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**Project OSRO/SUD/409/HCR  
Land and Property Study in Sudan**

**Study on arbitration, mediation and conciliation  
of land and property disputes**

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## 1. Preamble

The 'Land and Property Study on Arbitration, mediation and conciliation of land and property disputes' study stems from the – 'Land and Property Study in Sudan'<sup>1</sup> carried out through a partnership between FAO, UNHCR and NRC and will relate and refer to it for its field based findings of legislative and customary law and practice as well as to other sources available.

The study will make reference to existing agreements, statutes and customs, international documents and research on land dispute resolution mechanisms and propose recommendations for the immediate, short, medium and long term use of arbitration, mediation and conciliation and of the traditional equivalents of these legal tools.

## 2. Existing legal framework

The existing legal framework regarding arbitration, conciliation and mediation mechanisms is expressed in the following legal or quasi-legal bodies:

- **Provisions of the Wealth Sharing Agreement during the Pre-Interim and Interim Period;**
- **Statutory legislation: Government of Sudan Laws, SPLM Laws;**
- **Customary Laws;**

While the similarity of the statutory legislations does provide a common base regarding tools of arbitration and conciliation, consensus over applicable laws and areas of jurisdiction is a conditional and necessary element still lacking.

The provisions in the Wealth Sharing Agreement represent a further innovation in the legal scenario and presently add to the need for clarification. Agreement over exact hierarchy, urban vs. rural areas of jurisdiction, as well as over the applicable laws available to the adjudicating bodies is another necessary precondition for legal clarity and for the resolution of land related disputes.

The tools of arbitration, mediation and conciliation as provided for in the different bodies of customary law also require further consolidation and consensus over areas of jurisdiction and legal value.

We will analyse the various available tools, looking at weaknesses and strengths of each, underlining areas in need of improvement.

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<sup>1</sup> 'Land and Property study in Sudan' – Interim report – August 2004, Paul De Wit; FAO/NRC/UNHCR

The Sudan Joint Assessment Mission Conflict Analysis Guidelines recognize land as a critical factor underlying conflict in the Sudan, and in particular that: *“specific redress by individuals or local communities for improper management of land has hardly been available. **While the legal framework for land ownership has not yet been agreed by the parties, the proper functioning of the land commission established by the protocols at the various levels of government can go to great lengths to setting sound land use policies, arbitrating controversial cases and providing compensation.**”*<sup>2</sup>

## 2.1 Provisions of the wealth sharing agreement

The Ownership of Land and Natural Resources chapter of the **“Agreement on Wealth Sharing during the Pre-Interim and Interim Period”**, while of temporary nature and instituting a process, could represent in the interim period, and for the scope of immediately addressing land related disputes, a legally binding and partially superseding document with regards to the existing legislation.

The Agreement therefore needs to be integrated in the present overview of the legislative and customary practices related to arbitration, mediation and conciliation and analysed in comparison with these.

While the transitional measures adopted by the “Agreement on Wealth Sharing during the Pre-Interim and Interim Period” provide the base for an ongoing institutional building and participative process, they do appear to leave many questions unanswered and insufficiently addressing the immediacy of the matter of land disputes, particularly as relates to the returnee process.

For the purposes of the present study this document explicitly lays on the National and Southern Sudan Land Commissions, and without prejudice to the jurisdiction of the courts, the **function of arbitrating land related claims.**

The establishment of a process to resolve land related issues is certainly a necessary and welcome step, but it is necessary to underline that the present document appears to impose a condition of uncertainty in the immediate term. This is particularly true for the matter of land related disputes stemming from the returnee process.

If not adequately addressed, this situation could lead to an accumulation of the already existing and historically stratified claims, further cementing a situation of ambiguity which is certainly not conducive to post conflict peace-building and growth.

The provisions contained in the document, particularly from 2.0 to 2.9, appear to raise more questions than answers, leaving open for interpretation, or for further negotiation, many important issues.

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<sup>2</sup> SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES - Domenico Polloni, Senior Policy Advisor - United Nations, JAM Conflict Advisor- 2004

**We have detailed below some immediate questions each article raises with direct relevance to the purposes of this study:**

## **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.*

As stated above, this provision clearly postpones the final determination on resource ownership to a process. While this is a major step forward, based on other relevant country experiences it can be expected to take many years for the establishment of functional institutional structures, an inherently complex task.

On the other side, and for the specific object of this study, by excluding the definition of issues of ownership, the document leaves essentially unresolved the immediate necessity to address, at least ad interim, the already existing and forthcoming land related disputes, such as those related to the returnee process of IDPs and refugees.

*2.2. The Parties agree that the regulation, management, and the process for the sharing of wealth from subterranean natural resources are addressed below.*

*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.*

The insertion of the term concurrent implies a simultaneous and parallel, but not necessarily synchronized, regulatory function regarding land rights and use. Questions that can arise:

-What is the legal hierarchy of the bodies in 'concurrent competency'?

-If a contentious matter is ultimately referred to the constitutional court, upon which legislation will it resolve the issue? Upon longstanding yet disputed laws, on unrecognized yet fragmented and unconsolidated customs or on generally accepted principles of law and justice?

*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.*

-What legal value will the customary norms and practices and international trends and practices hold in the interim with regards to the resolution of land disputes related to the returnee process?

-If many land related disputes, especially in the south, necessitate a different legal recognition of customary norms for equitable consideration and adjudication, what will be their value in the interim?

*2.6 Without prejudice to the jurisdiction of courts, there shall be established a National Land Commission that shall have the following functions:*

-If the Land Commissions will not hold an exclusive domain of jurisdiction over land matters, what overruling powers will they be subject to, with regards to regular courts' jurisdiction?

-What are the appeal rules of procedure and for what causes?

-Upon which laws will they be decided and by which authority?

- What degree of certainty of law can the Land Commissions ensure?

**2.6.1 Arbitrate between willing contending Parties on claims over land, and sort out such claims.**

-What substantive law will the arbitration be based upon?

-What value of certainty will the awards rendered and the relative enforcements have?

*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.*

-What is the value of this provision vis-à-vis the 1990 Amendment of the Civil Transactions Act, Art 2.A, (adding to Section 559), according to which: **“no court or any other authority shall be competent to consider any application, suit or procedure in respect of any subject having to do with proprietorship of any land owned by the state”?**

-What value does this provision hold if government property is contested as acquired under the Unregistered Land Act of 1970 and the 1990 Amendment which states that: **“all types of lands not registered before the date of this Act shall be deemed as if they are registered in the name of the State” ?**

Or if contestation arises under the Civil Transactions Act 1984, Art 555 (1): **“Whosoever possesses an unclaimed and ownerless property with intent to own it, acquires the ownership thereof”**, in consideration of the SPLM tenet that all land is communally owned, therefore that there was never such thing as unclaimed and ownerless property.

2.6.3 *The National Land Commission may at its discretion entertain such claims.*

-What choices of legal action and redress will a party have in case of refusal to entertain such claims by the Land Commission?

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.*

-Does this provision, in relation to art. 2.5, tacitly recognize the value of customary law as *ius loci*?

-In case of disagreement on the law applicable, do principles of equity automatically prevail?

-What if the concurrent Land Commissions, National and Southern decide to apply different laws, for ex. Statutory and principles of equity?

-What in case of appeal? For instance can an opposite judgement be rendered on a law that is an integral part of the claim by one party?

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:*

-Is this advisory role contracting with the arbitrating role?

2.6.6.1 *Land reform policies;*

2.6.6.2 *Recognition of customary land rights and/or law.*

-What legal value will such recognition have in the immediate and short term?

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 coordinate 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.*

*-May the rules of procedure chosen contrast existing procedural norms? For example regarding the value of undisputed oral testimony with respect to irregular or non existing written evidence?*

*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.*

*2.7 In accordance with this Agreement and without prejudice to the jurisdiction of courts, there shall be established a Southern Sudan Land Commission which shall have the following functions:*

*-What hierarchical relation will it have with the National Land Commission?*

*2.7.1 Arbitrate between willing contending Parties on claims over land, and sort out such claims.*

*2.7.2 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.*

*2.7.3 The Southern Sudan Land Commission may entertain such claims at its discretion.*

*2.7.4 The Parties to the arbitration shall be bound by the Southern Sudan Land Commission's decision on mutual consent and upon registration of the award in a court of law.*

*2.7.5 The Southern Sudan 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.*

*2.7.6 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:*

*2.7.6.1 Land reform policies;*

*2.7.6.2 Recognition of customary land rights and/or law.*



2.7.7 *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.*

2.7.8 *Advise different levels of government on how to co-ordinate policies on GOSS projects.*

2.7.9 *Study and record land use practices in areas where natural resource exploitation occurs.*

2.7.10 *The Southern Sudan Land Commission shall be representative and independent. The composition of the membership and terms of appointment of the Southern Sudan Land Commission shall be set by the legislation constituting it. The Chairperson of the Southern Sudan Land Commission shall be appointed by the President of the Government of Southern Sudan.*

2.7.11 *The Southern Sudan Land Commission may conduct hearings and formulate its own rules of procedure.*

2.7.12 *The Southern Sudan Land Commission shall have its budget approved by the Government of Southern Sudan and shall be accountable to the President of the Government of Southern Sudan for the due performance of its functions.*

*-Similar questions as raised for the National Land Commission arise in these articles regarding the Southern Sudan Land Commission.*

2.8 *The National Land Commission and the Southern Sudan Land Commission shall co-operate and co-ordinate their activities so as to use their resources efficiently. Without limiting the matters of coordination, the National Land Commission and the Southern Sudan Land Commission may agree:*

*a) to exchange information and decisions of each Commission;*

*b) that certain functions of the National Land Commission, including collection of data and research, may be carried out through the Southern Sudan Land Commission;*

*c) on the way in which any conflict between the findings or recommendations of each Commission may be resolved.*

2.9 *In the case of conflict between the findings or recommendations of the National Land Commission and the Southern Sudan 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.*

-In case of disagreement and failed reconciliation which legislation will the Constitutional Court base its decision upon? Statutory, customary, ex aequo et bono, ex principiis iuris, principles of international law?

## **2.2 Statutory framework**

The statutory framework is represented by the Civil Procedures Act of 1983 adopted by the Government of Sudan, and by the Civil Procedures Act of 2003 adopted by the Sudan People's Liberation Movement.

Procedural statutory provisions regarding arbitration and conciliation are similar in both the Civil Procedure Codes of 1983 (Government of Sudan) and of 2003 (SPLM), but their current extension to cover land claims could be uncertain, vis-à-vis the provisions examined above in the **“Agreement on Wealth Sharing during the Pre-Interim and Interim Period”**.

The similarity of the provisions between the two Civil Procedure Codes could in theory facilitate a rather undisputed applicability.

While though the laws do cover, in less than 20 articles, matters such as: the consent of the parties to an arbitral or conciliation proceeding, the appointment of arbitrators, provisions regarding witnesses, evidence, costs, registration, modification, correction of the award, a notable shortcoming is the absence of important detail regarding the procedures to be followed.

Other provisions apparently could allow the courts a wide discretion in interfering with the procedure itself.

For example, in case of a standing agreement between the parties to refer a matter to arbitration or conciliation, a parallel suit may be commenced and there must be a specific application to the court to stay the suit, upon which the same court has apparently wide discretion in determining whether it *“is satisfied that there is no sufficient reason why the matter should not be referred”* to arbitration or conciliation, and that the applicant: *“was and still remains ready”* to arbitrate or conciliate, in which case: *“it may make an order staying the suit”*.

Furthermore, in the case of conciliation, the laws set a time limit of just one month for the conclusion of the proceedings. Such a time limit is not befitting to a truly conciliating spirit between the parties and therefore leans toward a more adversarial resolution of controversies.

Once one moves the scope of analysis from the realm of procedural norms to the substance of the applicable laws, questions can arise regarding the common consent of the parties to an arbitration over the substantive applicable laws which are to be referred to and upon which the arbitration

award is to be based, as also inferred by the provisions of articles 2.6.5 and 2.7.5.

A further question also remains regarding the issue of bodies of legislation that could be direct object of claims of one of the parties to an arbitration, as per article 2.6.2.

Regarding the acceptance of existing legislation, as De Wit points out: *“Southern Sudan rejects Government of Sudan statutory law in its areas of control, mainly the rural areas and a series of towns that have been under SPLM administration for some years now.”*

Based on these considerations, one can assume that: *“there is no unified, single legal framework that is accepted by all parties as being legitimate for the whole country. The GoS relies on statutory law that is still, after fifty years of independence, strongly entrenched in colonial legislation. These laws apply in principle over the entire country, but in practice their use is confined to GoS-held areas, i.e. the north and some patches in the south – the garrison towns.”*<sup>3</sup>

Giving further confirmation of the difficulty of resolving land disputes based upon present norms is the fact that *“the conflict has been exacerbated by the flaws of the current **land legislation**: where tribal communities failed to register land as their own, out of ignorance of the law, land was attributed to the state and could thereafter be sold by the state to Sudanese or foreign absentee landlords.”*<sup>4</sup>

**Thus, in urban areas any possibility of applying provisions of existing statutory laws or administrative regulations that could assist in solving disputes through arbitration, must be agreed upon by the parties, consistent with the principle set in article 2.6 of the Wealth Sharing Agreement.**

A specific analysis of the existing land related legislation is cited, in the event of its consideration as applicable law for arbitration mediation of conciliation, in lieu of principles of equity, as specified in articles 2.6.5. and 2.7.5. of the **“Agreement on Wealth Sharing during the Pre-Interim and Interim Period”**.

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<sup>3</sup> Land and Property study in Sudan – Interim report – August 2004 , by Paul De Wit

<sup>4</sup> SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES - Domenico Polloni, Senior Policy Advisor - United Nations, JAM Conflict Advisor - 2004

## 2.3 Relevant land related legislation

The following are the main bodies of land related legislation and some general and specific characteristics, as identified by De Wit (2001)<sup>5</sup>.

The characteristics were singled out focusing on those that could form the object of claims for dispute resolution in the context of the present study on arbitration, mediation and conciliation.

### ***“Land related legislation:***

- *Titles of Land Ordinance, 1899*
- *Land Settlement Ordinance, 1905*
- *Native Disposition of Lands Restriction Ordinance, 1918, 1922*
- *Land Resettlement and Registration Act, 1925*
- *Land Acquisition Act, 1930*
- *Pre-emption Act, 1938*
- *Unregistered Land Act, 1970*
- *Local Government Act, 1971*
- *Civil Transaction Act, 1984*
- *Investment Act, 1983, 1991, 1998*
- *Forest Act, 1989*
- *Construction Planning and Land Disposition Act, 1994*
- *Local Government Act, 1998*

### ***General characteristics:***

- *Fragmented and scattered still with a strong colonial inheritance*
- *Repeated revision; legislation far outrunning implementation*
- *Probably overlaps, and contradictions*
- *Devised to implement policies that do not necessarily reflect rural reality*
- *Very urban*
- *Based on commercial crop production, gives little or no attention to traditional land use systems, especially grazing*
- *Absence of awareness creation, poor dissemination, little knowledge and poor understanding, no translation into local languages.*

### ***Specific characteristics:***

#### ***The 1925 Land Resettlement and Registration Act***

*-States that ‘all waste, forest and unoccupied land’ shall be deemed to be property of the government until the contrary is proven.*

*-Proof of ownership relies heavily on ‘occupation’, i.e. highly visible land use.*

#### ***Unregistered Land Act, 1970***

*-All land that is not registered before the enactment of this law becomes the property of the government by default;*

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<sup>5</sup> “Legality and Legitimacy: A study on access on land, pasture and water – Sudan”; Paul V. De Wit, 2001; IGAD/FAO/EC

- Cuts heavily into rural communities' land rights and challenges communal and tribal ownership;
- Provides the government with a tool to facilitate the acquisition of large tracts of land for agricultural schemes, at the expense of rural residents and especially pastoralists;
- Transfers all unregistered land to the government, assigning the power of transfer to any public or national enterprise, as well as to farmers on a leasehold basis;
- The act also deprives prior users from the right to be compensated for loss of land use rights.

### **Civil Transaction Act, 1984 and its Amendment , 1990**

- Repeals the 1970 Unregistered Land Act.
- States that registered usufruct rights are equal to registered ownership;
- Legalizes elements of shari'a law;
- The Amendment excludes any consideration of a legal or other suit or procedure in respect of any subject to do with proprietorship of land owned by the state. <sup>6</sup>

**All these statutory bodies of law can create a potential conflict of law with respect to the customary laws that presume the communal undisputed ownership of land since time immemorial. This assumption is confirmed by the following analysis:**

*"The approval of the Unregistered Land Act in 1970 and consequently the Civil Transaction Act in 1983 provided the Government of Sudan (GoS) a legal mechanism to interfere at will in customary land management.*

*At any moment the State can undermine long standing rural realities and agreements. A good example of the negative effects of state intervention remains the extension of mechanised farming land. Thousands of people have been expropriated without any reasonable compensation and have lost direct access to land. It has also been reported that some minor pastoralist tribes have lost their home-dar as the result of the extension of agricultural activities. These groups are now permanently on the move, provoking conflicts along the way. Recently, the demarcation of large tracts of land for oil exploitation has resulted in conflict."<sup>7</sup>*

The historical background and analysis of the existing legislation suggests therefore that any further application through the mechanisms of arbitration, mediation or conciliation could create substantial issues of further contention,

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<sup>6</sup> excerpts from: 'Legality and Legitimacy: A Study on Access to Land, Pasture and Water Sudan' by Paul De Wit, June, 2001

<sup>7</sup> *Ibidem*

rather than solving existing ones, unless agreement is established over which bodies of law are applicable.

It is suggested that workable alternatives also be considered in the interim, with the caveat of their implicit temporary value in conflict prevention and reduction, as a new comprehensive policy is developed and implemented.

Such alternatives could be represented for instance by widely accepted principles and tools of international law.

Furthermore, it could indeed surface from exercises of consolidation of existing provisions, that many basic principles of national and international bodies of law, including customary systems, have much in common with regards to equity, restitution, and compensation principles for example.

## **2.4 Recommendations for improvement**

The eventual improvement of the existing legal framework could be through:

**A) Efforts to align the existing procedural norms to international examples of legislation which are widely accepted and of proven success in regulating procedures of arbitration, mediation and conciliation, and respond to fundamental principles of equity as also recalled by the provisions in the Wealth Sharing Agreement.**

**B) Provisions for conflict of law mechanisms between customary and statutory norms.**

**C) Collation and consolidation of all existing customary norms on arbitration, mediation and conciliation and the traditional equivalents.**

The first and second areas are part of a more comprehensive effort, regarding the ongoing peace process that informs the process of institution building of the post conflict Sudan.

The third area relates specifically to the realm of customary law: its formal recognition through a process of review consolidation and integration has already begun within the JAM exercise, and informally with initiatives by different agencies that will be coordinated in the Steering Committees on Land Policy and Customary Law.

As regards the amelioration of existing laws, a few important tools can be suggested as guide in revising the existing norms of the Civil Procedure Acts:

### **The UNCITRAL Model Law on International Commercial Conciliation<sup>8</sup>**

The provisions in this law can certainly offer a useful reference to the very scant consideration that Conciliation presently receives in the Civil Procedure Acts.

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<sup>8</sup> [www.uncitral.org/english/texts/arbitration/adriindex.htm](http://www.uncitral.org/english/texts/arbitration/adriindex.htm)

An integration of the statutory provisions with mechanisms offered by the customary systems could prove useful, especially once a consolidation of the traditional mechanisms is carried out.

### **The United Nations– UNCITRAL Model Law on International Commercial Arbitration<sup>9</sup>**

This law, while geared towards the regulation of arbitration of commercial disputes, could nevertheless be extended and adapted to fit the particular situation in Sudan as relates to land disputes.

The comparative advantage offered by this very practical, body of 49 articles of law, is its wide recognition and success in solving disputes of extremely varied nature and between widely differing parties from the world over.

A further suggestion could be to make use and adapt to the specific reality of Sudan, the **UNCITRAL Notes on Organizing Arbitral Proceedings<sup>10</sup>**, which is a compilation of notes elaborated to assist with useful tools in organizing arbitration and which is geared toward harmonizing differing approaches to the conduction of arbitration proceedings.

Some specific recommendations in the ‘Notes’ include reference to details that are not sufficiently covered by the Civil Procedure Acts of 1983 and 2003 among which:

- The translation of documents;
- Place of arbitration;
- Costs;
- Time limits;
- Definition of points at issue;
- Possibility of facilitating the continuation or initiation of settlement in course of arbitration proceedings;
- Rules regarding documentary evidence and methodology of submission;
- Admission of physical evidence and on-site inspections;
- Witness evidence, means of submission, language, oaths. etc.;
- Expert opinion and representatives of a party;
- Multi-party arbitration;
- Requirements for filing awards, timing, invalidity, costs.

Other relevant regional tools that could be considered are the:

- The Arbitration act of Zambia<sup>11</sup>;
- The Zimbabwe Arbitration Act<sup>12</sup>;

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<sup>9</sup> [www.uncitral.org/english/texts/arbitration/ml-arb.htm](http://www.uncitral.org/english/texts/arbitration/ml-arb.htm)

<sup>10</sup> [www.uncitral.org/english/texts/arbitration/arb-notes.htm](http://www.uncitral.org/english/texts/arbitration/arb-notes.htm)

<sup>11</sup> <http://interarb.com/vl/Zambia33.htm>

<sup>12</sup> <http://interarb.com/vl/Zimbabwe.htm>

Regarding existing statutory law there is a pressing need for agreement on whether there is a potential for immediate applicability of some norms, even if partial and supported perhaps by consensus over basic shared principles of law: equity, restitution, compensation.

An overarching recommendation guiding the potential improvement of the existing legal framework is that a 'filtering' exercise of comparison between the legal values and provisions existing in Sudan and any foreign instrument of law should be considered prior to enact any changes.

Quick importation of external laws is not the answer: rather a participative process involving all stakeholders should inform the effort aimed at consolidating, revising and bettering existing provisions first, maintaining what works already and is pertinent to the local reality in Sudan.

### **3. Customary legal framework**

A wide variety of customary legislations exists in southern Sudan, reflecting the differences in ethnicity, tradition, geography and livelihoods. This network of customary laws has maintained characteristics of flexibility, constant innovation and interaction for many centuries, if not millennia.

While widely differing, ethnic centred customary systems share the main common trait of being unrecognized oral traditions. This element has often disfavoured them historically, allowing easy simplifications and overruling by centralized decision making processes.

Nevertheless customary law, while in dire need of consolidation and official recognition, has confirmed its present validity and standing through the persistent use and demand by the local communities, in the face of many decades of war and conditions of utter uncertainty of the law.

Unfortunately very scarce collation exercises of customary laws have been carried out so far: as evident in the list of ethnicities below, to which different systems of law can be related to, much remains to be done although some initiatives are under way and others planned for.

#### **3.1 Basic judicial structure**

As reported in the field findings the following is the basic structure of customary dispute resolution and its integration with the formal court system:

*"-Ordinary family disputes are arbitrated at the local level by gol leaders or sub-chiefs, but the award is not legally binding.*

*-Other land property disputes are mainly dealt with at the executive chief or regional court level. The hierarchical lower local and regional courts are also staffed with customary authorities.*



*-Land disputes that reach higher levels of litigation, in case of disagreement over previous local level decision making, such as the county court, are still few, but are expected to increase with the return of IDPs.”<sup>13</sup>*

**Table 1 : Structure of the SPLM judiciary<sup>12</sup>**

<b>Level</b>	<b>Jurisdiction</b>
Gol leader	Family
Subchief	Village
Executive chief	Boma; part of payam
Regional court	Boma-payam
Payam court	Payam
County court	County
High court	Region
Court of appeal	Region

### **3.2 Ethnic customary systems of South Sudan**

The following list of the numerous ethnic groups present in South Sudan<sup>14</sup> can offer an idea of the great variety of customary law systems. It also maps out the possible extent of the compilation, collation and consolidation work that needs to be carried out within the effort of giving official recognition to the traditional systems, as explicitly mentioned in article 2.5 of the Wealth Sharing Agreement.

<sup>13</sup> from: 'Land and Property study in Sudan – Interim report – August 2004 , by Paul De Wit

<sup>14</sup> The House of Nationalities – January 2002

- |                      |                     |
|----------------------|---------------------|
| 1) Acholi;           | 31) Logir;          |
| 2) Aja;              | 32) Lokoya;         |
| 3) Anyuak (Anyuuaa); | 33) Lolubo;         |
| 4) Atuot (Reel);     | 34) Lopit;          |
| 5) Avukaya;          | 35) Lugbwara;       |
| 6) Bai;              | 36) Maban;          |
| 7) Baka;             | 37) Madi;           |
| 8) Balanda-Bor;      | 38) Makaraka;       |
| 9) Balanda-Bviri;    | 39) Moro;           |
| 10) Banda;           | 40) Mundari;        |
| 11) Bari;            | 41) Mundu;          |
| 12) Beli (Jur-Bel);  | 42) Murle;          |
| 13) Binga;           | 43) Ndogo;          |
| 14) Bongo;           | 44) Nuer (Nadh);    |
| 15) Didinga;         | 45) Nyangatom;      |
| 16) Dinka;           | 46) Nyangwara;      |
| 17) Dongatona;       | 47) Otuho (Lotuho); |
| 18) Ferghe;          | 48) Pari;           |
| 19) Gollo;           | 49) Pojulu;         |
| 20) Horiok;          | 50) Sere;           |
| 21) Imatong;         | 51) Shatt;          |
| 22) Jiye;            | 52) Shiluk (Collo); |
| 23) Jurchol (Luo);   | 53) Suri (Kachipo); |
| 24) Jur-Mananger;    | 54) Tenet;          |
| 25) Kakwa;           | 55) Teuth;          |
| 26) Keliku;          | 56) Tid (Tirma);    |
| 27) Kreish;          | 57) Toposa;         |
| 28) Kuku;            | 58) Uduk;           |
| 29) Lango;           | 59) Yulu;           |
| 30) Larim (Boya);    | 60) Zande;          |

### 3.3 Customary tenets on land

We will look below at some tenets in customary law that relate specifically to land disputes. The following excerpts are from different authors: Francis Deng, Deng Biong and John Wuol Makec. While they all refer to research in Dinka customs and uses, they represent a good starting point, that could easily be integrated with the results of ongoing and planned consolidations of customary law in the rest of southern Sudan.

J. WUOL MAKEC:

***“Any temporary dispossession or displacement of the owner from his land through the act of an invading enemy or by other events which are beyond the owner’s control does not deprive him of his title. If a landowner, in case of voluntarily abandonment of his homestead and land, makes it clear that it is his intention to return (by planting fruit trees for instance) and retain the title, reasonable steps must be taken to ensure that he will resume the occupation of the land.***

***No one, however, can be allowed to exercise the right of excluding others forever or for an indefinite period from abandoned land when the right of ownership of an individual over his land is not absolute but restricted.”***

***“The absolute ownership of lands is held by the community.”***

*“ since ownership of the whole land is vested in the community or tribe, it is impossible that a private person can simultaneously be entitled to acquire the ownership of it.”*

*“if the individual is entitled to maintain indefinite exclusive rights over the abandoned lands.. and if this is done by everybody, there will be very serious physical conflicts.*

***All these factors lead to the conclusion that an individual enjoys only possessory rights, which he loses as soon as he abandons the residence.”***<sup>15</sup>

D. BIONG:

*“Continuous and an uninterrupted occupation of land give the occupant a right over that piece of land. If it happened that, **he/she had abandoned it temporarily that does not affect his ownership.** If someone occupies or utilizes it for a short period of time, that would be allowed on the understanding that the original occupant **can terminate his presumed permission anytime** and resume his occupation/ownership of that plot.*

*“If the property which has been transferred....has been destroyed or has perished or got damaged (or injured) **the true owner is entitled to recover damages** against the person who made the wrongful transfer or acquired possession from him.*

*The title of any property which has been transferred to another by way of gift or donation is not traceable provided that the giver or the donor had a better title against anyone else at the time of the transfer to the donee.*

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<sup>15</sup> Makec, J.Wuol, the Customary Law of the Dinka People of the Sudan, Afro World Publ.Co.London, 1988

*The owner is entitled to trace his property into hands of anyone who acquires possession in good faith or bad faith from anyone who has no title to it.*<sup>16</sup>

F. DENG:

*The: "right of the individual member of the tribal community over his residential land is so strong that even if he abandons it, it must be kept unoccupied unless he gives consent to a relative to take it over.*

***Even if someone else be allowed to use the unoccupied land in the absence of the owner, on return it must be surrendered to him.***<sup>17</sup>

### 3.4 Lessons learned and recommendations

The following list well summarizes some evident needs of the existing customary law systems and of the relevant traditional institutions.

- Conflict of laws between different customary systems;
- Lack of legal recognition of the decisions made by the customary institutions;
- Explicit marginalization by existing laws;
- Uncertainty regarding the exact provisions of each body of customary law;
- Overruling by laws, ad hoc decisions, regulations;
- Politicization of the selection process of the customary authorities;
- Pressure added by the returnees process and related claims/disputes;
- Interference in land issues, due to the present legal vacuum, by 'privileged' categories of people without the involvement of traditional structures and mechanisms.

Drawing on these specific problems identified, some clear recommendations for improvement can be drawn as example from the Abyei study.

Their authoritative provenience from traditional chiefs guarantees a demand driven need and therefore should be held in high regard and replicated through further field findings.

“While the basic concept of harmonizing customary laws with the rest of the region was not opposed, **chiefs would like that**

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<sup>16</sup> A study of the traditional institutions, laws and values for peace building in Abyei Area by: Deng Biong Mijak, LL.B-September, 2004

<sup>17</sup> Dr. Francis Deng, Property and Value – Interplay among the Nilotes 1965 SLJR

**harmonization done through a dialogue at grassroots levels and not through imposed uniformed judicial or administrative decisions.**

Chiefs and elders also **appealed for the creation of a forum whereby civic education and dissemination of the customary laws**, social values and the role of the traditional institutions of governance in dispute management and resolution and hence peace building, could be carried out as well as concentrating on review of the customary marriage and dowry rules to accommodate the realities of the day.

It is strongly felt that the issue of traditional justice systems should be addressed, to determine how best to revitalize those traditional institutions, to review the customary laws of the area in order for those institutions and laws to again play their natural and competent roles in supporting the establishment of social order, security and peaceful co-existence in the area.”<sup>18</sup>

## **4. Regional and international references**

An initial exploration of international country experiences can offer a number of practical suggestions for addressing land disputes. The following is a collation of excerpts chosen in view of offering a summary of lessons learned for guidance in the context of land disputes in Sudan.

### **4.1 Relevant examples**

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

-“Issues of land tenure will only be solved through **dialogue and negotiation** between the people involved. However, this will have to be done in tandem with a review of political representation of ‘non- autochthonous groups; land tenure systems (civil and customary) and studies of the way that systemic problems have interacted with historical specifics and local power struggles.”

-“A prerequisite for local peace will be an attempt to **build the capacity of the local people to critique existing legal and administrative structures** and actively advocate for their needs.”<sup>19</sup>

-“Due to the importance of the customary authorities in land issues, their **role has been politicized.**”

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<sup>18</sup> A study of the traditional institutions, laws and values for peace building in Abyei Area - for UNDP-Sudan by: Deng Biong Mijak, September 2004

<sup>19</sup> African Center for Technology Studies –January 2004 – Preventing Conflict Through Improved Policies on Land Tenure, Natural Resource Rights, and Migration in the Great Lakes Region – Chris Huggins

-“The **interference of the provincial authorities** in the activities of customary authorities has **served to exacerbate local land tenure insecurity.**”

-“The customary chiefs retain some legitimacy and they must be therefore involved in the mitigation and ultimately the resolution of land conflicts, but only through a process of **open discussion about the role of the various parties in the land access crisis.**”

-“The process should involve a long term but low profile programme of **engagement by donors, informed by close grassroots involvement and research.**”

-“Evidence from Ituri and other areas suggests that **local markets** are a practical focus for local peace-making agreements. These **spontaneous agreements should be supported**, not just by NGOs but also by the United Nations Organization Mission in the DRC in terms of security arrangements.”

“-The judiciary should be strengthened in order to become more effective, and the Transitional Government should take steps to ensure that they are able to operate without political interference.”

“-**A new policy on land would seek to define customary land rights.**”<sup>20</sup>

## **RWANDA**

“-Government policy has directed people to share land resources or has opened up protected public lands for resettlement. Despite people’s willingness to share land, there are many land disputes at the local (intra- and inter-household) level. “

-The National Unity and Reconciliation Council found **that land disputes are “ the greatest factor hindering sustainable peace.**”<sup>21</sup>

“Analysis of how the international community provided uncritical support for Rwanda’s controversial villagisation policy highlights the need to improve **protection for resettling IDPs**, think more seriously about sustainable integration and **improve inter-agency coordination**”

“-The **Guiding Principles on Internal Displacement** **must serve as the lynchpin** of every response to internal displacement”<sup>22</sup>.

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<sup>20</sup> excerpts from: Land, Migration and Conflict in Eastern D.R. Congo – African Centre for Technology Studies, October 2004, K. Vlassenroot and C. Huggins

<sup>21</sup> African Center for Technology Studies –January 2004 – Preventing Conflict Through Improved Policies on Land Tenure, Natural Resource Rights, and Migration in the Great Lakes Region – Chris Huggins

<sup>22</sup> excerpts from S. Kleine-Ahbrandt, Forced Migration Review, 21 -2004 – Learning lessons from IDP resettlement: villagization in north-west Rwanda

## **BURUNDI**

-“Land related issues have great salience to long term conflict prevention.”

-“The system is multi-tiered, starting at the local level, with the Bashingantahe (a council of respected persons) made up of eminent males at the local level. Some members of these ‘wise councils’ have been appointed for political influence rather than local legitimacy. The legitimacy of some chiefs and commune administrators has also been compromised due to the conflict. Therefore, local level land disputes are less easily resolved.”<sup>23</sup>

-“The 1986 Land Tenure Code acknowledges the legitimacy of customary claims but requires all land, and all land transactions, to be registered with the state. However less than 5 % of the land is registered, and oral traditions about its ownership predominate.”

-“Endemic corruption in the Ministry of Lands has undermined the legitimacy of title deeds. Double registration of plots is another problem.”

-“Recent efforts to support the institution (of Bashingantahe) have been criticized in some quarters, as some Bashingantahe included in donor-funded support projects have been civil servants or political figures, which is not allowed under custom. Nevertheless the Arusha agreement emphasizes their role in reconciliation, at the level of the colline.”

-“Resolving land disputes, especially those related to the return of refugees, will be an essential part of peace-building in Burundi.”<sup>24</sup>

Drawing specifically from the experience of repatriation and reintegration in Burundi, the following short term recommendations were advanced:

- Build the capacity of institutions handling refugee repatriation and integration;
- Strengthen dispute resolution mechanisms;
- Increase levels of participation;
- Implement education and advocacy around land tenure issues.”<sup>25</sup>

## **NIGER**

“Democratisation brought about a decline of registered conflicts, as the traditional chiefs regained their influence at local level, including the right to settle conflicts. Thus, local jurisdiction in Southwest Niger has not been in the hands of neutral judges, but executed by village and canton chiefs who are

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<sup>23</sup> African Center for Technology Studies –January 2004 – Preventing Conflict Through Improved Policies on Land Tenure, Natural Resource Rights, and Migration in the Great Lakes Region – Chris Huggins

<sup>24</sup> excerpts from: Land access and refugee repatriation, the case of Burundi – P.M. Kamungi, J.S. Oketch and C. Huggins – African centre for Technology Studies, September 2004

<sup>25</sup> (excerpts from: Land access and refugee repatriation, the case of Burundi – P.M. Kamungi, J.S. Oketch and C. Huggins – African centre for Technology Studies, September 2004)

the ones primarily involved in land distribution and who contribute greatly to land use conflicts themselves.”<sup>26</sup>

### **Benin; Burkina Faso; Mali; Niger; Sénégal; Tchad**

*“Mais généralement dans chaque Etat, il est fait beaucoup recours aux méthodes de conciliation à travers des structures créées à cet effet, soit par voie législative, soit par voie réglementaire.*

*La législation béninoise privilégie le règlement à l'amiable à toute autre forme de règlement.*

*Les actions et poursuites devant le tribunal territorialement compétent ne peuvent être exercées qu'après échec d'une tentative de conciliation par le comité de gestion concerné.*

*Au Niger\_cette dernière peut se faire suivant une procédure basée sur des commissions de règlement de litiges décentralisées et hiérarchisées (village, tribu, quartier, canton ou groupement, arrondissement ou commune). La désignation des membres de ces commissions est malheureusement du ressort des autorités administratives. En cas d'échec des commissions de règlement de litiges, les actions et poursuites peuvent être portées devant les instances judiciaires légales.”<sup>27</sup>*

### **MOZAMBIQUE**

**“The incorporation of customary forms of evidence** into the formal land tenure system (land law) is a fundamental step in making such evidence legitimate within the formal system, and the formal system legitimate to smallholders.

For dispute resolution institutions to effectively operate between customary (including migrant) and formal tenure systems it must be realized that it is easier to modify national land legislation to accommodate evidence legitimate within the customary system, than it is to legislate out of existence customary norms and rules regarding land tenure, in an attempt to replace the customary tenure system with the formal.

This is not to suggest that the details of land tenure in all customary systems should be incorporated into formal law (an impossible task), but rather that the themes and tenets that embody these and make them operable, such as community membership, testimony, local leadership, history of occupation, present use, and use of in-place dispute resolution institutions for intra-community disputes, be recognized by statutory law. “

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<sup>26</sup> (Adapted Farming in West Africa: Issues, Potentials and Perspectives F. Graef, P. Lawrence and M. von Oppen (Editors) Land rights and soil fertility management in Niger- By Andreas Neef)

<sup>27</sup> (Rapport de Synthèse des Dispositifs Législatifs et Réglementaires en Matière de Pastoralisme: Benin; Burkina Faso; Mali; Niger; Sénégal et Tchad - BURKINA FASO Ministère de l'Agriculture et des Ressources Animales – PRASET)



“The key changes regarding conflict resolution adopted as articles in the revised Law indicate:

- Acceptance of non written forms of customary evidence, such as oral testimony, to defend claims to land;
- Explicit granting of land use rights to rural smallholders through occupation (without prejudice or inferiority compared with rights received by formal written title)
- Mandatory local community participation in the formal titling process
- Ability to register land in the name of the local community”<sup>28</sup>

## **BOTSWANA, SENEGAL, GAMBIA, NIGER, KENYA AND TANZANIA**<sup>29</sup>

### **KENYA**

“Side effects of the Kenyan reform have been widely criticized. Individualization had been conceived as an extinction of community controls over land, but by concentrating all rights in a single proprietor, it also cut off the customary rights and protections of family members and others. While there is no evidence that sales have resulted in significant concentration of landownership, they have played a role in the growing landlessness and increased urban migration and left many families without a safety net. **While disputes over land declined in the period immediately after the reform, after a decade the number of disputes mushroomed as members of families which had not fully accepted the individualist ethos quarreled with the registered owners.** The system relies upon participants to register successions and transactions, but they have very often not done so, undermining a system established at great cost.”

### **SENEGAL**

-“The failure successfully to adjudicate land disputes and devise new rules of resource utilization results in the outbreak of violence. Tenure pressure points exist in many parts of Senegal, simmering places of unresolved land disputes that suddenly erupt into explosive violence.”

-“Donor support for workshops, conferences, and applied research can be effective mechanisms for leveraging participation by a multiplicity of stake holders in the debate on necessary reforms.”

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<sup>28</sup> land dispute resolution in Mozambique: institutions and evidence of agroforestry technology adoption – 2001, Jon D. Unruh

<sup>29</sup> 1995 Old Wine in New Bottles: Creating New Institutions for Local Land Management- John W. Bruce, Mark S. Freudenberger and Tidiane Ngaido

## NIGER

“On 28 January 1975, the military regime devolved responsibility for conflict resolution to customary and administrative authorities to reduce lengthy court deliberations. This devolution failed because of contradictory interests of administrative and customary authorities.

Following the 18 June 1987 decree, which regulates circulation of livestock and defines grazing rights, commissions were created at the arrondissement level to resolve conflicts between herders and farmers.

The role of these commissions extended from conflict resolution between herders and farmers to include all tenure conflicts.”

“Lessons learned

1. The commissions created by the different Nigerien regimes to address land tenure issues were limited in their effectiveness because:
2. Commissions were composed of the same people who had the primary vested interests, that is, traditional chiefs and members of the aristocratic families.
3. Most of the conflicts resolved by these commissions were challenged over time as soon as a new subprefect was appointed.

The reconciliation that was reached was not always signed by all parties, which reduces their legal effectiveness.”

## TANZANIA

“Decentralization shifts the struggles of power from the secretive corridors of authority of the Village and District Councils to the open-air meetings of the Assembly. This at least makes visible the process of land administration at the local level and, in a sense, empowers even the poorer people of the village to a greater extent than in the earlier system.

The Presidential Commission’s report has excited interest throughout the region, but at least to date the prospects of a major reform in Tanzania seem threatened by bureaucratic inertia and self-interest.”

## GAMBIA

“The land tenure systems of The Gambia are complex, for they are composed of constantly changing norms and practices influenced by Western judicial concepts, Islamic religious values, and traditional beliefs and practices of the various ethnic communities in the country. These legal traditions coexist and interact to shape tenure arrangements to land and other natural resources. Tenure relations are dynamic and flexible due to the constant testing and revision of legal precepts through the court system and administrative practice.”

“The **Senegalese** and **Botswana** institutions have common elements...in both cases the new institutions have continued working with the lower level of the traditional hierarchy, the village and ward chiefs, acting often as an

appellate body for those dissatisfied with their dispositions. The collaboration with local traditional authorities has meant that these countries have not incurred the cost of a large land-administration bureaucracy.<sup>30</sup>

## **GHANA**

“There seemed to be general agreement amongst all the participants that **informal arbitration, using family elders, respected community leaders and/or specialists in arbitration**, was one of the most popular and frequently used way to resolve disputes between individuals and families or within families. It was praised as a method which helped to preserve social harmony and also **helped to mitigate the bitterness and conflict which resorting to court proceedings could often engender**. In this sense it is seen as the most 'appropriate' or socially acceptable method, and is compared unfavourably with **formal court proceedings which are viewed as a way of prolonging and deepening conflict, rather than an attempt at resolution**. It was stressed, however, that **for the arbitration to work effectively, the arbiters had to be accepted by all parties as genuinely neutral and disinterested; without this, its primary advantages would be lost**.

Whilst the informality of arbitration was crucial to its success, the workshop agreed that some documentation of decisions would be extremely useful in developing its effectiveness. The institutions of land administration could therefore play a more active role in supporting and facilitating arbitrations.”<sup>31</sup>

## **ETHIOPIA**

“Case Study: To Resilience and Demise of Indigenous Institutions for Conflict Resolution: **The Arrarra Institution of the Karrayu Oromo of Upper Awash**.

The following narration draws on (Ayalew 2001). The term *Arrara* refers to the process of conflict management involving individual clans within the community as well as conflict involving the Karrayu people and the neighbouring ethnic groups like the Afar and Argoba. The term refers to both the group of people making peace (i.e. *jarssota Arrara*) and the actual process of reconciliation and peace-making ceremonies.

At the end of the reconciliation process, representatives of the groups involved let the government authorities know that justice has been done and the disputes are settled peacefully.

However, recent decades saw **progressive erosion of the arrarra institution resulting from unwise and arbitrary intervention by government officials**. Local elders traced the origins of the problem to late 1970's, when the local cadres of the *Derg* (the military junta) “hijacked” and distorted the *arrarra* institution. Government-sponsored peace deals remained ephemeral and ineffectual. Government –appointed “elders” undermined the

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<sup>30</sup> old wine in new bottles: creating new institutions for local land management- john w. bruce, mark s. freudenberger and tidiane ngaido - 1995

<sup>31</sup> workshop 'land rights and legal institutions in ghana' - wood industries training centre, akyawkrom-ejisu-2002

*arrarra* institution through corrupt practices, which lead to a state of mutual mistrust among groups and increased conflict in the area.

It is high time that policy-makers attempt to recognize customary tenure systems harmonize them with statutory laws. **It is also time to recognize the role of indigenous institutions in regulating the use of scarce resources by cooperating and competing groups and in preventing latent conflicts from irrupting into uncontrollable violence.**<sup>32</sup>

## **CROATIA AND BOSNIA and HERZEGOVINA**

“A human-rights based approach to post-conflict property restitution is likely to produce results that are more consistent, fair, effective and sustainable than those based purely on the ‘right to return’.

Given that coerced return would in any case simply subject victims of human rights violations to further harm, property restitution programmes should be based on principles likely to ensure speedy, full and fair restitution of homes BiH and Croatia may be seen as evidence of the effectiveness of a human rights-based approach.”<sup>33</sup>

“Property restitution is central to the successful return and reintegration of both refugees and IDPs. Without it, perceptions of injustice are perpetuated and underlying conflicts remain unresolved.

**The Commission for Real Property Claims of Displaced Persons and Refugees was an innovative strategy to facilitate return by addressing the issue of property restitution.** Its purpose was specifically to receive and decide any claims for real property where the claimant did not enjoy possession of that property or to receive just compensation for it.”

“The CRPC experience has highlighted the necessity to ensure that property rights restitution should be a nationally-owned and directed process. While the international community can assist, it should refrain from imposing its concepts without thinking thorough how these can be implemented practically.”<sup>34</sup>

## **SOUTHEAST ASIA**

-“Other traditional local institutions often eroded over time because the government, either in its tendency to control or take over everything, hindered or substituted for former private institutions, or hindered their work through interference and a suspicious attitude instead of support and promotion. In spite of many official declarations, panchayats, jirgas and similar conflict-solving institutions are of lesser importance now than before or have disappeared.”

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<sup>32</sup> Fuzzy access rights in pastoral economies: case studies from ethiopia by dejene aredo

<sup>33</sup> excerpts from R. Williams, forced migration review, 21 - 2004: post-conflict property restitution in Croatia and Bosnia and Herzegovina

<sup>34</sup> Excerpts from A. Davies, Forced Migration Review, 21 –2004: restitution of land and property rights

-“In general, it is justified to speak of a severe lack of local institutions in the rural areas in Asia, with the result that conflicts are not solved except with the use of weapons or in similar illegal ways.”<sup>35</sup>

## **EAST TIMOR**

-“No agency held clear responsibility for return of persons displaced within East Timor, and most returned by foot or using their own transport.

-“it is almost inevitable that population displacement and property destruction will lead to widespread ad hoc occupation of vacant houses and conflict over remaining housing stock. The more this occurs the more difficult it will be to resolve competing claims to underlying title. The greater the extent of this ad hoc occupation, the more likely there will be a new round of transactions built on the shaky foundations of opportunistic possession rather than legal ownership. This will also greatly complicates efforts to resolve competing land claims, and re-establish sufficient certainty of titles to facilitate economic reconstruction.”<sup>36</sup>

## **LAOS**

“Land conflicts are increasing in the Lao PDR. The reasons for this are very complex. The uprooting of the rural population, migration and resettlement as a result of the war, restitution claims of families returning to towns as well as to rural areas have a significant influence.

They all act within the tense situation created by a new, only incompletely implemented and not yet generally accepted land legislation by broken down customary institutions as well as by inconsistencies in combination of both formal and customary land-tenure systems.

It is conspicuous in Laos that the attempt is made at all levels of conflict to satisfy parties in conflict over natural resources, first of all through negotiation and compromise. This ideal of harmony and balance is deeply rooted in the Buddhist tradition of the country. Only when - following the principle of subsidiary- attempts at mediation at all levels have failed do conflicts get taken to court.

Reported conflicts actually include at the local village level:

- Conflicts in villages between returning families and village inhabitants who have occupied their land. After flight, uprooting and in part emigration, many of them are now reclaiming agricultural land abandoned in wartime

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<sup>35</sup> Synthesis of Current State of and Trends in Land Tenure and Land Policy in Asia-1996- Frithjof Kuhnen

<sup>36</sup> (excerpts from: The Journal of Humanitarian Assistance Title: Land Policy in Post-Conflict Circumstances: Some Lessons from EastTimor-2001)

- Such conflicts become aggravated when at this point, various ethnic groups, which harbor mistrust for one another and apply differing customary regulations for resolving conflicts, are confronted with one another through resettlement (e.g. the Hmong).
- Generally, the capacity of the village authorities and committees in Laos for resolving conflicts is reckoned to be great. However, certain conflicts have remained hanging in the balance for many years;
- However, as long as the power of the State is asserted with the top-down approach, partly because of improved knowledge and the situation of the interests of the villages, the State will continue to be regarded as an "intruder" and as a "predator".
- Professional incompetence, a lack of information and the local administration's lack of good materials and personnel weaken their chances of arbitration.

**A further area of conflict is the unresolved restitution of dispossessed land.** The path of these conflicts is complicated as well:

- Dispossessed families demand their land back from the State, both in court and out of court. The demands are made more difficult when the property is valuable since high functionaries now often live in the houses, and each case becomes a political issue.
- Resolutions out of court attempted with negotiation and compromise in ad hoc land committees have so far proved to unsuccessful.
- New conflicts arise within the family because those who fled accuse those who remained of not having carried out their custodianship responsibly and of misappropriation.

Thus all parties involved in Laos have tried so far to resolve conflicts at all levels outside the formal court system where possible, for it is well-known that the system does not always function as an independent third party, that judges are not yet properly trained, and that court cases cost a lot of time and money and that it is not foreseeable what the outcome will be.

On the other hand, customary procedures of negotiation and arbitration are familiar. Thus, the system of conflict resolution needs further development. As markets are more formalized, procedures for resolving disputes over land will be needed.

In cases of conflict, a graded system of negotiation and arbitration is planned through various committees before cases go to court. Of course, there is the danger that this complex system will not be extensively implemented locally and the actors involved will thus be out of their depth. In such a case, the resource conflicts will come to a head. “<sup>37</sup>

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<sup>37</sup> (Land Tenure Development and Divestiture in Lao P.D.R.-Michael Kirk-1996)

## **CONTINENT WIDE – AFRICA**

Among the commonalities shared by many countries in Africa, a direct reference was made to the “adoption of ‘alternative dispute resolution’ methods to speed up land dispute resolution, make it nearer and fairer for landholders; the main methods are to give more legal weight to local level dispute resolution regimes or to put new land tribunals in place to help take the burden off the courts”.

“Many African countries are reforming the way in which land rights are identified and administered. Because problems are often similar to those being faced in Sudan, there are many useful developments to note. Those that are proving most important around the continent are these two emerging changes: first, widespread steps to improve the legal status of unregistered customary rural land rights which have lain unsupported in law for a century; and second, a related shift towards more localised systems for administering land ownership, even to community level. Many countries are however facing difficulty putting the last into effect, largely because they have tended to develop over-expensive and top-down systems, rather than beginning at the local level and building upon existing systems and capacity.”<sup>38</sup>

### **4.2 Summary of lessons learned**

The examples cited do offer a variety of lessons learned and suggestions for addressing issues that are similar in Sudan and many practical tools that could be incorporated in urgent initiatives to address land conflicts related to the returnee process as analysed further in the following section.

In the consideration of each country experience, it would be advisable to allow for a participative involvement of traditional mechanisms, as an important ‘filter’ in the incorporation of the best practices within the immediate and also medium-long term of addressing land related disputes through formal and traditional tools of arbitration, conciliation and mediation.

The following is a condensed summary drawn from the various experiences cited:

- Land disputes can hinder peace;
- Land disputes need a dialogue between the people involved for their resolution;
  
- There is need for capacity building of the communities to critique existing legal and administrative structure;
  
- The politicization of customary authorities and/or the interference of administrative authorities can exacerbate land tenure insecurity;

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<sup>38</sup> (Excerpts from: Best Practice in Emerging Land Reform in Africa Today- Liz Alden Wily-March 2004)

- There is need grassroots involvement and international support for spontaneous agreements;
- There is need for guarantees for the independence of judicial bodies;
- Corruption in government can undermine legitimacy of tenure;
- There is need for capacity building of the institutions dealing with repatriation and integration;
- There is need to strengthen dispute resolution mechanisms;
- There is need for increased participation, education and advocacy on land tenure issues;
- Top down reforms can prove weak;
- Individualization can foster landlessness and urban migration;
- Donor support can leverage participation in reforms;
- Conflict of interest should be avoided;
- Bureaucracy and administrative inertia can hinder change;
- Collaboration with local level authorities lessens costs;
- Informal arbitration can lessen tensions that grow in formal courts;
- Human rights based approach to return and property restitution is more fair, consistent and sustainable than if based on mere right to return;
- International models must address practical implementation issues;
- Lack of local level institutions in rural areas can favour illegal and violent conflict resolution;
- Lack of policy for return issues and ad hoc occupations can complicate the resolution of competing land claims;
- Local level dispute resolution mechanisms can alleviate burden of courts and speed resolution process;

## **5. Options for short, medium and long term use of arbitration, mediation and conciliation**

Without a strong initial momentum and a prolonged commitment to resolve past inequities while creating a transparent and accountable institutional framework, the challenge of building a conducive base to jump start the



economic and social needs for development in Sudan could be irrevocably lost.

The tools of arbitration, mediation and conciliation could represent a useful option for land, property and natural resource management, particularly if their inherent flexibility is adapted to the evolving challenges of a post conflict environment and until the gradual task of institution building is established. It is furthermore expected that while more formalized structures will be in place in urban areas in the medium and long term, these tools could efficiently address the specific needs of rural realities for a much longer timeframe.

The necessity of an active and coordinated involvement of all stakeholders is strengthened by the consideration that: *“given the historical precedents, dealing effectively with land issues has often been a pressing need in the immediate post conflict period. The ability to deal with the requirements quickly and effectively has often made a major contribution to post conflict recovery.”*<sup>39</sup>

As a tool that also informs action to minimize potential causes of conflict, the “SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES” can be an important reference. The document underlines the need to enrich the planning process through wide consultation also involving indigenous civil society, political parties, academia, diaspora and private sector.<sup>40</sup>

This position is reinforced by indications in the Guiding Principles: *“for reintegration to succeed, community based programs are often the most effective in ensuring that all residents of the community become self supporting, that infrastructure is rebuilt, and that efforts are taken to achieve reconciliation.”*<sup>41</sup>

Yet a caveat must be noted in that, as well stated by Hendrickson: *“bottom-up approaches to managing conflicts over natural resources will remain ineffective as long as the broader institutions which govern the management of natural resources are not reformed.”*<sup>42</sup>

Therefore the importance of a committed coordination of all stakeholders involved cannot be understated.

Experience has evidenced the dangers of neglecting this crucial element:

*“Failure to put in place the necessary mechanisms can keep conflicts simmering, either openly or under the surface, with high social and economic costs. In such situations, subsequent transactions can lead to rapid multiplication of the conflict potential, which in some rural areas can result in*

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<sup>39</sup> (LAND POLICIES FOR GROWTH AND POVERTY REDUCTION - A WORLD BANK POLICY RESEARCH REPORT- KLAUS DEININGER – 2003)

<sup>40</sup> (SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES - Domenico Polloni, Senior Policy Advisor - United Nations, Khartoum/Nairobi JAM Conflict Advisor - North/South)

<sup>41</sup> (Handbook for Applying the Guiding Principles on Internal Displacement, The Brooking Institution Project on Internal Displacement -1999)

<sup>42</sup> (Hendrickson, 1997 – Supporting local capacities for managing conflicts over natural resources in the Sahel: A review of issues and an annotated bibliography. London: IIED and GTZ)

*generalized insecurity of land tenure that jeopardizes the broader rule of law.*<sup>43</sup>

Indicators might not be immediately evident and the turning points can be overlooked. As described by Ramirez in the concept of **accumulation of sources of tension**, tenure systems tend to be resilient to change and can absorb turbulence, but only to a limited extent. Beyond certain thresholds, they can begin to break down.<sup>44</sup>

In order to address these concerns, the mechanisms of arbitration, mediation and conciliation could well suit the interim and short term needs of the gradual upgrade of the institutional mechanisms and ensure the tackling of land related conflicts, while representing in the medium and long term a solid, demand driven base upon which to build on.

The comprehensive framework of policy creation, civil society and institution building should therefore include the existing dispute resolution tools, making use of their inherent flexibility and wide inclusiveness potential.

The following set of recommendations, drawn from comparative experiences, could represent further guidance in the important process that lies ahead in the Sudan:

*-Recognition that for the indefinite future, most countries will be working with dual land tenure systems, one involving tenures such as freehold and leasehold in urban and peri-urban areas, the other based upon customary norms of community-based tenure;*

*-Support for upgrading land tenure and administration under both systems, resisting commitments of resources exclusively for work with the urban and peri-urban problems, and seeking clarity in issues of the interface between the two systems and interactions between them;*

*-Encouragement and support of initiatives such as those described above through pilots or broader programs, with donor support for such efforts through funding for studies to design and evaluate such systems, training of staff, and one-time establishment costs of such systems.*

*Within the rural sector, it is critical to:*

*-Continue to seek means by which local people can increasingly participate in selection of the management of the institutions, and greater internal democracy within the new institutions can be promoted;*

*-Seek clear recognition by national law of customary rules as the residual land law for rural land, except where displaced by specific legislative provisions, accepting that uniformity in land tenure nationally is not an urgent objective*

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<sup>43</sup> Land Policies for Growth and Poverty Reduction – A World Bank Policy Research Report - KLAUS DEININGER – 2003

<sup>44</sup> Ramirez : A conceptual map of Land Conflict Management: organizing the part of two puzzles - FAO Land Tenure Service, 2002

*and that acceptance of diversity can enhance the stability of a country more readily than overambitious attempts to enforce uniformity;*

*-Seek modalities that are effective and mutually advantageous for collaboration between new institutions and traditional authorities, especially those at local level, in the interest of an efficient and economical land administration system;*

*-Seek to identify frankly elements in the community-based systems that contravene important national, sometimes constitutional, policies, such as discrimination against women in access to land, and develop strategies for addressing these issues through legislation or in other manners;*

*-Refine criteria and processes by which land can, as necessary, be shifted to more formal tenure arrangements and outsiders accommodated in the interest of development, ensuring local control over that process and increasing local control of the more formal system as well;*

*-Seek innovative approaches to dispute resolution, in which resolutions reflect local norms concerning land and emphasize mediation rather than strict rule enforcement.<sup>45</sup>*

Specifically regarding the short term, three crucial elements can be drawn from the latest world bank land policy research report:

***A-The development of an incentive structure that rewards settlement of conflicts and insistence on informal resolution as a first step;***

***B-The ability to give legal validity to agreements reached as a result of such informal settlements;***

***C-A system of conflict monitoring and information dissemination to help establish norms of acceptable behaviour that would help affected individuals resolve conflicts among themselves.<sup>46</sup>***

For the medium term the same important land policy research can indicate further relevant steps:

*“Setting up a legal framework that minimizes the emergence of new conflicts and provides accessible mechanisms and procedures for settling old ones is a necessary, but insufficient, condition for a sustainable reduction of the conflict potential. The latter also requires the creation of an administrative or judicial infrastructure that can quickly and authoritatively settle conflicting claims. In doing so, documentary evidence, proven traditions, and oral testimony may need to be accepted as evidence of established rights where appropriate.”<sup>47</sup>*

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<sup>45</sup> Old Wine in New Bottles: Creating New Institutions for Local Land Management- John W. Bruce, Mark S. Freudenberger and Tidiane Ngaido 1995

<sup>46</sup> Land Policies for Growth and Poverty Reduction – A World Bank Policy Research Report - KLAUS DEININGER – 2003

<sup>47</sup> <sup>47</sup> Land Policies for Growth and Poverty Reduction – A World Bank Policy Research Report - KLAUS DEININGER – 2003

As far as long term aims, the Adaptation reform model could reinforce the role of arbitration, mediation and conciliation and the existing traditional equivalents as integral part of land and natural resource management.

*‘Adaptation’ reform models, while not idealizing indigenous tenure systems, attempt to build upon them. They recognize the considerable capacity of those systems to evolve to meet new social and economic challenges, and seek to create a supportive legal and institutional environment for that evolution. That environment is generally thought to include explicit recognition of the applicability of indigenous tenure rules, strengthening of local institutions to administer those rules, and provision of appropriate means of dispute settlement.”<sup>48</sup>*

The specific recommendation, drawn from the above study, to reconsider any broad replacement strategy reinforces the idea of maximizing the existing tools of dispute resolution that can offer coveted flexibility as the differing momentums of institution building of all stakeholders are linked and adapted to the evolving circumstances.

## **6. Practical guidelines for the returnee process**

*“It is unclear how many of Sudan’s estimated 3.5 million IDPs (the world’s largest internally displaced population) and over half a million refugees will be returning and over what time period.*

*There remains considerable debate among UN and NGO personnel over the question of assisted versus unassisted returns. There is serious concern over the capacity in the south to absorb large numbers of returnees and fears that mass return will trigger local conflict over access to already limited resources and services.”<sup>49</sup>*

This comment underlines the impellent necessity of addressing land and property disputes and of the consideration of all options available, from the existing traditional and innovative approaches to the “*set up of institutional fora of negotiation and arbitration of the most delicate issues (and above all property related ones) upon which the different groups perceive themselves in competition or under threat*”.<sup>50</sup>

The urgency of the returnee issue finds official recognition in the Joint Paper on Urgent Needs in Sudan, elaborated by the Government of Sudan and by the SPLM, where it is stated that:

*“there is concern that the capacity to handle a large flow (of returnees) is limited, and that such an influx could potentially exacerbate local tensions over access to already scarce services, water and land. It is for this reason*

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<sup>48</sup> Old Wine in New Bottles: Creating New Institutions for Local Land Management- John W. Bruce, Mark S. Freudenberger and Tidiane Ngaido 1995

<sup>49</sup> J.Rogge, Forced Migration Review, 21 – Protection and support of spontaneously returning Sudanese

<sup>50</sup> translated from: Mathieu-Land issues and violence in Africa: prevention of conflicts, drawing form the case of North Kivu -1999

*that potential flashpoints need to be identified and attended to through peace-building and conciliation activities. It is also important that the receiving communities are to receive equal treatment-hence the reintegration and resettlement portion of the return should be community based.”*<sup>51</sup>

Experiences from other post conflict scenarios indicate without doubt that there is a momentum, a small time-window of opportunity to be grasped. Beyond this key period, past injustices can quickly accumulate with new ones, to effectively entangle and choke any chance of a forming a base for stimulating economic and social growth, internal and external investment and thus hinder any chance and expectations of a concurrent and equitable involvement in the process by all stakeholders: civil society, institutions, private sector, international partners in development.

The present situation in Sudan carries a rare combination of commitment, expectations and pledges of the disputing parties, international partners, and of the civil society to deal efficiently with a very complex yet typical post conflict problem: the issue of setting the base for effectively addressing all contentious property related disputes.

It is crucial to consider that *“rapid and important displacements of populations and (consequent) operations aimed at territorial organization have as a common characteristic the creation of new tenure realities, often without socially acceptable governmental or customary mechanisms to deal with the redistribution and administration of the new balances in power.”*<sup>52</sup>

As such situations could easily build up in the Sudan context, it is essential to implement measures to address delicate transitional issues regarding existing and potential land disputes as a primary urgency.

Among these the importance of addressing the issue of restitution appears to be among the most pressing, as compounded by the following observation:

*“There are compelling grounds for asserting that organized repatriation efforts should not be undertaken unless clear legal and procedural safeguards are in place to ensure that returnees either recover their property or are compensated.*

*There is little to suggest that sidelining or ignoring restitution will produce harmonious societies based on the rule of law, human rights and justice.”*<sup>53</sup>

Ultimately, a quintessential element, both necessary and conditional, to an effective addressing of land and property disputes relating to the returnee process in the current transition to post-conflict in Sudan could be condensed by the necessary interaction of three elements:

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<sup>51</sup> September 29, 2004 Joint Paper on Urgent Needs in Sudan

<sup>52</sup> translated from: Mathieu-Land issues and violence in Africa: prevention of conflicts, drawing from the case of North Kivu - 1999

<sup>53</sup> Scott Leckie, Guest Editor – Forced Migration Review – May 2004

- the political will of the authorities/parties;
- the concrete well coordinated action of all stakeholders and partners;
- the inclusive participation and awareness of the civil society from the outset;

It is key in fact that, along the primary responsibility of the national authorities in addressing the matter, a concrete coordinated approach of all international agencies is elaborated in advance, as detailed in the Guiding Principles on Internal Displacement and as pledged in the Joint Paper on Urgent Needs as elaborated in Oslo on the 29<sup>th</sup> of September 2004 by the Government of Sudan and by the SPLM.

This process should actively include the participatory involvement of the population and of civil society organisations, NGOs and private sector in order to maximize all efforts and potential, avoiding unnecessary overlapping and hindrances.

In this chapter we will first examine specific issues regarding urban and rural areas, after which a set of practical tools and options for the strengthening and implementation of practical measures to address land disputes related to the returnee process will be presented:

- Conflict prevention mechanisms;
- The Joint Paper on Urgent Needs;
- The Guiding Principles on Internal Displacement;
- Traditional, church based, Ngo and civil society lead initiatives;

We will cite examples of best practices have effectively reduced inter and intra community differences in successful, traditional as well as innovative, exercises of arbitration, conciliation and mediation and are recommended for expansion and replication.

The identification of successful examples that can be supported, sustained and replicated follows a simple rationale: while a process of creating a new legal policy is underway, all efforts possible must be coordinated and directed towards the prevention, containment and resolution of existing disputes avoiding the dangers of stratification of claims and the potential escalation of hostilities due to the volume of returnee population.

## **6.1 Rural and urban scenarios**

### **RURAL AREAS**

While there seems to be no doubt that the current system of customary law is an important tool for addressing land disputes arising in rural areas, the need to support a valid yet weary mechanism that has been weakened after decades of civil war is also manifest.

The identification of substantial gaps accumulated during the long standing conflict underline an immediate and direct benefit that could result from the urgent strengthening and capacity building of the customary mechanisms.

There is a consensus that these can indeed prove very useful in avoiding escalation to more substantial conflicts.

## URBAN AREAS

Regarding urban areas the situation is considerably more complex. We will cite examples of existing and potential contentious issues recorded in government and SPLM held towns and suggest different possible approaches.

### GOVERNMENT HELD TOWNS: JUBA EXAMPLE

The following is a list of contentious matters that were identified in Juba:

- “-lack of documentation of land sale or lack of registration by buyer;*
- compensation claims by caretakers of IDP property;*
- bad faith registration of plot by caretaker in his own name;*
- state development of plots for public use in absence and without owner’s consent;*
- land administrative authorities allocating the same plot to multiple lessees and in charge of arbitrating the relative claim cases;*
- substandard quality of rights for women and IDPs;*
- compensation claims for lost property by lessees overtaken by de facto occupiers;*
- innocent third party irregular purchases of plots being overridden by returning original owners”<sup>54</sup>*

### SPLM HELD TOWNS: YEI EXAMPLE

The following land and property disputes were among those reported in Yei town:

- “ - urban plots being occupied by the military without the consent of the owner; when an absentee owner returns the plot is not vacated;*
- erection of infrastructure on non-owned plots, resulting in claims for compensation;*
- illegal sale of non-owned plots; often soldiers sell residential plots without any documentation; some commercial plots were traded by soldiers (without knowledge of the owner.*

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<sup>54</sup> excerpt from: ‘Land and Property study in Sudan – Interim report’ – August 2004 , by Paul De Wit

*- all property owned by absentee Greek and Arab owners is temporarily possessed by the administration and subleased to a third party.*

*If the owners reclaim their property it may create serious problems, especially if investment was made on the commercial plots without the knowledge and consent of the owner.*

*- abandoned or degraded property is subject to land grabbing with the administration unable to control the situation.*

*- risk for massive expropriation of land and property from southerners by southerners...if rented property is turned into de facto ownership.<sup>55</sup>*

## 6.2 Recommendations

Ultimately, land and other natural resources are managed throughout the Sudan by customary authorities, with specific rules being determined by the different customs. They could indeed represent the main instrument of land dispute resolution at little direct cost, particularly at the local rural level, as they are well known and recognized by the communities and their area of application is accepted to a certain degree.

Where higher level conflicts should manifest in rural areas, the successful model of the People to People Peace Process<sup>56</sup>, as well as civil society and Ngo initiatives should be strengthened, expanded and replicated, with the political will and support necessary assured by authorities and development partners.

As pertains to the urban land related conflicts particularly the situation, as seen above is not so clear cut.

Urban centred disputes do not fit the mainly rural characteristics of the customary laws and the mechanisms available for resolving them.

Furthermore, the varied provenience of urban population, and the potential disputes that can arise, cannot be addressed by the present unconsolidated status of the various customary laws for which conflict of law mechanisms have not yet been reviewed.

A solution could be offered by the possibility to arbitrate claims with reference to common shared principles of equity, or through agreement over the law of the land as stated in the provisions of the Wealth Sharing Agreement.

Among specific recommendations for addressing the delicate and stratified urban and peri-urban land issues, there could be the establishment of a mechanism similar to the **Commission for Real Property Claims of Displaced Persons and Refugees** that was set up after the Balcan war.

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<sup>55</sup> excerpt from: 'Land and Property study in Sudan – Interim report' – August 2004 , by Paul De Wit

<sup>56</sup> Building Hope For Peace Inside Sudan: People to People Peacemaking Process, Methodologies and Concepts Among Communities of Southern Sudan – New Sudan Council Of Churches - 2004



A basic reference to this experience was made above. While it was capable of re-establishing some degree of certainty as to property titles, it lacked local enforcement mechanisms, which in south Sudan are yet to be created, and necessitated enormous amounts of funding by donors.

The advantage of such a commission is that it could maintain guarantees of independence and neutrality.

The following analysis can help in comparing the complexity of the present situation in urban areas and the possible solutions that have been drawn from similar experiences.

*“When land is part, if not the core, of the conflict, and when there are population movements (internally displaced persons, refugees, returnees), there are likely to be conflicts over the ownership and/or occupation of land and property. Immediately after the conflict has ended many institutions are not functioning normally and therefore the normal monitoring and enforcement by the state institutions and the society, in regard to illegal occupations, is not functioning. With regard to land and housing de facto possession is often considered to be sufficient. **Emergency situations create opportunities for the grabbing of land, use rights (e.g. mineral rights) and property, by the poor, the rich and/or criminals. Political patronage in regard to property is extremely prevalent during conflict in regard to those in power and/or those in the resistance forces. Especially in regard to the rich and criminals, this behavior needs to be limited as much as possible, as it is very hard to solve the problem once the situation has stabilized.***

***Groups who have been previously discriminated against may, after a change of regime, try to get their revenge, or get back previously owned properties outside of the legal process. This may involve forcing out the current occupants and/or persuading the occupants/owners to sell under duress.***

*There is an urgent need to put mechanisms in place to deal with the situations described above in a proper, non-discriminatory way and with due process, **without being overly bureaucratic.** It is likely that innovative hierarchies of legal evidence will be needed, rather than following the normal civil law procedure system. To be able to deal with this situation a judgement as to the magnitude of the situation and different types of claims should be made.*

***An administrative structure will be needed to collect claims, inventory abandoned dwellings, allocate temporary permits, allocate building permits.”***

***“It may be necessary to set up a specialized tribunal or claims commission to deal with the disputes and allocation of permits”***

***“Ultimately, taking certain humanitarian considerations into account, evictions will have to be carried out. If the persons are unwilling to***

*abide voluntarily by the eviction order, police or security services will be needed to complete this. Usually forced evictions will only be needed occasionally as they serve as a model to the society that eviction orders have to be taken seriously. If however, eviction orders are not enforced, few people will follow them voluntarily. The credibility of the entire dispute resolution process will be affected if eviction orders are not generally followed. This is a key aspect of re-establishing government as a normal part of life and the rule of law.*<sup>57</sup>

Thus, even if land related disputes can be partially addressed through existing mechanisms and strong support from authorities and development partners, there is also to address specific needs for capacity building, infrastructure development and training.

**The sheer expected rate of influx of the returnee population and the important differences between urban and rural issues indicate the necessity to urgently coordinate practical approaches and specific activities for the upgrade, strengthening and capacity building of existing human resources and infrastructure as well as for the replication of successful existing practices as examined in detail below. This could be an important addition to the existing mechanisms for addressing land related disputes provided by statutory and customary norms.**

Contextual input of assistance and technical paralegal services, linked with activities of capacity building, training and infrastructure upgrading should be designed.

### **6.3 Preventive mechanisms**

The undeniable urgency of land disputes related to the returnee process imposes the consideration that the prevention of further disputes can be key in alleviating the burden of needy institutions for the resolution of disputes, avoiding the escalation of existing hostilities and avoiding the stratification of claims that could hinder the delicate transitional phase.

This approach could be simultaneous to the strengthening of peace building and conflict resolution processes.

Specific programs of training, capacity building, infrastructure upgrading and human resources up-scaling should be urgently designed, taking advantage of the existing mechanisms within traditional systems as well as innovative models and approaches as mentioned below.

It is suggested that while existing land and property dispute resolution tools offered by the statutory and customary mechanisms need to be reinforced, all efforts initially must resolve to ensure a stronger and more decisive action focusing on pre-emptive, concrete actions and measures.

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<sup>57</sup> Legal aspects of land administration in post conflict areas Dr. Jaap ZEVENBERGEN and Prof. Paul van der MOLEN, Symposium on Land Administration in Post Conflict Areas April 29 - 30, 2004 Geneva

Conflict prevention lies at an earlier stage than conciliation and prior to the manifested need for mediation and arbitration.

A preventive approach could ultimately prove to be very effective in reducing the burden that is expected to be placed on the statutory and traditional systems of dispute resolution by the expected necessity of responding to a massive quantity of property related claims put forth simultaneously.

A conflict preventive approach would also respond more immediately to the conciliatory and retributive orientation of traditional systems, than would the mostly adversarial mechanisms of arbitration or adjudication:

*“Unlike the European method, the traditional method aims at adjusting disturbances of the social equilibrium and restoring peace and good will while the European one tends to widen the gulf between the parties by concerning itself with facts and application of legal principles, granting all rights to one of them and excluding the other without consideration of the social implications.”<sup>58</sup>*

The following is a description of some characteristics of different conciliatory and adversarial approaches to dispute resolution:

#### ***Traditional Peace Building***

These are methods that particular communities have used over time and are embedded in the community value systems, attitudes and culture.

**It is negotiable hence may be healing enough to most people.**

However, it should be noted that while one community may regard a particular method as traditional, another might see it as modern.

#### ***Reconciliation***

Reconciliation is an activity within the practice of conflict resolution. It is a long – term process of overcoming hostilities, mistrust and suspicion between peoples in conflict.

Reconciliation is more or less a process of confidence and trust building that **leads to “healing” justice rather than “revenge” justice.**

#### ***Settlement***

**Settlement does not deal with who is right or wrong, but merely seeks to regulate harm or damage to parties concerned.** This approach seeks to prevent or reduce negative results of the existing conflict

It does not seek to permanently end the conflict because it does not address its root causes.

Thus most conflict settlements remain legalistic and involve deal making through the processes of negotiation, mediation and arbitration.

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<sup>58</sup> - A study of the traditional institutions, laws and values for peace building in Abyei Area - for UNDP-Sudan by: Deng Biong Mijak, LL.B, September 2004

### **Arbitration**

This is a process that is most common in legal settlement of conflicts. It literally **gives someone an award rather than address the problem.**

This is why arbitration is about interests. The arbitrator therefore addresses what the parties are interested in getting, rather the source of the conflict. Indeed the arbitrator sees the problem as a dispute over spoils rather than a conflict over needs.

### **Mediation**

This is the use of the third party as a mechanism to conflict resolution.

The mediator helps parties arrive at the best possible solution to their current problem, but which is not necessarily the best outcome for the fully satisfied by it. The use of third party to achieve resolution by mediation is likely to resolve conflict, but not wholly because the outcomes have been achieved through compromise. Compromise leads to loose-loose outcomes.<sup>59</sup>

## **6.4 Preventive tools for the return process**

A first application of the preventative approach is offered by the necessity to address the returnee movement in itself, its timing and modalities.

While keeping in mind the principle of voluntary return, a primary responsibility is to focus on easing and minimizing the adverse effects of the return movements, which entails a particular attention to ensuring careful planning for initial, en route and destination specific conditions of safety, nutrition, health and hygiene for both displaced and host communities.

Beyond the higher level coordination among authorities and agencies, specific support must be assured directly to the communities.

The following practical steps were adapted from the existing mechanism used in preventive agreements by Ngok Dinka and Missirya Chiefs to avoid clashes during the seasonal movement of herds.

**Removed of the case-specific traits, this tool of ‘preventative conciliation’, could prove useful to pilot and replicate in the assistance planning directed at the returnee process:**

*“i) Before take off chiefs should, first, **send messengers** to inform their counter parts about their intention to start coming;*

*ii) On their part, and in response to the request, chiefs would send their **permission through same messengers after having shown them routes** of their impending movements;*

*iii) In the said movements, the heads of the (cattle camps) must see to it that, **herds do not move nearer to farms;***

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<sup>59</sup> excerpts from New Sudanese Indigenous NGOS Network –Conflict Resolution and Peace Building Workshop Report - 2004

iv) *The chiefs, as **leaders of the hosting community, take upon themselves the responsibility of directing the various tribal groups** that, annually, traverse the area to go or relocate to specified grazing plains and water points to avoid clashes and conflicts;*

v) *The chiefs appoint monitors to monitor the seasonal movements as well as directing various tribal groups to specific grazing plains and water points.”*<sup>60</sup>

#### **6.4.1 Practical options identified in reference documents**

For the purposes of this study these international reference documents should represent the overarching framework and guidance for the identification of practical guidelines for the urgent addressing of land disputes arising from the returnee process:

**A) The Joint Paper on Urgent Needs elaborated by the GOS and SPLM<sup>61</sup>;**

**B) The Guiding Principles on Internal Displacement (and the Handbook for Applying the Guiding Principles)<sup>62</sup>;**

##### **The Joint Paper on Urgent Needs**

The Joint Paper on Urgent Needs in Sudan is important for two main reasons:

**1- It gives immediate guidance and recommendations for actions of involved stakeholders aimed at easing the potential for disputes;**

**2- It implies the will and responsibility of the concerned authorities as a necessary condition for the effective addressing issues arising from the returnee process.**

Based on the very recent elaboration of this document by the Government of Sudan and the Sudan People's Liberation Movement, there are a number of activities which are critical to peace-building and to the transition to development in Sudan.

These activities are focused on the first two years of the Interim Period, nevertheless the parties explicitly state that:

***“the urgent needs between now and the beginning of the Interim Period are essential to the success of the programs presented in the JAM”***<sup>63</sup>

Among the urgent needs identified those of immediate concern to addressing land disputes related to the returnee process are:

**-Protection;**

**-Community based resettlement and reintegration packages;**

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<sup>60</sup> excerpt from: A study of the traditional institutions, laws and values for peace building in Abyei Area- Deng Biong Mijak, 2004

<sup>61</sup> The Joint Paper on Urgent Needs in Sudan, elaborated by the GOS and SPLM-Oslo, Norway, September 29,2004

<sup>62</sup> UN Doc. E/CN.4/1998/53/Add.2 - 1998

<sup>63</sup> The Joint Paper on Urgent Needs in Sudan, elaborated by the GOS and SPLM-Oslo, Norway, September 29,2004

- Public awareness and development of joint messages;
- Averting/alleviating hotspots and initial stages of DDR;
- Development of local government and community capacities to handle reintegration and resettlement.

It can be argued that the need to address land disputes in general, and specifically as relates to the returnee process matches the immediate timeframe of the interim period, and ultimately entails responding promptly to all the needs listed.

**These needs therefore should be the direct focus of all initiatives supported by relevant stakeholders, including the use of arbitration, mediation and conciliation and other peace building and traditional mechanisms.**

### **Guiding Principles on Internal Displacement**

While the Guiding Principles are not a binding legal instrument, they are “based on and consistent with human rights law, humanitarian law, and refugee law by analogy. Their acknowledgement in resolutions of the UN Commission on Human Rights and Economic and Social Council underscores the moral authority they have begun to command. **The Inter-Agency Standing Committee has called upon its member agencies to share them with their executive boards and staff and to apply them in their activities in the field.**”<sup>64</sup>

**Among the specific indications arising from the Handbook on Applying the Guiding Principles there are a number of practical guidelines of action for stakeholders involved:**

- 1-Participate in and support interagency coordination focused on the internally displaced, ensuring that local organizations are partners in such coordinated efforts;
- 2-Take into account, in program design, ‘special needs’ groups within the displaced population whose rights might be subject to abuse;
- 3-Supporting visits of areas of potential return;
- 4-Convener consultations with leaders of displaced groups, local authorities and international organizations, prior to return or resettlement ensuring representation;
- 5-Disseminate information about the rights of displaced persons (to the populations themselves and) to relevant authorities;

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<sup>64</sup> by Francis Deng,- foreword statement to the Handbook for Applying the Guiding Principles on Internal Displacement, The Brooking Institution Project on Internal Displacement - 1999

6-Advocate with authorities and providing support to local nongovernmental organisations or other groups;

7-Train military personnel;

8-Establish monitoring and reporting systems that document violations;

9-Identify and help eliminate potential conflict between communities by convening consultations between internally displaced persons and populations residing in areas of return or resettlement, considering the needs of resident – as well as of returnee- populations in program design, and taking steps to prevent stigmatization or resentment;

10-Assess legal statuses or other relevant documents to determine returnees claim to land and property upon return, designing programs to ensure that IDPs property rights are protected and they gain access to legal assistance;

All activities in this direction are conditional in ensuring that the process does not result in an unnecessary burden on local communities and authorities, that could find themselves incapacitated to deal with the expected rise in land related disputes.

It follows that coordinated urgent actions and programs directly responsive to the urgent needs identified in the Joint Paper and based upon application of the Guiding Principles is recommended.

#### **6.4.2 Practical tools identified by traditional authorities**

The examination of some of the characteristics drawn from analysis of customary handling of land disputes in Abyei by Deng Biong, underlines the **need to strengthen traditional authorities, to consolidate customary laws and provide for conflict of law mechanisms.**

*“ the traditional institutions which were strong before the current civil war, were always resorted to by the Government authorities and formally charged with resolving those disputes. But since the current civil war broke out in 1983, the Ngok Dinka population was forced into massive displacement to the North as well as to the South in the period between 1985 and 1987. Like many others the traditional justice institutions suffered, and **their role became weak and ineffective in dispute resolution.**”*

*“Reading the statements of the study informants...it seems when the traditional structures were operational and normally carrying out their functions, they yielded positive results. But today, because those structures, as a matter of fact are fragmented on both sides of Abyei’s political divide, **their role is practically waning.**”*

*“Disparity of Ngok Dinka law with the laws of their neighbours has negative effects in their relationship with these neighbours. Example, is*

*like what some Dinka elders stress as a fact that there is no Puk (blood compensation) with the Nuer. This is a negative position when viewed in the context of the conciliatory role Puk plays in settling violent conflicts.*<sup>65</sup>

**Other immediate, practical suggestions to address the urgency of land disputes related to the returnee process can be drawn from interviews carried out with traditional authorities in the context of the same study:**

- 1- To improve the capacity of the traditional chiefs through training workshops or through paralegal training;
- 2- Support to traditional courts with furniture, equipment, stationery and trained clerical staff;
- 3- To revive the council of chiefs and elders and facilitate a process of review and if necessary amendment and/or incorporation into existing laws;
- 4- To initiate process of ascertainment, restatement and development of the customary laws and practices, to front ignorance and increase awareness and integration with parallel coexisting bodies of law;
- 5- For the regulation of population movements facilitate and support meeting and agreements over timing and routes to be used and appoint peace monitors, to monitor the movements and report and disputes or quarrels as early as possible to avoid any violent conflict developing out of those disputes;
- 6- The traditional system of seasonal movement monitors be encouraged and materially supported;
- 7- All authorities and the traditional institutions to ensure respect for territorial boundaries and severely punish any violations;
- 8- Set up of procedures for the prevention, management and resolution of any future disputes and conflicts;
- 9- To create a conducive environment for the traditional mechanisms to operate effectively and contribute towards conflict transformation and peace building;
- 10- Active Government authorities role (must not stop at the secession of hostilities, but must make sure that specific grievances sustained in the course of those hostilities are addressed and remedied, the parties are reconciled and social equilibrium is restored);
- 11- Encouragement of cross-line exchanged chiefs' visits and organization and facilitation of inter-tribal peace conferences on a recurrent basis;

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<sup>65</sup> Excerpts from A study of the traditional institutions, laws and values for peace building in Abyei Area by: Deng Biong Mijak- September, 2004



12- A stakeholder's workshop with attendance drawn from chiefs, elders and intellectuals on both side of the divide, as well as from the neighbouring tribes;

13- Through civic education and human rights workshops there is a need to encourage the teaching of and remind people of their good traditional values, social norms and the old war ethics.<sup>66</sup>

### **6.4.3 Practical options drawn from indigenous civil society organizations**

The crucial role of the communities in addressing land disputes related to the returnee process cannot be underemphasized: *"It will be vital to strengthen local dispute resolution mechanisms to solve disputes over access to land and claims for property restitution."*<sup>67</sup>

A recently elaborated set of specific recommendations for action regarding IDPs, returnees and exiles aimed at stakeholders in the JAM, government, UN agencies, donors and NGOs calls for:

***"a well planned governmental and inter-agency preparation programme to be worked out to receive mass returnees (IDPs, returnees, exiles): In addition to provision of basic services e.g. shelter, food etc, this should include local-base emergency preparedness and conflict transformation programme to prevent conflicts that may arise. Inclusion and consultation with CSOs, women and local community groups is very important."***<sup>68</sup>

An important reference point in the implementation of activities to address the urgency of the land disputes could be thus represented by existing indigenous civil society organizations.

The New Sudanese Indigenous NGOS Network (NESI), an indigenous umbrella body of 42 member organizations, coordinates a number of relevant practical initiatives in peace building that are reported below.

In ANNEX I we report the tables of activity of NESI that specify achievements, lessons learned and identified needs.

These could also be an important base for addressing immediate land related disputes and for strengthening conflict prevention and resolution mechanisms as the institution building process is underway.

In August 2004 NESI conducted a Training of Trainers course in the format of a workshop aimed at the enhancement of peace building skills of 30 trainers from 24 of its member organizations.

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<sup>66</sup> drawn from: - A study of the traditional institutions, laws and values for peace building in Abyei Area - for UNDP-Sudan by: Deng Biong Mijak, , September 2004

<sup>67</sup>J.Rogge, Forced Migration Review, 21 – Protection and support of spontaneously returning Sudanese

<sup>68</sup> UN Resolution 1325 Inclusion of Women in Decision-making levels and Negotiations: The Role of Policy-makers, Women's Organizations and Civil Society for Achieving an Inclusive Sudanese Peace Negotiations for a Just and lasting Peace for the Sudanese People A Civil Society/Women's Perspective A Discussion Paper For UN NGO Working Group New York, 21<sup>st</sup> October 2004 By \*Suzanne Jambo

The strategies adopted for the NESI training model are the following:

**“1) Developing community based early – warning system**

It is crucial that peace builders/ animators are able to arrest conflict at an early stage. Experiences all over Africa has shown that conflict that are initially regarded as trivial have ended up being more destructive.

**2) Establishment of vertical and horizontal networks and linkages**

Most conflicts at micro level (community / local) have direct connections with what happens at the macro level (regional, national). It is therefore crucial that linkages and networks are established with a view to educating and influencing policy makers and other stakeholders for sustainable peace.

**3) Establishment and Consolidation of Peace structures**

It can be very challenging to perform peace work in the absence of structures. Among the structures that can be influential in peace work include CBOs, LINGO, religious organizations, civil authority and the private sector. Working with all these stakeholders may require consolidation (where there such structures existing) or establishment of peace committees that represent a given community / society.

**4) Advocacy**

Peace work cannot ignore the importance of structural advocacy, bearing in mind that structures play a key role in peace promotion. Advocacy is the art of exploring various alternatives to open up systems. Advocacy may be people or policy centered.

It should be noted that the two approaches are complementary but not contradictory.

**5)Peace building education**

Peace training can be offered to those directly involved in peace work to enhance their skills in peace issues.”<sup>69</sup>

The methodology adopted considers options in peace building and conflict resolution as divided in two major categories:

a- Peace Building: traditional peace building, reconciliation

b- Non Peace Building: settlement, arbitration, mediation

The consideration of such a subdivision in the training model could enlarge the options available for addressing the urgency of land related disputes, by integrating ‘modern’ methods with traditional and innovative combinations, while paying particular attention at the difference between conciliatory versus more adversarial alternatives.

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<sup>69</sup> excerpts from NESI – NETWORK - CONFLICT RESOLUTION AND PEACE BUILDING WORKSHOP REPORT AUGUST 2004

**Tables specifying identification of relevant initiatives, challenges, planning and mapping of areas of operation of the 24 civil society organizations currently applying this model are contained in ANNEX I.**

#### **6.4.4 Practical options drawn from international organizations**

*“Since one of the most serious threats to stability both North and South is the persistence of local conflicts, the role of traditional authorities and civil society organisations, both indigenous and international, in neutrally promoting traditional peace-making mechanisms may be significant.”<sup>70</sup>*

The following are approaches drawn from Sudan or regional experiences of some international organizations that could be expanded and replicated as well as linked to maximize support for specific activities of capacity and institution building carried out by local civil society organizations and traditional authorities.

The following is a brief mention of some existing relevant initiatives and experience:

##### **Nairobi-Peace Initiative-Africa**

“In addition to working directly with people in conflict, NPI-A has seen its role as that of stimulating existing institutions. NPI-Africa has been involved in a wide range of peace building initiatives. Major activities have included:

-supporting grassroots peace building work in Liberia, Ghana, Kenya, Sudan, Uganda and Congo;

-promoting Track 2 mediation and conciliation efforts by religious and political leaders in Angola, Burundi, Ethiopia, Kenya, Mozambique, Rwanda and Sudan;

-building capacity in conflict transformation and peace building for peace workers in over 30 countries in Africa;

-organizing conferences and symposia on topical issues of concern to peace building and Africa in general.”<sup>71</sup>

##### **PACT**

“Pact’s approach in Peace Building is three fold:

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<sup>70</sup> SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES - Domenico Polloni, Senior Policy Advisor - United Nations, Khartoum/Nairobi JAM Conflict Advisor - North/South

<sup>71</sup> <http://www.overcomingviolence.org/dov.nsf/0/8932b916190a2f43c1256c5a002ee23b?OpenDocument>  
[www.nd.edu/~krocinst/people/wachira.html](http://www.nd.edu/~krocinst/people/wachira.html)

-to increase the ability of local communities to plan and manage activities that build peace;

-to increase the ability of local organizations to assist communities in implementing peace-building plans;

-to increase the ability of civil society and faith-based networks in building, consolidating and safeguarding peace.

The approach encourages reconciliation and healing as soon as possible, even before larger-scale conflicts are fully resolved, and favours traditional conflict resolution methods over imported ones.

### **Community-based dialogue, facilitation and mediation**

In all cases priority is given to traditional conflict resolution mechanisms.

### **Rapid response interventions**

Recommendations on interventions flow from the facilitated community dialogues.

### **Consolidation of peace building across communities**

Communities are encouraged to move away from personal grievances towards issues that require cooperation and inter-dependency.

### **Support mechanisms at sub-national/regional levels**

A key component is the development of a conflict early warning and information sharing system.

### **Grants management**

Pact awards small grants of short duration to CBOs and NGOs for specific peace building activities.”<sup>72</sup>

## **NOVIB**

A regional example that could be piloted for replication in Sudan is that of Novib in Somalia.

“One of the characteristics of Novib’s method in Somalia/land is the ‘process-approach’, meaning that there is a clear strategy and direction with room for creativity and flexibility in both planning and implementing activities. Therefore this programme is built through consultations and dialogue with the CSOs. Civil society itself has the major role in defining and implementing this project. Activities are not completely worked out beforehand but rather are developed in a participatory way with the organisations involved during the course of the project. Novib is also primarily a non-operational NGO and therefore supports activities through Somali partners and consultants.”

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<sup>72</sup> drawn from : [http://www.pactworld.org/platforms/peace\\_building.htm](http://www.pactworld.org/platforms/peace_building.htm)

“The project was formulated as a four-year programme with three phases around the broad objectives of raising awareness on the roles and responsibilities of civil society, through research, public awareness and advocacy, strengthening the capacity of civil society organisations to contribute to peace, development and human rights and strengthening linkages within civil society and with other actors including local authorities and the international community.”

### **Community based peace building**

“Novib plans to continue supporting civil society engagement with both the implementation of the peace agreement and with broader peace-building issues with an emphasis on increasing the ownership of the agreement through critical engagement and debate and to work using a bottom-up approach utilising links with grassroots, community-based and civil society organisations, in order to better address wider peace issues that go beyond the boundaries of the formal agreement.”

The results of this work would be to strengthen, link (at all levels) and empower local peace initiatives, with a special focus on women.”<sup>73</sup>

### **6.4.5 Practical options drawn from the people to people peace process**

In the context of lack of reliable and certain legal means of redress, an example of creative and successful addressing of land related disputes in southern Sudan, is represented by local initiatives, among which the People to People Peace Process stands out as an exemplary success case.

**This initiative is based on a model which can be used in the immediate necessity of confronting land related disputes caused by the returnee process, in the delicate interim period before an efficient judiciary is in place and before traditional mechanisms are fully strengthened, and functional.**

*“The People to People Peace Process, an initiative of the New Sudan Council of Churches, has been using traditional methods of conflict resolution to secure sustainable peace, return and reintegration.*

***It is a locally-owned process based on traditional methods of reconciliation.***

*Its first and most relevant success example is the Wunlit conference, which established peace between the Dinka and the Nuer after several attempts of various authorities had failed in the 7 year conflict.*

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<sup>73</sup> drawn from: [http://www.somali-civilsociety.org/strength/strength\\_project.asp](http://www.somali-civilsociety.org/strength/strength_project.asp)

*Subsequent conferences have followed a similar pattern. The ongoing work of the peace councils spawned from the conferences have fundamentally contributed to the renaissance of notions of restorative justice, reconciliation, forgiveness and ethnic co-existence in Southern Sudan. The People to People Peacemaking is a peace and reconciliation process between peoples with oral traditions which incorporates elements of Christianity and modern techniques of diplomacy and problem solving and reconciliation.*<sup>74</sup>

**The model has been applied in many instances:**

- NSCC/SPLM Yei Dialogue, Loki Accord, IDPs Workshop Pagaraw, Ayod Lou Gawaar;
- the Akobo, Loki Women, Rumbek, Watt, Gurnyang, Pak All Nuer, Chukudum Crisis, Kakuma Women, Koch and Wunlit II Peace Conferences;
- the Pochalla, Nyal and Thony Peace Education Conferences.

It would represent an opportunity loss if the proven success of its approach were not to be guaranteed, strengthened and supported for replication and extension.

The process may not be applied in all disputes, especially in urban contexts where more precise and institutionalised regulatory mechanisms are probably needed, but it is potentially replicable with success in many land disputes that can be expected to arise in rural areas.

While it differs from arbitration, litigation and the formal court system, the People to People Peace Process offers a practical, culture based and responsive approach that has often proven to be successful.

With the necessary support from authorities, civil society, donors and relevant international agencies it could be replicated to address land disputes arising from the returnee process.

Key characteristics of the process are:

- 1- it is structured as a process, not as an event, seeking to establish mechanisms to sustain and expand peace, while reconstructing governance systems and strengthening communities capacity to contain conflicts;
- 2-it does not allow a small elite of group representatives to articulate problems on behalf of aggrieved parties. A fundamental non-negotiable feature is the community participation and leadership: the people must own the peace process and its sustainability;
- 3-it provides powerful constraints on future breaches of agreements;

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<sup>74</sup> excerpts from Michael Ouko – Forced Migration Review-September 2004: From warriors to peacemakers: people to people peacemaking in southern Sudan

4-women and youth involvement is ensured as important elements of the process ;

5-transparency and openness is assured in involvement and representation within the process;

**The lessons learned collated from the various experiences of practical application of this peacemaking model underline that:**

*“-There is a significant niche for understanding and utilizing traditional approaches and methods along with other approaches, e.g. modern, Christian.*

*-It is important that external approaches are not used proscriptively.*

*-The peacemaking can be enriched and strengthened by incorporating rituals, symbols and acts of communal commitment, aspects of traditional heritage.*

*-Motivation and essence of forgiveness through asserting human dignity acknowledging responsibility and acceptance of retribution.*

*-Multilevel intervention for peace and reconciliation (grassroots, middle range and top level) approach as indispensable.*

*-Provisions for security and basic human needs as conditional to the process (for example in the context of the return of refugees and IDPs).*

*-The slow, gradual and complex nature of the process.*

*-The need to expand application of the process to situations of latent and potential conflict.*

*-The need for strengthening of the process by integration of community based early warning and response systems that have not yet been institutionalized.”<sup>75</sup>*

## **6.4.6 Final considerations**

The examples and practical options listed above emphasize the need for strong political support for customary and innovative initiatives that have already tackled the issue of land disputes, to be successfully replicated and expanded to address the complexity of the returnee process.

An important element that needs to be urgently addressed, as past experience has indicated, is the coordinated support of authorities and international bodies:

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<sup>75</sup> Building Hope For Peace Inside Sudan: People to People Peacemaking Process, Methodologies and Concepts Among Communities of Southern Sudan – New Sudan Council Of Churches, Nairobi, Kenya

***“Communal reconciliation mechanisms have attempted to tackle issues..... with a view to achieving enduring and sustainable co-existence between ethnic groups, but they have often been frustrated by the lack of political will to promote genuine reconciliation and by the failure by the development community to ensure the necessary follow-up on the recommendations made in the peace conferences. The role of traditional, grassroots peace-making can be refurbished and its potential be fully tapped by a close integration with peace monitoring and operations of the international community.”<sup>76</sup>***

In this context, the JAM Conflict Guidelines, the Guiding Principles on Internal Displacement, the Joint Paper on Urgent Needs, and the practical methods and tools examined above offer a sufficient working base.

There is need at this point for an integrated framework of action oriented coordination among stakeholders which should focus on specific project proposals for addressing in the immediate and short term period land disputes related to the returnee process, with an aim to longer term institution building goals.

## **7. Summary of findings**

Strongly reinforced by the findings of the present study is: *“the need to address urgent and short-term issues in the framework of a longer term developmental vision. Failure to do so may undermine any integrated recovery programme in the aftermath of the comprehensive peace agreement. This implies that all immediate and mid-term corrective, preventative and retentive land and property related measures that are envisaged to facilitate the return and recovery process need to be streamlined with an overall land policy, implemented according to an appropriate land legislation and supported by relevant institutions.”<sup>77</sup>*

Yet, the process of elaborating and implementing a post-conflict land policy in Sudan along with the relevant supporting legislative and institutional framework which is accepted by all sides is barely commencing and will involve further intensive efforts.

The gradual and detailed nature of this task is bound to cover a length of time, for which the experience of other countries leads to indicate an expectation of a period of a few years at the least.

Nevertheless, all initiatives that will be undertaken at this stage by the relevant stakeholders will have far reaching implications and without doubt either ease or further complicate the very delicate issues of land.

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<sup>76</sup> SUDAN JOINT ASSESSMENT MISSION CONFLICT ANALYSIS GUIDELINES - Domenico Polloni, Senior Policy Advisor - United Nations, Khartoum/Nairobi JAM Conflict Advisor - North/South

<sup>77</sup> Land and Property Study in Sudan-Interim report - Scoping of issues and questions to be addressed - Paul V. De Wit



The importance of the elements of flexibility and adaptability of all parties involved will therefore prove to be necessary and crucial during the transition to an effective, respected and reliable system of law, as also will an unrelenting far-sighted political will, supported by deep involvement and participation at the international and local grassroots level.

This study finds that the present institutional framework is insufficient to address, immediately and with sufficient guarantees of equity and justice, land disputes related to the returnee process, unless coordinated support for existing mechanisms and agreement over applicable laws is worked out, particularly in the urban context.

It is suggested that there is indeed a need for review and consolidation of existing norms, traditions and uses informed by common and international principles of equity, and with the possible 'friendly' integration by lessons learned in similar processes of other countries and by critical consideration, not sheer importation, of practical and valid tools offered by international instruments of arbitration, mediation and conciliation.

The existing legislation is mainly constituted by a fragmented statutory framework which, as discussed, is profoundly contested, and by a web of unconsolidated customary legislation pertinent to the various ethnic realities, which is characterized by its predominantly oral nature and a pre-existing and widespread use *ab immemore* in southern Sudan.

If the existing statutory legislation could be object of land related claims stemming from the returnee process, its use as applicable law in arbitrating, mediating or conciliating disputes is not recommended, except through consensus over undisputed norms and *principiis iuris* which inform existing systems of law.

Such principles do inform and represent the base of many customary, as well as statutory, systems of law, and could very well prove to be part of general shared principles in the ongoing consolidation of the many different tribal law systems.

Explicit reference to principles of equity and *ius loci*, or law of the locality where the land is situated, is contained in **articles 2.6.5 and 2.7.5** of the Ownership of Land and Natural Resources chapter of the "**Agreement on Wealth Sharing during the Pre-Interim and Interim Period**", yet with no specific reference to which *ius loci*, statutory or customary, will be considered applicable.

This remains a main point of potential contention to be resolved.

The urgent effort of consolidation and revision of the existing bodies of law could be a preliminary necessary component of the shaping of a future comprehensive land policy.

Thus, any interim and partial application of existing provisions to address urgent land related disputes must have the characteristics of the flexibility and wide acceptance by all interested parties in order to avoid further

exacerbating disputes and to maximize all efforts towards the use of prevention, as well as conciliation and mediation or arbitration tools available.

As noted above, the inherent characteristics of local traditions are based on conciliatory, rather than adversarial mechanisms of dispute resolution.

This local element should be the main 'filter' in the process of agreeing on applicable laws and in considering and proposing the use of foreign instruments of dispute resolution and of relevant lessons learned from other contexts.

A basic consensus between the parties over the needs above mentioned is key for any long term progress to be made. It is also directly related to the immediate necessity of coordinating a strong support involving all stakeholders to address the delicate returnee issues.

Furthermore, it should inform the provision of demand based capacity building and training of human resources and upgrading of basic infrastructures for dispute resolution in both urban and rural areas.

Simultaneously, successful preventive and dispute resolution mechanisms as provided by the existing systems, as well as innovative tools and initiatives as reported above should be urgently supported for further expansion and replication to address, contain and reduce land disputes, not least as relates to the returnee process.

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## ANNEX I

THE FOLLOWING TABLES OUTLINE THE EXISTING ACTIVITIES OF THE 24 INDIGENOUS ORGANIZATIONS PER REGION ACTIVITY AND RESPECTIVE AREA OF OPERATION.<sup>78</sup>

FOR EACH REGION THE PARTICIPANT ORGANIZATIONS IDENTIFIED ACHIEVEMENTS, CHALLENGES AND NEEDS.

### Upper Nile

Name	Role	Area of operation
NIP	Planning to engage in peace building initiatives)	▪ Maiwut
SCA	<ul style="list-style-type: none"> <li>▪ Peace between Twic and Mayom county</li> <li>▪ Peace between counties of Western upper Nile</li> </ul>	▪ Mayom
JARAD	<ul style="list-style-type: none"> <li>▪ Repatriation and peace building</li> <li>▪ Take people to secure places</li> <li>▪ Mediation on behalf of IDPs</li> <li>▪ Settlement for IDPs</li> </ul>	<ul style="list-style-type: none"> <li>▪ Bor</li> <li>▪ Panyagoor</li> </ul>
SYCP	<ul style="list-style-type: none"> <li>▪ Peace Advocacy</li> </ul>	<ul style="list-style-type: none"> <li>▪ Pibor</li> <li>▪ Pachala</li> </ul>
NRRDO	Planning to engage in peace building initiatives)	▪ Nuba Mountain
NSWF	Civic education	▪ South Sudan
GESO	Planning to engage in peace building initiatives)	▪ Udier
ACHA	<ul style="list-style-type: none"> <li>▪ Implemented peace mediation in Raing Lou Jekany</li> </ul>	▪ Raing

### Achievements, Challenges and Needs of organizations in Upper Nile

Achievements	Challenges	Needs
SCA / ACHA implemented peace among the inter-clan communities in Western Upper Nile and in Eastern Upper Nile e.g. Bol and Lek in Western Upper Nile and Lou and Jikenay in Eastern Upper Nile	<ul style="list-style-type: none"> <li>▪ Inadequate fund</li> <li>▪ Insecurity</li> <li>▪ Lack of infrastructure e.g. roads to schools and health centers</li> <li>▪ Food shortage</li> </ul>	<ul style="list-style-type: none"> <li>▪ Funds</li> <li>▪ Security</li> <li>▪ Transport</li> <li>▪ Capacity building</li> </ul>

<sup>78</sup> (tables presented in NESI – NETWORK - CONFLICT RESOLUTION AND PEACE BUILDING WORKSHOP REPORT AUGUST 2004)

## Bahr- el –Ghazal region

Name	Roles	Areas of Operation
GRDF	<ul style="list-style-type: none"> <li>▪ Organizing Peace building Conference</li> <li>▪ Training peace committee</li> </ul>	<ul style="list-style-type: none"> <li>▪ Gogrial</li> <li>▪ Malual</li> <li>▪ Angui,</li> <li>▪ Bor G. West.</li> </ul>
WORD	<ul style="list-style-type: none"> <li>▪ In process to convene peace building and reconciliation conference</li> </ul>	<ul style="list-style-type: none"> <li>▪ WAU and Rega</li> </ul>
CDAS	<ul style="list-style-type: none"> <li>▪ Community Peace Conference</li> </ul>	<ul style="list-style-type: none"> <li>▪ Twic</li> </ul>
HARD	<ul style="list-style-type: none"> <li>▪ In process to convene peace building and reconciliation conference</li> </ul>	<ul style="list-style-type: none"> <li>▪ Wau and Rega</li> </ul>
AORD	<ul style="list-style-type: none"> <li>▪ In process to convene peace building and reconciliation conference</li> </ul>	<ul style="list-style-type: none"> <li>▪ Awiel East and L. County</li> </ul>

## Achievements, Challenges and Needs of Organizations in Bahr-el-Ghazal

Achievements	Challenges	Needs
<ul style="list-style-type: none"> <li>▪ Reconciled communities and their leaders</li> <li>▪ Approved transfer of civic servants between two counties.</li> <li>▪ Brought people of Twic together</li> <li>▪ Reconcile communities in the county</li> </ul>	<ul style="list-style-type: none"> <li>▪ Funding</li> <li>▪ Rivalry over fund / resources among different actors</li> <li>▪ Peace process expensive (involves several negotiations)</li> <li>▪ Difficulties in bringing rival communities to a shared conference</li> <li>▪ Tedious work</li> </ul>	<ul style="list-style-type: none"> <li>▪ Capacity building in peace building and conflict management methodology</li> <li>▪ Sufficient fund for implementation</li> <li>▪ Network with local and regional peace building and conflict management stakeholders</li> </ul>

## **ACTIVITIES PLANNED**

The following is a list of further activities as planned by the various organizations in NESI network, that can integrate the existing activities as identified in the tables above:

Carrying a Peace Building Training Needs Assessment

Holding Peace Building workshops

Facilitation of the selection and formation of Peace Committee in counties

Empowering women in peace building

Enhancement of Traditional Institutions for conflict resolution

Civic education

Peace building and conflict management

Conflict resolution and trauma healing

Developing training plans as per the geographical needs

Developing Action plans for peace building after training

Training of Peace Committees

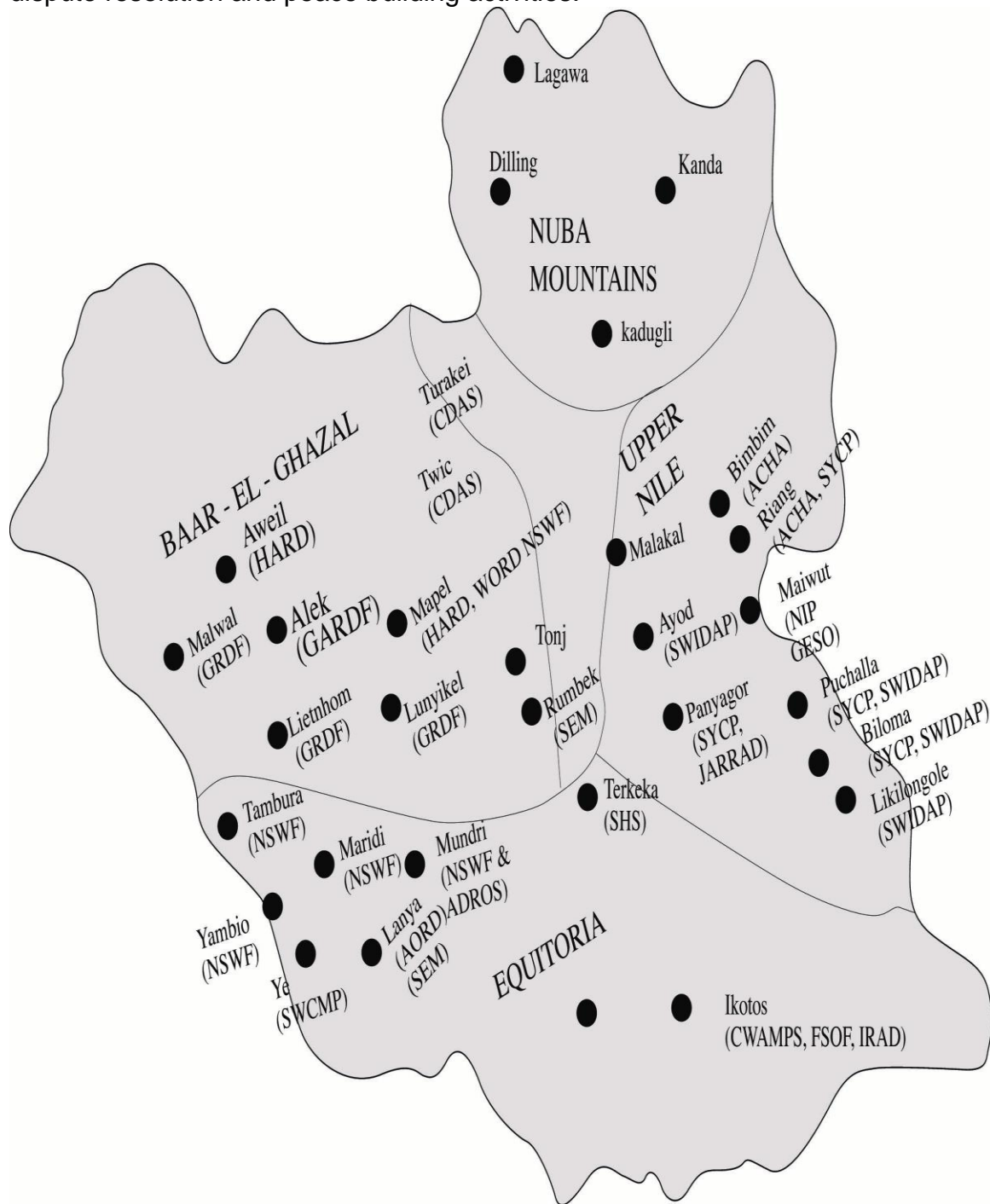
Development of Peace Building Training Plan

Implement the Training activities

Developing a peace building monitoring tool and system

Evaluation of the effects and outcomes of peace initiatives

As evidenced by the rough map below the areas of operation of indigenous organizations implementing peace initiatives is rather vast and capillary. It can represent an initial tool for the implementation and geographical extension of dispute resolution and peace building activities.<sup>79</sup>



<sup>79</sup> (presented in NESI – NETWORK - CONFLICT RESOLUTION AND PEACE BUILDING WORKSHOP REPORT AUGUST 2004)



## ANNEX II

### PEOPLE TO PEOPLE PEACEMAKING: THE CONCEPTUAL MODEL<sup>80</sup>

#### STEP 1: AWARENESS AND DEMAND FOR PEACE

##### ACTIVITIES AND METHODS:

**Conflict Identification:**

Players, Issues and Interests, Causative Factors, Nature and Pattern, Conflict Types.

**Situational Analysis:**

History and Background, Linkages, Needs.

**Entry Point:**

InterChurch Committee; Ecumenical Groups, Civil Authority, Military Movement, Women Groups, Youth Groups.

**Linkages:**

Seeking International Partnerships and Support.

#### STEP 2: PEACE STRATEGIES AND MOBILIZATION

##### ACTIVITIES AND METHODS:

**Mobilization of Community Leaders:**

Chiefs, Ecumenical Officers, Women Leaders, Elders, Youth Leaders.

**Leaders Meeting:**

Confidence Building, Sharing Decisions, Exchange Visits.

**Consensus Building:**

Pre-agreement, Interim Steps, Commitments.

**Linkages:**

International Partnerships, Donor Support.

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<sup>80</sup> (Building Hope For Peace Inside Sudan: People to People Peacemaking Process, Methodologies and Concepts Among Communities of Southern Sudan – New Sudan Council Of Churches, Nairobi, Kenya)

### **STEP 3: PEACE AGREEMENTS AND ACTIVATION**

#### **ACTIVITIES AND METHODS:**

##### **Mobilization of Community Gathering:**

Dissemination, Co-existence, Returning of Property

##### **Planning:**

Logistics, Site Preparation, Plans, Transport.

##### **Gathering for peace:**

Atmosphere Setting, People Movement, Social Interactions, Local Community.

##### **Peace Meetings:**

Convening and Sharing, Facilitation, Forgiveness, Reconciliation.

##### **Peace Resolutions:**

Reassurance, Signing Agreements, Rituals.

### **STEP 4: CONSOLIDATING AND SUSTAINING PEACE**

#### **Immediate Steps:**

Dissemination, Co-existence, Returning of Property.

#### **Linkages:**

Seeking International Partnerships and Donor Support.

#### **Peace Structures:**

Peace Council and Monitoring, Monitoring by Civil Authority, Early Warning Systems.

#### **Peace Projects:**

Boreholes, Hospitals, Schools, Food Security,.

#### **Peace Management:**

Civil Society, Churches, Community, Peace Celebrations.”