Humanitarian approaches to conflict and post-conflict legal pluralism in land tenure

Jon D. Unruh

Abstract

This chapter provides an introduction to legal pluralism in postwar land tenure, and some of the possible approaches humanitarian actors can take to deal with the challenges legal pluralism present. While suggesting what works in specific cases can be valuable, such examples are actually less common than the examples of problematic outcomes that humanitarian attempts at dealing with postwar land tenure have produced, particularly from the point of view of postwar governments attempting legislative reform. In this regard this paper also points out a few of the approaches and issues that need to be avoided. Subsequent to an introducing the various understandings of what legal pluralism in land tenure are, and how legal pluralism comes about during and after a war, the paper describes some of the larger general issues important to dealing with postwar legal pluralism in land tenure.

Introduction

The pursuit of secure access to rural land during and following conflict, and the confusion, competition and confrontation normally associated with such an endeavour, result in the emergence of multiple ways for attempting to legitimise land access, claim and use, with different sets of rules regarding land, property and territory. This will especially be the case where land issues are a significant component of the conflict. In such a situation, legal pluralism with respect to rights to land which are incompatible, opposed or in aggregate add confusion and tenure insecurity can jeopardise a peace process. One of the most acute examples of incompatible legal pluralism regarding land resides in the Middle East, where the

Israeli–Palestinian land issue has confounded attempts at peacemaking for decades. In essence, armed conflict and its repercussions reconfigure the network of social relations upon which all land tenure systems depend.

One useful way to view legal pluralism is described by Moore (1973) (Figure 4.1), in which separate social fields of 'legality' overlap and interact. Legal pluralism with regard to land tenure is defined by the different sets of rights and obligations concerning land and property, within multiple social fields. In Figure 4.1, the solid lines represent formal state law, and the dotted lines represent informal 'legal fields'. Such informal legal fields move much quicker than formal law and can change in ways that result in multiplication, merging or change in number of participants. As noted in the figure, there is also commonly a good deal of overlap among informal legal fields, and between formal and informal fields.
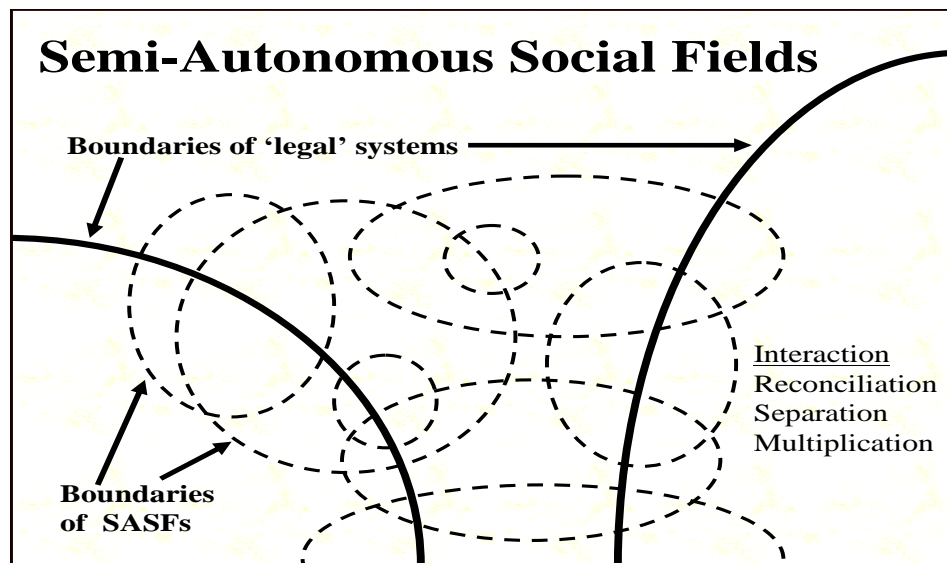

Semi-Autonomous Social Fields

Boundaries of 'legal' systems

Boundaries
of SASFs

Interaction
Reconciliation
Separation
Multiplication

Figure 4.1. Formal law is represented by solid lines, and informal 'legal fields' are represented by dotted lines. Source: Moore, 1973.

When difficulties between legal fields regarding land access, claim, use, disputes and security become widespread and severe over the course of a conflict, the result can threaten a delicate peace. For example, land issues in the peace accord in El Salvador were not dealt with clearly, contributing to different legal expectations. The land issue ultimately became the final sticking-point in the peace process, blocking complete demobilisation. In Nicaragua, misunderstandings regarding land access led the

contras to rearm during the peace process (de Soto and Castillo, 1995). And, subsequent to the end of the RENAMO war in Mozambique, formidable land tenure pluralities significantly aggravated the peace process. Such risks can be especially pronounced when large populations are dislocated during the course of a war, because IDPs and returning refugees and other marginalised groups often become more politically aware while dislocated from home areas. As a result, land access problems in a post-war phase can easily become part of the larger political landscape (Ek and Karadawi, 1991; Basok 1994; Alexander, 1992; Krznaric, 1997).

Especially difficult in periods of recovery are disputes over land between participants in different legal fields. Aggravating such a situation is the greatly diminished capacity of a post-war government to enforce the pre-conflict national tenure system. In a peace process, informal legal fields that have been created and maintained during war to meet property, land and territorial needs will usually be stronger than old or new laws. This is particularly the case because the dissemination and enforcement of laws (especially among agrarian, semi-literate, war-weary populations) will be weak or non-existent after conflict.

The development of legal pluralism in land during armed conflict
Population displacement and dislocation due to the effects of armed conflict can play a primary role in the development of legal pluralism with regard to land. The physical separation of people from their home areas and traditions of land use and land tenure can be the first and most dramatic step towards the development of a changed approach to land rights. This occurs in three stages. First, physical separation changes, terminates or puts on hold prevailing social rights and obligations among people regarding land and property, especially where actual occupation or social position forms the basis or a significant aspect of a claim. Second, once dislocated, people seek land elsewhere, but with an approach to access, claim and dispute different from that which prevailed in the home area. This comes about with a change in status, as people who were once community members become dislocatees, combatants, migrants, squatters, female-headed households or refugees. Affected populations (both arriving and receiving) can quickly establish alternative land tenure arrangements that follow newly emerging situations, or pursue variations of old arrangements which work under the prevailing circumstances. The direction that this takes and how rapidly it

occurs can depend to a significant degree on wartime and dislocation experiences. Third, the ability to return to a pre-dislocation land tenure system in a home area will depend on the length of the war, the intactness of the return community, relations between those who left and those who stayed and the degree to which individual and community changes during dislocation are still compatible with the previous tenure system.

Such changes can result in significant resistance and animosity towards returnees by community members who chose not to flee. Krznaric (1997) observes how dislocation influenced the development of legal pluralism over land within groups of Guatemalan returnees versus those who stayed, due to the refugees' raised political awareness during their exile in Mexico. This enabled dislocated people to advance interests suppressed under pre-dislocation political arrangements, such as those of women, lower socioeconomic strata and other marginalised groups. An organisational capacity also emerged within some sectors of the returnee community, as groups of returnees appropriated and used a transnational language of rights (human rights, refugee rights). Hammond (1993) notes similar contrasts in Nicaragua and El Salvador. Also relevant to 'going back' are the presence and activities of other actors, including squatters, large landholders, ex-combatants and commercial interests, all of whom may seek access to land thought to be previously unoccupied or abandoned during the war.

A reduction in the power and penetration of state law during war can also result in the emergence of multiple legal fields regarding land tenure. While this may be most pronounced in areas directly involved in a conflict or taken over by opposition groups, or where state enforcement or concern were historically weakest, a federal land and property administration can also experience an overall national reduction in capacity, as the state's financial resources are diverted to the war effort, administrative personnel become unwilling or unable to travel due to security concerns, significant sectors of the population begin to question the legitimacy of state institutions, records become outdated as land and property transactions go unrecorded during the conflict, the state's lands and property administration is seen as unworkable as a national institution and increasing numbers of people abandon the state tenure system.

Land-related grievances can also encourage the development of legal pluralism in land. Pre-conflict ideas of the 'unjustness' with which the state dealt with land rights for portions of the population can constitute an important force in the reduction of state penetration in land issues during conflict, and the emergence of alternatives. Such ideas can range from simple disappointment in or distrust of the state to the perception of the state as the enemy. The latter can be especially powerful if there exists an accumulation of land-related grievances against the state brought on by land alienation and discrimination, corruption or state intervention in agricultural production, dislocating agricultural and/or population programmes and heavy-handed enforcement of state decisions and prescriptions regarding land issues. After the end of a war, simple disappointment in the state can manifest itself in different forms of *ad hoc* local land administration, particularly since the ideology, mobilisation and aspirations of wartime are still fresh in the minds of many, and a post-conflict state administration can find that it has limited influence. For example, subsequent to the anti-colonial war in Zimbabwe, Alexander (1992) notes an initial reaction against the state regarding land and property as local chiefs were left out of the reconstituted state due to their alliance with the Rhodesian administration. As Alexander (1992) observes: 'the modernizing agenda and authoritarian practices of the [post-war] development bureaucracies helped to create a disaffected constituency upon which the traditional leaders were able to draw'.

With a reduction in state capacity, identity-based attachments to land can become more influential, especially if there is an identity component to the conflict. Approaches to land employed by one group in a conflict can be rejected by another, leading to opposed legal pluralism over land. In Sierra Leone and Liberia the land tenure approach employed by the paramount chiefs was strongly opposed by disenfranchised youth (many of whom were combatants), who were exploited in the arrangement. As the identities of those involved in armed conflict develop and hostility grows with an opposing group or groups, approaches to land issues will reflect this and can become a prominent feature in the conflict and subsequent peace process. Smith (1988) notes that ethnic identities are fundamentally tied to territory in Africa. As a result, identity in land is a primary source of legal pluralism with regard to land tenure. In Mozambique, local rivalries between communities were caught up in the war, resulting in some areas in a checkerboard effect of community-level

alliances with RENAMO and FRELIMO (Hanlon 1991). The two sides employed quite different approaches to local communities and land administration. FRELIMO replaced local indigenous leaders with locally selected 'officials', whereas RENAMO favored indigenous leadership. In another example, Cohen (1993) describes the differences between Palestinian and Israeli approaches to land and land tenure, and the ways in which these are grounded in identity. Identity for Palestinians has developed, to a significant degree, to mean opposition to Israel's approach to land administration, especially the construction of settlements.

Approaches to legal pluralism in a peace process

Legislative change is one of the more common features of a peace process. Intended to promote social change, new laws or modifications to laws are meant to aid in the reconstruction of society. However, such legislative change can be profoundly out of step with emerging plural tenure realities in post-conflict scenarios. A particular problem for the reform of land laws after wars is that it is extremely slow compared to the rapid development and operation of legal pluralism (Figure 4.2). Forms of formal legal pluralism are developed 'on-the-ground' and 'as needed' by the population at large, and are connected both to wartime and pre-war experience and group membership. In contrast, formal legal land and property reform after conflict is costly and time-consuming, as numerous institutions must be rebuilt, personnel trained and law-making pursued in ways that encourage legitimacy among the population at large. The problem becomes how to connect such a slow-moving process with the much quicker and more fluid behaviour of the informal legal fields. The next sections describe approaches to managing legal pluralism in land tenure after conflict.

Postwar Land Tenure Legal Domains

Informal 'legal fields'
(Sierra Leone)

Law reform
- Govt & Donor coord.
- Postwar recovery
- Research
- Legal drafting
- Ministries
- Parliament
- Debate
- Passage?
- Regulations
- Enforcement
- $$$$$

Slow

Fast

Chiefs, Lineage leaders

Strangers

Disenfranchised 'youth'

Customary lineage landowners

Women's groups

Displaced persons
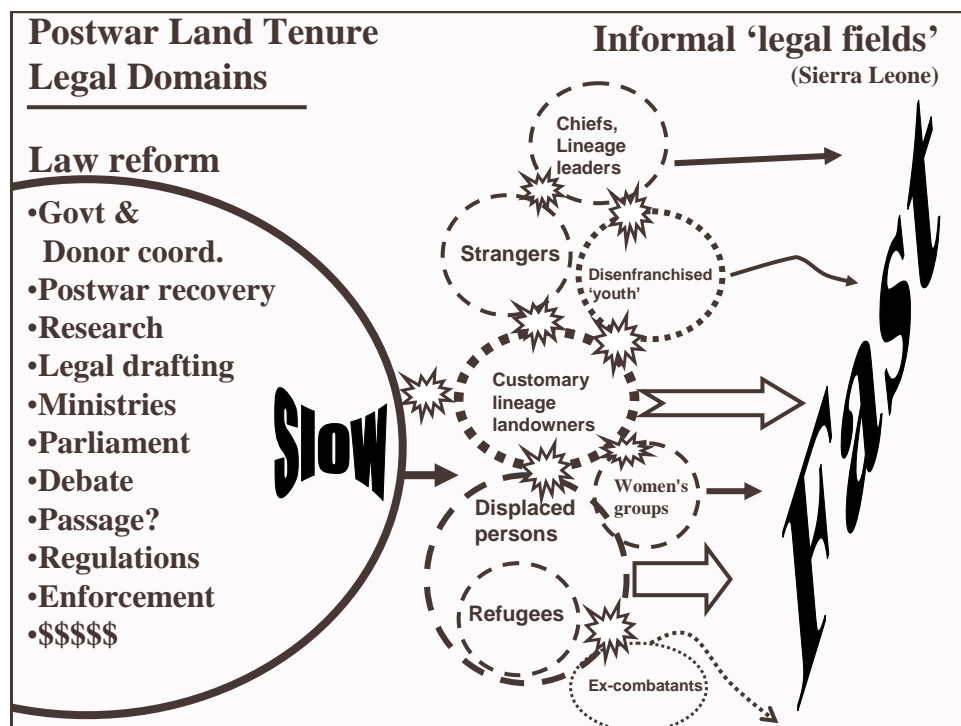
Refugees

Ex-combatants

Figure 4.2. Legal pluralism in postwar land tenure: formal and informal. Formal law is represented by the solid line (and the processes contain within), informal legal fields are represented by the various dotted lines, comprised of people with similar experience. The 'flash' (✸) symbol represents confrontation between legal fields.

'Forum shopping'

With a weakened post-war state, and inadequate legislation to resolve important land and property rights issues, engaging legal pluralism during a peace process is often worthwhile. In this context, previous experiences with what is known as 'forum shopping' (Figure 4.3) can be useful. Forum shopping occurs when individuals and communities choose which legal field to go to in order to resolve land rights problems – disputes, claims, restitution, squatting, eviction, etc. Where legal pluralism is present there can be a variety of legal fields to choose from, including formal law and the perceived legal fields associated with humanitarian organisations, donors and NGOs, and the objective third-party presence such actors may offer.

While messy, forum shopping can offer considerable room for manoeuvre or negotiability (Lund 1996), potentially reducing violence in a peace process if claimants feel that there are no rigid, uncompromising legal structures of questionable legitimacy confining their options. Berry (1993) argues that such negotiability of

relationships and associated rules is a fundamental characteristic of almost all African societies. Lund (1996) argues that such negotiation is actually indicative of all societies. Galanter (1981) notes that disputants commonly select fora from any sector – local, traditional, state, etc. – applicable to their own local political agendas. In Ethiopia, for instance, such form shopping is common, especially in conflict-prone areas of the south-east, where a mix of state, clan, religious, village and regional actors provide a wide choice of arenas in which to pursue land issues.

Forum shopping can be tied to local political manoeuvring between authorities knowledgeable about application of state laws, and authorities connected to ethnicity, lineage, geography, religion and group experience. This is especially the case in countries with a recent history of colonialism, where the state legal system is almost always a version of the colonial order with a European conceptual foundation (Moore, 1973). Such an order can have less in common with other legal orders indigenous to the country than in Western developed countries, where non-state legal systems 'blend more easily into the landscape,' (Merry, 1973, 880). In the former, the social distance between state and non-state legal orders will be significant, and as a result addressing the relationship between the two in a peace process becomes more important, as the underlying conceptual foundations do not combine easily with one another (also Hoocker, 1975).

In a variation on the forum shopping approach, Bavnick (1998) describes a case in India whereby local-level state officials are given the discretion to 'stand at the interface between the two legal systems [formal and customary] and bear substantial responsibility for adjustments' between systems. In a peace process, specific local-level officials can be charged with facilitating dialogue, interaction and adaptation between the state and other legal fields in place subsequent to a conflict, especially with regard to land disputes. In the India, officials do not seek to impose state law, but instead attempt to convince, co-opt or use any legal system or combination thereof to attain the state's objectives. In post-war Sierra Leone, the role of the 'customary law officer' has similar potential in acting as an interface between legal fields.

Informal 'legal fields'
(Sierra Leone)

For Issues of:
Land dispute resolution,
Reintegration,
Land access.

Forum Shopping

Chiefs, Lineage leaders

Customary lineage landowners

Formal law

Disenfranchised 'youth'

Strangers

Displaced persons

Refugees

Women's groups
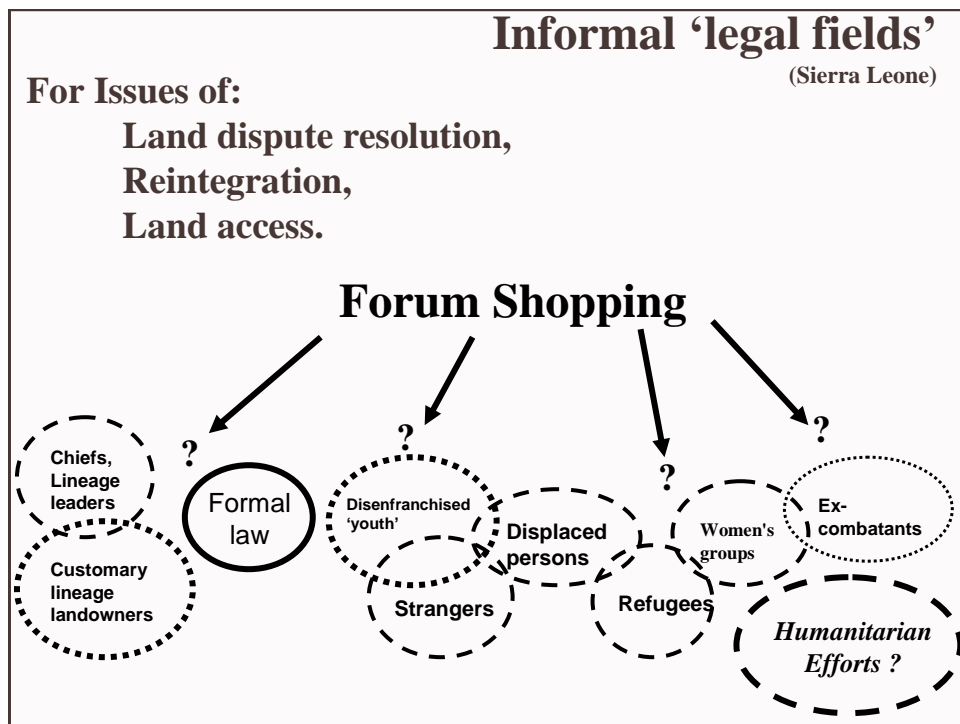
Ex-combatants

Humanitarian Efforts ?

Figure 4.3. Forum shopping in situations of legal pluralism. Claimants are able to choose which legal field to pursue land issues with, including formal law and humanitarian, donor and NGO entities.

From forum shopping to forms of appeal

Legal pluralism is known for its dynamism, and it is common for a good deal of change to take place as the different legal fields interact. Thus, while at the onset of a peace process there can be multiple approaches to administration, claims and the defence of land and property, over time the relationship between fields change, changes that can be used by humanitarian NGOs in particular. In a number of instances, forms of forum shopping have changed over fairly short periods of time (from months to years) into a relationship between legal fields which operate as a forms of appeal (Figure 4.4). In Somali Region in south-east Ethiopia, ways of pursuing dispute resolution have changed over time into a form of appeal, involving local elders, family courts or other informal groups. If there is unhappiness about the outcome of the proceedings, or if there is disagreement as to which forum to go to, the disputants can pursue the matter in higher clan or religious courts or the state's courts. This realignment of legal fields, from several choices at once to a sequence of choices, can come about particularly when authorities within some legal fields only consider hearing disputes and other matters after one of the 'lower-level' legal fields

have attempted to resolve the matter. Recognised legitimacy can be given by one legal field to another when some of the more popular or visible legal fields (e.g. district courts, chiefs courts) become overwhelmed by the volume of cases – which is inevitable after a war – and seek to decrease the number they must consider by insisting that the first disputants try a 'lower level' forum. In Sierra Leone, some district courts can insist that smallholders first pursue their claims in chiefs' courts at different levels, prior to bringing them to a district court.

The state, NGOs and humanitarian organisations can contribute to such a realignment by also requiring that parties wishing to engage them in dispute resolution, or use them as an objective third party, first visit a different informal forum. For the state this gives legitimacy to (re)emerging customary legal fields, particularly with regard to land dispute resolution, while also saving the state money and capacity for the purpose of land administration. For NGOs and humanitarians their mere presence can constitute an additional legal field (Figure 4.4), even if the specific project they are pursuing is not about land tenure or dispute resolution. Local communities can see outside actors and projects in the context of a third party able to be objective, as well as the perceived connections to or influence with the state, international organisations and local leadership. Thus, by first requiring that claimants visit one of the other customary fora (legal fields), such as (re)emerging customary institutions, local leaders, women's groups and IDP councils, NGOs and humanitarian organisations encourage people to move towards an appeal approach (Figure 4.4). At the same time, for cases that are dealt with by NGOs and humanitarian organisations, the communication of outcomes to what are perceived to be 'higher level' legal fields (district/provincial state representatives for formal law, or chiefs and clan leaders) would further encourage such a realignment.

The 'realignment' from a horizontal to vertical (appeal) arrangement of legal fields can also happen on its own. One example is Somali Region in Ethiopia after the end of the long war with the Derg military government in the early 1990s. Zimbabwe, earlier in its history, experienced considerable success in eventually managing customary land disputes after its independence war, and after initial resistance by chiefs. In this case, 'land boards' were instituted, comprising leaders from different segments of the population, who were responsible for overseeing disputes, allocations

and use. Their decisions were then made legal by formal law. The activities and decisions taken by the board were then seen as legal and binding by the state. Such boards can be supported by humanitarian organisations in a number of ways, including providing information, legal and otherwise, advocacy and organisational capacity.
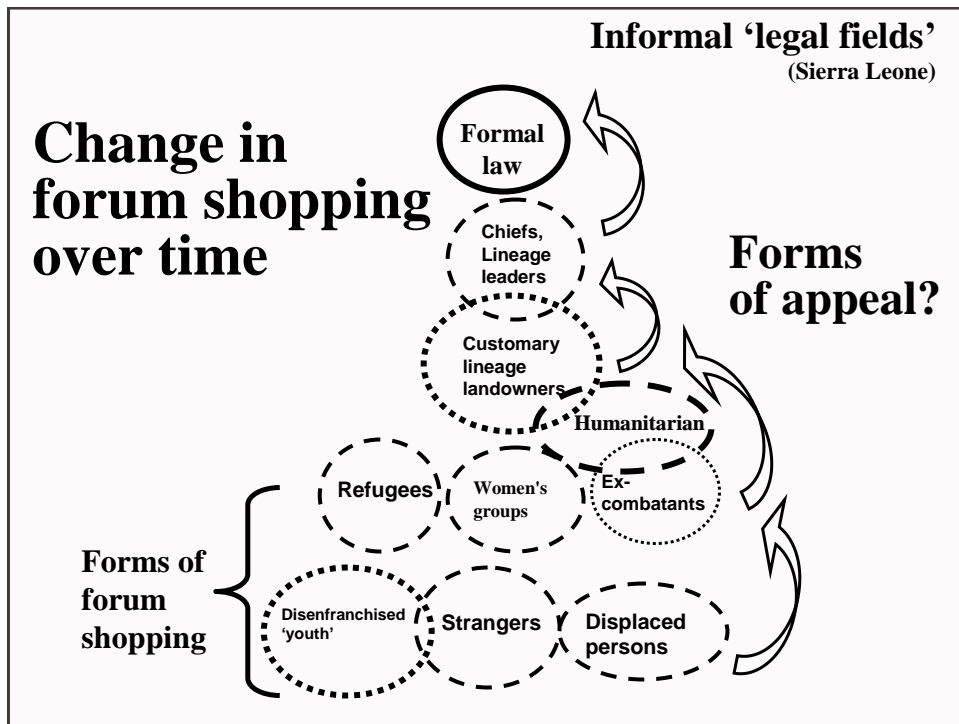

Figure 4.4. Forms of appeal in legal pluralism.

Mediation efforts

Humanitarian agencies and NGOs are frequently involved in mediation over problems of land and property after war. Several issues merit attention here. First, subsequent to conflict, attempts at mediation can often take place without the benefit of formal law as a legal backing to any final resolution or agreement. And because humanitarian agencies are frequently not national organisations, they are not in a position to make decisions regarding the viability of national laws. Thus, mediation efforts depend on the goodwill of the disputants and the ability of the mediation process to cultivate, purchase or otherwise encourage, coax or coerce such goodwill. Such an arrangement can lead to situations where, although good progress is made in the mediation of specific disputes, final agreements often fail or are postponed, negotiation resumes or new issues emerge. This can occur because the different parties to a land dispute can

see value in participating in the *process* of mediation, but not in an ultimate resolution, given the possibility that they may obtain a more favourable decision once formal or customary law is re-established. While this can be disappointing for the NGOs and humanitarian organisations running a mediation effort, the value for the peace process is that such mediation buys time in a non-violent way. This was the case in Timor-Leste along the volatile West Timorese border subsequent to the conflict there. An NGO had pursued mediation as an alternative dispute resolution approach for a complicated land dispute, but the effort stalled at the last minute and no resolution was reached. Rather than disengage, humanitarian agencies and NGOs should realise the important role such 'open-ended' mediation efforts play, not only in buying time, but also for the positive exposure and interaction between legal fields that can be achieved.

A second issue concerns making any resolution binding for the parties concerned. While formal law would require signatures by local leaders, to serve as symbols of the binding nature of mediation agreements, such an approach frequently does not hold meaning for semi-literate groups. In such cases it can be important to find a locally legitimate and meaningful way of making mediation outcomes binding. Local rituals and ceremonies can be important in this regard, as can ensuring that verbal statements by leaders involved in an agreement are witnessed by others.

Interaction between humanitarian efforts and the state

Law-making and consultation

Participating in legal reform presents an opportunity to influence new laws so that they are more inclusive. In a variety of post-conflict countries, donors, together with certain parts of government, can push for a broad consultation phase to be included as part of land-law reform. In such a phase, input is sought from various sectors of society, providing valuable information for the drafting of new laws, policies and decrees, and enhancing transparency. Such consultation encourages the interaction of informal legal fields with formal law, allowing formal law to 'borrow' from informal legal fields, as well as the reverse. Such consultative phases have been included in reform processes in Mozambique, Sierra Leone and Timor-Leste, and more effective land laws have been produced as a result. In Angola, however, there was comparatively little in the way of societal consultation in land law reform. To extent

that the resulting Angolan land law serves the interests of the poor, this is due to the activities of international NGOs. Donors, humanitarian organisations and NGOs, often with significant presence in rural areas, are well-placed to lend support and organisational capacity to such a consultation phase in their areas of operation.

State recognition of legal pluralism

State recognition of a legally pluralistic land and property situation in a peace process can be important to a weakened state of questionable legitimacy emerging from civil conflict. Legal pluralism has been formally recognised in a number of important domains in Ethiopia, where the constitution accords full recognition to customary and religious courts of law. Litigants are allowed to forum shop because customary and religious courts only hear cases where both contesting parties consent to the forum. In El Salvador's Chapultepec peace agreement, as in the Mozambican peace accord and subsequent legislation regarding land, state recognition of pluralism has contributed to the success of the peace process, particularly considering the large role that land issues have played in these conflicts. In both cases, recognition was a primary vehicle to facilitate the reintegration of much of the population into productive activities.

After the war in Sierra Leone there was considerable separation between the country's two land tenure systems (formal and customary), as well between the many forms of customary tenure practiced in its 149 chiefdoms. This was a serious obstacle to efforts to harmonise, attract investment, and promote the rule of law, equity and reintegration. The Law Reform Commission (whose purpose was to find approaches to modernising laws dealing with the commercial use of land, particularly in the provinces where customary law predominates), saw as the primary problem the low level of exposure, contact and communication between customary structures and leaders, coupled with a lack documentation and publication of customary and formal land tenure decisions. Had such communication occurred, chiefdoms may have been able to learn about tenurial decisions made elsewhere, promoting the informal harmonisation of important aspects of land tenure, as opposed to a multiplication of pluralistic approaches.

Humanitarian agency coordination with government and donors

Lack of coordination between humanitarian organisations and NGOs and the

government and donors is a significant problem in post-war land law reform. While all these organisations can bring significant local benefits for particular groups or villages, the lack of coordination and information flow between the government and the more local efforts can slow the reform effort; local communities may be misinformed, or the direction of reform misunderstood. For example, while it can seem worthwhile for NGOs to register and obtain title for land in the villages in which they operate so as to protect those lands, the outcome can often be the reverse: these lands become known to individuals well-placed in a war-weakened government who want to obtain land, or the laws that would facilitate such titling no longer apply.

Lack of coordination with the government entity leading the law reform process can generate considerable ill-will. The government may see humanitarian actors as being unaccountable, as taking the law into their own hands, or as providing support to some (often marginalised) groups in the country but not others. In a land tenure context, this can increase tension over land rights, claims and methods of proof. While these are not easy issues to resolve, increased coordination with government can provide for some reduction in the problems associated with information flow, and can provide early warning of possible tensions over land. In a worse case, which is more common than perhaps it might appear, humanitarian efforts can sometimes support one village's land claims against a neighbouring village, lineage or ethnic group, without being aware of the history or validity of all the different claims.

Land and property (restitution) as a human right versus a property right
The difference between land and property as a human right (particularly regarding humanitarian approaches to restitution), as against a property right, is a particular form of pluralism that humanitarian actors encounter. The two forms of 'right' are quite different and have different logical and conceptual foundations, and it can be difficult to move from one to the other. While human rights are generally not seen as a commodity that can be bought and sold, property rights are commonly transferred as a commodity, can be used as collateral in some economies and belong to a wider inter-connected property rights system. Land and property and its restitution as a human right are not connectable to a property rights system, whether customary or formal.

Activities by humanitarian agencies and NGOs which encourage, pressure or oblige national officials and/or customary leaders in a post-war country to provide for property restitution as a human right, without articulating technically how this will interface with existing (and usually rapidly changing) property rights system(s), has the effect of neither moving forward with the human right, nor solidifying the post-war property rights system(s); instead, it can introduce an additional incompatible form of pluralism. Expecting a minister or local leader or his/her staff to derive 'a way' for property as a human right to somehow 'fit' into the technical operation of either a formal property rights system or customary systems after a war is unrealistic, even if the capacity were present. What is needed are ways that humanitarian organisations themselves can 'translate' land and property restitution as a human right into workable property rights within prevailing tenure systems. In this regard, when those who have received property as part of a human rights restitution programme then sell such property, the programme can often be seen as a failure and humanitarian actors can seek to prevent such sales. In reality what is happening is that the recipients are themselves making the translation from a human right to a property right due to the lack of alternative ways of doing this. This should perhaps not be seen as a 'failure' in a restitution programme. The form of pluralism created by the incompatibility between the human right of property restitution and property rights within a tenure system needs a good deal of additional legal, policy and practitioner work.

Conclusions

Because humanitarian organisations are familiar with local livelihoods in the areas they work in, they are in an advantaged position to assist with land and property rights recovery after conflict. Important in this regard will be the recognition of the existence of various forms of legal pluralism after conflict, and the different ways in which these emerge and interact. This entails an ability to interface between the various informal legal pluralities regarding land tenure on the one hand, and the state (itself usually one of many ways of engaging in land tenure after conflict) on the other. While this chapter outlines some ways in which humanitarian organisations can pursue land tenure recovery, considerable innovation is also possible because these organisations are most familiar with the local realities. What should ultimately be kept

in mind is how the different legal pluralities interact with each other, and the place of humanitarian organisations within this interaction.

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THE CONTRIBUTOR

Jon Unruh (jon.unruh@mcgill.ca) is a Professor of Geography at McGill University in Montreal. His research and policy work deals with post-conflict land and property rights in the developing world, and the intersection of land tenure and environmental change. His past endeavours have focused on conflict resolution, land policy and law, restitution, legal pluralism, approaches to reconciling customary and formal tenure systems, and agriculture in post-war and peace-building scenarios.