Afghanistan Research and Evaluation Unit

Proceedings of the Land Conflict Workshop held on 8 April 2009

AREU

April 2009

Introduction and Overview of the Workshop

A day-long land conflict workshop was held on 8 April 2009 at the Afghanistan Research and Evaluation Unit, and included 21 participants from 12 organizations involved in land conflict issues in Afghanistan. Organizations and programmes represented at the workshop included:

- Afghanistan Independent Human Rights Commission (AIHRC)

- Afghanistan Research and Evaluation Unit (AREU)

- Amlak Department of the Ministry of Agriculture, Irrigation and Livestock (MAIL)

- German Technical Cooperation (GTZ)

- International Bar Association (IBA)

- Ministry of Justice

- Norwegian Refugee Council (NRC)

- Terra Institute

- The World Bank

- United Nations Assistance Mission in Afghanistan (UNAMA)/Rule-of-Law Project

- United Nations High Commissioner for Refugees (UNHCR)

- United States Agency for International Development (USAID)/Land Titling and Economic Restructuring Activity Project (LTERA)

The purpose of this workshop was to provide space for sharing experiences and concerns amongst a small number of people involved in land conflict resolution, framed within the findings of the recently concluded Land Conflict Project jointly undertaken by AREU, MAIL and NRC. This workshop also fed into a larger one-day workshop held on April 15, which was attended primarily by provincial heads of the Amlak Department.

This workshop consisted of three presentations, each followed by discussion sessions. A final discussion session focused on ways forward and recommendations emerging from the issues raised during earlier discussions.

The day's agenda:

Session 1: Introduction and overview of the workshop

        A. Overview of the workshop by Sarah Parkinson
        B. Participants' self-introductions and expectations for the workshop

Session 2: Introduction to the Land Conflict Typology

        A. Presentation by Colin Deschamps
        B. Discussion

Session 3: Determining the Appropriate Mode of Conflict Resolution

        A. Presentation by Rebecca Gang and Yasin Safar
        B. Discussion

Session 4: Community-Based Dispute Resolution – Its Role, Strengths and Limitations
      A. Presentation by Deborah Smith
      B. Discussion

Session 5: Closing plenary discussion: Ways forward?

Session 1: Introduction and Overview of the Workshop

Participants' Introductions and Expectations for the Workshop

Participants stated the following expectations for the day:

- To develop a game plan for following week's meeting

- To learn useful conflict resolution techniques

- To learn from each other, exchange ideas, share experiences, to learn what's been learnt—particularly from this project

- To enhance experiences from this project and hear how others have approached land conflict resolution

- To make sure that the lessons we've learned from land dispute resolution, and especially community based dispute resolution, are not lost in the future

- To decide on next steps for those whose projects are closing (LTERA, plus the partners involved in the Land Conflict Project)

- To see how to move this project forward: with MAIL, building on the strength of collaboration with the Amlak Department and other actors involved in land conflict dispute resolution

- To learn also from the strengths and weaknesses of this project and how it was implemented.

Session 2: Introduction to the Land Conflict Typology

Presentation by Colin Deschamps

Colin Deschamps, now Rural Development Specialist with the World Bank Afghanistan Country Office, is a former AREU Research Officer with the Natural Resource Management team and main author of the Land Conflict Project's Final Report.

The purpose of creating a typology of land conflicts was to better understand the nature and extent of land disputes in Afghanistan. The data was drawn from NRC's Information and Legal Aid Centres' databases from its five district offices. This data was neither random nor representative, because NRC's work is focused on refugees and returnees. Despite this, it was one of the best resources available on land conflict. A great challenge to the creation of the typology was the few records that are available on land issues, including land ownership and land disputes.

Analysing NRC's data led to the identification of the following categories of land conflict:

Table 1 - Land dispute category definitions

Category Name	Definition
Access	Challenges to established rights of access; does not imply challenges to ownership
Boundary	Disputes over the location of boundaries
Inheritance	Disputes arising from the transfer of property rights following the death of a land owner, whether through the GCS or customary institutions
Occupation	Disputes arising where land is appropriated from one party by another
Water	Disputes regarding the allocation of water resources (disputes over land resources that carry important rights to water have also been assigned to this category)
Undefined	Cases in the ILAC database for which there was insufficient data to characterise the dispute

Some key observations from the analysis of conflict types are:

- The highest frequency of disputes concern property ownership rights: Inheritance and Occupation are the most common sources of dispute.

- The majority of all disputes concern less than 10 *jeribs* of land. However disputes over the largest areas usually concern common property.

- Bad faith disputes appear to be more intractable than good faith disputes.

- Some resources are predisposed to certain types of dispute:

  o Non-mortgaged private land is of highest value and most frequently subject to occupation or inheritance disputes
  o A high proportion of access and boundary disputes concern mortgaged and common property
  o A relatively high proportion of water disputes concern mortgaged land.

- Disputes that challenge rights of land ownership generally endure longer than other types of cases.

- It is the most vulnerable to who tend to pursue disputes collectively: A high proportion of group cases address power asymmetries and are against commanders, the government and other powerful groups.

- In most respects, group cases differ from individually-led cases by area, disputants and whether they are in good- or bad-faith.

Discussion

- "Good Faith" is a legal term and is defined according to the intention of a person. It is subjective, and means that the person genuinely believes their claim is valid. But measuring good faith has to be evidence-based.

- If a person has formal documentation, it may be a sign of good faith, but not necessarily, since such documents may be forged or not reflect people's existing understanding of ownership arrangements.

- In practice, good faith and bad faith are very clear and easy to identify. Bad faith conflicts are land grabs and they are common: for example, commanders grab government land. These "bad faith" land grabs aren't reflected in the data used for the typology because of the way the data was collected (using NRC cases, which emphasize returnee issues). From the time of King Zahir, all the land belonged to

the government, but people have been illegally grabbing land, especially powerful people who then distribute the land amongst their relatives. This is a big problem.

- This dataset also seemed to contain a smaller proportion of boundary issues than we might expect. Probably this is also an artifact of the database: since it focused on returnees. Maybe it is not a first priority for returnees to resolve boundary disputes, since they're trying to establish basic rights/access to land.

- The proportion of dispute types shown in this typology is quite similar to the types of disputes that LTERA has come across in its work in informal settlements in Kabul (in District 13 particularly). LTERA carried out a survey of about 45,000 households, of which there is a large proportion of informal settlements. In this survey, about 1,500 disputes were reported, and their distribution (inheritance cases, etc.) fits the distribution shown in the NRC typology.

- Boundary disputes might also be underreported in a household survey because they might be seen as too personal. Also, many of them might end up being grouped in within the category of "inheritance" since they're often issues between family members.

- One surprising trend that LTERA has anecdotally noticed in their household data is that the number of cases reported in which children are seizing property from their widowed mothers is much greater than anticipated, and indeed makes up the majority of the inheritance cases.

Session 3: Determining the Appropriate Mode of Conflict Resolution

Presentation by Rebecca Gang and Yasin Safar

Rebecca Gang is Legal Specialist at the International Bar Association in Kabul and was previously the Land Conflict Project lead at NRC. Yasin Safar is an expert on land registration and land conflict issues in Afghanistan and was involved in the Land Conflict Project from inception.

One key lesson from the Land Conflict Project is the need to recognize reality, and to acknowledge it is different from how we would like things to be ideally: projects need to reflect the existing reality and practice more.

Specifically:

- Community based dispute resolution is very important in this environment and needs more attention.

- In recognizing the different systems actually in use, there is a need to play up to the strengths of these different conflict resolution systems and how they can work together.

- Those seeking to resolve land conflict disputes must involve the actual parties in the design of the individual conflict resolution approaches, and to recognize that "resolution" isn't a fixed term or state — it is based on mutual satisfaction and the sense of resolution that is shared by the defendant and the claimant. If this isn't achieved, the resolution is not sustainable, and the dispute will just come back, either in the same form or a different form.

The most important part of the case resolution process is the initial interview with the client, as a diagnostic tool that then guides the conflict resolution approach. At this stage, the legal council or person acting as a mediator can get a sense of the kinds of resolution that might be possible/acceptable to both parties, and build client ownership of the solution.

Some of the key questions for these important initial interviews:

- Who is the client? Male/female? Rich or old? Able to afford a court case? From what kind of family, and especially if they are female, what type of action would their family support? (court, *jirga*, *shura*, etc.)

- What kind of dispute is it?

- How big is the case? How many people are affected?

- Have any steps been taken previously?

- Are the parties ready to reach agreement, or do they want to?

- Does anyone else, other than the client and defendant, have a significant role in the conflict?

- Where are they located?

- Where is the disputed land?

- Are there any secondary impacts of the dispute resolution?

- What are the capacities of the formal and community-based mechanisms in those areas?

- What are the reputations of those heading or running the *jirga*, court, or other key institutions that would potentially be involved in the resolution of the dispute?

- What are the strengths and weaknesses of each system, and how can they be brought together to legitimate the resolution process?

- What is the local enforcement capacity? Who will enforce a decision that is made formally or informally? Are the potential enforcers able and willing to do so?

- What evidence or documentation is available on all sides?

- What do the disputants really want or need from the case? It may be different from what is explicitly demanded.

- Is there something missing — an incentive or intervention needed from outside to solve the dispute? (E.g. additional pasture land from the government, or canal repair)

People providing mediation services or legal counsel should ask these questions, but these are also the kinds of issues that donors or anyone involved in the issues of land dispute resolution must consider. Otherwise, resolutions to disputes will not be durable.

Other recommendations:

- There needs to be increased collaboration between the courts, government departments such as Amlak, and community-based resolution mechanisms. For example, we recommend that once a dispute is resolved by community means, the solution is registered in the formal court system so that it gains government endorsement.

- On the other side, we've also seen cases that were decided by the courts but where the client wasn't comfortable that the decision would be accepted by the community. In such cases, a jirga can be called and asked to endorse the decision and decide how the decision will be interpreted and enforced within the community.

- Often, judges and elders are happy to work together to make life easier for each other. In other places, however, they feel like they're in competition with each other. This is a real problem, but it is soluble through raising awareness amongst people in both sides about the mutual advantages of cooperation.

Discussion

- In deciding what kind of resolution mechanism to use, we have to consider the type of case. There are two types of case: civil/good faith cases can be solved through community-based dispute resolution (CBDR), but if it is a criminal case, especially land grabbing, it must be addressed through the court system, because otherwise, if it is a case of grabbing government land, there is a high risk of collusion. For example, there are cases where two villages both make claims of ownership on government land, agree to solve through CBDR, and then agree to divide the land up between themselves! This is an important issue were CBDR is not sufficient/appropriate.

- We need to harmonise these two mechanisms, looking from a legal perspective. This is already being done.

- It is worth remembering/recognizing that most land dispute cases are civil/good intent cases, and we should avoid misclassifying them or mistreating them as criminal cases.

- According to some government participants, the government should decide on issues of land ownership, although they do respect CBDR, it can create problems between the community and the government. When CBDR isn't properly harmonized with government systems, it doesn't work properly. Communities should be able to address issues of use rights, but not of ownership rights.

- The questions that Rebecca suggested be asked in the diagnostic process are the same sorts of questions that are asked by jirga members in a community-based resolution process.

- It is important to include community representatives in these sorts of discussions – for example, today we have no community representatives (those involved in *jirgas* etc) with us.

- There is now a new article (Article 282) that sets up a new entity within the Ministry of Justice called the "Informal Justice System" – now, based on this article, people are using this to claim government land, and it is a big problem now facing the Ministry of Justice.

- We need to think about what's on the ground, because we know that it is good to have clearly outlined procedures, but those procedures are not necessarily reflective of what is going on the ground.

- Using informal mechanisms can open the door to corruption. CBDR is useful, but only in some cases.

- Some disputes are easily solved, and it tends to be the more complicated ones that get to a stage where they get more attention.

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- Based on experience, communities' decisions are vital and have to be respected, because the community has its own power. Foreigners have often been fast to recognize this, more than the GoA. The problem is how to link the community system to the official system without encouraging corruption. This is the problem: for example, how to re-establish the official title of an owner who lost his document: it has to be done through the community and then registered through the courts, because the community is the only entity that has the memory necessary to judge and legitimize the owner's claim.

- One of the more important sources of making laws is through the customs of the people. Customary law has advantages and disadvantages and we should consider both.

- CBDR works well on issues related private land, but not land owned or related to the government — then it makes problems.

- We've had very good experiences in the past where judges have referred cases to the community for resolution. Cases solved by CBDR are more sustainable than other means, which is why the courts refer cases to the communities.

- Courts make decisions based on evidence and documentation, but where there are no documents, they can't resolve the cases. Forced resolution of cases can create more problems and lead to criminal cases.

- If the customary mechanism is used first and the outcome is registered by the courts, the outcome will be durable and avoid further clashes.

- Also, the formal court mechanism takes a long time to process cases and is more affected by corruption. They are also expensive: the expense of the case may be more than the value of the land.

- We should emphasize the lack of capacity and corruption within the court system. When a case goes to the *waliswali*, the head of the *waliswal* needs to investigate the issue, who the claimants are, the type of land ownership, and then only refer the case for resolution if it is private land (using a circular form).

Session 4: Community-Based Dispute Resolution – Its Role, Strengths and Limitations

Presentation by Deborah Smith

Deborah J Smith is Senior Research Manager, Gender and Health at AREU, and was the lead researcher on AREU's community-based dispute resolution research project.

The findings presented here are based on qualitative research in four provinces, mainly in rural areas, plus findings from Kabul city. However, the findings from Kabul were very similar to those from the rural locations. In total, this research drew on about 400 in-depth interviews, observation and informal conversations in the study locations. All of the study locations had a *huquq*, judge, prosecutor and *waliswal*.

In interviews, we asked respondents about both what they thought the process was in general, and what had happened in specific circumstances. Doing this, and comparing the general answers, we could see that how people described things generally was distinct to what they actually did. For example, although according to stated cultural norms, respondents said women had no role in the informal justice system, in specific examples, it was clear that women had numerous roles, as claimants/disputants, as wit-

nesses, and also through informal influence through relationships, for example.

We also found that CBMs have advantages over formal justice. They focus on redistributive and restorative justice, on building peace. This is not to say that CBM don't have any problems; there are times, for example, when they violate women's rights. But nonetheless, CBM are so useful that many other countries which already have strong formal justice systems are nonetheless becoming more interested in community-based resolution.

Discussion

- In urban areas, *jirgas* and *shuras* have not existed for as long as in rural areas because the settlements are new. In land disputes here, you can't go to the *jirga* because it isn't there, but the court system can't work for those people because the settlements are informal. How can we deal with land conflict in these settings? It's not easy to set up community mechanisms from scratch.

- In AREU's Kabul research, we found that families with disputes will talk to their elder neighbours as advisors. They then refer to the Neighbourhood Head (*Wakili Guza*), who can gather the white beards together for a *jalaza*. If that doesn't work, then they can go to the police. There is one representative for each street.

- AREU's findings were representative of the whole city — there was no special project that had been going on there.

- Sometimes the *Waliki Guza* are seen as corrupt or unfair, and not good representatives of the community.

- *Jirgas* will first get a guarantee before they try to resolve a conflict (when referred by the *woliswal*). Most of the time the guarantee is money, although in earlier times, sometimes it would be weapons. If cases are referred to the government, finally they are referred to the *jirga* and the government accepts.

- Not all *woliswals* are from the area, although usually there's a link between the community and the *woliswal*.

- The community-based mechanisms can't resolve all issues and they aren't neutral, they also need a functional justice system. However, there is also room to improve CBDR.

- Community based justice is "bottom" to "top". Traditional systems are not necessarily the same as community based. Community-based systems are inclusive of both *sharia* and customary law.

- There is also a need to formalize traditional laws. We tried to do this with the Judicial Reform Commission for two years, but when it was finished, it didn't pass.

- Increased [formal] education will allow for some common standards to emerge.

- Also demographics are changing, as the population is very young and people are moving. This suggests that the continuity of tradition may begin to breakdown.

- We must also recognize the important role of political advocacy in land conflict resolution, especially in large land conflicts, through governors, MPs and other political leaders.

- It is good for people to have options and multiple systems available to them: multiple systems can help people to stay accountable. What we need is a process for moving cases effectively through the different systems.

- Cases jump through systems, and there is a lot of corruption, especially in the formal system. Cases can get stuck and take too long to resolve, and one has to pay to pursue the dispute. Some powerful people seem to be untouchable. A lot of people also can't afford the taxes to register their cases. This has to be addressed in the high levels of government.

- It is right that people respect *jirgas* and their decisions, and also respect the law. We have a very useful law for Amlak-related disputes, those disputes to be resolved by the Amlak department. Amlak also identifies the difference between government and private property. When there's any case of dispute over Amlak property, it needs clarification, and those responsible for determining ownership are designated by presidential decree. Clarification means to research underlying factors of the dispute, recognize the rights of the disputants, and decide who is the owner. The clarification team, which is sent to the area of dispute, is a group of many different government representatives. Before they go to where the dispute occurred, they first go to the provincial government to find any documentation of property registration. Formal legal documents that can be proof of land ownership may include:

  o A deed
  o Papers showing land tax was paid
  o A certificate of division
  o Paper showing land was given as a gift
  o A customary deed (made during the King's time, before 1975)

- Based on these documents, the primary court issues a circular form to go to different government offices for registration. A member of the cadastral team is responsible for determining the boundaries. After the form goes through the different departments, it then goes to the communities. The documents will often show more land is owned than is actually owned, or vice-versa. The excess land is government land, as determined by the land law. This land now identified as government land can be sold back to the person who initially claimed ownership, up to a certain amount (10 jeribs of "category A" land) and the rest is registered as government property. The government has the right to keep, convert or sell that land at market rates.

- Members of Commissions have their own roles: "grabbed" land is supposed to become state property. After the land has been registered, it goes for deed registration. Once that goes through, the court finally decides the case. If there's still a conflict, the case goes to the Appeals Court.

- This process seems to mainly apply to cases where there's documentation, but many cases don't have documents.

- The Land Commission was stopped recently by Presidential Decree 83 (which postponed a nationwide land survey). But Karzai can still allow Cadastral to survey specific areas for specific purposes: namely clarifying ownership in case of a conflict, to resolve the conflict. Also in several areas — Panjshir, Paran, Takher, Kunduz and Bamyan — surveying has recently resumed.

- CBDR is the main solution to land conflict.

- There's no lack of law or courts regarding land issues. There's formal law, sharia, customary, etc. Taken all together, these are complete — there are no gaps in land law. Together, the different systems and mechanisms solve the problems.

- There are laws from all regimes and they are all still in place — from the King's

time, Daoud's time, Najibullah's time, and the Taliban's time — but they are not responsive. We can't avoid that, this is the heritage that we have, but we need to modernize them. It is just like trying to formalize informal settlements.

- [Debate: Is the current land law sufficient/strong enough? Some people said yes, more people said that it still needs strengthening and improvement.]

- Comparing the costs of the two different systems, the formal resolution process sounds very long and difficult and expensive.

- There is no cost to register the land formally, but it is very long and complex, whereas informal registration is short and easy. Because of this, about 75% of trans-actions involving transfer of land ownership are done informally. People also have to pay to travel and stay at a district headquarters when they pursue a formal system.

- Formal registration of land is slow because it is not mechanized. A clerk writes by hand and may only process 5 to 10 claims a day. We had the idea of the "one stop shop" but this didn't work… because of the difficulty of proving ownership rights. Rather than this one stop system, we need a process to definitively show owner-ship. For example, someone can have a formal deed, but then informally sell the land, and then there is no record of it.

Session 5: Closing plenary discussion: Ways forward?

- Not only lawyers, but also judges and other decision-makers involved in land dis-putes need to understand the details of the case and underlying motivations of the disputants, from both sides. Also, a lot of decision-makers need to know the processes of decision-making better.

- A major weakness in the land conflict process, in terms of reconciliation, is that we often talk of lawyers. But only a small proportion of people have access to lawyers, and actually would be able to use them. Maybe it is about simplifying access to the processes so that a lawyer is not necessary, or else increasing access to lawyers.

- Lawyers are needed, or something is needed — some outside presence — as an ac-countability mechanism. This could be done through civil society and it could be through legal assistance, possibly.

- In the cases in the Land Conflict Project, AREU and NRC acted as neutral third par-ties, and their very presence changed the outcome of some cases.

- Without an advocate, a person can get sent back, and they may not understand the process. For example, a participant came across an old man who couldn't find his documents, or the office lost them, and he had to wait 9 months, until they finally took him and helped him to get his documents.

- NRC is also the only organization offering civil legal aid, and focuses only on a very narrow slice of the population: refugees and returnees. This service needs to be expanded.

- Legal assistance was discussed at the Rome Conference in 2007 and it hasn't moved forward, although people agreed it was important.

- The MoJ also has it on contract to take on civil legal cases, but only those involving women and children. It should be widened. And the MoJ should have a system to avoid taking tax or legal costs from poor people: to offer free legal advice. There is a new "legal assistance" section of MoJ set up for poor people to get free represen-

tation. But the problem is realistically, those people are still expected to facilitate all the costs of transport, food etc for that assistance, so it is rarely free in reality. This is an issue of corruption, or at least of inadequate public salaries/resources.

- Amlak representatives could potentially play an assistance role in monitoring the courts and try to add some accountability to the process that way.

- One problem is lack of coordination between government ministries. The lack of co-ordination creates opportunities for corruption. There is also a lack of coordination between the community and the government. We have some good laws but lack of coordination. All ministries sort out their issues by themselves. For example, they might decide to build on land without checking with Amlak whether the land be-longs to the government. Then people will say "the government grabbed our land" and the government people will say, "Amlak gave it to us." Another example, in Logar, a municipality has given government land to some people to settle, but now others are complaining that it is their pasture land. More coordination and commu-nication between ministries would reduce the space for corruption.

- We also need to consider the enforcement aspect of resolutions: a decision is no good if it is not enforceable.

- We need to focus on legalizing and formalizing CBDR. However, there are already lots of actors involved in this.