

Housing, Land, and Property Rights in Post-Conflict Reconstruction

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Introduction

“I never knew that land has value in the way that we can sell it for money...But now I know it after seeing people sell their land to earn money. I believe it was around the 2000s when we learned about the value of land.”¹ This remark from a Cambodian farmer is an example of traditional conceptions of land in many developing countries, where “land is not perceived as a commodity but rather as an essential element of subsistence and as such cannot be alienated from the community.”²

The stark contrast between land as an essential element and land as a commodity is one reason property rights pose a contentious issue in post-conflict settings. Security over one’s home and land are cornerstones of sustainable peace. Security requires legal systems to ensure property rights. Effective legal systems reflect local and traditional perceptions of land and property.

Establishing housing, land, and property (“HLP”) rights in post-conflict settings has not always been a priority, or even a consideration.³ The importance of HLP rights has recently been recognized. Restitution of land and property to victims of international human rights violations is now held as an integral aspect of the peace process.

This paper will examine how land tenure security is established in post-conflict settings. The predominant method of this is the imposition of formal systems of land titling registration in societies that previously used informal systems of land ownership. Section 1 will examine the theoretical framework of HLP rights in post-conflict settings. The concepts of property rights, land tenure, legal pluralism, and

¹ Jack Brook & Borin Sopheavuthtey, *Capitalism in a Nutshell, the Growth of Cashews in Cambodia*, SOUTHEAST ASIA GLOBE (Nov. 4, 2021), <https://southeastasiaglobe.com/cambodia-cashew-plantation-capitalism/> (explaining that traditionally, Cambodians claimed possession of land by clearing and using it for agriculture, and, because the Cambodian 2001 Land Law ended that practice, farmers were subsequently pressured to cultivate land they were at risk of losing).

² Barbara McCallin, *Housing, Land and Property in Conflict and Displacement Settings*, 9 DEUSTO J. HUM. RTS. 29, 37 (2011).

³ See *supra* Section I.B.

tenure security are explained, as they pertain to displaced people.⁴ That is followed by a summary of the current international legal framework regarding HLP rights in post-conflict settings. Finally, the relationship between tenure security and economic development is analyzed.

Cambodia is an excellent case study of the many challenges presented by imposing new legal systems to ensure HLP rights in post-conflict settings. Section 2 will begin with an overview of land policy under the Khmer Rouge and the subsequent Vietnam occupation. Then, the post-conflict legal framework governing HLP rights is outlined. Finally, the results of these policies and the remaining challenges are presented.

Section 1: The Theoretical Framework of Housing, Land, and Property Rights in Post-Conflict Settings

A. Property Rights, Land Tenure, Legal Pluralism, and Tenure Security: Important Concepts Underlying HLP Rights

There are 82.4 million people displaced globally because of conflict.⁵ Forty-two percent of these are children.⁶ Between 4.2 to 10 million people are stateless.⁷ Displaced people reside in refugee camps or makeshift housing structures.⁸ Inadequate housing and lack of sanitation facilities contribute to public health crises.⁹ Displacement or destruction of arable land furthers food insecurity.¹⁰ HLP violations can

⁴ See *About Internally Displaced People*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/issues/idpersons/pages/issues.aspx> (outlining the difference between refugees and displaced people in international law). A full analysis of the different challenges facing international refugees and internally displaced people is outside the scope of this paper. For the purposes of analyzing restitution and HLP legal systems, those forced to abandon land and property because of conflict will be referred to generally as displaced people, regardless of whether they fled to refugee camps beyond the borders of the country of their nationality or not.

⁵ *Figures at a Glance*, UNHRC: THE UN REFUGEE AGENCY, <https://www.unhcr.org/en-us/figures-at-a-glance.html>.

⁶ *Id.*

⁷ *Bureau of Population, Refugees, and Migration: Statelessness*, U.S. Department of State, <https://www.state.gov/other-policy-issues/statelessness/> (explaining that a person may become stateless due to transfers of territory, among other causes). The unique HLP challenges presented by border disputes are beyond the scope of this paper.

⁸ See generally Bart de Bruijn, UNITED NATIONS DEVELOPMENT PROGRAMME HUMAN DEVELOPMENT REPORTS: THE LIVING CONDITIONS AND WELL-BEING OF REFUGEES (2009).

⁹ *Id.*

¹⁰ *Africa has plenty of land. Why is it so hard to make a living from it?* THE ECONOMIST (Apr. 28, 2020), <https://www.economist-com.proxy.wm.edu/middle-east-and-africa/2018/04/28/africa-has-plenty-of-land-why-is-it-so-hard-to-make-a-living-from-it>.

impact social stability for generations; internally displaced people are displaced for an average of over 10 years and refugees are displaced for an average of 20 years.¹¹

Ensuring HLP rights to displaced people who wish to return to their homes is necessary to ensure the right to return and establish peace by protecting residents from future forced displacement. HLP rights are complex and vary across different legal systems. Recognition of ownership or a right to occupy is often based more on local and cultural norms than formal legal systems. Property rights, land tenure, legal pluralism, and tenure security are important concepts that help explain these variations.

Property rights consist of a collection of rights, including but not limited to the right to exclude, possess, use, sell, or allow others to use a part of the land.¹² The rights regarding an area of land may be held by one owner, multiple parties, or collectively.¹³ In the United States and many Western countries, property rights rely on recognition by the state and the authority of the legal system to enforce these rights when they are violated.¹⁴ However, many countries and communities do not primarily rely on the state to enforce property rights and customary, religious, and other sources of authority govern or compete with the state to govern land.¹⁵ This may be because the state lacks legitimacy or capacity at the local level or abuses its power through illegal state-sanctioned property conversions.¹⁶

Land tenure refers generally to the legal or customary rules of a given society regulating how land and resources are allocated among people.¹⁷ Land tenure can be private, communal, open access (e.g. the high seas), or state-owned.¹⁸ Land tenure rules can be formal or informal.¹⁹ Formal rights are “explicitly acknowledged by the state” and can be enforced through the legal system.²⁰ Informal rights are not

¹¹ *Forced Displacement: Refugees, Asylum-Seekers and Internally Displaced People (IDPs)*, EUROPEAN CIVIL PROTECTION AND HUMANITARIAN AID OPERATIONS, (July 22, 2021), https://ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons_en.

¹² Scott Leckie & Chris Huggins, CONFLICT AND HOUSING, LAND AND PROPERTY RIGHTS: A HANDBOOK ON ISSUES, FRAMEWORKS AND SOLUTIONS 2 (2011).

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ FAO LAND TENURE STUDIES, LAND TENURE AND RURAL DEVELOPMENT 7 (2002).

¹⁸ See *id.* at 8 for definitions of these categories.

¹⁹ *Id.* at 11.

²⁰ *Id.*

recognized or protected by the state.²¹ An informal possession may be illegal or legitimate but governed by customary or local laws.²² Because property rights consist of many different individual rights, informal and formal rights may coexist over one piece of land.²³

Land tenure systems can overlap within one society. Legal pluralism is the “co-existence of several sources of authorities” with legally legitimate ability to decide matters.²⁴ This often emerges in countries where formal authority from the state is absent at the local level, allowing customary leaders to solve disputes.²⁵ Sources of authority are not limited to “acts, rules, administrative orders, [or] court decisions.”²⁶ Legitimate sources of authority include “cognitive and normative orders generated and maintained” within a “village, an ethnic community, an association, or a state.”²⁷ Informal sources of authority, such as religious laws, customary laws, and local norms, should not be discounted by outsiders as secondary to formal laws. Balancing the weight of multiple sources of authority is a major challenge in managing HLP disputes. While recognition of multiple sources of authority is necessary to understand legitimate claims to property rights, the parties claiming ownership may draw on different systems because that system supports their claim.²⁸

Tenure security is the “certainty that a person’s rights to land will be recognized by others and protected in cases of specific challenges.”²⁹ Tenure insecurity may contribute to a conflict, exasperate a conflict, and prolong a conflict. Globally, over a quarter of the population lives without tenure security and is vulnerable to forced displacement.³⁰ Deeply entrenched social and economic inequalities are exasperated by unequal distribution of property, and resulting tensions leave communities susceptible to

²¹ *Id.*

²² *Id.*

²³ *Id.* at 11 (explaining that, for example, an owner may formally own a parcel of land and informally lease out use rights to another person).

²⁴ McCallin, *supra* note 2, at 37.

²⁵ *Id.*

²⁶ Leckie & Huggins, *supra* note 12, at 47.

²⁷ *Id.*

²⁸ *Id.* at 48.

²⁹ FAO LAND TENURE STUDIES, LAND TENURE AND RURAL DEVELOPMENT, *supra* note 17, at 18.

³⁰ Leckie & Huggins, *supra* note 12, at 25.

conflict.³¹ Areas with highly valuable natural resources are susceptible to violence and economic exploitation.³² Tenure insecurity is also a tool of aggression. Violations such as land confiscation and the destruction of housing and crops are methods of displacement.³³ Legal regulations over property can also be manipulated by the displacing party to force displacement of certain groups.³⁴

Once a home or property is lost, vulnerable groups are left even more exposed, and conflict is more challenging to resolve.³⁵ Displaced people may join informal settlements, which lack legal security because they are not recognized by authorities, and risk secondary displacement.³⁶ Residents of formal emergency shelters are also subject to forced evictions, poor living conditions, and a lack of economic opportunities.³⁷

B. Resettlement to Restitution: HLP Rights in International Law and the Current Post-Conflict Framework

There is an established framework for standards of housing in international human rights law.³⁸ Establishing property rights in post-conflict settings presents different challenges because HLP rights vary in different legal and social systems. Ideas regarding HLP rights in post-conflict settings are an area of inquiry in flux.

³¹ McCallin, *supra* note 2, at 30 (explaining that in many countries, inequalities developed during the colonial era were further entrenched by the government post-independence); *see also* Leckie & Huggins, *supra* note 12, at 26 (explaining that colonial powers often forcefully displaced local communities, particularly indigenous communities, to make way for agricultural development or other economically beneficial uses).

³² McCallin, *supra* note 2, at 30.

³³ *Id.* at 31.

³⁴ *See id.* for an explanation of how this concept was used in the Occupied Palestinian Territories by Israel against Palestinians.

³⁵ *Id.* at 33 (explaining that displacement from home risks the “physical security and health of women, children, and the elderly.”).

³⁶ *Id.* at 31.

³⁷ *Id.*

³⁸ *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 25.1 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services...”); *see International Standards on the Right to Housing*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/Housing/Pages/InternationalStandards.aspx#udhr> for a complete list of standards articulated in international law.

During the 20th century, the right of refugees to resettlement evolved to a right to restitution. Prior to the end of World War II, the United States had quotas for immigrants based on country of origin that did not allow exemptions for refugees fleeing conflict and persecution.³⁹ The 1948 Universal Declaration of Human Rights established a right to “leave any country” and to “return to [one’s] country.”⁴⁰ It was not until 1950 that the United States amended its Displaced Persons Act to eliminate policies that discriminated against Jewish refugees.⁴¹ Refugees did not have official protection under international law until the U.N. adopted the Convention Relating to the Status of Refugees in 1951, which was limited to Europeans.⁴² The 1967 U.N. Refugee Protocol extended the rights to refugees around the world.⁴³ Between the mid-twentieth century and the end of the Cold War, persecuted people’s right to leave their country was critical to refugee policy, as Western governments assisted Soviet refugees in resettlement and assumed they would not be able to return home.⁴⁴

Increased migration post-Cold War led to U.N. agencies to hold that the right of refugees to return home “was necessary to promote post-conflict peace and development.”⁴⁵ While a right to return has been recognized since the 1948 Universal Declaration of Human Rights, it was considered a right to enter one’s country of citizenship or nationality and applied to individuals.⁴⁶ That right to return evolved into a right to return to their “homes of origin” and that applied to groups of displaced people, rather than

³⁹ *United States Immigration and Refugee Law, 1921-1980*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/united-states-immigration-and-refugee-law-1921-1980> (last visited Dec. 2, 2021).

⁴⁰ Universal Declaration of Human Rights, *supra* note 38, art. 13.

⁴¹ *United States Immigration and Refugee Law, 1921-1980*, *supra* note 39.

⁴² G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (28 July, 1951) (defining a refugee as any person who “[a]s a result of event occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”).

⁴³ UNHRC, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL, 1 (2011).

⁴⁴ Megan J. Ballard, *Post-Conflict Property Restitution: Flawed Legal and Theoretical Foundations*, 28 BERKELEY J. INT’L L. 462, 480 (2010).

⁴⁵ *Id.*, see Leckie & Huggins, *supra* note 12, at 122 (explaining that since expropriation of land and homes is a mechanism of ethnic cleansing, restoring property to displaced people, as opposed to just returning them to their countries, is necessary to address the wrongs committed).

⁴⁶ Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y.U J. Int’l L. & Pol. 441, 458 (2005).

individuals.⁴⁷ The Dayton Peace Accords specified that a “right to return” included a right to restoration of property lost in the conflict.⁴⁸ In 1998, legislation was adopted enabling the restitution of property in Bosnia.⁴⁹ In 1999, the U.N. clarified that the “right to enter” one’s country is based on a “special relationship” between an individual and his country, and may entitle a person a right to enter a country other than that of his birth or nationality.⁵⁰

The Principles on Property and Housing Restitution for Refugees and Displaced Persons of 2002 (“Pinheiro Principles”) explicitly established that “housing and property restitution must be seen as a necessary component of the implementation of the right to return to one’s home.”⁵¹ This development was based on the use of restitution in the Dayton Accords.⁵² The application of the “right to return” was formally applied to large groups of refugees, as opposed to individuals wishing to return.⁵³ The Pinheiro Principles also clarify that informal rights, not just formally registered property, should be recognized as legitimate claims of ownership.⁵⁴

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law of 2005 affirmed that victims of human rights violations are entitled to remedies and reparations, including “restitution, compensation and

⁴⁷ *Id.* It is important to note that although the right to return is voluntary, factors in various post-conflict settings have not fully provided displaced people and refugees with a fair choice between resettlement in a host country or return. McCallin, *supra* note 2, at 33 (explaining that one barrier to integration in the local community for displaced people is that integration is seen as acceptance of the results of war or conflict); Ballard, *supra* note 44, at 478 (explaining that while the Dayton Accords, discussed in this section, provided a choice between restitution and compensation, a compensation fund was never established, because of fear that compensation would minimize the will to return). An examination of how voluntary return efforts have been in post-conflict settings is beyond the scope of this paper.

⁴⁸ PAUL PRETTITORE, THE RIGHT TO HOUSING AND PROPERTY RESTITUTION IN BOSNIA AND HERZEGOVINA 7 (2003) (“All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”).

⁴⁹ *Id.* at 8.

⁵⁰ Leckie & Huggins, *supra* note 12, at 144.

⁵¹ Williams, *supra* note 46, at 459.

⁵² Ballard, *supra* note 44, at 481.

⁵³ *Id.*

⁵⁴ McCallin, *supra* note 2, at 34.

rehabilitation.”⁵⁵ Restitution means restoring the victim to his original situation, which includes “return to one’s place of residence” and “return of property.”⁵⁶ As of 2010, restitution is a common feature of post-conflict transitional periods and in peace agreements.⁵⁷

Restitution has many benefits for refugees in post-conflict settings. Proponents claim that restitution enhances the rule of law.⁵⁸ Restitution of HLP rights presents a remedy to those whose rights were violated and ensures the dignity of refugees and the displaced.⁵⁹ Restitution also formally recognizes that forced acquisitions of land and homes during the conflict are not legitimate and any gains made by aggressors through violence will not be tolerated.⁶⁰ For example, restitution of property rights in Bosnia was a way of un-doing ethnic cleansing by ethnic reintegration through the legal system.⁶¹ Additionally, restitution as a mechanism for tenure security is viewed as integral to lasting peace.⁶² Restitution may advance economic and social stability. Agricultural areas can be used productively again and legally protected property rights benefit economic growth.⁶³

Restitution has received criticism of the strength of its legal basis and of its benefit to returnees.⁶⁴ Because restitution requires tenure security, and tenure security requires a legal system that protects HLP rights, restitution leads to international influence over the development of domestic laws. Restoring property rights post-conflict requires not just financial, technical, and personnel resources from the international community, but also influencing the legal system by creating and enforcing property laws.⁶⁵

⁵⁵ G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

⁵⁶ *Id.*

⁵⁷ Leckie & Huggins, *supra* note 12, at 123.

⁵⁸ Ballard, *supra* note 44, at 483.

⁵⁹ Leckie & Huggins, *supra* note 12, at 124.

⁶⁰ *Id.*

⁶¹ Ballard, *supra* note 44, at 484. *But see* Mathijs van Leeuwen et al., *Promoting Land Tenure Security for Sustainable Peace-Lessons on the Politics of Transformation*, 49 *Current Op. Env't Sustainability* 57, 59 (2021) (explaining that the portrayal of land tenure registration systems as a technical process de-politicized what inherently has political implications).

⁶² Ballard, *supra* note 44, at 485.

⁶³ *Id.*

⁶⁴ *Id.* at 467.

⁶⁵ *Id.* at 470.

Land tenure systems are often highly influenced by local customs, and legal systems cannot be successfully imposed without considerations to local traditions and needs.⁶⁶ Conversely, if local informal tenure systems resulted in inequalities or landlessness that caused the conflict, restitution will not address the root causes of those problems.⁶⁷

Critics also point out that Western countries and international agencies supporting restitution and the right to return may view it as an alternative to their acceptance of refugees.⁶⁸ Rich countries grew hesitant to accept refugees in the 1980s as migrants came to be associated with a desire to flee poverty.⁶⁹ Additionally, the legal basis of the right to restitution has been questioned. Restitution is based on a “right to return”⁷⁰ as well as the protection of property rights in international law.⁷¹ However, this criticism is based on a weak link between concepts, rather than an assertion of illegality.

Finally, critics claim that restitution leads to lack of participation by the displaced in the post-conflict justice process. Restorative justice involves “the active participation of victims to find solutions to conflict.”⁷² The large number of claims in most restitution programs cannot be heard in a domestic court and must instead be settled through an administrative process.⁷³ Victims losing their opportunity to fully explain their claim is particularly troublesome considering the various systems of local and customary ownership systems that exist in many post-conflict societies.

How displaced people decide whether to return to their home and the challenges faced when they attempt to return may offer insight into the value or shortfalls of restitution in post-conflict settings. One

⁶⁶ *Id.*

⁶⁷ McCallin, *supra* note 2, at 36.

⁶⁸ Ballard, *supra* note 44, at 487. See Kristinn Sv. Helgason, THE ECONOMIC AND POLITICAL COSTS OF POPULATION DISPLACEMENT AND THEIR IMPACT OF THE SDGs AND MULTILATERALISM (United Nations Department of Economic and Social Affairs, 2020) for an explanation of the costs associated with refugees for host countries.

⁶⁹ UNHRC, THE STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM 130 (2006).

⁷⁰ Ballard, *supra* note 44, at 481

⁷¹ *Id.* at 484.

⁷² *Id.* at 490.

⁷³ *Id.*

analysis concluded that security and improved access to electricity increase the likelihood of return.⁷⁴ Another study found that “attachment to country,” “reunification with family and friends,” harsh conditions in their host country, and “trust in their country of origin’s security forces” were major motivating factors for displaced people returning home.⁷⁵ Although the rights of the displaced to recover property or compensation was prioritized in Iraq, a 2009 report identified inability to access one’s pre-displacement home caused by a lack of capacity to manage property disputes as a major reason Iraqis who desired to return home were unable to do so.⁷⁶ Tenure security and restitution of property increase the likelihood and success of return efforts by displaced people and failures to restore property rights frustrate the process. Therefore, despite critiques, restitution is an important aspect of post-conflict justice. However, it must be done in a manner that does not overwhelm the local administrative body, conflict with local legal systems, and is integrated with the overall post-conflict reconstruction process.

C. Economic Development Through Tenure Security: Land Titling versus Customary Tenure

Social and economic wellbeing is a pillar of post-conflict reconstruction.⁷⁷ Once fundamental needs are met and conflict stabilized, the goals shift towards long-term economic development.⁷⁸ Ensuring economic growth through market development is a major reason that the United States and other countries invest in rule of law reforms.⁷⁹ Sustainable development can proactively address many of the issues presented by conflict, such as famine, disease, and social instability. Land titling is often presented as a method of economic development in developing countries.⁸⁰ While land titling is also one method of

⁷⁴ Lori Beaman et al., *When Do Refugees Return Home? Evidence from Syrian Displacement in Mashreq* at 24, WBG Policy Research Working Paper 9688 (June 2021) (explaining that a 2011 survey of Syrian refugees found that when asked about hypothetical scenarios, “where the family hears from their former neighbors that their house is still intact...38% of respondents say that the hypothetical household is likely or very likely to return ...” where they find out that their home was destroyed, the probability of expected return reduces by 22 to 23 percentage points).

⁷⁵ Chloe Sydney, *Return Decision Making by Refugees*, 62 FORCED MIGRATION REV. 11, 11-12 (2019).

⁷⁶ Patricia Weiss Fagen, *Refugees and IDPs after Conflict: Why They Do Not Go Home*, U.S. INST. PEACE 8 (2011).

⁷⁷ John J. Hamre & Gordon R. Sullivan, *Towards Postconflict Reconstruction*, 25 WASH. QUARTERLY 85, 91 (2002).

⁷⁸ *Id.*

⁷⁹ Rachel Kleinfeld, *Advancing the Rule of Law Abroad* 50 (2012).

⁸⁰ Leah M. Trzcinski & Frank K. Upham, *Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia*, 1 ASIAN J. L. & SOC’Y 55, 55-56 (2014).

ensuring HLP rights in property restitution programs, this section will focus on the economic rationale for land titling programs and whether alternative programs better address post-conflict needs.

The end of the Cold War brought about parallel shifts in economic development policy and refugee policy.⁸¹ While the U.N. and other agencies transitioned from resettlement to restitution, the World Bank and other experts transitioned from relying on the free market for economic development to advocating for strengthened social and political institutions.⁸² In the mid-1990s, leading development economists shifted away from the emphasis on open markets of the 1980s and towards an interventionist approach, where the state has the “responsibility to regulate markets.”⁸³ In the 1980s, foreign interests imposed their agenda through conditions on aid programs geared towards privatization of businesses, reduction of tariffs, and “other market-oriented policies.”⁸⁴ This was replaced by “new institutional economics,” where successful economic markets were thought to depend on “regulatory bodies, non-corrupt civil services, and functioning legal systems.”⁸⁵

As experts began to recognize the importance of property rights in Western markets, they began to advocate for imposing similar property rights systems in developing countries as a means to spur economic development.⁸⁶ Tenure security is necessary for property to be bought, sold, and inherited.⁸⁷ While there are many factors jeopardizing land tenure in post-conflict settings and developing countries, experts held that the establishment of formal land titling was the best way to establish tenure security.⁸⁸ Proponents of land titling hold that because informal tenure systems constrain efficient allocation of

⁸¹ This paper does not address whether the changes in refugee policy and economic development policy resulted from the same causes, it just notes that they occurred at the same time. *See generally* Kristen E. Boon, “Open for Business”: *International Financial Institutions, Post-Conflict Economic Reform, and the Rule of Law*, 39 N.Y.U J. Int’l L. Pol. 513 (2007) (exploring increased efforts by international financial institutions in lawmaking in “failed and conflict-ridden states” and their use of rule of law programs to promote marketization).

⁸² Benjamin C.R. Flower, *Does Informal Tenure Result in Land Inequality? A Critique of Tenure Formalization Reforms in Cambodia*, 77 LAND USE POL’Y 240, 240 (2018).

⁸³ *Id.* at 241.

⁸⁴ Kleinfeld, *supra* note 85, at 50.

⁸⁵ *Id.* at 51.

⁸⁶ *Id.*

⁸⁷ Leckie & Huggins, *supra* note 12, at 3; *see infra* Section I.A (explaining that formal tenure is not necessary for tenure security).

⁸⁸ Flower, *supra* note 81, at 241.

resources, informal tenure systems contribute to poverty and limit growth.⁸⁹ Holding a freehold title to land, which combines a number of rights into one title that can be held by a single owner, is an efficient way of guaranteeing property rights.⁹⁰ Therefore, informal land tenure systems should be replaced by “global-standard institutions based on the principle of formal private ownership.”⁹¹ Land titles should be distributed to those occupying the land, a unified market for land will emerge, and land will be allocated efficiently through transactions, allowing for economic growth and decreased inequality.⁹²

In addition to allowing the owner to sell or pass on the land, a title may be used to leverage credit.⁹³ The majority of new business credit in the United States is procured by using titles to property as collateral.⁹⁴ Formal land tenure also incentivizes investments.⁹⁵

Proponents of replacing local tenure systems with global-standard land titles have been highly influential in forming agriculture development intervention policy.⁹⁶ The World Bank lent over \$1 billion to land titling projects in 2004.⁹⁷ Hernando de Soto, a leader in this field, has proposed giving formalized titles to poor households to allow them to enter the formal economy.⁹⁸ De facto possession rights, unlike de jure ownership, are “dead capital” because the possessor can’t leverage the rights for credit, therefore missing out on the economic benefits that credit allows for.⁹⁹ While the identified problems—tenure insecurity, difficulty getting credit—are critical, the solution of providing individual property titles has been ineffective or harmful when applied.¹⁰⁰

⁸⁹ *Id.* at 240.

⁹⁰ Leckie & Huggins, *supra* note 12, at 3.

⁹¹ Flower, *supra* note 81, at 240.

⁹² *Id.*; see Trzcinski & Upham, *supra* note 86, at 68 (explaining that decreased transactions costs are offset by the practice of informal payments in countries where corruption is a regular part of life, such as Cambodia).

⁹³ Leckie & Huggins, *supra* note 12, at 3.

⁹⁴ Trzcinski & Upham, *supra* note 86, at 56.

⁹⁵ *Id.*

⁹⁶ Flower, *supra* note 81, at 241.

⁹⁷ *Id.*

⁹⁸ Leckie & Huggins, *supra* note 12, at 4.

⁹⁹ John Gravois, *The De Soto Delusion*, SLATE (Jan. 28, 2005), <https://slate.com/news-and-politics/2005/01/hernando-de-soto-s-mistakes.html>.

¹⁰⁰ See *id.* (explaining the impact of land titling programs in Colombia, the Philippines, Cambodia, and elsewhere).

The assumptions underlying the concept that formal tenures systems through land titles increase efficiency and informal tenure systems decrease efficiency of the market have not been adequately examined. First, transaction costs are not the only reason for inefficient distribution of land.¹⁰¹ Deep-seated cultural norms, where the “power, status, and prestige” of owning land are more valuable than the money they would make from a sale, may prevent large landowners from selling their land.¹⁰² The specific needs and cultural norms of a community are often reflected in the informal tenure system that may have developed slowly over time.¹⁰³

Secondly, efficient use of land can be defined through yield or productivity.¹⁰⁴ When efficiency is measured in yield, efficient allocation means that land is allocated in a manner that will result in the biggest yield of crops.¹⁰⁵ Small farms produce more crops per hectare than large farms in labor-intensive agriculture because of the effective utilization of labor.¹⁰⁶ Therefore, land will be distributed from large farmers to small farmers through the market when transaction costs are low, or so land title proponents assert (land will not be distributed efficiently in informal tenure setting because transactions costs are high, so the cost of land is distorted.)¹⁰⁷ However, when factors besides labor are accounted for, such as access to credit, the cost of supplies, and improved cultivation technology, large farms are more productive than small farms.¹⁰⁸ Therefore, because large farms can make more profit off of one unit of land, land will be transferred from small farmers to large farmers.¹⁰⁹ This neither improves the economic outlook of small farmers in developing countries nor ensures stable conditions necessary in post-conflict settings.

¹⁰¹ Flower, *supra* note 81, at 242.

¹⁰² *Id.*

¹⁰³ *Id.* (explaining that most arguments made in support of informal tenure systems are based on practices in Sub-Saharan Africa, and that there is a gap in understanding this issue in Southeast Asia).

¹⁰⁴ *Id.* at 241.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 242.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Finally, a major challenge to the implementation of formal title systems is that they require a functioning legal system.¹¹⁰ If land titling is recognized by the state as the primary method of establishing ownership, but it is not followed up with distribution of land titles or enforcement at the local level, one part of the population may continue to rely on customary tenure, while another part of the population transitions to land titles. Unlike legal pluralism, which may evolve naturally depending on the strengths and weaknesses of formal and informal systems, introducing land titles where customary tenure is the norm can be harmful. Elites who have access to capital and understand the new legal system may purchase land titles to land currently informally occupied or used, resulting in tenure insecurity. If this occurs in a post-conflict setting, land titles may be purchased before the displaced owner can claim prior possession.

The Pinheiro Principles represent a “uniform property restitution process, primarily designed by Westerners with Western notions of property, law, process, and enforcement.”¹¹¹ However, restitution itself does not require the formal creation of land titles. Failures resulting from the attempted replacement of customary tenure systems with land titles have led the international community to rethink customary tenure systems. An alternative method to centralized title systems rejects universal models and encourages incremental steps based on the particular informal systems used at a local level.¹¹² While land titling often fails because of a lack of capacity at the local level, the administrative and technological needs of customary tenure are much more minimal.¹¹³ Reestablishing customary tenure in post-conflict settings can act as a form of restorative justice because the system relies on trust between community members.¹¹⁴ Customary tenure allows for “multilayered forms of land use,” such as seasonal agricultural

¹¹⁰ Leckie & Huggins, *supra* note 12, at 48 (“[L]aws are only as strong as the institution or collectivity that stand behind them.”).

¹¹¹ Ballard, *supra* note 44, at 495.

¹¹² Trzcinski & Upham, *supra* note 86, at 56.

¹¹³ Mark Freudenberger et al., *The Future of Customary Tenure*, USAID: LAND LINKS (July 30, 2013), <https://www.land-links.org/issue-brief/the-future-of-customary-tenure/>

¹¹⁴ *Id.*

needs, nomadic communities, or herding.¹¹⁵ It may therefore allow for displaced people to more quickly readapt to traditional agricultural practices.

The Great Lakes Protocol on Property Rights of Returning Persons addressed land conflicts occurring between displaced people attempting to return to their land and secondary occupants occupying their land, either because they took advantage of the social upheaval or they themselves were displaced from their land by conflict.¹¹⁶ One object of the protocol was to “establish legal principles” to ensure that returning displaced people could “recover their property with the assistance of the local traditions and administrative authorities.”¹¹⁷

Customary tenure has its drawbacks. Minorities and migrants are often left out of the process, because the system relies on social cohesion by the majority.¹¹⁸ If aggressors and victims share communal use rights, there is little recourse for repeated attempts to displace victims.¹¹⁹ Customs are often patriarchal in nature, so women may be left out of the process.¹²⁰ This is particularly problematic in post-conflict settings where a disproportional number of households are led by women.¹²¹ Social upheaval may have rendered the social conditions that were benefited by the customary tenure systems useful obsolete.¹²² Customary tenure does not present a good mechanism for how to handle property that was occupied by a third party while the owner was displaced, especially if the new resident did not know the displaced owner wished to return.¹²³

¹¹⁵ Jacquie Kiggundu, *IDP Return Processes and Customary Land Tenure*, BROOKINGS: ON THE RECORD (Feb. 7, 2008), <https://www.brookings.edu/on-the-record/idp-return-processes-and-customary-land-tenure/>.

¹¹⁶ Peter Van Der Auweraert, *Great Lakes Region Countries Move to Address Displacement and Return Related Land Issues*, UN MIGRATION: INTERNATIONAL ORGANIZATION FOR MIGRATION (May 1, 2015), <https://weblog.iom.int/great-lakes-region-countries-move-address-displacement-and-return-related-land-issues>

¹¹⁷ INTERNATIONAL CONFERENCE ON THE GREAT LAKES REGION, PROTOCOL ON THE PROPERTY RIGHTS OF RETURNING PERSONS (Nov. 30, 2006).

¹¹⁸ McCallin, *supra* note 2, at 38.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Kiggundu, *supra* note 115.

¹²² *Id.*

¹²³ McCallin, *supra* note 2, at 32. *See generally* Leckie & Huggins, *supra* note 12, at 18 (explaining how successive waves of dispossession by multiple occupying parties resulted in multiple groups of land claimants in East Timor).

“Refugees are changed by their exile.”¹²⁴ They are exposed to new ideas and values.¹²⁵ While their needs may have been served by the land tenure systems that existed pre-conflict, a changing world may make that impossible to recreate.¹²⁶ Although displaced people may want to return home, home “is as much about the memory of customs, traditions or beliefs as it is about a physical place.”¹²⁷ Efforts that address reintegration and “building a new sense of home and community” are necessary.¹²⁸ Purely technical processes for restitution, either through formal or informal tenure systems, are not sufficient for sustainable return.¹²⁹

Section 2: A Case Study of HLP Rights in Post-Conflict Cambodia

A. Background: Land Policy from the Khmer Rouge to the Peace Process

The Khmer Rouge regime gained control of Phnom Penh in 1975 and ruled the country for the next five years. The urban areas were quickly evacuated, and the entire population was reorganized and forced to work on collective farms.¹³⁰ Approximately 1.7 to 2 million people, or one-fifth of the population, were murdered or died from overwork, starvation, or disease.¹³¹ This resulted in mass internal displacement as well as refugees living in neighboring countries. The Khmer Rouge lost power in 1979, but a formal peace agreement was not established until 1991, and displaced people often could not return home because of continued violence. Additionally, the legal landscape changed dramatically, shifting from total collectivization to private ownership rights in the span of a decade.¹³²

Cambodia is historically an agricultural country. Legitimate possession of land was determined by the occupation and use of land.¹³³ Although the king owned all property, individuals could not only

¹²⁴ Leckie & Huggins, *supra* note 12, at 15.

¹²⁵ *Id.*

¹²⁶ Kiggundu, *supra* note 115.

¹²⁷ *Id.* at 492.

¹²⁸ *Id.*

¹²⁹ Ballard, *supra* note 44, at 495.

¹³⁰ Rhodri C. Williams, Title Through Possession or Position? Respect for Housing, Land, and Property Rights in Cambodia, in LAND AND POST-CONFLICT PEACEBUILDING 411, 417 (J. Unruh & R. C. Williams eds., 2013).

¹³¹ *Id.*

¹³² Leckie & Huggins, *supra* note 12, at 2.

¹³³ Williams, *supra* note 120, at 417.

possess the land they cultivated, but also pass the rights to their heirs.¹³⁴ French colonizers attempted to impose a system of formal land titles.¹³⁵ The Civil Code of 1920 allowed occupants to receive a title for their land by requesting it from officials. While most agricultural land had been registered by 1930, only ten percent of landowners received titled because of bureaucratic incapacities.¹³⁶ Most property records created between the colonial period and the Khmer Rouge regime consisted of records of ownership in urban areas.¹³⁷

The Khmer Rouge abolished the right to privately own property.¹³⁸ Land ownership records and the legal institutions that enforced property rights were destroyed.¹³⁹ The targeted killing of educated people depleted the ability to reinstate an administrative system that recognized pre-1975 HLP rights.¹⁴⁰ That did not matter because the subsequent authority made no effort to restore private HLP rights. Additionally, because Cambodia remained in a period of unrest until 1991, large numbers of refugees did not immediately return home, which allowed for further shuffling of any claims to land.

In 1979, Vietnam overthrew the Khmer Rouge in Cambodia and established the People's Republic of Kampuchea ("PRK"), which would remain in power until 1989.¹⁴¹ Land collectivization was eased and families were allowed to farm small plots of land.¹⁴² Many displaced people returned to the homes they had been forced to leave by the Khmer Rouge.¹⁴³ Land tenure claims based on pre-1975

¹³⁴ Trzcinski & Upham, *supra* note 86, at 57.

¹³⁵ Williams, *supra* note 120, at 417.

¹³⁶ Trzcinski & Upham, *supra* note 86, at 57.

¹³⁷ Kheang Un & Sokbunthoeun So, *Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform*, 84 PACIFIC AFF. 289, 291 (2011).

¹³⁸ *Id.* See generally DAVID P. CHANDLER, THE TRAGEDY OF CAMBODIAN HISTORY 239 (1991) (asserting that while collectivization by the Khmer Rouge was based on efforts in the Soviet Union, China, and Vietnam, where poverty was caused by the presence of landlords, landlords were not the cause of rural poverty in Cambodia, so collectivization of property alienated the vast majority of Cambodians).

¹³⁹ Un & So, *supra* note 127, at 291.

¹⁴⁰ Trzcinski & Upham, *supra* note 86, at 58.

¹⁴¹ Williams, *supra* note 120, at 417.

¹⁴² Un & So, *supra* note 127, at 292.

¹⁴³ JEAN-CHRISTOPHE DIEPART, COUNTRY PROFILE NO. 6: CAMBODIA: THE FRAGMENTATION OF LAND TENURE SYSTEMS IN CAMBODIA: PEASANTS AND THE FORMALIZATION OF LAND RIGHTS (June 2015).

ownership were never formally recognized.¹⁴⁴ The communist PRK regime confiscated urban real estate for their own officials and blocked the return to the cities.¹⁴⁵

In 1989, the formal peace process began. Although still run by Vietnam, the country became known as the State of Cambodia (“SOC”). Reforms allowed for more privatization and the formal establishment of property rights.¹⁴⁶ Privatization occurred by allowing the occupier to claim legal title to a home or area of land.¹⁴⁷ One motivation behind this policy may have been to finalize the lack of legal claims the 360,000 exiled Cambodians had over their prior homes and ensure rights for the PRK elite.¹⁴⁸ This resulted in a “free-for-all” where bribes and political influence were necessary to procure a title.¹⁴⁹ Most rural landowners did not receive proper documentation of their land during this time.¹⁵⁰ Less than fifteen percent of 4 to 5 million registration applications were processed by the late 1990s.¹⁵¹ Small farmers were unable or unwilling to pay exorbitant bribes, while the wealthy participated in land grabbing, distress sales, or land speculation.¹⁵² Most land sales were conducted informally, with parties registering the transaction with local officials, or simply through agreement letters or verbal agreements.¹⁵³ Additionally, the government provided land concessions to private investors, much of which is not used efficiently or at all.¹⁵⁴ Conflicts over land rights escalated.

The 1991 Paris Peace Agreements ended the war between the Vietnam-backed Cambodian People’s Party and Cambodian opposition factions that had fled to Thailand after the fall of the Khmer Rouge. The agreement also established the U.N. Transitional Authority in Cambodia.¹⁵⁵ UNTAC refused

¹⁴⁴ Williams, *supra* note 120, at 417.

¹⁴⁵ *Id.*

¹⁴⁶ Un & So, *supra* note 127, at 292.

¹⁴⁷ Williams, *supra* note 120, at 418.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Un & So, *supra* note 127, at 292.

¹⁵¹ Williams, *supra* note 120, at 418.

¹⁵² *Id.*

¹⁵³ Flower, *supra* note 81, at 246.

¹⁵⁴ Williams, *supra* note 120, at 418.

¹⁵⁵ Williams, *supra* note 120, at 418.

to try to resolve disputes over HLP rights.¹⁵⁶ Cambodia's transition to independence faced two challenges regarding HLP rights: (1) the humanitarian crisis caused by displaced people, returning refugees, lack of arable land due to landmines, and widespread poverty due to years of conflict; and (2) pressure to create a legal system suitable to international investment and market-oriented economic growth.

The humanitarian crisis was initially aided by the U.N. High Commissioner for Refugees ("UNHCR"). At the time, 360,000 Cambodians lived in exile in refugee camps in Thailand, and the agreement called for their repatriation, but it did not include a right of restitution to their homes, land, and property.¹⁵⁷ The repatriation process was considered successful at the time, and the U.N. may have been motivated to repatriate refugees in time to vote in the first U.N. supervised election.¹⁵⁸ Although repatriation was considered voluntary, Thailand refused to grant asylum to the Cambodian refugees who had fled there.¹⁵⁹ Additionally, while most Cambodians wanted to return, those who refused were deported by Thai officials.¹⁶⁰ Once in Cambodia, even providing returned refugees with minimal land for farming was stalled by "uncooperative local authorities and widespread landmine contamination."¹⁶¹

The UNHCR initially offered returning refugee families a plot of land.¹⁶² However, much of the unoccupied land had been redistributed, mined, or rendered inaccessible because of continued conflicts and within two months of the repatriation process, the available land had run out.¹⁶³ The UNHCR began to provide returning families the option of arable land, a "smaller plot of land and a house", or a "\$50 cash grant for each adult and \$25 for each child under twelve."¹⁶⁴ Eighty-seven percent of returned

¹⁵⁶ Scott Leckie, *United Nations Peace Operations and Housing, Land, and Property Rights in Post-Conflict Settings: From Neglect to Tentative Embrace*, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS 13 (Scott Leckie ed., 2009).

¹⁵⁷ Williams, *supra* note 120, at 418.

¹⁵⁸ Gry Tina Andersen, *Cambodian Refugee Women Returning Home* 37 (1994) (Masters student dissertation, University of Montana) (ProQuest).

¹⁵⁹ *Id.* at 39.

¹⁶⁰ *Id.* at 40

¹⁶¹ Williams, *supra* note 120, at 418.

¹⁶² Anderson, *supra* note 149, at 60.

¹⁶³ *Id.* See generally Cambodia, MINES ADVISORY GROUP, <https://www.maginternational.org/what-we-do/where-we-work/cambodia/> (explaining the continued impact of landmines on Cambodians).

¹⁶⁴ *Id.* at 61.

refugees chose the cash option, although their money soon ran out.¹⁶⁵ Lack of arable land was later identified by returnees as a major problem.¹⁶⁶ It was “either already taken or was mined.”¹⁶⁷ In comparison, women who remained in Cambodia fared well. In addition to agricultural work, they would engage in the economy by selling goods at markets.¹⁶⁸

Economic development and the peace process were stalled through the 1980s in part because of Cold War tensions. Until 1990, the Khmer Rouge represented Cambodia in the U.N. General Assembly.¹⁶⁹ The United States, China, and ASEAN countries provided aid and political support to Khmer Rouge-aligned resistance groups.¹⁷⁰ Although the international community was aware of the desperate humanitarian situation, donors were hesitant to support the interim regime backed by Vietnam and led by Heng Samrin.¹⁷¹ One billion dollars were donated by 1982, but it disproportionately supported Cambodian refugees living on the border, where opposition groups, including the Khmer Rouge, retained power.¹⁷² The United States imposed sanctions on Vietnam and the Vietnam-backed regime in Cambodia¹⁷³ and provided funding and weapons to the resistance groups with hopes that they would be able to overthrow the PRK.¹⁷⁴ The pressure faced by the new government to consolidate power and develop the economy resulted in the implementation and violations of land laws in the 1990s and 2000s.

B. The Legal Framework for HLP Rights Under the Current Government

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 56 (finding that, according to one repatriated woman, “the biggest problem for a repatriated family [was] to find a place to stay.” She returned to live with her husband’s family in a crowded house with 14 people. Another repatriated woman expressed a desire to return to the refugee camp because she had no home or land to cultivate after returning).

¹⁶⁷ *Id.* at 97.

¹⁶⁸ *Id.* at 101 (finding that, while 12 of the 13 women interviewed who were repatriated to Cambodia had no land, and this little economic opportunity, women who remained in Cambodia earned an income through business or market selling).

¹⁶⁹ Suellen Ratliff, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century* 87 CAL. L. R. 1207, 1208 (1999).

¹⁷⁰ Anderson, *supra* note 149, at 27.

¹⁷¹ *Id.* at 24.

¹⁷² *Id.*

¹⁷³ *Id.* at 27.

¹⁷⁴ Ratliff, *supra* note 160, at 1256.

Privatization was necessary for the newly elected Hun Sen regime and the Cambodian People's Party ("CPP") to transition the country into a democratic, multi-party, free-market state. The Land Law of 1992 was passed in order to regulate the privatization process.¹⁷⁵ This law was drafted quickly and designed to create a minimum sense of order.¹⁷⁶ Much was copied directly from the 1920 Civil Code.¹⁷⁷ The law recognized ownership (established through formal documents like a land title) and possession (temporary, remained valid as long as the possessor continues to use the land) rights.¹⁷⁸ If land had been held for five consecutive years and was not already registered, possession rights could be converted to ownership.¹⁷⁹ However, because most land had never been formally registered, those with an understanding of the law were able to claim ownership or otherwise manipulate the law to participate in land grabbing.¹⁸⁰ Additionally, the 1992 law extinguished all rights to land prior to 1979.¹⁸¹

Land acquisitions and concessions continued after the 1993 election.¹⁸² International pressure resulted in the 2001 Land Law.¹⁸³ This law aimed to provide Cambodians with strengthened tenure security, increase agricultural output for smallholder farmers as a means to alleviate rural poverty, and integrate the country into the global economy.¹⁸⁴ The 2001 Land Law and the World Bank program implemented to support it were fully influenced by the prevailing ideas of efficient land markets at that

¹⁷⁵ Un & So, *supra* note 127, at 292.

¹⁷⁶ Trzcinski & Upham, *supra* note 86, at 58.

¹⁷⁷ *Id.*

¹⁷⁸ Un & So, *supra* note 127, at 293.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Cambodian Land Law Kret-Chhbab/100, Aug. 10, 1992, art. 1.

¹⁸² Williams, *supra* note 120, at 419. *See generally* William Branigin, *Phnom Penh Rejects Results of Election*, WASH. POST (June 11, 1993), <https://www.washingtonpost.com/archive/politics/1993/06/11/phnom-penh-rejects-results-of-election/c43a7f1e-abc4-4ebd-b3b2-fe757f96f930/> (explaining the complexities of this election that are beyond the scope of this paper).

¹⁸³ *Id.* (explaining that HLP rights violations such as "large-scale land acquisitions... forced evictions, and unregulated concessions" continued in the 1990s, and motivated international donors to address these issues).

¹⁸⁴ Trzcinski & Upham, *supra* note 86, at 58. The law includes five classifications of land. All land is state owned until it is claimed through legal ownership. State owned land consists of (1) state public land, that has a public interest and cannot be privatized, and (2) state private land, can be privatized. (3) Private land is land that is privately owned, and (4) monastery land and (5) indigenous community land are the other classifications. Diepart, *supra* note 133, at 15. *See generally* Williams, *supra* note 120, at 430 (explaining that the 2001 Land Law also recognized collective ownership rights held by indigenous groups, but the protections provided are not sufficient). The impact on indigenous communities in Cambodia by this and other land use policies is beyond the scope of this paper.

time.¹⁸⁵ Informal tenure would be replaced by formal land titling in order to increase efficient distribution of land.¹⁸⁶ To achieve this, all land would be registered and mapped.¹⁸⁷ A systematic land registration would be implemented and a cadastral index map created, containing a Unique Parcel Reference Number for all plots of land.¹⁸⁸ This central registration system would be the exclusive method of proving ownership¹⁸⁹ and was based on the Torrens system used in Australia.¹⁹⁰

A central land registration system relies on accurate cadastral mapping.¹⁹¹ Although this presented a monumental task, the World Bank provided the technical and financial backing needed through the Land Management Administration Project (“LMAP”) created in 2002.¹⁹² The LMAP did not succeed in its goals to issue and register titles to urban and rural areas and establish an “efficient and transparent land administration system.”¹⁹³ The \$28.8 million project was discontinued in 2009.¹⁹⁴ The project focused on rural land because of the importance of agriculture to the economy and to the general population: agriculture is forty percent of the GDP and seventy percent of the country’s workforce is employed in agriculture.¹⁹⁵ This left the urban poor vulnerable to eviction. In one particularly insightful example of the project’s failure, the LMAP incorrectly denied land registrations to residents of Boeung Kak Lake in Phnom Penh, the area was leased to a private developer, and approximately 20,000 people were forced to abandon their homes.¹⁹⁶ The World Bank Inspection Panel recognized that this mass eviction was a result of its failure to properly design and supervise the project.¹⁹⁷

¹⁸⁵ *Infra* Section I.C.

¹⁸⁶ Flower, *supra* note 81, at 243.

¹⁸⁷ Williams, *supra* note 120, at 420.

¹⁸⁸ Un & So, *supra* note 127, at 293.

¹⁸⁹ Trzcinski & Upham, *supra* note 86, at 55.

¹⁹⁰ *Id.* at 58.

¹⁹¹ *Id.* at 59.

¹⁹² *Id.*

¹⁹³ *Cambodia’s Land Management and Administration Project (LMAP)*, CENTRE FOR PUBLIC IMPACT (May 9, 2017), <https://www.centreforpublicimpact.org/case-study/cambodia-land-management-administration-project-lmap>.

¹⁹⁴ Williams, *supra* note 120, at 423.

¹⁹⁵ *Cambodia’s Land Management and Administration Project (LMAP)*, *supra* note 185.

¹⁹⁶ *Id.*

¹⁹⁷ David Pred & Natalie Begalski, *Cambodia and the limits of World Bank accountability*, BRETTON WOODS PROJECT (Apr. 5, 2011), <https://www.brettonwoodsproject.org/2011/04/art-567913/>.

In addition to land titling, an important development in the 2001 Land Law was the distribution of public land through concessions.¹⁹⁸ In keeping with traditional land tenure systems, the 1992 Land Law codified the conversion of informal possession rights to occupancy rights after five years of use.¹⁹⁹ That policy ended and Social Land Concessions (“SLC”) were introduced instead, where the government was given the authority to distribute unoccupied land to those in need.²⁰⁰ SCLs were viewed as more organized than the recognition of informal occupation.²⁰¹ SCLs may be initiated through local government or national ministries.²⁰²

The Land Law also created Economic Land Concessions (“ELC”).²⁰³ The government may grant land for “agriculture and agro-industrial purposes” and recipients gain all ownership rights besides the right to alienation for 99 years.²⁰⁴ ELCs are legally limited to 10,000 ha per recipient, but as much as thirty-two percent of total ELCs consist of more than that limit.²⁰⁵ ELCs are used to sidestep the 2002 ban on logging.²⁰⁶ Although land must be developed within 12 months of issuance, a 2002 survey revealed that two percent of ELC land was actively used for cultivation.²⁰⁷ Land that is occupied or cultivated is often granted through ELCs, resulting in forced evictions.²⁰⁸ ELCs have resulted in grants of 2,547,718 ha of land, while SCLs have resulted in only grants totaling 113,167 ha.²⁰⁹ The relative failure of the SLC program may be explained by its lack of recognition of the complexities of social and political systems in

¹⁹⁸ During the 1990s, the CPP and the National United Front for an Independent, Neutral, Peaceful, and Cooperative Cambodia (“FUNCINPEC”) used concession to raise revenue for their political struggles and to fight to Khmer Rouge. This resulted in the destruction of natural resources. Eventually, Hun Sen and the CPP utilized concessions to consolidate power between rival factions and end the civil war by allocating land to the army to provide a livelihood for demobilized soldiers. Hun Sen also used concessions to develop centralized control over the military, the police, judicial powers, and other aspects of the government. Diepart, *supra* note 133, at 13-14.

¹⁹⁹ Trzcinski & Upham, *supra* note 86, at 59.

²⁰⁰ Un & So, *supra* note 127, at 294.

²⁰¹ Trzcinski & Upham, *supra* note 86, at 59.

²⁰² Diepart, *supra* note 133, at 23.

²⁰³ Trzcinski & Upham, *supra* note 86, at 59.

²⁰⁴ *Id.*

²⁰⁵ Diepart, *supra* note 133, at 23.

²⁰⁶ *Id.* at 23.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 24.

the upland regions, its lack of integration with regulation of unauthorized land use, and confusion regarding how the SLC and ELC programs overlap.²¹⁰

The Civil Code is the second important law governing land and property in Cambodia. In 1999, the Cambodian Ministry of Justice reached out to the Japanese International Cooperation Agency to work together to draft a code that unified the various civil law statutes (including the 1992 and 2001 Land Laws) and the Constitution of 1993 in order for Cambodia to enter the World Trade Organization.²¹¹ The resulting Civil Code was enacted in 2007 and went into effect in 2012.²¹² While the 2001 Land Law creates a bright-line rule that the central registration system is the ultimate authority in ownership disputes, the Civil Code is similar to the American deed recordation system.²¹³ The Code shifts away from the primary role of the central registration and presumes that an ownership right “belongs to the person to whom it is registered.”²¹⁴ Additionally, the Civil Code permits prescriptive acquisition, which was permitted in the 1992 Land Law and disbanded in the 2001 Land Law.²¹⁵

A third legal force impacting land registration is at play: Prime Minister Hun Sen issued Order 01 in 2012. Protests by those who lost their land to ELCs were increasing.²¹⁶ Motivated in part by the potential social instability resulting, Order 01 included a moratorium on ELCs and a campaign to provide land titles directly to rural households.²¹⁷ Over one million hectares of land were measured, and families received titles to ninety-two percent of it.²¹⁸ While this process has resulted in increased tenure security for those who receive titles, it decreases security for those without titles, who previously relied on local recognition of occupancy rights.²¹⁹ Because the formal land titling process is largely unfinished, large

²¹⁰ *Id.*

²¹¹ Trzcinski & Upham, *supra* note 86, at 60.

²¹² *Id.*

²¹³ *Id.* at 61 (explaining that Japan, where the property law system is similar to the American system, was concerned about corruption by local Cambodian officials, and therefore avoided a Torrens style system that is only beneficial “when the reduction in the expected cost of forfeiture balances the higher cost of initial registration.”).

²¹⁴ *Id.* at 60.

²¹⁵ *Id.*

²¹⁶ Sarah Milne, *Under the Leopard’s Skin: Land Commodification and the Dilemma of Indigenous Communal Title in Upland Cambodia*, 54 *Asia Pacific Viewpoint* 323, 326 (2013).

²¹⁷ Diepart, *supra* note 133, at 28.

²¹⁸ *Id.* at 29.

²¹⁹ *Id.*

numbers of the rural and urban poor are vulnerable. Order 01 will also undermine the legal recognition of prescriptive acquisition promulgated in the Civil Code. Because indigenous communities had to choose between individual and communal titles, the order also played a role in the erosion of communal titles.²²⁰

Much of the current legal challenges regarding HLP rights in Cambodia are the result of foreign influence over land policies. The global enthusiasm towards Hernando de Soto's centralized land titling proposals explains the breadth of effort on the part of international actors to impose a land title system in Cambodia. This can best be seen in the 2001 Land Law. There is evidence that Cambodians felt alienated from the drafting process. The official domestic sponsor of the 2001 Land Law reported that he "didn't understand the law" and the law belonged more to the NGOs than Cambodians.²²¹

The fundamental differences between the 2001 Law and the Civil Code represent the long struggle between international agencies over how to manage Cambodian land. In 1992, Finmap, a Finnish land management consultancy, was hired by a group of EU governments, the UN, and other international agencies for an aerial mapping project and executed a pilot land registration project in 1997.²²² As of 2011, Finmap continued related projects.²²³ In 1995, GiZ, the German development agency collaborated with the MLMUPC and Finmap.²²⁴ In 2003, the Cambodian Ministry of Land Management, Urban Planning and Construction ("MLMUPC") opposed JICA's recordation proposal for the Civil Code.²²⁵ Domestic conflict between the MLMUPC and the Ministry of Justice resulted; if the JICA system prevailed, the courts gain the final word on "whether the presumption of authenticity granted registered title was ultimately maintained or not," rather than the MLMUPC.²²⁶ After discussions dominated by foreign sponsors, the MLMUPC retained control over the registration and certification process while the courts gained the final say over the authenticity of the individual registrations.²²⁷ This tension between the

²²⁰ Milne, *supra* note 208, at 336.

²²¹ *Id.* at 59.

²²² Trzcinski & Upham, *supra* note 86, at 61.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 62.

²²⁶ *Id.*

²²⁷ *Id.*

MLMUPC and the Ministry of Justice was not accidental. Transparent property rights allow markets to operate with minimal government and judicial interference and facilitate direct foreign investment.²²⁸

Forced evictions often occur as a result of large-scale commercial projects that receive international funding. While the World Bank and the Asian Development Bank insist on protective resettlement guidelines, they are regularly unimplemented.²²⁹ Other bilateral donors do not require resettlement guidelines for the projects that they fund.²³⁰ China and Vietnam, two major investors in Cambodia, have never required resettlement conditions.²³¹ JICA began to require compensation for the displaced in 2005.²³²

The role played by domestic corruption cannot be understated. In the 1980s, the PRK reorganized the population into work units controlled by local people.²³³ The work units gradually dissolved, and the land was redistributed to individual households.²³⁴ Distribution was based on the size of households, but those with political connections leveraged their position to acquire more land.²³⁵ As the tenure system formalized, registration required a complex bureaucratic process with payments to everyone who played a role.²³⁶ While modern bureaucratic systems are in place in Cambodia, the traditional patrimonial system is present throughout society, allowing for “politically motivated distribution of favors.”²³⁷ The CPP dominates all aspects of the government and there is little ability to hold political actors accountable.²³⁸

²²⁸ *Id.* at 60.

²²⁹ Williams, *supra* note 120, at 428.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Flower, *supra* note 81, at 244.

²³⁴ *Id.*

²³⁵ *Id.* at 245.

²³⁶ Trzcinski & Upham, *supra* note 86, at 68. A full examination of the impact of corruption in Cambodia is beyond the scope of this paper. See generally Julia Wallace, *Development and Its Discontent*, N.Y. TIMES (Apr. 12, 2013), <https://latititude.blogs.nytimes.com/2013/04/12/development-and-its-discontent/> (examining the impact of bureaucratic corruption on road safety, where traffic police extract bribes from drivers arbitrarily, 6 percent of commercial trucks meet safety standards, 70 percent of drivers purchase their licenses, and traffic deaths doubled between 2005 and 2011, which provides a comparative look at the impact and pervasiveness of corruption in Cambodia).

²³⁷ Un & So, *supra* note 127, at 294.

²³⁸ *Id.*

Cambodia ranks 160th among 180 countries in the Corruption Perceptions Index²³⁹ and the United States has issued warnings against conducting business in the country.²⁴⁰

C. Results of Post-Conflict HLP Reforms

Cambodia has experienced consistent economic growth since 1998.²⁴¹ While some measures suggest inequality is decreasing,²⁴² a more holistic approach towards inequality reveals serious and pervasive issues.²⁴³ The price of land increased by thirty percent each year between 2004 and 2007²⁴⁴ and land distribution is unequal compared with neighboring countries. Landlessness increased from thirteen percent in the late 1990s to twenty percent in 2004.²⁴⁵ In comparison, four percent of Cambodians were landless in 1960.²⁴⁶ A 2007 report found that sixty-seven percent of respondents occupied eight percent of land, and twelve percent occupied seventy-two percent of land.²⁴⁷ In 2006, land disputes were the most important human rights and social issue facing rural Cambodians.²⁴⁸ Landlessness and rural poverty result in migration to urban areas.²⁴⁹ Local authorities in cities prioritize commercial interests at the expense of

²³⁹ TRANSPARENCY INTERNATIONAL: OUR WORK IN CAMBODIA, <https://www.transparency.org/en/countries/cambodia> (last visited Dec. 3, 2021).

²⁴⁰ Daphne Psaledakis & David Lawder, *U.S. Issues Cambodian Corruption Advisory, Sanctions Officials Over Navy Base*, REUTERS (Nov. 10, 2021). <https://www.reuters.com/world/china/us-blacklists-cambodian-officials-over-alleged-corruption-related-navy-base-2021-11-10/>

²⁴¹ NIELS-JAKOB H HANSON & ALBE GJONBALAJ, *ADVANCING INCLUSIVE GROWTH IN Cambodia 4* (IMF 2019) (“Over the last two decades real GDP per capita growth in Cambodia has averaged six percent, well above the ASEAN average of four percent.”); *see* WORLD BANK, *CAMBODIA: SUSTAINING RAPID GROWTH IN A CHALLENGING ENVIRONMENT 5* (2009) (finding that economic growth is driven by garment, tourism, construction, and agriculture sectors).

²⁴² Hanson & Gjonbalaj, *supra* note 242, at 5 (“Gini coefficient for consumption has fallen from 40.4 percent in 1997 to 29 percent in 2012... the [g]ini coefficient for disposable income declined from 36.7 percent in 1997 to 33.9 in 2012.”)

²⁴³ *Measuring human inequalities involves more than income*, UNDP CAMBODIA (Jan. 9, 2020), <https://www.kh.undp.org/content/cambodia/en/home/presscenter/articles/2020/measuring-human-inequalities-involves-more-than-income.html>.

²⁴⁴ World Bank, *supra* note 242, at 34.

²⁴⁵ Williams, *supra* note 120, at 411.

²⁴⁶ Diepart, *supra* note 133, at 13.

²⁴⁷ Un & So, *supra* note 127, at 300.

²⁴⁸ Williams, *supra* note 120, at 411.

²⁴⁹ Diepart, *supra* note 133, at 18 (“As of 2011, forty-seven percent of households had less than 1 ha of agricultural land while twelve percent has landholdings larger than 3 hectares.”)

urban residents.²⁵⁰ This results in insecurity and forced relocation.²⁵¹ A 2008 study estimated that eleven percent of Phnom Penh residents were evicted since 1990, with eighty percent of evictions occurring post-2000.²⁵²

In 2005, 153,584 Cambodians were involved in land conflicts. In 2008, 420,000 people (three percent of the population) were involved. Additionally, approximately 150,000 faced uncertainties because they were threatened by eviction.²⁵³ As of 2014, 1.5 million titles have been issued through the systematic titling process.²⁵⁴ It would take 45 years to title all estimated 10 million land parcels at the current rate.²⁵⁵

Despite the major interventions to secure HLP rights by the Cambodian government and international agencies, traditional notions of land tenure prevail. This is seen through rural migration patterns. Although economic development is centered in urban areas, half of all migrants move between rural areas.²⁵⁶ People move away from the central plains, where the land has long been used for rice cultivation and is in short supply, to forested areas near the Thailand and Vietnam borders.²⁵⁷ The 2001 Land Law prohibited the traditional practice of acquiring unoccupied land by clearing and using it for agriculture, and these migrants ignore that legal framework.²⁵⁸ They are therefore subject to tenure security and vulnerable to local authorities.²⁵⁹

A 2007 survey supports the continued prevalence of traditional tenure systems. Only 2.9 percent of 3889 reported agricultural plots were registered through the formal title system.²⁶⁰ Sixty-three percent

²⁵⁰ Williams, *supra* note 120, at 411.

²⁵¹ Williams, *supra* note 120, at 411 (“In Phnom Penh...approximately 55,000 people were evicted between 1998 and 2003, under circumstances that frequently violated their rights and impaired their standards of living...[A]pproximately 70,000 people are threatened with forced eviction in Phnom Penh, and at least 150,000 people live in fear of eviction from their homes and land nationwide.”)

²⁵² Un & So, *supra* note 127, at 297.

²⁵³ Un & So, *supra* note 127, at 292.

²⁵⁴ Trzcinski & Upham, *supra* note 86, at 65.

²⁵⁵ *Id.*

²⁵⁶ Diepart, *supra* note 133, at 19.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Flower, *supra* note 81, at 243.

of plots were documented using “traditional” tenure mechanisms based only on oral claims.²⁶¹ Thirty-five percent of plots were documented through “some form of local institution,” often a “title registration receipt issued by commune-level local authorities.”²⁶² Lack of formal land title did not impact tenure security. Only one percent of households in that survey reported loss of property due to dispute over ownership claims. However, this may be explained by the location of these plots in lowland areas that have been used for rice production for centuries.²⁶³ Land conflicts and evictions are more likely to occur in areas with less established land use purposes.²⁶⁴

A 2012 report supports claims that formal registration efforts are more successful in rural areas than urban areas, where land is valuable and more likely to be used for commercial development projects.²⁶⁵ The systemic land registration process, originating from LMAP but still in effect in parts of Cambodia, resulted in formal registration of ninety-nine percent of parcels in one rural area, while 80 percent of parcels in a Phnom Penh neighborhood lacked registration titles.²⁶⁶ Even in areas where land is registered, transfers are not registered with the central cadastral system.²⁶⁷

Land titling is conducted on the local level, so results of research in this area vary based on location. However, the current legal framework does not protect landowners from forced eviction by commercial entities. In addition to concerns regarding tenure security, ELCs have had a major impact on the Cambodian economy and environment. Twelve percent of the total land area has been granted to investors through ELCs.²⁶⁸ An additional 6 percent has been granted concessions for mining and hydropower projects.²⁶⁹ These concessions do not proportionally benefit the national economy. Twenty-

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ MARK GRIMSDITCH ET AL., ACCESS TO LAND TITLE IN CAMBODIA: A STUDY OF SYSTEMIC LAND REGISTRATION IN THREE CAMBODIAN PROVINCES AND THE CAPITAL 75-76 (NGO Forum Cambodia, 2012).

²⁶⁶ *Id.* at 48.

²⁶⁷ *Id.* at 93.

²⁶⁸ *Land*, OPEN DEVELOPMENT CAMBODIA (Aug. 3, 2015) <https://opendevelopmentcambodia.net/topics/land/#ref-76372-30>.

²⁶⁹ *Id.*

two percent of land in 2013 was controlled by the private sector, but in 2015, ELCs generated \$5 million in government revenue.²⁷⁰

ELCs and the neopatrimonial system that allows for corruption have resulted in massive environmental damage.²⁷¹ Twenty-four percent of tree cover was destroyed between 2001 and 2019.²⁷² Areas of forest protected by the state are also destroyed.²⁷³ Deforestation is driven by global commodity prices.²⁷⁴ Twenty-three percent of forests cleared between 2001 and 2015 were used as rubber plantations.²⁷⁵ Countries such as Vietnam circumvent the ban on raw timber exportation; in 2015, Vietnam imported \$385 million worth of timber and paid, and traders paid millions of dollars in bribes to Cambodian and Vietnamese officials.²⁷⁶

The Cambodian people have not accepted concessions and corruption passively. In 2010, 1,000 farmers protested a 9,500 hectare concession to the Phnom Penh Sugar Company after being offered \$100-200 per hectare in compensation.²⁷⁷ Community activists organize to monitor forests for illicit logging.²⁷⁸ Activists defy detention or death.²⁷⁹ Peaceful protests against the Boueng Kak Lake evictions have been met with violent suppression.²⁸⁰ Countless protestors have been arbitrarily detained, and thirteen women protesters were convicted of illegally occupying public property.²⁸¹ Families were still

²⁷⁰ *Id.*

²⁷¹ *Id.*; Trzcinski & Upham, *supra* note 86, at 68.

²⁷² Kai Kressek, *What's Happening in Cambodia's Forests?*, GLOBAL FOREST WATCH (Sept. 26, 2019) <https://www.globalforestwatch.org/blog/data-and-research/whats-happening-in-cambodias-forests/>.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Prak Chan Thul, *Cambodian farmers rise up over "land-grabbing,"* REUTERS (Mar. 19, 2010) <https://www.reuters.com/article/us-cambodia-protests/cambodian-farmers-rise-up-over-land-grabbing-idINSGE62I07I20100319>.

²⁷⁸ John Vidal, *'I could be arrested or killed': the activists fighting to save Cambodia's forests*, THE GUARDIAN (Feb. 16, 2017) <https://www.theguardian.com/global-development-professionals-network/2017/feb/16/arrested-killed-activists-fighting-save-cambodias-forests-prey-lang>.

²⁷⁹ Prak Chan Thul, *Cambodia releases activities detained over illegal logging protests*, REUTERS (Feb. 8, 2021) <https://www.reuters.com/article/us-cambodia-environment/cambodia-releases-activists-detained-over-illegal-logging-protest-idUSKBN2A80YI>.

²⁸⁰ *Reprisals against Members of the Boeung Kak Community, Cambodia*, IAP (July 13, 2016) <https://accountability.medium.com/reprisals-against-members-of-the-boeung-kak-community-cambodia-ee4be2623852>.

²⁸¹ *Id.*

trying to gain compensation or land from the city government ten years after the evictions were announced.²⁸²

Displaced Cambodians have on occasion found vindication. The Phnom Penh Sugar Company received significant financing from a bank that at the time was a controlled entity of the Australian bank ANZ.²⁸³ This information was leaked to the NGO Inclusive Development in 2014.²⁸⁴ While ANZ hired a consulting firm to perform an impact assessment before financing the company, the assessment did not include the conflict between the company and the impacted farming community.²⁸⁵ Inclusive Development filed a complaint with the Australian authority responsible for enforcing the Organisation for Economic Co-operation and Development (“OECD”) Guidelines.²⁸⁶ ANZ subsequently agreed to contribute its gross profit earned from its loan to the Phnom Penh Sugar Company to the rehabilitation of the displaced community.²⁸⁷

This recent settlement sets an important precedent. Financial institutions may be held accountable for their foreign investments, if not through international law, by the OECD enforcement authority of the country they are incorporated in. Although this may lead to more thorough assessment for future investments, compensation will not reverse the damages the evictions inflicted on the impacted families.²⁸⁸ Eighty-five percent of Cambodians rely on subsistence farming. When they lose land, they are forced to take out loans. The impact of evictions spans generations, as parents are forced to take their children out of school to find work.²⁸⁹ Additionally, the affected families expressed frustration that while

²⁸² Anath Baliga & Khouth Sophak Chakrya, *Boeung Kak: A Disastrous Decade*, THE PHNOM PENH POST (Feb. 3, 2017) <https://www.phnompenhpost.com/national-post-depth-politics/boeung-kak-disastrous-decade>.

²⁸³ <https://www.inclusivedevelopment.net/cases/cambodia-sugarcane-land-grabs/>

²⁸⁴ *Cambodia Securing Compensation for ANZ-Backed Land Grab*, INCLUSIVE DEVELOPMENT INTERNATIONAL <https://www.inclusivedevelopment.net/cases/cambodia-sugarcane-land-grabs/>.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Sun Narin, *Landmark Settlement in Cambodia Land-grab Falls Short for Many Villages*, VOICE OF AMERICA (Mar. 15, 2020) https://www.voanews.com/a/east-asia-pacific_landmark-settlement-cambodian-land-grab-falls-short-many-villagers/6185828.html.

²⁸⁹ *Id.*

ANZ had recognized its failures, the Cambodian government and the Phnom Penh Sugar Company were not held accountable.²⁹⁰

Many challenges facing Cambodia today are traceable to its particular history. However, many flaws in the attempt to restore HLP rights post-conflict mimic the theoretical framework outlined above. First, insufficient consideration was given to customary systems of land tenure pre-conflict. Additionally, the influence of international donors, with competing legal systems, has created legal ambiguities. Finally, parties in power have manipulated the uncertainty of the transitional phase to acquire land.

Conclusion

This paper attempted to narrow the topic of HLP rights by analyzing the implementation of land tenure systems in post-conflict settings with particular attention to the creation of formal land titling systems in societies previously governed by informal tenure. This is useful to understand the current state of countries like Cambodia, where changes in land laws have implications far beyond HLP rights. However, the theoretical framework examined is rapidly changing.

Recent scholarship on HLP rights in post-conflict settings recognizes mistaken assumptions underlying prior justifications. First, there is recognition that HLP rights are a major cause of conflict and restoring pre-conflict systems is not necessarily beneficial.²⁹¹ Second, HLP rights are no longer thought of as an outcome of a statutory system, but as an aspect of tradition that is subject to the same transitional period following conflict as other aspects of a society.²⁹²

This paper has examined the benefits and drawbacks of both formal and customary tenure systems. HLP scholars now hold that relying on either system alone is not feasible. This has resulted in a “paradigm shift” allowing for a coevolution of formal and customary tenure over time.²⁹³

²⁹⁰ *Id.*

²⁹¹ Jon D. Unruh & Musa Adam Abdul-Jalil, *Housing, Land and Property Rights in Transitional Justice*, 15 *International Journal of Transitional Justice* 1, 2 (2021).

²⁹² *Id.*

²⁹³ *Id.*

Recognition that HLP rights and conflicts are “enmeshed spatial exercises that produce a tangle of land-related grievances, dislocation, expropriation, damages, destruction, opportunity, divisiveness, and fraud” leads to two conclusions regarding suggestions for the future.²⁹⁴ First, HLP rights are highly dependent on the unique history of the affected society. Second, any attempt to reform HLP rights must take a broad view of the issue. An understanding of history, sociology, food systems, and ecology, among other aspects of a society and the origins of the conflict, are necessary to create sustaining tenure security.

A restitution process was not attempted in Cambodia because it was not yet the international norm. Restitution would be extremely challenging given the destruction of property rights. While restitution may have benefited those who lost urban property, the majority of Cambodians were and still are rural and would have benefited more by a supply of arable land protected from commercial interests. Dismantling the systems that allow for ELCs and redistributing the land to smallholder farmers may better serve the people of Cambodia today.

The international community poured huge amounts of money into land titling systems in Cambodia and elsewhere. While they acted with a good-faith intent to remedy a dire situation, agencies and financial institutions have been too ready to invest in plans that lacked empirical support.²⁹⁵ Furthermore, they have failed to ensure the use of protective measures or thorough assessments.

Amidst climate change and increased migration, it is easy to feel like restitution is losing its importance.²⁹⁶ However, if a more holistic role played by HLP rights and tenure insecurity in contributing to, exasperating, and prolonging a conflict is taken, the importance of HLP rights to the global community is clear. Local tenure systems may be often to blame for tenure insecurity, but international investors violate local and international laws. The international community is better situated to hold them accountable.

²⁹⁴ *Id.*

²⁹⁵ Trzcinski & Upham, *supra* note 86, at 56.

²⁹⁶ UNHCR: *World leaders must act to reverse the trend of soaring displacement*, UNHCR (June 18, 2021), <https://www.unhcr.org/en-us/news/press/2021/6/60ca09a74/unhcr-world-leaders-must-act-reverse-trend-soaring-displacement.html>.

