



# **Whose Land Is It? Commons and Conflict States**

**Why the Ownership of the Commons  
Matters in Making and Keeping Peace**

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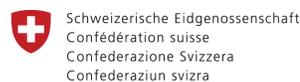
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Rights and Resources Initiative

*Washington DC*

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*Cover photo: Valley farms and a village, near low pastures and high pastures in Bamyan Province, Afghanistan.  
Photo by Liz Alden Wily.*

## CONTENTS

INTRODUCTION	iv
1 THE ISSUE	1
2 THE CASES	7
2.1 The Summer Pastures of Afghanistan	7
2.2 The Wooded Savannas of Sudan	15
2.3 The Tropical Forests of Liberia	23
CONCLUSION	31
ENDNOTES	36
REFERENCES	41

## INTRODUCTION

This paper focuses on the tenure fate of three commons: the 30 million hectares of pasturelands in Afghanistan, which represent at least 45% of the total land area and are key to livelihood and water catchment in that exceedingly dry country; the 5.7 million hectares of timber-rich tropical forests in Liberia, 59% of the total land area; and the 125 million hectares of savannah in Sudan, half the area of the largest state of Africa.

All three resources have a long history as customary properties of local communities. They also share a 20<sup>th</sup> century history as the property of the state.

There is nothing unusual in this contradiction. Between one and two billion people on the planet today are tenants of the state. They live on and use customary properties on which in the eyes of their national laws they are no more than lawful occupants and users. When their expansive collectively-owned forest, pastoral and fishing swamp lands are taken into account, over 4 billion hectares are involved, nearing one third of the world's total land area.

Perhaps this overlapping tenure would not matter if occupancy had been secure and in due course confirmed as the property of its respective community holders. But this was not to be. Country to country, continent to continent, customary owners have found their possessions *de-secured*. Discomfort with contradictory overlapping tenure has segued into contestation and contestation into conflict and claim. Sometimes this has taken a century or more of rumbling discontent to emerge as a single issue between governments and their people (Afghanistan). At other times it catalyses quite suddenly into a clear reason to go to war (Sudan). In others still, it becomes an issue emerging out of civil war as newly politicised rural populations look to ways to halt an erosion of rights which they have for too long considered beyond their power to remedy (Liberia).

Almost nowhere around the world has the ownership of the commons and integral to this the status of customary land interests *not* been a source of contestation between traditional owners and the state. While in industrial economies the issue is generally being worked out peacefully (Australia, New Zealand and Norway) this has proven much less so the case in rapidly transforming and frequently volatile agrarian states and where customary landholders are often majorities (Bolivia, Angola and Indonesia). Considerable turmoil may surround passage into new paradigms.

This paper explores the case in the three states of Afghanistan, Sudan and Liberia. These are selected on the basis of the author's direct experience working in these countries toward peaceful resolution in favour of the customary owners. To this extent this paper pretends to be neither neutral nor the cases fairly sampled. The issue is certainly as active in Latin America as it is in Sub-Saharan Africa, and emergent in Asia. Still, these cases provide good examples of both why and how the matter of the commons comes to the fore and is associated with civil conflict, and examples of how it is being managed today.

## 1

**The Issue**

First, what are the commons? Second, what is the tenurial contradiction referred to above? Third, just how significant an issue is this in civil conflict today?

### **TRADITIONAL COMMONS ARE LAND AND LAND-BASED**

A glance at the literature shows the very idea of commons has expanded dramatically over the last decade. For some, commons must now include knowledge as commons (libraries, the internet), medical and health commons (hospitals, genetics), cultural commons (public art, landscapes), neighbourhood commons (sidewalks and gardens) infrastructure commons (roads), market commons (exchange systems) and global commons from oceans to outer space and food security. These *new commons*, bravely classified by Hess (2008), may well put the traditional commons in the shade and certainly pose exciting intellectual and legal challenges around the nature of their possession and governance.

The traditional commons are nonetheless the focus of this paper. They may be defined as those lands or landed assets like timber, water and surface or near-surface minerals which by custom social communities own in undivided shares, unlike those assets which they own individually or as families, such as houses and farms. Commons tenure embodies radical communal ownership of the resource as well as use rights to those resources. The latter are possessed individually by

each member of the community by virtue of his or her membership. Overlaying these may be other sets of subsidiary rights to the resource, such as the seasonal access and use rights to pastoral zones frequently enjoyed by nomadic populations or members of neighbouring settled communities.<sup>3</sup>

This pattern becomes more complex where use rights even over farmland are limited to usufruct or where settlements move periodically within the communal domain. In these cases the entire domain is generally the collective property of the community, not just the communally-used assets within it, including forests, pastures or fishing swamps. This pattern is most clear where shifting cultivation is dominant, as in parts of Sudan and Liberia. It is not the case in Afghanistan where houses and irrigated farms have a long history of permanency. Accordingly, in Islamic, customary and modern statutory law, houses and farms are well-accepted as the private property of the customary holders. Not so, as we shall see, for those assets which they hold traditionally for good reasons as their collective property.

### **THE TRAGIC THESIS OF THE TRAGEDY OF THE COMMONS**

The premise of this paper is that a major seed of conflict exists in the contradiction posed between traditional ownership of communally-used assets like pastures and forests and their widespread statutory designation as public land. The meaning of public land is not perfectly consistent

across countries or continents, but broadly holds these three elements to one degree or another; that the land is considered ownerless (*terra nullius*), un-own-able, and if it is conceived as property at all, it exists as the shared property of the national community held in trust by the State. The practical reality is more straightforward; public land almost everywhere is administered by the State and is the *de facto* property of the State. Often the distinction between Government Land and State Land is itself obscure. The rights of indigenous populations to these lands are accordingly limited to *de facto* tenancy on government/state land.

It is unfortunate that space does not allow detailed exploration of how this contradiction has evolved for this is increasingly elemental to understanding tensions in much of the agrarian world today and which may spill so readily into conflict and civil war.

In brief, it is vital to note that this evolution has not been accidental, nor is it accidentally sustained. It has roots in the resource-grabbing habit of colonial enterprise and the just-as-greedy resource capture by modern post-colonial enterprise, in which political and economic elites conjoin in colonial-like manner. Moreover, the land thefts delivered have been typically legal, with European, especially English, and then American law put to service.

The early means of colonizers of the Americas, Asia and Africa was simply to deny that discovered peoples owned the lands they were found to occupy (although rarely with full support of home jurists, as McKay 2001, observes). Where Aboriginal Title, as it became known in early America, was acknowledged, the tactic was to cleverly relocate this right as a form of state sovereignty (*viz.*: Americo-Indian *nations*) and to then declare that this indigenous sovereignty could not co-exist with the sovereignty of the new modern State.<sup>2</sup> Thus McAuslan, a noted scholar of tenure jurisprudence, refers to an elision of imperium and dominium (2006). In lay terms, this means that the geographical sphere of political sovereignty was conflated with real *estate rights* to the resources within the geographic

domain of that polity. This conflation made it easy to diminish the possession held by indigenous populations to a permissive right of occupancy and use, and even this held at the will of the state.

Two dates stand out in this legal confabulation of reality: first, the 1823 Marshall Ruling of the US Supreme Court, which finally set the denial of customary ownership by natives outside Europe on legal course,<sup>3</sup> and second 1885, when European plenipotentiaries sat around a table in Berlin and decided that it was unnecessary to acquire (buy) the land from African natives.<sup>4</sup> At the stroke of a pen Africans were (as natives in Latin America and Asia had been before them) deemed essentially landless and their assets ripe for the picking.

The fact that pre-state Africa was also pre-capitalist Africa greatly aided the colonial case; Africans clearly did not regard their lands as tradable, fungible assets and thus to European minds need not be accorded status as real property owners. Needless to say, the case was even stronger for uncultivated lands where possession was less visibly entrenched and around which the wasteland thesis would consolidate (uncultivated land = unowned land or wastelands = natural state property). This would eventually evolve into the tragic thesis of the tragedy of the commons, tragic in that it consolidated the idea of collectively-used assets as un-owned. Of course this was a thesis which carried its own self-fulfilling prophecy; in the face of denial and dispossession of communal ownership and the failure to provide legally and practically for communal ownership to mature in the face of pressures, these properties indeed often became 'open to all' and would endure attrition, degradation and loss, against which the State alone would perceive itself as Guardian.<sup>5</sup>

### THE MODERN STATE AS COLONIZER

However, we should not dwell unduly on the metropolitan colonial origins of this dispossession, for the paradigms were (with few exceptions) retained without challenge by post-colonial administrations.<sup>6</sup> Even were those new governments

unknowing at the time, this cannot be claimed for the manner in which capture of customary land interests has since been entrenched and manipulated. Thus while modern Kenyans for example, trace the origins of mass land loss and injustices to colonial masters, they are only too well aware that harshest delivery has been over the last three to four decades.<sup>7</sup> So too they may note that the lands most under conflict are commons, those uncultivated or forested lands within customary domains and which have been most vulnerable to involuntary loss.

Nor must it be thought that these trends have been confined to formerly colonized states. Rather, the trend is fully inclusive of states like Afghanistan and Nepal which adopted colonial-like property norms with alacrity and reconstructed their own feudally-derived norms towards more state-ist resource capture (and often on the advice of international aid agencies).<sup>8</sup> In fact, political-legal denial of the commons as ownable or owned became such a common feature of the 20<sup>th</sup> century that it cannot help but be seen as a natural consequence of capitalist transformation and modern state-making. To what extent it was a necessary consequence is now open to dispute. While this should (and eventually usually does) divide people and their governments for a period, there is a more regrettable tendency for this to first play out in painful inter-ethnic strife, and most noticeably where one ethnicity is perceived as the beneficiary ally of the state. Afghanistan and Sudan provide concrete examples of this.

### **EMERGENT NEW LAND REFORM**

So what is the remedy? Unpacking of this particular contradiction lies at the heart of a great deal of land reform around the world today, whether in the handling of the land rights of indigenous minorities in industrial economies (as in Australia, Norway and New Zealand) or in changing status of majority customary rights in agrarian states (as in Bolivia, Guatemala, Papua New Guinea, Tanzania, Uganda and Mozambique).<sup>9</sup> New constitutions and

land laws do away with the notion of customary land interests as less than real property. Cumulatively such changes amount to a significant new trend in land reform, and in the process reorient the dominant focus of 20<sup>th</sup> century reform upon inter-class redistribution of rights to farmland, towards off-farm resources and towards the state-people relationship in property.<sup>10</sup> *Inter alia*, a common result is stark diminishment of public lands as State, Crown or Government Lands, and (more partial) decline in government authority over newly-acknowledged customary assets, often via localised land boards.<sup>11</sup>

### **THE LAW IS NEVER ENOUGH**

And yet, success is uneven in even nations which have embraced reform in the status of customary land rights. Shortfall most affects unregistered properties owned collectively: the swamps, plains, pastures, and forests which belong customarily to one or other definable community and which are not subdivided into family parcels for obvious agro-ecological reasons. Procedures for firmly securing these as private group-owned property are still undeveloped, or ambivalently included in the terms of new policies and laws.<sup>12</sup> Thus while new Tanzanian law (1999) guarantees the equivalency of customary rights with those obtained statutorily and irrespective of whether or not these are held by individuals, families or communities, it has only been through concerted effort to make this real on the ground that the law begins to be interpreted as inclusive of community woodlands and for these to be entrenched as property, a process which is now widely underway.<sup>13</sup> Similar trends are seen in Mozambique and Uganda where comparable protection of woodland and pasture is tangibly delivered only through community consciousness and action.<sup>14</sup>

Nor is it anywhere near assured that wholesale tenure reform will liberate the legal subservience of indigenous and customary property rights. In 2008, most of the two billion persons acknowledged as customary occupants around the

world remain ownerless in law. This is so despite proclamation (such as by the Commission of Legal Empowerment of the Poor) that securing property rights is a key to social change and equity, or the many echoes of this in the development advocacy of international financial institutions and bilateral donors.<sup>35</sup> We are rightly told that the world's poor often already have assets and recognising these as property is the stepping stone to clambering out of poverty. Of course when Hernando de Soto (2000) revived the clarion call for 'formalizing the informal' he had in mind the shanty shacks of modern cities and the houses and small farms of millions of smallholders. But what of the millions of hectares of customary lands held collectively by the world's global rural poor? Surely the recognition of these vast and valuable assets as their rightful property is a first rung on that ladder of change?

### THE NEW GLOBAL LAND GRAB

To a real extent, it seems not. Why? It may be that these resources are considered too valuable by the political elite to allow ordinary citizens to own. This is doubly so where communal lands bear valuable products. As values grow and state capture consolidates, the opportunity to recognize those lands as local property declines.

It is not far-fetched to suggest that we are witnessing a new era of resource capture, one which deeply interferes with local rights and especially the commons. Global land shortage for food and bio-fuel production, along with a globalised economic relationship which enables one state to readily lease its land to another, entrenches and magnifies state interest in unregistered lands. Just as the world's customary poor begin to see their land rights placed on a road to reform, a new tug of war over resources impedes this progress. In the same month of July 2008, while New Zealand handed back yet another tract of land to its indigenous community,<sup>36</sup> Sudan leased yet another tract of customary property to not just non-customary owners but to non-Sudanese, this time to the Abu Dhabi Govern-

ment for food production.<sup>37</sup> Even without the oil, timber and the fish within these community assets, every hectare of exploitable land is to be competed for and at times fought over. Middle Eastern, Chinese, Malaysian interest in acquiring public lands of African, Asian and Latin American states to produce food and fuel crops for themselves rises exponentially at this time, accelerating a longer history of foreign capture of agrarian commons for agribusiness (Brazil, Bolivia, Madagascar, Cambodia). The problem is, these lands are not genuinely the property of the governments which wilfully lease these to investors; these lands are more accurately the customary property of the rural poor.

### CUSTOMARY RIGHTS AS A RISING FACTOR IN CIVIL CONFLICT

Resentment of land continuing communal land loss is therefore unsurprisingly increasing tinder for civil conflict and war. If we cast our eyes around the 71 conflicts in the world today, we see that not only are the majority of these conflicts intra-state affairs (85%) but that two-thirds are driven by contested claims to land.<sup>38</sup> Mostly this is in a territorial sense and often has some roots in unjust treatment of customary occupation as legal tenure, as is illustrated in cases from Bougainville to Kurdistan, from Oromia to the Hmong areas in Laos. Wherever they exist, minerals, timber and oil also generate conflict as to who owns and controls these valuable resources, as witnessed in Angola, DRC, Indonesia, Colombia and the Niger Delta. Land grievance even has a part to play in that one-third of conflicts built around sharply divided political beliefs, a fact not lost upon the Marxist rebels in Indian states or the recently victorious Maoist rebels in Nepal, and who have accordingly placed equitable land reform high on the agenda of the new republic.<sup>39</sup>

### A PRIMARILY AGRARIAN CONCERN

Review of conflicts also shows that Africa is disproportionately the site of civil war,

especially since 2000 (48%). It hosts more coups, armed conflicts and causes more civilian deaths than any other continent.<sup>20</sup> This relates to a wider trend, that the site of civil conflict is overwhelmingly agrarian.<sup>21</sup> Few wars are in industrialized states. Low per capita income and growth rates, along with misgovernance with misuse of resource revenue may be prime triggers, as explored by Collier (2004, 2007). Land grievance is integral to that toxic mix, combining challenge to inequity with challenge to insecurity of rights to *our land*.

### THE CATALYSING EFFECT OF CONFLICT

As experiences from Sierra Leone to South Africa, Aceh to Angola and Guatemala to Cambodia bespeak, it may take the experience of war to crystallize and articulate the conflict between legal and customary ownership of communal resources as land theft. Or conflict may serve as a catalyst for challenging broader inequities and settling upon foundational land and resource rights issues. Kenya and then the DRC are just most recent in a long line of internally-conflicted states where lack of jobs, housing, farmland and political disappointment segued with speed into the powerful question “to whom does the land belong?”

### THE TURN OF THE CENTURY AS A CHANGING AGE

There are no signs that these civil conflicts will be the last point of conflagration, either on the African continent or in Asia and Latin America.

Just as populations begin to challenge continuing inequities among each other or with the state, the latter seeks to entrench its hold on the resources that are once again at stake. The fact that most of those affected in the developing world are poor and young adds piquancy and in frustration, militancy. It may be not fanciful to suggest that what the young are protesting is not just entering the 21<sup>st</sup> century with little hope of adequate homes

or income but also the failure of their elders (and the governments they create) to get it right, to make a safe transition from the village to the national state, to keep relations consultative and accountable – and distribution of resources relatively stable and fair where this had previously been the case. In this way, entry into the 21<sup>st</sup> century has proved a tipping point, an age-set change after half a century of post-independence in especially Africa, where most wars are being fought.

### FROM STATE-MAKING TO REMAKING THE STATE

An element of the socio-political transitions uncertainly underway which may need clarification is that while contestation around land increasingly settled as a people-government issue, there is nothing in this conflict which suggests communities wish or can do without the state. Rather, it is a different relationship which is widely and popularly sought, and which requires not just different land laws but a different way of governing land. No less than the reform of the state in its current powers and roles is fairly widely being sought, a task which makes it all the more difficult to achieve.

The centrality of land rights to governance is hardly surprising. While there are complex factors which bring a country to war, in agrarian states, land and other natural resources will always be central. Political and economic grievances focus around the right to land and its distribution. Concerns as naturally center upon those lands which are least securely held by poor majorities and have been experienced as most vulnerable to loss – the commons. In this way the 20<sup>th</sup> century state obsession with the security of the individually-held house and farm is shifting to off-farm collective resources. The role and power of the state over land is itself coming under challenge. Thus while the issue of communal property security is arguably the last colonial question in the formerly colonised world, it is also a new question, linking control over natural resources more directly to political systems and the results of which may well reshape the role and

powers of state. In the process, ideas of property are themselves liberated from the straightjacket of introduced norms. Justice in distribution of rights also takes on a new imperative. Reflections of this are seen in the gathering discourse on land reform, its links with democratisation and a shift from state-led to people-led reformism.<sup>22</sup>

### **CONFLICT OVER COLLECTIVE PROPERTY RIGHTS IS LIKELY TO RISE**

These are people-empowering trends which are yet to mature with force. In their absence it may be expected that more, not fewer, civil conflicts will arise in coming decades around the question 'to whom does this land belong?' Water, oil and mineral are also bound to come into sight. While recognising traditionally collective land assets as the private group owned property of communities is an obvious remedy, the shift from benefit-sharing to genuine state-people shareholding enterprise seems inevitable for less evenly claimed community assets such as affecting subterranean minerals. Until such trends towards more democratic and equitable control of resources emerge, it seems wise to eschew celebration that the number of civil conflicts and wars have been declining, as proclaimed in some recent human security reports.<sup>23</sup>

### **NOT ALL STATES GO TO WAR OVER THIS ISSUE**

The issues discussed above are on the agenda in no less than 150 agrarian states around the world today. Practically, most attention is right-

fully focused upon conflicted states, polities where the issues are most immediately felt, and where populations look with new eyes to the past and with new demands for the future. How far post-conflict administrations ignore or pluck out festering thorns of land grievances may be the difference between a country returning to war or not, or at best in the short-term, dissatisfied return to pre-war business as usual. As is now fairly well established, around half of all countries which have been at war with themselves over the last 60 years have seen civil conflict reignited, and often with more sharply defined land-related grievances among their primary drivers.<sup>24</sup> Tackling those issues promptly in the aftermath of war seems commonsense.

These are concerns which the peace mediating and post-conflict humanitarian and reconstruction sectors are slowly coming to grips with. Just as principles of international restorative justice begin to be entrenched (the UN Pinheiro Principles, 2005) these actors are becoming painfully aware that the key may lie less in getting land, housing and property relations back to the way they were immediately before the conflict than in their thorough reform. Yet more awkwardly, that the crux of needed reform lies less in the state's management of inter-communal property relations - the flashpoint of most conflict - than in the *state-people* property relationship which lies behind this inter-ethnic volatility.<sup>25</sup> These are matters which this paper attempts to explore in the cases of Afghanistan, Sudan and Liberia. The properties most at stake are those which pose the most challenge to the political, economic and legal conventions built around the state-people property relationship - the commons.

# 2

## The Cases

### 2.1 THE SUMMER PASTURES OF AFGHANISTAN

Pastures (or rangelands) constitute a minimum of 45% of the total land area of Afghanistan, or up to 60% of the total area when useable areas classified as wastelands are included.<sup>26</sup> Pastures support an important plank of the traditional economy of the majority of Afghans, not least in the end production of woollen and leather goods, rugs and carpets. Who owns, controls and uses pastures, has been at the heart of contested inter-ethnic relations and outright conflict in Afghanistan for no less than a century.<sup>27</sup>

#### PROXY COLONIZATION

Proxy colonization began in 1880 as the British encouraged the Pashtun tribal federation in what is today south-eastern Afghanistan to extend its authority northwards. With funds, advisers and thousands of muzzle-loaders from the Raj, the federation's leader, King Abdur al Rahman, amply succeeded. All peoples northwards to the Amu Darya River (the 'Oxus River' to the British) were brought to heel and the new State of Afghanistan created. The British objective was to create a loyal buffer state against Tsarist expansion southwards. It worked. By 1881, after half a century of Anglo-Russian imperial rivalries, the two parties agreed that the Amu Darya River would be the limits of their respective influence. The British would continue

to supervise foreign relations in the new state of Afghanistan until the First World War.

The repercussions of this 'Great Game' would be many. The Sunni Pashtun themselves were divided, half to become citizens of the new Afghan State and half to remain under formal British rule in what is modern-day Pakistan, a fact which helps explain the support which the (Pashtun) Taliban garner from fellow Pashtun in Pakistan today. Uzbeks, Tajiks and Turcos would also be split asunder. Those living north of the Amu Darya would in due course belong to the satellite Soviet states of Turkmenistan, Uzbekistan and Tajikistan while their relatives south of the river became part of Pashtun-controlled Afghanistan.

#### LOSING THE PASTURES BY CONQUEST AND DECREE

In 1894 these ancient populations in the north of new Afghanistan would see the first of many waves of Pashtun settlers arrive, competing increasingly for farm and pasture lands.<sup>28</sup> The situation was more severe for the Shia Hazara tribes of the central highlands (the 'Hindu Kush'). Despite a millennium of settlement and a reputation as fierce and independent (not least as notorious raiders of the Silk Route, which passed through their territories) the Hazara had never formed a single kingdom

or alliance of their own. Nor in the decades prior to British intervention had they managed to prevent Pashtun encroaching on their lands. In 1841 a travelling British emissary recorded that the Hazara's plains lands around Kabul and south to Kandahar "are being forcibly occupied by Pashtun."<sup>29</sup> By 1880 the Hazara were broadly confined to the mountains, those on the eastern periphery forced to pay tribute to keep the Pashtun at bay.

Now, with the new ambitions of Abdur al Rahman as modern state-maker, even this rugged mountain region known as Hazarajat was thoroughly invaded. Pashtun authority was installed right to the community level, along with harsh taxes (16 new taxes were imposed in 1893 alone). The Hazara rebelled. Furious, Abdur al Rahman ordered that "no sign of these irreligious people should be left in these lands and mountains" and that their property be redistributed among loyal *Kuchi* (Pashtun nomads). This was duly effected in 1893 and 1894. Clutching their leather-inscribed land grants (*firman*), favoured *Kuchi* clans began to enter the region for the rich summer grazing which had underwritten the Hazara economy for centuries. By doing so the Pashtun *Kuchi* nomads abandoned their historical migration southwards through Pakistan and where many of fellow Pashtun had settled. Initially, *Kuchi* attempted to settle in the Hindu Kush/Hazarajat but were uninterested in farming and defeated by the harsh conditions in the mountain valleys. Still, within a year or two, Hazara who had not been killed or marched to Kabul as slaves, were, a later royal chronicler would admit, "without livelihood."<sup>30</sup> The loss of pasture access more than anything else crippled their agropastoral economy.

Relief of sorts came 30 years later. In 1927-28 King Amanullah, the liberal grandson of Abdur al Rahman, recalled the *firman* issued to *Kuchi* and reissued these restricting them to the high pastures. By this act, the monarch implied that their grants were access rights rather than real ownership, which as monarch he retained. While Hazara regained their valleys and near pastures, this was hardly the restitution they had demanded.

The high altitude pastures were integral to their system of transhumance and additionally essential to providing the fodder and fuel needed for the six month long mountain winter in the deep valleys. In any event, Amanullah's multi-ethnic policy did not last long. Under successive rulers (1929-1978) Pashtunisation became a formal state objective. This included consolidation of Pashtun *Kuchi* possession of pastureland. Indigenous populations could at times access their customary pastures but only at the will of settled or visiting nomads.<sup>31</sup>

### CIVIL WAR

As is now well-known, the murder of President Daoud in 1978 ended the Pashtun dynasty and gave way to a communist revolution, to be sustained for a decade by Soviet invasion and support (1979-1989). Gorbachev's withdrawal saw the country collapse into inter-tribal warfare (the Mujaheddin period, 1991-1996). This was brought to an end by American backed conquest by the Pashtun Taliban in 1996, in turn crushed by an American-backed non-Pashtun alliance in which Uzbeks and Tajiks were dominant. In December 2001 the Bonn Agreement installed Hamid Karzai as President.

### MAKING THE PASTURES GOVERNMENT LAND

Further transitions had meanwhile altered the status of pasture. First, as USAID found its feet as a development agency in the 1960s it guided King Zahir Shah's Administration towards the introduction of modern (western) property law, administration and land taxation.<sup>32</sup> By 1964 several hundred technicians were being trained and with several hundred vehicles set out to title the country. They would cover less than 10% of the area by 1978. Half that area was registered as family owned farmland. Most of the remainder was pasture. This was recorded as Government Land, in accordance with the new registration and land tax law of 1965.

This titling and a subsequent Pasture Law of 1970 declared that while already-issued rights, including royal grants, were to be respected, no

pastures were to pass into private ownership or be leased or sold. Pasture as a whole was designated public land. Technically, this diminished royal grants to Kuchi and the many inheritance and transfer deeds in their regard made over the years to possessory access on *de facto* government land. In practice, this was not well-absorbed by nomads, nor was this made explicit in the text entitlements which continued to be issued then or since.<sup>33</sup>

Nor did nomad (*Kuchi*) dominance of the summer pastures alter. If anything, hand in hand with flourishing Pashtunisation, it had become more entrenched. Kuchi dominance doubled especially in Hazarajat where wealthier nomads, establishing themselves as traders and transporters along with livestock keeping in the 1950s, were able to acquire whole valleys of small farms, often in lieu of minor debts incurred by Hazara in purchasing cloth, tea and sugar in ways which are typical of mechanisms of feudal indebtedness generally.<sup>34</sup>

At the same time, new law actively empowered agricultural officials to control the allocation and use of pastures. With the useful instrument of land and livestock taxation to hand, many accomplished this with zeal and sometimes personal benefit. In either case Pashtun control over the land-holding of non-Pashtun groups was usually consolidated at the hands of mainly Pashtun officials. On grounds that 'all pasture belongs to Government' farming schemes were launched in more accessible pastures, often by officials or even by the Ministry of Agriculture itself.<sup>35</sup> Settlement schemes for people without arable land also flourished in the reformism of the 1960s and 1970s and in which Kuchi nomads were identified as priority beneficiaries.<sup>36</sup>

The results for poorer and power-lacking local populations were predictable; legal and practical access to the precious pasturelands at the foundation of their livelihoods was frustrated.<sup>37</sup> This was particularly so for the central zone Hazara; although their virtual enslavement from the 1890s was much eroded, Hazara continued to be exploited as labour both within and beyond the Hindu Kush, and inter alia, were deprived of the many educational developments which were flourishing at

the time. Subordination was profound, manifest in deprivation of territory, pasture access and ethnic discrimination in the fast modernising society.

Discontent grew through the 1970s and began to find expression in local organization.<sup>38</sup> Ironically, the farm distribution reforms advanced during the 1960s-1970s and targeted in Hazarajat to large feudal landlords were to do more for politicising Hazara in general against Pashtun encroachment than deliver land to the substantial numbers of arable landless. The stronger local focus throughout was upon the pastures, not the irrigated farmlands.<sup>39</sup>

### RECAPTURING THE PASTURES

Patterns of inter-ethnic social and land subordination were to change with the civil war through the 1980s. Often a first act of war by Uzbek and Turkmen communities in the north was to (brutally) evict Pashtun settlers - and recapture the pastures. Pashtun settlers would comprise the larger proportion of refugees fleeing to Pakistan, where the puritanical Taliban movement would take root. Hazara in mountainous central Afghanistan slowly acquired arms and again as first action, began to prevent Pashtun Kuchi entering the region with their animals in early summer, from the early 1980s. Except for a brief and violent period in the late 1990s when Taliban rule made Kuchi return to parts of Hazarajat possible, and resulting in some incidents of terrible violence, few nomads have since successfully returned to Hazarajat.<sup>40</sup>

### THE TRAGEDY OF PUBLIC LANDS

The use and management of the summer pastures had also altered by 2001. Already in the 1970s, over-exploitation of near pastures for fodder and fuel and expansion of rainfed farming into these dry fragile areas was being widely reported.<sup>41</sup> With the chaos of war and the demise of draconian state control limiting the worse excesses, the nature of public lands as property of everyone and no one took its toll. Hazara, long prevented from using the pastures for rainfed cultivation and in the pro-

cess having turned more to farming, dramatically expanded rainfed cultivation into the pastures. Contrarily, warlords in especially the north, taking a leaf out of the book of Government during the 1970s, began to open up pastures for commercial cultivation, limiting local access.<sup>42</sup> Land and pasture-short communities even in areas where no warlords or officials reigned also began to compete with each other for access to high altitude pastures, again justifying this on the basis that as 'pasture belongs to Government' then it must be open to all. Local leaders, especially following the departure of the Russians in 1979 added to the problem by resettling returnees on some of the lower pastures, multiplying settlements. Everywhere, shortage of pastureland, fodder and winter fuel (high pasture bushes) were by 1990 chronic. Distinctions began to arise between those communities which restored recaptured pastures to customary village or valley-based control and those where customary norms battled with encroaching elites, warlords and officials.<sup>43</sup>

### RESTORING THINGS TO HOW THEY WERE

The response by the post-Bonn Administration from 2002, largely still staffed by 1970s officials, was determination to return conditions to the way they had been in 1978. While the humanitarian community anxiously sought means to get four million people back to their home areas (including Pashtun to the north and puzzled at their obvious unwelcome by local Uzbek and Turkmen communities)<sup>44</sup> the reconstruction aid community wanted the agro-pastoral economy back on track. Inter alia it advised the re-launching of mass titling and the re-securing of "government property."<sup>45</sup>

By 2003, several ministries were urging the reissue of the Pasture Law of 1970, to once again declare that the pastures belonged to Government.<sup>46</sup> They dismissed as irrelevant a moderate edict passed a year or so earlier by the Taliban (2000) in which communities were at least acknowledged as the owners of near pastures. While the Ministry of

Agriculture was most concerned to retrieve its hegemony over pastureland to halt expanding rainfed farming, the Ministry of Finance eyed the pastures as land to offer local and especially foreign investors. The Ministry for Tribal Affairs (nicknamed the Kuchi ministry) was determined to help the nomads regain their control over the summer highland and northern pastures. Kuchi themselves did not initially force the issue; they had lost half their stock during the 1999-2002 drought, and were widely reviled by Afghans, including more liberal Pashtun, for their close association with the Taliban and their role in atrocities committed on their behalf in different parts of the country, including the purposive ravaging of the rich grape-planted Shamoli Plains by their herds.<sup>47</sup>

The restitution of nomad control of the pastures was not something which local non-Pashtun populations in the centre and north were about to allow. Their stance was that they had not fought the long war and liberated themselves and their resources from Pashtun domination, only to see this reinstated. Return of Pashtun to their settlements in the north was denied. Nor was return as a whole going to plan; several million refugees and displaced persons clearly had no intention of returning to rural areas where landlessness and exploitative relations reigned and no jobs and education could be found. They were cluttering up the cities, Kabul alone growing threefold between 2001 and 2004. A key group of those now settling in towns were landless and stockless nomads and who would regain stock only as herders for wealthy Kuchi businessmen.<sup>48</sup> As stock numbers began to recover in 2004, Kuchi leaders revived their lobby for recognition that they were the true owners of the summer pastures according to the original royal grants of the 1890s and 1920s and subsequently, triggering new anxiety among settled populations in the central and northern zones of the country.

By 2004 it seemed that pasture would be declared Government Land and the conflict between local customary rights and non-local interests would be left to fester for another century. This

indeed begun to unfold, in a series of new laws entrenching Government interest over non-private lands and encouraging private foreign investment by permitting leases of even “barren” land for periods up to 90 years.<sup>49</sup> Within the Kuchi community, moderate leaders were willing to recognize the pastures as owned by local communities so long as nomadic seasonal access was guaranteed. Unfortunately, these moderate voices were pushed aside.<sup>50</sup>

### **OFFERING BREATHING SPACE AND A WAY FORWARD**

Concurrently, the Ministry of Agriculture during 2002-05 was gradually persuaded that closer examination of the issues through localised learning might arrive at a more acceptable way of recognising tenure and distributing rights.<sup>51</sup> While failing to include a chapter on land matters in the new National Constitution in 2004, the dialogue proved instrumental in preventing constitutional declaration of pastureland as national or government property.<sup>52</sup>

Pilot projects to explore and resolve pasture tenure issues took time to get off the ground. Threat of Taliban incursion derailed a USAID-funded project to facilitate Hazara negotiations with nomads over the vast Nawor Pasture in the foothills of the Hindu Kush, which had been central to Hazara-Pashtun conflict for over 100 years.<sup>53</sup> Bureaucratic difficulties impeded an early start to a smaller conflict resolution initiative funded by the World Bank. By then Asian Development Bank (ADB) had been persuaded that mass titling of farmlands (a mere 12% of the total land areas) was not the panacea promised, and reshaped its land policy assistance into a more exploratory exercise of community based land registration, including pastures.<sup>54</sup> The United Nations Food and Agriculture Organization (FAO) was able to mobilise a much larger programme in the central highlands to assist several hundred Hazara communities to clarify and entrench respective collective ownership of pastures, within a context of establishing community

based pasture rehabilitation and management.<sup>55</sup> This drew support from the terms of a new Forest and Rangeland Policy (2005) which recognises that the Ministry could no longer control the pastures as it believed it had done in the 1970s, but which stopped short of acknowledging communities as outright owners.

### **LOOKING TO REAL CASES FOR GUIDANCE**

The lessons cumulatively emerging from especially the FAO initiative have been powerful and salutary.<sup>56</sup> The strongly local collective basis of pasture ownership has been confirmed and demonstrated as the logical basis for rehabilitating the vast but depleted rangeland resource and sustaining this over the longer term. Active customary tenure has been shown to manifest as family or hamlet ownership of rangeland immediately next to settlements, as village cluster ownership of higher pastures, extending to shared clan ownership in the case of the very largest pastures in Afghanistan and which may each embrace several thousand square kilometres. In not a single instance has family, village or village cluster tenure been locally-defined as less than ownership. At the same time communities acknowledge that Government and the law say that Government owns their pastures.

How far communities may uniformly install and sustain local control over pastures has proved less consistent. All too many communities have been confronted with the legacy of entrenched open access over the last century, unable to regain authority, despite their enormous investment in community-based regulation and management regimes. In almost every case this has occurred in those pastures which were placed under Government control during the last half-century, and primarily allocated to Kuchi nomads.<sup>57</sup> The main reason is instructive; now related less to Kuchi control than to the way in which powerful officials and notables have manipulated the status of these pastures as public land to their own interest, knowing full well that restoring local managerial

control would constrain access by their now many hundreds of animals.

Traditional owners in such areas have found they are unable to rely upon provincial or national government support for their management decisions, so long as the personal interests of one or two key notables and officials remain unchallenged. Fear of the residual power of these notables—former warlords still able to rally local armed militia, helps intimidate more benign officialdom. Unresolved devolution of rights and responsibility among levels of government from centre to province to district provide an easy excuse for inaction.<sup>58</sup> Affected Hazara communities begin to ruefully confess that it may be easier to treaty with nomads than overcome forces of malaise and misgovernance.

#### **FACILITATING NEGOTIATION BETWEEN CONTESTING CLAIMANTS**

Some progress precisely on this point has been made. From the outset, the FAO initiative was structured to include negotiation with Kuchi who could claim longstanding access to particular pastures in the Hindu Kush, in areas where pastures were resilient enough for multiple use.<sup>59</sup> This was put into effect in 2008, in response to the arrival of large groups of Kuchi nomads into the 3,500 sq km Band-e-Petab Pasture in northern Bamyan Province. Successful negotiation proceeded, only possible due to the willingness of those Kuchi clans to accept that Band-e-Petab belongs to the local Hazara clans and to pay grazing fees accordingly. That they were willing to do so is more testimony to their desperation in the search for grazing pasture, and the fact these Kuchi had always implicitly acknowledged Hazara ownership of this pasture. Additionally, the pasture is large enough to sustain their entry, and the pasture at high enough altitude to limit access to three brief summer months at most. Their agreement would contrast starkly with increasingly violent relations of Hazara with Kuchi arriving at the Hindu Kush from the south and east, as outlined shortly. Meanwhile the one-year ADB project demonstrated that community based

registration of rights, including to pastures was, as anticipated, perfectly viable.<sup>60</sup>

#### **REFORMING THE LAW**

As well as strongly influencing new national land policy (2007)<sup>61</sup> these and a set of other lessons have been fed into the drafting of a new pasture law. In its current iteration (June 2008) the proposed Rangeland Law (as it is named) makes its purposes “to recognize and formalize the custodianship, management and use rights of communities and other users, to establish a legal framework for bringing all rangelands under community custodianship” and “to define the regulatory, advisory and mediating role of the Government of Afghanistan in relation to pastures” (Article 1).

This represents a dramatic departure from the paradigms of 1970 or as proposed in 2003. The draft also provides for pastures to be classified as either private, community or public properties. The last is to be a residual category, and pastures are to be acknowledged as public property only where customary possession cannot be satisfactorily identified and sustained (Article 17). Additionally, the ownership of public pastures is to be on a district basis, not national.

As with private and community pastures, public pastures are to be managed by local custodians, identified as either owners (private and community pastures) or as those adjacent communities which hold the strongest socio-spatial and historical rights to the pasture (Article 3). Where nomads are able to demonstrate a long history of seasonal access to public land pastures, the law requires their interests be upheld as far as possible, and secured strictly through local agreement. Only where local, and then district and provincial mediation fails, may Kuchi submit claims to a President-appointed commission formed to determine the case (Article 22).

While this suggests a positive outcome after several years of post-conflict debate on the matter, such success remains unstable and vulnerable to retrenchment. Among local populations the retention

of any of their traditional pastureland as public pasture is alarming, not least because some of their most valuable pastures are precisely those which have a 20<sup>th</sup> century history of treatment as de facto government property and/or Kuchi property.

Meanwhile, Kuchi advocacy of a return to business as usual in tenorial claims is increasingly strident, empowered by associated Talibanization. Some officials also find it difficult to envision a future in which they do not themselves have complete ownership and control of the pastures, reflecting fear of loss of rent-seeking opportunities. The terminology of ownership was weakened quite early on in the drafting of the new Rangeland Law, laying a path for the government to potentially recapture central control and management of these pastures.

### **‘OWNERSHIP IS DANGEROUS’**

In such positions the government gained support from the position of the now-closed ADB project. This curiously advised in 2006 and 2007 that pastures must be again legally entrenched as government property, communities awarded rights to control and access a pasture but bound to sign agreements that government may take that land “for agricultural farms, livestock development and industrial parks, roads and other infrastructure with their consent.”<sup>62</sup> This was in line with the above-mentioned investment-friendly legislation. Aside from this, project staff suggested that “recognising the pastures as community-owned is dangerous.”

This stance reverts to the convention that the State is the only safe guardian of degradable resources, and especially those which are contested. Both positions defy local history and present-day reality. The post-conflict Administration possesses even less means or staff to regulate the hundreds of pastures around the country, and on the contrary has a history of being responsible for the degradation. The State’s definitive capture of the pastures from 1970s had itself been a further incentive to degradation, finally entrenching these resources as

open to all. Nor was there anything in the past actions of state which had lowered the temperature between favoured Kuchi recipients of this declared Government resource; this too had reached new heights during the 1970s, along with the final verve of Pashtunisation under the Republican President Daoud.<sup>63</sup>

There was another thread to such arguments, maintaining that as collective assets—which communities do not customarily trade, pastoral commons are generically un-owned, un-ownable and do not amount to real property. This is hardly an orthodoxy unique to Afghanistan and was much promoted there by the assisting international community during the 1960s.<sup>64</sup> There also seems to be touching faith in State trusteeship of resources, even after a century of contrary experience. Technically, resistance to acknowledgement of pastures as communal property directly underestimates the damage done to pasture over the last half century by studiously ignoring communal management structures. Moreover, such resistance neglects the advantage that recognition of local tenure gives to mobilising and sustaining local resource conservation. Such positions also underestimate the determination of local communities to see their tenure recognized and their associated resistance to a return to the way things were prior to the civil war. For the Hazara in particular, restoration of land rights has become inseparable from their empowerment and liberation as one of the few positive consequences of the civil war.<sup>65</sup> Finally, on a more practical level, as FAO responded to ADB positions, reluctance to recognize customary rights as amounting to ownership removes the opportunity to use the distinction between ownership and access rights as the mechanism through which the bitter settled people-nomad conflict could be practically resolved.<sup>66</sup>

Needless to say, the more conventional positions continue to resonate with the inclinations of more conservative officials in the post-conflict Administration, many holding the same positions they held before the civil war. The Ministry of Agriculture has for example recently seen its Forest Law draft

returned by the Ministry of Justice as too radical; a bill which far from proposing to acknowledge customary ownership of the tiny forest resource, sought only to enable those communities to *manage* these resources. Rising official interest in having expansive pasture lands to lease to investors is also strengthening reluctance to surrender rights to communities. As of October 2008, the Rangeland law remains in draft.

### NEW CONFLICT THREATENS

In the interim as formal decision on pasture rights is delayed, conflict continues to grow more threatening with each passing year between mainly Pashtun nomads and local populations. Fighting between Kuchi and Hazara broke out in spring 2006 and more seriously in 2007 as armed nomads gathered with their flocks at a main entry point into the mountains, demanding passage. As was the case in the 1990s, many Kuchi have allegiances to the Taliban, and in June 2007 they took the opportunity to raise the Taliban flag on the periphery of the Hindu Kush. In the resulting fracas, thirteen Hazara were killed, tens wounded, hundreds of Hazara homes burnt and thousands forced to flee.<sup>67</sup> Spring 2008 opened badly with a declaration by a Kuchi Member of Parliament that only Pashtun are true Afghans – and that they own all the land.<sup>68</sup> Following a walk-out by offended non-Pashtun, Parliament was closed for over a week. Hazara in particular took to the streets, demanding that Government and its supporting US-led international forces protect their lands from Kuchi armed invasion. Great bitterness was also expressed that Kuchi remain the only group still exempt from disarmament requirements.<sup>69</sup>

By June 2008 battles were taking place in several districts abutting the mountains, as arriving armed Kuchi again burned Hazara houses.<sup>70</sup> Hundreds of families again fled.<sup>71</sup> Political leaders including the Vice-President voiced concern that civil war could begin in areas which have so far not been directly involved in the fight against Taliban insurgents.<sup>72</sup> Hazara leaders meeting in

June and again in July 2008 reiterated their traditional ownership of the pastures of Hazarajat and requested that government and the international community disarm the Kuchi.<sup>73</sup> Fears that Kuchi are being armed by the Taliban have also been expressed, along with accusations that embattled Hazara are in turn looking to Iran for support.<sup>74</sup> The UN has been actively trying to mediate between Kuchi and Hazara leaders since the events of June 2007 but broadly has failed. A main reason may be the tendency of conventional conflict-resolution procedures to concentrate upon creating goodwill rather than advancing practical strategies for resolve such as the grounded FAO initiative early on found logical and necessary. By being unsuccessful, these high profile efforts imply, incorrectly, that the matter is irresolvable, heightening anxieties further and entrenching positions along ‘all or nothing’ lines.

In practice it has only been with the onset of the bitter winter season in late September 2008 and the return of encamped Kuchi to their winter pasture areas that tension has lessened. In the past, Afghans have relied on winter to proscribe such conflicts. The expansion of Taliban control northwards towards the Hindu Kush suggests however that the renewal of the Kuchi – Hazara land conflict may not wait for the spring this time.

### CONCLUSIONS

Stepping back, the question of “who owns the pastures?” is being battled over along several tracks:

- First, between government and people as to the extent of customary right to be recognised;
- Second, within government and the international community, as conservatives and modernists debate the wisdom and implications of retaining the pre-war idea of all pasture as real or de facto government property, and subsidiary to this, in whose hands it is most practically regulated towards rehabilitation and sustainable use; and
- Third, and increasingly violently, settled and nomadic people are fighting for tenure.

Underlying this is the time-old inter-ethnic and especially Pashtun/non-Pashtun divide which afflicts the country as a whole, and which shows signs of hardening with the gathering force of Talibanization. Should the unsteady peace in

Afghanistan not be sustained, the question of who owns the high pastures may be expected to be overtaken by more severe battles over territory, but with the prize still firmly fixed on this valuable and contested resource.

## 2.2 THE WOODED SAVANNAS OF SUDAN

In many respects the tenure situation in far-away Sudan is not so different from that in Afghanistan. The rural majority struggle to have their communal assets recognized as rightfully theirs, following a substantial history of these being treated as the property of the State. This too occurred in two phases, in modern laws declaring this to be so, underlain by an older history of colonial conquest and resource capture. The conflict between State and people's property interests is similarly delivered in contestation between nomads and settled communities, and again ethnically aligned, in this case between the largely Arab north Sudan and the African south. The role of well-intentioned international aid agencies is also present, variously obstructing or aiding positions, and never neutral.

There are other similarities in that the experience has seen political consciousness of injustices and resistance to return to pre-war conditions materialize and play an important part in shaping conflict today, increasingly as an issue between government and people. In these circumstances, potential resolution is not found in reconfirmation of declaratory law as it existed prior to the war. Successful resolution is more likely to emerge through localized and incremental learning by doing—an approach purposefully pursued precisely to avoid re-entrenchment of such “bad law” and to build a stronger and more inclusive platform for arriving at more workable and acceptable new law.<sup>75</sup>

More negatively, in both countries failure to resolve the single question—*who owns the*

*pastures?*—is helping to reactivate conflict. The International Crisis Group has recently expressed concern that failure to resolve deep grievances in central Sudan may lead to another Darfur. Coincidentally (or not) similar conclusions are emerging in Afghanistan.<sup>76</sup> A more pessimistic conclusion might be that the entire state of Sudan is at great risk of collapse, and for reasons which rest to significant degree upon contested rights to resources. State policy and law, abuse of customary land rights, engineered ethnicism, and greed for resources all play a role.

The situation of communal tenure in the two countries differs in other respects. This is not least in the difference governance environment within which the land rights issue is treated. On the whole, will to resolve the issue and be fair to customary rights is the stronger trend in Afghanistan.<sup>77</sup> It is less and less sure that this may be said for northern Sudan, the declamatory intentions that may be read into the Peace Agreement notwithstanding. Additionally, the issue of land rights and collectively-owned lands was a conscious cause of war in Sudan, although one largely inseparable at the time from ethno-religious differences. As a consequence the matter was brought firmly to the peace-making table by the most aggrieved party, the south, and which enjoyed identity with African as compared to mainly Arab and northern populations. The points of agreement that were (and were not) reached have been pivots in the handling of the issue since.

There is thus either irony or instruction in the fact that as matters stand in late 2008, communal

land owners are more or less in comparable situations in both countries. This suggests that either the contents of the Sudan Comprehensive Peace Agreement were insufficient to make a difference, or that it is post-conflict actions, whether prefaced by agreements or not, which determine the way forward. Alternatively, it might be concluded that the issues at stake are simply too loaded to find swift resolve, at least in what in both states is still the post-conflict short-term of three to seven years.

### **FOCUSING ON THE CENTRAL CONTESTED AREAS OF SUDAN**

A short account of the communal lands issue in especially the most contested central zone of the country follows. Modern Sudan exists today as a federation of 25 states, the 10 most southern forming the semi-autonomous region of Southern Sudan. Southern Sudan embraces around a third of the total land area and an estimated 40% of the total population. The peace agreement ending the 24 year civil war between the Arab north and largely African south was negotiated after a ceasefire in 2002 and finally signed in January 2005. This was the second civil war between these regions since Sudan gained independence from shared British Egyptian control in 1956. The peace was signed between the national Government of Sudan, led by President Omar Bashir, leader of the Islamic National Congress Party (NCP) and the Southern People's Liberation Army (SPLA), led by John Garang. During 2002-04 the SPLA formed a political party, the Southern People's Liberation Movement (SPLM). By accord, this governs Southern Sudan until the holding of a national election in 2009 (more likely, 2010). By the terms of the Peace Agreement, Southern Sudan has the opportunity to secede as an independent nation following a yes/no referendum to be held a year after the national election.

Although the mainly African populations of central zones and specifically the Nuba region of Southern Kordofan State and the Funj of southern Blue Nile State fought on the side of the African

south, these states were excluded from Southern Sudan, a cause of major grievance today. Nuba in particular fear that they will once again be subject to Arab-dominated colonisation and land theft as described below, while their fellow Africans in the south enjoy protection of customary property rights.

### **LAYING DOWN THE GAUNTLET**

“Land belongs to the people.” This was a maxim of the Southern People's Liberation Army (SPLA) and the Southern People's Liberation Movement (SPLM) led by John Garang and now Salva Kiir, who serves as both President of Southern Sudan and a Vice President of Sudan overall in what may only be described as an extremely uneasy form of co-governance. The problem was, SPLM leaders admitted in March 2004, it was not clear how to deliver land rights in practice.<sup>78</sup>

Within the North-South Peace Talks (from which Darfur was excluded) the matter mainly concerned the inhabitants of the central zone. These were African tribes and most notably the Nuba of the semi-mountainous Nuba Mountains (now the greater part of Southern Kordofan State) and the Funj of Blue Nile State to the east. Both had borne the brunt of fighting during the long North-South War (1984-2002). They were also peoples who had begun from the 1960s to lose millions of hectares of their communal plains to state-supported schemes and allocations.<sup>79</sup> While substantial numbers of Arab nomads (*Baggara*) had been living in or seasonally visiting the central region of Sudan for a century or more, greater numbers of northern Arab nomads were also encouraged to settle there in this period, or were doing so voluntarily as a means of dealing with the establishment of schemes in their own home areas further north.<sup>80</sup> It had in fact been these multiple encroachments which had driven Africans in the Nuba Mountains and Southern Blue Nile to join the southern-dominated SPLA against the national government, or more specifically, its ruling Arab Islamic elite, the National Congress Party

(NCP). The National Congress Party still dominates the political landscape today.

As open conflict came to an end with the signing of a first ceasefire, the Southern Kordofan and Blue Nile State were divided, partly controlled by the northern military and partly by forces under the SPLA. Both northern and southern forces were permitted to establish their own interim administrations. Abyei, an area traditionally in the southernmost corner of Southern Kordofan State, was considered a distinct, third zone. In March 2004, with a formal peace agreement in sight and hints that restitution would be possible, the SPLA governors of these three regions (known as the Three Contested Areas) were anxious to plan just how restitution of lost lands should take place and how these could formerly be secured as the property of Abyei, Nuba and Funj tribes.

Before addressing this, it is as worthwhile to be clear on how these lands had been lost in the first instance. As in Afghanistan, this was from the outset a matter of state law.

### **MAKING DISPOSSESSION LEGAL**

In the 1970s the principal legislation which allowed Khartoum to help itself to the lands of local populations was the Unregistered Land Act, 1970.<sup>81</sup> This was introduced mainly to satisfy concerns of the World Bank that evictions of local communities on vast mechanised agricultural schemes underwritten by its loans be made legal.<sup>82</sup>

This law was in due course replaced by a more subtle Civil Transactions Act, 1984. This Act assured farm and house owners that their occupancy was protected, but retained intact the provision that uncultivated and unregistered land belonged to Government. As unregistered land embraced more than 90% of Sudan's total land area, this confirmed the State as the majority landholder. Eviction by Government was made lawful, and even appeal to courts against eviction, unlawful.<sup>83</sup>

This position was not entirely new. The provisions built upon legislation dating back to the beginning of the Anglo-Egyptian Condominium rule of

Sudan which lasted from 1899 until independence in 1956. The founding law on this matter was in 1905, ruling that all "waste, forest and unoccupied land" was Government property.<sup>84</sup> Ironically, one of the objectives at the time was to protect African lands from further invasions and dominance by Northern Arabs. Administrative orders in following decades left villages with a maximum radius of 3 km as the area lawfully occupied. War and peace notwithstanding, these and related provisions remain in force today.<sup>85</sup>

### **LOSING RIGHTS**

Four themes are discernible in the ensuing handling of mainly African land rights. First, as above, was the early co-option by the State of those resources of most value to rural communities, their expansive wooded savannas, by legal denial that these were owned or ownable.<sup>86</sup> This consolidated with each decade and became decreasingly benign. It was also despite clear knowledge that in the words of a prominent British Administrator in the 1930s that "the native is inclined to consider that all land is either within his or some other village's boundaries."<sup>87</sup>

### **LOSING EQUITY**

Second has been the continuing story of northern capture of lands of the more fertile central and near southern zones of Sudan, and this in turn often engineered or delivered by Arab nomadic populations. As suggested above this also did not begin in the 20<sup>th</sup> century; on the contrary it had long origins in the enslavement of Africans by Arabs in the region. As Johnson records (2003), the British found on their arrival in 1899 that it was normal for northerners with access to the African south to pay tribute to their own leaders in the form of especially Nuba and Dinka slaves, not just gold or ivory from their lands. By the 1970s, and after a century in which Arab power was firmly reshaped into State authority, the pattern of resource grabbing and its underbelly of racial oppression were hardly altered.

### LOSING POWER

Third was Indirect Rule, originating in The Sudan precisely to bring the vast country under some degree of administration. In delivery, the foundations of collective land rights - communal jurisdiction - was ignored and reconstructed. In the important Nuba Mountains/South Kordofan for example, only four of some 60 Nuba tribes were recognized as living within Native Areas of their own, while the remainder were merged under Arab-controlled Areas and to whose Arab leaders, allegiance was necessary even to secure African residence.<sup>88</sup>

In the process, virtually all of the valuable clay plains of the Nuba were handed over to the three branches of the nomadic Hawazma from the north.<sup>89</sup> These zones were essential to Nuba livelihood, providing space for large seasonal farms which the steep mountain areas did not provide. The plains also provided pasture, woodlands and Gum Arabic, an ancient trading commodity. Northern descendant Arab nomads had by then well-established passage and seasonal grazing rights in these areas.<sup>90</sup> With a long history of slaving raids behind them, the Hawazma had for many decades routinely sent the Nuba scurrying to the mountains ahead of their summer arrival. The entrenchment by the British of this *status quo* as the legal reality was a source of great resentment to the Nuba.<sup>91</sup>

Nonetheless, even Arab Native Authorities provided a degree of protection to non-Arab local populations, and the demise of these institutions in 1971 opened the way for unbridled central government interference in local land rights throughout the Sudan. This was not halted by the restitution of (provincial) local government in the 1980s, for it was through these agencies that much of the manipulation of land rights by northern interests would thereafter be eased.<sup>92</sup>

### LOSING LAND

Fourth and most recent are the large scale evictions of local owners to make way for mechanised farming schemes. Initially these were

designed for local populations under the Numeiri mobilisation of agricultural cooperatives. By 1968 they were catering to northern private and foreign interests, in the hands of prominent officials, traders, agri-business, Islamic banks and Middle Eastern investors, and increasingly, selected supporters of Islamic fundamentalism.<sup>93</sup> Local land losses in the Nuba Mountains/South Kordofan area alone amounted to 4.5 million acres.<sup>94</sup>

Today these local land losses may be tripled, given the assurance of the Civil Transactions Act that those who drilled wells or opened farms in so-called waste, unoccupied and abandoned lands are considered lawful users, competing with local customary owners. During the war many settled populations fled these areas and Khartoum yet more actively encouraged northerners to move into this part of the country, to increase northern Arab and Islamic presence (the so-called Arab Civilization Project). This continues today, the objective being to consolidate the vulnerable (and oil and mineral rich) Southern Kordofan State as a predominantly Arab, Islamic and National Congress Party supporting State.<sup>95</sup>

### FAILING TO RECOVER RIGHTS AND RESOURCES

Ownership of land and underground resources were extensively debated during the peace-making period, supervised by Inter-Governmental Authority on Development (IGAD) in Kenya, but little could be agreed. In the eventual Wealth Sharing Protocol of January 2004 the subject of ownership was set aside for later agreement by an unspecified process (Article 2.1). This never occurred. It was however agreed that “a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices” (Article 2.5).

As ownership was firmly off the agenda, and given the well-known reluctance of Khartoum to change existing law, it is unlikely that the North considered that customary laws or practices could ever amount to land ownership. Events since have

shown this to be so. At the time, the added provision that “rights owned in land by the National Government will be exercised through the appropriate or designated level of Government” (Article 2.4) was warning enough. The odd provision for land matters to be subject of concurrent jurisdiction among levels of government confirmed warning that there would be little space for local governments to activate change (Article 2.3).

Land Commissions were also to be instituted at national and Southern Sudan levels with vaguely specified duties and powers relating to disputes between parties where they were both willing, at once limiting the kind of cases that would be heard (Articles 2.6 & 2.7). The Commissions were to make recommendations regarding land reform policies (Article 2.6.6). Hope was raised by the mention that this could include recommendations regarding “recognition of customary land rights and/or law” (Art. 2.6.6.2). This sub-provision would not appear again, in either the final Peace Agreement or the Interim National Constitution.

### **REMAINING IN THE NORTH AND BATTLING FOR RIGHTS**

Concerns around customary rights fell off the agenda following the agreement in early 2004. Despite significant behind-the-scenes lobbying by US agencies to see a more elaborate accounting of land rights and administration, this was never achieved, either in the final drafting of the Implementation Modalities (2004), the Comprehensive Peace Agreement (January 2005), or more importantly, in the drafting of the Interim National Constitution (2005).<sup>96</sup> As negotiations drew to an end SPLA was preoccupied with bringing the central zone three contested areas into South Sudan. By the time this had failed for the two main areas of Southern Kordofan and southern Blue Nile (August, 2004) the North was confident it need not revisit the issues.<sup>97</sup>

This has since been maintained, Khartoum preventing the two states of South Kordofan and Blue Nile from introducing articles into their State

Constitutions (2007) that went beyond the ambivalent provisions agreed originally in the Wealth Sharing Protocol of January 2004. A new chapter of Land proposed by the SPLM was rejected. This accorded customary interests status as property, irrespective of whether or not those rights were registered, or held as individual, family or community estates, provisions already well embedded in the reformed land laws of a rising number of other African states such as Uganda and Tanzania.<sup>98</sup> In addition, the chapter laid down the foundation for these to be administered by community land boards.<sup>99</sup>

### **CURTAILING THE OPPORTUNITY FOR RESTITUTION**

The chance to even have State Constitutions was a special concession to the Nuba and Funj in the failure of the long promise that the boundary of Southern Sudan would be drawn to include their areas. The intention was that these bodies would address the bitter claims of wrongful loss of lands. The Commissions were accordingly uniquely empowered by the peace agreement to “review existing land leases and contracts and examine the criteria for the present land allocations and recommend to the State authority the introduction of such necessary changes, including restitution of land rights or compensation” (Southern Kordofan/ Nuba Mountains and Blue Nile States Protocol, May 2004, Article 9.6).

Neither Land Commission has in fact been established. This has been despite expert drafting of enabling legislation provided under the aegis of a US-funded customary land security project and concerted but often frustrated efforts to bring non-SPLM members of the State legislatures on board.<sup>100</sup> Few Nuba and Funj state officials are optimistic that even if eventually formed, that the State Commissions will have autonomy from the NCP-dominated National Land Commission in Khartoum. This too has not yet been formed, more than three years after the signing of the Comprehensive Peace Agreement. It may be fairly safely concluded that the draft laws simply offered too much opportunity

for restitution to take place for the NCP leadership to find this acceptable.

### **PROMOTING CUSTOMARY LAND SECURITY AND DEVOLVED LAND AUTHORITY**

An innovative attempt to assist the two regional states to resolve their tenure conflicts from the ground up has also ultimately failed to make progress, again largely due to constraining political circumstances. The Customary Land Security Project began as US-funded pilot project on a shoestring budget in mid to late 2004, eventually instituted as a fully-fledged American aid project in 2006.<sup>301</sup> Its primary objective was to help Nuba and Funj communities prepare for restitution of their lands by agreeing among themselves the boundaries of their respective community land areas and by establishing community based councils to both make those claims and to administer their land relations, internally and with outsiders.<sup>302</sup>

One step in the multi-stage process agreed with local leaders was to meet with nomads who had settled on their lands or who wished to restart annual migrations into these areas. The objective was to come to mutual agreement on conditions and corridors.<sup>303</sup> This actually began to take place in southern Blue Nile during 2006 but has never been possible in the more divided and conflicted Southern Kordofan.

In parallel, investments were made to secure expert legal advice to:

- Help local leaders draft chapters on land for the State Constitutions;
- Draft land laws to put the promised Land Commission in place;
- Enable restitution to proceed swiftly and fairly; and
- Lay out the paradigms for recognizing community ownership and authority over respective community land areas.

Legislation was also devised to entrench elected Community Land Councils as the lawful land authority over these areas, to be supervised by County and State Land Offices, and where the

registries for Community Land Areas would be located.

### **SLOWLY MAKING WAY**

Due largely to resistance by NCP representatives with the support of Khartoum, none of the resulting draft laws reached the legislatures of Southern Kordofan or Blue Nile, nor are expected to do so in the near future. Overall, the project endured a rocky road, its genesis in SPLM-supported areas limiting its acceptance by Khartoum and its NCP representatives in the two States. This has most dramatically been the case in Southern Kordofan where divided administration of the State by SPLM and NCP has only very begun to be resolved in mid 2008, and allowing freer movement between the two zones.<sup>304</sup>

Nonetheless, by February 2008 nearly all the rural communities of Southern Blue Nile had reached agreement as to their respective area boundaries, established provisional Community Land Councils to negotiate *inter alia* on matters of restitution, should this eventuate. Negotiations with representatives of nomads from further north had also begun in Southern Blue Nile as early as 2005.

### **GIVING UP**

The situation was significantly less positive in South Kordofan State, where Nuba, having determined to define their land areas on a tribal rather than village cluster basis immediately encountered difficulty in agreeing the boundaries among themselves. This was partly because these areas embrace sometimes thousands of square kilometres.<sup>305</sup> It was mainly because many of these tribal areas are overlaid by mechanised farming schemes allocated to outsiders into which local leaders may not trespass, and/or are occupied by settlements of armed nomads. The project also confronted enormous resistance from the incumbent NCP Governor and his staff from 2007.<sup>306</sup> The Ministry of Agriculture has made matters worse by committing

to make available for lease no fewer than 20 million more acres in Southern Kordofan. Experience suggests these will again favour outsiders, raising local anger considerably. Seemingly unarmed with clear knowledge of history in the area, the International Fund for Agricultural Development (IFAD) is reputed to have offered financial support for these schemes, replacing grants from mainly USAID and The World Bank in the 1960s and 1970s.

### **GOING BACK TO WAR**

No fewer than three and up to nine armed insurgency movements have been launched among mainly the Nuba, preparing to return to war, should their grievances not be addressed.<sup>307</sup> These include the complete failure to see development since 2005, in spite of the peace agreement pledging to give Southern Kordofan special support. So far this special support has been restricted to nomad-inhabited and NCP supported parts of the province. Grievances also include failure to integrate the NCP and SPLM arms of government or to enable residents to even travel easily into each other's areas. And perhaps most of all, failure to resolve the deeply entrenched land conflicts between the settled Nuba and nomad pastoralists or to see a single claim addressed or resolved for restitution of wrongfully (if lawfully) appropriated lands for lease to private investors and officials from the north – and instead even pledge to extending these.<sup>308</sup> For its part, unable to operate, the Customary Land Security Project has closed in Southern Kordofan, and is scheduled to close in Blue Nile State in December 2008.

### **BACK TO BUSINESS AS USUAL**

There is nothing to suggest that real address of communal land rights issues will occur in northern Sudan, anymore in Kordofan than has been the case in Darfur to the west, and where war continues, with many of the same issues at stake.<sup>309</sup> On the contrary, Khartoum has signalled its continued resistance to change in the legal status of unregis-

tered lands as Government property, by continuing to issue leases on land it legally presumes to be vacant and un-owned, and not only in the South Kordofan State.

### **LOOKING TO THE SOUTH**

In contrast, some progress on these matters is slowly being made in Southern Sudan. Although necessarily keeping with the terms of the Interim National Constitution, the South Sudan Interim Constitution went considerable further in its text. This includes provision that “All lands traditionally and historically held or used by local communities or their members shall be defined, held, managed and protected by law in Southern Sudan” (Article 180(4)). Customary seasonal rights are also to be respected - provided they “do not interfere with the primary customary ownership interest in the land” (Article 180(5)).

### **MOVING TOWARDS JUST MODERN LAND LAW**

Progress has also been made on a new Southern Sudan land law. This is currently being considered by the Council of Ministers ahead of presentation to the legislature before the end of 2008, but which may slip into 2009. This Provisional Land Bill, 2008 provides for customary land rights “including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired statutory allocation, registration or transaction” (Article 8(5)). Customary owners are to be assured security of occupancy, irrespective of whether or not they hold rights individually or in association with others and whether or not these rights are registered (Article 8 (2) & (3)). Public land is made a residual category where “no private ownership including customary ownership may be established by any process” (Article 9 (2) (c)). Public land also excludes collectively owned swamps or secondary waterways which are traditionally owned by an identifiable community, and which has agreed to abide by rules for its environmentally sound use”

(Article 9 (2) (f iii)). A new class of land ownership is provided for, Community Land. This includes land “lawfully held, managed or used by specific communities as community forests, grazing areas or shrines” suggesting that this will be applied to those customary resources which are retained as collective property (Article 10 (2)).

Traditional authorities will continue to allocate customary rights and also be able to lease customary land to any non-member of the community but only on the basis of consensus in the community, and with ministerial approval for allocations above 250 acres (Article 14). Land Councils at the village cluster level will be established (Payam Land Councils) mandated *inter alia* to assist leaders and traditional authorities in managing community land, and protecting the customary land rights of communities (Article 49). Evidence of rights may include verbal testimony (Article 38). Communities may register their land either in the name of the community, a clan or family in accordance with the customary practices, a community association or a traditional leader holding the land in trust for the community and individual members of the community may register their individually held parcels once this has been partitioned off for such purpose by the community, in accordance with customary practices (Article 57). Finally, citizens are entitled to restitution of land as a result of the civil war from May 16, 1983 (Article 77).<sup>110</sup>

### UNCLARITY IN THE FOUNDING BASICS OF PROPERTY

These are all important and positive policies. Should they enter law, SPLA/SPLM claims that “land belongs to the people” could begin to see delivery in this part of Sudan. They are nonetheless offset by a lack of clarity as to who exactly owns the land, people or government. Section 7 of the law defines land as owned by the people of Southern Sudan but held by the Government as Custodian. This modification is reflected in the changing content of billboards around the Southern capital, Juba; whereas in 2005 these proclaimed that land and resources

belong to the people, this has been replaced with signs proclaiming that land and resources will be looked after by Government to the benefit of people.<sup>111</sup>

### PRESSURE TO LEASE AND LOSE

Of more practical concern are the substantial articles in the draft law encouraging the lease of lands to investors including foreigners in conditions where communities are to be consulted but their approval ambivalently required (Articles 6-63). Provisions for expropriation are also generous in the definition of public purpose which covers almost any purpose which government (or lead officials and politicians) might consider it to be (s. 72). In the absence of positive experience in Sudan as to the keeping to conditions or terms of leases, or in the payment of compensation for expropriation, these two mechanisms could well prove to be legal but nonetheless unjust mechanisms for squeezing land out of local communities. Still, the establishment of such procedures must be acknowledged as infinitely superior to the continuing denial in northern Sudan that local communities have proprietary rights to begin with.

The drive to make communally owned lands more freely available in the market place is most felt in Juba, the capital city of Southern Sudan. Having grown five-fold in the short three years following the signing of the Peace Agreement, Juba caters to thousands of returnees and also rural people looking for jobs and education.<sup>112</sup> The new Government multiplies its own labour force annually, and along with the military, humanitarian, peace-keeping, reconstruction aid communities and the burgeoning business sector, need land to live on, build upon and to work from. For this they look to the local Bari community, the customary owners of the land immediately around the capital. Disputes and prices have risen everywhere, the former sometimes with violence.

On occasion the SPLA and SPLM help themselves to land, as do ministries for their buildings and projects. At a more formal level, the immedi-

ate State Government (Central Equatoria) has been locked in dispute for some time with the Bari leadership as to how land may be fairly released for urban development. The Southern Sudan Land Commission has been unable to assist. Frustration grows. On one side is a militarily powerful and rather bullish new government which considers it a due right to be able to take land as needed, given

the sacrifices made over 24 years for the good of the people. On the other is a local tribal community which is also unlikely to surrender the commitment to land rights fought for over 24 years. The makings of new conflict over this matter are being set in place – and which the prompt submission of the land law to parliament (albeit provisional) is designed to prevent.

## 2.3

### THE TROPICAL FORESTS OF LIBERIA

Finally, to the tenure situation of Liberia's forest resources.<sup>113</sup> The role which forest has played in the recent spate of civil war on the West African coast is well-known internationally as the 'blood timber' issue. This refers to the allegation that the President of Liberia, Charles Taylor (1989-90, 1997-2003) was using revenue from timber and diamonds to fund rebels in neighbouring Sierra Leone. This resulted in UN sanction against international purchase of Liberian timber in 2003 and presently, his trial in The Hague, for this and related crimes.

#### “THE FOREST IS OUR FARM”

However this is not the conflict issue which preoccupies rural Liberians today, although the looting of their forest since the 1970s by government hand-in-hand with concessionaires has been integral to the current popular determination to bring forests under the control of their traditional owners, ordinary rural communities. In every sense of the word, rural Liberians are historically a forest people, their culture, economy and spatial organisation profoundly rooted in the forest. Livelihood in many parts of the country is founded upon a form of shifting cultivation which depends upon the fast-growing Guinea Forest to restore fertility to fallow fields. Forested areas, in various stages of re-growth are therefore integral to rather than

distinct from the farming system or farmed areas, although the distinction is increasingly made as farming becomes more settled.

Combined with an abundance of waterways which serve as boundaries, Liberia has a long history as a mosaic of discrete community territories without no-man's land in-between. Introduced ideas of wasteland or un-owned land which may be rendered unto the state have therefore sat more awkwardly in Liberia than in parts of Africa where community domains have been very large and boundaries themselves existing as often wide reaches of forest or grassland. And yet, typically, governing powers in Liberia have attempted to introduce such dispossessory notions that there is un-owned land.

#### COLONIAL RESOURCE CAPTURE WITH A DIFFERENCE

The course of this imposition has been somewhat unusual. Liberia's colonisers arriving on the west coast of Africa were private colonization societies bringing freed slaves from America. On landing in 1821 they recognized that the coast was already occupied and owned by Aborigines (as they referred to them). They proceeded to negotiate purchase of the sites they wanted for their settlements (“colonies”). A (very) little money and goods changed hands and contracts were drawn up.<sup>114</sup>

A salient event occurred at this point; ordinary natives rebelled against those first chiefs who sold their shared property to the colonists without their permission. This set a precedent of articulated collective ownership which remains vibrant today. It also would serve to pre-empt the kind of chiefly capture of land which would afflict some other West African states over the coming century, most notably Ghana.<sup>335</sup>

### BUYING THE LITTORAL

Eventually the whole coastline and areas 40 miles inland was purchased by at least eight different colonization societies. In due course these societies combined to form the first independent state in Africa in 1847, and their land purchases would cumulatively represent government land available for allocation to settlers. This would be a state in which the colonizing Americans would rule the indigenous population in stridently colonial manner, leading to eventual rebellion in 1980.

The previous owners of the littoral, local tribes, were guaranteed security of occupancy. Only around the turn of the century would they gain the right to purchase parcels of the Republic's land in the same manner as new settlers or new generations of Americo-Liberians. It was also at this time that the Liberian Government began to issue land concessions to foreign interests, the most famous being the issue of one million acres to a small American company called Firestone for the purpose of rubber production (1906, 1929) and from which the giant Firestone would grow. By 1970 over three-quarters of the country would be subject to mainly foreign leases or concessions, including the vast and precious timber and mineral rich forest resource.

### COLONIZING THE HINTERLAND

However the area of independent Liberia in 1847 was not Liberia as we know it today. As the European scramble for Africa got underway, the Republic lost significant areas to the British in

the north (Sierra Leone) and to the French in the south (Côte d'Ivoire). This drove the new Liberian state to extend its sovereignty inland, into the hinterland. By 1900 the possibility of buying these much larger and magnificently forested areas from native communities was much less; purchase was simply too costly. In any event, the ruling Americo-Liberians no longer thought such purchase was necessary; the decisions made in Berlin in 1885 and the models subsequently established by the British and French along the West Africa coast has established a quite different precedent of land capture.

### RECOGNISING THE HINTERLAND IS ALREADY OWNED

Nonetheless, Monrovia did not simply declare this expanded hinterland domain of political sovereignty the property of the state. On the contrary, it agreed with the chiefs in 1923 that their ownership was recognized and protected, and "whether or not they have procured deeds from Government for such land delimitating by metes and bounds their rights and interest" (Hinterland Laws and Administrative Regulations, 1923-1949; Article 66). Moreover, if they so wished, these communities could acquire title deeds for their domains, in the process converting their rights into fee simple communal holdings.

No less than thirteen chiefdoms were to take up this opportunity, bringing 2.3 million acres (nearly 1 million ha) under registered community ownership between 1924 and 1960. Two of these Aborigines Land Grants each covered over half a million acres of forest. Notably, in no case was title issued to chiefs, despite the intention of Monrovia to do so. Instead chiefs and communities ensured that it was clearly specified that the land was owned by *all* members of the community and their heirs and assigns.

However most chiefdoms did not secure such deeds. They had neither the means to pay the survey costs involved nor the organization or incentive to do so. For the law was clear, assuring

communities that even without such registration, their customary ownership was protected.

### TURNING OWNERS INTO TENANTS

And then enters the rub, the time in which modern Liberia took on the resource-grabbing behaviour of its neighbours to the north and south and the guarantee of recognition of customary ownership fell away. In hindsight, the trigger is not difficult to identify; by the 1950s it had become less palatable to Monrovia that Aborigines continue to own and control what were clearly extremely valuable resources and concessions for which foreign companies would pay handsomely. Nor was capture difficult to achieve, given that the political, social and economic dominance of Americo-Liberians over the indigenous community was still intact.

There was also a strong political-administrative justification for reconstructing Aborigine presumptions that they owned their lands; governance in the littoral and hinterland needed to be brought under a single uniform regime. Natives in the littoral had long ago lost or sold their founding tenure and steadily replaced these with acquisition of rights on an individual or sometimes collective basis from Government, and the hinterland populations should do the same. By then the idea that property exists only as individual and registered entitlements was also the orthodoxy, Americo-Liberians having a century-long history of documented purchases and transactions in well-kept registers in every coastal county.<sup>116</sup>

In law, the shifting ground in the Monrovia-Hinterland relationship was achieved by slight alteration in the wording of the Hinterland Law in the process of its redrafting in 1956 to enter the Liberian Civil Code as Title 1, the Aborigines Law. By these changes rural Liberians were no longer guaranteed “right and title” to their land but the right of *use* of these “public lands.” In addition, an earlier provision that omission by a tribe to have its territory delimited should not affect its right and title became the provision that this would affect

its right to the *use* of the land (Title 1, Chapter 11, Article 270).

### REVERTING TO COLONIAL FORM

Thus, as British, French, German, Belgian and Portuguese had so done before them, unregistered land became for all intents and purposes, the property of the state, and its customary owners became lawful users. Becoming active in Liberia from the 1960s, the donor community did not question this arrangement. On the contrary, as in Afghanistan, a new cadastral land registration was advised, and eventually embedded in a Land Registration Act of 1974. Typically, this was focused upon the advocated individualization of lands and their registration as freehold estates. In the process, whilst not denying the existence or importance of customary tenure, its implication as real property was reduced as mere encumbrance upon public lands owned by Government.<sup>117</sup> This quietly shifted the legal grounds of customary ownership, further reducing this to permissive occupancy.

### MAKING USE OF OPPORTUNITIES AND LOOPHOLES

There was however still opportunity for traditional owners to recover or establish formal tenure. They could buy back their land from Government, and initially at relatively low cost. Moreover, no change was made in the Public Lands law which required local chiefs to approve any application for registered entitlement and which could theoretically be used to limit capture of local lands. At least 19 chiefdoms set about buying back their land between 1956 and 1986, securing their community land areas as collectively-owned private property under Deeds of Public Land Sales. Together with the lands still under Aborigines Land Grants, these entitlements amount to at least 2.5 million hectares or around one quarter of Liberia’s total area. Most of this land area is still forested and represents 44% of the total forest estate today.

Although they were a minority in Liberia, these 30 or so communities were probably among the very few legally-recognized customary land owners on the continent around this time (1960s-1980s) (Ghanaian Ashanti chiefs were another exception).<sup>118</sup> Some 500 million other Africans around the continent had access, occupancy and use rights in abundance – but not ownership. Or, a few of their number (and mainly in Kenya) had extinguished their customary rights (and those of their families and their communities) and replaced these with imported freehold or leasehold entitlements, held individually. Through such promoted individualisation, titling and registration programmes on the continent at the time, collectively-owned assets were either subdivided among those with the means to use them (i.e. the better off members of the community) or in the case of forests, vested in the state or its local authority agencies.<sup>119</sup> From these hands, much of the forest estate around the continent would see steady encroachment, degradation or reallocation to mainly privileged tribes or individuals, a source of rising bitterness today, as the violent inter-tribal land evictions in Kenya in early 2008 would illustrate.

### **MISTREATING EVEN REGISTERED OWNERS**

If rural communities in Liberia needed reminding that changes were afoot, this might have come during the early 1960s with the declaration of over a million hectares as National Forests, declared thereafter the property of the State. These absorbed a significant share of these private properties and particularly those under Aborigines Grants. There is no evidence that this transfer of ownership met even the legal conditions of the time regarding consultation or compensation, placing this dispossession on constitutionally shaky ground.<sup>120</sup> Concessions to these areas were promptly issued, with no reference to local occupants/owners. Reconstruction of the forestry department as a President-appointed semi-autonomous commercial agency (Forest Development Authority, FDA) would seal total loss of control

by communities over the future of their forested properties.

### **DOUBLE-LOCKING RESOURCES AGAINST CUSTOMARY CLAIM**

As if aware of dubious claims of State, as late as 2000 Charles Taylor would strengthen its hand by entering into law the provision that while communities may own the land on which trees grow, the trees themselves belong to the State (National Forestry Act, 2000; s.10.4). This built upon a thriving timber industry which saw Government hand over the entire forest to lucrative logging concession, including those under entitlement. By then rural communities were well caught in a conundrum familiar to Sub Saharan Africans at the time – “the land is ours but Government owns it.”<sup>121</sup>

### **BRINGING RIGHTS BACK INTO THE PICTURE**

In 2008 a rather different scenario has emerged. Following the ending of the war in 2003 and the eventual election of a new President and legislature (2005-06), the status of customary land interests and especially the collective community ownership of forestland and forests have come under vibrant public debate. Following sanctions, a thorough review of forest concessions was undertaken (2004-05). This showed the high degree of corruption, abuse of local communities and their rights and extensive ravaging of the forest resource that had occurred in concession areas. Under considerable popular pressure, every one of the 71 current concessions was cancelled by the incoming new President Sirleaf Johnson in early 2006.

As part of the pledged reform process, a new National Forest Reform Law was enacted later that year (2006). Although declamatory towards respecting Liberian land rights, provisions went no further than assuring customary land owners one third of the rent which government would charge future concessionaires. The failure of the legislation to sufficiently overturn standing paradigms left the legislature itself uncomfortable. At the last minute

the Senate agreed to enact the law only with proviso that a Community Rights Law with Regard to Forests be drafted. A main concern was that the new law still did not require the Forest Development Authority to consult with communities prior to issuing concessions on tribal lands, nor did it bind concessionaires sufficiently to deliver social support measures.

### **GETTING BACK TO BASICS**

Consequently, through 2007 and 2008 much attention was focused on the drafting of the Community Rights Law. Civil society actors had been a driving force in mobilising UN sanctions and subsequent overhaul of the forestry sector and would lead the way in carrying out research and popular consultation on forest land rights. In this it initially worked closely with the supposedly reformed Forest Development Authority. Through several drafts, the Community Rights Law draft was rooted in recognition that:

- The natural forest resource as a whole is community-owned; and
- That the legal separation of trees from the soil from which they grow introduced in 2000 be revoked.

As to be expected (and as already seen to be the case in Afghanistan and Sudan) the process of articulating legal paradigms has generated considerable debate. Ultimately this has exposed a profound divide between the positions of the Forest Development Authority (FDA) and civil society as to customary rights to own, use and manage their resources. Neither government nor even the logging sector falls entirely on one side or the other. The Governance Reform Commission is in the process of launching a Land Reform Commission under which there is expectation (and demand) that customary land rights are entrenched as private property rights. Against this is frustration in the Treasury at the continued loss of revenue through the failure to reissue concessions, along with allegedly lukewarm response to carbon credit proposals which would enable the forest not to be logged at all.

Influential parties in the logging sector are more supportive of community rights than might be traditionally expected.<sup>122</sup> After the events of the last 15 years the industry is all too aware that any attempt to re-activate a concession system which denies local ownership of the resource will be counter-productive. There is also interest in the sector in smaller scale logging enterprise and community-private sector partnerships, now the norm in countries as diverse as Sweden and Mexico and which challenge the income-generating superiority of large-scale industrial operations.<sup>123</sup> Additionally, there is interest in being able to enter into contracts directly with communities, with the Authority serving as facilitator and watchdog and revenue collector, now more widely conceived as the correct role of the State.

### **RENEGING ON THE COMMITMENT TO REFORM**

FDA resistance to changing the tenurial basis of the 2006 forest legislation has steadily grown over the review and drafting process. An uneasy compromise of sorts was found in the fifth and supposedly final draft (July 2008) in which the status of community rights to forests or forestlands was set aside for decision by the upcoming Land Commission and/or as laid out in Liberian law. At the same time the draft recognised that forest growing naturally on land is after all attached to the land; that forest resources on community lands are owned by local communities. However the law did not specify what community lands constituted and there was in other articles ample scope for the Authority to exclude much of the forest resource as the National Forest Reform Law 2006 had done before it. Still, the compromise draft did propose that any decision affecting the status or use of community forest resources would not proceed without the prior, free, informed consent of the community (s. 2.2).

While the compromise draft pleased the mediating Governance Reform Commission, there was grave reservation expressed on the part of some leading civil society organizations and (and echoed

in a critique by the World Bank) that there was considerable risk in leaving the issue of forest tenure to the proposed Land Commission, given that it could well take some years to conclude its work. In the interim communities would be exposed to further loss of forest lands and erosion of related forest use and management rights under allocation of their lands to long term concessions. Reliance on existing Liberian law had also been amply shown to be dangerous, given its ambivalent terms precisely on the matter of customary land rights.

There was also the more immediate concern that the Forest Authority had already demonstrated bad faith in not adhering to its commitment to refrain from issuing concessions ahead of the promulgation of the new law. In April 2008 three forest management contracts were advertised, causing affected communities to publicly demand how the Authority thought it could issue concessions without the permission of the forestland owners.<sup>324</sup> The persistence of the Authority along this course, evaluating the 13 bids and deciding grantees (July 2008) increased concern. It even raised comment by the still-vigilant UN Panel of Experts on Forestry reporting to the UN Security Council.<sup>325</sup> The communities began to raise funds for taking the issue to the Supreme Court.

### **DOING AWAY WITH SOUND PROCESS**

Worse was to come. Without informing the collective drafting committee, the Forest Development Authority modified the compromise draft and submitted this version to the legislature for its approval via the President in September 2008. The modifications were small but significant. They included doing away with joint community-Authority supervision of commercial or industrial contracts, and restricting community involvement in contracts above 50,000 ha, thus neatly exempting most proposed concessions and throwing the need for community consent into question. However there was more alarm and even anger that the Authority had reneged on placing the final bill before rural communities in a long-promised and

partly already mobilised national consultation process.

In response, lawyers acting in concert with sympathetic Senators and Members of the House of Representatives placed before the Senate an alternative version of the law. This was largely an earlier draft of the law and which reinstated explicit recognition of forests as belonging to the communities within whose customary domains they are located, laid primary management and regulatory authority upon community based forest management committees, and enforced rigorous procedures for community consent for issue of all licences and concessions affecting their lands (s. 1.3, Chapters 3, 4 & 10). In addition, the law permitted the status of National Forests, National Parks and Wildlife Reserves to be revisited on a case by case basis, with the potential for the ownership of these areas to be restored to communities, albeit with conservation restrictions and government controlled regulation and management to be fully retained (Chapter 4).

### **THE PEOPLE'S REPRESENTATIVES SPEAK**

It was this version of the Community Rights Law with Respect to Forest Lands which was overwhelmingly enacted by the Liberian Senate on September 11<sup>th</sup> and unanimously passed by the House of Representatives the following week (September 19, 2008). At the time of writing (October 2008) the President has yet to sign the law into force. Lobbying for her to do so, or not do so, has been active since. These include formal Forest Authority submissions advising the removal of five chapters of the law in their entirety reducing community rights to virtually the status quo of 2000 and the ambivalent terms of the standing 2006 law. Several conservation NGOs, concerned at the threat to the status quo implied by the challenge to current park management, have sided with the Authority.

In contrast, the wider NGO Coalition of Liberia came out with unambiguous support for the law in a press release on September 22, 2008. At least two popular demonstrations in support of the law have been held in rural counties, and noticeably

including local trade union and lower level forest sector representatives. The Secretary General of the Association of Liberian Loggers has also openly criticised the Authority for its continuing inability to reform itself.<sup>126</sup> Constituencies have publicly praised their Senators and MPs for their courage in enacting a fair law.<sup>127</sup> In critical respects, the loyalty of the legislature members to the President or to their constituents is being profoundly tested. There is little expectation that the issue will be swiftly resolved. Nor are there much-needed signs that the President herself is acting decisively on this matter. There are suggestions that her inclinations are to the pre-war status quo of state ownership as well as regulatory control of the sector but with equal awareness that she may hardly contradict her own parliament's decision. The Forest Authority itself continues to lose valuable time in assisting communities to establish local level forest governance committees with which it could consult and reach case by case agreement, a procedure which is almost certainly going to remain prerequisite to issue of any harvesting rights on their lands.

### **COMMUNITY ACTION: SECURING "OUR LAND"**

In the interim, rural communities are acting on the ground to secure their customary tenure. This accelerates a process begun with the ending of the civil war as some thousands of displaced communities returned to their rural homes and began redefining the limits of respective domains with their neighbours. The author found that in mid 2007, upwards of one third of all communities in five sample communities had such processes of inter-community boundary demarcation underway.<sup>128</sup> There may little doubt that the one concession of the National Forest Reform Law 2006 to communities, to deliver one third of concession rental to affected forest-owning communities, helped accelerate this trend.

Boundary agreements are duly being recorded in witnessed documents. A proportion of cases require higher level facilitation to reach agreement, invariably first sought from paramount chiefs and

related county administrative authorities. Relatively few disputes over the boundaries of community land areas reach the courts, given the expense, time and often dubious reliability, involved. More and more communities either as villages (referred to as 'towns' in Liberia) or as village clusters (chiefdoms) have begun the process of registering these community land areas as their collective property and have already secured necessary permits to survey (Tribal Land Certificates). They raise funds from their employed relatives in cities to see this through. Land offices in all forested counties of Liberia report a sharp rise in applications for Public Land Sales from communities.

### **ROOM FOR MANOEUVRE - PEACEFULLY**

There are elements in the Liberia case which suggest a satisfactory outcome could in due course emerge despite currently polarised stand-off between people and state. The extent of inclusion and thence popular awareness around the issues is high, added to which there has been demonstrated capacity to take to the streets to voice concerns, to bring these to the attention of a vibrant and free radio and print media, and to look for and find support from the international human rights and forest development and conservation sectors.

Process has on the whole been sound in the drafting of the Community Rights Law at least until mid 2008. Discussion was consciously rigorous in its representation, incorporating government, private sector timber interests, NGOs and forest project advisers, and a course of mass popular consultation determined upon. It was failure to pursue this by the Authority which most illustrated breakdown. International actors have been alert to the issue, ranging from a UN Security Council resolution on Liberia (1819, June 2008) reminding the Government of Liberia of its obligations to attend to and resolve land and tenure rights in regard to the timber sector, to more modest international NGO support from agencies like Global Witness.

However, it has been the powerful role of local civil society organizations which has been the most

articulate but also the most moderating influence, assisting local communities to have their voices heard whilst equally engaging itself as cooperatively as possible with a clearly reluctant Forest Development Authority. While the dialogue is fraught, civil society participation is now accepted as an essential element of decision-making. Plans towards a more devolutionary style of government, building upon existing community socio-spatial structures, reinforce the role rural Liberians are directly expected to play in the future. Public consultation itself is increasingly a vehicle in the emerging new governance approach. And while the signs are that the halcyon early post-conflict era is beginning to

give way to business as usual, the Sirleaf Johnson Administration is as cognizant of the perils of ignoring popular demands around such founding issues as rights and powers over often the only significant capital asset of the poor rural population, their forests. Never far away is recognition that with such a youthful, often volatile, war-experienced and largely unemployed population, conflict in forested parts of the country could conceivably begin all over again – but this time with a much more specific grievance in mind. Returning the law to the very public consultation which it failed at the last minute to receive, could prove the most constructive and conflict-dispelling way forward.

## 3

**Conclusion**

Where do these three examples take us?

**COMMONALITIES**

First, there is clearly an enormous amount of commonality in the treatment of customary land interests over the last century and its drivers. These deserve cursory recap. They include comparable origins of dispossession in introduced and mainly colonising interference in local land norms, at times compounded in more recent history by a new form of international interference, the advisory and bank-rolling aid community. Rarely have any of these forces been entirely malign, and on the contrary, have at times have been fully well-intentioned. Nonetheless, as we have seen, sooner or later stark lines are drawn between people and state as to the possession and control over traditional communal assets - precisely because they are assets. While this takes post-conflict administrations by surprise in their assumption that they are at one with the people, it is less surprising when the centrality or resource control to state-making and the time-old extractive function of the state to the supposed benefit of all is taken into account.

The instrument of law has also been uniformly prominent, in both the unmaking and making of rights. The cases are also alike in that while conflict over collective assets may play out along inter-ethnic and religious lines, the more fundamental conflict is between people and their governments. Ultimately, this may only be resolved through

realignment in their respective rights and powers over property. Further, it will be evident that the battle over land rights is deeply intertwined with challenge to wider inequities, of which in agrarian states, rights over the land are elemental.

The focus of land conflict over *common* properties (rather than houses and farms) is not mysterious; it is these that are still open to capture and where most incentive to challenge current arrangements lies. The commonality of economic triggers both past and present in the 20<sup>th</sup> century demise of customary rights to those resources is also clear, as is the stark rapacity with which this occurred, and continues to reoccur. We have also seen that history matters, its lessons unwisely ignored.

Still, we are left with the fact that in none of these cases has acknowledgement of the commons as the property of communities been firmly achieved, three to seven years after the cessation of civil war. In two of the three cases the issue has only come fully to the surface through war. Even in the third case, Sudan, the post-conflict period is seeing this war issue further clarified and, in important ways, more precisely contested. That is, the people of Sudan are much clearer in their own minds as to what exactly they are finding for on the land front. Several conclusions may be drawn; first, that land relations are an issue that takes time resolve but more importantly this is so because battles over rights and resources embody struggles over power, place and money. It would be naïve to assume that the end of conflict ends land grabbing, or that elites or governments will not generically seek to maxi-

mise control and rent-seeking over these precious capital assets. The experiences of these three country cases are echoed widely in conflicted states.<sup>129</sup>

### **LAND RIGHTS REFORM AS INTEGRAL TO REFORMATION OF THE STATE**

At the same time, the tumult of post-conflict eras is not just the tumult of restoring order but the tumult of change, of finding a new way to run society. The overriding desire to get back to the way things were confronts the reality that everything has changed and the past cannot be entirely recaptured. In property relations as much as in other areas, the balance of power is realigned and governments in particular are challenged in ways they never expected. People want peace, but not on the same terms as before. War-experienced populations are not just war-weary but weary-wise, and not necessarily compliant. They have also generally found their voice and vehicles for voice. While many of the triggers to original conflict remain in place, these are popularly better understood, and in the jostling for place and power which follows a conflict, concretise into clear demands. It may safely be assumed that post-conflict conditions on all sides signal a necessary new phase in the making and remaking of the modern agrarian state. Given the land-based resource based dependence of agrarian states, it is logical that the founding question “*whose land is it?*” will be a key issue in the changing balance of power. Given the predominantly rural nature of the resources at stake, it is not surprising that this battle over rights often crystallizes around rights to the valuable commons – forests, pastures and fish-rich swamplands, to which mineral wealth where it exists merely adds pressure.

### **A COMMON PATH FORWARD – POPULAR ENGAGEMENT**

While the threat of violence hovers over rights to the commons in all three cases, they also offer some cause for optimism in that ad-

dress and redress is on the agenda, if most fragilely the case in northern Sudan. In Liberia, Afghanistan and in Southern Sudan, first platforms of change have been reached, expressed in the content of draft new legal paradigms as to how communal assets are modernly best understood, and legally entrenched. In all three instances this represents a significant improvement upon pre-war law.

The similarity in processes towards even this half-way point is worthy of note. It is not occurring because the incoming post-conflict administrations are simply changing the law (although this could be nearly the case in Southern Sudan). On the contrary, new administrations have been strongly disposed to reverting to pre-war norms. Rather, change (or the drive for change) is deriving from rural populations themselves. It is into these processes which local and national bureaucracies are necessarily drawn. The resulting exercises provide more than shared learning by doing, inclusive of government actors. They empower participants and empower the issue. Even at a small scale, they open routes which are difficult to close.

Liberia provides another aspect of this trend, less in directly assisting communities to rephrase their relations than in the way in which civil society groups have set themselves firmly as the mediators between state and people, and the agent which brings the issue into the public and international arena. This trend is barely visible in either Sudan or Afghanistan and where the absence of non-government advocacy must be viewed with increasing concern, helping to lead disagreement and discontinuance more readily to renewed violence. Moreover, in proposing to bring grievances to the court, Liberia holds out hope that the common issue at stake may be more peaceably resolved than is immediately likely in Sudan and Afghanistan. In Sudan, state-people positions are if anything, hardening in the north at this time. While this is less so in Afghanistan, revitalised hardening of positions is occurring by their proxies, settled and nomadic communities, and given Taliban support

for the latter, is bringing the matter into seriously dangerous territory.

### **BATTLES OVER MEANING - THE CHANGING CONSTITUTION OF PROPERTY**

This paper has explored the fate of the commons through a lens which juxtaposes understanding of their tenure as real property against a view that these are un-owned, un-ownable and/or inappropriately vested in communities.

Resistance to the idea of the commons as private (group-owned) property remains in all three Administrations and each gathers support for this from a range of actors, sometimes including international land advisers. It is as well to unpack what seems to be a still-unresolved conflict in ideas, and in particular to liberate the meaning of the term property from the 20<sup>th</sup> century straight-jacket into which it is still thrust.

First, it would seem that, economic drivers aside, resistance to recognising the commons as real property is primarily conservatism, a luddist refusal to let go of introduced or evolved notions of property which have never sat well in the meanings of property in the customary/indigenous realm. Second, officials rightly suspect that recognition of collective land interests as property amounts to empowerment, placing assets and powers in the hands of the mainly rural poor, and through which they might change the *status quo*; this includes limiting rent-seeking or coercing more equitable distribution of profits derived from the use of their newly-recognised property.

### **USING THE NON-TRADABLE NATURE OF COLLECTIVE PROPERTY AGAINST ITSELF**

Third, it is relatively easy for parties resisting recognition of especially collectively rights as property to draw upon the capitalist principle which defines property as a commodity, a fungible and tradable asset. This may theoretically be applied to the commons, at least to the extent that the owning community may lease out the estate,

and in some cases do, such as where a valuable wildlife area is handed over to a eco-tourist enterprise, or to a private logging concern. However it is rare to find communal property which may by custom be entirely alienated, by sale or otherwise. This stems from the peculiar character of traditional commons as community property. No community is static, or in its membership lives and dies at precisely the same time, thus precluding the kind of formalised inheritance which applies to individually owned estates. This explains why a traditional common property is owned not only by the living generation but to generations past and in the future. It is a fixed and identifiable owner but an owner whose internal nature changes over time.

In attempting to better define customary ownership and particularly as applied to family or community property, there has been revived interest towards unpacking tenure into specific rights within a bundle of rights. This is both helpful and unhelpful. Positively, this allows distinctions to be drawn between possessory and access rights. It has been shown how in Sudan and Afghanistan the ability to do this will be important to resolving sedentary-nomad interests in workable and acceptable ways, and not least because this resonates with older customary practice. Negatively, the unbundling of rights may have the reverse effect; enabling those reluctant to acknowledge the commons as *owned* assets to claim that the sticks in the bundle simply do not add up ownership, as usually lacking in that bundle is the power to sell the land.

### **THE NEED TO ADOPT A MODERN TEMPLATE OF OWNERSHIP**

There are many reasons why customary tenure over collective assets must be both termed and legally rooted as no less than ownership obtained under non-customary norms, for which questions relating to its saleability are ancillary.

The last century has shown that without acknowledged ownership a community cannot ex-

exercise the most essential right it endows; the right to determine who may use the land and how and to whom the benefits of use accrue. Whether the community does not permit itself or is not permitted by national law to sell the resource is irrelevant. There are practical considerations, most affecting uncultivated collective resources; without the right to exercise this power, the resource itself will degrade and lose its value given that there is no greater incentive to conserve a resource than to own it. And, as above, clarification of distinctions between who owns and who uses a resource are increasingly essential to ordering rights in fair ways.

Most of all, where competition for resources is so intense and the instrument of ownership so powerfully used to secure resources in a capitalised world, nothing less than a presumed right of ownership will suffice. *Simply permissively possessing the land is not enough.* The needed transition at this point is from customary rights being considered 'not good enough for ownership' to one in which these rights are seen as not good enough *without* ownership being implied.

Even for customary owners whose occupancy and use is currently unthreatened, re-examination of the implication of customary rights in the modern world and their relocation as unambiguous rights of ownership is necessary. This is, in short, precisely what rural peoples as discussed in this paper have been forced to do as the rights of customary tenure are threatened.

### **RELOCATING THE FOCUS OF RESTORATIVE JUSTICE**

This paper has focused on a single element of property relations, the tenure status of the commons, those land assets like forests and pastures which communities own in undivided shares. It has been suggested that conflict over these assets is a rising agrarian question and one which comes to the fore most urgently in conflicted agrarian states, where property relations have been thrown

into disarray. Competing status of the commons as belonging to communities or governments has been identified as the crux of the issue. It has been argued that just treatment of commons tenure means recognizing these as the private property of those communities which customarily hold these assets; and given the stresses of the modern world, endowing these with the maximum protection that constitutional and property law allows.

What this means for the peace agenda is that the impulse for restorative justice needs to shift its focus. To date restitution of property has meant restitution of houses, land and properties to those who held or owned these immediately before the war. This has been the outstanding post-conflict land, housing and property concern of the international community over the last decade or so. Finally in 2005 the UN Pinheiro Principles were agreed and have since been delivered into a multi-agency handbook guiding post-conflict administrations and humanitarian and reconstruction agencies in putting this restitution into practice.<sup>130</sup>

However, the three country cases reviewed here demonstrate that restitution in these terms may be the very opposite of what is required in regard to the commons, both for the sake of justice and to enable peace to be lasting. Returning the pastures of Afghanistan to state tenure and/or Kuchi control, returning Liberia's forests to *de facto* Forest Authority ownership, returning the plains of Sudan to the lessees of the state, will trigger return to conflict, and in very similar ways. For as long as customary communal rights remain unsecured, this threat hovers and is unfortunately already seeing some fruition in the case of Afghanistan and Sudan. These experiences are echoed throughout conflicted agrarian states, whether in Aceh, Indonesia, Cambodia, Angola, Cote D'Ivoire or other cases.

### **FROM RESTORATION TO REFORM OF LAND RELATIONS**

The implications for the post-conflict assistance sectors are clear. A more holistic approach to land relations in conflicted states is required

and stemming from this, a shift in the meaning of restorative justice in the land and property sector.

This is not something which the humanitarian or reconstruction sector needs to be told at this point. More or less every agency engaged with assisting post-conflict administrations is at this time grappling with this need. How to move forward is commonly on the agenda. There is, that is, less a need at this point to get the subject onto the peace-making than to get the content and strategies right. This paper has argued that one of the more fundamental matters to be addressed is the policy and legal status of customary land interests, and within this, particularly relating to properties held in common. These are central to the issue and central to peace-building and keeping the peace.

Of course this is not the only property issue confronting conflicted polities, nor is it address the only substantive matter requiring reform. A larger set of issues may be readily laid out.<sup>131</sup> One of the most important has not been touched upon here, the need to prepare for the post conflict city, the reality that conflicts and particularly their ending, trigger sharp growth in cities and which far exceed the already strong urbanizing trend seen in agrarian economies. This places stresses on post-conflict governance which new administrations are ill-equipped to deal with. As the conflict in Juba City between Government and the Bari community in Southern Sudan briefly suggested, even issues within this sphere are not unrelated to how customary land rights are treated in practice and in law. In fact, it is often at the urban-rural interface where customary rights come under most tangible pressure.

#### **MAKING IT AN ISSUE OF PEACE OR POST-CONFLICT DEMOCRATIZATION?**

The question finally arises as to how far it is necessary for concrete commitment to occur within the peace accord agenda. In principle, it may argued that no peace agreement in a conflicted agrarian state should be signed without the status of customary rights as property rights being

clear; additionally, that every advantage must be taken to lock post-conflict administrations into binding actions to carry through on these commitments.

In most ways the experiences of Sudan, Afghanistan and Liberia endorse that position. Even in the case of Sudan, the one country among the three where land rights were on the peace making agenda, failure of the parties to clarify exactly what was meant by customary land rights has handicapped success to act on this count in the north. And without internationally binding conditionality (on this or any other element of Sudan's Comprehensive Peace Agreement) there is little to force Khartoum to do so.

On the other hand, there is plenty of scope as shifting policies in South Sudan suggest that even where war was fought partly in order to secure the fact that 'land belongs to the people', significant renegeing on the part of those same combatants may readily occur. All too often political commitment to act in this area weakens and may even dissolve; in different ways Angola, Namibia, South Africa, Rwanda and Uganda are among those states which have all fallen well-short of post-conflict commitments affecting majority customary land interests.<sup>132</sup>

#### **PUBLIC OWNERSHIP OF THE ISSUES IS KEY**

The cases addressed here also suggest that practical progress may only be made once peace is in hand and people are restarting their lives, their land use and their land relations with each other and outsiders, including the Government. Moreover, it may also be concluded that the issues are best explored in ways in which those affected may themselves become more engaged directly in and lead reforms. This implies an even more important message; that ultimately it will be a matter of *popular will* that recognition of majority land interests as property occurs. A fair case may be made that such progress as has been seen on the customary and commons issue in Sudan, Afghanistan and Liberia rests almost entirely upon public awareness and action. Time will tell if this helps deliver change – and peace.

## ENDNOTES

- <sup>1</sup> See Alden Wily, 2007a for overview of five main patterns of customary tenure globally.
- <sup>2</sup> Refer Alden Wily, 2006b for development of this thesis.
- <sup>3</sup> See Alden Wily 2007b: 78ff for analysis of the Marshall Ruling
- <sup>4</sup> As implicit in Article 6 of the General Act of the Berlin Conference on West Africa, 26 February, 1885. To be precise, the colonisers did not make this a tenet of law or agreement but are on record as dismissing as preposterous the proposal made by the American observer to the conference that African lands should be paid for their land, not least given the debt natives would owe to Europe in its noble task of their civilization.
- <sup>5</sup> After half a century, it is time to stop blaming Garrett Hardin's *The Tragedy of the Commons* for this thesis (*Science*, 162 (1968): 1243-1248) which has much older origins in colonial treatment of non-cultivated lands. Hardin's essay was a theoretical exposition on the ethics of maximising tendencies of individuals in respect of open access domains and he had the unfortunate to example 'a pasture open to all' (my emphasis). In doing so he helped sustain the orthodoxy that communally-used assets are un-owned and which therefore must be privatised to survive. Responsibility for the already well-entrenched orthodoxy that commons are by definition unowned and that ownership and property are necessarily individually possessed was hardly Hardin's although he sustained this fallacy.
- <sup>6</sup> A famous exception was the Ashanti chiefs of the Gold Coast who resisted the inclusion of their lands under Crown Lands; Alden Wily and Mbaya, 2001, Ubink, 2008.
- <sup>7</sup> Alden Wily, 2008a.
- <sup>8</sup> For Nepal, see Alden Wily 2008d.
- <sup>9</sup> Alden Wily, 2006b, CLEP, 2008.
- <sup>10</sup> This is explored in Alden Wily et al., 2008.
- <sup>11</sup> See Alden Wily, 2003a for concrete examples in Sub Saharan Africa.
- <sup>12</sup> Alden Wily, 2006b, 2008c, Fitzpatrick, 2005.
- <sup>13</sup> Blomley et al., 2008.
- <sup>14</sup> Norfolk and Tanner, 2007.
- <sup>15</sup> For example, Deininger, 2003 for The World Bank.
- <sup>16</sup> Such restitution has even included restitution of nearly half the New Zealand's fish stocks to Maori tribes in 1992. It also needs to be noted that New Zealand has an unlike history in these matters in that from the outset (1847) indigenous (Maori) land ownership was legally entrenched but then not honoured by Governments, thus making it much more inevitable that restitution would eventually occur, such as also so in the Liberian case covered in this paper. See *The Independent*, 26 July 2008 (United Kingdom) for information on the most July 2008 restitution ruling in New Zealand.
- <sup>17</sup> This was in return for unspecified 'business links and technical know-how' and which the Abu Dhabi representative noted 'will not be our last such project in Sudan' (*The Guardian*, July 2 2008, United Kingdom).
- <sup>18</sup> Explored in Alden Wily, 2008b.
- <sup>19</sup> Alden Wily et al. 2008.
- <sup>20</sup> HSRP, 2005, 2008.
- <sup>21</sup> Alden Wily, 2008b.
- <sup>22</sup> Alden Wily 2000, 2003a, de Janvry and Sadoulet, 2002, Borras and McKinley, 2006, CLEP, 2008, Borras and Franco, 2008, Akram-Lodhi ed. 2008.
- <sup>23</sup> HSRP, 2005, 2008.
- <sup>24</sup> Collier, 2004, 2007, Alden Wily, 2008b.
- <sup>25</sup> Alden Wily, 2008b.

- 26 FAO, 1999.
- 27 The literature is rich but references here kept to a minimum, accessible in Alden Wily, 2003b, 2004a and 2008d. Among the most useful for this subject have been Canfield, 1973, Gawecki, 1980, Lee, 1996, Male, 1982, Poullada, 1973, Mousavi, 1998, Tapper, 1973, Pedersen, 1994 and Ferdinand, 2006..
- 28 Recounted in Lee, 1996, Tapper, 1973 with further documentation in Alden Wily, 2004b.
- 29 Recorded in Ferdinand, 2006.
- 30 Fayz Mohammed, 1925-26: Vol. III, as cited by Ferdinand, 2006.
- 31 Tapper, 1973, Pedersen, 1994, Ferdinand, 2006, Gawecki, 1980, Alden Wily, 2004a.
- 32 Alden Wily, 2003b, Stanfield & Safar, 2007.
- 33 Samples of entitlements from the 1970s are provided in Patterson, 2004.
- 34 Documentation of the process in Hazarajat is provided by Gawecki, 1980, Pedersen, 1994 and Ferdinand, 2006 and the consequences reported in certain districts in Alden Wily, 2004b.
- 35 A famous case of which is described by Favre, 2003.
- 36 Review of the 1960s-1970s reforms provided in Alden Wily, 2003a.
- 37 Documented by Pedersen, 1994, Patterson, 2004 and Alden Wily, 2004a.
- 38 See Mousavi, 1998 for comprehensive review of the politicisation of the Hazara prior to and especially as consequent of the 1978 communist revolution.
- 39 Alden Wily, 2003a.
- 40 The events of 1997-2000 in Bamyan Province are recorded in Alden Wily, 2004a.
- 41 Larsson, 1978.
- 42 Alden Wily, 2004a, Favre, 2003.
- 43 Alden Wily, 2008d provided detailed case studies of these events in especially Yakawlang District of the central Hindu Kush.
- 44 Human Rights Watch, 2002, Alden Wily, 2003b.
- 45 ADB, 2002, 2004.
- 46 Alden Wily, 2003b.
- 47 Alden Wily, 2003b.
- 48 De Weijer, 2005a.
- 49 Amendment to Land Law, 2001 of Gazette 595, 2006; Articles 4-11.
- 50 De Weijer, 2005b.
- 51 Alden Wily, 2003b, 2004a, 2005a, 2005b. It would be inappropriate not to acknowledge that the author was closely involved in this advocacy, as in the FAO initiative shortly described.
- 52 Alden Wily, 2003c.
- 53 Alden Wily, 2005b, 2008d, de Weijer, 2006.
- 54 Stanfield et al. 2008.
- 55 Alden Wily, 2006c, 2006d, 2006e.
- 56 Lety, 2007, Alden Wily, 2006d, 2006e, 2007c, 2008d.
- 57 The outstanding case of this is Khamaneil Pasture, the history and current fate of which is detailed in Alden Wily, 2008d.
- 58 Addressed in Alden Wily, 2008d.
- 59 Alden Wily, 2006c and 2006d.
- 60 Stanfield et al. 2008.
- 61 The Afghanistan National Land Policy, 2007 makes clarification and securing of land resources integral to community based resource management (Policy 2.2.6), issues of ownership and access rights to pastureland' a provincial matter, and seeks to have all land classified as public, private, community or state-owned land (Policy 2.2.1).

- <sup>62</sup> Stanfield and Safar, 2007, Stanfield et al. 2008.
- <sup>63</sup> Rubin, 1995.
- <sup>64</sup> Alden Wily et al. 2008.
- <sup>65</sup> Mousavi, 1998.
- <sup>66</sup> Alden Wily, 2006e.
- <sup>67</sup> *Daily Outlook*, June 2007.
- <sup>68</sup> *Daily Outlook*, April 2008.
- <sup>69</sup> Haidary, 2008.
- <sup>70</sup> UNAMA, 2008a.
- <sup>71</sup> UNHCR, 2008.
- <sup>72</sup> Hazaristan Times, July 10 2008.
- <sup>73</sup> UNAMA 2008a, 2008b.
- <sup>74</sup> Khaleej Times, 6 August 2008.
- <sup>75</sup> Alden Wily, Forthcoming.
- <sup>76</sup> As specifically stated by the Vice-President of Afghanistan (Hazara Times, July 10 2008).
- <sup>77</sup> The World Bank, 2008.
- <sup>78</sup> Alden Wily, 2004b.
- <sup>79</sup> See Manger, 1994 & 2003, Babiker, 1998, Abdel-Hamid, 1986, and Johnson, 2003 for history of the central region of Sudan.
- <sup>80</sup> Baggara in the central region comprise Misseriya, concentrated in the west of Southern Kordofan today and Hawazma, living in the central and mountainous Nuba areas and eastwards.
- <sup>81</sup> Aided by the People's Local Government Act, 1971, which abolished the native administration system and replaced this with hierarchies favourable to Khartoum. Space does not allow these corollary assisting processes to be elaborated here.
- <sup>82</sup> Cole & Huntingdon, 1997.
- <sup>83</sup> Refer Alden Wily, 2006a for review of the laws.
- <sup>84</sup> This began with Kitchener's Title of Land Ordinance in 1899 which declared all southern Sudan and rainfed land of central, eastern and western Sudan to be Government Land, although subject to occupancy rights. The precise law which deemed all waste, forest and unoccupied land to be Government Land was the Land Settlement Ordinance, 1905, its provision further entrenched in 1925, 1928 and 1930 and 1970.
- <sup>85</sup> Current national law on land includes the Land Settlement and Registration Act, 1925, the Land Acquisition Act, 1930, the Prescription and Limitation Act, 1939 (which confirmed that usufructs cannot eventuate into absolute ownership) and the Civil Transactions Act, 1984.
- <sup>86</sup> This provision borrowed directly from the colonial laws for British India, which in turn had a long history in English feudal law in the notion of 'Wastes, Woods and Pastures' belonging to Lords and the King, not communities (1285).
- <sup>87</sup> Cited by Babiker, 1998.
- <sup>88</sup> Babiker, 1998.
- <sup>89</sup> Salih, 1982.
- <sup>90</sup> Salih, 1982, Abdel-Hamid, 1986.
- <sup>91</sup> Manger, 1994.
- <sup>92</sup> Johnson, 2003.
- <sup>93</sup> Abdelgabar, 1997, Johnson, 2003. Osama Bin Laden was one recipient of a land grant in the Nuba Mountains, on his settlement in Sudan.
- <sup>94</sup> Manger, 2003.
- <sup>95</sup> A first step towards this was undertaken under the Peace Agreement 2005 when the SPLA reluctantly agreed to the inclusion of

the Arab-dominated West Kordofan within the boundaries of the new Southern Kordofan, likely reducing the Nuba to a minority. This has been compounded by the failure of the national census in April 2008 to comprehensively visit and enumerate Nuba communities (ICG, 2008). Much less success has been achieved with keeping the Arab population of the Southern Kordofan State loyal to the ruling National Congress Party, with a rising tide of reversion to the northern Umma Party.

<sup>96</sup> Alden Wily, 2006a.

<sup>97</sup> A special case was made for the third contested area, Abyei, as the homeland of the Ngok Dinka who had formed the SPLA, and over which the SPLA leadership was unprepared to compromise. A dedicated protocol was drawn up giving Abyei dual status, able to send representatives to both the national and Southern Sudan parliament and permitted to join the South by referendum in 2011. Needless to say, the boundary of oil-rich Abyei with the North has been a focus of dispute and then armed conflict in early 2008, the recommendations of a special boundary commission having failed, and now sent to a special tribunal in The Hague for resolution.

<sup>98</sup> Alden Wily, 2006b.

<sup>99</sup> CLSP, 2005.

<sup>100</sup> Pers comm. C. Gullick, Customary Land Security Project, 2004-2007.

<sup>101</sup> And in which again the author must declare a personal interest, having designed and technically advised the pilot project (2004-05).

<sup>102</sup> Alden Wily, 2004c.

<sup>103</sup> Alden Wily, 2005b.

<sup>104</sup> ICG, 2008.

<sup>105</sup> Alden Wily, 2006a.

<sup>106</sup> Pers comm. S. Williams, Chief of Party, Customary Land Security Project, July 2008.

<sup>107</sup> ICG, 2008.

<sup>108</sup> Pantuliano et al. 2007, ICG, 2008.

<sup>109</sup> De Waal, 2008. <http://www.ssrc.org/blog/darfur/2008>

<sup>110</sup> Had this article applied to Kordofan or Darfur this date restriction would have prevented restitution of the millions of hectares leased to northerners and companies during the 1960s and 1970s, but it assumed that this did not significantly occur in the south.

<sup>111</sup> Pers comm. J. Hatcher, July 2008.

<sup>112</sup> Patuliano et al. 2008.

<sup>113</sup> This section derives from research carried out by the author during 2007 on the forest tenure issue (Alden Wily 2007b) in association with the Sustainable Development Institute, Monrovia.

<sup>114</sup> Refer Alden Wily, 2007b: Cht. 1.2 for reproduction of these early sales contracts.

<sup>115</sup> Ubink, 2008.

<sup>116</sup> Alden Wily, 2007b.

<sup>117</sup> Land Registration Law, 1974, s. 8.44, 8.53, read with Public Lands Law, s. 30, 53 & 70.

<sup>118</sup> Ubink, 2008.

<sup>119</sup> Alden Wily, 2006b, 2008c.

<sup>120</sup> Additionally, unlike minerals, forests have never been constitutionally declared to be national property See Alden Wily, 2007b; Cht. 4 for details.

<sup>121</sup> Alden Wily, 2006b & 2007b.

<sup>122</sup> This includes the support of the Association of Liberian Loggers, the Liberian Timber Association and the Liberian Business Association, as per press release September 22, 2008 from the NGO Coalition of Liberia.

<sup>123</sup> Bray et al., 2006, RRI, 2008.

<sup>124</sup> *The Analyst*, 24 April 2008.

<sup>125</sup> UN Security Council, 2008.

<sup>126</sup> *The Inquirer*, 9 October 2008.

<sup>127</sup> *The Inquirer*, 8 October 2008.

<sup>128</sup> Alden Wily, 2006b.

<sup>129</sup> Alden Wily, 2008b, Collier, 2004.

<sup>130</sup> See discussion of this in Alden Wily, 2008b.

<sup>131</sup> See Alden Wily, 2008b, for exposition of issues.

<sup>132</sup> Alden Wily, 2006b.

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