

CHAPTER 2

Tackling land tenure in the emergency to development transition in post-conflict states: From restitution to reform

Liz Alden Wily

This chapter provides an overview of the land and property issues confronting post-conflict administrations. Its main argument is that the focus of the humanitarian sector upon restitution of property lost during war is too narrow and potentially obstructive to resolve given that in more and more cases thorough reform of pre-war land and property relations is required in order to keep and sustain peace. This is especially so as most wars today are civil wars and largely confined to agrarian states, where access to land is critical for the survival of most of the population, and post-colonial or post-feudal deprivation of land rights a common reality. The author concludes with practical suggestions for focusing action by the assisting humanitarian and reconstruction sector.

Introduction

A key attribute of land, housing and other fixed assets is that they are *property*. That is, they are owned, held or otherwise accessed and used by one entity or another, whether individuals, families, groups, communities, corporate bodies or governments, and whether or not the system through which this occurs is laid out in national law (statutory tenure) or through customary or other locally systemized practices. This chapter illustrates how tension between the two almost always emerges following civil wars along with broader issues of rights to land and property. It argues that the emerging focus on *property relations* by the post-conflict assistance sector is overdue and still requires development. While there have been successes, there are more cases where the humanitarian and reconstruction community have failed to bring property relations into focus, to pre-empt further tenure disorder, to remove land-related injustices that drive conflict or to create the conditions needed to limit the land-grabbing so pervasive after conflict.

Clearly, we are dealing today with something much bigger than helping displaced people return home and reconstruct their lives. Durable peace cannot, it seems, be achieved simply by return or by getting back to business

as usual. Return is itself a more complex business than it appears or as the declamatory Pinheiro Principles of 2005 and their mechanical delivery in handbooks suggest (FAO et al, 2007; Pantuliano, chapter 10 this volume). Humanitarian agencies increasingly have to ask themselves 'return to *what?*' when faced with refugees and IDPs who either never had property in the first instance (for example Afghanistan), still cannot access what property they have (for example Colombia, Sudan, Guatemala, South Africa), have settled on land they know to belong to others but have nowhere else to go (for example Rwanda, Colombia, Timor-Leste) or who are in direct competition for those properties with other parties, including the state itself and its foreign or local business partners (for example Angola, Sudan, Aceh, Liberia). To resolve these issues in lasting ways, property norms must be changed.

Reform not restitution

In fact, the outstanding requirement in many post-conflict societies is for the very revolution in property relations that the conflict did *not* deliver: new arrangements affecting ownership and access to resources. This poses a special challenge to the humanitarian community. Especially since the Balkan wars, humanitarians have focused on the principle of *restorative* justice, aiding displaced people to retrieve the homes, farms and businesses that they owned before the war. That the war itself routinely throws the rightness of such restoration into question is a fact not always well absorbed by humanitarian actors. Capture of especially rural lands during a war is often considered itself rightful return of lands wrongfully taken in the recent or even less-recent past. The characteristic focus on the individual returnee or displaced person also obscures the fact that many more pressing property issues are communal, or between people and the state.

Of course, responsibility for successfully tackling property issues in the early post-conflict state cannot be laid entirely at the door of the assistance community. Even without war, efforts to address troubled land relations face overriding constraints stemming from weak political will, corruption and administrative systems that are unable to cope (Adams and Palmer, 2007). The 'property project' is a development enterprise, and as such is only effective when owned and driven by the government and people concerned. Weak or self-serving political interests are a crucial factor in the widespread failure to satisfactorily address property concerns in post-conflict states, and in the tendency of around half of post-war states to slip back into conflict within five years of a peace accord (Development Workshop, 2005). The two may conjoin. Angola, for example, has failed three times to consolidate successive peace processes. A tangible factor is contested, mismanaged and politicized land administration (Robson, 2006). This echoes experiences elsewhere, in Palestine, Somalia, Sri Lanka, Sudan, Aceh, Iraq and Timor-Leste (Alden Wily, 2008c, 2008d; Pantuliano et al, 2007; Fan, 2006; De Souza, 2006). These

examples highlight the importance of the tenure context in which assistance operates.

The changing nature of war

War has changed over the last century, and so have the property challenges that come with it. Broadly, conflict has moved from an inter-state to an intra-state context. Battles over sovereign territory, and which necessitate territorial restitution and/or reparation, have accordingly shifted into inter-communal and inter-class conflicts, often complicated by ethnic concerns. 'Whose land is it?' has come to the fore in ways not experienced before. The land sector is struggling with these new realities (CLEP, 2008). Pivotal, the conviction of the 1960s that all will be resolved through the global adoption of Western property norms is giving way to a more nuanced understanding of property, particularly the indigenous tenure regimes common in the agrarian world.

Of the 70 or so conflicts currently under way, only 11 are inter-state and only 15 are not within agrarian developing economies. Since 2000, 48 per cent of civil conflicts have been in Africa where access to rural land matters deeply to the survival of the majority. A key element in the shape of emerging conflicts is the historical (and largely colonial) way in which new states were created over the last century or so, and the incomplete social transformations embarked upon in the 20th century. Paul Collier (2004, 2007) argues that a combination of low levels of income, economic failure afflicting the majority, the capture of valuable extractable natural resources by elites and mis-governance make agrarian economies ripe for conflict. The socio-political underbelly here is the emergent reaction against the property order in recent decades, in which perceptions of unjust elite capture of land and other resources are an elemental trigger.

Arguably, what we are seeing in agrarian states within and beyond Africa is an attempt to finally reject asset-related colonialism. In the post-colonial period of the last half of the 20th century, many oppressive, unworkable or simply irrelevant property norms were further entrenched, and then manipulated and abused by post-colonial leaders and their governments (McAuslan, 2006a, 2006b, 2006c; Alden Wily, 2006b). This is the case from Angola and Afghanistan (where colonization has been intra-state and inter-ethnic since 1890) to Timor-Leste and Guatemala (Alden Wily, 2004; van Hemert, 2004; De Sousa, 2006; Robson, 2006). We must also include the colonial-like norms that many agrarian governments impose in appropriating or diminishing the rights of majority populations; this is seen in government treatment of valuable collective resources such as forests and pastureland (Alden Wily, 2008d) and in revived popular challenges to feudal property relations, as in India, Bangladesh and Nepal where extreme inequity leaves more than a third of these populations landless or near-landless (Ramesh, 2007).

A state–people issue

In all agrarian societies, the question of who owns land, shelter and other pivotal assets is becoming more important with each passing year as resource and economic pressures mount. Although this affects non-conflicted polities just as much as societies that have gone to war with themselves, war provides more conscious provocation to once-tolerated norms. This confronts post-conflict administrations with a conundrum: on the one hand, desperate to re-launch stagnant economies, usually with resource-capturing investment; on the other, challenged to lead the way in finding still-elusive ‘development with growth’. Should local communities or the government own the major productive land assets of Afghanistan? Should millions of Sudanese have their customary lands recognized as their private property, or should they remain, for all intents and purposes, permissive tenants on government land? And what *is* that property – is it just their houses and fields, or do their estates include the vast and lucrative pastoral and wooded plains that they customarily own collectively? Who should own the forests and minerals of Indonesia, Colombia, Angola, Aceh, Nepal, Liberia, Sierra Leone, the Democratic Republic of the Congo (DRC) and Sudan? To whom should the major benefit of these assets accrue, and how far is ownership of such resources the foundation of an equitable return of benefits, an ownership which agrarian governments have so far steadfastly secured to themselves? Often the issue sets populations against their governments and their policies, a legacy that post-conflict administrations have to confront.

These broader issues cannot be ignored. While coups and armed conflicts have become less common in recent years (HSRP, 2008), this may not remain the case for long. Events in Kenya in 2008 are a salutary reminder of this risk (Alden Wily, 2008b). While tipping-points to conflict are likely to remain mainly political in nature, underlying land anger suggests that more concerted attention to agrarian property issues is in order, and that it is at base a governance issue. Signs that inter-state land-grabbing in the form of agri-business leases are on the rise as food supply threatens, is likely only to add to stresses between developing-country governments and their people as to who precisely owns the land leases, and with whom leases should be made (Alden Wily, 2008d).

Property issues as cause or casualty of war

To be fair, assisting agencies are now noticing property issues at every turn. If anything, there is a proclivity to exaggerate land problems as the *cause* of conflict. While this helps to put property concerns on the agenda it is not helpful to strategic planning. For this purpose, property concerns are best divided into four groups:

1. grievances that consciously triggered the conflict and that therefore carry with them a known victor's or peace agenda relating to property;

2. those that appear during the war due to a breakdown in norms, rule of law, the policies of those in control during the conflict and, especially, by displacement caused by the violence;
3. property issues that arise or are heightened because of a poorly managed peace;
4. inequitable property relations afflicting especially agrarian societies and that, if unresolved, promise further strife.

It is the last two that remain most poorly attended to in the emergency to reconstruction transition. This is due in no small part to the institutionally embedded focus upon the displaced, leading naturally to a focus upon restitution of the property losses that occurred *during* the war. In the process, the severity of this problem may be exaggerated (as is the case in Sudan and Liberia). More seriously, attention is deflected from chronic issues that must be addressed if related occupancy conflicts, including finding places for returnees to live, are to be resolved in a lasting manner.

Even where restitution of property is the outstanding challenge, this may not be possible. The ratio of holders to the land base may have changed (this is the case in Burundi and Rwanda, where land shortage exacerbates tensions), ethno-historical factors may throw into question the right of pre-war owners to retrieve those lands (the case of timber, oil palm and mining concession holders in Liberia, Sierra Leone and Aceh), the numbers of overlapping claims may be too great to swiftly unravel (Timor-Leste), or restitution may be socially or politically unsafe or unacceptable (as widely experienced in the Balkans, where ethnic cleansing has left a powerful legacy), impractical, mainly due to the long passage of time (such is the case for millions who moved into capital cities during the long wars in Afghanistan, Angola, Liberia and Sudan), or simply impossible (such as for those Colombians whose lands are still under militia control). Even in the much-proclaimed restitution successes in Bosnia, the key to success ultimately lay less in enabling the 40 per cent of population who were displaced to return to their homes than in assisting them to sell their homes to other ethnic groups whose dominance had been established in those areas (Williams, 2007).

Nor is it as common as imagined that deprivation of property or property rights is the trigger to civil war. For example, while people in Guatemala and Côte d'Ivoire, *did* go to war partly over land rights, people in Liberia, Afghanistan, Kosovo, Cambodia, Somalia, Sierra Leone, Angola and even initially in Sudan did not. This is not to say that claims of property injustice are not a main issue in war, but it does suggest that this is often inchoate, crystallizing only with the events of the war itself.

Most of all, far too little attention is paid to the role of a mismanaged peace in disturbing property relations in post-conflict states. This is not just where peace is a mirage (Timor-Leste, Afghanistan), but also where peace accords seem potentially more final (Liberia, Mozambique, Namibia). In Timor-Leste, for example, failure to prepare for, regulate and temporarily house the 75 per

cent of the population that had been displaced led quickly to mass 'wrongful' occupation and rental of houses, for which investment in necessarily slow cadastral development was never going to be the required response (van Hemert, 2004). Comparable failure to constructively address startling levels of urbanization in Angola, Afghanistan and Sudan similarly threatens peace, as does the slow resolution of land disputes between nomads and settled people. Property conflict *increases* in the post-conflict period, for reasons that often stem from a failure to understand or constructively manage post-conflict property relations.

Analysing property disputes

Although humanitarian agencies are uncertain in their handling of land disputes, their monitoring and mediation is nonetheless enthusiastically adopted as part of the humanitarian mandate. A common mistake is not to realize that dispute *always* accompanies property relations; even in peaceful agrarian societies land disputes account for 40–60 per cent of cases entering the courts (Alden Wily, 2007).

To use Liberia as example, the alarm raised by humanitarian agencies over the fact that 12 per cent of disputes concerned land and other properties (NRC, 2006, 2007) was found to be unwarranted (Alden Wily, 2007). So too, United Nations Mission in Liberia (UNMIL) and NGO concerns that 'communal war' threatened on the basis of what were a limited number of inter-tribal disputes in several districts exaggerated the issue. Nonetheless, this was routinely reported as fact, even prompting presidential announcements on the apparent problem (GRC, 2007). Failure to understand the matter at dispute, its history or the implications added to misconceptions and undermined the utility of expensive monitoring. The in-built focus on displaced persons adds further strain. A lack of analytical nuance on such matters often spills over into the provision of legal aid, which is also largely focused on returnees. While such assistance should not be undervalued, care needs to be taken not to overestimate its contribution to peace, as the cases that are taken up are often routine intra-familial and boundary concerns (Alden Wily, 2007).

The tendency to assume that disputes are uniformly negative should also be avoided. Again, to use Liberia, scrutiny of court and non-court disputes in 5 of 15 counties in mid-2007 showed that not only were wrongful occupancy cases largely confined to the urban and peri-urban sphere, as expected, but that over 90 per cent of rural disputes were over inter-village boundaries (Alden Wily, 2007). This was of enormous significance because it reinforced another finding of the research to the effect that hundreds of Liberian communities were actively seeking agreement with neighbours as to the limits of their respective village land areas; while contentious, such actions are an essential step towards rural land security and peace. The fact that it was self-driven and self-funded is doubly advantageous. Without clarification of such communal boundaries, communities cannot stabilize their rights or secure the formalization of those

collective rights they so desperately seek. The sharpened awareness of 'our land' and the concretization of community-based authority that occurs in this process are proving helpful to rural and peri-urban Liberians alike in limiting opportunistic capture of local lands by influential outsiders, including officials and the state itself. This is not to say that some disputes of this ilk are not bitter and difficult to resolve; this is frequently the case where community land areas are extremely large and have a long history of breakdown in customary jurisdiction. This is so in Sudan and Afghanistan where a comparable drive to concretize 'our area' may be seen in most rural areas (Alden Wily, 2006a). In Liberia, such breakdown in community-driven negotiation and agreement was shown to be limited. It was however precisely these kind of disputes that so alarmed UNMIL, which wrongly feared that communal disputes were rife (Solomon, 2006).

Peace can be dangerous

We also need to adjust our conventional distinction between war and peace, conflict and post-conflict periods, as Unruh (2004) and Bruce (2007) have also remarked. This goes beyond the fact that violence often continues after the signing of peace agreements, to the point that civil war is renewed. Even without this there is little that is peaceful in the property sector in post-conflict conditions. Return and restitution disturb settlement patterns, land use and the property market. In rural areas returnees may bring with them new technologies, new finance and new ideas, which alter land access, land use and landlord-tenant relations (this has happened in Afghanistan, for instance). Alternatively, the failure of communities to return or an inability to farm as before may make large tracts of owned land vulnerable to elite capture and new disputes (for example Angola, Afghanistan, Aceh). Even in orderly societies like South Africa, the terms of peace may make it difficult for the authorities to challenge popular responses to grievances, such as the mass occupation of farms perceived as rightfully the property of the previously dispossessed (SAHRC, 2007).

Increasing stress on the urban sphere

Characteristically, public buildings and open spaces in towns and cities are quickly occupied by those fleeing during the war or returning afterwards, and their occupancy often becomes the target of punitive actions by panicked administrations in the form of evictions, as seen in recent years in Khartoum, Juba, Luanda, Kabul and Dili. To those affected, this is not unlike comparable evictions undertaken during the war, in Rwanda, Angola, Burundi, Afghanistan, Cambodia and Timor-Leste, as the powers of the day manipulated occupancy to their own interests. This is especially so as military authorities often conduct the evictions.

Peri-urban insecurity also rises sharply as farming communities find their land co-opted, or their lands simply taken over during their absence or expropriated for low prices and resold for high prices by property developers and the state. Even where this is not the case, the characteristic weakness of post-conflict administrations and the disorder in such title documentation as exists encourage officials, military personnel, notables and developers to ride roughshod over existing occupancy and rights, particularly where these interests are not titled – the fact for 90 per cent of sub-Saharan Africans, for example (Deininger, 2003). Meanwhile, urban property values soar post-conflict due to high demand. This is exaggerated in the middle-class housing sector by the arrival of the wealthy international community and returning investors. This triggers further illegal land-grabbing and dispute – even within families (World Bank, 2005).

Even where battles over property rights were not a trigger to conflict, it may not be long before the rural and urban poor recognize that their property interests are still under threat, to perhaps a greater degree than before the war. New seeds of resentment are sown. In Sudan, the appropriation of peri-urban lands by both Northern and Southern militaries, continued promotion of nomad settlement on the lands of cultivator communities and the extension rather than restitution of commercial estates are all provoking resistance (Pantuliano et al, 2007, 2008). Slum evictions and reallocations of vast swathes of valuable arable land to non-local investors are having the same effect in Angola (Foley, 2007).

When it comes to peace, whether contestation over land and property was the cause of the original conflict does not ultimately matter. Experience shows that this will *always* emerge as a prominent governance concern, and one that has to be resolved for peace to be lasting. Timor Leste, Aceh, Sudan, Liberia, Sierra Leone, Côte d'Ivoire, Rwanda, Burundi, Angola, South Africa, Zimbabwe, Namibia, Guatemala, the DRC, Afghanistan, Israel-Palestine, Cyprus and Kenya all demonstrate the case.

Nothing is the same after a civil war

There is another element of this issue that needs noting. War changes people. Millions of people cannot be expected to endure or participate in the horrors of war, leaving their homes, sometimes for a decade or more, and not develop marked new awareness, skills and aspirations. Even those who do not want to return pass on to those who stayed behind the experiences that the distance of diaspora typically provides. Settlement patterns and the composition of communities also alter after a war, along with the sources and patterns of livelihood and labour, and even the way the land is used (Richards et al, 2005). As often as not, urban–rural linkages receive an extra fillip with a sharp rise in the proportion of households with one foot in town and one foot in the countryside. Added to this is greatly raised awareness among populations of past inter-social and political relations as affecting their rights to resources,

and much bolder demand for changes. Even the once-voiceless poor are much better able to demand their rights. In Afghanistan, for example, landlord-tenant relations have been forced to change following the 24 year civil war, not through revitalized farmland distribution policies or laws, but through local resistance to return to absentee landlord's farms that have been cultivated by landless tenants for a number of generations, or to yield exclusive use of pastures to non-local elites (Alden Wily, 2008c).

Overall, war, the experience of war and intolerance for past inequities and misgovernance may be expected to grow. Peace therefore becomes much less a matter of *restoring* the order than *changing* the order. There is, for example, nothing new about Firestone or other international companies occupying one-tenth of the land in Liberia, but there is something new in the intolerance of this land capture and in the sharp questioning of the government's role in issuing concessions (Alden Wily, 2007). There is nothing new in Afghanistan about the dominance of one tribe over others in access to the pastures, but a great deal that is new in the post-conflict resistance to this century-long tradition (Alden Wily, 2008c). There is nothing new in Sudan in the legal status of unfarmed lands as the property of the state, but much that is new in the resistance of affected communities to this state of affairs (Pantuliano et al, 2008). There is nothing new about Mozambicans and Angolans finding vast swathes of land allocated to big business, but there is something new about the local determination to limit it (Norfolk and Tanner, 2007; Robson, 2006).

These changes combine with a burgeoning civil society, remade or consolidated community identities and an ever-more critical press, providing fertile ground for the advancement of much-needed democratization and community-based approaches, not just to conflict resolution (the darling of the humanitarian community) but to real control over occupancy in urban and rural areas. This opportunity is unevenly exploited by the aid community in the common knee-jerk response of advising mass titling and/or the development of new national land policy and law as the route to change; efforts into which local NGOs are increasingly being co-opted. While policy reform is important, so too is local facilitation and problem-solving by affected people themselves, aspects that innovative policy and law can ill-afford to ignore. As illustrated in broadly failed or truncated attempts at post-conflict reform in Namibia, South Africa, Mozambique, Rwanda, Uganda and Angola, it is precisely such experiential learning, combined with genuine popular empowerment in terms of local neighbourhoods and communities being enabled to control their property relations themselves, that may be needed to crack intractable problems, arrive at workable norms or simply swing the balance from public inaction to action (McAuslan, 2006c; Norfolk and Tanner, 2007; SAHRC, 2007; Alden Wily, 2008d). This is something that land specialists themselves have trouble taking on board, the tendency being rather to observe the potential of post-conflict conditions to enhance popular participation in the plans of the state, rather than increasing self-reliant popular empowerment (Torhonen and Palmer, 2004; Adams and Palmer, 2007).

Rising demand and tension around customary land rights

A single dominant structural issue underlies much of the discussion so far, namely the dubious legal position of customary land interests in most of the agrarian world. For example, among the 30-plus conflicts in Africa in 1990 and/or since, there have been only three cases where this was not (often in hindsight) to prove a fundamental element in the grievances driving people to war and emerging out of war as a concrete target of remedy.

By ‘customary’ we mean indigenous land systems and the (typically unregistered) property rights they deliver. Summarily, as touched on earlier, customary regimes of land tenure were almost uniformly subordinated to imported European-derived systems. This made the better part of the agrarian world tenants of the state for much of the 20th century (Alden Wily, 2006b; McAuslan, 2006b). Rebellion against this position was a key element in anti-colonial wars around the globe, and remains a common factor in the post-independence secessionist movements that account for a significant proportion of today’s civil conflicts (for example in West Papua, Aceh and Ambon in Indonesia, the Hmong, Tamil and Kurdish insurgencies in respectively Laos, Sri Lanka, Turkey and Iraq, and the Naga, Tripura, Assam Bodo and Mizo conflicts in India). Conflicts in Africa typically involve battles over land and territory that have an inter-ethnic and territorial disposition, a state–people disposition and usually colonial and post-colonial dimensions, seeking to liberate majority populations from retained colonial norms. These all come into play for example in civil conflicts in Cabinda (Angola), Somalia, Ethiopia, Western Sahara, the Niger Delta (Nigeria), Darfur, Abyei and Beja in Sudan and the recurrent Tuareg wars in Mali and Niger.

Often, both the problem and its solution lie in the status of customary interests and in the balance of property between state and people. A natural focus is upon the dubious construct of ‘public lands’, a classification into which much of the customary world finds its traditional ownership suborned (Alden Wily, 2006b). Often these encompass the better part of the nation’s territory (for example well over half of Sudan, Liberia and Afghanistan). This has origins in the categorization by most 19th and 20th century administrations of lands beyond the house and farm as national, state, public or trust lands. Customary rights, particularly as they related to unfarmed resources, were routinely reduced to rights of occupancy and use only (Alden Wily, 2006b). This was advantageous to resource-hungry colonial and then post-colonial administrations, and remains so today as the value of these lands rises in the face of land scarcity, and with the exploitation of their fish, water, oil, mineral and timber assets. Not surprisingly, if not during war then after it, state ownership and control of these customary common properties becomes explicitly contested. In these circumstances, we can easily understand, as Collier observed (2004), why so many secessionist movements begin in high-value natural resource areas such as Aceh and Timor in Indonesia, Cabinda in Angola and Bougainville and Southern Sudan. Ominously, the rising number

of attempts by wealthy Middle Eastern states in particular in seeking to lease vast hectares of public lands in Africa will raise the stakes and tensions higher (Alden Wily, 2008d).

The search for improved security of customary tenure is understandably therefore not limited to conflict states. An estimated 2.2 billion customary landholders around the world are seeking recognition of their occupancy and use rights as modern private property rights in national law recognition (CLEP, 2008). A core element of rural land reform globally is around this issue, along with the development of mechanisms for its realization (Alden Wily, 2006b, 2008d). Innovations in family and especially collective entitlement are proving helpful (this is well-entrenched in Mexico and Tanzania and is slowly becoming operational in Mozambique, Ethiopia and Colombia). In particular, the notion of 'community land area', including valuable communal properties, is gaining traction. Still, this is frequently constrained by unresolved tensions between investor-supporting state control and people's rights, and progress tends to be easier in areas with low commercial timber or mineral value.

While humanitarian research and development agencies including the UN routinely comment upon the importance of attending to customary land tenure in the reconstruction agenda, there is little discernible depth in understanding or recognition of the extent of state capture of these majority interests. Again, a common shortfall is the sector's overemphasis on the ownership of individual assets to the exclusion of the more expansive, valuable and threatened properties that are logically held collectively (pastures, forests, swamps, community reserve lands). There is limited recognition that it is these customary assets that tend to fall first at the frontline of civil conflict and mismanaged peace (for example in Angola, Liberia, Sudan, Afghanistan and Aceh). This failing is in part a result of the understandable focus upon the displaced and the immediate needs of shelter and livelihood. It also stems from a lack of familiarity with the dynamics of a regime that is first and foremost a *community-based* system of property relations, with complex patterns of ownership and access. For example, it is common for humanitarian actors to recommend that nomads be given ownership of pastures in circumstances where in fact their rights are historically rights of seasonal access, not ownership, and where state-supported abuse of those rights contributed to war in the first instance (as in Sudan, Afghanistan, Chad, Somalia and Ethiopia).

Alternatively, agencies may press for the immediate retrieval and re-entrenchment of registered entitlements as if these issues were not a source of contention and grievance, or advocate titling without recognizing precisely what should be registrable and by whom – including families, groups and whole communities. Conversely, it is as common for the humanitarian sector to argue strongly against titling, for fear that this will generate elite capture, as was indeed often the result under early programmes of registration. This ignores (or rather does not know about) the shift in titling orthodoxy away from its individualizing and conversionary thrust into imported European forms towards approaches that seek to title customary rights 'as is', with the

attendant development of modern community-based administration systems (for example community land councils, with their own registers).

Ignorance of such advances frequently goes hand in hand with insufficient scrutiny of property legislation and policy, with a tendency to assume that what the law says is fair and acceptable, or at least must be accepted. This hardly serves post-conflict populations who are often themselves grappling with the contradiction between what they have become accustomed to accept as 'fact' through the long imposition of legal norms, and what they see as both traditionally and rightfully facts about their land ownership. Even when so aware, humanitarian agencies are faced with the conundrum of working within illegitimate but lawful norms. It may seem easier to simply focus upon the individual case, or on more accessible abuses of women's or orphans' land rights; while easier to analyse and safer to complain about, useful change in such areas is difficult to achieve without structural change in the customary regime overall.

Learning from non-conflict situations

With the exception of multiple claims of ownership arising through war and post-war conditions, the requirements for tenure reform are broadly the same as those which non-conflicted countries have to grapple with. These include how peri-urban rural interests are protected (or not protected) against invasive developer and elite capture (as big an issue in Tanzania as in Liberia); how fast-growing urban slum and squatter occupation may be swiftly regularized (as big a problem in Brazil as in Angola); how large investor versus subsistence interests may be constructed to mutual benefit (as big a challenge in Cameroon as in Sierra Leone); the conditions in which freedom of settlement should operate so as to not unfairly jeopardize local rights and norms (as big an issue in Uganda as in Rwanda); the relative rights of immigrant settlers of long standing as against those of original inhabitants (as big an issue for Ghana as for war-torn Côte d'Ivoire and now Kenya); the procedures through which property may be fairly acquired for public purposes (equally an issue in Zambia and Afghanistan); the status of unregistered or insufficiently documented properties (as big an issue in Lesotho as in Guatemala) – and, everywhere, overriding concerns around incorruptible property governance and sustainable reach. Post-conflict administrations and assisting agencies need not confine their search for solutions to other conflict states; much may be learned from non-conflict economies.

At the same time, the notion that best practice examples abundantly exist in non-conflict states is false. Post-redistributive reform is new around the world and still struggling to arrive at workable norms, as low levels of uptake and implementation bespeak (McAuslan, 2006a; Adams and Palmer, 2007). Justice is also still frequently remote in those norms finally settled upon (McAuslan, 2006c). Moreover, the openness to change, popular demand and urgency that characterize post-conflict conditions suggests that these states must lead the

way. This is especially so in regard to some founding issues that still elude less pressured reformism. These include the need for more innovative approaches to prompt regularization of the occupancy of millions of urban poor, along with much greater provision of mass social housing; simpler mechanisms to deliver collective titling en masse, particularly where high-value pastoral, forest or mineral resources are at stake; and the development of approaches that reconcile strongly held notions of ethnically defined dominion over (tribal) land areas with freedom of settlement. Kenya is just one topical case where such concerns are high on the agenda (Alden Wily, 2008b).

Nor may it be assumed that the aid community speaks with one voice in the handling of property matters. Even within the tenure fraternity, there is as much diversity of conviction and approach as in other spheres of social transformation. A common source of difference is the extent to which public lands should be made available to investors or to community tenure, as the route to lasting economic recovery. A version of this is at play in Afghanistan, where the Asian Development Bank is advising the government to entrench pastures as government property, and to remind those communities granted access rights that they may have to surrender those lands to investors in due course. In contrast, the Food and Agriculture Organization (FAO) of the UN has been urging the same government to restore as much pastureland as possible to community ownership to remove a cause of conflict and to provide an incentive for rehabilitation and conservation (Alden Wily, 2008c). Comparable differences exist among actors and agencies with regard to ownership of Liberia's timber forests (Alden Wily, 2007). Either way, humanitarian agencies need to tread a wary but informed path.

What to do? Selected strategies

Get in early

The outstanding requirement is to give the 'property project' the priority it needs – and from the outset. This means ensuring that it is placed high on the peace-making agenda. All too often, a great deal of damage is done to property relations in the first two years of peace as confused conditions reign and critical decisions not taken become more difficult as political will flags. The free-for-all impulse of the war years may continue. Land-grabbing is the commonest symptom and is difficult to undo. Thus far, peace accords, while more alert to property concerns, still largely fail to address the issue of tenure at all (Afghanistan, Liberia), fail to sufficiently prepare for long-known realities (Rwanda, Burundi), leave loopholes through which recalcitrant parties may clamber to avoid compliance with even principles they have agreed (Sudan, El Salvador, Nicaragua, Guatemala), or (almost always) fail to provide external monitoring with the teeth to discourage abuses.

The North–South peace agreement in Sudan in January 2005 is a good example. Despite several years of expensive 'expert' guidance by a six-nation

assistance consortium, the ownership of underground natural resources and parts of the crucial boundary between North and South were left undecided. Both lacunae threaten peace today. Not unrelated, and potentially even more important, the meaning of customary land rights was left undefined. This has allowed plenty of room for Khartoum to fall back on the pre-war convention that customary property is restricted to residential and cultivation lands. This retains some 80 per cent of Sudan in the hands of the government and assures it continued legal power to allocate customarily owned pastures and woodland savannahs to whomever it chooses, which it has duly begun again to do (Pantuliano et al, 2007; Alden Wily, 2008d). This defeats key objectives for which many, particularly in the North–South boundary zones, fought the long war to achieve (and continue to fight for in Darfur). Perhaps intentionally, it also renders agreed provisions for restitution of wrongfully appropriated lands in these areas largely irrelevant as these mainly comprise the estimated 10 million hectares of land wrongfully lost to government allocation to outsiders (Alden Wily, 2006c). Institutional provisions for land commissions were so incompetently drafted that no such bodies have yet been established in the North, and when they are they will be toothless lackeys of Khartoum, which has steadily demonstrated its repugnance towards real change. This has been especially felt in failed efforts to ensure that the Interim National Constitution and subsequent regional state legislation clarify what now seem deliberate ambiguities (Alden Wily, 2008d). Meanwhile, the international community, in failing to institute conditionalities on such matters, has tied its own hands in accepting the peace agreement without clearer provisions on land ownership.

Build up core expertise – and tangible lessons

Concern over property has been on the humanitarian agenda for some time now, supported by a growing number of research reports and sometimes substantial donor investment. As Bruce (2007) has observed that the absence of significant expertise in the sector is therefore puzzling. Given the front-line position of humanitarian agencies in the peace-making and early post-conflict period, this deficiency is sorely felt. Yet few shared protocols exist with which these actors may confidently guide both mediators and disputing parties in comprehending the magnitude of the issues or the options to consider. Surveys in refugee, IDP and home-country areas are now common, but are both insufficient and often ill-informed on property matters. In Liberia, for example, lack of tenure expertise led the World Food Programme (WFP) and its partners to conclude that one-third of the population was landless in 2006 and that one-fifth held land titles, conclusions that were both incorrect and potentially dangerously misleading for policy-makers (Alden Wily, 2007).

Providing the analytical and advisory rigour needed in such situations should not be difficult. There is now enough experience of post-conflict situations to know what to expect and plan for, and sufficient experience

of comparable issues in non-conflict states to draw up a shortlist of critical issues to investigate and practical strategies to pursue. For example, some observers in Sudan were keenly aware of the urgency of laying out precise principles regarding customary land rights, but both mediators and the parties themselves did not see these concerns as important enough to pursue. To tenure specialists at least, it has been no surprise that the matter should have quickly come to the fore after the signing of the peace agreement, as also occurred in Angola, Mozambique, South Africa, Liberia, Guatemala and now Nepal – among many other post-war states.

Use international power to best advantage while it counts

There is a short window of opportunity in the few years in which a post-conflict administration depends heavily on the international community for guidance and resources. Maximum advantage should be taken: experience tells us it is wise to have little faith in post-conflict governance institutions in matters of property. All too often, the champions of the oppressed become the oppressors, power corrupts and money talks, as illustrated in Sudan's lucrative oil relations with China, which are doing more to provoke a return to war than any other factor. Routinely, we have seen the proclaimed positions of liberation movements on property rights be diluted once they enter power and the declamatory commitments made in peace agreements fall away (in Namibia, South Africa, Mozambique, Uganda, Guatemala, Timor-Leste, Angola, Rwanda and Southern Sudan). The real difficulties in resolving property issues and making progress cannot be underestimated, any more than the reality that, as now widely recognized, the post-conflict transition is in every way a much longer and more tortuous process than initially anticipated (Robson, 2006). Nonetheless, as earlier suggested, there is much evidence to suggest that rising self-interest on the part of new administrations and their supporters exacerbates the problems.

Steps to counteract the worst ills may be formally entered into peace agreements and the terms of early support to administrations. Ideally, these will include entrenchment of worked-through commitments that protect unregistered customary and long-term urban occupancy, and forbid evictions unless full compensation to those affected has been agreed and paid; prioritize investment in urban planning, including for social housing schemes with preferential categories of applicants agreed; freeze the issue of new logging, mining or agribusiness concessions until procedures that ensure customary interests are properly investigated and accounted for; and lay down the procedures through which the public may bring politicians, officials and military leaders to account, where corruption is suspected. It is normally urgent to provide support for community-based rural demarcation and provisional titling of rural community land areas and collective titling of occupancy in slum neighbourhoods, as a first line approach to majority land security. Laying out exactly how the public will participate in property-related decision-making

is also wisely entrenched and subject to a tangible monitoring plan. The right of donors to withhold funding in the face of failures needs to be embedded.

Focus upon the most pressing realities

Much can be said about the need for supporting humanitarian actors to contribute by building planning on solid field analysis, to 'think outside the box' to arrive at workable solutions and to adapt their vision to the requirements of 'the long haul' – even though they themselves may not be involved over the longer term. Prioritization and practical focus are necessary. In this, three key tasks keep presenting themselves. These are the need to prepare for the consequences of rapid post-conflict urbanization; to reform the ways in which customary and particularly common property resources are tenured; and to pursue these and other policy-making and action in a genuinely localized and inclusive manner, which in turn can ensure political will.

Prepare for the 'post-conflict city'

Even without conflicts UN-Habitat estimates that, by 2030, 2 billion people will be added to the over 1 billion who already live in untenured urban slums (CLEP, 2008). The process is greatly hastened in post-conflict societies. Capital cities have with rare exceptions grown many-fold during and after conflicts (up to eight times in the case of Luanda in Angola, five times in Kabul, seven times in Juba). The crisis evolves at all levels, among people and government, families and neighbourhoods. Without early management, these cities take on a life of their own as centres of dangerously disturbed property relations that take many decades to resolve, a process not helped by violent evictions by panicked administrations. Volatile sectors of the majority poor tend to be most affected: former combatants, youth, some of whom have suffered traumatic war experiences as child soldiers and who come out of the war without families, unemployed and uneducated, female-headed households and the landless, homeless and displaced. Meanwhile, rural communities at the edge of cities also suffer as their lands are coercively eaten up by unregulated development and usually without fair compensation.

What may be done to pre-empt these identifiable trends? First, handling rapid urbanization and squatter cities is hardly unique and planning experience abounds in UN-Habitat, the World Bank and other institutional and national sources. Approaches have altered over the years in ways also reflected in rural sector planning, with a shift away from master planning and costly formalization programmes into programmes that focus immediately upon vulnerable sectors and actions that help them secure rights at least cost and with most speed (UN-Habitat, 2005; CLEP, 2008). Innovations such as the Special Urban Social Interest Zones of Brazilian cities, which prioritize vacant or unused lands for low-cost housing, housing projects in India and the Philippines, where developers are obliged to provide 15–20 per cent of

their developments for housing the homeless, India's street-vending policy, which targets hawkers for credit-based housing developments paid for from their profits and new forms of adverse title in Brazil and India that guarantee occupancy, with the proviso that, should the land be required, alternative areas will be provided (UN-Habitat, 2005; CLEP, 2008). Interim titles in the form of temporary, renewable or other classes of occupancy and housing permits abound. Collective entitlement in slum neighbourhoods, where homes are tiny and often impermanent, is advancing. Some of the systems are well-embedded in law (for example Tanzania, Botswana) and sometimes include explicit measures to prevent peri-urban rural communities wrongfully losing their lands (or, more precisely, their sharply rising values) to developers, governments or elites (including chiefs – for example Tanzania, Ghana) (Alden Wily, 2006b). Significant learning-by-doing continues to take place in cities as far apart as Gaborone, Dakar, Dar es Salaam, Bogota, Windhoek, Rio, Hyderabad and Kabul (Development Workshop, 2005; UN-Habitat, 2005; Payne et al, 2007; CLEP, 2008).

One constraint is that agencies and projects fail to share their experiences, another is that investment is not being brought into play early enough in post-conflict conditions. Nor have such measures as do exist been aggregated and placed within pre-emptive protocols for guidance or to limit the worst abuses and ease conditions in post-conflict societies. Nor do mass social housing schemes, particularly those that directly facilitate self-help developments, feature prominently in post-conflict humanitarian and reconstruction agendas or donor budgets. It is now clearly important to ensure that land rights principles and precise commitments are embedded in early agreements and fleshed out in first-line budgeting and planning.

To the above kinds of action may be added international monitoring of the acquisition of settlement sites for new arrivals; arrangements at peace-making that enable the full involvement of the police and peacekeeping missions in protecting areas; establishment of community-based neighbourhood management regimes; focal support to municipal authorities with monitoring to limit malfeasance in the issuing of permits to settle; publicized measures to bring ministers, officials and militia who abuse the law to court and public awareness raising among peri-urban communities as to their rights against wrongful and involuntary appropriation of their land by developers and the routes through which they may seek recourse should this be denied. The involvement of urban planning and tenure specialists in first-line humanitarian support would be beneficial.

Get to grips with the tenure status of natural resources and customary lands

A comparable set of issues relates to the vulnerable status of unregistered rights. This is heightened where valuable mineral, pasture and forest resources and extensive fertile land attractive to bio-fuel or other agri-business interests exist, as is the case in many post-conflict economies. Liberia provides a good

example of what can be done. First, civil society actors, with a good deal of assistance from the international humanitarian and aid community, forced a public review of logging concessions and placed the findings in the public arena, thereby ensuring sufficient pressure to coerce the newly-elected president to act (Alden Wily, 2007, 2008d). All logging concessions were cancelled and a pledge was made to investigate and introduce a communal rights law to guarantee customary owners of forest land a role in their future issue, control and benefit. Meanwhile, community definition of the boundaries of large communal properties is being widely adopted as a practical local level strategy to protect customary rights to precious forest and timber resources. This leads logically to the kind of collective titling that has been seen in a number of other states, including Tanzania, Mexico, Guatemala, Mozambique and Papua New Guinea. This will frame the way forestlands are defined and their use negotiated.

Pay attention to the powerful territorial notion of 'our land'

In agrarian societies, individual and family interests are almost always embedded within a wider socio-spatial construct of territorial ownership – 'our land'. Although most potent at the village level, this also has larger-scale dimensions in the form of 'tribal areas'. Depending upon the extent of formalized individualization of communal domains and the presence or absence of active collective estates (for example forests, pastures, swamps), 'our land' may be practically exercised or symbolic.

Failure to account for the persistence of this notion has repeatedly exacerbated tensions in agrarian conflicted states (Alden Wily, 2008d). The 2008 crisis in Kenya is one example of this. In Kenya, a tribally aligned political dispute rapidly segued into a tribal land dispute over which part of the country 'belonged' to which (tribal) community (Alden Wily, 2008b). That this has been so even in a country where much of the farmland has been transformed into individualized freehold plot entitlements, is instructive of the tenacity of the overriding power of territoriality in post-customary situations, and suggestive that it is unwise to discount this continuity. In contrast, other countries – Botswana, Ghana and Tanzania in Africa, and Mexico, Brazil and Bolivia in Latin America – have constructed the framework for formalizing rights in ways that attend to such norms, and which self-evidently reduce conflicts around this characteristically agrarian concern (Alden Wily, 2006a, 2008a). This also helps pave a workable path between the principle of freedom of settlement and respect for local tenure, always difficult in transforming states. Structurally, the issue is nested within the larger question of the status of customary property interests overall, and as a corollary to this, where authority over customarily held properties is vested – at community, intermediate or national levels. Sooner or later, all post-conflict agrarian states have to address this issue. Devolution of land authority to the most local community level

possible provides a critical practical path to achieve this (Alden Wily, 2006b, 2008a).

Make popular empowerment the cornerstone of practical intervention

All the suggestions above point to a common base approach: the need for the property project in which humanitarian and reconstruction agencies involve themselves to be as devolved, participatory and experiential as possible. Piloting represents a logical and unthreatening framework for this. Real issues are tackled and remedied with real people confronting real concerns. This has a multitude of advantages: it nurtures inclusive and democratic governance, and promotes and takes advantage of the awakening of civil society that follows civil war. It helps work around the problems agencies face when post-conflict administrations are risk-adverse or have limited reach outside capital cities. Where the law is unsound, a community-based approach is often the only way to make progress. This is also so where rule of law is so weak that centrally made decisions or legislation cannot be enforced. Even where formal governance is strong, core property issues may be too sensitive to be successfully resolved at national levels, or decisions may tend towards the lowest common denominator, or they may be strongly biased towards dominant elite or political interests. Above all, such approaches help those affected to clarify in their own minds what is fair and practical, to negotiate constructively where the issue at dispute involves other actors, communities or tribes, and to implement and adhere to the results. Such guided piloting also demonstrates to hesitant governments that such changes are viable and gives them the confidence to pursue policy and legal changes.

Post-conflict Afghanistan offers a concrete example. Pastures constitute the major resource of that dry country and their ownership and access is bitterly contested. Piloting with communities to work through inter-communal conflicts and contested rights with visiting nomads has opened the way to an entirely new paradigm of pasture ownership and which is already proving a useful conduit to resolution and equity in rights, as well as a bulwark against Talibanization of the land issues (Alden Wily, 2008c). The current pasture legislation in draft (Alden Wily, 2008) is starkly removed from existing pasture law and also the revisions initially proposed after the signing of the Bonn Agreement. Piloting showed that restitution of pastures to community ownership is viable, that visiting nomads are able to retain access rights in these conditions, and that it is both unwise and unnecessary for the state to retain ownership, especially given the historical conditions of its ethnic bias to nomads. Should this new paradigm ultimately fail to enter into law, an important tool remains with communities through their active participation, knowledge and empowerment. These are human capital assets that are not easily withdrawn by even the most recalcitrant of post-conflict administrations – as a comparable process in central Sudan illustrates (Alden Wily, 2006c, 2008d). In due course, this empowerment may be put to good

effect through increasingly democratic avenues – unless of course, failure to act on land rights issues returns disaffected populations to war – currently a likely scenario in central Sudan.

Work with women

In most land-related interventions, humanitarian agencies may also find it productive to focus upon women, particularly in respect of urban property matters. This is not just to help offset the legacy of the immense personal abuses women routinely suffer during war, but also to engage and empower this important source of peace-making and practical and collective decision-making. The large number of widows and female-headed households found in post-conflict conditions, who tend to gather in poor urban areas, makes them an accessible and needy target group. Experience suggests that women are well able to pursue tenure security objectives and become engineers of change in this area. One of the most successful slum interventions globally is the Mumbai SPARC (Society for the Promotion of Area Resource Centres) programme, begun with women pavement dwellers identifying vacant land in the city and, through group solidarity, forcing the government to allocate this land to them, an approach now being replicated in other Indian cities and in Bangkok (CLEP, 2008).

How does the humanitarian sector need to change?

The humanitarian community is broadly definable as those who focus upon the alleviation of human suffering during and after conflicts, and support transitional processes towards peace. In practice, many of the same UN, donor and NGO agencies are involved in early humanitarian work and in reconstruction activity as key implementers of projects in the consolidation period. By virtue of this fact, as well as often being first on the ground in war and post-war circumstances, UN and NGO humanitarian groups cannot escape a role in helping to ensure that housing, land and property issues get fully – and accurately – on the agenda.

A main theme of this chapter has been that the sector's focus upon the displaced and assisting with the restitution of their properties, while admirable, does not meet the demands placed before them, or even necessarily solve the problems of the displaced in lasting ways. While widening their focus is institutionally difficult for some agencies (for example the Norwegian Refugee Council and the United Nations High Commissioner for Refugees (UNHCR)), the sector as a whole has little choice but to dig a little deeper into property issues. To be fair, this is precisely what is starting to happen, for instance by the sector's supporting research centres such as the HPG and the US Institute for Peace (USIP), and through the kind of exploratory exercises that HPG held in February 2008 and which generated the chapters of this book. Through a gathering acquaintance with the structural context and especially tenure

dynamics of property issues, and a steady increase in its capacity to investigate, research and act expertly, a much greater contribution can be made.

In the process, an entirely new route will be opened up to the sector through which it may help post-conflict governments and populations secure the ultimate prize, lasting peace. In operations, a more community-based approach will further heighten understanding and enhance action, including in regard to the displaced population. The disposition of the humanitarian community towards public awareness-raising on land rights will ideally mature into a more concrete involvement in grounded initiatives designed to directly facilitate the securing of vulnerable property rights. So too, the important function of the humanitarian sector in monitoring and lobbying both the reconstruction sector and the host government in regard to the results, cannot be underestimated. An immediate task in launching such initiatives is simply to increase the sector's familiarity with the issues, ideally through comparative exercises among post-conflict states, to enable involved actors to develop analysis of trends and practical experiences in tackling the issues outlined in this chapter.

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Liz Alden Wily is a tenure specialist with 35 years experience in developing countries, including the post-conflict states of Afghanistan, Sudan, Liberia and Nepal. She works as both analyst and policy adviser and practitioner, piloting new approaches to tenure security. Her main focus is customary land tenure. She also publishes extensively, most recently *Whose Land is it? Commons and Conflict States: Why Ownership of the Commons Matters in Making and Keeping Peace* (Rights and Resources Initiative, Washington DC, 2008).