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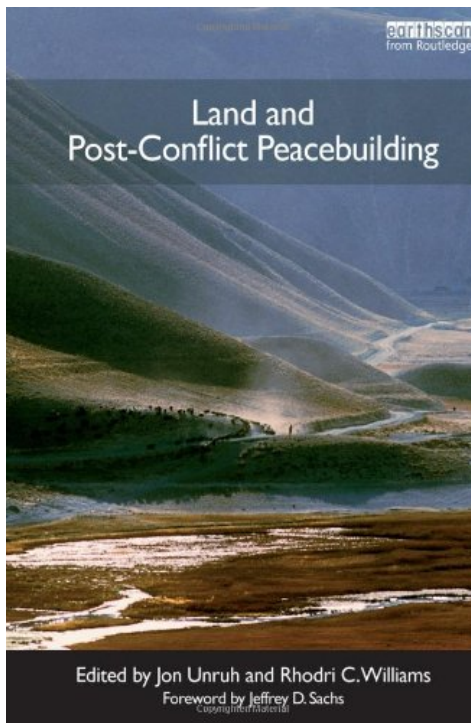
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Institutional aspects of resolving land disputes in post-conflict societies

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Institutional aspects of resolving land disputes in post-conflict societies

Peter Van der Auweraert

The international humanitarian and peacebuilding community's engagement with post-conflict land disputes—and with land issues more broadly—has grown considerably since the end of the Cold War, and especially since the Yugoslav conflicts of the 1990s.¹ Although interventions have mostly focused on conflicts that were accompanied by large-scale forced population movements, the notion that building a lasting peace often requires engagement with land issues is no longer as alien as it was ten or fifteen years ago (Leckie 2009; Moore 2010). Indicators of this greater recognition include an increase in normative work within the international community since that period,² as well as a growing number of handbooks, guidelines, and trainings that the international community continues to develop to assist its professionals in dealing with post-conflict and post-disaster land issues (Pons-Vignon and Lecomte 2004; UN-HABITAT 2007, 2010; Wehrmann 2008). This chapter is a modest contribution to wider efforts to improve knowledge sharing and integration of lessons learned from experiences in post-crisis land programming and other interventions.³

Land disputes are competing claims between or among individuals, communities, and state authorities about access to, control of, or use of certain pieces of land. All types of land can be subject to such competing claims, including urban land, rural land, constructed land, and land containing high-value natural resources.

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¹ For the sake of readability, the remainder of this chapter will employ the term *international community* to refer to the international organizations and nongovernmental organizations that are active in humanitarian assistance and peacebuilding.

² A prime example is the 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, better known as the Pinheiro Principles. This set of principles was endorsed by the United Nations Sub-commission on the Promotion and Protection of Human Rights on August 11, 2005.

³ The Housing, Land and Property Working Group of the Global Protection Cluster is intended to play a key role in this respect. See www.humanitarianreform.org/Default.aspx?tabid=434.

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Not all land disputes require special attention in peacebuilding or post-conflict recovery efforts. Land disputes occur even in the most peaceful societies, and unnecessarily dramatizing those that pose little or no risk to the long-term peace can have as adverse an effect as ignoring land disputes that do pose a threat (Alden Wily 2009). The key consideration is whether a set of land disputes has the potential to derail or undermine short- or longer-term peacebuilding efforts and to reignite the conflict; this has to be assessed afresh in each post-conflict situation.

There are, however, a number of general factors indicating that a land dispute poses a threat to peace. A land dispute may be a threat to peace in a post-conflict situation if access to or control over the use of land or the natural resources underneath it was one of the root causes or drivers of the conflict; if the conflict was accompanied by mass displacement, and the cessation of violence is triggering a rapid return of the displaced population; if the conflict was accompanied by large-scale land grabbing by the belligerent parties or by the population itself (for example, in the case of sectarian conflict); if the conflict was accompanied by widespread destruction of homes or livelihoods; or if the conflict caused the collapse of pre-conflict dispute resolution mechanisms. It is when land conflicts pose a threat to long-term peace that the international community often steps in to assist with their resolution.

The chapter begins by reviewing institutional options for resolving post-conflict land disputes. It stresses the importance of first understanding the political aspects of land disputes before making institutional choices. Three proposals are then introduced to improve the integration of local political considerations into the dispute resolution process: (1) the development of a standard assessment methodology that focuses on specific social and political dynamics in a given land dispute situation; (2) the establishment of multidisciplinary teams to work on dispute resolution projects; and (3) the maintenance of robust political engagement after resolution policies have been approved. These three proposals are then reviewed and evaluated on the basis of their practicability. The chapter concludes by stressing the importance of conducting a detailed analysis of the dispute resolution process, using the Property Claims Commission in Iraq as an example.

OPTIONS FOR RESOLUTION OF LAND DISPUTES

Many types of institutional arrangements can be used to resolve post-conflict land disputes, with the local situation and the nature of the disputes being the principal factors that will determine what is likely to work best in a given situation.

One concrete option is the establishment of an ad hoc land or claim commission that has exclusive jurisdiction over a defined post-conflict land-dispute file. Recent such commissions include the Commission for Real Property

Claims of Displaced Persons and Refugees in Bosnia and Herzegovina,⁴ the Property Claims Commission in Iraq,⁵ and the Housing and Property Claims Commission in Kosovo.⁶ Despite their common denomination, ad hoc commissions can strongly differ from one another—for example, in terms of the rules and procedures under which they operate and the constitution of their decision-making bodies, which can be entirely national, entirely international, or a mixture of both.

The local judicial system constitutes another possible institutional avenue for resolving post-conflict land disputes, although in most cases the courts will require significant additional resources to deal with the additional, often complicated caseload. In Colombia the national court system has played an important role in relation to land claims from internally displaced persons (Elhawary 2007).

Dispute resolution mechanisms that are based on customary law or tradition may also provide an institutional solution—where they exist, as they do in Côte d’Ivoire (McCallin and Montemorrow 2009). They will be especially relevant in countries where state institutions are weak or ineffective and where, in practice, land relations are mostly governed by customary law.

Finally, there are situations where a multi-institutional approach is the best available option. In Burundi, for example, post-conflict land disputes are addressed by the civil courts, the National Commission for Land and Other Properties, dispute resolution mechanisms based on customary law, and targeted community-based mediation efforts, usually supported by international or national civil society organizations (Theron 2009).

Political considerations

The political aspects of post-conflict land disputes should be one of the international community’s central concerns in advising or programming. This holds

⁴ The Commission for Real Property Claims of Displaced Persons and Refugees was created under Annex VII of the General Framework Agreement for Peace in Bosnia and Herzegovina, better known as the Dayton Peace Agreement. For a technical description of this commission, see IOM (2008). For an in-depth analysis, see Williams (2005).

⁵ The Property Claims Commission was established in February 2010 to deal with land disputes emanating from widespread property confiscations and politically motivated expropriations by the Baath Party regime. The Property Claims Commission is the successor organ to the Commission for the Resolution of Real Property Disputes (CRRPD), established in 2006, which was itself a successor to the Iraq Property Claims Commission, established by the Coalition Provisional Authority in 2004. All three commissions had virtually the same mandate, but there were some important differences. On the CRRPD, see Van der Auweraert (2009). On the differences between the respective mandates of the Property Claims Commission and the CRRPD, see Van der Auweraert (2010b).

⁶ The Housing and Property Claims Commission and the Housing and Property Directorate were both created by the United Nations Interim Administration Mission in Kosovo in 1999 (IOM 2008). For an assessment of the land and property situation in Kosovo, see Tawil (2009).

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true both when the international community is making or advising on the best institutional choices available and when it has been asked to provide support to the institutional arrangements chosen by local political leaders.

Usually the international community becomes involved in post-conflict land disputes where the conflict was accompanied by large-scale forced displacement and subsequent occupation of the displaced population's land by others. On the one hand, a durable solution for the displaced population is necessary, and on the other hand, a way must be found to prevent a reigniting of the conflict when returnees find their land occupied or controlled by others.

When looked at against this background, the core of such land disputes appears to be a clash of rights between the returnees and the current occupiers of the land. The principal challenge of resolving such a clash is to find ways of determining who holds the prevailing right over the land under dispute. For this a set of ground rules is necessary. The international community's principal normative framework in this respect is expressed in the 2005 United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, better known as the Pinheiro Principles. This set of principles articulates a rights-based vision of land disputes that puts a heavy premium on the restitution of the rights of the displaced and hence on a return to the pre-conflict land situation.

Restitution, however, can be a problematic remedy for land and property rights violations, especially when there has been protracted displacement. There are instances where restitution would be neither just nor in the interest of peace (Ballard 2010). This would be the case, for example, where prior to the conflict land was concentrated in the hands of a small, elite group or where discriminatory land and property relations were at the center of the conflict. Furthermore, an exclusive focus on the question of rights may overlook the fact that for local people, land disputes involve many issues other than just differing opinions about who has the strongest right to the land in question. Those issues are often deeply political, and if they are important enough, they will strongly influence how local people proceed.

Four local issues are particularly common: a close connection between landholding and the ability to exercise political power; disputes over land that has important symbolic or emotional value; competing and incompatible visions of post-conflict economic development; and structural inequalities in relation to access to and control over land.

Connections between landholding and political power

A connection between landholding and the ability to exercise political power can play out at both the level of the people who control and govern the country, in which case large landholdings can be translated into far-reaching political power, and at the level of local communities, where differences in social status and influence are frequently linked to the size of landholdings, especially in agrarian societies. In such situations certain parties will often have used the conflict to fundamentally alter land relations and thereby political power structures. People who have succeeded

in doing this will usually be extremely reluctant to let go of their spoils of war and will rarely, if ever, accept abandonment of the land simply on the basis that someone else has a legally stronger right. A prime example are the recent conflicts in the Democratic Republic of the Congo, where control over land containing high-value natural resources played a key role in the ability and motivation of the different parties to engage in horrifically violent conflict (Prunier 2009).

Symbolically and emotionally valuable land

When land has significant symbolic or emotional value to its present or former owners or occupiers, communities may pressure parties in a land dispute not to relinquish their claims so as not to weaken the community's hold on a certain area.⁷ For example, in the disputed Ninewa and Kirkuk provinces in Iraq, minority communities pressure former owners not to give up their claims even if the parties would be happy to opt for compensation instead. A similar situation has been playing out in Cyprus, where Greek Cypriots who lost property through the partition are being discouraged from accepting compensation for their loss rather than restitution (Gürel and Özersay 2006). For indigenous communities the relationship with ancestral land is often deeply interwoven with the community's identity and worldview.

Moreover, political entrepreneurs may use the symbolic or emotional value of land to continue agitating their fellow community members even after the cessation of violence. For example, when ethnic, tribal, national, or religious groups try to expand their power and influence in the new post-conflict society, any policy to resolve land disputes will need to integrate these symbolic or emotional aspects of land. A strictly rights-based approach, wherein a court or courtlike institution authoritatively declares who wins and who loses, will fail to durably resolve the dispute and may become a source of further or renewed violent conflict.

Competing visions of post-conflict economic development

When there are competing and incompatible visions of post-conflict economic development, a substantive choice must be made between those two visions, or the parties must arrive at a compromise that takes the visions of both sides into account. A typical example of this sort of situation is a clash between post-conflict leaders who support the expansion of agribusiness and subsistence farmers who are being pressured to give up their land (Daniel and Mittal 2009). In South Sudan, for example, land deals concluded between local power holders and foreign investors since the completion of the Sudanese Comprehensive Peace Agreement in 2005 threaten the land rights of small-scale farmers and farming communities (Africa Review 2011).

Such substantive choices underlying the resolution of post-conflict land disputes are not always openly debated, however. In Iraq, for example, the

⁷ For an analysis of social identity, natural resources, and peacebuilding, see Green (2013).

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potential impact of large-scale land restitution on the equality of distribution of land among the population, or on land management more broadly, has received very limited attention. Mostly the establishment and workings of the Property Claims Commission are discussed only from the perspective of the right to a remedy for land and property rights violations committed by the former regime (Van der Auweraert 2010).

Structural inequalities

Structural inequalities with regard to access to and control over land are often a factor when former owners attempt to reverse land gains that the formerly dispossessed made during the conflict. The former owners may accomplish this by invoking the concept of restitution, which is central to the international community's normative framework for resolving land disputes. In such situations, policy discussions about how to resolve the land disputes should focus not only on the question of legal primacy, but also on the more fundamental question of whether or not to accept the land redistribution that has taken place during the conflict.

For example, in the case of Timor-Leste, the technical difficulties of determining what rights should prevail when there are competing land claims are often cited as a key reason why, more than ten years after Indonesia withdrew, the country still has no transitional or permanent land law. This argumentation, however, hides a much more fundamental dilemma and disagreement about how land should be distributed in the country. Primacy of Portuguese over Indonesian land titles and, especially, over current informal occupation would mean, for example, that in the capital, Dili, the majority of land would be owned by a few very large landowners. Recognition of the primacy of peaceful occupation over earlier, formal property titles, on the other hand, would result in a broad distribution of small pieces of land among the population currently living in the city (ICG 2010; Fitzpatrick 2002; Van der Auweraert 2008).⁸

Institutional choices

Regardless of the nature of its engagement with a given post-conflict land dispute, the international community should care about the foregoing political considerations for several reasons. First, understanding the political situation can help

⁸ One common structural inequality that does not always have a direct link to the risk of more conflict is gender inequality with respect to access to and control over land—for example, when the local normative framework ties women's land rights to those of their husbands or other male relatives. Such situations violate the right to nondiscrimination on the basis of gender, which is enshrined in human rights conventions, and it may cause serious survival issues. Where the violent conflict has caused the number of female-headed households to rise, such households may end up with no livelihood possibilities unless the normative framework governing land is drastically changed (UNCHS 1999).

the international community to ensure that decision making regarding the dispute is as inclusive as possible. Unless it has a good grasp of who the different parties are, including their respective interests, power, and influence, it will have a hard time determining whether local decision-making processes are sufficiently diverse, or are exclusionary and dominated by the powerful few.

In Kirkuk, Iraq, for example, one key component of the United Nations Assistance Mission to Iraq's support to the local people's efforts to resolve multiple land issues has been to push for a decision-making process that equally involves all three main communities in the governorate (Arabs, Kurds, and Turkmen) and addresses the concerns of these three communities. Exclusionary decision-making processes, by contrast, can further inflame sectarian tensions.

The international community's use of its political leverage to advocate for an inclusive decision-making process can be crucial in situations where many factors work against inclusivity, such as a central government's desire to reassert itself after the conflict is over and to centralize power as much as possible,⁹ or victorious leaders' belief that they do not need to consult anyone outside their own circles but should start by safeguarding their own interests. Although sometimes little space is available for the international community to promote inclusivity, frequently the post-conflict administration depends heavily on the international community for guidance and resources, giving it a window of opportunity to weigh in on the broadening of the decision-making process (Alden Wily 2009).

Another reason the international community should pay attention to political considerations is that in order to assess what type of institutional arrangements are likely to work best, it must be able to contextualize these arrangements in the local political landscape. Of course, in most post-conflict circumstances, local people will decide on the institutional arrangements to be used for addressing land disputes—as they should. It is not uncommon, however, for local people to look to the international community for technical advice and input in this respect. Moreover, the international community often has an important role in funding those institutional arrangements, and this will also require an assessment of the suitability and likely success of various institutional options.

For example, the international community should consider the legitimacy and authority that different institutional arrangements are likely to have in the local communities they need to operate in. No blueprints or guarantees exist in this respect, at least in part because authority and legitimacy tend to fluctuate over time and often witness dramatic changes during a conflict, so empirical assessments are necessary (NRC 2010). The international community is ill-advised to either look solely to state institutions or embrace traditional or customary dispute resolution mechanisms without first investigating how local people feel about the institutions in question.

⁹ Centralization is not pursued only by local leaders. International initiatives also sometimes focus on the central government alone. With respect to Afghanistan, for example, see Jones (2010).

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An understanding of political considerations is also important for the establishment of new, special-purpose institutions like land commissions, which may need to have particular features to gain acceptance by local people who have particular expectations regarding dispute resolution mechanisms. For example, many Iraqi lawyers working with the Property Claims Commission in Iraq perceive mass claims-processing techniques as incompatible with due process, so the commission has been reluctant to embrace such techniques, even though they would considerably increase the efficiency and expediency of the commission's work.¹⁰

A related question that is difficult to assess without an understanding of the political situation is the extent to which available institutions are likely to have an inherent bias toward one of the parties in a land dispute and hence, without reform, may be unsuitable for playing an important role in resolving post-conflict land disputes. This can vary from one country to another. National courts, for example, may be subservient to large landowners' interests in one location but able to function in a neutral and objective way in another.

Finally, it is important for the international community to know where the resistance points are likely to be once the institutional arrangements start operating so it can play a constructive role in monitoring and in addressing problems that may arise in the process of resolving land disputes. One of the key challenges in the implementation of the proposed land restitution provisions in the Colombian Victims Law is likely to be resistance by local institutions that are dominated by large landowners and by commercial interests that stand to lose from a widespread restitution process for the benefit of the internally displaced population in Colombia (Blomqvist 2010).

It is not uncommon for resistance to land dispute resolution to continue throughout the implementation period. Such resistance can manifest itself in many different ways, from obstruction, to intimidation and bribery, to the use of violence to prevent the enforcement of decisions in particular land dispute cases. This is an area in which the international community can sometimes play both a preventive and a curative role, for example, by ensuring sufficient political engagement with those who are likely to disrupt the process of resolving land disputes. But, again, it can only do this if it has a clear understanding of the wider political picture, including the different stakeholders' positions, local standing, and likely political methods.

Such political engagement requires an extensive local network and sufficient staff and resources to continuously engage with this network throughout the implementation period. Projects that are intended to support policy implementation for land dispute resolution too often allocate their resources only toward the technical work, with little or no staff allocated to carrying out the political component of the effort.

¹⁰ On the use of mass claims processing in post-conflict situations, see Holtzmann and Kristjánssdóttir (2007).

Three proposals

Three actions may improve the international community's ability to integrate local political considerations into its work of supporting resolution of post-conflict land disputes: the development of a standard assessment tool that focuses on specific social and political dynamics in a given land dispute situation; the establishment of multidisciplinary teams to work on dispute resolution projects; and the maintenance of robust political engagement after resolution policies have been approved.

Development of a political assessment tool

The existing humanitarian assessment tools with which the international community usually approaches programming and interventions for land dispute resolution tend to have two principal characteristics (OCHA 2009). First, they usually aim to obtain quantitative information, such as the number of land disputes; the number of houses destroyed or occupied by others; and the percentage of land that is owned, rented, or subjected to the right of use. Second, these tools usually address predominantly technical, legal matters, such as the extent to which the displaced population holds formal property titles, the legal regimes that govern land relations, and the types of titles people tend to have over land.

Although these types of assessment are, of course, relevant and important, they provide the international community with little or no information about such issues as the competing interests and views that exist around land and its use; about who the principal parties in the post-conflict land dispute file are, including their respective strengths and weaknesses; or about who the leaders and power holders are in relation to this file. In short, the picture that the international community develops with its current tools may hide from sight many crucial aspects of the setting in which resolution of the land disputes will take place. If assessment is purely quantitative, issues that are of great political importance for local people will at best appear as a distant background that attracts attention only when the issues interfere with planned policies and programs—at which time it may be too late to change course.

One answer to these limitations is the development of a new standard assessment tool that focuses on the specific social and political dynamics surrounding the post-conflict land disputes and land relations in a given situation. With this in its arsenal of humanitarian assessment tools, the international community can enter the complex world of land and land disputes with a proper map. Routine employment of a political assessment tool may have the additional benefit of pushing the international community to think harder about who will win and who will lose as a result of its proposals and projects, and about which parties are likely to resist or support the objectives it wants to pursue. This in turn may provide international organizations with a much clearer picture of what impact their programs and projects are likely to have—and not to have—and the extent to which they are likely to succeed or fail.

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Finally, a political assessment tool may help the international community to better understand that despite its self-perception as a nonpartisan and neutral party, local people may view the international community as very much a political player among others, not least because its actions frequently have a real effect on how power, wealth, and influence ends up being distributed in the new, post-conflict society. This is not, of course, a reason not to engage, but it is an important element that the international community needs to take into account when developing and implementing its projects and programs.

Political assessment is not a one-time exercise. Assessing the specific social and political dynamics surrounding post-conflict land disputes will need to be repeated over time because those dynamics are usually in flux, especially in a transition period. Depending on the available time and resources, such reassessment can range from a desk review of available literature combined with small-scale interviews of relevant parties to much broader and more time- and resource-consuming community consultation and observation processes.

Establishment of multidisciplinary teams

The international community tends to rely too strongly on legal-technical advice and expertise when addressing post-conflict land disputes, with a particular bias toward professionals with human rights backgrounds. Although having a certain background does not, of course, preclude approaching land disputes with multiple viewpoints in mind, an overreliance on people trained in a certain way of thinking risks leaving the international community with a too-narrow view of what the specific disputes are about and how they can be realistically resolved. Therefore, systematic efforts should be made to use multidisciplinary teams to address post-conflict land disputes.

The ideal composition of such teams would depend on the specific situation, but in almost all cases they would need to include specialists in the politics of peacebuilding and conflict resolution, development professionals specializing in land and land administration issues, people with a broad humanitarian background and experience, country specialists, and people with a legal background. Of course, the systematic use of multidisciplinary teams is not by itself sufficient: the leadership in the international community should also insist that any proposed policies or plans be adopted only if they clearly set out their likely political, economic, development, and societal consequences and effects. A multidisciplinary approach is likely to decrease the chance that the international community will fail to integrate broader political considerations into its engagement with a given post-conflict land dispute file.

Maintenance of robust political engagement

The international community has a tendency to reduce, if not abandon, robust political engagement once policies and programs for the resolution of post-conflict land disputes have been approved or adopted, and to focus exclusively on project

or program implementation, including technical support, capacity building, and assistance to vulnerable groups or individuals. In many post-conflict situations, however, there is more political work to be done after the local authorities have agreed to adopt particular laws or policies to resolve post-conflict land disputes.

The political struggle around the resolution of post-conflict land disputes is likely to continue throughout the period of implementation, and it has the capacity to derail, divert, or otherwise undermine what the policies backed by the international community are aiming to achieve. It is for this reason that the international community needs to ensure that implementation is systematically accompanied by sustained, robust political engagement with the relevant local parties. This would put the international community in a better position to anticipate and reduce the adverse effects that negative dynamics can have on the goals it is trying to achieve and to quickly adapt its approach to the almost inevitable changes the local political situation will undergo during the implementation period.

There are a number of ways in which ongoing political engagement can be achieved, and what works best will differ from one situation to another. Key conditions that need to be fulfilled in terms of the internal functioning of the international community include a sufficient political alignment among relevant international organizations on the broad goals of the land dispute resolution effort;¹¹ a shared knowledge and understanding of the political realities on the ground and of the role of the international community; good lines of communication among international parties, especially in the case of communication from the periphery to the center; and allocation of sufficient and capable resources to construct and maintain real local networks and continuously engage with them on the issues that arise during implementation. Securing resources to establish strong local networks and maintain those networks long enough to acquire deep local knowledge may be the most difficult. Retaining staff for a sufficient length of time is especially challenging in complex and difficult post-conflict situations, which are often also the most dangerous ones.

Not all parties within the international community need to play the same part in continuing political engagement. A division of labor can be imagined, for example, between the political sections of UN missions, on the one hand, and specialized agencies and implementing organizations, on the other. The former could be responsible for continuous political engagement with respect to the post-conflict land dispute file, and the latter could focus on providing technical

¹¹ What these goals will turn out to be in a concrete situation depends on the interplay of various factors, including international community policy and practice, as expressed in international law, international soft law, guidelines, handbooks, and internal mandate and policy documents; the priorities and preferences of the donors engaged in the specific situation, and the resources they can make available; the type of international community organizations present on the ground; the policies developed and adopted by local leaders; and the socioeconomic, environmental, cultural, and political particularities of the local situation.

support to the implementation of the relevant policies. Although the often divided and competitive nature of the international community does not facilitate creating and maintaining a platform for common political engagement, this is not, however, impossible to achieve. The still insufficient but nevertheless much improved degree of convergence achieved among humanitarian entities through the humanitarian reform process can serve as an inspiration in this respect.¹²

PRACTICABILITY

Clearly, the particular political features of a set of post-conflict land disputes are not the only factors that should influence which institutional arrangements are chosen and put in place. Additional factors depend in part on the objectives that institutional arrangements are expected to fulfill beyond the peaceful resolution of land disputes. These objectives can include reconciliation between the parties to the disputes or within affected communities, establishing the truth about the land rights violations that occurred during the conflict, and reestablishing the rule of law or the population's trust in the state and its institutions. In the case of peaceful resolution of land disputes, however, practicability is a factor that should have a deep impact on the international community's approach to institutional arrangements.

The term *practicability* refers to the institution's realistic ability to resolve post-conflict land disputes in a fair and just manner, on the basis of the applicable ground rules, and within a period of time that is acceptable to the parties involved. The question of practicability—and the related issues of what is needed in terms of reinforcement, capacity building, and additional material resources to ensure practicability—needs to be considered both before the decision on institutional arrangements is made and throughout the process of resolving the land disputes. Unless practicability has been an overriding concern in deciding on the institutional arrangements—trumping, for example, abstract ideas or beliefs about what institutional arrangements should look like—there is a heightened risk of inflated and unrealistic expectations and, more important, of failure to successfully resolve the land disputes at hand.

It is not uncommon for tension to arise between what international organizations regard as key components of the rule of law and the reality of dispute resolution methods and mechanisms on the ground. If ideology trumps pragmatic considerations about what is practicable in a given situation, then efforts to support the resolution of post-conflict land disputes are likely to be in vain or, even worse, counterproductive.¹³

¹² The ongoing humanitarian reform seeks to “improve the effectiveness of humanitarian response by ensuring greater predictability, accountability and partnership.” For background, see www.humanitarianreform.org.

¹³ For a discussion of the shortcomings of traditional rule-of-law programming, see Samuels (2006).

The international community can play an important role in injecting the issue of practicability into the local debate about how post-conflict land disputes should be addressed, especially in situations where local authorities lack the technocratic skills and expertise to seriously consider this issue or are too embroiled in substantive issues to spend much time on practicability concerns.

Posing the institutional question broadly

To make an effective practicability assessment of institutional choices in a given post-conflict situation, the international community must pose the institutional question broadly enough. First, it must address the question of whether the observed land disputes are a problem merely in and of themselves or are also an expression of a broader structural problem, such as land scarcity or incoherent or otherwise inadequate land regulation, management, or administration systems. In the former case it maybe that the only thing that needs to be put in place is a mechanism to peacefully resolve those disputes. In the latter case, adequate post-conflict policies to resolve the land disputes need to focus on measures to address the underlying structural issues. This also means that the institutional question needs to address much more than just the institutions that are required to resolve the land disputes.

In Burundi, for example, there is a direct relationship between land scarcity and the high number of land disputes. There is simply not enough available, usable land to fulfill the needs of a population that remains largely dependent on small-scale farming. Unless the structural issue of land scarcity is addressed, the frequency of land disputes is likely to remain high, even with the best dispute-resolution mechanisms in place (Huggins 2009).

Second, the international community must assess a variety of institutional routes that are available to resolve the land disputes in the given situation. It is important not to focus the assessment solely on state institutions, but to also look at other types of commonly used dispute resolution mechanisms, including, where they exist, customary-law based mechanisms. In many post-conflict countries, state institutions were never strong to begin with, and it is very unlikely that the conflict will have made them stronger. Moreover, in countries with a weak state structure, state institutions and state law rarely have much reach beyond the capital city or other urban areas. Therefore, a pragmatic approach to post-conflict land disputes needs to at least consider other dispute resolution mechanisms as well, even if they do not seem to respond to all human rights criteria.

Finally, the international community should consider not just dispute resolution mechanisms but also supporting institutions in the practicability equation. This is especially relevant when the available institutional options are limited to using existing state institutions, such as courts or tribunals, or establishing a new ad hoc national or international land commission. Including supporting institutions in the practicability equation is necessary both for determining whether a certain institutional route is feasible and for identifying what additional resources need

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to be allocated to ensure that the chosen institutional route will produce the sought outcomes.

The example of the Property Claims Commission (PCC) in Iraq illustrates that many institutions can be involved in resolving post-conflict land disputes, in addition to an ad hoc commission. The PCC was originally established in 2004 to resolve land disputes related to the Baath Party regime's forced displacement and expropriation policies. At the time of writing, the PCC had received almost 160,000 claims, out of which it had finally resolved approximately 40,000.¹⁴ While the commission is the sole responsible organization for making decisions regarding the land disputes that come before it, a plethora of additional organizations are involved in the process of resolving the claims, as set out in figure 1 below.

For all the institutions that appear in figure 1, the same rule applies: the mandate of the PCC requires them to carry out additional work. As part of a practicability assessment, it would be necessary to ask whether these institutions have sufficient capacity for this additional work without additional funds or staff, or whether they require more resources in order to take on the extra responsibility. If questions about these issues are not posed at the outset, it is possible that foreseeable bottlenecks will not be addressed in time—as was the case with the PCC, whose progress was slowed in part by a lack of capacity and, in some cases, the unwillingness of supporting institutions to carry out their part of the work.

Posing the institutional question broadly enough is also important for carrying out the initial political assessment. The composition of support organizations and structures, the views and interests of their leadership, and their governance strengths and weaknesses in terms of political neutrality and transparency all will affect how they fulfill their roles in the land dispute resolution process.

Conducting a detailed analysis of the dispute resolution process

When local and international decision makers are assessing the practicability of a set of institutional arrangements, it is important that they have a full picture of what the process of resolving a land dispute under these institutional arrangements entails. They can most easily gain such an understanding by drafting a detailed process flow that exhaustively records the steps involved in resolving disputes. Such a process flow needs to start at the beginning—with the existence of two or more groups or individuals who have a dispute over a certain piece of land—then trace the path all the way to the moment when the dispute has been fully resolved.

There are multiple purposes for mapping out the process in such detail. The first is to enable policy makers to fully understand the complexities involved in resolving the land disputes, thereby preventing a situation in which such complexities are underestimated and predictable challenges and bottlenecks remain

¹⁴ PCC internal statistics, July 2010 (available from the author).

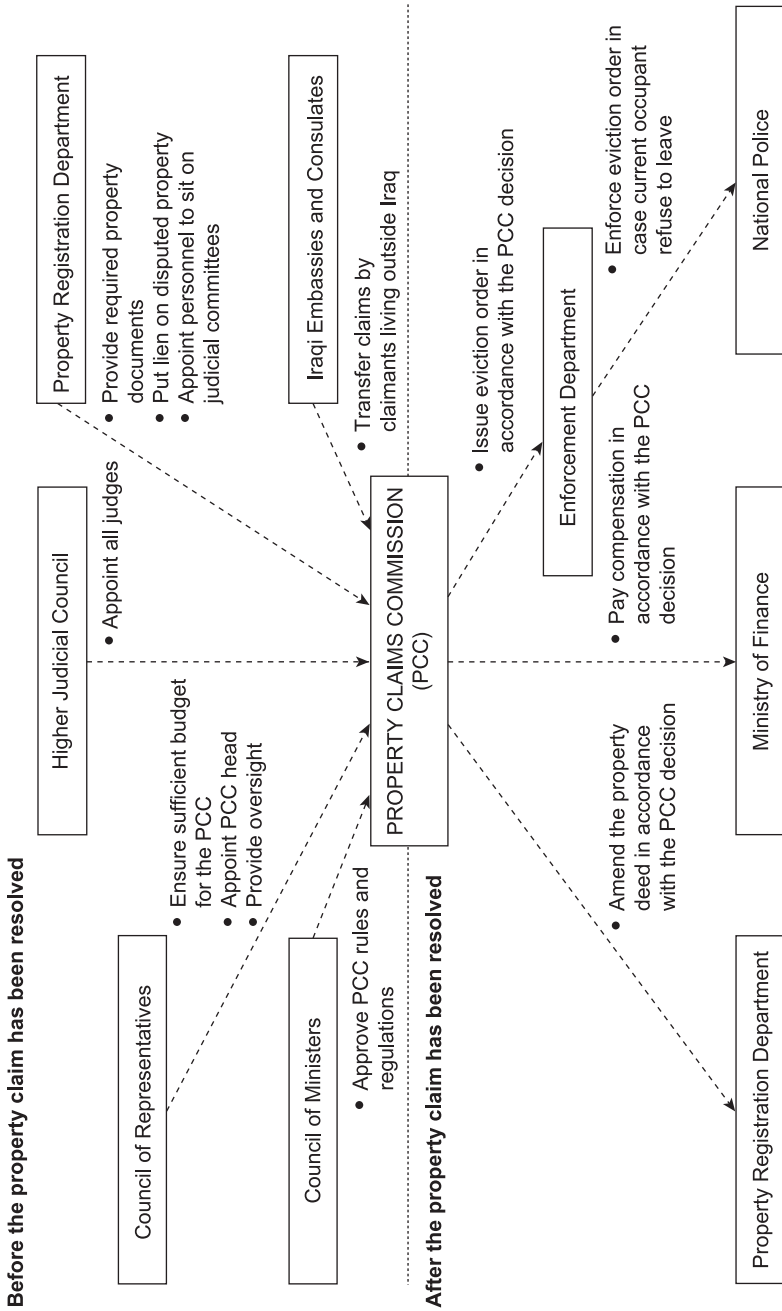


Figure 1. Institutional linkages with the Iraq Property Claims Commission

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out of sight when policy makers are determining which set of institutional arrangements is likely to work best in the given situation. For example, although at first a new land commission may seem to be a good idea, an examination of the detailed process may reveal that such a commission is unlikely to work in the situation at hand because it may take too long for the commission to become operational, or because it is unlikely that state institutions will be able to carry out their support functions in relation to the commission.

Second, detailed mapping of the dispute resolution process allows local and international decision makers to assess whether each step in the process is realistic and feasible—and if a step is not realistic or feasible, what, if anything, can be done to make it so. For example, if using the judicial route would require parties to the dispute to travel to the nearest court to file a complaint, and then to return multiple times during the court proceedings, it would be important to consider what exactly this would entail for the parties: How far would they need to travel? How long would they need to be away from their fields? Would they be able to afford transportation and accommodations? Would they have someone to tend their farms? If such hurdles are likely to appear, the next question that would need to be addressed is whether there are sufficient national or international resources available to assist the parties to the dispute with their access to the courts.

A third purpose for conducting a detailed process-flow analysis is to allow decision makers to make a realistic assessment of how long it will take to resolve all of the land disputes and to determine whether this duration is acceptable to the affected parties. For example, the PCC in Iraq was initially established to deal with the immediate influx of returnees to Kirkuk and other sensitive areas after the U.S.-led invasion of Iraq in 2003. The idea was that providing a peaceful route for the resolution of the many land disputes that were likely to emerge from this return would prevent private evictions and violence, and would provide previous owners the ability to rapidly resettle on their former land.

A detailed analysis of the process, accompanied by an assessment of the time it would take to resolve the expected caseload of disputes, would immediately have shown that the time frame of the returnees and that of the commission were dramatically out of sync. The returnees wanted their land back in a matter of months, but even under the best of circumstances, the commission would require many years to fully process the caseload that was likely to come before it. Although such findings would not necessarily have led decision makers to abandon the idea of establishing a land commission, they could have provoked consideration of interim measures and of additional routes for resolving at least some of the disputes in a faster, more efficient way.

CONCLUSIONS

The international community's role in assisting local parties with resolving post-conflict land disputes has the highest chance of success if it is fully grounded in local political and institutional realities. Interventions based on abstract rules

and principles usually yield few, if any, positive results unless their pursuit and application are grounded in what exists and what is realistically possible and attainable given local conditions. Ensuring the highest possible awareness of the local situation and of the limitations and possibilities it brings—before deciding how to engage with a given set of disputes—is the international community's best route to a successful contribution to the resolution of post-conflict land disputes.

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