Lessons learned and good practices in addressing housing, land and property disputes

A discussion paper submitted jointly by UNHCR and NRC[1]
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I. Background

In past decades, there has been growing recognition by national and international actors that the resolution of property and land disputes is a crucial step towards ending a conflict and building a sustainable peace. Only in the past few years, however, has a more comprehensive treatment of the subject emerged, principally with the negotiation and release of the *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (the "Pinheiro Principles") adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in August 2005[2].

Addressing land and property issues in post-conflict situations is particularly challenging when land is held under customary tenure, which is the majority of the situation. of land in Africa today. Much of the past experience with engagement in housing, land and property issues has been in contexts of statutory legal systems and land titling. Yet because the majority of conflicts and displaced populations are located in areas dominated by customary and informal tenure, there is a pressing need to develop expertise on restitution and compensation in informal ownership settings to facilitate solutions adapted to both the customary and statutory legal systems of the countries at stake.

When designing mechanisms to address land disputes in post-conflict settings and allocating responsibilities between the statutory system and the customary one, authorities should keep in mind the financial and human resources necessary to the functioning of such mechanisms. Solutions should be tailored to the existing capacity; otherwise well drafted legislation will remain unimplemented. The question of institutional capacity is even more acute when a country decides to design a comprehensive and systematic registration of land and convert customary law into freehold title.

II. Frameworks for addressing housing, land and property issues

On a practical basis, experience has shown that durable solutions for refugees and displaced persons are unlikely to be sustainable if housing, land and property issues are not satisfactorily resolved. Resultant dissatisfaction and disenfranchisement of impacted groups can negatively impact the overall peace process. Several lessons can be drawn from this experience and which may have relevance to the further consolidation of peace in Burundi.

A. Peace negotiations and peace agreements

As a general observation, housing, land and property issues impacting refugees and internally displaced persons should be matters of discussion and debate within peace negotiations as early as possible. Resultant peace agreements may be ideal instruments to include provisions on the housing and property rights for impacted communities, including if necessary the establishment of judicial or other mechanisms to ensure the implementation of such rights.

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[1] The interest of the Office of the United Nations High Commissioner for Refugees (UNHCR) in the subject of housing, land and property rights is based on the link between the right of return of the displaced—whether they be returning refugees or returning IDPs—and the right to adequate shelter, as well as its practical experience evidencing the crucial importance of respect for housing, land and property rights in anchoring the return and reintegration of refugees and IDPs.

The Norwegian Refugee Council (NRC) approaches the subject from the perspective of its Information, Counselling and Legal Assistance Programme (ICLA) whose objective is to facilitate durable solutions for refugees and displaced persons. NRC addresses land disputes by providing legal counsel and representation to displaced persons and/or acting as mediator. This approach is combined with institutional capacity building.

[2] The Pinheiro Principles derive from widely recognised international instruments and include examples of best practices that can be used during a restitution process. Their objective is to improve the consistency of responses to housing, land and property disputes and conformity of these responses to international standards.

Where refugees and IDPs voluntarily choose to settle elsewhere, it might be necessary to stipulate that this does not affect their right to property restitution or, should this not be possible, compensation or other form of reparation regarding property in areas of origin.

B. Customary land tenure[3]

Customary norms play a particularly important role in land administration in rural areas in many sub-Saharan African countries. In addition to being widespread, customary systems provide practical benefits especially in rural areas where statutory institutions may not yet reach, or may need considerable time to establish themselves.

Where the overwhelming majority of land tenure relations are regulated by the customary system, it is difficult to envisage any restitution or compensation process that does not rely on the engagement of traditional dispute resolution mechanisms. In the absence of official records, traditional authorities play an essential role either to determine or confirm rights or to implement a decision.

Customary systems present several advantages compared to the statutory system. For example in Sudan, strong and popular customary system evolved during the civil war. In view of the limited mandate and capacity of the South Sudan Land Commission, a recent roundtable meeting with a broad range of stakeholders (including returnees, humanitarian and development actors, government, and civil society) recognised the benefits to strengthening the customary system to ensure the full reach of rule of law in rural areas. One of their primary benefits is that they are often more easily accessible, both physically and financially by persons with specific needs. They are also more adapted to local conditions. In particular local populations understand the basis behind customary rulings whereas decisions based on statutory systems are not as well known. Consequently, decisions of customary bodies are often more easily enforced than those of the statutory system, which may lack resources and capacity, especially in rural areas.

However, customary systems may also present a number of potential disadvantages. Conflict and displacement may weaken the capacity of customary systems to adequately respond to land disputes in a variety of ways. Customary knowledge in relation to land may have been lost as a result of long displacement periods and deaths. Customary systems may also not have the capacity to address the sudden increase of land disputes resulting from the conflict and significant return of displaced populations.

Additionally, customary law may not have full or clear legal recognition within national law. This could be to the detriment of displaced persons' land and property rights. The fact that customary land rights are often based on usage can also weaken the land claims of displaced populations who have been forced to remain away for extended periods of time. Furthermore, the decisions of customary law mechanisms seeking to resolve housing, land and property ownership disputes may not necessarily conform to international standards or be in accordance with national law. Customary law is also slow to adapt to social changes and may take time to reflect new legal norms such as gender balance or gender equity.

The International Conference on the Greats Lakes Region adopted the *Great Lakes Protocol on Property Rights of Returning Populations*, *which* is interesting and innovative in that it recognises the need to associate traditional and community-based mechanisms to the statutory system in order to address land issues[4]:

[3] Much of the analysis and examples are extracted from a study on property restitution in informal ownership settings commissioned by the Internal Displacement Monitoring Centre of NRC, and from NRC field experience.

[4] The *Protocol* is part of the *Great Lakes Pact*, a document signed in December 2006 by 11 countries of the region to contribute to its stabilisation. While the recognition of the role of traditional land dispute resolution mechanisms is positive, its focus on the property rights of returning populations is problematic in that it does not address property rights issues of the displaced, who wish to pursue other durable solutions.

Article 4.3:
In particular, Member States shall:

a. Elaborate legislative procedures under which the local traditional and administrative authorities referred to in Article 69 of the Dar-es-Salaam Declaration, can assist to recover the property of returning refugees and displaced persons;

b. Establish simplified formal judicial procedures to enable internally displaced persons and refugees to lodge formal claims relating to the loss or recovery of their property;

c. Establish alternative and informal community based mechanisms and processes for resolving property disputes, with simple requirements of proof of ownership based upon reliable and verifiable testimony;

d. Establish an affordable property registration scheme under which title to property, including land, held under both customary and statutory land tenure systems is recognized.

In practice, NRC has often operated in contexts where the only viable option was to act through alternative mechanisms due to the lack of functioning statutory institutions, such as regular courts or *ad hoc* Commissions. Examples from Uganda and Afghanistan[5] show that working with traditional mechanisms facilitates community acceptance and enforcement. In the Democratic Republic of Congo, UNHCR is establishing links with traditional leaders for resolving land conflicts, in collaboration with the local NGO, Arche d'Alliance, while NRC is supporting local multi-sectoral reintegration commissions in mediating solutions to land conflicts. Similarly, the South Sudan Law Society, in a couple of locations, has helped to mediate land disputes between host communities and returnees, directly reducing tensions and helping to consolidate peace in the region.

C. National legal framework

To ensure appropriate respect for housing, land and property rights, it may be necessary first to assemble the collection of relevant legal norms and analyze for inconsistencies between international law, national statutory laws and applicable customary law. There may be aspects within existing laws, often remnant of systems decades old, that are today impediments to return, and/or access to land and justice for returnees including the specifics of property abandonment laws and whether inheritance laws discriminate against women or surviving children. Reform efforts may therefore be necessary. In Liberia, the *Act to Govern the Devolution of Estates and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages* provides a strong example of how to address a dichotomy between customary, national and international law on women's rights. Notably, this Act was passed at a very early stage in their peace process creating a more conducive environment to advocate for female returnees' rights. In Sudan, the Wealth Sharing Agreement and the Interim Constitution recognizes the coexistence of these systems; this was further acknowledged within the functions of the Land Commission, where within their policy making responsibilities, recognition of customary rights is specified.

In countries where most land rights are defined by customary tenure, addressing land and property disputes (through restitution, compensation or land reform) may require recognition by the national legal framework of customary tenure rights.

Alternatively, in those jurisdictions that do recognise customary law, the interaction and hierarchy between these systems of law may not be well defined, leading to confusion, inappropriate "forum-shopping" or simple inattention to pressing needs in the housing, land and property rights sphere. In Uganda, NRC addresses dispute resolution mechanisms using both statutory and customary systems and explores ways in which the two systems can work together by cooperating jointly with government representatives and traditional institutions to codify customary principles and ensure their respect.

[5] In Afghanistan, NRC has worked with customary and religious dispute resolution mechanisms on cases of land disputes— and supported the rights of claimants by highlighting the principles of *sharia* law compatible with international standards.

III. Principles for addressing housing, land and property issues

A. Equal access to, and full implementation of, statutory and customary law mechanisms

Effective respect of housing, land and property rights depends on achievement of the international principle of equal access to the law. Particular attention should be given to persons with specific needs. One effective response has been the implementation of public information campaigns and legal assistance to persons in displacement and upon return.[6] Experience has also shown that a very effective means to ensure equal access to the law is the training of customary leaders regarding international principles and facilitating their closer links with the statutory system, if possible, in particular if land issues are well defined. In Liberia, the provisional mechanisms put in place to resolve land conflict have created a greater interest amongst the people in rural areas to learn of their rights and the range of mechanisms available to protect them. Beyond the immediate positive impact in the housing, land and property sphere, such efforts also have a larger benefit in consolidating the rule of law and the attainment of a durable peace.

However, even well-drafted statutory laws and effective customary law responses can remain unimplemented due to the lack of capacity and awareness. In Uganda, the innovative response of issuing certificates of customary tenure has been deeply hampered by capacity constraints of the District Land Committees and lack of information of rural rights-holders. In Angola, relatively little demarcation or registration of land has taken place in rural areas due to overstretched administrative bodies.

B. Protection from forced displacement and freedom of movement

Even with the best intentions, solutions proposed to address land disputes should not themselves lead to forced and arbitrary displacement of people.[7] Such situations are not unique to countries emerging from conflict but can arise in recovery phases. The villagisation policy in Rwanda was highly controversial since it sometimes entailed forced displacement of populations who were obliged to destroy their properties before being moved to resettlement areas. In addition, villages were often build on land without providing adequate compensation to the owners of such land. Relocation to newly build villages also resulted in land being situated far away and created security concerns in particular for women.

Lessons learned from situations such as this, underline the need to approach any villagisation projects from a rights based approach particularly ensuring the informed consent of populations prior to resettlement, on adequate social services and infrastructure, as well as access to land and employment opportunities. Attention, properly taking into account specific situation of that country such as the nature of the conflict, history of the country and demographics, should be given in determining the composition of the population living in newly-built villages. Depending on the circumstances it is generally best to avoid concentrating a particular ethnic, social group (such as widows) or other persons with specific needs thereby creating localised ethnic or demographic segregation. Tenure security, land and ownership rights of those relocated in villages should also be clarified.

C. Improving security of tenure

One of the challenges with customary land tenure is that it is often not recognised by the statutory system, which weakens restitution and compensation rights of customary rights

[6] Pinheiro *Principle 4* on the right to equality between men and women expressly states the international human rights law principle of the right of women to equal access to inheritance and ownership.

[7] Pinheiro *Principle 5* on the right to be protected from displacement includes the prohibition of the practice of forced eviction. Similarly, *Guiding Principle 6* of the *Guiding Principles on Internal Displacement* underlines the right of displaced persons to be protected against being arbitrarily displaced from his or her home or place of habitual residence". *Guiding Principles 7 and 8* provide exceptional conditions under which displacement can be acceptable and *Guiding Principle 9* emphasises States' "particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."

holders and affects their tenure security. Faced with this difficulty when attempting to return land and properties to displaced populations, several countries have endeavoured to prevent future disputes by improving security of tenure through various means, the main ones being recognition of customary tenure by the statutory system and formalisation of customary tenure into land title. These longer term reforms entail legislative changes and a reform of the land administration system which can also affect the land and property rights of displaced persons. It is therefore important that mechanisms designed to facilitate land restitution to displaced populations are compatible with long term reforms.

The conversion of a system based mainly on customary land tenure to a system based on individual freehold title is a long term process and should be approached with great care. Such a system depends on the establishment of a cadastre and the comprehensive and systematic registration of land. It requires a regular and costly system of land surveying that imposes taxes on landowners when transactions of land take place as well as a decentralised land registration and titling system, close to rural populations. Even in the best case scenario where the institutional capacity exists and landowners are aware of their obligation to register transactions, they may not be in a position to afford this cost which will then rapidly lead to a highly inaccurate registry and hence insecurity on title.

Land titling reforms need to be carried out with particular care to ensure that better informed and well connected individuals do not take advantage of the process to the detriment of the rest of the population, in particular, women, and (former) refugees and displaced persons. Provisions should be made to ensure that joint ownership of spouse is possible and that spouse consent is required before any transactions. Criteria determining eligibility to land titling (such as continuous occupation of land for a certain period of time) can exclude refugees and displaced persons from the benefit of such programmes.

The challenges of recognition and registration of customary tenure:
In both Angola and Uganda, legislation has given formal recognition to customary tenure, therefore consolidating land rights and tenure security of many. The Angola legislation broadly recognizes customary forms of tenure and administration of land pursuant to customary norms. The *2004 Land Law* provides for the establishment of rural community land, recognises the administration of land within rural communities through customary practices, and establishs the concept of "customary beneficial ownership" for residents of rural communities confirming their land rights. However, in Angola, the *Land Law* sets up a mechanism by which anyone using state land without title for a three-year period can obtain such title, which can be problematic for displaced persons who lack access to registration mechanisms or are not informed of this provision.

In Uganda, both the *1995 Constitution* and the *1998 Land Act* consider customary forms of tenure as providing legitimate land rights. The Land Act further specifies that "certificates of customary ownership", based on customary norms, can be issued to individuals, families or communities. Thus both individual and communal rights are recognised. Once a certificate is issued, the land remains administered according to customary norms. Certificates can be used to secure credit, and can be subsequently transformed to freehold title via the formal registration process. With regard to communal land, the Ugandan *Land Act* provides for the establishment of Communal Land Associations for the purpose of determining ownership and management of land under customary norms. Communal Land Associations can own land under certificates of customary ownership, as well as under leasehold or freehold. Certificates of customary ownership are issued through simplified procedures. Land is demarcated and mapped in agreement with neighbours and customary leaders. Certificates can be obtained at the sub-county level, easier to access for rural inhabitants. Finally, all transactions involving certificates are recorded in the formal registration system, which enhances security of tenure if regularly and accurately updated.

Registration of customary tenure, without conversion to statutory forms of tenure, is legally possible in Uganda, Tanzania and Mozambique. Documenting land rights through recognition of customary tenure may prove beneficial to land owners and users. In Afghanistan, NRC has facilitated recognition by the formal system of land decisions issued by the *jirga*. Such formalisation processes enhance security of tenure.

IV. Concluding Observations

- Addressing land and property issues in post-conflict situations where most land is held under customary tenure requires a clarification of relations between the statutory and traditional systems in terms of responsibilities and legal hierarchy to address uncertainties arising from legal pluralism.
- Since property disputes are a source of instability, measures to improve security of tenure should be supported in the context of property restitution/compensation or land reform programmes. This can be achieved through a variety of means (legal recognition of customary tenure, individual or collective land titling) that are chosen based on their coherence with appropriate customary norm and its institutional capacity.
- Short-term measures and mechanisms designed to address property disputes should be compatible with longer-term land reforms.
- One of the most compelling and recurrent lessons learned in recent years is the importance of strong partnership to ensure the full respect of housing, land and property rights in post-conflict societies. This partnership ideally should be not only strong but multilateral, encompassing the active engagement of:
  - national and local government;
  - traditional leaders;
  - concerned populations, including refugees and displaced who choose not to return;
  - civil society including national NGOs (such as the South Sudan Law Society, and Arche d'Alliance);
  - international NGOs (such as NRC);
  - international humanitarian actors (such as UNHCR);
  - international development actors (such as UN Habitat, FAO and UNDP); and
  - international peacekeeping actors (such as UNMIS and UNMIL).
- Coherent and constructive protection of housing, land and property rights can be more effectively assured when incorporated into a larger peace building framework, such as those developed by the UN Peace Building Commission and peace agreements, as appropriate.