

# A Review of DFID's Engagement with Land Reform in Malawi

(Final Draft 21 December 2004)

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## *Acknowledgements*

I wish to thank the DFID Livelihoods team in Lilongwe for inviting me to undertake this assignment and for arranging meetings and logistics so efficiently.

This report has been prepared with the kind and enthusiastic assistance of Shaun Williams, who generously gave me his time, extensive knowledge and access to his archives on land matters in Malawi, not only during my brief visit but subsequently in e-mail correspondence over several weeks. Shaun went through several drafts providing additional information and pointing out errors and omissions. Needless to say, he bears no responsibility for the outcome.

It was a pleasure and privilege to work with him. I have no doubt that achievements in the land sector in Malawi have much to do with his presence in the country.

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21 December 2004

### ***Abbreviations***

ADB	African Development Bank
DANIDA	Danish International Development Agency
DFID	Department for International Development (UK)
EU	European Union
GRM	Government of the Republic of Malawi
G&SPS	Growth and Social Protection Strategy
HR	Human resources
IMF	International Monetary Fund
IEC	Information, Education and Communication
LGSP	Land Reform Support Project
MCAP	Malawi Country Assistance Programme (DFID)
MDGs	Millennium Development Goals
MLHS	Ministry of Lands, Housing and Surveys
MNLP	Malawi National Land Policy
MLRPIS	Malawi Land Reform Programme Implementation Strategy
MPRSP	Malawi Poverty Reduction Strategy Programme
NLRC	National Land Reform Council
ODI	Overseas Development Institute
PCN	Project Concept Note
PM	Project Memorandum
PPU	Project Planning Unit
PRSP	Poverty Reduction Strategy Programme
PS	Principal Secretary
SLCLR	Special Law Commission on Land Law Reform
SME	Small and Medium Enterprises
SWAp	Sector Wide Approach
TLSS	Technical Land Services Secretariat
WB	World Bank

## **1. Summary of conclusions and recommendations**

- 1.1 In the context of land policy development in Sub-Saharan Africa, the Government of Malawi is making reasonable progress. Malawi has probably now passed the most critical stage, that is the achievement of a broad popular consensus and Cabinet endorsement of the policy. From hereon, numerous issues relating to the implementation of the land policy will have to be systematically addressed. A strong case can be made to DFID for development assistance which will help to move the process forward.
- 1.2 DFID should continue to assist the land sector with strategic inputs of technical and financial support. It is in a good position to make a useful contribution, given its ten-year engagement (1995-2004) with the process, both in Malawi and in the region.
- 1.3 A programme which protects the land rights of the rural poor would fall within DFID's definition of 'social protection' and would be in support of the MDGs of halving global poverty and hunger. However, for the time being, the majority of rural poor on customary land probably do not suffer insecurity of tenure. Further, land tenure reform, without changes to the agrarian structures and conditions under which production relations operate, would be unlikely to trigger much needed structural transformation.
- 1.4 In the longer term, with the incorporation of rural areas into the market economy, policies which underwrite security of tenure and encourage investment will increase in importance, especially in peri-urban areas where land is at a premium. Urbanisation creates a demand for land and drives up land values. In these circumstances improvements in land administration and management will be needed to underwrite the security of tenure of poor people and to encourage investment in land improvements and contribute to economic growth. If development assistance is directed only to the social sectors (e.g. education and health), it will not be financially sustainable.
- 1.5 Geographical targeting will be crucial if Government is to obtain early returns on investment in land administration and management. This applies to the collection of land information as a basis for property rates and taxes, physical planning, land development for affordable housing, land redistribution, etc.
- 1.6 Because land reform is inevitably a long-term iterative process, DFID should have a clear view of how it intends to proceed, even if funding has to be programmed on a 'bridging' basis until it can be provided through general budget support.
- 1.7 In consultation with the MLHS and other donors, a longer term plan for DFID support (i.e. a Project Memorandum) should draw together many of the components of the draft PM of August 2003 and the draft Project Concept Note (PCN) of September 2004 and lay out a strategy for, say, the next four years thus bringing some stability and continuity to DFID's involvement. The first year of the programme could constitute the bridging phase.

- 1.8 An immediate and urgent task is the harmonisation of land laws in line with the MNLP. This should be incorporated within the bridging project and provide assistance in addition to that currently provided by the EU to the routine work of the Special Law Commission on Land Law Reform.
- 1.9 Other assistance should contribute to the gathering of information necessary for the development of a coherent, cost-effective and responsive plan of implementation.
- 1.10 DFID support for public information and awareness should continue. This should cover the MNLP and the draft land laws when they become available, followed up with capacity building of officials in decentralised land institutions.
- 1.11 DFID should also consider providing assistance to the establishment and regular meetings of the National Land Reform Council to coordinate and guide implementation of the programme and give it political muscle.
- 1.12 To lend coherence to the programme, DFID should continue to assist civil society organisations to engage in the land policy development and implementation process.
- 1.13 There will be a continuing need for experienced technical assistance over the next couple or more years. The donors and the MLHS are likely to want ready access to independent *ad hoc* advice on numerous land issues, legal, social and technical. Serious questions must continue to be asked about the scope, content and priority of activities comprising the MLRPIS, including those funded by donors.

## **2. Background to the assignment**

- 2.1 The TOR (see Appendix 1) for the ten-day assignment state that DFID Malawi has been supporting the development of the Malawi National Land Policy (MNLP) and land reform programming since 1995 when the Presidential Commission of Inquiry into Land Policy Reform was established. This was followed by the drafting of the *Malawi National Land Policy*<sup>1</sup>, approved by Cabinet in January 2002, and the *Malawi Land Reform Programme Implementation Strategy*<sup>2</sup>, which was finalised in June 2004.
- 2.2 According to the TOR, the *Malawi Country Assistance Plan*<sup>3</sup> contained a milestone ‘DFID programme to support Land Policy Reform SWAp by June 2003’, but this ‘was not achieved and there have been a number of changes, both internal and external to DFID, since the drafting of the MCAP that require a review of (DFID’s) engagement with the land policy and programmes’.

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<sup>1</sup> *Malawi National Land Policy*, Ministry of Lands and Housing, January 2002

<sup>2</sup> *Malawi Land Reform Programme Implementation Strategy (2003-2007)*, Ministry of Lands, Housing and Surveys, June 2004

<sup>3</sup> *Malawi: Country Assistance Plan 2003/4 – 2005/06*, DFID, April 2003

- 2.3 In an introductory briefing<sup>4</sup> on these changes, it was explained that, in the context of its Rural Livelihoods Programme, the response to the *Malawi Poverty Reduction Strategy Paper* (MPRSP), April 2002<sup>5</sup>, was the *Growth and Livelihoods Strategy 2004-2007*<sup>6</sup>, an internal DFID document and an elaboration of the MCAP. It built on the PRSP and the Government's subsequent *National Growth Strategy*. However, more recently (July 2004), the incoming head of DFID-Malawi had requested a clearer long-term vision of how DFID might assist Malawi. Thus DFID is now developing a *Growth and Social Protection Strategy* (G&SPS) as a follow up to the MCAP.
- 2.4 As stated in the TOR for this review, the G&SPS will analyse the current context, focus on outcomes and provide guidance on future programming. The move from the current sectoral approach to one with an outcome-oriented focus will involve a review of the portfolio of DFID investments to date and the impact of investments against the Millennium Development Goals for reducing Poverty and Hunger. It is against this background that DFID Malawi will review what direct support, if any, should be provided to the implementation of the National Land Policy.
- 2.5 Hence the consultant is contracted to:
- Undertake a rapid assessment of the key issues in relation to Land Policy and Programming.*
- Analyse these key issues in relation to the overall objectives of the developing G&SPS that is seeking to provide a long-term vision for inclusive economic growth and the reduction of poverty, hunger and vulnerability in Malawi.*
- Provide advice on a range of options for DFID Malawi, in line with our overall move to a more focused and coherent programme that considers risks and opportunities related to a managed withdrawal, a low-cost strategic engagement clearly linked to G&SPS objectives, and a more involved level of engagement using the draft DFID Concept Note as a reference. (TOR, see Appendix 1)*
- 2.6 It was further explained in the initial briefing that if DFID was to contribute further to the land sector, its policy must be clearly set out and justified in a Project Concept Note, rather than proceed in an *ad hoc* manner using resources pulled from other programmes. Further, future assistance to the land sector should not be an isolated activity, unrelated to other initiatives. If DFID was to support the implementation of the National Land Policy, it was necessary to show how this would be complementary to related programmes within and out-with the sector. There must be a clear link with other government and donor funded projects within the land sector and the Millennium Development Goals for reducing Income-Poverty and Hunger.

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<sup>4</sup> Meeting of the consultant with the Rural Livelihoods Adviser, Leigh Stubblefield, and Jimmy Kawaye, 1 November 2004

<sup>5</sup> *Malawi Poverty Reduction Strategy Paper*, Ministry of Finance and Economic Planning, April 2002

<sup>6</sup> *Growth and Livelihoods Strategy, 2004-2007*, DFID Malawi, Draft, 17 March 2004

### 3. Experience with land policy development in the region

- 3.1 In the last decade, with the exception of Angola and the Democratic Republic of the Congo, all countries of Eastern and Southern Africa have reviewed their land policies, laws and arrangements for land administration and management.<sup>7</sup> This introductory comment seeks to locate the land policy development process in Malawi and the issues encountered within a regional context and underline its importance for economic, political and social development.
- 3.2 Okoth-Ogendo<sup>8</sup> argues that the land question in Sub-Saharan Africa has dominated the political arena for over two centuries. Land and land resources were central to the imperial conquest, the colonial settlement and the extractive economy, administered in terms of imported legal frameworks which claimed to extinguish rights held under local customary law. Whether the purpose was agriculture, mining, administrative control or simply trade, land and property rights became the subject of fierce competition and conflict and, in most cases, were at the root of the freedom struggle. Under colonialism (and *apartheid*), indigenous agricultural systems and technologies were stultified and social structures, themselves dependent on control over land and natural resources, severely weakened by the purge or co-option of traditional leaders.
- 3.3 For up to four decades after independence, issues of land and property rights remained at the centre of contemporary politics in the region. Yet, with the exception of a few states (e.g. Botswana), governments were reluctant to confront the land issue. The performance of inherited land administration institutions has been notoriously poor. Problems included: dysfunctional legal and institutional frameworks; the neglect of arrangements for land dispute resolution; over-centralised and inaccessible land registries; arbitrary land acquisition and eviction of the holders of customary rights for urban development and for commercial crop production (resulting in the overcrowding of so-called African reserves or trust lands); and the demise of systems of common property and resource management - vital to rural livelihoods.
- 3.4 Where large areas of productive land had been alienated by colonial settlers (e.g. Kenya, Zimbabwe, South Africa), the main drivers of land policy development were essentially political. In Malawi, the past disregard of indigenous tenure, coupled with the mounting land pressure, especially in Southern Region, initially gave the process much needed political momentum. Economic drivers entered the arena with donor agencies who argued that, if agricultural and urban development were to be sustainable, fundamental changes in land policy and land law were necessary. In Malawi and several other countries in the region (e.g. Botswana, Namibia, Mozambique, Ghana and most recently in South Africa) social and cultural drivers have pressed for the preservation and/ or the reconstitution of traditional leadership structures to support land administration and land management in rural areas.

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<sup>7</sup> *Land administration* is the process of determining, recording and disseminating information about the tenure, value and use of land. *Land management* is concerned with the management of land as a resource from an environmental and an economic perspective.

<sup>8</sup> Professor H.W.O. Okoth-Ogendo, 'Land Policy Development in Sub-Saharan Africa: Mechanisms, Processes and Outcomes' *International Conference on Land Tenure*, UCT, South Africa, January 1998

- 3.5 Processes adopted for land policy development have ranged from the bureaucratic to the widely consultative, the latter involving civil society groups and private sector stakeholders. With DFID's encouragement, Malawi chose the latter inclusive course, which took the form of a comprehensive and interactive enquiry into problems, constraints and appropriate solutions, the outcome of which is the *Malawi National Land Policy* of January 2002. As elsewhere, the consultations in Malawi extended over years and the discourse covered the length and breadth of land issues.
- 3.6 Given the complexity and political sensitivity of the task, the process of land policy development (plus fine tuning) will take years rather than months. However, Malawi has probably now passed the most critical stage, that is the achievement of a broad popular consensus and Cabinet endorsement of the policy. From hereon numerous issues relating to implementation of the land policy will have to be systematically addressed. And repeatedly!
- 3.7 Again, this is to be expected. Every ten years or so since 1968 in Botswana, iterative policymaking in the land sector has followed a policy development process extending up to two years: (i) a commission of inquiry (or an expert review); calls for written submissions; public meetings involving a wide range of stakeholders; (ii) the preparation of a draft report, oral presentations and discussions at a national workshop covered by the media; (iii) a draft paper which is debated in Parliament; (iv) the publication of a government white paper setting out the policy changes adopted; the recommendations which have been accepted, amended and deferred (or rejected) with a justification for government having done so; (v) finally, where relevant, the drafting of laws or amending of existing laws.<sup>9</sup>
- 3.8 The process of land policy development and change in Botswana is in contrast to that played out elsewhere in Southern Africa over the last decade. In some countries, it is difficult to detect a relationship between the analysis of the problem or opportunity and the assessment of the evidence, the formulation of recommendations and the announcement of the policy change. In these countries, land policymaking is seen as a Cabinet task. Even then, the consistency associated with collective decision-making is absent, perhaps because policy is the prerogative of the President and/ or the Prime Minister and reflects political short-term expediency. In several important respects, the land policy development process in Malawi has proceeded well and a strong case can be made for building on this success and moving the process from potency to act.

## **4. The Malawi National Land Policy**

### ***Essential elements***

- 4.1 In Malawi, the Presidential Commission of Inquiry into Land Policy Reform was first commissioned in 1995. This was followed by the drafting of the *Malawi National Land*

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<sup>9</sup> Martin Adams, Faustin Kalabamu and Richard White 'Land tenure policy and practice in Botswana: Governance lessons for southern Africa', *Austrian Journal of Development Studies*, pp 55-74, XIX, 1, 2003

*Policy*, approved by Cabinet in January 2002. The essential elements of the MNLP include the clarification and strengthening of customary land rights and the formalisation of the role of traditional authorities in the administration of customary land, which covers some 70 per cent of the country. The MNLP recommends the survey and recording of each ‘traditional land management area’<sup>10</sup> and its protection against arbitrary conversion to public or private land and the permanent loss of rights to the local community. The policy also envisages that customary landholders (entire communities, families or individuals) will register their holdings as private ‘customary estates’ in ways that will preserve the advantages of customary ownership while ensuring security of tenure. ‘The property rights contained in a customary estate will be private usufructuary rights in perpetuity, and once registered, the title of the owner will have full legal status and can be leased or used as security for a mortgage loan.’<sup>11</sup> How this land titling is to be realised in legal and practical terms is by no means clear (see Annex 3: Note on Titling and Registration of Customary Land).

- 4.2 As Shaun Williams has pointed out when reviewing an earlier draft of this paper, on the basis of judgements in other countries,<sup>12</sup> it is possible that ‘native title’ was not extinguished as a result of colonial conquest and that the recognition of customary rights should not be dependent on their conversion to statutory rights. Indeed statutory conversion could extinguish customary rights and therefore be to the disadvantage of the community. The wider implications of the abovementioned cases have not yet been incorporated in the discourse on ‘native title’ in Malawi and they should be taken into account by the Special Law Commission on Land Law Reform (SLCLR) in their work of harmonising Malawi’s land laws in accordance with the new policy (See Section 7 and Annex 2).
- 4.3 Under the new policy, customary rights holders, whether registered or not, will hold realisable assets. Under past policy, holders of customary rights, whose property was acquired by the state, received merely nominal compensation for unextinguished improvements (crops, houses, etc), which was significantly less than the holders of private rights when acquired by the state.<sup>13</sup> The new policy removes the justification for two separate systems of land acquisition and compensation – one for user rights in customary land and one for private rights. The operation of the dual system penalises the poor and benefits the well off.
- 4.4 The MNLP also seeks to strengthen the land rights of women and orphans and to regulate land access by non-citizens. It envisages community-based purchase and subdivision of former commercial estates to ease land pressure. Principles for decentralised physical

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<sup>10</sup> i.e. ‘the geographic area of land held by a community and administered by a Traditional Authority’ on behalf of the communal group’ (MNLP, glossary)

<sup>11</sup> MNLP, 4.7.2 (c)

<sup>12</sup> See for example: Australian High Court, *Mabo and Others V. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014; and the Supreme Court of Appeal of RSA case no. 488/2001, *Richtersveld Community and Others V. Alexkor Ltd and the Govt. of RSA*, 24 March 2003, upheld by the Constitutional Court 14 October 2003

<sup>13</sup> See MNLP paragraphs 4.2.5, 4.6.2, 4.16.2

planning and for development of urban and rural land are also set out. A computerised land information management system is also presaged in the MNLP.

### ***The MNLP and the MPRSP***

- 4.5 The MNLPIS (page 6) states that the limited coverage of the land sector in the MPRSP (2002) was due to the fact that it was prepared in advance of the MNLP. Nevertheless, it seems that some osmosis occurred. Michael Roth of the Land Tenure Center, University of Wisconsin-Madison, in a review of land policies prepared for countries in Southern Africa, concludes that:

*Malawi's PRSP does a commendable job of linking land issues with land productivity concerns and poverty driven by inadequate land access, inability to use land effectively, poor quality land, and environmental degradation.*<sup>14</sup>

Indeed, a reading of the MPRSP reveals no shortage of references to land problems and their impact on poverty (see Box 1).

- 4.6 The MPRSP gives prominence to the problems posed by small fragmented land holdings, low production potential and to the importance of security of tenure for farmers on customary land. There is widespread evidence that investments in farm improvements are greater where land rights are secure. This need not depend on formal land titling but on recognition by society and the state that the land user is the legitimate holder and has the right to enjoy the benefits. In Malawi, the relationship of tenure security to on-farm investment has been the subject of rigorous research, which has extended into a comparison of matrilineal and matrilocal versus patrilineal patrilocal tenure arrangements. Studies show that under the customary land tenure system, rural land is generally secure and there is no widespread evidence that customary tenure creates disincentives to on-farm investment.<sup>15</sup> However, this situation can be expected to change with the growth of the land market.
- 4.7 As the MPRSP makes clear, Malawi's central agrarian problem is the dependence of the majority of small farmers on increasingly miniscule, nutrient-depleted arable farms. In the MNLP, the 'preferred long-term policy solution to the dwindling supply of land is to encourage investment in improved agricultural technology, non-farm employment and production enhancing investments in the farm sector'.<sup>16</sup> However, Ephraim Chirwa argues that the very limited availability of land in Malawi has until now severely constrained the effectiveness of pro-poor policies in agriculture.<sup>17</sup> In the MNLP, the short-term remedy for overcrowding is land redistribution, but, on the evidence presented, the land available for redistribution (i.e. 'agricultural leaseholds') is again very

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<sup>14</sup> Michael Roth, 'Integrating Land Issues with Poverty Reduction and Rural Development in Southern Africa' World Bank Regional Workshop on Land Issues in Africa and the Middle East, Kampala, Uganda, April/May 2002.

<sup>15</sup> Frank Place and Keijiro Otsuka, 'Tenure, Agricultural Investment, and Productivity in the Customary Tenure Sector of Malawi', *Economic Development and Cultural Change*, pp 77-99, vol 50, 2001

<sup>16</sup> MNLP, paragraph 5.17.1

<sup>17</sup> Ephraim W. Chirwa, 'Access to Land, Growth and Poverty Reduction in Malawi' Chancellor College, University of Malawi, August 2004 [www.sarpn.org.za/documents/d0001007/index.php](http://www.sarpn.org.za/documents/d0001007/index.php)

limited and a relatively small proportion of the 16% of the total agricultural land under

**Box 1: Land and poverty in Malawi according to the PRSP**

Page x	The key causes of poverty are limited access to <b>land</b> , low education, poor health, etc
Page 5	Some ..... are more affected (by poverty) than others. These include <b>land</b> -constrained smallholder farmers ...
Page 6	Causes of poverty: Many of these factors are constraints on the productivity of <b>land</b> , labour, The Southern Region's poverty can be explained ..... by the small size of cropland holdings
Page 8	Most of the poor are constrained in terms of both <b>land</b> and labour
Page 10	Food security is very dependent on size of <b>land</b> , education, available factors of production
Page 23	Technologies are inappropriate for use by low capital, small <b>land</b> holding farmers
Page 84	The most vulnerable: households headed by orphaned children .... the <b>land</b> constrained in rural areas
Page 28	<b>Land</b> constraints are mainly from low productivity of fragmented pieces of <b>land</b> , lack of <b>land tenure security</b> , high population density, ....Weak planning and coordination of sectors dealing with <b>land</b> .....Absence of pro-active policy intervention and limited capacity for dynamic monitoring of <b>land administration</b> may have directly contributed to problems of poverty, food insecurity and perceived inequalities in access to arable <b>land</b> ..... The strategies for achieving this objective are the implementation of the <b>Land Policy</b> , including providing <b>land</b> for the landless, increasing the productivity of small <b>land</b> holdings ..... guaranteeing <b>security of customary land tenure</b>
Page 29	<b>Land</b> consolidation for tractor operations (is recommended)
Page 92	CBNRM will be encouraged through district by-laws ..... devolution of responsibility for environmental monitoring and ensuring that the <b>land policy</b> is consistent with CBNRM
Annex 1	Action Plan: Support implementation of the <b>Land Policy; guarantee security of customary tenure; facilitate land distribution</b>

estates.<sup>18</sup>

- 4.8 An important conclusion that may be drawn from Chirwa's research findings is that should consolidation of family holdings take place in the longer term, returns to investment in smallholder agriculture can be expected to increase. A minority of better-resourced, more productive farmers could contribute more to aggregate food security if they had better regulated and more secure access to additional land, either through market transactions (with the inevitable equity implications), enhanced sharecropping or other temporary transfers of use rights.
- 4.9 And, of course, the converse applies. The continuous decline in arable land area *per capita*, identified as a major problem in the MPRSP, would not be so crucial if other sectors of the economy were expanding at a rate that would accommodate the growing population in off-farm activities. At current rates of growth, the economy is unable to absorb more unskilled labour. As things stand, the resettlement of small farmers (from South to North) will do little to solve the problem, but merely postpone it. With more

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<sup>18</sup> 1.2 million ha of agricultural land are under estates as compared with 6.5 million ha available for smallholders (Table 1, MNLP). Apart from the limited availability of land for redistribution, Chirwa (ibid.) identifies other perennial constraints associated with land redistribution and land settlement – lack of financial resources for land acquisition, problems related to beneficiary selection, loss of employment for farm workers on estates, and the need for support services for settlers.

land under smallholder agriculture, there will be more total output, but also more mouths to feed. If population expands as fast as total output, then neither *per capita* income nor food security will improve. An increase in *per capita* income can occur only if capital expands faster than the increase in population. This is unlikely to occur in the smallholder sector. The modest gains in the size of the capital stock obtained through resettlement of people on two hectare farms are unlikely to be enough to get sustained growth going unless the land reform farmers produce high value crops and adopt a modified farming system.<sup>19</sup> If the elusive ‘take off’ is to be achieved and if ‘all people at all times are to have access to sufficient food for an active and healthy life’ then a whole number of actions need to be taken across a wide range of sectors, not just land. Malawi currently shares this dilemma with other land-scarce and food-insecure countries in Africa – e.g. Ethiopia and Lesotho.

4.10 The authors of the MNLP accept the thrust of the above argument when they point out that:

*The preferred long term strategy of encouraging more intensive land use in the smallholder sector will, unfortunately, not address the immediate and short-term demand for land in some of the nation’s most congested farming districts. Instead, due to political expedience and the immediate need to avert social unrest, particularly in the south, this government will seek support to develop and sustain a land transfer and resettlement scheme. (paragraph 5.18.1)*

4.11 Where poor people have difficulty in gaining secure access to arable land, the redistribution of under-utilised private land is clearly important. But, whether land rights in remote rural areas are registered in terms of statutory law may not be of immediate concern – either for tenure security or for investment – provided that the rights of rural land users and occupiers are acknowledged and respected. The extent to which the formal recording of customary land holdings (i.e. both equitable and legal rights) will be practicable is the subject of debate and needs further investigation at a pilot scale. Available technical systems and tools may not meet the requirements of the holders of customary rights and may be very costly (see Annex 3). It may be more appropriate to place greater reliance on community-based, local-level land administration (including local-level recording and alternative dispute resolution) for upholding the land rights of the poor.

### ***The emerging land market***

4.12 An important component of tenure security is the confidence with which one can assign one’s rights (e.g. mortgage, sell, rent, lease and bequeath). With population growth, specialisation and the incorporation of peri-urban and rural areas into market economies, the importance of this right becomes increasingly important. So does the potential for distress sales and loss of land-based livelihoods in times of drought and other crises. Market transactions do, however, include leasing and rental arrangements, which need

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<sup>19</sup> Hence the importance of a World Bank grant of US\$ 27 million, rather than a credit, for the ‘Community Based Rural Land Development Project’ pilots.

not lead to permanent loss of land rights. The MNLP provides for measures to safeguard the interests of customary estate holders and their dependents.

- 4.13 However, much will depend on the vigour with which communities and their leaders are informed of their rights and responsibilities and the extent to which they are enforced. Shaun Williams<sup>20</sup> notes that the process of the state acquiring customary land has been to “encourage” Chiefs to “voluntarily” consent it<sup>21</sup> and thereby waive any claims for compensation<sup>22</sup>, so that the land can be reclassified as public land prior to the making of a grant to a third party<sup>23</sup>. To capture any of the economic rent from the expropriation of their land in this way<sup>24</sup>, either for their subjects’ or their own benefit, Chiefs are forced to solicit under-the-table-payments from grantees for this ‘service’, especially along the lakeshore, where chains of luxury holiday houses have been constructed and leaseholders have restricted access to the shoreline by fisherman. In these high value locations, rather than in deep rural areas, priority should be given to the survey and recording of the traditional land management areas and customary estates to protect customary rights.<sup>25</sup>
- 4.14 The implementation of the land tenure reforms will take place against the background of increasing globalization of the economy and the restructuring of production.<sup>26</sup> In Malawi and elsewhere in Southern Africa, this has already resulted in declining real incomes from farming and a growing proportion of rural incomes derived from non-farm activities, in conditions where the risks of farming have increased, while its returns have decreased. It is not only the small farmers who have been affected by deteriorating livelihoods. So have formal sector workers and the middle classes. This has had important effects on the scramble for access to resources, including land especially in peri-urban areas. To this extent, the land question has become much broader than simply one of access to land for agriculture in rural areas. It now encompasses the quest for land for housing and small-scale enterprises for other purposes. People want land in peri-urban areas for a variety of purposes: somewhere to live; to grow food to eat and to sell; to keep chickens and goats and to provide grazing for sheep and cattle.<sup>27</sup> They want a place to return to and to have land they can rent, sell and pass on to their heirs (see Box 2 for an example from Namibia). People will change the ways in which they use land as

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<sup>20</sup> pers. com.

<sup>21</sup> Using the Chiefs Consent Form

<sup>22</sup> To which the beneficial owners could be entitled pursuant to Land Act Cap 57:01, S. 28

<sup>23</sup> By gazettal, Land Act, supra, S.27 ss(1)

<sup>24</sup> This is the only way that customary land can be legally conveyed under current law

<sup>25</sup> The National Land Policy proposes reforms to these arrangement allowing customary title holders to assign their land to outsiders (after a five year cooling off period) and to re-vest in the previous customary title holders the reversionary interests in leases that have been created using the dubious expropriation devices describe above and for customary title holders to be given a share of the ground rent being levied by the GRM on ‘their’ tenants. Section 5.5 of this report refers below.

<sup>26</sup> Jonathan Crush and Sally Peberdy, Southern Africa Mainstreaming Project, 2<sup>nd</sup> Draft, University of Sussex, June 2004

<sup>27</sup> Geoffrey Nkhata and Richard Kachule, ‘Peri-Urban Land Tenure Planning and Regularisation: Case study of Malawi’ in *Peri-Urban Land Tenure Planning and Regularisation: Case Studies from Kenya, Malawi, Tanzania and Uganda* FAO Southern Africa Regional Office, April 2002

circumstances change, and in different ways from one another. They will not all give priority to production of crops or stock for the market.<sup>28</sup>

- 4.15 The contemporary struggle for land is not confined to peasants. The social base and leadership of the 'land hungry' include the landless, farm workers, retrenched mineworkers, industrial and urban-based workers, and the middle classes.<sup>29</sup> It is a struggle in which poor people are being sidelined. Nowhere is this more evident than in peri-urban areas. In twenty years, Lilongwe has grown from some 75,000 to an estimated 643,000. In 2000, the level of urbanization in Malawi was estimated at 25% with 2.7 million people living in or close to towns. The projections for 2030 are 55% and 12.1 million.<sup>30</sup> Most settlement takes place on customary land, often allocated by chiefs in a haphazard manner, without regard to environmental health and safety or provision for vehicle access and basic services.

### **Box 2 Tenure needs in informal settlements on peri-urban customary land**

**The family members** need to be assured that they will not be evicted without compensation; that they can improve their house to protect themselves against weather, thieves, etc; that their children can inherit the property or that they can sell or otherwise transfer it. They may need to borrow money using the property as collateral. They may seek a reduction in property related disputes and their properties to be serviced with water, electricity and upgraded roads. They need an inexpensive and accessible system of administering their property rights.

**The government** needs the system to be nationally uniform and sustainable. It needs a basis for implementing local taxation, land use and building control and for the provision of infrastructure. It requires a flexible means of administering property rights (e.g. the ability to accommodate individual and group rights, the rights of the middle class, business and poor people). It needs to deliver land titles to the people in an accessible and user friendly manner and to allocate land titles that are not perceived as inferior and can be upgraded to full freehold.

Source: R. Alberts, C. Fourie, P. Dahl Højgaard, J. Shitundeni, A. Corbet, and J. Latsky, *J. Land Management and Local Level Registries*, Ministry of Lands, Resettlement and Rehabilitation Windhoek, 1996

- 4.16 Violent conflicts between long term occupants and migrants (non-tribes people) are common. Women as a group are particularly disadvantaged by the changes resulting from the commoditisation of land.<sup>31</sup> The costs of taking no action to plan for rapid urbanisation and land tenure arrangements will be very high.

## **5. Social protection and economic growth**

- 5.1 In the drafting of its Growth and Social Protection Strategy, DFID-Malawi is in the process of reviewing investments to date and their impact on the MDGs for reducing poverty and hunger. It is against this background that it is considering what direct support, if any, should be provided to the implementation of the MNLP.

<sup>28</sup> Colin Murray and Gavin Williams, Land and Freedom in South Africa, *Review of African Political Economy*, 21(61): 315-25, 1994

<sup>29</sup> Lloyd M. Sachikonye, *Inheriting the Earth? Land Reform in Southern Africa*, CIIR, 2004

<sup>30</sup> Annex A, Urbanisation Trends, *Meeting the challenge of poverty in urban areas; Strategies for achieving the international development targets*. DFID, April 2001

<sup>31</sup> Harri Englund, 'Migration, Customary Tenure and Gender in Peri-Urban Areas: An Input to the Land Policy of the Republic of Malawi', FAO, March 2002.

### ***DFID support to date***

5.2 To date, DFID assistance to the MNLP has, in financial terms, been modest yet of considerable significance. It has provided support to research and policy analysis which have had the following, pro-poor and pro-growth benefits.<sup>32</sup> DFID support has contributed to:

- securing bipartisan political support for a progressive land reform programme, which is the *sin qua non* for long-term land reform;
- a participative and inclusive process of policy formulation and planning for land reform implementation, which has prevented land becoming a political football in a volatile election period;
- good donor coordination has reduced duplication;
- and significant grants for land reform from the WB and EU have been mobilised as a consequence of the process and the liaison DFID has funded.

But such is the slow pace of the land development process that benefits to primary stakeholders must await the implementation of the policy.

### ***Land reform and social protection***

5.3 The MNLP aims to move towards a system of land administration that is community-based and democratic and re-locates land administration at the local level. Such developments could be of importance to poor people, many of whom have suffered in the past from the loss of their land rights to settlers, commercial estates, urban expansion, etc. DFID support to a land policy which aimed to strengthen customary rights could fall under either definition of Social Protection provided in the DFID keysheets:<sup>33</sup>

- *The public actions taken in response to levels of vulnerability, risk and deprivation which are deemed socially unacceptable in a given polity or society' (Conway et al).*
- *Policies and practices intended to protect and promote the livelihoods and welfare of people who have lost out, or stand to lose out in processes of social and economic change and development' (Marcus and Wilkinson).*

5.4 In a market economy, land has many values other than its value for agriculture. For example, it often:

- has value as collateral, such that holding it may benefit non-agricultural enterprises owned by the same person or organisation;
- contributes to social prestige or political power;
- has value as a speculative asset, particularly in peri-urban areas, where future use for property development (e.g. low-income rentals) raises its value well above that derived from its agricultural usage;
- provides a better hedge against inflation than financial assets;

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<sup>32</sup> I am indebted to Shaun Williams for drawing my attention to these points

<sup>33</sup> DFID Social Protection Keysheet 20 [http://keysheets.org/red\\_20\\_social\\_protection.html](http://keysheets.org/red_20_social_protection.html)

- is bound up with identity, membership of a particular community and ancestral and/or spiritual roots;
- fulfils a security, welfare or insurance role, for example where other livelihood options are foreclosed.

5.5 The last of these values is likely to be most important for low-income housing and/or small-scale farming, given the relatively few alternative sources of welfare or insurance that people on low incomes have, and it may indeed lead them to place a very high value on land. However, most of the other values (listed above) are most applicable to higher income owners and can provide them with strong reasons for holding onto land; hence the case for intervention to secure the land rights of the poor.<sup>34</sup> Annex 1 contains a brief note on the link between food security and land tenure security in Lesotho. The argument applies equally to Malawi. In Malawi, as elsewhere in East and Southern Africa, colonial governments and subsequently independent states have ridden roughshod over customary land rights. Under the MNLP, Government aims to uphold customary rights, cease expropriation without compensation under the terms of the current Land Act and to give customary title holders an equitable share of the rent collected from leasing out customary land.<sup>35</sup> In this regard, support to the implementation of the MNLP would fall under the rubric of Social Protection: viz. a policy and a practice *intended to protect and promote the livelihoods and welfare of people who have lost out, or stand to lose out in processes of social and economic change and development.*<sup>36</sup>

5.6 As noted by Farrington *et al*, apart from land redistribution, land tenure reform can contribute to Social Protection, by strengthening resilience to adverse events by:

- improving the management of common pool resources used by the rural poor, both as a regular source of income and as a safety net (e.g. in gathering wild foods) during times of stress;
- reforming tenancy arrangements to provide tenants (and landlords) with a higher degree of security,
- reforming inheritance laws to allow women (and children as beneficiaries of trusts) to inherit land,
- and by improving documentation of land titles so that they can be used as collateral to obtain loans in time of need.<sup>37</sup>

### ***Land reform and economic growth***

5.7 It is difficult to build an irresistible case for land reform on the basis of its contribution to Social Protection given the scarcity of resources and the demands of other social sectors –

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<sup>34</sup> C. Poulton and J. Kydd, (2000) 'Review of the Operation of and Effectiveness of Land Taxes and their Possible Application in Sub-Saharan Africa' Paper prepared for DFID, Department of Agricultural Economics and Business Management, Wye College, Ashford, Kent.

<sup>35</sup> *Supra* n.25 refers

<sup>36</sup> DFID keysheets, *ibid*

<sup>37</sup> John Farrington, Rachel Slater and Rebecca Holmes, 'Social Protection and Pro-Poor Agricultural Growth: What Scope for Synergies?' *Natural Resource Perspectives* 91, January 2004. London: ODI

education and health. Can a case be made for supporting land tenure reform because it will stimulate growth? Alas, the implementation of the MNLP is unlikely to kick-start agricultural growth in the peasant sector because the structural impediments identified above. After liberalisation in the mid 1990s, conditions are no longer favourable for investment in the principal smallholder farming crop, maize.<sup>38</sup>

- 5.8 In the longer term, the case for assistance to the land sector becomes more attractive. To grow, Malawi needs to reach the point where small holders and those engaged in petty trade and SMEs have a rising standard of living and are able to invest in land improvements, save and spend money. With greater competition for land resources, increased mobility and specialisation, and the incorporation of rural areas into market economies, policies which underwrite tenure security and encourage investment increase in importance. Whether a tenure system is communal or individual, freehold or leasehold, there is widespread evidence that investments in improvements in rural and urban land are greater where tenure is secure.<sup>39</sup> Economic growth depends on the reform of land administration and management, as well as investment in infrastructure, water supplies, drainage, transport, storage and business support services, in a manner which takes account of local culture and society. If development assistance is directed entirely to the social sectors, it will not be sustainable because of the recurrent cost implications.

### *Land reform and governance*

- 5.9 As noted above, many SSA countries have been engaged in land policy and legal reforms in the last decade. In almost every country, the process has taken longer to bear fruit than anticipated, because of the failure to appreciate at the outset the complexity and highly contested nature of land issues in post-colonial states. Inadequate capacity in state land institutions has been a major constraint in implementation of reforms.
- 5.10 As McAuslan<sup>40</sup> observes, DFID assistance to land reform in Uganda was based on the assumption that it was an important part of the government's strategy for poverty reduction and sustainable rural development. In practice it was about institutional capacity building. He notes that the poverty eradication and sustainable development agenda drove the Uganda land reforms and that these lofty aims diverted attention from the most important need for capacity building or the re-engineering of the skills and knowledge of the officials at the centre. While the ultimate justification for DFID support for tenure reform may have been poverty eradication and sustainable land management, the immediate 'impact area' was improved governance and pro-poor economic and social policy reform.
- 5.11 It is in the capacity building of officials and the citizenry in land administration and management of the rapidly expanding urban areas that the implementation of the MNLP could eventually make an important contribution to growth (see Box 3).

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<sup>38</sup> Sarah Levy *et al* 'Food Security, Social Protection, Growth and Poverty Reduction Synergies: The Starter Pack Programme in Malawi' in *Natural Resource Perspectives*, 95, September 2004. London: ODI

<sup>39</sup> Klaus Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank and OUP, 2003.

<sup>40</sup> Patrick McAuslan (2003) *Bringing the Law Back In: Essays in Land, Law and Development*, Aldershot: Ashgate

**Box 3 Strategies for achieving international development targets in the urban land sector**

**Experience to date**

**Lesson 2:** Improved governance and management of cities and towns can contribute significantly to the reduction of urban poverty

**Lesson 3:** National public policy sets the framework for successful urban development and poverty reduction

**Priorities for DFID**

**Action 2:** Develop the capacity of local actors to manage pro-poor urban development and regional growth

**Action 3:** Support national governments to strengthen the legislative and regulatory framework within which city based development takes place

**Action 5:** Improve DFID's and others capacities to address the urban challenge through information support, and knowledge and research development

Source: *Meeting the challenge of poverty in urban areas*, DFID April 2001

## **6. The MNLPIS 2003-2007**

- 6.1 The MNLP provides the policy framework for land administration and land management and guidance on future legislation. With technical assistance from DFID and the World Bank, this was translated into a plan for land policy implementation. The *Malawi Land Reform Programme Implementation Strategy 2003-2007* (MNLPIS) of June 2004 aims to provide a logical guide for the implementation of the MNLP, identify the key issues arising from its recommendations and the relationship with other national policies.
- 6.2 A logical framework annexed to the MNLPIS summarises the planned five Output/Results of the Strategy, activities, indicators, timeframe and estimated costs. The five are as follows:
- i. Tenure security, confidence and fairness of all categories of rights in land strengthened
  - ii. Distribution of and access to land improved
  - iii. Good governance including transparency and popular participation at all levels promoted
  - iv. Use and management of land in all tenure categories improved
  - v. Capacity for implementing the National Land Policy strengthened
- 6.3 The plan is detailed and the scope and content ambitious. The Output/Results matrix provides a checklist for assessing current progress. A brief scan indicates that the schedule is far from being met and the targets are more than a year behind schedule. For example, the drafting of the legal framework for land policy implementation was scheduled for completion by March 2004 and is now promised by the Special Law Commission on Land Law Reform (SLCLR) to give effect to the legal reforms proposed in the NLP by March 2005, but there are doubts about this revised date being met. This applies to many other activities listed in the MNLPIS.

- 6.4 By the standard of Botswana, which is at the cutting edge of land administration in the region, the MNLPIIS is unrealistic. Even with a full complement of trained and experienced staff, a programme of the nature proposed would be hugely ambitious. Nevertheless, the exercise of preparing the plan was no doubt useful and not wasted. As is stated on page 1 of the MNLPIIS, the document is meant to be a flexible guide rather than a definitive programme, which will have to be modified as necessary as implementation proceeds. Perhaps that will be possible now that the EU grant for the ‘start-up phase’ of €1.9 million in July 2004 for an 18-month period has been approved. The pace of implementation, under Output/Result 5, can be expected to quicken now that EU funds for support to the Technical Land Services Secretariat are coming on stream.
- 6.5 An important part of the EU assistance for the start-up phase is for capacity building, which includes the formal training of 35 officials in land administration. In a meeting with the consultant, the PS<sup>41</sup> of the Ministry of Lands, Housing and Surveys, stated that, of the Ministry establishment of 23 lawyers, 18 posts were vacant. Further, decentralisation of land services, including physical planning, to 28 districts posed a serious challenge, given the fact that the Ministry has only 29 young land sector graduates at hand.
- 6.6 Another challenge for the Ministry will be the servicing of donor projects, the World Bank-funded land redistribution project and the proposed ADB project to implement MNLPI proposals relating to the survey and recordation of customary lands (still at the discussion stage).<sup>42</sup> Added to this are the concerns of the Ministry in meeting IMF demands to increase substantially state leasehold rentals, without first adequately assessing the consequences of such an action.
- 6.7 It is worth repeating once again Professor Patrick McAuslan’s dictum (para. 5.10) that, at this stage of the process, the most important task is building the capacity of:
- decentralised land administration agencies and land dispute bodies through training and the provision of a framework of rules and guides to regulate and structure discretionary power;
  - the citizenry through expanding their knowledge about the new law and the opportunities provided by the laws to acquire and safeguard their right to land;
  - the government by providing information necessary to develop a coherent, cost-effective and responsive plan to implement the reforms.

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<sup>41</sup> Mr George Mkondiwa, 3 November 2004

<sup>42</sup> So far the consultant has not been successful in following up questions posed to WB about HR requirements of these two projects, but it is hoped to provide this information in the final report.

## 7. Options for DFID

### *Introduction*

- 7.1 The TORs for the assignment require the consultant to provide advice on a range of options for DFID-Malawi that consider:
- risks and opportunities related to a managed withdrawal
  - a low cost strategic engagement clearly linked to G&SPS objectives
  - and a more involved level of management using the draft DFID Concept Note as a reference.
- 7.2 On reflecting on this requirement of the TOR, it became apparent that there were difficulties in responding to this request, in so far as the ‘more involved level of management’ described in the DFID Concept Note covers a bridging project of just one year and only three, albeit significant, activities. Is there a less involved low-cost strategic engagement than this? Thus, in addition to that of DFID’ withdrawal, the options considered are based on the components described in the Project Memorandum of August 2003 implemented over a four year period and those in the Draft Project Concept Note of September 2004. The three options are considered in reverse order.

### *A more inclusive project*

- 7.3 In August 2003, DFID-Malawi produced a draft Project Memorandum<sup>43</sup> for a ‘Land Governance Support Project’ (LGSP), ‘a component of the Malawi Land Reform Programme Implementation Strategy’ (MLRPIS). The document recommended the allocation of £570,000 for a bridging phase of one year, between the *ad hoc* project support which DFID had been providing for the formulation of the MNLP (as well as technical assistance for the preparation of the MLRPIS) and longer-term support as part of a SWAp, once the problems of providing budget support to GRM had been sorted out. On reflection, the activities described in the Project Memorandum, would seem to provide a good basis for longer-term DFID assistance to land reform, assuming an investment of say £2.0 million over four years.
- 7.4 The LGSP was designed to provide support to:
- i. Extensive dissemination of information about the MNLP and the finalized MLRPIS
  - ii. Completion of consultations with stakeholders about the draft MLRPIS and launch and distribution of finalised version
  - iii. Formation of a high level Steering Committee to coordinate the planning and financing of the LRPIS leading to the establishment of a National Land Reform Council (NLRC)
  - iv. Enhancing the capacity of the PPU to provide secretarial back up to the Steering Committee and leading to the establishment of a Technical Land Services Secretariat, with support from the EU, to do likewise for the National Land Reform Council.

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<sup>43</sup> Draft Project Memorandum ‘Land Governance Support Project, 2003-4, 22 August 2003

- v. Consultations over legislative proposals emanating from the Special Law Commission on Land Law Reform
- vi. Parliamentary committee scrutiny of draft legislation proposed by the Law Commission
- vii. Capacity building of civil society organisations to engage in the MLRPIS
- viii. The design of a joint land sector Monitoring and Evaluation system focusing on poverty and equity impacts of on going projects for use as a learning and innovation tool for the further elaboration of the MLRPIS
- ix. Technical assistance, to complement support from other donors, in high priority areas of Information Education and Communications, MLRPIS component project design and appraisal, legislative drafting.

7.5 Although details of the proposed scope and content of the above ten components would need to be revisited in preparing a four-year programme, the majority of the originally proposed activities would appear to remain appropriate in December 2004. The proposed support to the PPU and the TLSS may have been overtaken by the recently confirmed EU support, but item (ii) relating to the MLRPIS might well stay, as regular updating of the 'finalised version' of the implementation strategy is clearly needed. The problems currently facing GRM in implementing its land policy lends weight and urgency to the implementation of most of the proposals in the Project Memorandum. Further, as argued in Section 5 of this report, assistance to land reform could provide a pillar of the G&SPS. Brief observations on the originally proposed project components follow. The first three would arise from the legal changes necessitated by the adoption of the MNLP.

7.6 **Land Law Harmonisation:** The disjuncture between land policy development and the amendment and/ or drafting of land laws is a cause for concern, given experience of the land policy process in several other countries. In some cases, the drafting of land law has preceded the drafting of the policy, which has created a situation in which implementation is delayed awaiting the amendment of the preconceived law. In other countries, where land law reform is long delayed after the development of the policy, political momentum has been lost and legal drafters have lost sight of the principles underlying the policy. Experience strongly suggests that land law reform should closely track land policy development to facilitate a close dialogue between the policy analysts and the legal drafters.

7.7 The current one-year delay in legal drafting by the SLCLLR is problematic. Further, important legal issues relating to customary land rights have yet to be resolved. The topic has been discussed by the consultant with Shaun Williams and his memorandum on the subject is contained in Appendix 2. He warns of the unforeseen complexities of the legal reforms proposed by the MNLP and stresses the importance of ensuring that the registration of customary rights does not extinguish common law rights and replace them with statutory rights of lesser content. It would be unfortunate if this issue were overlooked in the preparation and design of the proposed Customary Land Reform and Sustainable Livelihoods Project, which is to be financed by the ADB.

- 7.8 It is possible that the SLCLLR does not have access to the resources necessary to take this matter forward and that an international legal expert on 'native title' and related land and property and planning law should be contracted to review the situation. A convenient time to do this might be in March 2005 when the SLCLLR is due to present its long awaited report. If the Commission has not completed its report at that stage, the opportunity should be taken for the legal expert to conduct an audit of the work done so far with a view to identifying bottlenecks and speeding up its completion. The legal drafting process should not be allowed to drag on any longer.
- 7.9 As proposed in the Project Memorandum of August 2003, funds should also be set aside to facilitate the work of the Parliamentary Standing Committee in their scrutiny of the draft land legislation. The process could involve calling on expert witnesses, community and traditional leaders and members of civil society.
- 7.10 **Information Dissemination:** This aspect of the Project Memorandum of August 2003 understandably focuses on the MNLP. This is currently going ahead under a project for National Land Policy Public Awareness, which commenced in April 2004, the object of which is to raise awareness of the National Land Policy throughout the country.<sup>44</sup> The project has four main outputs:
- Appropriate IEC messages for the MNLP developed
  - Capacity for creating public awareness on the MNLP strengthened
  - Mass sensitization about the objectives and content of the MNLP
  - Supervision of Public Awareness Campaign
- 7.11 In due course, the dissemination of information on land policy will have to be followed by a similar exercise devoted to communicating information on the draft land laws. The objectives of a public awareness and communications programme at this stage could be as follows:
- To provide information to the public about the new laws and to discuss implementation issues so that stakeholders know what the legal system is and what they need to do to access it;
  - To allow for discussion and ongoing interaction between the public and Government so as to gain buy-in for implementation and to improve Government's understanding of the people's needs;
  - To provide information to a key stakeholders who become partners with government in implementation of the legislation;
  - To improve the effectiveness of the legislation because people know how dispositions are to be dealt with and how to access the system.

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<sup>44</sup> National Land Policy Public Awareness Project Progress Report, 5 December 2004

- 7.12 **National Land Reform Council:** Inter-ministerial cooperation is vital to the success of any land reform programme. Various drafts of the land PM and PCN have recommended that DFID support the establishment of a high level Land Reform Council to succeed the current Steering Committee to coordinate and guide implementation of the programme and give it some political muscle.<sup>45</sup>
- 7.13 **Capacity building of civil society organisations:** Those who stress good governance and transparency and argue for participation see a role for NGOs greater than mere deliverers of services. They seek to involve NGOs and CBOs in the policy dialogue and in decision making. In this connection, strengthening them as separate, specialist institutions is important. Partnerships with these organisations will maximise the benefit of land reform initiatives to local communities.
- 7.14 The consultant was informed that NGOs involved in land reform advocacy in Malawi are few and confined to a handful of individual activists. Yet, elsewhere in SSA, civil society organisations have established strong links with communities involved in land reform. They are important in supporting rural and urban development and land reform policies.
- 7.15 The August 2003 Project Memorandum stresses the importance of strengthening NGOs in their role as representatives of civil society and as service providers in relation to public awareness. It proposes that the project should provide resources for meetings of the Civil Society Task Force on Land and Natural Resources and for study tours for practitioners to attend regional seminars and other events that will enhance their capacity. The inclusion of this proposed activity is endorsed.
- 7.16 **Monitoring and Evaluation:** The August 2003 Project Memorandum proposes to support the establishment of an M&E system to be established in the PPU for the MLRPIS. However, the EU project document of June 2003 provides for the design and operation of ‘a computerised monitoring and evaluation system for the LRP’ and this is now to be a function of the TLSS. It is understood that an M&E system has also been established for the WB project. In the circumstances, it would be appropriate if a future DFID project funded a series of *ad hoc* diagnostic evaluation studies<sup>46</sup> that would aim to assess the significance of past, on-going and proposed land related undertakings. Since work of this nature is the subject of detailed proposals in the Project Concept Note of September 2004, it is discussed below (paragraph 7.20).
- 7.17 **Technical Assistance:** Finally, the August 2003 PM recommends that DFID provide funds for technical assistance (TA), ‘to complement support from other donors, in high

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<sup>45</sup> See Figure 3 and Section 4.2 *Malawi Land Reform Programme Implementation Strategy (2003-2007)*, Ministry of Lands, Housing and Surveys, June 2004 and Section 3.5.1 Government Leadership, Draft Project Memorandum 'Land Governance Support Project, 2003-4: A component of the MNLPIS 22 August 2003

<sup>46</sup> Diagnostic evaluation studies were an important component of the work carried out by the Land and Agriculture Policy Centre, Johannesburg, in the mid-nineties and proved to be of crucial importance to the DFID funded Land Reform Support Project.

priority areas of Information, Education and Communications, programme design and appraisal and legislative drafting, all of which seem appropriate. Added to this, longer term TA will be needed if DFID were to fund the SWAp through budget support.

### ***A low cost strategic engagement***

- 7.18 The Project Concept Note of September 2004 for a Land Reform Programme Support Project 2004-5, corresponds to what might be considered ‘a low cost strategic engagement clearly linked to G&SPS objectives’. It is an updated, scaled down and more clearly specified version of the Project Memorandum of August 2003. Again it describes a bridging project of one year, but the proposals are more of a short-term nature. In addition to the proposed support to the NLC, it has two other components:
- 7.19 **Public awareness:** This builds on the National Land Policy Public Awareness Project which is already underway and identifies the need to consult on the draft legislation (if indeed the Bills are ready in time for the one-year project?)
- 7.20 **Policy studies:**<sup>47</sup> The two studies proposed in the PCN are clearly of immediate importance to the evaluation of components of the MLRPIS and are strongly endorsed by this consultant. Recognition of the importance of ‘spontaneous and unassisted movement of people’ and the capacity of customary land tenure arrangements to absorb migrants was an important motivation for the land policy and law in Mozambique in the mid nineties. If the proposed study of spontaneous migration from land-scarce to land-surplus areas can demonstrate that there is an alternative to the proposed WB-funded community-based land redistribution programme, Malawi would save itself expenditure (in this case scarce human resources) for more worthwhile allocation elsewhere in the land sector. Likewise, the proposed *ex post* evaluation of the Lilongwe West Customary Land Development Project could save tears which might otherwise be spilt on the ADB-funded Customary Land Reform and Sustainable Livelihoods Project.

### ***Withdrawal from the land sector***

- 7.21 Clearly, the decision whether or not to withdraw support to the land sector in Malawi has to be taken by DFID-Malawi on the basis of knowledge of the current scope and content of the range of GRM projects and programmes supported under MCAP, the relative performance of each, as compared with general budget support, and the aid resources available. It is not possible for the consultant to make an informed assessment of the pros and cons, risks and opportunities related to a managed withdrawal. However, several points may be made about the benefits of continuing and related issues:
- Topical policy debates on African rural livelihoods and Social Protection, particularly in poor, food-insecure countries (e.g. Malawi, Ethiopia and Lesotho) link land tenure security, non-emergency food aid and alternative safety nets (see Appendix 1).
  - Over the last decade, DFID has developed a comparative advantage and unmatched institutional knowledge on the provision of technical support to land policy

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<sup>47</sup> Is the name appropriate? Since the results of these studies would be applicable to proposed and ongoing projects, could they be called ‘diagnostic evaluation studies’? See paragraph 7.16.

development in Malawi and in Sub-Saharan Africa, which has been achieved with inputs of technical and financial assistance that are modest compared with the benefits involved.<sup>48</sup> The quality and continuity of DFID assistance to land policy development in Malawi, working in close collaboration with African experts and national and international civil society organisations, is generally acknowledged to have been of great benefit.

- True, assistance to land reform is politically sensitive and complex. Unlike other sectors (e.g. education, health, water supply), official development assistance to land reform presents particular problems arising from its volatile, cyclical and politically sensitive nature. It places corresponding demands on DFID's programme managers. But, as with other projects and programmes, the scale of the administrative burden depends upon on the nature of the programme design.
- It would be unfortunate if DFID-Malawi were to withdraw at a stage when the programme is moving into a critically important implementation phase. Assistance to land reform is likely to be needed in the region for the foreseeable future, but the nature and intensity of support required will vary from time to time. Land policy development and implementation is a long-term iterative process, needing feedback, learning and involvement of many stakeholders.<sup>49</sup>

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<sup>48</sup> Martin Adams, *Breaking Ground: Development Aid to Land Reform*, London: ODI, 2000

<sup>49</sup> *Seeking ways out of the impasse on land reform in Southern Africa; Notes from an Informal 'Think Tank' Meeting*, March 2003, [www.oxfam.org.uk/what\\_we\\_do/issues/livelihoods/landrights/africa\\_south.htm](http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/africa_south.htm)

## **Appendix 1: Terms of Reference**

### **A rapid review of DFID Malawi's engagement with Land Policy & Programmes**

#### **1. Background**

DFID Malawi has been engaged with land policy and programming issues since 1995 (Presidential Commission of Inquiry on Land Policy Reform). Annex 1<sup>50</sup> outlines key issues in relation to the Malawi Government's (GoM) land policy and DFID's response as described in the current Country Assistance Plan (CAP). The CAP Annex includes a milestone "DFID programme to support Land Policy Reform SWAp by June 2003". This milestone was not achieved and there have been a number of changes, both internal and external to DFID, since the drafting of the CAP that require a review of our engagement with land policy and programmes.

DFID Malawi is developing a Growth and Social Protection Strategy (G&SPS) in response to the Country Strategy Paper (April 2003). The Strategy will analyse the current context, focus on outcomes and provide guidance on future DFID Malawi programming. The shift to an outcome-oriented focus from our current sectoral programming requires a review of our portfolio of investment to date with a view to reducing the range of activities and clearly demonstrating the impact of our investments against the Millennium Development Goal for reducing Income Poverty and Hunger.

There appears to be limited appetite for a Land Policy Reform SWAp as envisaged in the CAP. It is unclear what the current GoM priorities are and a number of recently approved or planned donor-funded projects are unlikely to reinforce a coherent implementation of programming under an agreed policy framework.

#### **2. Purpose**

DFID Malawi will commission an independent Land Specialist to enable us consider our options for continued engagement with land policy and programmes and to ensure we have a clearly thought through position in relation to current issues and in support of our priority actions to inform the development and subsequent implementation of the G&SPS.

#### **3. Scope of Work**

The Land Specialist will be required to:

- Undertake a rapid assessment of the key issues in relation to Land Policy and Programming.
- Analyse these key issues in relation to the overall objectives of the developing G&SPS that is seeking to provide a long-term vision for inclusive economic growth and the reduction of poverty, hunger and vulnerability in Malawi.

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<sup>50</sup> This paper was prepared By a DFID-funded Consultant, Shaun Williams, to update DFID staff in February 2004.

- Provide advice on a range of options for DFID Malawi, in line with our overall move to a more focused and coherent programme that considers risks and opportunities related to a managed withdrawal, a low-cost strategic engagement clearly linked to G&SPS objectives, and a more involved level of engagement using the draft DFID Concept Note as a reference.

#### **4. Inputs and timing**

The Scope of Work requires an independent Land Specialist with proven skills and experience in land policy analysis and development and associated programme design, implementation and evaluation. Familiarity with Malawi Land issues and with DFID programmes and procedures would be an advantage.

The Consultancy will be for a period of up to 10 days, including two days preparation, five days in country and three days writing up time. The Consultant will be in-country between 1<sup>st</sup> and 5<sup>th</sup> November 2004.

#### **5. Reporting**

The Consultant will submit a draft report to the Livelihoods Adviser in MS Office format by 29<sup>th</sup> November 2004. The report should not exceed 30 pages excluding annexes. The final report will be submitted by 10<sup>th</sup> December 2004.

## Appendix 2: People met and contacted in the course of the consultancy

	Organisation	Date	Mode	Contact details
Leigh Stubblefield	Rural Livelihoods Adviser DFID-Malawi	1 November 2004	Meeting	00-265-(0)1-772400 Mobile: 00-265-(0)8-841285 <a href="mailto:LK-Stubblefield@dfid.gov.uk">LK-Stubblefield@dfid.gov.uk</a>
Jimmy Kawaye	Deputy Programme Manager, Rural Livelihoods DFID-Malawi	1&3 November	Meetings	00-265-(0)1-772400 Mobile: 08201582 <a href="mailto:j-kawaye@dfid.gov.uk">j-kawaye@dfid.gov.uk</a>
Tamanda Sakala	Contract Officer DFID Malawi	1 November	Meeting	00-265-(0)1-772400 <a href="mailto:t-sakala@dfid.gov.uk">t-sakala@dfid.gov.uk</a>
William Msiska	Programme Officer (Land Related Legislation) Law Commission	3 November	Meeting	01 772 822 Mobile: 08 869 855
Anthony Nedley	Project Manager Rural Development, Delegation of the European Commission, Malawi	3 November	Meeting	01 773 199 <a href="mailto:Antony.NEDLEY@cec.eu.int">Antony.NEDLEY@cec.eu.int</a>
George Mkondiwa	Principal Secretary Ministry of Lands, Housing and Surveys	3 November	Meeting	01 771 840 Mobile: 08 828 534 <a href="mailto:gmkondiwa@malawi.net">gmkondiwa@malawi.net</a>
Willie W. Samute	Principal Secretary Department of Local Government	3 November	Meeting	01 789 388 Mobile 09957569 <a href="mailto:localgovt@globemw.net">localgovt@globemw.net</a>
Shaun Williams	Land Policy Consultant, Lilongwe	4&5 November	Meetings	01 795 693 Mobile 08 843996 <a href="mailto:advyz@bigpond.com.kh">advyz@bigpond.com.kh</a>
Michael Aliber	Economist and Researcher, HSRC, Pretoria		e-mail	<a href="mailto:MAliber@hsrc.ac.za">MAliber@hsrc.ac.za</a>
Rogier v.d. Brink	WB Land programme specialist, Pretoria		e-mail	<a href="mailto:Rvandenbrink@worldbank.org">Rvandenbrink@worldbank.org</a>
Professor H. W. Okoth Ogendo	Member of the Malawi Presidential Commission on Land Policy and Emeritus Professor of Law University of Nairobi	6 December	Meeting	Kenya Mobile 0722754420 <a href="mailto:ogendohw@africaonline.co.ke">ogendohw@africaonline.co.ke</a>
Robin Palmer	Oxfam GB Global Land Policy Adviser	6 December	Meeting	<a href="mailto:rpalmer@oxfam.org.uk">rpalmer@oxfam.org.uk</a>

## **Annex 1: A Note on Food Security and Land Tenure Security**

(this note was produced with Lesotho in mind but also has relevance to Malawi)

### **Some definitions**

**Food security** refers to ‘access by all people at all times to sufficient food for an active and healthy life’.<sup>51</sup>

**Land tenure security** refers to secure access by, and land rights for, people who wish to use and occupy land for diverse purposes.

Note that while everyone needs food security, not everyone wishes to use and occupy land for food production. However, the great majority of people need secure access to land for accommodation (housing, business, etc.), even if it is held only in terms of a short term lease.

### **Food security and land tenure security**

It can be seen from the above definitions that food security depends on land tenure security in direct and indirect ways:

- those contributing to food security through their own food production need arable land tenure security;
- those contributing to food security through other economic activity usually need secure tenure of the land on which that activity takes place – either for themselves or for those controlling the activity on which their livelihoods and food security depend.

Both the direct and the indirect dependence on tenure security include the requirement for efficient, transparent and equitable land administration. Directly and indirectly, the ability to sustain a living on the land hinges on the strength of land rights, e.g.

- the right to occupy a homestead, a site for business or community purposes, to use land for crops, to make improvements, to graze animals and so on;
- the right to transact that land: to give, to mortgage, to bequeath, to rent areas of exclusive use;
- the right to exclude others;
- the right to enforcement of legal and administrative provisions in order to protect the rights of the holder.

### **Land and livelihoods in Lesotho**

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<sup>51</sup> Borrowed from ‘Food Security Program Proposal by the New Coalition for Food Security in Ethiopia’, Addis Ababa, 2003

- Equitable distribution of land has been a key traditional strength of land tenure and livelihoods in Lesotho. But there is not enough arable land to be distributed on an equitable basis.
- About 40% of all households, and 30% of rural households, have no fields. Those who do have fields generally hold very little: usually one or two fields totalling one or two hectares.
- Typical holdings – where people have fields at all – are inadequate for anything approaching household food self sufficiency with the agricultural methods prevailing in the country<sup>52</sup>.
- There is no large land-owning class with extensive farms whose redistribution or better use would enhance overall food security.
- The contribution of farming to food security, though still important, is gradually declining. Decades of agricultural development projects have failed to reverse this trend. Most households, if they have land at all, can contribute to their food security by farming – but not achieve it. Increasingly, other economic activity – indirectly dependent on land access and tenure security – must be the basis for food security.

### **Land tenure security and food security in Lesotho**

**Tenure insecurity is not the primary constraint on the contribution that farming can make to food security in Lesotho. *However:***

- women's access rights and widows' tenure security are inadequate;
- a minority of better-resourced, more productive farmers could contribute more to aggregate food security if they had better regulated, more secure access to additional land, either through market transactions (with the inevitable equity implications), enhanced sharecropping or other temporary transfers of use rights;
- arable tenure security and the efficiency of arable land use are currently impaired by the confused interim arrangements for land administration, pending implementation of local government and land reform laws (the former already enacted; the latter awaiting approval and dependent on implementation of the former);
- rural livelihoods and food security depend on community-based natural resource management structures that it would be socially and economically unwise to discard. Instead, their current decline needs to be reinforced by clearer communal tenure security, framed by clearer administrative arrangements. The sustainable land management provisions of the Land Husbandry Act (1969) are now widely disregarded.

**Tenure insecurity is a primary constraint on the general economic growth in other, non-farm sectors on which food security in Lesotho increasingly depends:**

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<sup>52</sup> Turner, S.D., 2003. *The southern African food crisis. Lesotho literature review*. Maseru: CARE Lesotho.

- with increasing urbanisation (28% of the population in 2000; a projected 49% in 2030) and increasing livelihood dependence on secure urban land rights, the current insecurity of urban and peri-urban land access and rights is a major threat to food security;
- in urban and peri-urban settings, it is even more important to redress women's current land tenure insecurity;
- an increasingly urbanised economy cannot prosper, and the food security of a growing proportion of the population cannot be assured, unless the poor and the better off are able to invest securely in land improvements and productive land uses;
- with greater competition for land resources, increased mobility and specialisation, and the incorporation of rural areas into market economies, policies that secure the land rights of the poor in rural and urban areas will increase in importance;
- bank loans for much of the investment on which food security will increasingly depend require collateral underwritten by land tenure security that current arrangements fail to provide;
- all kinds of economic activity are hindered by the current failure to resolve land disputes efficiently, which aggravates tenure insecurity on all kinds of land;
- tenure security, and consequently food security, are inadequately protected by laws for appropriate compensation when people are arbitrarily deprived of residential, farming or other land use rights by the state;
- aggregate tenure security and food security are harmed by the current failure to control land hoarding and speculation;
- urban and peri-urban livelihoods and food security, and the economic growth they require, depend on orderly land allocation and infrastructure provision, both of which have been hindered by current tenure insecurity and poor administration of land in these sectors.

There is thus an urgent need to enact and implement legislation that will enhance land tenure security in Lesotho. These measures will make an essential contribution to the nation's food security.

## **Annex 2: Draft Legal Brief: Customary<sup>53</sup> Title in Malawian Law**

**by Shaun Williams, 5 December 2004**

The Malawi National Land Policy (NLP) proposes several key legislative reforms, a summary of which is provided in Attachment A. Some very difficult and complex constitutional issues are thrown up by these policy recommendations, the most important of which relate to customary rights, or property, in land.

As part of the Land Reform Programme Implementation Strategy, the GRM has empanelled a Special Law Commission on Land Law Reform (SLCLLR) to give effect to the legal reforms proposed in the NLP. Chapter XII of Constitution of the Republic of Malawi provides that an independent Law Commission be established to review, repeal and amend laws as directed by the legislature. The Law Commission is also given the power *to review and make recommendations regarding any matter pertaining to the laws of Malawi and their conformity with this Constitution and applicable international law*<sup>54</sup>

Many of the same issues that were raised during the Presidential Commission of Inquiry and for which legislative reforms have been proposed in the NLP relating to the coexistence of customary and modern property laws in previously colonised states have recently been the subject of litigation in other SADC and Commonwealth countries and previous case law has undergone some fundamental reinterpretation.

There is a risk that the SLCLLR, with its limited resources and its laudably representative, rather than purely legally expert, membership, may struggle with these novel and profoundly technical legal innovations and will be unable therefore to recommend legislation to government that, if enacted, would hold water for very long. It may be prudent therefore to find ways to mobilise some additional resources to assist the SLCLLR to successfully tackle this challenge.

The Constitution of the Republic of Malawi also provides that the judiciary has the responsibility for interpreting the constitutional validity of all statutes.<sup>55</sup> The High Court has original jurisdiction to review any law, and any action or decision of the Government<sup>56</sup>. Sitting above the High Court is the Supreme Court of Appeal, which therefore has ultimate responsibility for making definitive interpretations of the constitution<sup>57</sup>. Therefore it may be useful and sensible to involve the courts directly in the process of reforming the legal framework for holding and dealing in real property in Malawi. There are, of course, time, cost and resource implications for government and its development partners that would arise bringing the courts into the reform process at this stage. The trade off for the delays and expense that this course would entail, would, however, be greater legal certainty. The real question is therefore not, if but how and when to do this.

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<sup>53</sup> The expression 'customary' is used throughout, rather than 'native' or 'indigenous', which are preferred in some of the judgements cite below, as this seems to be the conventional expression used in Malawi

<sup>54</sup> Republic of Malawi (Constitution) Act, 1994 (Act No. 20 of 1994), ss. 135(a)

<sup>55</sup> *ibid* S. 9

<sup>56</sup> *ibid* ss 108(2)

<sup>57</sup> This is central to the Malawian doctrine of the separation of powers as described by the previous Chief Justice L. E. Unyolo, Keynote Address, Conference on Separation of Powers, Mt Soche, 29 January, 2003, [http://www.ifes.org/rule\\_of\\_law/Documents/JIC%20Web/JIC%20Web%20Malawi/Justice%20Unyolo-English.pdf](http://www.ifes.org/rule_of_law/Documents/JIC%20Web/JIC%20Web%20Malawi/Justice%20Unyolo-English.pdf)

Rather than either persisting with the current plan to have the SLCLR report to the Minister of Justice some time next year, whether they are ready or not, or rush to the High Court with an ill thought out set of questions for pronouncement, the first step should be to bring in some additional resources to clarify the scope of the challenges and opportunities involved reconfiguring the way customary land rights are incorporated into Malawian law. With some quite modest additional assistance from its development partners, expert advice could be commissioned about the implications for the reform agenda proposed by the NLP, which relate to customary title of recent international developments in the law relating to customary rights or property in land. With this advice in hand, the procedural innovation suggested above of engaging the court in this process, would be much more effective.

Outlined below are some of most important and difficult questions about customary rights or property in land in Malawi today that have been raised by recent developments of the law in this area, which this expert technical assistance could attempt to answer.

### **1. What was the basis of the land law in Malawi before colonisation?**

The challenge here lies in moving beyond convenient generalisations<sup>58</sup> and getting, as far as possible to the actual characteristics of specific forms of customary law relating to real property, especially as regards alienability and communalism that existed in Malawi at the time of assertion of sovereignty by the Crown.<sup>59</sup> This more forensic approach has been adopted in a recent South African case<sup>60</sup>, reviving a previous caution contained in a highly persuasive authority about using a priori categories of rights or property in land to describe customary land laws.<sup>61</sup> In the South African case, the fact that indigenous landowners had conveyed subsidiary rights to outsiders prior to the acquisition of sovereignty by the Crown was taken by the Supreme Court of Appeal as proof of the existence of a precedent indigenous land law.<sup>62</sup>

### **2. What was the effect of the act of colonisation on this pre existing customary law?**

The process of colonisation in East Africa was particularly messy and unconscionable. However to the extent that it was an act of state, it is not contestable in a municipal court.<sup>63</sup> There is reasonable legal consensus that, however it was done, the acquisition of territorial sovereignty by the British Crown also resulted in its acquisition of the radical title to all the lands of Malawi. However several persuasive authorities<sup>64</sup> have recently confirmed that the weight of legal opinion is now that a change in sovereignty and in ownership of radical title does not necessarily mean that pre-existing private rights in property are disturbed. Rather the presumption is that, unless clear and plain action is taken to extinguish them, then the Crown's intention was that these rights should be fully protected by the common law, which after cession applied equally to all citizens.<sup>65</sup>

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<sup>58</sup> See for example a former Commissioner of Lands writing about customary land law in Malawi

<http://www.unu.edu/unupress/unupbooks/80604e/80604E00.htm/ch9>

<sup>59</sup> See *Yorta Yorta v Victoria* [2002] HCA 58 at para 55 for a jurisprudential analysis of the significance of the timing of this event.

<sup>60</sup> *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA)

<sup>61</sup> *Amoodu Tijani v. the Secretary, Southern Nigeria* (JC) [1921] 2 A.C. 399: 403-4

<sup>62</sup> In *Richtersveld* the Supreme Court of Appeal in South Africa drew from the evidence brought before a lower Court about the nature of indigenous Nama law affecting property in Little Namaqualand. The Land Claim Court found that the Nama had extracted minerals and conveyed grazing rights to their land to outsiders before the assertion of sovereignty by the Crown.

<sup>63</sup> *Sobhuza II. V. Miller*. (J.C.) [1926] A.C. 518 per Viscount Haldane at 523 in an appeal from the Special Court Of Swaziland

<sup>64</sup> *Mabo and Others v. Queensland No. 2* (1992) 175 CLR 1 F.C; *Delgamuokw v. British Columbia* (1997) 153 DLR (4th) 193 (SCC); *Richtersveld* op cit

<sup>65</sup> *Adeyinka Oyekan v. Musendiku Adele*. (J.C.) [1957] 1 W.L.R. 876 at 788E-I.

Therefore, it as been argued, customary rights or property in land survive as a burden on or a qualification to the radical title vested in the new sovereign unless they were extinguished by conquest or ceded upon occupation.

To determine what constitutes that qualification in Malawi, the many Treaties of Cession signed between the representatives of the Crown and local Chiefs between 1881 and 1893 should be carefully scrutinised for any expression of clear and plain intention to extinguish or surrender customary rights or property in land should. If the expression of an intention to extinguish or surrender is absent from the texts, then we must assume, based on authority, that customary rights or property in land are likely to have survived as a qualification to the radical title acquired by the British sovereign in Malawi.

So, surviving customary title has a single source, the customary law recognised in the Treaties of Cession and which has subsequently been recognised and protected by the common law and shaped by statute and subsequent legal acts of state.<sup>66</sup> Customary title as it exists now lies at the intersection of these three elements.<sup>67</sup>

**3. To what extent has the conduct of the imperial power and the post independence state  
a) recognised and acknowledged customary rights or property in land, or  
b) extinguished the same?**

Recent authority has confirmed that upon acquiring sovereignty, the British Crown acquired the absolute right to recognise, extinguish or grant any rights or property in land. The conduct of the Crown with respect to customary rights or property in land has been emphasised as a potential important indicator of acknowledgement and approval of customary rights. Repeated policy statements about 'protection', 'preservation' and non disturbance of natives has been read recently by the courts as implying recognition of native rights.<sup>68</sup>

**4. What has been the impact on customary rights or property in land of subsequent  
a) acts of State  
b) legislation  
c) grants?**

These are the only ways in which remnant customary rights could have been legally extinguished. To the extent that the Crown or subsequently the state has legally granted interests in customary land to third parties that are inconsistent with the ongoing enjoyment of customary title, those rights have probably been extinguished.

But, as the courts have consistently and again recently made clear, policy is not a legal tool of extinguishment, neither are protectionist legislative acts, such as the declaration of reserves for the sole benefits of its indigenous population, or statutes of a general nature. What is required to effect extinguishment is clear and plain formal and legal pronouncement of the exercise of this sovereign right. The most relevant legislative acts are as follows

- Nyasaland Order in Council, 1902
- Supreme Court of Appeal Act (Cap. 3:01)<sup>69</sup>
- Land Ordinance of 1951<sup>70</sup>

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<sup>66</sup> Delgamuukw op cit passim

<sup>67</sup> Yorta Yorta op cit at 31

<sup>68</sup> Delgamuukw op cit passim

<sup>69</sup> Incorporated the Order in Council into municipal law

<sup>70</sup> *The Land Ordinance of 1951 defined land as public, private or customary. However, "customary" land, was in essence defined as a mere species of "public land" (or crown) land. This was an arrogant*

- Registered Land Act (Cap 58:01)<sup>71</sup>

c) Not all grants made in Malawi since the assertion of sovereignty have necessarily been legally bestowed, and not all interests so created have been inconsistent with the continuance of customary title. In the common law tradition, several rights in land are capable of coexistence.<sup>72</sup> The customary title, which was improperly alienated, could have survived in the reversion of leaseholds subsequently granted to third parties by the Crown or the State. The records relating to the initial grants of estates made by and to the British East African Company by the Crown will have to be carefully examined, as will grants made during the Banda period, which resulted, in some instances in freeholds being created out of customary land in notorious circumstances, Grants of leaseholds to third parties carved out of customary land during the period of previous government should also be scrutinized.

The facts relating to each grant out of customary land, therefore, theoretically requires close examination. An exercise of this nature could generate some panic and uncertainty in property markets if it is mishandled. However international experience demonstrates how this process can be effectively managed through using public education and adopting stringent and consistent standards of fairness. The devices used by the State for extinguishment of customary title have become standardised over time, so that an examination of the effectiveness and legality of the provisions of the Acquisition of Customary Land for Public Purpose Act<sup>73</sup>, for instance would reveal much about the most recent multiple expropriations of customary land in Malawi.

An emerging generic feature of all species of customary title is inalienability, except by surrender to the Crown.<sup>74</sup> There is some authority for the proposition that, to be effective, even this very limited form of alienation must be in return for valuable consideration. Consideration of this question could be important in Malawi because so far surrender has generally not been in return for valuable consideration. Regardless of whether this point of law could be made out in Malawi, there is more general agreement amongst the authorities, that the exercise of this limited form of alienation of customary title gives rise to fiduciary responsibility accruing to the State in respect of those who had beneficial interests in the surrendered customary title.<sup>75</sup>

## **5. What would be the effect of the proposed NLP legal reforms on surviving customary rights or property in land if they enacted as proposed?**

An examination of the list (provided as an attachment) of the legal reforms affecting customary rights or property in land proposed in the NLP, in the light of the questions posed above, gives the

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*concession to Malawi citizens who, by virtue of the Ordinance, become tenants on their own land. This position was re-enacted in the Land Act (Cap 57:01), which came into force in 1965. The passage of the Land Act in 1965 did not change the status and insecurity of customary land rights caused by the application of the Land Ordinance of 1951. Malawi National Land Policy [2002] para 2.2.3*

<sup>71</sup> Copied verbatim from the Kenyan land law of the time.

<sup>72</sup> Delgamuukw op cit passim

<sup>73</sup> No 1 of 1969

<sup>74</sup> St. Catherine's Milling and Lumber Company v. The Queen. (J.C.) 14 App. Cas. 46

<sup>75</sup> Delgamuukw op cit at 161-4, Mabo op cit per Brennan CJ at 67. In the later judgement Brennan CJ distinguished between two alternative ways in which the Crown can perfect its title; either by purchasing customary title for valuable consideration or by accepting its surrender. The former method may not create the same fiduciary obligations as the later, because if the Crown is a bona fide purchaser for valuable consideration, the beneficial entitlement of those with equitable interests in the customary title may overreach the sale into the capital value of the consideration. In contrast, where customary title is surrendered by Chiefs, their trust obligations to the underlying beneficiaries of the surrendered customary title may be transferred to the Crown.

reader some idea of the profundity and complexity of these proposed changes. Great care will be required here, to both to achieve policy goals and avoid unintended consequences.

Of particular concern is the proposal in the NLP that that the customary title should be converted into some form of statutory title. As discussed above, conversion, or granting rights incompatible with the continuance of customary rights could have the effect of extinguishment.<sup>76</sup> Exactly what would be lost or gained, and by whom, in this process needs careful thought. The wider implications of the abovementioned cases have not yet been incorporated in the discourse on 'native title' in Malawi and they should be taken into account by the Special Law Commission on Land Law Reform in their work of harmonising Malawi's land laws in accordance with the new policy.

**6. To what extent are the acts identified in 3, 4 and 5 above consistent with the relevant constitutional law and Malawi's commitments to international law and norms, at the time, now and as they may be amended?**

Based on the experience elsewhere raising these issues is likely to provoke much contention. Given the understandable sensitivities of all Malawians about the historical injustices associated with cession, occupation and expropriation of land, debates about whether and the extent to which customary laws have been infused into Malawi's common law, or displaced by it, or extinguished by statute or international law, will be intensely contested.

To provide the GRM with advice which has enough gravitas to enable consensus around these issues to become possible, a suitably qualified group of international, regional and national experts will have to be engaged for an adequate amount of time to undertake a comprehensive programme designed to equip all the key players to undertake this difficult task.

However, resolution in the form of a persuasive judgement by the nation's ultimate legal authority that will enable reforms to move forwards with certainty, will only be possible after this preparatory ground work has been completed. Some of the analysis which will be required to get to this point would also be very useful for another of the Law Commission's current projects, its review of the current Constitution of the Republic of Malawi.<sup>77</sup>

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<sup>76</sup> This would not necessarily be the consequence of registration. See at Amoodu Tijani op cit at 407-8

<sup>77</sup> Republic of Malawi (Constitution) Act, 1994 op cit;

Republic of Malawi (Constitution) (Amendment) Act, 1994 (Act No. 31 of 1994);

Constitution (Amendment) Act, 1995 (Act No. 6 of 1995);

Constitution (Amendment) Act, 1995 (published as Act No. 1 of 1997). See particularly the following provisions

24. Rights of women to own property

28. Rights in property

207. Vesting of lands, etc., in the Republic

208. Savings of rights of the Government in property

209. Continuation of rights of persons in property

### **Legal Reforms affecting Customary Land Proposed in the National Land Policy**

1. Revise Land Ordinance of 1951, the Land Act (Cap 57:01), 1965, the Registered Land Act (Cap 58:01), 1967, and the Customary Land Development Act (Cap 59:01), 1967, draft and enact a basic land law that would apply to all land, irrespective of tenure. (2.2<sup>78</sup>)
2. Provision will be made in a basic land law to rationalize and accord full statutory recognition to customary land rights i.e. repeal section 25 of the Land Act (2.3)
3. All owners of registered customary estates enjoy equal treatment under the law as private landowners (4.9)
4. Regulations to protect against fraudulent transactions involving customary land will be proclaimed (4.18)
5. Interim (whilst customary estates are being registered) legislative prohibitions will be made on sales of family land and transactions that may adversely affect the welfare of the rest of the family (4.19)
6. The power of traditional leaders to control the allocation of customary land among members of their respective communities, including access rights granted to outsiders shall be democratized and protected by statute (5.3)
7. All transactions involving customary land will be required by law to be recorded using a procedure that is compatible with provisions dealing with formal Registration of Interests in Land as stipulated by the basic land law (5.5)
8. Any grouping of families and individuals living in a locality or having customary land rights in a defined area, that seeks to protect their common property interest or "dambo" shall be recognized and legally protected as common property (5.6)
9. All children will inherit land and real property belonging to parents equally (5.6)
10. Customary land administration practices that promote discrimination, abuse of administrative privilege and established property rights of customary landholders will be discouraged and where necessary prevented by law (5.7)
11. A Traditional Leaders Accountability Law and regulations will be enacted (5.10)
12. Customary Land Committees (i.e., Village Land Committee, Group Village Land Committee and Traditional Land Committee) will be established to oversee the formalization of customary land allocations and general administration of customary land (5.10)
13. Customary Land Administration and Responsibility provisions will be enacted to enforce the legal and administrative rights of customary estate holders (7.6)
14. A Customary Land Dispute Settlement Act shall be enacted (8.12)

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<sup>78</sup> All bracketed references at the end of each item are to the section numbers in the Malawi National Land Policy, GRM, 17 January 2002

### **Annex 3: Note on Titling and Registration of Customary Land**

The MNLP recommends the survey and recording of each ‘traditional land management area’<sup>79</sup> and its protection against arbitrary conversion to public or private land and the permanent loss of rights to the local community. The policy also envisages that customary landholders (entire communities, families or individuals) will register their holdings as private ‘customary estates’ in ways that will preserve the advantages of customary ownership while ensuring security of tenure.

*The property rights contained in a customary estate will be **private usufructuary rights** in perpetuity, and once registered the title of the owner will have full legal status and can be leased or used as security for a mortgage loan.<sup>80</sup>*

How this land titling is to be achieved has yet to be clarified. In Annex 2, Shaun Williams has asked some questions about the complex constitutional issues relating to customary rights or property in land which have been thrown up by recent decisions outside Malawi. This note asks some questions about the financial/ technical feasibility and the usefulness of the widespread survey and registration of private usufructuary rights in the light of experience from countries in the region.

#### **Impacts of titling at the farm level**

Kenya introduced the adjudication and titling of customary land rights in the late 1960s. The latest findings of long-term observations of land titling in Mbeere, Eastern Kenya, were recently reported as follows:<sup>81</sup>

*‘The outcomes provide unambiguous support for neither proponents nor opponents of externally promoted privatisation. Impacts include:*

- *increased inequality in access to land-based resources;*
- *mixed consequences for women: increased insecurity of tenure for some but enhanced opportunity for land ownership for those who can afford to buy;*
- *contribution to the emergence of a land constraint among households who were adjudicated zero or small land areas, for whom viable and affordable alternative methods to bush fallowing for sustaining soil fertility are not always available;*
- *failure to activate a credit market for most farmers;*
- *some activity in the land market, but not always for efficiency enhancing motives;*
- *some medium to long-term investment in, and on, the land albeit for a variety of motives: compensation to loss of free access to community resources, resource conservation, economic gain and, possibly, for securing land rights;*

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<sup>79</sup> i.e. ‘the geographic area of land held by a community and administered by a Traditional Authority’ on behalf of the communal group’ (MNLP, glossary)

<sup>80</sup> MNLP, 4.7.2 (c)

<sup>81</sup> Diana Hunt, *Agricultural Research and Extension Network Newsletter* No. 48, July 2003, London: ODI

- *some impetus to commercialisation of the local economy (via impacts on resource access and investment opportunities);*
- *local validation of individual land rights which most households regarded as sufficient even if they had not received title deeds.*

Studies by the Land Tenure Center, principally in Kenya, but also in Senegal, Somalia and Uganda, have failed to reveal a causal relationship between formal registration of individual rights and investment in land improvements and on farm productivity. Its researchers have concluded that: (a) in view of the generally depressed conditions of agriculture and in the absence of other possibilities for improvement, titling did not have an impact; (b) giving weak titles, constrained by various conditions and prohibitions, did not have the anticipated incentive effects on title holders; (c) much of the demand for titling arose from a wish to prevent the State giving the land to someone else; and (d) even in a vital and market-oriented agriculture such as that of Kenya, other factors (e.g. farm size and market access) overwhelmed the effects of titling.<sup>82</sup>

Platteau<sup>83</sup> argues that, in cases where a significant relationship is found to exist between enhanced on-farm investment and formal land title, this need not mean that they are causally linked. Farmers may tend to register land parcels that benefit from comparatively high levels of investment. In other words, registration may not stimulate investment, but merely be positively related to it.

Most of the research into the impact of formal titling in Kenya has focused on farm-level impacts. One has to turn to the 'Njonjo' Commission's report<sup>84</sup> or read the Kenya daily newspapers to learn of the ongoing bitterness caused by the excising of communal land and its conversion into private land by the political elite, parastatals, dishonest government officials and so on. The report makes clear that formal titling when accompanied by a corrupt land administration can have a lethal impact upon the livelihoods of the poor. The problem is not confined to Kenya. Taylor Brown in a study of land allocation in Zambia makes this point very forcefully.<sup>85</sup>

A recent World Bank research report recognises that the privatisation of customary tenure, without changing the agrarian structures and conditions under which production relations operate, will not generate efficient land use practices.<sup>86</sup>

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<sup>82</sup> John Bruce, *When should land rights be formalised? Issues in phasing of property system reforms*, Land Tenure Center, University of Wisconsin – Madison, 1996

<sup>83</sup> J-P. Platteau, 'The evolutionary theory of land rights as applied to sub-Saharan Africa: A critical assessment', *Development and Change*, 27, 1996

<sup>84</sup> Report of the Commission of Enquiry into the Land Law System of Kenya on the Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration, November 2002.

<sup>85</sup> Taylor Brown, 'Contestation, Confusion and Corruption: Market-based land reform and local politics in Zambia', *Competing Jurisdictions: Settling Land Claims in Africa* Vrije Universiteit Amsterdam 24-27 September 2003

<sup>86</sup> Klaus Deininger *Land Policies for Growth and Poverty Reduction* World Bank and Oxford University Press, 2003

*The last public pronouncement by the World Bank on land issues was in the 1975 Land Reform Policy Paper, which analyzed land largely in terms of agricultural use and productivity, devoting little attention to the importance of land rights for empowering the poor and improving local governance, the development of the private sector outside agriculture, the gender and equity aspects associated with land, and the problems arising at the interface between rural and urban areas.’ (page xlv)*

*It is now widely realized that the almost exclusive focus on formal title in the 1975 paper was inappropriate, and that much greater attention to the legality and the legitimacy of the existing institutional arrangements will be required. Indeed, issues of governance, conflict resolution, and corruption, which were hardly recognized in the 1975 paper, are among the key reasons why land is coming to the forefront of the discussion in many countries.*

*In customary systems, legal recognition of existing rights and institutions, subject to minimum conditions, is generally more effective than premature attempts at establishing formalized structures. Legally recognizing customary land rights subject to a determination of membership and the codification or establishment of internal rules and mechanisms for conflict resolution can greatly enhance occupants’ security. Demarcation of the boundaries of community land can remove the threat of encroachment by outsiders while drawing on well-defined procedures within the community to assign rights within the group. Conflicts historically often erupt first in conjunction with land transfers, especially to outsiders. Where such transfers occur and are socially accepted, the terms should be recorded in writing to avoid ambiguity that could subsequently lead to land-related conflict.*

In South Africa, Claassens and Cousins<sup>87</sup> observe that there is now a general call for greater legal recognition of rights under customary tenure, including secondary rights to land and resources. However, they recognise that, in relation to the legal recognition of customary rights, there is on-going debate on how this should be done. Determining the social boundaries of the group in which rights should vest, or in relation to which individual rights are to be defined, is inherently difficult. Land tenure in Africa ‘represents a set of mobile social relations valid for a point in time’<sup>88</sup> and often comprises multiple and overlapping rights to different resources. Boundaries are seldom clear and unambiguous, particularly in relation to common pool resources such as forests and grazing.

Claassens and Cousins, sounding a cautionary note, quote Shipton and Goheen:

*... administration of rural land-holding is an enormously difficult task in which government actions have often produced results opposite to those intended. The*

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<sup>87</sup> Aninka Claassens and Ben Cousins, Communal Land Tenure: Livelihoods, rights and institutions’ *Development Update*, 4, 2, 2003 [www.interfund.org.za](http://www.interfund.org.za)

<sup>88</sup> Michael Mortimore, *History and evolution of land tenure and administration in West Africa*, IIED Issue Paper 71, May 1997. London: IIED.

*embeddedness of land-holding in ecological, social, cultural and political life means that one tenure regime can seldom be legislated away in favour of another. To try to do this is to add layers of procedures or regulations on to others unlikely to disappear, and to add possibilities of manipulation and confusion.... Official rules quickly obsolesce*<sup>89</sup>

Tenure reform in Mozambique in 1997 and in Tanzania in 1999, recognize and protect existing occupation and use of communal land, and give them the status of property rights, without requiring their privatisation and conversion to Western notions of private ownership. In both these countries, as in Malawi underlying ownership of all land lies with the state. Strong statutory rights are then vested in the people who occupy the land, and the law enables the rights holders to further define and record these rights at the local level. An ongoing balancing act between group and individual rights, at different levels of social organization, is facilitated. Thus for much of rural Malawi, it is likely to be sufficient to limit cadastral survey and recordation to 'traditional land management areas'. This would confine individual titling to localities where the need for titles has been expressed, as a result of changing social norms or a need for credit, and in particular in areas where valuable land is subject to competition and dispute (e.g. urban and peri-urban areas, the lakeshore) or in resettlement areas where no customary system exists.

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<sup>89</sup> P. Shipton and M. Goheen, 'Understanding African landholding: Power, wealth and meaning', Introduction in *Africa*, 62, 3, 1992