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Property Restitution Laws in a Post-War Context: The Case of Mozambique

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Abstract

Post-war reconstruction environments involve particular contexts within which legal reform must operate in order to facilitate the peace process, recovery, and development. Land and property restitution after a war is an important but difficult issue for the integrity of the process, given the chaotic rights environment created by war and the limited financial, personnel, and institutional resources of governments recovering from war. This article examines Mozambique's experience with the creation of a land and property restitution legal regime within a post-war context that includes: a) strong restitution desires by very divided segments of the population that differ markedly in literacy, access to the state, allegiance during the war, attachment to legitimate authority, and tenure system; b) a history of changing and failed land policy; and c) the extreme lack of state capacity needed to manage a formal restitution program. After setting out the history of the war and land policy in Mozambique, the article examines restitution claims, and describes how the land law reform has attempted to produce a legal environment whereby many complex restitution cases could be 'self managed.'

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I. Introduction

Lawmaking 'in context' is particularly crucial in post-war situations due to the fragility of peace processes, and the specificity of pre-war, wartime, and post-war issues that must be attended to if reconstruction is to succeed. Restitution of property and land is a primary issue after a war and is important in both solidifying the peace, and moving forward with development agendas (e.g., Andersson 2004; Holbrooke 1998; Cox and Garlick 2003; Bailliet 2003; Unruh 2003; Unruh 2002). Ineffective post-war property and property rights restitution can create significant obstacles to reconstruction, as people either take matters into their own hands or pursue divisive approaches against the state and/or other groups viewed as responsible for the ineffective restitution (Andersson 2004). And while restitution legislation is a primary tool for dealing with notions of redress regarding property rights, restitution laws must also contribute to the future of an often violently divided society. Important questions include: how restitution laws deal with problems of inequities in literacy, connection to the state and to different sides in the war; lack of state resources, domestic and foreign investment in land and property, and significant differences in knowledge of and accessibility to legal information and the legal system.

This article explores Mozambique's post-war legislative experience with rural property and property rights restitution efforts. In pursuing restitution, Mozambique's post-war government needed to consider the following factors and obstacles:

1. The need to provide a just legal restitution regime to individuals that were in the past invested with land and property rights within the framework of the colonial government or the state. These include interests that occupied different sides in the war;
2. The need to provide a just legal restitution environment to small-scale landholders (smallholders) who historically have had little or no connection to the state's formal property rights system, but instead hold land customarily, based primarily on lineage. This segment of society constitutes the majority of the Mozambican population and has low rates of literacy, little trust in the central government, and supported both sides in the conflict;
3. The extreme lack of financial resources with which to pursue a funded, official land and property restitution program;
4. A history of changing, failed, and problematic land and property policies, laws, and situations dating back to the colonial period on which many restitution claims are based;
5. The need to create a property rights regime able to attract and retain foreign and domestic investment that can take advantage of Mozambique's extensive agronomic resources;
6. An ineffectual set of land and property institutions subsequent to the war, many of which were of questionable legitimacy in the eyes of much of the population, particularly those connected with the wartime opposition;
7. A debilitated court system incapable of enforcing government property-related decisions; and
8. Significant pressure from the international donor community and local and international nongovernmental organizations to attend to specific aspects of the

'land question,' such as private property, human rights, indigenous rights, and rights to adequate shelter.

The post-war land law in Mozambique engages a particularly difficult national issue regarding land and property, namely, the ongoing and problematic relationship between the many relatively large commercial interests (foreign and national), and the indigenous or smallholder sector. These two groups frequently claim the same land, but under different regimes of authority, legitimacy, and proof. Restitution of land and rights to land is critical for parties both within and between these groups. Issues of restitution, conflict resolution, resettlement, land access, and investment are most problematic in this relationship. The current land law is focused on addressing these problems.

Selznick's "fidelity to context" observations are particularly relevant in post-war settings: "that law must be adapted to—make sense of, and deal with the distinctive problems of whatever special context we think should be governed by law and should redeem, in its own way, the ideals we associate with the rule of law," and that legal efforts "must be more focused, based on a full understanding of the social sphere, practice, or institution" (Selznick 2002). While Selznick (2002) also notes that a "noncontextual approach to property rights is especially misleading," this is particularly the case in post-war environments where the priority will be the solidification of peace and reconstruction, as opposed to legal formalism.

II. Armed Conflict in Mozambique

The history of Mozambique's wars began in the colonial period with the rebel group, *Frente de Libertacao de Mocambique* (FRELIMO), who forced the Portuguese out of Mozambique through guerrilla warfare that began in the late 1960's and ended with independence in 1975 (Vines 1991; Nordstrom 1997). As FRELIMO fought the Portuguese, the group fractured, and one component became the *Resistencia Nacional Mocambicana* (RENAMO) in the late 1970's with the help of the regional political and economic interests of Rhodesia and South Africa (Anderson 1992; Stiff 1999; Bowen 2000). The Rhodesian government supported RENAMO in an effort to destabilize Mozambique's African controlled FRELIMO government (Finnigan 1992; Hall and Young 1997).

With the fall of Rhodesia (now Zimbabwe), RENAMO turned to South Africa, which had an interest in destabilizing Mozambique for the same reasons as Rhodesia: to allow them to maintain their political and economic hegemony over the region during the time of Apartheid (Vines 1994; Stiff 1999). The 16-year RENAMO war ended in 1991 with a peace accord with the FRELIMO government, and approximately 40 percent of the national population (approximately six million people, primarily in the smallholder sector) dislocated (Tanner 2002; Unruh et al 2003). Significant fracturing of various post-independence land policies also occurred. At the end of the war, resettlement and restitution of land became a large issue as millions of refugees and internally displaced persons attempted to return home, and commercial interests which earlier received large tracts of land under the colonial and independence regimes sought to reclaim land (Tanner 2002; USCR 1993).

III. History of Land Policies in Mozambique

While the armed struggle for independence against the Portuguese in Mozambique was supported by the populace less for ideological reasons and more to oust the Portuguese and get their land back, independence in 1975 instead led to nationalisation of all land and villagisation programs with roots in the Tanzanian experience. Post-independence land legislation in Mozambique was initially conceived along socialist lines (Tanner 2002). The legal foundation for all land belonging to the state is still part of the Mozambican Constitution (Republica de Mocambique 2004, Article 109), which also indicates however that the state recognizes and guarantees the right to ownership of private property (Republica de Mocambique 2004, Article 82).

With the nationalization of all property at independence, all pre-existing titles under the Portuguese colonial era were extinguished (Tanner 2002). Nevertheless Portuguese returnees have for some time attempted to exercise current claim based on colonial era rights and documents, with some success in the more remote rural regions primarily due to the lack of knowledge on the part of local inhabitants (Hanlon 1991). During the war in the 1980s, virtually all farms owned by Portuguese were abandoned, but remained as demarcated areas on old cadastral maps (Tanner 2002). While these claims do not survive post-independence land laws as colonial era claims, they could be submitted as new applications for restitution under the current law.

However, government sentiment regarding colonial era restitution remains strong. The Mozambican Prime Minister has “warned against attempts by former settlers, or their heirs, to reclaim property in Mozambique” (MNA 1999). Yet, former Portuguese settlers unhappy with the lack of any restitution program established a group in Lisbon in the early 1990s calling itself the “Association of the Expropriated from Overseas Territories,” and the Portuguese government has set up a department to deal with their concerns (MNA 1999). According to the Export Finance and Insurance Corporation (EFIC 2003) landowners are entitled to compensation, but the sums that would be involved are well beyond Mozambique’s capacity to pay. This is to a large degree why there is reluctance to address the issue directly under Mozambican law.

From independence in 1975 until 1983, the FRELIMO government’s ambitious strategy of socialist development in rural land policy was based on organizing the dispersed rural population into communal villages and restructuring their productive activities into collective action through cooperatives and state farms (Bowen 1993; Kyle 1991). Large and small holdings alike were often swept away and replaced by collective state farms and villagisation programs (Myers and West 1993). State-owned farms performed poorly in spite of their location on the best land, and promoted land disputes by replacing smallholder occupation and encouraging elite co-optation of lands (Finnegan 1992; Geffray 1991; Shipton 1994).

During this period, the government gave large-scale state farms priority in agricultural investment because it felt that developing and extending the state farm sector in the hope that use of technology would increase urban food supply and provide export crops to bring in foreign currency (Bowen 1993; Kyle 1991). However, the large investments in the state farm sector had disappointing results and were made at the expense of peasant farmer production and private capitalist farmers (Bowen 1993). Attempts at organizing the rural population into communal villages

had considerable disruptive effects. In the early 1980s, nearly 20 percent of the agricultural population lived in these villages (Kyle 1991). Most of these still produced little if anything on a communal basis, with the government being unable to provide needed inputs and reversion to subsistence production on private plots common (Kyle 1991). As well, peasants were not willing to be workers on state farm land that had been seized from them and from which they had been expelled. As a result, they resisted the government's collectivisation efforts (Bowen 1993; Kyle 1991). Rural dissatisfaction over these policies was widespread and frequently intense and contributed to support for the RENAMO insurgency (Minter 1994; USCR 1993).

After the realization that not a single state farm was profitable, land policy change provided a new emphasis on more decentralized, market-oriented, small-scale or "family sector" agricultural projects (Bowen 1993). However, the RENAMO war meant that many of the communal villages were now used as safe havens, discouraging the return of much of the villagised population to home areas. Among the land reforms implemented by the government was to channel scarce resources to priority areas. These were areas where economic, military, fertile land and water supply situations presented the best opportunity for positive results (Bowen 1993). Nevertheless, the new liberalized state agricultural policies did not benefit the small-scale producer. Instead, the main beneficiaries were middle-scale producers and large-scale private farmers (Bowen 1993). As a result, the reforms fuelled peasants' dissatisfaction with FRELIMO's agricultural policies (Bowen 1993).

During the RENAMO war there was significant *de facto* change in the legitimacy, effectiveness and enforcement of state laws regarding land and property. As the conflict progressed, the state's land administration institutions in affected areas of the country were dysfunctional and incapable of enforcing order. This came about due to general insecurity in areas occupied by the RENAMO opposition and populations sympathetic to them, diversion of resources, and the destruction of the land documentation system such as local registries and other records (Unruh 2001). The absence of personnel to carry out administrative functions, along with people who previously engaged the state for administrative services, further undermined the functioning of formal property rights institutions (Unruh 2001). As the war continued, the federal land and property administration experienced an overall national capacity deficit as specific influences become mutually reinforcing: 1) the state's financial resources were diverted to a war effort and elsewhere; 2) administrative and survey personnel became unwilling or unable to travel due to security concerns; 3) significant sectors of the national population began to question the legitimacy of state institutions; and 4) records became outdated as land and property transactions took place and went unrecorded (Unruh 2001).

IV. Restitution Claims

Because a significant component of the overall post-war context is the lack of resources (human, political, financial, institutional) to formally deal with restitution, there is currently no discrete program dealing with property-related restitution in Mozambique. Thus, compensation for property nationalized at independence continues to be a legally unresolved issue (EFIC 2003). One report indicated that the final responsibility for establishing a process for property restitution rests with

provincial governments, although no provincial government currently has such a legal procedure in place (USDS 2001).

After the war ended, those seeking restitution of lands included several categories: 1) descendants of the original indigenous population which was expelled during the colonial era; 2) people who received land from local administrations after independence and during the war; 3) forcibly dislocated persons who abandoned their lands due to the effects of the war; 4) people who occupied land they found to be abandoned during the war; 5) former Portuguese or *assimilado* owners who had their lands nationalized at independence; 6) concessions granted by state agencies during different policy regimes; 7) state collectives dating from the early independence FRELIMO era; 8) speculators and others who used the post-war fluid property rights environment to acquire lands; and 9) ex-combatants and current officials of both FRELIMO and RENAMO benefiting, official or unofficially, from the peace agreement (Unruh 1997). These categories of claimants seeking restitution may be particular to Mozambique but the broader point is that any country emerging from conflict would likely have similar challenges in respect of restitution of land and property.

While the government attempted to engineer post-war resettlement and reintegration in some way for both small and large holder interests, the lack of resources to carry this out in an organized way meant instead that international donors committed very large resources to transporting, registering and managing the actual return from displacement; however, returnees were free to go where they wanted (Tanner 2002). Millions went directly back to their original areas where many conflicts were settled by the customary authorities (Tanner 2002). The land policy reform process used this large role of the smallholder sector in resettlement, at no cost to the state, in 1996 (at the urging of the UN) to argue for a larger customary sector role in land rights under the new formal law (Tanner 1996). However, many returnees in the early and mid 1990s found strangers on their land, including private and commercial interests which were drawn to the agronomically endowed rural areas by opportunities presented by structural adjustment and the new market economy (Tanner 2002). The rural land legislation of the day (Act No. 1/86 of 16 April 1986), which preceded the current land law, was not designed for restitution and resettlement and simply favoured new formal land requests over land that had been apparently 'abandoned' for two years or more.

Immediately after the war, the government was concerned about getting national agricultural production resumed and gave priority to those (primarily largeholders) who could demonstrate that they had the capacity to bring apparently empty land back into production (Tanner 2002). This priority, together with the lack of any organized restitution program or specific restitution legislation, led to several problems. The land law at the time, by which the state owned all land and natural resources, together with a legal structure that held documentation as the singular evidence for claim or reclaim, meant that most smallholders who were returning to 'their' land or property had no real legal foundation (Tanner 2002). The post-war occupation of apparently abandoned properties by new investors and inhabitants gave rise to a large number of serious conflicting claims and restitution issues as dislocated smallholders attempted to return to these same lands (Unruh 2001).

While such conflicts in part had their roots in post-war confusion, they were also caused by the lack of any clear restitution regime, which itself was due to the extreme weakness and confusion of national administrative structures (Tanner

2002). In particular, confusion surrounded the role of District Administrators who allocated land interests at the local level with little or no consultation with anyone apart from the investor. Investors in agriculture, mining, hunting and tourism were issued use rights to land and property without knowledge of others, often over the same areas, and in locations where smallholder communities also claimed land. Moreover, the state allocated apparently 'free land' to investors who promised to put it into some form of production (Tanner 2002). The priority of the government, that is to put new capable investors on land to get agricultural production going over any real restitution program, led to conflicts on a scale that concerned the donor community in the context of the peace process. This led to pressure on the government to attend to 'the land question' (Tanner 2002).

V. Post-War Land Law Reform

After the multi-party elections in 1994, the government, with strong donor urging, initiated an ambitious land policy reform program that lasted until 1999 (De Wit 2000). This program involved national debates, three national land conferences, multi and bilateral donors, and a host of NGO and national and foreign interests, including foreign government interests – all attempting to influence the process. In addition, two major legal agreements contributed to the reform process. The first was Section IV of Protocol III to the "General Peace Agreement" between RENAMO and FRELIMO, which provided that "Mozambican refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it" (Hanchinamani 2003). The second agreement protects the land rights of returnees (internally displaced persons, refugees, diaspora). In addition, the "Tripartite Agreement between the Government of Zimbabwe and the UN High Commissioner for Refugees for the Voluntary Repatriation of Mozambican Refugees from Zimbabwe, and the Government of Mozambique", signed in 1993, required in Article 5(4) that "the government shall ensure that returnees have access to land for settlement and use, in accordance with Mozambican laws."

The result of the overall reform has been significant development in the legal domain regarding land in Mozambique. A new land policy was adopted in 1995 (Conselho de Ministros 1995), a new land law was passed in 1997 (Mozambique Land Law 1997), regulations for dealing with rural land parcels were promulgated in 1998 (Conselho de Ministros 1998), and a technical annex to these regulations regarding delimitation of community lands was passed at the end of 1999 (Direccao Nacional de Terras 1999). The focus of the new law is on rural properties where most of the population lives and where previous problems have proved quite intractable (Hanlon 2002).

While RENAMO leaders have been calling for denationalisation, which would significantly promote official investment in the restitution issue (MNA 1999), under the new law, all land continues to belong to the state. The logic behind state ownership is that private property leads to landlessness, where people (particularly smallholders) lose land to speculators, or after one or two poor agricultural seasons. Attempts to change this in the 1990 constitution and the 1997 land law were both rejected (Hanlon 2002). Proponents of this logic point out that there are other forms of credit, and that Mozambican banks have no interest in land mortgages for the smallholder sector in any case (Hanlon 2002). Despite the active promotion of

privatization by several donors and Mozambican elites (some of whom had acquired land after the war ended in the early 1990s which they had hoped to then sell), privatisation is opposed by peasant organizations concerned about landlessness, and to date the latter have won the argument. The ruling FRELIMO party policy regarding land, reaffirmed in the June 2002 8th Party Congress, “is to guarantee that the Mozambican people do not lose their most valuable resource – land, which as well as its economic value, also has a fundamental cultural dimension” (Hanlon 2002). There is also significant concern by the government that landlessness leads to urban migration and the resulting urban slums.

VI. The Construction of a Legal Environment for Land Restitution

In order to deal with rural land and property restitution in a way that is viable in a post-war setting, the Mozambican government has attempted to construct a legal environment whereby the different aspects of the restitution domain can be ‘self-managed’ (elaborated below) to a significant degree. The new land law (Mozambique Land Law 1997) prioritises two broad objectives. First, it aims to protect land rights for local communities (Articles 13, 15, 24), and second, to promote investment in partnership between local communities and commercial investors (Articles 1, 11, 19, 20) (Norfolk and Liversage 2003). As there is only one law that attempts to cover all aspects of the land and property question, restitution is rolled into these twin objectives. This section analyses how the land law seeks to provide restitution opportunities for large and small Mozambican landholders, as well as certain foreign interests, while at the same time protecting community rights and encouraging investment.

Restitution mechanics of the new law

The new law embraces several approaches to make land available for restitution, depending on the category of claim. The first approach involves obligatory resubmission of the large number of pending land applications under which conflicting claims had been made in the past. Article 46 of the current *Land Law Regulations*, which came into effect on December 8 of 1998, introduced a 12-month period within which all pending applications and pending land claims had to be renewed, subjecting them to the provisions of the new land law and regulations. The government also allowed additional periods of three months in 1999 after a very low rate of renewal, and then a further period of four months in 2000. The latter occurred through the delivery of individual letters to approximately 2,500 applicants affected by the requirement, together with announcements on the radio (Norfolk and Liversage 2003). Toward the end of this period, the government ‘archived’ all those applications that had been pending as of August 8, 1998 and which had not yet been renewed. However, applicants were still permitted to renew their applications after the cut off date, until July 2001. In August 2001, DINAGECA (*Direcção Nacional da Terras*, the national department responsible for land rights registration and mapping) cancelled the remaining titles and applications (Norfolk and Liversage 2003). For Zambezi Province alone (the primary agricultural province), 1,234 applications were cancelled, representing over three million hectares (Norfolk and Liversage 2003). This provided significant restitution of land to African communities

who had lost land prior to, during, and after the war, often under questionable circumstances (Tanner 2002).

The second approach under the current land law mandated that all holders of land use rights (called DUAT, *direto de uso e aproveitamento da terra*) have an approved development or business plan (Article 19). For foreigners, only those who have resided in Mozambique for a period of five years or more and foreign companies registered in Mozambique may submit such a plan. Two years after the commencement of the plan, the government grants 50-year use rights (renewable for another 50 years) (Article 17). If the plan is not justifiably implemented within two years after provisional approval for foreigners (five years for nationals), land rights are revoked (Article 25). This is the primary way for the government to reclaim (for restitution purposes) land use rights from foreigners who may have for a number of years claimed rights under previous legal regimes, including the colonial regime (Tanner 2002; Hanlon 2002; Norfolk and Liversage 2003). Rights are also terminated if the time frame for DUAT (50 years) (Article 17) or its renewal comes to an end, or if the DUAT holder renounces rights (Article 18). Foreign DUAT right holders may also lose rights via conflict resolution (dealt with below). And unlike the current investment law, which does not apply to investments made prior to its enactment, the 1997 *Land Act* revokes earlier laws relating to land.

This approach also seeks to address the issue of restitution based on bad faith transactions. In this regard, the approach has less to do with complying with transaction procedures, or forms of intimidation, than recognition of good faith 'occupancy' (Article 12) and complying with the terms of a 'development plan' (Article 18). Because under the previous law, bad faith transactions primarily had to do with those able to obtain title taking land and property from those without title, and not between two title holders, the new law seeks to address this through the occupancy and proof articles (Articles 12, 15). Technically, the bad faith aspect of the problem was primarily caused by the title applicant's failure to adequately provide notice to any current occupants that a title application was pending for a specific area. This was a step that was often skipped when applying for title in Mozambique. The new law does not nullify titles issued improperly on land already occupied by someone else (MPPB 1997). Instead, titles may be reversed by reason of non-compliance with the plan under which it was granted (MPPB 1997). Additionally, if a conflict emerges in respect of such land, then the current law with its articles that elevate customary evidence and smallholder occupation would prevail.

The third approach involves those who had lodged land applications and claims in terms of previous legislation and did signal their continued interest in the claims; these were then subject to renewal and/or adjudication in terms of the new 1997 law. The new law and regulations stipulates a mandatory formal consultation with the local smallholder community regarding the occupation and use plans of the applicant (Norfolk and Liversage 2003). The local communities are given considerable power in this encounter, in part because the 1997–1999 Land Campaign (an information dissemination effort) declared that "Mozambique has no free land" (Negrao 1999) meaning that community claims are contiguous throughout the country. As a result, all foreign and national investors must negotiate directly with the relevant local community for use rights to land (De Wit 2002; Pancas 2003). This position is strengthened because the current land policy emphasises that occupation "according to customary norms and practices" (as opposed to 'occupation' as defined formally in state law) constitutes one way in which the use right attributed by the

state is acquired without the need for conveyance (Hanchinamani 2003). Such rights are not seen as new, and do not have to be authorized; the law recognizes them and offers them full legal protection (Article 12; Tanner 2002). No time frame attaches to rights enjoyed by local communities, national individuals, residences, or 'family sector' (smallholder) development of land by individual Mozambicans (Article 17). In such cases rights can be acquired by simple occupation (Article 12), and are equal to title. Furthermore, internally displaced persons (IDPs) are also allowed full rights to land (without formal conveyance) if there was evidence that their occupation had been in good faith for 10 years (Hanchinamani 2003; Tanner 2002).

This position is different than under the previous law, which gave precedence to documented titles, or application for title, even if they had been incorrectly issued when others already occupied the land. Hanlon (2002) goes so far as to indicate that smallholder evidence of occupation takes precedence, although this is not explicitly stated in the law. Nevertheless this legal arrangement gives the holder of a DUAT right equal but not greater legal footing than local communities, individual smallholders, and nationals occupying residences – even in terms of formal rights previously granted (Norfolk and Liversage 2003). Even when new DUAT rights are issued via title, they do not extinguish local community rights. Local communities can retain customary rights to the land involving hunting, firewood, forest plants, water for cattle, and small-scale irrigation (Hanlon 2002).

Private investors and commercial interests who under the new law need to apply for new DUAT rights cover a spectrum of profiles including the following: (Norfolk and Liversage 2003):

1. Established and consolidated companies, with access to large tracts of land acquired before independence and solidified with title after independence, and with no recent smallholder occupation, re-occupation, or claim. These are often reconfirmed with the new DUAT arrangements without too much difficulty.
2. The large land concessions backlog stemming from both pending title applications from as far back as the early 1980s under the previous land law, and more recent (often of questionable validity) applications and claims (Barnes and Lastarria-Cornhiel 2000; Norfolk and Liversage 2003). The issue of restitution intersects with this 'pipeline problem,' both in terms of what constitutes a claim under the new law (with increased weight given to smallholder occupation and community claims), and the timing and mechanisms for determining the validity of titles and dates by which claims are accepted. In most cases, the community consultation and occupants' rights provisions of the 1997 land law have offered a mechanism to deal with the majority of the pipeline concessions (Tanner 2002).
3. Emerging speculative entrepreneurs trying to occupy a space in the new economic environment, including government and ex-government officials.
4. Colonial concession descendants, ex-plantation and farm management, and agricultural entrepreneurs trying to occupy a location left by their relatives or former employers. Some are genuine farmers, and all occupy or seek to occupy primarily lands with a colonial history (also De Wit 2000). While the constitution recognizes rights acquired through inheritance (Republica de Mocambique 2004, Article 83), the nationalization exercise at independence means that such rights must be reapplied for under the new law.
5. Occupiers of areas of old concessions which were previously operated by state-owned companies and have come under control of private sector investors.

Although there is uncertainty regarding the legal position of occupiers that may have resided on land in the intervening period between the collapse of the state enterprises and the privatisation process, they themselves view their occupation as legitimate, particularly as it was often sanctioned by representatives of the state.

The fourth approach, compensation as a form of restitution, is not detailed in the current legislation regarding land and property and is dealt with fairly simply in Articles 18 and 27. Compensation is due for immovable property when rights are extinguished in the public interest (Article 18). However, no rights to compensation exist for land, title, or non-movable improvements to property when provisional authorization is revoked due to non-compliance with a development plan (Article 27). In addition, if DUAT rights are revoked, all non-movable property and improvements revert to state ownership (Article 18). The investment law, however, is more specific on the topic of compensation, particularly with regard to its valuing and timing (Article 13). However, the investment law also indicates that it does not apply to investments made before the law entered into force (MIL 1993: Article 27). An example of a case where compensation was an issue involving displaced people seeking restitution is that of the Mozal Project (aluminium foundry), which was to pay a total of one million US dollars into a compensation fund (MNO 1998).

Restitution merged with investment objectives

With the requirement (1997 law) that all renewed applications for DUAT rights first pass through a consultation phase with local communities or individuals that may also be occupying the land in question, two options emerge for restitution of rights. The first is potential loss of largeholder rights due to smallholder occupation of the land in question and the strength of occupation rights provided for in the new law. In this case, if new or pre-existing formal rights holders find in their application or reapplication process that the area is occupied and claimed by smallholder communities, then transfer of rights to the smallholder communities can occur (Article 13; Norfolk and Liversage 2003; Tanner 2002). The second option is the more innovative and desired option from the point of view of the law, and is more likely to satisfy the government's desire to attract and retain foreign investment (Tanner 2002). This is the option that seeks to encourage investors (foreign and national) to negotiate on their own with established local communities by: 1) empowerment of local communities via the rights provided by occupation, and the community participation requirement in determining what areas are really 'open' or not; and, 2) enabling a significant role for local communities in terms of participation in natural resource management, conflict resolution, and in the process of titling and setting the limits of new areas requested by private investors (USDS 2001; Kloeck-Jenson 1998; Tanner 2002; Hanlon 2002; Norfolk and Liversage 2003). This negotiation is necessary for those attempting to pursue pre-independence claims (USDS 2001) and for those who wish to pursue restitution under the current law (Tanner 2002; Hanlon 2002; Norfolk and Liversage 2003). Ideally then, such an arrangement would provide concurrent restitution opportunities for both large and smallholders, even regarding the same land.

The second option also encourages negotiation by allowing a formal DUAT rights system to co-exist with smallholder community rights of occupation, in what is

called the 'open border model' (Tanner 2002; Norfolk and Liversage 2003; Hanlon 2002; MPPB 1997). With this option, if an old title or reapplication under the new law finds that smallholder Mozambicans occupy the land in question, then this does not necessarily compel loss of rights on the part of the investor (foreign or national). This is especially important given the notion in Mozambique that there is no land in the country that is unclaimed by a local community in some form (De Wit 2002). The option includes the possibility of delimiting smallholder land under occupation either before or at the same time a DUAT is granted to an investor. This is the case for new DUAT applications or re-applications for rights holders under a previous law (Norfolk and Liversage 2003; Tanner 2002).

The 'open border model' refers to the legal recognition of the boundary around a specific community and the rights of the smallholder community within it, together with the 'open' character of the boundary, which encourages investors, particularly foreign investors, to negotiate an arrangement regarding the exact nature of use rights by the investor within such a boundary (Tanner 2002). In other words, although the land within a community boundary (often quite large) is both occupied and farmed by the local community, it could also be exploited by the investor. Under this approach there is a partial transfer of rights, particularly from largeholders reapplying for DUAT (who would no longer have exclusive rights), to smallholder occupants with whom a negotiated arrangement is potentially achieved. The logic behind this arrangement is the need to attend to desires for land restitution while at the same time avoiding having the country zoned into smallholder and commercial areas (particularly given the negative history of similar arrangements in southern Africa under Apartheid), as well as to help alleviate smallholder poverty by encouraging linkages with investors (Tanner 2002). In this regard there was the expectation that many restitution cases would 'resolve themselves' (in other words, become 'self managed') through either non-reapplication for formal title (lands returned to smallholder communities) or through a negotiated arrangement with reapplication.

One important situation that emerges under this arrangement involves largeholders who must re-apply under the new law, now needing to negotiate with smallholder occupants that may not have been present (due to previous colonial, wartime, or government policy dislocation) when the application or claim was first lodged under previous laws. However, given that such smallholder occupation or re-occupation of lands occurs with restitution as its purpose, such a negotiated encounter is what the new law aims at as a means of achieving both restitution and investment goals. The new law in this sense gives vastly expanded restitution rights to peasants (Hanchinamani 2003). The idea of restitution for larger-scale land interests (foreign, commercial, etc.) appears to be focused on encouraging those pursuing such restitution to also engage in investment partnerships with local communities as part of their development plan.

VII. The Role of Conflict Resolution in Restitution

Conflict resolution via the state

For cases of restitution that fall outside the need to submit a re-application for a new DUAT under the current law, conflict resolution plays a primary role. However, there is no special mechanism or forum for the adjudication and reconciliation of conflicts

with regard to land and property. Garvey (1998) notes that given the existing severe constraints on human and financial resources in Mozambique, it is not practicable to set up an agency or commission with specialized jurisdiction in land and property matters, even though this might be the optimal vehicle for effecting restitution and the adjudication of title and resolution of land and property conflicts (Garvey 1998). The only alternative, therefore, is recourse to the court system.

However, there is significant judicial and administrative weakness in terms of providing adequate fora for conflict resolution within the court system (Garvey 1998). A report by the Export Finance and Insurance Corporation (EFIC 2003) notes that enforcement of contracts and legal redress cannot be assured through the court system. According to this report the judicial system is close to paralysis, suffering from a severe shortage of qualified legal personnel and an overwhelming backlog of cases; as a result most disputes are settled privately or go unresolved. This weakness is an aspect of the overall restitution context in Mozambique. From the government's perspective, making rights in land and property clear and transparent, together with simplifying and making the procedures for the acquisition and security of title more transparent, and broadly disseminating information concerning people's legal rights will make a substantial contribution to the resolution and avoidance of conflict. However, this does not resolve all conflicts (Garvey 1998).

Just as the application for a new DUAT, conflict resolution approaches under the current law involve significant increased advantage for the smallholder sector compared with the situation under the previous law (Hanlon 2002). The choices for the title holder(s) in such a case are to negotiate a private arrangement as provided under the new law, including co-titling arrangements, or entering into conflict resolution through the courts as specified by the new law (Hanchinamani 2003; Hanlon 2002; De Wit 2000). The Technical Director of the Land Commission has indicated that courts will give considerable weight to antiquity of rights (MPPB 1997), with the exception of Portuguese claims based on colonial era title (Tanner 2002). Also important for conflict resolution in land law is the 10-year rule for those occupying lands in good faith. This clears up many restitution cases where claimants (under the current or old law) have been absent, particularly during the long war (Hanlon 2002).

The law gives equal weight to three general forms of evidence in adjudication of land conflicts: title, testimonial evidence presented by members of local communities, and official inspection and other forms as permitted by law (Article 15; Hanlon 2002). Similar weight is also attached to those claiming existing use rights through good faith occupation (Tanner 2002). Hanlon (2002) suggests that oral evidence takes precedence over documented titles but this is not explicitly noted in the law itself. Regarding the involvement of foreign interests in conflict resolution, Article 32 of the Land Law indicates that conflict resolution must take place in a Mozambican forum. However, the EFIC (2003) report indicates that foreign investors are offered recourse to arbitration through the International Convention and Centre for Settlement of Investment Disputes (ICSID), and the Paris based International Chamber of Commerce. This is also stipulated in the investment law (Article 25).

Where a conflict resolution matter involves two returning customary communities, the rules promote a delimitation exercise, which in some cases can make a simmering conflict worse, and in others begins the process of a dialogue (Hanlon 2002; Norfolk and Liversage 2003). Delimitation is different from

demarcation, the latter being a term used for the registration of private rights holdings (Hanlon 2002). Some cases of restitution of customary lands involve competing claims to land use rights over time and can include local community occupation of, and dislocation from, land in the early and middle parts of the last century. These situations have, in some cases, led to the entitlement of a community right to occupy specific lands in the face of a contrary legal decision, where a community 'invaded' (or 'returned to') land that was legitimately awarded to an applicant in terms of the previous 1987 land law regime (Norfolk and Liversage 2003). The law does encourage local communities to adjudicate their own conflicts, but as one might imagine, a titleholder, particularly a largeholder not from a local community, would not likely be willing to submit to arbitration within community court, and a formal court would be approached (Garvey 1998).

When a conflict concerning land does enter the court system, it is most likely that it would be referred to the provincial court in the provincial capital (Garvey 1998). The current land law does specify the involvement of local communities in court adjudication (Article 24). This together with the 10-year good faith occupancy rule means that if a titled claimant was seeking restitution, and a community can verify that it had been in place for 10 years (meaning the community had claimed the land for 10 years, under customary norms of claim) the restitution would be unlikely. Thus, if someone had clear title under a previous regime but a local community claimed the land under customary occupancy, under the previous law the titleholder would prevail, but under the current law the community would prevail, with the possibility of a negotiated settlement.

Alternative opportunities for conflict resolution

The legal environment provided by the land law, together with the weak court system, encourages the use of alternative approaches in conflict resolution. The law on extra judicial conflict management (Law 11/99) legally recognizes alternative tools for conflict resolution (MNA 1999; De Wit 2002). The purpose of the legislation is to introduce alternative, speedy, cheap methods of solving disputes that will not involve the courts (MNA 1999). Primary forms include arbitration, mediation, and conciliation. The extra judicial conflict management law places significant focus on its arbitration procedures, which are clearly defined. It includes numerous articles presenting regulatory provisions for its implementation.

Some individual provinces have their own official arbitration and adjudication institutions. In Zambezia province, a large land conflict involving a community and a company was one of the major reasons for the creation of the Provincial Conflict Resolution Commission (De Wit 2002). The commission has decision-making responsibility (arbitration in land conflicts) and is supported by a technical commission, whose major functions are the analysis of conflicts in the districts and reporting to the provincial commission in order that the latter can make sound decisions based on field reality (De Wit 2002).

Conciliation is a useful tool in Mozambique when a dispute arises between two parties with equal power. The process deals mainly with facilitating the communication between the two parties so that they can come to an agreement before a facilitator that both parties respect, and who is neutral, influential, and has sound knowledge of the history of the area (De Wit 2002).

Different actors in Mozambique such as NGOs and local administrations use mediation in order to manage conflicts between communities and the private sector. These efforts have usually failed due to the great imbalance of power between the parties (De Wit 2002). The present legislation does not provide clear practical guidelines for mediation, but indicates that these may be derived from the arbitration process (De Wit 2002). One component of what can be seen as mediation, and that can be employed in cases of restitution where there is ongoing multiple claims, is co-titling (Article 10). This option gives nationals or groups of nationals the right to obtain joint DUAT rights where the exact arrangements of resource access and exploitation are negotiated among those involved.

VIII. Conclusion: Property Restitution Law in a Post-War Context

Land and property restitution in a post-war, reconstruction context is a delicate and potentially volatile issue. The challenges are significant. Problems of legitimacy of governance and institutions (formal and informal) merge with reduced state capacity, scarce financial resources, animosities connected to the conflict, and overlapping claims. At the same time, if strong desires for restitution at the individual and group levels are not effectively dealt with, the risks to a fragile peace process can be significant. However, for investment and development to play a positive role in reconstruction, tenure security for investors and projects is crucial. Mozambique has attempted an innovative approach to simultaneously manage the issues in this difficult matrix – including its own limited capacity to mount an official restitution program. While there are problems with this approach, the peace process in Mozambique is largely seen as a success, and it remains to be seen if the new land law can, in aggregate, achieve the desired outcome.

Selznick (2002) notes that property rights are especially vulnerable to “the lure of absolutes, which save us from the need to make context-governed judgments about claims of right.” Furthermore, the temptation to import property rights laws into the developing world from the developed world can be strong (Moor and Rothermund 1994) because it can be easier and quicker than attending to context. The stakes in post-war reconstruction are high. As a primary issue in reconstruction and recovery, legal rights in land and property restitution efforts in particular must attend to context in order to both achieve realistic success, and contribute to the higher ideals of peace, justice, and legitimacy of authority, institutions, and governance. These can in turn contribute to the reconstruction of context as a country recovers from the effects of war (Selznick 2002).

Literature Cited

Andersson, B. 1992. *Mozambique: A war against the people*. New York: St Martins Press.

Andersson, B. 2004. Access to land and land administration in post conflict situations: case study on Kosovo to support guidelines. FAO, Rome.

Bailliet, C. 2003. Property restitution in Guatemala: a transnational dilemma. In *Returning home: housing and property restitution rights of refugees and displaced persons*, ed. S. Leckie. Ardsley NY: Transnational Publishers.

Barnes, G., and Lastarria-Cornhiel, S. 2000. Land concessions backlog in Mozambique. *Land Tenure Center Newsletter*, No 79, Spring.

Bowen, M. 2000. *The State Against the Peasantry: Rural Struggles in Colonial and Postcolonial Mozambique*. Charlottesville: University Press of Virginia.

Bowen, M.L. 1993. Socialist transitions: policy reforms and peasant producers in Mozambique. In *Land in African Agrarian Systems*. eds Bassett T.J. and Crummey, D.E. University of Wisconsin Press, Madison WI.

Conselho de Ministros. 1995. Politica Nacional de Terras, Resolucao no. 10/95. Conselho de Ministros, Republica de Mocambique, Maputo.

Conselho de Ministros. 1998. Regulamento da lei de terras, Decreto no. 66/98. Conselho de Ministros, Republica de Mocambique, Maputo.

Cox, M., and Garlick, M. 2003. Musical chairs: property repossession and return strategies in Bosnia and Herzegovina. In *Returning home: housing and property restitution rights of refugees and displaced persons*, ed. S. Leckie. Ardsley NY: Transnational Publishers.

De Wit, P. 2002. Land conflict management in Mozambique: a case study of Zambezia Province. www.fao.org/DOCREP/005/Y3932T/y3932t05.htm

De Wit, P. 2000. Land law reform in Mozambique: acquired values and needs for consolidation. www.fao.org/DOCREP/003/X8050T/x8050t04.htm

Direccao Nacional de Terras. 1999. Anexo tecnico ao regulamento da lei de terras. Direccao Nacional de Terras, Republica de Mocambique, Maputo.

Export Finance and Insurance Corporation (EFIC). 2003. Mozambique – risk assessment, February 2003. Export Finance and Insurance Corporation (EFIC), www.efic.gov.au/static/efi/cra/mozambique.htm

Finnegan, W. 1992. *A complicated War*. Berkeley, CA: Berkeley University Press.

Hall, M., and Young, T. 1997. *Confronting Leviathan*. Athens: Ohio University Press.

Garvey, J. 1998. The nature of rights under Mozambique's reform land law. Capetown Conference on Land Tenure Issues, January 27-29, University of Capetown.

Geffray, C. 1991. *A Causa das Armas: Antropologia da Guerra Contemporanea em Mozambique*. Lisboa: Edicoes Afrontamento.

Hanchinamani, B, 2003. The impact of Mozambique's land tenure policy on refugees and internally displaced persons. *Human Rights Brief, Washington College of Law* 7: 2.

Hanlon, J. 1991. *Mozambique: Who Calls the Shots?* London: James Curry.

Hanlon, J. 2002. The land debate in Mozambique: will foreign investors, the urban elite, advanced peasants or family farmers drive rural development? Research paper commissioned by Oxfam GB, Regional Management Center for Southern Africa.

Holbrooke R. 1998. *To End a War*. New York: Random House.

Kloeck-Jenson, S. 1998. Locating the community: local communities and the administration of land and other natural resources in Mozambique. Capetown Conference on Land Tenure Issues. January 27-29, University of Capetown.

Kyle, S. 1991. Economic reform and armed conflict in Mozambique. *World Development* 19: 637-649.

Minter, W. 1994. *Apartheid's Contras: An Inquiry into the Roots of War in Angola and Mozambique*. Johannesburg: Witwatersrand University Press.

Moor, J., and Rothermund, D. (eds.) 1994. *Our Laws, Their Lands: Land Laws and Land Use in Modern Colonial Societies*. Hamburg: LIT Verlag.

Mozambique News Agency (MNA). 1999. Prime Minister defends nationalizations. Mozambique News Agency, No. 156, 21st April.

Mozambique Land Law. 1997. Land Act No 19/97. Government of Mozambique, Maputo.

Mozambique News Online (MNO). 1998. People displaced by Mozal project to receive compensation. Mozambique News Online, (22) 6/12/98.

Mozambique: Peace Process Bulletin (MPPB). 1997. After NGO lobbying, new land law increases peasant rights. Mozambique: Peace Process Bulletin, 2, 10/01/97.

Mozambique Investment Law (MIL). 1993. Law on Investment, No 3/93. Government of Mozambique, Maputo.

Myers, G., and West, H. 1993. Land tenure security and state farm divestiture in Mozambique: case studies in Nhamatanda, Manica, and Montepuez districts. Land Tenure Center, University of Wisconsin—Madison.

Negrao, J. 1999. The Mozambican land campaign, 1997-1999. The Caledonia Centre for Social Development.

Norfolk, S., and Liversage, H. 2003. Land reform and poverty alleviation in Mozambique. Paper for the Southern African Regional Poverty Network, Human Sciences Research Council.

Nordstrom, C. 1997. *A Different Kind of War Story*. Philadelphia: University of Pennsylvania Press.

Pancas, M. 2003. Mozambique access to land. Land and Food Security Seminar, Copenhagen, December.

Republica de Mocambique 2004. Constitution of the Republic of Mozambique, Assembly of the Republic, Maputo

Selznick, P. 2002. Law in context, fidelity to context. Working Paper No. 2. Center for the Study of Law and Society Jurisprudence and Social Policy Program. University of California, Berkeley.

Shipton, P. 1994. Land and culture in tropical Africa: soils, symbols, and the metaphysics of the mundane. *Annual Review of Anthropology* 23: 347-377.

Stiff, P. 1999. *The Silent War*. Alberton: Galago Press.

Tanner, C. 2002. Law-making in an African context: the 1997 Mozambican land law. FAO Legal Papers Online No. 26, March.

Tanner, C. 1996. Personal communication.

Unruh, J., Heynen, N., and Hossler, P. 2003. The political ecology of recovery from armed conflict: the case of landmines in Mozambique. *Political Geography* 22:841-861.

Unruh, J.D. 2003. Land tenure and legal pluralism in the peace process. *Peace and Change: A Journal of Peace Research* 28: 352-376.

Unruh, J.D. 2002. Local land tenure in the peace process. *Peace Review* 14: 337-342.

Unruh, J.D. 2001. Postwar land dispute resolution: land tenure and the peace process in Mozambique. *International Journal of World Peace* 18: 3-30.

Unruh, J.D. 1997. Land tenure and the peace process in Mozambique: the role of land dispute resolution in 'critical resource' areas. Ph.D. Dissertation, University of Arizona.

U.S. Committee for Refugees (USCR). 1993. *World Refugee Survey*. Washington D.C.

United States Department of State (USDS). 2001. *Mozambique: International Religious Freedom Report*. United States Department of State, Bureau of Democracy, Human Rights, and Labor.

Vines, A. 1991. *Renamo: Terrorism in Mozambique*. Bloomington: Indiana University Press.

Vines, A. 1994. *Landmines in Mozambique*. New York: Human Rights Watch.