Legal aspects of land administration in post conflict areas

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SUMMARY

An array of issues has to be faced when the land administration functions are being reactivated in a post conflict area. This paper will look at several issues with a strong legal component. It deals with land rights, and the land records describing these, and especially with what they (still) mean and what not, and how to use them and other information as evidence in a procedure to "clear up" the legal situation in regard to land. This procedure can be compared to a process of adjudication and depending on the choices made, can hinder or even *de facto* block the formal land market for years. Solutions could be the avoidance of registered (and guaranteed) title (as under a title registration system), by sticking to a deeds registration system, or introducing provisional or qualified titles. That, however, means everyone runs some risks for some time to come, in a formal land market that can start easier. The authors at least do not consider a post conflict period a good time to introduce title registration.

1. INTRODUCTION

An array of issues has to be faced when the land administration functions are being reactivated in a post conflict area. Some of the issues that need attention are finding and securing the land records that are (still) available and preventing illegal occupation and construction on the other land. Many others have been identified (UN-HABITAT, 2003) and compete for priority. Several of these issues are of a legal nature, or have at least some legal aspects to them, which can be explained by the fact that the relations that persons have to land are usually constructed or adapted by laws and regulations. The issues are not always easy to fully identify and are even harder to solve. This follows both from the fact that 'land' often was a part of the conflict, and from the fact that changing legislation is never easy, and certainly not in a period where all institutional arrangements are in a certain state of flux.

This paper will look at several issues with a strong legal component. It deals with land rights, and the land records describing these, and especially with what they (still) mean and what not, and how to use them and other information as evidence in a procedure to "clear up" the legal situation in regard to land. This procedure can be compared to a process of adjudication and depending on the choices made, can hinder or even *de facto* block the formal land market for years. Solutions could be the avoidance of registered (and guaranteed) title (as under a title registration system), by sticking to a deeds

registration system, or introducing provisional or qualified titles. That, however, means everyone runs some risks for some time to come, in a formal land market that can start easier. The authors at least do not consider a post conflict period a good time to introduce title registration.
A part of the problems that are likely to be encountered are not specific to post conflict areas, but can be found in many developing and/or transition countries. However, in dealing with them in a post conflict situation, one should clearly keep the special post conflict issues constantly in mind.

2. LAND BEFORE AND DURING THE CONFLICT

Although differences occur between different post conflict areas, there are always issues related to land of importance in the area. Land rights are unlikely to have been accessible more or less equally to all people in the area. Especially when the area is inhabited by two or more distinct groups, differences occur in the way they have access to (governmental or common) land, in their position on the land market and in the formality and/or legality of their activities related to land. In addition to the 'formal' institutions run by the dominant group, other institutions might be used by members of other groups (and even of the dominant group). This can be recognized customary institutions, like tribal chiefs and elders, but can also informal or parallel structures, which might be part of a wider 'shadow' economy and/or administration. Furthermore there might even be people whose interests in land are outside any institutional framework, based on actual possession and/or family tradition.

People might have ignored the 'formal' institutions for a variety of reasons like:
- illegality of the transaction under (discriminatory) legislation
- illegality of the subdivision under the applicable land use regulation
- differences between the intestate inheritance rules and customary or religious rule
- avoiding (inheritance or transfer) taxes
- avoiding expensive and/or time-consuming bureaucracy

These reasons as such are not only found in post conflict areas, but in many other places around the world as well, as for instance Dale and McLaughlin (1999, p. 130) observe: "In many countries there are examples where inheritance has not been registered or where dealings that are not officially recognized have informally been carried out –for instance the leasing of land in areas where bureaucratic controls make formalization difficult or where the State does not officially recognize leasehold tenure." However, in post conflict areas there is often a history of forbidding or discouraging transactions between members of different groups, both by law and in practice.

Such practices are likely to increase during periods building up to the conflict, and depending on the type and duration of the conflict, also during the conflict period. Either by applying discriminatory legislation, or applying legislation in a discriminatory way, members of the dominant group are brought in better positions than members of other groups. The effects might be increased by discriminatory practices in other areas of public administration (like privatization of housing to those who lease it or work for a certain (state) company), as well as by people leaving or fleeing from the area, or not being able

to travel (safely) to the centers of ‘formal’ power in the area.

All of this means that the land records relating to such periods, as well as the ones from immediately after the conflict, should be examined with a healthy suspicion. In addition to all the complications described before, there could even be outright alteration or manipulation of the records as such. Examples of manipulation include:
- unusual numbers of transactions of a certain type in a short time, or even on the same day
- transfers between members of different groups in the conflict
- transfers from public, common or communal properties to private persons, often in the form of privatization
- periods without, or with few, transfers, which might indicate that certain parts of the transaction records have been removed (e.g. pages taken out)
- a lack of transfers, esp. when the overview data showing the situation just prior to the conflict is missing, and/or a new group has come to power.

3. LAND RECORDS

Even though the land records do not mean everything, as is and will be discussed further in this paper, it is critical in the immediate post conflict period to find the land records (registry, cadastre, maps, possession lists, survey field records, text and graphic, digital backups, paper plans). These land records can contain information that is in the interest of some parties, as well as information that is not in the interest of other parties. A dominant group losing power over an area might want to remove the land records with them when they withdraw, in order to have proof of the land rights situation, usually beneficial to them, which existed just before they withdrew from the area. They may also want to destroy earlier information from before their group was the major beneficiary of the system. Furthermore they might want to destroy copies of the up-to-date information to prevent the incoming group from being able to return to normality in land issues very quickly.

The group taking control immediately after the withdrawal of the previously dominant group might want to destroy the information on the situation just before their arrival, which information was beneficial to the previous group. They might want to preserve older data from an earlier period, which data is beneficial to them. They also might want to alter the records they find in the land administration system in favor of their group. Such alteration may even be based on ‘instant’ tribunals, or on information coming from previously informal and/or parallel structures to government. Exiled or underground staff with appropriate skills might quickly take over the offices and land records, and either prevent abuse of the land records as much as possible, or actually be instrumental in changing the records to suit their purposes. Finally the land records can be threatened by destruction, usually through burning down the buildings they are kept in (either at random or as planned violence)

When possible the land records should be secured, and either moved to a safe place, be guarded, or be copied/scanned. Strategies how to locate, secure, value, computerize and

upgrade these land records are described at length in the land management evaluation tool (UN-HABITAT, 2003).

4. LEGISLATION

To understand the situation in the post conflict area comprehensively it is necessary to have a basic understanding of the regulatory framework. This includes policy, laws, regulations, administrative instructions, religious law, customary law, informal law and an overview of the tenure types. Primarily it is necessary to understand the regulatory and institutional framework in place just before the conflict started. However, it is also necessary to know the changes that have been made since then, either during the conflict or by the post conflict administration. To do this local experts are required, especially in law and governmental policies. Experts are also needed in religious, customary or informal rule systems, if these systems exist.

The key laws and regulations that impact the land sector should be identified. This also applies to basic documents describing policies and/or applicable rule systems, as far as they are documented. If no documents are available, they should be created, based on interviews with the relevant representatives (representing the tribal, informal or religious communities). The laws that are likely to be identified include the:
- Civil and/or land code
- Law on transactions in real estate and/or land
- Law on land and/or real estate registration
- Cadastre and/or surveying law
- Subdivision and/or land use control law
- Spatial or land use planning law
- Law on transfer tax/stamp duty
- Law on land and/or property tax
- Land consolidation law.

Local experts should be interviewed to understand how land related activities (land delivery, land transactions, subdivision, planning, building permits, allocation of public land) were performed *de facto*. An assessment should be made as to what extent these activities took place in an extra-legal fashion, for instance through parallel structures. The *law in action* –the way things were practiced in day-tot-day life– needs to be understood more than the law in the law books.

An overview of the different land tenure types and systems should be acquired. Any major differences between regions in the area should be identified. The focus should not be only on ownership/freehold/property rights. It is possible that the majority of the land and/or dwellings are held under rights of use or possession, which might have restrictions on transferability. Also, land and/or dwellings might be held through customary, informal or religious rights, not found in the written laws.

In reviewing the laws, an assessment should be made as to whether they discriminated against certain groups. It is possible that at some point in the history of the country land

transaction and/or allocation benefited certain groups more than others. This could involve subtle or blatant discriminatory procedures such as:
- rules that demand that (certain types of) transactions need to be approved by a certain authority before they are finalized; this might easily be used for discriminatory practices, by for instance blocking transfers from a member of one group to another group
- the non completion of the technical process/administrative procedure; an assessment of land transfer activities (e.g. allocation and transactions) should be made to establish if they were completed by following the correct procedures for verification/notarization and recording/registration, and whether this was complemented by the updating of the relevant records, and whether it included subdivision procedures, including surveys, preparation of plans and updating of the index/cadastral maps; this might be different between different areas (urban/rural, inhabited by different groups, very mixed areas) and between different countries
- the reasons for having unrecorded transfers should be known (see section 2).

Legislation that is considered discriminatory should be re-called as soon as possible under the new or interim administration. Even before that can be realized any application of it, or discriminatory implementation of other legislation, should be stopped through reference to international human rights conventions, especially on housing rights and security of tenure. Infringement of the rights of the weaker groups in society should be noted, such as women and minorities, as well as membership of the 'wrong' group at a certain time in a post conflict society. Former injustices should be addressed.

The effects of the earlier application of discriminatory legislation and the discriminatory implementation of legally neutral laws should be repaired as much as possible. If there are only a few cases the reparation can be dealt with through the claims system. However, both the person making the claim, and the person in possession, might have a reasonable case to be the right holder. Some kind of compensation may be required (e.g. money, government bonds, allocation right to unclaimed or reserve land or property). It is likely that specific restitution legislation will be required. Experience in regard to this exists in Central European transition countries, as well as in South Africa (FIG, 2002).

Understanding the regulatory framework at any depth is not easy and it may only be possible to construct it incrementally in steps. However, obtaining an increasing understanding is a prerequisite for several of the other activities that need to taken:
- understand what has been going on, and is still going on, in regard for instance to what is legal, and what is unacceptable
- rate the validity of the land record
- construct hierarchies of legal evidence to give guidance on what is a secure land right
- design appropriate dispute resolution mechanisms.

5. LEGAL AMBIGUITY

It is likely that the assessment of the regulatory framework will show legal ambiguity and contradictions. It is unlikely that there will be clear-cut rules that have been applied and can still be applied in a post conflict situation. Special attention will need to be paid to

human rights issues, especially housing rights, property rights, gender equality and access to dispute resolution mechanisms and due process. It is likely that local laws will have to be adapted and generic international laws introduced based on human rights conventions, hopefully only when necessary. Unfortunately in post conflict situations, where there are many foreign consultants, new laws from other countries are often introduced instead of first assessing and adapting the existing laws. Foreign laws:
- are harder to implement with local staff, as they will have a problem understanding them
- are likely to cause co-ordination problems and contradictions with pre-existing (and continuing) laws and regulations
- might not be accepted by local staff and/or (groups of) the population because it is considered alien to them.

As much as possible, new legislation should be drafted to explicitly fit the local circumstances in close co-operation with the local experts (or be drafted by local experts with international assistance). This will both improve the actual impact which the laws and/or regulations will have in the short term, and their sustainability in the long term.

Drafting laws and regulations is one thing, getting them approved by the appropriate institutions is another. This is always time consuming. It is necessary to spend time in lobbying these institutions ahead of time, explaining the drafts that they will need to approve, and why they should approve them. The time needed to do this should not be underestimated, especially when the constitutional framework itself is under development, or is complicated by a dual structure involving international administration. At the same time, often in these situations a careful assessment needs to be made as to when the 'time is ripe' for certain actions, both in terms of priorities and awareness of land issues.

6. LAND DISPUTES

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

Where discriminatory laws, regulations and policies have been implemented, either before, or during the conflict, this will have led to the infringement of rights of members of certain groups. Groups who have been previously discriminated against may, after a change of regime, try to get their revenge, or get back previously owned properties

outside of the legal process. This may involve forcing out the current occupants and/or persuading the occupants/owners to sell under duress.

Dwellings that have been abandoned (when people fled and/or have taken refuge elsewhere) should not be left empty. These should be inventoried as soon as possible to prevent the invasion of abandoned properties, both by those in need and/or by criminal elements. The property rights of owners who had to abandon their properties should be respected and protected.

Also, it is possible that groups who were discriminated against never had access to any formal property rights and lived in informal settlements. During the conflict these informal settlements could have been burned to the ground and/or removed. These groups have no formal rights to the land or documentation to substantiate their claim to the land. In this situation, these groups will have great difficulties asserting their right/claim to land and property. Also they may not be able to claim housing reconstruction grants, as these generally require legal evidence of ownership/possession.

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

An administrative structure will be needed to collect claims, inventory abandoned dwellings, allocate temporary permits, allocate building permits. It may be necessary to set up a specialized tribunal or claims commission to deal with the disputes and allocation of permits either because the:
- court structure is not functioning
- government structure is not considered to be sufficiently impartial in its administration of justice
- large number of cases involved will require special capacity to deal with them. Special (administrative) measures have to be in place to deal with a mass claims operation
- specialized hierarchies of legal evidence will need to be used in such cases.

In a post conflict situation the parties involved in a claim will require some form of mediation assistance to be able to reach a solution. Quick access to dispute resolution mechanisms is required. If possible, there should be two separate agencies, one for the allocation of building and other permits, and the other for the solving of disputes but with a joint set of guidelines and coordinated activities. The former should be as decentralized as possible. There should be clear guidelines about the relationship and the difference in functions between the courts and the tribunal for land disputes to ensure both legal clarity and the safety of court officials.

To allow members of all groups to make claims for infringements on their land rights, it might be necessary to facilitate the lodgement of land and property claims in neighboring territories or even countries, where refugees are present. This is especially important

where these groups cannot return to the area because of security considerations. Without this facility some groups in the conflict are likely to be seriously disadvantaged.

Sometimes the early assessment of type and scale of claims to be expected, proves to be incorrect once the claims are lodged. It is important to understand why this has happened as it may be an indication that:
- properties have been legally sold across the groups after the conflict, given that one group does not feel safe to return
- people are used to selling their property between conflicting groups outside of the legal system. This is especially prevalent in countries where this was the norm before the conflict
- people are trying to avoid the payment of tax by not making claims.

When a claim is settled and the present user/occupier of the dwelling or land is not awarded the right, an eviction order will have to be prepared. Ultimately, taking certain humanitarian considerations into account, evictions will have to be carried out. If the persons are unwilling to abide voluntarily by the eviction order, police or security services will be needed to complete this. Usually forced evictions will only be needed occasionally as they serve as a model to the society that eviction orders have to be taken seriously. If however, eviction orders are not enforced, few people will follow them voluntarily. The credibility of the entire dispute resolution process will be affected if eviction orders are not generally followed. This is a key aspect of re-establishing government as a normal part of life and the rule of law.

7. SOME CONSIDERATIONS ABOUT SYSTEMS OF LAND ADMINISTRATION

Regarding the options for choosing s system of land administration that is appropriate for the existing post conflict situation, we refer to the criteria that can be used for assessing those systems. There are many ways to assess a system of land administration. Recent research reveals that basically there are five criteria, against which a land administration system might be benchmarked (Palmer, 1996).

These five criteria are

- 'Jurisdiction wide coverage', which addresses the extent to which a country is covered by the system
- 'Quality control', which addresses the accuracy, completeness and reliability of the information on real property.
- 'Currency', which deals with how up to date the system is.
- 'Guarantee', which measures the extent to which the jurisdiction stands behind its public registry
- 'Indemnity', which addresses what happens if something should go wrong with the registration system.

Considering the introduction or re-establishment of a land administration system in a post conflict situation, decisions are to be made on the extent to which the system should meet

the criteria. These decisions -as all strategic decisions- are based on three main aspects:
(a) what are the purposes to be served?
(b) what options are available to meet these purposes?
(c) which options can be implemented given the conditions that exist?

The specific local situation will be reflected in
(a) the purposes that have priority: this is a policy-decision made by the post conflict administration.
(b) the conditions that exist: these regard e.g. the current nature and status of system of land registration with respect to the same criteria as mentioned earlier, the extent of violation of the legal order, idem the land records (registers and maps), and available human and financial resources.

Which purpose has priority?

In brief we would like to elaborate on the purposes. Land administration serves various functions in a society (GTZ, 1998):

1. improvement of land tenure security
2. regulation of the land markets
3. implementation of urban and rural land use planning, development and maintenance
4. provision of a base for land taxation
5. management natural resources

Concerning the *improvement of land tenure security*, the legal framework of land administration systems (related to the registration or recording of rights and interest in land) is determining the nature of the security provided. Within the context of the definition of these rights *in rem* (as an institutional prerequisite), deeds systems provide a different (*in casu* less) security compared with title systems. The combination of a strong notary system (e.g. *Latin Notary)* and a deeds registration might however provide as much security as the combination of non-authentic (party) documents with a title registration (strong role of the registrar).

Concerning the regulations for the *land market,* land administration systems provide transfer procedures of a different nature. On one hand there are plain procedures of submission of a transfer document and a recording after a minimum of formalities (e.g. *simple deeds registration*). On the other hand there are more complex procedures regarding investigations prior to the approval of the legal impact of the transfer (e.g. *issuing of a title certificate*). Some countries require approval by a chief surveyor, a chief planner or another authority. Advantage is that e.g. a building permit is granted together with the title, while in the first case the procedure for planning and building permits starts just after the transfer. The process time necessary for the transfer procedure (for example from the obligatory agreement to the official recording or registration, that is often used as a benchmark) therefore might result in a different '*value*' for the applicant.

Concerning *urban and rural land use planning, development and control*, the support of land administration systems lies foremost in the phase of development and control of a

given land use. This activity is to be seen as an intervention by the government in private rights to dispose. Without knowledge about who owns what and where (also in *customary areas*) land management will be hardly possible for the government. From the landowner's point of view, intervention by the government specifically limits his private right to dispose on the actual parcel, being the legal object of his private rights. The intervention takes an ultimate form in the execution of pre-emptive rights and expropriation. Regarding protection of third parties in good faith, pre-emptive rights and expropriation decisions should therefore be recorded in the land administration system.

Concerning the support of *land taxation,* the fact is that land tax is an outstanding example of local tax. Without knowledge about taxable persons, taxable objects and land values (all data to be provided by the land administration system), the generated revenue cannot be high. Land taxation in many countries is based on land administration systems.

The *management of environmental resources* is of increasing importance. The measures a government can take are in many cases executed by imposing restrictions on the use of land. A good example is soil sanitation, where governments can impose to owners of land a compulsory soil cleaning, and can give such measures the status of real right, which means that these orders have legal power against third parties (e.g. new owners). Therefore these public encumbrances are eligible for registration.

Which conditions are taken into account?

In brief we would like to elaborate on the conditions that determine the strategic choices. According to the legal-social approach, a prevailing jurisdiction in a country is the result of the development of norms and values in a society as times go by. Also a conflict is born out of local (or regional) circumstances and incidents. As a consequence, the nature of a post conflict situation will reflect country-specific characteristics in a substantial way. That means that the adaptation of solutions from abroad is not ***a priori*** appropriate to matching the local situation and demands. The prevailing system of land registration is of course a starting point for post conflict land administration. If the system meets certain standards pertaining to country coverage, quality, currency, guarantee and indemnity, it would be a first option to investigate to which extent one might continue the system (see section 4). On the other hand, the situation likely changed dramatically on the issue of quality, currency and guarantee. To restore the existing system, it might go beyond the available human and financial resources. As -normally- this will be the case, it would be advisable to decide on realistic objectives that reasonably are expected to be met in the near future.

Decisions on Purposes

The more purposes a system has to meet, the more expensive it will be. A system that for example should meet all described purposes (a true multi purpose land administration system), should meet a variety of customer demands and will be quite extensive. Also the requirement for precision and reliability are high. On the other hand, a system that meets only one purpose (e.g. land taxation) might be rather cheap. A system that aims at exactly answering all questions on private and public rightholders and boundaries, will be more

expensive than a system that only deals with full owners and parcel mid-co-ordinates. The crux is that serving land tenure security requires other content, precision and reliability than serving the land market, than serving land taxation, than serving land use planning, then serving management of natural resources.
A well-balanced policy decision is necessary: which purpose has priority. That will determine the scope of the system, and by consequence the capacity that is needed.

Decision on the scope of the system with regard to available resources

Within the purpose the system should meet, further decisions are necessary with regard to coverage, quality, currency, guarantee and indemnity. All decisions have their price. At the end of the spectrum, the most expensive system is a country covering full-fledged state-guaranteed title-system with surveyed cadastral boundary that meets high quality specifications, and is up to date on a daily base. On the other end of the spectrum one could find recording of ownership-rights only (no recording of secondary rights, public rights) with parcel-identifiers consisting of a mid point co-ordinate on a photo-map, only exerted in parts of the country, with monthly up-to-dateness and so forth.
The different impacts on land administration system will be described here after (van der Molen, 2003).

8. VARIOUS OPTIONS IN GENERAL

Regarding the recording of Land Tenure

Since land tenure is comprised of some form of ***bundle of rights and interests*** it is necessary to decide which elements of that ***bundle*** should at least be registered for the purposes to be fulfilled by the land administration system.

For example if the system is intended for the purposes of land taxation and the tax legislation stipulates that tax shall be levied solely on ownership, then it will serve no purpose to maintain records of leases, derived rights and actual land use.
However if the purpose is to facilitate credit mechanisms and the legislation defines mortgages as personal rights rather that rights ***in rem***, then the registration of mortgages might be irrelevant.
Should the purpose be to promote the land market and the parties involved (sellers, buyers, conveyancers, etc.) are not interested in encumbrances and servitudes, then there will be no need for records of this information.
Should the purpose be land management then government may consider information about ownership, group ownership, communal ownership, village ownership and the name of the chief, the village headman, to be sufficient for its purposes.
However when the government imposes restrictions on land use and the legislation stipulates that these restrictions are imposed on the owner rather than the parcel of land, then there will be no need for records. Conversely records of the restrictions could be beneficial when specific restrictions are imposed on parcels of land (thereby imparting them with a legal force on third parties such as buyers).

It is assumed that the country is at least of the intention to improve its land management capability (planning, development, maintenance of land use, and resource management). Since land-management policy is usually formulated on the basis of the country's general social and economic developments the policy can be drawn up without a detailed knowledge of land tenure patterns. However the implementation of land management policy is greatly dependent on knowledge of this nature, since the government will need to intervene in the existing land tenure patterns. The government will need to have access to the names of persons to contact for the negotiation of planned developments and, where relevant, for the acquisition of the land. In such a situation a simple land administration system will be sufficient, which need not contain more than elementary records of the combination of the names of the persons in authority (village heads, chiefs, family heads, residents, and company names) together with some form of definition of the units based on the location of the land (such as the address, or the map coordinates). Consequently large investments are not involved for a system of this nature. Since much land development is carried out in the form of projects (such as housing, transport and energy infrastructures, and nature conservation) the government can, where relevant, give consideration to the implementation of a project-oriented land administration system (for example, when problems are encountered in the public acquisition of land).

A government intending to levy land tax will require a more sophisticated land administration system which at least contains information on the parameters used for the assessment of the land tax (such as ownership, and possibly the use of the land and the surface area of the parcels of land). The collection of data can be restricted to the information the tax legislation stipulates as the base for taxation; this is usually comprised of ownership and/or use, and not derived rights and interests. Should the tax legislation regard group ownership as being subject to taxation and the surface area of the land as a taxable object (inclusive of land in common ownership) then the register could include the names of owners (individuals, companies and groups) together with an identifier and an indication of the surface area of the land.
Substantial investments are not needed for either very precise land tenure registration or for very accurate boundary surveys.

In principle a land administration system with the above content is, subject to certain conditions, suited to the improvement of the land market. Additional regulations will be required to protect parties in the market (particularly the buyers) since the system contains little information about the legal status of land. These regulations should remedy the imperfections in the system and could, for example, stipulate that sellers are under the statutory obligation to furnish complete and truthful information about the legal status (the rights, derived rights, restrictions, public encumbrances and boundaries) of their land, such subject to pain of claims in court in the event of the willful provision of incorrect information.

However should the presence of these rights and interests exert a great influence on the market prices and values then the operation of the market will be impeded in the event that the public is not provided with ready access to reliable and complete information. One measure of the extent of this problem could be the volume of litigation. Consequently the land administration system will need to collect and provide information

about the legal status of land that is as comprehensive as possible, a need which will give cause to substantial investments in the system. However it will be possible to pass on the costs of these investments to the market transactions, since the market will probably possess a strength and wealth sufficient to bear the additional transaction costs. Detailed information about the land will offer sufficient value to the relevant parties as compared with the benefit the parties gain from the wealth of information available to them.
A government which incorporates a specific legal recognition of titles in its records of rights and interests (for example, in the form of guarantees for the information, or the acceptance liability with respect to its correctness) will provide for the legal security of land tenure.

From the above it will be apparent that, depending on the purposes for which they are intended, land administration systems collect, process, and disseminate information about land tenure in systems ranging from extremely simple (solely the land use status quo) to comprehensive (all rights and interests) registers.

Regarding the organization of land administration functions

Many countries perceive land administration to be a public duty to be performed within the mandate of the state. This is also applicable to the allocation of land to the public (such as a Ministry of Land, Commissioner of Land). Consequently both duties are performed by organizations at a state level. These organizations often adopt a decentralized approach to the performance of their duties; for example, the registration is effected by the courts, which report to the Ministry of Justice, whilst the cadastral duties are performed by the local or regional branches of another Ministry (such as Housing, Environment, Home Affairs, etc.) , In some countries (such as France) the municipalities are responsible for the cadastre. Decentralized land registration systems (i.e. outside of the competence of the state) are not common.

However it is also necessary to view the division of duties, responsibilities and competences between the various layers of government from a perspective of the efficiency and effectiveness – requirements which would appear to be in mutually contradiction with each other. Although it might be extremely efficient to concentrate the time-consuming maintenance of registers and maps at one location, thereby needing the minimum number of staff, this would nevertheless not be very efficient; this is because land policy tools (land markets, land use planning, management of resources, etc.) are primarily measures of a marked local and regional importance, which consequently should be implemented in the proximity of and in interaction with the public.

This dilemma can be resolved by means of ICT (see also Bogaerts & Zevenbergen, 2001). Financial calculations reveal that central databases are more economic than decentralized databases, since this obviates the need for ICT staff at all the local offices (for systems management and maintenance, helpdesks, etc.). However the implementation of data communications simultaneously provides for the adoption of local responsibility for information management. This combination provides for the delegation of duties that need to be linked closely to persons at the appropriate local or regional level, whilst at the same time keeping the costs as low as possible by means of the centralized processing

and storage of the data.
Consequently ICT developments have rendered local operations feasible. In view of this there is no objection to the introduction of a land administration system at a local level – and especially in an analogue environment – since at some point in the future the local registers and maps can be made available to all the relevant levels of government, and can serve as the input for a subsequent central database. As a result one might imagine a migration path that begins at a local level, and gradually evolves into a system of centrally-stored data and remote information management with the commensurate responsibilities.

Regarding operational aspects (production processes)

Governments that intend to provide titles to land guaranteed by the state are aware that this is a costly operation. The concomitant precise adjudication processes, in-depth investigations of the legality of land transfers, and accurate boundary surveys are all capital-intensive operations. The simplest land register is a comprised of a shoebox containing simple transfer documents approved by the seller and buyer and endorsed by witnesses, together with a reference to a description of the object. It will be self-evident that a simple system of this nature will exhibit a large number of imperfections with respect to its comprehensiveness, validity, accessibility, etc. Nevertheless it does fulfil the *publicity* and *specialty* needs, albeit in a very rudimentary way – and the system could work.
An improvement to the above system would be the assignment of a certain legal status to the documents by having them drawn up by a licensed conveyancer, lawyer or civil-law notary. The costs incurred in maintaining the records can remain low, since the duties of the keeper of the shoebox (the box will evolve in the direction of a register) are restricted to filing the documents and keeping them available for consultation. The keeper does not investigate the legal impact of the documents; in essence this is a simple form of deeds registration.
However once the keeper of this simple register also investigates the validity and the legal impact of transfer documents, and has the power to approve or to endorse them, then he becomes a kind of registrar; his approval imparts an added value to the records, i.e. the transfer of right deemed to be valid and is recognized. In essence this is a simple form of title registration. However the costs incurred in the registration of the documents will increase in view of the keeper's additional duties.

The additional need for some form of identification of the relevant object on a map in the registration process in effect constitutes the beginnings of a simple cadastral system.

Consequently one might imagine a migration path for land registration that begins with a simple and rudimentary form of deeds registration, evolving over the years into a system incorporating the issue of approval for land transfers; at the same time the keeper evolves into a registrar (compare what happened in several Western European countries around 1900, Zevenbergen, 2002, p. 35 f.).

Regarding the timeliness of recording

On the introduction of the system it will immediately be necessary to devote attention to the updating of the records. The best method to guarantee up-to-date registers and maps is to stipulate that in the absence of records land transfers will not be valid, i.e. the buyer will not become the owner or acquire rights to the land. However this is a fairly stern approach; in practice the updating requirements will depend on the intended purpose(s) of the system. A system employed for taxation purposes could require less frequent updating than a system employed in connection with the land market; for fiscal purposes the submission of transfer documents by no later than a specific fiscal reference date would appear to be adequate, whilst for land-market purposes the daily updating of the records would be more appropriate.

Consequently one might imagine a migration path that begins with less-frequent updating and evolve to frequent day-to-day updating.

Regarding the identification of rightholders

The ***specialty*** principle stipulates that persons with access to the registers must be certain of the identity of the title holders listed in the records. The ultimate form of identification is comprised of records of ID cards and the relevant ID numbers as verified by the registrar or civil-law notary. The simplest form entails the identification of title holders by witnesses so as to impart the names in the records with a certain degree of validity. An intermediate form is comprised of a declaration from, for example, a conveyancer verifying that the persons cited in the transfer document are indeed the persons they say they are.

Regarding the identification of real estate objects

The accuracy with which the boundaries of the parcels of land are surveyed depends on the purpose(s) of the land administration system. Since boundary surveys and boundary mapping are expensive operations which involve a given amount of time it could be preferable to opt for an alternative

When the land administration system is intended to provide for land management then the government could consider information restricted to the outer boundaries of the customary areas and the name of the chief or the village boundary with the name of the village headman to be adequate for its purposes. In this instance it will not be necessary to record accurate information about individual parcel boundaries. When individualized forms of land tenure are an issue addresses or single midpoint coordinates could be appropriate (GPS or map coordinates). In situations in which information about the approximate boundaries is required the general boundary rule could be employed, resulting in the visualization of the boundaries on a topographic map or orthophoto

When the system is intended for land taxation purposes and the tax is not assessed on the basis of the surface area of ownership (the m^2) then it will serve no purpose to endeavor to make accurate surveys of the boundaries, and once again an address (if available) or midpoint coordinates may be sufficient for the needs. In such situations it is not necessary to draw up cadastral parcels.

Nor will accurate surveys of the boundaries be required when the system is intended for credit purposes, and the banks require solely the value of the building in reaching their decision as to issue a mortgage.

Consequently from a surveying perspective a suitable migration path could begin with a simple indication of the location of the land and then evolve via records of general boundaries towards accurate surveys of the boundaries.

9. OPTIONS REGARDING THE FIVE CRITERIA

On the criterion 'jurisdiction wide coverage' it would be advisable to restrict the application of the system to the areas where the purpose of the system is met optimally. Is the system aimed at serving the land market, restrict it to the urban areas 'where the market is'. Is the purpose to encourage agricultural credit, don't involve the urban areas in the system.

On the criterion 'quality', the specifications and quality assurance should meet the minimal requirements to promote customer satisfaction. There is no need to go beyond. A regulating mechanism is asking a price!

On the criterion 'currency', a system aimed a land taxation might by sufficiently working, when the currency is one year. Is the purpose however a 'fast moving' property market, then it should be daily up to date.

On the criterion 'guarantee' it is known that State guaranteed titles can only be issued when the State is convinced about the legal validity. This requires investigation, even field work on the spot, which will be costly and time consuming. A land market cannot always wait for 30 years until this level of operation is reached. A simple deeds recording might serve better.

On the criterion 'indemnity', a minimum liability should be accepted by the keeper of registers that the databases are in agreement with their source documents. To accept liability for the legal validity of a transfer requires much more and is expensive.

10. HIERACHIES OF EVIDENCE AND ADJUDICATION

Focussing in post conflict situations, it is likely that these forms of flexible hierarchies of legal evidence will have to be created in the period immediately after the conflict using a range of legal evidence. These hierarchies will have to be created for the purposes of the system, for example for land market transactions, as well as dispute resolution. The hierarchies will have to go beyond the conventional use of the legal evidence in the land register and cadastre and/or other formal documents. Also, a framework of legal evidence may well need to be created which takes into account that documents have been illegally altered as a result of the conflict.

In many cases the normal legal way of thinking in regard to land records will have only a limited meaning during the period after the conflict has ended. As already indicated, the land records might be missing, incomplete or lack currency. They might also only contain certain transfers, whilst other transfers took place outside the recording system. Some of the records may have been altered just before, during or immediately after the conflict. In general it will not be possible to rely solely on the land records to determine who holds which property rights. To a certain extent the situation can be compared in certain respects with a process of adjudication.

Adjudication is normally undertaken when land rights are brought onto a land register for the first time. Adjudication is the determination of rights in land. Based on all kinds of information available (official documents, other written documents, witness reports, etc.), a right holder is registered in the 'draft list'. This list is then put up for public inspection for a certain time (ranging from a few weeks to a few months). Objections can be made by right holders whose rights are not shown, or whose rights are listed under someone else's name. An attempt should be made as soon as possible in the emergency phase to insert adjudication into the technical process/administrative procedure. In the reconstruction phase it should be routine and a detailed explanation on adjudication and due process can be found in section 12 of the reconstruction phase (UN-HABITAT, 2003).

While good arguments are usually made by technical people that systematic rather than sporadic adjudication should be undertaken, it is too costly and slow in an emergency phase, and probably also in the reconstruction phase. Systematic adjudication should only be undertaken where the registry/cadastre hardly exists, or where the proprietary situation has been changed extensively (by for example, restitution, discriminatory processes, privatization or almost complete redevelopment after destruction in the conflict). Systematic adjudication should be considered when all claims have been settled and the system is fully able to cope with the day to day demands of the land market. Up to that point sporadic adjudication should be an option for anyone wanting to transact land, prior to the start of the systematic operation. That is, restitution should not wait until the systematic adjudication has been completed, but should be done as a sporadic administrative procedure.

Due process mechanisms, based on conventional adjudication approaches, should be inserted into the existing technical processes/administrative procedures associated with land market transfers in post conflict societies to ensure that people’s land rights are being adequately protected. This due process mechanism should also be inserted into any sporadic or systematic transfer of data from manual to digital systems, or when deeds systems are moved to title systems. However, the design should be done in such a way as to facilitate mass conversions, otherwise the entire land market will be frozen for years. Too often when purely technical exercises are undertaken the land rights of ordinary people are lost as:
- there is no due process mechanism
- the committee responsible for adjudication does not meet
- the due process mechanism is not designed to deal with mass claims.

In a conventionally operating land registration system it is likely that a rigid hierarchy of legal evidence is applied, tied to the law. However, in a post-conflict situation this should be replaced with a more flexible approach. Different types of legal evidence should be used. The weight given to each type of legal evidence should be determined by an appraisal of the characteristics of that evidence, taking into account the societal, legal and political situation before and during the conflict period. The types of legal evidence which should be used include:
- possession lists
- copies of cadastral plans
- notarized contracts describing the transfer of real property
- contracts on use of apartments
- public housing records
- building permits
- permits of use
- evidence of tax payments
- payments of utility bills
- (oral) witness reports.

A combination of sources of evidence (including some secondary evidence) should be used. A single source of evidence should not be relied upon.

That is, other types of legal evidence, rather than just the land records, could play a key role in determining property rights. Not only should counter legal evidence to the land records be taken into account, it might even be negligent to accept the land records at face value (until proven differently) in certain cases or areas. If land records are taken at face value this may well benefit the group in power over other groups, especially those not presently in the area (e.g. refugees).

Rules of legal evidence should be developed which:
- are as far as possible non-discriminatory between the different groups in the conflict
- allow for the likelihood of previously unregistered transfer documents
- use other documentation such as utility or tax bills, information from customary, parallel or informal structures
- accommodate oral witnessing.

An appropriate hierarchy of legal evidence for disputed cases, where different persons claim the same land rights, should be used. This is important when people belong to different groups in the conflict. In these circumstances, the land records recordation should be critically assessed, taking special care in regard to documents signed by persons not presently in the area, especially when the power-of-attorney is used to transfer land rights away from absentee owners. Often proof that a person has paid utilities and/or taxes for a certain property is used to demonstrate use of the property. However, this does not prove what type of right they held (owner, possessor, tenant).

Measures in regard to land market transfers are likely to be needed to protect the rights of persons who left or were forced out of the area. This can include offices for the lodgement of claims located in other areas and/or countries. It may also be necessary to assist these persons to object against a forthcoming registration of ´their´ land right in the

name of some else. The registration of the transfer will not be finalized for a certain period in that case. This will allow persons whose land rights have been illegally altered to claim against the 'soon to be registered right' for say a period of 3 months. If the period is too long it will limit the operation of the land market, including mortgages.
An additional safeguard is to work with the registration of deeds, in which counter claims are never totally ruled out, or to start with provisional or qualified titles that can still be challenged until they become full titles (e.g. after 3 to 5 years).
At least one of these options is a necessary to avoid the development of a *de facto* victor's land register. A balance will have to be found between allowing a (formal) land market to start as soon as possible, and having a certain level of security in that market, without neglecting the rights of certain groups.

In a post conflict situation trails of legal evidence and a flexible hierarchy of legal evidence need to be used both for dispute resolution and land market transfers. It is likely that this type of legal evidence would better fit a deeds registration system (preferably with a parcel based (cadastral) index), rather than a title registration system, which is based on the idea of indefensibility of the main records (land book).

11. **CONCLUDING REMARKS**

Migration paths

In view of the challenge of introducing, re-establishing or improving of the registration of information about ownership, etc., it would appear to be preferable to implement simple systems that can evolve into more complex systems over the course of the years.
Governments could adopt the following incremental approach to the implementation of their land administration systems:
- develop a long-term scenario specifying the land-policy tools ultimately to be supported by the land administration system
- assign priorities: in which sequence should tools be provided with support.
- decide on the minimum contents of the registers and maps
- design simple processes, and accept imperfections
- design systems which are scalable
- develop a migration path for the evolution towards the intended long-term use of the system
- anticipate ICT resources that can be introduced in the course of the years
- avoid accurate surveys of boundaries whenever possible during the initial phase
- avoid intensive investigations for the guarantee of titles, and accept the imperfections inherent in the recording of transfer documents (deeds).

Since countries exhibit differences –as do their attitudes, histories and societal cultures– it is not possible to draw up a general specification of the best migration path. However the adoption of the incremental approach as discussed above could provide a suitable framework for the successful implementation and development of a land administration system.

Administrative procedures containing due process

The technical processes/administrative procedures used in a stable situation are necessary but not sufficient in a post-conflict situation involving land. Due process and/or adjudication mechanisms have to also be included in the technical processes/administrative procedures to protect the land rights of:
- those who have been forced to abandon their property because of the conflict, especially if they have been forced to move out of the country/territory. These people's rights have to be protected against the invasion, the falsification of documents and/or use of false intermediaries/middle men.
- individuals whose land records may have been illegally altered.
- individuals whose land records have been lost/removed.
- internally displace persons and refugees and returnees, some of whom might not be able, or willing, to abide by conventional rules.
- individuals whose property transfers were previously done in secret because of discriminatory laws.
- individuals whose property transaction was started but not completed, either because of discriminatory procedures, or because of the conflict.
- individuals caught up in double sales, where the same land has been sold more than once, because of a lack of information by the buyers and/or post conflict conditions.

Two key mechanisms have to be used, namely, firstly increasing the range of legal evidence used to assess the right of individuals to property and land. The second mechanism is the development of due process and/or adjudication mechanisms. These mechanisms are described in section 10.

In short, in a post conflict situation there should be:-
- adjudication inserted into selected land market transfers administrative procedures. This selection should be based on a big picture evaluation about what is happening in the land market in regard to disputes and illegal operations. Adjudication should be obligatory
- this adjudication should be sporadic and not systematic
- it should include public notice in a number of places and a site inspection where possible
- it should use registry/cadastre legal evidence as well as other evidence of land rights
- a deeds system should remain in place, rather than convert to a title system at an early stage.

Keep the local situation in mind

Even more than in applies to land administration in general, one should keep the local situation in mind in the post conflict area. In addition to all the challenges of setting up a land administration system as they are often experienced in developing and transition countries, special attention is needed for the post conflict situation. Land issues are almost always part of the conflict, and ignoring these would lead to a non-sustainable land administration system, and even threaten the post conflict situation in general.
There are no easy ways out, and it will not be realistic to tackle all aspects of the land administration at once. A phased approach will be needed, in which priorities need to be

set due to the local needs and urgencies. It is good to look at other countries (especially in the same region and/or slightly ahead in its post conflict development), but not to copy whole system designs or laws from.

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BIOGRAPHICAL NOTES

Dr. Zevenbergen is associate professor in geo information management at the section Geo information and Land Development of the OTB Research Institute for Housing, Urban and Mobility Studies. In 2002 he completed his PhD study on systems of land registration, based on case studies in four different countries. He has been involved in legal advice and law drafting related to cadastral and lands registration projects in Moldova, Bulgaria and Suriname. In 2003 he had the privilege to accompany Dr. Clarissa Augustinus on the assessment mission to the HABITAT Kosovo Cadastre Support

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