

***Addressing Post-Conflict Property Claims of the Displaced:
Challenges to a Consistent Approach***

Panel Seminar

Brookings-Bern Project on Internal Displacement

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Key Background Information

Around 26 million people have been internally displaced by conflict worldwide, and many millions more by natural disasters and development projects. For some of these people return is not an option – for example where their home villages have been destroyed by natural disasters. Others may exercise their right not to return, instead choosing to integrate where they have been displaced or settle elsewhere in the country. For the majority of internally displaced persons (IDPs), however, return is the preferred durable solution.

One of the most significant obstacles to returning home, however, is gaining access to or compensation for property and land left behind. In some cases, homes have been destroyed or occupied by squatters or military forces. Sometimes the displaced are denied access by local authorities or militias, or they are coerced into signing over the titles to their land. Another common problem is when people return only to find that their property has been allocated to a third party without their consent.

The panelists at this seminar presented their insights on the topic of displaced persons' land and property rights, representing a diverse range of perspectives and experiences. Rhodri Williams focused on the legal dimensions of property rights; Dan Stigall explained the particular aspects of Iraq's property rights and property restitution in Iraqi courts; while Chris Huggins considered the specific challenges of customary land rights. The seminar was moderated by Khalid Koser

Challenges from a Legal Perspective: The Emergence of a Rights-Based Approach to Post-Conflict Property Rights in Law and Practice (Rhodri Williams)

Williams noted that a rights-based approach to resolving claims and conflicts over property has emerged and is now garnering significant support in post-conflict situations. Measures to prevent returning IDPs or refugees from accessing their property are increasingly treated as a violation of international standards. At the same time, restoration of property rights for the displaced has been central to broader initiatives of conflict resolution and peacemaking.

This relatively new focus on property rights in post-conflict situations is the product of three main factors: recognition of the significance of rights to housing, land and property; progressive development of international law and standards; and growing practice by states and UN bodies.

Historically, there has been considerable reluctance to adopt a rights-based approach to property issues, first because addressing displacement is often seen as a politically sensitive topic that may upset the post-conflict status quo; and second because it involves engagement with technically complex domestic law frameworks. Despite such complexities, dealing with the property rights issues that arise in the wake of conflict is crucial on many fronts. Such efforts can and often do contribute to the protection of human rights, the achievement of durable solutions to displacement, early recovery and economic development, transitional justice, peacebuilding, and establishing the rule of law.

Examining the two main legal principles relevant to solutions for the displaced – the right of return and the right to a remedy (in the form of property restitution), it is clear that there are gaps in the normative framework. For example, while forced displacement and deprivation of property rights are often clear violations of international law, the right of return and right to property restitution are not as clearly defined. The right of return is traditionally defined as the right to return to one's country, rather than one's home, providing little assistance to IDPs. Meanwhile, the right to a remedy is traditionally defined as a procedural right – for example a hearing in court - without specific guarantees of a substantive outcome, such as the restitution of lost property. Nonetheless, international caselaw and recent UN standards on reparations for victims of human rights abuses (UN Doc. A/RES/60/147) are part of a trend toward clearer state duties in this regard.

Growing acceptance of displaced persons' property rights among states and UN bodies is gradually being incorporated into practice. Most recently, the UN Secretary General called for “a more consistent, systematic and comprehensive United Nations-wide approach to housing, land and property issues” (UN Doc. S/2007/643). However a great deal of progress remains to be made. As discussed by Dan Stigall (below), international law standards are still often not applied in a manner that builds on the strengths of existing domestic law protections. Further, as elaborated upon by Chris Huggins (below), a good deal of analytical work remains in order to develop approaches to effectively protecting the rights of displaced persons in settings where land is held under customary rules.

Reinventing the Wheel (Dan E. Stigall)

More than 4.5 million Iraqis are now displaced from their homes, and there is still no comprehensive plan for restitution. Stigall discussed the need to look to Iraq's organic legal system when dealing with property rights of the displaced. By utilizing the laws and civil courts already in place, international organizations could avoid needless repetition and interference while at the same time harnessing local capacity. He underscored the importance of involving Iraqi civil courts in property restitution, given their natural jurisdiction over the subject matter, their existing legal infrastructure, their enforcement mechanisms, and the existence of their extraordinary civil law system. The involvement of domestic institutions is also critical in terms of legitimacy as it may lead to a certain amount of domestic buy-in.

Iraq possesses a sophisticated, bi-jural civil law system which is based on the French model but which incorporates elements of Islamic law. The Iraqi Civil Code, authored by Abdel-Razeq al-Sanhuri and enacted in the 1950s, clearly recognizes the right to private property as well as the right of 'possession', which typically exist in civil codes. Such possessory rights are a kind of right that allow for possession of a thing but which are less than full ownership and, thus, do not require proof of ownership. Continued possession for a prolonged period can lead to ownership over immovable property, however possession cannot be claimed if it is ambiguous, coupled with coercion, or obtained secretly. Therefore, many families who were forced out by militias, by generalized violence, and whose homes are now occupied by other families, will have the right to reclaim their homes.

The IPCC (the predecessor of the CRRPD), was established in 2004 to handle property claims from the Ba'athist era. Its mandate generally covered the loss of immovable property due to illegal confiscation by the Ba'ath regime or as a result of ethnic cleansing. Notably, the IPCC's mandate went beyond the protection of rights to include mechanisms for restitution. Article 10 of IPCC's annex provided for the possibility of resettlement, compensation from the state, new property from the state near the old residence, and/or compensation for the cost of moving. Unfortunately, the IPCC's structure and mandate contained several significant flaws and it lacked necessary resources. Its general principles were inadequate to fulfill its mandate, it failed to take domestic law into account, and it had no real enforcement mechanism. Furthermore, its operation was not well-coordinated with the domestic courts, many of which continued to litigate property cases according to the provisions of the Iraqi Civil Code.

The lack of adequate coordination with the organic Iraqi legal system and the lack of adequate mechanisms to operationalize restitution has meant that many displaced Iraqis - both from before and after 2003 - remain vulnerable and without an adequate means of redress.

Civil courts remain critical to the process of enforcing rulings and protecting property rights. Moreover, they are a central part of domestic society and must be empowered if the trend of continued displacement is to be halted and property rights are to be protected in an enduring fashion. The domestic legal system, however, cannot alone solve the enormous crisis of displacement in Iraq. While civil courts protect property rights and determine the "winner" in a contest over disputed property, they do not fully address the plight of the "loser." Further, domestic institutions may lack the institutional capacity to deal with the enormous influx of claims. International institutions or specialized domestic institutions, therefore, are needed to step in to augment those domestic institutions and to do those things that are not part of the ordinary legal process: assisting those without valid claims but who are, nonetheless, displaced; finding housing; providing compensation where appropriate; etc.

Stigall, thus, advocated a two-track approach in which domestic institutions are incorporated to the maximum extent allowable and in which international or specialized

domestic institutions serve the role of augmenting those domestic institutions by enlarging their institutional capacity and addressing those displacement concerns that fall outside the domestic institution's ordinary functional competence.

Defining Customary Land Rights (Chris Huggins)

There are specific challenges to addressing property rights and restitution in situations of customary legal systems, and around 90 percent of land in Africa, for example, is held in customary systems. While 'customary' is often to connote a static tradition, it is at times quite dynamic. 'Custom' evolves and with it so do the norms of land and property ownership. Furthermore, in many places, customary law is part of a pluralistic legal system encompassing, for example, religious and/or civil legal standards as well.

Customary tenure encompasses a significant array of systems and actors. In some regimes, land is officially held by the state while in others it may be individually or collectively owned. Land users' are often multiple – comprised of families, kinship groups, and entire villages; and the 'users' may fall into any number of categories, for example: owner, co-owner, primary or secondary user, unrecognized user, and so on. Land access might be dictated by local leaders, by kinship ties, or by how the land is used.

Huggins asserted that despite the strength of customary systems, they can be 'profoundly altered' during a protracted conflict. During conflict, identities may shift or new identities emerge that can alter land tenure patterns. For example, in some conflicts 'land alienation' may occur, describing a process whereby the government disposes of land and settlers move in. Those in charge of the system may become involved in the conflict or may lose their position within the community, thereby impacting the customary system.

Solutions for the displaced must therefore recognize the impact conflict can have on such land tenure systems. Fortunately, there is increasing recognition by organizations like the World Bank of customary tenure systems. One option that is usually discussed is formalizing ownership through titling, although titling is a highly contentious alternative out of which sell-outs, land-grabs, and latent conflict can emerge. Customary systems typically contain organic dispute resolution mechanisms which are more equipped to resolve disputes. In the customary systems, dispute resolution may rely on local NGOs or religious groups to mediate, and may draw on both custom and statutory law to determine ownership or usage. The main weaknesses of resolution mechanisms in customary systems, however, are that there is no due process, and as a result women and youth may lose out due to discrimination.

Discussion

In Iraq, as in other conflict-affected areas, families are often forced to flee their homes and do not have the time to gather documentation of property ownership, such as title

deeds.. In these situations, alternatives exist which can allow a person to prove ownership. Eye-witness testimony from neighbors can be difficult to obtain when people have scattered to multiple areas or when they are afraid to testify in a court. However, a telephone book listing one's address or old utility bills may be used to prove home ownership in certain cases. In some situations, it may be easier to prove possession or quasi-ownership.

Questions arose around the role of MNF-I in property disputes and restitution. It was acknowledged that Coalition forces in Iraq do *not* participate in any evictions of 'squatters', and in some cases prevent evictions from occurring. One participant felt that in cases where local officials had legally determined a home's rightful owner, the MNF-I should support evictions. Others asserted that this was not the role of the military – Coalition or Iraqi. Neither do 'blue helmets' get involved with evictions. Preferably, property resolution occurs through a comprehensive, local legal infrastructure. Furthermore, it was noted that Iraqis cannot 'self-help' – in other words, seek out compensation privately. IDPs are encouraged to go through formal channels to settle property disputes and compensation, but of course the courts are back-logged.

The issue of gender and property rights was noted as a concern for Iraq and other conflict zones as well as areas under customary tenure. Stigall noted that the Iraqi civil code is fairly gender-neutral, and contains nothing barring women from owning property. Iraq's Personal Status Law is strongly influenced by the Jafari school of jurisprudence, which is also relatively favorable to women. However, this speaks only to the written law, and not what occurs in practice. Similarly Williams noted that although women's property rights are supported in international legal norms, there is a gap between law and reality on the ground. In Uganda, for example, many women have a right to use land, but not to own it. In situations of customary land tenure, some people have pushed for titling, yet that can also undermine women's rights in certain contexts.

Many peace agreements leave out endorsements for the right to return, even in situations where there is an enormous IDP community. For example, Sudan's CPA does not explicitly address IDP return or resettlement. Kosovo is perhaps the exception. Given the link between sustainable peace accords and mechanisms for durable solutions for the displaced, this trend does not bode well for the future.

Kim Stoltz