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**Managing Conflict and Sustaining Recovery:  
Land Administration Reform in Tsunami-Affected Aceh**

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## **Managing Conflict and Sustaining Recovery: Land Administration Reform in Tsunami-Affected Aceh**

**Daniel Fitzpatrick**

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### **ACKNOWLEDGEMENTS**

This paper is based on fieldwork in tsunami-affected Aceh, Indonesia, between August 2005 and June 2007. In this time we conducted extensive field interviews of:

- Victims of the tsunami in Aceh Besar, Banda Aceh, and Aceh Jaya.
- Village heads and village leaders in Aceh Besar, Banda Aceh, Simeulue, Aceh Barat and Aceh Jaya.
- NGOs active in community land mapping and women's land rights.
- Members of the National Land Agency's titling adjudication teams
- Judges of the Syariah Court in Banda Aceh.

We have also drawn on field material kindly provided by the International Development Law Organisation (IDLO). This field material dates from early 2006, and in some cases we have re-interviewed IDLO informants to update developments.

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## EXECUTIVE SUMMARY

The Indian Ocean tsunami disaster killed over 150,000 people, damaged or destroyed over 200,000 homes and displaced over 500,000 in Indonesia alone. In the worst-hit province of Aceh, almost all land-related records were damaged or destroyed. Large numbers of boundary markers were obscured or obliterated. The National Land Agency (BPN) lost up to 30% of its staff. At least 15,000 land parcels remain under water, and as much as 7000 ha of land have been irretrievably damaged by the effects of mud, salt, sand and erosion.

Many of the institutions that manage the reconstruction of land rights in Aceh are severely degraded by the effects of disaster and secessionist conflict. There are favourable conditions for further land conflict. The stakes are high because land is a basic resource for recovery. While the frequency and severity of land disputes has been remarkably low in tsunami-affected areas, land conflict can take time to emerge and still has the potential to undermine recovery. The land institutions of autonomous Aceh will require long-term assistance to maintain recovery after the tsunami, and support reconstruction after the conflict.

This paper makes a series of detailed recommendations to strengthen land administration after the tsunami in Aceh. Part II provides an overview of the institutions of land administration in Aceh. It highlights the distinction between national and local systems of land administration, and recommends a focus on parallel empowerment to strengthen both local and national land administration systems. Part III analyses the strengths and weaknesses of the Reconstruction of Land Administration Systems in Aceh project ("RALAS"), with a particular focus on its implementation by Indonesia's National Land Agency (BPN). It makes the following recommendations.

- Subject to the recommendations made in this paper, Oxfam International should provide in principle support for continuation of the RALAS project in Aceh. RALAS promises to provide tenure security for housing beneficiaries, and access to formal credit for entrepreneurs. It also provides land title certificates at no cost to landowners.<sup>1</sup>
- BPN should commit to greater transparency and coordination with other agencies, including NGOs, in implementing the RALAS project. According to anecdotal reports, insufficient coordination with stakeholders was a key finding of Indonesia's Development Financial Audit Agency report (BPKP) on RALAS in April 2007. This paper welcomes recent indications that the RALAS Steering Committee, which includes NGO representatives, will meet more regularly and receive monthly reports from BPN. Oxfam International should support an expanded role for the Steering Committee, encourage local NGOs to re-engage with its activities, and advocate reliable and timely release of information from BPN to ensure adequate stakeholder consultation.
- BPN should return to using the original RALAS Manual, including its community-driven adjudication elements. The Manual revision would address a key issue for

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<sup>1</sup> Ministry of Finance Regulation No 104/PMK.01/2005 exempts, for the purposes of reconstruction and rehabilitation, landowners in Aceh and Nias from paying the property tax of 5% of the assessed value of their land and buildings at the time of initial registration and certification (Bea Perolehan Hak Atas Tanah dan Bangunan - BPHTB).

BPN - the need to check community-driven adjudication results against pre-disaster land records. It should also allow for random checking and verification by BPN teams of community-driven adjudication procedures at certain selected sites. But if community-driven adjudication is (1) compliant with the RALAS Manual, (2) not inconsistent with pre-disaster land records, and (3) not the subject of objection by neighbours or other claimants, then BPN should issue land title certificates without further adjudication or verification.

- RALAS team members are paid per land parcel so there is an incentive to record "owner unknown" whenever complexity or difficulty surrounds the determination of ownership. Available RALAS data suggest that approximately 3% of all owners in land parcels surveyed to date have been recorded as owner unknown (or "Mr X"). Payment per land parcel also creates an incentive to "redo" community-based demarcations and adjudications that were facilitated by NGOs. While the system of payment per land parcel could avoid perverse incentives through proper management, it is recommended that RALAS survey and adjudication team members be paid a set fee that is tied to agreed targets and work plans, rather than a system of payments per land parcel. Targets will not be met, and fees not paid, if the proportion of "owner unknown" in the ownership lists exceeds a certain level.

These recommendations should be read in conjunction with the gender-related recommendations relating to RALAS made in the partner paper in this series: *Women's Rights to Land and Housing in Tsunami-Affected Aceh, Indonesia*.

It is also noted that systematic land titling will not solve - and in some cases may exacerbate - problems caused by restrictions on access to common resources (e.g. maritime areas, fringing reefs, and forest lands). Recommendations relating to common property resources are set out in Part VIII (see below).

Part IV moves beyond the RALAS project to consider longer term reform of land administration in Aceh. It recommends that the new provincial government host a major conference on the future of land administration in Aceh. This conference should focus on the appropriate roles for national, provincial and district/municipality land management institutions. Part IV also discusses the need for substantial strengthening of sub-district land administration functions. Localised systems of land administration are cheaper, more convenient and much more familiar than the alternative mechanism offered by BPN. This fact highlights a potential weakness in the design of systematic land titling programs that are implemented by BPN. Without accompanying reform of land administration itself, many certificates will lose their accuracy over time as subsequent ("derivative") transactions and transfers are not updated in BPN records.

The mere fact that there are inconsistent land records at different levels of government does not justify cutting *camat* and *keucik* out of the land documentation process. It is appropriate to strengthen existing land administration functions at the local government level, so long as there are design and incentive features to encourage consistency with provincial and national land records. The capacity of local systems should be upgraded, their legal role should be formalised, and further attention should be paid - within the context of Aceh's special autonomy - to the fee structures that inhibit the referral of land documentation to BPN by the *camat*, *keucik* or parties to land transactions. Part IV recommends:

- Targetted programs of support to tsunami-affected *kecamatan* to improve (1) the quality of record-keeping in relation to land documents, with copies of all relevant documents to be passed on to BPN and the applicable village head; and (2) the capacity of the camat and his or her staff to mediate land disputes.
- Harmonisation of BPN land transaction fees transfer with the fees currently charged by *camat* in Aceh, in order to encourage consistency of record-keeping and accuracy of land records.
- A *Qanun* (provincial regulation) on land in Aceh that includes a detailed list of traditional Acehnese land rights and transfer documentation, and an accompanying statement that this documentation provides sufficient evidence of rights to land in accordance with the 1997 Government Regulation on Land Registration.

Part V considers the institutions of village government, and the role of adat in land administration in Aceh. In addition to further training and support for *keucik*, it recommends that implementing regulation be developed for Perda 7/2000, Qanun 4/2003 and Qanun 5/2003. These regulations should clarify:

- The way in which statutory land titles, and state administrative actions, interact with rights and processes based on local custom.
- The procedure to be followed for dispute-resolution through customary mechanisms.
- The circumstances in which *keucik* are not authorised to mediate or adjudicate disputes.

Part V also recommends:

- Continuation of mediation training for *keucik* in relation to land and inheritance disputes.
- Continuation of public awareness campaigns to provide basic information about rights to land after the tsunami, and mechanisms for advice and redress should individuals or groups disagree with a local-level decision.
- Continuation of funding for legal and women's rights NGOs, with a particular focus on rights and redress relating to land decisions at the local level.

Part VI discusses the role of the General Courts and the Syariah Court in relation to the resolution of land disputes in Aceh. It supports proposals for the transfer of jurisdiction over land disputes to the Syariah Court, and recommends targeted assistance to the Syariah Court. In developing support programs for the Syariah Court, the following capacity limits identified by UNDP should be taken into account.

- Poor infrastructure and administrative procedures, a shortage of personnel, logistical support materials and computers, and poor information and case management systems.

- Confusion over the territorial jurisdiction of district Syariah Courts as a result of mergers and divisions among certain districts in Aceh.
- Potential threats to independence as a result of proposed funding arrangements under the Law on Governing Aceh Act.
- A relative lack of public awareness relating to the Syariah Court.

Part VII identifies the key future roles of civil society organisations in supporting effective land administration in Aceh, particularly in relation to monitoring and advocacy programs. It recommends long-term support for NGOs able to provide legal, mediation and information services relating to land. It also recommends support for a non-governmental land monitoring and advocacy council in Banda Aceh. This council would provide high-level policy advice and advocacy to government agencies in relation to land rights. It would also have a strong media information component to publicise cases/abuses and advocate policy recommendations.

Part VIII concludes with a discussion of two specific legal issues: the definition of state land and the acquisition of land by the government. It recommends that the new provincial government of Aceh issue a law that:

- provides a clear definition of the "state's right of control" as it applies to Aceh, particularly by distinguishing between the public law right to regulate land, and a private law right to hold interests in land.
- requires all state agencies in Aceh to lodge documents describing their interest in state land with BPN or its provincial equivalent;
- requires all state agencies to provide documentary proof of their claims to state land where that claim is disputed by local landholders; and
- embarks on a process of mapping all state land in Aceh, on the basis of documents lodged by state agencies.

It is also recommended that the provincial government of Aceh develop further regulations concerning the valuation of compensation for land acquisition, the mechanisms for payment to landholders, and comprehensive safeguards to avoid potential conflicts of interest in the land acquisition process.



## 1 INTRODUCTION

The Indian Ocean tsunami disaster killed over 150,000 people, damaged or destroyed over 200,000 homes and displaced over 500,000 in Indonesia alone.<sup>2</sup> It also severely affected local systems of land administration. In the worst-hit province of Aceh, almost all land-related records were damaged or destroyed.<sup>3</sup> Large numbers of boundary markers were obscured or obliterated. The National Land Agency (BPN) lost most of its buildings, and up to 30% of its staff. At least 15,000 land parcels remain under water, and as much as 7000 ha of land have been irretrievably damaged by the effects of mud, salt, sand and erosion.<sup>4</sup>

Reconstruction of land rights in Aceh has had to proceed from close to "ground zero" circumstances. The stakes are high because land is a basic resource for recovery. Large numbers of claimants are competing for inheritance entitlements. Large numbers of victims need new land because their land is submerged or uninhabitable, or because they are renters who cannot afford to re-enter the rental market.<sup>5</sup> The government needs to acquire substantial amounts of land, not only for the landless but also to "build back better" through spatial and public safety planning. All these circumstances create favourable conditions for land conflict.

Many of the institutions that manage land disputes in Aceh are severely degraded by the effects of conflict and disaster. Prior to the tsunami, the General Courts were barely functional as a result of the long-running secessionist conflict. The General Courts have jurisdiction over land disputes, including disputes arising from government land acquisition. Since the tsunami, the Syariah Court has had jurisdiction over inheritance and inheritance-related land ownership cases, but it is affected by low levels of resourcing and forecasts of an increasing caseload. Even village and sub-district levels of administration, where most civil disputes are resolved, are affected by limited resourcing and capacity, the deaths of community leaders, and concerns over transparency and accountability.

Notwithstanding the high potential for conflict in tsunami-affected Aceh, the frequency and severity of land disputes has been remarkably low. This positive result owes much to the social resilience of the Acehnese, and in particular their capacity to resolve disputes through family or village mechanisms. Land programs adopted after the tsunami have also helped to keep the level of disputation relatively low. Nevertheless, land conflict can take time to emerge and still has the potential to undermine recovery. In all post-disaster environments, there is a risk that conflict and dispossession will become cyclical if basic disputes over land and resources are not resolved, and if reconstruction efforts are not integrated with longer term development programs. While land programs in Aceh have had positive results, it is

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<sup>2</sup> Early Indonesian government figures were 126,602 people killed and 93,638 people missing. Some later reports give a lower figure for the number of missing: see e.g. the estimate of 36,800 missing in Tsunami Recovery Indicators: UNIMS and BRR December 2005. From 1 January 2006 the Syariah Court for Aceh began to declare all missing persons deceased.

<sup>3</sup> Some damaged records, most notably the land books (buku tanah) for Banda Aceh, were rehabilitated over a 12 month period using deep freeze techniques in Jakarta.

<sup>4</sup> Supra note 2, p. II-5.

<sup>5</sup> See Fitzpatrick, D., *Housing for the Landless: Resettlement in Tsunami-Affected Aceh*, Indonesia, Asia Research Institute Working Papers on Aceh Series, available at <http://www.ari.nus.edu.sg/>. See also Fitzpatrick, D., *Access to Housing for Renters and Squatters in Tsunami-Affected Aceh*, Indonesia, Asia Research Institute Working Papers on Aceh Series, available at <http://www.ari.nus.edu.sg/>.

important that the institutional mechanisms for land law and administration are improved to maintain recovery and ensure ongoing development.

Aceh now has a peace agreement based on special autonomy status within the Republic of Indonesia. It faces a transitional period as the Tsunami Reconstruction Authority (BRR) prepares to hand over operations to the provincial government in 2009. The land institutions of autonomous Aceh will require sustained support to maintain recovery from the tsunami, and support reconstruction after the conflict. This paper makes a number of proposals for strengthening land administration in Aceh, with a particular focus on sustainable recovery from the tsunami. For reasons of space and the scope of research, the paper does not directly consider conflict-caused land issues in areas outside the tsunami zone. It also does not consider land use and spatial planning aspects of land administration in Aceh.

## **2 LAND ADMINISTRATION IN TSUNAMI-AFFECTED ACEH**

### **2.1 Land Administration: The Effects of the Tsunami**

The effects of the tsunami disaster on land administration in Aceh may be summarised as follows.

- 126,602 people killed and 93,638 people missing;
- 514,150 people displaced;
- 654 out of 5947 villages (*desa/gampong*) severely damaged or destroyed and 640 village administrations not functioning;
- 16 districts/municipalities (*kabupaten/kota*) out of 21 severely affected or not functioning;
- 252,223 houses totally destroyed or partially damaged;
- Approximately 74,000 ha of agricultural land damaged by mud, salt, sand and erosion, with 5000-7000 ha of land suffering permanent loss of fertility.<sup>6</sup>
- Approximately 300,000 land parcels (170,000 urban; 130,000 rural) out of an estimated 1,498,200 in Aceh generally affected by tsunami-related damage;
- Destruction of the National Land Agency (BPN) office in Kota Banda Aceh; 2 other BPN offices also destroyed and 3 severely damaged.
- Loss of approximately 30% of the staff in the Banda Aceh BPN office;
- Substantial damage to or loss of land records in BPN and sub-district offices, although BPN records in Meulaboh were largely unaffected;

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<sup>6</sup> Aceh and Nias Two Years After the Tsunami, Progress Report, BRR and Partners, December 2006, [www.e-aceh-nias.org/](http://www.e-aceh-nias.org/), pII-5, 15.

- Widespread loss of personal identity records in tsunami-affected areas;
- Significant inundation and subsidence of affected coastal lands, in many cases averaging between 10 and 20% per village area;
- Significant obscuring or obliteration of boundary markers such as walls and fences.<sup>7</sup>

While the tsunami had devastating effects on land administration mechanisms, it is important to distinguish the situation in Aceh from other post-disaster and post-conflict contexts.

- Almost all tsunami-affected areas are made up of ethnic Acehnese. The process of return is not complicated by the inter-ethnic rivalry among Acehnese, Gayonese and Javanese that has been evident in conflict-affected areas of Central Aceh.<sup>8</sup>
- Unlike former Yugoslavia and East Timor, there is no significant secondary occupation of houses. Thus there is no need for judicially sanctioned evictions as a prelude to restitution of land rights.
- Unlike East Timor, Rwanda and Afghanistan, there is no layered history of displacement and dispossession. Thus there is no underlying complexity of competing land claims between different groups of dispossessed.
- Unlike Thailand and Sri Lanka, there have been no significant tourist or other commercial forms of development along the tsunami-affected coastline of Aceh. Thus there were relatively few pre-tsunami disputes between commercial entities and allegedly dispossessed former landowners.

## 2.2 Land Rights and Records

Approximately 300,000 land parcels in Aceh were directly affected by the tsunami (170,000 urban/130,000 rural). Most estimates are that registered land titles covered approximately 20 % of all affected land parcels. Generally speaking, the remaining 80% are classified by Indonesia's National Land Agency (BPN) as customary ownership land (*hak milik adat*). While this land is not certificated, it is often subject to certain types of localised documentary records. In Aceh, written land records are usually generated as a result of land sales (*akte jual-beli*), gifts (*hibah*), and inheritance or divorce-related divisions (*pembagian hak bersama*). They are often based on a so-called *sporadik*, which consists of letters acknowledging physical control and customary ownership of land. These documents are prepared either by the village head (*keucik*) or the sub-district head (*camat*), and are often witnessed by representatives of the parties involved. If the *camat* is involved, in his capacity as the local land notary (PPAT), the transfer documentation will usually take the form of a formal notarised document (*akte*). While in theory the *camat* should forward copies of these

<sup>7</sup> See generally Regulation of the President of Republic of Indonesia Number 30 Year 2005 on Master Plan for Rehabilitation and Reconstruction for the Regions and People of the Province of Nanggroe Aceh Darussalam and Nias Islands of the Province of North Sumatra – Book 1 (“The Bappenas Master Plan”) at II-10, available at <http://www.bappenas.go.id>; at II 5-10.

<sup>8</sup> UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, pp. 24-25.

notarised documents to BPN, in practice the parties involved often forego BPN involvement to limit the costs of the transaction. As a result, a large number of localised land documents exist that are not included in formal land agency records.

This type of localised land documentation system exists across Indonesia. It seems particularly strong in Aceh, most likely as a result of decentralized district *kemukiman* administration in Sultanate times. Even BPN informants acknowledge that local mechanisms are the primary form of land administration in Aceh, with relatively few Acehnese understanding or trusting the formal BPN system. There are many advantages to decentralised land administration, including its low cost proximity to participants. But events in Aceh have shown that local land administration structures in Indonesia are multi-layered, fragmented and vulnerable to external shocks such as the tsunami disaster. This is because local record-keeping tends to be incomplete, and lacks effective mechanisms for duplicate records in regional or national systems. The result in Aceh was irretrievable loss of local land records in affected areas.

In areas governed by customary or localised systems of land rights, individuated land ownership seem far more common in Aceh than in other parts of Indonesia - particularly highly communal areas such as Bali and West Sumatra. Family-based customary ownership rights (*hak milik adat*) are the predominant form of land right in tsunami-affected Aceh. They are the norm not only in relation to residential land, but also rice fields and gardens. This predominance of individuated land rights is most likely due to the generational effects of Islamic inheritance principles in Aceh. Syariah law divides deceased estates among direct family members according to bilateral principles of inheritance. It does not devolve estates to the extended family or clan, or require reversion of unused land to the local community. As a result, most ownership structures centre on the nuclear family rather than the local clan or village.

This is not to say that customary ownership rights in Aceh are the same as statutory land ownership. Rural communities, in particular, have a greater say in the way in which customarily owned land may be used and transferred than would be applicable for land under statutory ownership. Acehnese experts and extensive field interviews suggest that in rural areas a customary ownership right:

- may only be sold if offered first to the neighbours (and possibly other community members as well);
- cannot be sold to community outsiders (although it may be leased etc with community approval);
- is subject to neighbours' and other community members' legitimate rights of access;
- may (in theory) be appropriated by the community for community purposes.<sup>9</sup>

It is important to note that these restrictions on customary ownership rights are considerably weaker, and often non-existent, in urban and periurban areas. Moreover, as is common in other parts of Indonesia, they also often take the form of negotiated interactions with

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<sup>9</sup> See, for example, el Hakimy, T. I. *Land ownership in rural areas in Aceh (at the village at Leupueung in Greater Aceh District)*, 1980 at 18-20, 39, 44.

community members and the village head (*geucik*), rather than set rules that are applied in all circumstances.

Many of the recommendations in this paper involve acknowledgement and support for localised forms of land administration in Aceh, as part of a process of parallel empowerment of land administration at the national, provincial and local levels. Well before the Basic Agrarian Law 1960 and its associated system of land notaries and BPN certification, Aceh had developed a sophisticated system for regulating and differentiating land transactions. In Acehnese tradition, mechanisms for the transfer of *adat* land rights include: *pusaka* (inheritance); *penghibahan* (presenting as a gift); *publoue* (selling); *gantoue peunayah* (compensation); *peugala* (pawning); *mawaih* (sharecropping) and *peuwakeuh* (grant as wakaf land).<sup>10</sup> These transactions are witnessed or verified by local officials: the *mukim* in Sultanate times and the *keucik* or *camat* after independence.

In the long term, there is scope for regulating the land market in Aceh around these familiar Acehnese mechanisms. Arguably, traditional Acehnese land transactions offer greater potential to facilitate a private land market than Indonesia's Basic Agrarian Law of 1960 and its associated systems. Indonesia's Basic Agrarian Law has not facilitated orderly development of a private market in land because its major rights of use - the right of building use (HGB) and the right of commercial use (HGU) - are in practice derived from the state rather than from private landowners. As a result, far too many land transactions must run through the state, and result in the issue of new state titles, rather than through the private agreement of contracting parties. Moreover, those secondary rights that are derived from private ownership - primarily leases, sharecropping agreements and pledges - are poorly defined and regulated, and relatively unprotected under the system of land titles registration..<sup>11</sup>

### 2.3 The National Land Agency (BPN)

In formal legal terms, BPN has sole authority over the surveying of land and the grant of land title certificates in Indonesia. It also has legal authority to confirm land boundaries for parcels that are either not registered, or registered but lacking a letter of measurement or mapping.<sup>12</sup> This authority over boundary confirmation proved contentious during reconstruction because it denied community members the legal authority to map and confirm their own boundaries - even though some NGOs had engaged in boundary demarcation in affected areas. These issues are discussed in Part III below.

Most independent observers believe that BPN has deep-seated organisational problems, and little capacity for transparent, effective and inclusive methods of land administration. In Aceh, these pan-Indonesian problems are compounded by severe degradations in capacity. The conflict left BPN with limited staff and equipment, and little influence in rebel-dominated areas. The tsunami killed 30% of BPN staff in Banda Aceh, destroyed three BPN offices -

<sup>10</sup> Ibid, at 65.

<sup>11</sup> For a general discussion see Daniel Fitzpatrick, *Land, Custom and the State in Post-Suharto Indonesia: A Comparative Legal Perspective*, in J. Davidson and D. Henley (eds.), *Adat Revivalism in Indonesia's Democratic Transition*, (2007 KLTV Press), pp. 116-135; and Daniel Fitzpatrick, *Public Power and Private Rights: Tangled Threads in Indonesian Land Regulation*, in H. Schulte-Nordholt (ed.), *Indonesian Transitions* (2006 KTLV Press), pp. 75-114.

<sup>12</sup> Government regulation 24/1997, article 19(1).

including Banda Aceh and Simeulue - and severely damaged all but one of the other offices in affected districts.

### 3 THE RALAS PROJECT

BPN's primary role in post-tsunami Aceh is to implement the Reconstruction of Land Administration in Aceh and Nias ("RALAS") project. The field staff working in the RALAS project have largely been brought in from other parts of Indonesia to speed up the process. The core element of RALAS is a program of systematic land titling. However, in contrast to other land titling programs in Indonesia, the RALAS project does not necessarily involve direct adjudication of land titles by BPN officials. Instead, an innovative "bottom-up" approach is set out in the BPN manual on land registration in post-tsunami areas ("the RALAS Manual").<sup>13</sup> Under RALAS community-driven adjudication, each landowner signs a statement of ownership that is endorsed by her neighbours and the village chief.<sup>14</sup> Where the landowner is deceased, the RALAS manual sets out a procedure for identification of heirs by the village head and village priest. The village head and priest will also endorse guardians for under-age landowners. In both cases (i.e. inheritance and guardianship), a mobile Syariah Court provides legal confirmation of the decision by the village head and village priest. The mobile Syariah Court has been partly supported by UNDP.

#### 3.1 Community-Driven Adjudication of Land Rights

Community-driven adjudication of land rights under RALAS has been a relative success. It is true that there have been cases of inappropriately sited housing in Aceh. But these cases largely stem from a failure to engage in community-driven adjudication, rather than inherent flaws in the RALAS project itself. While it took on myriad forms at the local level, community-driven adjudication generated sufficient documentation and certainty for housing providers to commence reconstruction, and avoided substantial delays by forgoing "top-down" mechanisms for re-establishing tenurial certainty. In practice, the first document generated by community-driven adjudication - the signed statement of ownership - provided sufficient "legal" authority for most forms of house reconstruction. Even in those areas where RALAS-certified community-driven adjudication did not precede house reconstruction, local determinations in the form of land owner lists prepared by the *keucik* or *camat* usually provided the tenurial basis for rebuilding to commence. Almost all housing providers went ahead with localised evidence of land records, usually in consultation with the *keucik*, *camat* and (sometimes) the district chief or city mayor (bupati/walikota). While the extraordinary circumstances of disaster meant that land rights and certainty did delay reconstruction, there is no doubt that delays and disputes would have been much worse if the designers of RALAS had not incorporated community-based agreements as the basic mechanism for adjudicating land rights.

#### 3.2 Systematic Land Titling

Land titling under RALAS has not been as successful as the community-driven adjudication program. The initial design of RALAS proposed to issue certificates over 600,000 land

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<sup>13</sup> BPN Degree 114-II/2005 on the Land Registration Manual for Post-Tsunami Areas.

<sup>14</sup> BPN RALAS Manual, Annexure 1.

parcels in tsunami-affected and adjacent communities by the end of 2008.<sup>15</sup> As at 21 June 2006, 2,083 land titles had been distributed to landowners; a further 7,025 titles had been signed and are waiting to be distributed; and 46,740 land parcels had been surveyed by BPN.<sup>16</sup> By this time, reconstruction had commenced on at least 50,000 houses. Building had thus started on most houses before the issue of land title certificates under the RALAS project.

While community-driven adjudication and boundary surveying by BPN has been highly important, land titling has been largely irrelevant as a mechanism to provide land rights certainty for the commencement of house reconstruction in Aceh. With some exceptions, most housing providers did not wait for the issue of certificates before commencing house reconstruction. This said, most housing providers are now concerned to ensure that their beneficiaries receive land title certificates prior to the closure of their post-tsunami operations in Aceh. This fact alone is a key reason why this paper provides in principle support for continuation of the RALAS project (see further below)

The number of land title certificates issued under RALAS increased significantly after an audit by Indonesia's Development Financial Audit Agency (BPKP) in April 2007. Prior to this audit, it appears that large numbers of land title certificates had been prepared but not distributed by district BPN offices. By September 30, 2007, 210,591 land parcels had been surveyed, and 104,551 land title certificates distributed by BPN. However, by July 2007, implementation delays and uncertainty had affected RALAS as a result of funding agency concerns over BPN compliance with grant agreement conditions. Negotiations continue over further funding for RALAS until the end of 2008.

Land titling is important to ensure that housing beneficiaries have sufficient security of land tenure. This security of tenure is especially important when large numbers of disaster victims have been beneficiaries of free housing programs. In the longer run, land titling is also important to economic recovery and development. One informant in Aceh Besar applied in early 2006 for a replacement land title certificates from BPN. As at May 2007, he had not received the replacement despite a number of a follow-up requests to BPN through his local village and sub-district heads.<sup>17</sup> He runs a highly successful cafe that employs six local people, and wants to borrow money to expand his business. He is a born entrepreneur but cannot borrow significant amounts from the banks without a certificate.<sup>18</sup> While comparative research confirms that land titling alone will not produce a market for credit, in the absence of other functioning market institutions, for entrepreneurs in urban and peri-urban areas - at least - BPN delays in issuing or replacing land title certificates have emerged as a key bottleneck to reconstruction in Aceh.

Why has certification by BPN fallen short of initial RALAS targets? Space does not permit a detailed answer, but some preliminary observations may be made from our fieldwork. First, there appears to be a need for greater support and allocation of resources from BPN in Jakarta to provincial and district BPN offices in Aceh. BPN in Aceh has very limited capacity and relies on outside staff to undertake RALAS land titling. Moreover, as government officials

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<sup>15</sup> BPN Decree No. 114-II.2005 *On the Land Registration Manual in Post Tsunami Areas*, 1.

<sup>16</sup> 'Multi Donor Fund for Aceh and Nias Project Update June 2006' Multi Donor Fund Secretariat (30 June 2006), 3.

<sup>17</sup> Interview 6 May 2007, Aceh Besar.

<sup>18</sup> And even if he does have a certificate, the lowest interest rate on the loan at the time would have been 18%.

and (usually) non-Acehnese, RALAS field staff require community facilitators to ensure community cooperation. Some respondents argued that the implementation of RALAS has not sufficiently incorporated use of community facilitators, including from the World Bank's *kecamatan* development programme (KDP).

Second, the original 2005 RALAS manual was predicated on the belief that (1) a Government Regulation on land in tsunami-affected Aceh and Nias would be issued relatively quickly,<sup>19</sup> and (2) the land books and other cadastral records had been irretrievably damaged. In the event, the Presidential Regulation was not issued until September 2007, and approximately 80% of the damaged land books was repaired by the end of 2006 with assistance from the Japanese aid agency (JICA).<sup>20</sup> These events had the following delaying effects on the RALAS project.

- BPN felt that the original RALAS manual lacked sufficient legal status because it assumed, on the basis of widespread destruction of records, a clean slate approach under which the issue of new land title certificates through the RALAS process would override any pre-disaster certificates (to the extent of any inconsistency). This approach required legal support from the proposed Government Regulation on land in tsunami-affected Aceh and Nias, in order to avoid any claims for compensation from pre-disaster land titleholders who alleged loss of rights as a result of the RALAS process. Because this Government Regulation was not forthcoming, BPN became reluctant to issue land title certificates on the basis of community-driven adjudication alone, even when the adjudication was compliant with the RALAS Manual. In 2006, BPN then bypassed community-driven adjudications by reverting to a new operating manual based broadly (but not exactly) on its standard title adjudication procedures under Government Regulation No 24 of 1997 on Land Registration.
- BPN began to cross-check the results of both community-driven adjudication, and its own adjudications in 2006, against the recovered land books (as well as undamaged land books from some districts). This cross-checking process did not commence until mid-2007, and was hampered by the poor quality of the Land Book and inadequate data management and coordination systems in district BPN offices.

The following recommendations and conclusions are made in relation to the RALAS project.

- Subject to the recommendations made in this paper, Oxfam International should provide in principle support for continuation of the RALAS project in Aceh. RALAS promises to provide tenure security for housing beneficiaries, and access to formal credit for entrepreneurs. It also provides land title certificates at no cost to landowners as Ministry of Finance Regulation No 104/PMK.01/2005 exempts, for the purposes of reconstruction and rehabilitation, landowners in Aceh and Nias from paying the property tax of 5% of the assessed value of their land and buildings (*Bea Perolehan Hak Atas Tanah dan Bangunan - BPHTB*) at the time of initial registration and certification. This high cost obstacle to registration outside the RALAS project is a key reason why most Acehnese landowners continued to use localised systems of land

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<sup>19</sup> The Regulation envisaged was a Government Regulation in Lieu of Law (*Peraturan Pengganti Undang-Undang – Perpu*).

<sup>20</sup> This figure is still subject to final verification by BPN. Most of the parcel register (*daftar tanah*) is irretrievably damaged, and will require parcel-by-parcel reconstruction.



administration in preference to the BPN system.

- BPN should commit to greater transparency and coordination with other agencies, including NGOs, in implementing the RALAS project. According to anecdotal reports, insufficient coordination with stakeholders was a key finding of Indonesia's Development Financial Audit Agency report (BPKP) on RALAS in April 2007. This paper welcomes recent indications that the RALAS Steering Committee, which includes NGO representatives, will meet more regularly and receive monthly reports from BPN. Oxfam International should support an expanded role for the Steering Committee, encourage local NGOs to re-engage with its activities, and advocate reliable and timely release of information from BPN to ensure adequate stakeholder consultation.
- BPN should return to using the original RALAS Manual, including its community-driven adjudication elements. The Manual could be revised to expand on a key issue for BPN - the need to check community-driven adjudication results against pre-disaster land records. In other words, the Manual would not assume that the issue of new land title certificates would override pre-disaster certificates (to the extent of any inconsistency).<sup>21</sup> It would simply require that the result of community-driven adjudication must be checked against existing and recovered land records, before any new land title certificate could be issued. The revised Manual could also expand on the need for random checking and verification by BPN teams of community-driven adjudication procedures at certain selected sites. But if community-driven adjudication is (1) compliant with the RALAS Manual, (2) not inconsistent with pre-disaster land records, and (3) not the subject of objection by neighbours or other claimants, then BPN should issue land title certificates without further adjudication or verification.
- RALAS team members are paid per land parcel so there is an incentive to record "owner unknown" whenever complexity or difficulty surrounds the determination of ownership. Available RALAS data suggest that approximately 3% of all owners in land parcels surveyed to date have been recorded as owner unknown (or "Mr X"). Payment per land parcel also creates an incentive to "redo" community-based demarcations and adjudications that were facilitated by NGOs. While the system of payment per land parcel could avoid perverse incentives through proper management, it is recommended that RALAS survey and adjudication team members be paid a set fee that is tied to agreed targets and work plans, rather than a system of payments per

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<sup>21</sup> Importantly, there would be no need for any further legal changes to produce this result. BPN officials would be required to cross-check community-driven adjudication results against existing and recovered land records (in fact, arguably BPN officials are already required to do so under the original wording of the RALAS Manual). If there were inconsistency between the community-driven adjudication result and the pre-existing land record, then the pre-existing land record would prevail and no certificate would be issued on the basis of community-driven adjudication. Should a certificate be issued, and a subsequent claim be made by an aggrieved landowner, then the potential liability of BPN officials would be exactly the same as for its ordinary systematic titling procedures under Government Regulation No 24 of 1997. If BPN officials follow BPN procedures, including the RALAS Manual, then any subsequent claims by aggrieved landowners - including landowners who apply under Government Regulation No 24 of 1997 for replacement of certificates lost through the tsunami - will simply lie against the holder of the current certificate, and not against any BPN official.

land parcel. Targets will not be met, and fees not paid, if the proportion of "owner unknown" in the ownership lists exceeds a certain level.

These recommendations should be read in conjunction with the gender-related recommendations relating to RALAS made in the partner paper in this series: Improving Women's Rights and Access to Land in Tsunami-Affected Aceh.

It is also noted that systematic land titling will not solve - and in some cases may exacerbate - problems caused by restrictions on access to common resources (e.g. maritime areas, fringing reefs, and forest lands).<sup>22</sup> Recommendations relating to common property resources are set out in Part VIII below, which considers the definition and delineation of state land in Aceh.

### 3.3 Ownership Disputes under the RALAS Process

While land titling has not attained all its targets under RALAS, the level of land dispute has been remarkably low in tsunami-affected areas. Our field evidence, including interviews with a large number of village heads, indicates that the vast majority of land disputes are resolved within the family, among neighbours or within the sub-village (*dusun*). One village *imam* reported that, as at 2 May 2006, only two land disputes had been brought for village government determination out of well over a hundred cases in his village.<sup>23</sup> Rare is the land case that requires determination by the village government, and far rarer is the dispute that goes beyond the village level. This evidence of relatively low land dispute is supported by available RALAS data, which records very few land ownership disputes in affected areas.<sup>24</sup>

### 3.4 Guardians and Orphans

In relation to orphans, the RALAS Manual does include a number of safeguards against the risk of dispossession by their guardians. The manual acknowledges a guardian's authority to manage their ward's property, but - most importantly - provides for registration of land ownership in the name of the child only. It also requires the guardianship approval form to be verified by the Syariah Court, and signed by the child's family, the village head, sub-district head and district mayor. Finally, it states that the nominated family representatives, village head, village *imam* and Syariah Court will monitor the guardianship in question. This monitoring will occur in the context of a number of legal provisions that allow removal of a

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<sup>22</sup> For a detailed discussion of the way in which common property arrangements in Indonesia are deemed to be state land, when they are not covered by registered land titles, see Fitzpatrick, D., *Disputes and Pluralism in Modern Indonesian Land Law*, (Vol. 22: 1 Winter 1997) Yale Journal of International Law, pp. 171-212.

<sup>23</sup> Interview Drs Abubakar, Village *Imam* Gampong Jawa, 2 May 2006.

<sup>24</sup> This said, anecdotal reports suggest that BPN may not have followed the RALAS Manual guidelines on reporting of disputes.

guardian on the grounds of misconduct or misuse of property.<sup>25</sup>

The potential for misconduct by a guardian is highlighted by the high number of disputes over appointments of guardians after the tsunami in Aceh. A number of village head informants indicated that disputes over entitlement to be appointed as a guardian are second only to inheritance disputes in the frequency of their need for resolution at the village government level. The stakes are often high because all landowners - including orphans - are entitled to a free house. Thus, one informant in Aceh Besar stated in relation to a village member who was guardian to four orphans from different families: "Four orphans - very fine. Four houses." Most orphans are not able to live by themselves in their own house, which means that many houses built for orphans can be rented out by their guardians.

The number of disputes over guardianship, and the incentives for misconduct by guardians, raise concerns that current law and the safeguards in the RALAS Manual would not be sufficient to reduce the dispossessory risks faced by landowning orphans after the tsunami. It is acknowledged that, under the current structures of RALAS, these risks do not arise from the fact of land titling itself. Nevertheless, it is recommended that:

- Either BPN or a delegated agency compile from RALAS data a separate inventory of all landowning children orphaned by the tsunami, the names and addresses of their guardians, and the location and parcel number of their land holdings.
- BRR or the provincial government host discussions with UNICEF, the Syariah Court and interested NGOs as to the most appropriate institutions to supervise guardians in tsunami-affected Aceh. These institutions should be supported by long-term funding.
- The proposals set out below for strengthening land administration functions at the village and sub-district levels include special measures to support supervision and monitoring of guardians of landowning orphans.

#### **4. BEYOND RALAS: LONG TERM REFORM OF LAND ADMINISTRATION IN ACEH**

##### **4.1 A Provincial Role in Land Administration**

All the recommendations set out above relate to land rights recovery through RALAS. Further reform to the administration of land in Aceh will be necessary to maintain recovery and ensure longer term economic development. In this regard, it is worth noting that the laws on regional autonomy devolve substantial powers of land administration to provincial and district governments in Indonesia; and the new Law on Governing Aceh (LOGA) goes even further, devolving general land administration powers to the provincial and district

<sup>25</sup> See for example Law 23 of 2002 on Child Protection (article 35 (2), 36(1)), the 1974 Divorce Law (article 53(2)), the Civil Code (article 107 (3), 109) and the 2002 Law (article 36 (1)). In Aceh under Qanun 10/2005, the resolution of disputes between a Guardian and his or her ward falls within the jurisdiction of the Syariah Court. However, Fatwa 2/2005 of the Acehese Council of Ulama states that the *Mahkamah Syar'iyah* should allow *geuchik* and *mukim* the opportunity to settle disputes involving orphans before any Court involvement. The Fatwa also states that the Syariah Court will supervise guardians of children orphaned by the tsunami. For a useful discussion see Harper, Fitzpatrick and Clark, *Land, Inheritance and Guardianship Law in Aceh*, International Development Law Organisation 2006, Ch. 1.

governments of Aceh (art. 213). District and municipal governments have authority for land administration within their borders (art.17), and the provincial government has authority over land administration functions that cross the district and municipality borders (art. 16). Subject to one exception (the acquisition of land by district and municipal governments), these opportunities for devolution of land administration have not yet been implemented in Aceh.

Should BPN be replaced, or at least supplemented, by a provincial land agency in Aceh? It is arguable that the problems at BPN are so deep-seated as to make it easier to start anew rather than wait for national reform. National-level reform of BPN has been attempted for at least 10 years, with relatively few visible signs of success. At least a provincial land agency would be susceptible to reform efforts developed by the new provincial government of Aceh. In starting afresh, Aceh can co-opt existing BPN staff and offices as other Indonesian provinces have done pursuant to the laws on regional autonomy. It can also shape new land administration structures that are closer to the localised mechanisms that remain from the days of the Acehese Sultanate.

This said, there is no guarantee that a provincial land agency will be more effective than BPN. There will be large start-up costs, and fundamental changes in land administration structures may be inappropriate at a time when effective land administration is essential for sustainable recovery and reconstruction. A final consideration will be the sensitive political implications of a wholesale move to provincial land administration. All in all, this paper does not make a formal recommendation that BPN be replaced by a provincial land agency in Aceh. It does recommend that the new provincial government host a major conference on the future of land administration in Aceh, so as to consider the respective roles of national, provincial and district/municipality land management institutions. It also recommends substantial strengthening of sub-district land administration functions as discussed in the following section.

#### 4.2 Strengthening Land Administration Functions at the Sub-District Level

The *camat* is an important figure in both national and local systems of land administration. Outside Banda Aceh, he or she is often the only authorised land notary (PPAT). PPAT prepare notarised documents of land sales, gift, inheritance, subdivision and partition. The *camat* may also prepare so-called *sporadik*, which are letters acknowledging physical control and customary ownership of land. As noted, some or all of these land documents may not be passed on to BPN - either by the *camat* all of the parties - in order to minimise fees and expenses. Where this occurs, the *camat* will be central to a localised system of land administration that operates outside the purview of BPN.

In similar fashion, the *camat* will also often act as the first point of recourse for disputes that cannot be resolved at the village level. For example, one *camat* in Meulaboh gave us a number of examples of mediations he had attempted after the tsunami. While some cases of mediation were successful, the unsuccessful examples make it clear that his dispute-resolution capacity was limited by a lack of clear legal authority to undertake land dispute mediation.

No comprehensive programme of assistance has been directed at *kecamatan* land administration functions in Aceh. Yet, as in other parts of Indonesia, local Acehese will likely continue to use sub-district heads (and village heads) to prepare and authorise land documents, even after they receive land title certificates. They will also use *camat* to mediate

disputes that move beyond the village level, at least in those areas where the *camat* is sufficiently trusted and capable. While these localised systems of land administration may operate outside the law, they are cheaper, more convenient and much more familiar than the alternative mechanism offered by BPN. This fact highlights an institutional weakness in the design of RALAS. Without accompanying reform of land administration itself, many certificates will lose their accuracy over time as subsequent ("derivative") transactions and transfers are not updated in BPN records.

Land titling alone will not extend the reach of BPN into hitherto unregistered areas of land in Aceh. One comparative lesson of land administration reform is that people will use those institutions that are cheaper, more familiar and more localised in nature. The mere fact that there are inconsistent land records at different levels of government does not justify laws that cut *camat* and *keucik* out of the land documentation process. While no doubt there are risks of corruption and inefficiency in localised land administration, it is appropriate to strengthen existing land administration functions at the local government level - so long as there are design and incentive features to encourage consistency with provincial and national land records, and oversight and transparency mechanisms to guard against the risk of corruption.

The capacity of local systems should be upgraded, their legal role should be formalised, and further attention should be paid - within the context of Aceh's special autonomy - to the fee structures that inhibit the referral of land documentation to BPN by the *camat*, *keucik* or parties to land transactions. This paper recommends:

- Targetted programs of support to tsunami-affected *kecamatan* to improve (1) the quality of record-keeping in relation to land documents, with copies of all relevant documents to be passed on to BPN and the applicable village head; and (2) the capacity of the *camat* and his or her staff to mediate land disputes.
- Harmonisation of BPN land transaction fees transfer with the fees currently charged by *camat* in Aceh, in order to encourage consistency of record-keeping and accuracy of land records.
- A *Qanun* (provincial regulation) on land in Aceh that includes a detailed list of traditional Acehnese land rights and transfer documentation, with an accompanying statement that this documentation provides sufficient evidence of rights to land in accordance with the 1997 Government Regulation on Land Registration. In this way, the *Qanun* would strengthen and confirm the legal status of localised documentation relating to land in Aceh.

## **5 VILLAGE GOVERNMENT AND THE ROLE OF ADAT IN LAND ADMINISTRATION IN ACEH**

### **5.1 The Structure and Authority of Village Government**

The structure and authority of Acehnese village government is now set out in a series of provincial regulations: *Perda* 7/2000 on *Adat* Life; *Qanun* 4/2003 on *Mukim* Governance Structures; and *Qanun* 5/2003 on *Gampong* Governance Structures. Under the laws on special autonomy, "*Qanun*" is the term for provincial regulation (*peraturan daerah – perda*); and "*gampong*" is the term for village (*desa*).

Perda 7/2000 identifies the principal actors in Acehese village government. The *keucik* (kepala desa) is the village head. While they receive a government stipend, *keucik* are chosen/elected by the community rather than appointed by the government. With some notable exceptions, *keucik* seem to enjoy a high degree of community trust in Aceh - although this has not prevented a certain degree of manipulation of the house reconstruction process. In theory, *keucik* are assisted by two village advisory bodies: *tuha peut* (in relation to law and religion) and *tuha lapan* (in relation to economy and development). In practice, these advisory bodies often do not exist in any formal sense. The *keucik* is also assisted by the village *imam* (*imam meunasah*), who under the RALAS project helps determine heirs and appointment of guardians.

Village government in Aceh is distinguished from other Indonesian provinces by its use of "*mukim*", a residual institution from the days of the Sultanate. A *mukim* formerly acted as the head of a local administrative unit clustered around a main mosque. *Qanun* 4/2003 re-establishes *mukim* as heads of local Administration in Aceh - above the village but below the sub-district. Both *keucik* and *mukim* are charged with applying *adat* to result village-level disputes, with inter-village matters of particular relevance to *mukim*. As with *tuha peut* and *tuha lapan*, not all areas of Aceh have a *mukim*.

The vast majority of land disputes are resolved (or managed) at the village level. The *keucik* is the key actor in managing disputes that cannot be resolved at the family, neighbourhood or hamlet (*dusun*) levels. In both rural and urban areas, there is very little trust in the General Courts, and a widespread reluctance to take disputes outside the local environment. Even when disputes to leave the local environment, they are often sent to the sub-district head rather than the Courts. While there is greater popular trust in the Syariah Court, and an increasing role for it in relation to land disputes, the primary focus of assistance efforts should be on local rather than judicial institutions.

In managing all resolving land disputes at the local level, the *keucik* will (in theory) apply local custom as modified by Syariah law. Under *Qanun* 5/2003, the village government has the authority to resolve all civil disputes by reference to custom as modified by Syariah law. But there is little further guidance on:

- the applicable legal framework should statutory titles, state land or state administrative action be involved;
- the remedies that may be applied or imposed; and
- the circumstances in which disputes may be bought or referred directly to the Courts.

There is also little guidance on minimum standards and appropriate procedure, including in relation to:

- public hearings and appropriate forms of evidence;
- rights of natural justice and rules against conflicts of interest; and
- the respective roles of mediation and arbitration in determining land-related disputes.

There is a relative lack of training, resources and facilities available to village-level dispute resolution institutions. While the *keucik*, in particular, tends to engage in mediation as a matter of course, there is scope for ongoing mediation training for *keucik* in relation to land and inheritance disputes. This ongoing training should build on the completed training programs of the International Development Law Organisation.

Given the primary dispute resolution role of the *keucik*, there is also scope for greater resources and training in relation to record-keeping. The documents that are kept in *keucik* offices include letters confirming land rights, letters of land sale and inheritance-related land subdivisions. These records are often incomplete and poorly indexed. There is relatively little coordination with sub-district offices and BPN in relation to record-keeping. As with sub-district offices, it is recommended that greater assistance be provided for record-keeping in relation to land in *keucik* offices.

## 5.2 Village Government: Transparency, Accountability and Impartiality

Local institutions will remain the primary mechanisms for dispute resolution in the foreseeable future. More steps are warranted to enhance their transparency, accountability and degree of impartiality. While *keucik*, in particular, are accountable by virtue of proximity to their community, there are some reports of village elites and allegedly appropriating or selling land without community consent, or (more frequently) manipulating reconstruction to accumulate housing or channel monetary entitlements to themselves or their associates. Our field research also indicates that the *keucik* and village *imam* at times failed to understand the application of Syariah law to complex and inheritance cases, often involving women, or failed to prevent male relatives from denying the legitimate inheritance entitlements of widows and female-headed households. These findings are set out in the paper in this series on women's rights to land in tsunami-affected Aceh.

It is recommended that:

- Public awareness campaigns continue to provide basic information about rights to land after the tsunami, and mechanisms for advice and redress should individuals or groups disagree with a local-level decision.
- Legal and women's rights NGOs continue to receive external funding, with a particular focus on rights and redress relating to land decisions at the local level.

## 5.3 Village Government: The Effects of Conflict and Disaster

UNDP research indicates that, in some conflict-affected areas, local dispute resolution institutions have been undermined by lingering mistrust and grievances involving anti- and pro-Indonesian government residents. This has particularly in the case where anti-government forces (Gerakan Aceh Merdeka – “GAM”) encouraged dispute resolution through *adat* as a means of disengaging from the formal justice system. In other areas, especially in Banda Aceh, the tsunami itself affected local institutional capacity through the deaths of experienced leaders, and their replacement by individuals lacking in community trust. UNDP notes that the government-appointed Council of Acehnese Custom (Majelis *Adat*

Aceh) is supposed to liaise with *adat* leaders, but that its activities have been limited by a lack of funds and membership capacity.<sup>26</sup>

In addition to further training and support for *keucik*, it is recommended that implementing regulation be developed for Perda 7/2000, Qanun 4/2003 and Qanun 5/2003. These regulations should clarify:

- The way in which statutory land titles, and state administrative actions, interact with rights and processes based on local custom.
- The procedure to be followed for dispute-resolution through customary mechanisms.
- The circumstances in which *keucik* are not authorised to mediate or adjudicate disputes.

A series of recommendations are made in Part VII below to encourage greater monitoring of village government decisions through civil society activity.

## 6 THE COURT SYSTEM

### 6.1 The General Courts

The General Courts in Aceh have been severely affected by the conflict and tsunami. At the height of the conflict, some reports stated that no Court on mainland Aceh was fully functional.<sup>27</sup> In August 2003, a draft UNDP Access to Justice assessment commented that:

“The justice system in Aceh has virtually collapsed, partially as a result of the ongoing conflict, and partially as a result of institutional failure”.<sup>28</sup>

The tsunami badly damaged the District Courts in Banda Aceh and Meulaboh.<sup>29</sup>

As noted, the vast majority of land-related disputes are resolved within the village or at the village government level. Those disputes that go beyond the village tend to involve the sub-district head, or increasingly the provincial Parliament, rather than the Courts themselves. Whether true or not, most Acehnese believe that the General Courts are susceptible to corruption and overly expensive. As with other Indonesians, they are cautious about applying winner/loser models of adjudication to local land disputes that involve significant issues of livelihoods and social insurance. For the reasons discussed below, this paper supports

<sup>26</sup> See UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, pp.7.

<sup>27</sup> See UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, pp. 21-22 (citing Human Rights Watch, *Indonesia: The War in Aceh*, pp.34-35; Human Rights Watch, *Aceh at War: Torture, Ill-Treatment, and Unfair Trials*, Vol. 16, No. 11, September 2004 (Human Rights Watch: Asia Division, 2004).

<sup>28</sup> UNDP - Indonesia. "Access to Justice - A Review of the Justice System in Aceh, Indonesia." August 2003. at 6

<sup>29</sup> UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, p. 69.



proposals to transfer of jurisdiction over land disputes from the General Courts to the Syariah Court.

## 6.2 The Syariah Court

Perda 7/2000 states that Syariah law is the benchmark for determining and applying *adat* in Aceh. The application of Syariah law to Aceh is a product of special autonomy. Law No 44 of 1999 allowed the application of Syariah law in Aceh, and Law No 18/2001 allowed the establishment (or re-establishment) of Syariah Courts. Under Qanun 10/2002, the Syariah Court has jurisdiction *inter alia* over inheritance, guardianship, and the legal status of missing persons. While it does not have jurisdiction over land rights (See Law No 7/1989, article 50), it may make land ownership determinations when they form part of a larger inheritance dispute (See Law 3/2006 amending Law 7/1989 on Religious Courts). Further extension of the Syariah Courts authority over land matters may occur pursuant to regulations promulgated by the provincial Parliament (DPRD).<sup>30</sup>

By May 2006, the Syariah Court had verified over 1922 inheritance determinations as a result of the RALAS process.<sup>31</sup> This process involved family members of a deceased landowner completing a standard form that identified the heirs, and the land that they had inherited. The agreement had to be acknowledged by both the *keucik* and the village *imam*.<sup>32</sup> Although our village head informants identified a large number of inheritance disputes at the family and village levels, very few inheritance or guardianship disputes resolution in the Syariah Court itself. Hence, the official Court figures are that by May 2006 only 12 inheritance cases arising from the tsunami had been brought before the Banda Aceh Syariah Court, and only 9 cases have been brought before the Jantho Syariah Court.<sup>33</sup> Moreover, at least according to one Judge, there had been no appeals at all from RALAS inheritance agreements and their verification by the mobile Syariah Court, as none of the inheritance cases before the Banda Aceh Syariah Court involved a dispute as to the inheritance of land. Most cases concerned bank accounts.<sup>34</sup> Again, this result highlights the strengths of the village-based processes incorporated into the RALAS project.

In interviews with judges of both the courts, the following reasons were advanced for this extraordinary lack of recourse to the judicial system.

- Most Acehnese do not fully understand the roles and functions of the Courts.
- There is still a great deal of trauma among victims of the tsunami, which means that they do not want to allocate and adjudicate rights to remaining property.

<sup>30</sup> By Decision KMA/070/SK/X/2004 the Chief Justice of the Indonesian Supreme Court endorsed increased jurisdiction for the Syariah Court over civil matters (*muamalat*), so long as this jurisdiction was authorised by provincial regulations. The new 1997 Law on Governing Aceh (art. 128 (4)) also contemplates provincial regulations to expand the jurisdiction of the Syariah Court. For a discussion see UNDP, *Making the Transition to Sustainable Peace and Development in Aceh* 36.

<sup>31</sup> See Harper, Fitzpatrick and Clark, *Land, Inheritance and Guardianship Law in Aceh*, International Development Law Organisation 2006, p. 72.

<sup>32</sup> BPN RALAS Manual, Annexure 4.

<sup>33</sup> Ibid, p. 72.

<sup>34</sup> Interview Banda Aceh Syariah Court Judge, IDLO Interviews.

- Orphans have not been "brave" (*berani*) enough to pursue their rights.
- Village-level conflict resolution mechanisms had proved very effective, particularly under the RALAS project.<sup>35</sup>

The Banda Aceh Syariah Court judge also noted that a Court determination would rarely "create peace" at the local level. She recommended greater incorporation of formal mediation into the Court system.

While very few land disputes have made it to the Syariah Court since the tsunami, as part of its jurisdiction over inheritance and guardianship matters, our field observations confirm the findings of a survey undertaken by UNDP that the Syariah Court is regarded as considerably more trustworthy and transparent than the General Courts.<sup>36</sup> UNDP also reports that the quality of record-keeping is far better in the Syariah Court than the General Courts.<sup>37</sup> Over time, it is very likely that the Syariah Court will gain greater resources and jurisdiction in relation to land at the expense of the General Courts. The Syariah Court will be a key institution in the emerging governance patterns of autonomous Aceh. It has little to do with the activities of the Syariah police, who operate under the jurisdiction of the government Syariah office. It is recommended that further support be given to the Syariah Court in Aceh, particularly in relation to the development of a mediation function. This support acknowledges that a focus on local conflict resolution mechanisms alone will not resolve all land-related conflicts in Aceh, and may in fact leave local mechanisms lacking in adequate oversight and appeal institutions.

In developing support programs for the Syariah Court, the following capacity limits identified by UNDP should be taken into account.

- Poor infrastructure and administrative procedures, a shortage of personnel, logistical support materials and computers, and poor information and case management systems.
- Confusion over the territorial jurisdiction of district Syariah Courts as a result of mergers and divisions among certain districts in Aceh.
- Potential threats to independence as a result of proposed funding arrangements under the Law on Governing Aceh Act.
- A relative lack of public awareness relating to the Syariah Court.

<sup>35</sup> Interviews with a Jantho Syariah Court Judge and a Banda Aceh Syariah Court Judge, IDLO Interviews.

<sup>36</sup> UNDP, *A Review of the Justice System in Aceh, Indonesia*, p. 34. See also Asia Foundation, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations* (Jakarta: Asia Foundation and AC Nielson, August 2001).

<sup>37</sup> UNDP – Indonesia, "Access to Justice: A Review of the Justice System in Aceh, Indonesia", August 2003, p. 38.

## 7 STRENGTHENING THE LAND MANAGEMENT AND INFORMATION SUPPORT ROLES OF CIVIL SOCIETY

This report has recommended substantial programs of government assistance because government agencies, including village officials, are in the front-line of restoring and confirming land rights in tsunami-affected in Aceh. This approach builds on the fact that, in many cases, civil society organisations are not legally or institutionally capable of substituting for specific land-related governmental roles and responsibilities. However, there are risks in providing funds to institutions that at times may be lacking in transparency. Thus it is essential that the government assistance recommendations in this report be complemented by civil society-based monitoring and advocacy mechanisms.

In this paper, and other papers in this series, the following land-related issues have been identified as requiring particular monitoring and advocacy attention:

- Re-locations due to spatial planning decisions, or loss of habitable land.
- Compensation for re-located communities, those who have lost land, and those whose land is expropriated for tsunami-protection purposes.
- The need to identify and regulate the duties of guardian institutions that hold rights to land on behalf of orphans.
- The vulnerable status of women's rights and secondary rights-holders (lessees etc), including in the context of housing and land titling programs.
- The inheritance entitlements of children, widows and female-headed households.
- The need to evaluate and monitor the impact of titling on customary land institutions.
- Access and rights to common property resources (maritime areas, fringing reefs and forest lands) by local communities.

This paper recommends long-term support for the following NGOs able to provide legal, mediation and information services relating to land.

- Gender Transformation Working Group/*Kelompok Lerja Transformasi Gender Aceh/KKTGA* (gender/domestic violence)
- *Mitra Sejati Perempuan Indonesia/MISPI* (gender)
- FLOWER (gender)
- *Koalisi NGO HAM* (human rights/judicial monitoring)
- *Peduli HAM* (human rights/judicial monitoring)
- *Lembaga Bantuan Hukum* (human rights/judicial monitoring)
- *TAMASAYA/Tim Advokasi untuk Masyarakat Sipil* (human rights/judicial monitoring)
- *PB HAM* (human rights/judicial monitoring)

- JKMA Aceh/*Jaringan Komunitas Masyarakat Adat* (cultural protection)<sup>38</sup>
- Aceh Judicial Monitoring Institute (legal/judicial monitoring)
- GERAK/*Gerakan Anti-Korupsi* (anti-corruption/judicial monitoring).<sup>39</sup>

This paper also recommends support for a non-governmental land monitoring and advocacy council in Banda Aceh. This council would provide high-level policy advice and advocacy to government agencies in relation to land rights. It would also have a strong media information component to publicise cases/abuses and advocate policy recommendations.

## 8 TWO LEGAL ISSUES: THE DEFINITION OF STATE LAND AND THE ACQUISITION OF LAND BY THE GOVERNMENT

This part considers two legal issues: the definition of state land and the acquisition of land by the government. Both these issues have been prominent in land disputes that have arisen after the tsunami.

### 8.1 The Definition and Delineation of State Land

The definition and extent of state land in Indonesia is not clear. State agencies are not required to register their land interests with BPN, or engage BPN to survey the boundaries of those interests. In Aceh, as in other parts of Indonesia, there are no maps that clearly delineate the extent and boundaries of state land. To date BPN has declined offers of assistance to produce such maps, largely because - aside from political obstacles - the definition of state land in Indonesian law leaves but too much room for variable interpretations. In Indonesian law, the state has a right of control over land and natural resources. It is not clear whether this is a public right to regulate land matters, or a private law right to hold interests in land. As it is interpreted, the state's right of control allows the state to claim all land that is not residential or subject to constant forms of use (so-called "free state land"), and all land subject to customary rights that are not recorded in the land register (so-called "not free state land"). Taken together, this claim to state land potentially encompasses all land in Indonesia other than land parcels registered in the national land titles register.

This extremely broad interpretation is facilitated by underlying uncertainty over the nature and status of private rights to land in Indonesia. Unlike common-law systems, Indonesia and law does not recognize property rights that arise through occupation alone, or provided for acquisition of title to land through "adverse" possession. In other words, people who have been in long-term occupation of vacant or state land, without either an agreement from the owner (e.g. under lease) or any attempt to evict them, do not acquire rights by reason of that occupation. While (in theory) claims against occupiers may be time-barred after 30 years, examples abound in Indonesia of long-term occupiers, some of whom have been paid land tax and been in possession for more than 30 years, being evicted on the basis that they do not have formal rights to their land.

<sup>38</sup> JKMA is working with BRR and PuGAR (*Pusat Gerakan Rakyat*) on a program of institutional strengthening for *imam mukim*, including their role in raising awareness of *adat* law. UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, p. 53.

<sup>39</sup> This list of NGOs may also be found in UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, p. 53.

Similar cases have arisen in Aceh. For example, Serambi Pos - Aceh's leading newspaper - reports that in Panggong village, Aceh Barat, 36 households were refused housing offered by an international NGO because their pre-tsunami houses had been built on land allegedly owned by the district Government. While they had been living on the land for 40 years, the district government claimed that the householders had only ever received a revocable license to occupy.<sup>40</sup> In a similar case reported by UNDP, local fishermen in an unidentified village had lost their houses and their land records, including evidence of land and building tax payments, in the tsunami. They had no land title certificates. The district government wanted them to relocate, ostensibly for safety reasons, and argued that the fishermen were living on state land. As a result, the fishermen and their families were reportedly moved several kilometres inland to a location that made it difficult to access their primary source of livelihoods.<sup>41</sup>

Even customary rights to land lack a secure legal foundation in Indonesia. In theory, most individually held *adat* rights to land were converted into statutory interests by the Basic Agrarian Law 1960. But a definitive list of converted *adat* rights has never been produced, and hence there is no certainty as to which *adat* rights in which locations have been converted into statutory rights. To compound this uncertainty, the status of rights to land occupied and used in *adat* areas after 1960 remains determined by ad hoc forms of state recognition rather than underlying principles of private law. In the event, most landholders that have acquired or derived their land through clearing or occupation after 1960 do not hold clear private property titles. This is further compounded by the fact that at least 75% of all recognized property titles in Indonesia remained unregistered, which means that there is a very vague dividing line between unregistered (but recognized) titles and unrecognized occupation-based interests.

A major land dispute in the village of Lambaro Skep, Aceh Besar, illustrates the difficulties that arise when undocumented customary claims to land are met by claims of acquisition by a powerful state agency. This dispute involves a claim to local land by the Indonesian Armed Forces (TNI). The dispute goes back some years, but has emerged with particular force after the tsunami and the subsequent peace agreement. TNI claims that it owns the land. It uses the land as a shooting range. According to interviews with local informants, there is no documentary proof of the TNI claim other than a map indicating the location of the driving range (although there are some suggestions that TNI may be a successor to a "management right" (*hak pengelolaan*) held by the Dutch military in colonial times). In particular, there are no documents describing the process of land acquisition by the government (*pengadaan tanah*). For their part, local villagers claim that the land is their own but their rights are not documented because the land is ancestral land. There are no easy solutions to this dispute, other than through mediation, because the underlying validity of each claim remains susceptible to multiple legal interpretations.

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<sup>40</sup> Serambi Pos, 3 December 2005, *Huni tanah Pemkab pengungsi terancam tak dapat rumah*.

<sup>41</sup> UNDP, Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development, October 2006, p 26.

It is recommended that the new provincial government of Aceh issue a law that:

- provides clear delineation of areas in which customary rights and law are to retain unqualified validity;<sup>42</sup>
- provides a clear definition of the "state's right of control" as it applies to Aceh, particularly by distinguishing between the public law right to regulate land, and a private law right to hold interests in land.
- requires all state agencies in Aceh to lodge documents describing their interest in state land with BPN or its provincial equivalent; and
- embarks on a process of mapping all state land in Aceh, on the basis of documents lodged by state agencies.

## 8.2 Land Acquisition by the Government

Land acquisition by the government has also been a major cause of land disputes in tsunami-affected Aceh. It is by far the most prominent source of newspaper reports on land conflict, and a number of roads have been blockaded at various times by disgruntled recipients (or non-recipients) of compensation. These blockades and protests have particularly affected construction of the new USAID-funded coastal road from Banda Aceh to Meulaboh. Land acquisition has been an obstacle to reconstruction because it hindered the rapid and conflict-free assembly of land for resettlement and infrastructure.

The law and practice of land acquisition by the government has caused significant conflict across Indonesia. These conflicts stem from procedural weaknesses, particularly in relation to consensual negotiation with landholders, and substantive omissions to pay market value for acquired (or "released") rights to land. Post-tsunami land acquisition disputes in Aceh are similar in degree and kind to those experienced in other parts of Indonesia.

There have been a substantial number of reported disputes over the payment of compensation for the acquisition of land by the government both before and after the tsunami. Almost all these disputes involved district governments, rather than BRR itself.<sup>43</sup> These disputes involve allegations that certain landholders were not parties to the compensation agreements; or that payments have either been delayed by disputes or not forthcoming at all. In one case in Blang Pidie, Abdya District, landowners allege they are still waiting for more than half of the promised compensation payments for land that had been acquired by the government in 2004.<sup>44</sup> In Aloe Naga, a village in Banda Aceh that has been heavily affected by inundation, conflict has arisen over compensation for land outside an area acquired by the government because this land is no longer productive as a result of the tsunami.<sup>45</sup>

<sup>42</sup> This is the approach adopted in Malaysia - a country that has enjoyed relative success in incorporating customary interests into a national system of land registration and regulation.

<sup>43</sup> In fact, according to a number of informants, the Land Unit in BRR has worked hard to ensure that negotiations are consensual, and that compensation payments approximate official valuations (if not market value in itself).

<sup>44</sup> Serambi Pos, 4 January 2006, *Warga ABDYA unjuk rasa tuntutan percepatan ganti rugi lahan, proses dilapangan dinilai pilih kasih*.

<sup>45</sup> Serambi Pos, 13 juli 2006, *Soal ganti rugi proyek tanggul bayar atau bongkar*.

Space does not permit a comprehensive evaluation of land acquisition law in Indonesia, including its application to Aceh. There are no easy solutions to land acquisition disputes in Aceh. In brief, however, the disputes that have arisen in Aceh highlight the following problems.

- Underlying uncertainty in Indonesian law as to the status of customary and unregistered rights to land can create loopholes through which compensation is not paid to affected landholders, or is reduced on the basis that the landholders have no legal rights to land.
- Underlying uncertainty in Indonesian land administration as to the boundaries of state land, and the mechanisms by which unregistered rights to land are to be identified and verified, creates substantial practical difficulties for Indonesian officials that seek to negotiate land acquisition and compensation with affected landholders
- As in many post-conflict and post-disaster contexts, land values in areas slated for infrastructure or resettlement activity have increased substantially since the disaster. In many cases, landholder expectations of compensation have been substantially greater than official valuations for their land.
- Early in the reconstruction process, the pressure to acquire land quickly for resettlement and infrastructure may have led some district governments to take unwarranted shortcuts in identifying suitable land, and negotiating with affected landholders.
- Early in the reconstruction process that was a mismatch of incentives because district governments have acquired most land for reconstruction, while payment for the land acquisition was made by BRR. As a result, district governments did not had sufficient institutional incentives to acquire the best land at the best price.

It is recommended that the provincial government of Aceh develop further regulations concerning the valuation of compensation for land acquisition, the mechanisms for payment to landholders, and comprehensive safeguards to avoid official conflicts of interest. Special attention should be paid to the difficulties that arise when identified land is not registered with BPN. The institutions of land acquisition should also be rearranged so that the authority to acquire land is matched with funding obligations for land acquisition. These recommendations are designed to be implemented in conjunction with other recommendations in this policy paper series, in particular the paper on resettlement in tsunami-affected Aceh.