

Post-conflict land administration: a note

Countries that have decided to take military action in and against countries that were either considered to be a threat to international peace and order or the governments of which were considered to be so oppressive to some of their own citizens that the international community felt obliged to step in to separate the combatants and attempt to enforce a peace or under the doctrine of pre-emptive strike have in the last few years come to realise that in virtually all such countries conflicts over land have been at least a part of the cause of the wider conflicts within or between the countries concerned.

Moreover, they have come to realise that even where conflicts over land have not been a particularly significant cause of the outbreak of a conflict, such conflicts are likely to break out during attempts to bring about and consolidate peace as those who fled the original conflicts return to find that their land has been appropriated by others; or that those who have 'won' seize the land of those who have 'lost' a civil war; or – a very common occurrence – documentary records of land administration have been deliberately destroyed during the conflict so that conflicts over who owns what land are almost bound to occur.

Reacting to this phenomenon, there has been an outpouring of official literature on what to do about land administration in a post-conflict situation. Four major publications may be highlighted:

The International Federation of Surveyors Commission 7 Proceedings (2004): *Land Administration in Post-Conflict Areas* (FIG, Frederiksberg, Denmark). This was the proceedings of a conference sponsored inter alia by FAO and UN-Habitat (FIG)

J. D Unruh (2004), *Post-conflict land tenure: Using a Sustainable Livelihoods Approach* LSP Working Paper 18 (FAO, Rome) (FAO)

USAID (2004) *Land and Conflict: A toolkit for intervention* (USAID Washington DC) (USAID)

N Pons-Vignon and H-B Solignac Lecomte (2004) *Land, Violent Conflict and Development* Working Paper 233 (OECD, Paris) (OECD)

The discussion which follows attempts to distil and comment on the essentials of these four documents. In a sense, most wars are about land in that one state is trying to seize territory from another state – this was certainly the case with all colonial wars of conquest – or one part of a state is trying to break away from another part – East Timor, Southern Sudan and the dismemberment of Yugoslavia are examples of that or one state is trying to get control of the mineral resources of another state – Liberia and Sierra Leone, the war in the DRC – or a people are trying to break away from oppressive colonial or national rule and establish their own state – the Palestinians’ struggle to free themselves from Israeli occupation, Somaliland’s successful struggle to free itself from oppressive rule from Somalia are examples of that.

But a characteristic of many of the civil wars that have taken place, especially in the Balkans and in Africa has been that the wars are not about territory – which national flag will fly above the land – but about land: who is to get to own, use and control land. The wars in the Balkans were as much about land as about territory; the Sudanese civil war in the two transitional states of Blue Nile and Southern Kordofan was entirely about land; behind the genocide in Rwanda was the struggle for land; and the eruption of near civil war in East Timor is as much about who gets what land as about who is getting or not getting the benefits of independence.

It is then because so many civil wars and internal conflicts are about land that the donor community has somewhat belatedly realised that more attention should be paid to land in efforts to stabilise and bring order to post-conflict societies. The OECD paper argues that once land becomes a key political issue, failure to tackle it straightaway can impede the chances of achieving a lasting peace and that donors’ conflict prevention programmes tend to neglect land issues; the paper specifically instances Afghanistan in this regard. All the papers draw attention to the problem that in an immediate post-conflict situation, governmental institutions are weak, trust both in government and between people and communities is absent and what is needed, per the OECD paper, is a post-conflict land policy which focuses on the political dynamics of the conflict over land rather than the technical dimensions of land administration. Donors have too often failed to comprehend the potential role of land policy in paving the way for reconciliation and growth.

Both the FIG and USAID papers stress the importance of tackling what they call secondary conflicts: unregulated activity involving the land, housing and property sectors for which there are no mechanisms to resolve the conflicts between parties other than

through using force and violence. Recognising this, the FAO paper states that what is important to a peace process in a land tenure context is equitable access to legitimate land tenure dispute resolution institutions which can play a crucial role in re-establishing legitimacy in governmental institutions generally. The USAID paper goes further and argues for emphasis to be put on strengthening the justice sector generally as a key component of land dispute settlement.

All the papers focus on the need to deal with disputes and a significant emphasis is put on the importance of relying and using local and community based dispute settlement arrangements, many of which will be up and running long before the state is able to put together a formal centralised system of courts and other dispute settlement institutions. Local institutions, separate from the state are likely to be regarded as more acceptable and legitimate than state-based local institutions. This has certainly been the case with local land commissions in Rwanda and mediation in East Timor. Where the people themselves sorted out land issues successfully in Rwanda, local government involvement was a failure.

The implications of this approach need to be spelt out. The centre needs actively to engage with the informal local, not ignore it or override it. When devising laws and administrative systems, it may be easier to change national laws to accommodate what are seen as existing legitimate local rules and practices than legislate out of existence rules developed by the people themselves as reflecting their felt needs and concerns. When the centre does begin to develop dispute settlement institutions, both the FAO and USAID paper stress the desirability of establishing mechanisms and programmes for land restitution, i.e. commence the process of trying to right the wrongs of the past that may have contributed to conflict. Such dedicated land restitution bodies must be independent and of sufficiently high standing and repute that their decisions will be accepted. The Comprehensive Peace Agreement (CPA) in the Sudan provides for Land Commissions to have this function in the two transitional states and restitution has also been a feature of post-conflict land administration in Bosnia and Kosovo.

Allied to the importance of reliance on and support for the local, the FIG paper draws attention to the need to make full use of the private sector in land management and administration. This is not for irrelevant ideological reasons but for very sound practical ones. During periods of conflict, governmental institutions cease to operate or are seen as too partisan to be trusted. The private sector – professionals, NGOs, CBOs – step into the

breach and undertake such tasks as dispute settlement, land transactions, land surveying, land titling, and possibly protection of land records. The FIG paper makes the point that such 'social capital' – the knowledge and skills of the private sector, the trust built up by the private sector (this might be a little overdone) at a time when state institutions are in a state of collapse should not be cast aside when state institutions are re-established. Rather, every effort should be made to develop public/private partnerships in land administration and dispute settlement.

A paper in the FIG Report of which a senior UN-Habitat official is one of the two co-author raises a very interesting and novel point about land registration. It argues for what it calls 'soft systems approach' to land administration geared to the reduction in state capacity brought about by war and argues, as an example of this approach, for a preference for deeds registration over title registration. At a practical level, deeds registration involves the private sector; private lawyers and others have to check the documents in the registry with respect to every transaction undertaken concerning the land to which the documents relate. Title registration on the other hand is a 'final' system – only rights and interests reflected in the official document in the land register matter; history, oral evidence, equity and fairness are irrelevant. Such a system is operated by state officials and only works if the officials operating it are honest, competent, and in sufficient numbers to allow the system to operate with reasonable efficiency and none of these criteria are met in the aftermath of conflict. Nor can such a system work if the relevant official documents do not exist having been destroyed during the conflicts as happened deliberately in East Timor, Somaliland and Kosovo and as a haphazard consequence of conflict in Afghanistan. Deeds registration on the other hand is sufficiently flexible to accommodate oral, hearsay and very informal written evidence of rights and interests in land; overlapping rights; allows for the possibility of the deed to be set aside by other and better evidence of some other rights in the land and so in turn allows for equity and fairness to play a role in determining title to land, all of which are essential in post-conflict land administration.

Now, this is not an entirely accurate summary of the two contrasting systems of registration in practice but it does contain a kernel of truth: title registration can only be effective if the possibilities of challenging the registered title are kept as limited as possible. Deeds registration on the other hand is only *evidence* of the authenticity of a title deed and so can be displaced by better evidence. And it is certainly arguable that deeds registration is simpler, more easily doable at local levels by relatively untrained

personnel and can be more easily fitted into existing grass-roots informal systems of title recordation. To that extent, it does make more sense to base title recordation and protection in post-conflict land administration on deeds rather than title registration. Both Rwanda and Afghanistan are, arguably mistakenly, opting for centrally based title registration while proposals for land administration in the two transitional states in the Sudan are based on introducing deeds registration. Pilot schemes focusing on local systems of deeds registration in Afghanistan show that such systems have a real role to play in post-conflict land administration.

Deeds registration will also facilitate a suggestion contained in the FAO paper: that in re-establishing tenure systems, and trying to handle the problems of IDPs and returnees, one could develop systems of temporary title and tenure security pending the creation of effective governmental institutions which can undertake a full investigation of title claims. Something along these lines has been established in Rwanda where land sharing – existing occupiers of land under customary title were prevailed upon to ‘share’ their land with returnees – was introduced in the aftermath of the genocide of 1994. The exact title of the land sharers was left unclear and even after the passage of the Organic Land Law of 2004 it remained unclear although the longer land sharing went on, the more likely it became that a plot of land previously owned by A had become two plots of land owned by A and B. Conversely the lack of any system of temporary titles or policy of land sharing together with attempts to re-create title registration systems has made it more difficult to sort out conflicts over title claims between occupiers of land and houses and returnees in Afghanistan.

To the extent that conflicts over land are not just about who has what title to land which is agreed to be part of the private domain of land in the state, but are about access to land, the USAID paper argues for divestiture of land from governmental stocks. Now this argument is in part – given the predilection of the US Government for private freehold tenure over any other sort of tenure including private leasehold – an ideological argument for privatisation of public property, but there is also practical sense in the argument that conflict over access to land is likely to be lessened if more land is made available. A contrast may be drawn here between Rwanda and Afghanistan. In Rwanda, game reserves and national parks have been converted to land available for settlement and use by the citizenry. In Afghanistan, the government is taking the opportunity of reasserting its control over land and one estimate is that it now owns and purports to control 86% of the land in the country. The FAO paper points out that government land appropriation is a

notorious cause of violence so that the adoption of such a policy by the government in Afghanistan is not helping to resolve land conflicts.

A localist approach must be applied to land markets. Even during the height of conflict, informal local land markets will continue to function, even if they are intermingled with elements of force and fraud. The FAO paper points out that development of a formal market that does not engage with what has gone before in the informal market runs the risk that smallholders will not engage with the formal market. The formal system has to engage the informal system as it develops to bring about a shared legitimacy. This will involve the land and property restitution commissions and one of the most difficult elements in developing laws on such bodies is to structure their powers so that they can and must distinguish between legitimate transfers and transactions in the past which cannot be overturned and those tainted with elements of force and fraud which must be. Here the centre will have an important role to play in conferring ex post legitimacy on local transactions.

Both the OECD and the FAO reports are very critical of donors. The OECD report as already noted criticises donors for not being sufficiently aware of the role of land in contributing to violence and of the importance of seeing the need to tackle land conflicts as a key element in re-establishing peace within a post-conflict society. But both it and the FAO report also criticise donors for the conflicts between them as to how to approach land issues and those donors who want to impose their own systems for their own purposes – e.g. freehold tenure in countries that have never known it; or downplaying customary tenure; or introducing Torrens systems of title registration. This latter approach is certainly evident in Afghanistan.

Concern is also expressed by these two reports on a lack of coordination between donors on land matters and in the case of the FAO report, the argument is put that in some cases there are too many donors involved in land issues. This is certainly a problem. In Rwanda, there have been two donors contributing to land administration: they do not co-ordinate their activities or what they are emphasising in their inputs and this causes confusion to the government. In Sudan, it is becoming evident that the input of donors into the National Land Commission is in effect contradicting the input of donors into the State Land Commissions in the two transitional states of Blue Nile and Southern Kordofan. In Afghanistan, there are multiple donors involved – FAO, USAID, ADB, the World Bank, UNAMA, UN-Habitat – and they have different and unco-ordinated

policies and approaches to land. The USAID input into land administration – reviving and extending title registration – proceeded in total disregard of the USAID report which had specifically noted that where institutions are weak, rights are unclear or overlapping claims exist, land titling or registration efforts can ignite or provoke conflicts.

A more critical issue is the role of donors where they perceive or think they perceive that national land policies and practices in post-conflict societies are not in accord with either international legal instruments and standards or with what the donors consider to be the ‘right’ approach. None of the reports touch on this sensitive issue but it cannot be ignored. In Rwanda for instance, commentators have pointed out that the land policies of the Tutsi-dominated government although couched in terms of ‘we are all Rwandans and no distinctions can or may be drawn between alleged differences between Rwandans’ are in practice favouring Tutsis over Hutus and the urban elite over the peasants (the two groups are interlinked). In Sudan, it is very clear that the national government is not complying with the CPA and its supporters in the legislatures of the two transitional states are blocking the development of land policies and institutions designed to give effect to the Protocol applicable to those two states which mandates restitution of land and the revival of customary tenure. Donors are soldiering on as if these issues which go to the heart of the conflicts which tore these two countries apart are non-existent. In Afghanistan, although numerous reports have been written by or at the request of and almost always financed by donors about the ‘real problems’ of land, the government is reluctant to tackle them and the donors are equally reluctant to press the government to tackle them so they continue to fester, impeding economic growth, social justice and political stability.

From this survey, what are the keys to creating an effective, efficient and equitable system of land administration in Afghanistan and how does Afghanistan rate against these keys?

The keys:

- take land policy seriously as a major contribution to restoring peace
- base restoring land administration at the local level
- build on local systems of laws, practices and locally developed institutions
- place effective and fair dispute settlement at the heart of national policy
- prefer ‘soft’ to ‘hard’ systems of land administration with special reference to
 - registration systems; deeds as opposed to title registration;

- allowing oral and hearsay and not just documentary evidence for title
- using the private sector in land administration
- land restitution must be central to restoring trust in land administration
- provide land to people rather than re-asserting government ownership of land
- donors must co-ordinate approaches and not impose *their* own systems

Of the 10 keys relevant to national policy and action, Afghanistan is deficient in every single one and of the 1 applicable to donors, the donors fail on that. There is as at 1st June 2007, no national land policy as such and it has never been seen as central to restoring peace. Local systems of land administration exist because there is nothing else in many places not because of any policy to develop them. The judicial system both generally and in relation to land disputes is still inadequate. Hard systems are as a matter of national policy preferred to soft in land titling and in evidential matters in relation to land. There is no clear policy on using the private sector in land administration. Land restitution in relation to returnees is slow and opaque; in relation to land grabbers, non-existent. The government's preference is to acquire or reacquire ownership of land at the expense of providing citizens with the opportunity to own land. Donors do not co-ordinate.

It is however, not impossible to acquire land in Afghanistan and there is evidence at least in Kabul – my knowledge doesn't extend beyond that – that at least investment from the diaspora is coming in. It is possible to buy off potential law suits and get one's title registered. This is not a disapproving comment: at the end of the day most existing landowners have a price at which they are prepared to sell their land and this applies to those in dispute about ownership of the land. In this, Afghanistan is no different to many other countries around the world.

Nor is the difficulty of making title insuperable. Not all foreign investors want a freehold title: those contemplating setting up a factory to produce clothes for an overseas market, for instance would probably be satisfied with a 30 year lease since they will anticipate recovering their start up costs very quickly and moving on when some other country offers a better deal. Korean and Taiwanese investment in clothing factories in Lesotho to supply the American market under AGOA is a case in point. Considering ways of attracting external investors in agriculture, Putzel writing about Asia, (2000) points out that "For large agribusiness corporations, there is increasingly a lack of concern for land ownership. What is important to the modern corporation is that property rights be clearly

assigned.” Once a title has been established, the Civil Code provides a set of rules for buying and selling land and for mortgages.

Many countries have established Export Processing Zones (EPZs) or their equivalent to assist in this kind of investment and this in effect takes land and e.g. labour relations, out of the national legal system. Afghanistan is going down this route but needs to realise that part of the selling point of such zones is quite simply the lack of regulations and the simplicity of getting permission to develop and build. Building codes need to be reviewed at least as much as do the land laws. The Expropriation Law could be used to acquire the necessary land; it is reasonably efficiently operated by Kabul Municipality and with relatively few amendments, could offer fairer compensation to those whose land would be acquired for such a zone.

Nor, despite World Bank and other official donor positions, are most private investors particularly concerned about the presence or absence of an efficient and fair judicial system. (US investors probably are concerned about this but they are not the only source of foreign investment). Maldives doesn't have an efficient or 'Western' style judicial system; that hasn't stopped European and Far Eastern investors piling into the tourist market there taking 25 year leases of tourist islands. Ditto Sudan, yet China and some European private investors invest in oil there. And China yet everyone including the US is investing in land there. It is highly significant that the 4 reports which form the basis of this note do not concern themselves with foreign investors: they are concerned with re-establishing just and efficient national systems of land administration for the citizenry as a major contribution to restoring peace.

So what specific steps could Afghanistan take which might improve its land administration and speed up land transferability. I would argue that it has to 'think and act outside the box', that is be prepared to be unorthodox and challenge traditional ways of doing things. Here are some specific proposals:

- develop an amnesty programme for land grabbers; if they will plan and develop 'their' land to fit in with government's own plans for urban development, then they should be allowed to convert the land to an official legal title which can then be passed on to those buying the grabbed land and allowed too to keep a goodly share of the proceeds of the sale of the land. This

isn't an ideal solution but if, thereby, urban land is brought into productive use, society as a whole benefits

- accept local systems of dispute settlement over land disputes and develop formal and dedicated institutions of dispute settlement dealing with land disputes throughout the country which would tie in with the local systems to speed up settlement of land disputes. Alternative Dispute Resolution (ADR) and Ombudsman should be provided for this purpose, not just courts
- develop participative and community based systems of title recordation in both rural and urban areas
- reverse the thrust to build up government land: allocate land to peasants and urban smallholders and facilitate their development of their land
- make use of the private sector for land management and building regulation purposes and legislate to provide for simplified systems of surveying, titling, building regulations and for 'bare-foot' surveyors
- establish 'one-stop shops' for permission for those wishing to invest in certain specified forms of land development; low income houses, small units for industrial development
- if new towns are to be developed, it should be on the basis of full participation and involvement of their planning and development of those who will be living there
- move towards creating an Organic Land Law which concentrates on general principles and provides a clear legal framework for administrative action and the development of detailed secondary laws covering key areas of land management
- reconsider whether as a matter of national policy, title registration is the right way forward or whether deeds registration and or private title transfer might not be a better way forward
- establish a small body – commission or committee – of high level persons to drive the reforms through. This body would be given specific time lines which would have to be adhered to
- take the initiative with the donors: get them to co-ordinate their support for Afghanistan's land policies
- above all develop a national sense of urgency and commitment in relation to tackling the challenges of land management in the country.