

Land Policy Development in Post Conflict Sudan: Dealing with Delicate Balances in a Fluid Environment

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1. Access to land and natural resources as a source of conflict

The number of armed conflicts and civil violence on the African continent has been rising over the last three decades². Although the causes of conflict are difficult to disentangle in a myriad and complex set of events, access to land, control of natural resources, competition between different land users to explore the natural resource base are increasingly seen as a key factor. On a number of occasions, such as in the Democratic Republic of Congo and Angola, there is no doubt that the control of natural resources, (oil, diamonds, coltan, gold, cobalt) is a major cause. In Angola the conflict is spilling over in a new set of disputes, between ordinary rural dwellers and an elite that seeks to control former agricultural holdings, mainly for speculative purposes³. In other countries such as Rwanda and Burundi, the link between conflict and access to land is different with demographic pressure on a limited land resource base being central⁴.

In Sudan the situation is more complex. It has been⁵ the scene of a different number of multi-layered conflicts, not only pitting the former Khartoum government and its ruling National Congress Party against the SPLA/M, but also the present Government of National Unity (GoNU) against movements in Darfur and Eastern Sudan. The North-South war has resulted in some 2 million deaths, the internal displacement of approximately 4 million citizens, and an estimated 400,000 - 600,000 refugees. The Darfur crises accounts so far for at least 200,000 casualties and as many as 2,5 million people are thought to have been displaced. Different groups in Southern Sudan continue to clash, requiring

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² Ross, M. "The natural resource curse: How wealth can make you poor", in Bannon, I. and Collier P. (2003) "Natural Resources and Violent Conflicts", The World Bank, Washington DC.

³ In African conflict and post conflict situations some sort of hierarchy for interest groups to force access to land, property and natural resources seems to exist. At the one end of this hierarchy stand oil, diamonds and other mineral resources such as coltan and cobalt. It passes through timber, urban real estate, infrastructure agricultural land (often pre-independence farms), potential tourism sites such as beachfronts, and finally results in efforts to grab of yet-to be explored agricultural land.

⁴ A study in Rwanda indicates that under traditional land use and farming systems some 425000 households would lose their livelihoods by 2010, mainly by being cut from viable plot sizes to cultivate. When major investments are made to improve and intensify these production systems, still 200,000 households would be deprived of access to a viable agricultural plot; P. De Wit (1997) "Utilisation des terres et aménagement", Internal UNDP/FAO Working Document for the formulation of an agricultural development strategy for Rwanda, FAO, Rome. This situation is significantly exacerbated by the return of hundreds of thousands of refugees since the date of the research.

⁵ The past tense is used but political instability and violence continue in parts of the country.

permanent monitoring and soothing action from the Government of Southern Sudan and non-governmental institutions, including the churches⁶. The volatility of the Darfur situation is well known.

The causes of the war between north and south Sudan are documented as being economic, religious, social, tribal and political.⁷ Suleiman argues that the SPLA/M drive for control over oil fields, customary grazing and agricultural lands were major causes for renewing the conflict in 1983⁸. While the perception of the war has been shifting to other differences between North and South, the underlying cause includes beyond any doubt access and management of land and natural resources, and the distribution of the benefits derived from their exploitation.

Chronic structural conflicts over land and natural resources have persisted for long time. An FAO–IGAD study⁹ identifies a multitude of land and natural resources related disputes between different groups in Southern Sudan at the time of the fieldwork in 2001. These include confrontations between agro-pastoralist over the use of pastures and water along the Bar El Arab (Kir) River, conflicts related to the competition for grazing land and water (Bahr El Jebel, Lau swamps and Bahr El Arab) between the major Southern ethnic groups, i.e. Dinka and Nuer (11 cases were reported). During the 1990s, conflicts between Nuer and Dinka groups destabilized large parts of Bahr El Ghazal, the Sobat river area and the Bor region, with its violence inducing massive displacement. Similar conflicts over grazing and water resources between different Nuer groups are documented in detail: the Lou-Jikany conflict.¹⁰ Similar evidence exists for the northern parts of Sudan¹¹.

Major reasons for Sudan being a country susceptible to systemic land and natural resources related disputes are identified as follows¹²:

- A need for access to land and natural resources for supporting livelihoods and economic development by different stakeholders, including the state, inducing stiff competition;
- A hostile ecologic environment and an imperative for mobility to support livelihoods invariably resulting in contact and eventually confrontation between different land users;
- The structure of social organization and the need to establish dynamic, sometimes volatile alliances between different groups which can easily be manipulated.

⁶ A search on www.sudantribune.com gives some flavor on the dimension and frequency of inter-group clashes in Southern Sudan, often with access to land, water and grazing as a cause of the conflicts.

⁷ International Crisis Group (2005a) "Garang's Death: Implications for Peace in Sudan" Africa Briefing N. 30, 9 August 2005. International Crisis Group (2005b) "The Khartoum-SPLM Agreement: Sudan's Uncertain Peace" Africa Report N°96 25 July 2005

⁸ Suleiman, M. (2005) "Ecology, Politics and Violent Conflict". Respect, Sudanese Journal for Human Rights Culture and Issues of Cultural Diversity, Issue n° 1 November 2005. Khartoum, Sudan.

⁹ De Wit, P. (2001) "Legality and Legitimacy: A Study on Access to Land, Pasture and Water Sudan". Report prepared for IGAD by FAO and funded by EC. Rome.

¹⁰ UNICEF (2000) "The Lou-Jikany conflict: A Situation Analysis and Procedures to Resolve the Conflict". UNICEF Khartoum.

¹¹ The Kababish-Meidob dispute over access to grazing land is documented in the archives of El Fasher and El Obeid since 1918, and resulted eventually in the Malha Agreement in 1964.

¹² De Wit and J. Hatcher, (forthcoming) "Sudan's comprehensive peace agreement: an opportunity for coherently addressing land and property issues?" in "UN peace building and housing, land and property rights - proposals for reform", Scott Leckie, Editor; Cambridge University Press

Over the past decades, the intrinsic tensions and incidents occurring when managing the livelihood mobility are influenced by a range of events that may exacerbate conflict. For the Darfur region, for instance, the following are recognized:

- Population growth¹³ and drought¹⁴ resulting in a degraded and shrinking natural resource base;
- Undermined local leadership, legal vacuum and uncertainties, administrative weakness, making local land management less efficient and unaccountable;
- Arbitrary interference of the government in local land use and management using policies and legislation that favor state interests only¹⁵, and undermine livelihood strategies of mobility;
- Lack of infrastructure and access to technology making local development is increasingly difficult;
- Unbridled interference from outsiders in a context of geo-politics and other agendas.

2. Creating a post conflict environment

The longstanding conflicts and a series of post conflict events have shaped an environment that is rapidly leading to a number of new challenges that require urgent attention. Elements of this post conflict environment include:

- Land and property problems related to displacement, resettlement, and the return of IDP and refugees; housing, land and property rights are violated, forced evictions do occur, slums around major towns such as Khartoum, but also in Nyala (South Darfur) appear as well as random demolitions¹⁶;
- The absence of a significant part of legitimate landowners in rural areas of Southern Sudan, results in low economic activity and sometimes a deceptive visible pattern of land use. This creates a wrong assumption of land that is free for occupation by outsiders and the state, contributing sometimes involuntary or deliberately to the process of land grabbing;
- A chaotic policy-legal-institutional environment gives rise to an opportunistic use of pluralistic legislation, and explores extreme margins of clientelism of public institutions. In Darfur for instance a tribal group uses customary law to confirm ownership of land in its home area. The same group uses however statutory law to claim land in areas to which they have migrated in

¹³ The population of Darfur has significantly increased, from some 1,3 million in 1956 to an estimated 6 million in 2003.

¹⁴ The 400mm isohyet, a locally (Darfur region) used threshold proxy for crop failure or success, has been shifting drastically in Darfur over a distance of 500 km during the last decades.

¹⁵ From the end of the 1960s on the GoS has promoted the massive horizontal expansion of agricultural production, accompanied by an expropriation of de facto community land, - the Mechanised Farming Schemes and Arab Breadbasket Policy. It is estimated that approximately 25-30 million feddans (one feddan approximate 0,4Ha) were placed under mechanised cultivation. The results of this policy have been questioned, and presently efforts are underway to review significantly the policy of large mechanized farming in dryland areas in Sudan. Efforts to parcel and allocate big farms continue however to date with the Ministry of Agriculture planning to convert into managed areas some 800,000 Ha (2 million feddans) of customary land in Eastern Sudan; Bellini, M., Saeed, A. and El Tayeb, Y. (forthcoming) "Land Tenure and Land Use in Eastern Sudan", FAO Khartoum

¹⁶ The Centre on Housing Rights and Evictions (COHRE), an independent, non-governmental organization, playing a leading international human rights role in campaigning for the protection of housing rights and the prevention of forced evictions has awarded Sudan with the 2004 Housing Right violator award.

recent history but over which other tribes have acquired strong ownership rights on the basis of customary law¹⁷;

- The military and war veterans, national elites and increasingly foreign companies use their influence to access land over which strong legitimate claims exist. The dynamics of liberation movements, transferring their former military influence and power into economic assets by acquiring access to land, natural resources and real estate take on an important dimension;
- The signing of peace agreements does not necessary lead to a stop of hostilities and conflict. Outstanding historic grievances, remnants of identity issues, and ethnic mobilization around sometimes day-to-day problems continue to undermine the peace process;
- Almost 50 years of civil war and frequent displacements of the populations have resulted in an uprooted society with weak community structures, politicized local and customary authority, power shifts. It appears that new community leaders are emerging in Darfur IDP camps, whereas some eminent tribal leaders are cut from their population with their authority being weakened and undermined.

3. Specific impact on land administrations¹⁸

The longstanding conflict has an impact on land administrations and their functioning. Land administration has always been poor in rural areas, as compared to urban areas, throughout Sudan. In rural areas existing statutory land legislation has rarely been applied (such as the Land Resettlement and Registration Act), even less so in Southern Sudan). Only cities such as Juba, Wau and Malakal, all three former regional headquarters in Southern Sudan, had at one stage a reasonable operational land administration. Different decentralization efforts of the public service were not accompanied by the transfer of information and cadastral records to new state level services. Following gives a brief overview, with a special attention for Southern Sudan:

- **Capacity of the land administration:** The post conflict situation in late 2004 can be illustrated by the capacity of the land administration in Juba, the present capital of Southern Sudan “ *The Juba Survey Department employs six technical staff, three field officers and three drawing officers to cover the entire GoS held region of Bahr el Jebel and the two Equatorias. The department has only one car and has nominal field equipment (some beacons). The absence of filing cabinets is striking, with most of the original survey and cadastral data scattered on the floor and haphazardly piled on top of tables and chairs.*”¹⁹
- **Status of survey departments:** Little is known about the status of the geodetic network. Most survey work is not related to a geodetic network. An assessment of survey work in Juba states that “*there are some town traverse points, and one or two benchmarks available in Juba town, but some of them*

¹⁷ The Civil Transaction Act (1984 and replacing the Unregistered Land Act of 1970) converts all non registered land by a pen stroke into registered government land. The principle that “no one has a stronger right than the other over government land” annihilates strong historic claims over land acquired through occupation.

¹⁸ The FAO publication “Access to rural land and land administrations after violent conflicts”, FAO Land Tenure Studies 8 (2005) gives a good overview on land administration challenges in post conflict situations and good practices to meet these. It was prepared on the basis of practical experiences acquired through different projects dealing with post conflict situations, including Sudan.

¹⁹ Charles M. Libo (2005) “Land administration needs assessment”; internal FAO report prepared under project OSRO/SUD/513/SWE. S. Norfolk (2005) “Land administration needs assessment”; FAO report prepared under project OSRO/SUD/415/NET.

*are already destroyed. Most of the survey work is hanging in space and not related to a geodetic network. Most plots these days are laid out in rudimentary fashion using tape measures. Because of lack of modern survey instruments, the survey work could not be tied to the Town Traverse points*²⁰. Official requests by FAO to have access to the geodetic network lay-out to the Sudan National Survey Authority in Khartoum were rejected. There is an absence of official base maps, and when existing these are not readily available through the normal channels; different NGOs, international organizations and agencies are producing their own maps. Some public information seems to be personalized by former and present public staff.

- **Land Register:** Land register information is transcribed mainly in Arabic. Records are not available for public consultation.
- **Uneven handed land service delivery:** There is no doubt that some groups receive a preferential treatment when compared to others. The long queues of military before land administrations buildings are self-explanatory. There is evidence that military and local political authorities are distributing land parallel to any existing land administration. People originating from elsewhere find it more difficult to acquire a residential plot in Juba. There is anecdotal evidence that single women encounter major difficulties acquiring access to a new residential plot.
- **Land administration as part of the problem:** Local administrations are under a lot of pressure to deliver services but with little means. There is a lot of emergency planning and land/property allocation in the absence of rights-holder. Most of these initiatives are laudable in their own right, but some may add a new layer of disputes.
- **Absence of legal framework and transparent procedures:** For a number of land administration tasks, a legal framework, regulations and norms still need to be developed. These include the identification of town boundaries, procedures for acquisition of land, plot allocation, compensation, land taxes, dealing with property claims. Existing procedures are a mixture of practice and precedent, which reflect what is generally understood to be 'how things are done', rather than being based systematically on statutory regulations or responding to all the needs of Southern Sudan.
- **Weak public awareness:** Requirements and procedures to be followed are little known. There is evidence that any paper, form or sketch map is used by some to establish unrightfully a claim over land. There is also a lack of clarity on the future of property that is registered in the name of people who fled Southern Sudan.

4. Mechanisms to initiate land reform processes

Assessing the process of land policy development in post conflict Sudan is a daunting task. After decades of war between the Government of Sudan (GoS)²¹ and the Sudanese People's Liberation Army/Movement (SPLA/M), and a number of more recent conflicts, of which Darfur has been beyond doubt the most violent, a series of peace agreements have been signed. The Comprehensive Peace Agreement (CPA - 09 January 2005) opened the way to the Darfur Peace Agreement (DPA - 05 May 2005)

²⁰ C. Libo (2005) *ibid*.

²¹ The Government of Sudan (GoS) refers to the government that was in power before the signing of the Comprehensive Peace Agreement; the Government of National Unity (GoNU) and the Government of Southern Sudan (GSS) refer to the post CPA situation, as stated in the current National Constitution.

signed in Abuja between the Government of National Unity (GoNU) and a faction of the Sudan Liberation Movement/Army led by Minni Minawi. The Eastern Sudan Peace Agreement was signed on 14 October 2006 in Asmara between the GoNU and the Eastern Front. A common denominator in all the final texts is the importance that the land question takes.

These peace agreements express the need to develop new land policies and laws that respond better to the realities of the different populations. The decentralization of decision making over access to land and the management of natural resources is a strong guiding principle, albeit as a concurrent power to central decision making.

Land commissions at different levels are proposed as an institutional instrument to guide land policy and law development, and to take on a future role in the handling of land issues. The Wealth Sharing Agreement (WSA - 7 January 2004) provides for two independent Land Commissions at national and Southern Sudan levels. The Commissions have similar powers, including the right to receive and resolve land claims, land policy and law development. Specific provisions on land commissions were later included in the Interim Constitutions. At the top sits a National Land Commission (NLC), which is conceived to be the main driving force to review land policy and law, and to deal with land claims. It is not clear whether its mandate will cover the entire country, or whether it is limited to former Government of Sudan (GoS) controlled areas. The agreement gives concurrent powers to a Southern Sudan Land Commission (SSLC) and to the state land commissions of the Southern Kordofan and Blue Nile States, commonly called "contested areas". These two states have acquired a specific political status during the Interim period.

The Protocol on "The Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Niles States", (26 May 2004) gives the two State Commissions also the power to review existing land leases and contracts, and to examine the present criteria for land allocations and to introduce changes. The Protocol on "The Resolution of Abyei Conflict", (26 May 2004) refers to the third main contested area, now defined as Abyei County, comprising the nine Ngok Dinka chiefdoms²². Residents of this area will be citizens of both North and South during the Interim Period and will cast a separate ballot simultaneously with the referendum for Southern Sudan to decide if their county becomes part of Bahr el Ghazal, which is in the South or retains special administrative status in the north. Drawing boundaries is a complex task here, mainly because of the presence of oil deposits.

The DPA provides for the creation of a Darfur Land Commission (DLC) for law and policy development and the arbitration of claims.

5. Progress made on addressing land issues and land policy reform

Progress made to face an increasing number of land issues varies in the implementation of the different peace agreements. At national level, all concerned parties made historic progress with the implementation of the CPA and a number of early solid achievements prove that the parties have

²² Dinkas are one of the main social groups of southern Sudan. The Dinkas are made up of a myriad of tribes, divided into sub-tribes, with levels below identified as sections and sub-sections. The Ngok are a major tribe of the Dinka population, that populates Abyei since time immemorial. Nine Ngok Dinka chiefdoms were administratively transferred from south Sudan to the north in 1905.

embraced the CPA as a genuine mechanism for durable peace in Sudan²³. In relation to land however, it are the unimplemented sections of the CPA that are more significant for gauging the status on land policy, legislation and institutional development, as well as for addressing land claims and disputes.

The establishment of the various land commissions remains precarious. The process of creating the NLC began in mid-2005 under the auspices of the Joint National Transitional Team (JNTT), with technical assistance from FAO. It was supposed to last only one month, before handing over a draft proposal to the National Constitutional Review Commission (NCRC). After the production of a first consolidated draft, the process became unclear, with little information available from government on progress made. Around August 2006, a draft NLC law, the contents of which were not made public, was presented to the Council of Ministers, but was not approved.

In September 2006, the NCRC strengthened its efforts to support the development of legislation for the NLC. In partnership with FAO, the NCRC organized a high level workshop to discuss NLC legislation in January, 2007. On the one hand, the presentation at this workshop of three different drafts and a separate concept paper illustrates the major differences that still existed on the constitution of the NLC, further impeding the policy and law reform process.

On the other hand, the workshop provided a set of 10 solid recommendations, including a strong proposal to *“revise the policies and laws at all levels of Government on land use and rights in land”*. These recommendations were all inserted in a new draft proposal. By September 2007, there was still no NLC operational in Sudan. It appears that the NCRC is still debating on two different drafts, which represent opposing views, and reflect, among other things the differences that exist between the role of the state and other actors in the functioning of the NLC, and the land reform process.

Efforts of land policy development in Southern Sudan in fact date back to the pre-CPA period. In September 2004 a consultative workshop on land policy was organized in Nairobi with participation from the SPLM (representatives from the Secretariat of Agriculture and Animal Resources and the Secretariat of Legal Affairs and Constitutional Development), FAO, USAID, Pact and Norwegian Peoples Aid (two international NGO). Terms of reference were agreed for a Land Policy Steering Committee to launch a process of land policy development, based on principles of inclusiveness, participation, civil society participation.

The steering committee was abandoned before it really started functioning and some of its tasks were taken over by a steering committee on customary law. Since March 2006, the GoSS has initiated the preparatory work to establish the Southern Sudan Land Commission (SSLC), which in line with the CPA, has concurrent powers with the NLC. Although the SSLC was never officially established by a specific law,

²³ The Interim National Constitution (INC) has been signed, the Government of National Unity (GoNU) appointed, the Government of Southern Sudan (GoSS) installed, a Transitional Legislative Assembly for Southern Sudan appointed, the Southern Sudan Constitution approved, and a Joint National Transitional Team (JNTT) established to follow up on donor assistance pledged at the Oslo conference. Of the six major commissions included in the CPA, the Petroleum Commission, the Judicial Service Commission and the Fiscal and Financial Allocation and Monitoring Commission are established.

it started operating to some extent by mid-2006 on the basis of a decree which appointed members to the SLLC, but which failed to clarify its mandate.

Under the auspices of the FAO and NPA, a land coordination forum was established in early 2007 to share information on land activities in Southern Sudan, especially with the SSLC. This forum also coordinated support to land policy and law development. Parallel to this, the Ministry of Legal Affairs and Constitutional Development (MLACD) drafted a new land law for Southern Sudan, which was made available to some insiders for comments by mid July 2007. This land law was drafted in the absence of a land policy that should spell out the vision of the GoSS and its citizens on how to deal with future land management. It seems that the core of SPLA/M vision on land is only encapsulated in the following two policy principles:

- Land belongs to the people/communities;
- Customary law is used as much as possible to handle land issues in rural areas; in towns the state takes over.

In the Southern Kordofan/Nuba Mountains and Blue Nile regions, the policy/law development and implementation process has stalled for several reasons, and so far none of the drafted laws have been formally adopted. New impetus was given when the USAID-sponsored Customary Land Tenure program began at the end of 2006. The process seems to be continuing somewhat in isolation, on a parallel track without many links to other ongoing efforts.

6. The FAO Sudan Land Programme

The FAO was the first international and UN organization that was requested to address land issues as part of the conflict transformation process. Under the auspices of the Land Tenure Service (formerly SDAA, now NRLA) and the Emergency Operations and Rehabilitation Division (TCE), the FAO's land activities emerged from its technical work in early assessments, implemented with a number of partner organizations. The 2001-assessment prepared for IGAD was ultimately used for background in the Naivasha peace talks²⁴. The 2004 Land and Property Study²⁵ was the start of a series of specific land tenure interventions that were included as sub-components in different emergency projects. So far, all but one intervention were financed as an emergency project. This set up has shown some constraints when dealing with issues that require a longer term vision, longer and permanent presence of technical expertise. As compared to hard and highly visible deliverables such as seeds, tools and veterinary services in early post conflict situations, the delivery of softer outputs such awareness creation, policy and law development, institutional capacity building, piloting of new approaches and methodologies, are not always considered as being essential or perceived as being tangible enough to please donors.

²⁴ De Wit, P. (2001), *ibid.*

²⁵ De Wit, P. (2004) "Land and Property Study in Sudan: Scoping of issues and questions to be addressed", prepared under project OSRO/SUD/409/HCR, financed by UNHCR, the Norwegian Refugee Council NRC, and FAO.

Notwithstanding a number of obstacles, early visioning and thorough scoping allowed FAO to implement a rather successful set of complementary activities to support the transition from emergency to development programming, which can be summarized as follows:

ACTIVITY	FAO INVOLVEMENT	OUTCOME
Establishment of National Land Commission (NLC)	FAO, the only non-Sudanese partner, has worked with governmental committees to conceptualize the mandate and organization of the NLC	3-day workshop held with the NCRC and created first linkages between these and governmental committees and the SSLC
Support to the Southern Sudan Land Commission (SSLC)	FAO supported SSLC establishment, providing technical and material assistance and policy advice, and has taken the lead to coordinate land issues	Organization of the first high level public workshop to discuss future land policy, and set up of a Land Coordination forum in southern Sudan to coordinate land issues
Land policy development in Darfur	FAO brought together high-level customary leaders, national law- and policy-makers and civil society representatives from each of the Darfur regions and tribes	Provided opportunities to train national and international staff from sister UN organizations, specific subject matter assessments implemented for arbitration of land disputes in Sudan
Land assessments	FAO conducted a series of scoping and assessment studies to identify specific needs for addressing land tenure, land use and conflict resolution measure in all areas of Sudan.	Provided opportunities to train national and international staff from sister UN organizations, specific subject matter assessments implemented for arbitration of land disputes in Sudan.
Regional conflict management	FAO facilitated workshop series to raise awareness, disseminate information and open dialogue - Darfur (partner with UNDP) Southern Sudan (with UNHC, NRC , Min. of Legal Affairs and Constitutional Development, and SSLC)	Workshops brought together diverse groups including academics, customary leaders, women's groups and local administrations to find ways to move towards common solutions which resulted in the DJAM land proposal for action.
Ascertainment of customary law and local conflict management	FAO designed and implanted research, trained national researchers, established a framework to develop guidelines for alternative conflict.	A series of studies conducted in selected areas in southern Sudan ascertained the extent of customary law, helping create a realistic interface between customary and statutory law.
Community land management projects	FAO implanted pilot experiences with parents in a number of return hotspots in southern Sudan to develop and test methodologies for post conflict land recovery planning	Local development committees strengthened; public and NGO staff trained in community mobilization, natural resource management, land management and tenure.
Support to land administrations	FAO designed and provided training, purchased equipment and logistically supported the land services	Main land administrations services in Southern Sudan (Juba, Wau and Malakal) have been upgraded to deliver embryonic service, and respond to immediate needs.
Support to returnees	FAO partnered with UNHCR, NRC and IRC to develop information dissemination framework	Framework now serves as a basic for informing displaced persons of possible land and property problems upon return and provides answers to commonly asked questions

FAO seeks now to conceptualize and implement a number of strategic land projects targeted to the different needs in various geographic areas, but maintaining an overall programme approach – the Sudan Land Programme.

6. Lessons learned on the processes of land reform and land policy development

This paper describes two sets of lessons learned during the early post conflict era in Sudan. A first cluster deals with the processes itself, providing some insights on opportunities that were taken or missed, and on challenges that still need to be tackled. It is clear that reform can become more successful when the enabling operational environment is turned more favorable. A second set of lessons learned gives some thoughts on a possible framework and some initial contents for the reform.

Isolated processes without synergies

Land policy reform in Sudan is multi-layered, simultaneously ongoing at different levels and in different regions, with each process showing specificities, but also sharing a set of common issues. The recognition of customary land rights, aimed at giving a stronger legal backing to community land rights, addressing land claims, focusing on alternative dispute resolution, the strengthening of land administrations and institutional reform through land commissions, local land use planning to better manage mobility, are all issues that are on the agenda of the different reform processes. There is however little synergy created between the different processes for which, of course, a number of historic reasons can be suggested after decades of conflict. Policy makers on different sides of the barriers are utterly suspicious of each other, and different regions show a strong drive for self determination.

The need for some mutual understanding and degree of co-operation are however implicit in the CPA and other peace agreements by virtue of the concurrent competences of the different land commissions. In practice, it is hard to imagine that the major challenges of restoring lost land rights and property, and resolving outstanding claims can be solved without a minimum degree of mutual understanding.

Building policy reform processes into peace agreements and constitutions

The inclusion of the need to address land claims and land policy/law development as part of the CPA and DPA, translated by the negotiated mandates of the different land commissions, has set the institutional scene for action. There is little doubt that rooting land issues in the peace agreements could only happen with some degree of international pressure. This goes in the direction of the proposed international charter for dealing with postconflict situations, where “the sorting out of conflicting and confused property claims” is considered as an essential element²⁶. The Interim Constitutions for the Sudan and Southern Sudan also include a legally binding requirement to deal with land and natural resources related challenges.

Embedding these needs in new constitutional law provides some degree of protection against possible future hesitations to continue with the policy reform process. It also sets out guiding principles on the

²⁶ P. Collier (2007) “The Bottom Billion: Why the poorest countries are failing and what can be done about it”. Oxford University Press

direction and contents of this reform, and offers some form of guarantee that the reform does not depart too much from its negotiated intentions. This strategy is to some extent a Sudanized version of a charter.

The fear for political backtracking on previous policy commitments is real. The fact that the NLC is not yet established suggests a lack of commitment to address land issues, though it may also underline the difficulty of the challenge. A possible change of direction in land policy can also be observed in Southern Sudan. In the wake of the successful peace talks, the SPLM vested an almost exclusive right of ownership in land to “the people and communities” of Southern Sudan. The position of the GoSS is now more subtle; it proposes the state takes a much stronger direct interest as a landowner and manager²⁷.

It is therefore important for peace agreements and new constitutions to include a raft of guiding principles on key issues like land. These will always stay as a reference for national and international institutions and actors monitoring the implementation of negotiated peace agreement. This is essential in a situation where the public demands reform, but the government(s) are reluctant to engage. A question remains whether the UN is willing to use the leverage of its mandate to monitor the implementation of the CPA to effectively do something on delays or parts that are not implemented, such as the establishment of the NLC.

Situational analysis, raising awareness and disseminating information

It is essential to invest in independent analyses that can put the land question on the agenda of postconflict governments and their partners. This may constitute a first step to give these issues their rightful place in peace agreements and constitutional law. Such analyses can identify the need to act, to establish the main areas needing further attention, and to create a framework for further dialogue.

Just some six years ago, at the time of the IGAD study, land rights issues in Southern Sudan seemed to be of little concern for the SPLM/A leadership. Messages were conveyed that upon the normalization of the political situation, and the eventual return of millions of displaced people, no land problems would occur. If problems arose, these would be dealt with on a routine basis by customary chiefs. This assumption turned out to be wrong; problems do occur and the former wishful thinking on the return process and the peaceful settlement of returnees in rural areas simply does not correspond with the reality. Again in 2004, the results of a Land and Property study seemed to be received with some reluctance by policy and decision makers, especially in Southern Sudan. Identified challenges in this study do however occur and require attention, as is increasingly acknowledged now.

In addition to a timely assessment of land issues, it is as important to discuss the results with a wide public through different mechanisms such as workshops and seminars²⁸. In promoting consultative workshops, in partnership with government and regional institutions such as the MLACD and NRC, FAO

²⁷ Recent land law proposals in Southern Sudan put the burden of proof for the recognition of existing rights over land that is visible unoccupied to the weaker land users such as local communities, pastoralists, absent IDP and refugees. A reverse of proof, giving responsibility to the state that land is free (of rights) would certainly be more in line with the statement “land belongs to the people/communities”..

²⁸ The results of the FAO-UNHCR-NRC Land and Property study were discussed in a series of 3-day workshops that were organised in the period 2005-2007 as part of a number of the FAO Sudan Land Programme, covering most of the Southern Sudan states.

and UNHCR were able to bring together many very different stakeholders and facilitate sometimes passionate but open discussions. This has created a situation where the information has become public property, and different layers of society have become convinced that action is required to address major challenges. More important still is the genuine participation of some senior level public staff in these awareness creation activities. These events have slowly stimulated a change in mentality which, although facilitated by external actors, has become a 'home-grown' process.

This demonstrates the key role of international organizations such as FAO and others as 'honest brokers', able to promote discussion in the relatively neutral context of international community supported meetings and providing a space for local ideas and solutions to take root.

Competing institutional responsibilities and blurred policy directions

The embryonic land policy reform efforts in Southern Sudan have been marked by unclear institutional responsibilities. During the pre-CPA period, the Secretariat for Agriculture and Animal Resources (SAAR) took a clear lead, focusing on the rural areas. It followed mainly a rights-based approach for tenure reform, embracing the SPLM/A policy declaration that "Land belongs to the people/communities"²⁹. The SAAR was inclined to look for a balanced approach, recognizing the rights of local populations over land, whilst creating an enabling environment for an emerging private sector to have access to land and nurture investment in rural areas.

The newly established GoSS decided to make land part of the mandate of the Ministry of Housing, Urban Planning and Lands, automatically giving 'the land question' a heavy urban accent. Land issues then centered on the creation of new urban plots, the often *ad hoc* handling of requests for parcels of urban land for business, the settlement of the new GoSS in Juba, and urban planning.

In the rural context, the new Ministry of Agriculture and Forestry turned into a *de facto* player, albeit in the more traditional role of promoting activities that complicate rather than resolve deep rooted problems. A strongly renewed emphasis on the promotion of private, including foreign, investment in the agricultural sector represents a clear shift from a rights-based to an investment-based approach, with the role of local communities and their legitimate rights over land once again becoming secondary.

The role of the SSLC in policy and legislative development has been marginal so far, although it should be the driving force. It is a new and still weakly staffed institution, with little real experience in land issues and has not been able to stand up to more powerful political forces.

Other ministries have only been marginally involved in the few discussions that have taken place on possible land policy direction and content. The drafting of a Land Act was an internal exercise carried out by a small group within the SSLC, overseen by an international legal expert. Few openings were created

²⁹ "Land belongs to the people" is the land policy statement of the SPLA/M that emerged from fears that the Government of Sudan would use and manage the mineral deposits including oil, agricultural lands and grazing potential and the water resources of the Nile for the sole benefit of the northern-based elite and its allies, thereby marginalising the customary owners of these lands, i.e. Southern Sudan tribes. Armed attacks on the Chevron installations in Unity State, on the earth digger at the Jonglei Canal and on the mechanised farms in Blue Nile State, all in 1983, highlight the efforts of the SPLA/M in defending access to land and natural resources for "their people".

for other players to participate and exchange views. The SSLC meanwhile is acquiring some teeth, and is organizing some informative workshops in a number of southern states on land legislation.

Donor engagement, coordination and funding priorities

The Sudanese case sheds some light on the opportunities and constraints of donor and international intervention. The special UN mission for Sudan, UNMIS, is providing support to the implementation of the CPA. There is a UN Sudan Unified Mission Plan that outlines the structure, strategy and activities of the UN in post-conflict Sudan. Ironically, although land, property and natural resource issues were at the heart of the conflict and continue to present a major challenge to a secure peace, no specific provisions are foreseen within UNMIS to deal with these issues³⁰.

The UN specialized agencies are meanwhile both concerned and mandated to do something. FAO, UNHCR, UNDP and UN-Habitat are all dealing with land and property issues, but without much apparent support and guidance from the UN mission. This may not be surprising, given the huge challenges facing UNMIS as it tries to stabilize a fragile and still volatile situation, but calls for questions.

The marginal attention for land issues is reflected in the post-CPA budget. The Joint Assistance Mission (JAM) is an effort between the GoNU, the GoSS, the UN and major bilateral players to establish the main framework for pledging recovery and development funds for Sudan, and is considered by most partners as the sole basis for the development of an assistance strategy and the allocation of funds. The JAM documents consider land policy reform as the only explicit land related activity in Sudan for the 6-year interim period, and include US\$ 500,000 for the GoNU and US\$300,000³¹ for the GoSS over the same period. If these resources are taken as a proxy for the importance that the GoSS, the GoNU and the international community give to addressing one of the root causes of the longest armed conflict in Africa for the next six years, then it is highly unlikely that the efforts will result in tangible results. It must also be stressed that so far no specific Multi Donor Trust Fund (MDTF) project on land has been proposed. It tells as much about the national as the international interest to get things going on the land front³².

A unified UN view on the needs and possible responses to the land question patently does not exist. It underlines the importance for a clear framework where the immediate political role of the peacekeepers and humanitarian agencies, and the critical long term peace consolidation role of the specialized agencies, are explicitly laid out, understood by all parties, and *adequately resourced*. If funds are not included in the post-settlement budget, it is essential that other external funds are mobilized to finance development activities such as a land policy review that both address root causes of conflict, and are the key to successful socio-economic development, that in turn consolidates peace.

³⁰ In fact, the words "land" and "property rights" do not appear at all in the 2005 UN Sudan Unified Mission Plan, a 73-page document.

³¹ The JAM is budgeted at US\$7.9 billion for the first 2.5 years, until end 2007. For this same period the budget for the GoNU and the GoSS to deal with land policy is respectively US\$ 0.4 million and 0.2 million. The total budget for land policy over the whole six year period is US\$ 0.5 million and 0.3 million respectively. On the other hand, US\$ 48 million is allocated to the region's media.

³² A MDTF project is proposed by the governments, often together with a UN or other implementing partner. All too often donors and UN agencies lobby for having their own proposals being accepted by a national partner, and approved by the fund administrator. The costs of the projects are shared between governments and donors.

The issue then is how to develop a more structured and complementary (but not necessarily integrated) approach. Framework agreements (mainly bilateral) are made between organizations at headquarters level, but these are not always translated in the field. Meanwhile, pragmatic and practical arrangements emerge at the field and country level, but these are often too dependent upon the skills and personalities of specific individuals and are not necessarily the result of clear strategic thinking and effective operational support from headquarters. Lastly of course, the different UN organizations - including both the political and development wings - compete for the same donor resources and good inter-agency agreements may erode the access each agency has to funds.

A structured and complementary approach has been absent in the Sudan at country level. Some bilateral agreements are between agencies, including strategic partnerships. Leadership roles and comparative advantages of different agencies were briefly touched upon in UN Country Team meetings³³, but left without the necessary formal follow up. Since the beginning of 2007, efforts to produce a more coordinated approach have resulted in an *ad hoc* coordination group on land in Southern Sudan with the participation of FAO, UNHCR and UN-Habitat. This group does its best to support the SSLC, but its approach is rather at the discretion of the field staff and consultants of each organization, instead of being planned and implemented in a formal and structured way. Maybe the informal way is more adapted to a situation where outputs result is required but the enabling operational environment is not conducive.

Civil society participation

Sudanese civil society has so far failed to play an important role in land policy development, but there is a strong demand from all layers of society to have their voices heard by policy makers. This is clearly demonstrated by the active engagement of civil society once opportunities are created, such as in Darfur. Under conditions of extreme hardship, people feel that they *can* contribute to discussions of the future with a constructive and positive mind, emphasizing opportunities to improve land and natural resource management rather than focusing on its negative connotation as a cause of conflict³⁴.

Local people strongly express their desire to be consulted when the government devises policies for land and natural resource management. Darfurians in particular are convinced that viable solutions are engrained in their customs and practices that have evolved over time in the face of various crises.

Presently, there is a serious lack of confidence building between government and civil society. In fact the work of NGO and other civil society groups in Darfur is seriously discouraged. As a result, most people resort easily to conspiracy theories to explain the crises. Efforts made by some international

³³ There is anecdotal evidence that the leadership role for land tenure within the UN system in Sudan was discussed in the Red Sea UN retreat in May 2005, with FAO being appointed as the leading technical agency.

³⁴ Three state level workshops in Darfur, originally entitled "Land and the root causes of conflict in Darfur" were organized by UNDP/FAO together with the Centers for Peace and Development of respectively the Universities of El Fashir, Nyala and Geneina (May-June 2006). Darfuris emphasized however that the major challenge is to address the future with a constructive and positive mind, emphasizing opportunities to better deal with land and natural resources management, rather than focusing on its negative connotation of root cause of the conflict. The conviction among local people that this positive approach is "the" way forward was clearly demonstrated by the national partners changing the title of the respective seminars in the different locations into "Land and Peace Building" in El Fashir, and "Land Management and Rural Development" in Geneina.

organizations such as FAO and UNDP to encourage confidence building have resulted in positive outcomes, such as a proposal by the NCRC to include civil society members in the future NLC. This underlines again the importance of international organizations acting as honest and respected brokers when dealing with sensitive land policy issues.

Acknowledgement of the multi-dimensional character of land

Sudan is yet another case that clearly demonstrates the multi-dimensional character of land issues. The GoS always focused on the use of land for economic purposes, mainly by redistributing customary land to large scale mechanized farming operators. Apart from other injustices, this completely ignored the social role that land has for local populations, and has fuelled the bitter decades old conflict.

More recently land has also taken on a stronger political dimension. Local political power directly depends on being a landowner in areas like Darfur and the Eastern region. Some groups who do not have a “homeland” (this implies that they are not considered as a customary landowner), have obtained some sort of land ownership with help from the government. This phenomenon has directly resulted in certain groups losing part of their customary lands, such as the Massalit in western Darfur. There is also evidence that the land question in the Nuba Mountains has become an issue of ethnic identity. The Nuba people are an amalgam of different tribes with different customs, but identify themselves as a common group – the “Nuba people” - on the basis of customary land ownership. This reflects the need to have a common (ethnic) identity against a common enemy, i.e. the northern pastoral tribes that invade and occupy their cropping land.

This multi-dimensional character calls for a broad vision and a holistic approach to land issues, departing from previous efforts that focus on economic goals (the GoS in north; some GoSS interests in the South), or a social agenda (some other factions within the SPLM and GoSS), or a strict human rights perspective (international and non- governmental organizations in Darfur). The protection of human rights in Darfur is an essential, if not the most important issue at this moment, but Darfurians themselves stress that the land question needs to be addressed more in a rural development context. An unbalanced, single dimensioned approach may make one or other interest group reluctant to participate in the process, resulting in an outcome that is not legitimate for all. The Pinheiro Principles³⁵, for example, present a set of strong legalistically inspired human rights based principles, developed on the basis of international standards and principles, to address land and property issues in post conflict situations. It is doubtful whether applying these in Darfur would be acceptable for a majority of national stakeholders that want to find genuine and durable solutions for peace in the region.

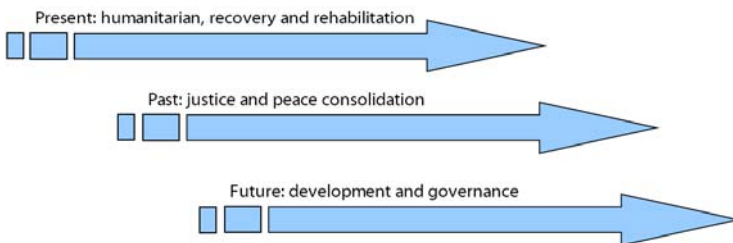
³⁵ Centre on Housing Rights and Evictions (2005), “The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons”, In 2002, the UN Sub-Commission for the Promotion and Protection of Human Rights appointed Paulo Sergio Pinheiro as the UN Special Rapporteur on Housing and Property Restitution. In 2005, the UN Special Rapporteur released his report, now known as the “Pinheiro Principles”.

7. A framework to tackle post conflict land issues

Experiences acquired in Sudan indicate that there is a need to tackle different land issues during the different post conflict phases, ranging from emergency over recovery/rehabilitation to development. At the same time, there is a clear need to address the past. If past injustices, or perceptions of injustices, are left to be simmering, they can explode at any moment and annihilate the benefits of recovery and rehabilitation efforts. The bottom line may be that past injustices should be acknowledged, and mechanisms be created for people to express their grievances. A major task of the various land commissions in Sudan is exactly addressing historic land claims.

Not all action is linear in its implementation, and clearly defined in time. It is inherent that a significant number of actions that relate to different phases happen simultaneously, and that the processes themselves overlap. Providing new plots to returnees in an urban setting should take into account some longer term vision on urban development, even if this vision is embryonic. Providing access to displaced people on abandoned infrastructured state land, such as irrigation schemes or mechanized farms, should take into account a longer term view on how the state will deal with these lands. Building the capacity of local institutions to facilitate the return process needs to be considered in a context of possible future decentralization of governance and/or deconcentration of public service, at least if this is a national policy. It is unlikely that dealing with the past can happen before there is a minimum threshold of acceptance to do so by the former antagonists. This probably requires some form of stabilized governance, with functional institutions.

There is thus an overlap in time between the different action clusters, as illustrated below:



Getting things right from the start and avoiding to promote short-sighted solutions that may jeopardize longer-term development is not easy. All immediate and mid-term corrective, preventive and retentive land and property related measures that are envisaged to facilitate the return and recovery process need to be streamlined with an overall developmental vision and policy which is often missing in chaotic post-conflict situations, as is the case in Southern Sudan. It is important to develop this vision, even when it is embryonic. A good example exist in Southern Sudan. "Land belongs to the people" is an early, embryonic policy statement made by the SPLA/M, but so far further thinking on how to put this into action has not yet taken place sufficiently. The policy statement can however be mould into completely different shapes, ranging from a socialistic inspired land policy to a neo-liberal concept.

The specific actions will of course require further thought, experimenting. One must start, on a calculated basis, promoting a learning-by-doing process. Some early initiatives demonstrate that

calculated local initiative can contribute to develop these longer term visions³⁶. This makes the entire process iterative and evolutionary.

The challenge ahead is summarized as follows:

“Dealing with past injustices to establish a sound basis for the future while providing temporary solutions for the present.”

Dealing with the present and the future probably requires the same enabling policy, legal and institutional framework, which are often absent in early post conflict situations. Addressing the past merits special measures and may result in the need for a specific policy, legal and institutional framework, which is time-bound and of a temporary character. After years of war, everything is poor: institutions, civil society, legal and policy frameworks, absorption capacity of government. On the other hand, post-conflict situations provide an opportunity to address for specific issues that were left aside before, and eventually caused the emergence of the conflict. A major task ahead is to take the necessary steps to convince the post-conflict governments that short-sighted, often explorative and speculative land management in a chaotic environment has a high opportunity cost for later economic development and may eventually result in the resumption of open conflict.

The Sudan experience also contributes to identify specific needs to be addressed during under the different dimensions of post conflict intervention. Following gives a brief overview.

Dealing with the present: humanitarian, recovery and rehabilitation issues

The urgency and efficiency with which a number of immediate land issues are being dealt will contribute to the success of a conflict transformation process. Specific action identified in the early assessments includes:

- Inventory, assessment and research on statutory law, urban and rural land issues and challenges, nature and dimension of land disputes, local dispute resolution mechanisms;
- Broad and continuous dissemination of the results of assessments and research;
- Assessment of land administrations and their capacity to deliver services; some initial support to emerging land administrations;
- Ascertainment of customary law to support dispute resolution; promoting mechanisms for expedient alternative land dispute resolution
- Awareness creation and information dissemination on land rights for IDP and refugees;
- Developing a model for legal aid and counseling for displaced people and returnees;
- Providing transparent and coherent measures and procedures to provide rapid solutions for securing access to land for returnees and hosts;
- Creation of new residential plots in urban areas;
- Support to the establishment of different land commissions;

³⁶ Some of the demand driven activities by local administrations in Yei payam (Central Equatoria state -Southern Sudan) generate local solutions to acute land problems. The Yei payam administration has developed extra legal procedures to facilitate the transfer and sale of land and property in urban areas. The procedures require, among other things that (i) ownership is proven by documents or oral evidence of neighbours and (ii) the transfer is countersigned by four witnesses. A copy of the transfer process is kept by the administration, with other copies given to the original owner and the purchaser. The administration charges 10 percent of the actual value of the transfer.

- Sensitization of policy makers on possible visions for land policies, based on national policy statements and international experiences;
- Direct support to women-headed households to provide access to land.

Most of these identified needs were addressed in one or the other way by different organizations and institutions, albeit in an uncoordinated fashion³⁷.

Some special attention needs to be given to the importance of finding rapid solutions for providing secure tenure rights over land. Post conflict situations are invariably characterized by land that is temporarily abandoned by owners who have fled to safe havens. This 'force majeure' displacement then results in land being mistakenly considered as free for occupation by other actors. As these rights are not visibly exercised, serious land grabbing then occurs in places where rights do in fact already exist, becoming a major source for conflict in some urban and peri-urban areas of Southern Sudan, with rapid expansion to rural settings.

Specific and urgent measures to address this situation must be part of a global land policy vision. This includes a series of actions, like the restitution of lost land and property rights, the establishment of safety nets for tenure security after violent conflict, and the provision of new land for people who have lost their rights and agree in kind compensation. The restitution of lost rights is essential for meeting the expectations of returnees. Perceptions of injustice are perpetuated if these needs are not translated to the local level during a peace process. Where land and natural resources continue to be managed at the community level as a corporate asset, the establishing of a quick safety net through securing tenure rights for entire rural communities (rather than considering individual or family tenure security) is an option.

It is also essential to secure the tenure rights over land and natural resources for host communities and people that accommodate returnees. A failure to do so may result in a situation where the hosts have lesser rights, or rights that are perceived as being inferior. This may lead to serious frictions between the two groups, and is certainly not conducive to a smooth integration of displaced people. It is however common knowledge that institutions and organizations dealing with return issues often ignore the needs of the hosts. This is partially due to the mandate of these organizations and the administrative/operational problems they may face providing assistance to others than refugees or IDPs. But also to ignorance and a short-sighted approach to a systemic problem³⁸.

The principle of separating land use from land ownership can also be used as a mechanism to unlock the use of abandoned land when the real owners are not yet identified or still absent, without jeopardizing a future restitution to the real owner. This separation is achieved by issuing short term leases (1 -2 years) to people in need of direct access to land. Traditional systems often have mechanisms for leasing or lending land. For example, Dinka customary law includes specific provisions for dealing with issues such

³⁷ The response of the UN to land and property issues in Sudan is illustrated by P. De Wit and J. Hatcher, (forthcoming) "Sudan's comprehensive peace agreement: an opportunity for coherently addressing land and property issues?" in "UN peace building and housing, land and property rights - proposals for reform", Scott Leckie, Editor; Cambridge University Press.

³⁸ F. Grünwald (2001) "Uprooted people in the Sudan: from drought and war to peace and development", FAO report prepared for the IGAD Partner Forum Working Group "Planning for Peace" quotes Montesquieu in a similar context as "to every complex problem, there is a simple solution, and it is always a bad one".

as temporary dispossession through displacement, rights for excluding others when land is abandoned, ways to retain land rights in the absence of the owner and claims to resume occupation after a period of absence.³⁹

Addressing the past: justice and peace consolidation

An essential element for justice and peace consolidation is dealing with rights that were lost before or during the conflict. This involves the *restitution* of rights lost and *protecting these rights* from new post-war pressures in those countries that manage to make the transition to a relatively stable peace.

There appear to be two different dimensions for the restitution of land and property rights in Sudan. In first instance there are the individual and household rights of IDP and refugees that were lost during the conflict itself. Secondly, there are the longer standing historic grievances and injustices, which are mainly group claims and often more complex to be addressed (for instance the people forcibly displaced by the petrol concessions or mechanized farming schemes). The latter have often contributed to the emergence of the conflict.

Different tools to effectively deal with the restitution of land and property rights that have been tested in different countries include:

- Functional and effective land and property claims commission: legislation, procedures, operational support tools;
- Monitoring capacity on hot spots to target interventions ;
- Awareness creation and information dissemination on the right and procedures to lodge claims;
- Establishment and capacity building of basic functional land administrations and other supporting institutions (land and property valuation capacity, judiciary);
- Compensation policy and mechanisms including the provision of a new stock of housing plots (which establishes a clear link between the different post conflict dimensions); and,
- Capacity building to enforce decisions made on restitution, on compensation or on any other matter decided upon by the claims bodies.

The different land commissions of Sudan have the legally binding mandate to tackle most of these challenges. The NLC is not yet established, while the activities of the SSLC have not yet addressed the above issues.

Preparing the future: measures to promote rural development and good land governance

Most African countries continue to rely on the use of land and natural resources for achieving certain levels of economic growth. The land development options are diversified, with the agricultural sector still offering growth opportunities, but also the exploitation of forests and mineral resources taking on a more important role. In a number of now stable post-conflict countries, tourism is becoming increasingly important for the national economy, and this also tends to rely heavily on access to prime land and natural resources, especially in coastal regions or near national parks.

³⁹ John Wuol Makec (1988), "The customary law of the Dinka people of Sudan", Sudan.

Over the past years, FAO has taken major to develop a framework for addressing land and natural resources management to promote rural development and good resource governance. This framework can be used as a reference for identifying action clusters and packages that can be delivered to governments that have made commitments to genuinely address these challenges. The framework is presented schematically in the figure below⁴⁰.

The essence of this approach is that land policy reform is promoted as a package of linked measures. Partial implementation of the package may result in some progress, but this will probably be of a temporary nature and is not likely to be sustainable in the longer term.



There is an ideal logical sequence for any land policy reform process. Firstly, a comprehensive policy vision is developed. This is then translated into a legal package that can implement the policy. Land legislation can take different forms, depending on the legal systems in different countries. Simultaneously, institutional arrangements for turning policy and law into action need to be defined. These are normally prescribed in the legislation, but this is not always the case. There is more chance that these

institutions will function in the future when they are grafted on existing structures.

The structure and content of both policy and legislation are variable. In its most comprehensive form, the resulting policy and legal framework should address three issues:

- (i) securing rights,
- (ii) protecting rights,
- (iii) exercising rights.

The protection of land rights can include specific provisions to address conflict management, such as in the CPA proposals of Sudan. Land use and/or territorial planning may also be part of a land policy and land law, or treated separately. In Sudan community level planning is used in the post conflict situation to facilitate the return and recovery of rural populations⁴¹.

⁴⁰ Adapted from Paul De Wit, Massimiliano Bellini and Jeffrey Hatcher "The FAO land programme in Sudan: From emergency interventions to sustainable development", in the Land Reform, Land Settlement and Cooperatives Bulletin 2005/2, FAO Rome.

⁴¹ A number of FAO projects are or have been dealing with participatory land management or land use planning in Southern Sudan. UNHCR has supported this approach to facilitate the return and recovery of displaced people.

8. Some elements of land policy contents and debate in post conflict Sudan⁴²

To start filling up the framework of land policy development, this section gives some flavor of current debates with a focus on securing land rights in Southern Sudan and Darfur.

Balancing social and economic challenges

Securing land rights for all citizens, including rural communities, displaced people and returnees, has always been a priority for SPLM. In the advent of the CPA, it became also clear that secure rights over land by potential investors is one of the conditions to attract investment. Balancing these two needs seems to constitute a major challenge for the policy makers. Some line ministries such as Ministry of Agriculture and Forestry seem to consider a land policy that in first instance responds to accommodate foreign and national requests for investment in rural areas. This policy direction brings along individual land titling which can be used as collateral to get access to commercial credit, and may result in exclusive property models. It must be stressed that a scramble for land by an elite may be another reason to promote this line of approach. Land speculation in rural areas is alimeted by the displacement and absence of large parts of the population, and often by a deceptive present land use pattern.

Of course, this vision only responds to one set of reasons for securing land tenure in rural areas. The Sudan case demonstrates that when conflict originates from competition over access to land and natural resources, the policy debate should strongly focus on aspects such as social peace, conflict resolution and prevention between different groups of land users (conflicts often break along ethnic faults in Southern Sudan), supporting the emerging livelihoods of the ordinary rural dweller after decades of extreme hardship . This seems to be supported by another layer of society, including decision makers in the MLACD, and some emerging civil society groups (e.g. the Southern Sudan Law Society). More thought is required on the different options for securing tenure for different land users. So far, this has not really happened. The GoSS has produced a draft land Act in the absence of this reflection.

Strong focus on legalizing customary land rights

All the peace agreements acknowledge that legalizing customary rights over land and natural resources is key to policy change in Sudan. Bringing legitimate rights closer to legal prescribed rights is perhaps the major land policy challenge facing African leaderships today. Sudan reveals a complex fabric of interwoven views regarding what is legal and legitimate for the different sides that have signed the CPA and who are, in principle, trying to make it work. Even on the side of Southern Sudan, that has always strongly defended that legitimate rights should acquire a much stronger legal status, different views on legitimacy and legality seem to be difficult to blend in a coherent overall strategy.

Draft versions of the GoSS Land Act include specific provisions for the registration of community, clan, family and other customary land rights. The DPA does not leave doubts on the same subject when it

⁴² Some parts of this section are inspired by ongoing work for NRLA- FAO on "Land Policy Development in an African Context: Lessons learned from selected experiences", under preparation by Paul De Wit, Christopher Tanner and Simon Norfolk.

states under article 158 that “ *tribal land ownership rights, historical rights to land, traditional or customary livestock routes, and access to water shall be recognized and protected*”. Customary land rights under the GoNU legislation remain very precarious and vulnerable in law, *putting all the customary community holdings of land at the mercy of the Government should it choose at any time to interfere and assert its legal rights to oust or otherwise restrict, in any manner, those holdings*⁴³ . Discussions with senior officials from the Ministry of Justice (Khartoum) point however in the direction for an increased legal recognition of customary law and customary land rights to handle future land challenges in rural areas. This vision is strongly supported by academics of the Law Faculty of the University of Khartoum.

The contents of the peace agreements seem to overlook somewhat the complex and diverse character of customary land rights. The Darfur Peace Agreement stands out as an example, with the signing parties seemingly adhering to the simple solution of a complex problem by stating that “*Tribal land ownership rights (hawakeer), historical rights to land, traditional or customary livestock routes, and access to water, shall be recognised and protected*” (Art. 158 of the DPA). The article does not encompass the complex and subtle nature of the traditional land tenure systems in Darfur. Customary rights are not uniform, and include different ownership rights, land use rights, rights of way, permanent and temporary rights, inclusive and exclusive rights. *Hawakeer* rights also cover different concepts and perceptions, ranging from conditional land leases, over ownership rights to private feudal types of rights. The recognition of the latter will not necessarily constitute a contribution to finding solutions for contemporary problems⁴⁴ .

Legalizing customary land rights requires further attention. A major challenge ahead seems to be the provision of a package of possibilities so that local populations and individuals can turn their legitimate rights into legal rights as they see fit and corresponding to their needs.

Land and natural resources under a common tenure regime

The need to genuinely address the securisation question of land and natural resources that fall under a common tenure regime is implicit in policy statements and draft legislation. Livelihood strategies of all rural populations of the Sudan (perhaps with the exception of some groups based in the Eastern Equatorial rim) embrace principles such as opportunistic use of land and natural resources, mobility, risk management to averse social and environmental conditions. They entail that households have access to territories, different types of soils (wetlands, drylands), different natural resources (summer and winter grazing, seasonal watering places, forests, swamps). When people have access to individual plots only, they are not able to implement strategies to meet their livelihood ambitions. Securing access over the commons corresponds with a strong pro-poor development strategy.

⁴³ O. El Sammani, Z. A. Rahman and A.S. Fadlalla (2004) “Land tenure and the legal framework in some selected areas in northern Sudan”; FAO Project OSRO/SUD/409/HCR

⁴⁴ P. De Wit, M. Bellini, J. Hatcher, M. H. Mukhtar, M.A. Abdul-Jalil, A. Fadlalla (forthcoming) “Turning a root cause of conflict into an opportunity for peace building: Home grown visions for land policy development in Darfur”. This work is the result of a series of 3 FAO-UNDP workshops that were held in Darfur on “ Land and the Darfur Peace Process”; it culminated in a 3-day World Bank-FAO Darfur Joint Assessment workshops where an impressive representation of the Darfur leadership discussed ways forward for a land policy framework in Darfur.

Securing rights over communal land also becomes an essential element of policy development in post conflict situations. Speculation over temporary abandoned land may result in the alienation of major tracts of land from their legitimate and/or legal owners. The state can also act as an expropriator, by abusing unclear regulations on the allocation of land for public purpose or for public interest. Placing the burden of proof of existing rights over land on local communities in GoSS draft legislation seems to point in the direction that the state establishes a strong pre-emptive right over common property land. Broad indistinct concepts such as “waste land”, “unoccupied land”, “free land” continue to be used, and give a free ride to the state to acquire new rights over existing customary rights⁴⁵.

Mozambique is an excellent example where the recognition of community land can be considered as part of a pre-emptive strike to guard land from large scale speculation after an armed conflict and displacement of rural people. Southern Sudan seems to take a different view, remaining reluctant to give a strong legal status to the commons. Extensive and mobile land uses are not always considered as being “productive”, though in fact they are, as is the case in northern Sudan, including Darfur. Governments seem to become uncomfortable when confronted with mobility. They tend to encourage sedentarization of mobile systems, rather than making serious efforts to better manage mobility. There seems to exist a tendency to use the false notion of free land, associated with the absence of highly visible land uses, to prescribe new individual rights over these communal lands, often to outsiders, or to the state itself (as management schemes or protected areas).

Efforts to give a stronger legal status to communal land and natural resources bring along a series of other challenges that require further attention:

Role of the customary authority. Local institutions that manage communal lands are generally strongly integrated with customary social and political structures, with dominating lineages exercising decision making powers. The role of these customary authorities in future management structures should be a focus of debate.

Representation and legal personality. There must be a debate about possible forms of community representation for official and legal functions exercised by the community, such as signing business contracts, opening bank accounts, and securing legal land claims for the community. This raises the issue of the legal personality attributed to an institution that holds and manages a basket of rights, including those over communal land.

Management of customary rights. Customary leadership has always played an important role in the administration of land throughout Sudan. During pre-independence, the colonial government co-opted customary authorities as a Native Administration. After independence, this capacity was replaced by different forms of the state apparatus, more so in north Sudan than in the south, where land administration has always been confined to some urban areas only.

Current policy makers should reflect on both the causes of the conflict – the disruption of local livelihoods and the exclusion of local people from large areas – and the need to return to a policy

⁴⁵ The same concept of wasteland is also part of the GoS enacted CTA 1984, a piece of legislation once so much loathed by the SPLM, especially the articles that give strong rights over land to the state.

of recognizing and including, rather than excluding, customary land systems.

The current signs in Darfur are that national stakeholders understand that local communities should play a more prominent role in land management, but without necessarily turning back to a pre-colonial type of Native Administration. This presents the challenge of assisting communities to become competent and accountable managers, including raising awareness of their land administration role amongst community and tribal leaders. This includes training community representatives in best practices for land administration, as well as making funds available for tuning community land management bodies operational.

Vesting genuine land management responsibilities in local institutions goes hand in hand with the decentralization of land management. This not only refers to the de-concentration of the public service, but also to a genuine decentralization of government. Stronger forms of self determination are at the heart of the peace agreements.

Rights of individuals. Another major challenge is the rights of individuals over land under a customary tenure regime. In principle, a bundle of rights exists over land managed by customary structures, including strong individual, household or family rights, rights of way for pastoralists. There is some agreement that mechanisms should be created to allow individual rights holders to take themselves and their land out of customary jurisdiction. The draft Southern Sudan Land Act is not fully clear on this. Mechanisms to achieve this are, for instance, provided for implicitly in the “*Plan Foncier Rural*” approach in Western Africa⁴⁶. There is consensus that this form of alienation can only happen if accompanied by dialogue and consensus between the particular individual and those who manage the customary rights. The discussion on the transferability of such alienated land to third parties, including from outside the community, also needs further thought.

The Rights of Women

Addressing issues of land tenure security for women is just slowly emerging as an issue in land policy debates in Sudan. Estimates that up to 45-50% of the expected returnees are women headed households or single women who have lost their husband and/or other male family members is an overarching reason why it deserves much more attention than it actually does. The equal rights of women are addressed in the Sudanese Interim Constitutions. Efforts to turn these rights into daily practice remain precarious and challenges seem to be somewhat different for rural and urban areas.

The emphasis on the legal recognition of customary systems of land access and management, especially in rural areas, requires further debate on how this may impact on the rights of women to get unconditional access to land. The rights women enjoy under common tenure regimes are often weak and are more likely to correspond with a ‘land use right’ which they gain, not as individuals, but through

⁴⁶ See for instance P.Lavigne Delville (2006) “Registering and Administering Customary Land Rights: PFRs in West Africa”, communication to the World Bank Conference on Land Policies & Legal Empowerment of the Poor”; H.M.G. Ouédraogo (2004) “Etude comparative de la mise en oeuvre des Plans fonciers ruraux en Afrique de l’Ouest : Bénin, Burkina Faso, Côte d’Ivoire”, LandNet West Africa

some kind of relationship with a male rights holder. Customary marriage is the most common institution through which rural women establish access to land. They then depend upon this relationship for the maintenance of their basic food security, and that of their children.

Decision makers often argue that the rights of women are protected by customary law. This is the case in societies where customary rules protect older women and widows. For younger women, the situation can be very different. The armed conflicts are turning them into *de facto* household heads, without accompanying changes in customary rules that might give them more security over household land. Southern Sudan is an excellent example where the consequent dispossession of women may occur on a much wider scale in the future.

The HIV-AIDS pandemic is exposing women to land and asset grabbing when their partners die prematurely. Once referred to as “the last untouched pocket of Africa in regards to HIV/Aids prevalence”, Southern Sudan now faces a massive threat from the pandemic⁴⁷. All the ingredients for the rapid spread of HIV/AIDS are here: several millions of displaced people returning home, poverty, very low school enrolment, a rudimentary health system, and the powerlessness of women and girls, combined with cultural practices, polygamy and widow inheritance. Securing land rights for women is therefore central in the battle to reduce and control the spread of HIV. Yet with partners dying at an earlier age, customary rules no longer give adequate protection to young mothers and widows. Pressures on land also contribute to a trend where the more powerful dispossess the weaker, female members of the community.

In urban areas statutory law prevails increasingly more than customs. Provisions to protect the rights of women do exist in these laws, but the possibilities for independent decision making by women remain restricted by deeply entrenched customs and traditional practices. There is an overwhelming feeling in Southern Sudan that the rights of women are of secondary importance. Change is seen as being induced by the international community; it is not necessarily a nationally driven process. It must however be noted that a strong nucleus of activists for women rights does exist, with charismatic members mainly originating from the southern Equatorial states.

Little progress has yet been made to develop effective targeted solutions to improve the access rights of women to land and property. Apart from the tie into over-arching constitutional principles, these can include provisions for co-ownership of land and property (family titling), favourable inheritance and succession regulations, and joint decision making over collectively held land and property (co-titling). In most cases women can only use these provisions if they a) know about them, and b) have adequate support to start along what is bound to be a difficult path. Often they also require civil records such as a birth, marriage or death certificate. Many do not have these, or they are lost, a major problem after armed conflicts. Civil marriage can substantially contribute to securing tenure over land and property for women, as this will guarantee that civil procedures may apply.

It is also striking to find that even where strong legal provisions do safeguard access to land for women, land administrations are not always willing to apply these on an equal footing with men. Anecdotal

⁴⁷ Swangin Bismarck in the Sudan Tribune December 1, 2006.

evidence shows that women in Southern Sudan, who are educated and secure in their position as independent individuals, face major difficulties getting access to urban plots through public services.

Alternative conflict management

The return of millions of displaced people calls for an expedient handling of land, property and natural resources related problems that may occur. In post conflict situations, it is essential to ease tensions and prevent new flashpoints from turning into the cause of renewed violence. Conventional judicial systems are rarely effective, and/or not always present. There are challenges of quantity, quality and underlying philosophy. In 2004, the judiciary of Southern Sudan was composed of 39 trained judges with professional experience (first class), from which 10 judges had high court experience. With reference to the northern parts of Sudan, Z. Rahman⁴⁸ observes that *“it is sad to know that, while in the past there were judges known to be specialized and well versed in land law, there are none at present, and though almost all the aspects of land law are codified, they are so complex that it takes a standard of legal mind (which seems to be lacking) to be able to digest it.”*

Litigation in open courts breeds secrecy and confrontation, and creates formidable tensions between the litigants, which may ultimately lead to hostility, antagonism and enmity. This is especially so when the successful party boasts about his legal victory, with results that should not be underestimated in a tribal society like the Sudan.

There is a prevailing view to use more alternative dispute resolutions mechanisms and encourage out-of-court decision making. Every community has an institution responsible for settling disputes, with procedures and processes that have been practised for generations and with which communities are familiar. Conciliation and mediation have been legally accepted by the GoS and the SPLM as conflict resolution mechanisms before the CPA. They have shown their value on a number of occasions⁴⁹. A major advantage of alternative dispute resolution is the continued use of customary law. This is what the people are most familiar with, close to and loyal to. It is simple and is easily understood by the people as it is closely linked to their history, and is much more flexible than statutory law, thus allowing for different interests to be accommodated. The use of customary law poses however a number of other challenges which are briefly discussed below.

The CPA also suggests the use of arbitration for resolving land conflicts; one of the major mandates of the NLC and the SSLC is exactly the arbitration of claims. Rahman⁵⁰ argues however that the present legal framework in North Sudan (and actually in Southern Sudan where legislation is very similar) is not very conducive to arbitration as a tool for the large scale and expedient resolution of land disputes, especially with the return of millions of displaced people. Arbitration is unlikely to be appropriate when

⁴⁸ Z. Rahman (2004), “Arbitration as a mechanism for resolving land disputes”, FAO Project OSRO/SUD/409/HCR

⁴⁹ The Wunlit Agreement consolidates peace between Dinka and Nuer and remains an excellent example of reconciliation after a vicious conflict of several years. This model was subsequently applied on numerous occasions (Akobo Conference; Koch and Wunlit II Conference; Pochalla, Nyal and Tonj Education Conferences; NSCC/SPLM Yei dialogue), and can be replicated with the necessary support from national and international partners - “Study of the Traditional Institutions, Laws and Values for Peace Building in the Abyei Area”, Deng Biong Mijak-2004.

⁵⁰ Z. Rahman (2004), *ibid.*

governments are involved as a contending party. Suggestions are available to improve the way arbitration can be used for land conflicts in Sudan⁵¹.

One constant in the use of alternative land dispute resolution is that customary law serves as a reference to hear and heal. This virtue extends to litigation in courts, like in Southern Sudan where the use of customary law in the judiciary systems is included in the Interim Constitution. A challenge remains on how to create a framework that enables its use.

The use of customary law

The policy to use customary law for dealing with land management and conflict resolution is stressed in the CPA, which commits all parties (the GoNU as well as the GoSS) to “*progressively develop and amend relevant land legislation to incorporate customary law and practices*”. This raises several questions that need further attention:

- How can customary law be practically dealt with and integrated into the wider system (i.e. be made ‘legal’ as well as ‘legitimate’)?
- Is customary law to be used for all land, or just for rural land falling under customary land management systems?
- What about state lands and land in urban settings?

Previous efforts in Sudan have resulted in some form of codification of customary law, at least in selected regions of the country. One example is re-statement of customary law by different segments of the Dinka tribe in the Bahr-El-Gazal region⁵². This exercise has proven to be a good tool for taking stock and harmonizing the different legal provisions of customary law through a grassroots dialogue. There are dangers however in codifying customary law on a once-and-for-all basis. Doing so may seriously undermine the dynamics of a system that is inherently adaptable and designed to accommodate change, as witnessed for example in the Darfur region.

New efforts in Southern Sudan consider more the notion of “ascertaining” customary law, referring to the research and documentation of local customs. This still leaves open the question of how this can be used in a legally determined framework. In this context, Odhiambo⁵³ concludes that “*the provisions in the Interim Constitution of Southern Sudan provide a useful foundation, but that the passing of an appropriate legislative framework is critical for the implementation of these constitutional provisions*”.

When using customary law, there is probably also a need to compare some of its values against universally accepted norms, values and principles. Several countries have agreed to follow these by ratifying international charters and conventions, including issues of equal rights for women and free settlement within a territory. Land custom and practice are also increasingly subject to environmental

⁵¹ Z. Rahman (2004), *ibid*.

⁵² “The restatement of the Bahr El Gazal Region customary law”, 1984, includes the codification of Dinka, Luo and Fertit customary law; in “The customary law of the Dinka people of Sudan”, John Wuol Makec, 1988.

⁵³ M. Odhiambo, 2007 “Analysis of land tenure systems under customary law in Southern Sudan” consolidated report for FAO project OSRO/SUD/415/NET.

concerns. The need to filter customary rules through these universal values is accepted by most outsiders, though not always by customary authorities themselves, especially in Southern Sudan. Changing longstanding local norms too abruptly may be unwise, and may lead to people taking justice in their own hands.

9. Concluding remarks

Sudan has a long history of confrontation between different groups who are continuously looking for access to land, grazing, water and other natural resources to implement their livelihoods. Over the last fifty years, government policies and a number of conflict catalysts have distorted a fragile and dynamic negotiated equilibrium between these groups, resulting in one of the major humanitarian crises of recent history. A number of brokered peace agreements are in place but will not solve all structural problems. Peace agreements also bring along new land conflicts, especially when military and political forces seek opportunities to transfer their wartime powers into post conflict economic power, mainly by scrambling for land and natural resources. New challenges on promoting investment in post conflict situations, closely interwoven with speculative efforts of new actors, seem to increasingly ignore the problems of the ordinary Sudanese communities and its citizens.

All peace agreements recognize that issues of access and management of land and natural resources need to be addressed, and they provide some institutional mechanisms to do this through the proposed land commissions. Several years after peace was agreed, the commissions are not yet in place or ill function. The international community, especially the UN mission that monitors the implementation of the CPA, does not have a strategy to handle one of the root causes of the several conflicts that continue to simmer. Initially, only nominal financial resources, national and donor, were earmarked through the JAM to engage in a process of land policy reform, and it seems that this continues. Different UN organizations and agencies provide some assistance as they see fit, with the FAO attempting to bundle bits and pieces of land components under emergency projects into some kind of land program, but not without difficulties.

Dealing with structural land issues in an emergency and humanitarian context turns out to be extremely difficult. Some uncalculated actions, often strongly legalistic inspired on the basis of international references, such as quickly providing paper-secure individual land rights to displaced people, while existing rights of host communities are ignored, may be counterproductive. It ignores the complex historic and socio-economic realities of the different populations that have adapted to a harsh, often hostile socio-economic and ecologic environment, and generated local solutions to respond.

Sudan is a good example to demonstrate that there is a need for a longer term view to handle post conflict land situations. It includes immediate emergency actions, but these need to be framed in developmental vision that balances pro-poor strategies with the creation an enabling environment for investment in rural areas. In the years to come, agriculture, livestock production, fishing, the exploration of natural resources and minerals will continue to be the backbone of the Sudanese economy. On this basis, rural areas merit much more attention than they actually do. Land policy visioning is however

largely ignored so far. A third element of a holistic approach is dealing with past injustices, or perceived injustices. Millions of people have been displaced, some of these were forcibly evicted, some social groups have been marginalized. In the absence of possibilities to express grievances, and opportunities for fair compensation, all that is build may crumble at the slightest crack . Facilitating governments to establish this three-tiered approach, and turning it into something home-grown is a major challenge for a land program in Sudan.

The contents of a longer term land program are clear: policy development, law development, institutional capacity building. Securing rights over land and natural resources for all stakeholders, including the rural and urban populations, an emerging private sector and the state, is a daunting task in itself, but falls short. Rights need to be protected, occurring disputes need to be addressed and possibly solved. Rights also need to be exercised. Creating an enabling environment to use rights, and derive benefits from their use and management is another challenge.

Discussions on how to concretely fill up this longer term land program are rather chaotic, at least un-coordinated. The policy statement “ Land belongs to the people/communities” (of Southern Sudan) seems to turn into another reality where the state takes on a strong regulatory role, ambitioning to make all decisions “ in the name of the people” but without listening to these people. There are however a number of basic principles that are entrenched in the constitutions, and around which a future land policy vision could be conceived. This needs political will of governments, commitment of all involved, including the donor world. Competition over access to land and natural resources is acknowledged to have played a major role in sparking and sustaining conflict, but finding solutions is seemingly not an integral and genuine part of the conflict transformation process.