of Sharia law compatible with human rights to influence the outcome of decisions.

42 UN Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," para. 16. See also para. 36: "Due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition. If these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice."

43 Brynna Connolly, "Non-State Justice Systems and the State: Proposals for a Recognition Typology," *Connecticut Law Review* 38, no. 2 (2005): 239–294.

44 On the various types of interaction between formal and informal systems, see also Stephens, "Typologies, Risks and Benefits," 146.

45 The Liaison Office, *Linkages between State and Non-state Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia*, May 2009.

46 Brennan Webert, Norwegian Refugee Council Country Office in Afghanistan, personal communication with author, June 2010.

47 Wojkowska and Cunningham, "Justice Reform's New Frontier," 107.

48 Ibid.

49 Stephens, "Typologies, Risks and Benefits," 149.

50 Jamie O'Connell, "Empowering the Disadvantaged after Dictatorship and Cconflict: Legal Empowerment, Transitions and Transitional Justice," in Golub, *Legal Empowerment: Practitioners' Perspectives*, 117.

51 The NRC is a humanitarian nongovernmental organization that provides assistance, protection, and

durable solutions to refugees and internally displaced persons worldwide. One of the NRC's core activities is to provide legal counseling and assistance to persons displaced by conflict to help fulfill their rights and to facilitate achievement of durable solutions.

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[53] See note 41.