MANAGING POLITICAL AND ECONOMIC CLAIMS TO LAND IN DARFUR

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1. Introduction

The headline is striking: The Land Question: Sudan's Peace Nemesis.[1] It reflects a growing body of opinion that competition for land is an important, even the most important driver of conflict in Sudan, especially in Darfur, and that there is an urgent need for far-reaching reforms to land policy, management and administration: reforms which will include the 'registration of rural land … to secure the rights of rural people' and 'modernised customary land administration institutions, which should be community-based rather than simply grounded in tradition'.

These are ambitious prescriptions; two different perspectives show how ambitious. The first comes from the new, deeper international understanding of land tenure practice that has developed over the last decade. The second reflects lessons learnt from an intensive effort that was made during to understand and address land use issues in South Darfur during the 1980s.

Land has a political as well as an economic value. Most reforms to land rights and land tenure are focussed on the economic value: land law, titling, registration, land administration etc. Where, however, there is conflict over the political value of land, these technical reforms can contribute little and may even make the situation worse.

2. Land Tenure in Practice

Since the 1960s, the international development community has supported land tenure reform in many parts of the world, but few programmes have resulted in sustained progress[2]. In the last ten years, a more comprehensive understanding of land tenure has developed. This is presented most comprehensively in the 2003 World Bank report on Land Policies for Growth and Poverty Reduction[3]. This new understanding highlights one key challenge: matching tenure reform to the current needs of the people who use the land. Timing is everything. In remote communities where land is not used or traded intensively, traditional or informal forms of tenure can

> "Land tenure projects had 'two features in common: an extraordinary number had been prematurely aborted because of poor results; and [almost] none had succeeded in turning extralegal assets into legal ones.'" DeSoto, 2000

be perfectly adequate. Reform is unnecessary and expensive, even damaging. On the other hand, where development and social change are rapidly raising the value of land, tenure reform must keep up. If it is left too late, land holders may have to sell their rights for less than they are worth or, in the worst case, lose them by force.

The next few paragraphs compare the situation in Darfur with key points from the new synthesis on land tenure.

A. The Value of Land

If crops are valuable and populations are ;arge, then land owners want strong title and can afford the cost of getting it. Darfur is not such a place. Rainfall is low, markets are far away, the Sudanese economy is weak and poorly managed and the land area is very large relative to its population, even after the northern deserts are excluded. The result is that the intrinsic, or economic value of land is low. Conflict and insecurity have driven it even lower.

> ".. property rights evolved .. to respond to increased payoffs from investment in more intensive use of land resulting from population growth or opportunities arising from greater market integration and technical advances." Deininger, 2003

Even with the help of computer technologies, mapping a large region and registering all claims to land is one of the largest and most expensive undertakings a government can face. This is why such an 'extraordinary number' of land tenure programmes have been aborted because of poor results. In regions like Darfur, the low economic value of land means that only the simplest possible methods are affordable or sustainable.

B. Land Law and Technology

In developed countries land tenure is the domain of lawyers and surveyors, and legal and technical issues have dominated attempts at reform; especially where computers, satellite mapping, and GPS seem to offer ways to short-circuit the evolution of

property rights. However, De Soto has shown[4] that laws and land administration technologies can never be more than tools. Property rights are

> "… the transition to integrated property systems had little to do with technology"
> "… this property revolution was always a *political* victory."   De Soto, 2000

created by social consensus and by the political leadership which supports that consensus, not by laws or systems. Even the simplest form of community-based land registration is still a technical solution in this sense; a solution which will fail if it is not supported by - preceded by - social consensus and political will. This is a particularly important message for the international community in Sudan. Technical solutions which seem to offer a way round the difficult political context will be particularly attractive. That does not mean they will work.

C. Enforcement

Even where they are fully supported by society, land laws are meaningless if the courts do not give their judgements quickly and at reasonable cost, and if the State does not ensure those judgements are enforced. The Sudanese State's inability, or unwillingness, to enforce agreements which have been negotiated between warring tribes has been a significant factor in what has happened in Darfur. Tanner & Tubiana report the Zaghawa of N. Darfur blaming Government of Sudan *"for mediating, but then failing to force the Awlad Zeid to pay compensation—or failing itself to pay the Compensation, as the government is expected to when diya (blood money) is too high.[5]"*
Darfur had seen this pattern of weak Government mediation and inadequate enforcement many times before, notably during the fighting around Jebel Marra in 1989 and 1990[6].

> "11. A failure on the part of Government to enforce respect and to impose its authority in the areas of conflict. This was a conspicuous factor leading to the violation of the Peace Agree-ment." Zalingei Peace Conference Report, 1990

Once again, the conclusion is that there is no way round the questions of social consensus and political leadership.

3. Dar & Hakura: The Political Value of Land

Land has a political value which springs from its allegiance to a particular community and its leaders. That value is not necessarily linked to its economic worth to the individual who uses the land; that individual may actually be rather indifferent to whether he belongs to one community or another. Pantuliano's paper is one of many which do not make a clear distinction between the political and economic value of land. But it is a fundamental distinction. The legal and technical arrangements summed up as land tenure concern individual rights to the economic use of land. They offer no solution to the wholly political question of which community or government unit the land belongs to.

The Abyei Boundary Commission is a good example[7]. Although the economic interests of the Messiriya are an issue, the real question is whether the area is to belong to North or South Sudan.

> "Abyei was the … territory of the .. Dinka chiefdoms transferred to Kordofan in 1905."
> "the Misseriya community .. continue to view the Abyei agreement, .. as a zero-sum game in which they risk losing their traditional grazing routes .." ICG, 2005

That question can only be settled by a political agreement: ideally, but not necessarily, an agreement that is based on the balance of the evidence; ideally, but not necessarily, one which yields the greatest economic benefit from the land and the fairest distribution of that benefit.

The Fur state institution of *hakura* was a political allocation of land. The State granted the lord of the *hakura (Sid al Hakura)* the right to levy taxes, legal fees and labour dues on the estate and to allocate the land to farmers, either directly or through agents. In theory this system extended even to the outlying areas as *hakurat al urban* (Hakura of the Arabs), although the Sultanate rarely had much control in these areas[8]. The

political nature of *hakura* is clear in the historical record[9]. As the box shows, there was, or came to be considerable over-lap between *hakura*, an official state allocation of land, and *dar*, the area claimed by a particular tribe or community. In the same way, the political position of *shartai*, reporting to the Sultan, overlapped with the land-holding position of *sid al hakura*. All the overlaps came together when "*the people of the hakura*" elected their *shartai/sid al hakura*.

> "Abu el Bashar put Saadalla Gelam in to run his hakura. When Abu el Basher died Saadalla carried on as Shartai dealing direct with the Sultan. He was followed by Hasab el Karim elected by the people of the hakura. …. Dar Abu el Basher contained 25 villages."
> O'Fahey, 1976

The historical record also shows the extraordinary fluidity of settlement in Darfur. In the past, large tribes such as the Bani Halba and Ma'aliya fled Darfur to escape the Fur state, and returned when conditions changed. As the box shows, smaller communities moved more than once in a lifetime as their political fortunes went up and down. When considering whether what is happening in Darfur today constitutes 'ethnic cleansing' or even 'genocide', it is important to remember in mind that forced re-settlement as a result of political competition has a very long history in Darfur. What has happened since 2003 is on a larger scale than at any time since the Mahdia, but it is not new.

> " 'They … were driven out of their Dar by Abdel Shafi Sineen and went to Fasher … On the fall of Fasher they fled to Dar Masalit where they settled on the Giraf north of Wadi Kaja …. They have about 5 villages … Now that the country has settled down they wish to return to their old Dar.' — their request was refused.."
> O'Fahey, 1976

The proposed Darfur Land Commission will, in effect, take over a task that absorbed much of the Colonial authorities' time: settling political claims to land. O'Fahey's notes from the Kutum files show just how complex that task was. The 1938 case of *Zayyadiyya[10] Hakura "Abu Mukhair" in Dar Beira* involved tracing a line of inheritance back a century, distinguishing between the taxation rights of *asyad al tin* (lords of the soil) and 'settlers from other tribes', and distinguishing between the M*elik of Beira's* rights to issue judgements

and levy fines, as the 'original *hakim* of the Belad Beira', and the *asyad at tin*'s rights to do the same within their own community[11]. After several years of violence and at a time when the broad consensus supporting customary approaches to these issues may no longer exist, the Land Commission's task is likely to be even more difficult in the early 21st century than it was in the 1930s.

The Zayyadiyya case illustrates how the political functions of taxation and justice were tied to the allocation of land. *Zakat* has been abolished as a government tax and the *Idara Ahlia's* judicial function is much reduced. However, this does not mean that land has lost its political value. The creation of elected local councils has given it a new value: the votes and claims on government resources which are attached to the people who live on the land.[12] How-ever, there is one vital element of the

> "So why did they fight? … the answer lay in electoral politics. The land under dispute belonged, [under] the 1920s settlement, to the Gimr but it was farmed by Fellata. The question was which rural council did they vote for …. : the Gimr council at Katila or the Fellata at Tullus."
> Morton, 2004

earlier system that has been destroyed by the shift to unitary councils based on one-man-one-vote: that is the ability to sub-divide political power between communities which share one area. Again the Zayyadiyya case illustrates the point. In a single area, acknowledged to be part of the *Melik of Beira's* domain, taxation was split 1/3:2/3 between the Zayyadia and 'other settlers'. The right to levy fines in court cases was also split along communal lines. Morton cites a conflict of the 1980s, between the Ta'aisha and Salamat of SW Darfur, which revolved around control of the elected council and the power to charge fees on cattle sales[13]. In an earlier era that might well have been solved by an agreement to split the powers between the two communities.

Wadi Salih is an area to the south of Jebel Marra. It was a centre of conflict in 1989/90 and again in 2003. Intersos monitoring reports list what has happened to every

settlement in the area[14]. The lists show the political nature of events. Many villages described as African have not been disturbed because "*the people didn't side with rebels*". These Africans either belong to minor tribes or to somewhat larger ones, such as the Gimr, which have managed to avoid becoming involved. On the other hand, villages belonging to the much larger Fur and Masalit tribes which did support the rebels have all been abandoned. Unfortunately, nothing is said about the other side of the conflict: which Arab, and possibly even African, tribes have been leading the attacks and which have not become involved at all. In 1989/90, Morton reports, it was clearly recognised that the *janjawid* only came from "*some Arab tribes*"[15] and it is likely that is still the case.

Wadi Salih is a frontier area. It borders the *Dars* of two major Baggara tribes, the Bani Halba and the Ta'aisha, and it is also close to Chad. Rainfall is relatively high and the vegetation is denser than around Jebel Marra. Although the population is predominantly Fur, it is a long way from the Fur heartland north of the Jebel and it is possible that it was settled relatively recently. Its combination of broad valleys and uplands offers good pasture as well as good crop land, making it one of the few areas in Darfur where herders and farmers are likely to be in close contact for long periods. The Intersos reports indicate that 'Arab nomads' are 'squatting' on the land of abandoned Fur villages. The situation is almost certainly not so clear cut as the word 'squatting' implies. Arab *Fariqs* have always farmed in Wadi Salih, in between the Fur villages. Equally the Fur themselves may well have been 'squatting' in the sense that the land may never have been formally allocated to them.

This pattern of mixed settlement by more than one group – some or all of whose rights to the land are poorly defined - can be found all over Darfur. When there is peace, it is one of the region's economic strengths. It allows the land to be used in the most flexible and productive way; which is particularly important when the rains are as unreliable as they are in Darfur. However, the Zayyadiyya case cited above is an illustration of the issues that mixed settlement raises; issues which are not about how the land is used but about how society is managed when more than one community share an area. The

case also illustrates the fundamental task of government: to deliver, and if necesssary enforce, an acceptable settlement of those issues.

4. Trees and Axes: The Economic Value of Land

The fact that *hakura* is essentially about the political value of land does not mean that Darfur does not have institutions to govern rights to the economic value of land. "*Within the village lands each villager has the right to cultivate. If he leaves the village the land occupied by him is allotted to someone else. …. the area allotted is supposed to be no more than he can work (kifayat yad)*"[16] Thus Tothill describes the principle underlying the way the vast majority of land was, and still is held. Within a *hakura*, the *sid al hakura* delegated land management to a land sheikh (*shaykh al ard*), who allocated the land to individual farmers; "*whose title Lord of the Axe (sid al fa's) illustrated how their tenure was established by the act of marking the trees for cutting and clearing*"[17]. The exact parallel between the 'axe rights' of Darfur and the 'tomahawk rights' that De Soto reports from the USA in the 18th and 19th centuries[18], underlines the fact that property rights in land almost always spring from the act of clearing the land for farming. And that right is maintained by keeping the land in use after it has been cleared. The land shaykh could not withdraw land, once it had been allocated, unless it had clearly been abandoned for good. Hamza reports case law

> "She did not cultivate it but she had (gum arabic) growing in it and she informed the sheikh of her intention to return. … When she did return to tap the (Gum Arabic) and her husband tried to stop her, he was overruled." Hamza, cited in Morton, 1993

that "*strong evidence is needed to rebut a presumption that the holder intends to return*" to land that was not being used. As the box shows, women's rights to land were recognised and defended on the same basis.

Darfur shows many examples of the way property rights reflect and adapt to changes in the economic value of land. When Sudan was the world's leading exporter of gum arabic, people began to register their holdings of *hashab* (gum arabic) trees. Until the introduction of boreholes, Baobab trees were used to store water for the dry season. Rights to these were also registered. On Jebel Marra, high quality wheat land ('*ard al qamih)* was "*in all practical respects owned … it could also be inherited …*". The contrast was with the less valuable millet land (*'ard al 'aysh*), which remained under looser, communal tenure[19].

This broad structure of loose customary rights established through clearing and usufruct, with stronger, formal rights emerging where land has special value, is not just a matter of ancient history. As recently as the 1980s, surveys in south and west. Darfur showed that "*the largest single class of land was acquired by uncontrolled clearance from virgin bush. This was true in both the wider regions of the WSDC area (ie S. Darfur), where 46 per cent of fields were 'cleared from bush without permission', and the more intensive basement wadis of the JMRDP area (ie the southern half of W. Darfur) …. [where] 34 per cent was described as 'Free gift/cleared from bush'* "[20].

Hamza was writing about the Fur in the 1960s and Tothill about all of W. Sudan in the 1930s and 1940s. The customary land tenure regime they describe is clear and structured. As the WSDC survey shows, in the more southerly regions of Darfur, where settlement accelerated in the 1970s and 1980s, things were much less formal. "*Only in one part of South Darfur, the Goz Ma'aliya (E. of El Da'ein), is formal allocation by the sheikh still important. Perhaps it is significant that this is the heartland of commercial groundnut production.*"[21]

There are various possible explanations for this free-for-all in southern Darfur. It may be that the written record has always exaggerated the importance and reach of customary law. Certainly, fully-fledged *hakura* never reached the lands of the south Darfur Baggara covered by the WSDC surveys. It also may be that by the 1970s the *idara ahlia* had lost both the authority and the interest needed to maintain the system. Added to this, there is evidence that so much land was available in these areas that there was little need for any form of tenure at all. Morton has argued that the introduction of borehole water supplies, better transport and the elimination of big game had opened up large sections of south Darfur that had been inaccessible before; such large areas that cropping intensities and the pressure of land use actually fell[22]. Whatever the reason, between 1950 and 1973, Darfur and in particular S. Darfur, supported a dramatic expansion in the smallholder production of groundnuts using traditional techniques without any reported difficulties over land tenure. [23]

5. A Lesson from the Past

Between 1982 and 1990, the Government of Sudan, the World Bank, the EU, the United Kingdom and the Saudi Fund for Development spent $100 million, perhaps even more, on development in South and West Darfur. The Western Savanna Development Corporation (WSDC), in Nyala, and the Jebel Marra Rural Development Project (JMRDP), in Zalingei, sought to promote rural development through agricultural research and extension, road building, water supply and community infrastructure.

The Sahelian drought of the early 1970s coincided with large population movements from north to south Darfur. This was believed to threaten an environmental disaster, as increasing population pressure and the weakness of customary land tenure would force farmers to crop their land to exhaustion and herders to build up their herds until the pastures of Darfur were destroyed. In all respects Darfur seemed to match the theory of the 'tragedy of the commons': that under communal tenure farmers cannot fallow their land to preserve its fertility and pastoralists cannot reduce their herds to protect their grazing. WSDC was specifically designed to test the generally accepted solution to the tragedy: stronger land tenure. It established settlements where farmers had formal title to enough land for a stable fallow rotation, and

it helped livestock communities to set up grazing reserves where stocking could be controlled.

The lesson from this experience was harsh. Farmers did not follow the proposed rotation and the livestock community never kept to the recommended stocking rate. Subsequent analysis has shown that the "*ample circumstantial evidence of increasing pressure on both the crop land and the range land of Darfur ... was misleading …. it diverted attention from the need to establish three facts. The first was that an absence of formal land tenure was an obstacle to better farming practice and that the traditional support for communal access to rangeland prevented destocking. The second was that the crop land actually was over-cultivated and the rangeland over-stocked. The third was that more careful management of either crop land or rangeland would result in higher production.*"[24] Not one of these three killer assumptions, all of them fundamental to WSDC's strategy, was in fact correct.

WSDC was very thoroughly prepared by a large team which spent over two years in the region. Detailed maps were prepared of soils, vegetation and land use, and specialists in economics, sociology, agriculture, natural resource management and livestock production all agreed with the analysis that south Darfur was facing a crisis of population growth and environmental decline. Their conclusions were widely accepted and they matched a strong international consensus about what was happening in the Sahelian belt, all the way from Sudan to Cameroon. They were still wrong.

The lesson is simple but hard to accept: that those who suggest solutions to Darfur's problems which are derived from an established international consensus, even when it is supported by theory and detailed field research, do so at their peril.

There is, perhaps, one other lesson worth considering. The international community ended its commitment to Darfur in 1990, as a way of expressing its disaffection with the new, more Islamic Government of Sudan. Had it not done so, it would not have largely lost the body of understanding it had paid so much to create. It is even possible that understanding would have developed to the point where it had something really useful to offer. More importantly, during the 1980s a cadre of Sudanese professionals was created, both Darfuri and others, with real experience in the region. Had that group not been dispersed as far as India and California things today might be different.

6. Conclusion

Political and economic aspects of land in Darfur are linked but they must be dealt with separately. The first concerns the way communities which share an area interact, the second how land is put to productive use.

For the first, it is clear that a settlement to end competition over the political value of land will be an essential part of any lasting peace in Darfur. An exercise in what might be termed 'political titling' is needed to settle all political claims made by communities to *hakura* or *dar*. As the Anglo-Egyptian Condominium found, this will be a large and complex exercise. A mass of oral evidence, much of it biassed, will have to be sifted, with very limited written evidence to help eliminate the bias.

The Abyei case has shown that even when the written, historical evidence is clear the settlement may not be accepted. The assumption implicit in the title of the Abyei Boundary Commission explains why: its task was to decide on boundaries and answer a simple, yes/no question: Does Abyei belong to North or South Sudan? It did not have a clear brief to decide what were described above as "*the issues that mixed settlement raises; issues which are not about how the land is used but about how society is managed when more than one community are living together.*" In Abyei, the principle inter-communal issue concerns the northern, arab Messeriya's right to graze the lands settled by the Ngok Dinka to their south. In the past their right to do so was accepted,

> "The Ngok Dinka and Misseriya communities must receive assurances that their land and grazing rights will be guaranteed irrespective of the referendum's outcome." ICG, 2005

regardless of which province Abyei belonged to: Kordofan or Bahr el Ghazzal. Now that new, harder boundaries are being drawn, that may not be so in the future.[25]

To avoid a multitude of stalemates – each one a miniature Abyei – it will be essential to establish and win support for a complete set of principles on how these inter-communal issues will be settled, before any attempt is made to deal with specific cases. Only in that way will a Darfur Land Commission have the mandate it will need to address these issues and confidence that the decisions it makes will be accepted, supported, and, if necessary, enforced.

One important principle can be stated in advance: that the allocation to one community of political title to a *dar* should never override established economic rights within that *dar* which belong to other communities or to individuals from other communities. Grazing rights and farmland are the obvious examples. Even here, however, supporting regulations will be needed. If, for example, the Messiriya are to graze in Abyei, rules to protect Dinka crops and manage clashes with Dinka livestock will be required.

It will be much more difficult to decide how claims on political power and access to government resources will be managed. There is a range of choices. At one extreme, a return to the *idara ahlia* model would allow each community within a mixed settlement to manage its internal own affairs: tax, justice and the distribution of government resources. Cases which involved more than one community would dealt with by negotiation between them. In developed country terms, this would represent the multi-cultural solution. At the other end of the spectrum, a wholesale move to unitary councils elected by one-man-one-vote would mean that all issues would have to be dealt with centrally. The recent history of extreme inter-communal violence makes it seem highly unlikely that the latter approach could succeed. Elected councils in Darfur have always been weak and vulnerable to domination by influential leaders, or by a majority which is not willing to look beyond the interests of its immediate supporters. On the other hand, the *idara ahlia* has been eroded so far that it may not be possible to re-create it.

There are no models from elsewhere or standard international approaches which Darfur can follow. A major effort of research and consultation is needed, therefore, to draft a new political and administrative framework to underpin a 'political titling' of land in Darfur. Such a framework is likely to combine elements of both *idara ahlia* and elected representative democracy. Some form of independent judiciary also be needed.

Whatever combination is decided upon, oversight, governance and enforcement will be fundamental. Whether it was the Fur sultanate, the colonial power or the Government of independent Sudan, history has shown the need for political decisions is constant, decisions: over which community holds title, over boundaries, and over the division of political authority between communities living together. It was also necessary to discipline the *idara ahlia*, for example by replacing incompetent or corrupt *nazirs* and *omdas*, and more recently the local authorities, by suspending dysfunctional local councils. To this must be added the need for almost daily action to support and enforce the decisions reached. To take just one example, by policing the movements of cattle herds within the accepted rules and sanctioning attempts to break those rules.

To sum up, any successful settlement of 'political title' in Darfur must combine three things:

- a set of strong but very simple principles for the management of intercommunal issues;
- a comprehensive settlement and registration of the 'political title' of every community, including the physical boundaries of every *dar* and, even more important, what can be called the internal boundaries between the communities which share the *dar*; and
- the affordable and sustainable political framework needed to govern, oversee and support the workings of this political settlement.

Managing the economic value of Darfur land will be a simple matter by comparison. The principles of customary law are clear and appropriate for the current stage of development in Darfur. However, the erosion of the *idara ahlia* has left it unclear who has the authority to decide questions of customary law, and national legislation, such as the Unregistered Land Act of 1970, is reported to have undermined customary tenure.[26] Darfur cannot afford, and does not need, a comprehensive cadastre of individual claims to economic title in land; apart from anything else, it would take far too long to create for it to make any useful contribution to peace in Darfur. Two things are needed instead. The first is agreement on the essential principle of customary law: that uncontested use of the land is, of itself, enough to establish a valid claim to that land. The second is, once again, "an affordable and sustainable political framework to govern and oversee" the application of that principle.

There are two exceptions to this: urbanisation and mechanisation. The first is a reality in Nyala, El Fasher and other centres, where the time may be right to register land holdings and establish formal title. For the second, apart from one unsuccessful government farm, Darfur has never had the large mechanised farms found in eastern Sudan. However, the potential does exist, mainly in the south of the region. Arrangements will be needed to ensure that land held under customary tenure is not transferred to modern-sector farmland without full compensation.

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[1] S. Pantuliano, The land question: Sudan's peace nemesis. ODI HPG Working Paper, December 2007

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[9] O'Fahey, Kutum 1976.pdf. www.smi.uib.no.

[10] It has been reported that the camel owning tribes of N. Darfur did not hold land under *hakura.* This case indicates otherwise as the Zayyadiyya are just such a tribe.

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[26] Pantuliano, op. cit.

ABOUT THE AUTHOR

James Morton spent nearly seven years in Darfur during the 1980s. His research on economic development and environmental change in Darfur is based on a series of large socio-economic surveys, which he led, and on parallel research carried out by his colleagues. This covered agriculture, natural resources and sociology in what is now south and west Darfur. As a graduate in Arabic language, James was able to work particularly closely with his many Sudanese colleagues and with the wider Darfur community.

More recently, James has worked as a specialist in land tenure. Between 1997 and 2004, he led a major programme of support to the reform of land law, land institutions and land administration in Guyana. He has also researched land policy for DFID and contributed to current work on land tenure in Rwanda.

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