

Note

The Battle After the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution

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I. INTRODUCTION

Many legal systems around the world fail to protect property rights equally for men and women, leaving women dependent upon their husbands or male relatives to provide housing and land on which to subsist. Women's limited access to property becomes especially damaging in post-conflict

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situations, when women displaced by war try to return to their homes and often find that they have lost any legal access to their former property.

How a post-conflict country addresses housing, land, and property issues in particular can determine “the extent to which peace is sustained, and the degree to which measures of remedial and restorative justice are enshrined within post-conflict political and legal frameworks.”¹ These issues are especially critical because “housing and land [are] two of the very few assets available to people in post-conflict settings.”² Existing international legal protections of housing and property rights are often infringed or disregarded, and the tension that results can spark violence that disturbs the transitional justice process.³

Transitional justice, as one author defines it, is “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”⁴ If transitional justice is conceived narrowly as a means to achieve retribution for the individual victim, then its power to address a broad range of rights is limited.⁵ On the other hand, transitional justice can include a restorative component that includes reparations, and even a redistributive component, one that goes beyond the crime and punishment model to “reconstruct the health, education, housing or other welfare systems”⁶ and to address inequality.⁷ If a new government wishes to transition its society from conflict to “lasting peace,” incorporating a much broader approach than retribution may be necessary.⁸ And since “[a]n estimated 80 percent of all refugees and displaced persons are

1. Scott Leckie, *United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings*, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS 1, 6 (Scott Leckie ed., 2009).

2. *Id.*

3. *Id.* at 6-7.

4. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003) (footnote omitted). One example of a very limited vision of transitional justice that failed the country's women took place in El Salvador. After a bitter twelve-year civil war, the government of El Salvador signed the Peace Accords in 1992. See Margarita S. Studemeister, *Introduction*, in U.S. INST. OF PEACE, PEACEWORKS NO. 38, EL SALVADOR: IMPLEMENTATION OF THE PEACE ACCORDS 7, 7 (Margarita S. Studemeister ed., 2001). These accords contained some redistributive plans that primarily focused on reintegration, such as agrarian land transfers and loans to former combatants. See Theresa Whitfield, *The U.N.'s Role in Peace-Building in El Salvador*, in EL SALVADOR: IMPLEMENTATION OF THE PEACE ACCORDS, *supra*, at 33, 37. Land tenure was thought to be a “root cause” of the original conflict, and property rights were considered a “serious issue” in the design of the post-conflict transition plan. Graciana Del Castillo, *Post-Conflict Reconstruction and the Challenge to International Organizations: The Case of El Salvador*, 29 WORLD DEV. 1967, 1971, 1982 n.9 (2001). However, women were largely left out of the process and results of reform. Land tenure changes during transitional justice primarily benefitted men because they were focused on combatants—who tended to be men—and did not provide much for women who wanted to own land after conflict. See U.N. CTR. FOR HUMAN SETTLEMENTS (HABITAT), LAND MANAGEMENT SERIES NO. 9, WOMEN'S RIGHTS TO LAND, HOUSING AND PROPERTY IN POST-CONFLICT SITUATIONS AND DURING RECONSTRUCTION: A GLOBAL OVERVIEW 40 (1999) [hereinafter UNCHS, GLOBAL OVERVIEW].

5. Daniel Aguirre & Irene Pietropaoli, *Gender Equality, Development and Transitional Justice: The Case of Nepal*, 2 INT'L J. TRANSITIONAL JUST. 356, 362 (2008).

6. *Id.* at 363.

7. *Id.* at 364.

8. *Id.* at 363.

women and children,”⁹ transitional justice must take the specific circumstances that women face into consideration.

This Note argues that property restitution programs in transitional justice settings need to correct barriers to women’s property ownership. In so doing, efforts by government, civil society, and the displaced themselves to achieve transitional justice can also create long-lasting property rights reform that moves a post-conflict society toward both reconstruction and equality. After considering the existing international legal framework as well as several case studies of transitional justice schemes, this Note will argue that actors in transitional justice should take certain steps at the very beginning of the transitional process to ensure that women’s property rights are protected as they return to their lives.

This Note advocates for a stronger and more explicit recognition of the necessity of gender equality in property rights in international law in the field of property restitution. The international framework can and must be improved to make very clear that equal access to property is an international standard, particularly in transitional justice. A strong international framework can guide, as well as be incorporated into, local law reform.

Recognizing that local reform is essential, this Note also suggests steps that domestic governments and other local actors can take to ensure that women receive adequate access to restitution. First, formal national legal systems must be reformed to provide for nondiscriminatory access to property.¹⁰ Second, because property rights in some countries are governed not by formal law but rather by customary law, transitional justice must attempt to reconcile discriminatory customary law with any formal law reform so that both systems provide equal access to property rights for women.¹¹ Transitional justice should take a multidimensional approach on this issue by combining law reform with redistributive practices such as land distribution programs and with safe and easy access to legal mechanisms for women to enforce these rights.¹² And finally, transitional justice systems should incorporate the voices of displaced women, since, as the case studies will demonstrate, those that do so are more likely to achieve the goal of equitable property restitution. Two ways in which post-conflict countries have successfully included women in the process are (1) launching awareness campaigns to inform women of their rights and the possibilities for change and (2) receiving the input of civil society in the transition.¹³ This Note emphasizes the importance of both of these steps in eliminating discrimination in property restitution.

As mentioned above, this Note distinguishes between formal property

9. Eve McCabe, Comment, *The Inadequacy of International Human Rights Law To Protect the Rights of Women as Illustrated by the Crisis in Afghanistan*, 5 UCLA J. INT’L L. & FOREIGN AFF. 419, 422 (2000). The total number of displaced persons (including refugees and the internally displaced) was over thirty-four million at the end of 2006. Giulia Paglione, *Individual Property Restitution: From Deng to Pinheiro—And the Challenges Ahead*, 20 INT’L J. REFUGEE L. 391, 392 (2008).

10. See *infra* Section IV.A.

11. See *infra* Section IV.B.

12. See *infra* Section IV.C.

13. See *infra* Section IV.D.

rights restrictions and informal or customary restrictions. Formal restrictions are those written into the constitution, statutes, or common law of a country or locality. I shall primarily consider formal restrictions on a national level, but of course these restrictions may be amplified through the formal laws of localities within states. Even in countries that provide adequate formal protections for women's property rights, women often face customary restrictions that trump these formal laws, particularly in localities where access to legal mechanisms and the country's formal judicial system is limited. An example of a customary restriction is a system of land inheritance that transfers real property from a father to only his male children. While many countries ban this sort of discriminatory inheritance scheme through legislation, these laws are frequently ignored in favor of the traditional male-to-male transfer, leaving little recourse for female children.¹⁴

It is also important to clarify the meaning of "property rights" in this Note. While the right to housing is crucially important, the focus of this Note is a much broader set of rights that constitute our sense of property ownership. "Property rights" or "land rights," used interchangeably, mean the rights to buy, sell, transfer, exclude others from, use the resources of, and build housing on a piece of property. Some of the countries discussed in the case studies have nationalized all land and only allow their people the right to use their land, or otherwise limit its alienability. In these cases, I refer to people's usufruct rights or specify the exact range of rights being discussed.

The Note proceeds as follows. Part II describes the importance of gender equality in property rights, especially in the post-conflict context. Part III outlines the international legal framework for equal property rights for women, including in the restitution context. Part IV analyzes several case studies of post-conflict nations that have had various degrees of success in returning women to their homes and reforming discriminatory property laws. And finally, Part V attempts to present some best practices and lessons learned from the case studies in order to achieve the goals outlined here in Part I.

II. THE IMPORTANCE OF GENDER EQUALITY IN PROPERTY RIGHTS AND PROPERTY RESTITUTION

A. *The Value of Property*

Women's secured property rights are essential to their economic and physical survival, particularly in developing countries where livelihoods depend upon subsistence agriculture.¹⁵ This is especially true in female-headed households, where women can utilize the economic benefits of property rights to improve the welfare of their household. Property rights have been shown to provide women with better sources of credit and to improve land use and

14. See Leslie Kurshan, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U. J. GENDER SOC. POL'Y & L. 353, 361 (2000).

15. UNCHS, GLOBAL OVERVIEW, *supra* note 4, at 12.

productivity.¹⁶

A lack of adequate property rights for women can also lead to noneconomic human rights violations against them, including violence.¹⁷ For example, in countries where female genital mutilation is a prerequisite to marriage, and marriage is necessary for survival because a woman does not have the right to own property individually, genital mutilation becomes necessary to secure a woman's future.¹⁸ Domestic violence can also be aggravated by inadequate access to property. If a woman's property rights are dependent upon her marital status or tied to her spouse in some other way, she can remain trapped in a relationship that includes constant domestic violence because she is compelled to choose between that and homelessness.¹⁹

Often, the difficulties women face during wartime are not unique to conflict but are instead the result of "accentuat[ed] discrimination" that women face during peace as well.²⁰ But these discriminatory systems—a country's property rights regime among them—can have even more troubling consequences in a postwar country. Women who have been displaced and widowed by war and who return to countries with discriminatory property ownership regimes can come back to find their property occupied by male relatives who claim enforceable rights to that property. These rules can thus lead to systemic homelessness among returning women. Homelessness, or dependency upon a relative for a home, can leave an already vulnerable person even more susceptible to social isolation or violence.²¹ If players in transitional justice do not take a gender-sensitive approach to post-conflict reform, they risk reifying the discriminatory systems that existed before and were aggravated by war.²²

B. *The Post-Conflict Opportunity for Gender Reform and Gender Reform as a Means to Recovery*

Study after study emphasizes the importance of a country's women in

16. ANNE CHANDIMA DEDIGAMA, PROPERTY RIGHTS ALLIANCE, INTERNATIONAL PROPERTY RIGHTS INDEX: 2009 REPORT 37 (2009).

17. See SHELLEY WRIGHT, INTERNATIONAL HUMAN RIGHTS, DECOLONISATION AND GLOBALISATION: BECOMING HUMAN 182 (2001) (noting that violence against women is both a cause and consequence of women's "continuing economic subservience"). Economic dependence, such as dependence on a husband for rights to property, serves to disempower women by "preventing them from challenging violence as well as making them more susceptible to it." *Id.*

18. Kurshan, *supra* note 14, at 357 n.19 (2000) (citing Kristen M. Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541, 545 (1997)).

19. See *Women and Housing Rights, Fact Sheet No. 9*, CTR. ON HOUSING RTS. & EVICTIONS (Aug. 17, 2008), http://www.cohre.org/sites/default/files/9._womens_housing_rights_and_domestic_violence_0.pdf.

20. FATIMA AYUB, SARI KUOVO & YASMIN SOOKA, INT'L CTR. FOR TRANSITIONAL JUSTICE, ADDRESSING GENDER SPECIFIC VIOLATIONS IN AFGHANISTAN 4 (2009).

21. HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS: IMPLEMENTING THE "PINHEIRO PRINCIPLES" 37 (2007) [hereinafter HANDBOOK].

22. Telephone Interview with Mayra Gomez, Senior Expert on Women and Housing Rights, Ctr. on Housing Rts. & Evictions (Oct. 13, 2009).

rebuilding after conflict.²³ Rather than being passive victims, as they are often portrayed, women are post-conflict political activists, mobilizers, caretakers, community builders, and heads of households.²⁴ Women build peace, “often in private and ‘from the bottom up’, unacknowledged and unsupported” by the leaders of transition in their country.²⁵ Perhaps because of their unique role within the household, women in general prioritize family needs and collective rights rather than retribution when asked about redress.²⁶ Thus, women tend to take a future-oriented approach to transition that many would argue is key to the rebuilding process. But the reintegration of displaced women back into a post-conflict country, and thus their participation in the peace process, is very often impeded by legal restrictions on their right to inherit and own property and other discriminatory mechanisms,²⁷ which can serve to limit the ability of women to play their full role in the “design and implementation of peace and

23. One such study neatly summarizes the point of much of this literature:

Given the complexities of modern war, issues related specifically to women and gender justice include: rights, economic development, sexualized violence, children born as a result of war rape, child abductions, trafficking, HIV/AIDS, specific health needs, lack of land and property rights, women-headed households, girl-headed households, orphans, asylum status with gender-based persecution, psychological trauma, women and girls as refugees, returnees and internally displaced persons. In attending to these complexities, the *interdependence between gender equality, social justice, sustainable development and peacebuilding cannot be overstated.*

ELISABETH J. PORTER, PEACEBUILDING: WOMEN IN INTERNATIONAL PERSPECTIVE 11-12 (2007) (footnotes omitted) (emphasis added); *see also* Naomi R. Cahn, *Women in Post-Conflict Reconstruction: Dilemmas and Directions*, 12 WM. & MARY J. WOMEN & L. 335, 336-38 (2006) (describing the unique aspects of women’s roles in conflict and transition); Swanee Hunt & Cristina Posa, *Women Waging Peace: Inclusive Security*, 124 FOREIGN POL. 38, 38 (2001) (“[W]omen usually arrive [at the negotiating table] straight out of civil activism and . . . family care. . . .”); *id.* at 41 (“We can ignore women’s work as peacemakers, or we can harness its full force across a wide range of activities relevant to the security sphere: bridging the divide between groups in conflict, influencing local security forces, collaborating with international organizations, and seeking political office.”).

Another world of literature emphasizes the link between gender and development. Development programs like microfinance are more and more frequently targeted at women, in large part because program funders believe that women are more likely than men to place importance on nurturing children, nutrition, and family. While this approach is still heavily debated, the development community has targeted women with the goal of bringing about growth and change for all. *See, e.g.*, WORLD BANK, GENDER EQUALITY AND THE MILLENNIUM DEVELOPMENT GOALS 3-4 (2003); Shana Hofstetter, Note, *The Interaction of Customary Law and Microfinance: Women’s Entry into the World Economy*, 14 WM. & MARY J. WOMEN & L. 337 (2008). By not giving women equal footing in the peace process, transitional justice is depriving itself of the special value that women add to development because of their preferences, experiences, and roles within the household.

24. *See* Noeleen Heyzer, *Women, War and Peace: Mobilizing for Security and Justice in the 21st Century*, in HUMAN & ENVIRONMENTAL SECURITY: AN AGENDA FOR CHANGE 50, 53 (Felix Dodds & Tim Pippard eds., 2005).

25. Judy El-Bushra & Cécile Mukarubuga, *Women, War and Transition*, 3 GENDER & DEV. 16, 18 (1995) (citing E. FERRIS, LIFE & PEACE INST., WOMEN, WAR & PEACE: AN ISSUE PAPER (1993)); *see also* Rita Manchanda, *Ambivalent Gains in South Asian Conflicts, in THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION* 99, 99 (2001) (“Women have formed mothers’ fronts and coalitions for peace, women have become guerrillas and soldiers, and women have emerged as agents of social change, conflict resolution and transformation.”); Naomi Cahn, Dina Haynes & Fionnuala Ní Aoláin, *Returning Home: Women in Post-Conflict Societies*, 39 U. BALT. L. REV. 339, 343-44 (2010) (“[W]omen are central to any national recovery process, socioeconomic or otherwise, and especially so in societies which have been conflicted and violent.”).

26. El-Bushra & Mukarubuga, *supra* note 25, at 18.

27. ERIN MOONEY, LIBERIA AND THE IMPLICATIONS OF WOMEN’S INHERITANCE RIGHTS FOR IDP RETURN AND REINTEGRATION: FINDINGS AND RECOMMENDATIONS FROM MISSION IN APRIL-MAY 2004, at 1 (2004).

reconciliation processes.”²⁸

Additionally, the sad but true story, as demonstrated by several of the case studies in Part IV, is that conflict often leaves more women alive than men, skewing the population and forcing women to lead their households and to take on other leadership roles simply because of the absence of the men who used to play those roles. Thus even if a country does not want to involve its women in the transition process, their involvement may just be a fact of the circumstances, and any hindrance to women taking on these responsibilities can be detrimental to the country’s transition. For these reasons, it is in a transitioning country’s best interest to take a redistributive, equality-based approach, even if equality as a principle has no inherent value for that country.²⁹

In addition to that pragmatic argument, scholars and practitioners have recognized the inherent normative value of incorporating gender equality into the post-conflict agenda.³⁰ According to this line of thought, one goal of post-conflict nations should be “an improved social structure that accords full citizenship, social justice and empowerment based upon respect for women’s rights.”³¹ This notion of equality as a fundamental value is embodied in the Convention on the Elimination of Discrimination Against Women, which notes in its preamble that “discrimination against women violates the principles of equality of rights and respect for human dignity.”³² The U.N. General Assembly recently recognized the importance of gender equality as an end in itself by creating the U.N. Entity for Gender Equality and the Empowerment of Women (U.N. Women), a streamlined entity designed to aid member states with the “empowerment and rights of women and gender mainstreaming.”³³ The creation of the new agency reinforces international acknowledgement of gender equality as a “basic human right” in addition to its role in promoting development.³⁴

Even putting aside the necessity of the redistributive approach for successful recovery, moments of political transition are a golden opportunity

28. Julie Mertus, *Improving the Status of Women in the Wake of War: Overcoming Structural Obstacles*, 41 COLUM. J. TRANSNAT’L L. 541, 544 (2003) (quoting U.N. SEC’Y-GEN., WOMEN, PEACE AND SECURITY: STUDY SUBMITTED BY THE SECRETARY-GENERAL PURSUANT TO SECURITY COUNCIL RESOLUTION, ¶ 338, U.N. Sales No. E.03.IV.1 (2002)).

29. See *infra* Part IV.

30. See Sheila Meintjes, Anu Pillay & Meredith Turshen, *There Is No Aftermath for Women*, in *THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION* 3, 17 (Sheila Meintjes, Anu Pillay & Meredith Turshen eds., 2001) (“We believe that women must acquire fair access to resources in their own right, and that the struggle in the reconstruction period is precisely over the terms of women’s entitlements. Our desire is to describe the conditions that favour social transformation and to outline our vision of a society that respects women’s autonomy and bodily integrity.”); see also Cahn et al., *supra* note 25, at 344 (“In many countries, the low level of women’s education, their lack of power, and cultural obstacles to women’s equality hamper improvements in women’s status and health even as the country as a whole seeks to recover.”).

31. Aguirre & Pietropaoli, *supra* note 5, at 363-66.

32. Convention on the Elimination of All Forms of Discrimination Against Women pmb., Dec. 18, 1979, 1249 U.N.T.S. 13.

33. G.A. Res. 64/289, ¶ 51(c), U.N. Doc. A/RES/64/289 (July 21, 2010).

34. *About UN Women*, UN WOMEN, <http://www.unwomen.org/about-us/about-un-women/> (last visited Mar. 16, 2010).

for a new, progressive government to reform the pre-conflict social structure and for interested nongovernmental organizations (NGOs) and the international community to modify the legal structure of gender relations in a country. As will be demonstrated in the context of property rights by the case studies later in this Note, mechanisms of transitional justice can be used as “tools to advance women’s rights.”³⁵ But as those case studies will also show, a change on paper is not enough. If gender equality is truly a goal of a country’s transitional justice regime, then a comprehensive process of legal reform, education, and cultural change, brought about by government, civil society, and women themselves, is crucial (and possible) to achieve that goal.

III. INTERNATIONAL LAW GOVERNING GENDER EQUALITY AND PROPERTY RESTITUTION

While the body of law governing women’s property rights in post-conflict situations is very wide-ranging—including refugee, humanitarian, and human rights law, as well as law targeted specifically at women and gender equality³⁶—it still contains some problematic holes. For example, many of the relevant international instruments address women’s rights to housing but neglect the broader property rights regime, necessitating reliance on provisions that guarantee more abstract rights like equal access to a livelihood and financial independence.³⁷

By using the international human rights framework, women who are unable to secure their rights domestically can in theory turn to the general international human rights bodies for relief.³⁸ But the more significant impact of an international framework is the guidance it provides to countries seeking to shape their post-conflict domestic law and practice to be in alignment with international norms. As the case studies in Part IV show, international instruments do have an impact on domestic transitional justice. Therefore, the lack of any explicit recognition of the equal right to property or property restitution through a broadly accepted international instrument hinders the process of eliminating discrimination in property restitution programs.

A. *International Human Rights Law*

1. *Overview of the Human Rights Framework*

Because of the limitations of refugee law³⁹ and humanitarian law,⁴⁰ the

35. Aguirre & Pietropaoli, *supra* note 5, at 9.

36. Scott Leckie’s incredibly thorough collection of relevant law, HOUSING, LAND, AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAW, CASES, AND MATERIALS (Scott Leckie ed., 2007) [hereinafter LECKIE, LAW], has been invaluable for Parts III and IV of this Note.

37. UNCHS, GLOBAL OVERVIEW, *supra* note 4, at 21.

38. Kurshan, *supra* note 14, at 356 (citing Cecilia Medina, *Toward a More Effective Guarantee of the Enjoyment of Human Rights by Women in the American System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 257, 271 (Rebecca J. Cook ed., 1994)).

39. In the context of property restitution, refugee law is insufficient to help those who are internally displaced and do not fall under the definition of “refugee.” See R. Andrew Painter, *Property*

best international legal resource for protecting the property rights of internally displaced women is likely international human rights law.⁴¹ Equality in the enjoyment of human rights “is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments.”⁴² The equality provisions of these instruments mandate de jure as well as de facto equality in signatory countries.⁴³ However, as Shelley Wright argues, the vision of the creators of these documents codifying international human rights norms may have been limited in their perspective on women.⁴⁴ One reason for this may be that women were not adequately represented in the international bodies drafting these documents,⁴⁵ and therefore not enough female voices were heard to ensure that women’s rights received adequate treatment. Regardless, advocates for women’s rights have been turning more and more to the international human rights system to further their goals, and the following discussion identifies the provisions of the major human rights treaties that could be used for that purpose.

2. *Existing Human Rights Instruments*

The Universal Declaration on Human Rights (UDHR), signed in 1948, requires member states to secure the recognition and observance of the rights enumerated through teaching, education, and “progressive measures.”⁴⁶ This includes property rights: Article 17 of the Declaration guarantees that every person has the right to own property and that no person shall be “arbitrarily deprived of his [sic] property.”⁴⁷ Article 22 ensures that everyone has the right to an adequate standard of living, which can easily be interpreted to include housing and property rights, since these are essential to adequate living conditions.⁴⁸ Additionally, Article 2 of the UDHR bans discrimination against

Rights of Returning Displaced Persons: The Guatemalan Experience, 9 HARV. HUM. RTS. J. 145, 146 (1996).

40. Humanitarian law can also be ineffective because it is triggered only when threshold requirements of internal armed conflict are met. *See id.* at 147.

41. Women’s rights advocates who were formerly using gender-based international instruments to fight for change may also be switching their strategy in favor of international human rights law. This “mainstreaming approach” argues that since women are humans, they should use human rights instruments to protect their rights. Kurshan, *supra* note 14, at 356. Some advocates argue that nondiscrimination itself is a human right that should be protected through those instruments. *See, e.g.*, Medina, *supra* note 38, at 271.

42. U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16*, ¶ 1, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005) [hereinafter General Comment No. 16].

43. *Id.* ¶ 7.

44. *See* WRIGHT, *supra* note 17, at 27-28.

45. Kurshan, *supra* note 14, at 362. Kurshan argues that women and their priorities are still underrepresented in the large international human rights bodies. *Id.*; *see also* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 624 (1991) (“Despite the common acceptance of human rights as an area in which attention can be directed toward women, they are still vastly underrepresented on UN human rights bodies.”).

46. Universal Declaration of Human Rights pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948) [hereinafter UDHR].

47. *Id.* art. 17.

48. *Id.* art. 22.

women with respect to the rights enumerated in the Declaration, including those described above.⁴⁹ Despite its thoroughness, the UDHR is not legally binding on states, but its principles are codified in several treaties born after the UDHR, which are legally binding and also establish enforcement mechanisms, such as courts and committees, to review the actions of subscribing states.⁵⁰

Building on the principles of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) was created to protect “the ideal of free human beings enjoying civil and political freedom.”⁵¹ Adopted in December 1966, this Covenant does not specifically provide any protections for housing rights; however, Article 26 of the ICCPR broadly provides for “equal protection of the law” and “effective protection against discrimination” based on grounds including race and sex.⁵² This provision has been successfully used in the Human Rights Committee to fight discrimination in property restitution in one post-Communist state.⁵³ However, to the best of this author’s knowledge, the provision has not yet been successfully used to challenge gender discrimination in restitution. Furthermore, it should be noted that while the Human Rights Committee is empowered to hear individual claims by the Optional Protocol to the International Covenant on Civil and Political Rights, only thirty-five countries are signatories to the Optional Protocol.⁵⁴

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was developed to ensure that “everyone may enjoy his [sic] economic, social and cultural rights” in accordance with the principles of the

49. *Id.* art. 2.

50. UNCHS, GLOBAL OVERVIEW, *supra* note 4, at 22.

51. International Covenant on Civil and Political Rights pmbl., Dec. 16, 1966, 999 U.N.T.S. 171.

52. *Id.* art. 26. One hundred and sixty-seven countries are party to the ICCPR, including all of the countries used as case studies in this Note. *Status of International Covenant on Civil and Political Rights*, U.N. TREATY SERIES, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 28, 2011).

53. In the Human Rights Committee case *Simunek v. Czech Republic*, the plaintiffs were displaced from Czechoslovakia by the Communist regime in 1987, and their property was confiscated by a state institution and eventually auctioned off or destroyed. Plaintiffs discovered this when they returned to Czechoslovakia in 1990 and filed a request for the return of their property. At the time, there was no legislation in place requiring restitution, but in 1991, Act 87/1991 was passed and provided that Czech citizens who are also permanent residents of the territory and whose property was overtaken by the state were entitled to restitution of that property. *See* Zákon č. 87/1991 Sb. (Czech). After bringing their case to the Human Rights Committee (established under Article 28 of the ICCPR), plaintiffs argued that the exclusionary requirements of Act 87/1991 reinforced the discriminatory taking of properties and that this discriminatory denial of remedies to nonresidents violated the nondiscrimination requirement of Article 26 of the ICCPR. The Human Rights Committee agreed, required the Czech Republic to provide an adequate remedy to the plaintiffs, and encouraged it to repair its legislation. Human Rights Comm., *Simunek v. Czech*, U.N. Doc. CCPR/C/54/D/516/1992 (July 31, 1995), *partially reprinted in* LECKIE, LAW, *supra* note 36, at 362.

Adam v. Czech Republic involved a very similar set of facts—plaintiffs, nonresidents whose property in the country was confiscated by the Communist government, brought a suit under Article 26 and argued that Act 87/1991’s residency requirements were discriminatory. The Human Rights Committee again ordered adequate compensation and encouraged a review of the legislation. Human Rights Comm., *Adam v. Czech*, U.N. Doc. CCPR/C/57/D/586/1994 (July 25, 1996), *partially reprinted in* LECKIE, LAW, *supra* note 36, at 371.

54. *Status of Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en (last visited Apr. 15, 2011).

UDHR.⁵⁵ Like the ICCPR, this Covenant does not specify a right to ownership of property.⁵⁶ However, Article 2 of the Covenant requires that signatory states take “all appropriate means,” including legislation, to guarantee the rights enumerated and to achieve the realization of those rights without discrimination based on characteristics such as sex.⁵⁷ Among the rights enumerated are the rights to “adequate food, clothing, and housing.”⁵⁸ Since the ICESCR enumerates positive rights rather than negative rights, there has been less enthusiasm to create an enforcement system for states that fail to ensure these rights for their people.

While both the ICCPR and the ICESCR include nondiscrimination provisions, neither is specially targeted at the particular issues that women face in the enforcement of the rights enumerated in the UDHR. One attempt to rectify this gap is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁵⁹ CEDAW is considered to be the international bill of rights for women, and unlike other human rights instruments, which govern the interactions between a state and its citizens, it also requires an accepting state to eliminate discrimination against women by any person or organization.⁶⁰ Article 13 requires states to take appropriate measures to remove discrimination against women in economic and social affairs in order to ensure equality.⁶¹ Article 16 requires that states ensure that both spouses have equal rights to ownership and management of the couples’ property (but, notably, no mention is made of a single woman’s right to own property).⁶² Importantly, CEDAW addresses the role of discriminatory customary law and requires that

States Parties shall take all appropriate measures to modify the social and cultural patterns of the conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁶³

The reach of CEDAW into what has traditionally been regarded as the private realm has both been criticized for impeding on religious and cultural rights within the home and recognized as an improvement for reaching the

55. International Convention on Economic, Social and Cultural Rights pmbL., Dec. 16 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

56. See Paglione, *supra* note 9, at 395.

57. ICESCR, *supra* note 55, art. 2. One hundred and sixty countries are party to the agreement, including all of the states examined in the case studies in this Note, with the exception of Mozambique. *Status of ICESCR*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Mar. 22, 2011).

58. ICESCR, *supra* note 55, art. 11.

59. Elizabeth F. Defeis, *The United Nations and Women—A Critique*, 17 WM. & MARY J. WOMEN & L. 395, 400 (2011) (noting that CEDAW was a response to the need to supplement the existing human rights treaties with one that focused specifically on women).

60. McCabe, *supra* note 9, at 431.

61. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 32, art. 13.

62. *Id.* art. 16.

63. *Id.* art. 5(a).

sphere where most women's rights violations take place.⁶⁴ While CEDAW does not have any sort of adversarial enforcement mechanism,⁶⁵ it has been used in some domestic cases to provide support for an international standard of gender equality in property rights. For example, in *Dhungana v. Minister of Law and Justice*, a women's rights organization challenged a law that severely restricted a daughter's ability to inherit her father's property.⁶⁶ Since CEDAW has the status of national law in Nepal, the plaintiffs argued that the law violated CEDAW, as well as the equality provisions in the Constitution of Nepal.⁶⁷ The Supreme Court held that the law was discriminatory and required the government to draft new legislation to replace it.⁶⁸ While identifying and implementing an adequate replacement has been a challenge, to say the least,⁶⁹ the defeat of the legislation using international human rights tools in a domestic court is a testament to the need for a well-designed international system to protect women's rights.

CEDAW has also been used to attack gender discrimination in customary law. The Tanzanian case of *Ephrohim v. Pastory* involved a woman who was given only usufruct rights to land she inherited from her father and was prevented from selling it by a codification of customary law.⁷⁰ Because the Tanzanian Constitution did not make specific, explicit guarantees for women, the High Court relied on Tanzania's ratification of CEDAW and the ICCPR to strike down the discriminatory customary law that constrained the plaintiff's full use of her land.⁷¹

Another Tanzanian example demonstrates that CEDAW can be used by married women to protect their property interests when a country's law favors her husband. In *Mohamed v. Makamo*, the High Court of Tanzania reversed the results of a divorce that awarded only five percent of the marital property to the female spouse. Citing the constitution's incorporation of the principles of CEDAW and the UDHR, the High Court determined that the lower court's decision was "discriminatory and a reflection of stereotyped concepts of a man and woman."⁷²

64. See McCabe, *supra* note 9, at 434.

65. The U.N. Committee on the Elimination of Discrimination Against Women is supposed to monitor each party's national efforts to fulfill its obligation to eliminate discrimination within its borders. It can make recommendations but does not have any way to make sure those recommendations are implemented other than continued monitoring. See *Committee on the Elimination of Discrimination Against Women*, U.N. DIV. FOR THE ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/committee.htm> (last visited Mar. 27, 2011).

66. U.N. DEV. FUND FOR WOMEN, BRINGING EQUALITY HOME: IMPLEMENTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 22 (Ilana Landsberg-Lewis ed., 1998) (discussing *Dhungana v. Minister of Law and Justice*, 6 Nepal Kanoon Patrika [Nepal Law Journal] 462 (1994)).

67. *Id.*

68. *Id.*

69. *Id.*

70. U.N. DEV. FUND FOR WOMEN, *supra* note 67, at 21 (discussing *Ephrohim v. Pastory*, 87 I.L.R. 106; [1990] L.R.C. (Const.) 757 (Tanz.)); U.N. FOOD & AGRIC. ORG., INT'L FUND FOR AGRIC. DEV. & INT'L LAND COALITION, RURAL WOMEN'S ACCESS TO LAND AND PROPERTY IN SELECTED COUNTRIES 5 (2004) (on file with author) (discussing same).

71. *Id.*

72. See Tamar Ezer, *Report: Inheritance Law in Tanzania: The Impoverishment of Widows*

Although rare, these few significant domestic cases that incorporate international human rights instruments for the benefit of female parties demonstrate (1) the importance of an international legal framework that adequately protects women's rights, (2) the interaction of the various international rights instruments in creating that framework, and, of course, (3) the weight that can be given to these instruments by domestic governments and courts. As the case studies in Part IV will further show, accession to CEDAW has influenced (or at least coincided with) domestic legal change toward gender equality. However, the practical effectiveness of CEDAW is limited by the fact that signatory states are allowed to submit reservations based on "religion, culture, tradition, or economics."⁷³ CEDAW collected more reservations than any other human rights treaty, and many of these reservations directly relate to discriminatory property and inheritance laws.⁷⁴ If states excuse themselves from these equality provisions, then for the purpose of property restitution it is as though a transitioning state did not ratify CEDAW. These specific reservations also work against the establishment of equal property rights as an international norm.

3. *Summary of the International Human Rights Framework*

In sum, the international human rights instruments hold that some vision of property rights is a human right, and, in conjunction with the nondiscrimination provisions of the instruments, that both men and women must have equal access to that vision of rights. But in the end, what kinds of property rights are actually protected under international human rights law? One author distinguishes among three views of how property rights fit into international law.⁷⁵ The narrowest view holds that international human rights law protects property already held by an owner; thus in the post-conflict context, human rights law would require restitution only for those who already had property before the conflict. The middle view incorporates equality into the vision of property rights as human rights; in a post-conflict country, this view would require not only restitution but also nondiscrimination in the acquisition of new land, which could require reform of the land laws. And the broadest view of property rights as human rights requires the state to ensure that everyone not only has equal *access* to property, but also owns a minimum amount of property required for survival. While it is difficult to find authority for the broadest view, the middle view has support in a combination of the property and the nondiscrimination provisions of the various human rights instruments.⁷⁶

Ensuring equal property rights for displaced women requires something more complicated than any of these three views. In order to ensure that

and Daughters, 7 GEO. J. GENDER & L. 599, 628 n.196, 634 n.243 (2006) (quoting Mohamed v. Makamo, Civil Appeal No. 45, at 4 (Tanz. High Ct. 2001)).

73. Defeis, *supra* note 59, at 401.

74. *Id.*

75. See Painter, *supra* note 39, at 169-70.

76. See *id.* at 176-77.

displaced women have their property restored to them even though discriminatory laws prevented them from legally owning that property prior to conflict, there essentially must be retroactive land reform that gives women pre-conflict legal rights to their property and then restores that property to them through restitution. States must then make permanent the elimination of discriminatory land laws, allowing women equal access to property in the future. Moving international law to mandate all of the above has been a challenge for international women's rights advocates.

B. *International Humanitarian Law*

While international humanitarian law is less widely applicable than international human rights law, it has the advantage of directly addressing problems that occur during wartime and immediately after conflict. Most of the relevant provisions of humanitarian law govern the front end of displacement—that is, they prohibit forced displacement of civilians and destruction of civilian property in armed conflict unless imperative military necessity demands it.⁷⁷ But the Fourth Geneva Convention also requires that any evacuated person must be transferred back to his or her home at the end of the occupation of that territory.⁷⁸ And Article 75 of the Rome Statute of the International Criminal Court authorizes the court to establish the necessary principles governing reparations, which includes restitution of property. The International Criminal Court can also order a criminally convicted person to make such reparations directly.⁷⁹ Still, international humanitarian law is limited in that its implementation of humanitarian law is largely left to participating states, primarily through domestic legislation, and nothing in the body of international humanitarian law specifically addresses the gendered problems of property restitution.⁸⁰

C. *The Pinheiro Principles*

The international mechanism most applicable to the issues discussed in this Note is the Pinheiro Principles, a set of principles designed for governments, international organizations, and civil society to use to develop an equitable and successful restitution program. The Pinheiro Principles were the result of a coordinated effort between the Centre on Housing Rights and Evictions and the U.N. Special Rapporteur on Housing and Property

77. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 17, Dec. 7, 1978, 1125 U.N.T.S. 609; Convention Respecting the Laws and Customs of War on Land arts. 23, 33, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

78. Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

79. Rome Statute of the International Criminal Court arts. 17(1), 17(2), 75(2), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

80. See Karen Hulme, *Armed Conflict and the Displaced*, 17 INT'L J. REFUGEE L. 91, 112 (2005). Hulme states that the right to property restitution can be "inferred from the overarching principle of humanity which lies at the core of humanitarian law," but the extent to which this helps the displaced in practice is unclear. *Id.*

Restitution, Paulo Sérgio Pinheiro.⁸¹ The Principles were approved by the U.N. Subcommission on the Promotion and Protection of Human Rights in August 2005,⁸² and were supplemented by a handbook that provides specific, practical policy recommendations to governments attempting to incorporate the Principles.

Principle 3 presents the overarching ideal of nondiscrimination, requiring states to ensure that refugees and displaced persons are treated equally under the law.⁸³ As the Handbook notes, nondiscrimination is particularly important in this context because displacement is often closely tied to race and ethnicity.⁸⁴ Principle 3 explicitly prohibits discrimination based on sex as well.⁸⁵

Discrimination based on sex is the focus of Principle 4, which requires that states “ensure the equal right of men and women, and the equal right of boys and girls, to housing, land, and property restitution” and to “voluntary return in safety and dignity, legal security of tenure, property ownership, equal access to inheritance, as well as the use, control of and access to housing, land and property.”⁸⁶ Specifically, states must explicitly recognize the equal ownership rights of male and female heads of households in their restitution programs and policies,⁸⁷ and they should even “adopt positive measures to ensure gender equality in this regard.”⁸⁸ It would be difficult to think of clearer language as to at least one U.N. organ’s expectations of gender equality in the restitution process, even if the Principles do not explicitly define how those expectations should be met.

It is important to note that Principle 4 is not limited to nondiscrimination. It pointedly urges states to actively work toward a more equal system of property rights distribution, including in those situations where the pre-conflict status quo discriminates against women’s property rights “either in law or in practice.”⁸⁹ Thus, adhering to Principle 4 could require positive measures to develop equality through restitution by using gender-sensitive restitution programs and outreach and resources targeted at women and female-headed households.⁹⁰

The Pinheiro Principles are the new international standard governing property restitution for returning refugees and internally displaced persons. They are ambitious in their inclusion of both groups and also in their coverage

81. Telephone Interview with Mayra Gomez, *supra* note 22.

82. HANDBOOK, *supra* note 21, at 3.

83. Special Rapporteur on Housing and Property Restitution, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, art. 3, Econ. & Soc. Council, Comm’n on Human Rights, Sub-Comm’n on the Promotion and Prot. of Human Rights, U.N. Doc. E/CN.4/Sub.2/2005/17, Annex (June 28, 2005) (by Paulo Sérgio Pinheiro) [hereinafter Pinheiro Principles].

84. HANDBOOK, *supra* note 21, at 32.

85. Pinheiro Principles, *supra* note 83, art. 3.

86. *Id.* art. 4.1.

87. *Id.* art. 4.2.

88. *Id.* art. 4.3.

89. HANDBOOK, *supra* note 21, at 36.

90. *Id.* at 37.

of tenure and use rights in addition to formal property rights.⁹¹ But it should be emphasized that the Principles are at this stage just guidance, not binding law. They have no enforcement or review mechanism, no committee to provide guidance to states seeking to implement the Principles, and no method by which a state can make a commitment to the Principles before or after conflict. At best, the Principles can be considered “soft” law, but more accurately they are a series of best practices. And they certainly do not have the force of CEDAW or any other international human rights treaty.

Furthermore, because of the weaknesses of the property-related aspects of the underlying legal instruments on which the Principles are based, their legal and theoretical foundations are somewhat questionable.⁹² The human rights instruments discussed above do not clarify the position of the right to property in international law, and this lack of clarity is “reflected in the normative vagueness of the right to property restitution.”⁹³ Thus the Principles could be viewed as embodying “a new right based on the evolution of international law, rather than one firmly grounded in international law”⁹⁴ or existing international norms. In order for the Principles to be taken more seriously, the underlying legal foundations need to be strengthened, and discrimination-free property restitution must be more explicitly recognized as a right of displaced persons.

D. *The Value of the International Framework*

It is difficult to enforce the above international instruments and provide individual women with adequate access to international means of enforcement. As a result, an ideal outcome of a country’s ratification of these human rights treaties would be the use and incorporation of the international principles embodied in those treaties into domestic law. The case studies in Part IV give some examples of how countries rebuilding their legal systems in the aftermath of war can use the provisions of these instruments in developing their constitutional and statutory law. But, as those cases will demonstrate, the enforcement problems bleed down to the very local level, and ultimately the individual woman who is not able to secure her own property may not be able to use this international system to help herself. Ultimate change has to happen in the domestic legal system, not just in national statutory law, but also in localities that remain governed by their own customary law. While international law can shape domestic decisions in wording statutes and designing mechanisms for redress, especially in a post-conflict context of sweeping reform, domestic actors must commit to recognizing the value of the economic empowerment of their own country’s women and to make gender equality a priority.⁹⁵

91. Paglione, *supra* note 9, at 401.

92. Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT’L L. 462, 482 (2010).

93. Paglione, *supra* note 9, at 395.

94. Ballard, *supra* note 92, at 483.

95. In contrast to the conclusion of this Note, some authors argue that the international framework is actually an inappropriate intrusion on the domestic transitional justice process, leading to

IV. THE BATTLE AFTER THE WAR: CASE STUDIES

Having explored the existing international law framework governing gender equality in post-conflict property restitution in Part III, this Part proceeds to analyze how this issue played out in four case studies.⁹⁶ The case studies were chosen specifically either to illustrate a particular problem faced by those concerned with this issue or to illustrate a practice that contributed to reform. The story of Liberia exemplifies the struggle that women face when a post-conflict government fails to take immediate action as part of its post-conflict restitution and land reform programs to address inequalities in its formal property rights regime. To illustrate how the failure to address customary law can thwart a reform-minded government's efforts at furthering equality in its property rights regime, I then discuss transitional justice in Rwanda. The post-conflict stories of the final two case studies, Mozambique and Guatemala, embody aspects of a successful gender-sensitive approach to transitional justice. Mozambique demonstrates the necessity of a multidimensional approach to reform, and Guatemala represents the importance of incorporating the voices and opinions of displaced women themselves in attempting a transition program directed at them.

A. *When Legislative Change Is Slow or Never Comes: Liberia*

Liberia spent most of the 1990s engulfed in two civil wars that ripped the country apart and left it weakened well into the new millennium. The first of these wars was sparked a young rebel named Charles Taylor, who led the National Patriotic Front, the main rebel group fighting to unseat President Samuel K. Doe.⁹⁷ Taylor's seven-year "War Without End" resulted the death of Doe and the seating of Taylor as President of Liberia.⁹⁸ During his presidency, Liberia signed the Abuja Peace Accords as well as agreements governing the

misguided and even harmful "imports and exports of foreign legal principles." Ballard, *supra* note 92, at 470-71. This Note instead takes a more optimistic view of the role of the international framework; as the case studies will show, international instruments can provide a reference point and even a source of protection for women who cannot find protection in their domestic legal framework.

96. Though obvious, it must be stated nonetheless that reforming property rights through transitional justice is easier said than done. There is really no better way to understand what problems arise, and what practices actually work or at least work better than others, than by looking at what people actually do on the ground. But as with any attempt to make broad generalizations about varied scenarios, trying to find patterns in discrimination and property rights among a wide range of post-conflict countries with incredibly complicated histories and culturally tied legal systems is extremely difficult. Part of the challenge of finding an international solution is precisely the highly contextualized nature of the problem.

Given this, the cases were chosen not with the hope of finding a random and representative sample, but were instead chosen to illustrate specific aspects of the problem and potential solutions. Part V will then attempt to synthesize the information learned in these case studies into some sort of broader understanding of how actors can move forward in transitional justice with the goal of this type of reform in mind. Of course, any real application of that broader understanding will also have to be highly contextualized, but with these multiple cases, I hope to provide a more widely applicable understanding than I could by just focusing on one case.

97. Kenneth B. Noble, *Civil War in Liberia Threatening To Divide West African Neighbors*, N.Y. TIMES, Aug. 29, 1990, at A2.

98. Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 INT'L J. LEGAL INFO. 345, 357 (2005).

protection and integration of refugees displaced during the first civil war.⁹⁹ One declaration contained a specific promise of property restitution: all returnees were guaranteed that they “shall have their rights to their original land restored upon return.”¹⁰⁰

Charles Taylor did not prove to be much of an improvement in leadership, to say the least, and rumblings of a second civil war started in the late 1990s. This time the rebellion was led by Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), and both groups succeeded in unseating Taylor in 2003. At that point, the two rebel groups signed an overarching peace agreement with the new government of Liberia, one that promised the return and reintegration of refugees and the internally displaced “in accordance with international conventions, norms and practices.”¹⁰¹

Women suffered greatly both as civilians and as warriors. Approximately a third of the combatants were women, and forty-two percent of the female combatants were exposed to sexual violence during the war.¹⁰² Civilian women were treated as commodities and often used as payment for male combatants, who were allowed to rape and brutalize the women and girls they captured.¹⁰³ But in the aftermath of the war, women emerged as a powerful group asserting rights that they did not have prior to war and eventually securing the first female head of state in Africa.¹⁰⁴

Women began to organize and work for their collective interests by the end of the first civil war.¹⁰⁵ Right away, women’s rights NGOs working with

99. Agreement Between the Government of the Republic of Liberia and the United Nations High Commissioner for Refugees for the Voluntary Repatriation and Reintegration of Liberian Returnees from Asylum Countries, Jan. 3, 1996, *available at* <http://www.unhcr.org/refworld/docid/3ae6b31ac.html>.

100. Government of the Republic of Liberia Declaration on the Rights and Security of Returnees § E, Jan. 3, 1996, *available at* <http://www.unhcr.org/refworld/docid/3ae6b31ac.html>.

101. Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties art. XXX(1)(a), Aug. 18, 2003, *available at* http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_08182003.pdf.

102. *Aftermath of Liberian Civil War: Study Finds One-third of Population Served as Combatants, Large Numbers Experienced Sexual Violence*, INT’L MEDICAL CORPS (Aug. 15, 2008), <http://www.internationalmedicalcorps.org/Page.aspx?pid=1630>.

103. Lydia Polgreen, *Many Liberian Women See the Ballot Box as a Step Up*, N.Y. TIMES, Oct. 19, 2005, at A3.

104. Helene Cooper, Op-Ed., *Waiting for Their Moment in the Worst Place on Earth To Be a Woman*, N.Y. TIMES, Nov. 16, 2005, at A22. Cooper poignantly describes her fellow countrywomen as they went to cast their vote for Ellen Johnson-Sirleaf:

In Liberia, when their sons were kidnapped and drugged to fight for rebel factions, and when their husbands came home from brothels and infected them with H.I.V., and when government soldiers invaded their houses and raped them in front of their teenage sons, these were the women who picked themselves up and kept going. They kept selling fish, cassava and kola nuts so they could feed their families. They gave birth to the children of their rapists in the forests and carried the children on their backs as they balanced jugs of water on their heads.

These are the women who went to the polls in Liberia last week. They ignored the threats of the young men who vowed more war if their chosen presidential candidate, a former soccer player named George Weah, didn’t win.

Id.

105. UNCHS, GLOBAL OVERVIEW, *supra* note 4, at 53.

refugees noticed a disparity between women married under civil law, who were by law given inheritance rights, and women married under customary law, who were not given similar property rights under the national legal framework.¹⁰⁶ The disparity was problematic in the post-conflict context because it prevented some women from returning to their homes,¹⁰⁷ as the restitution provision of the peace agreements only promised a return to the pre-conflict status quo.

Seeking to address this problem quickly, the Association of Female Lawyers of Liberia took a two-pronged approach: they brought remedying legislation to the Parliament, and they began an awareness campaign among the women affected.¹⁰⁸ They worked to educate women of their rights and of the gender disparities in customary law, but these NGOs were not successful in bringing about legislation providing women already married under customary law with property restitution.¹⁰⁹ While the awareness campaign worked, pushing women who were at first hesitant to challenge custom to raise their voices and lobby for legislative change, resistance from the legislature prevented that change from coming until 2003, when rights were equalized for women married under both systems.¹¹⁰ This does not mean that land and property rights between men and women are now equal in Liberia; that is still an ongoing struggle.¹¹¹

To illustrate the challenges Liberian women faced after the civil wars, consider the story of a Liberian mother whose husband was killed by Charles Taylor's forces and whose home was burnt to the ground, driving her into hiding with her seven children.¹¹² Upon return, she found that her in-laws had occupied the land upon which her house stood, and because she was a common law wife, she had no legal recourse, no home, and no rights to the property where were home once stood, until the 2003 legislation was passed.¹¹³ More than a million women and children in Liberia share a similar story.¹¹⁴ And while these women now have some ownership rights, implementing the new legislation requires fighting corruption in the legal system, changing the traditional mindset favoring male ownership, and educating women widely about their rights.¹¹⁵

The last point indicates that a country that takes the first step of adjusting

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 52.

110. An Act To Govern the Devolution of Estate and Establish Rights of Inheritance for Spouses of Both Statutory and Customary Marriages of 7 Oct. 2003 (Liber.), available at <http://www.unhcr.org/refworld/docid/44868b524.pdf>.

111. See Press Release, Comm. on Elimination of Discrimination Against Women, Liberia Is Writing New History for Its Women and Girls, Delegation Tells Women's Anti-Discrimination Committee, Admitting Great Challenges in That Endeavour, U.N. Press Release WOM/1748 (July 31, 2009) (describing a recent act passed in Parliament that would create a Land Reform Commission to remove any remaining barriers to women's land ownership).

112. Rebecca Murray, *Liberia's Land Just for Some*, INTER PRESS SERV. (June 9, 2009), <http://ipsnews.net/africa/nota.asp?idnews=47147>.

113. See *id.*

114. *Id.*

115. *Id.*

its property rights regime by passing appropriate legislation may yet be defeated in its endeavor by the entrenched customary law system (which is discussed thoroughly in the next Section) and by problems in the legal framework that enforces the legislation. Displaced women returning to their homes quite possibly will not know about the change in the law, and thus they may not seek a remedy when denied the property that is their due. Even if they do know their rights, they may not have access to the legal process necessary to secure their rights to their property.

B. *The Role of Customary Law: Rwanda*

Land and ownership of land has particular importance in the country of Rwanda, where it is the primary resource and a very scarce one. Over nine in ten Rwandans are subsistence farmers, and in an already dense country with a rapidly growing population, tensions over the control of land fueled the country's history of internal displacement and violence.¹¹⁶ Over two-thirds of the country's eight million people have been displaced at some point during just the last fifty years.¹¹⁷

This period of displacement was catalyzed in the late 1950s when the country reached a tipping point where competition over land became so great that redistribution became imperative. This competition exploded into a violent reaction against the Tutsi ethnic group, hundreds of thousands of whom were forced out of the country.¹¹⁸ Spates of ethnic conflict followed for the next ten years, while the government swallowed up more and more land. In 1990, civil war broke out between the government and the Tutsi-dominated Rwandan Patriotic Army (RPA). In 1993, the two groups signed the Arusha Peace Agreement, which stipulated that returning refugees (who were not gone for more than ten years) shall "have the right to repossess their property on return" because property was considered "a fundamental right for all the people of Rwanda."¹¹⁹ The peace was sadly short lived; it was broken by the brutal massacre of hundreds of thousands of Tutsis by the government in 1994.¹²⁰ The genocide was stopped only by the resurgence of the RPA, which then took over the government of a badly traumatized country. Over two million Hutus were displaced in that process.¹²¹

Soon after the Tutsi-dominated government was in place, displaced Tutsis began returning to Rwanda from their neighboring countries of exile, and they

116. Lisa Jones, *Giving and Taking Away: The Difference Between Theory and Practice Regarding Property in Rwanda*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 199, 199 (Scott Leckie ed., 2003).

117. *Id.* at 200.

118. *Id.*

119. Protocol of Agreement Between the Government of Rwanda and the Rwandese Patriotic Front on the Reparations of Rwandese Refugees and the Resettlement of Displaced Persons art. 4, U.N. Doc. A/48/824-S/26915, Annex V (June 9, 1993). Article 4 provides that returnees who were away for longer than ten years be compensated with new land from the government rather than the land they used to own in order to avoid conflicts with more recent occupiers of that land. *Id.*

120. Jones, *supra* note 116, at 201.

121. *Id.*

were followed a few years later by returning Hutus when Rwanda's neighbors entered conflicts of their own.¹²² This influx of returnees put an incredible strain on the country's land resources. However, the Tutsi government quickly adopted both the Arusha Accords and the Constitution of Rwanda, created in 1991, as part of the country's Fundamental Law.¹²³ Additionally, in 1995 Rwanda signed the Tripartite Agreement with the U.N. High Commissioner for Refugees (UNHCR) and several of its neighbors hosting Rwandan refugees, which required that Rwanda take "all possible measures" to allow these refugees to resettle and to protect their property.¹²⁴ In practice, the government has tried to implement measures to settle property disputes for returning men and women to protect their social and economic rights according to the requirements of international law.¹²⁵ Monitoring by the UNHCR has indicated that the vast majority of refugees seeking to recover their land rights in Rwanda between March 1996 and January 1997 were successful.¹²⁶ Despite this success, the Rwandan transitional justice system has failed to adequately ensure gender equality in property.

To understand the context of this failure, one must understand the history of Rwanda's unusual land policies. Customarily, land in Rwanda belongs to the first occupant.¹²⁷ However, a 1976 law decreed that all land, regardless of custom, belongs to the State of Rwanda, and an occupant of that land only has usufruct rights and rights to the product of the land;¹²⁸ the occupant can be removed from that land by the state if justly compensated.¹²⁹ Only a select few among the country's elite were given guaranteed rights to their land.¹³⁰ "All land 'sales' under customary law required the permission of the Minister in charge of lands," but this policy was rarely followed because of the cost and delay involved in the process.¹³¹ To address the problems posed by returning refugees, the Ministry for Agriculture and Livestock passed a land reform policy in 1996 that took up abandoned rural land and redistributed it to secondary owners.¹³² The policy was meant to guarantee that returning widows and their children would have immediate access to land, at least until the titleholder returned to claim it, and females were considered equal to males as heads of households when the government determined land grants through its

122. U.N. High Comm'n for Refugees, Kigali Office, *Women's Property Rights and the Land Question in Rwanda*, in WOMEN'S LAND AND PROPERTY RIGHTS IN SITUATIONS OF CONFLICT AND RECONSTRUCTION 38, 38-39 (1998), available at <http://www.unifem.org/attachments/products/WomensLandAndPropertyRights.pdf> [hereinafter WOMEN'S LAND AND PROPERTY RIGHTS].

123. Jones, *supra* note 116, at 201.

124. U.N. High Comm'n for Refugees, Kigali Office, *supra* note 122, at 40.

125. *Id.*

126. *Id.*

127. *Id.* at 38.

128. Jones, *supra* note 116, at 200 (citing Decree-Law on the Purchase or Sale of Customary Rights over Land or Rights of Occupation, No. 09/76 of Mar. 4, 1976 (Rwanda)).

129. U.N. High Comm'n for Refugees, Kigali Office, *supra* note 122, at 38.

130. Johan Pottier, *Land Reform for Peace? Rwanda's 2005 Land Law in Context*, 6 J. AGRARIAN CHANGE 509, 514 (2006).

131. *Id.*

132. Jones, *supra* note 116, at 208.

redistribution programs.¹³³

Rwanda's new constitution, ratified in 2003, has been lauded for its adherence to and acknowledgement of international law, including CEDAW.¹³⁴ Article 11 of the constitution bans discrimination based on sex, and Article 29 guarantees private property for every person.¹³⁵ During the post-genocide period, the parliament formalized the rules of inheritance through its Succession Law of 1999, which explicitly provided three important protections for women: (1) it allowed a widow to inherit property from a deceased husband; (2) it granted equal inheritance rights to men and women; and (3) it established a marital property system with three options from which a newly married couple could choose, including separate property ownership.¹³⁶ It should be noted though that these protections do not include land ownership, because all land is still formally owned by the state.

In spite of, or perhaps because of, the interconnection between land and conflict, it took Rwanda eight years to pass a comprehensive formal land reform law.¹³⁷ Much of the momentum for the Land Law of 2005 came from research that showed that land redistribution policies would promote peace and reconciliation and would address some of the conflicts that stemmed from the resettlement of refugees, as well as "women's desperate need for land."¹³⁸ The Land Law abolished all customary systems of land tenure and began the organization of a private land market through the establishment of a registered title system.¹³⁹

The formal legal framework is there. But perhaps the most challenging problem that Rwanda faces in its attempts to provide legal protections for women is the force of customary law. Article 51 of the constitution preserves the power of customary law as long as it does not violate "human rights, public order and good morals."¹⁴⁰ The force of customary law is particularly strong in relation to land and property because of the messy formal legal framework and the problems created by the 1976 law—the gaps and weaknesses of the existing framework often allow it to be ignored in favor of customary practices.¹⁴¹ And problematically, the Succession Law of 1999 applies only to civil law marriages, subjecting women not married through the formal legal structure to discriminatory customary law.¹⁴² Women married under customary law have no ownership rights and cannot receive any property from their husbands. A

133. CTR. ON HOUSING RTS. & EVICTIONS, BRINGING EQUALITY HOME: PROMOTING AND PROTECTING THE INHERITANCE RIGHTS OF WOMEN 94 (2004) [hereinafter COHRE, EQUALITY].

134. *Id.* at 89.

135. CONST. OF THE REP. OF RWANDA, arts. 11, 29 (2003).

136. COHRE, EQUALITY, *supra* note 133, at 91 (citing Succession Law of 1999, No. 22/99 of Nov. 12, 1999 (Rwanda)).

137. Pottier, *supra* note 130, at 510.

138. *Id.* at 510-11.

139. *Id.* at 521.

140. CONST. OF THE REP. OF RWANDA art. 51 (2003).

141. *See* Pottier, *supra* note 130, at 514.

142. COHRE, EQUALITY, *supra* note 133, at 93; *see also* Laurel L. Rose, *Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation*, 13 TEX. J. WOMEN & L. 197, 227-28, 242 (2004).

woman can only receive land from her father under specific circumstances and with the will of the father. Upon her death, any property held by a woman must pass on to her son.¹⁴³ By custom, a widow is only given usufruct rights over her deceased husband's property, and even then only if she continues to live in the matrimonial home.¹⁴⁴ These rules violate the international laws openly adopted by the country, and they have made resettlement of Rwandan women incredibly difficult. As one commentator put it, during the immediate aftermath of war, women who returned to their communities were "precariously situated" between the limiting customary law systems and a formal system that had not yet been developed.¹⁴⁵

With the passage of time, Rwandan women have begun to challenge and change these discriminatory customary regimes. As the dust of the war settled, it became apparent that women were going to be required to take on roles in Rwandan society that they did not hold before: up to one-half of women were widowed in some areas, drastically increasing the number of female-headed households, and women now produced about seventy percent of the country's agricultural output, strengthening their need for secure land tenure.¹⁴⁶ In part out of necessity, women took on leadership roles in their communities and began to overcome the constraints of customary law and limitations of statutory law. The statutory law eventually changed, but women returning from the war who found their property occupied by in-laws, relatives, or nonrelatives had very little chance of reclaiming their land.¹⁴⁷ Women had to rely on the goodwill of their relatives or resort to manipulating the weaknesses in the legal system to secure land.¹⁴⁸

In spite of Rwanda's relatively progressive land and gender policies, and in spite of the fact that women have been playing a prominent role in Rwanda's local and national leadership since the war,¹⁴⁹ many Rwandan women struggled to secure their property rights after the war, and many remain without their property many years after conflict.¹⁵⁰ These women show that, in countries where customary law remains powerful and discriminatory, formal law reform must be quick and comprehensive, and it must acknowledge the effect of customary law and reconcile it with the new principles embodied through formal statutes.

C. *Reform in Multiple Spheres: Mozambique*

The sixteen-year civil war that tore apart the once prosperous country of

143. COHRE, EQUALITY, *supra* note 133, at 95.

144. See U.N. High Comm'n for Refugees, Kigali Office, *supra* note 122, at 41.

145. Rose, *supra* note 142, at 219.

146. *Id.* at 219 n.72.

147. *Id.* at 228.

148. See *id.* at 236-37.

149. Josh Ruxin, *When It Comes to Women Lawmakers, Rwanda Leads the World*, N.Y. TIMES ON THE GROUND BLOG (Oct. 7, 2008, 3:59 PM), <http://kristof.blogs.nytimes.com/2008/10/07/when-it-comes-to-women-lawmakers-rwanda-leads-the-world/>.

150. COHRE, EQUALITY, *supra* note 133, at 97.

Mozambique had its roots in the Portuguese occupation. The Frente de Libertação de Moçambique (FRELIMO) formed to oust the colonizers and managed, after a decade of guerrilla warfare, to drive out the Portuguese and achieve independence for the country in 1975.¹⁵¹ During this period of fighting, one piece of FRELIMO fractured and became the Resistencia Nacional Moçambicana (RENAMO).¹⁵² After independence, RENAMO worked to destabilize the FRELIMO government, with backing from Zimbabwe—then known as Rhodesia—and South Africa.¹⁵³ Its efforts spawned a civil war that brutally killed thousands of civilians and displaced over forty percent of the nation's population. Finally, a peace was brokered and the two sides signed the General Peace Accord in 1992, ending over thirty years of war.¹⁵⁴

Protocol III of the peace agreement covers return and reintegration of the displaced. While the exact details of a plan were left to be worked out between the government, RENAMO, and international organizations like the Red Cross, the agreement guarantees both the restitution of property and the establishment of legal mechanisms to retrieve one's property from secondary occupiers.¹⁵⁵ At the time of the peace agreement, land tenure in Mozambique was regulated by the constitution and two land laws. According to Article 8 of the 1975 constitution, all land and its resources belonged to the state.¹⁵⁶ While the provision was intended to redistribute land from big landowners, it succeeded in driving away capital and left the country in an economic crisis.¹⁵⁷ In spite of the problems created by this land tenure provision, it was repeated in the constitution written in 1990, except for a provision that protects property rights acquired through "inheritance or occupation."¹⁵⁸ In accordance with the constitution, the Land Law of 1979 nationalized all of the land in Mozambique and prohibited the alienation of almost all land and resources.¹⁵⁹ Like many of its African neighbors, Mozambique had many customary land regimes running parallel to the formal one, and in rural areas, women's access to land was determined by local custom.¹⁶⁰ Under customary law, men have direct inheritance rights to land, but a woman's control over land is tied to her

151. Jon Unruh, *Property Restitution Laws in a Post-War Context: The Case of Mozambique*, 1 AFR. J. LEGAL STUD. 147, 149 (2005).

152. *Id.*

153. SALLY BADEN, INST. OF DEV. STUDIES, POST-CONFLICT MOZAMBIQUE: WOMEN'S SPECIAL SITUATION, POPULATION ISSUES AND GENDER PERSPECTIVES 4 n.6 (1997), available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/OCHA-6R6ETF/\\$file/bridge-gen-Jun97.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/OCHA-6R6ETF/$file/bridge-gen-Jun97.pdf). One understanding of the conflict saw it as a product of external interests, with the RENAMO acting as a tool for the agendas of South Africa and Rhodesia. Others saw the conflict as primarily an internal one, resulting from failed policies of the FRELIMO government. Most likely, the civil war was caused by a combination of internal and external forces, but the extent of each is still debated. *See id.* at 6-7.

154. *Id.* at 10.

155. General Peace Agreement for Mozambique, Protocol III, § 4(e), U.N. SCOR, 47th Year, at 14, U.N. Doc. S/24635, Annex (1992).

156. CONST. OF THE REP. OF MOZAMBIQUE art. 8 (1975).

157. Gregory W. Myers, Julieta Eliseu & Erasmo Nhachungue, *Security, Conflict, and Reintegration in Mozambique: Case Studies of Land Access in the Postwar Period* 11-12 (Univ. Wis.-Madison Land Tenure Ctr., Research Paper No. 119, 1994).

158. *Id.* at 12.

159. *Id.* at 11-14 (discussing the land laws of Mozambique in detail).

160. *Id.* at 45.

husband or male relatives, and in case of divorce, a woman living in the south is forced to leave her home and loses all rights to her property.¹⁶¹ Discrepancies between the customary and statutory systems made it very difficult for women to access the legal system to protect their rights.¹⁶²

The government that emerged from the postwar elections in 1994 embarked on a massive land reform campaign that lasted five years and included debates, conferences, and the involvement of donors, NGOs, and foreign governments.¹⁶³ One of the products of this campaign was the Land Act of 1997.¹⁶⁴ The Land Act reiterates that the land of Mozambique belongs to the state,¹⁶⁵ but individuals, corporations, and communities can hold usufruct rights individually and jointly in accordance with the law.¹⁶⁶ It incorporates the antidiscrimination principles embodied in the constitution, in which men and women are considered equal in economic and social affairs,¹⁶⁷ with relation to land; for example, Article 16 prescribes that land use rights can be inherited without any distinction based on gender.¹⁶⁸ These rights can also be acquired through: (1) customary law, as long as it does not conflict with the constitution; (2) occupancy for ten years; or (3) a formal application process established by this Act.¹⁶⁹ Rights are allocated equally to both genders under the law.¹⁷⁰ Notably, the Land Act was passed in the same year that Mozambique acceded to CEDAW.

The Land Act was considered a breakthrough because of its interweaving of the statutory and customary law systems,¹⁷¹ thereby avoiding some of the conflict that the dichotomy has created in many of the other countries discussed in this Note. One provision of the Land Act in particular has been singled out as a successful step toward improving customary land rights for women without eliminating or interfering too greatly with customary norms. This provision allows farmers to acquire collective land titles, which has the potential to prevent the alienation of common lands.¹⁷² Under customary law, women have separate and independent usage rights to common lands, which they can use for subsistence,¹⁷³ and the Land Act thus provides a means to protect this customary property right. Customary law is only honored through the Land Act

161. Rachel Waterhouse, *Women's Land Rights in Post-Conflict Mozambique*, in WOMEN'S LAND AND PROPERTY RIGHTS, *supra* note 122, at 45, 47.

162. Myers, Eliseu & Nhachungue, *supra* note 157, at 50.

163. Unruh, *supra* note 151, at 153.

164. Lei No. 19/97 de 1 de Outubro de 1997 [Law No. 19/97 of October 1, 1997], Boletim da República No. 40 (3d Supp.), Oct. 7, 1997, (Mozam.), translated in MOZAMBIQUE LAND LEGISLATION 9 (MozLegal ed., 2004), available at <http://faolex.fao.org/docs/pdf/moz15369E.pdf>.

165. *Id.* art. 4

166. *Id.* art. 10.

167. CONST. OF THE REP. OF MOZAMBIQUE art. 36 (1990).

168. Lei No. 19/97, *supra* note 164, art. 16.

169. *Id.* art. 12.

170. Waterhouse, *supra* note 161, at 49.

171. U.N. Office for the Coordination of Humanitarian Affairs, *Land Reform in Southern Africa: Mozambique: Women Still Struggle for Land Rights Despite New Law*, IRIN (July 1, 2003), <http://www.irinnews.org/InDepthMain.aspx?InDepthId=26&ReportId=69845> [hereinafter IRIN].

172. Lei No. 19/97, *supra* note 164, art. 10.1; Waterhouse, *supra* note 161, at 50.

173. *Id.* at 48.

to the extent that it abides by the constitution and its antidiscrimination provision.¹⁷⁴

After several more years of advocacy by civil society and female activists, Mozambique passed a comprehensive new family law in 2004, a highly touted piece of reform that formally makes great changes and could impact the cultural vision of family structure itself.¹⁷⁵ Some of the most notable provisions of the law include recognition of women and men as heads of households, recognition of noncivil marriages, and an inheritance rule that allows women to inherit her partner's property if they have lived together for a year and to receive alimony if they have cohabited for three years, which prevents men from escaping spousal responsibilities simply by avoiding civil marriage.¹⁷⁶ The new family law further integrates statute and custom, making it easier for rural courts to apply the law. It also makes structural changes that facilitate a culture of gender equity; for example, it asserts shared leadership in the family and over the family property, and it allows each spouse to work without the consent of the other.¹⁷⁷

Problems of education and access trouble the implementation of the new land law as well as the family law, and women's rights NGOs will have their hands full in Mozambique for a long time. But as information about the law trickles through the system, cases go through the court systems, and precedents are set, the hope is that the basic principles that underlie the Land Act and the new family law can become part of daily life and can actually change the mindset of communities, allowing the post-conflict reforms (which admittedly took over a decade) to be fully implemented.¹⁷⁸

D. *The Agency of Displaced Women: Guatemala*

As in Rwanda, a primary source of Guatemala's history of conflict is its land. Displacement in Guatemala can be traced to its colonial days, when indigenous lands were expropriated, and in some cases sold to coffee exporters.¹⁷⁹ In 1952, the government's land policy included a system that redistributed both private and state-owned lands in order to correct inequality in land ownership.¹⁸⁰ While many families benefitted from the reform, large landholders such as the United Fruit Company protested the redistribution of their land.¹⁸¹ A U.S.-supported military coup overthrew the government

174. CONST. OF THE REP. OF MOZAMBIQUE art. 67 (1990).

175. See JENNIFER LEIGH DISNEY, WOMEN'S ACTIVISM AND FEMINIST AGENCY IN MOZAMBIQUE AND NICARAGUA 125 (2008).

176. *Id.*; Leonard Maveneka, *Mozambique's Family Law Passes!*, OXFAM INT'L, http://www.oxfam.org/en/programs/development/safrica/moz_law.htm (last visited Mar. 28, 2011).

177. DISNEY, *supra* note 175, at 158; Maveneka, *supra* note 176.

178. See Chris Hufstader, *New Laws and New-Found Respect for Women in Mozambique*, OXFAM INT'L (Apr. 11, 2006), <http://www.oxfamamerica.org/articles/new-laws-and-new-found-respect-for-women-in-mozambique>.

179. Cecilia Bailliet, *Property Restitution in Guatemala: A Transnational Dilemma*, in RETURNING HOME, *supra* note 116, at 165, 169.

180. Painter, *supra* note 39, at 148-49.

181. *Id.*

responsible for the new land policies and instated one that was pro-agribusiness and economic development.¹⁸² The new government's land policies led to considerable displacement as large landowners swallowed up the land of small subsistence farmers, leading to "one of the most skewed land distribution patterns in all of Latin America."¹⁸³

It was during this period that rumblings of insurgency began. The Unidad Revolucionaria Nacional Guatemalteca (URNG) began its rebellion efforts with a series of targeted attacks against institutional leaders, but after many years of this strategy, the group switched to a "scorched earth" policy that killed over two hundred thousand people and displaced over a million.¹⁸⁴ The thirty-six year civil war finally ended with the signing of the Peace Accords in 1996. While the Accords were not legally binding, they reiterated constitutional and international human rights norms and emphasized the need to address the socioeconomic roots of the conflict.¹⁸⁵ The Accords also expressed a commitment not only to help returning refugees recover their lands, but also to ensure that all landless refugees obtain land through a soft loan process, and over half of the refugees that returned immediately after the ceasefire were assigned new lands by the government.¹⁸⁶ Through other agreements, such as the Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict, the government guaranteed refugees and internally displaced people restitution or, if restitution would require difficult legal proceedings, an option to choose compensation.¹⁸⁷ Several of these agreements explicitly recognize the government's responsibility not to discriminate against women, and one explicitly recognizes both male and female heads of households and allocates family lands to them as co-owners.¹⁸⁸

Guatemalan statutory law, for the most part, has been nondiscriminatory. The constitution states that men and women are equal regardless of marital status.¹⁸⁹ Guatemala also ratified CEDAW in 1982.¹⁹⁰ However, lawyers have exploited a contradiction in the family code to argue that women's property is attached to marriage, and since many families in Guatemala live together under common law and are unmarried under the statutory framework, this leaves them unprotected by some legislation.¹⁹¹ Finally, the National Land Distribution Decree of 1951, which states that only one member of a family will hold title to lands held in family patrimony, had been consistently interpreted to give the male head of household title to family lands until the rule

182. *Id.* at 149.

183. *Id.* at 149-50.

184. Bailliet, *supra* note 179, at 170.

185. *Id.* at 171. In 1999, Guatemala tried but failed to approve constitutional reforms that would have given legal weight to some aspects of the Peace Accords because a majority of the population did not vote. *Id.*

186. Paula Worby, *Organizing for a Change: Guatemalan Refugee Women Re-affirm Their Right to Land*, in *WOMEN'S LAND AND PROPERTY RIGHTS*, *supra* note 122, at 54, 57.

187. Bailliet, *supra* note 179, at 172-73.

188. Worby, *supra* note 186, at 58-59.

189. CONST. OF GUATEMALA art. 4.

190. Worby, *supra* note 186, at 58.

191. *Id.*

was modified in 1996 to include the whole family on the title.¹⁹² This change, which was largely a result of pressure from women's groups who were supported by the U.N. High Commission for Refugees, was also reflected in a 1999 land access program called FRONTIERRAS, which required that the land titles issued under it had to include both spouses regardless of marital status.¹⁹³ Until then, less than ten percent of the beneficiaries of major land programs were women.¹⁹⁴

While the implementation of these progressive programs has often been problematic, hindered by weaknesses in the system and existing traditions that keep women from their deserved titles,¹⁹⁵ the Guatemalan story highlights the power of displaced women themselves to organize and influence the process of transitional justice. While in exile from their home country, women refugees formed their own representative organization called Mama Maquin, whose primary role was to "raise consciousness about discrimination against women."¹⁹⁶ After the Accords were signed, Mama Maquin realized that while widows and single women were covered under the restitution process, women married under statutory or common law were not addressed.¹⁹⁷ As Marcia Garcia Hernandez, a member of Mama Maquin, stated:

That is when we decided to fight for the right to be co-owners of the land for our own security and that of our daughters and sons, so that the woman will not be left out in the street if the man sells the land or abandons his partner. . . . For us and our organization, this situation presents great challenges and means changes in ourselves too, because, since land is the basis of life, economic well-being and community development, we women must fight to make our participation real in all facets of community life and society.¹⁹⁸

Mama Maquin realized that female returnees needed to be a part of the land acquisition process and needed to have a voice in cooperative and community land ownership structures.¹⁹⁹ Members brought their demands to national returnee organizations, international institutions like the UNHCR, and to their own husbands. Their joint efforts resulted in the support of the international community, the inclusion of the equality provisions in land legislation described above, increased awareness of those protections, and opportunities for returnees to participate in the reconstruction of their own country and communities.²⁰⁰ The successful inclusion of women in the postwar land programs, such as FONTIERRAS, emphasizes the value of allowing the

192. *Id.* at 59.

193. Susana Lastarria-Cornhiel, Land Tenure Ctr., Univ. of Wis.-Madison, *Gender and Property Rights Within Postconflict Situations* 15 (U.S. Agency for Int'l Dev., Issue Paper No. 12, 2005) (citing Ley del Fondo de Tierras [Land Fund Law], Decreto Numero 24-99 [Decree No. 24-99] art. 20 (1999) (Guat.)).

194. *Id.* at 14.

195. *See id.* at 15.

196. UNCHS, GLOBAL OVERVIEW, *supra* note 4, at 37.

197. Maria Garcia Hernandez, *The Implementation of the Guatemalan Peace Accord with Special Reference to Women Returnees from Mexico*, in *WOMEN'S LAND AND PROPERTY RIGHTS*, *supra* note 122, at 126, 128.

198. *Id.* at 128-29.

199. *Id.*

200. *Id.* at 129-30.

participation of women in the design of the restitution process.²⁰¹ As Ms. Garcia Hernandez rightly said: “[T]he participation of women is an absolute necessity in the construction of peace.”²⁰²

V. LESSONS LEARNED AND RECOMMENDATIONS FOR GENDER-SENSITIVE PROPERTY RESTITUTION

The struggle for women’s property rights has become significant as governments begin to integrate property restitution into their transitional justice systems. One optimistic author wrote in 1998 that the stage had been set for serious progressive development in the area, and that there were signs of a “common and serious intention to follow through the recommended agenda for change.”²⁰³ And yet, all around the world, the cycle continues: women are displaced during war, face unspeakable horrors as gender-based violence becomes a more and more common weapon of choice, and return with hopes of peace only to find that their homes have been occupied and they have no way to get their property back.

Part IV’s case studies demonstrate that post-conflict states with discriminatory histories may have discriminatory formal law, customary law, or both prior to conflict; they also may have transitional justice and property restitution mechanisms that attempt to reform formal law, both customary and formal law, or neither.

Some post-conflict governments do not make gender equality a priority in transitional justice and either refuse to modify discriminatory property ownership laws or pass new restitution laws that perpetuate and reincorporate pre-conflict discrimination against women. A discriminatory post-conflict formal law system could mirror, or could deviate from, the post-conflict customary law system, but regardless, it indicates a failure of the new government to understand or react to the principles outlined in the multinational treaties and reiterated in the Pinheiro Principles. This failure may be apparent on the face of the restitution law, such as one that explicitly prohibits women from owning or inheriting property. But the failure is just as real if a restitution law is silent on the issue of who owns property, allowing that gap to be filled by the existing discriminatory pre-conflict law or by discriminatory customary law.

Moreover, even a law that explicitly protects women can be inadequate if it ties a woman to her husband by, for example, promising that husband and wife have equal rights to their property, but does not make any note of those women who are widowed or not legally married.²⁰⁴

The remainder of this Part addresses what can be learned from those

201. Lastarria-Cornhiel, *supra* note 193, at 15.

202. Garcia Hernandez, *supra* note 197, at 131.

203. Asteya M. Santiago, *Socio-Economic and Cultural Factors Affecting Women’s Rights to Land and Property in the Asia-Pacific Region*, in *WOMEN’S LAND AND PROPERTY RIGHTS*, *supra* note 122, at 24, 35.

204. *Id.* at 16.

countries that have been through this struggle, and what can be used in nations that are just beginning the process of transitional justice.

A. *Stronger International Framework*

The international legal framework can significantly influence any progress in removing discrimination from restitution programs. The existence of international human rights treaties that specifically protect women's rights to housing and property as human rights not only provides a ready-made legal framework that can be incorporated into national law, but also helps shape gender equality into an international norm and expectation. A new government that emerges from conflict with hopes to align itself with international standards can look to these treaties for guidance in taking a gender-sensitive approach to transitional justice, thus implementing an early and important step to achieving broader gender equality by guaranteeing equality in its property restitution mechanisms. U.N. bodies such as the UNHCR and the Committee for the Elimination of Discrimination Against Women are deeply involved in the reconstruction of war-torn countries. As international enforcement mechanisms become more institutionalized, there is hope that women can have their rights validated through the international judicial system.²⁰⁵

Because of the importance of the international system in securing women's property rights in transitional justice, the existing framework should be clarified so that an equal right to property is explicitly recognized in human rights law and an equal right to property restitution is recognized in international humanitarian law. One option for such clarification would be a version of the Pinheiro Principles that would essentially codify the various pieces of existing international law to recognize these rights, obligate states to abide by them, and set up a review mechanism to enable individuals or organizations to bring complaints against states that are not in compliance. This is a matter of not just economic rights but of human rights, so there should be a way to enforce their protection on an international level.²⁰⁶ International bodies can also bolster the existing instruments, such as the ICESCR, by creating additional monitoring mechanisms, which can provide guidance and knowledge from past experience to a nation specifically in the area of gender equality in transitional justice.

205. Such actions would be similar to *Simunek v. Czech Republic* and *Adam v. Czech Republic*, described in *supra* note 53.

206. WRIGHT, *supra* note 17, at 190-91. Wright advocates another approach to international law that may provide at least a partial solution to the problem. She suggests that international law holds nations responsible for ensuring that people have an "adequate standard of living" and that the ICESCR should be bolstered with additional monitoring and enforcement mechanisms in order to bring a "violations approach" to socio-economic rights. *Id.* at 189-92 (quoting Audrey Chapman, *A New Approach to Monitoring the International Covenant on Economic, Social and Cultural Rights*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (Henry J. Steiner & Philip Alston eds., 2d ed. 2000)).

B. *Domestic Formal and Customary Law Reform*

While the international system can be very influential, legal reform ultimately must come from the new government of the post-conflict state. Governments either have to be dedicated to the ideal of gender equality and recognize the value of equality in property restitution, or have to be willing to involve actors from civil society and the displaced themselves to participate in developing transitional justice. It is critical that post-conflict governments not take a gender-blind approach to all aspects of transitional justice, but especially property restitution.²⁰⁷ By making a commitment to gender equality in the transition process, a new government can carry through long lasting legal reforms.

This first step of formal legal reform is necessary and can be successful, but the cases described in Part IV suggest that the timing of this reform is crucial. Guatemala, and to some extent Rwanda, implemented gender-sensitive reforms soon after conflict, as a part of their immediate post-conflict land programs. In those countries where reform did not happen right after conflict, women had to struggle for years and go through the traditional discriminatory legislative mechanisms to secure their rights. The experience in Guatemala suggests that actors in transitional justice need to start organizing even before return occurs in order to inject gender reform into the foundation upon which the transitional justice system will be built.²⁰⁸ Explicit recognition of equal property restitution rights in international law can facilitate this preplanning by making property restitution a priority for the actors involved.

As discussed in Part I, a gender-sensitive framework for property restitution would require more than a system that returns property to the pre-conflict title owner. It has to recognize rights of women who return from conflict without the spouse or other male figure who held title to the property. Of course, it is conceivable that a country could devise a very narrow but equitable post-conflict restitution program that returned property to women who would have otherwise had rights to that property through a male spouse or relative who died in war without promising that women attempting to acquire property in the future will not face restrictions. As described above, Guatemala used this type of limited restitution program before Mama Maquin intervened in the process. But as this Note has emphasized, transitional justice is an opportunity to make permanent reform of discriminatory land laws and then build a restitution program upon a more equitable system of property ownership. Without fundamental changes to this system and a property restitution scheme that explicitly addresses the unique problems that returning

207. Telephone Interview with Mayra Gomez, *supra* note 22; see HANDBOOK, *supra* note 21, at 19 (“Ultimate responsibility for securing the implementation of the rights found in the Principles rests with the State.”).

208. The U.N. High Commissioner for Refugees recognized the value of acting early. In an inter-office memo, the organization noted that issues of property and housing must be incorporated into its “pre-return” plan of action. This plan included identifying relevant national laws and promoting the repeal and reform of any laws that conflicted with international human rights standards for housing and property rights. LECKIE, LAW, *supra* note 36, at 61.

women face, a country will reify an existing discriminatory structure to the detriment of its women and also of the peace process and future recovery.²⁰⁹

Once a government has committed to reform, it must address not only its formal law but also discriminatory customary law. As the case studies in Part IV showed, a major problem with customary law is that even when countries enacted formal land reform, the statutory law only recognized civil law marriages, leaving an entire set of relationships unprotected by new reform. Instead, formal law should specifically recognize the marital relationship of spouses not married through a formal process so that women married under either system are afforded the protections of formal law. It is important that the formal law be extremely clear as to when it applies and when customary law reigns, particularly when there is discrepancy between those two legal systems. As exemplified by Mozambique's Land Act, reform must strive to reconcile both formal and customary law, but ultimately if the latter is irreconcilable with nondiscriminatory national and international law, a woman must have the option to turn to formal legal mechanisms that override the discriminatory provisions of customary law in order to protect her rights to her land.

C. *Counterarguments and Responses*

Such a strong preference for eliminating what those in the Western world see as discriminatory custom and tradition may be viewed as a usurpation of culture. Attempts to universalize gender justice in order to reform developing countries are sometimes seen to be "Westernizing and colonizing."²¹⁰ Shelley Wright provides one powerful response to this antipaternalism argument: "[T]he fact that a practice is sanctioned by culture should not in and of itself be used as an excuse to condone the reality of suffering and disempowerment that may result."²¹¹ Martha Nussbaum responds similarly to this culture-based argument against the development of universal norms in gender rights. She emphasizes choice, noting that a woman should not be precluded from choosing to lead a "traditional" life, so long as "certain economic and political opportunities" are in place.²¹² As she notes, cultures change, and perhaps the development of cross-cultural norms are not a destruction of individual cultures but a sign of the dynamism of culture itself.²¹³ While it is important to

209. This risk of reinforcing existing discrimination was recognized in the Colombian context in Donny Meertens & Margarita Zambrano, *Citizenship Deferred: The Politics of Victimhood, Land Restitution and Gender Justice in the Colombian (Post?) Conflict*, 4 INT'L J. TRANSITIONAL JUST. 189, 200 (2010). Meertens and Zambrano describe the problem that widows in Colombia face in attempting to get restitution after conflict. Without written proof of tenancy or a formal marriage certificate, these women cannot follow the procedures to register their abandoned property. As the authors argue, a progressive transitional justice process cannot achieve its goals without addressing discriminatory legal and social practices. *Id.* at 204.

210. Martha Nussbaum, *Women's Capabilities and Social Justice*, in GENDER JUSTICE, DEVELOPMENT, AND RIGHTS 45, 51 (Maxine Molyneux & Shahra Razavi eds., 2002).

211. WRIGHT, *supra* note 17, at 89.

212. Nussbaum, *supra* note 210, at 51.

213. *Id.* at 52. Furthermore, in many countries, women have been excluded from the process of shaping current cultural norms. Felicity Kaganas & Christina Murray, *The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution*, 21 J.L. & SOC'Y 409, 422-23 (1994)

acknowledge that a woman's equal right to property is not necessarily a universally recognized norm from which all deviations need to be extinguished, this Note identifies a situation in which women's choices are limited and advocates for means to expand their choices.²¹⁴

Some scholars have argued that formalizing property rights makes property even more inaccessible for women because of economic barriers to ownership.²¹⁵ This is not an issue for property restitution because here, women already "owned" the property in question. The issue is that in order to make property ownership accessible both *de jure* and *de facto* during and after transitional periods, a redistributive approach to transitional justice is necessary, one that includes land distribution programs (as in Guatemala and Rwanda) and a multidimensional reform of other discriminatory laws (such as Mozambique's Family Law). Additionally, the formal law reform can and should be structured in such a way that customary provisions that actually protect women's property rights are saved: for example, Mozambique's Land Act preserved the customary collective ownership of common lands, which women used for their subsistence.²¹⁶ Thus, formal law reform does not have to create economic barriers for women if constructed in a careful way.

D. *Beyond Law Reform*

A multidimensional approach to reform should include improving the judicial mechanisms that allow enforcement of any changes in the law. A consistent problem in the countries discussed in this Note was implementation: the law might be on the books, but the judges are still embedded in a culture that disregards women's ownership rights, and affected women may not even know about their rights in the first place. One effective solution to this problem is consistent and thorough education of both women and repeat players in the legal system, including lawyers and judges. The awareness campaign that the Association of Women Lawyers led in Liberia exemplifies the type of education that can be used to organize women and to overcome their own

(describing the discriminatory customary law in South Africa as a product of colonial patriarchy).

214. Wright continues her discussion of this tension between a paternalistic desire to impose certain values in advocating for women's rights and the desire for tolerance and noninterference with other cultures in the genital mutilation context. While tracing various views of femininity to the East/West divide and to the remnants of colonialism, Wright also concludes that an expansion of women's choice is necessary, but so is respect for the choices they make within that realm, even if those choices contradict our instincts about what is right for them. *Id.* at 91.

215. For example, the Internal Displacement Monitoring Centre notes:

In the context of a poorly functioning formal state system for land transfers and purchase, and with the breakdown of the customary system as the result of displacement, land titling initiatives can thus have a negative effect, in particular on vulnerable individuals, such as displaced people, women (particularly widows) and children. Members of these groups are usually considered to have tenancy rights only, not ownership rights. Land titling usually benefits those in power and men. Given inequitable laws and practices denying wives joint ownership of family land, women often lose out in this process.

INTERNAL DISPLACEMENT MONITORING CENTRE, HOUSING, LAND AND PROPERTY 81 (2006), available at [http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/E3CEAF22C4A4E236C12572BF003DFE6D/\\$file/Global_Overview_2006_Property.pdf](http://www.internal-displacement.org/8025708F004BE3B1/%28httpInfoFiles%29/E3CEAF22C4A4E236C12572BF003DFE6D/$file/Global_Overview_2006_Property.pdf).

216. See *supra* note 174 and accompanying text.

resignation to discriminatory laws. If this sort of campaign can be carried through after laws are changed, then more and more women will take their claims to court.

Education is only one of the crucial roles that civil society can play in protecting women's interests during reconstruction.²¹⁷ All of the examples of successful reform in the case studies involved efforts by civil society organizations, sometimes working against the current of an unresponsive government like Liberia's. Civil society plays a role in every step of the way, from lobbying international and national governmental entities,²¹⁸ to drafting new legislation,²¹⁹ to representing women in court. And civil society offers the best means of participation for those women directly affected by the war who want their voices heard. Much as transitional justice is an opportunity for legal change, the postwar period also provides opportunity for change in social structures and gender relationships.²²⁰ Postwar changes in the structure of the household and the need for women to take on leadership roles in both the private and public spheres can promote the reevaluation of "old preconceptions and stereotypes in favour of more rational and just relationships."²²¹ These changes can drive the successful organization and representation of women by women as exemplified in Liberia, Guatemala, and Rwanda,²²² and allow women to capitalize on the upheavals caused by war to fight rigid discriminatory structures. Existing organizations like the U.N. bodies involved in post-conflict countries should facilitate the collective action by women by providing them the tools to set up a representative organization that can participate directly in designing the transitional justice scheme. If women are able to organize and participate in the transition process, they will be more likely to continue to assert their rights in their government and in their communities and pursue equality after the transition process comes to an end.

VI. CONCLUSION

Denying women access to property when they return after being ripped from their homes because of war is piling tragedy upon tragedy. It is fundamentally against international law and a violation of human rights. The process of changing these compounded tragedies will undoubtedly continue for a long time, but with this Note, I seek to draw attention to a problem that has not been recognized as it should by the international human rights community. I also hope, through the discussion of several countries' stories, to demonstrate that in spite of the incredibly varied contexts, displaced women all over the world face some similar challenges: their legal systems refuse to recognize

217. See IRIN, *supra* note 171.

218. See, for example, the efforts of civil society in Guatemala at *supra* notes 179-81 and accompanying text.

219. For example, this occurred in Nepal. See *supra* note 67 and accompanying text.

220. El-Bushra & Mukarubuga, *supra* note 25, at 20.

221. *Id.*

222. Rose, *supra* note 142, thoroughly discusses the reorganization of social structures that occurred in Rwanda as a result of conflict.

their ownership of property in a way that is independent of their ties to male family members and spouses, and when those connections to men are severed, as they often are in war, women lose access to their own property and therefore to their own homes and means of livelihood. But if government, civil society, and displaced women themselves take a proactive stance during the post-conflict period of transitional justice, they can use that period of sweeping reform not only to ensure that all returnees are given back their property without regards to gender but also to boost gender equality and align the nation with international norms permanently.

This process will involve a multifaceted approach. First, the existing international framework needs to more explicitly recognize the equal right to property restitution after conflict, potentially through a stronger, preferably binding version of the Pinheiro Principles. Second, local lawmakers should take advantage of the transitional period to reform formal law and eliminate any discriminatory provisions in property provisions; reformed formal law needs to assert women's rights to property that formerly could only be owned by their husbands or other male family figures, or the goals of property restitution cannot be achieved. Discriminatory customary law should also be reconciled with these changes, and formal law should provide women with recourse when discriminatory customary law is irreconcilable. Third, law reform should be combined with improved enforcement mechanisms, land redistribution programs, education efforts to inform displaced women of their rights and available resources, and the inclusion of civil society and displaced women in the development of the transitional justice scheme. Through these changes, actors in transitional justice can lay the strong groundwork for the rebuilding of a fair and equal society and a long-lasting peace.