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Land Policy Reform, Customary Rule of Law and the Peace Process in Sierra Leone

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Abstract

Armed conflict is particularly destructive to socio-legal relations regarding land and property. Reconstruction priorities increasingly include the reform of property legislation as part of efforts to address the causes and reasons for continuation of conflicts. However, a pervasive problem is that postwar laws are extremely difficult to connect with informal on-the-ground developments regarding perceptions of spatially-based rights as populations pursue livelihoods, grievances and aspirations. Left unattended, the problem constitutes a potential flashpoint for a return to conflict. This article examines this connection for postwar Sierra Leone, in order to highlight issues and questions of potential utility. The stakes are high for successfully connecting postwar land tenure laws with informal socio-legal realities. For Sierra Leone, a primary issue is the presence of a large population without access to land, tenure insecurity discouraging investment, large-scale food insecurity and rural unemployment while significant swathes of arable and previously cultivated land stands idle.

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I. Introduction

Land and Property Rights in Postwar Reconstruction

The success of often volatile land and property restitution efforts within a peace process, as well as the prospects for displaced persons and ex-combatant reintegration, food security, and economic recovery, hinge on positive outcomes resulting from the mix of informal, emerging perceptions of land and property rights, and new postwar legislation. Such legislation is usually an attempt at resolving and regularizing land and property issues from before, during, and after the war. However this is a tall order for legislative reform. While connecting such reform with postwar 'on-the-ground' tenure realities is frequently a significant component of a peace process,¹ this connection suffers from a lack of success and a lack of examination with regard to what approaches work.

This article examines the case of postwar Sierra Leone with regard to this connection. To date, an analysis of land and property rights in postwar Sierra Leone has not been conducted in the literature. The article commences with a description of the emergence of multiple informal rule of law systems regarding land tenure after a war, and then examines the Sierra Leone case in light of current legislative reform efforts, and how this intersects with on-the-ground informal land tenure to produce specific constraints and opportunities.

Postwar Emergence of Multiple Rule of Law systems

Plunkett articulates at length the importance and pervasiveness of "war and people's search for alternative rule of law systems"² and the relationship between the rule of law and conflict. While the rise of the Taliban in Afghanistan, Islamic Courts in Somalia and sectarian division in Iraq are among the more vivid examples, there are many others. The informal derivation of a variety of approaches to acquiring, (re)establishing, securing, defending and proving rights and claims to property, land, homeland and territory during and after a war parallels the general fracturing of societies into smaller war and postwar communities of shared experience, dislocation and (re)location.³ Plunkett⁴

¹ Centre on Housing Rights and Evictions (COHRE), 2006 *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva); S Leckie, 'New Directions in Housing and Property Restitution' in S Leckie (ed), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, Ardsley NY 2003); JD Unruh, 'Property Restitution Laws in a Post-War Context: The Case of Mozambique' (2005) 3 AJLS 147; M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

² M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005, 78)

³ e.g. T Hohe, 'Developing Local Governance' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); G Junne & G Verkoren, 'The Challenges of Postconflict Development' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); B Kamphius, 'Economic Policy for Building Peace' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

⁴ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005, 79).

elaborates specifically how micro rule of law systems come about during and subsequent to conflict:

[t]he priority given by an individual to a rule system may be radically altered during times of war, particularly where the state is fractured, frustrated, or collapsed. While the official will assert allegiance to the authority of the state or to 'his group,' an individual is likely to have a complete reverse of priority or rule observance, especially when the state is weakening or has collapsed.

Thus instead of only one source of authority emerging in a fractured society after a war, there are in reality "many lesser social compacts built around relationships".⁵ These relationships are tied to survival, identity, region, ethnicity, religion, opposition to other groups, dislocation and other wartime experiences. Such compacts operate at different scales and are sufficient to create and sustain an informal rule of law even in the absence of a state, or due to the absence of a state.⁶ In such a situation, rule of law systems (including weakened state law) with respect to land and property rights that are incompatible, opposed, or in aggregate add confusion, confrontation and tenure insecurity, can jeopardize a peace process.⁷

Plunkett⁸ notes that over a decade of peacekeeping experience in diverse theaters have provided the international peacebuilding community with "strategic insight into the so-called lessons learned in the establishment of functioning justice institutions at the elite, functional, and village level".⁹ And the conclusions are that the task of establishing an overall formal rule of law is critical and needs to come before the re-establishment or maintenance of the state apparatus; but that such legislative efforts will be "meaningless unless a living rule of law system is established."¹⁰

In this context, the broader job of a peace process over the often significant number of years involved in the course of recovery is to bring informal micro rule of law systems together into a larger structure connected to the state

⁵ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005, 77).

⁶M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005): JD Unruh, 'Land Tenure and Legal Pluralism in the Peace Process' (2003) 28 P&C 352.

⁷JD Unruh, 'Property Restitution Laws in a Post-War Context: The Case of Mozambique' (2005) 3 AJLS 147; JD Unruh, 'Land Tenure and Legal Pluralism in the Peace Process' (2003) 28 P&C 352; B Kamphius, 'Economic Policy for Building Peace' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

⁸ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

⁹ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005, 98).

¹⁰ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005, 98). State apparatus in this case refers to the reconstitution of the infrastructure, all employees, and some institutions.

whose one rule of law is compatible with the many micro rule of law systems.¹¹ The question is how to do this.

How is space (land and property) to be legally and politically constituted to support the multiple objectives of a peace process, while at the same time engage emerging on-the-ground tenurial realities and provide for tenure security for a semi-literate, war-weary population as well as with commercial investors? The question becomes particularly complex because, 1) some of the spatially-based causes of the war, along with acute socio-spatial issues that emerged during the war, will remain in an aggravated state; 2) local realities will be stronger than whatever a new leadership is or state institutions and laws are about; 3) state capacity, including trained personnel, institutions, organizations, and financial resources, will be extremely weak; 4) customary and wartime leaders and power structures will continue to exist parallel to new state institutions; 5) local postwar populations tend to focus on short-term objectives relating to survival and reacquisition of assets, meaning that a priority for any state or international socio-legal effort is that it be quickly functionally relevant and meet the material and social needs of the populace; and, 6) local informal rule of law systems may not be easily understood by outside actors in a peace process, who can favor using an imported Westminster-type of constitutional arrangement which may have little relevance to realities at smaller scales in more village level communities.¹²

Important questions include: do the emergent informal rule of law systems regarding land and property have utility as 'justice assets' (e.g. dispute resolution, reintegration, land and property allocation, peacemaking) in a peace process? What 'legal logistics'¹³ are needed to move forward with a broader rule of law for land tenure as part of a durable peace, given that the issue is significantly complex, and no clear way ahead exists? Approaches which at first might seem viable are significantly problematic.

The enforcement problem

One such approach, attempted numerous times, is to move forward robustly with the re-establishment of a formal land tenure system, with a focus on enforcement

¹¹ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); CE Adibe, 'Accepting External Authority in Peace-Maintenance' in J. Chopra (ed) *The Politics of Peace Maintenance* (Lynne Rienner, London 1998); JD Unruh, 'Land Tenure and Legal Pluralism in the Peace Process' (2003) 28 P&C 352.

¹² T Hohe, 'Developing Local Governance' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); Development Workshop (DW) *Land and Reintegration of Ex-Combatants in Huambo Province of Postwar Angola* (Development Workshop, Luanda 2004); M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); CE Adibe, 'Accepting External Authority in Peace-Maintenance' in J. Chopra (ed) *The Politics of Peace Maintenance* (Lynne Rienner, London 1998); B Soennecken, 'The Geopolitics of Postwar Recovery' in C. Flint (ed), *The Geography of War and Peace: From Death Camps to Diplomats* (Oxford University Press, Oxford UK 2005).

¹³ M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

in order to replace local informal approaches. However even if formal law could be (re)derived and implemented quickly enough in a post-conflict setting, and the enforcement capacity existed, the primary dilemma is that the enforcement of formal law depends on the direct or implied threat of forced coercion—such as police, courts, prisons.¹⁴ This is particularly the case in laws relating to land and property.¹⁵ While such a threat may be expected to have the desired outcome with populations generally accustomed to peace and wanting to retain it, with postwar populations this is more problematic. For the latter the threat of forced coercion connected to enforcement will be much more distant and much weaker than the actual force in the form of violence recently experienced—considerably reducing the utility of the threat with regard to compliance.

Of particular concern is that the threshold for a return to open violence for some groups – ex-combatants, warlords, those who seek to gain economically and politically – can be quite low after a war.¹⁶ This can particularly be the case because armed groups involved in the exploitation and trade of certain land-based resources can themselves emerge as powerful micro rule of law systems, and can express considerable reluctance to formalize their activities, especially if they see themselves as ‘losing’ in the peace process.¹⁷ The latter notion risks becoming broadly the case if such enforcement ignores local perceptions of justice and participation; which can in turn compromise efforts at getting local populations to ‘buy into’ national reconstruction.

Wily¹⁸ notes for Afghanistan how ineffective property rights enforcement is, and how urgently needed local participatory processes are in postwar land tenure for the country. An added problem with this approach is that a postwar government and the peace process involving the international community may be reluctant to engage in force (or threaten its use) in the context of a recent war, particularly when the state occupied one side in the conflict, and violence remains a viable approach to resolving problems among the population. In addition, in postwar scenarios the state does not have the monopoly on force, regardless whether the larger political contest was resolved through victory or with a peace accord.

¹⁴ A Sarat and T Kearns, ‘Making Peace with Violence: Robert Cover on Law And Legal Theory’ in A Sarat and T Kearns (eds) *Law’s Violence* (University of Michigan Press, Ann Arbor 1992); J Derrida, ‘Force of Law: The ‘Mystical Foundation of Authority’ (1990) 11 *Cardozo Law Review* 1020; N Blomley and others (eds) *The Legal Geographies Reader* (Blackwell, Oxford 2001).

¹⁵ N Blomley, ‘Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid’ (2003) 93 *Annals Assoc. Am. Geog.* 121; R Cover, ‘Violence and the world’ (1986) 95 *Y LJ* 601; J Mennell and N Goudsblom Elias, *Norbert Elias on Civilization, Power, and Knowledge: Selected Writings* (University of Chicago Press, Chicago 1998); CM Rose, *Property as Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, Boulder 1994).

¹⁶ B Kamphius, ‘Economic Policy for Building Peace’ in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

¹⁷ B Kamphius, ‘Economic Policy for Building Peace’ in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005); J O’Loughlin, ‘The Political Geography of Conflict: Civil Wars in Their Hegemonic Shadow’ in C Flint (ed), *The Geography of War and Peace: From Death Camps to Diplomats* (Oxford University Press, Oxford 2005)

¹⁸ LA Wily ‘Land Rights in Crisis: Restoring Tenure Security in Afghanistan’(2003) Afghanistan Research and Evaluation Unit, Kabul.

II. Background – The Sierra Leone Conflict

The eleven year long conflict in Sierra Leone began in 1991 with an incursion by the Revolutionary United Front (RUF) from neighboring war-torn Liberia. While this marked an official start to armed combat, conflicts over a variety of issues were already pervasive in a country debilitated by extreme mismanagement, corruption, disenfranchisement of much of the rural population, and neglect, all of which provided willing combatants to the RUF.¹⁹ In May 1999 a peace accord was signed in Lomé, Togo. By April 2000 over 8,000 UN troops were deployed in the country, and the United Nations Mission in Sierra Leone (UNAMSIL), was in 2001 the largest such force in the world.²⁰ At the war's end in January of 2002 almost a quarter of the population, more than one million people were displaced either within or outside of the country; with approximately half a million in refugee camps in Guinea and Liberia. Thousands of Sierra Leoneans began their return, with this movement joined by approximately 5,000 Liberians fleeing the civil war in that country.²¹

Land issues in Sierra Leone were a significant source of the overall conflict.²² Amnesty International²³ noted that in some areas of the country land problems were so acute that joining the rebels sometimes led to the opportunity to take lands by force. Hussein and Gnisci²⁴ note that tensions over land contributed to the eruption or exacerbation of conflicts in all the Mano River countries (Sierra Leone, Guinea, Liberia) as well as in Cote d'Ivoire. Land disputes in Sierra Leone (endemic in the south), along with land allocation and access decisions, were nominally dealt with by chiefs, who were noted for arbitrary, corrupt, self-serving approaches to such decisions.²⁵ Keen²⁶ indicates that the chieftaincy system was one of the primary contributors to the war due to

¹⁹ AB Zack-Williams, 'Sierra Leone: the Political Economy of Civil War, 1991-98' (1999) 20 TWQ 143; Country Information and Policy Unit (CIPU), 'Sierra Leone Assessment' Amnesty International UK (2001); P Richards, 'Anarchists or Catalysts?' (1995) 20-26 Feb WA 266.

²⁰ United Nations Office for the Coordination of Humanitarian Affairs Integrated Regional Information Network (IRIN), 'Sierra Leone: Blue Helmets Quit, but Peace Elusive' (Report) (10-16 December 2005) IRIN-WA Weekly Round-up 308.

²¹ Country Information and Policy Unit (CIPU), 'Sierra Leone Assessment' Amnesty International UK (2001).

²² D Keen, 'Greedy Elites, Dwindling Resources, Alienated Youths: The Anatomy of Protracted Violence in Sierra Leone' (2003) IPG 67; KL Hardin, *The Aesthetics of Action: Continuity and Change in a West African Town* (Smithsonian Institution, Washington DC 1993); P Richards, K Bah, J Vincent, J. 'Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone' (Report) (2004) Social Development Paper No 12, World Bank; DJ Francis, 'Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?' (1999) 20 TWQ 319.

²³ Amnesty International, 'Sierra Leone: The Extrajudicial Execution of Suspected Rebels and Collaborators' (Report) (29 April 1992) London.

²⁴ K Hussein, & D Gnisci, *Land, Agricultural Change and Conflict in West Africa: Regional Issues from Sierra Leone, Liberia, and Cote d'Ivoire, Phase I: Historical Overview* (Sahel and West Africa Club / OECD, Issy-Les-Moulineaux, France 2005)

²⁵ P Richards, K Bah, J Vincent, J. 'Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone' (Report) (2004) Social Development Paper No 12, World Bank.

²⁶ D Keen, 'Greedy Elites, Dwindling Resources, Alienated Youths: The Anatomy of Protracted Violence in Sierra Leone' (2003) IPG 67.

longstanding and common abuses particularly regarding land issues. As a result some of the worst violence was focused on certain leadership elements in the customary system, and many chiefs were targeted by the RUF and fled for the safety of Freetown, the capital, or abroad.²⁷

Richards et al²⁸ and Hussein and Gnisci²⁹ explicitly identify the debilitation of customary and formal land and property institutions as a major cause of rural marginalization, disenfranchisement, and poverty in Sierra Leone, all of which led to pronounced discontent. Richards et al notes that a particular problem was the “poverty and instability of large numbers of the rural youth ‘spun off’ from village society because of control exercised by village elders over land and marriage.”³⁰ Some analysts suggest there is some concern that the re-establishment of the chieftaincy system in Sierra Leone after the war is a precarious situation, given its role in the cause of the conflict.³¹ A particularly serious problem is the extreme food insecurity in both rural and urban areas of Sierra Leone. In aggregate the primary food security issue is the presence of a large population without secure access to land, and large-scale rural unemployment, while at the same time significant swathes of arable and previously cultivated land stands idle.³²

III. Research Methodology

Information for this analysis comprised rapid rural appraisal (RRA) fieldwork in rural and urban Sierra Leone for two months; analysis of current and pending legislation; and a review of the academic, UN, donor, and Sierra Leone government literature. Fieldwork took place during June and July of 2005, and involved rural areas in all provinces of the country and the larger urban locations of Freetown, Bo, Kenema, and Kabala. Fieldwork data collection involved semi-structured key informant interviews with 83 individuals and groups representing landowning lineages, dislocatees, migrants, youth groups, women’s groups,

²⁷ P Richards, K Bah, J Vincent, J. ‘Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone’ (Report) (2004) Social Development Paper No 12, World Bank; O Alterman and others, ‘The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002’ (2003) (Report) National Forum for Human Rights, Freetown, Sierra Leone.

²⁸ P Richards, K Bah, J Vincent, J. ‘Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone’ (Report) (2004) Social Development Paper No 12, World Bank.

²⁹ K Hussein, & D Gnisci, *Land, Agricultural Change and Conflict in West Africa: Regional Issues from Sierra Leone, Liberia, and Cote d’Ivoire, Phase I: Historical Overview* (Sahel and West Africa Club / OECD, Issy-Les-Moulineaux, France 2005).

³⁰ P Richards, K Bah, J Vincent, J. ‘Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone’ (Report) (2004) Social Development Paper No 12, World Bank, i.

³¹ K Hussein, & D Gnisci, *Land, Agricultural Change and Conflict in West Africa: Regional Issues from Sierra Leone, Liberia, and Cote d’Ivoire, Phase I: Historical Overview* (Sahel and West Africa Club / OECD, Issy-Les-Moulineaux, France 2005); along with Richards, K Bah, J Vincent, J. ‘Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone’ (Report) (2004) Social Development Paper No 12, World Bank; and D Keen, ‘Greedy Elites, Dwindling Resources, Alienated Youths: The Anatomy of Protracted Violence in Sierra Leone’ (2003) IPG 67.

³² JD Unruh, & H Turray, ‘Land Tenure and its Relationship to Food Security and Investment in Postwar Sierra Leone’ (Report) (2005) FAO Rome.

refugees, ex-combatants, agricultural officials, ministerial officials, chiefs, elders, rural planning officials, land and property survey personnel, customary and state local court officials, academics, donors, UNAMSIL, and the formal banking and legal establishment.

Such an RRA approach to fieldwork is one of the most appropriate in fluid socio-political field conditions which preclude more stable, structured methods.³³ Information collected from the 83 interviews was analyzed with a text analysis approach.³⁴ The laws and associated legal texts examined include: The National Lands Policy; The Commercial Use of Land Act; The Lands Commission Act; the Local Government Act; The Local Courts Act; The Legal Practitioners Act; The Sierra Leone Constitution; The Report to the Chaytor Committee – Restitution; The Law Reform Commission Annual Report; The Food Security Framework for Sierra Leone; The Lomé Peace Accord; The Draft Land Policy; and the Impact of the Draft National Land Policy on Urban Development in Sierra Leone.³⁵

IV. Land Tenure – Background

While statutory tenure prevails in the capital Freetown and the Western Area of the country, most rural land in Sierra Leone is held customarily by landowning families (lineages) who are able to trace their ancestry to early pre-colonial arrivals in the area.³⁶ This duality in tenure is acknowledged in the current legislation, the National Lands Policy, as having existed since the colonial era.³⁷ The lineages are attached to a chieftaincy structure that plays a significant land administrative and custodian role.³⁸ According to this structure there is no rural land in the country that does not reside within a chiefdom, and therefore not subject to customary tenure, with the exception of the small 'Western Area' where

³³ e.g. M Plunkett, 'Reestablishing the Rule of law' in G Junne and W Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner, Boulder 2005).

³⁴ S Titscher and others, *Methods of Text and Discourse Analysis* (Sage, London 2000); CW Roberts, *Text Analysis for the Social Sciences: Methods for Drawing Statistical Inferences From Texts and Transcripts* (Lawrence Erlbaum Associates, Inc., Mahwah, NJ, USA 1997).

³⁵ National Lands Policy 2005; Commercial Use of Land Act, 2004; The Lands Commission Act 2005; The local Government Act 2004; Local Courts Act 2003; The Legal Practitioners Act 2000; The National Constitution of Sierra Leone 1991; DED Chaytor, and others, 'Report to the Chaytor Committee – Restitution' (Report) (2003); Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004); Ministry of Agriculture, Forestry and Food Security (MAFFS), 'Food Security Framework for Sierra Leone' (Report) (2005); Lomé Accord - 7 July 1999, Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone 1999; A Renner-Thomas, 'Background and Main Features of the Draft Land Policy' Workshop - Draft National Land Policy, Freetown, August 16-19, 2004; I Njai, 'Impact of the Draft National Land Policy on Urban Development in Sierra Leone' Workshop - Draft National Land Policy, August 16-19, 2004.

³⁶ National Lands Policy 2005; Colonial indirect rule provided strong legitimacy and precedent for linking lineage membership and authority to land rights within customary communities in West Africa, e.g. S Berry, 'Privatization and the Politics of Belonging in West Africa' in R Kuba and C Lentz (eds), *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006).

³⁷ National Lands Policy 2005.

³⁸ P Richards, K Bah, J Vincent, J. 'Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone' (Report) (2004) Social Development Paper No 12, World Bank; JD Unruh, & H Turray, 'Land Tenure and its Relationship to Food Security and Investment in Postwar Sierra Leone' (Report) (2005) FAO Rome.

Freetown is located. The 149 chiefdoms in the country vary in size, and boundaries can be ill-defined, or in some form of dispute.³⁹ Landowning lineages are attached to particular areas within a chiefdom and each chiefdom can contain several such lineages. And while there are chiefs at different administrative levels, the Paramount Chief is particularly important in land issues and no significant land matters in a chiefdom are final unless the Paramount Chief approves.

In this context the chief has an important role in dealing with postwar return, reintegration, and (re)settlement issues regarding land. 'Strangers' (those not from a particular chiefdom, including migrants, tenants, the internally displaced, refugees, ex-combatants, and foreigners) comprise 20-40 percent of chiefdom populations⁴⁰ and may be allowed access to lands on an annual basis by landowning lineages. The temporary occupants are required to pay a token quantity of their crop yield to the landowning family to acknowledge that the land does not belong to them, in an attempt to forestall future claims.⁴¹ Such claims are further discouraged by prohibitions against strangers planting economic trees or making other improvements to the land they are temporarily given access to. These prohibitions, in aggregate, have an impact on national level food security, investment, and economy. In some chiefdoms, the prohibition against improvements may be lifted for strangers who locate in the area, marry locally and have children, and otherwise signal a long-term intent to stay. In other chiefdoms a stranger never ceases to be a stranger, and in still other chiefdoms strangers are not allowed to settle at all due to fears that they will attempt to claim land they are temporarily given.

Customary law regarding land is unwritten in Sierra Leone, apart from general reference to it within formal legislation. However a significant legal point is that customary law is enforceable in statutory court.⁴² This is why a lessee or purchaser of land under statutory law (including commercial investors) must contend with the customary (lineage) 'offense' feature of any rights transfer, whereby the security of the agreement remains in effect as long as customary law, society, individuals, and groups are not offended; with the nature of such offenses undefined, undocumented, changeable, and variable across different chiefdoms. Such legal control over the fate of statutory land transfer agreements, particularly with commercial interests not native to the chiefdom or to Sierra Leone, and involving significant money and land, presents a serious constraint to investment, economy and reconstruction.

From the lineage perspective the retention of such a feature (offense) acts as a form of insurance in order to avoid disadvantage. This can be seen as a response to a history of a weak and corrupt formal legal system where recourse against transgressions in an agreement were not possible, together with

³⁹ National Lands Policy 2005; M Gamanga, 'Land management in Sierra Leone' (2004) unpublished document, Paramount Chief, Simbaru Chiefdom, Kenema District.

⁴⁰ R Salazar, "Mission Report, Sierra Leone, Assessment of the Agrarian Situation' (2004) United Nations Food and Agriculture Organization, Rome.

⁴¹ The reluctance on the part of the lineages to making an economic renting arrangement that is binding, is to avoid having to make agreements that will prevent the easy retaking of lands. Thus granting extremely insecure temporary land access and evicting 'strangers' is an ongoing process.

⁴² Statement by Peter Tucker, Director, Law Reform Commission, Sierra Leone (Personal communication 2005); Local Courts Act 2003.

instability during and after the war. The prospect of legally removing such a feature is not high, particularly as long as other forms of tenure security (particularly formal legal tenure security) are not effective or available for many in the customary sector.

There exists in customary Sierra Leone a strong notion of the fundamental inalienability of land regarding the landowning lineages. The belief that land exists for the dead, the living, and the unborn (within the lineage), and so cannot be permanently alienated, is a significant feature of landholding in rural Sierra Leone – as it is elsewhere in West Africa⁴³ – and strongly influences current land tenure. As a result land transfers to outsiders are problematic, although they are attempted, and the idea that most or all members of a lineage need to agree to any transfer is strong. In its extreme form (which was encountered in the fieldwork), it is impossible to get all family members together to agree to a transfer, because most of them are not yet born. In such a situation, any transfers that are made can easily be cast as illegitimate and the land reclaimed.

A large part of the inalienability concept in Sierra Leone has to do with the way land as an asset functions for customary landholders, and the distinction between this and the way money or other assets function. The reality that land outlives all owners and occupants, and that it, 'keeps on giving' (keeps producing crops, grazing, timber, minor forest products, agroforestry, extraction, etc.) over time, is a primary feature of the asset. Thus regardless of how poor the agricultural season, or the occupants, there is an important 'element of continuation' regarding how land functions over generations, that is fundamental to food and personal security, livelihood, and identity. Selling land, essentially trading land for cash, is a fundamental change in the nature of the asset possessed. Land 'keeps on giving,' cash in rural Sierra Leone, does not. Opportunities for investing cash to enable an asset to grow or continue to provide over time are virtually non-existent in rural areas for farmers, and require a different set of skills, which very few farmers possess particularly after a long war. Thus unlike other assets (cash, a vehicle, a shop, or even a job), all of which can at some point in time be 'finished,' land is never finished in the same way, and so keeps on providing. That a large amount of this land asset is 'banked' by the lineages (possessed but uncultivated, unrented, and unsold) is important for groups that have come out of an extremely unstable and insecure period, but problematic for national level food security and economic recovery.

While the concept of selling land can exist in rural Sierra Leone, it is significantly different than the Western concept involving permanent and exclusive transfer of all rights. Lentz⁴⁴ articulates the difficult aspects of selling land in West Africa, "the questions of who has the authority to transfer what rights and over which parts of a given property, who are the legitimate recipients

⁴³ S Berry, 'Privatization and the Politics of Belonging in West Africa' in R Kuba and C Lentz (eds), *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006); R Marshall-Fratani, 'The War of 'Who is Who': Autochthony, Nationalism, and Citizenship in the Ivorian Crisis' (2006) 49 ASR 9; SO Eboh, *Inalienability of Land and Citizenship in the African Context*. (IKO Verlag für Interkulturelle Kommunikation, Frankfurt 2005).

⁴⁴ C Lentz, 'Land Rights and the Politics of Belonging in Africa: An Introduction' in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006, p. 23)

of transferred rights, and the nature of the rights transferred, and the temporal dimension of the transfer” remain unresolved for the lineages and chiefdoms. Thus there are ongoing demands by the seller’s fellow lineage members, which often results in retaking land. And while some analyses suggest that more individualized rights to land is a growing phenomenon in West Africa, a closer look reveals this to be the case primarily within the lineage, and much less so with outsiders.⁴⁵ Recent studies also show that when more individualized rights to land become increasingly common within the lineage, it is here where sanctions against the rights of individuals to transfer land to outsiders without consulting holders of allodial title or lineage heads, are most strongly evoked.⁴⁶

One of the most difficult issues is intergenerational and intra-family conflict regarding land sales, as the West African customary concept comes into contact with the Western understanding. It is in particular young men who seek to invoke fairly powerful arguments on the pre-eminence of nativeness more than the older generation.⁴⁷ The bitterness of such confrontations between generations is often severe.⁴⁸ This is an important aspect of postwar Sierra Leone.

While it might seem counter-intuitive that young men who were disenfranchised from the customary system due in-part to problems over land, and who experienced significant disruption in livelihoods due to the war and their part in it, would attempt to reinvigorate customary tenure practices, it is important to consider the context. Such disenfranchised youth never experienced the benefits of an effective, legitimate statutory tenure system, given that the system was not operating during the 11 year war, and was debilitated and corrupt prior to the war. In addition land sales to outsiders are seen both as a process of excluding youth from land they might otherwise have legitimate customary claim to, and as a feature of the less than legitimate formal tenure. Such a scenario is important to postwar land tenure in the country in two ways.

First, that disenfranchised youth seek to reattach themselves to customary tenure constructs is a positive development for a segment of the population who would otherwise be attached to no other property rights rule system, and who comprise a potentially unstable element in Sierra Leone’s postwar landscape. Second, such a phenomenon underscores the importance of aligning new land

⁴⁵ C Lentz, ‘First Comers And Late Comers: Indigenous Theories of Land Ownership in the West African Savanna’ in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006).

⁴⁶ S Hagberg, ‘Money, Ritual and the Politics of Belonging in Land Transactions in Western Burkina Faso’ in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006); C Lund, ‘Who Owns Bolgatanga? A Story of Inconclusive Encounters’ in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006); C Lentz, ‘First Comers And Late Comers: Indigenous Theories of Land Ownership in the West African Savanna’ in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006).

⁴⁷ (Lentz 2006a; Hagberg 2006)

⁴⁸ It has been argued that such a desire for having land remain in lineage possession is a manifestation of the quest for greater security, particularly after a war and in a context of deterritorialization, homogenization, and the arrival of migrants, e.g. A Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minneapolis Press, Minneapolis 1996); C Lentz, ‘Land Rights and the Politics of Belonging in Africa: An Introduction’ in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006).

policy and laws to postwar customary tenure, and assessing how these will interact.

V. Legislative Reform and Customary Rule of Law

Land laws in Sierra Leone

The land policy reform currently underway in Sierra Leone is the first time in the history of the country that a comprehensive land policy is being formulated.⁴⁹ Prior to this a range of statutes (some over 100 years old), together with a significant quantity of received legislation (from England), along with legal instruments and customary practices as applied through the customary court system constituted an *ad hoc* tenurial approach for the country.⁵⁰ While most of the national laws date from the 1960s, legislation passed in the colonial era remain in force without reform even though similar laws in England have undergone substantial reform or have been repealed.⁵¹ One of the older laws is The Statutory Declarations Act of 1835, whose use continues and is the source of much current litigation regarding land.⁵² The primary pieces of legislation in Sierra Leone's current land law reform efforts are, The Land Policy, The Land Commission Act, and The Commercial Lands Act. Secondary pieces include, The Local Government Act, The Chaytor Commission-Restitution, and The Local Courts Act. All are new. The landowning lineages and populations in the chiefdoms are aware of newly emerging legislation, and a number of chiefs were asked for their input.

However, these actors have significant concerns regarding the outcome of the new legislation, how it will intersect with customary law, and how land rights will be impacted.⁵³ The land restitution issue in Sierra Leone is quite contentious, to the degree that a special committee was formed directly under the President to review properties confiscated by the government (under different regimes) for the period 1968 (just after independence) to 1993.⁵⁴ This work has been made significantly difficult given the large-scale destruction of documents during the war in both urban and rural areas, together with a "rush for restitution".⁵⁵ The creation of this committee was among the first efforts of the postwar government with the end of the war in 2002.

The reason for the attention given to resolving restitution issues quickly after the war was explicitly to promote reconciliation and national unity.⁵⁶ In an

⁴⁹ National Lands Policy 2005.

⁵⁰ National Lands Policy 2005.

⁵¹ National Lands Policy 2005; Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004).

⁵² National Lands Policy 2005.

⁵³ O Alterman and others, 'The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002' (2003) (Report) National Forum for Human Rights, Freetown, Sierra Leone, remark that a priority for the country after the war is for policy-makers to gain an understanding of the informal legal regime as it currently exists in Sierra Leone, particularly the customary law in which people live their daily lives.

⁵⁴ DED Chaytor, and others, 'Report to the Chaytor Committee – Restitution' (Report) (2003).

⁵⁵ National Lands Policy 2005, vi.

⁵⁶ DED Chaytor, and others, 'Report to the Chaytor Committee – Restitution' (Report) (2003).

operational sense this occurs because restitution is often regarded as the first step in acknowledging the legitimacy of latent land and property rights claims that emerge from a variety of legalities after a war.⁵⁷

There has been a profound lack of authoritative interpretation regarding the rules of customary law in the country, and according to the Law Reform Commission this is the primary reason why customary law has not responded and adapted to the social and economic changes which have taken place in the country and the world.⁵⁸ As a result, customary laws in Sierra Leone “have remained largely in their primeval state”,⁵⁹ with each of the 300 customary courts interpreting law according to the traditions and mores of the tribal community within its jurisdiction and with little exposure to other interpretations.⁶⁰ Tucker⁶¹ notes that “[t]he totality of the law of Sierra Leone is therefore archaic and in some cases contradictory, making access to justice difficult and the outcome unpredictable.”

Emergent informal rule of law systems

After the war a number of informal micro rule of law systems involving land tenure emerged in the country. Primary among these are: disenfranchised youth, chiefs, strangers, lineage members, women’s groups, internally displaced persons, refugees, and ex-combatants. Disputes involving access to land between some of these groups has created significant animosity in some areas of the country. Alterman et al⁶² note for example that animosities between the large numbers of ex-combatants and returnees in Sierra Leone created significant tension, particularly in Kailahun District (bordering Liberia, and a former RUF stronghold), and that this latter location is where the conflict could restart. As well animosity over land continues to varying degrees between disenfranchised

⁵⁷ (e.g. S Bagshaw, ‘Property Restitution for Internally Displaced Persons: Developments in the Normative Framework’ in S Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, Ardsley; T Rempel, ‘Housing and Property Restitution: The Palestinian Refugee Case in S Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, Ardsley NY 2003); L Jones, ‘Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda Case in S Leckie (ed) *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational Publishers, Ardsley NY 2003); Centre on Housing Rights and Evictions (COHRE), 2006 *The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (Geneva);

⁵⁸ Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004)

⁵⁹ Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004, 2.

⁶⁰ Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004).

⁶¹ Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004, 2)

⁶² O Alterman and others, ‘The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002’ (2003) (Report) National Forum for Human Rights, Freetown, Sierra Leone.

youth and the chieftain structure, and between the lineage landholders and disenfranchised youth, strangers, women's groups, and displaced persons. Much of the problem regarding the landholding lineages stems from the way they manage land with regard to other groups, driven by their own tenure insecurity.

For the landholding lineages, a fear of permanent claim by strangers has been significantly enhanced after the war due to a combination of the lack of a legitimate, enforceable legal structure; chaotic postwar tenurial features; and the direction the peace process has taken with regard to previously marginalized groups. Of particular significance is the latter. The broad sensitization and empowerment efforts of the UN peace process, together with the disruptive, power shifting effects of the war, has enabled certain previously marginalized and under-represented groups within rural society to now have a much greater voice, and have their demands considered. Such groups constitute some of the same emergent micro rule of law systems noted above.

Radio broadcasts by UNAMSIL and NGOs discussing human rights, land rights, new laws, roles and responsibilities of chiefs and government, elections, and voting, are very popular and facilitate awareness among these groups; to the degree that they can now draw the attention of important actors in the peace process (donors, NGOs, UNAMSIL) regarding perceived violations of rights regarding land.⁶³ The Paramount Chiefs note that the voice of such groups is much stronger subsequent to the war, and that they are now obliged to pay attention to these.

Thus, the change in social relations that has occurred between these marginalized groups and the power structure (chiefs, landowning lineages, the state), together with the large presence of the international community in the country, provide the recognition that previously marginalized groups now have access to recourse outside the district, lineage, and chiefdom, thus solidifying their formation as informal rule of law systems. While the position of the Paramount Chiefs after to the war has returned, the position of certain previously secondary groups has strengthened. One chief mentioned that "the minds of the people have changed as a result of the war" and this was echoed by other chiefs. "They demand things, they confront you, they have less respect" indicated another chief.

The enhanced position of these groups has provided the opportunity for them to exercise greater rights regarding land. This is encouraged by the rural presence of NGOs, donors, and donor funded organizations which advocate for such groups, and in a number of cases are able to obtain land access on their behalf. Such a situation combines with chaotic postwar tenure features to produce greatly increased tenure insecurity for landholding lineages.⁶⁴ The result

⁶³ also C Lentz, 'Land Rights and the Politics of Belonging in Africa: An Introduction' in R Kuba and C Lentz (eds) *Land and the Politics of Belonging in West Africa* (Brill Press, Boston 2006).

⁶⁴ Such features include, land encroachments; illegal acquisitions; destruction and falsification of documents; illicit sales and registrations multiple times over the same land; improper survey practices; indeterminate local state authority; poor consultation, coordination and cooperation between private, customary, and state sectors; postwar movements of populations across international, regional, and chiefdom borders; the establishment of unauthorized settlements; and unregulated mining and manufacturing activities, e.g. National Lands Policy 2005; M Gamanga, 'Land management in Sierra Leone' (2004) unpublished document, Paramount Chief, Simbaru Chiefdom, Kenema District.

has been a greater reluctance to allow strangers onto lineage held land for fear that they will now have a greater ability to permanently claim such lands. This situation reinforces the connection between improvements or investments made to land by strangers (even occupation of the same land for more than one year) and the perception that such improvements are, or might become, forms of evidence for permanent claim.

As a result, land is held increasingly tightly by landowning lineages and secure access is broadly denied to strangers. The stranger tenure insecurity, however, is of a different form than what the landowning lineages experience. For strangers the insecurity involves the fear of being capriciously and quickly evicted off land to which temporary rights have been granted. The distinction between the forms of tenure insecurity for these two groups (those who own land, and those who seek temporary rights of access) while perhaps subtle, is important because they interact to aggravate each other. Not only does insecurity on the part of the lineages cause insecurity on the part of strangers, but if the tenure security of strangers were increased prior to an increase in the tenure security of landowning lineages (which is the direction the situation is headed under the peace process), the result would be to discourage the lineages from granting access to strangers in the first place.

The overall effect of the two types of tenure insecurity is a clustering of postwar rule of law tenure systems into three general agendas, 1) the customary lineage landholders, together with the chiefs, seek to retain control of their land in the face of greater tenure insecurity, by denying secure access to strangers; 2) previously marginalized groups emergent as a cluster of postwar informal rule of law systems who seek to increase land access and tenure security by using their enhanced position in the peace process to attempt to claim lands; and, 3) those most connected to formal law (government, donors, commercial interests foreign and national) who seek to increase land access and tenure security for investment purposes.

New legislation and informal rule of law: constraints and opportunities

Constraints: privatization

The National Lands Policy articulates the urgent need for a more coherent approach to land administration after the war.⁶⁵ An important positive feature of the Policy is that it intends to increase the tenure security of the landholding lineages thereby reducing the need to retain the capricious 'offense' feature in land rights transfers. An attempt to outlaw the offense feature without offering other forms of security or recourse would likely result in a further decrease in providing land access to strangers, and an increase in the disjunction between customary and formal tenure. In this sense the interaction between the postwar Lands Policy and postwar customary law is fairly innovative, realistic, and will likely have positive outcomes. The provision of such tenure security by the Lands

⁶⁵ National Lands Policy 2005.

Policy however also prevents the privatization of lands. In this regard the relevant parts of the Policy include:

1. [E]ffectively protect the rights of landowners and their descendants from becoming landless or tenants on their own land;⁶⁶
2. Discourage the outright sale of land;⁶⁷
3. No ownership of any communal or family land can pass to any individual, nucleated family or descendants of the individual, who by customary practice holds that land in trust for the community or family, other than what any other member of the land holding community is entitled to, and in accordance with the customary practices and usages of the particular community and guidelines of the appropriate Local Authority.⁶⁸
4. [A]s much as possible land disposal or acquisition of any kind for all types of land uses should not render a land title holder, his kith and kin and descendants completely landless or tenants on the land to which they originally had legitimate title, save in the case of compulsory acquisition in the public interest.⁶⁹

In this context, it is worth noting that customary land ownership is equal to title in the Policy. As well the above language of the Policy appears to support the inalienability of land with regard to the landowning lineages, and the role of lineage descendants in claiming rights to land. In so doing the evolution toward freehold tenure and a land market in the rural areas is overtly discouraged. Such formal legal alignment with customary land inalienability has served to gain much needed support for the postwar Lands Policy from the powerful landholding lineages, which is important given the extremely limited enforcement capacity of the state, and the fragile postwar socio-political and socio-legal environment.

Opportunity: forms of conveyance

In supporting the inalienability of land, the postwar legislation seeks to address the 'element of continuation' to which customary landholding lineages attach great importance. However, to both support the element of continuation and at the same time fully explore opportunities for pursuing a range of postwar land access goals involving commercial investment, the legal framework for such opportunities would ideally need to mimic the way land functions within the element of continuation in customary society. The set of postwar legislation is attempting a significantly difficult task – connecting formal and customary land tenure (problematic enough normally in Africa) while attending to the overall goals of both in a postwar setting. The current land legislation seeks to use

⁶⁶ National Lands Policy 2005, 7.

⁶⁷ National Lands Policy 2005, 7.

⁶⁸ National Lands Policy 2005, 11.

⁶⁹ National Lands Policy 2005, 12.

innovative forms of 'conveyance' to achieve this. By placing greater attention on tailored forms of conveyance and less attention on formal law, significant potential for innovation is possible in connecting formal and informal tenure.

The formal Western legal notion of conveyance is the transfer of a right to another, but under a very wide variety of concepts, conditions, and circumstances.⁷⁰ The distinction between land law and land conveyance is that the law deals with legal rights in land, whereas land conveyancing transfers rights and interests in land. In other words, legal concepts about property reside in law, but the mechanics of applying the concepts is what constitutes conveyancing.⁷¹ It is this intersection of law with tenurial reality, or the different ways of actually implementing property rights concepts, that is of utility in the current context. In formal Western legal systems a 'conveyancer' is charged with the construction and derivation of different ways for creating and transferring interests in land, and to ensure that the party who makes the transfer is in secure ownership.⁷² Deriving a mechanism for conveying a right is what will delineate or specify a right in land. And it is here where the opportunity resides. The creation of a 'right in land' is important given that freehold (all rights in land) does not exist in a transferable sense outside the lineage in most of rural Sierra Leone. The Western Area, including Freetown, is the exception, where freehold titles can be conveyed.

There are many different types of conveyance, each of which can be interpreted and applied in a variety of ways.⁷³ Kenya, earlier in its history, has had some successful experience in this regard.⁷⁴ Thus one advantage of focusing on conveyances in the postwar legislation is that the variety and flexibility of different forms of conveyance is an important fit with the fluidity of postwar land tenure; and the delineation of specific (but not all) rights also engages the customary element of continuation and land inalienability.

While various forms of interest in land can be conveyed, including conditional conveyance, innocent conveyance, and voluntary conveyance, of particular interest is what is known as 'mesne conveyance'. This is an intermediate transmission of rights in a chain of rights provision between the first grantee and the present rights holder.⁷⁵ Thus a mesne landholder is able to convey rights to tenants, but the landholder is also accountable to a superior landholder. This is similar to the customary law arrangement in rural Sierra Leone whereby individuals and families within lineages can provide certain rights of use and access to 'strangers', but the individuals and families are themselves accountable to the lineage and Paramount Chief. Thus in this regard some rights

⁷⁰ BA Garner, *Black's Law Dictionary* (West Group, St Paul, USA 2000); PL Onalo, *Land Law and Conveyancing in Kenya* (Heineman, Nairobi 1986, 7); EH Burn, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, Oxford, UK 2005).

⁷¹ PL Onalo, *Land Law and Conveyancing in Kenya* (Heineman, Nairobi 1986).

⁷² WG Robillard, DA Wilson, CM Brown, *Evidence and Procedures for Boundary Location* (Fourth Edition, John Wiley and Sons, New York 2002); PL Onalo, *Land Law and Conveyancing in Kenya* (Heineman, Nairobi 1986).

⁷³ BA Garner, *Black's Law Dictionary* (West Group, St Paul, USA 2000); WG Robillard, DA Wilson, CM Brown, *Evidence and Procedures for Boundary Location* (Fourth Edition, John Wiley and Sons, New York 2002); GW Robillard and DA Wilson, *Brown's Boundary Control and Legal Principles* (Fifth Edition, John Wiley and Sons, New York 2003).

⁷⁴ PL Onalo, *Land Law and Conveyancing in Kenya* (Heineman, Nairobi 1986).

⁷⁵ BA Garner, *Black's Law Dictionary* (West Group, St Paul, USA 2000).

can be provided by individuals and families, but others fall within the control of the Chief. This is also similar to the legal concept of senior, equal, or junior rights which also are common in forms of conveyancing.⁷⁶

Another useful form of conveyance is a 'ground lease' whereby any improvements built by the tenant revert to the lessor.⁷⁷ In this regard planting economic trees or making other improvements on land cannot be used as a claim on the land by the tenant. Such examples from English law, serve to illustrate that there can be conceptual similarities between forms of English law and customary law in Sierra Leone, and that these can be of utility in connecting formal and customary law.

An additional useful form of conveyance in the current context is a license. While a leasehold creates a proprietary interest in land whereby use of the land is exclusive (including exclusion of the landlord(s)), a license holder in the Western legal definition only has the right to use the land for particular purposes and no right to exclude the current or previous inhabitants.⁷⁸ The issue of whether an exclusive right to occupy and use land has been granted is the test of whether such a right is characterized as a lease or a license.⁷⁹ Such licensing is mentioned here because it may offer some potential for addressing certain problems stemming from the interaction of customary and formal law in Sierra Leone, where non-exclusionary and rights-specific forms of land resource exploitation are needed.

Postwar Mozambique has experienced some success with this form of conveyance. In an approach called the 'open border model,' legal recognition of the customary boundary around a community and the rights of community members within the boundary are guaranteed. But the open character of the boundary encourages commercial investors to locate within such a boundary.⁸⁰ In such a construct land within a community boundary is occupied and used by a local community, and also exploited by a commercial investor through a secure transfer of specific rights, but not the right to exclude the customary landholders.⁸¹

Leasing is also an important form of conveyance, and the concept of leasehold has been extremely flexible and useful in facilitating a separation between the ownership of land and the use of land.⁸² Most fundamentally leasehold creates a 'proprietary interest in land.' But significantly relevant to Sierra Leone, the landlord retains what is known as 'the right of reversion,' whereby at the termination of a lease for whatever reason, full rights are returned.⁸³ This is essentially what the landholding lineages in Sierra Leone

⁷⁶ WG Robillard, DA Wilson, CM Brown, *Evidence and Procedures for Boundary Location* (Fourth Edition, John Wiley and Sons, New York 2002).

⁷⁷ BA Garner, *Black's Law Dictionary* (West Group, St Paul, USA 2000).

⁷⁸ J Stevens and RA Pearce, *Land law* (Sweet and Maxwell, London 2000).

⁷⁹ J Stevens and RA Pearce, *Land law* (Sweet and Maxwell, London 2000).

⁸⁰ JD Unruh, 'Property Restitution Laws in a Post-War Context: The Case of Mozambique' (2005) 3 AJLS 147; C Tanner, 'Law-Making in an African Context: The 1997 Mozambican Land Law'. FAO Legal Papers Online No. 26, March 2002.

⁸¹ C Tanner, 'Law-Making in an African Context: The 1997 Mozambican Land Law'. FAO Legal Papers Online No. 26, March 2002.

⁸² J Stevens and RA Pearce, *Land law* (Sweet and Maxwell, London 2000).

⁸³ J Stevens and RA Pearce, *Land law* (Sweet and Maxwell, London 2000).

currently seek to do with strangers – creating or seeking reasons for a quick forfeiture of temporary rights in order to retain the right of reversion. But because formal law previously did not allow for the effective retention of the right of reversion in a lease, the lineages seek to retain such a right on their own, by prohibiting the planting of trees and making other improvements, by requiring that tenants move off, or re-beg land annually, and by inventing ‘offenses’ through which the right of reversion is exercised – the only way to be assured that the right still exists.

That the promotion of leasing in the Commercial Use of Lands Act seeks to strengthen the right of reversion for the landholding lineages may seem counterintuitive, given that the lineages already go to great lengths to retain this right, with considerable negative repercussions on tenancies, land access, reintegration and food security. The problem however is how the security of this right is retained.

Leasing arrangements are much preferred over selling land by all chiefs and landowning lineage members engaged in the research. That lease payments provide money over time is secondary to other aspects of a lease arrangement that may provide for livelihoods over time as land does. Thus, while the notion of periodic payments in a leasing arrangement can be one aspect of the ‘element of continuation,’ money in particular is unlikely to benefit the number of people who, due to their membership in the landowning lineage, may later attempt to annul, claim, or enter into a dispute with one or more parties to a lease.

During the course of the fieldwork a pervasive desire was expressed by both chiefs and elders of landholding lineages to have additional tangible features of a conveyance engage the ‘element of continuation’ in ways that robustly benefit the broader lineage over the long term (as land does) even if the inclusion of such features meant a reduction in periodic monetary payments. Items mentioned that would parallel the element of continuation function of land include: hiring and training local workers, investor – smallholder relationships regarding mechanization and processing of agricultural products and other out-grower arrangements, schools, health clinics, extension services, a proportion of the earnings of the business, roads, wells, medicines, veterinary services, piped water supply, teachers, and new seed varieties—in other words, local development. Some items on this list function in a relationship to land so as to upgrade the asset nature of land for the lineages. Items such as training, agricultural extension, new seed varieties, roads, water supply, etc., are essentially investments in the people-land relationship which makes a land asset more valuable over time, and more able to provide over time. Such features of ‘continuation’ and benefit for a lineage or community, is particularly useful in engaging the prospect of a lineage member appearing after the lease agreement and claiming they do not receive benefits.

But such features of continuation perform another important function, in that they serve to keep leasing arrangements binding. Different than a one-time signature on a document to make an agreement binding, leasing arrangements in rural Sierra Leone need to be maintained in a customary context by ongoing forms of relationship between the lineage and the tenant – regardless if the tenant is a smallholder ‘stranger’ or a commercial investor. For the customary

sector the existence of such features of continuation are in a very real sense obligations by the tenant. In this regard land transfers in Sierra Leone are very much like the analogy used by Guadagni⁸⁴ in describing how such transfers in Africa are not an economic transaction, but instead a social transaction. Such that “the customary right to land is like the modern right to vote: foreigners may not buy it in any other way than by acquiring citizenship”,⁸⁵ and by implication the obligations of citizenship. Such obligations connected to acquiring the right to vote do not cease once the right has been acquired.

The Commercial Use of Land Act promotes innovative, flexible conveyancing arrangements. The Act seeks to engage the inalienability concept, including its operational aspects within customary law. Thus while the need to “consult the members of the family” is clear in the Act⁸⁶ the meaning of ‘consult’ and ‘family members’ is purposefully left legally undefined and therefore open to interpretation.⁸⁷ The Act acknowledges that there is no realistic departure from the involvement of lineage members in any land transaction (including leases), such that embodying this customary ‘involvement’ within formal law may contribute to the tenure security of landowning lineages. The bill positions the issue of a lineage member turning up subsequent to a lease agreement to claim land or compensation, as a matter between the claimant and the lineage leadership, and not between the claimant and the leaseholder, which was the case prior to the new law. While such a claimant could benefit from any group based ‘continuation’ features of a lease, this nonetheless puts any dispute within the domain of customary law and dealt with in customary court. However these courts are viewed with considerable distrust with regard to objectiveness, fairness, and legitimacy.⁸⁸ Thus while this may be an efficient legal arrangement given that the local courts are the most institutionalized entity of customary law in the country,⁸⁹ it may nonetheless contribute to a certain ‘fear of agreement’ by the head of a lineage. This is because the arrangement almost guarantees that a lineage head will need to deal with future disputes in an institutional forum of

⁸⁴ M Guadagni, ‘Trends in Customary Land and Property’ in MES Jordan and A Gambaro (eds) *Land Law in a Comparative Perspective* (Kluwer Law International, London 2002).

⁸⁵ M Guadagni, ‘Trends in Customary Land and Property’ in MES Jordan and A Gambaro (eds) *Land Law in a Comparative Perspective* (Kluwer Law International, London 2002, 9).

⁸⁶ Commercial Use of Land Act, 2004.

⁸⁷ Statement by Peter Tucker, Director, Law Reform Commission, Sierra Leone (Personal communication 2005).

⁸⁸ See also P Richards, K Bah, J Vincent, ‘Social Capital and Survival: Prospects for Community-Driven Development in Post-Conflict Sierra Leone’ (Report) (2004) Social Development Paper No 12, World Bank. Because these local courts deal with land issues (and this responsibility will increase with the new Land Policy, Land Commission Act, and Commercial Use of Land Act) their legitimacy is fundamental to tenure security. Whether this increased responsibility and activity will aggravate or mitigate the legitimacy and effectiveness problem with the local courts, and hence affect tenure security for the lineages remains to be seen. While, O Alterman and others, ‘The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002’ (2003) (Report) National Forum for Human Rights, Freetown, Sierra Leone, finds the potential and pervasiveness of the local courts promising, considerable transparency and capacity are required to take on the role that the Commercial Use of Land Act envisions.

⁸⁹ O Alterman and others, ‘The Law People See: The Status of Dispute Resolution in the Provinces of Sierra Leone in 2002’ (2003) (Report) National Forum for Human Rights, Freetown, Sierra Leone.

questionable legitimacy and effectiveness, if the benefits of a lease are not sufficient to forestall such claims.

A related form of this fear can come about due to the binding nature of leasing agreements. From a customary perspective such agreements can have the effect of reducing livelihood options, i.e., reducing the possibility of retaking and using land in livelihood support options, particularly in difficult times. This is connected to the uncertain socio-political and food security environment, where risk reduction and keeping options open are priorities. The result can be reluctance to engage in a leasing agreement in the first place, or adhere to an agreement over time. The nature of such a fear highlights the need for focusing on aspects of a leasing agreement that can significantly expand livelihood options instead of reducing them.

The Commercial Use of Lands Act also contributes to the tenure security of the landowning lineages through Article 10, 'Reversion of fixtures'.⁹⁰ This article deals with the fate of improvements to lands for both movable and permanent fixtures. The article assigns the legal status of 'fixtures' to items for which compensation is due to the tenant at the end of a lease. Importantly, purposefully planted economic trees are explicitly included in this article. In this regard, trees and any other permanent or semi-permanent fixtures cannot serve as forms of land claim. Thus articles 7 and 8 of the Act describing forms of tenancies (forms of conveyance), together with article 10, appear to provide for a much-needed formal legal detachment between economic trees and land claim by strangers. That forms of rent are also now available (articles 5, 6) that allow the landowner to retake land at the end of a contract, including trees and other fixtures, is important in encouraging landowners to engage in rental contracts without fear that improvements will be used as forms of permanent claim to lands. The idea is that this will encourage landowning lineages to allow more tenants and improvements on their land.

Security of Leases

A particular problem regarding any leasing arrangements between commercial investors and customary landowning lineages is the security of the lease for the investor given that customary law is unwritten. A concern in the government, business, and banking sectors in Sierra Leone is that the successor to any Paramount Chief can choose not to honor a land rights agreement particularly if the succeeding chief is from a different 'ruling house.' "There are always problems with the next chief" indicate members of the National Chamber of Commerce.⁹¹ While the customary communities and chiefs spoken to maintain that such succession is not a problem, customary law remains unwritten and variable across different chiefdoms, and examples of a new chief annulling a lease made by a previous chief do exist.

⁹⁰ Law Reform Commission (LRC) *Law Reform Commission Annual Report 2003*. (Freetown, Sierra Leone 2004).

⁹¹ Statement by Members of the Sierra Leone Chamber of Commerce, Freetown, Sierra Leone (Personal communication 2005).

However, the research revealed that an acceptable approach for all parties is to include an article in the lease agreement that attends to the succession issue, in essence documenting specific customary laws in individual statutory leases. This can be of utility, because again, customary law is enforceable in formal court. Documenting customary law in such a manner opens important possibilities, especially from a legal pluralism standpoint. Thus while the process of documenting all customary land laws for the country would be a significantly large and long-term project, the documentation of specific laws or elements of laws (e.g., succession of chiefs) on an as-needed, lease-by-lease basis at little cost to the state, is quicker and can provide for valuable precedent and legal material for subsequent leasing generally, and for codifying customary law over time and space. Such a process of documentation would also highlight which aspects of customary land laws are most important or most problematic, and hence become included in written leases as a priority.

The tenure security of strangers is also dealt with in the new postwar legislation, albeit in a way that still positions them subject to customary law, but also opens new options. Tenancies in the Commercial Use of Lands Act are dealt with in terms that allow for both a continuation of the current situation of informal year-to-year land access by strangers, as well as a more secure form of conveyance via a lease. Thus the protection of lineage landowners from claim by tenants who do not have a contract is made legal by the Act (right of reversion), as is the ability of customary landowners to evict such tenants at any time (although now only with three months notice).

But the legislation also allows for more secure multi-year tenancy arrangements involving a contract that provides greater security for a tenant. This involves the participation of witnesses, and the Paramount Chief, and allows for the possibility of assigning the interest of the tenancy to another party (subletting) with the permission of the Chieftom Council. Such an arrangement has the potential for creating a transferable 'interest in land' which is seen as an important opportunity by the Law Reform Commission. However, as the Lands Policy states,⁹² while, "[i]nterest in land by virtue of any right contractual or share cropping, or other customary tenancy arrangement, are recognized as legitimate sources of land titles and are to be classified as such",⁹³ this is conditioned on the tenant, "agree[ing] with the land owner to adhere to the covenants and other customary practices governing the disposal of the land" and, "the tenant of land anywhere in Sierra Leone is obliged to respect the customary or common law covenants governing the tenancy of land of which he is a tenant".⁹⁴ The inclusion of such conditions in the Lands Policy, while still (and now formally) subjecting tenants to undocumented customary law, serves a couple of purposes.

First, it adds to the tenure security of the lineages and makes formal law part of this security, which encourages the lineages to support formal law with the potential result that more strangers are allowed onto lineage land. Second, this particular approach to connecting formal and customary law can encourage

⁹² National Lands Policy 2005, 9.

⁹³ National Lands Policy 2005, 11.

⁹⁴ National Lands Policy 2005, 12.

the inclusion of specific customary 'covenants and practices' into the documentation of conveyance agreements in order to provide clarity. But it also invites in the same manner, a statement that purposefully excludes certain customary covenants.

Both inclusion and exclusion aspects are important given, again, that such agreements and customary law are enforceable in formal courts, and thus the making of and participation in such agreements can also be seen as customary practice. Such 'conditioning' of undocumented customary law is also pursued in the Commercial Use of Land Act. Such that while customary conventions and practices need to be adhered to according to the Act, such constructs cannot now include denial of rights based on tenancy arrangements regardless of whether they are connected to contract or custom. Such 'conditioning' is a new and innovative approach to connecting formal and customary tenure.

VI. Conclusions

Postwar land and property rights have proven to be a particularly difficult yet fundamentally important component of peace processes. The socio-political plurality, fluidity, dynamism, and tension which are primary features of land issues in a peace process, present significant challenges. An examination of the Sierra Leone case allows a consideration of important aspects of postwar land tenure, in particular how land and property rights in different legal domains (formal, customary, 'stranger', etc.) can interact after a war.

An examination of the 'internal logic of legalities'⁹⁵ in the case of Sierra Leone reveals important notions that are fundamental to land tenure and peace building. Foremost among these is the logic of the inalienability of land among the customary lineages. In supporting the inalienability of land, the postwar legislation seeks to attend to this logic. Such formal legal alignment with customary logic has served to gain lineage support for the new formal laws. Another important logic internal to the lineages is the element of continuation, which contributes to the inalienability concept in that other assets in rural Sierra Leone do not function the way land does. Thus innovative forms of leasing, and conveyancing, which are able to mimic the element of continuation are much favored by both customary landholders and those working with formal law. It is also important however to understand the internal logic of the other legalities (ex-combatants, disenfranchised youth, dislocatees, etc.) in their quest for tenure security with regard to the lineages.

Connected to the last item is the need to engage what already exists in the legal landscape in order to avoid, to the extent possible, the mismatch between law and reality. The current legislation in Sierra Leone utilizes two approaches in attempting this: (a) bringing important practices of customary tenure into formal law, and then attaching new options to these, and (b) utilizing the formal legal concept of conveyance in exploring formalized land rights opportunities within important customary concepts. These approaches can allow for, among other

⁹⁵ M Blacksell, C Watkins, K Economides, 'Human Geography and Law: A Case of Separate Development in Social Science' (1986) 10 *Prog. Hum. Geog.* 371.

things, tenancies with strangers that were initiated under the tenure insecure practice of offenses and capricious evictions, to evolve into more secure economic transactions. An additional possibility also exists whereby aspects of customary law can be incorporated into leasing on a case by case basis. This can be another way to utilize (and acknowledge) what is already informally in place in the legal landscape, but in new arrangements that can be of particular utility in a postwar context. Such new arrangements can be made legally and realistically operable by the variety and flexibility of different forms of conveyance.

Blomley⁹⁶ comments insightfully and at length on the problems with an over reliance on formal legalistic approaches. This article highlights the particular problems with formal legal enforcement in a post-war land tenure context, and the case of Sierra Leone illustrates the difficulty the state has in relying on such formal enforcement. At the same time there is currently a de-emphasis on legal formalism in some of the social sciences, and a greater emphasis on 'law and society'.⁹⁷ And within law there is a relatively new emphasis on 'law in context' and comparative law, which moves away from formalism and includes forms of customary and informal law.⁹⁸ Such developments are quite positive in moving away from a reliance on legal formalism, particularly in problematic scenarios such as after a war. At the same time, much can be learned by the experience of specific countries and Sierra Leone should be commended for its innovative approaches to the interaction between postwar statutory land policy reform, and the customary and micro rule of law tenure systems which prevail in rural areas.

⁹⁶ N Blomley, 'Text and Context: Rethinking the Law-Space Nexus' (1989) 13 *Prog. Hum. Geog.* 512.

⁹⁷ e.g. O Chase, *Law, Culture and Ritual* (New York University Press, New York 2005); P McAuslan, *Bringing the Law Back in Essays in Land, Law and Development* (Ashgate Publishing, Burlington VT, USA 2003); L Nader, *Law in Culture and Society* (University of California Press, Los Angeles 1997); S Moore, *Law as Process: An Anthropological Approach* (James Currey Press, Oxford, UK 2000).

⁹⁸ e.g. P Selznick, 'Law in Context, Fidelity to Context' Working Paper No. 2. Center for the Study of Law and Society Jurisprudence and Social Policy Program, University of California, Berkeley 2002; S Taylor, 'Introduction' Special Issue: Nationality, Refugee Status and State Protection Explorations of the Gap between Man and Citizen (2005) 22 *LC* 1; W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge UK 2006); M Guadagni, 'Trends in Customary Land and Property' in MES Jordan and A Gambaro (eds) *Land Law in a Comparative Perspective* (Kluwer Law International, London 2002); S Evers, M Spierenburg, H Wels, *Competing Jurisdictions: Settling Land Claims in Africa* (Brill Publishers, Boston 2005).