

# Post-War Development and the Land Question in South Sudan<sup>1</sup>

**N. Shanmugaratnam**

Department of International Environment & Development Studies, Noragric  
Norwegian University of Life Sciences (UMB)

P. O. Box 5003

NO-1432 Aas, Norway

Email: nsh@umb.no

## INTRODUCTION

The Land Question (LQ) was one of the core issues behind the protracted war between the Government of Sudan (GOS) and the Sudanese People's Liberation Movement/Army (SPLM/A) in the southern regions of the country. The positions of the two protagonists on the LQ seemed irreconcilable, as one was statist and the other communitarian. According to the GOS, all land in the country belonged to the state whereas the SPLM/A's position was that all land in 'New Sudan' belonged to the community, while the state was 'a custodian of the land'. The ground realities reflected this contradiction in the country as a whole, when the two parties sat down in May 2002 to negotiate a peace deal. According to existing land legislation in Sudan, more than 90 percent of the country's land belonged to the state but in reality customary (communal) types of tenure were in practice in many parts of the country. Members of the community had individual rights to land for housing and farming, though these rights had a gender bias as women could access land only through their fathers and husbands. There were, thus, two parallel systems of land rights in Sudan – the legal statutory system and the indigenous system of tenure based on customary rights. The former served the bigger rural entrepreneurs, urban dwellers, foreign investors and elite groups to obtain land through secure leaseholds, while a large majority of land users depended on the latter, which was unable to ensure formal security of tenure. However, customary rights continued to enjoy legitimacy among the rural people of diverse ethnic groups and sub-groups in different parts of Sudan (De Wit 2001).

In most parts of the South, the government in Khartoum was unable to enforce the statist land legislation due to the protracted armed conflict, and communal tenure was being practised without interruption in the areas controlled by the SPLM/A. Communal tenure in these areas was being enforced by socially embedded local institutions which were recognised by the SPLM/A and with which it collaborated through its newly created, rather rudimentary, local organs of the Civil Authority of New Sudan (CANS). The conflict in South Sudan has a long and complex history and multiple causes. However, the region's rich natural resource endowments, particularly the land and water resources and, since the late 1970s, the newly discovered commercial oil and mineral deposits had played a major role in its development into a

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protracted war. This has had major implications for the LQ and its resolution and for the livelihoods of millions of people, which depended on agriculture, pastoralism, agro-pastoralism, and inland fishing.

The Comprehensive Peace Agreement (CPA) of January 2005 between the GOS (under the National Congress Party – NCP) and the SPLM/A, addressed several core issues such as the right to self-determination of the peoples of South Sudan, power sharing, oil and non-oil wealth sharing, democracy, and permanent ceasefire and security arrangements, but left the vexed LQ to be resolved at a later stage by the two parties (Shanmugaratnam 2008a; Sundnes and Shanmugaratnam 2008). The GOS and the newly established SPLM-led interim Government of South Sudan (GOSS) have established their land commissions to address issues of land policy, including the ownership of land and subterranean resources, at the central and regional levels. The GOSS is still in the early stages of developing a comprehensive land policy, while trying to adopt ad hoc arrangements to deal with emerging land issues. The existing information base on the land tenure systems in South Sudan is very limited and the field surveys commissioned by the GOSS have so far covered only some parts of the region. Thus the southern land commission is handicapped by a lack of adequate information on existing land tenure and land use systems in all the ten states. However, the global context of the peace process, which began with the Machakos Protocol of July 2002, and the active intervention of the donor community in the peace process and post-conflict development brought the two parties face to face with the neoliberal paradigm of development which, *inter alia*, is premised on privatisation and commoditisation of land. Apparently, this posed fundamental policy and institutional challenges to both the statist and communitarian positions. Privatisation of land, however, is not a totally alien idea to policy makers in Khartoum since the GOS had actually carried out a programme of privatisation of state-owned agricultural enterprises in the 1980s and 1990s (Dagdeviren 2006). Moreover, Khartoum has also been privatising state-owned industrial enterprises. By 2002, while reiterating its communitarian position, the SPLM had actually turned its attention to the need for a land policy that enabled commercialisation of agriculture and the development of an inclusive and equitable market economy in South Sudan.

The peace process, CPA and the imperatives of the post-war development paradigm have willy-nilly drawn the GOS and the interim GOSS into the neoliberal development policy discourse and set the external conditions for land policy for the central as well as the regional governments. Indeed, the neoliberal development paradigm is a premise of the international agenda for 'liberal peace'. It is also relevant to note that, after the end of the cold war and in the changing geopolitics of the region, the SPLM leadership has steadily moved closer to the US and towards a pro-liberal economic ideology. The CPA identifies the 'international community' as a source of funding for its implementation. It names the same 'international community' as the principal source of aid for post-war reconstruction and development related activities such as repatriation, resettlement, reintegration and rehabilitation (Shanmugaratnam 2008a).<sup>2</sup> An internationally sponsored Joint Assessment Mission (JAM), led by the World Bank and the UNDP (United Nations Development Programme) was created to assess the more immediate rehabilitation and recovery

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<sup>2</sup> See CPA and its Annexure II, Implementation Modalities and Global Implementation Matrix. (The Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Nairobi, Kenya, 9 January 2005).

needs and to formulate a framework for reconstruction and recovery up to the end of 2010.<sup>3</sup> Both parties have to come to terms with the need to institute property rights reforms that enable private use of land for commercial purposes while accommodating the diverse types of communal tenure that exist. In this regard, the challenges the GOS and GOSS have to grapple with have their distinct characteristics. This is due to the differences in their original premises on the LQ as well as the variations in land use, customary institutions, and the priorities of resettlement and post-war development between and within regions.

A well thought out land policy is an urgently felt need in South Sudan but its realisation is no easy task in a region with diverse forms of communal (or customary) tenure, ecological conditions and land use practices. Moreover, the region has been devastated by wars and famines for many years. The factors that contribute to the urgency include the growing need for land to resettle returning refugees and internally displaced persons, the pressures from potential investors and donors to make land available for private commercial use (which includes oil and mineral extraction in areas with rich deposits of these resources), the need to identify and set aside lands for public purposes and infrastructural and urban development, and the need to deal with resource conflicts and competing claims to land. The constraints emanate from several sources. The GOSS is still in the early stages of establishing the administrative structures in the ten states under its authority.<sup>4</sup> This process is moving slowly and unevenly across the states due to lack of human capital, experience, and financial resources. Moreover, internal divisions and factionalism within the SPLM and its limited professional capacities have their negative effects on the functioning of the GOSS. The SPLM is still going through a process of transforming itself from an armed movement with a military style hierarchy into a political party with a democratic structure, a process which is likely to take a long time (Rolandsen 2007).

The GOS seems to be more occupied with conflicts in other parts of the country, particularly in Darfur, and with the censures and pressures from foreign governments and international bodies over its handling of the situation in Darfur. This has adverse impacts on the implementation of the CPA. The GOS and NCP have been criticised for lacking the political will to implement the CPA (International Crisis Group 2006). Further, the relations between the NCP and the SPLM have been under stress ever since the two got together in the post-CPA National Unity Government of Sudan. The unilateral withdrawal of the SPLM from the government of national unity in October 2007 was a clear sign of how badly strained the relations between the two partners, and hence between the centre and the South, had become, even though the SPLM returned to the government in December 2007. Both sides have been accusing each other of violating the CPA. It would seem that there is a growing lack of mutual trust.<sup>5</sup> Under the CPA, the interim

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<sup>3</sup> The JAM produced a report in two volumes in 2007. The report deals with different aspects of the implementation of the CPA and reconstruction. On the LQ, it mentions the need for a land policy and sets a time frame for the Land Commission to come up with its recommendations for a land policy.

<sup>4</sup> The ten states are Eastern Equatoria, Central Equatoria, Western Equatoria, Western Bahr el Ghazal, Northern Bahr el Gazal, Warrap, Lakes, Jonglei Upper Nile and Western Upper Nile (Unity).

<sup>5</sup> The NCP-SPLM relationship has been under continuous stress over several issues which include a clash between SPLA and pro-government militias in Malakal in December 2006, which the SPLM claimed was not an isolated incident, and disagreements over the actual share of oil revenues transferred to GOSS by GOS in 2007. There is also tension between the two over the future of the disputed oil-rich Abyei region.

GOSS will be in power for a period of six years, which ends in 2011, when an internationally monitored referendum shall be held to decide whether the South wants to be part of a united Sudan or to secede. The GOSS is expected to accomplish many tasks in the interim phase against many odds.

This is the broader context in which this paper looks at the LQ and some aspects of the policy and institutional challenges with reference to emerging land issues in South Sudan. The paper provides a brief overview of the background to the conflict with reference to its natural resource dimension before discussing the post-CPA situation regarding the LQ in South Sudan. Finally it identifies some issues for an open discussion.

## **1. RESOURCES AND CIVIL WAR IN SOUTH SUDAN**

Historians have traced the origins of the two civil wars that ravaged South Sudan after the Sudanese independence of 1956 to political changes and conquests in the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> centuries. The formation of the Sudanic states in the 18<sup>th</sup> century, their subsequent incorporation into the Turco-Egyptian empire and the latter's replacement by the Anglo-Egyptian Condominium in the 1890s were important phases in the development of what is generally seen as the North-South conflict which took violent forms at different times and led to two civil wars with a decade of peace in between in southern Sudan<sup>6</sup> (Johnson 2003). The causes of the wars were multiple and cumulative. It is not possible to delve into this complex history in this paper. However, it would be relevant to highlight the resource dimension of the conflict to set the background to the issues addressed in the sections that follow. In the days of the Turco-Egyptian regime, the south was subjugated and turned into a hinterland from which the state extracted taxes while commercial companies exploited its fertile lands. The south was also a reserve of labour including slaves for the northerners, who also used violent means to control people and land resources. There were rebellions by the southerners against the subjugation. The subjugation and violence continued during the Anglo-Egyptian occupation as well. However, by early 1920s, British officials adopted some legal means to curb the use of violence to access economic resources even though the political and economic marginalisation of the south continued (Keen 2001; Johnson 2003; Gray 1996).

The south became more marginalised politically and economically after the country's independence in 1956 due to the discriminatory policies and practices of the GOS, which appeared to be more interested in having the resources of the region appropriated for the benefit of the business and state elites in the north and their foreign allies than in the development of the former. The Unregistered Land Act of 1970, passed by General Numeiri's regime, was a major threat to communal tenure as it declared all lands unregistered in accordance with the Land Settlement and Registration Ordinance of 1925 to be state property. This law enabled the government to appropriate unregistered communal land and allocate or sell it for large-scale projects. The law, which was opposed by local communities, proved useful for the government's water diversion and oil prospecting projects.

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<sup>6</sup> There were two civil wars in the South since the country's independence from Britain in 1956. The first ended in 1972 with the signing of the Addis Ababa Agreement. The second civil war began in 1983.

There were several causes for the second civil war which broke out in 1983, a decade after the Addis Ababa peace agreement of 1972, which brought the first civil war after independence to an end. However, Khartoum's unilateral decisions to commission projects that exploited the natural resources of the south without any regard for the human security, land rights, and livelihoods of the affected people were major contributors to the conflict. For instance, the commencement of construction of the controversial Jonglei Canal in 1978 as a joint Sudanese-Egyptian project in collaboration with a French company posed a major threat to the livelihoods of large populations belonging to the *Dinka*, *Shilluk*, *Nuer*, *Anuak*, *Murle* and other communities in the South. The project was expected to drain the Sudd marshes of the White Nile at Jonglei and supply water for commercial farming downstream in N. Sudan and Egypt<sup>7</sup> while converting the swamps into cultivable lands. Covering an area of 1.7 million hectares, the Sudd is one of the largest tropical wetlands in the world. It overflows during the rainy season (April-October) and recedes in the dry season (Ramsar 2006). It is an ecosystem with a variety of fauna and flora and its wet grasslands (toich) serve as dry season grazing lands for the herds of pastoralists from different communities. It is a source of drinking water and fish for the local people. So it was no surprise that there was popular opposition to the Jonglei Canal project in the south. Suliman (1998: 3) contextualises the problem succinctly:

There was justifiable mistrust of the project from the southerners who saw the North and Egypt benefiting while their own lives were irreversibly changed, not for the better. By drying out the swamps and taking away the 'grass curtain', the canal would open up the entire Sudd area for mechanised farming, the domain of the Jellaba, and also allow the north to move military equipment and troops into the South with greater ease. Thus the project's giant earth excavating machine, the biggest in the world, was one of SPLA's earliest targets, much to the chagrin of the governments of Egypt and the Sudan.

The work on the Canal came to a halt in 1984 when the giant Bucketwheel, as the excavating machine was known, was severely damaged by an attack from the SPLA. The unfinished canal and the wrecked machine in Jonglei served as symbolic reminders of an unresolved conflict.<sup>8</sup> The resource value of the Sudd has taken a great leap with the discovery that it has the largest oil block in Sudan (Ramsar 2006). Indeed, the natural resource dimension of the North-South conflict assumed even greater complexity with the discovery of commercial oil deposits in 1978-81 in regions of Sudan including the south by the American oil company Chevron, which was commissioned by the GOS. The Numeiri government chose not to have the oil processed locally but to construct a refinery near the Port Sudan and link it to the oilfields by a 1400 km pipeline. This move deepened the southerners' mistrust of and anger towards the GOS. An attack on Chevron's oilfields by the SPLA forced the company to suspend operations in February 1984 (Suliman, 1998). However, oil exploitation was revived in the 1990s in the north and then moved southwards where the richer deposits are located. Foreign oil companies, including European and Asian,

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<sup>7</sup> The canal was designed to divert some 25 million cubic meters of water a day from the southward flow of the upper Nile waters just north of Bor and carry it through 360 km to Malakal. Egypt and Sudan were to share the water on a 50-50 basis (Baker 1995).

<sup>8</sup> The Jonglei canal project has been reviewed by GOS, GOSS and the Egyptian government after the CPA and, according to recent reports, there are moves to renew the project and strong opposition against it within the SPLM and among the public.

were quick to move in. The construction of the pipeline was completed in 1999 and the first deliveries of oil reached Port Sudan in August 1999.

The GOS had used military means including helicopter gunships and Antonov bombers to drive people out of their villages and towns to secure the land for oil fields. Hundreds of thousands of people were displaced and many had lost their lives in Western Upper Nile as a result of this practice of 'land clearance' by the GOS, which had been using the oil revenue to finance the war.<sup>9</sup> The government also manipulated local conflicts and created anti-SPLM militias in Western Upper Nile. It used these militias to defend the oilfields and drive away the communities living in and around them. The entry of oil redefined the parameters of the conflict and dramatically increased the importance of control over territory. It reinforced SPLM/A's will to fight while giving an impetus to the internationalisation of the conflict. "With the onset of large-scale production of oil", notes Seymour (2001: 3), "the oil rent has created new structures of profit, power and political control that have reshaped the capabilities of, and incentives for, key actors in the conflict." The government's military expenditure rose dramatically as its oil revenue soared. The government's oil revenue shot up from a mere 7.64 percent (or US\$61.1 million) of total revenue in 1999 to 40.45 percent (or US\$572 million) in 2001. During the same period government's military expenditure as a share of oil revenue rose from 27.4 percent to 60.25 percent (Human Rights Watch 2003: 345). By this time, the GOS was fighting wars in parts other than the south as well (Darfur, and eastern and northern Sudan) and the situation was described as "a network of internal wars" by Johnson (2003).

The high military expenditure, however, did not seem to help the government to weaken the SPLM/A as it was able to defend the large territories it had captured. On the other hand, the SPLM/A was not in a position to stretch its resources further without risking military reversals. The military stalemate and international pressure, which increased after 9/11, compelled the protagonists to start the negotiations which led to the CPA.

## **2. SPLM'S POST-WAR DEVELOPMENT POLICY DILEMMA AND THE LQ**

While being explicit that it is not intended to address the ownership of land and subterranean natural resources, the CPA does offer some pointers on the future of the LQ and the functions of the proposed land commissions. The agreed principles also reveal the compromises reached by the two parties and the conflicting interests that need to be managed and accommodated in the future. The CPA states that all existing oil contracts 'shall not be subject to re-negotiation' while persons whose rights were violated may seek compensation through 'due legal process'. The SPLM had insisted that the oil contracts were made against the will of the communities who owned the land under communal tenure and who were displaced and harmed by the GOS's use of force to clear land for oil extraction and hence the contracts were illegal. In the early stages of the negotiations, the SPLM wanted the contracts re-negotiated. However, it later relented on this demand while the GOS agreed to the inclusion of the clause on compensation to the

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<sup>9</sup> See Christian Aid (2001 and 2003), and Human Rights Watch (2003) for documentation and analysis of the conflict with reference to oil exploitation and its impact.

victims. An agreed principle that indicates the broad premises for future land policy and legislation also reflects the willingness of the signatories to go beyond customary laws and public ownership:

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. (CPA 2005: 49)

In this context, ‘international trends and practices’ would seem to imply, *inter alia*, privatisation and the creation of land markets. What is being envisaged is a land reform but a clear policy and its modalities of implementation and how private investment and accumulation by outsiders would be facilitated are yet to be formulated. However, already in 2003, the SPLM had articulated its vision of development in which the private sector occupied an important place along with the public sector.

The New Sudan economy shall be a mixed free market economy in which both public and private sectors shall complement each other and be encouraged, with the public sector based on social welfare, competitiveness, efficiency and provision of social overhead service. ... Foreign investment in the New Sudan shall be allowed and encouraged and repatriation of profits shall be guaranteed. (SPLM 2003)

Commenting on the SPLM Resolution, Sundnes and Shanmugaratnam (2008: 73) say:

Whatever interpretation one gives this vision, there cannot be any doubt that it envisages a major role for domestic and foreign investors in creating a dynamic private sector in Southern Sudan. To realise this vision, the GOSS will need to find land tenure systems and an economic policy that enable private accumulation via commercialisation.

The existing communal or customary tenure in South Sudan is actually a historical product of institutional hybridisation that took place during British occupation. The system of chiefs ‘owed as much to British innovation as to indigenous custom’ (Johnson 2003: 12). “However”, note Sundnes and Shanmugaratnam (2008: 72), “the system has become so well embedded in their culture and life worlds that local residents regard it as indigenous and believe in its efficacy to regulate their access to land and to adjudicate social conflicts.” Indeed, it is the social embeddedness of an institution that distinguishes it from bureaucratic structures which are viewed by people as externally imposed arms of the state (Cleaver 2003; Sundnes and Shanmugaratnam 2008). The customary tenure allows private use and development of land for farming and other productive activities. Even though customary tenure varies in form across South Sudan, it has some common fundamental characteristics. The authority to allocate community land lies with a system of local chiefs and individuals and groups have rights to land through membership to the community. A land, once taken possession by an adult male in accordance with existing rules, can be inherited by his son. Women have access to land only through male relatives. Rights of herders to the commons operate on the same principle of membership to the community. There are power relations and inequalities within the community and these are reflected in the variations in the size of herds owned and

the extent of land cultivated.<sup>10</sup> Resource conflicts are normally handled by local institutions, but these institutions have been finding it extremely difficult to handle resource conflicts caused by war-induced mass displacements of pastoralists and farmers. Many of these conflicts have also turned too violent due to the easier access to firearms in rural areas as a result of the protracted war. This is a rather stylised description of a complex system, which is quite flexible even though conflicts and institutional decay are not uncommon.<sup>11</sup> However, large-scale allocation of land to foreign investors is at present a frightening proposition to rural communities in South Sudan, which are only too well aware of how scores of people were dispossessed of their lands by oil companies and the GOS.

The term “mixed free market economy” (SPLM 2003) embodies contradictions the SPLM seems to be struggling to reconcile in order to live up to its pledge to the people of South Sudan and to sustain the legitimacy of the interim government. It is about combining inclusiveness and equity with growth in the post-war development of South Sudan in the present global context. This issue should be so fundamental to GOSS’s development policy for several reasons. First and foremost, the extent of deprivation and poverty caused by years of war and famine need to be addressed as an urgent priority. The popular support for the liberation struggle in South Sudan was inspired by the hope and expectations given by the SPLM that life would be freer and better after liberation. With the end of the war and the establishment of the interim GOSS, the people expect the SPLM to deliver on its promises. Their expectations include human security, protection of the rights to land and water resources and the extension of these rights to women, support and opportunities for livelihood revival and access to health care and education. Land rights (which include water rights) are so vital since herding and farming are the basic means of livelihood for the vast majority of the people. The lack of land rights for women was raised within the SPLM which had promised to reform customary rights to empower women.

Regarding land, the popular perception in South Sudan was that there was plenty of it for all. Before the CPA, I had heard many local people and even some senior SPLM officials express this view (Shanmugaratnam et al. 2002). However, now there is a growing awareness in the region that there are competing demands for land and its subterranean resources such as oil and minerals and that the demand for the subterranean resources comes from powerful international and domestic sources. Meeting the land needs of the millions of internally displaced people and refugees who have returned or are waiting to return to South Sudan alone is a major challenge for the GOSS. This is likely to involve three to four million people. On the other hand, the oil revenue to which the GOSS is entitled, under the wealth sharing arrangement of the CPA, is its biggest source of the much-needed funds to run the government and for post-war development.<sup>12</sup> However, most of this revenue, which fluctuates according to world market trends

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<sup>10</sup> See Sundnes and Shanmugaratnam (2008) for a documentation and analysis of differentiation and marginalisation in a locality in Yirol which has been under SPLM/A’s control for several years.

<sup>11</sup> See Bior et al. (2005) for a general description of customary tenure based on a recent preliminary survey of eight different communities in South Sudan. Also see Sundnes and Shanmugaratnam (2008) for an account of land rights and land use in Dinka community.

<sup>12</sup> Under the CPA, the GOSS is entitled to 50 percent of the net oil revenue derived from oil producing wells in Southern Sudan, and the oil producing state/region is entitled to at least two percent of the net revenue from its oil (see CPA, Chapter 5, page 54). Another source of funding for reconstruction is the World Bank managed



in oil prices, goes to pay the salaries of the government's employees and the soldiers of the SPLA. Furthermore, there are already tensions in the south over the sharing of the revenue between the oil producing states and the GOSS. These tensions have aggravated the already tensed relations between some ethnic groups, as for example between the Dinka and Nuer communities, the latter complaining that their state was not receiving the two percent share it is entitled to as an oil producer under the CPA (Mbogo 2006).<sup>13</sup> The GOSS has recently permitted some companies including Malaysia's Petronas to start oil extraction work in the Jonglei and other oil-rich areas. While this will lead to increased revenue for the GOSS, older concerns about the socio-economic and environmental consequences of oil extraction projects remain. These concerns raise justifiable fears that Sudan will continue to suffer under the spell of 'resource curse'.

Regarding foreign investments in the oil sector in Sudan, the past experience has shown that multinationals and some foreign governments such as that of China had no compunction about collaborating with the Sudanese government which adopted violent means to evict people to clear land for oil extraction and used the oil revenue to intensify the wars in the south and other parts of the country.<sup>14</sup> Sudan became just another example of a resource-rich country torn by war and mass poverty – another case of 'natural resource curse' (Stiglitz 2006).<sup>15</sup> The 'resource curse' cannot be eliminated without a development process that combines growth with equity and quality of life and without the appropriate structures to govern the development process. This is more easily said than done in the case of Sudan. There are internal and international obstacles to the realisation of such a development process. Internally, a fundamental requirement is a government with a strong commitment to such a development process, and state institutions with capacities to govern or facilitate it. This condition remains unmet in Sudan as a whole for several reasons. The absence of war is a necessary but not a sufficient condition to lift the 'resource curse'. And in Sudan, war is not yet a thing of the past as the situations in Darfur and other areas show. Even after the CPA, there are instances of displacement of people due to take over of areas by corporations for oil extraction in the south. For instance, in June 2006, Refugees International (RI) reported that people were being forcibly displaced by oil companies in Malakal. RI quotes a UN official in Malakal: "Just go up to Melut and you'll meet many people who had run away because of the oil companies. Oil is adding more fuel to displacement rather than helping us welcome returnees with economic investment" (RI 2006: 1). The report warns that the NCP was using militia and the South Sudan Defence Forces (SSDF) and 'other tactics' to create or promote conflicts in the south and sabotage the CPA as it fears that the southerners may

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Multi Donor Trust Fund (MDTF) set up after the CPA. The MDTF is expected to provide a third of the funds on the basis that it contributes a dollar for every two dollars allocated for reconstruction by the GOSS.

<sup>13</sup> Dinka is the largest and Nuer the second largest ethnic group in South Sudan. The current Dinka-Nuer conflict began in 1991 as a consequence of a split in the SPLM/A along ethnic lines. The conflict turned extremely violent and many lives were lost. A peace pact was reached between the leaders of both groups in 1999. However, tensions have remained. There is a perception among the Nuer and the smaller ethnic groups in South Sudan that the SPLM/A is dominated by the Dinka.

<sup>14</sup> See Human Rights Watch (2003) for detailed documentation and analysis of oil development, mass displacement, human rights violations and the role of foreign corporations and governments in Sudan's oil sector and the conflict. Part IV (pages 510-707) of the study deals with Foreign corporate complicity and Foreign government support in particular. I mention China specifically because of its large investment in oil in Sudan and active support to the GOS during the conflict by supplying arms and defending it in the UN.

<sup>15</sup> On lifting the resource curse in developing countries, see Stiglitz (2006).

vote in favour of secession at the end of the interim period. The main cause of this fear is that secession would deprive Khartoum of its share of the oil and mineral wealth of the south.

It appears that there are differences of opinion within the SPLM hierarchy on foreign investment and land reform. Moreover, the GOSS is still struggling to overcome its capacity constraints which affect development policy making and implementation. The relations between the GOSS and GOS seem to be too strained for the two to cooperate on a sustained basis. These internal weaknesses translate into an internationally weak bargaining position for Sudan. Internationally, the hegemony of the neoliberal paradigm, the power of multinationals and the behaviour of countries like China with huge and urgent demands for oil are not so conducive to meet the policy and institutional challenges of equitable development in a resource-rich but politically and organisationally weak country such as Sudan. Inequality, poverty and internal conflicts have got worse in many oil-rich developing countries with internal conditions comparable to those of Sudan (Stiglitz 2006). So the danger of ‘resource curse’ continues to loom large in Sudan. Of course, the ‘resource curse’ is man-made and its transformation into a ‘blessing’ is a challenge for the political class and policy makers.

### **3. ISSUES FOR DISCUSSION AND FURTHER STUDY**

The history of the LQ in South Sudan is quite complex indeed. External pressures and internal demands and priorities have added a new dimension to this complexity in the current context of post-war development. The high dependence of the GOSS on donors for funding and expertise in the interim phase adds extra importance to the role of external actors in guiding development policy. In its two volume report entitled Framework for Sustained Peace, Development and Poverty Eradication, the JAM has only set a timeframe up to 2007 for the Land Commission to put forward its recommendations to “appropriate bodies as per the CPA” (JAM 2005). The Land Commission has not completed this task yet. However, new oil projects have been sanctioned by the GOSS. Resettlement of returnees is a matter of high priority. Old land conflicts caused by forced migrations remain to be solved while new ones have emerged. The scale and complexity of resettling large numbers of returnees pose unprecedented demands on the GOSS and local institutions. They have exposed the institutional and capacity limits at different levels. Assessments by INGOs assisting resettlement have shown that the capacities of local communities to absorb the returnees are highly limited. Moreover, reintegration and livelihood revival remain major challenges. The arrival of returnees has also exacerbated already existing tensions between pastoralists and farmers in some areas. The GOSS and the international agencies concerned find it hard to meet the logistical challenges of the return process, which involve long distances, high transportation costs and mined and flooded roads (IDMC 2007).

As already noted, the GOSS has not been able to prevent the displacement of people by oil companies that have established new projects in the south. Since the old oil contracts have been recognised as valid under the CPA, the GOSS has little control over the activities of the companies operating under these contracts. The GOSS has complained to the US that the Sudanese National Petroleum Commission has not been transparent in handling oil revenue sharing while failing to provide documents regarding oil contracts

for review.<sup>16</sup> The emerging issues in the new oil exploration areas expose the ad hoc and top-down nature of the GOSS's approach as well a lack of capacity. There is no evidence so far to believe that the GOSS has laid down some guiding principles regarding the utilisation of land and subterranean resources and made efforts to put them into practice in these areas through appropriate institutions and the effective enforcement of the rights of local communities. Apparently, there has not been any meaningful consultation with local communities even though the CPA says that the "communities in whose areas development of subterranean natural resources occurs have the right to participate, through their respective states/regions, in the negotiation of contracts for the development of these resources" (CPA 2005: 52).

There are different dimensions to the post-war development challenges in South Sudan. However, the centrality of the LQ is not in doubt. Given the ground realities, the Land Commission has to address the big issue of how communal or customary tenure can be adapted or reformed to enable the development of a 'mixed free market economy' to use the phrase from SPLM's Resolution 20, a phrase pregnant with the inner contradictions of the SPLM and the policy dilemmas of the GOSS. This problem can be discussed and debated in terms of several issues. In this session, I would like to reflect on the future of customary tenure.

### **3.1. Future of Customary (Communal) Tenure**

A report commissioned by the Secretariat for Agriculture and Animal Resources of the CANS and based on a preliminary survey of land tenure in some parts of Southern Sudan states the larger context with reference to the region's natural resources as follows:<sup>17</sup>

The new government in Southern Sudan comes into existence at a time when globalization and liberalization have become the defining principles for the management of national economies and resources. These imperatives will present critical challenges to the new administration, especially in the light of the acknowledged land and natural resources wealth of Southern Sudan. (Bior et al. 2005: 7)

On 'opportunities for individual utilisation of land for market production', the report observes:

One of the key arguments against customary land tenure has been that it inhibits the individual from utilising the land to produce for the market and create personal wealth. In this regard, customary land tenure is seen to be more appropriate to subsistence production and it is suggested in order for land to be used productively, customary land tenure must be transformed and give way to modern tenure that is based on markets. This argument has been discredited over the years by research that shows the dynamism of customary land tenure and how it responds to market opportunities. Nevertheless, the argument continues to inform much of the development and land reform thinking across Sub-Saharan Africa. (Bior et al. 2005: 22)

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<sup>16</sup> GOSS 2007.

<sup>17</sup> The study was supported by Norwegian People's Aid (NPA) and I was associated with the planning of it, as an advisor on behalf of NPA.

This view challenges the dominant paradigmatic position on formalisation of land rights in Africa and elsewhere. This issue has a long history but it has been revived in a big way by De Soto with the backing of international donors. Studies have shown that land registration and titling programmes in Africa, including Sudan's neighbour Kenya, have failed to produce the expected results while exacerbating conflicts, inequalities and marginalisation (Peters 2002; Ogoth-Ogendo 1976 and 2005). There is a strong view within the SPLM and in South Sudan that this route to land reform should be avoided. On the other hand, any romanticisation of the customary institutions should be avoided too. There is a large body of empirical studies to support Bior et al.'s point about the 'dynamism of customary tenure' to enable market oriented production in Africa. However, there is enough evidence from African countries to show that this dynamism is driven by power relations and that it has been associated with marginalisation, vulnerability and poverty with women being the worst off. The more powerful have exploited the ambiguities of customary land rights to their advantage (Peters 2002).

In South Sudan, social differentiation and marginalisation have been going on in areas which were under SPLM/A's control for several years. The absence of warfare in these areas enabled households to revive their lives and livelihoods. We found this process to be uneven, which was not unexpected but the extent of marginalisation was quite serious as around 60 percent of the households in our study locality considered themselves poor or very poor. These households were unable to bridge the hunger gap of four to five months between April and August. The situation clearly showed that access to land might be a necessary but not a sufficient condition for livelihood revival (Sundnes and Shanmugaratnam 2008; Shanmugaratnam et al. 2002).

While calling for further detailed studies to provide inputs for a comprehensive land policy, Bior et al. make a strong case for customary tenure as "a foundation for the creation of the land policy for New Sudan" and for the involvement of the communities in framing the policy. Indeed, by insisting that customary tenure should be a foundation of future land policy, Bior et al. are giving expression to the popular will of the people of South Sudan, which was endorsed by the SPLM throughout the struggle. The report captures local perceptions and concerns about the future of communal land tenure in South Sudan:

Communities are apprehensive that with the onset of peace, the government and other actors may seek to appropriate the land and wrest it from the control of communities and their institutions, and ignore the role of elders and other community leaders in the management of land and natural resources. (Bior et al. 2005: 25)

Communities seem to be harbouring doubts about the interim government's actual position on the LQ. Customary tenure and the local institutions that administer it enjoy legitimacy among the people because they are socially embedded. In the present context in South Sudan, a top-down approach to land reform may be perceived by local communities as an intervention that will take land away from them or severely limit their right to land. This alone can be a major reason for people to oppose a land reform. There are also ethnic factors that may contribute to conflicts over land policy depending on how different ethnic groups perceive it. A bottom-up process would seem to be the right approach to deal with the LQ as it can enable

the identification of institutional innovations which are acceptable for most of the people. This presupposes a long-term perspective and the political will to adopt a long-term approach on the part of the GOSS. On the other hand, there are land issues that need immediate attention. Thus there is a need to address both the immediate and the long-term challenges at the same time, though both are interrelated and belong to the realm of land policy in the broad sense. This makes it imperative to deal with the more immediate issues in a long-term perspective.

The more immediate land related issues include the following:

- Preparation of local communities to receive returnees who have chosen to settle in their areas.
- Resettlement of returnees (IDPs and refugees) in ways that ensure them access to land resources to rebuild their lives and livelihoods in a conflict-free local environment.
- Assistance to customary institutions to deal with resettlement in terms of allocation of land for housing and farming, and access rights to commons for returnees.
- Resolution of old and new resource conflicts: herders-herders; herders-farmers; farmers-farmers. Some of the conflicts involve different ethnic groups. This may require external assistance in some cases.
- Granting women direct access to land.
- Development of the capacity of CANS to function better and co-operate better with customary institutions at the local level.
- Compensation for the old and new victims of oil projects.
- Institutionalisation of local representation in negotiations of new oil contracts.

## **CONCLUSION**

Regarding the longer term process, the fact that the interim government's term ends in 2011 may be viewed as a constraint. This is a mistaken view and should not be a reason to be in a hurry to introduce institutional reforms of customary tenure without the consent of the people. It is not just the informational base that is too weak for the GOSS to frame a comprehensive land policy including institutional reforms but there is also a lack of consultation with the communities. The remaining time before the referendum can be gainfully used by the GOSS to initiate a consultative process aimed at developing a land policy that reflects the popular will and enables the sustained enhancement of livelihoods, while addressing other land related development issues. The question of the feasibility of such a process takes us back to my earlier discussion of the internal and international constraints.

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