WHOSE LAND IS IT?

Commons and Conflict States
Why the Ownership of the Commons Matters in Making and Keeping Peace

July 2008

Liz Alden Wily
Independent land tenure specialist
Fellow, Rights and Resources Initiative

The Rights and Resources Initiative

The Rights and Resources Initiative is a global coalition to advance forest tenure, policy and market reforms. RRI is formed by international, regional and community organizations engaged in conservation, research and development.

The mission of the Rights and Resources Initiative is to promote greater global action on forest policy and market reforms to increase household and community ownership, control, and benefits from forests and trees. RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington D.C. Please visit http://www.rightsandresources.org for more information.

Partners

Supporters

Norad

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Agency for Development
and Cooperation SDC

Sida

Table of Contents

I THE ISSUE 4
II THE CASES 8
THE SUMMER PASTURES OF AFGHANISTAN 8
THE WOODED SAVANNAS OF SUDAN 14
THE TROPICAL FORESTS OF LIBERIA 20
III CONCLUSION 24
Bibliography 29

I THE ISSUE[i]

This paper addresses the tenure fate of three commons: the 30 million hectares of pasturelands of Afghanistan which represent 45 percent 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 percent of the total land area; and the 125 million hectares of savannah in Sudan, half the area of that largest state of Africa.

All three resources have an uncountably long history as customary properties of local communities. They also share a 20th century history as the property of the state.

Of course there is nothing unusual in this contradiction. Between one and two billion people on the planet today are tenants of the State (CLEP, 2008, Alden Wily, forthcoming (b)). They live on and use traditional properties on which, in the eyes of the national laws of those countries, they are no more than lawful occupants and users. When their expansive collectively-owned forest, pastoral and swamp lands are taken into account, up to five billion hectares are involved, potentially one third of the world's total land area.

The real tragedy is not of the commons but of 'public lands'

The characteristic framework of their tenancy is 'public lands'. Sometimes public lands are legally implied as ownerless (*terra nullius*), un-own-able or sometimes as the shared property of the *national* community, held in trust by the state. Mostly the reality is that these areas are not just controlled by governments but the *de facto* property of governments.

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

In brief, it is mainly necessary to note that its 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 of modern post-colonial enterprise and in which political and economic elites conjoin in un-strangely similar manner. Moreover, the land thefts delivered have been typically *legal*, European and 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 those 'discovered' *owned* the lands they were found to occupy (although rarely with the support of jurists) (McKay, 2001). Or, where Aboriginal Title (as it became known in early America) *was* acknowledged, if not to ignore this, then to cleverly relocate this as a form of state sovereignty (viz: Americo-Indian *'nations'*), and to then declare that this local sovereignty could not co-exist with the sovereignty of the new modern State (Alden Wily, 2007a). Thus McAuslan, a noted scholar of tenure jurisprudence, refers to an elision of *imperium* and *dominium* (2006a). In lay terms this means the conflation of the geographical sphere of *political* sovereignty with real estate rights to the resources within that area. This conflation made it easy to diminish the land rights of indigenous populations to a permissive right of occupancy and use, at the will of state.

Two dates stand out in that process: first, the 1823 Marshall Ruling of the US Supreme Court, which finally set the dispossession of natives outside Europe on legal course (but using the feudal norms of English law as first experienced by the Irish as justification), 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.[ii] At the stroke of a pen Africans were, as natives in Latin America and Asia before them, to all intents and purposes deemed landless and their assets ripe for the picking.

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.[iii] Even should those new governments have been unknowing at the time, this cannot be said for the manner in which capture of customary land interests has since been entrenched and manipulated, by themselves or proxy agencies. Thus while modern Kenyans trace the origins of mass land loss and injustices to colonial masters, they are only too well aware that harshest delivery has been in recent decades (Alden Wily, 2008d). 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, but rather, are inclusive of agrarian states like Afghanistan which have adopted colonial-like property norms with vigour and/or reconstructed their own feudally-derived norms towards more state-ist resource capture (not least through international advice). In fact, political-legal denial of the commons as ownable or owned became such a common feature of the 20th century (and sometimes earlier) that it cannot help but be seen as a 'natural' consequence of capitalist transformation and modern state-making. How far it was a *necessary* consequence is now wide open to dispute. While this should (and eventually usually does) divide people and their governments, there is a more regrettable tendency for this to first play out in painful inter-ethnic strife, and most noticeably where one tribe is perceived as the beneficiary ally of the state.

Uncertain reform

So where is the remedy? It is true that the unpacking of this particular contradiction lies at the heart of a great deal of land reform around the world today, whether this be in the handling of the land rights of indigenous minorities in industrial economies like Australia and Norway, or topically, New Zealand,[iv] or in changing status of *majority* customary rights in agrarian states like Bolivia, Guatemala, Papua New Guinea, Tanzania, Uganda and Mozambique among others (Alden Wily, 2006b, CLEP, 2008). In all these countries, new constitutions and land laws do away with the notion of customary land interests as less than real property and collectively represent a significant trend in land *rights* reform. This results (*inter alia*) in stark diminishment of public lands as State, Crown or Government Lands, and (more partial) decline in government authority over these newly acknowledged customary assets, often via localised land boards (Alden Wily, 2003a, 2008a).

The law is never enough

And yet, success in even these nations is uneven. 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 (Alden Wily, 2006a, forthcoming (b), Fitzpatrick, 2005). 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 gradually entrenched as 'property' (Alden Wily, forthcoming (c)). Similarly trends are seen in the case of Mozambique and Uganda where comparable in principle protection of woodlands and pastures are visibly only able to be protected through community consciousness and action (ibid).

Nor is wholesale tenure reform affecting indigenous/customary rights overall yet assured. In 2008 most of the two billion persons acknowledged as customary occupants around the world remain legally ownerless. 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 in the developing world. 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 revived the clarion call for 'formalizing the informal' he had in mind the shanty towns 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 resource crunch

To a real extent it seems not. And the reason may simply be that these resources are too valuable to allow ordinary people to own. This becomes doubly so where these lands bear valuable products. As values grow, opportunity to recognize those lands as people's property declines. It is not far-fetched to suggest that a whole new era of resource capture and one which deeply interferes with people's land rights to especially the commons, is beginning. Global land shortage for food and bio-fuel production, along with the globalised economy enabling one state to lease the land of another's enhances state interest in unregistered lands ten-fold. There is some irony in that 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. Even without the oil, timber and the fish on or in these community assets, every hectare of exploitable land in our land-scarce world is invaluable, and increasingly, to be competed for and at times fought over.

Customary rights as a rising factor in civil conflict

And this is precisely what is happening. If we cast our eyes around the 71 conflicts in the world today, we see that not only are the majority intra-state affairs (85%) but that at least two-thirds are driven in part by contested claims of rights to land (Alden Wily, 2008c). Mostly this is in a territorial sense and often has some roots in unjust treatment of customary occupation as legal tenure in those areas, as cases from Bougainville to Kurdistan, from Oromia to the Hmong areas in Laos illustrate. Wherever they exist, conflict as to who owns and controls minerals, timber and oil are also involved as cases in Angola, DRC, Indonesia, Colombia and latterly Nigeria amply suggest. 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 several Indian states or the newly victorious Maoist rebels in Nepal, and who have accordingly placed equitable land reform high on the agenda of the new republic.

A primarily agrarian concern

Review of conflicts also shows that Africa is disproportionately the site of civil war, especially since 2000 (48%), hosting more coups, armed conflicts and causing civil deaths than any other continent (HSRP, 2005, 2008). This relates to a wider trend, that the site of civil conflict is overwhelmingly agrarian (Alden Wily, 2008c). Few wars are in industrialized states. Low per capita income and growth rates, along with mis-governance with mis-use of resource revenue may be prime triggers, as explored by Paul Collier (2004, 2007). Land grievance is part of that toxic mix, combining challenge to inequity with challenge to insecurity of rights to 'our land'.

The catalysing effect of conflict

However, as experiences from Sierra Leone to South Africa, Aceh to Angola, suggest it often takes the experience of conflict for this to consciously crystallize and to be understood historically and currently as essentially land theft. Or for the challenge to broader socio-economic inequities which so many agrarian conflicts ultimately define, to focus around the land and resource rights issue. Kenya is just the most recent in a long line of internally-conflicted states where lack of jobs, housing and farmland and political disappointment segued with (in that case, unusual) 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 it will be the last, either on the African continent or in Asia and Latin America. This is not least because 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 age-skewed developing world are poor and young adds piquancy and in frustration, militancy. It may not be fanciful to suggest that what the young are protesting is not just entering the 21st century with little hope of adequate homes or income but the failure of their elders 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 was the case. Instead the young poor in modern agrarian nations recognize a world that has become less, not more, equitable by the decade, with little remedy in sight. In this way, the turn of the century has proved a tipping point, almost an age-set change after half a century of post-independence in especially Africa, where most wars are being fought.

An issue of rights, not just resources

The point being made here is that while there are complex factors which bring a country to war, in agrarian states land will logically be central. Political and economic grievance and demand for changes in the way the state is run in due course find a main focus around the right to land and its distribution. Further, concerns will naturally pool around those lands which are least securely held by poor majorities as experienced by them to have been most vulnerable to loss – the commons. In this way the 20th century obsession with the security of the individually-held house and farm naturally gives way, and where action is advanced, this is seen in the reconstructed targets of registration. All three cases to be discussed illustrate this.

Moreover, while the issue is in many respects 'the last colonial question' in the formerly colonized world, it is also a *new* question, linking control over natural resources much more directly to political systems, and to demands for equity. Not just space but rights are at stake. Not just benefits but recognition of controlling rights and due ownership. Rising values and demand for resources pit state and people against eachother in ways that are even more extreme.

Nor is the question yet fully answered. For some years many have been suggesting that the answer begins to be found in a more democratic approach to land rights (Alden Wily, 2000, 2001). In the absence of such people-empowering reforms it may be expected that more, not fewer, civil conflicts will arise in coming decades. Moreover, my guess is that these will be increasingly about not just 'Who owns the forest?' and 'Who owns the plains?' but 'Who owns the oil and minerals?' and 'Who owns the water?' While recognising collective lands' resources as collectively held private property is an essential founding step, in regard to the latter, the shift from benefit-sharing to genuine State-people shareholding enterprise seems inevitable. Until such changes begin to more broadly appear around the world, it seems wise to eschew celebration that the number of conflicts is still declining as recorded by the Human Security Report (HSRP, 2008).

The post-conflict state as a new nation demanding new norms

The issues described above are not unique to conflicted states, being common to the one hundred or more nations where the majority of property rights are derived from and sustained by customary/indigenous regimes. Yet the issues are most sharply felt and in most urgent need of address in those countries where the state is in turmoil and populations looking 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 and resource 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.

From restitution to reform

This is only now beginning to be understood in the crucial peace mediation and post-conflict humanitarian and reconstruction sectors. Slowly and somewhat painfully these actors begin to recognize that the key lies 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 volatility.

This paper attempts to illustrate the ideas laid out above in the cases of Afghanistan, Sudan and Liberia. Centrally, it aims to show how the properties most at stake in this relationship are those which pose most challenge to the political, economic and legal conventions built around the state-people property relationship – the commons.

Before embarking on that examination, it may be helpful to elaborate a little on what is meant by commons in the agrarian world. Commons are those lands (or landed assets like timber, water and surface minerals) which by custom communities own in undivided shares, unlike those which they own individually or as families, such as houses and farms. At one and the same time commons tenure embodies root communal ownership of the resource, and use rights to those resources possessed individually by each member of the community. Overlaying these may be other sets of subsidiary access and use rights such as frequently enjoyed by nomadic populations or members of neighbouring settled communities (Alden Wily, forthcoming (c)).

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

II THE CASES

THE SUMMER PASTURES OF AFGHANISTAN

Who owns, controls and uses pastures, has been at the heart of contested inter-ethnic relations and conflict in Afghanistan for no less than a century. An historical synopsis is necessary.[v]

Proxy colonization

This begins in 1880 with British encouragement of the Pashtun tribal federal 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 country of Afghanistan created. The British objective was to create a loyal buffer state against Tsarist expansion southwards. This 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. In 1894 these ancient populations would see the first of many waves of Pashtun settlers arrive, competing increasingly for farm and pasture lands (Lee, 1996, Alden Wily, 2004a).

Losing the pastures by conquest and decree

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 population (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" (Ferdinand, 2006). By 1880 the Hazara were broadly confined to the mountains, and some even paying tribute to keep the Pashtun at bay (Ferdinand, 2006).

Now, with the new ambitions of Abdur al Rahman as modern state-maker, even this rugged 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 (*ibid*).

Furious, Abdur al Rahman ordered that 'no sign of these irreligious people should be left in these lands and mountains' and that their property 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 they abandoned their more characteristic migration southwards through Pakistan. Initially, many attempted to settle but were uninterested in farming and defeated by the harsh conditions in the mountains 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 record, 'without livelihood'.[vi] A lost crux of their economy was access to the pastures.

A relief of sorts arrived 30 years later. In 1927-28 the more liberal King Amanullah recalled the *firman* and reissued these land grants, restricting *Kuchi* to the high pastures. This hardly made a difference. The high altitude pastures were integral to the transhumant pasturage of the Hazara and access to them also essential to provide the fodder and fuel needed for the six month long mountain winter. 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 nomad (*Kuchi*) possession of pastureland. Local and indigenous populations could access their customary pastures but only at the will of settled or visiting nomads.[vii]

Civil war

As is now well-known, the murder of President Daoud in 1978 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-endorsed conquest by the 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

Several events had in the meantime occurred in relation to the pastures. First, as USAID found its feet as a development agency it guided King Zahir Shah's Administration towards the introduction of modern (western) property law, administration and land taxation in the 1960s (Alden Wily, 2003b, Stanfield & Safar, 2007). By 1964 several hundred technicians were being trained and with several hundred vehicles set out to title the country. They would in the event cover less than ten percent of the country by 1978. Half that area was registered as family owned farmland. Most of the remainder was pasture. This was registered as Government Land, in accordance with the new registration and land tax law of 1965.

This and a subsequent Pasture Law 1970, declared that while already-issued rights including by 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 government land. In practice, this was not well-absorbed by nomads, nor was this reflected in the text of the entitlements that continued to be issued then or since (Patterson, 2004).

Nor did nomad (*Kuchi*) dominance of the summer pastures alter. If anything, hand in hand with flourishing Pashtunisation, it became more entrenched. Furthermore, Kuchi dominance doubled especially in Hazarajat where wealthier nomads, having already established lucrative transport and marketing businesses in the 1950s, steadily acquired whole valleys of small farms, often in lieu of small debts inccurred by poor Hazara in buying goods from them (Pederson, 1994, Ferdinand, 2006).

At the same time, the new policy and law actively empowered agricultural officials to control the allocation and use of pastures. With the useful instrument of land and livestock taxation at hand, many accomplished this with zeal (and sometimes significant personal benefit). In addition, on the grounds that 'all pasture is government land' farming schemes including mechanisation along with the private schemes of officials began to appear on the more accessible pastures. Formal settlement schemes for people without arable land also flourished in the 1970s, *Kuchi* nomads were identified in the law as the priority beneficiaries (Alden Wily, 2003b). Poorer local populations found themselves still handicapped in accessing their traditional pastures and some were not able to access their pastures at all (Patterson, 2004, Alden Wily, 2004a, Ferdinand, 2006).

Recapturing the pastures

All this changed with the civil war. Often a first act of war by Uzbek and Turkmen communities in the north was to (often brutally) evict Pashtun settlers and recapture the pastures. The latter comprised the larger proportion of refugees fleeing to Pakistan, where the puritanical Taliban movement would evolve (Alden Wily, 2004). In mountainous central Afghanistan, as Hazara armed themselves, they began to prevent Pashtun Kuchi entering the region with their animals in early summer. Except for a brief and violent period in the late 1990s when Taliban rule made their return possible, few nomads have since successfully returned to Hazarajat.

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 the pastures for fodder and fuel and expansion of rainfed farming into these dry fragile areas was a concern (Larsson, 1978). With the chaos of war and the demise of overriding draconian control, the nature of public lands as everyone's land and no one's land began to take its toll.

Local farmers, long prevented from using the pastures for rain fed cultivation expanded into these. Warlords, taking a leaf out of the book of Government during the 1970s, began to open up pastures for commercial-like cultivation, limiting local use. Land and pasture-short communities even in areas where no warlords or officials reigned, also at times began to compete with each other for access to high altitude pastures on the grounds that as 'pasture belongs to Government' then it is free for all. Local leaders, particularly after the departure of the Russians added to the problem by resettling returnees on some of the lower pastures, multiplying settlements. Shortage of pastureland, fodder and fuel were 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.

Restoring things to how they were

The response by the post-Bonn Administration from 2002, and 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) the reconstruction aid community wanted the agro-pastoral economy back on track, and *inter alia* advised the re-launching of mass titling and the re-securing of 'government property' (ADB, 2004).

By 2003, several ministries were urging the re-issue of the Pasture Law of 1970, to once again declare that the pastures belonged to Government. The more moderate edict of the Taliban in 2000 which allowed that local communities at least own the pastures nearest to settlements was dismissed as irrelevant. While the Ministry of Agriculture was most concerned to retrieve its hegemony over these areas to halt expanding rainfed farming, the Ministry of Finance began to greedily eye the pastures as land to offer local and especially foreign investors. For its part, the Ministry for Tribal Affairs, and nicknamed the *Kuchi* ministry, was simply determined to help the nomads regain tenure over the summer pastures. *Kuchi* themselves did not initially force the issue publicly, having lost half their stock during the 1999-2002 drought and given their revilement as so profoundly associated with Taliban atrocities in different parts of the country.

In any event, 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 position was that they had not fought the long war and liberated themselves and their resources from Pashtun domination, only to see this revived via Pashtun nomads. UNHCR and other agencies also began to find that the return of Pashtun to the north was less than welcoming. 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/or 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 (de Weijer, 2005a). As stock numbers began to recover in 2004, *Kuchi* leaders revived their lobby for their ownership of the summer pastures by royal grant to be recognised, triggering new anxiety among settled populations.

By 2005 all the signs were 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.[viii] Meanwhile, moderate nomad leaders, willing to recognize that the pastures are owned by local communities so long as their seasonal access is guaranteed, were pushed aside (de Weijer, 2005b).

Offering breathing space and a way forward

At the same time, during 2003-05 the Ministry of Agriculture was gradually being persuaded that rather than rushing to declare pasture to be government land, field exercises would provide clear guidance as to how rights could be fairly distributed (Alden Wily, 2003b, 2004a, 2005b). While failing to see a recommended chapter of land matters entered into the new National Constitution in 2004, the dialogue had also been instrumental in preventing the constitutional declaration of pastureland as national property (Alden Wily, 2003b).[ix]

Such piloting 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 (Alden Wily, 2005b, de Weijer, 2006). Bureaucratic difficulties impeded an early start to a smaller conflict resolution initiative funded by the World Bank. By then 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 of pastures (Stanfield et al., 2008). FAO was able to successfully 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 (Alden Wily, 2006c, 2006d). 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 stopped short of acknowledging communities as outright owners.

The lessons cumulatively emerging from especially the FAO initiative have been powerful and salutary (Lety, 2007, Alden Wily, 2007b, 2008a, forthcoming (a)). The strongly local collective basis of pasture

ownership has been confirmed and amply 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 at several levels, 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 embrace one thousand or more 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 'Government owns the pastures.'

How far communities can uniformly install and sustain local control over pastures is less comprehensive (Alden Wily, 2007b, 2008a). While the FAO project has found that with acknowledgement of their tenure, that communities are readily able to bring these under working village-based regimes, there are occasions where this has proved impossible.

The main reason is instructive; this has less to do with the fact these have a long history as areas allocated to nomads than for the fact that powerful notables and especially officials have over the last decade used this fact as justification for their own co-option of the pasture. For this to be sustained, they cannot afford to approve a situation in which local ownership or control is vested in the customarily-owning adjacent communities and which they correctly fear would limit their access, due to the urgent need to limit stock numbers and the harvesting of the forage for commercial sale as fodder or fuel (*ibid*).

On their part, the traditional local owners have found that they are entirely unable to rely upon provincial or national government support for their management decisions, so long as the personal interests of officials remain. Some now confess they would rather treaty with nomads than deal with this situation. Some progress just on this point has been made. In one of the affected pastures, a large group of nomads have secured access in 2008, through quiet negotiation with local community owners, and by payment of grazing fees as acknowledgement that they are seasonal users, not the customary owners of the pasture (Alden Wily, forthcoming (a)).

Meanwhile, the ADB project has demonstrated that community based registration of rights, including to pasture land, is viable (Stanfield et al., 2008).

Reforming the law

As well as strongly influencing new national land policy (2007)[x] these and a set of other lessons have been fed into the drafting of a new pasture law. In its current iteration (June 2008) this 'Rangeland Law' (as the new pasture law is called) 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).

In all these respects 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, to be defined as public pastures only where customary possession cannot be satisfactorily identified or sustained (Art.17). Additionally, the ownership of public pastures is to be on a district basis, not national. Custodians are defined as communities which are considered to be the legal possessor and long-term manager of the pasture (Art.3). Where nomads have a demonstrated long history of seasonal access to summer pastures, these interests are to be recognized and upheld as far as possible, but via localised arrangement and with the payment of grazing fees to local owners made voluntary. Only should local negotiation fail, and district and provincial mediation after it, may they submit claims to a President-appointed task commission formed to determine the case (Art.22).

While the above suggests a highly positive outcome after several years of post-conflict debate on the matter, such success remains unstable and highly vulnerable to retrenchment. A sign of this has already

occurred in the reduction of the terminology of 'ownership' in an earlier draft to *possession*, laying the way potentially for Government to reclaim root ownership. This change responded to uneven acceptance among senior officials that even some pasture should be acknowledged as community-owned.

'Ownership is dangerous'

In such positions Government gains support from the position of the now-closed ADB project. This curiously advised in the strongest of terms 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 "f*or agricultural farms, livestock development and industrial parks, roads and other infrastructure with their consent*" in line with the above-mentioned legislation (Stanfield et al. 2008). Its advisers have severally suggested that 'recognising the pastures as community-owned is dangerous'.

This position reverts in key respects to contested 1970s norms, not least in the assumption that as collective assets and which additionally communities do not customarily trade, commons like pastures are un-owned, un-ownable and do not amount to property. There also seems to be touching faith in state trusteeship of resources, even after a century of contrary experience; technically it underestimates the damage done to the resource by ignoring customary rights as property rights and socio-politically, underestimates the determination of local communities to see their tenure recognized (Alden Wily, 2006d). The FAO project has also argued that reluctance to recognize customary rights as amounting to ownership fails to get to grips with the strategic utility of drawing distinctions between ownership and access rights as a way to resolve the bitter settled people-nomad conflict, and which so tangibly aligns along ethnic lines.

Needless to say, the more conventional positions resonate with the more conservative of officials in the post-conflict Administration, mainly those holding the same positions they held before the civil war. The Ministry of Agriculture has most recently seen its Forest Law draft returned by the Ministry of Justice as too radical, a law which far from proposing to acknowledge customary ownership of small local forests, only sought to enable those communities to manage these. Slowly rising interest in having additional lands to lease to investors is also coming into play, strengthening reluctance to surrender rights to communities.

New conflict threatens

Meanwhile conflict between mainly Pashtun nomads and local populations continues to grow more threatening with each passing year, as formal decision as to pasture rights and their ordering is postponed. 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 central highlands, demanding passage. As was the case in the 1990s, many Kuchi have allegiances to the Taliban, and in June 2007 took the opportunity to raise the Taliban flag. In the resulting fracas, thirteen Hazara were killed, tens wounded, hundreds of Hazara homes burnt and thousands forced to flee the area (*Daily Outlook*, June 2007). Spring 2008 opened badly with a declaration by a Kuchi MP that only Pashtun are true Afghans and own the land (*Daily Outlook*, April 2008). Following a walk-out by offended non-Pashtun, Parliament was closed and Hazara especially took to the streets, demanding that Government and the international forces in Afghanistan protect their lands from *Kuchi* armed invasion, and that the Kuchi, still exempt from disarmament (because of their lifestyle and home areas in the south) be disarmed (*Quqnoos*, April 2008, Haidary, 2008).

At the time of writing in July 2008 fighting has broken out again and with yet more severe effect in a number of districts abutting the central highlands, with Kuchi again burning Hazara houses (UNAMA, 2008a). Hundreds of families have again fled (UNHCR, 2008). Political leaders including the Vice-President are voicing concern that civil war could begin in areas which have so far not been directly involved in the fight against Taliban insurgents (*Hazara Times*, July 10 2008). Hazara leaders meeting in June and again in July have condemned Kuchi incursions, reiterated their ownership of the pastures of

Hazarajat and begged Government and the international community to disarm the *Kuchi* (UNAMA 2008a, 2008b). Fears that *Kuchi* are being armed by the Taliban also begin to be expressed.

In this way, the question of 'who owns the pastures?' is being battled over along several tracks; first, in effect between government and people as to the extent of customary right to be recognised, and second, within government and the international community, as conservatives and modernists battle out the wisdom and implications of retaining the pre-war idea of all pasture as Government land. Third, and obviously much more violently, settled and nomadic people are fighting for tenure. Underlying this is the time-old Pashtun/non-Pashtun divide, which shows signs of new hardening. Underlying this again is Talibanization.

For its part, unarmed with the kind of practical strategies such as the FAO project has pursued to layer pasture rights in ways which meet general if not total satisfaction for both parties, UN mediation efforts have proved impotent since June 2007, and show little sign of having sought access to technical solutions. More dangerously, by being so, they imply, incorrectly, that the matter is irresolvable, heightening anxieties further and entrenching positions.

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 especially 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, again ethnically aligned. The role of well-intentioned international aid agencies is also seen in both cases.

There are additional similarities in that the experience has seen political consciousness of injustices and resistance to restitution of pre-war conditions materialize and play an important part in the shaping of the conflict today, and as increasingly as an issue between Government and people. Further, in these circumstances, potential resolution is being found less in prompt reassertion of law than through more localised and incremental learning by doing, with slowly-crystallizing popular demand. More negatively, in both countries failure to resolve the single question '*who owns the pastures?*' is triggering or adding to renewed conflict, although at localised levels.

In other respects the situation of communal tenure in the two countries could not be more different. The issue of land rights and as affecting collectively-owned lands was a conscious driver to war in Sudan, and as a consequence brought to the peace-making table by the party which felt most aggrieved. The points of agreement that were (and were not) reached have been clear conductors of treatment since.

There is thus either irony or instruction in the fact that as matters stand in 2008, communal land owners are more or less in comparable situations in both countries at this point. This suggests that either the contents of the Sudan Comprehensive Peace Agreement on these matters 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 resolve, at least in what is in both states still the post-conflict short-term of three to six years.

A summary of the situation in Sudan follows.

Laying down the gauntlet

"*Land belongs to the people*". This was a maxim of the Southern People's Liberation Army (SPLA) led by John Garang, and which became the Southern People's Liberation Movement (SPLM) and the ruling

political party of South Sudan today. The problem was, SPLM leaders admitted in March 2004, it was not clear how to deliver this in practice (Alden Wily, 2004b).

The issue of 'who owns the land – Government or people?' had become a tangible concern in Sudan by the time peace began to be brokered between the North and South in 2002. Most of the concern was held by peoples within the north; Beja in the north-east, Darfuri in the west, and Abyei Ngok, Nuba and Funj in the north-central zone of the country.

Within the North-South Peace Talks (and from which Darfur was excluded) the matter mainly concerned these last central zone Africans. These were tribes who had borne the brunt of fighting during the long North-South War (1984-2001). 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 as shortly described. Northern Arab nomads were also being encouraged to settle in these areas, or were doing so voluntarily as a means of dealing with the establishment of schemes in their home areas further north. It had in fact been these multiple encroachments which had driven the central African populations to join the southern SPLA against the national government, or more specifically, its ruling Arab Islamic elite, the National Congress Party (NCP).

In March 2004, with peace 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 this should take place and how returned lands could be properly secured as the property of Abyei, Nuba and Funj. I will return to the process eventually embarked upon but first will outline how these land losses had come about. As in Afghanistan, this was from the outset a matter of law.

Making dispossession legal

By the 1970s the legislation which allowed Khartoum to help itself to the lands of local populations was the Unregistered Land Act, 1970. This was introduced mainly to satisfy concerns of the World Bank that evictions of local communities on vast schemes underwritten by its loans be made legal (Cole and Huntingdon, 1997). This law was in due course replaced by a more subtle Civil Transactions Act in 1984. This assured farm and house owners that their occupancy was protected but retained intact the provision that uncultivated land and *unregistered* land belonged to Government. As unregistered land embraced more than 90 percent of Sudan's total land area, this confirmed the State as the majority landholder. Eviction by Government continued to be lawful, and appeal to courts against eviction, unlawful.[xi]

This position was not new. These provisions built upon legislation dating back to the beginning of the Anglo-Egyptian Condominium rule of Sudan which lasted from 1899 until independence was admitted in 1956. The founding law on this matter was in 1905, ruling that all '*waste, forest and unoccupied land*' was Government property.[xii] Ironically, one of the objectives at the time was to protect African lands from already evident invasions 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, legislation effecting this remain in force today.[xiii]

Losing rights

Four themes are discernible in the ensuing handling of mainly African land rights. First, as above, was the early cooption 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.[xiv] This consolidated with each decade and became decreasingly benign. It was also despite clear knowledge that (in the words of one British Administrator) "*the native is inclined to consider that all land is either within his or some other village's boundaries*" (Babiker, 1998).

Losing equity

Second has been the continuing story of northern, Arab capture of lands in the more fertile central and southern zones, and this in turn often engineered by nomadic populations. As implied above this also did not begin in the 20th century; on the contrary it has very 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 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 subordination were hardly changed.

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 residence (Babiker, 1998).

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 (Salih, 1982). Although these zones were essential to the Nuba for their 'far farms' as well as providing pasture, woodlands and Gum Arabic, Hawazma had indeed established strong s*easonal* grazing rights in these areas (Abdel Hamid, 1986, Salih, 1982). 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 (*ibid*). To have this situation effectively entrenched by British administrative policy became a source of resentment to the Nuba (Manger, 1994). 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 (Johnson, 2003).

Losing land

Fourth and most latterly, have been the large scale evictions of local owners to make way for the mechanised farming schemes referred to above. Initially these were designed for local populations. By 1968 they were catering explicitly to northern private and foreign interests, including prominent officials, traders, agri-business, Islamic banks and Middle Eastern investors (Abdelgabar, 1997, Johnson 2003). Local land losses in the Nuba Mountains/South Kordofan area alone amounted to 4.5 million acres (Manger, 2003).

This may be triple the area today 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. 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. Needless the say, this is allegedly continuing today, given the prospect of national elections on the horizon (Pantuliano et al., 2007)

Failing to recover rights and resources

Not surprisingly, land was on the peace-making agenda mediated between the national government and the SPLA from 2001. This was facilitated by an IGAD-appointed consortium of six nations (Kenya, Ethiopia, Uganda, Norway, Britain and the United States). The first protocol of agreement was signed in July 2002 and final agreement not until January 2005. From the first protocol it was agreed that SPLA-controlled areas – 'the south' – and to be known as South Sudan - would be recognised as a semi-autonomous region and within six years of signing a final peace agreement, would have the opportunity to secede as an independent nation, depending upon the results of a yes/no popular referendum. Almost entirely African, largely Christian, South Sudan comprises only a third of the area of Sudan and well under half the total population. Nonetheless, its land and resources are fertile and rich in water and oil.

Ownership of land and underground resources were extensively debated during the peace-making period but little could be agreed. The eventual Wealth Sharing Protocol of January 2004 saw the subject of ownership agreed to be set aside for later agreement by an unspecified process (Art. 2.1). This never eventuated. 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*" (Art. 2.5).

As ownership was firmly off the agenda, and the reluctance of Khartoum to change existing law known, it is unlikely that the North considered that customary practices could ever amount to ownership. Events since have shown this to be so. At the time, the added provision in the protocol that "*Rights owned in land by the National Government will be exercised through the appropriate or designated level of Government*" (Art. 2.4) were warning enough. As was the odd provision for land matters to be a subject of unspecified concurrent competency, almost guaranteed to limit local level action (Art. 2.3).

Land Commissions were also to be instituted at national and South 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 (Art. 2.6 & 2.7). The Commissions were to make recommendations regarding land reform policies (Art. 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 agreement or the interim constitution.

Remaining in the North and battling for rights

Concerns around customary rights tended to fall off the agenda following the above 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 Comprehensive Peace Agreement, the Implementation Modalities, or more importantly, in the drafting of the Interim National Constitution (2005) (Alden Wily, 2006a). As negotiations drew to an end SPLA was preoccupied with bringing the three contested areas into South Sudan and by the time this had failed (August, 2004), the North was confident it need not revisit the issues. This has since been maintained, Khartoum preventing the two states of South Kordofan and Blue Nile introducing articles into their State Constitutions (2007) which had not already been laid out in the Wealth Sharing Protocol of January 2004. The desired articles were designed to accord customary land rights status as property, irrespective of whether or not those rights are registered (*ibid)*.

Curtailing the opportunity for restitution

Even the chance to have State Constitutions was a special concession to the Nuba and Funj in the failure of the long promise that the boundary of South Sudan would be drawn to include their areas. A special case was made for Abyei as the homeland of the Ngok Dinka who had formed the new SPLA, and around 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 South 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 since, the subject of an unsuccessful boundary commission, whose recommendations are currently subject to a tribunal decision in The Hague.

The main point of establishing State Commissions was to address the bitter claims of wrongful loss of lands. The Commissions were empowered 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, Art. 9.6). As of mid-2008 neither Land Commission has been established, even after (or because of) fine enabling legislation drafted with the help of international expertise under the USAID project described below. 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 and after comparable quality assistance in drafting. It may be speculated that the draft laws simply offer too much opportunity for restitution to genuinely occur, in the eyes of NCP ministers who must approve the laws.

Promoting customary land security and devolved land authority

Nor ultimately has an innovative attempt to assist the two regional states to resolve their bountiful tenure conflicts with the State and with nomadic populations, been able to make rapid progress. This began as a USDA-funded pilot project on a shoestring budget in late 2004, eventually instituted as a fully-fledged USAID project in 2006.[xv] Its core objective has been 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 administer their land relations, internally and with outsiders (Alden Wily, 2004c).
In addition one part of the multi-stage process agreed with local leaders is to meet with nomads who have settled on their lands or who wished to restart annual migrations into these areas, the objective being to come to mutual agreement as to conditions and corridors (Alden Wily, 2005c).

A parallel investment was to secure expert legal advice to help local leaders draft chapters on land for the above-mentioned State Constitutions, and to draft land laws to put the promised Land Commission in place, to enable restitution to proceed as swiftly, fairly and smoothly as possible, and to 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 NRC representatives with the support of Khartoum, none of these bills have yet reached the state parliaments of Southern Kordofan or Blue Nile, nor are expected to do so in the near future. 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 (pers comm. C. Gullick, S. Williams).

Giving up

The situation is 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, not least because they embrace vast areas, in some cases of several hundred square kilometres. Moreover many of these areas are overlaid by mechanised farming schemes into which local leaders may not trespass, and/or are occupied by remote settlements of armed nomads. The project also confronted enormous resistance from the incumbent NCP Governor and his staff from 2007. Meanwhile, there is revived commitment by the Ministry of Agriculture to make available for lease no fewer than 20 million ha in South Kordofan, and which experience suggests, will again favour outsiders. IFAD, seemingly unarmed with a clear historical picture of events to date, is said to be offering financial support, replacing aid from mainly USAID and The World Bank in the 1960s and 1970s. It is alleged that rising numbers of Nuba have begun to rearm, ready to return to war, should their land grievances not be addressed. Unable to operate, the Customary Land Security Project has closed in Southern Kordofan.

Back to business as usual

Overall, there is little to suggest that real address of communal land rights issues will occur in the North, anymore in Kordofan than in Darfur to the north-west. On the contrary, Khartoum has signalled its continued resistance to change in the legal status of unregistered lands as Government property, in continuing to issue leases on land it presumes to be vacant and un-owned, and not only in the South

Kordofan State. Most recently (July 2008) it has leased 30,000 hectares of prime Nile-side land to Abu Dhabi in return for unspecified 'business links and technical know-how' (*The Guardian*, July 2 2008). This, the excited Abu Dhabi representative offered, 'will not be our last project in Sudan'.

Looking to the South

In contrast, some progress on these matters is slowly being made in South 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*" (Art. 180 (4)). Customary *seasonal* rights are also to be respected - provided they "*do not interfere with the primary customary ownership interest in the land*" (Art. 180 (5)).

Significant progress has also been made on a new South Sudan Land Law. Still in draft in 2008, this provides for customary land rights to have "*equal force and effect in law with freehold and leasehold rights acquired through statutory allocation, registration or transaction*" (Art. 8). Customary owners are to be assured security of occupancy, irrespective of whether or not they hold rights individually or in association with others (Art. 8). Public land is made a residual category where '*no private ownership including customary ownership may be established by any process*" (Art. 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" (Art. 9 (2) (b)).

'Community land' is also defined as ownable and may include pastures, forests or shrines or other collective land assets held by communities (Art. 10). Evidence of these rights can include verbal testimony (Art. 39 (3)). Finally, communities may register their land either in the name of the community, a clan or family in accordance with the customary practices as applicable, a community association or a traditional leader holding the land in trust for the community (Art. 56).

These are all important and positive policies. Should they finally enter law, SPLA's claim that '*land belongs to the people*' could begin to see delivery in this part of Sudan. However, there is not much sign that this will occur. On the contrary, the South Sudan Land Commission is seeking to revise the draft substantially in 2008, with USAID assistance, with handling of customary rights firmly subject to intended revisions. It is noticeable in South Sudan, one development worker reports, that whereas billboards in 2005 proclaimed that land and resources belong to the people, these have since been replaced with signs proclaiming that land and resources will be looked after by Government to the benefit of people (pers comm. J. Hatcher).

Not surprisingly, a main source of disenchantment contention derives from frustrations around the South's capital city, Juba. 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 (Patuliano et al. forthcoming). The new Government itself multiplies its labour force annually, and along with the military, the humanitarian, peace-keeping and reconstruction aid communities, and the burgeoning business sector, need land to live on, build upon and work on. For this they look to the local Bari community, the customary owners of the land immediately around Juba. Disputes as well as prices have risen everywhere. Promises of land for investment around the capital have also been delayed. Often the military and in particular the SPLA helps itself to land as do ministry projects. At a more formal level, the new state government of 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 Land Commission has been unable to help. Frustration is growing on both sides. 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; on the other is a local tribal community which is unlikely to surrender the commitment to land rights fought for over 24 years. The makings of a conflict over the issue are being set in place.

THE TROPICAL FORESTS OF LIBERIA

'The forest is our farmland'

Finally, the tenure situation of Liberia's forest resource is recounted.[xvi] This timber-rich area constitutes over half the country's land area and has been a main contributor to foreign exchange for five decades and a source of livelihood for several centuries. The latter is founded on 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 rather than distinct from the farming system or farmed areas. 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 can be rendered unto the state have therefore sat more tangibly awkwardly in Liberia than in parts of Africa where each community's area was vast and the boundary a substantial wooded area or grassland in its own right. And yet, typically, it is precisely such overlay of ideas of un-owned land that has been attempted in Liberia as elsewhere.

Colonial resource capture with a difference

However the course of this has been somewhat unique. The colonizers arriving on the west coast of Africa were private colonization societies bringing freed slaves from America. On first landing in 1821 they recognized that the land was owned by the aborigines (as they called them) and proceeded to negotiate purchase of the sites they wanted for their settlements ('colonies'). A little money and especially goods changed hands and contracts drawn up. A salient event occurred at this point; ordinary natives rebelled against the first chiefs who sold their shared property to the colonists without their permission. This set a precedent of articulated collective ownership that remains entrenched until today and which served to pre-empt the kind of chiefly capture of land which would begin to afflict some other West African states and most notably Ghana (Ubink, 2008).

Buying the littoral

Eventually the whole coastline 40 miles inland was so purchased by colonization societies which would in due course combine to form the first independent state in Africa (1847), albeit one in which the colonizing freed slaves would rule the indigenous population in colonial-like ways. The previous owners of the littoral, these native tribes, were guaranteed security of occupancy; only around the turn of the century gaining the right to purchase parcels of the Republic's land in the same manner as settling freed slaves and their descendants were able. Over time government also leased land to foreign interests, the most famous being the lease of one million acres to a small American company named Firestone in order to grow rubber (1929), and from which the giant Firestone would grow.

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 state to extend its sovereignty inland (the 'hinterland'). The possibility of buying these much larger and magnificently forested areas from native communities was less; purchase was costly and following the models by then established by the British and French, 'unnecessary'.

Recognising the hinterland is owned

However rather than simply declaring this expanded area of political sovereignty the property of the state, Monrovia 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; Art. 66). Moreover, if they so wished, these communities could acquire title deeds for their domains, in the process converting their rights into a fee simple communal holding.

No less than thirteen chiefdoms were to take up this opportunity. Several of the resulting Aborigines Land Grants (as they were called) covered over half a million hectares each. Notably, in no case was title issued to chiefs, members of communities ensuring that it was clearly specified that the land was owned by all members of the community and their heirs and assigns. Many more chiefdoms did not secure such deeds. They had neither the means to pay the survey costs nor the organization or interest to do so, assured 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 simply became less palatable to Monrovia that aborigines continue to own and control what were clearly becoming extremely valuable resources and concessions over which it could grant to especially foreign companies with lucrative returns. Nor with the colonial-like dominance of Americo-Liberians over the indigenous community still intact, was capture difficult to achieve. Furthermore political-administrative justification existed in the need to bring the way in which the hinterland was governed into conformity with the governance of the original coastal area and where public land was with somewhat more justification the outright property of Government.[xvii]

In law, either deliberately or more likely as a consequence of the shifting ground in the Monrovia-Hinterland relationship, this 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, now the omission of a tribe to have its territory delimited shall not affect in any way *'its right to the use of the land',* rather than as previously, the tribe's right and title (Title 1, Cht. 11 Art. 270).

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, lawful users. The donor community, becoming very active in Liberia from the 1960s, 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, 1974. This was typically focused upon the advocated individualization of lands and their registration as freehold estates, and in the process, while not denying the existence or importance of customary tenure, removed the implications of real property that had earlier pertained and additionally deemed tribal lands as a mere encumbrance upon public lands owned by Government.[xviii] This silently shifted the grounds of tenure, realized in practice by the real control of forests by the new Forestry Development Administration and the loggers to whom it leased community lands and with no reference to them.

Nonetheless, these traditional owners could become the legal owners by buying their own land back from Government, and initially at low cost. Moreover, no change was made in the Public Lands law which required local chiefs to approve any application for registered entitlement. Again at least 19 chiefdoms set about buying their land between 1956 and 1986, securing their community land areas as their 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 percent of the total forest estate today.

As an aside it might be noted that excepting the Ashanti Chiefs in Ghana, these communities were probably the few recognized customary land *owners* on the continent around this time, the 1960s and 1970s. The rest 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 their tenure with imported freehold or leasehold entitlements which they held individually. In the process collectively-owned assets were either subdivided among those with

the means to use them, or in the case of the larger forested areas, vested in County Councils, directed to serve as trustees on behalf of the State, and from both pair of hands, these lands have since all too easily slipped, significantly contributing to the bitterness as to ancestral lands being expressed today (Alden Wily, 2008d).

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 today. Additionally, unlike minerals, forests have never been constitutionally declared to be national property.

Double-locking resources against popular claim

As if aware of dubious claims of State, as late as 2000 Charles Taylor would strengthen its hand by entering into law 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 several decades of 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*'.

Bringing rights back into the picture

In 2008 a rather different scenario presents itself. Following the war, the status of customary land interests and especially the collective community ownership of forestland and forests have gradually come into public debate. This has grown out of substantial popular challenge to the right of the Liberian Government to issue concessions on community land. This in turn has origins in the joint civil society and international community demand that the forestry sector be thoroughly reformed. The catalyst was less rights than revenue, in growing awareness in the international community that no less than a fifth of total logging revenue was disappearing into private pockets in the Taylor Administration (1989-2003) and that a significant proportion was being diverted into arms purchases in support of rebels in neighbouring Sierra Leone. In addition, the forests were clearly being looted by unscrupulous concessionaires, with one of the fastest rates of forest loss on the continent. UN sanctions were imposed on purchase of Liberian timber (2003), a thorough review of each concession undertaken (2004-2005) and all of which the incoming elected President in 2005 was persuaded to cancel (2006).

Stopping short of delivery

Integral to the reform a new National Forest Reform Law, 2006 has been enacted. Issues of community ownership were still not clearly on the agenda and popular demands settled on a need for Government to begin to share some of the revenue with communities affected by the concessions. Accordingly the law declares that communities will receive one third of the rent Government will charge of concessionaires. The failure of this legislation to sufficiently overturn standing paradigms left the legislature uncomfortable. At the last minute it agreed to enact the law with proviso that a Community Rights Law with Regard to Forests be drafted. The greatest 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 or bind concessionaires sufficiently to delivering social support measures in their long-term concession areas.

Getting back to basics

Much attention through 2007-08 has been focused on developing the Community Rights Law. A concerted effort has been made by civil society organizations to consult with rural communities and to

better understand their conceptions of forest-related rights. Work by this author, investigating the history of customary land rights, has been integral to this (Alden Wily, 2007a). Through several drafts, the Community Rights Law draft become rooted in recognition that the natural forest resource as a whole is community-owned and additionally, that the 2000 separation of trees from the soil they grow from, and retained in the new 2006 forest law, is unsound.

As to be expected (and as already seen to be the case in Afghanistan and Sudan) the process of articulating legal paradigms has stimulated considerable and at times fraught debate, exposing a predictable divide between in this case the Forest Development Authority and civil society as to how customary rights to own, use and manage their resources. Neither government as a whole nor even the logging sector as a whole fall entirely on one side or the other, the Governance Reform Commission showing great interest in land reforms which will clarify and entrench customary rights as property rights in general. Against this is rising frustration in the Treasury at the continued loss of revenue through the failure to reissue concessions and with the links of at least some government officials and politicians with logging companies, an allegedly lukewarm response to carbon credit proposals which would enable the forest not to be logged at all. While broadly urging prompt reissue of concessions the logging sector itself is all too aware after the events of the last fifteen years that any attempt to re-activate a concession systems which denies local ownership, or right to help determine if and how forests are used, will be counter-productive. Some local companies are showing interest in smaller scale logging enterprise and community-private sector partnerships, and which in countries as diverse as Sweden and Mexico challenge the income-generating superiority of industrial operations. There is also now widespread interest in being able to enter into contracts directly with communities, with the Authority serving as facilitator and watchdog and revenue collector.

The passage of a Community Rights Bill into law which firmly recognises that much of the forest resource is customarily owned by communities under deed or through historical guarantee of tenure is far from assured. At the time of writing a compromise fifth draft is under discussion (July 14, 2008). This lays out three important principles; that forest resources on community lands are owned by local communities; that forest growing naturally on land is attached to the land; and that any decision, agreement or activity affecting the status or use of community forest resources will not proceed without the prior, free, informed consent of the community (Section 2.2). At the same time, it is equally laid out that the Forest Development Authority shall be in control of forests, raising doubts as to how far communities may establish themselves as regulators and managers of their own forests. In addition, issues around recognition of community land tenure rights are to be left to a Land Commission and/or as laid out in Liberian law (Section 3). On both counts this is problematic; the Land Commission is yet unformed and the land law, as indicated above, at this point uncertain in its support for customary rights as property rights.

Community action: securing 'our land'

Meanwhile rural communities are increasingly taking the issue into their own hands. First, many of Liberia's 10,000 or so rural communities are concretising their customary claims through voluntary inter-community negotiations to clarify or confirm exactly where the boundaries of their respective community lands lie. These are duly recorded in witnessed agreements. Although this is not an unusual post-conflict response to war-time disorder and displacement, knowledge that a share of logging revenue could come their way has added sharp incentive. A rising number of villages and village clusters have determined to register these areas as their collective property and have already secured necessary permits to survey (Tribal Land Certificates) and currently raise funds for this to be undertaken. Officers in all forested counties report a sharp rise in applications for Public Land Sales and predominantly from communities.

Going to court

Second, the debate around customary land rights is widely inclusive of the public. Evidence that the Forest Development Authority has forged ahead in planning to issue concessions without the informed consent of communities has met with anger. Three forest management contracts were advertised, bids

submitted and evaluation of 13 bids underway by June 2008 (UN Panel of Experts, 2008). In April 2008, communities in the affected area demanded public explanation from the Forest Authority as to how it thought it would issue concessions or salvage contracts without the agreement of community owners (*The Analyst*, 24 April 2008). The persistence of the Authority along this course has enraged segments of the population. Prominent civil society groups have joined forces with the affected land owners to bring their case to court (pers comm.. S.K. Siakor, July 2008). The capacity of civil society actors to mobilise international support has already been demonstrated in the role these actors played in getting the concessions reviewed and ultimately cancelled in the first instance.

Room for manoeuvre - peacefully

There are important elements in the Liberia case which suggest despite the heated relations, a satisfactory outcome could emerge. These lie first in the manner in which decision-making around the Community Rights Law is evolving, with rigorous attention to both representation of all stakeholders and concerted efforts towards public awareness-raising and consultation. Additional to this has been significant support from the international forest conservation and human rights lobby groups, and the attention paid by the UN to the issues driving forest degradation and mismanagement (UN Panel of Experts, June 2008). It was not insignificant that a recent Security Council resolution on Liberia (1819, June 2008) reminded the Government of Liberia of its obligations to attend to and resolve land and tenure rights in regard to the timber sector. The role of civil society actors has been pivotal throughout including in its determination to engage from the outset with government actors and politicians.

Nor is the administration entirely unsympathetic. Public consultation towards a pledged new national land policy has already raised demand that customary ownership overall, not just as affecting forestlands, be respected. Proposals for more devolutionary government add to this. These initiatives are administered by the Governance Reform Commission and which begins to play a more active mediating role on forest tenure and governance issues (CFWG, 2008).

And while the signs are that the halcyon early post-conflict era is beginning to give way to business as usual, with economic necessity backed by private enterprise increasingly dictating the terms, the Sirleaf Johnson Administration is equally cognizant of the perils of ignoring popular demands around this issue. With such a politicised, mainly youthful and volatile population, there is no lack of understanding that conflict in forested areas could begin all over again – but this time with a specific grievance in mind, as to who owns this valuable resource. The promise of well-supported and publicised court cases suggests this may yet be avoided.

III CONCLUSION

Where do these three examples take us?

Commonalities

First, there is an enormous amount of commonality in the treatment of customary land interests over the last century and with a striking degree of similarity in its drivers. These deserve cursory recap. They include the remarkably similar origins of dispossession, in introduced and mainly colonial interference in local land norms, only to be compounded in more recent history by a new form of international interference, the advisory and bank-rolling aid community. The reality that no modern state has been or can be an island unto itself is inescapable.

The instrument of law has also been uniformly prominent, in both the unmaking and making of rights. The cases also share the fact that while conflict over collective assets may play out along inter-ethnic, and often aligned inter-religious lines, the more fundamental conflict is between people and their governments and necessarily resolved through a realignment of their respective rights and powers over

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

The centrality of conflict over common properties is not mysterious; it is these that are still open to capture and these where most incentive to challenge current arrangements lies. The commonality of economic triggers both past and present in the 20th century demise of customary rights to those resources is also clear, as is the stark rapacity with which this occurred – and continues in new waves to occur. We have also seen that *history matters*; that how important the history of land relations is to resolve and that its lessons are unwisely ignored.

The tumult of post-conflict in finding new order

Still, we are left with the fact that in none of these cases has final acknowledgement of the commons as the property of communities been firmly achieved, three to seven years after the cessation of war. Instead, we see that in two of the three cases these are more *post-conflict* issues than matters which armed conflict sought to resolve and even the third case, Sudan, the post-conflict is seeing the issue significantly clarified – and in ways newly contested. Several conclusions may be drawn; first, that this is a matter which takes time to resolve, and second and related, that a main reason for this is that battles over rights and resources embody struggles over power, place and money that never are swiftly resolved. It would be naive to imagine that the ending of a conflict somehow ends the tendency for elites and governments themselves to capture resources. States are always in transition, and agrarian states, in processes of active transformation, even more obviously less so.

Peace as the catalyst to reform of the State

If anything, we must begin to recognize how dangerous peace can be, as the drive to restore power and resource relations to the way they were before the war, meets head-on 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 are in particular challenged in ways they never expected. War-experienced populations are not just war-weary but weary-wise, and not necessarily compliant, unquestioning or undemanding. At the same time, many of the triggers to original conflict remain in place and are, in the jostling for place and power which follows a conflict, even heightened. As political scientists, we can recognize this as yet another phase in the making and remaking of the modern agrarian state. Nor should we be surprised that post-conflict environments always see new waves of popular power enter the agenda, at this point in history, most delivered in a drive for more devolutionary and people-empowering governance. Nor, given the nature of agrarian states as land and natural resource dependent from family to state, can it be surprising that this is closely intertwined with rising demands for land rights reform, and reaching into the founding question 'whose land is it?'

A common path forward - popular engagement

While the threat of violence hovers over the commons rights issue in all three cases, they also offer cause for optimism. Moreover, there are hints in all cases of a similar way forward. This appears in especially Afghanistan and Sudan through practical project processes which do more than consult with commons owners but engage them in trial processes of change. It is through this and not through benign positioning by new Administrations as to land rights that movement away from die-hard positions begins to be seen. These 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 face of this overall process, 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 its absence begins to seem a drawback. Moreover, in bringing grievance 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, where in one case

contrary State-people positions are hardening and where in the other, while this is less so, revitalised hardening of positions by their proxies, settled and nomadic communities, brings the case into dangerous territory. First of course, fair law on which to found cases is needed, neither yet available in those two states. In this regard, the cursorily-mentioned presentation of the bitter and recently violent dispute over the North-South boundary at Abyei to a tribunal in The Hague equally suggests an obvious but unused avenue to peaceful resolution.

Battles over meaning – the changing constitution of 'property'

In this paper I have 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, and 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 property from the 20th 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 notions of property and which have never sat well in the meanings of property in the customary/indigenous realm. Second, officials rightly suspect recognition of collective land interests amount to property as empowering, placing in the hands of mainly the rural poor, tools through which they might change the *status quo* including limiting rent-seeking or, coercing more equitable distribution of profit, rarely volunteered. Third, it is still relatively easy for parties resisting recognition of especially collectively rights as property rights to draw upon the western convention that collective possession can never amount to ownership in the true sense because the traditional measure of this does not exist, or because the state does not want this to exist; the asset is not a fungible entity which can be traded.

In this regard, revived interest in the tenure world towards unpacking tenure into specific rights within a bundle of rights is both helpful and unhelpful. Positively, this allows distinctions to be drawn between possessory and access rights and which two of the three cases have shown will be important to resolving sedentary-nomad interests in workable and acceptable ways (and not least because this resonates with older customary practice where it has not been manipulated). 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, for often lacking in that bundle is the power to sell the land.

There are of course 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, and which questions relating to its saleability are ancillary. The last century has shown that without acknowledged ownership a community cannot 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 however, in a world 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 do. Simply possessing the land in practice is not enough. It needs to be termed ownership and so rooted. In short, we must see furtherance of the transition from customary rights being considered 'not good enough for ownership' to one in which these rights are not good enough *without* ownership 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 required. 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 argued 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 in array and both open and needful of re-examination and reordering. Competing status of the commons as the property of 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 *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 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 manner of restitution into practice. It is salient that this development has been most driven by the terms of the Dayton Agreement and post-conflict initiatives in the Balkans since.

However, all three case studies demonstrate that this maybe 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. Indeed, such restitution could only trigger return to conflict and for as long as communal rights remain unsecured, threaten to do so. These experiences are echoed throughout conflicted agrarian states, and remain as a rumbling concern in most of those agrarian states which have not gone to war with themselves in recent decades. The implications for the post-conflict assistance sector are clear. A more holistic approach to land relations generally in conflicted states is required and stemming from this, a shift in the meaning of restorative justice in the land and property sector.

Less a matter of getting agencies to act than getting them to act on the right issues

This is not something which the humanitarian or reconstruction sector needs to be told at this point. Although new, more or less every agency engaged with assisting post-conflict administrations is at this time grappling with this need, from UN agencies like UNHCR and UN-Habitat and FAO to lead international humanitarian actors on the ground like the Norwegian Refugee Council, Oxfam and Care. How to move forward is commonly on the agenda and checklists bountifully being prepared. 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, I hope I have shown, are central to the issue and central to peace-building and keeping the peace.

Reinforcing the founding concern of the status of customary rights

Of course this is not the only property issue confronting conflicted polities, nor is its address the only substantive matter requiring reform. Elsewhere I have laid out a larger set of issues needing reform along with suggested changes in strategy towards land and property issues in peace-making and post-conflict peace building overall (Alden Wily, 2008c). One of the most important addressed there has not been touched upon here, 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. This places stresses on post-conflict governance which new Administrations are ill-equipped to deal with. As

the case of conflict in Juba City between Government and the Bari community illustrated, even issues within this sphere are not always unrelated from the founding issue as to how customary land rights are treated in practice and in law.
Overall, there is little that can escape the centrality of address of unsatisfactory and unjust status of customary rights in general and always specifically including the commons in conflicted agrarian polities. For those concerned with natural resource rights, good governance and equity, the importance of moving collective land rights centre-stage as property is logical. Arguments towards are hardly new (much advocated by myself among others for a decade or more). Nor, as I have indicated is action on this front new. This stumbles however in the face of rising new pressures. A much more concerted effort seems needed towards reinforcing the centrality of delivery to peace and safe social change. Additional to this, through pilot learning in particular, is evolution of workable, cheap and replicable methodologies for enabling majority populations to genuinely and easily take up the opportunities.

Making it an issue of peace or post-conflict democratization?

The question finally arises as to how far it is necessary for concretized commitment to occur within the peace accord agenda. I have been among those arguing that this is essential, that no peace agreements should in today's world 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 (*ibid*).

In most ways the experiences of Sudan, Afghanistan and Liberia as analysed here endorse that position. Even in the case of Sudan, the one country among the three where land rights were on the agenda, it may be argued (and I have elsewhere done so) that the failure of the parties to clarify exactly what was meant by customary land rights has amply served to handicap and justify failure 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 appear to suggest that even where war was fought partly in order to secure the fact that 'land belongs to the people', significant reneging on the part of those same combatants may readily occur. All too often we have seen around the agrarian world (and not confined to those leaving conflict) significant slow-down or even dissolve of the most ardent of political resolve in this particular area. In different ways Angola, Namibia, South Africa, Rwanda and Uganda are among those which have all fallen well-short of post-conflict commitments affecting majority customary land interests.

Additionally, a message which arises clearly out of the three cases is that real 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 that the issues are explored in ways in which those affected may themselves become more aware and engage directly in and test reforms. This carries with it an even more important message; that ultimately it will be a matter of popular will that recognition of majority land interests as property interests occurs. The case can fairly well be made that such progress as has been made on the customary and commons issue in Sudan, Afghanistan and Liberia rests almost entirely upon public awareness through one route or another being facilitated. Time will tell if this helps deliver change – and peace.

Bibliography

Abdelgabar, O.1997. Mechanised Farming and Nuba Peasants An Example of Non-Sustainable Development. The Sudan Spektrum 48 Berlin.

Abdel-Hamid, O. 1986. The Hawazma Baggara Some Issues and Problems in Pastoral Adaptions. Department of Social Anthropology, University of Bergen.

ADB (Asian Development Bank), 2004. Technical Assistance to the Islamic Republic of Afghanistan for Capacity Building in Land Policy and Administration Reform.

Alden Wily, L. 2000. Land Tenure Reform and the Balance of Power in Eastern and Southern Africa. Natural Resources Perspectives No. 58, Overseas Development Institute, London.

-----. 2001. Reconstructing the Commons. In Africa Today Issue 48 (1) Spring 2001: 76-99, Indiana University Press.

-----. 2003a. Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa. IIED, London.

-----. 2003b. Land Rights in Crisis: Restoring Tenure Security in Afghanistan. Kabul: Afghanistan Research and Evaluation Unit, Kabul.

-----. 2003c. Land and the Constitution. Kabul: Afghanistan Research and Evaluation Unit, Kabul.

-----. 2004a. Looking for Peace on the Pastures: Rural Land Relations in Afghanistan. Synthesis Paper Series. Afghanistan Research and Evaluation Unit, Kabul.

-----. 2004b. Limitations and Potentials in the Sudan Peace Process So Far in Respect of the Land Interests of the Contested Areas, USDA/USAID Customary Land Security Project for the Three Areas, Nairobi.

-----. 2004c. Securing Majority Customary Land Rights in Central Sudan. USDA/USAID, Nairobi.

-----. 2005a. Getting to Grips with Pastures Issues in Afghanistan. Presentation to the Pastoral Conference, USAID/RAMP with Ministries of Agriculture and Tribal Affairs, November 15-17 2005, Kabul.

------. 2005b. Step by Step Guidelines for Facilitating the Negotiation of Pasture Access by Settled and Nomadic Users. for RAMP/USAID, Kabul.

-----. 2005c. Revised Guidelines for Securing Customary Land Rights in Southern Kordofan and Blue Nile States, USDA/USAID Pilot Customary Land Security Project May, 2005.

-----. 2006a. The Land Issue War and Peace in Sudan. Paper prepared for the 7th International Sudan Studies Conference "Fifty Years after Independence: Sudan's Quest for Peace, Stability and Identity" University of Bergen, Norway, April 6th-8th 2006.

-----. 2006b. Land Rights Reform and Governance in Africa. How to make it work in the 21st Century? UNDP.

------. 2006c. A Review of Pasture Ownership and Management in Bamyan Province, Afghanistan. June 2006. SALEH, FAO.

------. 2006d. The SALEH Approach to Community Based Pasture Ownership and Management. Presentation to Government, Donors and NGOs in Kabul, 21 November 2006.

-----. 2006e. First Note on the Policy and Legal Implications of Pasture Piloting by the SALEH Project in Bamyan Province, SALEH, December 2006.

-----. 2007a. So Who Owns the Forest? An Investigation into Forest Ownership and Customary Land Tenure in Liberia. Sustainable Development Institute and FERN, November 2007

-----. 2007b. Progress Towards Community Based Pasture Management in Bamyan Province, May 2007, SALEH, FAO.

-----. 2008a, An Overview of Community Based Pasture Management as Developed by SALEH FAO, 1 May 2008. SALEH, FAO.

-----. 2008b. Custom and Commonage in Africa Rethinking the Orthodoxies. Land Use Policy Journal Vol. 25 (2008) 43-52.

-----. 2008c. It's more than about going home ... Tackling Land Issues in the Humanitarian to Reconstruction Transition in Post-Conflict States. Paper presented to ODI Conference on Land in Post-Conflict Transitions, Humanitarian Policy Group, February 2008, London.

-----. 2008d. Getting to the Heart of the Matter: Power over Property. Developed land governance: is this the key to resolving the land issue in Kenya? Kenya Land Alliance, Nairobi.

-----. Forthcoming (a). The Pasture Story. Trying to Get it Right in Afghanistan. The SALEH Experience. FAO.

------. Forthcoming (b). Who Owns Africa? Unpacking the Communal and Collective in Customary Land Tenure in Africa Today. Paper to be presented to African Customary Law Revisited: The Role of Customary Law in the 21st Century, October 23-24 2008, Botswana, Leitner Center for International Law and Justice, Fordham Law School, New York.

-----. Forthcoming (c). From State to People's Law. Assessing Learning by Doing as a Basis of New Land Law. Van Vollenhoven School of Law, Leiden University.

Babiker, M. 1998. Land Tenure in Kordofan: Conflict between the 'Communalism' of Colonial Administration and the 'Individualism' of the Hamar. Chapter in Kordofan Invaded Peripheral Incorporation and Social Transformation in Islamic Africa (eds.) E. Stiansen and M. Kevane, Leiden E.J. Brill Social Economic and Political Studies of the Middle East and Asia Vol. 63

CFWG (Community Forestry Working Group), 2008. Minutes of the CFWG held in the Governance Reform Commission, June 2 2008, Monrovia.

CLEP (Commission for Legal Empowerment of the Poor). 2008. Final Report, UNDP. New York.

Cole, D. and R. Huntingdon, 1997. Between a Swamp and a Hard Place Development Challenges in Remote Rural Africa. Harvard University Press.

Collier, P. 2004. Natural Resources and Conflict in Africa. In Wars of Africa. Crimes of War Project.

-----. 2007. The Bottom Billion Why the Poorest Countries Are Failing and What Can Be Done About It. Oxford University Press.

Daily Outlook, June 24 2007. Kochis Hoist Taliban Flag in Behsood. Volume No. 679. Kabul.

-----. March 31, 2008. Afghanistan's Hazaras protest over pastures. Kabul.

De Weijer, F. 2005a. National Multi Sectoral Report on Kuchi, Ministry of Rural Rehabilitation and Development, Kabul.

-----. 2005b. Conference on Afghan Pastoralists (Kuchi) Report on Proceedings, November 15-17, 2005. USAID/RAMP with MAAF & MFTA, Kabul.

-----. 2006. Intermediate Report on Pasture Negotiations in Nawork Ghazni Province, RAMP/USAID, Kabul.

Ferdinand, K. 2006. Afghan Nomads Caravans, Conflicts and Trade in Afghanistan and British India 1800-1980. Rhodos International Science and Art Publishers A/S, Copenhagen.

Fitzpatrick, D. 2005. 'Best Practice' Options for the Legal Recognition of Customary Tenure. Development and Change 36 (3): 449-475.

Haidary, H. 2008. Hazara-Kuchi feud forces MPs to wav lyrical Quqnoos. Kabul www.quqnoos.com

Hazaristan Times, July 10, 2008. Muhaqiq says: Civil War if Kuchis' dispute not resolved. Kabul.

HSRP (Human Security Report Project). 2005. Human Security Report 1995-2005. Human Security Centre, Liu Institute for Global Issues, University of British Columbia.

------. 2008. Human Security Report Brief 2007. Simon Fraser University, Canada.

Johnson, D. 2003. The Root Causes of Sudan's Civil Wars. African Issues. The International African Institute in association with James Currey, Indiana University Press and Fountain Publishers.

Larsson, J. 1978. Status of Alpine Rangelands in Central Afghanistan with special reference to the Ajar Valley, FAO.

Lee, J. 1996. The 'Ancient Supremacy': Bukhara, Afghanistan and the Battle for Balkh, 1731-1901. New York: Brill, Leiden.

Lety, D. 2007. Community Based Pasture Management in Say Dara Valley, Afghanistan. Solidarites, Kabul.

Manger, L. 1994. From the Mountains to the Plains The Integration of the Lafofa Nuba into Sudanese Society. The Scandinavian Institute of African Studies, Uppsala.

-----. 2003. The Issue of Land in the Nuba Mountains. A Desk Study for the Nuba Mountains Programme Advancing Conflict Transformation (NMPACT), UNDP Sudan.

McAuslan, P. 2006a. Legal pluralism as a policy option: Is it desirable, is it doable? Paper presented to Conference on Land Rights for African Development: From Knowledge to Action. Drylands Development Centre, UNDP, October 31-November 3 2006, Nairobi.

-----. 2006b. Improving Tenure Security for the Poor in Africa. A Framework Paper. Working Paper #1, Support for Legal Empowerment Programme, FAO, Rome.

McKay, F. 2001. Indigenous Land Rights: Legal Issues. Chapter 3 in M. Colchester (ed.). A Survey of Indigenous Land Tenure, FAO Land Tenure Service, Rome.

MRRD & CSO (Ministry of Rural Rehabilitation and Development and Central Statistics Office), 2005. The National Risk and Vulnerability Assessment, 2005. Kabul.

Panel of Experts, June 2008. Report of the Panel of Experts on Liberia Submitted Pursuant to Paragraph 5 (e) of Security Council Resolution 1792 (2007) concerning Liberia (S/2008/371), UN, New York.

Pantuliano, S., Buchanan-Smith, M. and P. Murphy. 2007. The long road home Opportunities and Obstacles to the reintegration of IDPs and refugees returning to Southern Sudan and the Three Areas. Report of Phase 1 HPG, ODI.

Pantuliano, S., M. Buchanan-Smith, I. Mosel, forthcoming. The Long Road Home Phase II Juba Report, Humanitarian Policy Group, ODI, London.

Patterson, M. 2004. The Shiwa Pastures 1978-2003: Land Tenure Changes and Conflict in Northeastern Badakshan. Case Study Series. Afghanistan Research and Evaluation Unit, Kabul.

Pedersen, G. 1994. Afghan Nomads in Transition. Thames and Hudson, London.

Quqnoos.com 18 April 2008. MPs accuse Karzai of fueling Hazara-Kuchi Clash.

Salih, K.O. 1982. British Policy and the Accentuation of Inter-Ethnic Divisions: The Case of the Nuba Mountains Region of Sudan 1920-1940 in African Affairs 89 (356): 417-436

Stanfield, J. D. and M.Y. Safar, 2007. A Study of the General Directorate of Land Management and Amlak of the Ministry of Agriculture, Irrigation and Livestock, Capacity Building for Land Policy and Administration Reform, ADB/DFID, Kabul.

Stanfield, J.D., S. Safar, A. Salam & Rural Land Administration Project Team. 2008a. Community Rangeland Administration: Focus on Afghanistan. Terra Institute Limited.

The Analyst, 24 April, 2008. Gbarpolu Citizens Request Critical Information. Monrovia.

The Guardian, 2 July, 2008. Abu Dhabi leases Sudanese land to boost food security. London.

Ubink, J. 2008. In The Land of The Chiefs Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana. Leiden University Press.

UNAMA, 2008a. Security Report, June 23, 2008. Kabul.

-----. 2008b. Security Report, 14 July, 2008. Kabul.

UNHCR, 2008. Displaced Families in Shibar and Bamyan. 16 July, 2008, Bamyan, Afghanistan.

[i] This paper draws directly upon my own development work in the three states and upon previous work and writing around the subject, explaining the imbalance of referencing towards my own papers.

[ii] As per article 6 of the General Act of the Berlin Conference on West Africa, 26 February, 1885. To be precise, the Berlin Conference did not declare purchase land of unnecessary but set aside proposals towards this raised by the American observer, confining their commitment to the noble task of civilizing the natives, as per Article 6 of the General Act of the Berlin Conference on West Africa, February 1885; refer Alden Wily, 2007a:78ff for details of this and the US Marshall ruling of 1823.

[iii] A main exception was the Ashanti chiefs of the Gold Coast who resisted the inclusion of their lands under Crown Lands.

[iv] The New Zealand Government has just handed back half a million acres of Crown forest land to seven local tribes now comprising some 100,000 persons (*The Independent*, 26 June 2008). This follows other large restitutions since the 1990s, including the transfer of nearly half the nation'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; it is arguably this that has made it so inevitable that restitution would eventually occur.

[v] The literature on this is rich but references here kept to a minimum, amply accessible in Alden Wily, 2003b, 2004a and forthcoming (a).

[vi] Fayz Mohammed, 1925-26: Vol. III, as cited by Ferdinand, 2006.

[vii] Detailed cases studies of this in Alden Wily, 2004a. Also see Pedersen, 1994 and Ferdinand, 2006.

[viii] Amendment to Land Law, 2001 of Gazette 595, 2006; Articles 4-11.

[ix] The author's substantial involvement in these developments must be admitted, including in the FAO initiative shortly referred to.

[x] The National Land Policy, 2007 makes clarification and securing of land resources integral to community based resource management (Policy 2.2.6), makes '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).

[xi] Refer Alden Wily, 2006a for review of the laws.

[xii] 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 declared 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.

[xiii] This 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.

[xiv] 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).

[xv] And in which again I must declare a personal interest, having designed and technically advised the pilot project (2004-05).

[xvi] This section draws almost entirely from information and data provided in Alden Wily, 2007a.

[xvii] All these matters are explored thoroughly in Alden Wily, 2007a.

[xviii] Land Registration Law, 1974, s. 8.44, 8.53, read with Public Lands Law, s. 30, 53 & 70.