

## **LAND ISSUES REVIEW, 2004-5, VOLUME II, NUMBER 2, DECEMBER 2005**

Food and Agriculture Organisation of the United Nations  
Sub-regional office for Southern and Eastern Africa, Harare, Zimbabwe

### **LAND REFORM HIGHLIGHTS IN EASTERN AFRICA, 2004-5**

In March 2003 a small group of land experts met in Pretoria, South Africa, to discuss ways out of what they termed the 'impasse' affecting land reform in Southern and Eastern Africa. A major recommendation of the group was in support of the publication of an electronic newsletter which would provide news of current land reform developments in the region. The first volume of that newsletter comprised two issues, one on Southern Africa, followed by a second focusing on Eastern Africa, which was published in August 2004. As in the second issue of the first volume, 'Eastern Africa' as used here includes Burundi, Eastern Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Sudan, Tanzania and Uganda - each country is discussed below in ascending alphabetic order.

The first volume of this period review provided baseline information on the evolution of land policy and land reform implementation in each country in the two sub-regions. This second volume, and those that will follow, hopefully annually, are intended to update and build on that seminal volume. The series of snapshots of each country captured by successive issues should be useful for planners, programme designers, advocates, practitioners, citizens and subjects engaged in land reform anywhere, but especially in Africa, to identify their own possibilities and potentials.

The objective of publishing this series of reviews is to determine whether the impasse relating to land reform in both sub regions, which was originally diagnosed by these experts in 2003, persists, or, alternatively, if and in what facet of this complex process some dynamism or engagement can be detected.

The principle reference materials for this volume have been peer reviewed books and journal articles, which were published after the previous newsletter was distributed. Where resources of this quality were unavailable, 'grey paper' was resorted to, which had been either generously shared by collaborators or was trawled from the internet by the author. Where necessary, media reports were drawn on as sources of last resort. Unless confidentially was requested, sources have been assiduously attributed.

As in the first volume, the level of detail in these second volume issues varies from one country to the other, partly as a result of methodological limitations; partly because there has been much more activity in some countries than in others. Unfortunately, reporting thoroughly on the undoubted inter-country connectivity of land reform processes within each sub-region has so far been beyond the scope of this project.

Any comments on the usefulness of this review, and of ways in which it might be improved, would be greatly appreciated. Please contact Shaun Williams, who is the principal writer of this volume ([shaunwilliams@advyz.biz](mailto:shaunwilliams@advyz.biz)), who takes full responsibility for the final version. Needless to say, land rights everywhere will always be highly contentious!

## Burundi

The 2003-4 review noted the part land has played in the protracted civil war and the great challenge posed by the possible return of refugees, mainly from Tanzania because of the high population density throughout the country. The first version of the newsletter also reported that the Land Code is in the process of being revised and that a draft was ready for presentation to parliament for debate which contained provisions for extending the coverage of formal land documentation which will require a well-designed policy to implement. The earlier newsletter noted current proposals do not envisage any kind of land redistribution exercise. Elections which were scheduled to take place by just after publication of the 2003-4 review and on the eve of publication. As this edition was being written the World Bank approved US \$35 million grant for Burundi to improve food security and set up a sustainable land management system. Burundi also received \$5 million from the Global Environment Facility to support the development of a national institutional framework for land management, and to strengthen national planning for land resources.

Recent electoral success has seen hopes rise in Burundi.

“In April 2005, Burundians voted overwhelmingly for a new power-sharing constitution, which many hope will help maintain the peace. Under the new constitution, the presidency and 60 percent of the national assembly is given to the Hutus and 40 percent of the national assembly to the Tutsis.”<sup>1</sup>

The challenges to peace remain daunting.

“But with the FNL still active, especially in the hills of Bujumbura Rural province close to the capital, the nation’s road to peace is by no means guaranteed. Although the FNL signed an agreement with the interim government in May 2005 to end hostilities, attacks have continued. The U.N. has maintained its 5,600 peacekeeping soldiers in Burundi.”<sup>2</sup>

The pathway to reconciliation may be even more fraught, as the United Nations’ post-conflict formula, tried and tested (and failed) elsewhere in the region, is being used again here.

“Burundi’s government and the United Nations have agreed to set up a truth and reconciliation commission and war crimes court. The commission will examine the causes of Burundi’s decades of ethnic tensions and compile a list of people suspected of genocide and war crimes. The suspects will be tried by the new court.”<sup>3</sup>

Rebuilding the country, starting with providing food security is going to be a daunting task, as neither personal safety nor security of harvest, let alone tenure security, are close to being guaranteed.

“According to the Food and Agriculture Organization, an estimated two million Burundians – a quarter of the population – will need food aid in 2005. This is a 40 per

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<sup>1</sup> Whiting, A., “Crisis Profile: Can peace take root in war-weary Burundi?”, AlertNet, 15 July, [http://www.alertnet.org/thefacts/reliefresources/11214266381.htm] accessed 16/11/05

<sup>2</sup> ibid

<sup>3</sup> ibid

cent rise on 2004 because of a severe drought last year. The FAO says the country faces a food deficit of about 280,000 tonnes.

The food emergency has steadily worsened ever since civil war broke out in 1993. The economy has been crippled, and continued insecurity has limited people's ability to farm.

Food shortages are particularly acute in the north, northeast and central provinces, areas traditionally regarded as Burundi's food basket. Families have already resorted to selling their livestock and other assets, including the roofs of their houses. Many have left their homes in search of casual labour or alternative sources of food."<sup>4</sup>

The large numbers of refugees will make the resettlement issues extremely challenging  
"In 2004, an estimated 90,000 mainly Hutu refugees returned to Burundi from Tanzania. Some had been away for up to 20 years. They now need food and land. The land issue is complicated by the fact that some want to return to their original land, which in most cases has been farmed by other people for years.

The United Nations High Commission for Refugees has estimated that 430,000 Burundians are still in exile. It expected to organize the voluntary repatriation of 150,000 people in 2005."<sup>5</sup>

A new land law came into effect in September 2005.<sup>6</sup> The old law banned land sales, but they happened anyway. Lack of accurate records of past transactions hampers official efficacy in resolving disputes over land that persist up to judicial level. Local dispute resolution machinery has to some extent been co-opted by the state and has become caught up in partisan politics. However recent research has shown that up to half of land disputants have taken recourse to these institutions before seeking alternative external assistance.<sup>7</sup>

A recent comprehensive review of land access and displacement in Burundi<sup>8</sup> made three short term recommendations for reform. The authors stressed the urgency of the need to build capacity of institutions dealing with land administration and land dispute resolution and to implement education and advocacy campaigns. Long term the priorities for reform were thought to be land policy reform, decentralisation, viable off farm livelihood alternatives, rebuilding regional economic cooperation and further research and information dissemination.<sup>9</sup>

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<sup>4</sup> ibid

<sup>5</sup> <http://www.unhcr.org/cgi-bin/texis/vtx/country?iso=cod>

<sup>6</sup> Huggins, C., (2005) "Shades of Grey – Post Conflict Land Policy Reform in the Great Lakes Region", Paper Presented at Conference Changing Politics of Land Reform in Africa, 28-9 November, French Institute for South Africa, Pretoria (p 8)

<sup>7</sup> Ibid p. 12

<sup>8</sup> Kamungi, P. M., Johnstone Summit, Oketch and Chris Huggins, (2005) "Land Access and the Return and Resettlement of IDs and Refugees in Burundi" in Chris Huggins and Jenny Clover (eds), From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa, ACTS and ISS, June 2005, pp. 250-3

<sup>9</sup> Ibid pp 250-3

The authors also make the point that the time has come to expedite the disbursement of the US one billion dollars pledged by donors to encourage the parties to reach the Arusha peace agreement.<sup>10</sup>

### **Eastern Democratic Republic of Congo**

The 2003-4 review noted the protracted civil strife which has beset the country, recent peace making efforts and impending elections. The newsletter also reported that NGO sources had commented that land reform did not appear to be high on the post conflict settlement or security agendas. However control over exploitation of subterraneous resources \was acknowledged as an important factor underpinning the conflict.

The 2003-4 review also observed that access to land by different actors is also a factor in the conflicts, and patterns of control over land have been altered through a number of mechanisms including forced displacement; shifts in power between customary and administrative leaders; and changes in the various socio-economic structures that allow people to enjoy the benefits of agricultural and pastoral production (such as market access). Conflict was reported as producing new competition for land, as part of a wider renegotiation of the local economic space and re-drawing of ethnic, class, and other 'boundaries' between groups.

The newsletter concluded that the Democratic Republic of Congo requires legislative and possibly also redistributive land reform, that customary rights and responsibilities should be clearly defined through a consultative process and that the structures - political, economic, and social - through which land access is mediated must also be reformed.

"A year after the end of a half-decade war that killed a jaw-dropping 3.8 million Congolese, mostly through starvation and disease, fierce fighting continues in the remote, eastern part of the country.

.....In hostile terrain hundreds of kilometres from the capital Kinshasa, militias clash with government forces and U.N. peacekeepers, and plunder natural resources such as gold, diamonds, cassiterite and coltan. They terrorise local populations through campaigns of killing, rape and abduction.

The eastern part of Congo remains a dangerous place for aid workers, even as the humanitarian crisis deepens. Relief workers are often targeted and supplies looted, while fighting has forced the suspension of humanitarian programmes in food security, health care, water and education.

According to the United Nations, access is so bad that 3.3 million people are out of reach of aid groups.

According to the latest mortality study by the International Rescue Committee, some 3.8 million people have been killed since 1998, mostly due to disease and malnutrition.

Some experts fear the whole peace process could be derailed. Congo's President Josph Kabila has been unable to maintain control over the huge country, and various rebel groups have refused to join the new national army.

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<sup>10</sup> Ibid p. 250

...The five-year regional war, which at different times involved seven countries and at least as many rebel groups, officially ended in 2003 when delegates of Kabila's government in Kinshasa signed a peace agreement – dubbed the Final Act -- with representatives of the main rebel groups.

The Final Act follows four years of failed peace, dating back to a 1999 ceasefire signed in Lusaka, which allowed the United Nations to establish a peacekeeping mission called MONUC in Congo.

But the ceasefire was repeatedly violated by all signatories, and violence continued, particularly in the north and east, where various groups jockeyed for power and exploited the country's natural resources.

After the signing of the Final Act in 2003, power vacuums created by the withdrawal of troops in North and South Kivu and in the Ituri district led to renewed violence."<sup>11</sup>

### **Eritrea**

The 2003-4 review observed that in recent years land issues have been overshadowed by conflicts, both internal and external resulting in widespread displacement and resettlement challenges hampered by extensive land degradation as a consequence of war and overcrowding. Expropriation of lands occupied by indigenous minorities was also noted as a significant problem.

The 2003-4 review also noted that parts of Eritrea were littered with landmines from past conflicts, while high population densities had resulted in extensive land degradation over a very long period. There remains a tense conflict over the border town of Badme and particular tensions surrounding the Kunama ethnic group of 100,000 near the border with Ethiopia. 70,000 are in Eritrea and there is a controversy over the status of 4,000 Kunama refugees in Ethiopia. The Kunama generally accuse the Eritrean Government of grabbing their land as part of a process of resettling people from the highlands into the lowlands.

### **Ethiopia**

The 2003-4 review reported noted the emergence of dialogue between central government and civil society about land ownership, tenure security and resettlement activated by the PRSP process. This dialogue was taking place in the context of chronic food insecurity, issues associated with environmental degradation due to the extremely high population densities and growing landlessness.

The 2003-4 review reported calls by Ethiopian economists and land policy experts for government to revisit its land policy, currently predicated on tight state ownership and controls, but few signs that the government is prepared to move in this direction. Indeed, there is evidence to suggest that in Ethiopia, frequent recent attempts at tenurial land reform have been a significant source of insecurity of tenure. Therefore commitments by governments to not redistributing land again any time soon, as the Amhara regional

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<sup>11</sup> Arie, K., (2004) "Crisis Profile: What's Going On In Congo?", Alertnet - Background Material, 12 August, [<http://www.alertnet.org/thefacts/reliefresources/111988748265.htm>] accessed 16/11/05, pp. 1-2

government has done by adopting a land use policy that stops future land redistribution, might stimulate more investment and production.<sup>12</sup>

Subsequently, further studies have emerged counselling caution, pointing out that the anxiety about private ownership felt by some in the ruling coalition arises from the bitter memories of those who experienced in their own lifetimes the disastrous effects of both privatising and nationalising land reforms. Mass displacement of peasants in the fertile South by newly vested landlords as recently as the nineteen sixties and substantial declines in opportunities for casual and seasonal wage employment arising from the nationalization of land in the nineteen seventies<sup>13</sup> both had devastating consequences for the poorest rural people. There is clear evidence however that despite the continuing significance of agriculture to the economy of Ethiopia, growth in both output and productivity measures have been disappointing.<sup>14</sup>

New analysis of empirical work done at the beginning of the millennium cast doubts on some of the popular assumptions about the both equitable distribution of land in Ethiopia and about the impact fragmentation is having on poverty.<sup>15</sup> These assumptions have long been the basis on which advocates for and against land reform have been justifying their positions and criticizing each other.

The conclusions being drawn from this new research are heretical.

“In view of the weakness of the agriculture sector to contribute to economic development, researchers should also ask, among others, the following fundamental questions:

- Is smallholder agriculture in Ethiopia doomed?
- If yes, why is the government pinning the country’s hope of survival on a lost cause? What are the alternatives to agriculture?
- If no, how could smallholder agriculture best be assisted to take off?

Perhaps the most provocative conclusion that can be supported by the analysis presented in this paper is that agricultural stagnation in Ethiopia is not attributable to too much inequality in terms of incomes and assets, but too little.”<sup>16</sup>

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<sup>12</sup> ILRI, (2004) “Ten years on: Land tenure, property rights and institutions”, CGIAR, [[http://www.ilri.cgiar.org/InfoServ/Webpub/Fulldocs/LPAP\\_10Years/ch14.htm](http://www.ilri.cgiar.org/InfoServ/Webpub/Fulldocs/LPAP_10Years/ch14.htm)] last accessed 10/11/05

<sup>13</sup> Sender, J., Deborah Johnston, (2004) “Searching for a Weapon of Mass Production in Rural Africa: Unconvincing Arguments for Land Reform”, *Journal of Agrarian Change*, Vol. 4, Nos. 1 and 2, January and April 2004, p. 155

<sup>14</sup> Teshome, A., Stephen Devereux (2005) “Inequality and Agriculture in Ethiopia: A Case Study” *WDR 2006 Background Paper on Asset Inequality and Agricultural Productivity*, PASS, DFID, pp 16-7

<sup>15</sup> Mersha, G., Mwangi wa Githinji, (2005) “Untying the Gordian Knot: The Question of Land Reform in Ethiopia”, *ISS/UNDP Land, Poverty and Public Action Policy Paper* No. 9, 15 October, Institute of Social Studies, The Hague here is website ref for this – good idea to provide for readers where possible [http://www.iss.nl/opencms/opencms/land/research/ISS\\_UNDP/papers/Ethiopia\\_paper.pdf](http://www.iss.nl/opencms/opencms/land/research/ISS_UNDP/papers/Ethiopia_paper.pdf)

<sup>16</sup> Teshome, A., Stephen Devereux (2005) op. cit. p 20

The scholars who have reinterpreted the existing evidence have come up with a new approach. They are recommending a phased approach that will prepare the ground for land reform.

“(I) labor intensive public investment (II) a national campaign for literacy and education (III) Intensify and extensify (sic) the use of animal draught power and other inputs in farming (IV) where possible consider the introduction of new commercial crops.”<sup>17</sup>

After which these authors recommend legalising land reforms from below by legitimising existing informal leases. Even this modest prescription comes with a caveat about the importance of Ethiopia iteratively developing home grown land tenure innovations.

Government is hoping that an accelerated voluntary resettlement plan will address both of the critical problems constraining agricultural production, but restrictions on inter – regional migration will limit the impact of such programmes.

“Resettlement could potentially solve both the problems of restricted labour mobility and restricted access to land, and the federal government is currently implementing a ‘Voluntary Resettlement Programme’ (VRP) which aims to resettle 2.2 million people in three years – but within regions, not across regions (thus Oromiya settlers are being resettled within Oromiya Region; Amhara settlers within Amhara Region, and so on).”<sup>18</sup>

The voluntary nature of the resettlement programme and its feasibility have been questioned by independent studies. Generally, donors have shunned the process. In any case, the scale and severity of Ethiopia’s rural population pressure would suggest that 2.2 million is a drop in the ocean. In one important way, more land (for example, land won by resettlement in the lowlands) will not solve Ethiopia’s problems, but merely postpone them. With more land, there would be more total output, but also more mouths to feed. If population expands as fast as total output, then neither per capita income nor food security will improve. An increase in income can occur only if capital expands faster than the increase in population. The modest gains in the size of the capital stock obtained through resettlement may not be enough to get sustained growth going. The resolution of Ethiopia’s grave population problem requires a critical minimum effort to increase investment at a rate fast enough to outpace the increase in population. As long ago as 1960, the economist Rostow coined the expression ‘take off’ to express this notion. Yet Ethiopia faces a decline in economic performance.<sup>19</sup>

Since the current political tension re-emerged in Ethiopia, donors have suspended basket funding to the Government and all development financing is being channelled through United Nations, which suggests that more regions included in the Voluntary Resettlement Programme.

Another reason why resettlement may not have the desired effect on land distribution is the incentive pack age which is being used to entice people to participate.

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<sup>17</sup> Mersha, G., Mwangi wa Gĩthĩnji, (2005) op. cit. p. 24

<sup>18</sup> Teshome, A., Stephen Devereux (2005) op. cit. p 13

<sup>19</sup> Adams, M. (2004) “Rural Development in East Hararghe”, Oxfam GB, unpublished

“However, one of the incentives, probably the most important, given to re-settlers is that they will retain the land at home for three years, which leaves the door open for returning to it in the event that they are dissatisfied with their new homes. That means, their land left behind is not redistributed or given to the landless. The non-settlers remain with the same amount of land for three years. Under this situation, it is difficult to see how the pressure on the land is eased or productivity increased.”<sup>20</sup>

Land remains a crucial focus of political debate within Ethiopia.

“The question of land is a major theme in socio-economic and political discussion today and was an issue during the national elections of 2005. Opinions differ on issues related to ownership and providing tenure security. The party in power is in favour of maintaining state ownership over land. They argue that privatisation will trigger massive land sales by poor rural people, who then migrate to urban areas, further aggravating the urban crisis and deepening poverty. Some opposition parties argue that Ethiopia’s persistent poverty, food insecurity and underdevelopment is caused by an inappropriate land tenure system and therefore lobby for privatisation of land, freehold ownership and land markets.”<sup>21</sup>

## Kenya

The 2003-4 review report that the land chapter in the draft revised constitution seems to be broadly accepted and that a National Land Policy Formulation Process (NLFPF) was expected to pick up pace of land reform in the coming months. Donors had contributed to a basket funding mechanism to cover the costs of the NLFPF, the establishment and operation of the Coordination Unit in the Ministry of Lands and Housing, technical assistance, studies, workshops, and professional fees. DFID was also reported to be supporting a major training and capacity building programme for land boards and dispute tribunals.

The Proposed New Constitution<sup>22</sup> was the subject of a national referendum on 21 November 2005. The Kenya Land Alliance had called for changes to be made to the property chapters of the version to be put to the vote.<sup>23</sup> Specifically were asking for the removal or amendment of provisions<sup>24</sup> that in any way diluted or derogated from the provision<sup>25</sup> which vests radical title in the people of Kenya. Furthermore the Kenya Land Alliance submissions called for “ironing out” (by amendment) the “mixed up scenario” with respect to community land tenure contained within the Proposed New Constitution and for the role of the proposed National Land Commission to be restricted to “developing policies and (drafting) laws”. Finally the Kenya Land Alliance’ submission called for further amendment to better secure the land rights of women”.

<sup>20</sup> Teshome, A., Stephen Devereux (2005) op. cit. p 19

<sup>21</sup> Kanji, N., Lorenzo Cotula, Thea Hilhorst, Camilla Toulmin and Wray Witten (2005) “Can Land Registration Serve Poor and Marginalised Groups?” Summary Report, Research Report 1, IIED, London, p. 7

<sup>22</sup> *Kenya Gazette Supplement*, Nairobi, 22 August 2005

<sup>23</sup> *Daily Nation*, 26 October 2005, p. 26

<sup>24</sup> *Proposed New Constitution*, Articles 80 (2) (3), 81 (3), 85 (2) (a)

<sup>25</sup> *Proposed New Constitution*, Article 79 (1)

After the Proposed New Constitution has been rejected, it is unclear whether the current government will make another attempt at constitutional reforms. Prior to the vote, however, the Government of Kenya anticipated that, regardless of the outcome of the referendum, implementation of proposed land reforms will proceed but that rejection could cause some delays. This view has been supported by expert advice provided to government.

The anticipated constitutional changes, as outlined in Chapter 7 of the Constitution Bill, are not an absolute pre-condition for land reform in Kenya. It will be recalled that the proposals emerging from the NLPFP (National Land Policy Formulation Process) have their origin in the Njonjo report, which predates the several drafts of the proposed new constitution. Published in 2002, the Njonjo report describes the changes which would be required for land reform under the current dispensation. However, the proposals of the Njonjo Commission would require constitutional amendments to entrench the institutional changes which it proposes. The failure to resolve the constitutional issue has slowed down the process and the impetus of the proposed land reforms. On the other hand, it has made way for a more measured and less hurried transition.

... It has to be determined whether land reform should proceed in terms of an amended version of the existing Constitution, duly passed by Parliament, or in terms of a redrafted constitution which receives majority support in a subsequent national referendum. One thing is clear and that is the strong public support for the reform of land administration and management in Kenya.”<sup>26</sup>

The Report of the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land (‘Ndungu Commission’)<sup>27</sup> highlighted how, in the previous regime, corrupt officials had massively abused the inherited colonial land administration system by illegally assigning land titles. The report recommended government initiate action to recover these properties. As recommended by the report, a draft bill has now been approved and signed by the Minister for publication establishing a tribunal to verify land titles. The bill is expected to be tabled for discussion in parliament in early 2006. Oversight of the “formidable task”<sup>28</sup> of following up the Ndungu Report has been assigned to a Task Force that is currently being empanelled. An implementation unit is to be established within the Ministry of Lands and Housing. Government is seeking external assistance for both these initiatives.

The National Land Policy Secretariat has recently published an Issues and Recommendations Report.<sup>29</sup> Government has stressed that in its view land policy development is a process not an event. In the words of the Minister of Land and Housing in his introduction to the report,

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<sup>26</sup> Adams, M. (2005) “Budgetary Implications and Feasibility Assessment, Kenya National Land Policy Formulation Process, Revised Main Report”, 30 November, Ministry of Lands and Housing, Nairobi, p. 46

<sup>27</sup> Ndungu, P. et al (2004) *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*, Government Printer, Nairobi

<sup>28</sup> Southall, R., (2005) “The Ndungu Report: Land & Graft in Kenya”, *Review of African Political Economy*, 103, March, pp.142-51

<sup>29</sup> National Land Policy Secretariat, (2005) *Issues and Recommendations Report*, , Ministry of Lands and Housing, Nairobi

“The principal objective of preparing this Report is to present the documentation of issues and policy recommendations that have been commonly identified analyzed and agreed upon by the stakeholders.”<sup>30</sup>

The report provides a broad overview of the full range of complexities that constitute the domain of land policy. Its recommendations are sweeping and ambitious. Implementation of such a bold programme of reform will have to be carefully phased and prudently managed. The report acknowledges the active participation of ministries, government agencies, academic institutions and civil society organisation in the National Land Policy Formulation Process.

The *issues and recommendations* report has therefore sensibly been followed up by a technical report on the *budgetary implications* and assessment of the *feasibility* of implementing the proposals generated by the National Land Policy Formulation Process. This report recommends establishment of a transformation unit within the Ministry, staffed with four international experts for which government is also seeking external support.

Donor engagement in land reform in Kenya appears to be deepening. Donors, (DFID, Sida, DCI Ireland, USAID), supported by UN-Habitat have expressed their willingness to provide financial and technical assistance for the implementation of the recommendations contained in the Ndungu Report. The World Bank funded project “Improvements in the land registration system” involving digitalisation of records has commenced. An agreement for bilateral cooperation between the Government of Kenya and Sweden was recently signed.<sup>31</sup> The agreement covers support for National Land Policy Formulation, capacity building, establishment of a land information system. The Government of Kenya’s contribution is in relation to the Kenya Slum Upgrading Programme (KENSUP).<sup>32</sup> At the request of the Ministry, DFID have submitted a concept paper to the Ministry of Land and Housing regarding the establishment of a SWAP for the sector. Donors have indicated support in principle for taking a SWAP forward. Both DFID and Sida are also supporting civil society’s involvement in dialogue with government in relation to land reform. A series of external study tours has been completed and have reported. On 19 December 2005, the draft National Land Policy was completed.

“While Kenya has committed to the gender equality through international law, the Constitution contains a tension between this principle and the exemptions made for certain laws affecting women’s rights. Women’s ownership of property in marriage has

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<sup>30</sup> Ibid p. vii

<sup>31</sup> 5 September 2005

<sup>32</sup> The second meeting of the African Ministerial Conference on Housing and Urban Development (AMCHUD) will take place in Nairobi in December 2005 (or early 2006). AMCHUD was established in 2004 to promote dialogue amongst African Ministers on key issues related to housing and urban development. AMCHUD has been integrated into the African Union (AU) as one of its organs. Against the background of recent evictions in Africa, specifically Zimbabwe, the Governments of South Africa and Kenya have requested a second meeting of AMCHUD to focus on two core issues: alternatives to forced evictions and the implementation of the 2005 World Summit on the Millennium Development Goals (MDGs). Paragraph “M” of the World Summit Declaration calls for increased resources for affordable housing and prioritizes slum upgrading and slum prevention as the way forward for achieving MDG Target 7/11

been object of court cases on issues such as married women's capability to hold property, the valuation of non-monetary contribution to matrimonial assets, and co-habitation without marriage, offering a multifaceted picture of the legal situation of women and the role of courts in supporting them. As regards land tenure in Kenya, colonialism and the Torrens title system had profound effects on existing customary tenure systems, although it never succeeded in replacing these. Formalisation of land rights in Kenya, actualised within a very patriarchal setting, has resulted in the exclusion of women from ownership of land which is a key resource for both subsistence and economic activities. Current legislation establishes three main classes of land tenure: individual, governmental and group ownership, which all show weaknesses when it comes to respecting and protecting women's right to land. The ongoing national land policy formulation process seems to show more interest in gender issues and the constitutional review provides a framework for consideration of women's land rights. Yet, the case of Kenya raises the important question of whether 'formalising the informal' is the best way to provide for women's rights to land. The subjugation of customary rights and their systematic replacement with modern norms on tenure has not resulted in the obliterating of those norms, suggesting that formalising informality is not an easy task in a social context where informal norms are sometimes perceived to be more binding than formal ones."<sup>33</sup>

At the time of writing the previous Minister of Lands and Housing, Amos Kimunya, who along with the entire Cabinet had been dismissed by the President in the aftermath of the defeat of the Proposed New Constitution in the referendum, had just been reinstated as Minister for Lands. The new Minister of Housing described splitting up the old ministry as "the right thing to do."

Land and Housing were only recently amalgamated. Housing and land issues are obviously crucially intertwined and problems have previously occurred when they have been under separate ministers. But this may be a small price to pay for the reappointment of a minister who has a solid grip on the complexities of the land reform processes underway in Kenya.

## **Rwanda**

The 2003-4 review reported that, after finalisation of a new Constitution and its first post genocide elections, Rwanda's Land Policy was approved by Cabinet in February 2004 and a Land Bill was under considered by the legislature.

In 2004 the Land Reform Decree was adopted by the Rwandan Parliament and Senate. The new law provides land rights for individuals (currently almost all land is owned by the State) and will guide land management and use. The main aspects of National Land Policy the new law is attempting to facilitate are regrouping people into new settlements, land consolidation, master planning and land use legislation

Villagization, urbanization and land consolidation are all sensitive policy issues. As a means to achieve these objectives, the Government of Rwanda is intent on registering all land parcels. A dual, parallel land administration system is to be set up, catering for both

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<sup>33</sup> Ikdahl, I., Anne Hellum, Randi Kaarhus, Tor A. Benjaminsen, Patricia Kameri-Mbote (2005) "Human rights, formalisation and women's land rights in southern and eastern Africa", *Studies in Women's Law* No. 57, Institute of Women's Law, University of Oslo, p xiii

land held under customary forms of tenure to be recorded on locally held land records and commercial properties leased out by the state to be registered on a national cadastre.

Reforms of this order will require mass cooperation and participation. Yet in Rwanda today little political space is available to the civil society organisations to assist the government in its land reform project by mobilising the requisite mass cooperation. Lack of capacity further constrains what the existing political architecture will allow national NGOs to contribute.<sup>34</sup>

The United Kingdom is Rwanda's largest development partner, pledging GBP42 million in financial year 2004-5. In return, the Government of Rwanda's commitments to UK Government include "To continue the promotion of national unity, justice and reconciliation". Under this overarching commitment is the specific pledge to "Based on the Constitution, and wide consensus, develop and implement a strategy for land reform", which by implication would be supported by financial and technical assistance from DFID, presumably for both government and civil society.<sup>35</sup>

Some influential commentators have recommended that the proposed land administration initiatives should be selectively piloted on a participatory and voluntary basis and carefully evaluated before any attempt is made to implement these reforms nationally. This is how the DFID-funded land reform support project has been configured.<sup>36</sup> These authorities and others have also expressed concern that some in Government may not see the utility and necessity for adapting and refining land policy and legislative framework as more experience is gained through implementation.<sup>37</sup>

The surprise announcement in August 2005 that the number of Provinces would be reduced from 12 to 4 and the number of districts from 106 to 30 by 2006, illustrates the tendency of top-down policy change in Rwanda. This new local government architecture has implications for the DFID funded land reform project featuring a dual centralised decentralised land administration systems, which is due to start up at the time of writing.<sup>38</sup>

The government has de-ethicised debate about land reform in Rwanda. This has operated to the disadvantage of the forest-dwelling Batwa people, large numbers of whom have become landless as a consequence and the organisation promoting their rights has been rendered 'unable to operate legally' by charges of 'unconstitutional' and 'divisionist' conduct.<sup>39</sup>

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<sup>34</sup> Wolters, S., (2005) "The Gacaca Process" *African Security Review* 14 (3) p. 67

<sup>35</sup> DFID, (2004), Memorandum of Understanding between the British Government and the Government of Rwanda, [<http://www.dfid.gov.uk/countries/africa/rwanda.asp>] last accessed 10/11/05, p. 1 and p. 6

<sup>36</sup> DFID (2005) Support for Phase 1 of the Land Reform Process: Rwanda, Contract No.: 056249

<sup>37</sup> Musahara, H., and C. Huggins (2004) "Land Reform, Land Scarcity and Post: Conflict Reconstruction-A Case Study of Rwanda", *Eco-Conflicts*, Vol. 3 No 3, October, pp. 3-4

<sup>38</sup> Huggins, C., (2005) "Shades of Grey – Post Conflict Land Policy Reform in the Great Lakes Region", Paper Presented at Conference *Changing Politics of Land Reform in Africa*, 28-9 November, Pretoria, French Institute of South Africa, pp 3-4

<sup>39</sup> *Ibid* p. 8

*Abunzi* councils established by the 2003 constitution to mediate land disputes, similar to the *gacaca* tribunals set up to engage in post genocide reconciliation<sup>40</sup>, have been operational only since early 2005. Problems with the operation of these institutions reported so far include excessive influence of local social relations, corruption and illiteracy.<sup>41</sup>

DFID's own assessment of its involvement in Rwanda suggests that caution and lengthy project timelines will be required.

“Donors have been wary of engaging on land issues in Rwanda due to their particularly high political sensitivity: it is clearly a place where donor practices may be critical to the future security of millions of people, given intense land pressures and limited non-agricultural opportunities. DFID, however, has taken the lead in supporting the Rwandan Land Ministry to build implementation capacity, persuading the Ministry to take things slowly in order to get them right: following DFID's support for a Land Policy Adviser (2002-4) and encouragement of a consultative approach (between the Ministry and the LandNet civil society alliance for example), three Technical Advisers are now about to embark on a two year ‘road map’/pilot project to plan for the longer term implementation (over 10 years) of the new land policy and land laws. The Ministry is also considering an interim stage of giving title to whole communities before full individualisation; DFID will be working to ensure that ‘anti-poor’ dynamics do not emerge either in existing local customary institutions or in any new community institutions set up as part of this. Finally, DFID has successfully contributed to securing more safeguards around appropriation to be built into the new organic land law, and is co-ordinating closely with USAID's work under a broad DFID umbrella (DFID Rwanda 2005; Dyer pers. comm. 2005)”<sup>42</sup>

### **Somalia**

At the time the 2003-4 review was published, Somalia had not experienced a recognised, functional central government for 14 years. Formal laws regarding land tenure and land reform have been replaced by informal patterns of property claims based on an admixture of customary tenure and armed occupation in the country's inter-riverine agricultural zones. The 2003-4 review opined that the fact that powerful militias and whole clans benefited from occupation of the most valuable riverine land in Somalia was a significant barrier to reconciliation in the country.

In less valuable, rain-fed agricultural areas in southern Somalia, it was noted that local farming communities continue to rely on customary land tenure and that, in some instances, to harvest their own crops, farmers were required to pay tribute to local militias and self-declared protection forces. The expansive pastoral rangeland of Somalia

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<sup>40</sup> In 2001, local courts called *gacaca* courts were set up in parallel with formal courts to expedite trying the extensive backlog of genocide cases (currently estimated to be 800,000) but have been operating in only pilot areas. *Gacaca* courts have recently been opened throughout the country. At least one commentator has expressed concerns that their activities might reignite smoldering resentments. See Wolters, S., (2005) “The *Gacaca* Process” *African Security Review* 14(3) pp 67-8

<sup>41</sup> Huggins op cit p. 12

<sup>42</sup> Daley, E., Mary Hobley (2005) “Land: Changing Contexts, Changing Relationships”, Urban-Rural Change Team, DFID p. 43

remained a commons area. However, wealthier, more powerful pastoral households were illegally enclosing good grazing areas with apparent impunity.

In contrast, the 2003-4 review reported that in northwest Somalia, the unrecognised secessionist state of Somaliland land tenure legislation has been made into law and farmers had been granted full ownership of their agricultural plots, as opposed to 99 year leases which the previous Somalia government allowed. An effective cadastral survey project funded by the United Nations Development Programme had registered a third of the agricultural zone of Somaliland and had virtually eliminated land disputes in farming areas.

The 2003-4 review also reported that urban land ownership throughout both south-central Somalia and Somaliland remained contentious. Despite local municipalities frequently being accused of issuing multiple deeds to the same plot in exchange for bribes, several Somali towns and cities experiencing real estate booms, fueled in large part by Somalia's extensive Diaspora and pervasive land speculation.

More than a year latter, some commentators perceive "faint signs of recovery" of the Somali State.<sup>43</sup> By the end of August 2004, most of the 275 MPs had been sworn in, albeit still in Nairobi. On 10 October 2004, following an election by the Transitional Federal Parliament in which Ethiopian influence was apparent, Abdullahi Yusuf, leader of the Somali Reconciliation and Reconstruction Council faction, emerged as the new transitional president.<sup>44</sup> The new President has asked the international community for USD15 billion and twenty thousand troops to be able to return the instruments of government to Somalia and begin the process of disarmament, reconciliation and reconstruction.

So far only the African Union has expressed any enthusiasm for participating in this project. Since the formation of the new Transitional National Government, terrorism and counter-terrorism clashes have continued with renewed deadly force.<sup>45</sup> Both the reconciliation and the state building required to achieve any kind of land reform still seem along way off. Given that the state of Somalia was a poorly conceived colonial project, born fragile, then inadequately nurtured and has been inordinately resistant to resuscitation since collapsing, maybe its resurrection is not the most durable or desirable outcome.<sup>46</sup>

## Sudan

The 2003-4 review presented a summary of the history of intra state, post colonial conflict along the north-south 'divide', observing that rural land relations in Sudan have long been contested and that the enormous land and mineral potential of the south in general have been key factors in Government of Sudan' ('Northern') resistance to

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<sup>43</sup> Cornwell, R., (2004) Plus ça change...? , *African Security Review* Vol 13 No 4, p 1

<sup>44</sup> Ibid p. 4

<sup>45</sup> International Crisis Group, (2005) "Counter-terrorism in somalia: losing hearts and Minds?", *Africa Report* N°95, 11 July

<sup>46</sup> Del Boca, A., "The Myths Suppressions, Denials and Defaults of Italian Colonialism" in Palumbo, P., (2003) *A Place in the Sun: Africa in Italian Colonial Culture from Post-Unification to the Present*, University of California Press, Berkeleypp 31-3

(Southern') secession. The authors remarked that, although today's conflict in Darfur is now far more complex than an inter-tribal dispute over land and grazing rights between sedentary cultivators and pastoralists, that is the source of the conflict.<sup>47</sup>

The 2003-4 review went on to outline the successes of the ongoing peace process since 2002. Most relevant of these were *The Agreement on Wealth Sharing During the Pre-Interim and Interim Period, 7 January 2004* which laid out how revenue from oil and gas exploitation would be distributed between the North and Southern Governments. The Agreement also pledged to reform laws to include more attention to customary interests and to establish Land Commissions to hear disputes between willing parties. Also important was *The Protocol on The Resolution of Conflict in Southern Kordofan/Nuba Mountains and Blue Niles States, 26 May 2004* concerning the two areas that bore the brunt of conflict since 1983. The Southern People's Liberation Movement failed to secure these two areas as part of the South, but in compensation both States were awarded 'model area' status, where special investments and new approaches to development could be adopted. Land Commissions were also to be established in these two States, with the same powers laid out for the National and Southern Sudan Land Commissions.

The 2003-4 review identified a number of key land issues which had contributed to ongoing conflict in Sudan. Among the most serious is long-practised land colonisation by Government and Government-supported agencies with, for example, over five million hectares of customary commonage now under lease or licence to northern commercial farmers or investors in Southern Kordofan State. Although settled communities have been the main losers, northern pastoralists have also found their seasonal access to dry season pastureland constrained. By siding with the Khartoum Government, the mainly Arab pastoralists have not helped their case in the contested areas, where African communities are now fiercely determined to retrieve lost properties and regulate seasonal access by northerners themselves. Competing pastoral and farming interests have been a self-evident root of conflict in many parts of the country. Failure to accord customary land rights explicit status as private property rights was also highlighted as an ongoing cause.

The 2003-4 review also reported that the US Sudan Task Force was launching a pilot programme to radically improve the tenure security of customary occupants in the Sudanese People's Liberation Movement controlled areas of the conflict Regions of Nuba, Abyei and Blue Nile. The UNHCR, FAO and the Norwegian Refugee Council recently initiated a programme for the development of practical and legally valid solutions to provide secure access to land, natural resources and housing before and/or upon the return of IDP and refugees in both urban and rural areas and in both northern and southern Sudan. UNHCR/FAO/NRC and others such as the South Sudan Law Society and Southern Sudan Ministry of Agriculture (SAAR) were also reported to be developing capacity building pilots that were expected to feed into evolutionary land policy planning and law development, especially in contested and southern areas.

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<sup>47</sup> See De Waal, A., (2004) 'Counter-Insurgency on the Cheap: The Road to Darfur', *London Review of Books*, 5 August, [<http://www.lrb.co.uk/v26/n15/waal01.html>]

Progress has been mixed, shortfalls largely due to increasingly evident reluctance on the part of the previous Khartoum Government partners (the National Congress Party) to honour or see through its part of the Comprehensive Peace Agreement. In the land sphere, this has been seen in continued rejection of state-of-the-art provisions towards equitable land relations in the Interim National Constitution and State Constitutions, and which ultimately led the Southern Sudan Government to also settle for minimalist provisions that do no more to clarify or elaborate the limited provisions of the Peace Agreement. While the promised Abyei Land Commission to determine the boundary of the Abyei Area went successfully ahead, the stronger northern interests in the Khartoum Government have reneged on its promised acceptance of the Commission's findings, leaving precious oil-rich land areas of the Abyei Dinka outside the boundaries of South Sudan.

On the other hand, at local level there have been successes. Notable among these is the US funded Customary Land Security Programme operating in Nuba/Southern Kordofan and Blue Nile States. Despite US sanctions constraining procurement and international recruitment and despite lack of cooperation by northern Government interests, the project has already assisted more than 20 of the 80 or so tribal communities in Southern Kordofan and all 30 communities in Southern Blue Nile to delineate the precise boundaries of their respective communal domains. This is being achieved through community representatives walking every step of each shared boundary area, agreeing and recording the results. Project facilitators adjudicate and take GPS readings. The resulting maps and detailed descriptions are to be registered at County Headquarters. Each community is shortly to begin the process of establishing Community Land Councils to hold the root customary title of the domain and administer interests on its behalf and to prepare and submit restitution claims for individual or shared common estates within the Community Land Area which were wrongfully appropriated by previous Governments. Detailed Guidelines for these and follow-up steps have been elaborated, including early steps to bring still vulnerable commonage in each domain under closer community protection as Community Forest or Pasture Reserves and to begin the process of enabling northern pastoralists to renegotiate seasonal use of the latter. Legal drafting has begun towards a modern State Land Commission Act in each State and towards new Land Acts designed to embed the evolving community-based land administration regime and equitable respect for customary land rights. Given the scheduled dominance of northern National Congress Party representation in the two State Parliaments until the national election in 2008/09, and given continued resistance to change on the part of these interests, the passage of these laws is not expected to be swift. Nonetheless, the project approach has provoked enormous public support both within the two pilot States and beyond, including in the South and in

Darfur where the approach could contribute significantly to resolving key disputes helping to drive the conflict.<sup>48</sup>

Other commentators have divergent views about both the significance and feasibility of land tenure reforms.

“The central development strategy of the 1980s was to prevent the predicted Tragedy of the Commons by offering farmers and herders title to their land, so that they could invest in it to raise production. This met with almost no interest. The scope for profitable investment was limited and there was little direct competition over land: for farming or for rangeland. Farmers saw no point in land title and they were right. A sign of the lack of pressure was the way groups from northern Darfur, who wished to move south, were able to negotiate with the people of the south for land to settle, without difficulty or significant cost.

None of this meant that there was not ample scope for clashes between farmers and herders; but the clashes seemed to be about managing the herds’ movements, so they did not damage the crops, not about competition for land or water. Traditional rules supported by local government orders were in place to control these movements. Overall, there was no evidence of any tragedy of the commons.”<sup>49</sup>

The same commentator makes the point that if there is little or no competition for land and water, this cannot be the key driver of the conflict and therefore this should not be the initial focus of international peace building efforts.

“Individual disputes over land played a part in the steadily worsening security situation in Darfur. There will always be disputes. Overall, however, it is not likely that competition for resources is a major driver of the current conflict. Darfur remains a very large region for quite a small population. Given the right support, there is room for all.

Once a conflict has started, however, burning crops, stealing cattle and driving people from their homes are the easiest weapons to hand. This makes it look more like a conflict over resources than it really is. Predictions are dangerous. If, however, there is a winning side in the Darfur conflict, I do not expect them to occupy and use the land they have won. Apart from anything else, they will not have the manpower.”<sup>50</sup>

Following this analysis the first steps toward peace should focus on resurrecting the functioning parts of the pre-existing traditional dispute resolution system and on providing support to the justice sector so to be able enforce their arbitrated outputs.

## **Tanzania**

The 2003-4 review reported that the Land (Amendment) Act, 2003 was due to become operational in July 2004. One of the objects and reasons for the amendments was to

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<sup>48</sup> Comments provided by Liz Alden Wily, Technical Adviser, USAID/USDA Customary Land Security Project, Sudan, 2004-05.

<sup>49</sup> Morton, J. (2004) Resources, Development and Politics in Darfur, Resource Paper, September, HTSPE, Hemel Hempstead, p. 5

<sup>50</sup> Ibid p. 6

create a legislative framework “allowing for and regulation of sale of bare land”<sup>51</sup> so as to allow mortgaging of property as a means of encouraging domestic and foreign investment.<sup>52</sup> At the time of enactment of these amendments there was increasing land related conflicts in both rural and urban Tanzania-Mainland and Zanzibar and growing concern about the pace and direction of political and economic changes in a deeply divided Tanzania.

The Government was reported as planning to continue to implement projects geared towards Individualisation, Titling and Registration (ITR) of residential land. However the land rights of smallholder producers such as peasants, artisan miners, and pastoralists were receiving less attention.

The new land laws were reported as placing emphasis on the wider participation of women on issues relating to dispute settlement as well as review of policy and legal framework pertaining to land administration. Despite a progressive legal framework, there remained a pervasive lack of gender and human rights awareness and many women did not have information, confidence, experience and resources to secure their proprietary entitlements.

The current policy focus on providing ‘idle’ land for Foreign Direct Investment has recently been subjected to a critique comparing it to colonial powers providing “uninhabited or un-owned” land to European investors; both are said to be forms of primitive capital accumulation. The similarities are said to be the “use of extra-economic force, whether justified by law or not, to enable expropriation of resources and exploitation of labour” and “strategic state intervention to create necessary conditions for capital to reap super-profits.”<sup>53</sup>

At a recent workshop on implementation of the new land laws, the legitimacy of some of these concerns was acknowledged by Professor Hayuma, Advisor to the Permanent Secretary of the Ministry of Lands & Human Settlement Development.

“Concern was also expressed concerning arbitrary decisions of Village Councils and Assemblies in appropriating villagers’ lands without consent or compensation. Concerns about compensation also arose with regard to persons whose lands are taken or acquired by government. Encroachment on reserve lands also arose.”<sup>54</sup>

However while conceding that there have been problems, he played down their significance by pointing out the implementation of the legislative framework designed to

<sup>51</sup> United Republic of Tanzania (2004) *The Land (Amendment) Act, 2003*, Government Printer, p.31.

<sup>52</sup> For a detailed analysis of the legal framework for mortgages and its implications for encouraging borrowers and lenders see McAuslan, P. (2005) “Legal pluralism as a policy option: Is it desirable, is it doable?” UNDP-International Land Coalition *Land Rights for African Development: From Knowledge to Action*, Nairobi, October 31 – November 3 [[http://www.undp.org/drylands/docs/land-tenure/workshop-11-05/Legal\\_Pluralism\\_Edited\(McAuslan\).doc](http://www.undp.org/drylands/docs/land-tenure/workshop-11-05/Legal_Pluralism_Edited(McAuslan).doc)] accessed 02/01/06, pp 16-7

<sup>53</sup> Shivji, I., (2005) “Primitive accumulation of wealth means reaping without sowing *Pambazuka*, 20 October

<sup>54</sup> Oxfam Ireland, Trocaire, Concern (2005) “Report on Proceedings of Symposium on Implementation of 1999 Land Acts”, Dar es Salaam, March. Development Cooperation Ireland, p. 5  
[http://www.oxfam.org.uk/what\\_we\\_do/issues/livelihoods/landrights/downloads/tanzania\\_1999\\_land\\_acts\\_implementation\\_symposium\\_report.rtf](http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/tanzania_1999_land_acts_implementation_symposium_report.rtf)

facilitate the government's policy objectives of "poverty reduction, agricultural transformation, good governance and promotion of a land market and collateralisation" has been painfully slow, so that not much damage has been done.

"Slow progress in demarcation of Village boundaries and issuance of CROs in relation to demand were noted."<sup>55</sup>

The same workshop the Commissioner for Lands provided a less than impressive report on progress in terms of volumes of surveys, registrations and issuance to date, but made clear that what progress had been made in relation to registration was being used to fulfil government policy objectives.

"Furthermore, land records data have been computerised by scanning of land registries files. With regards to Section 20 (2) of the Land Act, a total of 286 pieces of land have been designated for allocation to TIC. Nine plots and four farms have been fully allocated to TIC so far." (p 3)

..... In Dar es Salaam, over 27,000 new plots have been surveyed of which 72 percent have been allocated. Also in Dar es Salaam, the Ministry in cooperation with the municipal councils has given title to 50,000 informal land owners in the city since last year. By 2006 it is expected that a total of c. 400,000 will have such titles.

Concerning the Village Land Act, 6,000 villages have been surveyed so far. Those villages that have a certificate of village land can proceed to grant certificates of Customary Right of Occupancy (CRO) to villagers. To this end a Village Land Registry needs to be established with a Land Registry at the District level. These have been established in four districts with six other districts planned."<sup>56</sup>

This lack of progress has been put down to lack of resources.

In her opening remarks to this workshop the Permanent Secretary, Ministry of Lands and Human Settlement Development reasoned that

"The principal constraint is shortage of resources of all kinds. The cost of full implementation nationwide is staggering. A further constraint is the lack of maps of the requisite scales for village land use planning and survey of individual plots."<sup>57</sup>

This admission reflects a wider tendency for proponents of lands tenure reforms to underplay the high cost and complexity of establishing both centralised and decentralised property rights information systems, which governments subsequently seize upon to rationalize slow roll out of implementation. Undoubtedly in many countries in Africa this is more of a realistic explanation than a ready-made excuse. However, in Tanzania, increased revenue being collected from the pumped up land administration system would appear to allow government to invest considerable more in reforms if it had the will to do so.

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<sup>55</sup> *ibid*

<sup>56</sup> *Ibid* p. 3

<sup>57</sup> *Ibid* p. 2

Whilst recently reporting publicly on the progress of land reform implementation, the Commissioner for Lands gave the following estimates of expenditure and income for land administration.

“The cost of the plan was estimated at Tsh2.8 billion p.a. Funding has been at an average of Tsh193.4 million p.a. to date, leading to little progress on implementation.”

.....Revenue collection has seen considerable increases since 1996/97 when Tsh1.4 billion was collected, to 2003/04 when Tsh5.5 billion was collected.”<sup>58</sup>

In terms of human rights, the rate at which progressive reforms are being implemented seems to have slowed.

“While the slow pace of implementation makes it hard to draw conclusions about the success of this process, the Tanzanian legal model can at least serve as an example of efforts to integrate women’s rights issues into legislation aimed at the formalisation of land rights. However, gendered perspectives have become less visible in debates on land law in Tanzania after the legislation was enacted. One of the aims of the land reform was to facilitate a market for land rights and the use of land as collateral. This idea is supported by the World Bank, international donors and Hernando de Soto’s Institute for Liberty and Democracy. In this picture women’s land rights seem to be sidelined, even though NGOs continue to spread information on the rights of women entailed in the new Acts, and efforts to change discriminatory inheritance law continue.”<sup>59</sup>

Describing the extent of donor engagement in land reform the authors report that

“As of May 2004, the two Acts were to a large extent still not implemented. There seems to be a general lack of knowledge about the law. Copies of forms, regulations and even the Acts themselves are also lacking (GAPP 2004). To some degree, NGOs and the relevant ministries have been carrying out information campaigns, including some with a main focus on women’s land rights. However, as the legislation is complex, held in a technical language and quite detailed, due process can only be achieved if complete, nuanced and understandable information is spread to all those concerned. The EU has provided financial support for a draft strategic plan for the implementation of the land laws (URT 2005), and both the EU and the World Bank are seen as potential sources for funding for implementation. The Tanzanian Poverty Reduction Strategy Paper makes mention of implementation of the land legislation, and the Institute of Liberty and Democracy and donors are also involved in related projects.” (p 42)

In relation to the recent engagement of De Soto’s and his Institute of Liberty and Democracy’s (ILD) in Tanzania, the authors’ remarks are, for obvious reasons, cautious.

“Recently, the Tanzanian government has decided to embark on a formalisation programme proposed by the Peruvian economist Hernando de Soto and the Institute for Liberty and Democracy (Benjaminsen et al. 2004). The Norwegian Agency for International Development (NORAD) has agreed to fund the first stages of a programme

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<sup>58</sup> *ibid*

<sup>59</sup> Ikdahl, I., Anne Hellum, Randi Kaarhus, Tor A. Benjaminsen, Patricia Kameri-Mbote (2005) “Human rights, formalisation and women’s land rights in southern and eastern Africa”, *Studies in Women’s Law* No. 57, Institute of Women’s Law, University of Oslo, p. xi

in Tanzania using ILD's approach to formalisation. Critical questions have been raised concerning several aspects of the programme, both in relation to Tanzania specifically and as a general approach. It is unclear how the programme will relate to the World Bank's planned initiative to implement the 1999 land legislation as referred to in the PRSP. The ILD programme will work under the auspices of the President's Office, while the World Bank programme will be hosted by the Ministry of Lands."<sup>60</sup>

The Mkapa / de Soto initiative for formalization of property rights and business endeavors, under the sponsorship of the recently formed High Level Commission on Legal Empowerment of the Poor is referred to in Tanzania as MKURABITA. A team from the ILD, in the form of a programmed management unit, has been on the ground in Tanzania now for a year. They have completed the diagnosis phase and have just embarked on 22 months of design. The 1700 pages diagnosis report is reputed to be packed with descriptions of legal processes and obstacles, but is weak on forward-looking analysis and awareness of the various contexts in which reform would be taking place. The ILD team recently presented a summary of its findings at seminar organized by Norwegian Peoples Aid and the Tanzania Policy Forum.

Whether the initiative will have much effect is difficult to predict, but its work is likely put pressure on the existing legal framework for property rights. As pointed out elsewhere,

"However, by early 2005, only the first two stages (of the ILD methodology) have been carried out in a few countries, and only Peru has any experience with the Implementation phase. Since this is the critical phase where the practicalities of the approach will be tested, debates and criticism of de Soto's approach have so far mostly been based on knowledge of earlier formalisation and privatisation programmes, as well as empirical knowledge of concrete tenure systems and anticipated consequences of formalisation of these systems."<sup>61</sup>

The current election provides an opportunity for populace to express their judgment about the pace and direction of land reform.

### **Uganda**

The 2003-4 review reported a large increase in funding allocated to the land sub sector, in the national budget for 2003-4, compared to the previous year, as a consequence of the commencement of the Poverty Eradication Action Programme, which had identified land reform as a critical issue for the eradication of poverty.

At the time of publication of the 2003-4 review, the protracted National Land Policy formulation process had got to the point where number of further studies had been recommended and a Land Use Policy was ready for presentation to Cabinet for approval. The sometimes bitter and lengthy campaign to secure land rights of women was partially vindicated by the proclamation of the Land (Amendment) Act, 2004 providing for mandatory transaction sanction powers for spouses. This fell short of the absolute co-

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<sup>60</sup> Ibid, p 44, footnotes removed

<sup>61</sup> Ibid, p 27

ownership status for spouses sought by the civil society coalition which had long been lobbying for legislative reforms.

Since then the security situation in the region and in the northern part of the country have deteriorated considerably, the Government of Uganda's relations with donors has become more detached and the disjunction between theory and practice in relation to land reform in Uganda has become more starkly obvious.

The two decade long war between the Lord's Resistance Army and the Ugandan Peoples Defence Force has been mostly fought out in Acholiland, which is comprised of the Districts of Gulu, Kitgum and Pader. As a recent study on displacement and food security has pointed out, the fallout of the war on civilians has now reached epic proportions.

"During 2004 the security situation improved somewhat with frequent claims that the war is about to end, but for as long as the civilian population is confined to camps, claims that peace has been achieved ring hollow. The current humanitarian situation is one of the worst in the world, with over a million displaced living in appalling conditions."<sup>62</sup>

These optimistic claims of imminent settlement have continued to be voiced by various actors throughout 2005.<sup>63</sup> Despite what may well be tactical optimism, the fact remains that the security situation in the north has become increasingly parlous and the recent escalation of the war<sup>64</sup> is exacerbating various pre-existing conflict-related threats to the land rights of the indigenous population and increasing the number of displaced people.<sup>65</sup>

"A number of threats to land exist in Acholiland, not all of which are fully appreciated by the general population. Threats that are likely to be short term in nature include illegal occupation and logging particularly by army officers or private investors, and government schemes such as the Security through Production Programme that plans to use uncultivated land for mechanised farming. However, of greater concern and not widely recognised are land grabbing by neighbours and relatives, particularly of land belonging to widows and orphans and encroachment by sub county offices.

There are also a number of fears that are widely felt among the IDP population, that the war is being used to disenfranchise the Acholi people of their land. Whatever the outcome of the armed struggle between the Government and the LRA, lasting peace in the country will not be achieved with a simple military victory. Trust between the people of Acholi and the Government must be rebuilt, and fear about land is one factor in that relationship.

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<sup>62</sup> Adoko, J., Simon Levine, (2004) "Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them", Land and Equity Movement in Uganda for Civil Society Organisations for Peace in Northern Uganda, c/o CARE, Kampala, p. 1  
[http://www.oxfam.org.uk/what\\_we\\_do/issues/livelihoods/landrights/downloads/csopnu\\_land\\_matters\\_in\\_displacement.rtf](http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/csopnu_land_matters_in_displacement.rtf)

<sup>63</sup> Prendergast, J., (2005) "End This African Horror Story", *Washington Post*, 7 April

<sup>64</sup> Large, T., (2005) Crisis Profile-What's going on in northern Uganda?", AlertNet - background material, 7 June, [<http://www.alertnet.org/thefacts/reliefresources/111996997351.htm>] accessed 16/11/05

<sup>65</sup> Estimated to have risen to 1.5 million by International Crisis Group, (2005) "Building A Comprehensive Peace Strategy For Northern Uganda", *Africa Briefing* N°27, Kampala/Brussels, 23 June, p. 1 and up to two million people by Hobbs, J., (2005) "Get tough, Security Council", *International Herald Tribune*, 10 November

Many people in Acholiland have lost the use of their land: either because it has been occupied by defence forces or IDP camps or they have been forcibly displaced. Compensation should be provided by the Government, although *ex gratia* payments or provision of other land while they are displaced could be negotiated as an alternative.”<sup>66</sup>

Apparent inaction on the part of Government and the army to protect the land rights of internally displaced people (IDP) is having negative short term affects on trust and confidence and could have long term lasting impacts on the possibility of securing peace in the north in the future.

“The failure to secure access to land and promote land rights is generating increasing distrust of the Government’s motives regarding the war, compounded by fears that some individuals from outside Acholiland could be expropriating land while people are displaced. At the same time the rules governing land tenure are in transition creating opportunities for exploitation by those with better education and knowledge. The ability of IDPs to secure their land on return will have long term implications for peace and stability in the North and action now could avert a new humanitarian crisis of landlessness and social exclusion.”<sup>67</sup>

This crisis presents major challenges to the existing legislative framework for land reform and for the National Land Policy Formulation process. The plight of internally displaced people and the extent of threats to their land rights emphasises the need for recognition and enforcement of pre-existing customary tenure, prior to any registration. Researchers suggest that internally displaced people need urgent assistance from legal aid organisations to argue for their rights to be respected and for local officials to compile registers of public land so as to prevent alienation of temporarily unoccupied customary land. A coordinated government response has been recommended.

“District level government and the Ministry of Lands need to actively promote implementation of the Land Act, supporting the institutions of customary tenure and ensuring that judicial process works to protect people’s rights. There is a particular need to establish the necessary court system (e.g. LC2 and LC3 council courts) and train the local councils in land law and clarify their roles, particularly with regard to their relationship with the clan system. To assist people to assert their rights, mass education campaigns should be carried out informing people of their rights and sensitising those adjudicating on land issues of their roles and the problems people face in protecting their land.”<sup>68</sup>

The authors of this report seem convinced that the Government’s current military strategy in this war, of interning the local population so as to starve out the Lords Resistance Army is causing an increasingly disproportionate burden to fall on the local civilian population and that in turn may be contributing to the protraction of the conflict. They recommend a suite of actions that could redress this breakdown of trust; paying compensation to those people who have lost their access to land through the war, for camps and other purposes; limiting expropriations by Government and the military to

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<sup>66</sup> Ibid p. vii

<sup>67</sup> Ibid p. xv

<sup>68</sup> Ibid pp xiv-xv

only those land required by the national interest; protecting IDP land against expropriation by others and increasing the areas around the camps where IDP can farm to improve their current food security.<sup>69</sup>

Other commentators see land restitution as holding the key to lasting peace in northern Uganda.

“Economic reconstruction on a massive scale must be undertaken in northern Uganda so the area can become prosperous once again; the physical and social devastation of northern Uganda during nineteen years of brutal armed conflict has been thorough. Fair and independent adjudication of claims to land will be necessary for economic recovery. Land is an increasingly delicate issue in northern Uganda where more than 90 percent of the Acholi population has been displaced for such a prolonged time. Vulnerable groups, such as child-headed households (who may have no knowledge of the land they are entitled to), widows, and those with absent leaders will possibly be exploited. The equitable adjudication of land disputes will be key to the success of any future peace as well.”<sup>70</sup>

In addition to providing support to peace process and to internally displaced people<sup>71</sup>, donors, including UK, Ireland and Norway have also been providing financial support enabling local NGOs cited above to produce critical research of the highest quality. This locally empowering engagement is helping Ugandans get beyond the somewhat abstract process of National Land Policy formulation by simultaneously throwing up issues of implementation whilst the policy dialogue is under way, bringing it back down to earth in the process.

However the bulk of donors’ assistance to Uganda is now by way of budget support. Hence the significance of PEAP and the MTEF processes in which land reform is given some prominence. However within that framework of assistance, monitoring and evaluation of what governments say they are going to do with donor’ money and what it is actually spent on and the extent to which it is being used to cross-subsidize domestic outlays, are both of critical importance.

A number of admittedly small-scale studies have also been recently published with donor assistance, which reveal a worrying and perhaps widening disconnect between theory, as expressed in the legislative and policy frameworks for property rights, and practice, as measured by what is happening elsewhere outside the war zone in relation to land administration and tenure reforms.

As the following description demonstrates, none of the elaborate bureaucratic structure prescribed by legislation is currently functional, at least in one north eastern province which is the subject of this study.

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<sup>69</sup> Ibid p. xiv

<sup>70</sup> Human Rights Watch, (2005) “Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda”, *Human Rights Watch*, September, Vol. 17, No. 12(A), p 62

<sup>71</sup> As pointed out by Adoko and Levine, (2004) op cit., some of this assistance, such as agricultural inputs, seems to be of limited utility, given the current lack of access to land around the camps to farm and the risk of looting, mutilation and murder by LRA and retribution from the army for trying to farm anywhere else.

“In fact, the reality is somewhat different. The area land committees have never been formed, because the District Council, which is supposed to pay them, says it has no funds. The land recorders are not functioning at all: although the sub-county chiefs are in place with other duties, they do not even know that they are supposed to act as recorders or what the role entails. District Registrars are not in place either.”<sup>72</sup>

The situation with respect to adjudication of land disputes is no better.

“In practice, the state institutions described above are not functioning as prescribed, nor are their duties being carried out by anyone else. The District Land Tribunal was hardly functional at the time of the research (it now meets three times a month), and the parish and sub-county executive committees have not been equipped to deal with land disputes. This means that the only recourse for land disputes is the LC1 (chairperson of the village council, an unpaid elected office), who has no legal authority to decide land matters, an almost total lack of knowledge of what land law actually says – and no legal training or support to help.”<sup>73</sup>

The economic strategy underpinning current government thinking about land reform is that poverty can be eradicated by growth in agricultural output generated by increased investment. This increase in investment will supposedly come from investors willing to take on greater risks gaining access to more land through the operation of the emerging land market. That market will trade individually titled parcels which are to be craved out of lands under certificates of customary title, which will be eventually issued over previously under-utilised land held under customary tenure. As has been the case elsewhere, this theoretical framework already appears to be operating in unforeseen ways.

“Land is increasingly being treated as a marketable commodity, and the signs are that this trend will intensify. This developing land market has not so far been linked to the creation of certificates of customary ownership and titles, as most land being sold is untitled land. The lack of certificates and titles is not a barrier to land becoming a marketable commodity (as policy assumed), as people (or rather, men) feel secure on their land. The relationship is rather the reverse: the land market may, in the long term, accelerate the titling of land, as purchased land is more easily converted into freehold land, since it is without the same cultural encumbrances.”<sup>74</sup>

The study concludes that these sales are supply rather than demand driven and is motivated mostly by “land grabbing” for speculative rather than investment purposes and will therefore not lead to greater investment or production or therefore to poverty eradication. Conversely the sales observed by the study teams were mostly distress sales by vulnerable people who will become more impoverished as a consequence of the

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<sup>72</sup> Adoko, J., Simon Levine, (2005) “A Land Market for Poverty Eradication? A case study of the impact of Uganda’s Land Acts on policy hopes for development and poverty eradication”, Land and Equity Movement in Uganda, Kampala, pp 23-4  
[http://www.oxfam.org.uk/what\\_we\\_do/issues/livelihoods/landrights/downloads/lemu\\_land\\_market\\_for\\_poverty\\_eradication.rtf](http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/downloads/lemu_land_market_for_poverty_eradication.rtf)

<sup>73</sup> *ibid*

<sup>74</sup> *ibid* p. 51

absence of an economic alternatives to their former subsistence based livelihoods and the erosion of social safety nets previously supplied by the social reciprocity which underpins customary tenures.

“Whatever the merits of the increasing privatisation of land, and its association with the emergence of commercial farming, it must be recognised that poverty eradication in northern Uganda is not going to be achieved only, or even mainly, through these processes. Since customary tenure and small-holder agriculture will remain the main context of poverty, greater investment needs to be made to understand the dynamics of customary land tenure vis à vis poverty, and how, within an economy dominated by small-holding farmers and semi-agricultural labourers, agricultural development can be supported without further alienating those most in need.”<sup>75</sup>

Another recently published study, this time in one of provinces selected for piloting of systematic demarcation, also found a land administration lacuna and contrary to theory, that it was causing a fundamental reassignment of rights between targeted families rather than just providing a mirror of existing rights.

The authors concede they are attempting to evaluate a system that has yet to be properly established and are forced to use the thoroughly circular argument that if there is not a proper system put in place to deal with the supposed lack of a system of customary tenure, customary tenure will return.

“This absence of guided and controlled administration of land rights has left the committee without options but to act on the limited knowledge and skills that they possess. Matters were made worse, when it was revealed that they had not even been issued copies of the Land Act or a schedule of their responsibilities as a Land Committee. In terms of authority, the instruments to originate this are also lacking, whereas the District Council approved the committee, there are still no appointment letters and no logistical support is provided from the District.

It is important, to note at this moment in this research, that the basic framework that would have defined guidelines and a starting point for systematic demarcation is the National Land Policy, however, this is still in its formative stage, hence the scattered administration arrangement. Land administration requires a clear hierarchy and procedure, otherwise formal and informal authorities will compete to fill the power gaps, the result will be administrative anarchy, which is not yet evident in the study, but whose symptoms are clear for all to see. Research affirms that when a land administration system fails, an informal system will replace it.<sup>76</sup>

Given the area under pastoral production, its economic significance and the known vulnerability of pastoralists, this is another problematic and unimplemented facet of the existing legal framework for which a compelling case for urgent attention has been made

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<sup>75</sup> Ibid p. 54

<sup>76</sup> Herbert, K., Margaret Rugadya, Esther Obaikol, (2005) “Systematic Demarcation of Customary Tenure in Uganda”, Land Research Series No: 6, Associates for Development, Kampala, p. 50 I have a different title plus author **Capital Creation, Transfer or Reversal: Assessing the Outcomes of Systematic Demarcation of Customary Tenure in Uganda** Associates for Development, Land Research Series No. 6 (Herbert Kamusiime, Margaret Rugadya, Esther Obaikol)

out, so far with little effect.<sup>77</sup> As the authors of a recent submission to the National Land Policy formulation process have pointed out, the registration of certificates of customary ownership could prove to be prohibitively expensive and complex in relation to rangelands and to do so under current law risks conflating existing user rights with ownership rights.<sup>78</sup>

Whilst incorporation of Communal Land Associations might well prove helpful, their roles within rangelands are unclear as is the force of the Common Land Management Schemes they are required by legislation to formulate in relation to state or other private or commercial interests. Mitigation strategies against unintended negative impacts of proposed land market reforms on both the industry and its producers will have to be designed and implemented, when, or if, any of these reforms begin to bite.

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<sup>77</sup> Ministry of Finance, Planning and Economic Development, (2004), Draft Poverty Eradication Action Plan (PEAP IV), p 97, cited in Rugadya, M., Esther Obaikol, Kamusiime Herbert (2005) “Critical Pastoral Issues and Policy Statements for the National Land Policy in Uganda”, Associates for Development, Kampala, p. 19

<sup>78</sup> Rugadya, M., Esther Obaikol, Kamusiime Herbert (2005) “Critical Pastoral Issues and Policy Statements for the National Land Policy in Uganda”, Associates for Development, Kampala