LAND POLICY DEVELOPMENT IN AN AFRICAN CONTEXT

LESSONS LEARNED FROM SELECTED EXPERIENCES

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

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Photography: FAO

List of abbreviations

AFD	Agence Française de Développement
GoS	Government of Sudan
CBO	Community Based Organisation
CFJJ	Centre for Juridical and Judicial Training
CNSFMR	Comité National de Sécurisation Foncière en Milieu Rural
CPA	Comprehensive Peace Agreement
CVD	Conseil Villageois de Développement
DINAGECA	National Directorate for Geography and Cadastre
DJAM	Darfur Joint Assessment Mission
DNTF	National Directorate for Land and Forests
DPA	Darfur Peace Agreement
DUAT	Direito de Uso e Aproveitamento de Terra
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organization of the United Nations
FRELIMO	Frente de Libertação deMoçambique
GoBF	Government of Burkina Faso
GoM	Government of Mozambique
GoNU	Government of National Unity
GRAF	Groupe de Recherche et d'Action sur le Foncier
GoSS	Government of Southern Sudan
IFAD	International Fund for Agricultural Development
IGAD	Inter Governmental Authority on Development
IIED	International Institute for Environment & Development
IMF	International Monetary Fund
INC	Interim National Constitution
INDER	Institute for Rural Development
JAM	Joint Assistance Mission
JNTT	Joint National Transitional Team
LTC	Wisconsin Land Tenure Centre
MAE	Ministry of State Administration
MLACD	Ministry of Legal Affairs and Constitutional Development
MPD	Ministry f or Planning and Development
NCRC	National Constitutional Review Committee
NEPAD	New Partnership for African Development
NET	Nucleo de Estudos de Terra
NGO	Non Governmental Organisation
NLC	National Land Commission
NPA	Norwegian Peoples Aid
ORAM	Organização Rural de Ajuda Mutua
RAF	Agrarian Land Tenure Reform
RENAMO	Resistencia Nacional de Moçambique
SAAR	Secretariat for Agriculture and Animal Resources
SIDA	Swedish International Development Cooperation Agency
SPLA/M	Sudanese People's Liberation Army/Movement
SSLC	Southern Sudan Land Commission
UGC	General Union of Cooperatives
UNAC	União Nacional das Associações dos Camponeses
UNDP	United Nations Development Programme

UNHCR	Office of the UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNMIS	United Nation Mission in Sudan
UNOMOZ	United Nations Operations in Mozambique
USAID	United States Agency for International Development
WB	World Bank
WFP	World Food Programme

Table of Contents

List of figures

1. Introduction

Land is critical to the economic, social and cultural development of many countries. Land was also a key reason for the struggle for independence for many African countries and land issues remain politically sensitive and culturally complex.

It is important to remember the commitments of FAO Member States at the International Conference on Agrarian Reform and Rural Development (ICARRD[1] – Brazil, March 2006):

"... We recognize that policies and practices for broadening and securing sustainable and equitable access to and control over land and related resources and the provision of rural services should be examined and revised in a manner that fully respects the rights and aspirations of rural people, women and vulnerable groups, including forest, fishery, indigenous and traditional rural communities, enabling them to protect their rights, in accordance with national legal frameworks.
We emphasize therefore that such policies and practices should promote economic, social and cultural rights, in particular of women, marginalized and vulnerable groups. In this context, agrarian reform and rural development policies and institutions should involve stakeholders, including those producing under individual, communal and collective land tenure systems, as well as fishing and forest communities, among others, in relevant administrative and judicial decision-making and implementation processes in accordance with national legal frameworks". (ICARRD Final Declaration).

The role of States has also being highlighted in this context:
We recognize that States have the primary responsibility for their own economic and social development, which includes national policies for the implementation of agrarian reform and rural development strategies. In this context, we recognize the crucial role of the partnership of governments, civil society and other stakeholders for the sustainable implementation of agrarian reform and rural development.

Political ownership, willingness and commitment are key factors for the definition, elaboration and implementation of effective land policies. Financial support is also an important aspect to be considered and in this respect it is to be noted that in the last couple of decades we have witnessed a reducing engagement by many donors into the land agenda.

However, growing land scarcity and concern about land-related conflicts and rising levels of rural impoverishment, especially in Africa, have brought land to the fore once more. The main difference with the recent past is the wide spectrum of actors who want to take part in the elaboration of the land policies, as well as the more and more recognized need to root the proposals in the particular context of each specific country.

So, more and more now land policies are becoming part of the structural intervention measures in post-conflict situations, as well as in those countries fully engaged with the promotion of good governance, decentralisation, and democratic institutions at local and national levels.

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[1] www.icarrd.org

The paper, focused on African experiences, starts by discussing the importance of Land Policy Issues at Regional Level. It reviews the evolution in thinking regarding land policy ending up with the identification of the critical issues being faced by Africa today whilst remembering the role that FAO can play in promoting a sound partnership between governments and their citizens in the twenty-first century.

The core of the document is represented by three different case studies, Sudan, Burkina-Faso and Mozambique which serve to draw some lessons which can be applied for future interventions in similar contexts. In particular are analyzed the diversity of policy objectives, and the need to embed policy development in other processes. The land question in post-conflict situations is also treated in more details as is the endless story of how to secure land rights in both customary and statutory regimes. A specific attention is being given to the rights of women, an issue which is becoming more and more important, and not only in Africa, to conclude with specific lessons in land conflict management.

In parallel with the International Conference on Agrarian Reform and Rural Development, in March 2006, three pan-African multilateral institutions have launched an initiative aiming at the development of a Land Policy and Land Reform Framework and Guidelines for Africa. The key principles of this initiative are very much convergent with the ICARRD principles: need to promote sustainable, equitable and inclusive rural development; need to prevent and address land-related conflicts; overarching responsibility of the national States; reconcile efficiency and equity, investment for the creation of employment opportunities and poverty alleviation; support informed and constructive dialogue among key stakeholders for the identification and implementation of land policies/reforms.

This Land Policy and Land Reform Framework and Guidelines (in short: Land Policy Initiative) is one of the priority programmes of the Commission of the African Union. These issues are also central to the development programmes of the United Nations Economic Commission for Africa (ECA) and the African Development Bank (ADB). The three sister institutions under the leadership of the AUC are jointly leading the process alongside Regional Economic Communities (RECs), Member States and development agencies to develop an Africa Land Policy and Land Reform Framework and Guidelines aimed to secure land rights, increase productivity, improve livelihoods, enhance natural resource management, and contribute to broad-based economic growth. Regional assessments and regional workshop to discuss and enrich them have being completed in 2007 and 2008 to prepare the guidelines on the basis of regional findings and recommendations. The next steps are anticipated for the first half of the year 2009 and involve a meeting of the Minister of Lands, and eventually an endorsement of the Framework and Guidelines by a summit of Heads of States and Governments. FAO is proud to have been, with other UN organizations, one of a number of partners supporting this process. It is hoped that the present document can also provide "food for thought" and useful material for these ongoing and future reflections, and for the strengthening of land policies in the continent.

2. Land Policy Issues at Regional Level

Access to land has been perhaps the most emotive of issues in the Southern African region, and continues to drive conflicts in the rest of the continent as well. This volume discusses the issues surrounding land policy in African countries, with selected case studies from countries that have hugely different historical and cultural backgrounds. The triangle linking the Sudan, Burkina Faso and Mozambique incorporates a great many other countries where land issues have often been at the heart of bitter and violent conflicts (Sudan and Mozambique) or where land conflict is perceived as being a threat to peace (Burkina Faso). Evidently getting land policy right has huge implications for long term stability, and for promoting processes of sustainable social and economic growth across the African continent.

Perhaps a good opening question is to ask when a policy process starts. If we look at the Mozambican case study for example, we might come up with the answer, 1994, when the post-war FRELIMO government began to look seriously as land issues, and launched a process that culminated in the 1995 National Land Policy and the much praised 1997 Land Law. In the case of the Sudan, the same question might point to the period running up to and including the 2005 Comprehensive Peace Agreement. In South Africa, we would probably start with the first ANC government took office after the ending of the Apartheid regime.

It is clear in all these cases that a ´land policy process´ begins with key events and political events that are themselves responses to social and other pressures, some critical and violent, others less so. These events however also take place in a wide and deep landscape. In the first instance, virtually every country in sub-Saharan Africa shares the common experience of achieving freedom from colonial rule. Getting land back from the colonial power is thus a common plank in all the policy platforms. But having got it back, what should be done with it? A failure to address this question adequately can also be seen at the base of many conflicts still continuing today.

The other aspect common to all countries – and not just in Africa – is that policy processes are set deep within longer term historical timescales. What is interesting when comparing the land laws of Mozambique and Guinea Bissau for example, is how they both incorporate concepts and ideas with roots in their common colonial past; and how different these concepts, and even the language used, compared with other countries coming from a different colonial past. A land administrator or policy maker from Angola visiting Mozambique would have little difficult in discussing key aspects of their respective land laws and land policies. Set them both down in the Southern Sudan with its complex cultural mix of nomadic pastoral land use systems and the overlaying struggle between the Islamic north and the Nilotic south of the Nuer and the Dinka, and they would be hard pressed to find common ground.

Within countries too it is important not to overlook the significance of pre-colonial land issues. It is all too easy to find the roots of today's problems in the immediate colonial past, and ignore the influence of what is, after all, a far longer period of indigenous history for many countries. Mozambique again is a good example. Long before the Portuguese gained full control over the country – in the *early 20th Century* – the peoples of the north, centre and south of what is today Mozambique struggled continuously to secure control over the rich and fertile alluvial plains of the Zambezi

River Valley. Major political formations evolved around this struggle, such as the Monomatapa Empire (only finally ´pacified´ by the Portuguese less than one hundred years ago), and the Shona kingdoms that dominated Zimbabwe and what is today Manica Province in Mozambique.

This long and deep rooted tension is still a factor today, although many governments would officially deny it. Any number of cases can be cited where they have erupted into bloody conflict, with disastrous results. And where conflicts have been settled but the underlying land and resource issues are not adequately dealt with, simmering tension remains and development is constrained. The Sudan today, in 2008, as a good case in point.

The answers to the post-colonial question ´now we have the land back, what do we do with it?´ are also many and diverse. Where did governments start? In Mozambique they looked to the Soviet model, imported almost lock stock and barrel. The objective was not to develop a new national land policy based on African custom and practice, but to create a ´new African´, liberated not only from the colonial yoke, but also from the perceived constraints of tradition and custom. This contrasts sharply with the situation in Botswana, where the role of traditional structures has always been fully recognized and integrated into the policy making process. And indeed, in Mozambique today, we see traditional leaderships and systems being accepted once again, as the government has come to realize that in reality, they have never lost their legitimacy, and still retain immense authority in the eyes of the people.

A land policy process therefore never has a beginning and an end. It might have phases, each of which can be identified with specific changes in the society to which it is being applied. But it is a grave mistake to pretend that somehow a new policy can be started from scratch, starting with the ´slate wiped clean´. This observation applies to all aspects of the policy process: the concepts and tools available to policy makers; the many diverse interests who will be affected by the policy process (most are the same as those affected by earlier policies); the external pressures (international community, the ´Cold War, globalization, and today, climate change). It is more a question of looking at the disassembled pieces of a large jigsaw, and seeing if they can be put together again but with a different result from the picture on the box.

This might seem like quite a gloomy conclusion to reach, for those policy makers who genuinely believe that they can radically change the situation, and come up with new ideas that will once and for all put an end to inequality, poverty, low agricultural production, or whatever the specific policy objective of the particular government might be. Perhaps it is better however to see it more as a call for a bit more humility, and a more genuine commitment to producing policies that really reflect the deeper traditions, needs and ambitions of any given country.

And things do change. History is not entirely circular and repetitive, and there are aspects of a given situation today that might well offer the policy maker opportunities that simply did not exist ten, twenty or a hundred years ago. One key element is education. In most countries across Africa, populations are waking up, acquiring the minimum level of education needed to demand a stronger voice in the way policies are conceived, turned into law, and implemented. Some countries – or at least some programmes in some countries – are well aware of this and are implementing

programmes to create greater local capacity to demand more of their land administrators. Democratisation and the consolidation of new political institutions – when coupled with a respect for deeper cultural norms and practices – will radically transform the policy making process in many countries.

With all these points in mind, what *are* the land policy issues facing the ´region of Africa´ today? An initial list is quite easy to come up with:

- ending poverty
- raising agricultural production
- avoiding environmental degradation and collapse
- ensuring a more equitable sharing out of resources
- securing land rights for women
- how to manage land in the era of HIV-AIDS
- how to use land as capital, to create a national capitalist class, to secure credit.

Behind all of these are a range of deeper issues. Perhaps the most complex is how to integrate still important and widespread customary systems of land management into the formal structure of a modern nation state? This in turn raises issues of legal pluralism, and how to integrate very different legal and normative systems into a single, coherent (and effective) structure. Another question is how to bring all stakeholders into the process, be they peasant farmers, their traditional chiefs and leaders, and businessmen and women from elite groups in the national capital. Most countries today are still in a situation where urban economies are not able to provide enough new jobs for a mass of people coming in from the countryside. Keeping people on the land, and helping them to use their land to produce more secure and more productive livelihoods is a key concern across the continent. Gender is a central theme in every discussion group and policy workshop. As is the environment.

In some countries dealing with the legacy of the colonial past is still a driving force behind the land policies of the last ten years. Zimbabwe is the classic example, and it is possible that this issue is set to significantly influence the land policy agenda in South Africa as well. While this is understandable, such preoccupations can obscure the importance of other structural issues that are more contemporary and rooted in the economies that have grown up since colonial times. This point brings us full circle, to locate land policy in the longer term historical landscape of Africa, but engage with the African of today – and tomorrow – in the search for new solutions to new (and old) problems.

The case studies presented here all point the way to a more forward looking strategy that recognizes the grievance of the past, provides space for all to get involved, and respects the rights of all citizens to get something positive out of the new policy. That policy also has its macro and micro dimensions. Lofty national development goals are for whom? What is this thing called ´the State´ that creates development imperatives and too often shapes and imposes a policy solution onto its citizens? Evidently policy has to have a wider vision, but very often it has to respond as well to what are often very small and quite specific local needs. How do these come to the notice of policymakers? And if they do take notice, how can they be persuaded to include them in the final product, a ´new land policy´?

FAO as an organization has its principal mandate, ensuring the food security of the poor and doing all possible to alleviate poverty. This evidently positions the organization firmly within the first four or five of the issues quickly listed above. Land policy issues in Africa are then geared towards equality, ensuring that those who are dependent upon land can keep it and use it more productively, and helping them to gain the maximum possible from the new market opportunities that are opening up around them with increasing globalization.

In this context it is also useful to keep in mind the conclusions of a framework paper written for a recent FAO Workshop on Improving Tenure Security for the Poor in Africa[2]: "with respect to land relations and policies designed to benefit the poor, there are two competing models of governance and development on offer in and for Africa. One is to adopt the agenda of the international community and its International Financial Institutions….make land available for international investment and development via free and open land markets and homogenized national land laws…..The other model is to develop national agendas, not to repel globalization…but to ensure that national considerations are at the forefront"[3].

The paper goes on: "this means giving primacy of place to the land concerns of the poor, both women and men, who are now the majority of land holders in all countries in Africa…It is their rights that need to be secured and left to fester, and their productive uses of land that need to be developed by appropriate forms and institutions of finance. In short, this amounts to a partnership…between governments and their citizens in the twenty-first century". Such a partnership cannot ignore the lessons of the past in any country, and it will inevitably be constructed with some of the tools and concepts that are inherited from earlier era, but is hast to be forward looking, and it has to be genuinely inclusive, allowing space for all to contribute, but most importantly, for the poor to be heard and to be considered as the central beneficiaries – and implementers – of whatever policies emerge.

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[2] McAuslan, Patrick (2006). *Improving Tenure Security for the Poor in Africa:Framework paper for the Legal Empowerment Workshop – Sub-saharan Africa.* Rome, FAO, Legal Empowerment for the Poor programme, LEP Working Paper No 1.

[3] Ibid, page vii

3. Sudan - Complex and Hesitant Land Policy Reforms in a Dynamic Post Conflict Environment

3.1 Background to the process

Assessing the process of land policy and law reform in post conflict Sudan is a daunting task. After decades of war between the Government of Sudan (GoS)[4] 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) signed on 09 January 2005 opened the way to the Darfur Peace Agreement (DPA) on 05 May 2005 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 of the land question.

Structural conflicts between different land users have in fact persisted for centuries and are of permanent concern. In this context, the present land policy reform processes in Sudan are essentially a response to an acute crisis situation.

Livelihood strategies for a majority of rural households throughout the Sudan have always depended on access to land and natural resources; these are mobile, event driven and opportunistic. In the period leading up to the present crisis, policy interventions of the GoS have had completely different objectives that have undermined this access and reduced mobility. The original population have been excluded from large tracts of land that have been given over to oil concessions.[5] The development of large scale mechanized farming in the transitional areas between north and south Sudan has also had similar consequences. Rural land users have been cut off from their resource base, major pastoral routes are blocked, and people are forced to leave their ancestral lands[6].

Even now efforts continue to convert customary grazing land into private or state owned mechanized farms, taking on enormous proportions in some areas[7]. A number

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[4] 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.

[5] Human Rights Watch (2003) reports on the basis of information from UN, WFP and others that an estimated 174,200 civilians remain displaced as a result of the conflict in the oil fields in Western Upper Nile and Unity State.

[6] In an unpublished FAO report Abdelbasit (2006) reports that "in Southern Kordofan, more than 44 seasonal migration routes spanned by pastoral communities have been blocked by mechanized schemes and have permanently been lost to agricultural capitalist leaseholds due to increased expansion of demarcated and un-demarcated mechanized farming from 300,000 feddans (in 1969) to 4.5 million feddans in 2006. The situation is even worse in the Blue Nile State (in 2006) where three out of the eight major trekking routes have been closed down by large-scale agricultural lease-hold owners. For the remaining four nomadic routes, along the east bank of the Blue Nile River, continuous threats of confiscation of livestock apprehended in the game reserve not only pose serious hazards to pastoral peoples, but also has made herders and shepherds realize that they could save their wealth from random confiscation only if they resort to the 'barrel of the gun'. This is a potential threat to peace in the Blue Nile State".

[7] From the end of the 1960s on there was a massive horizontal expansion of agricultural production, accompanied by an expropriation of de facto community land, land grabbing and speculation - the Mechanised Farming Schemes and Arab Breadbasket Policy. It is estimated that approximately 25-30 million feddans (one feddan approximate

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of studies have analyzed these land conflicts, as well as events and elements that can be considered as catalysts, exacerbating their impact on the environment, economy and, shamefully, on human life[8]. Since Independence in 1956, the local customary capacity to deal with land management has been replaced by different forms of the State apparatus, but these have never succeeded in promoting a legitimate and efficient type of management.

The legislation that regulates access to land and land use has invariably been designed to defend the interests of the state and not of the rural population. "Land legislation in Sudan is excessive, confused, and complicated", "arbitrarily used", "excessively used for purposes of expropriation of private land"; "something is wrong with our land laws and we need to address this mischief", are all statements made by the highest level echelons of Sudanese society during a consultative workshop on the establishment of the National Land Commission (NLC), organized by the National Constitutional Review Committee (NCRC) with FAO in February 2007. These statements suggest that decision makers realize the need for urgent reform.

The legal system of the Sudan is pluralistic, with customary law, statutory law and, in the northern part of Sudan, Sharia law all being used in an opportunistic way. This results in widespread 'legal shopping'[9], as different interests select whichever code or legal provision best suits their interests. Well informed people use this legal uncertainty for their own benefit, which may take on political dimensions. As the existing legislation is not well known to the public - it was never publicized on an acceptable scale, or in the case of Southern Sudan, is still under development – a majority of the population is unable to use it.

Public land management, including the allocation of land for private and public purposes, happens in a realm of secrecy. There is little transparency on land allocation by public institutions and services. The concept of "free" land, defined by the absence of highly visible land use, is frequently used to justify the transfer of existing legitimate rights over these lands to other stakeholders, including the state. In recent times, this practice has been exacerbated by the fact that in several parts of the country, especially and Darfur and Southern Sudan, land has been temporarily abandoned as its occupants flee the armed conflicts.

0,4Ha) were placed under mechanised cultivation. These efforts continue 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

[8] 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. 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 FAO, UNHCR and NRC. Abdalbasit Saeed (2006) "Needs assessment of land and natural resources management issues in Blue Nile, Southern Kordofan and Abyei area", unpublished FAO report.

[9] Some people, especially those with grievances against others who claim historic land occupation, rely on the legal position that unregistered land belongs to the government to then claim access to land and natural resources that have in fact been occupied, used and managed by others since time immemorial. The argument that "no one has a better title than any other" on government land is used to justify this practice. In their areas of origin, the same people use customary law to establish a strong right over land on the basis of "first occupant" and continued historic occupation. This process is ongoing in Darfur.

3.2 The Land Reform Process

The recent 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 of these reforms, albeit as a concurrent power to central decision making.

Land commissions at different levels are proposed as an institutional instrument to guide policy development and to take on a future role in the handling of land issues. At the top sits a National Land Committee (NLC), which is conceived to be the main driving force to review land policy and law.

Efforts of land policy development in Southern Sudan in fact date back to the pre-CPA period in 2004. 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 (NPA). Terms of reference were agreed for a Land Policy Steering Committee to launch a process of land policy development.

The steering committee was abandoned before it 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, it started operating to some extent by mid-2006 on the basis of a decree which appointed members to the SLLC.

The Darfur land policy reform process has been entrenched so far in the activities of the Darfur Joint Assessment Mission (DJAM), an initiative driven by donors with the support of the GoNU to coordinate humanitarian, recovery and development aid to the region. Under the UNDP Rule of Law program and with support from the Centers for Peace and Development of, respectively, the Universities of El Fashir, Nyala and Geneina, the FAO organized three state level workshops on land tenure issues in Darfur. This laid the basis for a high level 3-day workshop in Khartoum in October 2006, with the participation of a wide representation of local customary leaders and political parties. The workshop succeeded in setting out the main principles for land policy development in Darfur:
- the recognition and legalization of customary land rights;
- a better administration of customary land rights;
- improved management of mobility through participatory land use development;
- dispute resolution for land and natural resources.

With the violence continuing and serious insecurity in the region, the DJAM process was discontinued by the end of 2006. There is evidence that the GoNU has appointed a president to head the Darfur Land Commission by early 2007. At the time of the writing of this paper it was however not known whether this Commission was formally established, or whether it was operational. The status of the Darfur Land Commission is not clear.

Land policy and land law development in the contested states of Southern Kordofan/Nuba Mountains and Blue Nile has been supported by a USAID sponsored project which builds on previous pilot experiences in community land management. At one stage, efforts to draft policy and legislation were quite advanced. By late 2005, the project informed the donors that legislation to establish the state land commissions and a new land Bill would be finalized by end of that year and that a land acquisition Act and a land investment Act would be drafted during the course of 2006.

3.3 Status of the reform processes

Progress 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 solid achievements prove that the parties have embraced the CPA as a genuine mechanism for durable peace in Sudan[10]. In relation to land however, it is the unimplemented sections of the CPA that are more significant for gauging the status on land policy, legislation and institutional development.

There is, for example, still no national law to officially establish the NLC. 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 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.

At national level, in September 2006, the NCRC strengthened its efforts to support the development of legislation for the NLC. In partnership with FAO, the NCRC organised a high level workshop to discuss NLC legislation in January 27-28, 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 exist 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"*. By mid 2008, there was still no NLC operational in Sudan.

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. It later organized a stakeholder consultation workshop on land policy development for Southern Sudan in August 2007. This is one of the few official events that publicly debated land policy development for Southern Sudan. Myriad of issues came up during

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[10] 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.

the workshop the most important of which were the land ownership question, land administration system, compensation of individuals and communities for appropriated land for public or private sector investments, woman's land right and the issue of land right in the context of resettlement of returnees and IDPs. Parallel to this, the SSLC leaded the drafting of a Land Bill (2007), with participation from the Ministry of Legal Affairs and Constitutional Development (MOLACD) of GoSS. The bill was handed over to the ministry for legal drafting but it is now shelved. The workshop with the theme: '*Towards development of a Comprehensive Land Policy for Southern Sudan: Designing the Roadmap* was a prelude to land policy development for Southern Sudan.

In the Southern Kordofan/Nuba Mountains and Blue Nile regions, the policy development and implementation process has stalled for several reasons, and so far none of the promised 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.

3.4 Lessons learned on the process of land policy development

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 some institutional reform, the strengthening of land administrations, local land use planning, are all issues that are on the agenda of the different reform processes. There is however little synergy created between the 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 mutual understanding and some degree of co-operation are 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.

Situation analysis, raising awareness and disseminating information
It is essential to invest in independent analyses that can put the land question on the agenda of governments and their partners. Such analyses can identify the need to act, establish the main areas needing further attention, and create a framework for further dialogue.

Just some six years ago, at the time of the IGAD study[11], land rights issues in Southern Sudan seemed to be of little concern for the SPLM/A leadership. Messages were conveyed that land problems were not on the agenda and would not occur in the future. It was assumed that upon the normalization of the political situation, and the eventual

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[11] See supra note 8.

return of millions of displaced people, there would be no problems. 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.

In addition to a timely assessment of land issues, it was even more important to discuss the results with a wide public through different mechanisms such as workshops and seminars[12]. The role of FAO and UNHCR in promoting consultative workshops, in partnership with government and regional institutions such as the MLACD and NRC, was 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 officers in these awareness creation activities. These events have slowly stimulated a change in mentality which, although facilitated by external actors, was very much a 'home-grown' process.

This demonstrates the key role of 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 home-grown ideas to take root.

Practical Demonstrations
The Sudan story also shows the value of pilot experiences, as powerful instruments to inform policy makers and the wider public about opportunities, needs and the possible contents of policy reforms. These experiments can immediately address challenges identified earlier, and although few in number, some have been successful and are contributing now to the shaping of future policy[13].

Building policy reform processes into peace agreements and constitutions
The inclusion of land policy reform as part of the mandate of the different land commissions in the CPA and the DPA has set the institutional scene for addressing land policy. The Interim Constitutions for the Sudan and Southern Sudan also include a legally binding requirement to deal with land policy reform.

Embedding the need for land policy change in new constitutional law also provides some degree of protection against any future hesitation to continue with the policy reform process. It also sets out guiding principles on the direction and contents of this reform, and offers some form of guarantee that the reform does not depart too much from its negotiated intentions.

There is however a real danger of political backtracking on previous policy commitments. 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

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[12] The results of the FAO-UNHCR-NRC Land and Property study (see De Wit 2004) were discussed in 3-day workshops that were organised in all ten Southern Sudan states.

[13] Examples include the USAID supported pilots in Southern Kordofan and Blue Nile states; NPA was also active in different parts of Southern Sudan, while FAO had pilots under two different projects covering priority areas for the return of refugees and IDP.

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 nuanced; it proposes the state takes a much stronger direct interest as a land owner and manager.

It is therefore important for peace agreements and new constitutions to include guiding principles on key issues like land. These must be accompanied by other measures, as outlined above, since alone they will be insufficient to guide the often complex processes of reform. Nevertheless, continuing differences in policy visions between different stakeholders and uncertainties over the use of different legal frameworks (Khartoum law, new Southern Sudan law, customary law) within the MLACD and between the MLACD and other ministries in Southern Sudan do indicate that the situation on policy and law development remains very dynamic. After the installation of the GoSS, some public statements were made by senior government officials in favour of using statutory law developed by the former Khartoum government. The use in Southern Sudan of these same laws, like the Civil Transaction Act (which substitutes the Unregistered Land Act but keeps the same basic principles that have turned all non registered land into state owned land), has always been highly contested by the SPLM.

Institutional responsibilities and policy direction
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 mainly on the rural areas. It followed a rights-based approach for tenure reform, embracing the SPLM/A policy declaration that "Land belongs to the people/communities"[14].

A major reason why southerners started the armed conflict again in 1983 was to gain control over land and natural resources to the benefit of their own people. It appeared that at least one faction of the SPLM leadership was looking 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[15].

The peace agreements called for a Land Commission in the south, which in principle could have maintained this approach or at least allowed for a reasonable level of debate before altering it. However, since the CPA, the role of the SSLC in policy and legislative development has been marginal. It is a new and weakly staffed institution, with little real experience in land issues and has not been able to stand up to more

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[14] "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".

[15] A similar balancing act is at the heart of the 1995 National Land Policy in Mozambique which, in the absence of the structural problems facing GoS and GoSS policy makers, resulted in a successful legislative process and a reasonable degree of success in implementation. Many of the underlying economic and social pressures that have required such a balancing act are however common to both countries. See page 33.

powerful political forces. Thus 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 became centred 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.

Other ministries have only been marginally involved in the few discussions that have taken place on possible land policy direction and content. Legislative development is in principle the responsibility of the MLACD. The first draft of a Land Bill was however produced without much involvement of the MLACD and was prepared in the absence of an overarching land policy. Although the drafting included a broad representative of stakeholders at the initial stage, a much smaller group was eventually responsible for the final output of the draft, overseen by an international legal expert. The draft was presented to wider stakeholders in early August 2007 during which broad and specific views on the draft were given which enriched the final draft that was presented to the MOLACD.

Donor coordination and funding priorities
The Sudanese case shows clearly the importance of the right kind of donor and international intervention. Unfortunately, in this case, the response of the United Nations as a political and peace-keeping body again seems to be at odds with its other role as a development institution.

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 however, 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 issues[16].

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 from the political mission. This is not surprising, given the huge challenges facing UNMIS as it tries to stabilize a fragile and still volatile situation. In post conflict situations such as in Sudan, the priority of the 'political UN' has to be emergency relief, recovery and other conflict transformation challenges such as disarmament and demobilisation. Organizing the return of millions of displaced people, often involving life saving actions, rehabilitating strategic infra-structure, and providing food to millions of uprooted people are massive tasks.

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[16] 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.

This 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$300,000[17] 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[18].

A unified UN view on the needs and possible responses to the land question patently does not exist. It is equally clear that when root causes of the conflict are not addressed it is unlikely that durable solutions can be found. This 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.

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 have been made between agencies, including strategic partnerships. Leadership roles and comparative advantages of different agencies were briefly touched upon in UN Country Team meetings[19], but left without the necessary formal follow up. Since the beginning of 2007, efforts to produce a more coordinated

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[17] 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.

[18] As a response to this unbalance, some bilateral partners like Denmark have earmarked additional contributions to support land policy development as part of their technical support projects.

[19] 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.

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.

Civil society participation

Sudanese civil society has so far failed to play an important role in 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 instead of focusing on its negative connotation as a cause of conflict.

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 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 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. 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" (they are not considered as a customary land owner), have obtained ownership of land with help from the government. This phenomenon has directly resulted in certain groups losing 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 an holistic approach to land issues, departing from previous efforts that focus on economic goals (the GoS in north Sudan), or a social agenda (the SPLM in Southern Sudan), or a strict human rights perspective (some 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 the need to consider land 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 Principles[20], 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 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 durable solutions for conflict in the region.

The importance of rapid solutions for securing land rights
Post conflict situations are invariably characterized by land that is temporarily abandoned by owners who have fled to safe havens. This 'force majeur' 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. 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.
Separating land use from land ownership can also be used as a mechanism to enable the use of land when the real owners are not yet identified or still absent. This separation is achieved by issuing short term leases (1 -2 years) to people in need of direct access to land. Traditional systems also often have mechanisms for leasing or lending land. For example, Dinka customary law includes specific provisions for dealing with issues such 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 absence[21].

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[20] 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".

[21] John Wuol Makec (1988), "The customary law of the Dinka people of Sudan",

Legalizing customary rights
All the peace agreements acknowledge that legalizing customary rights over land and natural resources is key to policy change in Sudan. Different social groups have different rules governing land and natural resource management, adding colour to the customary pallet. These rights are legitimate for a majority of the population in rural areas, but through history have undergone changes, adapting to dynamic environmental and socio-economic conditions. Other changes have been induced by the succession of rulers and governors, and later by parallel statutory legislation interfering with the customary setting.

The contents of the peace agreements seem to overlook the complex and diverse character of customary land rights. The Darfur Peace Agreement (DPA) 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. *Hawakeer* rights 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 problems[22].

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 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, and funding for community land management bodies.

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

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[22] 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: Endogenous visions for land policy development in Darfur".

agreements.

Alternative conflict resolution
An urgent response is needed now to a wide and diverse number of disputes. 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. Indeed, the settlement of land and natural resource disputes is, by tradition, overwhelmingly dealt with out of court. This seems to be a viable approach in the reconstruction of southern Sudan, where the capacity of the judiciary is still weak, and where judicial capacity building will still take many years.

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. Personal relationships play a vital role in the social ties among people and any rupture in these relationships may end up with a complete disruption in the social ties between communities and perhaps even more bloodshed.

The soothing and healing nature of conciliation and mediation is therefore more appropriate in post conflict situations than confrontation in court. If conciliation and mediation do not result in a satisfactory outcome, the CPA suggests the use of arbitration. The present legal frameworks in North and Southern Sudan are not however 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 governments are involved as a contending party. Suggestions have been made to improve the way arbitration can be used for land conflicts in Sudan, but once again, the use of local customs and norms is an essential element of all proposals.

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 the parties to "progressively develop and amend relevant land legislation to incorporate customary law and practices". Southern Sudan does not yet have substantive land legislation, with the result that the settlement of disputes over land and natural resources involves a delicate balancing of claims and counter claims that are based on customary law, the law of the GoS, and the legal system introduced by the SPLM in the form of the Interim Constitution of Southern Sudan.

The application of customary law still needs to be clarified, as well as the role of customary institutions. This calls for mechanisms to ascertain, clarify and document customs, with a view to identifying a corpus of customary law that is common to the communities of Southern Sudan. This can then constitute the foundation for a new legal system.

Another dimension that needs clarification when using customary law is that certain traditional values do not correspond with universally agreed principles. When the latter are part of national legislation, or are captured in the constitution, as is the case in Sudan, possible clashes may occur. This applies, for example, to the issue of the rights

of women in Southern Sudan. The Southern Sudan Interim Constitution has good provisions regarding the rights of women, which have implications for their land rights. Practice on the ground however, is heavily influenced by customary norms that do not accord direct land rights to women.

There is therefore a need for a structured process of education on women's rights as part of the overall raising of awareness about the Constitution. Examples exist where the impact of the civil war and HIV/AIDS pandemic have led to specific communities changing their attitudes and practices in respect to women's land rights. These examples can be built upon when seeking to influence communities, particularly elders, about the need to give effect to women's rights before marriage, during marriage, and upon dissolution of marriage.

3.5 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, and add additional layers of conflict.

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 external 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 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, and 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 protection, 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 put together and implement 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.

4. Burkina Faso - Inclusive Decision Making and Consensus Building on Land Policy

4.1 Background

The process of land policy reform in Burkina Faso is an example of a West African country whose government seeks to share its strong powers over ownership and management of rural land with other actors. This reform springs from previous efforts to find solutions to a number of underlying land tenure problems that are perceived as obstructing rural development and the achievement of a higher degree of food security.

The 1984 Agrarian Land Tenure Reform (commonly known as the RAF- Réforme Agraire et Foncière) was grafted onto an already strong state control of land ownership and state management. With the stroke of a pen this turned all land into state property and identified the state as the sole land manager. The policy promoted state run development schemes, centralized decision-making, and the reorganization of the rural space with the colonization of areas that had been cleared of river blindness.

In 1996 a failure to achieve some key objectives of this reform lead directly to the decision to review it. The absence of regulations is considered as a major reason for the failure to implement the 1984 reform. Therefore, some eight months after its revision in 1996, a comprehensive implementation code of 512 articles was approved. This new body of law was intended to codify all the practicalities of land management, but in fact resulted in a complex, extremely technical and not always practical code that was alien to the day-to-day realities of the rural world.

In practice, the RAF turned out to be more of a fiscal tool, unsurprisingly so, having been conceived and subsequently revised mainly under the auspices of the Ministry of Finance and Economic Development. Its field of application concentrated on urban areas, where more important tax revenues could be generated, and on management schemes, mainly irrigation and livestock production.

The present efforts to develop rural land policy and law occur in an environment of decentralization of governance and democratization of society. The commitment of the Government of Burkina Faso (GoBF) to improving governance has also created openings for civil society to exercise a far stronger role in contributing to policy development. These enabling processes promote other values, such as bringing different layers of governance into decision-making, allowing negotiation and dialogue between different interest groups, and lobbying by pressure groups.

Two major driving forces behind the reform have an economic and social character. On the one hand, there is an increasing private sector demand to have access to land and resources in the rural areas. On the other hand, the government is well aware that competition over access and use of land may eventually result in a major social crisis, which may spill over into open conflict.

International and regional efforts to promote land policy reform[23], as well as the endorsement of reforms by intergovernmental institutions[24] have also supported and encouraged the decision of the GoBF to engage in this process.

4.2 Land issues in Burkina Faso

Since the inception of the RAF, Burkina Faso maintains a dual system of a legally defined state monopoly over rural land, combined with a legally recognized land management role for customary land owners, smallholders and pastoralists, lineages, and local informal institutions.

The state has turned large tracts of customary held land into irrigation, rainfed or livestock production schemes, using the concept of "land for public purpose" to achieve this without any form of dialogue or agreement with customary landowners. When beneficiaries of managed schemes are predominantly local people, including legitimate landowners, disputes are limited to individual quarrels over parcel boundaries. In the case of outsiders occupying large tracts of land, serious disputes may arise. This overlay of legitimate local land rights and new, legally attributed rights results in a high degree of tenure insecurity.

Turning customary land into management schemes has also undermined mobile livelihood systems such as pastoralism. The colonization of new lands for crop production has induced real competition between different rural actors for access and use of the land resource base. In some areas these confrontations turn into open conflict.

The general denominations of "customary authority" and "customary land rights" understate the complex myriad of different local decision makers, rules and regulations on access to land, its holding and transfer. As in many African countries, Burkina Faso is a deeply multi-cultural society, with balances and tensions between different social groups. Different customary leaders lobby for power, though these internal struggles do not seem to break along ethnic or religious lines. Disputes over access to land are generally of an individual nature, rather than between opposing groups.

The belief still prevails that the development of a rural agriculture-based economy depends upon the promotion of state enabled management schemes and support to medium scale agricultural producers. Recent development thinking continues to follow a parallel approach, with smallholders being considered as actors who are not embracing principles of economic market production and consumption. This legacy has major implications for a land tenure reform process, where access rights to land for ordinary smallholders are categorized as being secondary to the rights of people who are perceived as being producers with a market vision. The correlation between highly

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[23] The African Union, the Economic Commission for Africa and the African Development Bank encourage member countries to review land policies mainly to respond better to NEPAD initiatives. There is anecdotal evidence that some development projects financed by the AfDB are subject to prior land policy reform.

[24] Burkina Faso has recognized the "Uniform Act Organizing Securities" law issued by the Organization for the Harmonization of Business Law in Africa. This Act considers that mortgages can only be obtained against real property rights duly registered under the land tenure system. The provision puts pressure on governments to deal with tenure reform. In the case of Burkina Faso, it encourages the issuance of full ownership rights to land, initially in urban areas.

visible types of land uses, such as irrigation or well laid-out agricultural fields on the one hand, and the entitlement to acquire new legally recognized (land use) rights remains strong. The state decides what is 'development' and what is not, and on this basis gives out land use rights to certain land users.

Presently the GoBF is supporting the emergence of an agro-business sector, which is now changing social relations in rural areas. This is again a response to the view that the smallholder sector is unable to substantially contribute to and eventually support national food security needs. Agro-business is gradually carving out a space on customary land, while at the same time looking for opportunities to access land in managed schemes. There is a tendency towards the concentration of high quality land (lowlands, infra-structured land) by an elite group, which is mainly urban based. This process is happening at a lower scale than in some other countries however, and landholdings are relatively small. Indications are that demand is still quite low[25] .

Unlike its neighbours, Burkina Faso is not a settler country. Foreign land interests are not widely spread, mainly because the resource base is not richly endowed. In fact the country has experienced strong emigration to other countries, such as Côte d'Ivoire. Many migrants have returned since the civil unrest in Côte d'Ivoire however, with a significant number settling in rural areas and needing land for cultivation. Strong internal migration patterns, induced by a hostile environment of drought, add flavour to a complex situation of mobility. Pastoral systems cover vast areas, beyond the national boundaries, resulting in contact with settled crop producers. Pressure on land in the central parts of the country has induced migration to other areas, sometimes creating ill feelings between local populations and migrants.

In this complex context, the state concentrates on the management of land with infrastructure. The land administration system has been developed and trained mainly as an instrument to issue land use titles over state land and to collect taxes, with a heavy emphasis on urban areas. Institutional organization is cumbersome, with linkages and cooperation between different institutions not always occurring in the best interest of clients. The theoretical set up of the land administration is also not matched by its present capacity, resulting in poor service delivery.

Land use planning is used by the state to try and create "order" in the rural world. This centralized and technocratic approach to planning aims at allocating land for specific land uses without necessarily taking into account the livelihood strategies of rural people. Efforts to reduce the mobility of opportunistic land use systems, or to separate herders from crop producers, have largely failed for a number of reasons. And land use planning has not prevented protected areas, reserved forest, and hunting concessions from being encroached upon by populations looking for productive land. This problem is exacerbated by the fact that these areas are often given protected status without local populations being informed, let alone being involved in the decision making process.

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[25] The biggest rural plot registered in the Hauts Basins region measures 169Ha, while at the national level a plot of 650Ha has been described as "exceptionally big". A recent study provides some insight on the demand side for land ownership titles in rural areas ("Etude sur les demandes et le deliverance des titres en milieu rural", ATEF, 11/2006). The study indicates that since 1966 only 1,303 demands for such a title have been made, with peaks after the revision of the RAF (1996 onwards), and the return of Burkinabé citizens from Côte d'Ivoire in 2004. Some insiders, however, question these results as being severe underestimates. The average size of the parcels equals 4.58Ha.

4.3 The land policy process

Some 20 years after the first reforms, tenure security in the rural areas of Burkina Faso remains precarious. The situation is described as "a real tenure crisis" that is progressively expanding across the rural world. The present efforts of the GoBF are driven by two vectors: (i) creating a more enabling environment to support economic development and achieve higher production levels under conditions of rapid population growth; (ii) maintaining high levels of social peace and preventing a number of looming conflicts between different land users who are challenging for access and use of the same natural resource base. The discussion that follows illustrates the nature of the process, and its major guiding principles.

A holistic policy vision
After several attempts to review and reshape old legislation, the GoBF became convinced in the early 2000s that making adjustments to existing legislation would not produce satisfactory solutions to its land tenure challenges. It accepted that a creative vision was needed to handle land issues in rural areas. With the exception of Ghana, it was the first time that a country from the region decided to begin with a deep review of the issues, before drafting new laws.

It was agreed that this process would not be restricted to a superficial process of soliciting different views, mainly from the public sector. Important openings were created for all actors with a stake and legitimate roles in the land question. Participation was extended to crop producers, pastoralists, women, customary leaders, landowners, community representatives, locally elected people, business and interest groups.

Institutional arrangements for dialogue
Although traditional and public discussion platforms do exist, it was decided to establish a national committee, the CNSFMR (Comité National de Sécurisation Foncière en Milieu Rural) to facilitate the exchange of ideas between the different sectors. The membership of this committee, with representation from several ministries, farmers' organizations, NGOs and CBOs, illustrates its inclusive character. The CNSFMR has a technical secretariat that takes care of its day-to-day business. The secretariat is supported by a team of independent, high level national consultants who are providing the necessary expertise and experience to stimulate the policy debate. The expertise of this supporting team covers all aspects of rural land: legal, social, rural development, institutional, conflict management, and land administration.

A major responsibility of the technical support group has been to organize and stimulate the policy debate at all levels, from national to local. Specific stakeholder groups were encouraged to debate issues at local level, after which their conclusions were compared with the views of other groups in regional debates. The technical support then had to distil all the various viewpoints and produce a consensus vision of what was required. Thus the reform process has not been dominated only by land experts or legal advisors. There has been a genuine contribution by future beneficiaries, not only in discussing preconceived ideas handed down by government, but also through contributing with their own expertise and life lessons.

Diagnostic assessment to underpin policy visioning
The excellent diagnostic work on land issues that emerged during the years that lead to the decision to develop a rural land policy served as a good tool to underpin the debate[26]. Burkina Faso is endowed with an important number of reputable researchers on land that have support from major international think thanks. Some of these researchers have formed the Groupe de Recherche et d'Action sur le Foncier (GRAF), a leading NGO on land issues, which continues to play a strong lobby, awareness creation and research role on land issues in the country. Linkages with and support from Gret (A French NGO) , International Institute for Environment & Development (IIED), the World Bank (WB), the Food and Agriculture Organisation of the United Nations (FAO), International Fund for Agricultural Development (IFAD), Agence Française de Développement (AFD) and other donors ensure that national NGOs can play a central role in policy development. These NGOs and other individual researchers are highly esteemed by the GoBF, creating the necessary openings for their role in supporting, stimulating and encouraging debate, based on genuine diagnostic work. In a later phase of the process, the involvement of this technical expertise became more active in the development of key documents, including drafts of policy and law.

This approach is based on evidence of the realities of the rural world, and confirms the importance of well documented research and pilot experiences[27]. These are essential to find innovative answers to rural land questions which can be tested before including these in policy and law frameworks, and up-scaling their use over the national territory. It is important to underline the fact that it is not always easy to find appropriate funding for these experimental pilots in the early stages of policy reform.

Enabling donor support
The commitment of the GoBF to go through a profound and sometimes painstaking reform process in the search of genuine consensus creates trust with partners. Donors like the openness and transparency of the process, and are therefore continuing to fund it. The process itself is well organized, with a specific coordinating institution in charge, facilitating the channelling of external support. It seems that this line of operational coordination will also be followed for the implementation of the policy and law, once they are approved. Proposals for establishing a cross sector National Implementation Programme, a permanent Technical Secretariat, and a National Fund for securing rural land tenure point in this direction.

Entrenching policy development in other processes
The land policy reform process in Burkina Faso is not a stand alone reform effort. It coincides with other major processes of government decentralization, the deconcentration of public services, strengthening the judiciary, the democratization of society, efforts to improve gender equity and strategies to alleviate poverty. All of

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[26] The research on land issues culminated in the document "Diagnostic de la situation de sécurisation foncière en milieu rural" H. Bary, H. Ouédraogo, S. Sanou and D. Thiéba, published in 2005 under the auspices of the DGFROP.

[27] The pilot experience of the "Plan Foncier Rural – Ganzourgou" stands out as a highly successful pilot experience where innovative approaches have been tested to secure different types of customary land. It has also been a successful case for testing land dispute mediation. The results of this 5-year experience have significantly contributed to the land policy debate.

these create synergies that are essential for a successful land policy reform. A reform that bets heavily on local institutions for its implementation and that wants to bring responsibility for land management closer to the land users, inducing more local accountability, needs to consider stronger forms of local government and de-concentration of the public sector. The transparent process of upstream land policy development is in itself already a good example of democratization of society, resulting in other forms of governance.

Institutional capacity building
The institutional capacity building that accompanies the land reform process is essential. Local institutions are given a mandate to take decisions, but with certain levels of checks and balances. The scheduled establishment of land services at the commune level (*Services Fonciers Ruraux*), and of rural land tenure commissions at the village level (*Commissions Foncières Rurales*) are milestones to support this institutional reform. The commune services are new and will require major efforts before they can be made operational. Such services are required in all of the 302 rural communes that have been established as part of the decentralization policy. The Rural Land Tenure Commissions are grafted onto existing structures of CVD (*Conseil Villageois de Développement*), elected bodies that serve as an interface between local government (the rural communes) and the rural populations. Customary authorities will be considered as full members of the village level commissions, according to recent proposals.

The de-concentration of public sector services (such as cadastre, land register and fiscal services) is identified as being essential to support future policy implementation. There is still reluctance to delegate certain responsibilities to private sector operators. The de-concentration efforts are accompanied by a vision to reinforce the centre, which may be contradictory to earlier policies of structural adjustment, where emphasis was put on slimming down the public service.

Legal completion of the policy reform
The GoBF has learned lessons from the past that a land policy reform must go down the wire, and not be limited to the production of a policy and a law. There is recognition that the poor results from implementing previous legislation are partly due to the incomplete process of the legal development process itself. A land law can only be implemented when it is accompanied by regulations, other legal tools, procedures, guides and administrative forms and tools. Land can only be legally secured in the name of individuals or groups when these entities have a legal identity, implying the need for civil records. Along the same lines, the rights of women can only be exercised (on the basis of sometimes excellent provisions in family laws) when these women qualify for using this legislation to their benefit. This implies the need for official civil marriages, instead of undocumented traditional marriages which are still prevalent, even in the urban areas.

The GoBF intends to present to parliament a comprehensive package of land legislation, not just a framework law. This should enable the policy to be turned into reality on the ground, with possible immediate results and quick gains. Ironically, this may turn out to be somewhat problematic, since upstream policy and law development is an iterative process in which testing, fine-tuning and re-adjustment are essential before a widespread application. This calls for a continuous monitoring of policy

implementation, with active lobbying for review if and when required. Land policy observatories and independent monitoring and evaluation capacities are being designed by the decision makers.

Information dissemination
Without making all beneficiaries of policy reform land literate, it may be difficult for them to use it as an instrument to the benefit of all rural stakeholders, including ordinary people. The risk exists that better informed layers of society use parts of policy and law to achieve their specific goals, ignoring the balancing elements for more vulnerable groups. This may ultimately lead to an uneven handed policy and law implementation, sustaining conflict rather than resolving it. The GoBF is anticipating this situation by proposing a solid 1-year information dissemination campaign after the reforms are passed by parliament, but before the law will actually be implemented. In fact, the nature of the reform process itself already secures that a significant part of the rural population is potentially aware of the ongoing changes, their contents and possible implications for their own livelihoods.

Costs and impact assessment
Policy reform implies costs, not at least to turn it into reality when high expectations are created after a profound and inclusive process of consensus seeking. There is a ongoing and timely reflection on the possible costs of the land policy reform process, albeit on the demand of some donors who are sensible to support its implementation. Reforms that are accompanied by indicative budgeting from the early stages onwards may turn into wishful thinking, rather than realistically responding to address the tenure crises.

Some government partners are assessing the possible impacts of the land policy reform process on a wider basis than the obligate "parcel-level economic rate of return to donor investment" principle. This seems to be become more essential when the objectives of land policy reforms reach further than securing land tenure to improve investment and to increase production in rural areas. When preventing conflict and keeping social peace becomes part of the equation, other standards of impact assessment and rate of success are required.

4.4 Consensus issues of land policy contents

The baseline of the reform process is (i) to narrow the gap between the legitimacy and legality of rights over land and natural resources, and (ii) to strike a balance between the land management role of the central state and its subsidiaries on the one hand, and the capacities of indigenous institutions and individuals on the other hand.

Recognizing diversity
An essential virtue and achievement of the GoBF land policy reform process is that all concerned parties acknowledge the existence of a rich pallet of rules, rights, and ways to handle things throughout the country. The one-size-fits-all approach is deemed to fail when specific local conditions require a targeted response. Translating this to securing access to land for different actors, it became clear that the titling of land in the name of individuals would only respond to the needs of a restricted group of land users, often the most endowed ones who have the necessary resources to pay the high costs. In the regional context land ownership titling is encouraged, mainly to protect

commercial banks against poor down payment practices. A majority of rural land owners do not envisage using land as a collateral for having access to credit. They want to have access to cheaper measures for securing their land. The GoBF supports different options for securing access and tenure over land. Some of these mechanisms come with the same advantages as a full land title such as the transferability of the right, the use of the right for a mortgage.

Legalizing customary land rights
The recognition of customary rights over land and natural resources is beyond any doubt perceived as being essential to secure tenure in rural areas for a majority of the population. A restricted number of pilots have identified ways to handle this under specific socio-environmental conditions, but further testing is required. Evenly important is the acknowledgment that different types of legitimate rights do exist and do need to be recognized: rights of individual occupying land in good faith, family rights, and other rights vested in larger social groups, often corresponding with lineages. In principle rights of women are treated on an equal footing, but practice shows that these continue to be marginalized under most customary systems.

The identification and validation of customary land rights is derived from "Rural Land Tenure Plans" - *Plan Foncier Rural.* This is a participatory method based on dialogue and consensus that uses high resolution remote imagery as a facilitating tool to map existing legitimate rights over land and natural resources. After validation with neighbours and other stakeholders, including procedures of public notice and possibilities for appeal, these rights are registered as a right of possession, a "*Procès verbal de possession foncière en milieu rural*". This right of possession can in principle be transferred into any other recognized statutory right over land, including the right of ownership.

Readings of early law proposals indicate however that some care is appropriate. It appears that existing legitimate rights over land that are recognized are not necessarily being considered as having the same quality as newly prescribed rights issued by the state. If they are inferior, than the danger continues to exist that well informed stakeholders take advantage of the situation and transfer lesser rights of others into rights of their own. The transfer of customary rights seems also to be conditioned by the need to develop the land according to standards agreed upon by the state. Land legislation under development seems to be considered as being complimentary to existing legislation, and will not replace it. This may well reduce the overall positive impact of the creative policy proposals on rural society.

A package of interventions
The policy reform considers the solution to the land question as a package of interventions, not as a single remedy. It is not only a question to secure access to land when such a need is expressed, but also a challenge to provide solutions on how to use these rights, and protect these when they are threatened.

Part of this package is the inclusion of mechanisms to transfer rights. The documentation and registration of the transfers of land rights turn informal sometimes rogue deals into visible and formalized acts. It is an important step to legalize legitimacy, and is considered as an essential tool to prevent conflict between land users, and more in particular between the heirs of people who have made undocumented

deals years ago. It will largely depend on the practicalities and the costs involved whether the documented transfer of rights will be a success and achieve its objectives. The active involvement of village level institutions in land management, with customary authorities as full members, should ensure that local people have trust in these services and use them. There are also mechanisms to alienate individual rights from customary group rights on a consensual basis of dialogue.

Ascertainment of customary law
The reform considers well the wide variations of local rules and regulations that govern land issues, and the need to respect this multi-culturalism, albeit within an overall framework of national statutory principles. There is still doubt whether the latter would not excessively dominate the local specificities, and downgrade the use of customary law when confronted with statutory law.

The need to ascertain local customs as well as the requirement to devise local norms of land management and dispute resolution that are derived from these customary frameworks is being discussed in public fora. It can take on the form of local land tenure charters – *chartes foncières locales* - developed at the commune level by local institutions with the participation of civil society groups, including women. These local land tenure charters are validated and registered, and stand as a reference guide on local land management. They include rules on access to customary land for different actors, duration and condition of informal land leases, management rules of communal property, and management rules of rights of way.

Recognizing the importance of land under common tenure
Land and natural resources that fall under a common tenure regime are given the necessary attention. These are identified and registered by local institutions, and protected against possible alienation. These resources are identified by local land management institutions; provisions are made to strengthen their management skills. There is still a need for checks and balances, as to make sure that the delimitation of communal areas in the name of public institutions does not initiate a process of transfer of communal customary land to some form of local government land.

Consensus on land use
The reform process considers local land use planning as an essential element to achieve its social, economic and environmental objectives. Some shift in approach can be observed when compared to previous efforts of planning. Land use planning tends to depart from centralized, technocratic decision making and embraces now more the principles of dialogue, negotiation and consensual decision making. Local conventions on access to land and land use are negotiated between different users and interest groups such as farmers and pastoralists. These are validated and stay as a regulatory reference for future land use.

Alternative dispute management
The number of land and natural resources related disputes is rapidly increasingly and has urged the GoBF to take appropriate measures to contain these. It is acknowledged that in most cases alternative methods to address land disputes are more appropriate than judicial solutions. This approach corresponds well with the African tradition of consensus seeking, with all parties coming out in some degree of satisfaction, avoiding the bitter winners-losers outcome of a court trial. Conciliation and mediation are

suggested as preferred mechanisms, and are made compulsory before resorting to courts. Conciliation and mediation consider the use of local rules and regulations to come to mutual agreements, while the facilitators are drawn from the area where the dispute occurs. The up-scaling of alternative dispute resolution techniques from their pilot experience level to a nation wide efficient and expedient use presents some major challenges. Discussions are ongoing on how mediation can be institutionalized, whether there is a possibility to professionalize it to some extent, and how the technical aspects can eventually be improved.

Strengthening of the judiciary
With the arrival of some more powerful players in the rural areas, it is obvious that not all disputes can be solved out of court. Voluntary dispute resolution shows weaknesses when the power between the protagonists is unbalanced. Efforts to strengthen the judiciary are considered as part of the reform process, including the training of new judges and auxiliary staff, as well as upgrading the skills of existing judges. Possibilities to bring the judiciary closer to the rural populations are being tested, such as the holding of forensic audiences in remote areas where there are no courts.

The possibilities for the "state" in one of its forms (central or local government, public land administrations) being part of a dispute are real. In cases of administrative failures, such as the multiple allocation of the same land parcel to different beneficiaries, the administrative court needs to intervene. This court is not yet well prepared for this task.

4.5 Concluding remarks

While the need for land policy reform and some initial possible responses to challenges were gradually identified in pilot experiences and a number of development programs, the process more concretely shaped when a consolidated diagnostic on the land tenure situation in the rural areas was prepared in 2005. This diagnostic was translated into a first draft policy document, providing the major orientations and strategic axis for a new rural land policy.

A profound and genuine consultation process followed, covering all 13 regions of the country, culminating in the holding of 3-day National Forum held in June 2007, with the participation of all layers of society. A total of more than 600 participants freely and passionately expressed their views, resulting in consensus on a significant number of the suggestions, but also requiring further discussion on some diverging views. There seems to exist some fear from certain public sector stakeholders to share powers on land management with others, often local actors and institutions. The role of the customary authority in the future handling of land tenure still remains an issue of concern.

The reform process has now reached a stage where policy proposals need to be endorsed by government, and be translated into legal documents. First efforts indicate that this process will continue to embrace principles of participation and dialogue. On the other hand there are also indications that some strong and innovative policy proposals may be translated in a somewhat weaker format into legal texts. The continuous consultative character of the process guarantees however that checks and balances are present to potentially ensure that legislation and agreed policy contents do not substantially differ.

A fundamental issue is that the legislation of this new policy will be complementary and not replace the existing land legislation, i.e. the RAF. This may constitute the single most important obstacle for its successful implementation. Issues of excessive costs for certain administrative processes are unlikely to change if old procedures and standards are maintained. This may entail that the new policy and law will not be used to the extent that is desired to achieve all its objectives. This calls at least for an overhaul of relevant existing law if innovations want to have a chance for being implemented. A question remains whether the new reforms will be adjusted to fall in line with older values, or whether there is enough political will to graft the new proposals on a new stem that is free of impeding principles.

It must be acknowledged that the present process is the result of a government opening up to civil society for their involvement in policy reform. The underlying principle is that when policies are devised on the basis of a broad platform of participation and consensus, they become part of the daily life of the citizens, and may be used more to achieve the objectives.

The process itself is not contained to the development of a once-for-all new policy and legislation to implement it. Some leading stakeholders seem to acknowledge that present efforts are just part of a longer term process that will not stop once there is a new rural land law. The iterative character of law development is already part of the draft proposals. It underlines the need to learn by doing, to adjust legislation, to review it after an initial period of implementation. Major emphasis is also put on institutions that must enable the implementation of the reform package. Capacity building is a long process, especially when considering genuine decentralization of service delivery and a sharing of power between different stakeholders. The success of the policy reform, its contents as well as the nature of the process itself, will ultimately be determined by the degree to which the ordinary rural land users will use the provisions to improve his/hers life.

5. Mozambique – Participatory Policy and Legislative Development, Difficult Implementation and Follow Through

5.1 Background

A recent policy assessment prepared for the donor community makes the point that Mozambique 'has been doing land reform' since Independence[28]. In fact land has been a focus of contemporary political struggle and development policy for at least fifty years. The Portuguese always had land at the top of their agenda as they expelled local people to exploit the best soils. New colonial laws in the 1960s however gave protection to local rights in an attempt to thwart the growing pressures of nationalism.

Post-Independence land reform can be roughly split into two distinct phases: the socialist, centrally planned economy between 1975 and the late 1980s; and a pluralistic political system and market economy which began in earnest with the 1990 Constitution. Each phase has involved a 'land reform' driven by very different ideologies and visions of the future. Yet in spite of the intensity of the Liberation Struggle and its accompanying rhetoric and transformations, concepts and practices with roots in the colonial era have also continued to shape the debate over land.

After Independence, internal political struggles that resulted in victory for the left wing elements of FRELIMO[29] were reflected in the countryside. Many peasants joined the Armed Struggle to get their land back, and in the shifting political climate of 1975-76 they reoccupied abandoned Portuguese plantations, reasserting old rights established under traditional land management systems. All this changed when FRELIMO emerged as a socialist vanguard party. Colonial plantations and farms were integrated into vast state enterprises, and the peasantry again became workers on their own land. The so-called 'family sector' was still allowed to cultivate subsistence plots, but was encouraged to adopt cooperative models grouped around planned villages where essential social services could be provided.

The socialist experiment did not work for many reasons, including the long Civil War that ended with the October 1992 Peace Accord. In the late 1970s, opponents of the FRELIMO government re-emerged as RENAMO, the Mozambican National Resistance, and violent conflict and devastating droughts laid waste to rural Mozambique. Rural development of any kind was almost impossible. Nevertheless several things happened during this period with important consequences for the land policy process of the mid-1990s.

Firstly, in the mid 1980s, FRELIMO accepted that private *agriculture* had a role and began allocating State assets to national and international private interests close to the governing party. From this point on, *land again began to acquire value as a factor of production, and state patronage became a force in securing it.* By the time the Peace Accord was signed, the countryside was a patchwork of relatively secure areas around

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[28] Calengo, André, Oscar Monteiro and Christopher Tanner (2007). *Land and Natural Resources Policy Assessment.* A report commissioned by the Embassy of the Netherlands in Maputo, for distribution to government and donors.

[29] Frente para a Libertação de Moçambique, the front that united a wide range of nationalist groups to conduct the Armed Struggle against the Portuguese.

State Farms and key infrastructure, in which millions of displaced people crowded together on small plots allocated by local administrations and resident communities.

Secondly, huge areas of rural Mozambique were abandoned as up to seven million people fled the war and the droughts. This created the illusion of unoccupied land, which under the 1979 socialist inspired Land Law, meant that it was *free for the State to allocate to new users who could demonstrate their capacity to put it back into production.*

With its economy in ruins, Mozambique also joined the World Bank and the IMF in the late 1980s and began a serious structural adjustment programme. The transition to a market economy was well underway by the early 1990s, and peace had an immediate impact on 'the land question'. While the 1990 Constitution maintained the principle of State ownership, it allowed for a 'land use and benefit right' (or DUAT[30], the Portuguese acronym) which offered a relatively secure form of land access that was both inheritable and renewable. New economic opportunities were opening up for private investors and land rapidly gained value as *the* factor of production. As millions of peasants returned home, conflicts erupted as they found their land occupied by investors with State DUAT titles.

The threat of serious social conflict was critical for a country faced with post war reconciliation and economic recovery. New market forces were fuelling a debate over land privatization. With a de-capitalised peasantry unable to use all their old land rights, fertile land close to markets and roads was especially at risk from investors who could convince government that they had the resources and know-how – 'capacity' - to put land back into production.

The more positive ideological legacy of FRELIMO still influenced thinking on land issues however. Many senior figures adhered to principles of social justice and a concern for the basic rights of small farmers who worked the land. The government remained strongly committed to State ownership as the principal means of protecting local rights and national sovereignty. Yet it was also committed to the market economy for promoting new investment and development in a country stripped of working capital. It therefore had to reconcile the very different interests of local people and new investors, while addressing poverty alleviation and guaranteeing the land rights of the poor, upon which their basic food security depended. A new land policy was needed.

5.2 The 1995 Land Policy and 1997 Land Law

Preparing for an inclusive process
Before the war ended, the FRELIMO government had already begun looking at land issues with the creation of an 'Ad Hoc Land Commission'. This body was restricted in terms of both participation and scope, with a mandate that only covered State Farm privatization. Other factors were meanwhile creating the conditions for a more inclusive policy process.

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[30] Direito de Uso e Aproveitamento de Terra

The uneasy truce between FRELIMO and RENAMO was well managed by a UN peacekeeping force for two years, and culminated in the first multi party elections in October 1994. FRELIMO had a convincing win, but the new government had a very different character and democratic legitimacy. The political opposition now also had a legitimate voice however, and expected to participate in important new policy processes.

The international community was also pushing hard for inclusive politics as part of reconciliation and peace building. Many new civil society organizations also started up in this period. Most began with humanitarian objectives, but several moved to rural development once the immediate needs of returning refugees and displaced people were met. These NGOs soon saw that a key challenge was countering the perceived threat to local community land from private sector interests. With new resources and experience from the immediate post-war period, these new organizations were ready and able to take part in the land policy process.

Perhaps most significantly, there were no specific interest groups who were significantly more powerful than others and who could call the shots. There was only a fledgling national private sector with very little own capital, and FRELIMO was clearly in the driving seat with its commitment to State ownership as the bedrock of *national* tenure security against powerful foreign interests.

Donors were also deeply worried that the potential for land grabbing in an economy with no alternative employment would destroy rural livelihoods, exacerbate poverty and social tensions, and thus undermine the whole peace process. The new government was therefore under a lot of pressure to ensure a democratic policy process almost as a condition for the huge volume of post-war funding[31].

The Land Commission
The Land Commission is perhaps one of the defining elements of the Mozambican land policy and subsequent legislative process. This body facilitated dialogue between a wide range of interests, and effectively managed the technical assistance needed to produce the policy, write the new law, and then develop implementing regulations. All of these processes involved a wide range of actors from both government and civil society.

The genesis and consequent structure and *modus operandi* of the Land Commission are central to understanding its effectiveness. When FAO began its work with the then 'Ad Hoc Land Commission' in early 1995 (see below), it included just the Ministry of Agriculture and the Institute for Rural Development. The FAO team argued for a far more inclusive body, resulting in a new Interministerial Commission for the Revision of Land Legislation (which quickly became 'the Land Commission' for most people), which included nine line ministries and key departments such as Forestry and Wildlife.

FAO then made the most of strong donor backing for an open democratic approach, and advocated for full commission membership for other stakeholders, notably civil society. Government eventually agreed to this and two NGOs representing the 'land

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[31] UNDP reports show this running at some US$1 billion per year, throughout the post-war years and into the early 2000s.

and rural development' organizations joined the Commission, alongside prominent national figures such as the late Professor José Negrão and specialists from the University of Eduardo Mondlane Land Studies Unit (see below).

Besides its membership however, the Commission stood out because of its extremely lightweight and flexible institutional character, backed by a very strong political mandate and presided over by the Prime Minister (although the Minister of Agriculture had the executive vice-presidential role). The Commission had a core staff of just three, including one senior professional officer, and was supported by three non-resident FAO consultants who visited at regular intervals. Each participating institution had a right to send two representatives to the regular technical committee meetings. The importance of the issue and the strong political direction behind it meant that attendance was always high, and the discussions of key points always benefited from inputs by the wide range of interests represented.

The Commission also developed a large network of NGO and public sector partners at provincial and district level. These partners took part in regional discussions of the draft law, provided feedback on key questions, and participated directly in field trials of regulatory instruments such as community rights delimitation. The small Commission team took notice of what was happening in the countryside, and where possible incorporated comments and suggestions coming up from local level. A strong relationship of trust and confidence in the Commission was built up as a result, and the difficult task of reconciling often quite opposing interests and needs was in the end achieved with a considerable level of consensus over the end result. And those who disagreed at least accepted the outcome as legitimate, the result of wide participation and an inclusive process.

Technical Assistance

Concerns to support the new democracy and market economy led USAID to fund a University of Wisconsin Land Tenure Centre (LTC) project at the Ad Hoc Commission from 1991 to 1994. Their research revealed that many local people felt their historical rights were again being ignored as 'their' land was given to private interests; and also showed how important customary land administration systems still were[32].

A US government preference for land privatization exacerbated tensions created by these results, and the LTC shifted to the University of Eduardo Mondlane. Here it played a critical role creating an independent national research capacity (the Land Studies Unit[33], still in existence today) that continued to feed high quality empirical data into the national land debate. In particular, their results confirmed the relevance and legitimacy of customary land administration as 'the' *de facto* land administration in a country with very weak government services.

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[32] See for example, Myers, Gregory, Julieta Eliseu and Erasmo Nhachungue (1993): Security and Conflict in Mozamique: Case Studies of Land Access in the Post-war Period. Maputo, Ministry of Agriculture and Fisheries, and Wisconsin, Madison, Land Tenure Centre; Tanner, Christopher (1993): Land Disputes and Ecological Degradation in an Irrigation Scheme: A Case Study of State Farm Divestiture in Chokwe, Mozambique. Maputo, Ministry of Agriculture and University of Wisconsin-Madison Land Tenure Centre, Research Paper No 111

[33] Nucleo de Estudos de Terra, or NET.

FAO already had a long presence in Mozambique, and had been working with the Ministry of Agriculture through the Pre-programme for Family Agriculture (also supported by UNDP). As part of this programme, a team of prominent national political, academic, and civil society figures was commissioned to write on 'the land question' as they saw it in 1994[34]. Another component of the Pre-programme looked at farm systems and the way local people were managing land in the apparently chaotic post war scene[35].

FAO was therefore well placed to fill the space left by LTC, and in January 1995 it was invited by the newly elected government to provide technical assistance to the Land Commission. The FAO team drew upon the farm system and land management work of the Pre-programme, and from work on customary land systems in Guinea Bissau, a country with a similar legal and political background that was also involved in a transition from a socialist to market system. The team provided overall programme direction and supervision, as well as high level international technical and legal expertise with a strong capacity building element at a time when available national capacity was weak.

Participatory policy and legislative process

The Land Commission provided a forum for dialogue where all stakeholders could voice opinions and feel included, even when their particular views were not finally incorporated. Most importantly however, all these stakeholders were involved *from the beginning* in the discussion of policy and the kind of law the new policy would require. This was not a case of government developing a law and then inviting consultation with stakeholders.

Two drafts of the new law were also circulated to many organizations, the University and others for their comments, which were duly incorporated. Strong support from the Ford Foundation, secured with help from the FAO team, paid for provincial seminars with NGOs and others, lead by Land Commission trained teams. And finally an open National Conference debated and endorsed the new Land Law Bill (*anteprojecto)* which was finally approved by the National Assembly in October 1997.

The open and democratic Land Commission[36] process gave the resulting products – the 1995 National Land Policy and the 1997 Land Law – immense social and political legitimacy. This is a hugely important feature for understanding what later happened as civil society took up the banner of full implementation, faced by official reluctance to implement the more progressive elements of the new law (see below). Today, this legitimacy is an important factor as a new debate on land is taking shape.

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[34] FAO (1994): Mozambique: Advisory Policy on Rural Resettlement and Land Tenure. Rome, FAO and Maputo, Ministry of Agriculture, Technical Support Services of Programmes (TSS-1), Report No. MOZ/92/T02/A/08/12

[35] De Wit, Paul, Nyamuno C., Shumba M., and L. Mufandaedza (1995): Propostas de Planeamento de Uso de Terra (Part 1,2). Maputo, National Institute for Agronomic Research (INIA), Land and Water Department/National Family Sector Agricultural Pre-programme, FAO-UNDP Project MOZ/92/012.

[36] See Tanner (2002) for a more complete account. Law Making in an African Context: The Mozambican Land Law, FAO Legal Papers Online Number 26.

The Policy and Legal Framework

No policy or law can give all things to all men, or women. But by involving as many people and social groups as possible, what emerged was a *law for Mozambicans,* that regulates *what Mozambicans do* (or at least, what they were doing in the mid 1990s), and which had broad social and political support.

This legal framework is still in force today. Its potential not just as a land law but as a *rural development strategy* is still appropriately summed up in the much quoted 'mission statement' of the 1995 Policy: " *to safeguard the rights of the Mozambican people over their land and natural resources, while promoting new investment and the a process of equitable and sustainable development"*.

The policy achieved these objectives by first recognising all rights acquired by customary practices as equivalent in every sense to the State-allocated DUAT. By extension, the role of customary land management systems was also recognized as part of the overall land management system. Secondly, emphasis was given to securing tenure rights for investors so that they could invest with confidence. Equity was important however – investment is welcome and needed, but it must not jeopardize local rights or create inequality, and should brining benefits to all. The rights of women were explicitly included, with their Constitutional equality with men emphasized. Lastly, the policy brought in key questions of environmental sustainability.

These principles were incorporated into the 1997 Land Law and implementing Regulations, including the key Technical Annex for Delimiting Community Land Rights. This point underlines another factor for success, namely the need to get implementing regulations into place. It took just four years to develop the new law and get the most important implementing regulations approved. This is an essential first step which both consolidates political and legislative commitment, and facilitates on-the-ground implementation by executing agencies.

The law itself has been written about extensively elsewhere[37], but it is useful to list its main features:
- 'at a stroke' it formalized the many thousands of 'rights acquired by occupation through customary norms and practices', and gives them full legal equivalence to the State DUAT;
- these rights are managed by *local communities,* with a single DUAT in their own name and which look after the many individual DUATs of community members using customary land practices and systems
- the local community mechanism effectively integrates customary and formal land law without the need for formal codification of local practices, and allows a wide range of cultural approaches to land within a single conceptual framework;

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[37] See Tanner (2002), Norfolk and Tanner (2006): *Improving Tenure Security for the Rural Poor.* FAO, Rome, Legal Empowerment for the Poor Working Paper Number 5. See also Serra (2007) for a complete and recently updated collection of land law, regulations, and other relevant legislation: *Colectânea de Legislação sobre a Terra,* Maputo, Centre for Juridical and Judicial Training. Also Quadros (2003), *Manual de Direito da Terra,* Maputo, Centre for Juridical and Judicial Training; and Calengo (2003), *Lei de Terras Comentada e Anotada,* Maputo, Centre for Juridical and Judicial Training, for more technical legal commentaries on the 1997 Land Law.

- customary norms and practices are legitimate so long as they do not go against over-riding Constitutional principles (especially important for women who are often affected by prejudicial customary norms and practices);
- community-held DUATs are managed through the principle of 'cotitularity', whereby all community members have a right to participate in decisions over community held land;
- the law *does not demand* registration of rights acquired by occupation, recognizing that local people do not have the skills or resources to do this, and that the public sector also does not have the capacity to do the job either (thus the strong legal protection accorded these rights cannot be undermined by a failure to meet other, subsequent obligations)
- the law gives private investors secure DUAT rights over land for 50 years renewable for a further 50 years, acquired by formal request to public land services and inheritable and transferable (subject to administrative consent, but they *cannot* be bought, sold or mortgaged);
- investors and others must respect local rights, and have to do a consultation (*consulta)* with local communities to ensure that the land they want is not already occupied with a community held DUAT (if it is they have to negotiate terms for ceding local rights, or sharing somehow in the use of the resource, before the government will proceed to issue a new DUAT);
- communities are given an explicit role in land and natural resources management, including determining the limits of their own DUATs, participating in the allocation of new DUATS (*consultas* etc); and in conflict resolution
- new State allocated DUATs *must* be registered, but registered rights do not overrule other rights acquired through occupation and which have not yet been registered
- when it is necessary to prove rights, apart from documentary evidence the law allows verbal testimony from community members, and other 'technical methods prescribed by law' (this includes delimitation using the Technical Annex of the Land Law Regulations);
- communities are represented by what is now called in NGO circles the 'G-9', an elected group of men and women who may, but do not have to, include traditional leaders (note that the words 'traditional leaders' or similar do not appear *anywhere* in the law or its regulations).

5.3 Key Elements in the Policy Process

War and Social Change
Equality and Gender
While it is immensely destructive, war is often credited with promoting rapid technological and social advances. Women in particular have often seen their cause advanced by decades after playing key roles in liberation struggles and doing jobs normally reserved for men in peace time.

In Mozambique the victorious Liberation Struggle ushered in an era dominated by a strong ideology of equality, building a 'new African' liberated not only from colonialism but also what was perceived of as the conservatism and limitations of traditional society. There was a strong focus on the rights and role of women in the new revolutionary society, and new forms of popular participation were introduced.

This process seeded a pattern of civil society involvement that was able to rise to the new opportunities presented 20 years later, by the 1992 Peace Accord and a new focus on multiparty and civil society participation that was an important factor in the successful 1995 Land Policy and 1997 Land Law process.

Renewed Relevance of Customary Structures
The revolutionary movement also had unexpected consequences. Instead of handing land back to the peasants, the new FRELIMO government introduced a new form of land use and occupation that was once again seen by many peasants as another 'theft of our land'[38], another imported ideology which, like colonialism, had little to do with their real needs and cultural reality. Marginalising traditional leaders seen as colonial puppets and stripping them of their power also created antagonism and drove many customary practices underground.

These measures are said by some to have contributed to the subsequent civil war, especially in the north and centre of the country which historically has always been in opposition to southern political power[39]. Traditional structures were affected in different ways. Firstly, while FRELIMO marginalized them, the RENAMO opposition gave them a strong role. Even in government areas, customary leaders exploited the weakness of local government and managed to exercise significant influence, either from behind the scenes or by occupying local government posts.

Secondly, war and the forced flight of millions of people did not destroy local customary systems, but gave them new political relevance as they responded clandestinely to local needs, and managed both the refugee exodus and the return of local people to their home areas. Instead of becoming archaic and irrelevant, when the time came to discuss land issues, they emerged as 'the' land administration for most rural Mozambicans, responding to that most modern of phenomena, civil war and refugee flight.

Economic Impact and 'Free' Land
The war, exacerbated by devastating droughts, also decapitalised an already poor peasantry and drove them off their land. This created large 'empty' areas which, under prevailing legislation, were 'free' for Government to allocate to those with 'capacity', more able to effectively use national resources. Later occupation of abandoned land and resulting land conflicts gave an impetus to land reform that also ensured it explicitly included social as well as economic concerns.

Years of war, economic collapse and the major drought of 1991-92 finally brought the two sides together. Ironically, these pressures had also resulted in a more Western-

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[38] Tanner, Christopher, Gregory Myers and Ramshad Oad (1992): *State Farm Divestiture in Mozamabique: Property Disputes and Issues Affecting New Land Access Policy, Chokwe Region*. Madison and Maputo, Land Tenure Centre, University of Wisconsin-Madison, and Ministry of Agriculture, Government of Mozambique; LTC Research Paper no 111.

[39] See Geffray, Christian (1990): *La Cause des Armes au Mozambique: Anthropologie d'une guerre civile.* Paris, Éditions Karthala. The centre of the Monomatapo Empire roughly corresponds to present day Gaza Province. All FRELIMO leaders have come from here, or have strong links with Gaza, creating a perception of 'dominance by the south' amongst northerners who feel that Maputo has ignored their needs and monopolised resources. The decentralization programme is therefore significant, as the second city Beira now has an elected RENAMO government, as does the important port of Nacala, in the newly dynamic northern economy centred around Nampula.

style form of governance and the 1990 Constitution – both key RENAMO objectives. This departure from the socialist past allowed the State DUAT to be remodelled into a stronger private right (a type of State leasehold), while also giving Constitutional guarantees for private property and rights acquired by occupation.

Exhaustion and the Search for Peace Creates New Openings
The war ultimately came to an end when both sides were completely spent, with another devastating drought removing any remaining prospects of 'living off the land' and both armies demoralised. External support had dried up with the changing geo-political climate and an end to Apartheid in sight in South Africa. But the war had provoked some major changes along the way, culminating in the new 1990 Constitution which met many of the RENAMO objectives. Thus when peace broke out – the war literally stopped overnight – a series of apparently contradictory conditions had been established by the previous ten years of violence and massive political shifts that were to be critical in both facilitating the new land debate, and shaping its outcome:

- customary structures were still strong, especially in RENAMO areas, but also in FRELIMO areas where in fact they alone had been able to respond to dire local needs
- state structures at local level were almost non-existent
- the country had almost been 'rezoned' by the war, creating an illusion of vast areas free for allocation to those with 'capacity' to use them and bring the economy back onto its feet
- the framework for multiparty and stakeholder dialogue had been created by war-induced political changes and strong international community pressure linked to development assistance and support for the peace process
- there was still a strong legacy of socialist principles and socially progressive ideals that moderated post-war calls for still more radical change, especially in the key are of land

Post-war International Community Commitment
The Peace Accord was followed by two years of strong international community 'co-government' through the UNOMOZ mission to Mozambique. Not only was full military demobilization achieved, thus removing the risk of a return to arms, but the civil side of the mission focused strongly on creating the conditions for the first multiparty elections in October 1994. This political agenda was agreed to by all parties as a cornerstone of the Accord, and gave a huge boost to the creation of a new national civil society, with new NGOs and new political parties being formed.

The elections were a complete success, and the new government, albeit again FRELIMO, now enjoyed the legitimacy of having been freely elected, while also now facing an equally legitimate political opposition in a newly invigorated National Assembly. New laws, especially laws as sensitive as a land law, could be developed by a political system that allowed democratic participation.

At the same time the international community was pouring resources into the country at a rate of some US$1 billion per year. Plans for National Reconstruction were drawn up. Macro-economic reforms intensified and were consolidated. The private sector began to find its feet. Demand for land grew, but in the positive context of a country

exhausted by conflict and desperate to make the most of what peace and stability could offer.

The presence of peacekeepers across the country was an essential element in this bigger picture, both as part of the massive programme to bring millions of people back to their home areas, and as part of the overall programme to reduce tension and remove the possibility of renewed conflict. However, the international community commitment to economic recovery and political transition was equally important in creating the conditions for the land debate that was soon to follow.

Promoting open dialogue and stakeholder involvement
The Land Commission was of fundamental importance in the Mozambican policy process, and in the legislative programme that followed it. It provided a flexible and relatively neutral space where a wide range of interests could present their ideas and discuss often difficult issues. While it was not always possible to accommodate all viewpoints, the space provided by the Commission allowed most of those who took part to feel that at least they had had a chance to contribute, and to air their opinions before final decisions were taken.

The legitimacy conferred on the policy process is a fundamental outcome of this work by the Commission, and the way it was structured and run. Free from major institutional procedures and not encumbered with excessive protocol and hierarchical concerns, it promoted discussion rather than managed it, stimulated ideas rather than imposed them, and then subjected its results to thorough public and partner scrutiny before moving ahead to the next, and ultimately final phase of its work.

Technical Assistance
The account of the land process above shows how important different types of technical assistance were for the land policy and legislative process. Firstly, the LTC programme at the Ad Hoc Land Commission exposed injustices in the State Farm privatization programme and also underlined the continuing relevance of customary land management systems. This important work continued in an independent context when it transferred to the national university[40].

Secondly, FAO technical assistance to the Ad Hoc Commission, and later 'Land Commission', proved critical for facilitating a more inclusive process and introducing new ideas into a debate that up until its arrival, had two main elements: a) the land question was a question of implementation capacity, and the existing law was more or less adequate; and b) all that was needed were some internal reforms to the existing law to bring it into line with the market economy.

Other FAO technical assistance combined with other empirical evidence to show 'what Mozambicans do' to access and use land, and supported calls by the new FAO team at the Ad Hoc Commission for a more radical overhaul of land legislation, *preceded by a thorough review of land policy*. As a neutral agent, FAO was also able to advocate for

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[40] The Land Studies Unit (Nucleo de Estudos de Terra) created at that time continues today and still contributes to the national debate on land, albeit with a weaker base since the LTC programme ended in 2001.

a more inclusive commission that also included civil society[41] alongside a larger number of government sectors.

The role of the 'right kind of technical assistance' in the Mozambican policy and legislative cannot therefore be exaggerated. It can feed new ideas into systems that are emerging out of years of conflict and are too weak to undertake radical policy reviews on their own. And when it can add relative political neutrality to capable technical skills, as was the case with the FAO programme, technical assistance teams can also propose things that national colleagues – especially those outside government – are unable to openly espouse. In this context, the background to technical assistance, in the form of a donor group united around basic procedural principles, is also a key element.

The case also shows that a UN agency such as FAO has an edge over bilateral programmes in areas of sensitive national policy. Without a bilateral political agenda to push, such as USAID concerns over land privatization, FAO technical assistance could argue that it was presenting government with the best-case technical proposal, developed by an organization of which Mozambique is also a member.

Civil Society
Post-war humanitarian relief and peace building also gave a new impetus to this process, while taking it in a direction that allowed new organizations to form without political links to the governing party. By the mid-1990s civil society in Mozambique already had a vigour and self confidence that belied its relatively short history, and once allowed into the land debate of the mid-1990s, it participated with great courage and determination in the shaping of the new law.

Civil society has played a fundamental role in the development of the current policy and legislative framework for land, as core member of the Land Commission, and as participants in all the surrounding debates and workshops that took place during the policy and legislative process between 1995 and 2000, when the final implementing instrument was put in place[42]. It has also been important in its implementation since 1997, in ways which are discussed below. Firstly however, it is important to understand why and how civil society has been involved.

Just advocating civil society participation is not enough. Other factors beyond the land policy process determine if and how civil society is in fact ready or able to participate in the effective manner demonstrated by the Mozambican example. The account above has given a brief background to the way in which civil society has grown out of early socialist models of popular participation and a serious early FRELIMO commitment to principles of social justice and equality. These were later taken and reinforced by two key processes that were not influenced or promoted by the governing party, and which in fact depended largely on externally-derived initiatives and support.

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[41] These two organizations have grown to become major forces in the civil society land and resources movement. They are ORAM, the Rural Association for Mutual Assistance, and UNAC, the National Peasants Union.

[42] Note that this does not include the recently approved Regulations for Urban Land, which were developed initially by the Land Commission but then taken over the Ministry for Public Works and Housing. These new Regulations create more questions than they answer, as they limit and undermine principles established in the Land Law (notably the key issue of acquired rights through good faith occupation), and include questionable provisions that in effect permit an urban land market.

The first of these is the emergence in the mid-1980s of the important Green Zones movement that resulted in the creation of the General Union of Cooperatives, or UGC, which is still a major force in small farmer land rights in close alliance with the National Union of Peasants (UNAC). The UGC resulted from the efforts of a charismatic Catholic priest who had helped set up cooperatives for women around Maputo and other big cities, on land that was later subject to land grabbing by a range of official and unofficial interests. Critically the UGC was never subsumed into the official FRELIMO cooperative movement, and contains the origins of an independent peasant movement in Mozambique. In 1995, together with UNAC, the UGC was a major NGO actor in the land debate.

The second NGO process to note is the emergence of many new organizations in the wave of humanitarian and early rural development projects during the two year peace process overseen by UNOMOZ. Access to UNHCR, WFP, UNICEF, OXFAM and other major international NGO funds resulted in a flowering of new national NGOs, including one, ORAM, that has since emerged also as a major force in the debate on land, and in Land Law implementation on the community rights side.

Continuing donor support direct to these NGOs has also given them the stability and confidence to grow and acquire considerable operational and technical experience, and they are not easily ignored by government. These are conditions that may be specific to Mozambique. The underlying points however is that simply advocating for strong civil society involvement is not enough – *that civil society itself has to have the capacity to get involved, in a politically independent and technically competent way.* This is not something that comes out of a Land Policy, but is rather the result of the myriad of forces that prepare a country to undertake a review of Land Policy in the first place.

Customary and Public Land Administration
The land policy debate was strongly shaped by the recognition that customary land management and administration systems were still robust, legitimate and functioned across most of Mozambique. This was in spite of years of colonialism, civil war, political marginalization, and demographic upheaval.

It was also recognized that public land administration was virtually non-existent at local level, and was mainly serving the interests of new investors seeking DUATs over high potential land. Policy makers were therefore faced with the choice of either recognizing and integrating the systems that most Mozambicans actually used to access and manage land (customary structures of different kinds across the country), or imposing a new and modern land administration that would 'formalise' land management and give people secure tenure along largely western lines, with individual titles registered in a modernized Cadastre.

Field data proved that local structures were indeed doing the bulk of public land administration at virtually no cost to the State. These systems enjoyed widespread legitimacy and were trusted by most local people. There was therefore no real choice, and both the Policy and the 1997 Law incorporated customary land management as a core element of the new legal and institutional framework. This approach had important implications:

- it allowed for the 'at a stroke' formalization of hundreds of thousands of customarily acquired land rights, now legally recognized as equivalent to the State DUAT;
- it instantly made a legally recognized form of land administration accessible to the vast majority of Mozambicans (i.e. their own cultural system), substituting for public services that were still far away and largely irrelevant;
- it required a major shift of attitude and of technical approach amongst the small rump of public sector land administrators, who were all trained in conventional northern land surveying and registration methodologies.

The Land Policy recognized this by including a specific chapter on the need to reform land administration institutions, and the task of proposing such an institutional reform was later included as the last part of the new Land Commission mandate.

While the Commission was completing its work, the need for a complete change in the public land administration was indicated in an evaluation of SIDA support to the National Directorate for Geography and Cadastre (DINAGECA) [43]. This support had initially concentrated on giving individual titles to peasant households using aerial photography and detailed surveying on the ground. The approach proved to be hugely expensive and poorly adapted to farm systems that were very different to European models. The evaluation recommended that the national training school for surveyors and topographers should change its curriculum to include indigenous land systems, and that the cadastral service should focus more on community needs in its future programming.

These points underline the fact that 'land reform' requires not just legal and other political principles to be altered and adopted, but that it also requires significant institutional reform *as part of the land reform process itself.* A failure to achieve this last objective lies at the heart of all subsequent difficulties with implementation of the 1997 Land Law, as discussed in the concluding section below.

Traditional Structures or Local Democracy?
The Government of Mozambique was in fact also beginning to recognize the continuing importance of customary structures, as part of another key policy process lead by the Ministry of State Administration (MAE) – the development of a new approach to local government.

Technical assistance again played a critical role here, with MAE advised by a team of researchers from the University of Eduardo Mondlane Centre of African Studies and American academics supported by a USAID democracy project[44]. MAE went on to produce a progressive new law for elected local government that was approved in October 1994, and which created an important political backdrop for the land law process[45].

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[43] Fourie, Clarissa et al (1996). *Mid Term Evaluation of Swedish CIDA Support to DINAGECA.*

[44] See for example, Lundin, I.B. andJ. Machava (eds) (1995). *Autorixdade e Poder Tradicional.* Maputo, Ministry of State Administration, Administrative Development Unit.

[45] This important law was later revoked by the *elected* post-1994 National Assembly on the grounds that it was un-Constitutional, having been developed and approved by an unelected government. Ironically most opposition came from within FRELIMO, where more conservative opinion was concerned about devolution of power and the

Unfortunately this law was later revoked by the newly elected multiparty Assembly on the grounds that it was unconstitutional and developed at a time when multiparty input was not possible. It did however open the way for the later official rehabilitation of traditional leaders by FRELIMO, after two decades of marginalizing them and the traditional practices they represent. This in turn resulted in new legislation in 2000 to formally create new 'community authorities', who could include traditional leaders if so elected or selected by their respective communities. Amongst other things, these new authorities are responsible to overseeing land and resource management issues, introducing an element of confusion into the still-relevant debate about who represents communities in the Land Law context.

This is not the place to deal with this issue in detail[46]. What is important here is to stress that while the Land Law recognized the validity of customary systems and rights acquired through them, it *is not a blueprint for bringing back traditional leaderships as core management institutions.* There is no reference in the law or its instruments to 'traditional' leaders. The law and regulations instead include provisions for elected groups of community representatives that must include women, and which are responsible for negotiating and signing documents related to land management under the Land Law.

Thus the 1997 Land Law is not simply a reaffirmation of 'customary' or 'tribal' structures. It *does* have a democratizing role in two senses: firstly it gives full recognition of all customarily acquired rights and gives local communities a legally mandated role in land and resource management; secondly, it provides for mechanisms that democratize local systems that can often be autocratic and undemocratic, and subjects them to the overarching primacy of Constitutional principles such as the equality of men and women.

Dualism
A major target of the 1995 Policy and 1997 Land Law was the ending of the dualist model that characterized Mozambique after years of colonial and post-Independence separation between big enterprises and the 'family sector'.

The new law effectively deals with this by integrating customary rights and other DUATs within a singly law that does not create distinct 'communal' and 'commercial' areas. All DUAT holders are legally equal, but simply get their right through different means. All land areas and natural resources can be subject to DUATs acquired through any of the three legally prescribed ways.

Nevertheless dualism is a phenomenon with very deep roots, and in Mozambique (and indeed across much of Africa) it is still evident in the bias of state services towards the private or modern sector, and a continuing public sector failure to respond to the land

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potential for pro-RENAMO traditional leaders being elected at local level. The resulting re-assertion of a more conservative administrative model made Land Law implementation more complex than it might have been had the earlier law been retained.

[46] There are many references, for example the CTC report for DfID (CTC 2003); Buur and Kyed (2006); Kyed, Buur and da Silva (2007,), that discuss the relationship between the Land Law and the authorities recognized by Decree 15/2000.

management needs of the vast majority of their clients, the rural public of small farmers and local communities.

This goes deeper than just a failure to identify and register DUATs acquired by occupation. The post-Independence land reform failed to 'reform' the colonial land structure, in two senses: firstly it imposed a socialist *management* model on an already 'dualised' colonial agrarian economy, thus preserving the skewed structure of land use and maintaining the fictitious divide between 'modern' and 'traditional (family)' sectors; secondly, in the post-1990 market economy era, it failed to remove colonial landholdings from official records, with the result that these are still treated as land units 'alienated' from local communities, and which can be offered as going concerns to new investors.

Re-allocating these old properties is a significant source of land conflict ten years after the 1997 law, as investors take over land that has long been reoccupied by local people. Principles of 'good faith' occupation espoused in the Land Law should instead apply, although local people are rarely able to argue this case or defend their acquired rights in these cases.

The bias towards the 'modern sector' is also visible in a pro-private investor tendency on the part of government, driven by another deeply rooted concept, that of 'capacity' and the need to find investors and others who can get land back into production. These points show how deeply certain concepts can be rooted, and how difficult it can be for even the best Land Law to overcome them.

5.4 Rural Development Policy

The 1997 Land Law itself can be seen as an instrument of rural development, with its focus on ensuring on one side that local rights are respected and protected (thus guaranteeing livelihoods and the resources needed for local development); and on the other, that new investment is done in such a way as to generate new resources and opportunities for rural communities and investors alike.

The *consulta* mechanism in the Land Law, together with principles such as community-private sector partnerships that can result from effective consultation processes, are central parts of a rural development policy built around the recognition of local rights, and the implementation of measures that allow people to exercise these rights in pursuit of their own development objectives.

Land Law implementation has however taken place to date in a relative policy vacuum in the sense of a wider vision and strategy for rural development. One complaint often heard of the community delimitation process (where locally held DUATs are proven and spatially recorded on official maps), is that it does not result in any real benefit for local people. Private sector DUAT holders also complain that the land use right does little to help them secure credit and that the overall business and trading environment is so complex and non-transparent that any 'rural development' based on investment is impossible.

Implementation of new land policy and laws cannot therefore be expected to have their full impact on social and economic indicators, in the absence of a surrounding

programme and strategy to provide other essential conditions for a vibrant rural economy:

- roads and other links to markets
- effective input distributions services (mainly private sector shops)
- good marketing arrangements (promoting good intermediaries, markets, etc)
- access to credit (involving banks in a participatory dialogue to develop appropriate new financial instruments as well as conventional credit products)
- access to technical assistance (both government and private)
- a solid and reliable judicial system able to police the use and abuse of rights, enforce contracts, and bring public agencies to task when they overstep the law

The department responsible for Rural Development was transferred to the new Ministry for Planning and Development (MPD) under the present government. Previously, as the National Directorate for Rural Development of the Ministry of Agriculture, and as the Institute for Rural Development (INDER, part of the first Ad Hoc Land Commission), it had relatively little power. It was however closely involved in developing participatory guidelines as part of the implementation process for the new Local Government Bodies Law of 2002, and in that sense has been addressing some of the issues that are central to the Land Law.

Over the last three years the new department in MPD has been developing a rural development strategy which was finally adopted in early 2007. Unfortunately the new strategy makes little explicit reference to land issues, and does not make use of the Land Law or the use of land rights as core mechanisms to promote a locally based and equitable development process. The need to avoid this error is an important lesson to be drawn from this review of the policy process.

5.5 Implementation

With a new law built upon wide stakeholder participation and a solid analysis of what Mozambicans actually do to manage their land, it would be logical to assume that implementation would be relatively straightforward. This has not been the case however. The 1997 Land Law has enjoyed huge popular legitimacy since it was approved, but has failed to achieve its full potential as an instrument for securing rights on the one hand, and bringing local people fully into the rural development process on the other.

This is not to say that it has been a failure – far from it. A recent report underlines its success in several key areas before going on to critically evaluate whether a change in direction is needed. These areas of success include:

- preventing or at least significantly slowing down a major rural-urban exodus that would have resulted from unchecked land grabbing and other processes that were underway in 1995;
- ensuring that local rights are at least now always taken into account when new projects are planned and new DUATs are to be allocated
- the use of the community consultation mechanism in practically all new DUAT requests, also underlying the fact that local rights do need to be taken into account;
- a significant improvement in the investment climate in the first five to eight years especially, as investors began to understand that the DUAT, if well implemented

and backed by existing legal guarantees, does offer secure conditions to invest and achieve the returns they want.

However, other indicators are not so positive. There are clear signs of land concentration especially in the best areas of fertile land or with high tourism and other use potential. Community consultations are usually poorly carried out, and do not focus on the development and local equity aspects of the new investment, but on securing a local 'no objection' to new private sector DUAT requests. Land administration practices are long, complex, and often non-transparent, with many areas where 'discretionary practices' and inefficient bureaucracies encourage corruption.

Most importantly the key community rights elements of the law have not been implemented with any real commitment by government. Responsibility for this has been left very much to civil society, with support from sympathetic bilateral donors. The result is that official records are highly skewed, and mainly only contain information on the several thousand 'private sector' DUATs awarded directly by the State. Large areas of Mozambique still appear to be 'empty' when official maps are consulted by investors, and local rights remain extremely vulnerable to land grabbing or 'elite capture' by individuals and entities that know how to use and manipulate official structures.

The failure to reform the existing land administration is a large part of this problem. The previous DINAGECA, now reformed to include Forest and Wildlife under a new National Directorate for Land and Forests (DNTF), has its roots in colonial times when it responded mainly to the needs of an urban (colonial) elite who needed formal land surveying and titling services. Until recently little had changed in this respect, except that the urban elite is now comprised of a new national middle class and politically powerful interests, and a small but growing number of foreign investors and firms.

The institutions implementing the new law have had little training in the new methods needed to put it into practice, and the recommendations of the 1996 SIDA evaluation have gone largely unheeded. Arcane procedures frustrate investors and communities alike, and accusations of corruption and a lack of transparency are frequently heard.

Civil society has played an impressive role, dating back to the late 1990s when a major national movement was organized by Professor José Negrão and a large group of national and international NGOs. The Land Campaign took six basic 'Land Law Messages' out to hundreds of communities and at least ensured that local people had a very minimal appreciation of the new rights the new policy and law have given them. This campaign was successful up to a point, and where strong NGO programmes have continued to implement the law in practice, local people are aware of their rights and what they can with them. In many areas however this is not the case, and local people remain vulnerable and unable to use the real powers and rights given them by law.

All these points underline the need to include a 'post-policy' strategy in any Land Policy process. It is not just about principles and politics, but about ensuring that these principles are put into effect. Often this requires a thorough review of existing institutions, both in terms of their structure, accessibility, and methodologies and training. Unfortunately however such institutions are often very conservative, and very resistant to change. In many cases a decision to leave them unreformed is a clever way

for more conservative elements in a society to resisting the more progressive measures proposed by a new policy or land law. This is an important lesson to draw from the Mozambican case, where in the main it is civil society with independent donor backing that has been largely responsible for the relative success of the 1997 Land Law to date.

5.6 Evolving Land Policy – A Constant Reform

Ten years after the innovative 1997 Land Law, Mozambique is a very different place with a rapidly growing private sector based economy. To quote one recent report:

> *'Many now believe it is time for a fresh look at land and resource policy. Large areas of arable land are not being used, and government and donors alike want to see more investment in land and forest management. Some argue that not allowing private property rights over land is holding things back, making it impossible to use land as collateral for securing bank credits. Others point to the fact that local land rights are still vulnerable to capture by more powerful interests, and that poor implementation of existing laws and uncontrolled development are undermining the sustainable use of precious natural resources and exacerbating the impact of global warming. It is therefore a good time to ask if the land and natural resources policies and laws of the mid-1990s are still appropriate for Mozambique in 2007 and beyond.'[47]*.

The report analyses a wide range of national opinion to answer this question. It concludes that in fact the 1995 Policy and the 1997 Land Law are still entirely appropriate for the conditions of Mozambique today, and reveals clearly that there is a broad social consensus in favour of maintaining the law as it stands. A recent Commemorative National Conference to celebrate 10 Years of the Land Law also underlined this point.

The report does identify the need for some changes at the regulatory level, so that the DUAT can be used more easily as a form of collateral. This implies its marketability in some way or other, and if this can be achieved while maintaining the other focus on protecting local rights, both local people and investors stand to gain from the new opportunities presented by a growing market economy.

The need for much more effort on civic education is also stressed however, so that Mozambicans at all levels can exercise the rights they have, use them for their own development, negotiate with government and investors, and, where necessary, defend their rights in the courts. This last point underlines a further aspect of 'land policy' development that is often overlooked: the need to ensure that the judicial and other supervisory systems are fully on board, trained and equipped to be able to ensure that rights under law are respected and upheld. In this context there are important new programmes in place already to deepen the process of civic education, and to make people more aware not just of the fact they have rights, but also of how to use them and to defend them.

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[47] Calengo, Monteiro and Tanner, 2007:1

FAO is again at the forefront of this important work, with a programme of community paralegal training complemented by interactive seminars with key district officials that focus on issues of rights, gender issues, and Constitutional guarantees of the rights of citizen and investor alike[48]. Once again, the relative neutrality of the organization is an important element in generating the confidence and trust of all the different interests touched by this programme. A Conference to commemorate ten years of the 1997 law is also supported by this project, underlining the point that in fact, there is never an end to land reform.

With this in mind it is worth noting that the other main conclusion of the report cited above is that the Mozambican government should consider creating a new Land Commission type of body to ensure that whatever changes do come out of the new debate on land issues, have the level of legitimacy and widespread support of the 1997 Land Law. Only in this way will the complex range of interests have a voice in what is proposed, and only in this way will the resulting proposals satisfy legitimate investment needs while avoiding seriously harming the legitimate rights of a still vulnerable Mozambican population.

This would seem to be a simple but essential lesson to draw from the Mozambican case as a whole, and it is logical to expect that a country that has used this model successfully would quickly resort to it again as it grapples with the challenge of keeping policy up-to-date and responsive to the many needs at local and national level. Recent developments however suggest that the Mozambique of the early 21st Century is not so concerned to ensure an inclusive process, as land policy and related legislation comes under closer political scrutiny.

The case of the recent Urban Land Regulations is one example, where the provisions in effect undermine key principles of the Land Law that safeguard the rights of millions of squatter (´good faith occupancy´) households, and open the way for a *de facto* urban land market. There are other new pressures that were scarcely thought of in the mid 1990s, notably a new Government policy and strategy for a ´Green Revolution´[49] and a major new policy focus on biofuels. There is an evident return to a belief in the efficacy of large production units, and the biofuel movement especially requires access to very large areas for investors.

In this context Government of Mozambique is evidently concerned about the way the Land Law gives DUATs over large areas to local communities[50], and is attempting to restrict this right through apparently minor changes to the Land Law Regulations. A recent amendment to one article makes little difference to legally acquired rights in strictly juridical terms, as these are established by the over-arching Land Law, but the regulatory change will give the Council of Ministers *de facto* control over the way in

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[48] At the Centre for Juridical and Judicial Training (CFJJ) of the Ministry of Justice, with Netherlands Government support.

[49] Government of Mozambique (2007). *Conceito, Princípio e Estrategia de Revolução Verde em Moçambique.* Maputo, Ministry of Agriculture

[50] www.portaldogoverno.gov.mz/noticias/news_folder_politica/outubro, 2007. In a statement on the official government website, the Minister launching the regulatory change commented that provincial governors have been ´allocating vast areas to the communities´, and that the new measure will ´simply impose more rigour on the allocation of land´.

which local community and other rights acquired by occupation are recognised and registered.

The way these changes are being introduced shows how countries with a record of strong participatory policy making can quickly shift gear and return to a more orthodox, centrally directed approach. There was virtually no public consultation before the recent regulatory change, and it remains to be seen if the broad consensus over land management continues as communities see their rights restricted or even taken away.

All of this begs the question: if good models are not used in later policy processes by countries where they have been tried and tested, what chance in other places? For this reason it is important to analyse the various elements that support one type of policy process over another, and present future policy makers, legislators, and funding partners with a ´tool kit´ of ´things that work´, rather than a prescription model that *might* guarantee the ideal inclusive policy process that took place in the Mozambique of the 1990s.

5.7 Policy Development Lessons Learned from Mozambique

The Mozambican case underlines the importance of an inclusive and participatory policy process, which then forms the bedrock of subsequent legislation. In an area as sensitive as land policy and land law, it is essential to do things this way around – policy first (if possible with a high level of consensus and social legitimacy), then the law.

The successful process in Mozambique was no accident however, and resulted from a set of conditions that in many respects were not only unique to this country, but also unique in relation to the particular historical moment at which the 1995 Land Policy began to be shaped. Nevertheless, identifying the specific characteristics that allowed the successful policy and legislative process to move forwards can provide other countries facing similar challenges with a good set of potential policy development tools.

With this in mind, specific factors that enabled and shaped the Mozambican case are:
• a civil war that created a rural landscape in which features such as abandoned land and seriously weak public services later fed into concerns about land grabbing, and provided a huge impetus for some kind of post-war 'land reform' as a condition for maintaining the fragile peace and future stability;
• a civil war which also drove a political process that ushered in political reforms and a market economy – giving new value to land and opening the way for constitutional revisions that facilitated multiparty and stakeholder involvement in the later land process;
• the national commitment to the new market economy and pluralistic political system made Mozambique a favoured recipient of western donor support, supporting the economy and livelihoods at a critical moment of policy development and political consolidation;
• the fragile post-war constellation of political and social forces was also (therefore?) effectively managed by UN peace keepers, and created the conditions – through a

huge relief and humanitarian programme – for new civil society organizations to form and gain experience;

- while donors had divergent views on the *content* of a new policy and law (especially regarding land privatization), they united around the need for democratic and inclusive *political process,* making it difficult for government to 'divide and rule' and risk losing massive financial and technical support for reconstruction;

- separate externally funded programmes created a key independent research capacity that contributed field data to convincingly show (reluctant) government officers how important customary rights still were, and how customary systems were managing most basic resources;

- the underlying and positive social philosophy of FRELIMO was able to counteract pressures for more radical change (such as introducing private property in land);

- in spite of the political dominance of FRELIMO, there were no specific power groups within Mozambican society that were able to drive the land debate in a particular direction;

- 'the right kind' of technical assistance, both national and international, played a key role

- lastly, successful policy development is often a question of personalities – specific people being present at the right time – and this is not something that can be easily planned for in a 'policy process';

It is an open question as to whether the Mozambican case would have gone the way it did without the presence of FAO as honest broker. There is clear evidence of government attempts to restrict participation at certain points along the way[51], and FAO, as a politically neutral but technically strong mediator and facilitator, was able to advocate for an inclusive Land Commission and bring in new ideas to a receptive and broad group of commission members. *This is a critical 'lesson learned', and shows the importance of politically neutral but effective UN technical assistance in post-conflict situations.*

The inclusive and participatory Land Commission subsequently proved to be an essential element in the success of the Mozambican policy process. But simply advocating a Land Commission is not enough – a range of other factors have to be present to ensure that this commission is genuinely open to new ideas, prepared to listen to all social and economic groups, and adequately supported politically. This point is underlined by the success of this body in the mid 1990s, and the difficulties with Land Law implementation in the absence of a similar body since then.

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[51] Personal communications between the FAO team leader and the LTC Technical Team Leader, Scott Kloeck-Jenson, confirmed by committee members from civil society and the University.

6. Lessons learned for land policy development

6.1 Diversity of policy objectives

There are many reasons for initiating land policy reform, and these depend to a large extent on the prevailing national political environment, regional initiatives and international trends. Perhaps the first thing to see in these cases studies however is that the 'the land question' is never 'solved', but merely evolves over time as political and social (and now environmental) objectives change. Recent events in the Sudan where the CPA threatens to unravel, and attempts by the Mozambican government to make subtle but potentially profound changes to its landmark 1997 Land Law underline this point.

It is evidently not possible to prescribe a good land reform, based on models developed in specific countries – each country will develop the land reform it wants, subject to prevailing political factors and other pressures. It is useful however to look for what might be called ´essential conditions´ that should be present if a land reform or policy process is to be considered ´successful´, if we take this to mean having a positive impact on social equity, the livelihoods of the poor, and longer term political stability and peace.

´The´ objectives in a land policy may or not include ´reform´ *per se,* but they should reflect a broad consensus about what is needed, and respond in some way to as many of the perceived needs that exist in any society at any given time. Evidently it is impossible to please all the people all of the time. But a good policy should attempt to go as far in this direction as possible.

To do this it is essential to create an enabling environment that allows all needs to be placed on the table and to be considered by the policy makers. Needs will change over time and may require new policies at some later date. But the underlying approach must be the same if new approaches are to respond to new needs, and be supported by those who will have to implement the new policies and laws. Governments seeking to manage such change must ensure that appropriate mechanisms are in place to ensure that stakeholders feel included and ´listened to´ as the policy debate evolves.

In all three countries, the framework in which land reform has happened has in fact changed drastically over the last 30 years or so. African reforms in the late seventies and eighties were driven by a strong national, often socialist-inspired vision of the State as landowner and land manager, with considerable if not absolute powers. ´Rural development´ meant using large tracts of land for state farms or huge development schemes, with rural people seen mainly as workers. Outside these massive enterprises, communal villages were created where local people were organized to produce for a state run economy, and marginalised smallholder production was tolerated rather than supported.

These extreme top-down reforms considered land solely as an economic asset, with the state as the exclusive beneficiary. Behind even these reforms, however, stood a range of social and political objectives. In Mozambique, social objectives *were* part of the process from the outset. The early post-Independence strategy sought to place the means of production at the service of the people, and creating a 'new African' was an

explicit goal. Reforms were intended not just to boost production, but also to marginalize and replace customary as well colonial land management and administrative systems.

The post-war era saw a radical shift to a market economy and political pluralism. The 1995 Land Policy was developed in a far more inclusive way, and the resulting land management model is decentralised and attempts to respond to a wide range of interests, at local and national level. The result was a policy with clear social objectives, and which still enjoys widespread legitimacy and popular support. Yet behind its concern to secure the ´rights of the people´ and promote equitable and sustainable development, the underlying goals have not changed much from the 1980s - national development and ending poverty.

The regional and international context is also important for national land policies. Initiatives such as NEPAD are underpinned by an unquestioning acceptance of globalisation and neo-liberal thinking, and identify the private sector, and especially foreign investment, as the driving force of development. NEPAD also supports the development of national entrepreneurs, to create home grown capital. Many of these people need land for their projects. This has huge implications for land policy and the way in which it is implemented.

All the case studies reflect this to some extent, with measures designed to attract private investment. In the case of Burkina Faso and Mozambique, mechanisms are included in the law to ensure not only that investor capital is secure, but also that community rights and participation can be guaranteed, through mechanisms such as the consultation process between communities and new investors. Available evidence indicates however that these *consultas* in Mozambique are poorly carried out in most cases, and that the goal of ´equitable´ use of land resources is far from being realised. The "PV de palabre" plays an important role in the transfers of land rights between customary land rights holders and new actors from the private sector.

The overall trend towards private sector domination of the rural economy is evidently a powerful force that can ´bend´ implementation in practice and weaken the more progressive elements of the even the best and most inclusive policy process. Other sectoral, fiscal and commercial legislation can also shape the ´real policy environment´ in a way that restricts progressive land management in order to facilitate access to land and natural resources and secure rights for investors. In this context the issue of ´objectives´ becomes intimately linked to the emergence of new groups with new economic and political power, upsetting the socio-political balance that may have existed when the more progressive principles of earlier laws and policies were debated and agreed.

Land policy ´objectives´ then become strongly influenced by other visions of how economies and enterprises work. Bold principles might be laid out in a land policy, but if the underling economic model is one based on private sector investment, it is this model that will determine how land policy implementation will take place in practice. Mozambique today is a clear case in point. The government of Southern Sudan seems to face real challenges to turn their land policy objective "land belongs to the communities' into a reality under increasing pressure to create a more enabling

environment for private sector investment rather than for protecting the legitimate rights of rural communities over land and natural resources.

Another perception that is clearly linked to the market economy model is the widely held view that commercial and financial institutions require some form of private titling to use land as collateral for accessing credit. Land policies and laws then provide instruments that award individual titles over land, either as freehold ownership, or through some form of secure leasehold or use right. This process inevitably comes into conflict with local interests, especially where the relative power of local and external interests is very unequal. The ratification of the OHADA treaty by Burkina Faso for instance has created doubts whether the national practice of using land use rights (such as permis d'exploiter and a bail emphytéotique), and not land ownership rights, as a collateral for a bank loan, will continue to be accepted by commercial banks. The main objective of OHADA is to regionally harmonize commercial/trade law in Africa. It suggests that mortgages can only be issued on the basis land ownership titles, although commercial banks in Burkina have a tradition to accept other land (use) rights for this purpose. Again citing the Mozambican example, it *is* possible to regulate this process to ensure that local interests are not ignored, but this requires a range of strong implementation measures and reformed institutions to be in place – a tall order for most countries.

The case studies also show that having individual freehold title´ is not always necessary, however. Burkina Faso demonstrates that land ownership is not the only way of using land as collateral, and is not essential for getting access to credit for smallholders. The Angola land law [52] includes provisions for community land to be considered as collateral for access to commercial bank credit (art. 37. 8). It is not yet clear however how this will be dealt with in practice. *The* critical factor is that the State must be able to guarantee *in practice* the rights accorded to all land users by law. Only then can investors – big and small, entrepreneurs and communities – make financial and longer term plans with confidence in the fact that the parameters shaping their long term vision *will not change.*

The Mozambican state leasehold – the DUAT – is a private and exclusive right that can last for up to one hundred years. Provided the state can guarantee this right, and the right of investors to recover their investment when they pass on their land use title, full ownership is not a necessary condition for credit. Banks are beginning to work within this framework, but they want to see a more transparent business environment and a government commitment to the rule of law, where contracts and other guarantees have real meaning.

New agendas
Land policy objectives are also influenced by new agendas that were not even thought of several years ago. In most countries the traditional mantra of producing cash crops for export is now being joined by the rush to produce bio-fuel crops. These crops demand very large areas of land, and local rights are instantly at risk as governments seek to jump on this new bandwagon with the justification that substituting hydro-carbon derivatives is both in the national interest *and* contributes to the battle against

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[52] Government of Angola: Lei de Terras n 9/04 de 09 de Novembro

global warming. Other new industries are also emerging to shape the policy agenda, notably tourism and mining.

There is no doubt that bio-fuels can and should give a new impetus to the development of agriculture, bringing new jobs and helping to alleviate poverty. The three case studies show how they are already beginning to affect and drive land policy in some places. The issue is then to be clear about what other objectives are affected, and decide if new measures are needed to ensure that they can be maintained, or if they should be set aside in the interest of some greater good.

Two such objectives are food security, and environmental sustainability, today given greater urgency by the new climate change debate. Land policy changes to provide land for bio-fuel projects might be justified because they address climate change – producing eco-friendly fuels – but there are fears that food production will be adversely affected, especially for smallholders who lose their land. Even the climate change argument can be challenged, if EIAs and other measures are set aside in favour of some grander goal of national development.

´Equitable development´, food security, sustaining and strengthening local livelihoods, are all key policy objectives that should continue to influence the land debate and land policy. All tend to take second place alongside economic and ´national interest´ objectives, and those who support these ´softer´ objectives will probably have to fight to ensure that they remain at the heart of any land policy debate. And even if they succeed, a commitment to *achieving* such softer objectives in the context of a dominant economic (often elite) agenda still requires strong governments and implementing institutions.

All of these developments put ever more pressure on rural communities, who risk losing all or the best parts of their natural resources base. The case of the Sudan is a salient one here, where pre-conflict land allocations by government to large commercial enterprises were a major factor in fuelling the bitter civil war, and where a failure to resolve this kind of pressure still threatens to undermine the fragile peace accord. Commercial occupation of huge areas in southern Angola is another good example, where the livelihoods of hundreds of pastoralist communities are directly threatened, promoting dissent and tension at a time when the focus has to be on peace and reconciliation.

A Raft of ´Higher Principles´
There is a growing awareness of the need to set economic development policy upon a raft of ´higher principles´, such as equity and natural resources sharing. Instead of states taking over local land and giving it to investors, the notion of negotiated partnerships between rural populations - organized in communities or other forms of common interest - and private sector operators is taking root. This approach can still substantially contribute to the national economy, *and* has an important conflict prevention dimension. Land reform in this context must create an enabling environment for inclusive rather than parallel rural development, built upon principles of dialogue and negotiation.

When the objectives of land policy reform are clearly spelled out in this way, countries are in a better position to devise legal, institutional and technical measures for its

implementation. Burkina Faso is a good example, compared with Southern Sudan where a land law is being devised in the absence of a shared vision about the wider raft of ´higher principles´ and the long term development model. Mozambique also shows how ´higher principles´ can shape successful policy development, but also provides a warning about how, in the absence of a commitment to continued participation and dialogue, ´real land policy´ begins to take the place of ´the land policy´ as society develops and new powerful economic interests drive the national agenda.

Meanwhile, while the policy debate goes on, in many countries the reality is that there is a woeful lack of complete and accurate registration of all existing rights, whether held by communities, good faith occupants, or private title holders. This underlines the need for effective and honest land administrations even where progressive national laws 'at a stroke' formalise local customary rights and do not oblige all uses to register their rights. Much can also be done in a sort of ´pre-policy´ context to ensure that local rights have some minimal level of protection, through efforts to strengthen community organisation, provide even informal documentary and maps of local rights, and strengthen local capacity to engage in the policy debate.

Embedding policy development in other processes
Setting land policy development within other reform processes is a good way to ensure that a ´raft of principles´ does indeed create more favourable conditions for achieving some degree of sustained success. Comparing Burkina Faso with Mozambique shows this well.

In Burkina Faso the development and implementation of the new land policy occurs in an environment where the state is fully engaged in the decentralization of government down to the regions and the commune level (communes rurales et urbaines). As part of this policy, the rural commune councils will be supported by specialised Rural Land Services to exercise their functions as decentralised land managers. Village Development Committees are elected to exercise some form of governance at the lowest level, while acting as an interface between the rural populations and the communes. These committees include rural land commissions) to deal with land management and to support the functioning of land administrations. At the same time, government is deconcentrating land administration functions to regional and provincial level. This twin track approach creates synergies between the different processes, resulting in a more enabling environment for land policy implementation.

Many would argue that the implementation phase of the land policy reform in Mozambique has been deprived of these synergies. Indeed a landmark local government law that would have provided an excellent supporting environment for the new 1997 Land Law was subsequently revoked as unconstitutional by the new democratically elected Assembly. Local governance was subsequently introduced very gradually and in a very controlled way, focusing on a limited number of urban municipalities and without a direct link to the land tenure reform process.

Devolving land administration functions to district level has also been slow, and covers only a restricted number of areas. The state land administration service is also only present in a handful of rural districts, where all technical services then have to be provided by the provincial service which is often many hours of difficult travelling away. Reforms to formally recognise ´community authorities´ (who are often

traditional leaders, especially in rural areas) and give them a role in land and resource management, have also weakened the more progressive elements of the Land Law. The role of the elected community group known as the G9[53] has been downplayed as public services now consider it sufficient to work only with the new community authority, taking decisions that do not enjoy widespread support and often resulting in conflict[54].

Set against the backdrop of rising demand for land by those who *can* easily access state land services – mostly urban based interest groups – this failure to provide a more decentralised and locally responsive land administration has contributed to a rather unbalanced, slow and only partial implementation of the land policy package. It has also favoured land access by these more urban-based interests at the expense of local rights, and the potential for a more equitable process of land rights allocation that brings real benefits for local people is also lost[55].

6.2 Land Policy and Peace

In an increasing number of African countries, violent conflicts are directly related to the competition for access and the use of land and natural resources. The examples discussed in this paper show how important it is to start from a more comprehensive approach to land policy reform. Peace and the long term stability that is essential for ending poverty are both at stake.

The apparently unending wave of crises and armed conflicts on the continent often involve parties that are in competition for the same land and natural resources, and it is increasingly evident that land policy and land management are intimately linked to social stability and conflict management. In countries where violent conflict has already occurred, such as the Sudan, Mozambique and Angola, addressing historic grievances and injustices, responding to local needs and restoring historic rights, are as essential to land policy reform as economic goals.

All of these countries initiated their land policy reforms with social stability clearly in mind. The case of Burkina Faso in particular shows how policy reform can be tailored to prevent disputes over land spilling over into conflicts that may again escalate into violence. Social stability was also uppermost in the minds of Mozambican policy makers and politicians in the post-war period, when millions of refugees were returning, and uncontrolled demand for land directly threatened their acquired customary rights.

Making land policy reform part of the different peace agreements in Sudan has ensured that it at least stays on the agenda. This is essential in a situation where the public demands reform, but the government(s) are reluctant to engage. As the UN is monitoring the implementation of the Comprehensive Peace Agreement, it now has a

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[53] G9 refers to a group of 3-9 people who are chosen at the community level as representatives of this community to exercise a legally defined function in the process of community land delimitation. This concept is conceived as part of the Technical Annex of the Regulations to the Land Law.

[54] CTC report, 2003:91; also Tanner and Baleira, 2007

[55] Tanner and Baleira (2007)

tool in its hands to remind policy makers of commitments made during the peace negotiations.

Post-conflict policy - time and process
Injustices tied to land are often a root cause of conflict, and when past injustices are not addressed, it is difficult for post-conflict peace building to be sustainable.

Issues of access, control and transfer of land, property and natural resources are multi-dimensional and need to be tackled in different ways during the different phases of a post-conflict situation: emergency, recovery and development. Figure 1. displays the different needs for intervention for the post-conflict period[56]:

Figure 1. The phases of addressing HLP issues
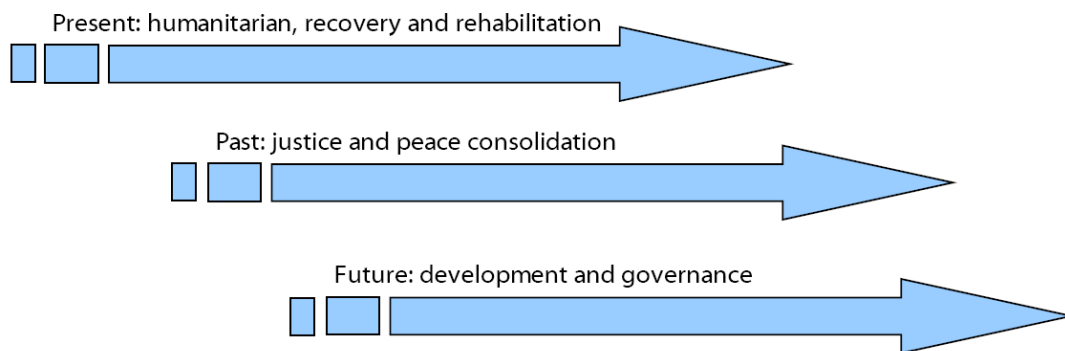
The challenge ahead can be summarized as follows:
> *"Dealing with past injustices to establish a sound basis for the future while providing temporary solutions for the present."*

Dealing with the present and the future requires the same enabling policy, legal and institutional framework. However, 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.

It is important to get things right from the start and certainly not to promote short-sighted solutions that may jeopardize longer-term development. All immediate and mid term corrective, preventive and retentive land and property related measures that are envisaged to facilitate the conflict transformation process need to be streamlined with an overall developmental vision and policy which is often missing in chaotic post-conflict situations.

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 specific issues that were set aside or ignored before the conflict and may then have been a direct cause of it. The Sudan case

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[56] Adapted from 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.

shows this well. A major task 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.

Post-conflict situations also provide new opportunities for new social forces to coalesce and gain experience, particularly if there is a strong external presence guaranteeing not just the peace, but also the conditions needed for civil society to emerge onto centre stage. Mozambique is a good example.

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. The Sudan case shows that an early assessment is essential to including land and property issues in the peace negotiations and consequently in the peace agreement. This will remain always a solid reference for securing that outstanding land and property questions are effectively addressed by post-conflict governments, even when genuine political will to do so fades away during implementation of the agreement.

Other specific actions that can be taken include:
- Awareness creation and information dissemination on land rights for IDP and refugees;
- A model for legal aid and counselling for displaced people and returnees;
- Research into customary law and its continuing legitimacy and role;
- Inventory, assessment and research on statutory law, land issues, nature and dimension of land disputes, others;
- Transparent and coherent measures and procedures to provide secure temporary access to land for returnees;
- Different mechanisms of expedient land dispute resolution;
- Support to emerging land administrations; and,
- Direct support to women-headed households to provide access to land.

Addressing the past: justice and peace consolidation
The single most important element for justice and peace consolidation is how to deal 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 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. 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; and,
- Capacity building to enforce decisions made on restitution, on compensation or on any other matter decided upon by the claims bodies.

Protecting rights lost or apparently abandoned during a conflict involves very similar measures. In the first instance it is essential that the existence and continuing legitimacy of these rights is recognised by whatever formal post-conflict administration exists. Measures can then be devised that give some form and substance to these rights, and protects them in the immediate post-conflict situation while more longer term solutions are found to the land policy challenge.

Preparing the future: measures to promote rural development and good 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 such as Mozambique, tourism is becoming increasingly important for the national economy, and this also tends to rely heavily on access to the best land and natural resources, especially in coastal regions or near national parks.

Over the past years FAO has taken major steps 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 Figure 2[57].

Figure 2. Framework for addressing land and natural resources management

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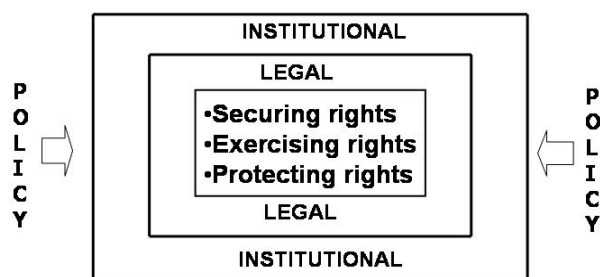
[57] Adapted from Paul De Wit, Massimiliano Bellini and Jeffrey Hatcher "The FAO land programme in Sudan: From emergency interventions to sustainable development", in the Land Reform, Land Settlement and Cooperatives Bulletin 2005/2, FAO Rome.

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:
- securing rights,
- protecting rights,
- exercising rights.

The protection of land rights can include specific provisions to address conflict management, such as in Burkina Faso, or in the CPA proposals of Sudan. A number of countries such as Mozambique have put major emphasis on recognising and securing land rights acquired through customary ´norms and practices´, or customary rights. Countries such as Ghana include the exercising of land rights – using land - as an integral part of the land policy, whereas in other countries like Mozambique, land use is subject to a range of sectoral controls and laws including environmental legislation.

Land use and/or territorial planning may also be part of a land policy and land law, or treated separately. Both issues are addressed together in Burkina with the RAF. In Mozambique, land and territorial planning policies and laws have been separated, but a new Territorial Planning Law includes clear references to guaranteeing acquired land use rights. The new law also addresses weaknesses in the land legislation, for example by providing much stronger guidelines for determining ´just compensation´ if the state revokes their legitimate rights.

6.3 Securing land rights

Securing rights to access and hold land is the key to the land policy debate. The objectives for securing land rights may differ and are not always clearly spelled out in policy documents. The securing of land rights is often accompanied by political rhetoric about social and other principles, but at its heart the issue is normally placed squarely within the prevailing economic framework of any given country. As such, land access and secure tenure are subject to a range of pressures from more and less powerful interest groups with often contradictory agendas.

Access to land is normally secured to promote the investment of land users in rural areas, consequently resulting in increased production, and contributing to achieve overall goals such as poverty reduction, macro-economic growth. Access to credit is often a critical question in rural areas, and many people – particularly those who

espouse a neo-liberal market economy model – believe that this requires land to be used as collateral. This in turn requires appropriate legally defined rights that can be guaranteed by the state, accompanied by proof of holding these rights, whether freehold or leasehold. Indeed some land policies only consider this particular issue – the need to create an enabling environment for the titling of individual land ownership in order to gain access to credit from commercial banks.

Of course this vision only responds to one set of reasons for securing land tenure in rural areas. It ignores the fact that the beneficiaries of land policy are not just the privileged group of economic entrepreneurs who want private rights, but are also the smallholders who are usually the majority of the rural population and who often contribute more to the national economy than the entrepreneurs, probably for the foreseeable future. The credit-driven approach also fails to take into account that secure tenure has implications far beyond the economic dimension in most countries, with aspects of livelihoods, social peace, conflict prevention, and environmental degradation becoming increasingly important. A broader view of secure tenure is needed, embracing all beneficiaries and the various reasons why it is a good thing to have.

More thought is required on the different options for securing tenure for different land users. Beyond any doubt a major achievement of the last ten years or so is that most stakeholders now agree that a common thread of policy reform is the need to close the gap between legality and legitimacy. ´Legality´ normally characterises those land rights that are acquired through some form of state involvement – using a specific law and formal institutions that administer land access through services such as cadastre and land registries. The relative ´legitimacy´ of these rights resides in a set of power relations that may or may not have popular support, but may be ´legitimised´ by formal processes such as parliamentary approval and Constitutional instruments. It may also be backed up the threat of force, or at least some control over the ´legitimate´ forces available to the government and its backers.

The colourful pallet of customary land rights acquired through customary norms and practices have a far less secure sense of ´legality´, but at the local level at least they are strongly ´legitimate´, being rooted in a social and cultural consensus over ownership and use built upon longstanding norms and practices (or in other words, customary laws). These rights are not new or prescribed but are historically acknowledged by local people, and are managed by local institutions, often with the direct participation of customary leaders. Exercising and defending these rights often places their holders in conflict with those who hold ´legal´ rights, and the issue of power relations and the control of force and other institutions – even the judiciary – then plays a strong role in determining with the ´legal´ or the ´legitimate´ emerge as victorious.

Bringing these two world views closer together is perhaps the major land policy challenge facing African leaderships today. All the case studies underline the need to try and achieve this blending of the formal and customary worlds, so that the resulting policy is seen as both ´legal´ and ´legitimate´ by as many people and socio-economic groups in the society. Mozambique and Burkina Faso offer good examples of s the best case scenario, although implementation problems in Mozambique show a clear tendency on the part of the elite to question the ´legality´ of the ´legitimate´ rights recognised and given substance by the 1997 Land Law. The Sudan on the other hand

reveals a complex fabric of interwoven views regarding what is legal and legitimate, for the different sides that have signed the CPA and are in principle trying to make it work.

Customary land rights

There is now consensus that the legal recognition of existing customary land rights is a major step towards securing land tenure for most rural people. The case studies presented here all confirm this in their different ways, with other countries also trying out different tools. Ghana simply recognizes existing customary rights as being the same as any other right, while in Burkina Faso they are transferred into different categories of statutory rights. Mozambique does not recognize customary rights as such, but declares in its land law that occupation and use according to local norms and customs is one way of acquiring the state land use and benefit right, the DUAT. Thus customary rights are legally formalised ´at a stroke´, which is widely seen as one of the major advances of this progressive legislation.

Rights acquired by occupying land in good faith are also important in post conflict situations where displaced people have occupied land for long periods without being challenged by other rights holders. Mozambique and Burundi both include measures to recognise and protect these rights.

Some West African countries have tested measures to recognize a wider array of customary land rights. These are underpinned by a holistic approach developed under different, more varied settings that consider internal migration and pastoralism as important elements (for example the Plan Foncier Rural in Burkina Faso, Benin, Côte d'Ivoire). Mozambique recognises a community held right that can also encompass a wide range of land uses. Within the so-called ´local community´, the customarily acquired rights of individuals and smaller groups within the community are also simultaneously addressed and given legal protection – effectively bringing together legality and legitimacy.

An essential part of legal recognition is to make customary rights visible. It is then more difficult to ignore them when other interests want to access and use local resources. This implies delimitating, mapping and registering these rights. Without this, they may be recognised in law, but remain vulnerable to capture by more powerful groups. The haphazard implementation of the Mozambican land law since 1997 is an excellent example, where a failure to register the majority of customarily acquired rights has still left them exposed and vulnerable to capture, especially in an era of rapid growth and rising demand for land.

There is also agreement about the need to address land and natural resources rights within common tenure regimes. Secured access to common tenure property is essential for exercising the livelihood strategies of most African rural populations, especially poor and vulnerable groups and including pastoralists. Livelihood strategies of rural people embrace principles such as opportunistic use, mobility, and risk management of adverse social and environmental conditions, and access to a range of resources at different times. They require that households have access to substantial territories that include different types of soils (wetlands, drylands) and different natural resources (summer and winter grazing, seasonal watering places, forests, and swamps). When

such people are limited to individual plots – for example if their land rights are captured by other groups - they cannot maintain these strategies and their livelihoods. Common land is often embedded within the wider area over which a community of households holds customary rights. It is then managed by the same institutions that allocate land to specific households on a more singular or almost private tenure basis. Securing access over both existing customary rights and the commonly held and used land is therefore is a major part of any pro-poor development strategy.

By extension, securing rights over all forms of customary land is also an essential element of policy reform in post conflict situations. Speculation over temporarily abandoned land may result in large areas being alienated from their legitimate and/or legal local owners. Mozambique shows clearly how 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. Several countries seem to be reluctant however to give a strong legal status to the commons in particular. Extensive and mobile land uses are not always considered as being "productive", although in fact they are. In northern Sudan, including Darfur, officials seem to become uncomfortable when confronted with mobility. In many countries with nomadic pastoral communities, governments tend to encourage the sedentarization of whole communities, instead of making more serious efforts to recognise and manage their rights.

There is also a near universal tendency amongst governments to resort to the false notion of ´free land´, defined as land where there is no highly visible land use, to split land away from local rights holders and allocate it to new individual users, who are usually commercial investors or have links to the ruling elite. In this respect it is notable that in Mozambique, local land administrations are once again being told by a government concerned to find large areas for new bio-fuel and other projects, to identify areas of ´free land in State possession´. There is no legal basis at all for this *de facto* policy shift, which reflects deeply rooted official views of ´real land use´ and the need to give land to those better able to use it.

Efforts to give a stronger legal status to customary land and natural resources create a series of other challenges:

- *The role of customary authorities*: 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 is a focus of debate in most countries. Some opt for the statutory membership of customary leaders in local institutions (Burkina Faso), while others consider their participation as ex-officio (Botswana). The Mozambican case reveals how complex the challenge is, where clear legal provisions to elect local representatives for land matters are overshadowed by other legislation that recognises ´community authorities´ and gives them some land management functions (often to the detriment of local rights and local participation in land management as def defined by the Land Law itself).
- *Representation and legal personality*. There is much 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. In Mozambique, the ´local community´ has full legal status as a private entity holding a collective private right – the DUAT. There are however many people in and outside government who do not accept this and block the application of this principle in practice. While legally the community is *not* a public administration unit, the impact of decentralisation legislation and ´community authorities´ also creates an air of confusion that lends itself to un-transparent practices that put local rights at risk. Burkina Faso is inclined to give local development councils (which may have a specialized rural land tenure commission) a type of governance role, with privileged links to local government.

- *Local management capacity*. The capacity of local institutions to manage existing customary rights including commons in a present day setting does not always meet the growing needs of a range of local and external interests. Institutions in Darfur were efficient in the past but are now cut from reality. Strong politicization of land management institutions and competition for control over natural resources is at the heart of the Darfur conflict. The effectiveness of local institutions declines with the arrival of "strategic" alternatives, such as the use of the formal statutory systems to find easy, fast, sometimes opportunistic solutions. Reform proposals look at ways to turn remnants of legitimate Native Administration into institutions on the basis of universal principles such as of inclusivity, democracy, local accountability, participation of women[58]. Even in Mozambique it is apparent that institutions that are effective when dealing with local level problems, are at a major disadvantage when faced with the need to deal with better equipped and more knowledgeable delegations and institutions from the ´outside world´. Recognising *in practice* the legally defined role of these structures, and giving them the skills and resources needed to play their part, is an essential element of policy implementation[59].

- *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. There is some agreement that mechanisms should be created to allow individual rights holders to take themselves and their land out of customary jurisdiction. This is provided for implicitly in the "*Plan Foncier Rural*" approach in Western Africa, and is explicitly included in the Land Law regulations in Mozambique, where ´de-annexation´ from the local community is allowed. 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 (which is the case in Mozambique). The discussion on the transferability of such alienated land to third parties, including from outside the community, also needs further thought.

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[58] De Wit, Bellini, Hatcher, Mukhtar, Abdul Jalil and Fadlalla (forthcoming): Turning a root cause of conflict into an opportunity for peace building: Endogenous visions for land policy development in Darfur

[59] An innovative programme supported by FAO in Mozambique is training paralegals to work with local leaders and others to improve not only their awareness of rights under law, but how to use these rights in practice and, when necessary, resort to legal and formal judicial procedures to defend them. Support includes accompanying communities when they take part in the key community consultation with investors who seek to occupy and use land over which communities hold the state DUAT.

Statutory land rights
Major progress is being made to make people aware that the question of securing land rights involves far more than just responding to the economic needs of an emerging business class. All rural actors want to secure their access and use of land and natural resources. Social justice, peace consolidation and conflict prevention are all other reasons why governments must consider carefully how they go about the issuing of new, statutory rights.

There is growing agreement that a wide range of rights that can be used to secure tenure for different target beneficiaries. This departs from the classical neo-liberal view that only full ownership results in long term security. Issuing long and short term land use rights, different sorts of lease contracts, easement rights, licenses and permits are all mechanisms that may provide people with tenure security. The fundamental issue in all cases is whether or not states can or want to guarantee these rights, through effective registration and judicial measures when necessary.

All rights – whether freehold, leasehold, or licences – raises questions about their transferability, and their relative degree of inclusiveness or exclusiveness[60]. Land policy makers *have to* take these into account, as they are fundamental aspects of *making rights work*. A secure land rights that the holder cannot sell or otherwise pass to a third party may in fact simply place the holder in a straightjacket that restricts his or her economic and livelihood choices.

Many countries separate ownership from land use, with the former residing in ´the State´, which then allocates use rights in various ways to its citizens and (perhaps) foreigners who also want land. This has proven to be an excellent tool for initiating early recovery and development efforts in post conflict situations. In practical terms it allows governments to control pressures for land grabbing, and to issue short term land leases over land where the (perhaps unknown) legal and legitimate land owners (IDPs and refugees) are absent. This prevents high value land being kept out of production, while at the same time respecting existing rights. It is also useful when prior or existing rights over land need to be confirmed and validated in chaotic post conflict situations.

Once post-conflict stability is achieved, the separation of ownership and use still has its place. In Mozambique for example, new DUATs are issued on a 50-year state lease which is renewable for another fifty years. Provided that these rights are administered and guaranteed in a transparent fashion, and can be protected by recourse to the courts, they offer investors ample security and time to achieve good economic returns. The state meanwhile is able to control the pressure for land and keep social and other ´soft´ objectives high up on its land policy agenda.

These cases all provide important lessons about the importance of having a land policy that offers a diversified package of solutions to secure tenure under different possible settings and for a wide range of land users. And there is more awareness that beneficiaries should be able to choose freely between these different options.

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[60] The inclusivity/exclusivity of land rights can be addressed under different dimensions. One considers the separation or not between surface and subsoil land rights, whilst another deals with the absolute or conditional exclusion of people on land over which private land rights are established.

More governments are acknowledging the need for simple, cost effective and accessible approaches to securing land rights in rural areas. Too often, rigid, western inspired procedures are used to issue land rights for rural Africans. Not all situations require the same high precision technical standards however. New procedures are being developed and tested for identifying, delimiting and registering for communal and other customarily occupied land. In Mozambique the technique of delimitation has been tested in field conditions, and now forms part of the implementing instruments for the 1997 Land Law. Similar approaches are being used in Burkina Faso. All appear to work well in practice. Challenges remain however when these approaches are scaled up from pilots to a national coverage, or where they are opposed by economic and other interests that see this process as denying them access to the land they want.

There are also discussions over whether the technology used to issue land rights should somehow match the value of the land. This may imply that lower standards of land surveying and administration will be used in rural areas, while higher standards are applied in urban and peri-urban areas. Although this approach might be acceptable from a technical perspective, care is needed to ensure that it does not result in an unbalanced implementation of underlying principles and the emergence of parallel urban and rural land cadastres. The long delay in getting Urban Land Regulations approved in Mozambique, and the subsequent concerns that they undermine rights established in the over-arching land law, illustrate this point well.

Land taxes derived from urban land administration are also generally higher and easier to collect. Separating the rural world from the towns and cities may well undermine the sustainability of land administrations in rural areas, and drive a process of economic differentiation in which rural areas are denied their fair share of public revenues. As producers of food for the towns and cities, this concern in rural districts is entirely justified.

6.4 The Rights of Women

Addressing issues of tenure security for women is emerging as a key issue in land policy discussions. Secure access to land for rural women in Africa is recognised as essential if they are to lift themselves out of poverty and improve their social and political position in general.

Major progress has been made since the 1997 Beijing World Summit for Women. The equal rights of women are now addressed in the constitutions of several countries, backed up by specific provisions for women in land and related legislation. In some countries family law has also been redesigned to strengthen the rights of women as head of households, and clarify their rights when inheriting assets from deceased partners.

The reality in Africa, however, is that most women still live within customary contexts where awareness of the finer principles of formal legislation is very limited. The rights women enjoy under common tenure regimes are often weak and are more like a ´land use right´ which they gain not as individuals, but through some kind of relationship with a male rights holder. Marriage is the most common institution through which rural women will gain access to land. They then depend upon this relationship for the maintenance of their basic food security, and that of their children. This is even the

case for matrilineal systems, where land rights pass through women (the so-called uterine line) but are still held and controlled by male lineage or family heads.

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. Divorce in urban areas especially is rising in many countries, and divorced women can be marginalized and face losing land and property. Two other issues are placing younger women at far higher risk however. Firstly, the many armed conflicts are turning them into *de facto* household heads[61], 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.

Secondly, the HIV-AIDS pandemic is exposing rural women to land and asset grabbing when their partners die prematurely. A recent FAO conference on women's land rights underlines the link between secure land rights for women and HIV-AIDS[62]. Insecure livelihoods drive women – and girls - to high risk practices as prostitutes and unprotected sex with males who can provide them with new resources. 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. Women with HIV-AIDS are stigmatised and marginalised by their communities. And pressures on land also contribute to a trend where the more powerful dispossess the weaker, female members of the community.

The land rights of women is therefore a critical issue in Africa today, where even the more progressive approaches discussed above may not be effective for rural women. Using customary practices and systems as the basis for recognising and registering local land rights may control land grabbing, but this policy choice still leaves women in the community vulnerable to land grabbing by their (male) neighbours and relations. These situations call for specific action for women to be taken in policy and law development.

In Mozambique the need for specific measures for women was highlighted by women's groups who were concerned that the new land law would reinforce customary land practices that are prejudicial to women. Indeed across Southern Africa, this issue is already emerging as a serious challenge, underling the need to provide women with options for legalizing their customary rights through recourse to some higher level set of principles.

These options are most often found in national constitutions, which is why, for example, the Mozambican law includes the condition that customary practices apply, *so long as they do not conflict with the Constitution*[63]. Meanwhile the possibilities for

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[61] In Southern Sudan it has been estimated that up to 50% of the returning families may be female headed, and can be exposed to problems of access to land in urban and rural areas.

[62] Gender, property rights and livelihoods in the era of AIDS, FAO Rome, 28-30 November 2007

[63] Law 19/97, Article 12 (a)

independent decision making by women in rural Africa remain restricted by deeply entrenched customs and traditional practices. In the more traditional societies such as in Southern Sudan, there is an overwhelming feeling 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.

Implementing measures to safeguard the rights of women in practice then implies a challenge to deep rooted social and cultural principles that can place women at even greater risk of marginalisation and becoming social outcasts. Governments considering how to deal with these issues face a daunting challenge, and it is evident that classical land administrations are poorly equipped and trained to deal with this complex issue on the ground.

For these reasons, little progress has yet been made to develop effective targeted solutions to improve the access rights of women to land and property. A first step would be to ensure that women can make use of the sometimes excellent and progressive provisions available in the different legislations. 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. In Burkina Faso it is acknowledged that civil marriage can substantially contribute to securing tenure over land and property for women. As a response, initiatives are taken by organizations such as GTZ to support collective civil marriages.

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 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.

A range of policy measures are therefore needed, including not only land policy *per se,* but also measures to raise the awareness of their right by rural women, campaigns to change attitudes amongst conservative male leaders, and measures to provide legal support to those women who do want to challenge the *status quo.* And alongside this, institutional reform, capacity building, and attitudinal change in the mainstream implementing agencies is also essential.

6.5 State land and land for public purposes

The allocation of land for the public purpose can be a source of conflict when it takes on the form of the expropriation by the state of legitimately, sometimes legally owned land, often under customary tenure, for reasons that are not always clear for the public. Sometimes the public does not perceive that this allocation brings along direct benefits for them, a situation which is fully understandable in the case this public interest land is transferred subsequently to third parties, like foreign investors. Different

mechanisms seem to emerge in land policy development to reduce to some extent the overall power of the state to take unilateral decisions on public purpose land.

A more precise definition of "public purpose" may reduce speculation around its use. Sometimes "public interest" is interchangeably used with "public purpose" but the significance of both concepts is rather different. The notion of public interest is wider, and creates more space for unaccountable decision making. The allocation of prime-land beachfronts to private developers may well be in the public interest, when it generates an important source of income for the state. In the case local communities are cut from their resources base, it does not serve a public purpose. When these communities are not able to derive direct benefits from this tourism development, it can also hardly be called land allocation for the interest of the public.

The definition of the "state", or rather the lack of a clear definition, may create another series of possible disputes. There seems to exist some consensus that decision making on land allocation of state land, or to allocate land for the public purpose is preferable dealt with at decentralized level, with public hearings being part of the process. Transferring this responsibility to locally elected bodies, rather than to the "state apparatus" may create more local accountability for decision making on land allocation.

The registration of state land and land for public purposes is a step ahead in creating more transparency on legal land ownership by the state. In Burkina Faso the state has allocated significant parts of customary land for the public purpose and transferred these into management schemes. Very few state run schemes are however surveyed and registered, leaving major doubts on the tenure status of these lands, resulting in multi-layered claims. New policy guidelines emphasize the need for the delimitation and registration of these lands (as well as state-owned protection and conservation areas) Dialogue with local communities is part of this exercise and may eventually result in some re-negotiation of boundaries, and compensation for lost rights. This initiative is commonly known as "purging customary land rights over schemes", in fact a process of legitimizing legal state ownership over these lands. Failure to do so contributes to sustain an environment of permanent customary claims over management schemes. It illustrates well the need for local consultation when allocating land for public purposes. Making state ownership over land and natural resources public on a wide scale, by using for instance internet facilities, is another initiative that may contribute to creating more transparency for the public on the state as a landowner.

Broad indistinct concepts such as "waste land", "unoccupied land", "free land" continue to be used in some policies and laws, and give a free ride to the state to acquire new rights over existing customary rights. These concepts invariably refer to the absence of highly visible types of land use, such as construction, permanent crop farming, and irrigation. Rights that are established through seasonal, low intensive uses such as winter/summer grazing, gathering, hunting are disregarded. The use of these concepts also translates a continuing effort to attribute rights on the basis of conjunctural land use and development only, not necessarily on a rights basis. There is a major danger in post conflict situations that land allocation for major recovery projects happens on this basis in the absence of legitimate/legal land owners who fled the country or location to safe havens. A recent Supreme Court hearing in Khartoum

on the issue of waste land in Islamic (*muat*) law points in the direction that this provision is being used for establishing rights over the lands of others.

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 create a more favourable environment to prevent future conflicts.

Better addressing the legal status of state owned land is another provision to check and balance public land allocation. Some countries maintain a dual system of state land ownership, one being the public domain, the other being the private domain of the state. Transparent decision making over the public domain is easier to achieve through the elected bodies, while decisions over land falling under the private domain are less susceptible for public scrutiny. Shifting state land from the private to the public domain can be encouraged to reduce decision made at will by the authorities.

The issue of state land brings along the discussion on the role of the state as a land manager. There is acknowledgement that the role of the state as the sole land manager needs to be reviewed. This is encouraged by a number of other processes such as the democratization and decentralization of governance. The state continues to play an eminent role in the management of specific state lands such as managed schemes, protected areas, key resources, urban land. There is a tendency for the devolution of management powers from central public institutions to locally elected bodies. This can only but be applauded, as it may result in more local accountability for decision making.

Another tendency is the outsourcing of land administration tasks and responsibilities to private sector providers. It appears that this remains somewhat problematic for a number of countries, as land administrative bodies seem to resist this. It is not without some ground of truth that the latter are being considered as conservative institutions that are sceptical to share these responsibilities. There is little doubt however that the major tasks of public institutions should focus more on developing the normative framework and to monitor whether this is adequately applied. The state could also continue to exercise the function of manager over the public land domain.

6.6 Conflict management

Evidently in a post-conflict situation, it is essential to ease tensions and prevent new flashpoints from turning into the cause of renewed violence. Effective resolution of land conflicts is a central part of the overall strategy to consolidate peace and promote future development. Without this, no-one will have the confidence to invest, and the legality and legitimacy of all land rights, however acquired, will never be established.

Conventional judicial systems are rarely effective or indeed present in most of rural Africa. Access to justice is never easy, and in many rural areas courts are far away in a district or provincial town. Legal action is difficult to initiate, even if people know how to do it, and lawyers also tend to be urban based and as far away as the courts. And once initiated, legal actions are costly and take a very long time.

In most countries therefore, customary institutions are ´the´ justice system, and deal with the vast range of problems that occur. They do this with a high level of effectiveness and legitimacy rooted in the surrounding culture[64]. The issue then is whether these systems are ´legal´ as well as ´legitimate´ - in other words are they and the decisions they take recognised by the state and the rest of society outside the village or clan?

In Mozambique, ´juridical pluralism´ has been elevated to the level of the Constitution, where it is declared that ´the State recognises the various normative systems for resolving conflicts that coexist in Mozambican society, provided that these do not conflict with the fundamental values and principles of the Constitution[65].

This kind of formal integration of customary conflict resolution systems is more the exception than the rule however. Even in Mozambique it is evident that customary institutions are really only effective when dealing with local disputes between neighbours and villages that share a similar ´world view´ and accept the *legitimacy* of the local customary dispute mechanisms. When disputes occur between locals and outsiders, recourse to just the customary system is rarely sufficient, and powerful external interests are adept at using the formal administrative and judicial systems to secure what they want at the expense of local people[66].

In many countries however formal institutions are poorly equipped to deal with disputes between local and external interests. There is often also a blurring of the line between the different ´powers´, with local public administrations often taking on the role of the judiciary and the ´real judiciary´ being sidelined when it comes to dealing with land and related matters. In Burkina Faso the appointed *préfet de départment* represents the state as a local level administrator, but also exercises the function of president of the departmental tribunal. In case of conflict between litigants, the court's president seems to be inclined to take a line that defends the interests of the state. In Mozambique, local people fail to make the distinction between the ´the government´ and ´the judiciary´- both are part of ´the State´ and respond to and protect the interests of those close to it. At a more pragmatic level however, they also fail to understand how judges – who deal mainly with crime – can help when it comes to issues of land and natural resources use. Better to go to the land administration, which is specialised in this area, even if they might in fact be part of the problem being addressed[67].

Bringing ´custom and practice´ more formally into the overall system of land management and, when necessary, conflict resolution, therefore emerges not only as practical, but essential. This observation has its place however, as part of a *package* of

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[64] Boaventura dos Santos e Trindade (2002), ´Conflito e Transformação Social: Uma Paisagem das Justiças em Moçambique´, give a complete view of this ´landscape of justices´ in Mozambique. Negrão et al (2002) also stress the importance of local conflict resolution systems, while Baleira et al (2005) distinguish between ´homogeneous conflicts´ between local people (dealt with effectively by traditional systems), and ´heterogeneous conflicts´ (local people clash with the outside world).

[65] Constitution of the Republic of Mozambique, 2004, Article 4

[66] See Baleira *et al* (2005) for a comprehensive view of land and resource conflict in Mozambique, in which these competing world views and the relative effectiveness of local institutions is discussed.

[67] Baleira *et al* (2005)

measures that can include formal systems when needed, and customary or other alternative conflict resolution methods.

Use of customary law

There is no doubt about the importance of using customary law in land management in Africa – all three cases above show this clearly. This raises several questions however:

- 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?
- what about the rights of women?

As indicated above, there is a tendency to use customary law in rural areas and at local level, where disputes involve neighbours and others who share the local customary ´world view´. The customary methods used are accepted as legitimate by both sides, and decisions tend to be accepted and effective.

The ground between customary and more formal legal systems and jurisdictions is however now always clear cut. It appears that in most places, statutory law prevails *de jure* over customary law when there is some conflict between the jurisdictions. This provision is set out for instances in statutory law proposals of countries that adhere strongly to the use of customs such as Southern Sudan and Burkina Faso.

The conflict of interest between the two systems may be smaller under a common law system, which derives its guiding principles from jurisprudence that may be based on local customs. Nevertheless even here the ´common law´ of the urban world may be very much at odds with the common law of the rural village.

All policy makers therefore face a considerable challenge to integrate customary law within the wider body of national or formal law, and to give it legality as well as legitimacy. This is the case whether in the more common law based systems of eastern and most of southern Africa, or the more codified Roman law based systems of western Africa and Mozambique.

Mozambique in fact offers policy makers a way through this maze, and merits special attention here. The 1995 Land Policy, upon which the 1997 Land Law is built, recognizes ´the customary rights of access and management of land of the resident rural population, promoting social and economic justice in the countryside´[68]. This in turn reflects an official acceptance that in fact the vast majority of land access in Mozambique was and still is managed through customary systems. The new law therefore had to recognise this and build them into the legislation in some way.

As discussed above, the 1997 law achieves this by recognising ´occupation by customary norms and practices´ as one way of acquiring the official state ´land use and benefit 'right' or DUAT. Furthermore, these ´norms and practices´ are permitted to be used inside ´local communities´ that are given an explicit role in land and resource management. In this way, customary law was integrated into the formal ´law of the

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[68] Carlos Serra (2007:27)

land´, and the country today has only one law covering its entire national territory – there are no ´communal areas´ or ´private commercial farming´ areas. Everyone has the same DUAT, expect that it is acquired in different ways.

This approach also does away with the need to record and document local rules and customary land laws, which in any case are flexible and common law-based and are not easily codified. Those administering the law at local level do however need to have some knowledge of local customs, and in practice the most effective district level officers in most branches of the State, including judges, work hard to find a balance between the acceptance of local custom, and its subjugation to over-arching formal principles when necessary. Accompanying court and other administrative decisions in the future may however provide the material, produced out of real custom and practice on the ground, for a genuinely Mozambican form of jurisprudence to be developed.

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 region[69]. This exercise has proven to be a good tool for making an inventory of 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 into 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 Odhiambo concludes that:

> *The position of customary law appears to have been strengthened somewhat by the Interim Constitution of Southern Sudan. Article 5 lists "customs and traditions of the people of Southern Sudan" as one of the sources of legislation. More specifically, Article 180 enjoins the different levels of government to "recognize customary land rights under customary land law" and to "institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices". These provisions provide a useful foundation for the application of customary land law in the administration of land rights and the settlement of disputes, but the extent to which they are translated into actions and affect decisions will only be determined over time. In any case, the passing of an appropriate legislative framework is critical for the implementation of these constitutional provisions[70].*

Burkina Faso resolves the issue of the use of customary law for land management in some way by proposing the adoption of the mechanism of "local land tenure charters" (*chartes foncières locales)* in its policy. The charters refer to sets of local rules that

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[69] "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.

[70] M. Odhiambo, 2007 "Analysis of land tenure systems under customary law in Southern Sudan" consolidated report for FAO project OSRO/SUD/415/NET.

regulate a number of land management activities according to the customs of the place. This will be given legal validity by the issuance of a specific decree to the future land law that will include provisions on the modalities for its development and future use. Local charters are registered and suggestions are being made for their regular updating.

When using customary law, there is probably also a need to compare some of its values against universally accepted norms, values and principles. Most of the 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 is also increasingly subject to environmental concerns.

The need to filter customary rules through these universal values is accepted by most outsiders, though not always by customary authorities themselves. There is evidence that some traditional leaders in Southern Sudan oppose the insertion of articles in the Interim Constitution that give a stronger status to the rights of women. They indicate that these principles were accepted only on the basis of pressure from the international community. Changing longstanding local norms too abruptly may be unwise, and may lead to people taking justice in their own hands.

Alternative Approaches
The prevailing view on land and property dispute resolution is to use more alternative dispute resolutions mechanisms and encourage out-of-court decision making, especially in rural areas. Dialogue as a way of finding solutions for disputes between contesting parties is deeply entrenched in African culture, as well expressed by Zaki Rahman, a former Sudanese minister of justice[71]:

> *"Every bystander is a potential mediator who is ready to offer (and in some cases does offer even without invitation) his assistance and his "wisdom" that this is not the end of the world! He may go all the way to deliver a summary judgment based on his own impression of the nature of the dispute without having to wait for any hearing of the quarrelling parties! This intrinsic habit of Sudanese people is so deeply entrenched that any mediation resulting in some formal settlement is but a secondary practice. The differences may end than and there. It is the soothing effect of mediation produced by the opportunity of each party to let off steam which makes mediation and conciliation an ideal method of settlement of disputes in a society like that of the Sudan."*

In fact in many countries, conciliation and mediation are increasingly being officially recognised as a means of settling land and natural resources disputes. These techniques have both a traditional and a modern face. At the same time, there is a new Law of Arbitration and Reconciliation which promotes and regulates the use of modern techniques of dispute resolution. All these instruments are available to policy makers and practitioners on the ground when it comes to dealing with land conflicts.

The role of judges and state prosecutors as councillors and arbitrators is also being increasingly discussed. Sudan has empowered the courts receiving law suits to undertake the function of conciliation between the contesting parties. In practice at

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[71] Zaki Abdel Rahman (2004) "Arbitration as a mechanism for resolving land disputes", Land and Property Study in Sudan ,FAO Project OSRO/SUD/409/HCR.

local level, this is what many judges do anyway, aware of the relative futility of handing down formal judgements that are unlikely in any case to be implemented in practice.

In part, the official recognition of alternative dispute resolution mechanisms is also a response to the unsatisfactory nature of litigation in general, and with respect to land and property conflicts in particular. Mediation and arbitration even in the more formal context are seen as lower cost and quicker alternatives.

 The presence of courts in rural areas remains low, with sometimes wide differences to be covered by protagonists to lodge claims or institute a case. Initiatives such as the organization of forensic audiences by urban based courts in rural areas bring the judiciary closer to rural disputes. Major training programs for strengthening the judiciary such as in Mozambique, point in the direction that the system remains understaffed and/or the judiciary is not yet well versed when dealing with land issues. Formal training of magistrates does rarely address land and natural resources issues, more focusing on family, business and criminal law.

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 discussed elsewhere.

Conciliation and mediation may give an "official" role to customary leaders who continue to exercise important powers in local land management. Modern African governments, inspired on basic principles of democracy and inclusive governance, seem to face some challenges with attributing official functions to customary authority under these systems. Their leading role in conflict management is however not contested. Balancing their powers in land management with other, statutory, institutions seems to be a tendency.

Burkina Faso proposes to turn conciliation into a compulsory act of conflict resolution before resort can be made to courts. This may be a promising approach when governments have to deal expediently with an important caseload, such as in post conflict situations where the return on IDP and refugees may create such situations. Compulsory hearing of disputes regarding land by traditional authorities, with possibilities for appeal in courts seems to be a viable way to alleviate pressure on courts and filter claims to a manageable dimension.

Putting significant weight on alternative conflict resolution brings along a number of challenges that need to be dealt with. Conciliation and mediation are often promoted in an experimental project context. Up-scaling its use to a nation wide coverage may require some form of institutionalization and "professionalization". The latter seems to be contrary to some intrinsic qualities of conciliation and mediation, but nevertheless their implementation requires financial resources, qualified personnel, logistics support. The registration of the outcome of the process is also a requirement to make it more efficient.

Arbitration is also suggested as an alternative for land conflict resolution, such as in Sudan where it is explicitly mentioned as a major task for the different land commissions as part of the CPA and Interim Constitutions. International reference frameworks on arbitration mainly refer to commercial disputes, with specific guiding principles on arbitration of land disputes sometimes dealt with in national legal frameworks. The latter are not always enabling for an expedient handling of land disputes, as demonstrated by the Sudanese case[72].The merit of arbitration is that it avoids undesirable aspects of judicial proceedings, such as high costs, but results in a binding nature of the award. Arbitral rewards may revert to courts and may be subject to numerous layers of objection. Arbitration requires prior agreement by the parties, and is likely to be rejected when public institutions are contending parties, or when powerful litigants are involved. Improvements to the technical framework of arbitration of land conflicts in Sudan include measures such as: bringing arbitration as close a possible to where the disputes arise; the application of customary law and rules of equity; the use of simplified procedures that people easily understand; qualified but limited review and appeal options.

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 the use of customary law.

Using the Courts
It follows from the discussion above that while local people may have effective institutions for their immediate local problems, they should also know how to use the formal mechanisms provided by the state when they really have to. Building the formal legal system into a new land policy, but in a more appropriate way, is a task that most policy makers have to face at some point.

Mozambique offers a useful example once again. In recognition of the fact that land law implementation was only to be effective if it could be policed and the law enforced, a programme was developed to training the judiciary in the principles of the new law. This was especially relevant as it contained many new provisions and concepts, including the way it integrates customary land management principles and gives local communities a clear role in both resource management and in conflict resolution.

Two other new laws had been approved at around the same time, one for Forestry and Wildlife, and the other for the Environment, and the programme integrated these into its training package for judges and state prosecutors. This was implemented by the Centre for Juridical and Judicial Training (CFJJ) of the Ministry of Justice, with FAO technical assistance and Netherlands funding. The programme has done a great deal to bring the formal judiciary more fully into the area of land and environmental management, although its impact to date is still limited by a range of practical factors such as too few rural judges and a desperate lack of knowledge amongst rural people about how to use these more formal systems.

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[72] Zaki Abdel Rahman, 2004, ibid.

To address this last point, and also to reinforce awareness of *how to use* legally attributed rights over land and resources, the CFJJ-FAO programme has now evolved into a training programme for paralegals who work at community level. They have a dual role as ´civic educators´ and ´barefoot legal counsel´, including assisting communities that want to take their grievances to court or to at least secure professional legal support when dealing with the outside world.

This kind of programme in no way seeks to replace effective local solutions to conflict prevention and resolution, but does offer local people the possibility of using the same systems that give other, urban or more powerful citizens a clear advantage over them. The idea is to complete the toolkit available, from which the most appropriate institutions, methods, and professional support can be selected.

Curbing land speculation

Several land policies and laws include mechanisms to curb land speculation. These include provisions to ensure that new land rights do not overlap with existing land rights, or that new land rights are acquired with the consent of existing rights holders. Examples are the different forms of local consultations processes found in Mozambique, or the *PV de palabre* in Burkina Faso.

Other tools allow land managers to monitor the correct use of land rights (the *plano de exploração* or development plan in Mozambique, the *cahier de charge* in Burkina Faso, and time limits set for implementing projects and using land in a number of countries). Each mechanism has its place, but their application in practice rarely matches the objectives for which they were created. Reasons for this are rooted in weak land administrations that are also prone to political manipulation and interference.

The use of a "public notice" in rural Africa is not always satisfactory. Many people are illiterate, distances between public notice locations and land users are often huge, and the locations are not always clearly indicated. It is not clear in many notices how people can respond, and object to or challenge proposals. Doing this, especially in written form, is also not part of African culture.

The concept of the local consultation as part of a land allocation procedure is sound. It can establish the tenure situation on the ground, and make sure that requested land is "rights free". If the land is occupied, the consultation can determine conditions through which the rights holder might consent to give up part or all of his/her land to a third party. The tool is often misused however, and even when universally applied, it rarely achieves concrete results that benefit local people[73]. In most cases it is seen as a step to get through for a private investor to secure his or her land, and not as a chance to establish an effective agreement over conditions and local benefits.

The reality is that the consultation process can work only if there is a genuine will by land administrators to make it work, and if local people are aware of their rights and have the confidence to negotiate, even when faced with opposing interests who are evidently more powerful and backed by official structures.

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[73] For consultations in Mozambique and their impact on local livelihoods, see Tanner and Baleira (2007), FAO Livelihood Support Programme Working Paper No. 27.

The control of legal shopping to get access to land is another tool to control land speculation. Other laws are often used to bypass progressive land law provisions. Investment laws that fast track land access, often for large areas, are one example. The divestiture of state enterprises in Mozambique is another example where large land areas were accessed by cheaply purchasing a defunct company, dismantling it, and subsequently disposing of the land that was part of the business transfer. On the other hand, flexible provisions in land laws are also used to achieve other objectives that may be hindered by other legislation. In Mozambique there have been cases of private investors getting a state leasehold for agriculture, and then logging timber on the land without going through the difficult process of obtaining a logging licence. The lesson learned here is that different provisions must be streamlined and managed collectively to reduce the negative effects of legal shopping to a minimum.

6.7 Conclusions

After long periods of bitter civil war and violence, there is a desperate need to maintain what are often fragile peace settlements. And in societies facing rapid change and where new social and political institutions may still be in a fragile phase of development and consolidation, tensions created by land conflict can rapidly spill over and foster instability and even civil war. Land in this context becomes a kind of time bomb: if 'the land question' is not well handled, a rise in land conflicts can undermine social stability at a critical time of post-war reconciliation and economic recovery.

As countries settle down and stabilise, new pressures can also generate new tensions. Successful post conflict consolidation can usher in a period of growth with a consequent surging demand for land by investors and others. Local rights come under pressure, and renewed tensions can result. These processes put pressure on all stakeholders not to be too entrenched and dogmatic. They also require government and others to deal with the land question seriously.

The case studies presented here present very different situations that have all resulted in some level of success with regard to developing new policies for land. A first lesson to learn is that it is important to get the land policy into place first, and then do the legislation. As an integral part of this process, it is also essential to fully consider the institutional implications – the need for new services, new training, reformed curricula at technical schools, decentralisation.

The best of the case studies also underline the central importance of a high level of stakeholder participation, from policy and legislative development through to institutional development and implementation. The Mozambican and Burkina cases are excellent examples in terms of involving civil society and others from the outset when developing the principles of new land policies.

Land policy is not a static thing however, and countries and the needs of those who live in them change over time. Solutions that are appropriate today may not be appropriate tomorrow. This is the core argument at the heart of the new land debate that is emerging now in Mozambique, after ten years of strong economic growth and with a newly confident private sector arguing for land privatization as a fundamental condition for further investment and growth. But there are good ways to handles these pressures for change, and there are less good ways. The key lesson is to ensure a level

of participation that continues to produce both a ´legal´ and ´legitimate´ policy, acceptable and implementable by all those who will depend upon it for their livelihoods as well as their economic and investment plans.

Mozambique is again a useful example, where an apparently tried and tested participatory approach is being set aside as pressures mount to modify key elements of the 1997 legislation and its regulations. This shows how difficult it is to prescribe a good land reform, based on models developed in specific countries. Each country will develop the land reform it wants, subject to prevailing political factors and other pressures; and even countries that have used a good model in the past may decide not to use in the future.

It is useful however to look for what might be called ´essential conditions´ that should be present if a land reform or policy process is to be considered ´successful´, if we take this to mean having a positive impact on social equity, the livelihoods of the poor, and longer term political stability and peace. Transparency, inclusiveness, participation, responsive to local as well as national and investor needs, incorporating economic and ´soft´ objectives – all of these conditions are found in the case studies.

There are also key external factors that may or not facilitate processes in particular countries at particular points in their history. Sudan and Mozambique reveal this very clearly, where very different constellations of external support at critical times have produced fundamentally different outcomes. The role of relatively politically neutral UN agencies like FAO, as honest broker and proposer of innovative and often challenging technical solutions, also stands out.

Finally the issue of the land rights of women within the customary context underlines the complex challenge facing policy makers. Using customary systems as the basis for collective or ´pre-emptive´ registration of local rights may help prevent land grabbing by outsiders, but it then leaves local women exposed to customary practices that are clearly inimical to their best interests, especially in the era of HIV-AIDS.

We hope that the case studies and the discussion above helps policy makers and legislators understand better the nature of this challenge, and that they are able to find in this short document, some useful tools for undertaking the daunting task of producing new policy that is responsive to the wide range of needs at all levels, village, city, investor, government, that characterise the increasingly complex societies we all live in.