MAKING PEACE IMPOSSIBLE?
FAILURE TO HONOUR THE LAND OBLIGATIONS OF THE COMPREHENSIVE PEACE AGREEMENT IN CENTRAL SUDAN

A RESOURCE PAPER

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SUMMARY

This paper examines progress made on land-related provisions of the Comprehensive Peace Agreement of Sudan (CPA, 2005) with special reference to Southern Kordofan and Blue Nile States in central Sudan (known as 'the contested areas'). The paper is triggered by the need to clarify land issues for the upcoming popular consultation on the progress of the CPA.

The paper finds that –

a. the land provisions of the CPA were weak, but sufficient to allow legal and political change in how Government treats majority land rights. This specifically included potential for redress for the land abuses which contributed so significantly to the North-South civil war (1983-2002).

b. This opportunity has not been taken up in respect of the two areas or in Northern Sudan in general although it has been taken up in Southern Sudan. In the north, no progress has been made on key land commitments. This prominently includes failure to improve the legal standing of customary land rights or to establish planned Land Commissions to hear claims arising from involuntary loss of community lands due to unjust state policies from the 1960s.

c. Some but evidently insufficient legal, technical and financial support has been given by international agencies since 2004-05 to encourage and help the Government of Sudan at national and state level to make the legal and institutional changes necessary.

d. However, the founding lack has been political will to make the changes required under the CPA. This is most tangible in sustained national policy to issue leases for yet more millions of hectares of local customary lands to non-local commercial farming investors. This directly affects the contested areas as well as other northern zones, including Darfur.

e. Although details of leases are hard to come by, there is strong likelihood that yet more rural citizens will be evicted from their lands as these allocations are developed. Alternatively, communities will be permitted to remain on their farms but will lose their major natural capital asset, their woodland, plains and pastoral commons. In fact, since the food shortage crisis of 2007, the Sudanese Government has led Africa as the largest lessor of its people's lands to national and foreign investors.

f. It may be safely assumed that the failure to change land laws to recognise customary land rights as property interests is directly related to central government reluctance to curtail its current ability to continue issuing leases over these lands to outsiders.

g. In contrast to the north, the Government of Southern Sudan, in a position to enact its own land laws under the terms of the CPA, has made major progress in protecting the customary land rights of its citizens. Alarming shortcomings in legal protection persist in particular regard to how commercial investors may acquire lands, although not nearly to the extent now apparent in the North.

On grounds that much of the state-people conflict over what constitutes just property rights is a common concern throughout Sub Saharan Africa, this paper also looks to remedies being introduced elsewhere (Part III). The results are mixed. On the one hand, land reforms directly relevant to Sudan are widely underway on the continent. On the other hand, this reformism is slow, often partial, and demonstrably easily interfered with by contrary policy forces, such as currently presented to host African governments by international demand for vast tracts of land for commercial purposes. Uncertain rule of law, even where improved protection of customary land rights now exists, compounds local vulnerability, and is reminder that just law is an insufficient condition on its own towards inclusive transformation. Nevertheless, important paradigm and land governance shifts tangibly persevere, and in these following ways are concretely instructive as to steps which post-CPA should have, could have, and must still now direct itself in the land sphere -

a. Shift in *the legal status of customary land rights*, moving towards recognizing these as real property interests which must be upheld even when not formally recorded or evidenced in title deeds; where this has occurred (in upwards of 10 countries so far) this has allowed millions of rural land holders to move from being tenants of the state, or squatters on their own land, into position as lawful owners of those parcels;

b. Changes within the above which clarify that legal customary land ownership applies not just to lands on which farms or houses are present but to the *common properties of each community*, their forest/woodlands, marshlands and rangelands;

c. Introduction of *modified titling regimes* which recognize that while formal registration need not be a prerequisite to recognition of customary land ownership that such certification helps to double-lock tenure security and providing for means whereby this may be accomplished at scale;

d. Legal change as to how compensation is paid when the State compulsorily acquires rural lands in the interests of public purpose. In some cases this includes new constitutional requirement that compensation is paid before eviction takes place. Mostly changes relate to who is compensated, on what basis and through which procedures, all important for increasing majority land rights protection and causing governments to think twice before wilfully removing lands from rural communities;

e. In those cases where there has been a marked sense of grievance as to massive involuntary loss of land by the hand of Governments granting those lands to non-customary owners or investors (such as has been the case in Sudan, Kenya, Namibia, Zimbabwe and South Africa) the opening of the door to restitution and/or compensation for the loss of the value of the land; and

f. Perhaps most important of all given the direct empowerment which such moves engender, steady devolution of land control and administration to more local levels. In best practice cases this enables locally elected village land councils or boards to regulate land holding within a specified territory, and to certify or register holdings (including common holdings, not just farms and houses) in ways upheld by courts.

The review finds that these six interventions among others are critical if Sudan is to meet its obligations under the CPA and the Interim National Constitution. The failure of the National Unity Government to do so thus far is cause for concern. It is strongly recommended that popular consultation accordingly focus not just on technical remedies, but on discussion of how ordinary majority rural populations in the two target areas may better organize themselves to ensure that the State and National Governments better understand their rights and demands.

It is also strongly concluded that much more international support is needed to enable those already willing to act within the Government of Sudan to be able to do so. Improved legal accountability of the CPA to both ordinary citizens and to the international community supporting the peace process is also urgently required, to foster positive actions. The arrangements for popular consultation itself are found to deeply flawed, in lacking legal requirement that the results of consultation are acted upon.

Finally, the paper concludes that the gravity of failing to meet land obligations under the CPA is dangerous to stability. Abuse of customary land rights through legal but unjust means was one trigger to long civil war. The

failure to remove those grievances through sound, fair and actively implemented new land policy and law is provocative in the extreme.

INTRODUCTION

Land provisions were a key element of the January 2005 Peace Agreement signed between representatives of the Khartoum Government (GOS) and the Southern Sudan People's Liberation Army (SPLA), following a 24 year-long civil war. While not ideal, the provisions provided scope for removing the thorn of systematic abuse of local land rights by the Khartoum Administration. Those abuses had played a key role in triggering the war.

This paper is prompted by the legal commitment of the national government to consult with populations in two of three areas which became known during peace negotiations as 'the contested areas'. These are Blue Nile and Southern Kordofan States. They lie in the south of what is now referred to as Northern Sudan, and were the main sites of the civil war. They are therefore outside the southern third of Sudan, which gained through the Peace Agreement the right to self-determination as an independent sovereign state, to be decided by referendum in early 2011. The Peace Agreement treated the third contested area, Abyei, distinctly, and is not covered here.

To provide information useful to those leading consultation, this paper undertakes two tasks in two parts; first, following a background section elaborating the land issue (Part I), it reviews progress made in achieving the land commitments of the Peace Agreement (Part II). Second, it reviews land policy and law changes more widely in the Sub Saharan continent determine if anything may be learned from this (Part III). The paper concludes with recommendations (Part IV). Relevant content from the Peace Agreement are appended, along with several other resources.

PART I
THE HISTORY OF THE LAND ISSUE IN THE TWO CONTESTED AREAS

1 State-people conflict of interest

While there are many aspects of the land issue affecting the two areas, the most urgent cluster around a contested relationship between the State and people in respect of land rights.

'State' refers primarily to the national administration in Khartoum ('Government') and from whence policy and legal conditions derive. 'People' refers to those who have longstanding residence and land-based livelihood in Blue Nile and Southern Kordofan States. Non-local pastoralists who have historically used the two areas for seasonal grazing also have land grievances relating to the decline in grazing area in these two areas. Settled and pastoral populations also contest the ownership and use of these resources among themselves. Even without such factors, population growth and declining per capita land availability, sedentisation and changing land use demands by pastoralists, and the commercialization of pastoralism such as through businessmen acquiring herds managed by pastoralists, place pressure on land resources in central Sudan. Nevertheless, by far the greatest tension and grievances stem from the effects of national land policies since the 1960s.

2 An issue of war, and peace

The Second Civil War[1] began in 1983 between North and South populations and ended with the ceasefire in 2002, and more formally by the Comprehensive Peace Agreement of 9th January, 2005.

Local anger at State appropriation of local lands was a main reason why indigenous Nuba and Funj communities in the two contested areas joined the battle of the Southern People Liberation Army (SPLM) against Khartoum's rule in 1984. For the Nuba, this followed on failure to have their land grievances heard in Khartoum (Komey, 2009, after others). War was prominently waged in these two states, causing more than

[1] A previous conflict having erupted during Independence in 1955, now referred to as the First Civil War.

one million local people to lose their lives. Physically, the two states became quickly divided into areas controlled by the Government of Sudan (GOS) and generally more southerly areas, controlled by the Sudan's Liberation Army (SPLA). These divisions became deep-routed, especially as Khartoum encouraged pastoralists from the north to settle in northern parts of each State and additionally extended its land allocation policies during the war.

Following the war, demands for land restitution centred SPLA led negotiations in the peace process as affecting the two areas. Special attention was given to these demands in the Agreement in the form of *The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States*, signed in Kenya in May 2004. Like other protocols, this became a chapter in the final Comprehensive Peace Agreement. In turn, its commitments were embedded in the *Interim National Constitution of the Republic of Sudan*, 2005.

3 Founding conflict as to what constitutes property

The founding matter at dispute was one which has been common in Sub Saharan Africa: the political and legal usurpation by governments of customary rights to the land enjoyed by rural populations.

The singular feature of these customary (or 'indigenous' or 'autochthonous') regimes is simply that rights to land derive from *community-based* norms, not state decisions or norms handed down. Over time, community based norms gain the attributes of tradition. At the same time, because they stem from a living community, these norms ('customary law') are noticeably flexible and vibrant. What does not change is the authority of the community as to how rights are structured, interpreted and upheld.

The conflict between community and state land regimes is most tangible in contradictory acknowledgement and regulation of land interests in customary and statutory law, although as outlined later, many state land laws now absorb customary law as a legal source of land law.

This evolution has not occurred in Sudan, where the national government has sustained colonial norms in denying that customarily-owned lands amount to property interests, as outlined below. The upshot is that the majority of Sudan's rural land area falls by default to government ownership. Uncultivated or unsettled lands (villages, houses) are most vulnerable. This affects community-owned lands like woodlands, rangelands and marshlands and plains lands, used for shifting cultivation, grazing and extractive wood and non-wood product use. In law these are treated as 'unowned wastelands'.

The result is legal dispossession. Such rights as exist are confined to lawful occupation and use of lands which are deemed to be unowned and therefore national/state assets. In practice these become government lands. Local rights of occupation and use to these lands are themselves only permissively enjoyed; that is, for as long as the government of the day allows them to be exercised. Nor may these users legally sell or control the future of those lands. Depending upon government plans for the lands affected, this legal dispossession may be delivered in physical dispossession – eviction, and loss of livelihood.

Sudanese are not the only Africans to have endured this situation. Subordination of customary land rights was the majority norm during the 20th century in Sub Saharan Africa. Nor did independence always make the difference expected, as later explained. By 1990 colonial and then sustained post-colonial policies after independence turned an estimated 500 million Africans into squatters on their own land (Alden Wily, 2010a).

4 Making dispossession real on the ground

The extent to which ordinary rural communities felt the effects of abusive land law varied greatly around the continent. In Sudan the impact was dramatic and severe, through the 'bread basket' policies of the 1970s which sought to dramatically raise food and related commodity production.

The vehicle was well-meaning *mechanised farming schemes* (Abdelgabar, 1997, Cole & Huntingdon, 1997, Magzoub, 1999, Saeed, 1980, Suliman, 1999). The schemes were launched at scale with mainly Egyptian and Gulf State funding. Although the schemes were designed to include 40-60% local persons as beneficiaries, this fell away within several years. Instead, local communities found that thousands of hectares of their traditionally owned lands were taken by the Khartoum Administration and leased out to wealthy outsiders.

While local Arab tradesmen (*Jellaba*) were early beneficiaries, northern businessmen, officials, politicians and foreign companies from the north, and from Egypt, Palestine and other foreign countries, came to dominate. The majority of the new land owners were absentee landlords. In one scheme alone (Habila in Southern Kordofan) nine of 191 parcels, each between 500-600 acres, were leased by Government to absentee merchants, officials and retired army officers from the north. Local traditional owners were evicted or became hired labour on their own lands.

Darfur, Sennar, Gedaref, Upper Nile and White Nile were also sites for schemes but the most affected were Southern Kordofan and Blue Nile States. Eviction, displacement, dispossession, loss of livelihood and mass out-migration resulted, the latter mainly to Khartoum and South Sudan. By 1990 the Government of Sudan had allocated 5.5 million ha of customarily owned lands in these two States to non-local investors for mechanised farming. Another 10 million hectares were self-acquired by local elites or investors for such developments (FAO, 2006, UNEP, 2007, UNDP, 2008).

5 Issues at dispute

The land dispute of today is played out in three main arenas -

a. between local populations and Khartoum in respect of official treatment of their customary land rights;

b. between elites and ordinary populations as to the former's preferential treatment in accessing leases and cheap tractor and seed loans and occupying local lands; and

c. between local populations and nomadic pastoralists; pastoral access to home northern areas began to be squeezed by creation of the schemes, forcing pastoralists to move southwards earlier and earlier each year. Movement within these areas was also altered through the creation of schemes, diverting their traditional transit corridors into more populated residual Nuba and Funj areas, areas which they had previously avoided. During and after the civil war, sedentisation was directly encouraged by Khartoum to help entrench dominant northern occupancy (El Imam & Egemi, 2004, Magzoub, 1999).

In addition to farming schemes, licensed and unlicensed bush clearing for charcoal production in the two areas added to land losses and pressures upon pastoralist land access as well as local communities.

6 Environmental and economic concerns

Environmental concerns compounded land losses as local communities watched fertile and lightly wooded plains turn into dustbowls as a result of rampant bush clearing and expansive tractor farming (Saeed, 1980, Harragin, 2003, Cole & Huntingdon, 1997). Red sky dust haze continues to cloud the summer horizon in scheme areas in Southern Kordofan (Alden Wily, 2004c). UNEP, UNDP, the World Bank and FAO and ministries in the Government of Sudan itself have since technically reported massive loss of tree and shrub cover, erosion and soil loss, and a continuing decline in soil fertility (GOS, 2005, FAO, 2006, UNEP, 2007, The World Bank, 2010).

Economic concerns have also come to the fore as it is now better recognised that large-scale mechanised sorghum and sesame farming as practised in the two areas has at no time generated local employment. Eviction and land loss has not therefore been offset by employment opportunities. Nor is the per hectare yield significantly greater than the productivity of non-mechanised sorghum and sesame farming. The Government of Sudan acknowledged some time ago an annual decline in productivity of two percent. The World Bank reports that *"Sudan's sorghum yields on semi-mechanised farms are only at 0.5 tons per hectare and stagnant or declining, pointing towards 'soil mining' and a system that is neither sustainable nor economically competitive*" (2010). And yet the Government Sudan is recorded as continuing to support the schemes for the purposes of keeping up food supply (Norfolk, 2008).

7 The dispossession of local populations was legal

It is important to record that out-leasing of local customary property has not been illegal, given the content of national law. The key instruments have been the Mechanised Farming Corporation Act, 1968 and the Unregistered Land Act, 1970 (Annex A). The former laid out procedures for leases. The latter established it as law that untitled lands, whether held by individuals, families or communities, did not amount to real property and thereby fell by default to Government ownership. This law was repealed in 1984 in favour of the Civil Transactions Act (CLA), but which retained key principles (see below).

8 Dispossessory law had international agency support

It also needs to be noted that Sudan has a long history of at times quite successful commercial farming schemes, beginning in the 1940s with the Sorghum Production Schemes in Eastern Sudan. These were devised to supply grain to British troops in East Africa during the Second World War. Privatised estates expanded in the 1950s and in 1968 the Mechanised Farming Commission was established, and became the Mechanised Farming Corporation in 1975.

The establishment of mechanised farming in central Sudan was also well-backed by UN agencies including FAO, UNDP and especially the World Bank and USAID. This was in line with the development orthodoxy of the 1960s-1980s which saw the following as requisite to raising production and wealth in Africa –

a. the abolition of all forms of communal ownership of the land;

b. credit and other policies designed to favour better-off and larger farmers over and above majority poorer peasant farmers, on grounds that the former were more likely to develop and invest in the land;

c. the launching of conversionary land titling, designed to turn customarily-owned family and community lands into individual freehold holdings, freehold considered the ultimate trigger to farm investment;

d. establishment of a free market in land allowing better-off farmers to buy out poorer farmers, intended to both allow for large scale farming and produce a landless proletariat for what was hoped would be urban industrialization; and

e. introduction of mechanised farming at scale.

While UNDP and the World Bank led promotion of the above strategies, the latter in fact withdrew its funding for the mechanised schemes quite early as it became apparent that as well as being excluded, local farmers were being evicted from their farms and community areas (Cole & Huntingdon, 1997). In a bid to make such evictions fully legal, the Government of Sudan enacted the above-mentioned Unregistered Land Act, 1970. Advancement of commercial farming continued to expand, under both official schemes and through informal arrangements, frequently assisted by loans from Islamic banks.

The final tally of lands in Sudan lost to customary holders through commercial farming enterprise is unknown. Nor is the exact number of Sudanese made landless or land poor known. Formal schemes are officially reported today as covering 14 million acres countrywide. FAO, 2006 and UNDP, 2008 consider this a gross under-estimation, respectively putting on record that there could be up to 25-30 to 31 million acres of lands under privately-instituted semi mechanised farming.

9 The failure to overturn colonial property norms

There is little doubt that policies which negatively affect the land rights of ordinary Sudanese today have their origins in British colonialism under the Anglo-Egyptian Condominium of 1899-1955. The mechanisms were similarly experienced by Africans elsewhere on the continent. These in turn usually built upon pre-existing inequities among local ethnicities.

To over simplify, the primary objective of French, German, Portuguese, Belgian and British colonizers was to secure as much land and land-based resources (timber, gum Arabica, minerals, ivory, skins) as possible to service their European home countries (Alden Wily, 2010c). Production and labour was also regulated and

manipulated to this end, especially following the First World War (including delivering specific schemes such as the Gezira Scheme in Sudan and the Groundnut Scheme in Tanganyika).

At the same time, keeping the peace among ethnic groups and "keeping the natives fed and content" were also crucial. For as long as it was considered that there was enough land for all, locally existing access and rights to land were in fact protected – although just as far as it was expedient. It was for example the norm that African lands were initially protected against encroachment by white settlers (or Afro-Americans in the case of Liberia), but that this gave way as more and more land was needed (Tanganyika, Kenya, Malawi, Zimbabwe, Zambia, Senegal, Cameroon, Angola, Cote D'Ivoire, etc.).

Native occupation itself was kept insecure by recognising only settlements and cultivated lands as protected and declaring forests, woodlands, swamplands and other such resources to be ownerless or unownable (Alden Wily, 2010a, 2010b). These were lands which by tradition (and logic) local communities maintained as *collectively-owned* lands, held in undivided shares. As competition for land rose, including for state needs and demands, protection of local rights tended to diminish to a situation wherein only those parcels which were formally registered were held to be 'private property'.

The case of Sudan

Although broadly similar across different colonies and protectorates, local history and conditions (including resistance) actively contributed to the shape of strategies and norms entrenched in land laws. In the case of Sudan, this included British desire to curtail (a) entrenched landlordism and exploitative tenancy in especially Arab communities; (b) associated advanced land hoarding and speculation along the Nile, and (c) continuing slavery and exploitation affecting African populations in the centre and south of The Sudan (Babiker, 1998, Johnson, 2003, Manger, 1994, Salih, 1982, Komey, 2009).

This produced a dual colonial land policy, but one which was additionally internally inconsistent in each its parts. There was recognition and appreciation of the well-developed land market in Arab areas, including permanent housing and settled agriculture, lending itself readily to introduced European land administration norms (first applied in the Gezira Scheme in the 1920s).

The remaining areas were simply deemed to be areas of native settlement and where tribal and village communal ownership was acknowledged as existing. Paternalist protectionism of African occupancy was a dominant objective in the early years.[2] Land acquisition and even migration between the north and south was also legally constrained through 'closed area' ordinances, designed to protect African areas from land taking by northerners. There were also religious drivers in British intent to limit Arabisation of Africans, and especially protect the Nuba in central Sudan who were considered to be one of the most historically exploited set of communities. [3] Although forcibly brought down from the hills for easier control, the Nuba and Arab Baqqara pastoralists were to be kept apart. The *Closed Areas Ordinance 1922* forbade further recruitment of Nuba into the army where they might become Arabised, kept Nuba out of towns in special villages on their periphery, denied Nuba the right to travel to Gezira to get jobs, denied pagan Nuba entry into Muslim schools and encouraged Christian missionaries to the area.

At the same time it was convenient for the British to accept whatever territorial distinctions among tribes appeared to exist, even where these were clearly bitterly contested. Again, the Nuba were a major case in point. While the entire south had endured several centuries of extractive exploitation of resources (gold, ivory, skins, slaves), the physical displacement of the Nuba by arriving Arab pastoralists in the late 18th century was accepted. This had caused Nuba to flee to the hill areas of their territories. Turco-Egyptian rule (1821-1883) consolidated the dominance of the Baqqara, who were entitled to collect taxes and capture Nuba as conscripts for the Turkish Army. Despite obvious Nuba resistance to Arab occupation of their plains, the British accepted Baqqara dominance when defining the native territories of both groups in Kordofan (Johnson, 2003, Manger, 2003, Abdelgabar, 1999, Saeed, 1980). This included relying on local Arab notables to run most of the Nuba

[2] For example, Kitchener promptly proclaimed on arrival in 1899 that no sale of land would be recognised without title as a means of inhibiting speculation and benignly "to safeguard the ignorant and improvident peasant from selling his whole heritage" (Babiker, 1998, citing Hawkesworth in 1935).

[3] The Nuba were seen as 'unclothed and innocent' and a protective 'Nuba Policy' instituted (1920-1940) also designed to limit the spread of 'bastard Arabisation and Islamisation' (Salih 1989, Manger, 1994).

domain in service of its new 'Indirect Rule' strategies of the 1920s. The Nuba were to be protected within this context.

Even without the conflict land claims context, such protection was strictly on colonial government terms. No mechanisms were provided for registering the tribal or village collective tenure which was acknowledged as existing, such as British colonizers had been forced to do in the case of the Gold Coast colony (Ghana) or Southern Nigeria (Alden Wily, 2010c).

In addition, expansive lands under customary land ownership, embracing forests (woodlands), rangelands and areas used for shifting cultivation, were excluded from local level jurisdiction and tenure. Village areas were defined as limited to 3 km from the centre of the settlement. The rest of the land was designated non-village land, falling under the category of un-owned "waste, forests or unoccupied land", deemed the property of the State. This was despite early official awareness "the native is inclined to consider that all land is either within his or some other village's boundaries …" (Babiker, 1998, citing Bell in 1914).

10 Making colonial laws yet more draconian

Following Independence in the mid 1950s, the new Government neither did away with the colonial norms nor upheld their better spirit, such as it was. On the contrary the more dispossessory intentions of colonial legislation were dramatically enhanced. Constraints to land speculation were removed, the idea of wastelands and unowned lands was expanded to embrace *all* unregistered lands, and the nature of African landholding as no more than a permissive right of *occupation and use* of Government property was entrenched.

The above-mentioned Unregistered Land Act, 1970 achieved all this. In 1984 the Civil Transaction Act reinstated protection of customary occupancy and use in respect of lands subject to houses and permanent farms (Resource Annex A). In other ways the 1984 law increased Government's dispossessory powers over unregistered lands. Specifically, it declared that (i) all non-registered land should be considered as if registered in the name of the State; and (ii) that no court or other authority was empowered to hear complaints as concerned land belonging to the State.

This meant that all other land than occupied by huts or clearly cultivated lands - an estimated 2.3 million sq km or 93 percent of the land area of Sudan – was from 1970 legally available to the State to allocate or permanently alienate to whomever it pleased. Any surety of access to pasture animals, expand farming, and cultivate plains, or control water sources, fell away. Regulation also fell into demise during the war years, such as relating to sustaining of stable trek routes for pastoralists into central and southern areas. To change the law understandably became an objective of peace negotiations.

10 The task ahead: popular consultation

Tackling the special problems of much-invaded Southern Kordofan and (Southern) Blue Nile States, where war had raged and land grievances were so severe, fell further and further back on the peace negotiations agenda. This took place from 2002-2004 in Kenya, under the supervision of IGAD (Inter-Governmental Authority on Development), and in which Britain, Norway, America, Kenya, Ethiopia and Uganda were funders and designated international advisers. Up until May 2004, the fate of neighbouring Abyei was tied into the fate of the two other 'contested areas', the three areas sharing a central Sudan location and whose mainly African populations anxiously sought to become part of Southern Sudan. In the event this was to be possible only for the people of Abyei, for whom it was specially agreed that they may determine through referendum to become part of the North or South of Sudan during 2011. A distinct protocol was signed on the same day for Nuba Mountains/Southern Kordofan and Southern Blue Nile. As compromise, the parties finally agreed that these areas would remain in Northern Sudan.

To soften what for many in the two states was a bitter blow of being excluded from the opportunity of being part of Southern Sudan, special conditions under the CPA were laid out for these two areas. One of these was that special land commissions would be set up to address local grievances. Another was that popular consultation in 2009 would determine if implementation of the CPA since 2005 had met local aspirations and without which *"final settlement of the political conflict in that State*" will not occur. Shortcomings identified

through this public process are to be remedied through negotiation between the legislatures of the two States and the National Government. In the event, popular consultation did not take place, now scheduled for 2010.

PART II
THE CPA AND PROGRESS IN MEETING LAND COMMITMENTS

1 The land provisions of the CPA

For reference land provisions of the peace agreement are provided in Resource Annex B. Follow up provisions of the Interim National Constitution of the Republic of Sudan, 2005 (INC) are also provided, along with those embedded in the constitutions of the two States (2006).

The land content in the National Constitution (INC) is entirely drawn from the CPA without elaboration. The INC makes application of the CPA binding upon the Governments – that is, the National Government, the Government of Southern Sudan, and Governments of the composite States. The Constitutions of the two states do not depart from these provisions and in fact fail to reiterate all land provisions therein. They do however bind the States to adhere to the INC and CPA. The most important document is therefore the CPA in that it is the legal document which most fully elaborates commitments. However the INC includes non-land articles of relevance, provided in Annex B.

In summary, the CPA provides for the following in respect of land matters –

1) Sudan will develop policies and strategies to ensure social justice, including ensuring means of livelihood.

2) Private property may not be expropriated by the National Government or State Government for other than public interest and subject to payment of prompt and fair compensation.

3) While regulation of land matters is to be a concurrent competency between the National Government and State Governments, the principle of subsidarity is to be upheld; that is, enabling decision-making to be made at the most local level possible consistent with justice and efficiency.

4) The need to protect each person's human rights and fundamental freedoms is made binding; in international law this includes the right to property.

5) Best-known international practices of sustainable development and specifically inclusive of sustainable utilisation and management of natural resources are to be pursued, and within a transparent and accountable framework.

6) A process is to be established by the two Parties to clarify ownership of land and subterranean natural resources.

7) Laws are to be progressively amended to incorporate customary laws and practices, local heritage and international trends and practices; this represents a commitment to give customary land laws and practice statutory support.

8) The petroleum sector is not to be developed without due attention to the interests of local populations, consultation with those people, and the taking of their views into account. It is specified that this is designed to enable local populations to participate through their respective States in the negotiation of contracts and to ensure they are provided a share in the benefits of those developments. Their rights to land may not be appropriated for petroleum purposes without due consideration of compensation of losses incurred.

9) The special needs of Blue Nile and Southern Kordofan (as well as Abyei, South Sudan and other conflict affected are recognized; such zones will be especially enabled to further development.

10) Both Blue Nile and Southern Kordofan States are to establish Land Commissions to exercise the powers of the National Land Commission at the State level.

11) The most specific power of the two State Land Commissions is to deal with claims to land arising from past injustices. Towards this end the two State Land Commissions are empowered to -

    a. review existing land leases and contracts and assessment of the criteria followed for those allocations, with recommendations of changes as necessary, including restitution of land rights or payment of compensation;

    b. arbitrate between willing contending parties on claims over land who are then bound by the decision of the Commission; and

    c. enforce the law applicable to the locality, or such other law as the parties to arbitration agree, including principles of equity.

12) Should a State Land Commission and the National Land Commission be unable to agree on their respective decisions, the matter is to be referred to the Constitution Court for adjudication.

2 A weak set of land commitments

Considering the importance of land issues to peace, the CPA land provisions are disappointing. For example, one might have expected to see clear statement as to the recognition of customary land rights, not least because it was a principle already being quite widely applied in other African states at the time of negotiations (see later). Given the egregious history of treatment of unregistered rights, payment of compensation before evicting landholders would also have been expected.

Provision only for rights to land, not ownership of the land itself

It will also be observed that that the Parties to the Peace Agreement were unable to agree on the ownership of the land or of mineral and oil resources under the ground.

The Interim National Constitution 2005 did not add this it. It refers only to protection of private property (Article 43) and to rights in land owned by the Government (Article 186 (2)). Definition of what constitutes 'private property' is not stated, a critical omission in the Sudan circumstances.

To discern current land ownership, one must turn to existing legislation. As the 1998 Constitution ceased to be in force as of 2005, its provision that all land is public land (Article 9) cannot be taken as the final word. However the Civil Transaction Act, 1984 which is still in force sustains this position (sections 27, 559); that all land in Sudan is public land, out of which private rights to land may be awarded or acquired. The same law distinguishes between the land and "treasures and minerals under the soil". However it declares these to be the property of the land holder, one fifth of their value payable to the State by way of Zakat or Taxes (s. 556).

The breadth of the mandate of the State Land Commissions is ambiguous

Another unclarity of the CPA concerns the powers of the State Land Commissions in the two areas. As noted above its primary power is to review existing leases with a view to recommending changes (May 2004: Article 9.6). This is a narrow mandate when the plethora of land policy matters affecting land relations is considered. Responsibility for policy change is reserved to the National Land Commission and the Southern Sudan Land Commission (Wealth Sharing Protocol of January, 2004, reiterated in the INC 2005, Article 187 (d)).

There are other constraints affecting these important bodies -

    a. the State Commissions are *review and advisory* bodies only. They may recommend but not enforce their recommendations or decisions. Specifically, in matters related to leases, restitution or payment of compensation, their findings, decisions and recommendations must be registered in a court of law to acquire force;

b. submission of claims to the Land Commission are *voluntary* and arbitrated between two *willing* Parties. No mechanism is provided for bringing those who are unwilling to arbitration. This could stop progress in its tracks;

c. the Commission itself is *not bound to attend* to land claims; it may decide to entertain or not entertain claims itself;

d. no time limit is set by which point the State Land Commissions must be in place and operating, or land claims dealt with; and

e. land matters are made a concurrent competency between the National and State level with unclear delineation as to respective roles and powers in the matter of distinguishing between National and State Lands and resources; this directly affects the customary collectively owned land resources of communities.

The above are obvious loopholes through which inaction or action with limited effect could result.

3 Opportunities for change have existed

Despite the above, other openings through which change could be pursued exist in the Peace Agreement and subsequent constitutional provisions affecting the two states. After all, even if contradictory it was directed that the State Land Commissions were to "*exercise all the powers of the National Land Commission at the State level*". [4] The two states also shared in the national commitment to *"institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices"* (INC, 2005: Article 186 (3)), and which both states embedded in their own State Constitutions.[5] Ominously, it was also recorded that should the Governments fail to do the above, then "*All current laws shall remain in force ..."* (Article 226 (5)), even though it is such laws which lie at the root of land conflict.

Both the CPA and the subsequent Interim National Constitution (INC) also embedded more general commitments to human rights. While conventional pledges to protect private property are handicapped in this instance by Sudan's denial of any than registered entitlements as private property, pledge was made to uphold the terms of several key international conventions, and interpretation of which now encompasses respect for the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources (see Box One).

In principle therefore there were weak but arguably sufficient routes for greatly improving the condition of majority land rights in Sudan, inclusive of the afflicted contested areas. These range from concrete mandates of the two Land Commissions to reassess specific leases and contracts involuntarily overriding local tenure to more strategic changes in the oppressed status of customary land rights in general.

3 Performance of the CPA since 2005

Table 1 summarises implementation of tangible commitments of the CPA. The chapters refer to the individual protocols which together formed the final CPA. Chapter II focuses on power sharing, Chapter II on wealth sharing, specifically inclusive of minerals. Chapter V is the protocol of most direct relevance to the contested areas as the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States, signed on May 26 2004.

[4] Protocol for two areas; May 2004, Article 9.5, and reiterated in the State Constitutions, respectively Article 95 Blue Nile and Article 121 91) (c) South Kordofan Constitution.
[5] Article 120 (3) South Kordofan Constitution and Article 94(3), Blue Nile State Constitution.

TABLE 1: PROGRESS ON LAND COMMITMENTS OF THE CPA

NO	SOURCE WITHIN CPA	PROVISION	PROGRESS JUNE 2010 IN RESPECT OF BLUE NILE & S KORDOFAN STATES
1	Chapter II Art. 1.6.1	To comply with the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, African Charter on Human and People's Rights	No evidence of compliance with key articles in those international laws (see BOX ONE)
2	Chapter II Art. 1.6.1	State will endeavour to ratify other human rights treaties which it has signed (ILO 169, Declaration of Indigenous Rights)	Not undertaken
3	Chapter II Art. 2.10.1.2 & 2.11.3	A Human Rights Commission to be established, to be detailed by the National Constitutional Review Commission	Not established
4	Chapter II Art 2.11.2.1	A Constitutional Court to be established to uphold the INC and State Constitutions and to strike down laws or their provisions which do not comply with these. The Court is also to protect human rights and fundamental freedoms	Not established
5	Cht III Art. 2.1	Process to be established on ownership of land and subterranean resources	Not undertaken
6	Chapter III Art. 2.5	Process to be established to progressively develop and amend the relevant laws to incorporate customary laws & practices, local heritage & international trends and practices	Draft Land Acts produced under USAID assisted Customary Land Security Project but not debated or adopted by either of the two State Governments or legislatures
7	Chapter III Art. 3.1.5	Consult with persons enjoying rights in land and take their views into account in respect of decisions to develop subterranean natural resources, and who shall share in the benefits of that development	No information that this has occurred
8	Chapter III Art. 3.1.7	Enable those communities to participate through states in the negotiation of contracts for development of subterranean resources	No information that this has occurred
9	Chapter V Art. 9	Rights in land owned by the National Government to be exercised through the appropriate or designated level of government	Unclear that the State authorities have received authority to do so or that they in practice do so
10	Chapter V Art. 9.3	State Land Commissions (SLC) to be established	Not established although Draft Land Commission Acts for their establishment devised by USAID-assisted Customary Land Security Project
11	Chapter V Art. 9.5	State Land Commission (SLC) to exercise all powers of the National Land Commission (NLC)	Not applicable as SLC not established
12	Chapter V Art. 9.6	SLC specifically competent to review existing land leases and contracts, examine criteria and recommend changes as necessary, including restitution of land rights or compensation	Not applicable as SLC not established

13	Chapter V Art. 9.7	SLC may exchange information and decisions with NLC	Not applicable as neither NLC nor SLC established
14	Chapter V Art. 9.7	SLC to carry out research in agreement with NLC	Not applicable as SLC not established
15	Chapter V Art. 9.8	SLC to refer conflict in decisions and positions between itself and the NLC to the Constitutional Court	Not applicable as SLC and Constitutional Court not established

BOX ONE
INTERNATIONAL LAW AND CUSTOMARY LAND RIGHTS

Protocols, treaties and declarations under the aegis of international bodies such as the United Nations or regional bodies such as the African Union are referred to as international law. They become enforceable law in a country only when that country adopts their text into their domestic legislation. However even without this, signature of these documents is considered a commitment to the principles expressed in those documents.

Human Rights Law

The **Universal Declaration of Human Rights** (1948) declares that 'Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property' (Article 17).

The **African Charter on Human and Peoples' Rights** (1981) states that - 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws' (Article 14), and:

"All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation" (Article 21).

The **Convention on the Elimination of Racial Discrimination** (1965) defines racial discrimination as including discrimination based on ethnicity (Article 1) and confirms the right to own property alone as well as in association with others (Article 5). The Committee on the Elimination of Racial Discrimination which is in charge of monitoring the implementation of the Convention on the Elimination of Racial Discrimination highlighted in its General Recommendation XXIII that states should "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources", and additionally, urges restitution and/or compensation. The view of the Committee is that the non-recognition of customary land rights would equate to a discriminatory practice on the part of the government.

The **International Covenant on Civil and Political Rights** (1966): "In no case may a people be deprived of its own means of subsistence" (Article 1.2).

The International Labour Organization's Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) outlines the special rights of such peoples regarding activity on their customary lands. More precisely, Article 14 states that "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. … Governments shall take steps as necessary to identify the lands, which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession".

The Declaration on the Rights of Indigenous Peoples (2007) adopts stronger language. Although Sudan is yet to ratify the Declaration and incorporate its content into domestic law, it voted in favour of the adoption of the declaration. The Declaration is by far the most explicit as to indigenous/customary land rights inclusive of those held by tradition collectively such as for woodlands, pastures, wetlands and as lands owned by communities but used by individual members of the community (Articles 8, 26-29, 32). The Declaration states:

"Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" (Article 26).

The **African Commission on Human and Peoples' Rights** is increasingly calling upon states to pay specific attention to the customary land rights of their indigenous/customary landholding populations. This is through the establishment of a

specific working group on indigenous peoples/communities, which has highlighted the importance of recognizing and promoting customary interests. In a recent decision against Kenya, the Commission has stated that government should respect the customary land rights of indigenous communities, and that non-recognition of such customary land rights would be a violation of Article 14 of the African Charter on Human and Peoples (RCMRD & MRG, 2010). This is the first explicit legal decision on customary land rights for indigenous/tribal peoples in Africa.

International Environmental Law

While international environmental law does not deal *per se* with land rights, the Convention on Biological Diversity (CBD) provides binding provisions to protecting the customary use of resources in accordance with traditional cultural practices (Article 10 (c)). The CBD was ratified by Sudan. Since then, there have been nine meetings of the signatory nations (Conferences of the Parties, or COP). Each has delivered multiple decisions. COP7 and COP9 have in particular provided relevant decisions to the tenure situation of majority populations in Blue Nile and Southern Kordofan States as to local rights to natural resources.

These are mirrored in the African Convention on the Conservation of Nature and Natural Resources is directly relevant, whose major objective is "to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour" (preamble) and which is intended "to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge".

4 A grave lack of progress

Clearly there has been almost zero performance on land commitments of the CPA. Precisely what has induced this failure will better emerge through popular consultation. In the meantime, these conditions need noting, not least because they raise questions as to how effective renegotiated agreement to act, arising out of popular consultation, is itself likely to be –

a. An absence of technical or legal assistance within the two States cannot be attributed as the main cause, as this was in fact provided during the period 2005-2008 and such support also provided by local and international sources to the national Government of Sudan;

b. Although poorly structured, the CPA provisions were sufficient to allow action, as evidenced in Southern Sudan taking significant steps to remove oppressive treatment of citizens' land rights in the same Interim Period; and

c. That instead of reining in or dealing with existing claims against State allocation of local lands for commercial farm investment, this trend has continued and expanded during the Interim Period.

Each is elaborated below.

4.1 Technical and Legal Assistance in the two States was provided

Technical and legal assistance was most specifically given to the two States under the aegis of a USDA natural resources project and then USAID-funded programme, namely a Customary Land Security Project (CLSP). During the peace negotiations, the former project reviewed the land issues in the two areas (Harragin, 2003) and on its behalf, this author recommended strategic, legal and programme measures needed to launch protection of majority land rights in those zones (Alden Wily, 2004a, 2004b).

A pilot programme was immediately implemented from October 2004 until end 2005. Due to persisting militarisation and borders between what had become GOS and SPLM/A zones during the war, assistance was in practice limited during this period to the SPLA/M zones of both states. The programme's field objectives were ambitious but structured fully around the obligations of the CPA. The project aimed to work systematically with rural communities to better understand their land grievances, and to assist them to –

a. Delimit their respective community land areas; through facilitated and monitored walking and recording of agreed boundaries, followed up by formal mapping and then certification at County level;

b. Bring all land matters in the area under their own control; through assisted creation of elected community land committees, mandated to undertake practical land use planning, regulation of new clearing, and recordation of existing rights;
c. Ensure that permanently settled pastoralists within their respective areas were included in inter-village negotiations and definition of different sets of rights within the community land areas;
d. Clarify the rights of those pastoralists who had been assisted by Government during the war to settle permanently in their areas;
e. Fairly assess and negotiate requests from non-local northern nomads to pass through or use community pasture areas, with preferential treatment for those groups which had long established use rights in the past; and
f. Document exactly which parts of respective community domains were wrongfully subject to non-local occupation and use as a result of government instituted or privately instituted mechanised schemes and settlements since 1968, and assist them to make submissions to State Land Commissions (Alden Wily, 2004c).

While financial assistance was limited and logistics hampered by sustained militarised divisions between GOS and SPLM controlled areas, significant progress was made, particularly in Southern Blue Nile (Alden Wily, 2005a). Guidelines on procedures were fully tested and widely applied by field teams (Alden Wily, 2005b). Local response and participation was exceptionally high among settled Nuba and Funj, but the groups of settled nomads in Southern Kordofan areas proved difficult to access. Communication with northern pastoralists pressing to re-enter Southern Blue Nile were however positive. Plans were made to expand the programme, duly put in place from 2006 and operating until 2009 as a formal component of US aid to Northern Sudan.

In the meantime, administrations in both States were given substantial legal assistance to establish workable and fair land principles in their Constitutions, an example of which is provided in Annex B. On the advice of central government, these suggestions were rejected by both State legislatures, both heavily dominated by northern National Congress Party representatives. As noted above, the result is State Constitutions which do not even fully reflect the provisions of the Interim National Constitution, let alone provide due elaboration from a state-based perspective or constitutional ground rules in matters of land administration (Annex B).

Legal support was also given towards the establishment of the State Land Commissions and land legislation to guide land tenure and administration in the two areas.[6] As the project's legal adviser reminded the state administrators, *"it is a matter of law under the CPA that the two States should develop their own Land Commissions and land laws*" (McAuslan, 2005). And yet no headway was made in this area either. Until the present neither the Land Commissions nor appropriate state land legislation is in place.[7]

Lack of national political will to address land grievances

Although USAID has not published its programme reports for the period 2006-2009 the project is known to have suffered from financial, logistical and personnel constraints. However these pale alongside the conflicted political conditions in both States in hindering progress. Frustration led to outbreaks of violence between groups which had migrated from the north into Southern Kordofan and Nuba communities, as recorded in UN, IRIN and International Crisis Group reports. Unconfirmed reports of militias being established by armed groups of disaffected young Nuba began to be reported as early as 2007.

Tensions between SPLM and NCP representatives in the State Governments and Legislatures have also allegedly grown. IFAD-backed proposals to re-launch mechanised farming schemes in Southern Kordofan have not been helpful, even though IFAD protested that it would focus on local farmers as participants. According to an informant, the NCP-backed Governor in 2009 complained of being heavily pressured by Khartoum 'to give land away' while the senior SPLM representative was as actively pressured by local populations 'to get the land back'. Neither felt they had control of the land agenda in the State. Eventually, in early 2010 they summoned a

[6] This comprised a draft Bill for a Land Commission Act 2006, a draft Bill for a Land Act 2006 and a draft Bill for Grants of Land Act 2006.
[7] Land legislation as listed in the footnote above was originally drafted in October 2005, redrafted in January and February 2006.

'council of the wise' which agreed to form a committee to pursue the establishment of the long-awaited Land Commission in Southern Kordofan, but further development around which is vague.[8]

The difficulties being experienced in the two States are integral to major shortfalls in the land sphere at the national level. As the lead international agency in providing and channelling support to the new unity government, FAO held a series of workshops with officials and politicians between 2004 and 2007 on the subject (De Wit, 2004, De Wit et al., 2009). Direct assistance was given the Joint National Transitional Team (JNTT) towards getting the National Land Commission in place. This resulted in a consolidated draft law for its establishment, but then rejected at higher levels in the Khartoum Administration. A modified draft prepared by the National Constitutional Review Committee (NCRC) in August 2006 was also not approved by the Council of Ministers. A high level workshop followed in January 2007. Several competing official drafts and associated concept notes were presented, illustrated the lack of unity of purpose or strategy within the so-called Unity Government (Norfolk, 2008). The only point of agreement was that 'new policies and laws are urgently required' (De Wit et al., 2009).

4.2 Southern Sudan has managed to take action in the same Interim Period

Despite weaknesses in the CPA land provisions observed above, Southern Sudan has made progress in meeting its obligations.

Action in the south was in fact prompt. The Southern Sudanese Government (GOSS) did not ignore the opportunity available in drafting state constitutions. The Interim Constitution of Southern Sudan elaborated the general statement of the CPA as to customary rights by explicitly stating that –

> 180 (4) 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.
>
> 180 (5) Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking into account the need to protect agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law (Extracts from Interim Constitution of Southern Sudan, 2005).

Southern Sudan also moved quickly to institute the Southern Sudan Land Commission, looking directly to parliament rather than a new law to put this in place. The first task the Commission set itself was to develop a new land law for the South, assisted by the Ministry of Legal Affairs and Constitutional Development. This was enacted as The Land Act in January 2009.

The law directly addresses the same concerns affecting populations in Southern Kordofan and Blue Nile. In fact it appears to have borrowed significantly from the draft bills prepared in 2005-2006 under the aegis of the Customary Land Security Project in the two contested areas, as well as upon new land legislation in Uganda (1998) and Tanzania (1999).

In substance, the new Land Act for Southern Sudan represents best practice in a large number of respects. For example, it acknowledges customary rights are real property rights, pledges to uphold these even if not registered and explicitly includes the holding of land collectively, as one mode of recognised property interest. These matters are explored further in Part III. Because of its pertinence to circumstances in Southern Kordofan and Blue Nile States, key provisions are listed in Box Two.

Limitations

As most such new land laws find necessary, the new legislation depends upon the establishment of fully devolved land administration to be operational or actively applied. There is yet no formal development of the community or county land institutions needed, and almost as little development in the ten Governments within Southern Sudan, some of which are barely instituted. This lack of institutional foundation is major

[8] Information at May 2010 from an informant who wishes to remain anonymous.

impediment to the realisation of rights. It may be fairly safely presumed that a minority of Southern Sudanese are even aware of their land rights under the new law, let alone able to access procedures to secure or defend these.

In addition, for all its strengths, the Southern Sudan Land Act reserves to Government the right to zone and declare areas available to commercial investment including medium to long lease of those lands. It does not condition this upon free, prior and informed consent by affected customary land owners. By the law, investments are to reflect community interests and contribute economically and socially to its development (Section 63). Citizen or non-citizen investors may identify the lands they seek and concerned Ministries are then bound to consult with the Community concerned and 'the view of the Community shall duly be taken into consideration' (Section 63 (3)). More positively, compensation for loss of land or rights is due, including for the value of the land and no transfer of ownership or rights over the land is to be made until the type, amount, method and timing of payment has been agreed with those affected (Section 75). However, without popular awareness of rights and opportunities or procedures to entrench well-thought through and pursued inclusive consultation and assessment, it will be all too easy for investors or their advocates within government to ride roughshod over local rights. The law also allows Traditional Authorities to directly recommend to higher level land bodies (Payam, County and State) that a local or foreign person or company be granted a leasehold for a specified portion of the community land area of 250 acres or less. The lease may be granted for a period up to 99 years.

In this regard it is understood that very large areas of land within Southern Sudan have already been identified for attracting substantial foreign investment, although no public information on leases has been made available. Without democratically formed Payam Land Councils in place, it is difficult to be assured that due diligence in consultation with communities is taking place.

BOX TWO
PROVISIONS OF THE SOUTHERN SUDAN LAND ACT, 2009
OF DIRECT RELEVANCE TO LAND MATTERS IN SOUTHERN KORDOFAN & BLUE NILE STATES IN NORTHERN SUDAN

The law provides for the following -

1. Establishes that land may be acquired, held and transacted through customary, freehold and leasehold systems (s. 7 (2)).

2. Rights in land under customary tenure shall be assured security of occupancy irrespective of whether or not their interest is held individually or in association with others (s. 8 (3)).

3. Customary land rights including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through statutory allocation, registration or transaction (s. 8 (6)).

4. All land in Southern Sudan is classified as public, community or private land (s. 9).

5. Public land is owned collectively by all the people of Southern Sudan and held in trust by the appropriate level of government (s. 10 (1)). Inter alia, public land includes land for which no customary or other ownership may be established (s. 10 (i)) and all forest and wildlife areas which are formally gazetted as national reserves or parks (s. 10 (g)).

6. Community land shall be held by communities identified on the basis of ethnicity, residence or interest, and includes any land declared to be community land by law, and land lawfully held, managed or used by specific communities as community forests, cultivation, grazing areas, shrines or any other purposes recognised by law (s.11).

7. Private land is any registered land held under freehold or leasehold tenure (s. 12).

8. Foreigners may acquire leaseholds (s.14).

9. Traditional Authorities may allocate customary land rights for residential, agricultural, forestry and grazing purpose (s. 15 (1)). This is to be based upon consultation with other members of the community, and prior to allocation, the

Traditional Authority will notify the County Land Authority or the Payam Land Council (s. 15 (2) & (3)).[9] Allocations of more than 250 *feddan* (acres) must be approved by the State Minister (s. 15 (5)).

10. A customary allocation is for the natural life of the person, and may be inherited, but cannot be alienated (s. 15 (8)).

11. Derivative rights refer to leases, sub-leases, usufructs, and easements, and confer a right of occupancy or use (s. 17).

12. Subject to community consensus a Traditional Authority may recommend a grant of lease to a person, company, whether national or foreign (s. 27 (1) if less than 250 *feddans* in consultation with the Payam and County Land Authority (s. 27 (2)). The State Ministry must approve leases of larger than 250 *feddans* (s. 27 (3)).

13. Usufructary rights may also be granted, lasting for the lifetime of the allottee, and endowing all rights to the land (s. 31-33). The law enables the recognised usufructary to enjoy the right personally, lease it out, sharecrop the land, or assign the right to the land for valuable consideration (payment) or gratuitously (at no cost) to another (s. 33 (5)).

14. Sharecropping agreements may not exceed three years duration (s. 33 (6)).

15. Usufruct rights may be contracted in written or oral form (s. 32).

16. Evidence of ownership and derivative rights to land may be proven by a prima facie legal title or by any other practice recognised by communities, in conformity with equity, ethnics and public order (s. 39).

17. Prior to any land decision whether in urban or rural areas, the land administration must consult with communities concerned (s. 41 (3)).

18. Land Administration is to be conducted by the Government of Southern Sudan, State Governments, County Land Authorities and Payam Land Councils (s. 41).

19. The Payam Councils comprise the Payam Administrator as Chair, the Executive Chief of each Boma with the Payam, a representative of Farmers and Herders Association, a representative of civil society, and a woman, and other members as deemed appropriate. All shall be nominated by the concerned Ministry of the State, after consultation with the Traditional Authority concerned (s. 49).

20. The functions of the Payam Council are to allocate land, support the registration and transfer of interests in land, protect customary land rights, assist Traditional Authorities and Leaders in the management of the community's lands, protect communal grazing land, forest, wetlands and water resources, and arbitrate and mediate land disputes and issues (s. 50).

21. Collectively owned land as well as individually owned land may be registered and certificate of title issued if requested by the registered owner (s. 53 & 57).

22. Upon demarcation, the title relating to community land shall be endorsed by the registration office (s. 58). Community land may be registered in the name of a community, a clan, or family, a community association or a traditional leader as trustee, with the consent of the community (s. 58). Individual members may request individual registration after the plot has been partitioned from the relevant community land, on the basis of custom (s. 58 (3 & 4)). Registration has the effect of vesting ownership in the registered holder (s. 60).

23. Any citizen or non-citizen may access land in Southern Sudan for investment purposes, so long as the proposed activity reflects an important interest for the community or people living in the locality, and will contribute economically or socially to the their development (s. 61 & 63). Before awarding access the Concerned Ministries will consult with the communities, and the views of which shall be duly taken into consideration (s. 63). Compensation to those affected is required (s. 64).

24. Pastoral lands are to be delineated and protected, and approaches to water points not restricted or other developments undertaken which prevent or restrict traditional grazing rights (s. 66 & 67).

25. Government may expropriate land for public purposes subject to agreement and compensation (s. 73). Compensation shall be just, and take into account the purpose for which the land is being utilised, the market value of the land and the value of investments which have been made in the land (s. 75). No transfer of ownership or rights shall be made until the type, amount, method, and timing of the payment of compensation has been agreed upon with those affected (s. 75 (5)).

[9] Payam is equivalent to a ward, smaller in population and area to a county but comprising several villages.

26. Public interest is defined as including (but not limited to) uses for government or for public use, sanitary developments, urban development, social housing, resettlement and reintegration, land required for ports, airstrips, defence purposes, railways, roads, public works and any other activity with a public purpose (s. 73 (5)).

27. A person is entitled to restitution of a right in land if he or she lost the right after an involuntary displacement as a result of civil war as starting from May 16, 1983 (s. 78). Any claims must be submitted within 3 years of the enactment (i.e. before January 2012).

28. Traditional procedures and customary law and practices are legally recognized as a means of dealing with restitution claims (s. 79). Claims may also be filed with the Southern Sudan Land Commission or its branch offices in the States (s. 79 (3)). The Commission will apply the law of the locality (s. 79 (8)). Where the land cannot be restored to the owner, then compensation in cash or kind or both may be granted (s. 80).

29. Anyone who in good faith occupied a land belonging to another person or group of persons may not be deprived of this right without compensation (s. 82). Any person who lawfully occupies a piece of land for 30 years without interruption in an urban area from May 16, 1983, shall be granted legal title or rights thereon (s. 82 (4)). An unlawful occupant is a person without a customary or legal title or without the express consent of the owner (s. 84). This person may be evicted by a court order (s. 84 (4)).

30. In resolving land disputes, priority shall be given to processes and mechanisms that fall outside the government judicial process and traditional dispute resolution mechanisms (s. 91 (1)). Customary law is to apply to dispute resolution (s. 91 (2)). Parties to a dispute may apply for arbitration to the County Land Authority (s. 94). There shall also be a Land Division in the High Court in every State consisting of a Judge and two assessors (s. 99). Parties to a conflict may petition the High Court to resolve the issue (s. 99 (4)).

4.3 Land leasing to outsiders has continued

'Outsiders' is used here to refer to any Sudanese or non-Sudanese who does not have customary land interests in the area.

As background, globally, and especially in Africa, there has been a new and intense wave of State allocations of local customarily held lands to outsiders. The research of GRAIN, FAO, the International Institute for the Environment and Development (IIED), the German international aid agency (GTZ), the International Land Coalition (ILC) and the World Bank are consistent sources of information on this 'global land grab'. [10] This is so named as it once again affects mainly poor agrarian economies wherein millions depend on land for their livelihood. That it represents a surge cannot be denied given that large allocations of developing country lands to investors is occurring at ten times the rate recorded in 2004 (World Bank, 2010). This has most immediate origins in a slump in global grain stocks in 2007 and sharp rises in food prices, prefaced several years earlier by a sharp rise in land acquisitions for commercial biofuel production.

Although oil palm expansion is most advanced in Asian states (and Indonesia and Malaysia in particular), in terms of both inter-state backing large scale leasing and the actual areas of land being leased for food or biofuel production, Sub Saharan Africa leads the way. Eighteen African Governments acknowledge leasing large tracts of land amounting to around 20 million ha over the last three years (Alden Wily, 2010a). Media sources suggest a similar area again is under application or negotiation. African Governments directly welcome bountiful international investor interest; many have recently enacted investment promotion laws facilitating foreign land acquisition.[11] Numbers of bilateral investment treaties between governments have also been signed, bringing such leases under the ambit of international trade law, an important protection for investors.

As this author observed in early 2010, among the mass of critical concern generated by this trend in the international media and international aid community, it has taken some time for one of the more fundamental

[10] Useful sites are http://www.grain.org/landgrab/ and http://www.landcoalition.org/program/cpl_index/html

[11] Refer the following for press cuttings and reports on land leasing in Africa - http://www.oxfam.org.uk/resources/learning/landrights/downloads/select_bibliog_reports_biofuels_africanlandrights_global_land_grabbing_at_010310.pdf
http://www.oxfam.org.uk/resources/learning/landrights/downloads/select_bibliog_presscutts_biofuels_africanlandrights_global_land_grabbing_at_010310.pdf

issues to be addressed; the simple fact that much of the land being leased out by governments is dubiously theirs to give away (Alden Wily, 2010a).

For the most part, lands being leased to both local and international investors are legally defined as public lands (or variously named state, national or government lands) and over which national governments do indeed hold legal jurisdiction. At the same time, these are lands which are already firmly owned by local families and especially communities under customary land law norms. As closely examined in Alden Wily, 2010b, by far the greater proportion of estates being leased by national governments (and sometimes for terms extending to 99 years, affecting four generations of local customary owners) encompass customary holdings which are by traditional owned and used on a collective basis; that is, unfarmed woodlands, rangelands, marshlands and pastures. This is not surprising, as it is these lands which offer most intact areas at scale for out-leasing, because as unfarmed lands governments feel on surer footing in claiming these as their property. Governments also sensibly prefer to avoid disturbing existing settlements and farms as far as possible, even though these same lands are also untitled.

In these circumstances it is also unsurprising that countries where least legal protection is given to untitled, customary properties and especially those which are unfarmed lands, are those where out-leasing at scale is most advanced; Sudan, DRC, Madagascar, Ethiopia, Liberia, Mozambique, Zambia and Mali. This excludes the suspected but entirely undocumented alleged land leasing at scale in central African countries, where issue of concessions over customary land areas for mining and timber extraction already reach astounding dimensions (Alden Wily, 2010c).

Needless to say, there are also signs in all the above-mentioned countries of rising local conflict and resistance as local populations are confronted with the loss of local communal assets (GTZ, 2009, Schoneveld et al., 2010, Tamrat, 2010, FIAN, 2010, Milimo et al, 2010, Mpoyi, 2010).

Sudan leads the land rush in Africa

Government out-leasing to private and often large-scale enterprise is of course far from new in Sudan, begun (with dire consequences) in the late 1960s as shown earlier. This continued throughout the war, and saw a noticeable rise in land leasing to Middle Eastern states in 2003, along with issue of oil concessions to Chinese and other enterprise, following the formal cessation of hostilities. The Middle Eastern leases are particularly noticeable for their scale and for the fact that Middle Eastern countries have food production and water objectives, these countries aiming to conserve their own scarce water resources by food and livestock production at scale in Africa.

Globally, and on the African stage, the Government of Sudan in Khartoum in by far and away the largest out-leaser of its citizens' land. Confirmed large scale leases since 2007 recorded by the World Bank add up to 3.965 million ha (9.8 million *feddan* or acres). These new allocations are in addition to the estimated >12.5 million hectares (31 million acres or *feddan*) already under private or Government commercial lease before 2005, often to absentee lessees living outside the area or even outside the country. Most of the confirmed recent leases are to domestic investors (78%) although often backed by foreign banks or agencies.

The area of land under new leases is unlikely to reflect the true scale and nature of current land leasing. Knowledge of exactly how much land is also being leased by the Southern Sudan Government is also scarce.
As elsewhere international agencies and monitoring groups have been frustrated by the absence of public notification of leases or contracts. Obtaining facts is further complicated by institutional overlap in leasing procedures, involving Ministries of Finance, Investment and Agriculture. Even the term of permissible leases can be contradictory, leases which have been made for 99 years defeating the terms of the Land Use Act, 1997 and contravening Ministry of Agriculture rules that leases proceed on the basis of an initial three year lease, followed by leases of seven, 20 and 30 years (Norfolk, 2008). Different rules seem to apply for different applicants.

Overlap between national and State administrations also appears to be problematic. This came up in a meeting of some 600 officials, politicians, traditional authorities and ordinary farmers in Blue Nile State in May 2010 (Notes on Meeting provided by USIP, May 24, 2010). Called to discuss subjects for popular consultation around the CPA, land came to the head of the agenda. Widespread fury was expressed at the continuing allocation of

lands in the State to private persons and foreign investors. State officials acknowledged a hand in this but claimed to be instructed by Khartoum; until 2005 they had had no control at all over allocations, and complained that Khartoum had by that point given out more land in the State than was available. One participant observed that as a result his community had been left 'with a ditch, some palm trees and land taxes'. An official acknowledged that 62 leases in Blue Nile State were recorded, most of 10,000 feddan (acres) or more. Three especially large leases were cited; one to a Middle Eastern company (200,000 acres), another to a Sudan/Egyptian company (160,000 acres), and a third to a certain Sheikh Mustafa (250,000 acres). Development of these lands had not begun. It is unclear from the record of the meeting provided when these leases were issued or affecting the lands of precisely which communities. What was clear from the meeting was overriding consensus that ordinary communities must be permitted to regain control over their local land areas, and that 'past allocations should all be cancelled'.

5 Findings

In summary, it is apparent that since the signing of the CPA no progress has been made to remove the conditions by which people's lands may be lawfully but detrimentally taken from them. Or, to use the words of the CPA, relevant laws have been neither developed nor amended '*to incorporate customary laws and practices, local heritage and international trends and practices*".

Nor has progress been made in tackling the many *existing* cases of contested allocation of local lands to non-customary persons or agencies. Not even the most basic requisite step, formation of the two State Land Commissions, has been implemented. And yet, more allocations of people's lands are clearly being made. The fact that this comes on the back of agreed commitments to remedy past grievances around land losses through precisely the same out-leasing of customary property suggests an astonishing invitation to challenge and conflict.

Local populations have not been consulted on these developments nor been party to other inclusive democratic decision-making on the use and future of local lands. At the same time, state agencies are confronting a very different population from those of pre-war years. War is a significantly politicising event in itself. In circumstances where wrongful if legal loss of lands was so central to participation in the North South war in the contested areas, these populations came out war with land concerns very much of their minds. One of the more common observations in project reports in the early Customary Land Security Project was how strongly even the poorest and remotest villages felt about land issues, and the importance of the project's role in providing them with a fair and simple process to clarify both internal tensions as to land rights and how to practically and non-violently move forward to re-establish their rights (Alden Wily, 2005a). Frustrations in seeing real change advance in State policy and legislation and programmatic support, may be fairly safely speculated as a likely factor in the steady rise of land-related conflicts in the contested areas over the 2006 to 2009 period (IRIN, 2008, Norfolk, 2008, Pantuliano et al., 2008, UNEP, 2007, Sorbo & Strand, 2007).

It is therefore difficult to not draw the conclusion that the land issue is being dangerously ignored and mishandled in the contested areas as in northern Sudan as a whole. This directly contradicts the spirit and terms of the CPA. The very driver to past land-related conflict and war - wrongful if legal taking of ordinary poor people's lands – is being re-instituted. Stability in the two areas – among others - could be at grave risk.

5.1 Doubts as to the procedure for popular consultation

A further circumstance adds to concerns. The way in which provisions for popular consultation have been drafted in the CPA make it doubtful that real change through this avenue will occur. This is because, despite proclamation that popular consultation is a democratic right and mechanism to ascertain the view of the people of the two states (See Resource B: Popular Consultation), the State Commissions to be set up to assess the performance of the CPA are not firmly bound to base this upon popular consultation other than through people's representatives in the legislature. Second, the role of a third national Commission in their respect is unclear. It is this Commission which will use reports "to rectify any procedure ... to ensure faithful implementation of the Agreement". However, to do so, the State Governments must negotiate with the National Government.

This so-called 'popular consultation' was to be undertaken by 9th July 2009. This did not occur and instead was scheduled for mid 2010, now possibly late 2010. It is unclear that any or all of the three Commissions have been established. In the interim, State officials in Blue Nile and Southern Kordofan have identified five main issues to be subject to consultation; power sharing, wealth sharing and natural resources, local security, land and cultural/religious issues. Even should genuine public consultation in due course proceed, the extent to which the highly State Legislatures will be able to reach agreement as to precise rectification is uncertain, given how closely aligned its representatives are to the respective agendas of the SPLA and the majority National Congress Party. Even should they be able to do so, a question mark also hangs over the scope for real rectification, in light of dependence upon Khartoum's support for this.

PART III
IS THERE ANYTHING TO LEARN FROM THE REST OF AFRICA ON LAND MATTERS?

1 Relevance

There are many reasons why it is useful to look beyond Sudan to compare experiences affecting majority rural populations and their right to land. Rural Sudanese share with other Africans dependence upon the land for livelihood, a common set of land use regimes, a common set of land tenure regimes arising out of community-based and sustained norms ('customary land tenure'), and a common set of land holding patterns within these wherein houses and farms are generally owned on an individual or family basis, whilst larger common use resources like forests, woodlands, marshlands and rangelands are retained as the collective property of individual communities (Alden Wily, 2010b).

Rural Sudanese have also endured a similar colonial history to all but one or two African nations. This is important because most of the ideas and policies which underwrite modern land law derive from European norms introduced by colonizers, as touched upon below.

Sudan also shares the woeful failure of *post-colonial* Administrations to rid themselves of the colonial land yoke. Contrary to popular orthodoxy, not only were colonial land laws and policies retained well beyond an anticipated transition period, key dispossessory policies were quite widely enhanced from the 1960s (Alden Wily, 2010a). In this context, Sudan's Unregistered Land Act, 1970 is not so unique in its suppressive effects on majority rural land rights. Comparable measures were instituted in Malawi, Zambia, Mauritania, Somalia, Burundi, Liberia, Cameroon, Tanzania, Nigeria, Benin, Burkina Faso, Senegal and DRC during the same early post-independence decades. By 1990 over half of Africa's states, not just Sudan, had, for example, enacted new land laws which vested *all* unregistered land directly in the State (*ibid*).

Other suppressive paradigms were nested in this condition such as that only formally registered lands were considered to be real property. As a result unregistered properties have not been compensation when appropriated for public purposes, usually only the value of standing houses or crops covered. Registration itself was largely focused upon the individual or (male) household head, rendering women and dependents legally landless. Pastoralists and hunter-gatherers accessing land often as customarily seasonal rather than primary right holders, have also found their interests legally un-provided for.

It has also been common on the continent for only developed land to be eligible for recognition as registrable estates, such as demonstrated in houses and cleared and cultivated farms. Even this acknowledgement could be acquired only through procedures which extinguished customary incidents of tenure in favour of freehold, leasehold or other imported norms. From several directions therefore, the millions of hectares in each country purposively retained by rural communities as shared woodland, pasture, and marshlands were commonly deemed to be ownerless and even 'wastelands'. As such in country after country, with notable exceptions (e.g. Liberia between 1929 and 1956 and Botswana since 1968) these lands fell by default to state tenure and control.

Sudan has also shared with many other African countries a long 20th century history of centralising control over land holding to ever more unaccountable and remote offices from landholders (Alden Wily, 2003). This steady trend through the 20th century dispossessed rural communities of the authority needed to protect and sustain their resources and land holding patterns. It also subjected their landholding to external, erratic,

unaccountable and frequently unjust decision-making. In the failure of these centralised regimes to reach effectively to the periphery, contradictory customary norms have nevertheless by default been sustained, although seriously undermined by the lack of legal support for their operation. Finally, there has been common failure beyond Sudan to limit the emergence of quite startling polarisation in land holding, the advent of land hoarding and speculation by elites, and the existence of substantial tracts of entirely idle lands in situations of growing rural landlessness (Alden Wily, 2010a).

2 Instructive land reforms since 1990

Africa outside Sudan is yet more important for the changes to the above paradigms which have been occurring since 1990. As a country at war until 2002, this reformism has by-passed Sudan, although openings in these directions were provided in the single directive of the CPA that laws be amended to take more account of customary norms. Although African land reform has reflections in Asia and especially Latin America, continental triggers have most specifically been the rising tide socio-political democratization since 1990 along with pressure to open the land market to local and foreign investors, not least as demanded by structural adjustment policies imposed on African Governments.

Some of the changes being wrought are sufficiently fundamental to be embedded in new National Constitutions, themselves a reflection of the transitions afoot on the sub-continent. No fewer than 30 new Constitutions have been promulgated in Sub Saharan Africa since 1990. The Constitutions of Uganda (1995) and South Africa (1996) were especially catalytic in laying down new land rights paradigms. Most recently, Kenya's new National Constitution 2010 provides for an entirely new class of land, Community Land, to encompass and protect customary ownership rights existing in the two thirds of the country area where compulsory conversionary titling into individualised freehold tenure regime begun in the 1960s did not reach.

Changes in rural land rights are also occurring through shifts in how natural resources like forests and wetlands are owned and managed. ITTO & RRI, 2009 have shown how there has been a gradual, but steady movement since 1990 away from Government or State ownership of forests towards private ownership of plantations and community ownership of natural forests and woodlands. The latter increased by 22% between 2002 and 2008. In Africa, most community gains in forest ownership have been made in four countries; Tanzania, The Gambia, Mozambique, and South Africa. In Tanzania for example, communities have primary rights today over 17 million ha of forests/woodlands under the aegis of acknowledge village lands. Since 1995, they have themselves set aside 2.4 million ha as formally protected Village Land Forest Reserves, a construct now formally provided for in new 2002 forest legislation (Alden Wily, 2010b). This represents a level of asset sharing which is impossible to conceive of in countries where un-cultivated and collectively held lands are not deemed to be ownable by entities other than the State. It goes hand in hand with land tenure reforms affected by new land laws in 1999.

Decentralisation of governance regimes is also playing a major role in gradually heightening the security of tenure of millions of rural Africans, especially where this is linked to localisation of control over natural resources, most clearly seen in Francophone West African states like Mali, Niger, Burkina Faso and Benin. The notion of 'community land areas' and the need to delimit these, well advanced in Tanzania from the 1970s, is becoming a key operational mode in a slowly gathering number of other states, including Angola, Mozambique, Liberia, Uganda and Malawi.

While enactment of new law does not necessarily mean prompt application or uptake, or even widespread public awareness of shifts in the legal status of rights, it is both a measure of changes being affected and a necessary platform to build upon. It is notable therefore that no fewer than 30 of Africa's 56 island and mainland states have new land legislation enacted or in draft. Mozambicans and Tanzanians among others have recently been able to draw on their land legislation in instances where their governments appear to show signs of reneging on new pro-majority poor land policies (Alden Wily, 2010a).

The extent and ease of reform should not be exaggerated. Changes have occurred far from smoothly. For example, Ghana, Zambia, Lesotho and Malawi all launched new policies in the 1990s but have failed to entrench these in new laws. Creation of investigatory and policy-making commissions has taken time, although unlike Sudan, these have eventually been instituted within several years and currently operate in Liberia, Sierra Leone, Gambia, Nigeria, Mauritania, Senegal and Somaliland. Each is developing new national land

policies, with intentions to place their recommendations before national referenda or mass public consultation. In contrast, some countries like Uganda and South Africa which adopted changes quickly have been forced back to the drawing board to make newly enacted land laws more workable. Still, there are other countries where progress has been steady; in different ways this is the case in Ethiopia, Tanzania, Madagascar, Mozambique, Benin, Burkina Faso, Niger and Rwanda. Table 2 overviews where countries stand in their commitment to reform land tenure and land administration.

TABLE 2: STATUS OF PROGRESS ON COMMITMENT TO LAND REFORMS

ADVANCED IMPLEMENTATION OF REFORMS	LEGAL CHANGE & PLANNING WELL UNDERWAY	NEW NATIONAL LAND POLICIES &/OR COMMISSIONS OPERATING	BEGAN BUT HALTED, OR HAS MADE PROMISES ONLY OR PARTIAL COMMITMENTS TO CHANGES AFFECTING MAJORITY CITIZEN LAND INTERESTS
Tanzania	Angola	Nigeria	Eritrea
Mozambique	Burkina Faso	Ghana	Swaziland
Uganda	Guinea Bissau	Liberia	DRC
South Africa	Southern Sudan	Sierra Leone	Chad
Namibia	Eritrea	Kenya	Cameroon
Mali	CAR	Zambia	Equatorial Guinea
Benin	(Southern) Sudan	Malawi	Togo
Ethiopia		Niger	Zimbabwe
Madagascar		Burundi	Guinea
Cote d'Ivoire		Mauritania	Congo Brazzaville
Rwanda		Senegal	Sudan (excl Southern Sudan)
Botswana		Gambia	
		Somaliland	

Sources of information: Alden Wily 2010a, 2010b, 2010c.

3 What exactly is being reformed?

Naturally each country has its own circumstances and agenda. At the same time there are commonalities in the targets of reforms. Once embarked upon, legal change is emerging on all these matters, each of which is relevant to the situation in Southern Kordofan and Blue Nile States, and Sudan in general –

a. How land markets may or may not operate
b. The scope of 'private property', often extending this to enable communities to be acknowledged as owners
c. The extent to which registration is necessary for customary rights to be upheld by government and the courts
d. Methods of this formalisation
e. How land disputes are to be resolved with trends toward formalization of customary channels to relieve burdens on formal courts
f. How and where land is to be formally regulated and administered
g. How minerals and water sources may be owned and especially how benefits to affected landholders are to accrue
h. How forests/woodlands, rangelands and wetlands may be owned, with trends towards community based tenure and management
i. How foreigners may or may not acquire land
j. How far the law tolerates absentee landlordism, land hoarding and speculation of undeveloped lands
k. Frequent establishment of land ceilings limiting excessive fragmentation and overlarge estates
l. Shifts in the scope of public purpose generally with inclusion of private investments in land covered as of ultimately public purpose
m. Improvements in compensation rates and procedures including as affecting untitled land owners
n. How the land interests and rights of women, pastoralists, disabled persons and orphans are to be better protected, including placing limits on unjust customary practices

o. How rising millions of urban 'squatters' may have their longstanding occupancy in urban areas formally recognized and protected
p. How far principles of equity in rural landholding are to be actively pursued, and
q. Whether restitution of lands now seen to have been unfairly if legally taken by Governments or other actors in the past is to be undertaken.

Within the above and related subjects, there is: a strong rural bias in the focus of reforms (despite the rising millions of urban dwellers), a dominant trend of devolutionary land administration, more just treatment of customary land rights, and a rise in simplified approaches to registration of rights and transactions.

4 Devolutionary land administration

This is being seen in West Africa (especially Benin, Burkina Faso and Ghana, but planned in Liberia and Sierra Leone), East Africa (especially Tanzania but also Uganda and Rwanda) and in Southern Africa (most notably Malawi, Madagascar, Botswana and Namibia) (Lavigne Delville, 2005, Teyssier et al., 2008, Mendelsohn, 2008, Alden Wily, 2003, 2006, 2010b). Village level land administration and regulation institutions now exist in some of the above, such as in the Community Land Secretariats of Ghana or more comprehensively in the mandating of all elected Village Councils in Tanzania as the legal land manager. Often new functions include the capacity to establish their own Village Land Registers (e.g. Benin, Ghana and Tanzania) and carry out adjudication procedures towards this. While traditional authorities are not being excluded, their roles are being balanced within democratically elected bodies of which they are ex officio members or advisers (Malawi is a good example). Localised land dispute resolution is also being quite widely introduced, including adoption of traditional informal procedures, subject to introduced legal parameters of accountability and fairness within which they may operate.

5 New treatment of customary land rights

A number of new land laws overturn the 20th century position of customary land holders as no more than lawful occupants and users of public or *de facto* State lands. The most radical deem customary rights to be lawful private property rights even if not registered, and even if held by families, groups or communities rather than on individual basis. Through this action alone millions of Africans in Benin, Tanzania, Uganda, South Africa – and Southern Sudan – are *at least in law* assured levels of level tenure security previously not existing. Lands which have been historically most vulnerable to state cooption – communal pastures, woodlands and rangelands – in particular now enjoy higher protection through these measures as acknowledged community properties. The classical position of these estates as not just unowned but unownable is undermined.

There has been much less work than necessary in developing procedures and constructs for such common properties to be formally identified and registered (Alden Wily, 2006, 2010b). Communal property or land associations (South Africa and Uganda) have proved costly and unwieldy for communities to pursue. More effective mechanisms have been developed in Tanzania, Mozambique, Benin, Southern Sudan and Burkina Faso and with new initiatives in planning in Liberia, Sierra Leone and Angola (Knight, 2010, Alden Wily, 2010b).

Of more concern, there remain many countries where communal assets are purposely excluded in new legal and policy frameworks from otherwise strong provisions for family and individual house and farm properties to be formally registered as owned. Namibia, Botswana and Madagascar are cases in point. These leave common properties vulnerable to state or local land board reallocation to private individuals, defeating the wider and pre-existing interests of communities. New Ethiopian law makes it legally possible for communal forests, woodlands and pastures to be registered as community properties, and this has occasionally occurred in Amhara Regional State. However this is on conditions which enable the regional state government to reallocate these lands for investment or other necessary 'public purposes'; this is now amply being taken up, with encouragement of the federal government, which requires each region to identify millions of hectares of 'vacant' lands to be available to investors (Tamrat, 2010).

There is also variance in the alienability of acknowledged common properties. Some new laws forbid their sale or lease (e.g. Tanzania), others do not, opening the way for traditional authorities to sell community lands (e.g. Ghana (as well described by Schoneveld et al., 2010). Still others permit community properties to be rented or

leased out by owner communities but not sold, the case now in Southern Sudan for parcels of 250 acres or less.

6 Titling is still on the agenda but with modifications

Reforms are also improving the opportunity and procedures for rural populations to secure their holdings as titled parcels. While most changes remain focused on individualised entitlement, such as affecting houses and farms, family properties and community assets are also more easily registrable (Tanzania, Uganda, Benin, Burkina Faso). Survey and mapping requirements are being reduced to enable titling to progress at scale and speed. Communes, district or county councils and village councils are being empowered as Registration Authorities, reducing costs, heightening accountability and access at scale. Rwanda, Madagascar and Ethiopia are notable for their recently launched mass titling schemes (NLC, 2010, Teyssier et al., 2008, Tamrat, 2010), with progress beginning to advance in Tanzania, Benin and Burkina Faso (Kironde, 2009, Lavigne Delville, 2010).

Because of changes in policy and legal attitude to customary tenure, delimitation of community land areas is emerging as the logical first step to clarification and entrenchment of rights. This may vest ownership of the land in the community (e.g. Mozambique) or represent less ownership than community jurisdiction, the community then empowered to title lands within the land area as it sees fit (e.g. Tanzania).

Procedures pursued in the above-mentioned Customary Land Security Project in Southern Kordofan and Blue Nile States were founded on just such experiences. Identifying which parcels within the Community Land Area are held in perpetuity or under other arrangements by individual members of the community may then follow at a more leisurely pace. Uganda, Madagascar, Benin, Burkina Faso, Southern Sudan and Angola are among those states making comparable legal and procedural provisions. Basically, it is up to the community to decide if it wants to register the whole land area as its private group-owned property, or only some parts of the area such as shared woodland and pastures. It also has choices as to whether farms and houses are registered as individual or family properties. While some countries have made registration compulsory over the last 10 years (Cote d'Ivoire, Angola, Namibia, Rwanda) this is generally later abandoned as impractical, with specific case by case registration of rights made voluntary.

7 The focus is shifting from the farm to all land resources

An important aspect of all the above is the way in which the classical focus on the farm as the primary land holding of rural communities is expanding to allow more cognizance of non-farm rural resources like pastures, forests/woodlands and wetlands. A crucial development is new provision to enable ordinary rural communities to be recognised, often for the first time, as land owners in their own right, holding such assets in undivided shares.

Concern around *equitable distribution of land* is much less evenly on the reform agenda. On the whole this is limited in most new land laws and policies to reaffirming or placing new restrictions upon idle lands (most recently made a constitutional principle in Kenya). More or less everywhere the basic right to land is being reinforced but without commitment to ensure this is delivered in programmes of redistribution.

Restitution of wrongfully taken lands is also unevenly on the agenda. This has been a main subject in the reforms of Ethiopia since 1975 and also in the Southern African states of Namibia, South Africa and Zimbabwe, where the issue centres on rebalancing historically disproportionate land holding by white settler populations. Although the process has proved slower and more expensive than envisaged in 1996-97, South Africa has made progress, paying compensation to hundreds of claimants and physically redistributing 3 million ha over the last decade. South Africa and Botswana have also more recently seen significant high court rulings in favour of restitution to hunter-gatherer minorities, affecting Government as well as privately-held lands.

Over the last decade in particular there has been a sharp rise in attention to land rights and adoption of a human rights approach to rural land holding. That is, it is somewhat more difficult in African countries for Governments to ride rough shod over existing land holding of ordinary rural communities. The advisory Human Rights Commission of the African Union has begun to take an active interest in the status of majority of land rights, including the earlier-mentioned decision on the wrongful deprivation of the lands the Enderois

pastoralists in Kenya to make way for a new Game Reserve some 30 years past. The AU adopted a set of principles on land policy in 2009, but which do not specifically enjoin member states to acknowledge the customary land rights of their rural populations (AU et al., 2009).

Nevertheless, through the kind of reforms outlined above, state landlordism is being slowly eroded. The definition of public land is more circumscribed, in more countries now limited to land and resources which are essential for public service and use, rather than encompassing lands which simply have not been acknowledged or registered as owned. For example, state or public lands cover only 5% of Botswana today, and less than 20% of the land areas of Ghana, Tanzania and Uganda and probably an even smaller proportion of Southern Sudan. That is, as soon as customary land rights are legally acknowledged as constituting property rights (and whether registered or not), then the state's claim over these lands sharply diminishes. It may of course acquire these lands, but through procedures laid down for expropriating private property in public interest.

8 The limits of reformism

While such routes of reformism are clearly well afoot on the African continent, it is also as obviously incomplete, hesitant, and under more or less constant challenge. This is not least from governments themselves, who have shown themselves often quite unready in practice to have their substantial powers over land and position as majority landlords of untitled lands reduced to fiduciary and regulatory functions. Such hesitation is most seen in the partial ways in which customary land rights are actually recognized in legislation, with all manner of limitations. As observed above this remains most pronounced with respect to the commons – those holdings which communities own and use collectively, and which may encompass many thousands of hectares. It is also seen in the partial way through which decentralization of land authority is in practice delivered, at times devolving useful powers only to medium level agencies such as district and commune administrations and who may then be held more accountable to paymaster central governments, than to their constituency communities.

Nor do the important new policy and legal developments in the land sector necessarily counteract burgeoning and unregulated polarisation in rural land holding, whether this be by the hand of chiefs themselves disposing of their people's lands or by the market practices of elites and politicians in the acquisition of public lands. If anything, land tenure reform comes at a time in the region where competition among different strata and groups in society at the turn of the century is reaching new heights. Inter-tribal, inter-ethnic and inter-class tensions around land rights are accordingly quite rife. This is tangible in a continuing range of publicly contested land claim issues between chiefs and their people (South Africa, Ghana), migrants/settlers and indigenes (Ghana, Cote d'Ivoire), landlords and tenants (Uganda, Ghana), large and smaller livestock owners (Namibia, Botswana), men and women (Uganda, South Africa, Malawi), arable and pastoral families (Tanzania, Mali, Niger, Ethiopia), pastoralists and hunter-gatherers (Botswana) (Alden Wily, 2009). The current leap in the internationalization of the land market in Africa may be expected to consolidate elite alliances among politicians, officialdom and businessmen, already well rooted in the neo-patrimonial relations of many African polities, and harden what often seems to be divergence of interest between ordinary populations and their governments when it comes to distribution of rights and resources (Alden Wily, 2010a). It is already ominous that such tensions commonly prove to be triggers in civil conflicts, especially in Africa since 1990 (Alden Wily, 2009).

PART IV
CONCLUSIONS & RECCOMENDATIONS

The lessons from Africa for Sudan in the land sphere are therefore mixed. On the one hand, policy and legal reformism from 1990 has set in train widespread reassessment of how existing land holding by rural populations should be secured, including simply recognising these are perfectly viable property interests in their own right, whether registered or not. Restoring greater measure of local control over local landholding, albeit through much more democratic mechanisms than in the past, is also proving very important to rural tenure security. While reformism for understandable reasons by-passed Sudan during the last 20 or so years, an abundance of useful paradigms and experiences exist for Sudanese administrations to be guided by these, should they be willing.

On the other hand, continental reformism is indisputably a work in progress and can be derailed, more or less by the same failures in political will which are much more dramatically being experienced in Sudan in such matters. In Sudan this is primarily in limited commitment to revise land access strategies in such manner that justice can be delivered in the two contested areas, and other parts of Sudan where customary lands have been taken at scale over the last 40 years. It also now appears to be a matter of highly conflicted inter-Party political relations, whereby domination of state administrations and legislatures by the more conservative National Congress Party in the two areas has inhibited institutional development and policy change. It also needs to be acknowledged that cross-cutting class interests over the last five years may also have begun to play an active role in sustaining an unjust tenure situation for poor rural majorities; that is, that the land acquisition interests of elites within the two contested areas may also no longer support real change, if this limits their personal acquisition of large estates at the expense of poorer rural communities.

Clearly, popular consultation with a view to 'rectifying' the terms of the Comprehensive Peace Agreement in Sudan faces an uphill task, when the interests of the majority are considered.

Aside from substantive matters, there are in this instance also procedural concerns. This includes doubts as to how sufficiently remote rural communities will in fact be consulted. From the poor way in which consultation is covered in the Peace Agreement it could be argued that consultation only with elected representatives is required. Second, even if rural communities are widely consulted, there must be doubts as to how far their voices will be heard. There is no binding requirement that their views are more than 'taken into account'. The results of consultation are also taken out of local hands in that final authority will be wielded by Khartoum in determining if and how demanded rectifications to the terms of the CPA are made.

And yet in circumstances wherein there has been demonstrated so little political will for real change over the post-CPA period, and where change will almost certainly only ever be through substantial popular knowledge empowerment of the issues at stake and organized demand around these, popular consultation takes on special important at this time. A special effort will be needed to ensure that ordinary rural communities are able to participate *en masse* and that they are well-informed of the more technical and especially legal and institutional issues at stake which continue to subordinate their rights at scale.

Helpfully the CPA provides a viable context for this. It has been concluded earlier that although flawed, the CPA land terms were on the right track in support of majority rural land rights. This was especially so in making it binding upon governments to amend laws to take customary norms into account, and in instituting bodies to consider claims against loss of community lands, an acknowledgement that this was wrongful (if legal) and requires immediate attention for conflict in the two areas to be finally ended. What was most negative about these provisions was the lack of binding elaboration on the former, and a mis-constructed route to the latter, enabling the central and states governments to sidestep their responsibilities and severely narrow the number of cases which could be considered by requiring that both parties be willing to participate. These shortcomings threw the entire matter of acting on land issues onto total reliance on already dubious and in fact, historically malign in this respect, political will to substantive change.

Nevertheless affected rural communities (and there are some hundreds in the two contested areas alone) may use the coverall provisions of the CPA to demand following key rectifications to its terms in matters of land –

1. That more specific and time-bound actions to change the law affect their customary rights are made, most explicitly to recognise customary land rights as real property rights, even if unregistered; and to ensure that this as explicitly includes all customarily held collective properties, not just houses and farms. This is necessary to bring their most threatened and invaded assets; plains and woodlands into recognition as owned;

2. That equally explicit assurance that where individual, family or community lands are compulsorily acquired by the state or national government for public purposes, that compensation is paid at the same level as for other private properties, and explicitly including where the property is customarily owned collectively;

3. That under the CPA's recognition that taking of customary lands was often wrongful and that restitution is a necessity, the placement of a immediate freeze on further land allocations within the two contested areas, until existing cases has been heard and resolved;

4. That it is essential to make the institutional arrangements for addressing these matters more workable by removing the disabling elements of concurrent powers through unambiguously devolving authority over land allocation to the most local level possible; this is in the interests of subsidiarity, a good governance principle which already embedded in the CPA and Interim National Constitution. Specific needed rectifications include (i) making the proposed State Land Commissions fully autonomous of the National Land Commission; (ii) extending the powers of these bodies to be formally responsible for developing State Land Policies and within a fixed time line; and (iii) requiring the Commissions to operate as a mobile Commission, systematically investigating wrongful land allocations and claims in each County;

5. That each rural community in the two States be similarly directly empowered through rectification of the terms of the CPA to be fully empowered and assisted to pursue delimitation of their respective community land areas and to establish legally Community Land Boards to be acknowledged as the lawful land authority over the delimited area. These steps are fundamental to all aspects of securing just land relations for the majority in the two areas; whether this be in order for those communities to be able to precisely identify which parts of their land areas have been leased out to outsiders, to be able to regulate land holding in future within those areas, and to bring formalization and other land administration procedures to a viable and sustainable level of operations. Helpfully, under the CLSP project instituted in the two areas, significant learning by doing experience on these developments exists, and on the basis of which evidential demands for rectification of the CPA may be made.

Severe issues of political will remain. Bringing the CPA itself more firmly under the ambit of international authority seems inescapable for progress to be made. How this may be engineered is surely a subject for the international community to take on with purpose and conviction. AU and especially UN jurisdiction appear logical outcomes. Within this, a freeze upon further allocations of unregistered community lands to non-customary land holders needs to be made part of the conditions established. Any allocations which have been inactive for more than five years should be cancelled.

For any of the above to be promptly and practically delivered, much greater financial, technical and programmatic commitment on the part of the international aid community is necessary. A consistent approach among agencies will be necessary.

Cited References

Abdelgabar, O.1997. Mechanised Farming and Nuba Peasants An Example of Non-sutainable Development in 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.

Alden Wily, L. 2003. Governance and Land Relations. A Review of Decentralization of Land Administration and Management in Africa. Land Tenure and Resources Series. International Institute for Environment and Development [IIED] London.

-----. 2004a. Limitations and Potential in the Sudan Peace Process in Respect of Land Interests in the Contested Areas with Recommendations for Action. March 2004. USDA/USAID Natural Resources Project in Sudan, Nairobi.

-----. 2004b. Suggestions for Land Articles in the Interim Constitution of Sudan. August 2004. USDA/USAID Natural Resources Project in Sudan, Nairobi.

-----. 2004c. Project Concept Note: Securing Majority Customary Land Rights in Central Sudan. October 2004. USDA/USAID Natural Resources Project in Sudan, Nairobi.

-----. 2005a. Collated Technical Reports on the Customary Land Security Project. USDA/USAID Customary Land Security Project in Southern Kordofan and Blue Nile States Sudan. Nairobi.

-----. 2005b. Securing Customary Land Security in Blue Nile and Southern Kordofan States. Step by Step Guidelines for Facilitators. USDA/USAID Customary Land Security Project. Nairobi.

-----. 2006. Land Rights Reform and Governance in Africa How to Make it Work in the 21st Century? Paper presented on behalf of UNDP Drylands Development Centre and UNDP Oslo Governance Centre to the International Conference on Agrarian Reform and Rural Development (ICARRD) Porto Alegre, Brazil, 7-10 March 2006. www.energyandenvironment.undp.org/undp/index.cfm?

-----. 2009. It's more than about going home … Tackling land tenure in the emergency to development transition in post-conflict states Chapter 2 in Uncharted Territory, Land, conflict and humanitarian action, Sara Pantuliano (ed.). Humanitarian Policy Group, Overseas Development Institute, London.

-----. 2010a. 'Whose Land Are You Giving Away, Mr. President?' Paper presented to the World Bank Conference on Land Policy and Administration, Washington April 26-27 2010 Available at: http://siteresources.worldbank.org/INTARD/Resources/335807-1229025334908/alden-wily.docx

-----. 2010b. The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure. International Land Coalition, Rome.

-----. 2010d. Whose Land is It? The Status of Customary Land Tenure in Cameroon. FERN and Rainforest Peoples Programme, London.

AU, ECA & ADB (African Union, Economic Commission for Africa & African Development Bank), 008. Regional Assessment on Land Policy in West Africa Land Policy Initiative: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods. African Development Bank, Cote d'Ivoire.

Babiker, M. 1998. Land Tenure in Kordofan: Conflict between the 'Commuanlism' 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

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

Cotula, L., S. Vermeulen, R. Leonard & J. Keeley, 2009. Land grab or development opportunity? Agricultural investment and international land deals in Africa. FAO, IIED and IFAD.

De Wit, P. V., 2004. Land Property Study in Sudan. Interim Report. Scoping of Issues and Questions to be Addressed. Norwegian Refugee Council, UNHCR & FAO.

De Wit, P., C. Tanner & S. Norfolk, 2009. Land Policy Development in an African Context. FAO.

El-Imam & O. Egemi, 2004. Addressing Land Questions in the Nuba Mountains. Capitalizing on Previous Experiences. UNDP, Khartoum.

FAO, 2006. Sudan Country Brief, Part II" Forestry Department, http://www.fao.org/docrep/007/ad910e/AD910E26.htm

FIAN, 2010. Land Grabbing in Kenya and Mozambique. A report on two research missions – and a human rights analysis of land grabbing. FIAN International Secretariat, Germany.

GOS (Government of Sudan), 2005, Volume I of V, National Medium Term Investment Programme, Support to NEPAD–CAADP Implementation, TCP/SUD/2909 (I) (NEPAD Ref. 05/12 E), Khartoum.

GTZ, 2009. Foreign Direct Investment (FDI) in Land in Developing Countries. Division 45, Agriculture, Fisheries and Flood, Federal Ministry for Economic Cooperation and Development, Bonn.

Harragin, S. April 2003. A Background Report to Accompany the Literature Review/Annotated Bibliography. Desk Study on Land Use Issues in the Nuba Mountains, Sudan. Concern Worldwide and Save the Children US.

IRIN, 2008. Sudan: Rich farms, conflict and climate change" http://www.borglobe.com/business/business/397-sudan-rich-farms-conflict-and-climate-change.html?

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.

Kironde, J., 2009. Improving Land Sector Governance in Africa: The Case of Tanzania. Paper presented for the Workshop on Land Governance in support of the MDGs, The World Bank, Washington DC, March 2009.

Knight, R., 2010. Practical Implementation of Statutory Recognition of Customary Land Rights: ILDO's Community Land Titling Initiative. Paper presented to World Bank Land Policy and Administration Conference, Washington DC. April 2010.

Komey, G. K., 2009. Land Factor in Wars and Conflicts in Africa: The Case of the Nuba Struggle in Sudan. Chapter 15 of an unidentified volume.

Lavigne Delville, P., 2005. Registering and Administering Customary Land Rights Current Innovations and Questions in French-Speaking West Africa. In Proceedings. Secure Land Tenure 'New Legal Frameworks and Tools', P. van der Molen & C. Lemmen (eds.), FIG Commission 7, Denmark.

-----. 2010. Competing Conceptions of Customary Land Rights Registration (Rural Land Maps PFRs in Benin): methodological, policy and polity issues. Paper presented to World Bank Annual Conference on Land Policy & Administration, Washington DC, 26-27 April 2010.

Magzoub, T. 1999. Legislation of repartitioning and allocation of land between pastoral and agricultural production systems in Northern Kordofan. SOS Sahel/IIED El Ain.

Manger, L. 1994. From the Mountains to the Plains The Integration of the Lafofa Nuba into Sudanese Society. The Scandanavian 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. 2005. Commentary on the Land Commission Act for South Kordofan and Blue Nile States, October 2005. Customary Land Security Project Southern Kordofan and Blue Nile States in Central Sudan, Nairobi.

Mendelsohn, J., 2008. Customary and Legislative Aspects of Land Registration and Management on Communal Land in Namibia. Ministry of Land & Resettlement & European Union, Windhoek.

Milimo, J., J. Kalyalya, H. Machina & T. Haamweene, 2010. Social Impacts of Commercial Pressures on Land in Zambia: A Case Study of Macha Mission Land in Choma District of Zambia. ILC Collaborative Research Project on Commercial Pressures on Land. Rome.

Mpoyi, A., 2010. Social and Environmental Dimensions of large scale land acquisitions in the Republic of Congo. Presentation to the World Bank Annual Land Policy & Administration Conference, April 26-27, 2010.

NLC (National Land Centre), 2010. Low Cost Titling in Africa Land Tenure Regularisation in Rwanda. Ministry of Environment and Land, Rwanda.

Norfolk, S., 2008. Land Tenure Issues. Study on the Sustainable Development of Semi-Mechanised Rainfed Farming. HTSP and NewTech, London.

Pantuliano, S., M. Buchanan-Smith & I. Mosel, 2008. The Long Road Home. In-depth Study into the Reintegration of IDPs and refugees returning to Southern Sudan and the Three Area. Humanitarian Policy Group, ODI, London.

RCMR & MRG (Rights Centre for Minority Rights Development, Kenya and Minority Rights Group International), 2010. Commentary on behalf of Endorois Welfare Council v Kenya, Communication 276/2003.

Saeed, M. H. 1980. Economic Effects of Agricultural Mechanization in Rural Sudan: the Case of Habila, Southern Kordofan' In Problems of Savannah Development: the Sudan Case, edited by G. Haaland, 167-84. University of Bergen.

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

Schoneveld, G., L. German & E. Nutakor, 2010. Towards Sustainable Biofuel Development: Assessing the Local Impacts of Large-Scale Foreign Land Acquisitions in Ghana. CIFOR. Paper presented to World Bank Annual Conference on Land Policy & Administration, Washington DC, 26-27 April, 2010.

Shazali, S. October 2002. Pastoral Land Tenure Systems at Federal and Local Levels in the Sudan. UNDP, Khartoum.

Sorbo, G.M. & A. Strand, 2007. Land Issues and Poverty Reduction: Requirements for Lasting Peace in Sudan and Afghanistan in 2020 FOCUS BRIEF on the World's Poor and Hungry People, October, 2007.

Suliman, M. 1997. The Nuba Conflict in Sudan. Institute for African Alternatives, London.

Tamrat, I., 2010. Governance of Large Scale Agricultural Investments in Africa: The Case of Ethiopia. Paper presented to the World Bank Conference on Land Policy and Administration, Washington DC, April 2010.

Teyssier, A., A. R. Rivo, Ra. Razafindralambo & Y. Razadindrakoto, 2008. Decentralisation of land management in Madagascar: process, innovations and observation of the first outcomes. FAO, Rome.

UNDP, 2008. Land Tenure in Sudan: Critical Review for Institutional and Law Reform. Reduction of Resource-Based Conflict Project, Khartoum, January 2008.

UNEP, 2007. Post Conflict Environment Assessment, Khartoum, 2007

World Bank, 2010. Rising Global Interest in Farmland Can It Yield Sustainable and Equitable Benefits? Agricultural and Rural Department, Washington.

RESOURCE ANNEX A

OVERVIEW OF 20th CENTURY LAND LEGISLATION IN SUDAN

Title of Lands Ordinance, 1899
- Permanently cultivated riverain land in the north and centre recognised as private property.
- Limited landlord share of tenant's crop to one fifth (further limitation on landlord estates (*wathiga*) in 1906)
- All southern Sudan and rainfed land of central, eastern and western Sudan declared Government land and divided into land 'subject to no rights' and land 'subject to rights vested in a tribe, section or village'. No individual private ownership recognised in these areas (included Southern Blue Nile and Nuba Mountains/Southern Kordofan) but communal rights acknowledged and to an extent protected
- Provided for the settlement of disputed titles to land, the appointment of a commission to receive and adjudicate upon claims to land
- Established a land register.

Woods and Forests Ordinance 1901
Presumed all forests, timber and forest products to belong to government until proved otherwise.

Land Acquisition Ordinance, 1903
Provided for the expropriation of all rights 'not amounting to full ownership' for public purposes or for private development that was 'likely to prove advantageous to the Government'. [First protest against takings of such lands in 1908 by Wad Habouba]. Lands not amounting to full ownership embraced all rangelands, especially in the north.

Land Settlement Ordinance, 1905
Deemed all waste, forest and unoccupied land as Government land until the contrary proven. Unoccupied lands held to be 'entirely free from private rights or where rights existing do not amount to full ownership' [Survey and allocation of the Blue Nile White Nile triangle undertaken in 1908 with first issue of large concessions (e.g. to Kassala Cotton Company).

Deeds Registration Ordinance, 1907
Set up deeds register, amended in 1908, 1920 and repealed by 1925 law.

Native Disposition of Lands Restriction Ordinance, 1918
Forbade sale, mortgage or disposal outside inheritance without government consent, but could issue leases of up to three year terms. Further protection of tenant rights under *wathiga.*

Closed Districts Ordinance, 1922
A Kordofan State Law designed to stop Nuba migrating to Gezira Scheme, losing their culture and becoming Muslims. Also limited Arab settlement in Nuba areas. Repealed in 1947.

The Land Settlement and Registration Act, 1925 [IN FORCE]
Amendments 1954, 1955, 1961, 1962, 1965, 1970, 1972, 1973 and 1974
- Repealed 1899, 1904, 1907, 1918 laws above and consolidated and expanded their content, providing for systematic registration
- Ambiguous definition of Government Land as all land 'entirely free from any private rights or that the rights existing in or over it do not amount to full ownership' (s. 13 (ii)). Waste, forest and unoccupied land unequivocally placed in this category (s. 16c)
- Registrable usufruct 'on land owned by Government or any other person' include a right to cultivate, of pasture, to forest produce, and to occupy and farm (*amara*)
- Provided for registration of leasehold (*hikir*), three years or more.

The Gezira Land Ordinance, 1927
Provided for purchase of all land for the Gezira Scheme for compensation not exceeding one Egyptian Pound an acre (feddan) from private owners (since 1899 riverine land in particular recognized as private registrable property).

Chief's Ordinance, 1931
Provided for Native Areas and Native Authorities at three levels Nazir/Mek, Omda and Sheikh
Laid out their powers, duties and responsibilities, prominently including tax collection
Powers included making local by-laws (Local Orders); these became main instrument for regulation of especially seasonal pastoral access to Native Areas, with corridors and associated rules of passage and access and watering defined in detail.

Native Courts Ordinance, 1932
Made chiefs head of courts with wide powers in especially land dispute resolution.

Central Forest Act, 1932 & Provincial Forest Act, 1932
Repealed Ordinances of 1901, 1908 and 1917 incorporating their content with new provision for Central Forest Reserves and Provincial Forest Reserves for protection purposes.

The Prescription and Limitation Ordinance, 1928
Provides that a person in use or enjoyment of waste, forest or unregistered land with or without the express permission of the Government *shall be deemed to be usufructary until the contrary is proved* (by registered entitlement under the 1925 law; this was only implemented in irrigated areas of Northern Khartoum and Blue Nile and some parts of Darfur).

The Land Acquisition Act, 1930 [IN FORCE]
Amended in 1955, 1961, 1971, 1972, 1973 and 1974

- Repeals 1903 law for compulsory acquisition and alters criterion for 'material benefit to the public generally or to persons residing or owning land in the neighbourhood'
- Clarifies subordination of customary rights as 'land which is owned by the Government subject to rights of watering, grazing, cultivating, wood cutting and the like, enjoyed by the members of any tribe or section of a tribe, or of any town, village or part thereof' (s.3) (i.e. maintained customary rights as permissive rights of occupancy & use only)
- Settlement of rights required prior to acquisition (s.9)
- Those with rights to nominate representatives to negotiate compensation.

Prescription and Limitation Act, 1939
This law reiterated that usufructs cannot be promoted into absolute ownership. The contrary is established upon settlement under the provisions of the Land Settlement and Registration Act, 1925.

Mechanised Farming Corporation Act, 1968
Created to promote and regulate investment in rain fed mechanised schemes in blocks of 500-1,500 acres; 60% of area to go to investors, 40% to local people, to be issued as 15 year or less leaseholds. No one individual to hold more than one farm [none of this followed after first couple of years]. This law was repealed in 1992 in favour of State Corporations.

The Unregistered Land Act, 1970

- Deemed all land 'of any kind whether waste, forest, occupied or unoccupied, which is not registered before the commencement of this Act … to be the property of the Government and shall be deemed to have been registered as such, as if the provisions of the Land Settlement and Registration Act, 1925, have been duly complied with' (s.4).
- Slight retraction in later amendments (1972, 1973) allowing the President to exempt certain areas, permitting new registration [mainly applied along the Nile].

Local Peoples Government Act, 1971
Repealed 1931 Chiefs Act and removed Native Authorities in favour of elected governments [at higher levels and largely filled with Sudan Socialist Union politicians].

The Unregistered Land Amendment Act, 1974
Permits eviction including by reasonable force (s.8).

Presidential Decree, 1980
The principle of tribal homeland (diar, sing., *dar*) and the special grazing areas in instances associated with them) undermined with assurance of the right of all Sudanese citizens to settle anywhere in the country on "unregistered land" [accelerating land grabbing].

The Civil Transactions Act, 1984 [IN FORCE]
This repealed the Unregistered Land Act, 1970 but incorporated its content (as mainly section 559) with additions -

- Government ownership of land was lessened from outright proprietorship to trustee ownership on behalf of God (s. 559) and declared to be public property (s. 27)
- Freeholds registered after 6.4.1970 were reduced to "ownership of the usufruct" (s. 559)
- Customary owners clarified as no more than 'lawful users' (s. 590)
- A principle to guide the application of the law improved status of customary rights: 'A custom shall be given effect whether it is general or particular' (Section 5 Part 1 Chapter 1)
- Opportunities opened for land grabbing by those with means through drilling wells, building, cultivation and irrigation to acquire recognition as private right holders (s. 555 & 560(1))
- All fallow land treated as pasture, increasing vulnerability of cultivators to pastoralist encroachment
- Implied a possibility of restitution arising from dispute determination (s.6)
- Provided for family ownership but limited to 15 years and targeted to apartments and business premises (s. 538 Chapter 4)
- Made 'treasures and minerals' under the soil the property of the owner with one fifth of value payable to the State by way of Zakat or Taxes" (s. 556, Part XIX Chapter 6)
- Protected the customary right of occupancy and cultivation (*manfaa*) (s. 568) subject to federal powers of withdrawal for failure to use the land (s. 570)
- Declares a *registered* usufruct to be on equal footing with registered ownership (s.560)
- Unregistered land remains registered in the name of the State (since 1970 deemed to be as if registered as Government Land)
- Required payment of compensation to resulting 'lawful customary users' on expropriation (s. 560)) 'A lawful user under the provisions of this Act, even if not registered, is protected by law to the extent of actual use and shall not be expropriated save for public interest and for just compensation (s. 560(4) and 'Only use which is customarily practised shall be recognised' (s. 560 (5))
- Required that due regard be taken of (i) existing settlements, environmental demands, animal health and pastures (ii) avoiding injury to smallholdings; (iii) encouragement of settlement (s. 561)
- Large tracts of land only to be granted in accordance with best methods of production and care for drainage (s.561)
- Grants for agricultural purposes to take precedence over other purposes (s. 561 (1))
- Permits could be issued for grazing and woodcutting on waste land and federal and state authorities empowered to regulate places and seasons for grazing (s. 565).

Forest Act, 1989
Replaced 1932 law, bringing all pasture under the act.

The Law on Criminal Trespass, 1974

Restricted the right of nomads and smallholders to public land (Government land) permitting Government to order eviction, using reasonable force as necessary (s. 8) [law enacted to support investor control of mechanised farms].

Sudan Penal Code, 1974
Added to the law on trespass, making even 'annoying' of a new owner a criminal offence.

Local Courts Act, 1977
Repealed 1932 law and removed Native Courts (North Sudan).

Civil Transactions Amendment Act, 1990
- Finally did away with all customary title to land by declaring that 'All non-registered land should be considered as if registered in the name of the State'.
- Forbade any court or other authority 'to look into any application or complaint or procedures or any other matter which is concerned with land owned by the State' including pending cases (s. 559)
- Made it easier for the State to confiscate land in which the owner had failed to invest (applicable to mechanised farming schemes) and relieved the State of the need to refund fees and expenses or to compensate the owner (s. 570).

Native Administration Act, 1990
Restored Native Authorities, but with lesser powers.

People's Committees Act, 1992
Created elected committees at village level.

Presidential Decree, 1994
Declared that all pasture routes that had been blocked by agricultural schemes would be re-opened.

Local Government Act, 1995
Created new framework for local government, largely retained in 1998 law below.

Local Government Act, 1998
- Repealed 1990, 1992 and 1995 law, reshaping local authority area as a Commissariate headed by a President-appointed Commissioner (s. 4& 5) and supervising Locality Councils (s.8-18), mandated to create elected People's Administration councils at quarter and village or tribal camp levels (s.19).
- Empowered states to establish Native Administration under state laws, with leaders elected by rules of local consultation and custom for 7 years (s. 20-22).

Land Use Act, 1997
Limits leases to 30 years.

Investment (Encouragement) Act 1999
Amended in 2003. Supports issue of licences to investors with emphasis on local partners in the amendment.

Forests and Renewable Natural Resources Act 2002
Replaces the Forest Act 1989; provides for communities to manage local forests (no ownership recognized).

Range Protection and Pasture Resources Development Act (1996?)
Provides for designation of pastures and classes including Community Pasture Reserves to be managed (not owned) by communities.

Source: Alden Wily, 2006, *Understanding the Power of Property. An Examination of how Contested Land Rights Drive Conflict in Sudan (unpubl.).*

RESOURCE ANNEX B

ARTICLES RELEVANT TO LAND MATTERS IN THE COMPREHENSIVE PEACE AGREEMENT, THE INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN, 2005, AND THE INTERIM STATE CONSTITUTIONS OF BLUE NILE (2005) AND SOUTHERN KORDOFAN STATES (2006)

THE COMPREHENSIVE PEACE AGREEMENT, 9 JANUARY 2005

The Comprehensive Peace Agreement (CPA), also known as the Naivasha Agreement, was a set of agreements culminating in January 2005 that were signed between the Sudan People's Liberation Movement (SPLM) and the Government of Sudan (GOS). The protocols/agreements comprising the CPA are - CHAPTER 1: The Machakos Protocol signed in Machakos, Kenya on July 20, 2002

1. CHAPTER II: The Protocol on Power Sharing, signed in Naivasha, Kenya on May 26, 2004
2. CHAPTER III: The Agreement on Wealth Sharing, signed in Naivasha, Kenya on January 7, 2004
3. CHAPTER IV: The Protocol on the Resolution of the Conflict in Abyei Area, signed in Naivasha, Kenya on May 26, 2004
4. CHAPTER V: The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States signed in Naivasha, Kenya on May 26, 2004
5. CHAPTER VI: The Agreement on Security Arrangements, signed in Naivasha, Kenya on September 25, 2003
6. ANNEXURE I: The Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices, signed in Naivasha, Kenya on October 30, 2004, and
7. ANNEXURE II: The Implementation Modalities and Global Implementation Matrix and Appendices, signed in Naivasha, Kenya on December 31, 2004.

The comprehensive agreement was signed on January 9 2005 and marked the commencement of interim implementation. This was to comprise a pre-Interim period until July 9 2005 at which time the formal Interim Period of five years would begin, governed by the Interim National Constitution of the Republic of Sudan (February, 2005). Within that time -

(i) a referendum would be held in South Sudan to decide if it would secede from Sudan and become an independent state;
(ii) a referendum would be held in Abyei as to its future membership of either South Sudan or Sudan, and
(iii) popular consultation would be held in the two areas of Southern Kordofan and Blue Nile State, as the main sites of conflict during the Second Sudan War, in order to improve upon the CPA in their regard.

Set out below are articles in the protocols and the Interim National Constitution which are relevant to land matters in Blue Nile and Southern Kordofan States. The Constitution builds directly upon the CPA in land matters (as well most others), hence duplication. The Interim Constitutions of Blue Nile State and Southern Kordofan State do likewise, with no elaboration.

FROM THE AGREEMENT ON WEALTH SHARING DURING THE PRE-INTERIM AND INTERIM PERIOD
Naivasha, Kenya: Wednesday, January 7th, 2004

SECTION 2.0: OWNERSHIP OF LAND AND NATURAL RESOURCES

2.1 Without prejudice to the position of the Parties with respect to ownership of land and subterranean natural resources, including in Southern Sudan, this Agreement is not intended to address the ownership of those resources. The Parties agree to establish a process to resolve this issue.
2.3. The Parties record that the regulation of land tenure, usage and exercise of rights in land is to be a concurrent competency exercised at the appropriate levels of government.
2.4. Rights in land owned by the Government of Sudan shall be exercised through the appropriate or designated levels of Government.
2.5. The Parties agree that a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage and international trends and practices.
2.6 Without prejudice to the jurisdiction of courts there shall be established a National Land Commission that shall have the following functions:

2.6.1 Arbitrate between willing contending Parties on claims over land, and sort out such claims.
2.6.2 The party or group making claims in respect of land may make a claim against the relevant government and/or other Parties interested in the land.
2.6.3 The National Land Commission may at its discretion entertain such claims.
2.6.4 The Parties to the arbitration shall be bound by the decision of the National Land Commission on mutual consent and upon registration of the award in a court of law.
2.6.5 The National Land Commission shall apply the law applicable in the locality where the land is situated or such other law as the Parties to the arbitration agree, including principles of equity.
2.6.6 Accept references on request from the relevant government, or in the process of resolving claims, and make recommendations to the appropriate levels of government concerning:
2.6.6.1 Land reform policies;
2.6.6.2 Recognition of customary land rights and/or law.
2.6.7 Assess appropriate land compensation, which need not be limited to monetary compensation, for applicants in the course of arbitration or in the course of a reference from a court.
2.6.8 Advise different levels of government on how to co-ordinate policies on national projects.
2.6.9 Study and record land use practices in areas where natural resource exploitation occurs.

2.6.10 The National Land Commission shall be representative and independent. The composition of the membership and terms of appointment of the National Land Commission shall be set by the legislation constituting it. The Chairperson of the National Land Commission shall be appointed by the Presidency.

2.6.11 The National Land Commission may conduct hearings and formulate its own rules of procedure.

2.6.12 The National Land Commission will have its budget approved by the Presidency and will be accountable to the Presidency for the due performance of its functions.

FROM PROTOCOL BETWEEN THE GOVERNMENT OF SUDAN (GOS) AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT (SPLM) ON THE RESOLUTION OF CONFLICT IN SOUTHERN KORDOFAN/NUBA MOUNTAINS AND BLUE NILE STATES, *Naivasha, Kenya, 26TH May, 2004*

SECTION 3: POPULAR CONSULTATION

The Government of Sudan and the Sudan People's Liberation Movement (the Parties) committed to reaching a just, fair and comprehensive peace agreement to end the war in Southern Kordofan/Nuba Mountains and Blue Nile states, agree on the following –

1.1 Popular consultation is a democratic right and mechanism to ascertain the views of the people of Southern Kordofan/Nuba Mountains and Blue Nile States on the comprehensive agreement reached by the Government of Sudan and the Sudan People's Liberation Movement.

1.2 That this comprehensive agreement shall be subjected to the will of the people of the two States through their respectively democratically elected legislatures.

1.3 That the legislatures of the two States shall each establish a Parliamentary Assessment and Evaluation Commission to assess and evaluate the implementation of the agreement in each State. The two Commissions shall submit their reports to the legislatures of the two States by the fourth year of the signing of the comprehensive Peace Agreement.

1.4 An independent Commission shall be established by the Presidency to assess and evaluate the implementation of the comprehensive Peace Agreement in each of the two States. The Commission shall submit its reports to the National Government and the Governments of the two States who shall use the reports to rectify any procedure that needs to be rectified to ensure faithful implementation of the Agreement.

1.5 Once this agreement is endorsed by the people through the legislature of any of the two States as meeting their aspirations, then the agreement becomes the final settlement of the political conflict in that State.

1.6 Should any of the legislatures of the two States, after reviewing the Agreement, decide to rectify, within the framework of the Agreement, any shortcomings in the constitutional, political and administrative arrangements of the Agreement, then such legislature shall engage in negotiations with the National Government with the view of rectifying these shortcomings.

SECTION 9: STATE LAND COMMISSION

9.1. The regulation of the land tenure, usage and exercise of rights in land shall be a concurrent competency exercised by the National and State Governments.

9.2. Rights in land owned by the National Government within the State shall be exercised through the appropriate or designated level of government.

9.3. There shall be established a State Land Commission in the State of Southern Kordofan/Nuba Mountains and Blue Nile, respectively.

9.4. The State Land Commission shall be composed of persons from the State concerned.

9.5. The State Land Commission shall exercise all the powers of the National Land Commission at the State level.

9.6. The State Land Commission shall be competent 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.

9.7. The National Land Commission and the State Land Commission shall cooperate and coordinate their activities so as to use their resources efficiently. Without limiting the matters of coordination, the National Land Commission and the State Land Commission may agree as follows:-

9.7.1. To exchange information and decisions of each Commission;

9.7.2. That certain functions of the National Land Commission, including collection of data and research, may be carried out through the State Land Commission; and

9.7.3. On the way in which any conflict between the findings or recommendations of each Commission may be resolved.

9.8. In case of conflict between the findings and recommendations of the National Land Commission and the State Land Commission which cannot be resolved by agreement, the two Commissions shall reconcile their positions. Failure to reconcile, the matter shall be referred to the Constitutional Court for adjudication.

FROM THE PROTOCOL BETWEEN THE GOVERNMENT OF SUDAN (GOS) AND THE SUDAN PEOPLE'S LIBERATION MOVEMENT ON POWER SHARING

Naivasha, Kenya, Wednesday, May 26, 2004

Section 1.4 The Parties agree that the following principles shall guide the distribution of powers and the establishment of structures:

1.4.3 Acknowledgement of the need to promote the welfare of the people and protect their human rights and fundamental freedoms;

1.4.4 Recognition of the need for the involvement and participation of the people of South Sudan at all levels of government and National institutions as an expression of the national unity of the country;

1.4.5 Pursuit of good governance, accountability, transparency, democracy, and the rule of law at all levels of government to achieve lasting peace;

Section 1.5 Principles of Administration and Inter-Governmental Linkages:

1.5.1 In the administration of the Government of National Unity, the following provisions shall be respected:

1.5.1.1 There shall be a decentralized system of government with significant devolution of powers, having regard to the National, Southern Sudan, State, and Local levels of government;

1.5.1.4 In their relationships with each other or with other government organs, all levels of government and particularly National, Southern Sudan, and State Governments shall:

(a) Respect each others' autonomy;

(b) Collaborate rather than compete, in the task of governing and assist each other in fulfilling each others' constitutional obligations;

(c) Perform their functions and exercise their powers so as:

i) Not to encroach on another level's powers or functions;

ii) Not to assume another level's powers or functions conferred upon it by the Constitution;

iii) To promote co-operation between them;

iv) To promote open communication between government and levels of government;

v) To strive to render assistance and support to other levels of government;

vi) To advance the good co-ordination of governmental functions;

vii) To adhere to procedures of inter-governmental interaction as agreed upon;

viii) To promote amicable settlement of disputes before attempting litigation;

ix) To respect the status and institutions of other levels of government;

x) Allow the harmonious and collaborative interaction of the different levels of government within the context of national unity and for the achievement of a better quality of life for all.

SCHEDULE F: Resolution of Conflicts in Respect of Concurrent Powers:

If there is a contradiction between the provisions of Southern Sudan law and/or a State law and/or a National law, on the matters referred in Schedule D, the law of the level of government which shall prevail shall be that which most effectively deals with the subject matter of the law, having regard to:-

1. The need to recognize the sovereignty of the Nation while accommodating the autonomy of Southern Sudan or of the States;
2. Whether there is a need for National or Southern Sudan norms and standards;
3. The principle of subsidiarity;
4. The need to promote the welfare of the people and to protect each person's human rights and fundamental freedoms.

THE INTERIM NATIONAL CONSTITUTION OF THE REPUBLIC OF SUDAN, 2005

[As Under]

PART ONE

THE STATE, THE CONSTITUTION AND

GUIDING PRINCIPLES

Environment and Natural Resources

11 (3)The State shall promote, through legislation, sustainable utilization of natural resources and best practices with respect to their management.

Social Justice

12 (1) The State shall develop policies and strategies to ensure social justice among all people of the Sudan, through ensuring means of livelihood and opportunities of employment. The State shall also encourage mutual assistance, self-help, co-operation and charity.

[As Under]

CHAPTER IV

THE DECENTRALIZED SYSTEM OF GOVERNANCE

Levels of Government

24 The Sudan is a decentralized State, with the following levels of government: -

(a)The national level of government, which shall exercise authority with a view to protecting the national sovereignty and territorial integrity of the Sudan and promoting the welfare of its people,

(c) The state level of government, which shall exercise authority at the state level throughout the Sudan and render public services through the level closest to the people,

(d) Local level of government, which shall be throughout the Sudan.

Devolution of Powers

25 The following principles shall guide the devolution and distribution of powers between all levels of government:-

(a) recognition of the autonomy of the Government of Southern Sudan and the states,

(b) affirmation of the need for norms and standards of governance and management at national, Southern Sudan and state levels, that reflect the unity of the country while asserting the diversity of the Sudanese people,

(c) acknowledgement of the role of the State in the promotion of the welfare of the people and protection of their human rights and fundamental freedoms,

(d) recognition of the need for the involvement and participation of all Sudanese people, particularly the people of Southern Sudan, at all levels of government as an expression of the national unity of the country,

(e) pursuit of good governance through democracy, transparency, accountability and the rule of law at all levels of government to consolidate lasting peace.

Inter-Governmental Linkages

26 (1) In the administration of the decentralized system of the country, the following principles of inter-governmental linkages shall be respected:-

(b) in their relationships with each other or with other government organs, all levels of government and particularly national, Southern Sudan and state governments shall observe the following:-

(i) respect each others' autonomy;

(ii) collaborate in the task of governing and assist each other in fulfilling their respective constitutional obligations.

(c) government organs at all levels shall perform their functions and exercise their powers so as:-

(i) not to encroach on the powers or functions of other levels,

(ii) not to assume powers or functions conferred upon any other level except as provided for by this Constitution,

(iii) to promote co-operation between all levels of government,

(iv) to promote open communication between all levels of government,

(v) to render assistance and support to other levels of government,

(vi) to advance good co-ordination of governmental functions,

(vii) to adhere to procedures of inter-governmental interaction,

(viii) to promote amicable settlement of disputes before attempting litigation,

(ix) to respect the status and institutions of other levels of government.

(d) the harmonious and collaborative interaction of the different levels of government shall be within the context of national unity and for the achievement of a better quality of life for all,

(2) Any two or more states may agree on mechanisms or arrangements to enhance inter-state co-ordination and co-operation.

[As Under] PART TWO
BILL OF RIGHTS

Right to Own Property

43 (1) Every citizen shall have the right to acquire or own property as regulated by law.

(2) No private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law.

Sanctity of Rights and Freedoms

48 Subject to Article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State pursuant to Article 142 herein.

[As Under]
PART TWELVE
THE STATES AND ABYEI AREA
Southern Kordofan and Blue Nile States

182 (1) Without prejudice to any of the provisions of this Constitution, the Agreement on the Resolution of the Conflict in Southern Kordofan and Blue Nile States, shall apply with respect to those two states.

(2) Agreement on the Resolution of the Conflict in Southern Kordofan and Blue Nile States shall be subject to popular consultation by the people of the two states through their respective democratically elected legislatures in accordance with the provisions stated therein.

[As Under]

CHAPTER V

THE GOVERNMENT OF NATIONAL UNITY

Duties of the Government of National Unity

82 The Government of National Unity shall undertake the following duties

(f) devising a comprehensive solution that addresses economic and social problems, replacing conflict not just with peace, but also with social, political and economic justice and respect the fundamental freedoms and rights of the people of the Sudan,

(g) formulation of a repatriation, relief, rehabilitation, resettlement, reconstruction and development plan to address the needs of the areas affected by the conflict and redress the imbalances in development and resource allocation.

PART THIRTEEN
FINANCE AND ECONOMIC MATTERS

CHAPTER I:
GUIDING PRINCIPLES FOR EQUITABLE SHARING OF RESOURCES AND COMMON WEALTH

185 4) The State recognizes that Southern Sudan, Southern Kordofan, Blue Nile, Abyei Area and other conflict affected areas face serious needs; they shall be enabled to perform basic government functions, establish civil administration, rehabilitate and reconstruct the social and physical infrastructure in a post-conflict Sudan.

(6) Revenue sharing shall reflect a commitment to devolution of powers and decentralisation of decision-making in regard to development, service delivery and governance.

(7) The development of infrastructure, human resources, sustainable economic growth and the capacity to meet human needs shall be conducted within a framework of transparent and accountable governance.

(8) The best known practices in the sustainable utilization and management of natural resources shall be adopted by the State.

CHAPTER II
LAND RESOURCES
Land Regulation

186 (1) The regulation of land tenure, usage and exercise of rights thereon shall be a concurrent competence, exercised at the appropriate level of government.

(2) Rights in land owned by the Government of the Sudan shall be exercised through the appropriate or designated level of Government.

(3) All levels of government shall institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices.

National Land Commission

187 (1) Without prejudice to the jurisdiction of the courts, there shall be established a National Land Commission that shall have the following functions:-

(a) arbitrate between willing contending parties on claims over land,

(b) entertain claims, at its discretion, in respect of land, be they against the relevant government or other parties interested in the land. The parties to the arbitration shall be bound by the decision of the Commission on the basis of mutual consent and upon registration of the award in a court of law,

(c) enforce the law applicable to the locality where the land is situated or such other law as the parties to the arbitration agree, including principles of equity,

(d) accept references on request from the relevant government or in the process of resolving claims, make recommendations to the appropriate level of government concerning land reform policies and recognition of customary rights or customary land law,

(e) assess appropriate land compensation including but not limited to monetary compensation, for applicants in the course of arbitration or in the course of a reference from a court,

(f) advise different levels of government on how to co-ordinate policies on national projects affecting land or land rights,

(g) study and record land use practices in areas where natural resource development occurs,

(h) conduct hearings and formulate its own rules of procedure,

(2) The National Land Commission shall be independent and representative of all levels of government.

(3) Membership, appointment, terms and conditions of service of the National Land Commission shall be regulated by law. The Chairperson of the National Land Commission shall be appointed by the President of the Republic with the consent of the First Vice President.

(4) The National Land Commission shall be accountable to the Presidency which shall approve the budget of the Commission.

[As Under]
CHAPTER III
DEVELOPMENT AND MANAGEMENT OF THE PETROLEUM SECTOR

The Framework for Petroleum Management

190 The basis for a definitive framework for the management and development of the petroleum sector shall include:-

(a) sustainable utilization of oil as a non-renewable natural resource consistent with:-

(i) the national interest and the public good,

(ii) the interest of the affected states,

(iii) the interest of the local population in affected areas,

(iv) national environmental policies, biodiversity conservation guidelines and cultural heritage protection principles,

(b) empowerment of the appropriate levels of government to develop and manage, in consultation with the relevant communities, the various stages of oil production within the overall framework for the management of petroleum development,

(d) persons enjoying rights in land, shall be consulted and their views shall duly be taken into account in respect of decisions to develop subterranean natural resources from the area in which they have rights. They shall share in the benefits of that development,

(e) persons enjoying rights in land are entitled to equitable compensation on just terms arising from acquisition or development of land for the extraction of subterranean natural resources from the area in respect of which they have rights,

(f) the communities in whose areas development of subterranean natural resources occurs have the right to participate, through their respective states, in the negotiation of contracts for the development of those resources,

(g) regardless of the contention over the ownership of land and associated natural resources, there shall be a framework for the regulation and management of petroleum development in the Sudan during the Interim Period.

Transitional and Miscellaneous Provisions

226. (1) This Constitution is based on the Comprehensive Peace Agreement and the Constitution of the Republic of the Sudan 1998.

(4) For the purposes of this Constitution and the Comprehensive Peace Agreement, the Interim Period shall commence as from July 9th 2005, and any measures taken or institutions established by the signatories to the Comprehensive Peace Agreement pursuant to the same prior to the adoption of this Constitution shall be deemed to have been taken or established by virtue of this Constitution.

(5) All current laws shall remain in force and all judicial and civil servants shall continue to perform their functions, unless new actions are taken in accordance with the provisions of this Constitution.

[As Under]
SCHEDULES

Schedule (A)
National Powers

The exclusive legislative and executive powers of the national level of government shall be as follows:

15. National Lands and National natural resources;

Schedule (C)
Powers of States

The exclusive executive and legislative powers of a state of the Sudan shall be as follows:-

3. Local Government;
8. State Land and state Natural Resources;
13. The management, lease and utilization of lands belonging to the state;
21. The development, conservation and management of state natural resources and state forestry resources;
23. Laws in relation to agriculture within the state;
34. Traditional and customary law;

Schedule (D)
Concurrent Powers

The National Government, the Government of Southern Sudan and state governments shall have legislative and executive competencies on any of the matters listed below:-

5. Urban development, planning and housing;
17. Environmental management, conservation and protection;
18. Relief, Repatriation, Resettlement, Rehabilitation and Reconstruction;
21. Women's empowerment;
22. Gender policy;
23. Pastures, veterinary services, and animal and livestock diseases control;
27. Water Resources other than interstate waters;
32. Regulation of land tenure, usage and exercise of rights in land.

Schedule (E)
Residual Powers

The residual powers shall be dealt with according to its nature (e.g., if the power pertains to a national matter, requires a national standard, or is a matter which cannot be regulated by a single state, it shall be exercised by the National Government. If the power pertains to a matter that is usually exercised by the state or local government, it shall be exercised by the state).

Schedule (F)
Resolution of Conflicts in Respect of Concurrent Powers

If there is a contradiction between the provisions of Southern Sudan law and/or a state law and/or a National law, on the matters referred in Schedule D, the law of the level of government which shall prevail shall be that which most effectively deals with the subject matter of the law, having regard to:-

(1) The need to recognize the sovereignty of the Nation while accommodating the autonomy of Southern Sudan or of the states;
(2) Whether there is a need for National or Southern Sudan norms and standards;
(3) The principle of subsidiarity;
(4) The need to promote the welfare of the people and to protect each person's human rights and fundamental freedoms.

UNACCEPTED DRAFT OF LAND CHAPTER BY THE SOUTHERN BLUE NILE CONSTITUTIONAL DRAFTING COMMITTEE, OCTOBER 2005

1. BLUE NILE LAND COMMISSION

1.1 The Blue Nile Land Commission is hereby established to hear all claims related to land rights in Blue Nile State in accordance with the Comprehensive Peace Agreement including Article 9 of the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States, this Constitution and State law referred to in sub-article 1.7.

1.2 The Blue Nile Land Commission shall exercise all powers of the National Land Commission within Blue Nile and all other powers granted to it under the Comprehensive Peace Agreement, this Constitution and State law referred to in sub-article 1.7. The Blue Nile Land Commission has a duty to adjudicate all claims related to land rights in Blue Nile State brought by any aggrieved person or party. Decisions of the Blue Nile Land Commission shall be binding on all parties, subject to appeal to the courts of Blue Nile.

1.3 The Blue Nile Land Commission shall be competent to review existing land leases and contracts and examine present land use and occupancy allocations within Blue Nile pursuant to a claim raised for loss of land rights or as otherwise provided by law, and resolve claims in just ways, including restitution or payment of compensation.

1.4 The Blue Nile Land Commission has a duty to hear and determine all issues in accordance with the highest and best principles of administrative justice and substantive principles of equity and social and economic justice.

1.5 The Blue Nile Land Commission shall recognize and use customary law as a primary basis for its decisions.

1.6 Written documentation, literacy or land registration shall not be required in order to bring a claim of wrongful dispossession or to receive a grant from the Blue Nile Land Commission.

1.7 The competencies, composition and working procedures of the Blue Nile State Land Commission, along with the principles upon which its decisions and recommendations shall be based, shall be established by State legislation enacted no later than six (6) months after the adoption of this Constitution.

1.8 No level of Government in Blue Nile State shall issue, renew or recognize the issue of new statutory leases or contracts on rural land in the State until such time as the Blue Nile Land Commission has made final determination upon all claims in the relevant area.

2. LAND RIGHTS

2.1 The paramount title to land in Blue Nile State shall rest with the communities of Blue Nile and rights to use this land outside of designated urban areas shall be distributed by them in accordance with customary law and community decisions. No land use decision may undermine this fundamental right protected by this Constitution.

2.2 In accordance with the principles of devolution and subsidiarity, rights in land owned by the Government of the Sudan in Blue Nile State shall be exercised through the State Government of Blue Nile unless they are properties which expressly require national level administration.

2.3 Customary land tenure is and always has been an integral part of the land law of the State.

2.4 In accordance with Schedule C of the Interim National Constitution governance of traditional and customary law is a competency of the State. The State legislature shall enact a law to amend existing statutory laws applicable to land in the State to incorporate customary land tenure laws and practices. In doing so, the State government shall give due regard to the principle of subsidiarity and the importance of respecting local community practices and decisions with regard to customary law.

2.5 All customary rights to land, regardless of whether they are registered or supported by written documentation or not, shall have the same legal force and validity as any other private right to land.

2.6 All Governments in Blue Nile shall recognize customary rights to land as private property rights whether or not these are registered or held by individuals, families, groups, communities or other customarily recognized groups.

2.7 The State Government may acquire property for public purposes, through procedures which involve full consultation with affected parties and prompt payment of advance compensation commensurate to the market value of the property as well as associated costs, including the value of the buildings or other developments on the land, loss of livelihood and income attributable to the expropriation, and expenses of moving and reestablishment. The State Legislature shall enact a land acquisition law to entrench further procedures in accordance with international best practice.

2.8 The State Legislature shall enact legislation to enable each community to define and record its community land area in agreement with neighboring communities and to make provision for registration of this entitlement. Each community will form a community land council to hold and manage community land for the benefit of all the members of the community and to regulate individual, family and collective rights in community land.

2.9 The customary rights of nomads to seasonally access pasture shall be respected provided that these do not unduly interfere with the primary ownership interest in the land and provided that nomads comply with designated corridors and rules applied in those areas. Seasonal access rights shall be regulated by the State and local governments in consultation with local communities. Representatives of nomad groups may negotiate seasonal access directly with community representatives and these agreements shall be upheld through Government regulation.

2.10 The establishment of administrative boundaries shall take into account the boundaries of community land areas.

3. PROTECTION AND MANAGEMENT OF ENVIRONMENT AND NATURAL RESOURCES

3.1 Recognizing that the people and the future generations of Blue Nile have the right to a clean, healthy and sustainable environment, the State Government, local governments and community authorities shall manage the natural environment and natural resources of Blue Nile in a sustainable manner for the benefit of present and future generations, and enact laws accordingly.

3.2 The Government of Blue Nile, local governments and community authorities shall preserve and promote the biodiversity of fish and wildlife species within Blue Nile and adopt policies and legislation protecting plant and animal species from decline and extinction, including protection from poaching and preservation of important habitat areas.

3.3 All water resources of Blue Nile State, including its surface and underground waters and aquatic life, are the property of the people of Blue Nile State, held in trust for them by the State of Blue Nile and managed in accordance with this Constitution and applicable state law. Inter-state waterways shall be managed by the Government of Blue Nile State in association with other state governments and the national government, as necessary.

3.4 The availability of clean, safe, readily-accessible and sustainable drinking water is a fundamental right of all people in Blue Nile. The Government of Blue Nile State shall use all best efforts to realize this right.
3.5 The people of Blue Nile have the right to use and benefit from the water of Blue Nile consistent with the public interest as defined in this Constitution and as further defined by law.
3.6 Prior to the Government of Blue Nile, or any local government within Blue Nile taking any action that may significantly affect the environment, it shall ensure meaningful public participation in the decision-making process and study and mitigate the possible social and environmental impacts of such action.
3.7 It is the policy of this Constitution and the Government of Blue Nile to devolve the management of water, forests and woodlands, wetlands, wildlife and other natural resources to the most local level possible in order to enhance public commitment, capacity and self reliance in the protection and management of these resources.
3.8 It shall be the duty of the State Government and local governments to assist community land councils to develop and adhere to land use management plans that take full account of the need to protect and sustain the natural environment, including the designation of vulnerable woodland areas as Community Forest Reserves.
3.9 The State shall recognize and protect customary rights of individuals and communities to extract subterranean natural resources using traditional methods, so long as these actions do not individually or collectively result in undue impacts to the environment or the sustainability of such natural resources.

4. BEST PRACTICE

4.1 All laws and administrative practices relating to any matters referred to in this Chapter shall be in accordance with international best practices.

ENACTED BLUE NILE STATE TRANSITIONAL STATE CONSTITUTION 29TH NOVEMBER 2005

39. Islamic Sharia, the unanimity, the popular consensus and the Sudanese people's customs, traditions and religious beliefs taking into account the diversity in Sudan are the source of legislation in the State.

Lands

Organization of Lands

94 – (1) The law shall organize acquisition of lands by the state and their occupation as well as implementation of rights for it.
(2) The state shall take over implementation of the rights which are given to it by the government of the Sudan as established by the constituent decision 186 (2) in the Transitional National Constitution for the year 2005 AD.
(3) The state shall begin gradual enforcement and arrangements to develop the laws so as to contain a connection from the lands to include traditional practices, local heritage, and instruction of international practices.

Land Agreements

95 – (1) The state shall promulgate through the law of the land commission, which shall be formed from persons possessing experience and capability in the state and it shall put into practice all of the agreed upon national land reforms at the state level.
(2) The state land commission shall return land use and land contracts as well as scrutinize the pledged standards for land allocation and recommend changes which are seen as necessary by the state powers according to that which assures rights of land acquisition or reparations for them.
(3) State land agreements shall cooperate with national agreements in arranging to attend actively to the use of their resources with efficiency.
(4) State land agreements shall be issues to come before the governor.

INTERIM CONSTITUTON OF SOUTHERN SUDAN, 2005

CHAPTER II: LAND AND NATURAL RESOURCES IN SOUTHERN SUDAN

Regulation of Land and Natural Resources

180. (1) The regulation of land tenure, usage and exercise of rights thereon shall be a concurrent competence, exercised at the appropriate level of government in Southern Sudan.
(2) Rights in land owned by the Government of Southern Sudan shall be exercised through the appropriate or designated level of government in Southern Sudan, which shall recognize customary land rights under customary land law.
(3) All levels of government in Southern Sudan shall institute a process to progressively develop and amend the relevant laws to incorporate customary laws, practices, local heritage and international trends and practices.

180 (4) 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.

180 (5) Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking into account the need to protect agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law.
(6) Communities and persons enjoying rights in land shall be consulted and their views duly taken into account in decisions to develop subterranean natural resources in the area in which they have rights; they shall share in the benefits of that development.
(7) Communities and persons enjoying rights in land shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land for the extraction of subterranean natural resources in their areas in the public interest.

Southern Sudan Land Commission

181. (1) Without prejudice to the jurisdiction of the courts, there shall be established a Southern Sudan Land Commission that shall have the following functions:-
(a) entertain claims, at its discretion, and in respect of land, be they against any level of government or other parties interested in the land;
(b) arbitrate between willing contending parties on claims over land; the parties to the arbitration shall be bound by the decision of the Commission on the basis of mutual consent and upon registration of the award in a court of law;
(c) enforce the law applicable to the locality where the land is situated or such other law as the parties to the arbitration agree, including principles of equity;
(d) accept references on request from the relevant government, or in the process of resolving claims, make recommendations to the appropriate level of government concerning land reform policies and recognition of customary rights or customary land law;
(e) assess appropriate compensation for land including but not limited to monetary compensation, for applicants in the course of arbitration or in the course of a reference from a court;
(f) advise different levels of government on how to co-ordinate policies on Southern Sudan projects affecting land or land rights;
(g) study and record land use practices in areas where natural resource development occurs;
(h) conduct hearings and formulate its own rules of procedure; and
(i) any other functions that may be conferred upon it by law.
(2) The structure, composition, appointment, terms and conditions of service of the Commission shall be regulated by law.
(3) The chairperson of the Commission shall be appointed by the President of the Government of Southern Sudan.
(4) The Commission shall be independent and representative of all levels of government in Southern Sudan.
(5) The Commission shall have its budget approved by the Southern Sudan Legislative Assembly and shall be accountable to the President of the Government of Southern Sudan for the administrative performance of its functions.

182. (1) The National Land Commission and Southern Sudan Land Commission shall co-operate and co-ordinate their activities so as to:
(a) use their resources efficiently;
(b) exchange information and decisions on land issues; and
(c) resolve any conflict between their findings or recommendations.
(2) In case of conflict between the findings or recommendations of the National Land Commission and Southern Sudan Land Commission which cannot be resolved or reconciled by agreement pursuant to sub-Article (1) (c) above, the matter shall be referred to the Constitutional Court.
(3) The Southern Sudan Land Commission may carry out certain functions of the National Land Commission, including collection of data and research.