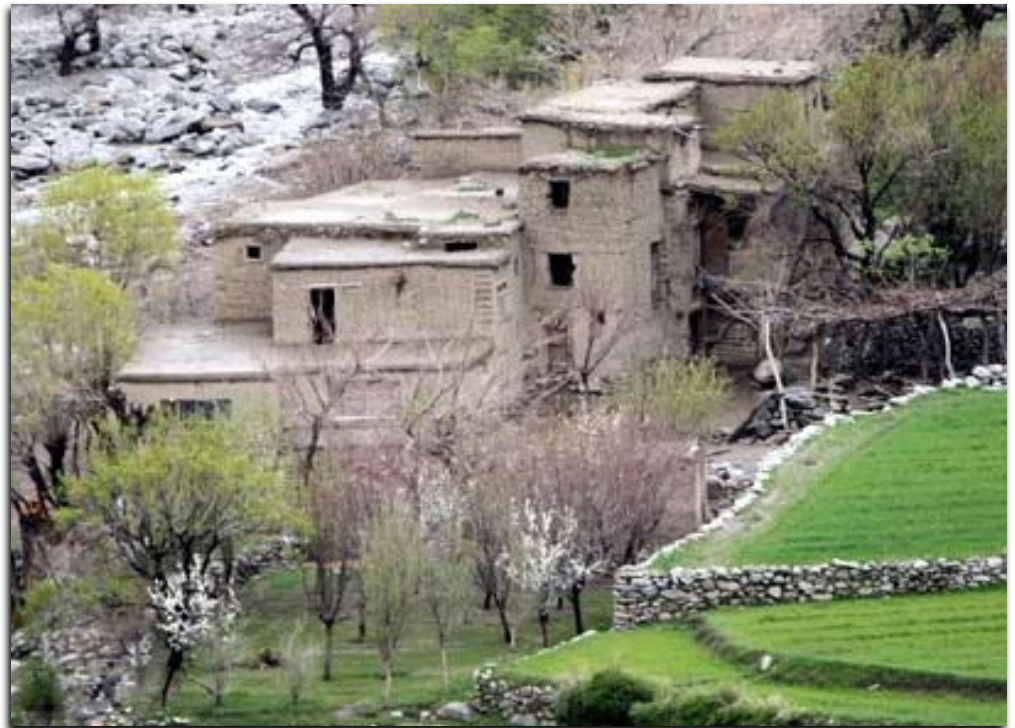


Afghanistan Research and Evaluation Unit
Issues Paper Series

Land Conflict in Afghanistan

Building Capacity to Address Vulnerability



Colin Deschamps and Alan Roe

April 2009



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Building Capacity to Address Vulnerability

**Colin Deschamps
and Alan Roe**

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April 2009

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About the Author

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About the Afghanistan Research and Evaluation Unit

AREU is an independent research organisation based in Kabul. AREU's mission is to conduct high-quality research that informs and influences policy and practice. AREU also actively promotes a culture of research and learning by strengthening analytical capacity in Afghanistan and facilitating reflection and debate. Fundamental to AREU's vision is that its work should improve Afghan lives.

AREU was established in 2002 by the assistance community working in Afghanistan and has a board of directors with representation from donors, United Nations and other multilateral agencies, and non-governmental organisations. Current funding for AREU is provided by the European Commission (EC), the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children's Fund (UNICEF), the United Nations Development Fund for Women (UNIFEM), the World Bank and the governments of Denmark, Japan, Norway, Sweden, Switzerland and the United Kingdom.

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This Issues Paper draws heavily from the project's Inception Report and Interim Report, which were written by Alan Roe and Sharna Nolan. Annex 1 is for the most part Sharna Nolan's. Brendan Whitty was instrumental in project design and Sharna Nolan worked on the project for one-year, contributing to many aspects, particularly the typology.

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Terminology

The term “nomad” may mean one who moves seasonally and between well-defined territories but in common usage is more often understood as one who roams about. The Kuchi, Afghanistan’s largest “nomadic” group, generally fit the former description and are thus more aptly described as “transhumant”: persons whose primary livelihood activity is the seasonal movement of livestock between mountain and lowland pastures. Although Kuchi are increasingly adopting non-transhumant lifestyles or transhumant lifestyles that also include other economic activities, the term Kuchi in this paper is used to mean a transhumant group unless otherwise noted.

The terms “formal” and “informal” are often used as the primary categories of resolution mechanisms in Afghanistan, including for land conflict cases. However, formal may connote more legality, legitimacy and enforceability than informal, this despite evidence to the contrary. To avoid suggesting something that may not be true, resolution mechanisms are termed according to the institutions that implement them, for example “Government Court System” and “Community Based Mechanism”. Additional information is given where available, for example “*shura*” or “primary court”.

The usage of the terms *jirga* and *shura* vary widely across Afghanistan and there is no definition apt for describing either term in all of the myriad contexts in which they may be found. *Jirga* and *shura* are thus used based on local usage, that is, how those involved in the process refer to it. Most communities differentiate between a *jirga* and a *shura* but the definitions given in the glossary of this paper are identical so as to allow for the full range of definitions that each term may connote.

Acronyms

ACC	Afghan Conservation Corps
AIA	Afghanistan Interim Authority
AIHRC	Afghanistan Independent Human Rights Commission
AREU	Afghanistan Research and Evaluation Unit
CBM	Community Based Mechanism
CM	Co-management
CPR	Common Property Regime
GAIN	Green Afghanistan Initiative
GCS	Government Court System
GIS	Geographic Information Systems
IDP	Internally Displaced Person
MAIL	Afghan government Ministry of Agriculture, Irrigation and Livestock; MAIL was previously called the Ministry of Agriculture, Animal Husbandry and Food (MAAHF)
NGO	Non-Governmental Organisation
NRC	Norwegian Refugee Council
RLAP	Asian Development Bank's Rural Land Administration Project
UNAMA	United Nations Mission in Afghanistan
UNHCR	United Nations High Commissioner for Refugees
USDA	United States Department of Agriculture
WOL	Applied Thematic Research on Water Management, the Opium Economy and Livestock in Afghanistan
SALEH	Sustainable Agricultural Livelihoods in Eastern Hazarajat

Glossary

Dari/Pashto terms

<i>Amlak</i>	department responsible for land administration and policy implementation; part of the Ministry of Agriculture, Irrigation and Livestock
<i>farman</i>	decree of law or proclamation
<i>Ismailia</i>	member of the Ismaili branch of Shiism
<i>jerib</i>	unit measurement of land area equivalent to 2,000 m ² (5 jeribs = 1 hectare)
<i>jirga</i>	council, traditionally an assembly of village, tribal or ethnic leaders; see Terminology
<i>Kuchi</i>	Pashtun groups with a heavy reliance on transhumant movement of livestock; see Terminology
<i>malik</i>	village or community leader (Pashto)

<i>mullah</i>	Islamic religious leader
<i>noqileen</i>	Land distribution initiative that took place during the administration of King Zahir Shah. During his reign the north and northeast of Afghanistan were deemed to be under-populated based on the extent of cultivation the land could support. The King resettled primarily Pashtun families from the south and southeast of Afghanistan to these areas to cultivate the land, and to extend his political reach. For generations, these types of distribution projects have resulted in conflicting land grants and multi-party disputes fueled by ethnic differences and struggles for local power.
<i>Pashtun</i>	ethnic group concentrated in southern and eastern Afghanistan
<i>shura</i>	council, traditionally an assembly of village, tribal or ethnic leaders; see Terminology
<i>Sharia</i>	Islamic laws

English\technical terms

Afghanis	Afghanistan's currency; the official exchange rate is not pegged but the street exchange rate has remained consistent at 1 US\$ = 50 Afghanis over recent years; this is the exchange rate used in this paper. All Afghanis referred to in this paper are "new" Afghanis (post-2002).
cadastre	an official register of the quantity, value, ownership and rights associated with buildings and land
chi-square test	a type of statistical hypothesis test
common property regime	a management structure by which multiple custodians (legal possessor and long-term manager) have influence on decisions
community-based mechanism	conflict management utilising local people and indigenous knowledge to prevent or resolve conflicts within or between communities
customary	the norms by which a community traditionally organises its social relations, including the community's manner of ordering and recognising custodianship of and access to land and its resources
government court system	decision making body of the Afghan government primarily responsible for adjudicating disputes
pastoralists	peoples whose primary economic activity is the raising of livestock
Product Moment Correlation	A measure of the correlation between two variables
transhumant	persons whose primary livelihood activity is the seasonal movement of livestock between mountain and lowland pastures

Executive Summary

This Issues Paper presents the findings, conclusions and recommendations of the “For Building Capacity to Address Land Related Conflict and Vulnerability in Afghanistan” research project, known in brief as the “LC Project”. Funding for the LC Project was provided by the Afghan Ministry of Agriculture, Irrigation and Livestock (MAIL) with assistance from the World Bank. The LC Project’s overall objective was to help reduce land-related insecurity and vulnerability by strengthening the Afghan government’s capacity to resolve or assist in the resolution of land conflict in a manner that is fair, effective and legitimate.

The effective management of land is critical to Afghanistan’s development. Land tenure, the system by which land is owned and managed, has a significant influence on the agricultural sector, which in turn will be the cornerstone of rural development for the foreseeable future. With the rural population experiencing a higher poverty rate and significantly outnumbering the urban population, the Afghanistan National Development Strategy (ANDS) gives the agricultural sector top priority status.

The Afghan government’s lack of capacity to manage land tenure, a situation most visibly demonstrated by the prevalence and intensity of conflict over land, hinders its ability to effectively plan for rural development. A dearth of land titles—necessary for many land transactions and dispute resolution mechanisms administered by the government—leads most rural landholders to utilise community-based resolution mechanisms. These community-based mechanisms, known as CBMs, are in many instances unable or not permitted to provide parties with documentation acceptable to the government. This perpetuates a reliance on CBMs at the expense of an expansion of government-administered mechanisms.

Effective management of land tenure is inextricably linked to other sectors. For example, as poppy production and the opium economy continue to flourish—notwithstanding commendable progress in

certain areas—many farmers find themselves with insufficient land, or insufficient water for their land, to sustain their families with legal agricultural activities. It is well understood that if they do choose to grow opium poppies, this may have the knock-on effect of funding the insurgency and perpetuating conflict. Similarly, many of the causes of land conflict also underlie other dimensions of Afghanistan’s development context: population growth; repeated intergenerational division of family resources; returnees and internally displaced persons; climate change and its impact on meteorological anomalies such as drought; and corruption, at both a government and community level. A better understanding of these causal factors can also help mitigate land conflict.

Despite all these considerations, the prevention and resolution of land conflict continues to take a back seat to other issues. Management of land conflict is mostly ad hoc, with disputants trying to navigate an unclear web of community-based and government systems, which are themselves often circumvented by influential people or the officials responsible for them.

The large demonstrations in Kabul in mid-2008 over transhumant versus sedentary land rights served as yet another reminder of the need to invest more resources and attention in the prevention and resolution of land conflict. Steps have already been taken in the right direction. Owing to the influx of donor assistance since the overthrow of the Taliban and, to a more limited degree, a realignment of policy by the post-Taliban government, land conflict in Afghanistan is now better resourced than at any time in recent memory. However, although progress has been made, the results remain tenuous and accomplishments incomplete, and there are many reasons for continued investment in the sector.

Types of land conflict

Land conflict exists in a myriad of forms and results from diverse circumstances. For example, it can take the form of non-violent inheritance disputes

among siblings; ethnicity-based provincial-level conflicts that result in conflict, casualties and significant damage to property and livestock; and group-based land-appropriation that perpetuates inter-community tensions. Each conflict takes place in a unique context composed of various influences, which further complicates efforts to “typify” land conflict.

However, acknowledging the unique nature of each land conflict does not preclude the development of an understanding of the common characteristics of different types of land conflict, nor does it limit the usefulness of such knowledge. With this in mind, a typology of land conflict was developed using data from Norwegian Refugee Council’s Information and Legal Aid Centres. The key findings were:

1. The highest frequency of disputes concern property ownership rights (inheritance and occupation are the most common causes)
2. The majority of disputes concern less than ten jeribs of land (20,000m²); however, disputes over the largest areas usually concern common property
3. Most disputes are in “bad faith” (where one party appears to be challenging another party with the aim of illegally acquiring the land), which appear to be more intractable than “good faith” disputes (where both parties feel they are genuinely entitled to the land)
4. Some resources are predisposed to certain types of dispute:
 - Non-mortgaged private land is of highest value and most frequently subject to occupation or inheritance disputes
 - A high proportion of access and boundary disputes concern mortgaged and common property
 - A relatively high proportion of water disputes concern mortgaged land

5. Disputes that challenge land ownership rights generally last longer
6. It is the most vulnerable 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
7. In most respects, group cases differ from individually-led cases

Based on the information from the land conflict typology and other sources, the LC Project determined that the majority of land disputes in Afghanistan fall into one or more of five principle categories. They are:

1. Conflicts involving the illegal occupation of land by powerful people
2. Conflicts involving inheritance rights to private property
3. Conflicts involving the return of people to land they previously owned
4. Conflicts over private property between established villagers (not returnees, refugees or internally displaced people)
5. Conflicts involving common property resources managed through common property regimes, for instance certain pastures, forests and water for irrigation

Five pilot cases corresponding to each of these principle categories were selected for further study.

Best practice approaches for resolution

Approaches that a conflict manager (such as amlak staff, a respected community member, or a lawyer) may use to help resolve a land conflict differ based on the resolution mechanism used and the particular attributes of a case. Best practice approaches are not meant to be applied blindly. Instead, they are

key points to consider when approaching a land conflict. Best practice approaches are presented below, based on the main dispute-resolution categories used in the report: the general court system (GCS), community-based mechanisms (CBMs), and political advocacy.

In all cases:

- Conduct detailed interviews with disputants and other relevant individuals to develop a full understanding of the conflict before determining a resolution approach.
- Working with disputants to understand their desired outcome helps focus the selection and course of the resolution mechanism and increases disputant buy-in; similarly, explaining the possible outcomes helps keep expectations realistic.
- Allow disputants to express their concerns to a neutral third party without decision making power to facilitate dialogue between the disputants and those involved in resolution.
- Collecting and verifying required documents can often be an onerous process, but it is necessary to allow the disputants to feel that all relevant information has been duly considered.
- Raising awareness among disputants of their rights helps clarify the expectations of all parties involved.
- Suggest respected and fair community leaders to represent each side to ensure that disputants' interests are similarly protected.
- Neutral third-party participation in mediation sessions increases efficiency, accountability and transparency.
- Ensure multiple reviews of decisions to guarantee a universal understanding of agreement terms and to promote the durability of the outcomes.
- When possible, registering CBM agreements with the government, usually via the court system, increases the legitimacy of an agreement, improves enforcement and precludes future claims on the same issue.

Regarding political advocacy:

- When meeting officials, the attendance of neutral third parties encourages the relevant authorities to take action as required by law.
- Involving other organisations to advocate according to their experience increases the effectiveness of advocacy by utilising existing relationships and areas of expertise.

Lessons learned

The LC Project activities, including the development of the land conflict typology and the investigation of pilot land conflict cases, allowed for the articulation of “lessons learned”. These are recommendations applicable to most categories of land disputes and resolution mechanisms. They are:

- Clear indicators can be identified that determine whether a land dispute may be more appropriately resolved through the general court system, a community-based mechanism or political advocacy.

In the general court system:

- Assist with court procedures by preparing disputant claims, collecting and verifying disputant documentation, and identifying and preparing witnesses.
- Brief officials on applicable civil, sharia and common law to facilitate their accurate implementation.

Through community-based mechanisms:

- The approach taken to dispute resolution must remain adaptive and flexible to setbacks and changes. As circumstances or stakeholders change it may be advantageous to switch dispute resolution approaches completely.
- Preparation, advocacy and oversight are essential to increase the performance of the court system.
- Preparation, information and oversight can build the capacity and effectiveness of community-based adjudication mechanisms.
- All stakeholders should be given ownership of the dispute resolution process to help legitimate the outcome.
- Some disputes may not be resolvable through the court system or a community-based mechanism and so require an ad hoc approach that may include administrative action, executive attention and political advocacy up to the national level.
- Community-based agreements are best sustained by some form of official endorsement to guarantee their outcomes, especially where rule of law is weak.
- Mediated agreements may require some form of incentive to draw the parties into the negotiation.
- The selection of mediation and resolution tools should be appropriate to the situation.
- There is therefore a clear need to engage with government stakeholders from the outset of any conflict-resolution initiative.
- Supporting both village level institutions and local government is important to achieving lasting resolutions to land conflict and better quality land management in general.
- Recognise shared “rights of use” rather than “ownership” of common property.
- National NGOs can help legitimise and support the implementation of agreements.
- Careful criteria applied to the selection of disputes means there can be a reasonable expectation of a successful resolution.

1. Introduction

This Issues Paper presents the findings, conclusions and recommendations of the “For Building Capacity to Address Land Related Conflict and Vulnerability in Afghanistan” research project, known in brief as the “LC Project”. Funding for the LC Project was provided by the Afghan Ministry of Agriculture, Irrigation and Livestock (MAIL) with assistance from the World Bank.¹ The project was managed by the Afghanistan Research and Evaluation Unit (AREU) and implemented in partnership with the Norwegian Refugee Council (NRC). Initially envisioned to last eighteen months (November 2006 to April 2008), the project was subsequently extended for an additional twelve months (through to April 2009). The project’s overall objective was to help reduce land-related insecurity and vulnerability by strengthening the Afghan government’s capacity to resolve or assist in the resolution of land conflict fairly, effectively and legitimately.

The impetus for the project was a demonstrated need for capacity building at all levels of the MAIL *Amlak* department, which is responsible for land administration and policy implementation. In both rural and urban areas, land administration procedures are largely non-existent, with the vast majority of land transactions and dispute resolutions taking place through customary institutions. Of the cases that are currently in the formal courts system, many remain unresolved or in a continuous state of referral. The subsequent reliance on land-management systems outside of the writ of the government serves to undermine both its legitimacy and its efforts to effectively plan for rural development. However, numerous factors will continue to limit an increase in the number of cases that the government court system (GCS) is capable of handling. These factors include poor perceived legitimacy by Afghans, limited writ in rural areas, and the comparatively high amount of time and resources required as compared to community-based mechanisms (known as CBMs).

This, combined with the traditional reliance on CBMs for the resolution of land conflicts, indicates a need for increased exploration of more systematic linkages between the GCS and CBMs.

In Afghanistan, several decades of conflict have resulted in a formal legal system that is severely challenged by a pervasive lack of resources, qualified staff and, in many cases, legitimacy in the eyes of the people. CBMs pre-date the formal system and are used in an estimated 90 percent of property cases today. As Afghan courts continue to improve in their capacity and legitimacy as a result of the attention of the Afghan government and the international community, it is anticipated that the caseload of the formal system will continue to increase over time. Today, property claimants’ options range from the most casual of CBMs all the way to judicial review at the Supreme Court level. Choices of dispute resolution methodology are highly dependent on the circumstances of each case, such as the identity of the parties and their ability and willingness to access the GCS (financially, physically and socially).

The informal system is generally perceived to be more efficient, less expensive and at less risk of corruption than the GCS. In some communities, decisions made through a CBM, such as a *jirga* or *shura*, are considered to be more legitimate as they are based on community mores. At times, they may therefore be more enforceable than GCS decisions. CBM processes are also well suited to illiterate claimants or those with no legal documentation, which is exceedingly common in rural areas. At the same time, the GCS continues to improve in some areas, making it an increasingly attractive option for disputants, particularly those returning from extended periods of displacement or with strong documentation and financial resources. The GCS is increasingly popular in the periurban and urban areas where the writ of the Afghan government, including the GCS, is most enforceable. In Afghanistan, the GCS and entities of CBMs may coordinate efforts, with *jirgas* and *shuras* resolving certain cases and registering their decisions in the

¹ The Ministry of Agriculture, Irrigation and Livestock was previously called the Ministry of Agriculture, Animal Husbandry and Food (MAAHF). The LC project was funded by the WB at the request of the Afghan government MAIL, which is the primary stakeholder in the project.

official court records to give them legal status, while in other instances referring cases to the GCS. When an attempt is made to resolve a case through a CBM such as a *shura* or *jirga* and the case then goes to the GCS, findings from the CBM are often used as anecdotal evidence. There are many cases in which either CBM or GCS attempts at resolution fail and the alternative system is then employed to try and bring resolution. In particularly complicated or entrenched cases ad hoc political avenues may be employed, although this is normally reserved for cases where both CBMs and the GCS have failed.

Implementation of the project was a collaborative effort by AREU and NRC, as the managing and implementing partners respectively. AREU, as managing partner, was responsible for the development of the methodology and for ensuring

that project activities would effectively meet the project's objectives. It was also responsible for reporting to the government and the World Bank through meetings and reports, and for developing the land conflict typology. NRC, as implementing partner, was responsible for leading capacity building training sessions, implementing resolution methodologies at pilot sites and providing AREU with statistics from its Integrated Legal Aid Centres.

The principal project stakeholder was the Afghan government, particularly those institutions which hold responsibilities pertaining to land administration. This logically lent a particular focus toward MAIL's *Amlak* department, but also included cadastral and other departments. Other stakeholders included NGOs and multilateral organisations.



Crops growing in Kabul Province, near the Afghan capital. Photo: Cynthia Lee

2. Methodology

The LC Project aimed to achieve its objectives through the following actions:

- Selecting pilot cases for study, and through them design, trial and refine a range of land conflict resolution methodologies that can be implemented at community provincial or national levels and are replicable in other parts of Afghanistan.
- Developing a typology of land conflicts in Afghanistan based on NRC data from their Integrated Legal Aid Centres (ILACs), with the goal of better understanding the types, prevalence and characteristics of land conflict in Afghanistan.
- Supporting the development and implementation of Afghan government land law and policy by contributing to the development of effective strategies for land conflict prevention and resolution.
- Building the capacity of the MAIL's *Amlak* department and of other relevant stakeholders through the implementation of the project and training workshops.
- Advocating lessons learned from the project, principally for the Afghan government and also for NGOs and other organisations active in land management.

It was acknowledged at the project's inception that factors outside of the control of project partners might make certain pilot cases non-resolvable and thus limit their usefulness to the project. Therefore, five pilot cases were selected in anticipation that three to five of these would be useful as research case studies for the project. Five principal categories of land disputes were selected:

- Conflicts involving the illegal occupation of land by powerful people
- Conflicts involving an inheritance right to private property

- Conflicts involving the return of people to land they previously owned
- Conflicts over private property between established villagers (not returnees, refugees or internally displaced people)
- Conflicts involving common property resources managed through common property regimes (CPRs), for instance certain pastures, forests and water for irrigation

Research and evidence from the early stages of the LC project and other projects suggested that it is useful to divide land conflicts into two general categories: conflict over land managed by common property regimes, where the conflict tends to be structural and inter-community, and conflict over private property, typically triggered by outside disturbances (such as displaced persons or even the Afghan government itself) to village institutions.

Five pilot cases were then selected such that each principal category of rural land-related conflict would be explored, with some of the pilot cases involving aspects of conflict from more than one category. Generally speaking, three cases relating to private property conflicts and two cases relating to conflicts over resources previously managed through a CPR were selected. The pilot cases selected were:²

- A land appropriation dispute between two private parties (farmers with families) over 20 *jeribs* of irrigated land in Kunduz Province.
- An inheritance dispute between a female claimant and two of her brothers over 6.9 *jeribs* of irrigated land and a shop in Herat Province.
- A group displacement dispute in Baghlan Province between communities of different ethnicities (Ismaili and Pashtun) over 630 *jeribs* of rainfed land suitable for irrigation and with family dwellings in Baghlan

² The locations of the cases analysed, aside from their province, are not disclosed in this report for reasons of confidentiality.

Province. The land is currently little-used due to the conflict.

- A dispute over canal-water allocation for irrigation between two village groups of different ethnicity in Parwan Province.
- A pasture access dispute between settled villagers and transhumant pastoralists over approximately 2,000 jeribs of pastureland, which is increasingly being cultivated by the villagers, in Panjshir Province.

The case in Baghlan is identified as an NRC “principal case”, defined as those cases that, if raised, will highlight significant issues and obstacles that prevent refugees, returnees and IDPs from accessing legal remedy toward long-term durable solutions. The factors considered when identifying principal cases are:

- Have exhaustive local legal or administrative procedures been unable to obtain remedy?
- Does the case: involve a group; represent recurring trends; demonstrate grave violations of human rights; show likelihood of obtaining a decision from local, regional or national authorities; involve a joint intervention with other agencies; or require political support as a more appropriate or necessary means for receiving assistance?
- Does pressure from extra judicial and unofficial sources make political intervention the only means to achieve remedy?

The ways in which these cases came to the attention of the project partners is important as this may give some information as to other characteristics of the case. Generally speaking, cases brought to the attention of an internationally connected organisation such as AREU may demonstrate a higher likelihood of involvement by powerful community members, meaning that they are less likely to be representative—and, for the purpose of the project, less useful—of the majority of apparently similar cases. Cognizant of this, the project team

took care to ensure that the cases selected were not only consistent with the categories determined in the land dispute typology but also typical and representative of the wider range of cases in each category. To be sure, power relations are often an integral part of conflicts over land. The aim therefore was not to dismiss power relations but to ensure that the power dynamics in each case were similar to those found elsewhere. The cases were identified by the following means:

- Kunduz land appropriation dispute: the case was identified in 2005 during a visit to a refugee camp in Pakistan’s North West Frontier Province by NRC Pakistan’s Return Facilitation Team. The case was referred to the LC Project team in early 2007.
- Herat inheritance dispute: the plaintiff found out about NRC from another NRC client and requested assistance from the NRC Herat office.
- Baghlan group displacement dispute: The United Nations Assistance Mission to Afghanistan (UNAMA) registered the case in August 2007 and subsequently referred the case to NRC in a coordination meeting that included the United Nations High Commissioner for Refugees (UNHCR) and the Afghanistan Independent Human Rights Commission (AIHRC). UNAMA provided NRC with background information to the case.
- Parwan water allocation dispute: UNHCR identified the case and referred it to NRC.
- Panjshir pasture access dispute: a *malik* (community leader) from the Kuchi contacted AREU directly, who duly referred the case to NRC.

Building on these collective findings, the project team began its field investigations of the spectrum of resolution approaches developed during the Inception Phase. NRC, through its well-established network of ILAC field offices, spearheaded the initial stages of the fieldwork component, in the

first instance providing background information to pilot cases in respective ILAC geographic zones of responsibility, which enabled the Kabul-based project team to engage communities appropriately. In many instances existing and often long-standing relationships between ILAC lawyers and communities at pilot sites were instrumental in allowing AREU and NRC to develop the relationships necessary to achieve project objectives. Information garnered from previously described sources (e.g. reviews of other projects, the inception workshop and the typology) was thus cross-checked with the most important source: the communities themselves, such that resolution mechanisms could be identified. A critical consideration at this stage of the project was how the project team's suggested approach to a conflict would be accepted by the community and vice-versa.

The resolution mechanisms ultimately identified for implementation at each field site were specifically tailored to address the unique circumstances of the dispute, yet adaptable enough for application to similar conflicts in other locations as per project design. All resolution approaches, regardless of

location, were united in the principle of providing socially legitimate and practically enforceable resolutions that engage appropriate stakeholders, both directly and indirectly.

Nevertheless, challenges identified or encountered during the Implementation Phase were numerous, but for the most part could be attributed to the sensitive nature and jousting for power implicit in many conflicts, particularly land, which for many Afghan families is their most valuable asset. The project team was especially aware of how visits to pilot sites might be viewed by communities, including expectations from the communities of a quick, direct and tangible benefit. The project being what it is—a research initiative designed to influence policy—meant that activities did not readily nor necessarily transfer to such benefits. Mitigation measures centred on clear and forthright explanations to the communities at pilot sites as to the objectives of the project. Indeed, explanations were necessary to stipulate and remind communities that the team's aim was not only the resolution of a particular case but also the documentation of replicable resolution mechanisms.



A disused tank lies in a field in the Panjsher Valley – disputes involving land are a frequent legacy of conflict in Afghanistan. Photo: Jay Lamey

3. A Typology of Land Disputes

A key point of departure for the project was to better understand the nature and extent of land disputes in Afghanistan on the basis that such a foundation is necessary for designing and implementing relevant approaches to the resolution of land conflicts. An effective way of characterising land disputes was through the development of a typology of land disputes that captured the general categories of dispute as they are found in Afghanistan. This section presents the results of the typology and draws conclusions on how these characteristics influence land dispute resolution approaches.

3.1 Data validity

The greatest challenge to the development of the typology was accessing accurate and germane data. As mentioned in the Executive Summary, few records on land—whether on ownership, disputes or otherwise—are held by the Afghan government. One source of data which was available to AREU had already been drawn upon in a preliminary way, this being the NRC ILAC case database.³ However, due to the way in which this data was collected, there remained considerable limitations on its external validity and thus the broader inferences that can be derived from it, as discussed next.

ILAC offices are located in seven provincial capitals, although these offices also accept cases from other provinces.⁴ When providing information or legal services to clients involved in land disputes, ILAC staff record short case summaries for their internal records. Since 2004, this information has then been entered into a database of cases dealt with or in-process at ILACs. This database is the source of

3 Very preliminary and limited evidence was used from this resource for presentation in McEwen A. and Whitty, B. (2006) 'Water Management, Livestock and the Opium Economy: Land Tenure', Kabul, AREU.

4 At the time of creation of the typology, ILACs existed in Bamian, Herat, Nangarhar, Balkh, Baghlan and Kabul. Because the LC project's focus is on rural land conflict, Kabul (where most cases registered at the ILAC deal with land in an urban setting) was not included in the typology. A new ILAC opened in Kunduz in early-2007 after the creation of the typology.

data used for the land conflict typology.

The data from ILACs used in this typology is not random, nor can it be assumed to represent an accurate cross-section of land conflict in Afghanistan. As mentioned, ILACs are located in only seven of Afghanistan's 34 provinces, due to finite resources and organisational focus. Insecurity in wide areas of southern and eastern Afghanistan, particularly in those provinces bordering Pakistan, combine with organisational focus with the result that no ILAC is located in these areas. Disputants that bring their cases to an ILAC for assistance may be on average better educated, wealthier and more powerful than disputants that do not bring their cases to an ILAC, because the centres are located in provincial capitals where land is more expensive and where access to education and other government services are better than in more remote areas. Of course, citizens from surrounding villages may travel to provincial centres to bring their cases to the attention of the ILAC, but available data did not indicate this conclusively one way or the other. Because of the nature of the NRC mission, ILACs deal exclusively with refugee or returnee clients and nearly all cases will thus have a refugee or returnee as the plaintiff or defendant. With this in mind, the data should not be considered as implicitly representative of broader land problems in Afghanistan.

However, as long as these limitations are recognised, the data offers a unique—and one of the best—resource with which to study the attributes of a large number of recent land conflicts from around the country.

3.2 Data set and analysis: Characterising land dispute

AREU staff extracted 1,168 land and water resource dispute records from the ILAC database. A range of both categorical and continuous variables were identified to most effectively capture the attributes of these disputes, and a spreadsheet created based

on these variables. For the purposes of constructing a typology, these can be organised by several important variables. These include the category (or type) of the dispute; parties to the dispute; type of resource under dispute; land area under dispute; use of the disputed land; and, duration of the dispute.

Land disputes were classified according to five general categories, plus a sixth undefined category, as shown here:

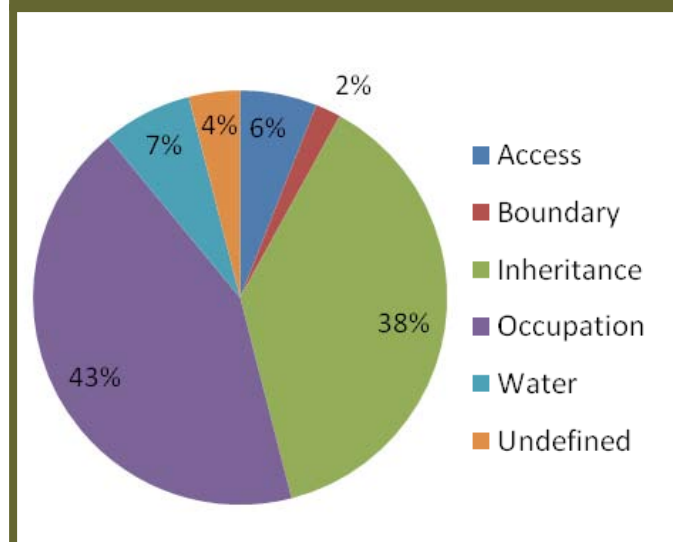
Table 1. Land dispute category definitions

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

Looking at this data in aggregate in Figure 1, we see that the single most important source of dispute derives from the occupation of land by one party from another. The next most frequent category of disputes is those over inheritance (the generational transfer of land). The data therefore suggests that the majority of disputes in the database (81 percent) centre upon ownership rights to land. Conflicts over boundaries, access and water (rather than outright ownership) appear less frequently. It is important to remember, though, that all cases registered in NRC ILACs

will also have a refugee or returnee component, reflecting the NRC's mandate.

Figure 1. Breakdown of NRC recorded disputes by conflict category (n=1168)



NRC data indicates that the area of land under dispute can range from under a single jerib to tens of thousands of jeribs. However, while the geometric mean area under dispute is about 200 jeribs (40 hectares), the standard deviation for this value is very high (>3000). This geometric mean is actually distorted by some very high values. The majority of recorded disputes (71 percent), concern less than ten jeribs (two hectares) of land. The frequency distribution of disputed land areas is shown in Figure 2 (next page). The modal value lies between two and four jeribs.

The tables that follow (two to four) characterise disputes based on whether the resource is private land (mortgaged or non-mortgaged), managed through a CPR, or a water resource. Two indicators have been used to indicate the relative vulnerability of plaintiffs: first, whether the action involves women; and second, whether the plaintiff themselves draws an off-farm income or is solely dependent on the land. The data is presented in aggregate and disaggregated according to whether the case involved only individuals or if a group is involved (i.e. a village).

Figure 2. Frequency distribution of land areas (<26 jeribs) subject to dispute (n=620)

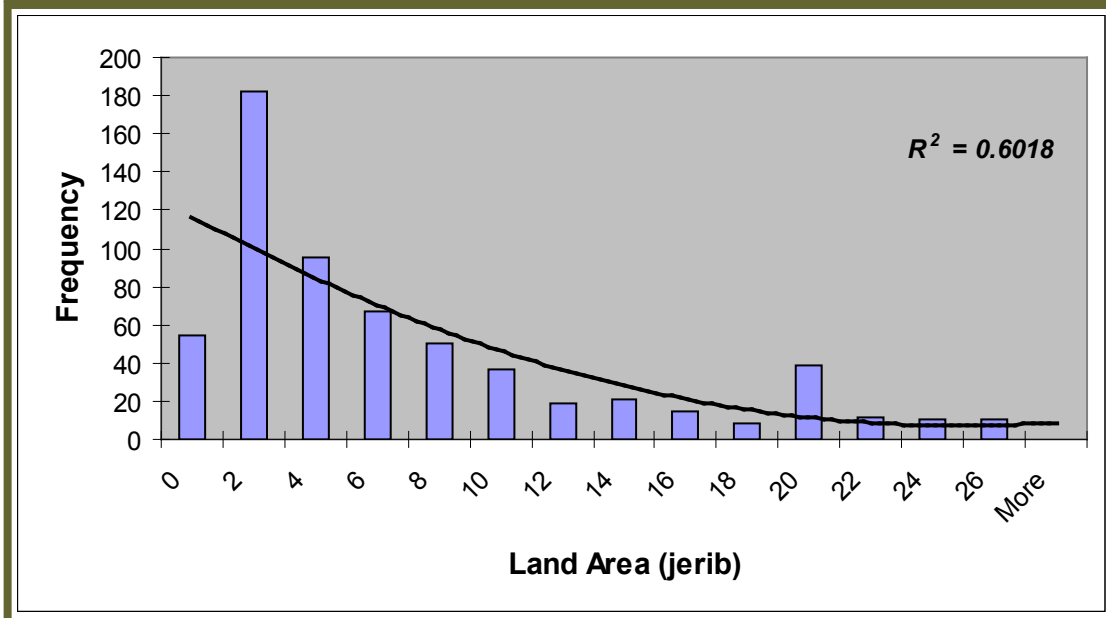


Table 2. All recorded NRC cases (n=1168)

Category	Total (%)	Mean area (jeribs)	Good faith	Resource Type (% of cases)					Vulnerability (% of cases)	
				Private mortgaged	Private non-mortgaged	CPR	Water resource	Other	Women	Off farm
Access	6	127	33	67	16	16	0	0	34	49
Boundary	2	319	3	52	28	21	0	0	35	48
Inheritance	38	48	19	97	1	1	1	0	21	32
Occupation	43	363	21	96	1	4	0	0	15	52
Water	1	17	25	25	42	8	8	17	8	14
Undefined	2	237	32	91	4	5	0	0	5	33

Table 3. Individually-led NRC cases (n=1008)

Category	Total (%)	Mean area jeribs (std. dev.)	Good faith	Resource Type (% of cases)					Vulnerability (% of cases)	
				Private mortgaged	Private non-mortgaged	CPR	Water resource	Other	Women	Off farm
Access	4	9	25	82	7	9	2	0	21	30
Boundary	7	4	8	69	0	0	15	15	8	15
Inheritance	34	34	11	98	2	0	0	0	25	41
Occupation	45	39	11	98	0	2	0	0	13	39
Water	8	16	53	0	0	5	1	94	77	12
Undefined	2	208	32	92	2	6	0	0	26	39

Table 4. Group-led NRC cases (n=159)

Category	Total (%)	Mean area jeribs (std. dev.)	Good faith	Resource Type (% of cases)					Vulnerability (% of cases)	
				Private mortgaged	Private non-mortgaged	CPR	Water resource	Other	Women	Off farm
Access	19	200	20	63	37	0	0	0	70	47
Boundary	10	761	25	44	6	38	13	0	56	19
Inheritance	20	285		90	0	10	0	0	19	19
Occupation	42	3,002	9	85	2	12	2	0	26	16
Water	5	901	38	88	0	13	0	0	88	13
Undefined	4	99	14	86	0	14	0	0		

3.3 Good and bad faith

On the basis of available evidence, disputes over rural land and water resources may be characterised as existing in “good faith” (both parties genuinely believe they are entitled to the disputed resource) or in “bad faith” (where one party appears to be challenging another party with the aim of illegally acquiring the resource and which may involve the use of coercion, fraudulent documentation or deliberate misrepresentation).⁵ ILAC data suggests that overall, a much higher proportion of land disputes occur in bad faith than in good faith, as shown in Figure 3. Therefore, it seems that most ILAC recorded disputes represent deliberate attempts to appropriate the resources of others, rather than genuine confusion or duplication of ownership. However, even if both parties are acting in good faith, this does not exclude the possibility of serious conflict arising between them.

Statistical analyses finds that good faith disputes generally involve smaller areas of land than bad faith disputes. Similarly, we find that good faith disputes do not tend to last as long as those in bad

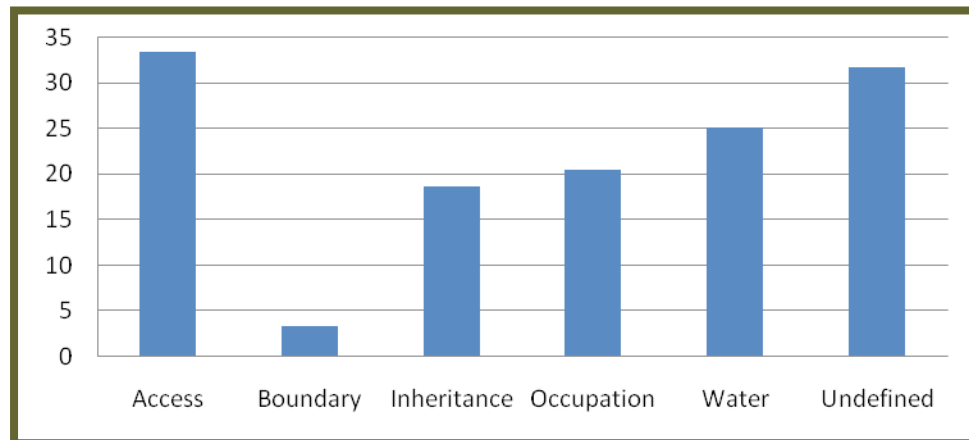


Figure 3. Proportion of cases with disputants acting in “good faith” by category

faith. These findings seem to confirm the intuitive assumption that good faith disputes are probably more tractable than bad faith ones. Although good faith disputes may be more tractable, bad faith disputes are more prevalent and the development of resolution mechanisms must correspondingly take the conditions existing in bad faith disputes into account.

3.4 Types of resource

The majority of recorded disputes occur over private, non-mortgaged land. This type of land will generally be of higher value than land that is

⁵ NRC ILAC staff used these criteria to classify cases accordingly.

mortgaged or managed by CPR and is often well-irrigated and fertile agriculture land. However, some differences can be found in the incidence and type of dispute by the different category of resource. The most important types of dispute to afflict mortgaged and land managed by CPR seems to be those concerning rights of access and boundaries. Other types of dispute are much less frequent. The overwhelming majority of inheritance and occupation disputes (>95 percent) concern high value, non-mortgaged private land, with relatively few disputes concerning other types of resource.

By contrast to all other categories of dispute, those over water more often relate to mortgaged land than non-mortgaged (possibly because it is the less irrigated land which is first mortgaged off, or maybe because there is uncertainty as to whether water rights to land are also transferred to the mortgage holder).

The chi-square test was used to examine relationships between resource types and categories of dispute. Results confirm that both inheritance and occupation type disputes exceed expected frequencies on non-mortgaged private land, at ($X^2 = 13.450$, sig 0.004) and ($X^2 = 9.885$, sig 0.020) respectively. Disputes over access to land did not statistically deviate from expected frequencies for different resource types ($X^2 = 0.405$, sig, 0.939) and there was insufficient data to undertake a comparison for boundary and water disputes.

3.5 Duration of disputes

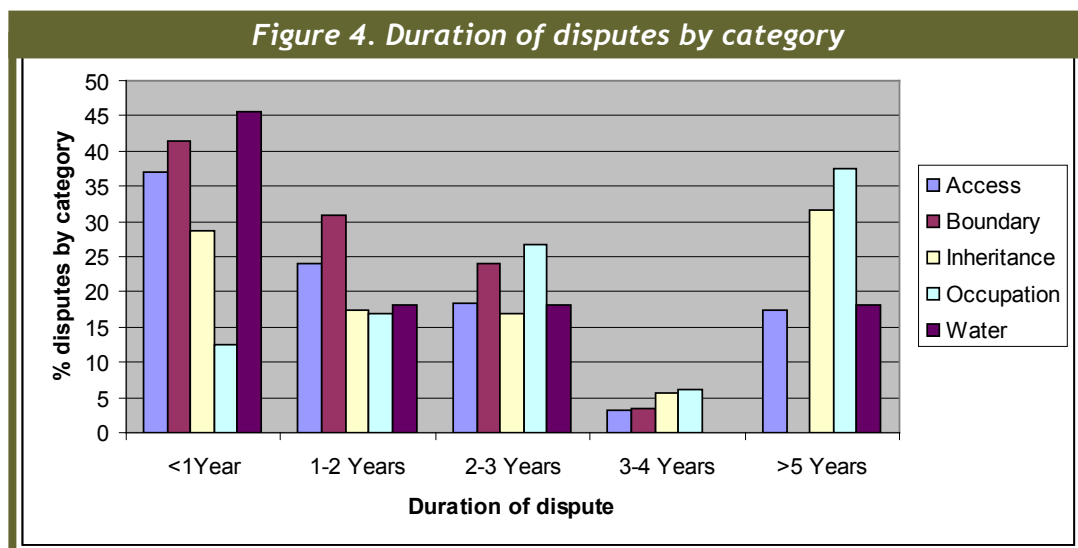
Trends are evident in the duration of disputes. NRC case records suggest that both access and boundary related disputes (i.e. those not concerning full rights of ownership) are not as enduring as disputes over inheritance and ownership, which tend to occur in bad faith, concern full rights of ownership and often concern more valuable types of land resources. Inheritance and land occupation disputes are most frequently reported to the NRC within the context of cases that have endured longer than five years.

Pearson's Product Moment Correlation was used to explore the linear relationship between the variables of land area and duration of dispute. A very weak positive correlation was identified ($r = 0.032$). It therefore seems probable that the area of disputed land has little relationship to the severity or tractability of the dispute.

3.6 Vulnerability

The NRC data provides two categorical variables that can be used as proxy indicators for vulnerability. These are the involvement of women in cases, and whether the plaintiff receives an off-farm income.

It was found that farmers with off-farm incomes were generally involved in disputes concerning larger areas of land ($M = 152.21$ jeribs) than those without ($M = 42.33$ jeribs), and with α at 0.05, this difference was significant (ANOVA $p = 0.001$). The relationship between women's involvement in cases and disputed land area was similarly tested.



Surprisingly, disputes that involve women tend to be over larger areas of land than those that do not ($p=0.047$), although this might be because of women's frequent inclusion in group cases (which tend to be over larger areas).

In order to further investigate the vulnerability status of plaintiffs in cases brought to NRC, an arbitrary index was established that combines the proportion of women involved in each type of case with the proportion of plaintiffs without sources of income other than the land. This index runs on a scale from zero (no women, all plaintiffs have other incomes), to two hundred (all cases involve women, no off-farm incomes). The results of this analysis are presented in Figure 5.

These data from recorded NRC cases suggests that in all categories of dispute, other than Occupation, plaintiffs involved in group cases are more vulnerable than those bringing cases individually. To some extent this finding is intuitive (weaker individuals banding together to pursue cases), although it could also reflect the way data were recorded by NRC field workers (large groups are more likely to include at least some women and households without off-farm incomes).

Looking at all disputes in aggregate, we see little variance in the vulnerability status of plaintiffs by different categories of dispute. However,

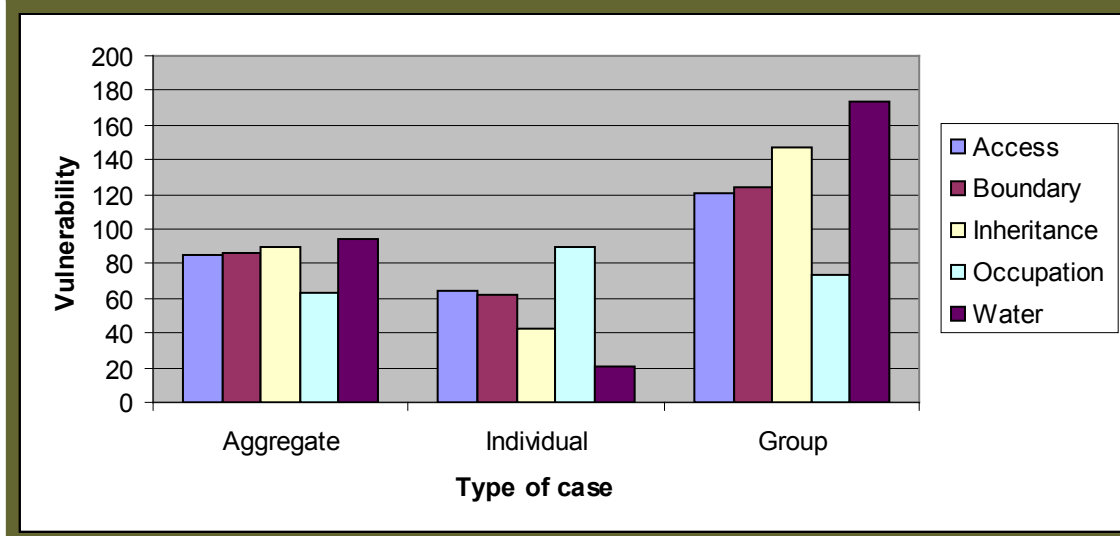
differentiating individual cases, we find that plaintiffs involved in occupation disputes appear more vulnerable than those involved in inheritance disputes. Disputes over water seem to involve the least vulnerable plaintiffs. By contrast, when group cases (involving multiple plaintiffs) are examined, it appears that those involved in occupation cases are actually the least vulnerable, and those in water disputes the most.

3.7 Individual versus group cases

Cursory examination of data revealed that NRC's group cases, that is, those brought to NRC by multiple plaintiffs (e.g. a village), appeared to involve larger areas of land than cases brought by individual plaintiffs. Accordingly, this was tested by way of an independent samples T test to compare the areas under dispute for each type of case. Results indicated that, while the mean for group led cases was very large (1335.96 *jeribs*, Std.dev 9696.9), the mean for individual cases was smaller (50.15 *jeribs*, Std.dev 348.54). This difference was significant ($p= 0.047$). Furthermore, group led cases tend to be more enduring with Mean Rank values of 346.03 compared to 314.17 for individually led cases (Mann-Whitney U test, $p= 0.048$).

The chi-square statistical test has indicated differences between the types of defendants

Figure 5. Vulnerability of plaintiffs by category of dispute and type of case



involved in those different types of cases. ($X^2=81.84$, sig <0.0005). Although constituting less than a quarter of all cases for which data is available, group cases account for over 50 percent of all cases against other villages, and about the same proportion against the government. Over a third of all cases against commanders are brought by groups. However, relatively lower proportions of group cases are brought within families or villages, or against returnees. Group cases therefore tend to be brought where power asymmetries exist between the parties involved in disputes.

The chi-square test was also used to investigate whether there was any relationship between how cases are led relative to whether disputes are in good or bad faith. Results indicate a deviation from the expected frequencies; group cases are taking forward a higher than expected proportion of bad faith disputes ($X^2 = 7.04$, sig 00.8).

As cases involving groups seem to differ from cases involving individuals in terms of area, duration and disputants, there is justification for looking at these types of disputes separately in future projects. A summary of preliminary findings of these differences is given in Table 5.

Table 5. Summary of differences between individual and group cases

Variable	Individual dispute	Group dispute
Land area	Smaller area	Larger area
Duration of dispute	Shorter	Longer
Good faith	Relatively higher proportion of good faith disputes	Relatively lower proportion of good faith disputes
Type of land resource	Mostly concerning private land	A relatively higher proportion of disputes concerning common property
Parties to dispute	Relatively higher proportion of disputes involving same family or neighbours in the same village	Relatively higher proportion of disputes involving other villages, commanders and government (asymmetric power)

3.8 Key findings from the typology

1. The highest frequency of disputes concern property ownership rights: inheritance and occupation are the most common sources of dispute
2. The majority of all disputes concern less than ten jeribs of land. However disputes over the largest areas usually concern common property
3. Most disputes are in bad faith. These disputes appear to be more intractable than good faith disputes
4. Some resources are predisposed to certain types of dispute:
 - Non-mortgaged private land is of highest value and most frequently subject to “occupation” or “inheritance” disputes.
 - A high proportion of “access” and “boundary” disputes concern mortgaged and common property
 - A relatively high proportion of water disputes concern mortgaged land
5. Disputes that challenge rights of land ownership generally endure longer than other types of cases.
6. It is the most vulnerable 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.
7. In most respects, group cases differ from individually led cases by area, disputants and whether they are in good or bad faith.

4. Summary of pilot cases

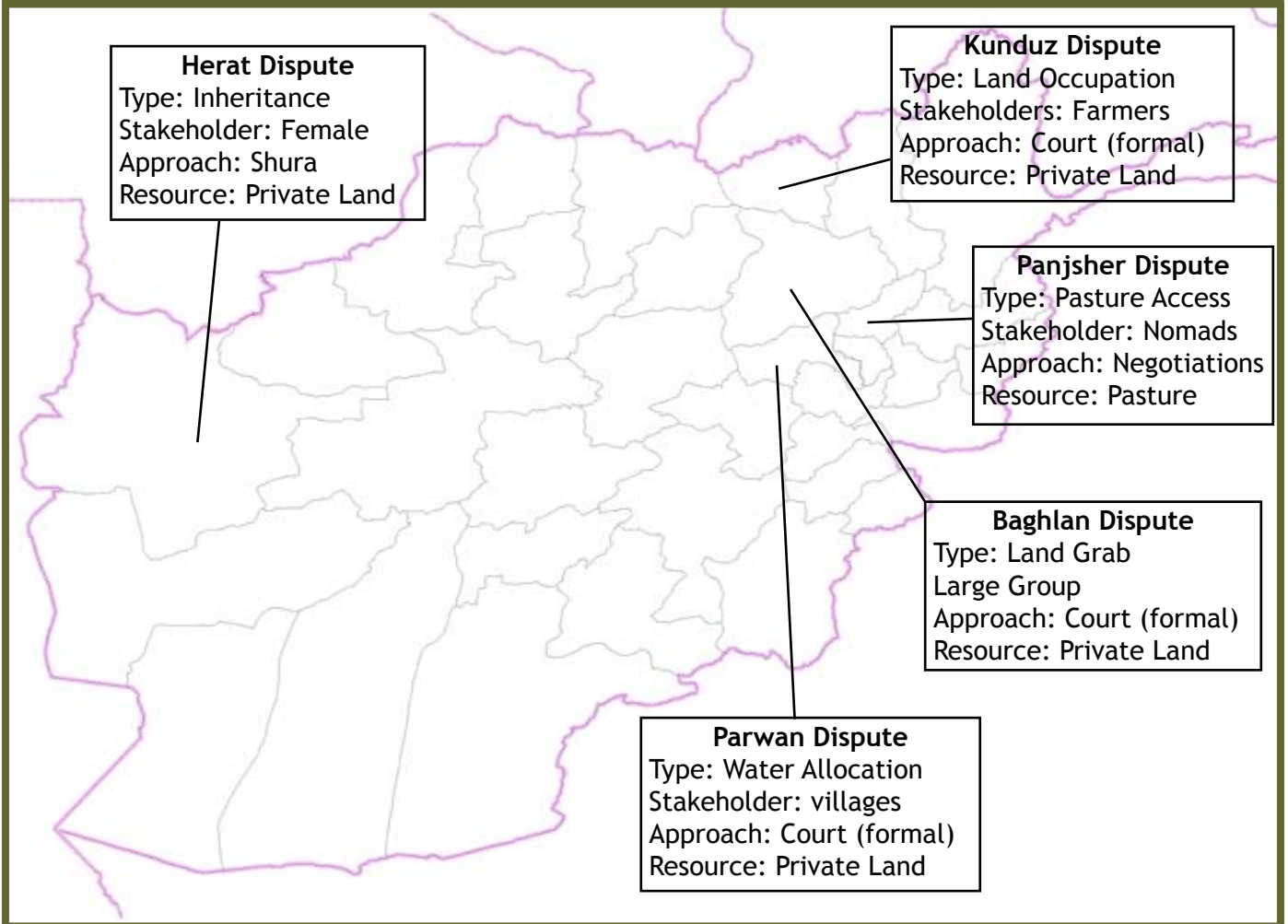
This chapter summarises the five cases selected as representative of land conflicts elsewhere in Afghanistan. The location and key characteristics of the pilot cases are summarised in Table 6 and mapped in Figure 6. These five cases are explored in further detail below, with the aim of giving the reader the necessary background through which to understand the resolution mechanisms in the rest of the paper. For each case, information is given on the location of the dispute; primary and secondary

dispute classification; resource in dispute; parties to the dispute; current status of the dispute; dispute resolution strategy; and key issues of the dispute. As discussed in Section 2, the LC Project also examined the means by which cases were brought to their attention, and took care to ensure that the cases selected were not only consistent with the categories determined in the land dispute typology but also typical and representative of the wider range of cases in each category.

Table 6. Summary of pilot cases

Location (Province)	Resource	Primary Dispute Classification	Secondary Dispute Classification	Parties	Resolution Approach
Kunduz	20 <i>jeribs</i> of irrigated land	Land appropriation	Returnee land rights	Two male farmers with families	GCS; later brought to and resolved by a CBM
Herat	6.9 <i>jeribs</i> of irrigated land and a shop on the property	Land inheritance rights	Land inheritance rights of females; returnee land rights	A married woman and her two elder brothers	CBM
Baghlan	630 <i>jeribs</i> of rain-fed land suitable for irrigation used for small-scale cultivation and residential purposes	Group displacement and possible land appropriation		63 Ismaili families and an unspecified number of Pashtun families	Resolution through CBM and GCS were pursued but failed; resolution through national level political advocacy ongoing
Parwan	Water in a canal feeding	Common property resource		20 upstream Sanjiddara villages (some 3,000 households) and 3 Khalazai villages (some 2,000 households)	CBM with requirement for external rehabilitation of canal
Panjshir	2,000 <i>jeribs</i> of pastureland, increasingly being cultivated	Common property resource		A small number of transhumant pastoralists and approximately 213 village households	CBM with a component of local political advocacy

Figure 6. Location of Pilot Cases



4.1 Pilot Case # 1: Land Appropriation

Location of the dispute: Kunduz province

Primary Dispute Classification: Land appropriation

Secondary Dispute Classification: Returnee land rights

Resource in dispute: Twenty jeribs of irrigated land; these properties are registered with the district Amlak department

Parties to the dispute: Two male farmers with families of five and eight members. One farmer (the defendant), appropriated the land after the other farmer (the plaintiff) fled to Pakistan in 1982

Status: Solved; closed

Nature of the dispute

The plaintiff claimed his father received the land as part of a *noqileen*⁶ resettlement in the 1950s. The land was registered with the district Amlak office's land registry (the registration of land with *Amlak* departments is unusual, but by no means non-existent). After the death of his father, the plaintiff inherited the land and worked on it until he fled to Pakistan in 1982, during the Soviet occupation.⁷ The defendant began farming the land and continued doing so without contest until the plaintiff returned to Afghanistan following the overthrow of the Taliban.

The defendant claims that his father loaned the purchase price to the plaintiff's father, who was required to pay for the land as part of the *noqileen* settlement. The defendant claims that the agreement was for the plaintiff's father to then sell the defendant's father the land. The defendant presented two informal documents, a *hojatkhata* (loan agreement) and *urfi* (sales agreement) as evidence at court. The *hojatkhata* and *urfi* are both informal documents, issued by the community and verifiable only through witness testimony.

The plaintiff petitioned the Governor of Kunduz, who ordered that a delegation be formed to determine how to resolve the case.⁸ Since both parties held documents of ownership, the delegation

6 *Noqileen* were land distributions that took place, inter alia, during the administration of King Zahir Shah, who led Afghanistan with various degrees of power through the mid-twentieth century. During his reign the north and northeast of Afghanistan were deemed to be underpopulated based on the extent of cultivation the land could support. The King resettled primarily Pashtun families from the south and southeast of Afghanistan to these areas to cultivate the land, and to extend his political reach. For generations, these types of distribution projects have resulted in conflicting land grants and multi-party disputes fueled by ethnic differences and struggles for local power. *Noqileen* are based on *farman* (decree of law or proclamation).

7 There are many possible reasons, such as wealth, ethnicity and family history, that would cause one person to flee and another to stay.

8 Creating a delegation to resolve land conflict—especially when public land is involved—is a relatively common practice in the north-eastern region of Afghanistan. These are usually created by the provincial governor and include members from the local *Amlak* and the judicial offices. Allegedly, there is an administrative procedure stipulating the composition of such delegations but further information was not able to be found.

recommended that the dispute be heard by the primary court. This recommendation was non-binding but was duly accepted by the parties to the conflict.

The primary court called the plaintiff and defendant to present witnesses. The plaintiff's witnesses testified that the land had been given to the plaintiff's father through *noqileen* and that they had no knowledge of an agreement with the defendant's father. The defendant explained that most of the men who had been at the transaction were no longer living and duly presented witnesses who were not present during the *noqileen* and could only say that they had heard that the defendant's father had purchased the land from the client's father. The witnesses were not accepted by the court and the defendant was given opportunity to present witnesses that had been present but he was unable to do so.

The court determined that the land belongs to the disputant with the better legal documentation.⁹ The plaintiff prevailed as he provided documentation showing that his father had obtained the land directly from the Afghan government, that the land had been registered with the *Amlak* department and that his father previously paid taxes on the land. Complicating the case further, the plaintiff—having won at the primary level—admitted that he was unsure about the details of the transaction and the defendant may be right.

The defendant appealed the decision to the Kunduz Appeals Court, which transferred the case to the Baghlan Appeals Court. The circumstances of the transfer to the Baghlan Appeals Court are less than transparent: the plaintiff claims that the defendant requested this transfer because he felt that the Kunduz Appeals Court would rule for the plaintiff. The plaintiff also claims that the defendant requested the transfer to Baghlan due to existing

9 Legal basis may include Article 203 of the Civil Code, which states that the initial step in a judicial proceeding is determining the parties to the dispute and which of them possesses legitimate evidence of their claim. (Official Gazette Issue no. 722, Article 203 [unofficial English translation])

relationships with members of that court. The Supreme Court of Afghanistan granted the transfer despite an apparent lack of grounds for such a transfer. The plaintiff, fearing that the transfer would result in delays, bribery and a decision for the defendant, requested that the case be transferred to the Special Court for Property Disputes in Kabul. NRC lawyers explained to the plaintiff that this was not possible due to his lack of a Voluntary Return Document or other proof of refugee or returnee status and the request was dropped. The case was never heard by the Baghlan Appeals Court, however, as the plaintiff, despite having won in the primary court, accepted to have the case referred to a *jirga* for mediation for reasons of legitimacy and fairness.

The *jirga* mediated an agreement wherein the plaintiff would repossess the land provided he pay off the remaining loan amount (100,000 Afghanis or \$2,000) owed by his father. The defendant would not have any future claim on the land. Both parties agreed to these terms and signed a letter of agreement. The parties submitted this letter of agreement to the courts such that the agreement is adopted into the court's record. Article 231 of the civil law states:¹⁰

"If the parties to the claim settle their differences prior to the commencement of the claim and the proceedings, their settlement is put in writing and their dispute is brought to an end.

"If the settlement takes effect during the proceedings and the trial, the settlement is recorded in the decision and a judgment is issued allowing the settlement and an end to the dispute between the parties."

This is interpreted by NRC lawyers and others that mediated agreements submitted to the court are to be adopted into the court's record.

Dispute resolution strategy: The plaintiff brought the case to the GCS but later accepted that the case be mediated by a *jirga*, this despite having won at

10 Official Gazette Issue no. 722, Article 231 [unofficial English translation]

the primary court level. The plaintiff's decision was based on two factors. First, uncertainty of a fair trial at the appellate level as the defendant may hold sway there. Secondly, an assessment that a *jirga* has more legitimacy in the eyes of the community and will therefore allow for stronger enforcement of the decision, as well as maintaining or improving the plaintiff's and his family's standing and security in the community.

Key issues

- Advantages of community-based conflict resolution mechanisms versus the GCS, including efficiency and legitimacy in the eyes of the community¹¹
- Duplicate land ownership documents, possibly both legitimate, frequently because they have been issued by different Afghan government regimes¹²
- Corruption in the GCS; in this case, a party to the conflict was perceived to command an influence that could have an extraneous influence on the judgment
- Challenge of keeping cases moving through a GCS that is often inefficient and backlogged with cases
- Formalization of decisions reached through CBM

11 The comparative advantages and disadvantages of a GCS versus CBMs have been explored in depth elsewhere. See, for example, Thomas Barfield, Neamat Nojumi, and J Alexander Thier, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan," United States Institute for Peace, available at http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf (accessed 8 April 2009)

12 Numerous regimes have held power in Kabul during the decades of conflict since the mid-1970s. Often taking power by force, new regimes frequently chose not to recognise the actions of their predecessors as legitimate.

4.2 Pilot Case # 2: Female Inheritance Rights

Location of the dispute: Herat province

Primary Dispute Classification: Land Inheritance Rights

Secondary Dispute Classification: Land inheritance rights of females; returnee land rights

Resource in dispute: 6.9 jeribs of irrigated land usually sharecropped out to local farmers and a shop on the land; the land is registered with the district Amlak department

Parties to the dispute: A married adult woman (the plaintiff) in dispute with her two elder brothers (the defendants). All three disputants currently live in Herat city, where the plaintiff's brothers and husband own small businesses.

Status: Solved; closed

Nature of the dispute

The father of the disputants took his family to Iran in 1985 during the Soviet occupation of Afghanistan. Following their father's death in 1998, the plaintiff, her five sisters, six brothers (two of which are the defendants) and mother inherited the land and property holdings. The defendants travelled regularly between Iran and the family properties in Herat during the family's time in Iran, whereas the plaintiff did not return until 2005. The plaintiff's other siblings and her mother returned to Herat before 2005 and the inheritance was subsequently divided among those parties present (that is, all family members except for the plaintiff). Upon her return the plaintiff requested land and money for the shop from the defendants. The plaintiff deemed that the defendants were responsible as they returned from Iran first, assumed control of the holdings and distributed the inheritance to other family members. The plaintiff's family did not support her.

The plaintiff and her husband attempted to have the case resolved by a *shura* in May 2005 and by

the Herat City Court in June 2005. In both cases, the plaintiff was told that the case could not be resolved without the presence of all heirs.

On 2 November 2006 the plaintiff approached NRC for assistance. NRC contacted the heirs, all of whom were present for a 13 November 2006 *shura* with community elders and community leaders. NRC explained land inheritance rights according to *Sharia* and the civil code.¹³

¹³ It should not be assumed that community elders and community leaders are familiar with, let alone experts in, *Sharia*. For example, in the Inheritance, Property and Family Law training provided by NRC for community elders and community leaders in ten districts of Herat province, it was observed that participants are often literate but have a limited knowledge of *Sharia*. This is not surprising as *sharia* is a complicated subject of which only senior mullahs may be knowledgeable. It should be mentioned that many mullahs knowledge of *sharia* is not complete, with specialisation in one or more subject areas. For example, most senior mullahs are familiar with family rights in *sharia* but fewer mullahs have knowledge of inheritance law, which is a difficult specialty. Most community *shuras* are thus comprised of community elders and religious leaders, and are often chaired by one or more mullahs. Decisions are made by elders based on instructions of the mullahs. Indeed, the legitimacy of a *shura* often depends on the presence and instructions of mullahs. A problem that arises is that knowledgeable mullahs are not always available to participate in *shuras* in remote areas. The *shuras* may thus be led by less-knowledgeable mullahs who have more limited understandings of *Sharia*. In these cases decisions are often made according to community customs and

The legal heirs in this were deemed to be the deceased's wife (categorised as *zawelforoz* in *Sharia*) and the deceased's children (categorised as *asaba* in *Sharia*). NRC lawyers explained the inheritance rights of each category. The deceased's wife was duly allocated one-eighth of the patrimony, with the remaining seven-eighths divided among the deceased's children with males receiving twice the inheritance of females.

The legitimacy of the sale of the shop was also brought into question. According to *Sharia* and the civil code, inherited property must be divided before it is sold or must be sold with the permission of all legal heirs. Customary law in this, and many other parts of Afghanistan, requires that community elders sign property transaction documents. The community elders, by signing the transaction documents but not ensuring adherence to *Sharia* and civil code, had violated (quite possibly without knowledge) the rights of the plaintiff. The legality of the sale of the shop was thus questioned.

Based on these explanations the inheritance rights of the family members were reviewed and the plaintiff duly received the same inheritance as her sisters. A representative of the community demarcated the land and on 20 November 2006 the plaintiff received a total of 0.335 *jeribs* from different locations and 71,600 Afghanis (\$1,432) based on her inheritance rights and the value of the shop, previously sold by one of the brothers. An agreement letter was signed and submitted to the courts.

Dispute resolution strategy: Both the plaintiff and the defendants agreed that community-based mediation provided the best opportunity for swift resolution while maintaining the reputation of the family. The LC Project team assisted by preparing the disputants for the mediation through a series of bilateral meetings during which the disputants were briefed on the purpose of the mediation, the role of the neutral mediator and relevant parts of

community leaders' understanding of justice which, in many cases, is based on compromise instead of *Sharia*.

Sharia law. The defendants' goodwill towards the plaintiff (their sister) was an important, albeit not necessarily essential, component of the successful conflict resolution.

It was necessary for NRC to arrange the *shura* because of insufficient knowledge within the community and also, apparently, because of a lack of willingness by the members of the *shura* to implement *Sharia* appropriately, especially with regards to questions of gender. It appears that *shura* members, without the involvement of NRC, may not have agreed to a *shura* because the plaintiff was female and the defendants were male. This may have been avoided were the plaintiff's husband to request the *shura*, but the fact that this is a hereditary dispute to which the husband is not a part may have limited such an approach. Also, according to Afghanistan's civil code, it would have been first necessary for the plaintiff to ask the GCS to grant her husband power of attorney.

Legal support for the decision of the *shura* includes article 1993 of the civil code: "The ownership of movable and immovable property, and the rights left behind by the deceased shall be transferred to heirs in accordance with the rules..."¹⁴ Article 1994 states that "the right of inheritance is realised with the death of the bequestor..." and article 2091 states: "Each one of the heirs may demand from the settler that he deliver his part in the patrimony separately to him, except when the inheritance must remain common by reason of prior agreement or provision of the law."¹⁵

Key issues:

- Advantages of community-based conflict resolution mechanisms versus the GCS, including efficiency and legitimacy in the eyes of the community, and retaining honour

¹⁴ Official Gazette Issue no. 353, *Part Two: Transfer of Ownership Due to Death, Topic One: Inheritance, Sub-Topic One: General Provisions*, Article 1993 (1355) [unofficial English translation].

¹⁵ Official Gazette Issue no. 353, *Part Two*, Article 1994; Official Gazette Issue no. 353, *Part Two*: Article 2091.

- Women's inheritance rights according to *Sharia* and the GCS, including discrepancies between these¹⁶
- Returnee rights and the difficulty of proceeding with a case when not all stakeholders have returned to Afghanistan
- Formalization of decisions reached through *shura*

16 Afghanistan is an Islamic Republic. Chapter One, Article Three of the Constitution states: "In Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam." There is no official English translation of the Constitution; official Dari and Pashto versions and unofficial English versions are available at from: Islamic Republic of Afghanistan, The Office of the President, English version available from <http://www.president.gov.af/english/constitution.msp>. Most English translations of Afghan legislation is available from the Afghanistan Legal Documents Exchange Center (www.afghanistantranslation.com). There is thus theoretically no difference

between the civil code and sharia, whether in the field of inheritance rights or other in for other questions.

4.3 Pilot Case # 3: Group Displacement

Location of the dispute: Baghlan province

Primary Dispute Classification: Group displacement and possible land appropriation

Secondary Dispute Classification: Not Applicable

Resource in dispute: Six-hundred-and-thirty jeribs of land used for small-scale cultivation and residential purposes. The land is suitable for irrigation but no irrigation structures exist. The land is currently mostly fallow and has few inhabitants because of the dispute. The Afghan government plans on building a dam in the area and, although the dam will not flood the resource in dispute, neighbouring lands will be flooded (including those of the Pashtun families party to the conflict), thus increasing the value of the land in dispute. There has been discussion at the national level of creating a township on the disputed site for persons displaced by the reservoir created by the dam. The mechanism through which individuals would be compensated is unclear and limited Afghan government capacities, specifically, cadastre and Amlak, will make this a difficult process.

Parties to the dispute: Sixty-three Ismaili families (the plaintiffs) and an unspecified number of Pashtun families (the defendants) are claiming entitlement to the disputed area. The Ismaili families are displaced and living in Pul-i-Khumri, the capital of Baghlan province. The Pashtun families live adjacent to the disputed land.

Status: In progress

Nature of the dispute

The Ismaili families claim to have received ten *jeribs* each as a grant from the Najibullah Afghan government in 1988.¹⁷ The grant may have been based on ethnicity as the provincial governor at the time was also Ismaili.¹⁸ The families received title deeds, which were registered with the district *Amlak* office. In 1998, due to their minority status, the families were forced to flee when the Taliban captured the province. The elders of the neighbouring village, who, like the Taliban, are Pashtun, appropriated the land and divided it among their own community members. In the years since the Ismaili fled some of the parcels have been sold, transferred or otherwise distributed, making it difficult to identify the current owners and therefore the parties to the dispute. The Ismaili families returned to Afghanistan in 2002 following the fall of the Taliban but were prevented from reoccupying the land. They lived in an Internally Displaced Persons (IDPs) settlement with little arable land and few employment opportunities.

The Ismaili families pursued the case in court, where they brought a suit against a group of families, not specific individuals. Decisions were issued against them at both the primary and appellate level. The Ismaili then appealed the case to the Supreme Court of Afghanistan, who overturned the decision of the lower courts for lack of application of law or procedure. The decision of the Supreme Court stated that the primary court should have required that the plaintiffs identify all defendants prior to hearing the case. In 2006, the case was remanded to the lower courts for retrial.

With the case back on its docket, the primary court stated—in accordance with the decision of the Supreme Court—that it would only hear the case if the plaintiffs brought specific defendants to the court. This was not possible due to the subdivision of the land, which makes identifying all owners difficult

17 M. Najibullah, of the Ghilzai Pashtun tribe, was the last president of the communist Democratic Republic of Afghanistan, serving from November 1986 to 16 April 1992. M. Najibullah was killed by the Taliban when they captured Kabul in September 1996.

18 Other Ismaili families received land in similar distribution schemes but are not party to this conflict.

(as noted previously). The plaintiffs thus petitioned the Parliament of Afghanistan through the newly created Petitions and Complaints Committee, which is permitted to receive petitions and complaints directly from citizens. The committee, which can make recommendations but not binding decisions, recommended that the Governor of Baghlan restitute the disputed land to the plaintiffs. The Governor of Baghlan duly delegated responsibility to a delegation, who subsequently decided that the Ismaili were the legal owners of the land. Like the Petitions and Complaints Committee, the delegation had the power to make recommendations but not binding decisions. However, the then Governor of Baghlan was fired prior to taking further action, whether or not it would have been in accordance with the recommendations of the Petitions and Complaints Committee and the delegation.¹⁹

Having lost significant momentum, the case was brought to the attention of the newly appointed Governor of Baghlan. Following involvement by NRC, UNAMA, UNHCR and AIHRC, the Governor of Baghlan agreed that a *jirga* should be convened to determine the rightful owners of the land. It appeared that the governor was unwilling to impose a decision in any form for fear of repercussions. As one respondent put it, “the attribution of land to Ismaili tribes entails some tensions among other tribes and the governor is not strong enough to impose his will and decisions.” Whether the Governor is or is not strong enough may be beside the point, however, as the decision may have been based on a belief that a *jirga* would have more legitimacy in the eyes of the community than his decision would. The *jirga* has not yet taken place, due perhaps to delays resulting from the politically sensitive nature of the case.

Dispute resolution strategy: Progress on this case has been made through political intervention, as both CBMs and the GCS were unable to make progress due to the sensitive nature, scale and

19 The most apparent reason for the firing of the Governor of Baghlan was the bombing at the Baghlan Sugar Factory which resulted in many fatalities, including Members of Parliament who were attending a ceremony marking its re-opening. However, the current Governor of Baghlan stated that his predecessor was also fired due to his inability to solve this land conflict.

complexity of the case. The GCS may have failed to adequately apply the law due to the discrimination against the Ismaili, which precluded any transparent or balanced discussion of the issue in favour of a uniformed, biased interpretation of the law. Community-based mediation failed to reach an agreement amenable to both groups, likely in part due to the historic tension between them. However, due to the abundance of conflicting evidence, the complexities in the dispute, and the political interests involved, it is still uncertain that a fair resolution can be reached through political advocacy. It may be necessary to pursue a different solution, such as the distribution of an alternative portion of land to the minority group.

Key issues:

- Need to prioritise issues impacting large numbers of people or that threaten to destabilise an area²⁰

20 The NRC explains that the Baghlan case is principal case, as described in the Methodology chapter, accordingly:

Although the Baghlan case has not exhausted all legal procedures, the case represents a recurring trend wherein claimants are denied meaningful access to justice in the courts due to corruption, favoritism and lack of political will. By focusing on this case, the Land conflict Project hopes to show how political advocacy can facilitate access to

- Partiality of Afghan government officials based on ethnicity, religion, history and other factors, and a corresponding biased application of law
- Refugee and IDP returnee rights
- Large numbers of disputants with no one authorised to represent all plaintiffs or defendants²¹
- Duplicate land ownership documents, possibly both legitimate, frequently because they have been issued by different Afghan government regimes

a system that should be universally accessible, and how that system can be made to perform with improved transparency and accountability.

The Baghlan case is particularly interesting as, in addition to the failure of legal and administrative procedures (bullet number one), political intervention has also failed (bullet number three). In this case the difficulty is with the implementation of decisions taken through political intervention.

21 “Class action” or “representative action” lawsuits are those where a large group of people collectively bring a claim to court. This type of lawsuit originated in the United States and is still a predominately US phenomenon.

4.4 Pilot Case # 4: Water Allocation

Location of the dispute: Parwan

Primary Dispute Classification: Common property resource

Secondary Dispute Classification: Not applicable

Resource in dispute: Water supplied by a primary canal irrigating the fields for, and supplying drinking water to, approximately 23 villages

Parties to the dispute: Three Khalazai villages representing approximately 2,000 households (the plaintiffs) and approximately 20 Sanjiddara villages representing approximately 3,000 households (the defendants) upstream of the plaintiffs; the Khalazai are Pashtun and the Sanjiddara are Tajik.

Status: Solved; agreement reached conditional on the rehabilitation of the canal, possibly through the National Solidarity Program or another initiative

Nature of the dispute

Following conflict in the area during the civil wars of the early to mid-1990s, commanders from the defendants' community built a dam in 2002, restricting the flow of water to the plaintiffs' villages and demanding payments for allowing water to flow. With UNHCR support, a *jirga* was convened between the parties to the dispute in 2006 (information was not able to be obtained to explain the four year gap). While the defendants decided to allow flow to the plaintiffs, commanders ostensibly representing the defendants again intervened to stop the flow. Apparently, village elders and other community leaders were unable to persuade their commanders to allow water flow. Appeals were made by the plaintiff to the Governor of Parwan, who was of the same ethnicity as the defendants; he did not respond. In the summer of 2006, water shortages resulted in severe hardship throughout Afghanistan, including claimed deaths in the plaintiffs' villages; the lack of water and associated dire agricultural situation drove approximately 600 plaintiff families to other parts of Afghanistan (predominantly Kabul) and to Pakistan. In 2007, heavy flooding damaged the canal, making it incapable of delivering sufficient water to either the plaintiffs or the defendants.²²

Dispute resolution strategy: After initial

investigations, the project team identified a strong commitment from both parties to enter into a water sharing agreement, if enforcement guarantees could be given. The team has been working to develop a framework for this type of agreement and was meeting with success until the flood damage to the canal. At this point, the parties are still willing to negotiate an allocation plan, but implementation is not possible until the capacity of the canal to carry water can be restored. For this reason, the team's resolution approach will include both facilitation of a community-based agreement and identification of another body to complete canal rehabilitation.

Key issues

- Common-property resources
- Ethnic underpinnings of land dispute
- Ability of communities to access assistance from the Afghan government, international organisations or others, though programs such as NSP²³
- Breakdown of traditional maintenance agreements, such as that for the canal
- Strain on natural resources caused by population growth from returnees and birth-to-death rates

²² Further investigation is needed to determine why the maintenance schemes that apparently allowed the canal to function through previous decades failed in this instance. Common factors such as population growth and ethnic conflict may or may not play significant roles.

²³ NRC was involved in legal aspects of the case but otherwise left the rehabilitation of the canal to existing structures and institutions, in this case the NSP through village CDCs and area Facilitating Partners.

4.5 Pilot Case # 5: Pasture Access

Location of the dispute: Panjsher

Primary Dispute Classification: Common property resource

Secondary Dispute Classification: Not applicable

Resource in dispute: Approximately 2,000 jeribs of pastureland used by transhumant pastoralist Kuchis from approximately April to August. The pasture is also grazed by livestock from adjacent villages and is increasingly cultivated by these villagers.

Parties to the dispute: Transhumant pastoralist Kuchis (the plaintiffs) and approximately 213 sedentary households from a nearby village (the defendants).

Status: Study concluded due to lack of applicable land conflict

Nature of the dispute

Both communities have shared use of the disputed land—predominantly as pasture—for approximately 100 years, with isolated conflicts resolved through mediation by community elders (a CBM) and solutions enforced by community consensus. There has been increased—but by no means widespread—conflict in recent years, due primarily to population growth in the villages, which has led to cultivation of land historically used by Kuchi livestock for pasture. The project team visited the site several times but was unable to locate the Kuchi party to the conflict due to their intrinsically frequent but not predictable movements. The project team was finally able to discuss the case with the Kuchi community during a September 2008 visit to the site.

The result was unexpected for the project team: Kuchi and villagers alike informed the project team that the dispute is not as widespread as the team was initially informed but rather that the Kuchi *malik* that originally brought the case to the project team’s attention did so, apparently, in hopes of personal gain. The project team was told that the only recent conflict was between two individuals (not the communities): a Kuchi whose livestock strayed into a cultivated field; and, the villager whose crops were damaged. The project

team was told that the conflict, arising from the villagers request for compensation for damages, was quickly resolved within the community. In the words of one of the Kuchi, “[the *malik*] is the one who is creating the dispute between us. He is not from here. There is no dispute between us [the villagers and the Kuchi].”²⁴

While it certainly plausible that the *malik* “invented” a conflict in hopes of gain for himself and/or his community, another explanation is that it was not only the *malik* who was complicit in exaggerating the conflict, but that the others backed away from this approach upon having determined that they would not benefit from additional assistance in the form of, perhaps, food distribution or infrastructure rehabilitation projects.

Yet another possibility is that the very involvement of the project team was impetus enough for the parties to resolve the conflict themselves. The Kuchi and villagers may have determined that through their involvement in the project they would be depicted as communities unable to resolve their own problems and that, to avoid this, they had better quickly resolve the problem themselves. Or,

24 Interview, Panjsher Province, 1 September 2008.

perhaps, initial discussions with those members of the communities that the project team was able to contact succeeded in bringing home the implications of the pros and cons of continued dispute versus resolution, with the communities choosing the latter and duly resolving the conflict themselves.

This unexpected development left the project without a case study for one of the most important land conflict issues (certainly that which in 2008 elicited the most attention): Kuchi transhumant populations versus sedentary farmers. Nevertheless, this case served to illustrate several points relevant to land dispute resolution.

Dispute resolution strategy: The dispute resolution strategies employed by the communities appears (based on the infrequent nature of conflict and quick resolution of even those) an adequate means for solving their potential and actual conflicts.

Key issues

- How individual personalities may have been or are able to quell or inflame the situation
- Risk of outside intervention in conflating or politicising a dispute by bringing in new expectations



Fields in various states of harvest (Panjsher Valley). Photo: Jay Lamey

5. Approaching Conflict Resolution

Previous chapters have determined and defined the characteristics and major types of land conflicts and presented pilot cases through which prevalent types of land conflict may be further studied. The findings set out in the next chapters of this report are intended to inform the development of suitable and effective conflict resolution approaches.

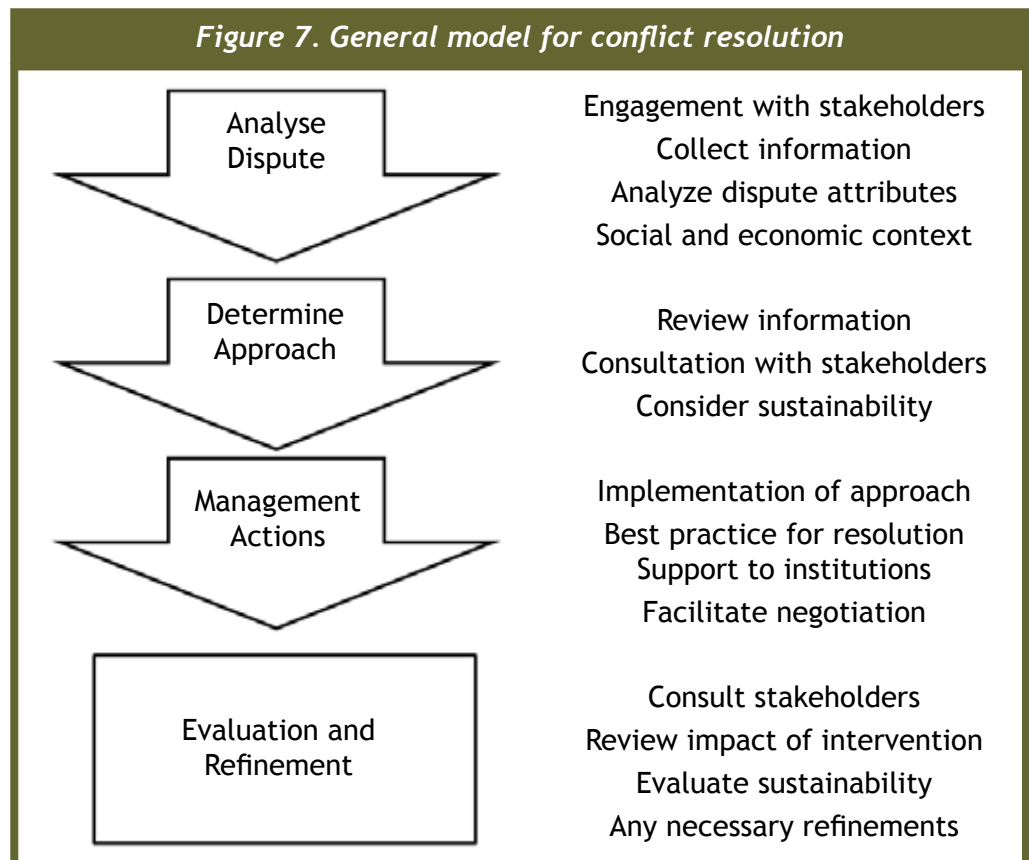
Findings suggest that in some cases (e.g. when disputants adhere by community-based authority or social consensus) CBMs such as *shuras* or *jirgas* provide the most effective, socially legitimate and enforceable instruments of resolution. In situations where disputants do not adhere to community-based authority or social consensus, adjudication through the GCS may be more appropriate. Intractable disputes involving one or more disputants who may be influential, powerful or otherwise unbound by either community-based authority, social consensus or the GCS may require pressure to be applied at political levels to ensure meaningful resolution. Evidence from this and other projects suggests that a spectrum of flexible resolution mechanisms must be developed that are applicable according to variables such as the nature of the dispute and its participants. Certainly, all land conflict resolution mechanisms should be united in the principle of providing socially legitimate and practically enforceable resolutions engaging all direct and indirect stakeholders in the dispute. All approaches to conflict over access state and public property

should to some extent engage Afghan government authorities as stakeholders.

5.1 A general model for conflict management and resolution

The general conflict resolution mechanism proposed is based on information gleaned from this project and other initiatives. It provides a sequence of steps by which the conflict manager (in this case, the project team; in other cases a representative of the Afghan government or community) first analyses a conflict to better understand its specific nature and then identifies an approach appropriate to its resolution. This leads on to a specific management intervention and finally an evaluation. This staged and systematic approach closely parallels the recommendations of work on land conflict management undertaken by the Food and Agriculture Organization of the United Nations (FAO) and other institutions.²⁵

Figure 7. General model for conflict resolution



²⁵ See for example FAO (2006), Ramirez, R. (2001), USAID (2004), FAO (2005).

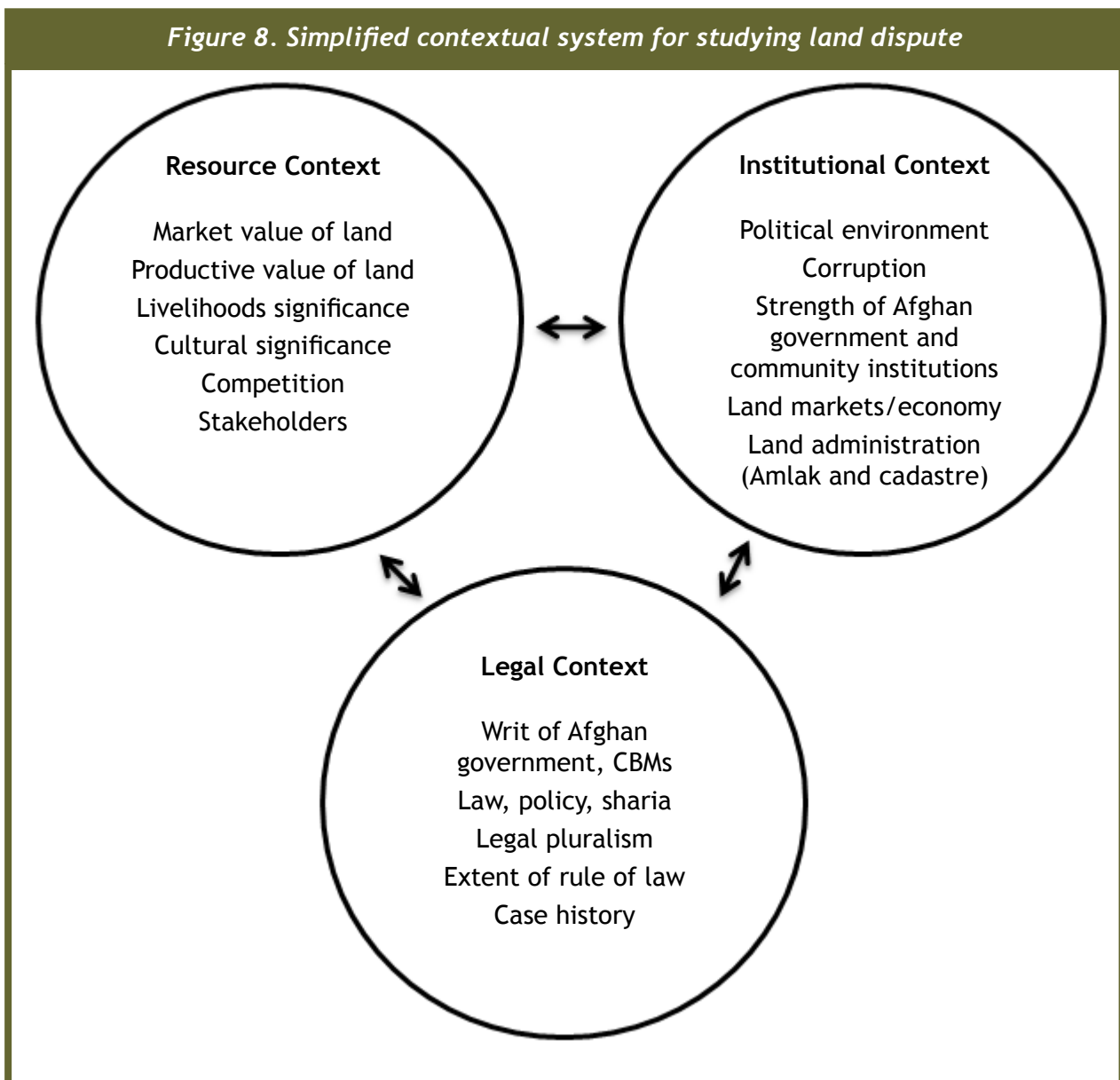
5.2 A framework for understanding land conflict

Fundamental to this mechanism is effective diagnosis of the major elements of the conflict. This raises further key questions about the context, structure and dynamics of land conflict that those charged with resolving the conflict need to address prior to selecting appropriate dispute resolution tools. The following section provides a basis for land dispute analysis by outlining the key structural components of disputes before relating these attributes to different forms of resolution strategy.

Studies have shown that many of the incentives and imperatives for land conflict can be identified through their social, political, economic and historical context. Land conflicts are complex and often comprise an accumulation of grievances or processes occurring at multiple levels. Reflecting on the framework set out in Figure 8, it can be envisaged how change in any of the determinant factors will influence the overall nature of the conflict in question.

For example, conflict concerning a land resource upon which the parties in dispute depend solely for their livelihoods will have different dynamics to

Figure 8. Simplified contextual system for studying land dispute



one where land is of relatively low economic value to one or both disputants. The existence or not of strong dispute resolution structures will influence how disputes are manifested and develop. The legal context, including the type of legal basis (e.g. civil law, *Sharia*) and whether an effective framework for the implementation of decisions is in place will affect the nature of a dispute and possibilities for its resolution.

While factors influencing the emergence and dynamics of conflict are by no means restricted to those summarised in Figure 8, the key point is that minor differences in the overall context of a dispute will influence the nature of the dispute as a whole. All disputes are embedded in diverse and complex contextual realities, including historical, social, economic and political factors. The extent to which a dispute must first be studied and understood cannot be overemphasised as this is an essential first step towards determining the most suitable approach.

The nature of the parties or disputants involved has an important affect on the characteristics of the conflict and resolution mechanisms that may be employed. This makes an effective stakeholder analysis an indispensable tool in dispute analysis. Stakeholder analysis, reduced to its simplest form, means identifying the parties involved in a dispute and exploring their interests and objectives in pursuing the dispute. Stakeholders to the dispute may hold either direct or indirect interests in the resource in question. Those with indirect interests will include groups affected by the broader consequences of the dispute resolution. In disputes where entitlements are complex, such as those over common property resources, there may be many legitimate stakeholders.

Power relationships between disputants will influence every stage of dispute development, manifestation and resolution. Conflict over land may be exacerbated where power asymmetries exist: the powerful may overstep their legal bounds if they fear little reprisal; the powerless may feel compelled to resort to violence or other extra-judicial actions if they are unable to otherwise protect their perceived entitlements. For example,

the powerful may be able to exert an influence over the institutions and structures that would normally operate to resolve conflict, and so be encouraged to make claims to resources for which entitlements already exist.

Power imbalances between stakeholders may be a consequence of the actual power attributes (social, economic and political) of the stakeholders themselves or may be structurally imposed, for example by a policy or legal framework favouring one group over another. Consequently it is possible to distinguish between “horizontal” and “vertical” power-relationships in land conflicts. “Horizontal” are those occurring between those sharing a roughly similar power status (often members of the same social group), while vertical disputes will involve a gap between actors’ socio-political influence.

The power relationship between disputants will affect how a conflict manifests itself. An imbalance will influence how actors pursue the dispute and thus how the conflict is expressed. Power imbalances are particularly significant in Afghanistan where rule of law is weak. With respect to dispute management, an effective resolution process may require special strengthening and support to the weaker actors to counterbalance the political advantages and influence held by the more powerful. For example, submissions to a provincial court by an impoverished returnee whose land has been occupied by a powerful local actor may require advocacy and scrutiny to ensure that due process is being followed.

A conflict analysis process looking at both the context of the dispute (its substance and contributory factors), and the relationship between actors involved, will inform the determination of appropriate mechanisms with which to approach the dispute. However, it is important that conflict analysis does not transgress into prejudice or determination of the rights or wrongs of the dispute.

5.3 Options for land dispute resolution

This paper has thus far set out CBMs, the GCS and

political advocacy as the major categories through which disputants may pursue resolution of their land conflict. Characteristics of resolution mechanisms available within each category are explored below and are summarised in Table 7. Although these are general categories of dispute resolution mechanisms, applicable in numerous non-Afghan contexts as well as Afghan contexts, they all have a degree of relevance either because they are already implemented or because they are worth exploring in the future. Resolution mechanisms that require that all parties to the conflict agree to the mechanism are termed consensual; non-consensual mechanisms are those that do not require agreement from the disputants for the mechanism to be implemented.

Non-consensual approaches are usually embedded in some form of written legal framework and decisions are usually binding. The principal advantages of non-consensual dispute resolution techniques are that *if* the rules that regulate decisions are legitimate and widely known, decisions will be easy to understand. Furthermore, the decisions in most adjudicated cases are enforceable by law, with the implication that the State is the guarantor of the decision. However, where state institutions are weakened or the judicial process suspected of partiality, the legitimacy and effectiveness of the adjudication is undermined. Furthermore, non-consensual resolution mechanisms are often more time consuming and resource intensive than consensual resolution mechanisms, both during the

adjudication and enforcement stages. As discussed in the LP Project’s Inception Report, the GCS, which is charged with implementing non-consensual dispute resolution mechanisms, is not only ineffective but also currently overwhelmed with cases, raising the incentives to explore consensual forms of dispute resolution.

Consensual approaches to conflict management often offer a range of advantages. Evidence, such as the Typology of land conflicts, indicates that many claimants prefer to pursue resolution through a CBM—in most cases, consensual mechanisms—and are also encouraged to do so by community elders as well as officials within the GCS. Because the process is consensual, decisions are often built on compromise, which makes the process faster and decisions more easily enforceable. Indeed, consensus-based approaches to land dispute resolution are in many instances less about determining who is “right” and who is “wrong”, but helping disputants to understand their respective positions and find a workable solution. Consensual mechanisms also have their drawbacks, however, such as prejudicial treatment of women, religious or ethnic minorities or where the balance of power between parties is disparate. In communities where traditional structures have broken down due to chronic displacement, consensual mechanisms may be subject to the same corrupt practices as non-consensual mechanisms.

Table 7. Consensual and non-consensual approached to land conflict resolution

Type	Technique	Description	Outcomes
Non-consensual	Adjudication	Evidence presented to a judge who decides outcome	Usually binding; decision upheld by law
	Arbitration	Non-judicial arbitrator listens to evidence and renders a decision	May or may not be binding, depending on prior agreement between disputants
Consensual	Negotiation	Disputants meet to discuss and reach agreement through compromise	May or may not be binding
	Conciliation	A neutral third party engages disputants separately to reconcile differences	May or may not be binding
	Facilitation	A neutral third party helps direct disputants to reach a resolution to the conflict	May or may not be binding
	Mediation	A third neutral party with no decision making role acts as an intermediary between disputants to improve communication	May or may not be binding

6. Conclusions

6.1 Challenges Identified

Through the LC Project, including the study of the five pilot cases, preparation of the typology and other activities, project partners have identified the main challenges to pursuing effective and durable resolution to land conflicts in Afghanistan. Many of these challenges have also been encountered by other institutions and individuals active in the prevention and resolution of land conflicts.

The main challenges identified include:

- Limited capacity of the justice sector, particularly the GCS
- Limited capacity at the MAIL, including *Amlak* and cadastre departments
- Irregularities among community-based dispute resolution mechanisms
- Lack of awareness among disputants as to their legal rights and required steps to formalise or claim those rights, including a limited ability to read and understand documents relative to a land claim
- Weak communication between the Afghan government, the GCS and those active in CBMs such as *shuras* and *jirgas*
- Delays in resolution, due to beliefs by one or multiple parties that delaying the proceedings will be advantageous or due to the failure of officials to impose procedure as instructed by law
- Corruption of government officials
- Lack of coordination amongst government entities
- Lack of rule of law and widespread insecurity

The LC Project found that more than one of the main challenges identified above—in addition to secondary challenges not listed above—will commonly appear in a single case.

6.2 Lessons learned

Lessons learned from the project, whether through the pilot cases, the Typology or the literature review of other projects, were:

- **Clear indicators can be identified to determine whether a land dispute may be more appropriately resolved through the GCS, a CBM or political advocacy.**

The project team found in all cases that indicators of varying complexity can be employed to decide which conflict-resolution mechanism is most appropriate for a specific dispute. When the five pilot disputes were initially selected, there was a presumption (based upon previous NRC case work experience) regarding how each would most likely be resolved. In practice, once the dispute was investigated or methods tried, it often became clear that these assumptions were incorrect due to a range of circumstantial factors. A good example of this is the female inheritance dispute, which initially was thought to be suitable for advancing through the GCS, but in fact was rapidly resolved through a CBM (*shura*).

- **Dispute resolution must remain adaptive and flexible to setbacks or changes. As circumstances (or stakeholders) change it may be advantageous to switch dispute-resolution approaches completely.**

The project team observed an impasse at two pilot sites that necessitated a change in approach to an alternative resolution mechanism. First, in the group displacement case in Baghlan, a lack of progress through the GCS led to an examination of the case at the political level. Secondly, in the dispute over private land in Kunduz, the lingering question of local acceptance and perceived legitimacy following a court ruling led to both parties accepting that the case be heard by a CBM. This is also a clear indication of how different mechanisms address

distinct dispute resolution outcomes and may complement each other.

- **Preparation, advocacy and oversight are essential to increase the performance of the GCS.**

The GCS in Afghanistan is under pressure from lack of capacity, lack of resources, heavy case loads and endemic corruption. Courts in Afghanistan have traditionally been subject to local political pressures and the influence of powerful parties, and even in areas where the GCS has been significantly improved, many Afghans continue to doubt the legitimacy or independence of the courts. The experience of the pilot project in Kunduz has shown that with effective support from independent legal aid, such as in the preparation of witnesses and documents, collation of the relevant points of law, and advocacy for adherence to procedure, courts can operate with increased efficiency, although they may still lack legitimacy in the eyes of the community. More significantly, the team also found that the presence of independent counsel in judicial proceedings greatly improves transparency and accountability while reducing risks of corrupt practices.

- **Preparation, information and oversight can build the capacity and effectiveness of CBM adjudication mechanisms.**

The team discovered that the performance of CBM *jirga* and *shura* proceedings may be enhanced through preparation and facilitation. Team members have found that participants generally welcome briefings on applicable civil and *Sharia* legal standards, as they are seeking to reach well-informed and durable solutions. Participants also welcome the participation of an objective third party to ensure that proceedings remain focused, balanced and that all parties are equally heard throughout. In the case of the inheritance dispute in Herat, the project team helped the parties to facilitate an organised process by gathering available testimony and documentation, while briefing the parties throughout the preparation phase on relevant provisions of *Sharia* law on inheritance. Participation of an objective external

actor in the mediation enabled the parties to discuss the issues calmly, as each was more able to feel assured that their interests were being protected equally. The team further facilitated the drafting of an inheritance distribution document, which was signed by all parties to ensure durability.

- **All stakeholders should be given ownership of the dispute resolution process to help legitimate the outcome.**

Preliminary project findings suggest that resolution efforts should include all stakeholders to achieve a successful and legitimate outcome. Perhaps the best example of this can be given from the Herat inheritance mediation, which involved the entire group of heirs, not just the immediate disputants. This wider group brought social legitimacy to the proceedings and peer pressure to ensure an equitable division of the inheritance. The dispute in Kunduz also shows that where a resolution is delivered as a decree without wider community participation or acceptance, it might not enjoy social legitimacy and may need to be taken to a more participatory forum such as a *jirga* to win wider community support.

- **Some disputes may not be resolvable through existing GCS or CBM methods and so require an ad hoc approach, which may include administrative action, executive attention or political advocacy up to the national level.**

Project experience indicates that some disputes may be so politically divisive that it is virtually impossible to ensure a fair and equitable resolution within a reasonable timeframe through either the GCS or CBMs. This is evident where large power asymmetries exist or where Afghan government authorities themselves hold a strong vested interest in the outcome of a dispute, such as in the Baghlan group displacement dispute. Under these circumstances the likelihood of reaching a durable solution through provincial level mechanisms is remote and thus the team must move to its position of last resort, that of national political level advocacy. The dispute is then brought to the attention of senior members of the national Afghan

government and judiciary in an attempt to bypass and override provincial level interests.

- **Community-based agreements are best sustained by some form of official endorsement to guarantee them, especially where rule of law is weak.**

The project team found that community-based agreements will only be considered credible when endorsed by provincial authorities, particularly where asymmetries exist between disputants. Official endorsement serves as an incentive for participation and is also viewed as a guarantee that the authorities are prepared to uphold the agreement. The team found this evident in Parwan, where some stakeholders only agreed to come to the table if the authorities consented to act as a guarantor of any agreement. Interestingly, the reluctance of one party in the Panjsher dispute to involve the provincial authorities seems to be recognition that this may shift power relations between the disputants.

- **Mediated agreements may require some form of incentive to draw the parties into the negotiation.**

The project team found that in negotiated settlements, where outcomes cannot be enforced by the state, participants need to see some form of incentive for engaging with the process. This may be something as straightforward as the opportunity for a fair hearing, or it may be something more substantive. In the Parwan dispute, the possibility that a donor could be found to undertake canal repairs was sufficient to draw both disputant parties into negotiation. In Panjsher, the pastureland is officially state land and so both parties have only common rights of access. They may have perceived a certified access and use agreement as strengthening their respecting entitlements in some way, without affecting their existing claims.

- **There is therefore a clear need to engage with government stakeholders from the outset of any conflict-resolution initiative.**

The Afghan Conservation Corps (ACC) project achieved major success by partnering with a range of government stakeholders. This served to increase local acceptance of the projects and legitimise their activity by association with government. Evidence from USAID's Rebuilding Agricultural Markets Program (RAMP) suggests that where central government support is withdrawn, projects are prone to failure. There is therefore a clear need to engage with government stakeholders from the outset of any conflict-resolution initiative, convincing them of the value of the action and the appropriateness of the methods utilised. Government stakeholders should ideally be drawn into the resolution process itself and their participation should be engaged throughout the process.

- **Supporting both village level institutions and local government is important to achieving lasting resolutions to land conflict and better quality land management in general.**

Experience indicates that local community and village level governance institutions are key actors in the management of land rights and resolution of community conflict. Evidence indicates that with the degradation of formal and state systems of land, communities have come to rely increasingly on customary adjudication practices. The UNHCR, UNAMA, the Asian Development Bank's Rural Land Administration Project (RLAP) and ACC have all successfully built upon the mediatory capacity of *jirga* and *shura* in their resolution efforts.

In addition to mediating resolutions, local institutions are commonly identified as agents for ongoing enforcement for the resolution. In recognition of this important role, village level institutions are being increasingly identified in the Draft National Land Policy and Pasture and Forestry Laws as brokers in the management of common-property resources.

RLAP has shown that village councils are willing and capable of affecting land administration and management, but do need government recognition and support. One way to do this may be to engage with Community Development Councils that form

a body that is equally recognised by the village, the government and the international community through the NSP programme.

Another recommendation emerging from the LC project is the need for clearly defined roles for land use management and the planning of common property resources that facilitates partnerships with formal and informal land institutions. In principle, it appears that the MAIL is open to a community led approach as a way to establish a land information system for common and privately owned land. With support, it is therefore feasible the government is also open to participating in community-based approaches to land management and dispute resolution.

- **Recognising shared “rights of use” rather than ‘ownership’ of common property.**

The work of Sustainable Agricultural Livelihoods in Eastern Hazarajat (SALEH) and RLAP on common property draws particular emphasis to the need to address “rights of use” rather than “ownership” over common property, such as pastures. Disputes over the ownership of pasture have proven to be intractable and inflammatory in the past, often leading to violence.

The experience of SALEH and RLAP indicates that community dispute resolution needs to be managed at the community level, which is demonstrated to be more flexible in its recognition of land entitlements. For example, both of these projects have negotiated and recorded access rights based upon traditional entitlements and negotiation by community level institutions. The success of RLAP in registering pasture agreements has stemmed largely from the support of the project from local *shura*, rather than the support of local *Amlak* offices.

- **National NGOs can help legitimise and support the implementation of agreements.**

For RLAP, the facilitation of land agreements in partnership with a national NGO proved to

be a workable option. Both UNAMA and UNHCR approaches also involve integrated activities with other national NGOs and international agencies.

Particularly where they have strong local credibility within communities, NGOs can help legitimise and support the implementation of agreements in much the same way as local governance structures. Some NGO’s (such as NRC) are able to bring specific expertise to conflict resolution efforts that may not be available to government or other actors.

- **Careful criteria applied to the selection of disputes means there can be a reasonable expectation of a successful resolution.**

Experiences from UNAMA and RAMP activities suggest the importance of applying careful criteria in the selection of disputes so that there can be a reasonable expectation of successful resolution. It has been demonstrated that where disputes are accentuated by ethnic tensions, long standing animosity between communities or irreconcilable power asymmetries, the likelihood of achieving successful resolution on land issues alone is diminished.

The importance of well planned timing has also been highlighted by the experiences of RLAP. The activities and interests of rural communities are linked to the seasonal calendar and the local agricultural schedule. Consequently, in certain seasons stakeholders will have more time to participate and contribute to resolution actions. This is particularly important when land use involves nomadic pastoralists, who may be physically absent from the land during certain times of the year.

Annex 1 - Afghanistan's current legal and policy framework

The Constitution of the Islamic Republic of Afghanistan was adopted in January 2004, following the defeat of the Taliban and the subsequent signing of the Bonn Agreement in December 2001. The Bonn Agreement established a “Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”²⁶ The Bonn Agreement stated that the 1964 Constitution and existing laws and regulations would be used as the legal framework for the Afghanistan Interim Authority (AIA) until the adoption of the new Constitution.²⁷ The current Constitution, based on the 1964 version, was adopted and signed into law in 2004. The 2004 Constitution establishes the hierarchy of law as follows: first, the 2004 Constitution; civil law; and, finally *Sharia* law of *Hanafi* jurisprudence.²⁸ The Civil Code is largely based on *Sharia* law, and while there are some differences, questions of precedence rarely arise.²⁹

Furthermore, Article Two of Afghanistan's Civil Code states: “Where there is no provision in the law or in the fundamental principles of the *Hanafi*

26 The Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, Article 2 (Legal framework and judicial system), 5 December 2001, available at <http://www.afghangovernment.com/AfghanAgreementBonn.htm> (accessed 09 April 2009)

27 “The following legal framework shall be applicable on an interim basis until the adoption of the new Constitution...The Constitution of 1964, a/ to the extent that its provisions are not inconsistent with those contained in this agreement, and b/ with the exception of those provisions relating to the monarchy and to the executive and legislative bodies provided in the Constitution; and existing laws and regulations, to the extent that they are not inconsistent with this agreement or with international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations.” (The Agreement on Provisional Arrangements, Article 2)

28 Constitution of the Islamic Republic of Afghanistan, Article 130.

29 The Constitution states that “In Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam,” although the Constitution and statutory law take precedence they cannot contradict *Sharia*.

jurisprudence of Islamic *shariat*, the court issues a verdict in accordance with the public convention, provided the convention does not contradict the provisions of the law or principles of justice.”³⁰ Article 26 of the Civil Code further specifies that regarding “rights of possession and ownership...the law of the locality shall be applicable where the property is located.”³¹ Articles 2 and 26, combined with the general lack of reference materials in the GCS across Afghanistan, effectively provide legal basis for the use of customary law, albeit only when the Constitution, civil law and *sharia* do not apply.

The Constitution grants sole jurisdiction over criminal cases to the state justice system, and while the Constitution does not expressly mention Afghanistan's informal justice system, in practice community-based dispute resolution mechanisms are the forum of first, and often last, resort for the majority of Afghans in civil claims.

Recent legislation

Extensive legislative analyses have been done on the development of law in Afghanistan since the formation of the Afghanistan Interim Authority. Some of the most detailed studies on the development of property law and land tenure issues were compiled by researchers working with AREU. Among others, Liz Alden Wily produced an excellent publication for understanding the historical context of land tenure and property rights legislation from the early 20th century to the 2001 Bonn Agreement.³² Since Bonn, many laws and decrees have been issued governing land tenure, including:

- **Land Law:**³³ The *Law on Managing Land Affairs* was approved by relevant Afghan government agencies and subsequently signed by President Karzai 21 July 2008, enforceable thereafter. The 95 articles (approximately 29 pages) have yet to

30 Official Gazette Issue no. 353, Part 1, Article 2 (1355).

31 Official Gazette Issue no. 353, Part 1, Article 26 (1355).

32 Wily, “Land Rights in Crisis”, 23-26.

33 Official Gazette no. 958, *The Law on Managing Land Affairs*.

be translated into English, official or unofficial.

- **Rangeland Law:** The most recent public draft, which was developed with strong technical support from UNEP and consultations by the Afghan government with relevant international and Afghan institutions, is currently being reviewed by the MAIL. Bearing in mind that the draft has not yet undergone the full public consultation process nor been reviewed by the Ministry of Justice, it is likely that the final version approved by Parliament will differ significantly from the current draft version. It is hoped that this consultation process will facilitate implementation by increasing Afghan government buy-in to the process. However, it is envisioned that the spirit of the law will remain similar to that in the current draft.
- **Decree 83:**³⁴ Governs the role of *Amlak* in the regulation of government-owned land and resolution of attendant tenure disputes. The decree seeks to resolve disputes arising from the distribution of government land under various regimes. The decree defines government-owned land broadly, establishes clear limitations for public use and mandates compensation for land re-appropriated from unlawful owners.
- **Decree 89:**³⁵ Established the Special Property Dispute Resolution Court (“Special Court”) and abolished the Special Land and Property Court, which was established to handle property disputes of returnees (but not IDPs). Although the Special Court was mandated to travel to the provinces to hear cases originating outside of Kabul, disputants were in effect required to travel

to Kabul for access to the Special Court. To rectify this problem, Decree 105 mandated the creation of Special Courts outside of Kabul.³⁶

- **Decree 99:**³⁷ States that Afghan government land can be allocated to private businesses or farmers in order to stimulate investment. In addition, government land can be redistributed within the government for government use. Cultivated land can be leased in 100 *jerib* lots to farmers for a term of 40 years; leases for non-cultivated land are in 500 *jerib* plots and last 90 years.³⁸ Lessees are selected using a bidding system which offers a lease to the highest bidder. Applications are received and processed by the MAIL and the Presidential Office. According to the Director of Land Management and Distribution the revenue generated by leases increased from 2.2 million Afghanis in 2001 to 16 million Afghanis in June 2007.³⁹ Land has been re-appropriated by government and subsequently leased-out in several provinces.
- **Decree 104:**⁴⁰ Issued in 2003, it establishes the beginning of government land allocation schemes benefiting returning refugees and IDPs. The decree allocates uncultivated government land to the qualifying returnees and IDPs in the applicant’s area of origin or as close by as possible. Applicants must provide evidence of displacement and must not hold title to any property.

Institutional Context

The management of rural lands in Afghanistan is ostensibly the mandate of the department of *Amlak*. In reality however, a large proportion of rural land transactions and dispute resolutions take place

34 “...property registered as GIRA land shall remain thus... any land regarded as public for more than 37 years is public land...waterways and wells on public land should belong to the public... distributed public lands without homes built on them shall revert to being public lands... public lands registered by former governments shall remain as public lands... common lands shall remain as common land for community use... Afghan government claims on land, but not yet legally decided, cannot have taxes levied... arable lands, housing and markets belonging to Afghan government can be rented but any property rented before 1357 shall have its rent reassessed...” Official Gazette no. 816, Decree 83, 15.10.1382 (2004) [unofficial translation]

35 Official Gazette no. 817, Decree 89, 30.10.1382 (04/2003) [unofficial translation]

36 Official Gazette no. 911, Decree 105, 1.11.85 (21.01.07) [unofficial translation]

37 Official Gazette no. 802, Decree 99, 28.3.81 (18.6.02) [unofficial translation]

38 These lease periods are also stated in *The Law on Managing Land Affairs*

39 Personal communication cited in *Inception Report*, 102

40 Official Gazette no. 868, Decree 104, 20.09.1382 (203) [unofficial translation]

through customary mechanisms.⁴¹ Weakening rule of law over the past three decades of conflict has further strengthened community-based institutions and the role that they assume in land management and conflict resolution. Solving land issues through *jirga* and *shura* is now considered (as compared to the GCS) an equitable, efficient, cost-effective and, perhaps most importantly, legitimate mechanism. With the GCS and other Afghan government entities being frequently bypassed, the Afghan government is challenged by a dearth of records and information on rural land tenure. This continues to hamper the Afghan government's capacity to effectively plan for development.

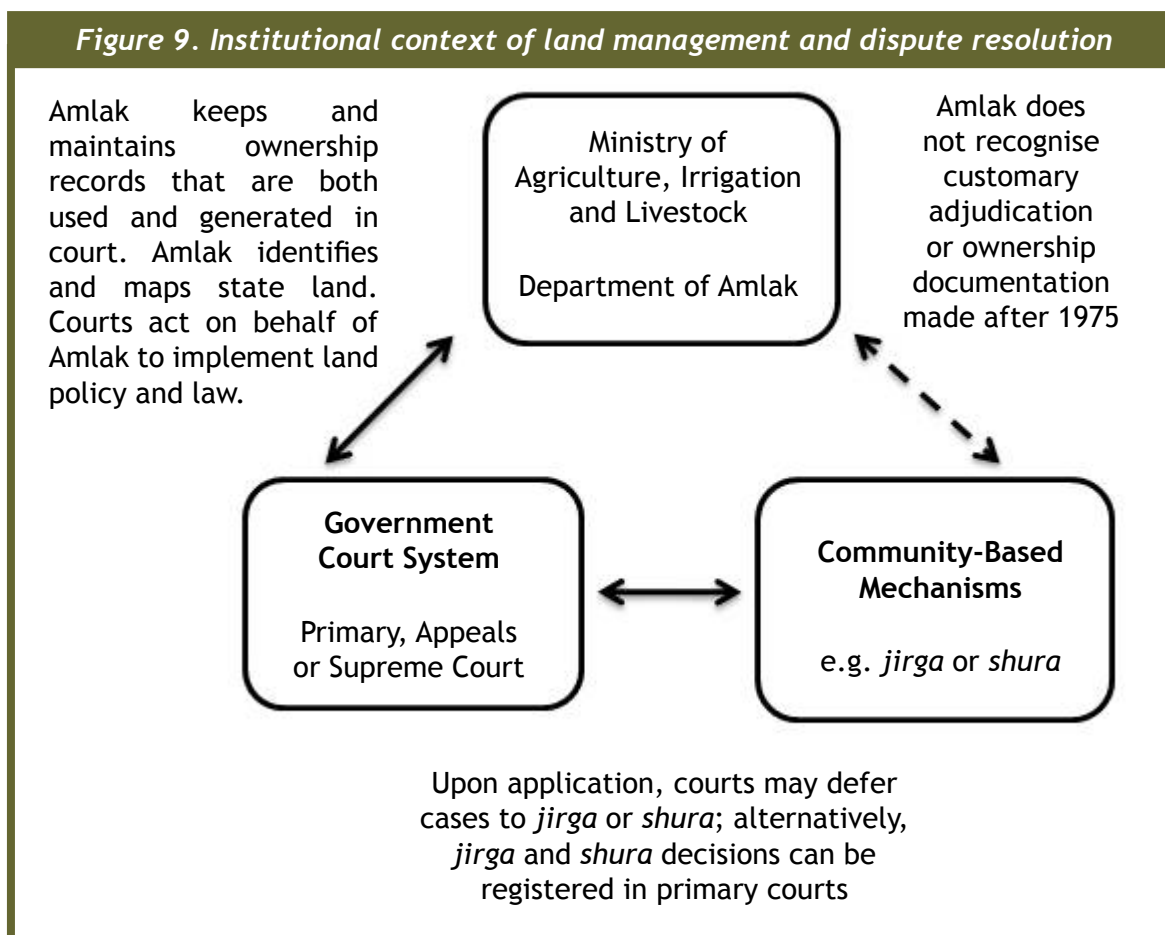
The following section examines the current state of land administration in rural Afghanistan. It does so with the view of assessing the role and functionality

of the Afghan government, the GCS and CBMs, as well as the communication channels between them, so as to identify how the design and implementation of Afghan government laws and policies can better shape its interaction with community structures for land management. Figure 9 depicts the general organisational structure for rural land management and the ways in which the Afghan government, the GCS and CBMs interact.

The Department of Amlak

At every level, the Department of Amlak has limited human, technical and fiscal resources, and subsequently lacks capacity and authority in many parts of Afghanistan. Afghan government records of ownership are incomplete, and rely heavily on the voluntary ownership declarations of the mid-1970s⁴²

Figure 9. Institutional context of land management and dispute resolution



41 See, for example, Alec McEwen and Brendan Whitty, *Water Management, Livestock and the Opium Economy: Land Tenure (Kabul: AREU, 2006)*.

42 Where ownership was voluntarily declared for 800 000 properties prior to the communist-driven land reforms

and cadastre surveys undertaken during 1964-78⁴³. Conflict delayed further surveying efforts, leaving large swaths of rural land holdings un-surveyed. The ownership of this land remains uncertain as in many cases registration records are non-existent, obsolete, duplicate versions contradict one another, have been intentionally destroyed, or are largely based on customary law.⁴⁴

The Government Court System

The effectiveness of the court system depends on its available resources, and its accountability. NRC client experiences indicate that courts in large cities such as Kabul, Mazar, Herat and Jalalabad are becoming more effective. These are areas where the courts have strong local relationships with the police, which allow for enforcement. Returnees may choose to approach courts due to a reluctance to approach CBMs after extended periods of displacement. This increased reliance on the GCS may be associated with a corresponding increase in resources and possible efficiency.

While the situation in the GCS may have improved with the appointment of a new Chief of Justice in late 2006, the GCS is not trusted in many regional centres, let alone rural areas. In Jawzjan and Baghlan for instance, over 80 percent of clients requested that NRC representatives only use informal systems to solve their land disputes. A possible reason for this is frequent claims that corruption in the GCS remains endemic. Judges may face threats of violence or other retaliation if they do not rule for a powerful disputant or a disputant with powerful friends. Judges may also be overwhelmed with the challenge of remaining apprised of current law in Afghanistan, a country that has seen at least four major regimes in the last thirty years, many of which brought significant changes to the laws of their predecessor.

43 In mid-2007 it was estimated that maps held in the Geodesy and Cartography Head Office (Kabul) cover an estimated 33 percent of agricultural land and nearly 10 percent of non-agricultural land (including rangeland, forests and deserts), demarcating some 1,333,700 plots and 548,800 land owners

44 For example, in Kandahar where some 90 percent of cadastre records were destroyed in wars (pers. comm., M. Y. Safar); customary ownership may or may not be documented

Community Based Mechanisms

It is generally understood that, within a given village, there is usually a consensus of agreement on the ownership of land within a village boundary. Work by McEwen and Whitty reinforces this, illustrating that most villagers living within a study sample are confident in their ownership of land despite the fact they do not hold formal ownership deeds.⁴⁵ These recognised land rights do not usually require documentation to be recognised by CBM structures. This is not to say that consensus on ownership within villages is always the case and recent population movements—notably the return of refugees from Pakistan and Iran—have increased conflicting claims within a village.

CBM structures such as *shuras* and *jirgas* have distinct advantages over the GCS, such as their relative cheapness, speed, accessibility and legitimacy. CBMs are more capable of adjudicating disputes in the absence of formal deeds through the witness testimony of other villagers. This is an important advantage as a large proportion of the rural population is illiterate and may be therefore excluded from testifying in the GCS, which tends to favour written records. CBMs also facilitate land sales, which usually involve a buyer and seller requesting that their *malik* or *mullah* write a statement detailing the transaction. This statement then becomes a type of deed and may describe the parcel of land by size, neighbours' boundaries, sale value and ownership. Historical information is sometimes also included in the deed.

Jirgas and *shuras* have other land administrative functions in addition to facilitating the transfer of land. This includes adjudicating land and water related disputes, where the procedure appears to be relatively standardised across regions. When an ownership dispute arises, the two disputing parties may collect money to call together community elders. When this is the adopted approach the money becomes the stake upon which both parties agree to abide by the resulting decision. During the procedure, both parties may call witnesses or

45 Alec McEwen and Brendan Whitty, "Water Management, Livestock and Opium Economy: Land Tenure" (Kabul: AREU, 2006).

produce documentation that substantiates their claims. Final decisions must be accepted publicly by both parties, in order to be legitimate within the community and to get money back. Stake money usually increases proportionately to the area of land involved. According to a UNHCR representative, it is common in central Pashtun areas to have armed men present during proceedings involving large amounts of land, whose job it is to enforce the decision of the *jirga/shura*. It should be mentioned here, however, that *jirgas* are not perfect. For example, they can be corrupt, especially when one of the disputants has a relationship with a decision-making member of the *jirga*.

Communication between Amlak and the government court system

Communication is often limited to the *Amlak* providing documentation for cases in the GCS. The civil courts are entrusted to act as the “official” representative of the law and are active in adjudicating disputes and facilitating land sales. Currently, the land deed registration process is relatively dysfunctional. By illustration, during 2005, one district court in Kabul only recorded eight sales transactions in an eleven month period. Many citizens attribute this to spiralling “processing fees” (whether legit or as bribes) that are necessary to facilitate each step of a twenty five step process.⁴⁶

Communication between the GCS and CBMs

At the district and provincial level, the GCS may offer the parties to a conflict a chance to resolve the conflict through a CBM, if they deem that the chances of achieving resolution through a CBM are high. This is an implicit recognition that, unlike GCS rulings, decisions made through a CBM usually hold more legitimacy and are therefore more sustainable, as well as often being quicker and less costly than the GCS. Decisions made through a CBM can also be registered in district courts, improving the potential for the development of accurate records within the GCS. Some of the pilot cases that

were solved through CBMs were then registered with the Afghan government; see, for example, the pilot cases in Herat and Kunduz.

Communication between a CBM and Amlak

It appears that in most rural areas, communication channels between *Amlak* and village-level institutions are weak. The Afghan government has stated that it does not accept customary ownership documents written after 1975. It is therefore hardly surprising that tensions arise between Afghan government institutions and communities that have—in the eyes of the Afghan government—no acceptable land ownership documents. Commonly, these communities may be considered to be illegally occupying and cultivating state land. If these households are poor, they are vulnerable to losing their land through appropriation by the government, which may then be redistributed or leased to someone else. As claims to state land can only be heard through the GCS, customary ownership rights may be nullified if the ownership is based on only oral testimony or if ownership documents are deemed insufficient (e.g. because they do not clearly stipulate boundaries).

⁴⁶ Extracted from Stanfield, Reed and Safar, from the document “Description of Procedures for Producing Legal Deeds to Record Property Transactions in Afghanistan,” produced September 2005 for the USAID Land Titling, Registration and Economic Restructuring Project.

Annex 2 - Previous AREU and NRC work on land issues

A2.1 Afghanistan Research and Evaluation Unit

Since 2002, AREU has undertaken a series of investigations into land issues and has proposed a number of practical strategies for handling land conflicts. The results from this work were disseminated in various forms, including through AREU's publication series, summarised in Table 8.

Land Rights in Crisis: Restoring Tenure Security in Afghanistan explored the history of land ownership and of land tenure policy and made policy recommendations for the Afghanistan Transitional Administration. In August 2003, AREU published a policy brief entitled *Land and the Constitution: Current Land Issues in Afghanistan*, which

presented an overview of the current situation of land ownership, investigated ways to address key problems and suggested constitutional language on land. In 2004, AREU published two leading papers on land issues: a Briefing Paper entitled *Rural Land Relations in Conflict: A Way Forward*; and, a synthesis of findings from three provinces entitled *Looking for Peace on the Pastures: Rural Land Relations in Afghanistan*. The latter draws together findings, which were published as case studies, from the provinces of Bamiyan, Faryab and Badakhshan. The studies in Bamiyan and Faryab were rapid appraisal studies but concurred in a main finding that pastureland tenure needs priority attention. The third (commissioned) report on pasture issues in Badakhshan built upon in-depth and longitudinal research previously completed by its author. A working paper in 2005, *Who Owns the Farm: Rural Women's Access to Land and Livestock*, explored factors that constrain or enable women's access to land and livestock.

Table 8. AREU publications on land issues

Title	Type of Paper	Author	Release Date
Water Management, Livestock and the Opium Economy: Natural Resources Management, Farming Systems and Rural Livelihoods	Synthesis Paper	Alan Roe	Nov. 2008
Water Management, Livestock and the Opium Economy: Options for Land Registration	Working Paper	Alec McEwen and Sharna Nolan	Feb. 07
Water Management, Livestock and the Opium Economy: Land Tenure	Case Study	Alec McEwen and Brendan Whitty	June 06
Who Owns the Farm: Rural Women's Access to Land and Livestock	Working Paper	Jo Grace	Feb. 05
Looking for Peace on the Pastures: Rural Land Relations in Afghanistan	Synthesis Paper	Liz Alden Wily	Dec. 04
Rural Land Relations in Conflict: A Way Forward	Briefing Paper	Liz Alden Wily	August 04
Land Relations in Faryab Province: Findings from a field study in 11 villages	Case Study	Liz Alden Wily	June 04
The Shiwa Pastures, 1978-2003: Land Tenure Changes and Conflict in Northeastern Badakhshan	Case Study	Mervyn Patterson	May 04
Land Relations in Bamiyan Province: Findings from a 15 village case study	Case Study	Liz Alden Wily	Feb. 04
Land and the Constitution: Current Land Issues in Afghanistan	Policy Brief	Liz Alden Wily	August 03
Land Rights in Crisis: Restoring Tenure Security in Afghanistan	Issues Paper	Liz Alden Wily	March 03

WOL findings on land resources and tenure

The AREU Natural Resources Management Department implemented the European Commission-funded Water Management, Livestock and Opium Economy (WOL) project from May 2005 to April 2009. The principal objective of the WOL project is to:

*... enhance the sustainability of Afghan rural livelihoods and reduce dependency upon illicit crops by providing policymakers with clear and accurate information on the use, management and role of natural resources (with specific focus upon land, water, livestock and opium cultivated within the agricultural economy). The project is expected to generate evidence-based recommendations for improving the effectiveness of agricultural policy and rural programming.*⁴⁷

As such, the WOL project includes the study of land resources and tenure, albeit in a different form than the LC Project, the most significant difference being the LC Project's focus on the conflict prevention and resolution. WOL objectives in the land sector are to:⁴⁸

- Investigate the forms of tenure farmers and other users hold to land resources
- Study the advantages and constraints of existing systems of land tenure and how these influence agricultural use and NRM
- Consider the effectiveness of the existing land policy framework and provide recommendations for its improvement

WOL research led to the publication of two papers on land management: a case study that presented a review of the current situation of land tenure and made policy recommendations (*Land Tenure*) and secondly, an overview of options for land registration in rural areas (*Options for Land Registration*).⁴⁹

47 Alan Roe, *Water Management, Livestock and the Opium Economy: Natural Resources Management, Farming Systems and Rural Livelihoods*, (Kabul: AREU, November 2008), 1.

48 Roe, *Natural Resources Management*, 15

49 Alec McEwen and Brendan Whitty, "Water Management, Livestock and Opium Economy: Land Tenure" (Kabul:

Combined, these papers present preliminary data and case study evidence on land tenure and related conflicts in seven provinces in rural Afghanistan, as well as a comprehensive law and policy review for land policy.

The first WOL Synthesis Papers established and explored cross-sectoral linkages between land and water, agriculture (including poppy production) and rural livelihoods in general.⁵⁰ Key findings presented in this paper include the following:

- "Few, if any, farmers in Afghanistan hold official titles to the land they occupy. Consequently, nearly all transactions and adjudications occur within the customary local system, and farmers access land under diverse forms of tenure that have different associated terms and levels of risk. WOL research indicates that between a quarter and a third of all cultivated land at research sites is managed under some form of temporary use agreement (subordinate land rights [such as lease, mortgage or share-cropping])."
- Fragmentation of land holdings contributes to the stifling of markets for land. Whereas land holdings at certain field-sites are insufficient to support licit livelihoods without supplementary incomes, significant differences exist in per-capita mean land holdings under different types of production.
- Land resources managed by CPR are "of particular value to the resource poor" and involve fewer disputes, albeit with a higher likelihood of involvement by actors external to the CPR.

The second WOL Synthesis Paper focused on identifying steps that would enable the implementation of priority goals—as identified in documents such as the interim ANDS and draft land policy—in rural areas of Afghanistan. With such policy documents prioritising horticulture and

AREU, June 2006).; Alec McEwen and Sharna Nolan, "Water Management, Livestock and Opium Economy: Options for Land Registration" (Kabul: AREU, February 2007).

50 Roe, *Natural Resources Management*

other high-value crops, the portion of the second Synthesis Paper dealing with land focuses on how land tenure status in rural areas will impact the implementation of such policies.

A2.2 The Norwegian Refugee Council

The Norwegian Refugee Council (NRC) is an international non-governmental organisation which has been running an Information Counseling and Legal Assistance programme in Afghanistan since 2003. The activities are implemented through seven Information and Legal Aid Centres (ILACs) in Bamiyan, Herat, Kabul, Kunduz, Mazar-i-Sharif, Jalalabad and Pul-i-Khumri, which provide free information and legal advice to returnees and IDPs. In the first six months of 2008, NRC mobile teams conducted 552 community visits, during which 1,458 information cases were registered (with a total of 195,586 indirect beneficiaries) and consequently 362 information cases solved (75,210 indirect beneficiaries). In the same period, 412 new legal cases were registered (214,506 indirect beneficiaries) and 400 solved (73,517 indirect beneficiaries).

NRC possesses important infrastructure and community networks that make it an effective implementing partner for resolving and documenting private land disputes in Afghanistan. Its staff also possess strong practical skills in negotiation, training and conflict resolution. Furthermore, the NRC holds important data and evidential resources (the primary repository of rural land dispute information in the country) which have been accessed by AREU to support analytical work.

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