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Post-conflict restitution of customary land: Guidelines and trajectories of change

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ABSTRACT

Since the 1990s a body of soft international law and public policy has developed around property restitution after conflict. The Pinheiro Principles and the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT) both proffer remedies for property losses experienced due to violent conflict and forced displacement. These international guidelines for remediating harm caused by property loss or damage in conflict at best only partially address losses in customary tenure systems. This article has two goals: first, to delineate where the international guidelines are out of step with the nature of customary tenure; and second, to identify trajectories of change for customary land tenure systems after violent conflict. These two issues are fundamentally linked. The characteristics of post-conflict environments– contested authority structures, displaced and returning populations, and contentious land relations – make customary land vulnerable to expropriation and elevate the threat of asset loss for customary rights holders. This challenges the assumption that people can always return to rural agricultural livelihoods when displaced from customary land; that is only true if those customary land systems function the way they did before the violence. This article draws on a socio-legal analysis of secondary sources and qualitative data gathered by the authors through focus group discussions and semi-structured interviews in rural communities in Burundi, Liberia, and Uganda over the past decade. Because customary land tenure systems are prevalent over much of the territory currently affected by violent conflict in Africa, the Middle East, and Central Asia, the absence of specific restitution policies for customary tenure systems is a significant gap in international public policy.

Ten years ago, the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) were published after lengthy international negotiations. Among other hopes, such as the protection of natural resources and sustainable livelihoods, the VGGT were anticipated to provide better protection and tenure security for people holding their land via customary tenure. In hindsight, it is obvious that aspirations for the VGGT were too optimistic (Myers & Sanjak, 2022). The application and usefulness of the VGGT in customary tenure systems have been less than ideal. In this article, we use this tenth anniversary of the VGGT to reflect on their role and that of other soft international law in providing restitution for property losses in customary tenure systems, with a focus on conflict-affected settings.[1]

Property restitution after violent conflict is problematic everywhere. Countries throughout the world face challenges managing the aftermath of violence-induced population displacement and property losses decades after the end of violence. Recently, the Syrian civil war has led to the destruction of homes, loss of businesses, and forced sales (Stubblefield & Joireman, 2019). Half of the southern Syrian refugees surveyed by the Norwegian Refugee Council reported homes that were destroyed or damaged beyond repair; a majority of Internally Displaced People (IDP) reported missing property documentation (Norwegian Refugee Council et al., 2018). In Nigeria, violence by Boko Haram leads people in rural areas to abandon their farms, leaving land unoccupied and allowing neighbors to take it over (Adelaja & George, 2019). In Somalia, conflict, since the 1990s has led to property losses and competing property claims over customary land (Bakonyi et al., 2019). In South Sudan and Burundi, decades of displacement, multiple waves of return migration, and contested political transitions have caused structural changes and competition in land occupation and land governance, which became increasingly complex with the

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[1] We define soft international law as widely used guidelines, policies, and recommendations without enforcement mechanisms.

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ongoing resettlement of people from other parts of the country, and the return of IDP and refugees (Justin & van Leeuwen, 2016; Tchatchoua-Djomo et al., 2020). These patterns repeat in Afghanistan, Colombia, the Democratic Republic of Congo (DRC), Myanmar, Uganda, and elsewhere. In many current crises, customary land tenure is the dominant form of property claims in rural areas impacted by conflict. Indeed, in terms of size of population affected and area, customary tenure is the most prevalent form of landholding in conflict areas.[2] In Sub-Saharan Africa, only an estimated 10% of land is registered, the rest is outside of formalized land administration and under some type of customary land governance (Byamugisha, 2014; Deininger, 2003).

In recent decades, a body of soft international law and public policy has developed around housing, land, and property (HLP) restitution after conflict. However, the mechanisms for remediating the harm caused by property loss or damage in conflict at best only partially address the issues of losses in customary tenure systems. This article draws on a socio-legal analysis of qualitative data gathered by the authors through focus group discussions and semi-structured interviews in rural communities in Burundi, Liberia, and Uganda over the past decade, as well as on secondary sources. We have two goals in this article. First, we aim to delineate how customary landholding is misaligned with rights to property restitution articulated in international policies. Our second goal is to identify trajectories of change for customary land tenure systems after conflict; recognizing that protracted violence and displacement can permanently alter customary tenure systems or erode them completely. Identifying change trajectories is important because the implicit assumption that people can recover ownership of pre-war landholdings and return to their customary livelihoods is not accurate everywhere, making the restitution for lost assets even more important. We will address these goals by first defining what we mean by customary tenure systems and the property rights held within them. Then we identify the international policies that address property restitution after violent conflict and the three mechanisms they articulate for HLP restitution: return the original assets, compensate with similar property, or provide monetary compensation. We then discuss how each of these mechanisms might work or be obstructed in changing customary tenure systems. Finally, we address three possible trajectories of change for customary tenure systems after violent conflict and their implications for restitution.

1. Customary land tenure

Customary rights are claims to community resources such as land, water, and trees, that are framed and regulated under customary law.[3] Customary land is infrequently part of a formal administrative structure with recorded boundaries, ownership, and transfers. The absence of formal records can make land users vulnerable to dispossession when land rises in value and creates contexts of dispute and exclusion. Customary land is typically held by an individual male and his family on a larger area of land belonging to a group of people linked by kinship, such as a clan or a lineage group. Customary tenure rights can be vested in an individual or a group, and they can overlap. Individuals may have a claim to usufructuary rights to customary land, but they do not own it in the sense they would if they held a formal land title; the land is not under an individual's exclusive control and only some customary systems have formal records of occupancy (Besteman, 1994). Customary land claims are multilayered, dynamic, negotiable, and embedded in social relations (Ubink, 2008). For example, different household members may hold overlapping claims on family land, and other users can be granted temporary and non-transferable access to certain resources on the land (e.g., wood collection, grazing, sharecropping); likewise, community members may hold a variety of claims on community land and resources. In Sub-Saharan Africa, men typically have claims to customary land, while women have the right to use the land of their husband's or father's kin group but cannot claim land on their own and can lose the right to use the land if their relationships with those male relatives are broken by death or divorce (Joireman, 2008; Pottier, 2005; Tsikata, 2016; Whitehead & Tsikata, 2003). Similarly, migrants to an area can 'purchase' or rent customary land but have a weaker claim to land than its original inhabitants (Lavigne Delville & Moalic, 2019). Land sales occur in customary tenure systems, but they are less frequent than in formalized systems and the lack of documentation of land holdings means that sales are often incomplete, poorly documented, and contested. Those who sell customary land may be censured by the community (Gochberg, 2021). Where there is customary land there are traditional or customary authorities who are guardians of community resources. In most places, they are elders with knowledge of the community's membership and history. Customary land tenure can take multiple shapes and can enable the re-writing of past practices and the invention of new practices (Chimhowu, 2019; Pottier, 2005).

While customary tenure systems can adapt to social upheaval because of their negotiability and the lack of exclusive claims, these same qualities can make them susceptible to exploitation (Ubink, 2008). There has been a focus in the literature on the vulnerability of customary tenure rights to large-scale land acquisitions and titling efforts (Bottazzi et al., 2016; Deininger & Xia, 2018; Lanz et al., 2018; Peters, 2009; Peters, 2013; Yengoh et al., 2016), but there is far less information about customary tenure systems during and after violent conflict.

2. International public policy on property restitution

Two relatively recent, internationally accepted, policies guide property restitution after conflict: The Pinheiro Principles (2005) and the VGGT (2012). The Pinheiro Principles were developed after the end of the Cold War when property issues were an ongoing problem in both Bosnia and Tajikistan. At the time, property return was a contentious post-war issue and political violence led to substantial population displacement. The Pinheiro Principles were developed within the UN and endorsed by the Sub-Commission on the Promotion and Protection of Human Rights in 2005. That same year, the UN General Assembly approved The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('The Basic Principles') which addressed housing and property return as a legal

[2] At the end of 2020, the last available year for data, UNHCR reported the largest source countries of refugees to be Syria, Venezuela, Afghanistan, South Sudan, Myanmar, the Democratic Republic of Congo, Somalia, Sudan, Central African Republic and Eritrea. The largest numbers of Internally Displaced People (IDPs) were in Colombia, Syria, the Democratic Republic of Congo, Yemen, Somalia, Afghanistan, Ethiopia, Nigeria, Sudan and South Sudan UNHCR. (2021). *Global Trends: Forced Displacement in 2020*. UNHCR. Retrieved September 6 from https://www.unhcr.org/flagship-reports/globaltrends/.

[3] The use of customary law in post-colonial settings is distinct from customary law in socialist settings in which customary norms were allowed to the extent that they did not contradict public law Edgar, A. L. (2004). *Tribal Nation: The Making of Soviet Turkmenistan*. Princeton University Press, Joireman, S. F. (2014). Aiming for Certainty: The Kanun, Blood Feuds and the Ascertainment of Customary Law. *The Journal of Legal Pluralism and Unofficial Law*, *46*(2). https://doi.org/10.1080/07329113.2014.916090, Upton, C. (2009). "Custom" and Contestation: Land Reform in Post-Socialist Mongolia. *World Development*, *37*(8), 1400–1410. https://http://dx.https://doi.org/10.1016/j.worlddev.2008.08.014. In both post-colonial and post-communist settings, customary law shapes group identity, gender relations, and influences behavior in key areas such as inheritance practices.

Table 1
Housing, land and property restitution international guidelines.

	Pinheiro Principles	VGGT
Published	2005	2012
Process	Developed in a UN sub-commission on human rights	Consultative intergovernmental process led by the FAO Committee on World Food Security, including private sector groups, research institutions, and civil society organizations
Primary Focus	Housing, land, and property	Protection and use rights of natural resources including land, fisheries, and forests
Remedy for property loss	Return or compensate with money	Return or compensate with money, or comparable property
Addressed restitution in customary systems	Not specifically	Directly
Recognize women's rights to property	Yes	Yes
Recognize the rights of overlapping or secondary rights holders	No	Implicit recognition of pastoralist claims to grazing land and other secondary rights-holders

remedy; meaning that the legal harm or damage of housing and property dispossession was recognized, as was the need for a solution to that harm.[4]

The key contribution of the Pinheiro Principles was recognizing the rights of those who unlawfully or arbitrarily lost their housing, land, or property, to have that property restored to them or to be compensated for its loss. The Pinheiro Principles apply this right to IDPs and refugees alike. They also recognize the rights of women and girls to property ownership, marking substantial progress in gender equality as many displaced women come from contexts with customary law where their property claims are secondary, or dependent on their relationship to others (Joireman, 2008). The Pinheiro Principles have an appealing simplicity – return that which was lost or taken or compensate people if their property cannot be returned. The Pinheiro Principles are widely known and used for guidance by countries and humanitarian organizations. In the *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles"*, published in 2007 by the United Nations, it is acknowledged that

> "...while restitution processes during [the] past decade have been undertaken throughout the world, including Europe and the Balkans, it appears that the global restitution focus in coming years will be on Africa's restitution challenges. These efforts may ultimately require different approaches and tools than those which played out in Eastern Europe and assorted other regions and sub-regions given the widespread application of customary law throughout the continent. Practitioners will need to be aware of both the global lessons learned on restitution, and the unique features of the restitution question in the African context" (UN, 2007: 13-14).

In other words, although the Pinheiro Principles do not specifically address restitution of customary land rights, they were expected to be considered and adapted by practitioners and policymakers in framing policies addressing HLP claims. For example, the Pinheiro Principles were used as a key reference guideline for enforcing HLP restitution by the Burundi's national authorities in charge of restitution and were integrated into the official guidelines for HLP restitution, including customary land (CNTB, 2012).

The most recent international guidelines to address post-conflict property rights are the 'Voluntary Guidelines' or VGGT. The 2012 VGGT resulted from a comprehensive consultative process led by the Food and Agriculture Organization's Committee on World Food Security (see Table 1). They focus on productive resource access generally and address land governance and resource access in all contexts, not just post-conflict. The VGGT are useful in settings with customary law and customary land tenure because their mechanisms are not as specified. For example, the Pinheiro Principles state very specifically that claims for restitution should be submissible in person, by post, or by proxy. The mechanisms and processes for property restitution in the VGGT are less specific and restitution options are more varied. For example, the VGGT address customary tenure systems and allow for compensation through the return of different plots of land. Article 14.2 notes:

> "Where possible, the original parcels or holdings should be returned to those who suffered the loss, or their heirs, by resolution of the competent national authorities. Where the original parcel or holding cannot be returned, States should provide prompt and just compensation in the form of money and/or alternative parcels or holdings, ensuring equitable treatment of all affected people."

In rebuilding communities and economies after conflict, both housing and natural resource access are important, particularly in environments where subsistence farming or smallholder agriculture are the prevailing livelihoods. Therefore, both sets of guidelines are useful despite being 'soft' international law and lacking specific enforcement mechanisms. They are important insofar as they guide governments and humanitarian organizations in framing policies, making decisions, and channeling resources.

3. Three avenues of restitution for property loss in customary tenure systems

The Pinheiro Principles and VGGT articulate three possible responses, or remedies, to property loss in conflict: return the original property, provide an alternative, equivalent property, or compensate for the property with its monetary equivalent. In the next section, we will consider what each of these three remedies might look like in customary tenure systems. However, there is one significant caveat: there is no international fund to pay compensation for property losses resulting from violent conflict. Therefore, any funding for compensation must come from the state or international donors, a challenge that will be addressed later in this article.

[4] The international standards set out in the Pinheiro Principles and VGGT are frequently adjudicated through mass proceedings and special tribunals which may have reduced standards of evidence because of the challenges of documentation in post-conflict settings Permanent Court of Arbitration (Ed.). (2006). *Redressing Injustices Through Mass Claims Processes*. Oxford University Press, van Houtte, H., Delmartino, B., & Yi, I. (2008). *Post-War Restoration of Property Rights Under International Law: Institutional Features and Substantive Law* (Vol. 1). Cambridge University Press. Examples are the United Nations Compensation Commission which was funded by Iraqi oil proceeds to restitute claims from the Iraqi invasion of Kuwait and the Commission for Real Property Claims of Displaced Persons and Refugees which handled claims in the wake of the Bosnian War.

3.1. Return the property that was lost

Both the Pinheiro Principles and the VGGT assume that people will return to their home areas after the end of violence and establishment of local security – reclaiming former houses, land, and assets. Yet, when, and how people return varies across contexts. In Bosnia, people reclaimed their homes after the war, only to sell them and move if they were in an area where the returnees were an ethnic minority (Toal & Dahlman, 2011). In Kosovo, when the war ended in 1999, Albanians returned quickly and reclaimed their property: a small proportion of the original Serb population returned, and members of the Serb-speaking Roma population were forcibly returned years after the end of the conflict (Joireman, 2022). In northern Uganda, when the conflict ended, most IDPs returned home over a relatively short period (3–4 years), although they did not necessarily rebuild their houses where they were previously located (Joireman et al., 2012). In Liberia, people returned to their communities of origin sporadically over many years, often with long sojourns in intermediate locations (Joireman & Meitzner Yoder, 2016). All these examples suggest that returning home and reclaiming property after conflict may not be immediate and is conditioned by factors beyond security.

It is not unusual for displacement from violent conflict to last decades (Devictor & Do, 2016). In countries with property registers and robust land administration systems, war can impact the formal records that exist through neglect, destruction, or the intentional actions of those looking to subvert future property claims (Stubblefield & Joireman, 2019). Without formal records of land occupation or cadastral data, the memories of people provide vital information for legitimate claims.[5] Yet, long displacements can erode customary tenure systems. People's memories fade and customary leaders can pass away, not return, or be replaced by others without the same memory of land claims. The land itself can also change as traditional boundary markers or landmarks, such as particular shrubs, tree varieties, and graves, disappear due to damage or neglect.

In customary tenure systems, without formal records, those who return to their home communities first, or early, may benefit by claiming the best land. They may also occupy land that was not previously theirs in advance of the return of its rightful customary landowners. This can add layers of confusion to post-conflict customary tenure systems and cause tensions. In Uganda, Mozambique, South Sudan and Burundi, return migration to home areas led to numerous conflicts, some violent, as people claimed land in areas where they had not previously resided or farmed (Hetz et al., 2007; Joireman et al., 2012; Myers, 1994; van Leeuwen, 2010) or experienced confusion about land boundaries and overlapping claims (Braak, 2023; Kandel, 2016; Tchatchoua-Djomo, van der Haar, van Dijk, & van Leeuwen, 2020; Hopwood and Atkinson, 2013). If sale of land is possible, illegitimate occupation can be an incentive for people to sell customary land before the competing claims can be addressed by traditional or government authorities (Tchatchoua-Djomo, 2016).

After a lengthy displacement, not all community members in customary tenure systems want to return to an agricultural livelihood. Yet, if they do not return, they lose any claim to their assets in most customary tenure systems. This is problematic in several ways. First, there is a general inequality of rights of those in customary tenure systems, wherein they do not get compensated for their losses because their claims are undocumented, as opposed to those who hold titled property and can prove a loss and make a compensation claim. This is, however, mostly a hypothetical issue because there is often no compensation available for those who have lost property of any kind. The second concern is that if people do not want to resume an agricultural livelihood, but they have a claim to customary land, there is a perverse incentive for them to return to their home community, claim land, and then sell it to finance a new livelihood elsewhere. In places where sales move land out of the customary tenure system, this narrows the resource pool available to future generations (Joireman, 2018). Another concern is that legislative reforms, such as land formalization, may drastically redefine the rules of land access. While land formalization may crystallize new tenure arrangements, refugees who return late may lose any possibility of making claims on customary land.

An additional challenge is the ability of women to claim customary land. Their use of customary land is often dependent on their spouse's or father's kin group, children, or other male relatives who have a right to the land as members of the lineage. If their spouse, father, or uncles were killed in the conflict, if they have children by men outside of the lineage, or if there is a radical change to customary institutions, they may not be able to reclaim their limited use rights. Widows with male children are entitled to make claims on late husbands' land as their sons' inheritance as long as the norms of the kin group allow it. Occasionally, women can inherit family land when there are only female descendants or when their brothers die before the division of the family land without leaving any male children (Munezero & Niyonkuru, 2016). In northern Uganda, the clan of the child's father is supposed to provide the child's mother with land so that she can raise the child legitimated by the family/clan on their land. If the father of their child is unknown, a too common occurrence in times of war when sexual violence is pervasive, women are unable to make a land claim for the child and face difficulty in getting land themselves from their natal clan (Joireman, 2018). There have been many cases in which young mothers have returned from captivity with the Lord's Resistance Army or from IDP camps in northern Uganda and their natal clan is not willing to give them land because under customary law they should receive land from the clan of the child's father (Opiyo, 2015).

3.2. Restitution with equivalent property

The second potential restitution mechanism for loss of property in international policy is restitution with equivalent property. This mechanism is named in the VGGT (Section 14.2), but not the Pinheiro Principles. Restitution with equivalent property is potentially useful as a strategy in customary systems as land access rights are often negotiated based on needs and competing claims (Tsikata, 2016). Restitution with similar property is consistent with customary norms. That said, there are several additional problems regarding the restitution with equivalent property. First, land is finite while the population of people with claims on the land grows during displacement. This was certainly true in northern Uganda where the population doubled during a 20-year displacement (Hetz et al., 2007). Intergenerational claims on land add a layer of complexity to already sensitive land disputes. Second, additional land must be located to enable restitution with equivalent property. Jon Unruh notes, that though compensation with equivalent property can be tempting, "... there are frequently already pronounced information and administration deficits that make reallocating lands extremely complicated and confused" (Unruh, 2022: 3). If equivalent land is to be given, it is not clear where that land will come from. Even when state land could be mobilized for

[5] Recent creative uses of new technologies have attempted to construct alternative cadasters to protect the assets of those displaced by conflict Unruh, J. D. (2016a). *Assembling evidence for a land and property restitution database during the Syrian civil war* World Bank Land and Poverty Conference, Washington, DC. https://www.conftool.com/landandpoverty2016/index.php?page=browseSessions&presentations=show&search=Unruh, Unruh, J. D. (2016b). Weaponization of the Land and Property Rights system in the Syrian civil war: facilitating restitution? *Journal of Intervention and Statebuilding*, *10*(4), 453–471. https://doi.org/10.1080/17502977.2016.1158527.

accommodating the restitution needs, it is important to assess whether there are other social or environmental justice concerns regarding national land reserves or the preservation of ecological commons which should be considered. Most often there is a lack of information on available land after a conflict because of population displacement and the disruption of land governance institutions. Third, how should equivalency be assessed? Customary systems typically do not have mapped landholdings or robust land markets from which the value of land could be derived. Assessing the equivalency of property is therefore challenging. Lastly, the overlapping claims in customary settings do not allow for an easy identification of a pool of claimants because of the existence of secondary rights holders who may have seasonal rights (pastoralists), use rights (women), or temporary rights (migrants). The few contexts in which the return of equivalent property has worked have had relatively robust dispute resolution systems in urban settings with functional land administration systems, such as Iraq (Van Der Auweraert, 2009).

3.3. Monetary compensation

The third mechanism for the restitution of property losses after a conflict is monetary compensation. While this might appear to be the easiest path forward and is often highly desirable to displaced people, it is made challenging by the absence of any international fund for compensation. In practice, this means that funding for compensation must come from the state or international organizations. Accessing state funds is problematic on several fronts. The state may have been an actor in the conflict and reluctant to compensate for the losses of a group that challenged its authority. In Kosovo, for example, the post-war government allocated 300,000 Euros in 2017, nearly two decades after the end of the conflict, to compensate for lost Serb property - nowhere near the amount needed (Joireman, 2022). Even if a state was not involved in property expropriation and is willing to compensate for the property losses of its citizens during the war, the post-conflict setting places imperative demands on state funds for the provision of basic education and health care services, public infrastructure, and functioning of government bodies. Individual compensatory demands are thus in competition with generalized social justice concerns (Kalmanovitz, 2010). Funding for property restitution in some settings has come from international organizations, but these funds tend to be targeted and quite limited. Unruh (2022) identifies other operational tensions to monetary compensation including: administrative capacity/bureaucratic burden; national political agendas; differing preferences within families; the multiplication of claims over time and challenges of valuation. In customary tenure systems, these difficulties multiply because of limited land markets, multiple and overlapping claims to land, ongoing displacement and the disruption of family lives due to conflict.

Ties between identity and resource access in customary systems add another layer of complication. Presumably, compensation entails a renunciation of future resource claims by individuals and their descendants. In many customary tenure systems, resource claims are contingent on group membership. If individuals receive compensation in place of a land claim in a particular area, their status as a member of that group and the status of their children is ambiguous. While compensation severs the locational tie to the clan area it has an unclear impact on group membership where '. . .access to rural land is often a symbol as well as a consequence of membership in a descent group or rural polity, maintaining such access serves to validate membership in the group, as well as vice versa' (Berry, 1984: 91). If a parent opts for compensation instead of customary land, does that preclude their children from making claims? While a formal/legal perspective might make the answer seem obvious, yes, the negotiability of customary tenure claims makes that much less clear if the child is a recognized lineage member.

International law and policy measures are replete with generalizable rights that accrue to individuals. While there is much to recommend this universal approach, the generalizability of international law can be at odds with customary systems, which are malleable, particularistic, contingent, and communitarian. International legal standards place obligations on state actors, while customary land issues are negotiated within specific localities and communities – often in situations where state involvement is absent or undesirable. UN organizations and aid agencies pay attention to international law and standards regarding property restitution. These organizations will seek policy outcomes consistent with the Pinheiro Principles and VGGT that are unlikely to be achieved in many areas where customary tenure systems have been altered by conflicts.[6] Investment in jobs, training programs for the displaced, and/or the provision of agricultural tools, livestock or small business startup loans may be helpful ways of assisting displaced people from customary tenure systems who do not wish to return (Fagan, 2011).

3.4. Other considerations

Customary land tenure systems can erode over periods of violent conflict and population displacement. Power relations among customary authorities can reconfigure tenure systems and post-war governance reforms may also impact the structure and composition of customary institutions. Fitzpatrick and others have emphasized the importance of complex customary tenure rules in post-conflict settings as protection of land rights from a predatory government (Fitzpatrick et al., 2012). They argue that community land allocation mechanisms may have an undesirable intricacy when viewed by outsiders, but that complexity enables local enforcement mechanisms without reliance on the state.

In countries with decades-long conflict or with waves of conflict and displacement across decades and space, such as Afghanistan, Burundi, DRC, and Somalia, descendants of early waves of displaced people may not be able to identify family assets abandoned years earlier. In Burundi, these people are called 'returnees without references' or 'uprooted returnees'. The state, with support from international aid agencies, established new villages to accommodate their return (Falisse & Niyonkuru, 2015).

Governments can contribute to difficulties in post-conflict environments in two ways: first, by launching land certification or formalization programs before return has been completed; and second, by allocating 'unclaimed land' to large-scale land entrepreneurs. Land certification or formalization programs launched in post-conflict settings, even if designed to reduce land disputes, are vulnerable to elite capture and can create additional conflict over land (Braak, 2023; Mitchell, 2014; Pritchard, 2016; Tchatchoua-Djomo, van der Haar, van Dijk, & van Leeuwen, 2020; World Bank, 2009). Similarly, customary tenure systems are vulnerable to large-scale land acquisitions (Kobusingye, 2018; Serwajja, 2014). Granting contracts to 'unclaimed' customary land to private national and foreign enterprises for large-scale land development during or after conflict risks giving away land that has yet to be reclaimed and preventing a return to agricultural livelihoods (Alden Wily, 2007; Atkinson, 2009; Ayoung Siakor, 2017; Myers, 1994). We should anticipate the proliferation of land disputes where there is return migration. Enabling large-scale land

[6] See Bakewell for a discussion of the ways in which categories and criteria around refugees can render invisible those who do not fit neatly into them Bakewell, O. (2008). Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration. *Journal of Refugee Studies*, *21*(4), 432–453. https://doi.org/10.1093/jrs/fen042.

acquisitions or changing tenure policies as people return to their original homes and farms will exacerbate conflicts in a situation that is already unpredictable. Competition between development goals and local communities' livelihoods adds a layer of contention to already strained society-state relationships.

4. Post-conflict trajectories of change in customary tenure systems

A critical post-conflict need in customary tenure systems is secure and continued land access so that users can make the most efficient use of their assets. Identifying customary rights and the variety of customary rights holders is critical to protecting those rights against both external and internal threats.[7] There is evidence from customary tenure systems across Sub-Saharan Africa that weak tenure rights make users vulnerable to land expropriation and that those with stronger security of tenure are more likely to adopt strategies that increase agricultural productivity (Besley, 1995; Deininger et al., 2014; Goldstein & Udry, 2008). Those with weaker tenure rights, such as women, youth, and migrants, have reduced incentives to enhance the productivity of land (Gaddis et al., 2018). Some studies have suggested that customary tenure systems contain land conflict at the local level, preventing its expansion to the national level (Boone, 2014, 2017). There are differences in perspectives on whether customary tenure systems should be protected, whether their replacement with formalized tenure systems is inevitable, and if an acceleration in that direction is concerning or an organic institutional change that should be supported.[8]

Without taking a stand on whether customary tenure systems should be replaced or defended, we identify three observed trajectories of change in customary tenure systems after violent conflicts: erosion, adaptation, and replacement (see Fig. 1). We considered other possible trajectories such as systems that became choked by conflict or underwent a substantive change but determined that they collapsed into these three categories. These trajectories are based on observations in different post-conflict settings in Sub-Saharan Africa where customary tenure systems are present in almost all countries in rural and some peri-urban and urban areas. We argue that prolonged displacement, partial returns, and the societal changes that occur during and after violent conflicts are likely to lead to critical – even irreversible – transformations in customary tenure systems. These changes allow for a rewriting of what is customary, creating new institutional matrices, similar to the manner in which formalization of customary tenure creates a politics and 'grounds for resistance or contestation' around groups of winners and losers from the formalization process (Boone et al., 2021).

4.1. Erosion

Conflicts come in different forms. Some are limited in time and geographically contained. Others continue for decades and shift in terms of the location and concentration of violence. We posit that there is a particular type of conflict that threatens the existence of customary tenure systems – protracted violent conflicts that shift across geographic areas. We see this type of conflict in the DRC, Somalia, Nigeria, and Sudan. Some of these conflicts originated with land disputes, such as those between pastoralists and farmers in Sudan's Darfur area. Over time, violence shifts locations displacing civilians in areas where it is high and allowing the return of civilian populations when and where violence wanes. In Sudan, this caused the erosion of customary authorities and the evolution of individualized tenure impacting both the nature of land rights and the ability of pastoralist and agricultural communities to peacefully coexist (Krätli et al., 2013; Maxwell et al., 2017).

Displaced people move from areas of violence to safe areas seeking land from locals in places of refuge. They may remain or move on depending on the presence of violence and availability of land and/or water. Armed groups may control the movement of people within areas, favoring the resource claims of some and forcing others out (Young & Jacobsen, 2013). Longer-term migrants to an area may purchase land, intermarry with residents, and develop new land claims in their areas of refuge. As time passes, the knowledge of resource claims from before the conflict, which reside in the memories of customary leaders and original occupants, wanes or disappears. The transformations in institutions and state-citizen relations that emerge from violent conflict may become irreversible when the violence ends (Peluso & Lund, 2011).

In Burundi, after the 2000 Arusha Peace and Reconciliation Agreement, hundreds of thousands of refugees returned to Burundi, hoping to reclaim land abandoned during repeated episodes of conflict. Faced with increasing grievances, competing claims over customary lands, and declining customary tenure institutions, the state adopted new policies and laws regulating land disputes, the restitution of land and other property to those displaced by conflict, and the formal registration of customary land rights (Tchatchoua-Djomo, 2018; Tchatchoua-Djomo et al., 2020). However, the state changed policies and laws on several occasions causing confusion and institutional competition over jurisdiction in land dispute resolution and land allocation. For example, from 2006 to 2010, a land restitution policy encouraged local decisions on the division/sharing of contested land between returnees and secondary occupants. Then, in 2013, the policy was amended, strengthening the power of centralized land governance authorities on customary land and eliminating land sharing. After several years of implementation, land tenure reforms have not produced the desired results. Layered land claims, contested authority, and inconsistencies in the regulatory framework have overwhelmed local institutions and courts. Ongoing competing claims to land entangle with higher-level political conflict as decisions made by public institutions are challenged or unenforced (Tchatchoua-Djomo & van Dijk, 2022).

A return to customary tenure resonates with both government actors and community members because of its intrinsic legitimacy and the potential for a functional tenure system without a large investment of government resources; yet it is a fantasy in areas with persistent conflict and population displacement. Reconstructing the customary tenure systems that existed before conflict is no longer possible because of the absence of embodied knowledge of rights and claims. For example, if displaced people are returning to areas they never lived in previously and claiming land or if a post-conflict tenure system is run by 'customary leaders' who are just demobilized soldiers, as happened in areas of West Africa after the Mano River wars and in Mozambique, we are likely no longer looking at a functioning customary system (McCallin & Montemurro, 2009; Rincon, 2010; West & Kloeck-Jenson, 1999). Studies in conflict-affected settings have shown that not all refugees and IDP aspire to return to their localities of origin (Omata, 2013; Weima, 2017). Many of those that would have land claims in customary systems change their livelihoods due to conflict and displacement (Young & Jacobsen, 2013). Children raised in cities and camps lack the farming knowledge required to participate in rural subsistence agriculture (Honan, 2015). This is not to say that

[7] Identifying land rights need not be the granting of a legal title. Effective and low-cost land registration or certification of customary ownership can promote tenure security without the high-cost land administration and cadastral system titling demands.

[8] See Chimhowu, A. (2019). The 'new'African customary land tenure. Characteristic, features and policy implications of a new paradigm. *Land Use Policy*, *81*, 897–903. For a discussion of changes to customary land tenure in Sub-Saharan Africa in non-conflict settings.

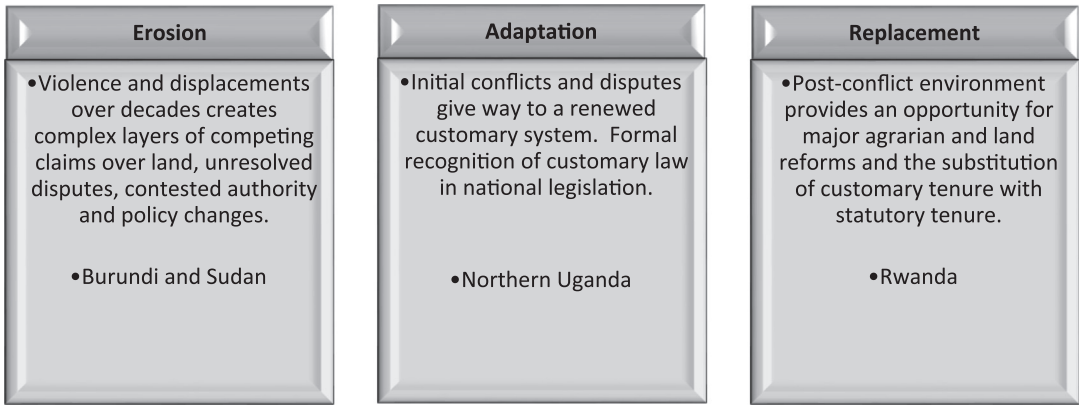

Fig. 1. Trajectories of customary land tenure systems in conflict-affected settings.

an informal tenure system cannot be re-established, but it may function differently from pre-war customary tenure.

4.2. Adaptation

The dynamic nature of customary law enables customary land tenure to shift over time and accommodate different needs, such as in- and out-migration. In some post-conflict settings, we observe a changed customary tenure system that re-establishes in place and allocates the resource rights of those who return to their place of origin. This does not occur seamlessly or easily as resolving disputes and renegotiation of rights take time. Northern Uganda is an example of a post-conflict setting where peace has led to the reclaiming of traditional land rights and a renegotiated customary tenure system. In 2009, when the conflict between the government of Uganda and the Lord's Resistance Army ended, civilians in northern Uganda returned to their homes from IDP camps and urban areas. The initial return led to a rash of conflicts as displacements of up to 20 years led to the loss of knowledge about land claims and specific boundaries (Joireman, 2018). However, after some time, most land conflicts were resolved and customary tenure was re-established (Hopwood & Atkinson, 2013). A particularly noteworthy development was how the customary tenure system changed. Young men were able to access land in their own right without waiting for decisions by their elders, even though this was controversial because so many then sold their customary land (Joireman, 2018; Kobusingye, 2018). Yet, women, especially young women, faced significant challenges in claiming land after the conflict even in areas where their claims might previously have been accommodated (Whyte et al., 2012). The customary tenure system was restored after the conflict, but with changes embedded within new land governance and administrative structures formed by decentralization and land law changes that occurred during the 20 years of conflict and displacement. This reordering of governance is visible in other post-conflict settings where there are lengthy displacements, land tenure reforms, and state restructuring or new state formation, such as South Sudan (Justin, 2020; van Leeuwen et al., 2018). Contextually we can see that patterns of violence in systems that adapt can be distinguished from those that erode: violence tends to be geographically limited; people are not repeatedly displaced; and population displacement occurs within the state.

4.3. Replacement

The post-conflict moment can be a critical juncture when a new government is in place, one which has either won control through military victory or a negotiated settlement. Alternatively, the post-conflict state may have defeated its opposition and have the power to make significant changes to property rights. In Syria, the Assad regime changed property law during the conflict to dispossess those political opponents who had fled the country (Stubblefield & Joireman, 2019). Changes to property law and administration are difficult to negotiate in a democratic state, so a suspension of democracy or the chaos of war can provide opportunities for expropriation or change.

Rwanda, an authoritarian state with a strong reform agenda was able to use the post-war setting to implement a top-down agrarian transformation that included a gender-sensitive land reform (2005), revised inheritance law (1999), change in the land administration system, and a countrywide land mapping and registration process (2013). The 1994 genocide left a large number of female-headed households, so the focus on gender-sensitive land laws was, at least in part, an effort to address their needs as well as a large number of property disputes (Pottier, 2006). This top-down formalization effort radically changed land tenure in Rwanda, formalizing landholding and creating more equitable and secure property rights for women. Before the start of the nationwide systematic land tenure regularization program in 2009, land tenure in Rwanda combined customary and statutory systems. The 2013 Land Law provided for equal land rights without discrimination based on gender or ethnicity, endorsing the state as the sole authority to allocate land rights. Customary tenure has been replaced by statutory tenure. However, the land reform did not eliminate informality and many land transactions still occur without being registered (Ali et al., 2019). Post-conflict Rwandan state's complete control of the political system enabled the change and formalization of customary property rights.

These three trajectories show both the resilience and vulnerability of customary tenure systems. Violent conflict creates societal upheaval, displaces civilians, and alters the ownership of resources. In the aftermath of violent conflict, we can expect there to be disputes over property ownership and resource access as people try to reclaim assets or assert ownership of property that is 'unclaimed'. These three post-conflict trajectories are fluid and not exclusive. A customary tenure system that is undergoing adaptation may be at some point replaced. The trajectories are an attempt to highlight and order the outcomes on customary tenure from conflict so that scholars and policymakers may better understand the circumstances faced by returnees and those deciding whether to return home.

5. Conclusion

The destruction of property, population displacement, illegal occupation of homes and land, and other harms are the detritus

of violent conflicts. International policy instruments such as the Pinheiro Principles and the VGGT were developed to protect livelihoods and ensure the return of property lost through violent conflict. These are helpful international policies that assist governments and international organizations in the rebuilding of communities. Yet, these well-intentioned guidelines insufficiently address the multi-faceted nature of customary tenure systems – the dominant form of landholding in many areas currently impacted by conflict. The three restitution strategies – return original property, return similar property, and provide monetary compensation – pose serious challenges in areas without formal records of land boundaries, valuation, and occupancy. People in customary tenure systems have property rights, though they are different from those in formalized systems. Restitution policies insensitive to the way customary tenure systems function have the potential to prevent people from receiving compensation for assets to which they have legitimate claims, limit their livelihood choices, and dispossess those who have secondary rights such as women and migrants. In post-war contexts property restitution efforts focused on transitional justice can problematically occur at the same time as land policy changes designed to promote economic development. These two sets of efforts can involve different groups of national and international actors and raise challenging prioritization issues, e.g. is it appropriate to register land rights in an area or over a plot of land where there is a pending restitution claim?.

Our first goal in this article was to address the misalignment between customary tenure rights and international policy on post-conflict property restitution. The second was to identify the post-conflict trajectories of customary tenure systems. These two issues are fundamentally linked. There is an ambiguous and unarticulated assumption that people can always return to rural agricultural livelihoods when displaced from customary land. That is only true if customary land systems are still functioning in the way they did before the violence. The reality is that although customary land systems may survive conflicts, they do not remain the same. Even in places where customary tenure is operative, we can anticipate a high degree of conflict over boundaries and rights when peace is established. The characteristics of post-conflict environments – contested authority structures, displaced and returning populations, and contentious land relations – make customary land vulnerable to expropriation and magnify the potential for asset loss among customary rights holders.[9]

Progress can be made in recognizing asset losses in customary tenure systems and providing appropriate compensatory mechanisms. Our hope is to equip scholars and policymakers with an understanding of the rights to land under customary tenure systems and to identify the trajectories of change caused by violent conflicts to enable reasonable expectations of post-conflict customary tenure systems. Customary tenure systems are not invulnerable; they do not just resurface after a war ends without contestation or renegotiation. Demographic changes, population displacement, and peace agreements that empower 'customary' faction leaders or send demobilized soldiers back to their rural homes can all lead to changes in customary tenure.

This article suggests several areas for additional research and avenues for policy development. There needs to be further work on aligning the Pinheiro Principles or VGGT to the dynamic realities of customary systems of land tenure. There is significant, albeit divided, theoretical and practical literature around replacing customary tenure systems with more formalized land tenure, but there is very little research and limited policy analysis around erosion and adaptation in post-conflict customary tenure systems and almost none that is comparative in nature. This article begins the task of discerning how violent conflict transforms customary tenure but does not complete it. More research needs to be done on this subject before robust suggestions for policy reform can be made. Given that so many countries with protracted conflict have customary tenure, developing more applicable restitution guidance is a pressing humanitarian and development concern.

[9] We see in multiple contexts of Sub-Sharan Africa how the rising value of land creates incentives for customary leaders to redefine their role from guardians to owners to take advantage of new income opportunities Serwajja, E. (2014). *Investigation of land grabbing amidst resettlement in post-conflict Amuru District, northern Uganda* [PhD Dissertation, University of Western Cape]. Cape Town., Ubink, J., & Pickering, J. (2021). Shaping legal and institutional pluralism: land rights, access to justice and citizenship in South Africa. *South African Journal on Human Rights*, 1–29. https://doi.org/10.1080/02587203.2020.1867483, World Bank. (2009). *Post-Conflict Land Policy and Administration Options: The case of Northern Uganda.*

CRediT authorship contribution statement

Sandra F. Joireman: Conceptualization, Investigation, Writing – original draft, Writing – review & editing. **Rosine Tchatchoua-Djomo:** Conceptualization, Investigation, Writing – review & editing.

Data availability

Qualitative data used in this research is not available to protect the privacy of interview subjects.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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