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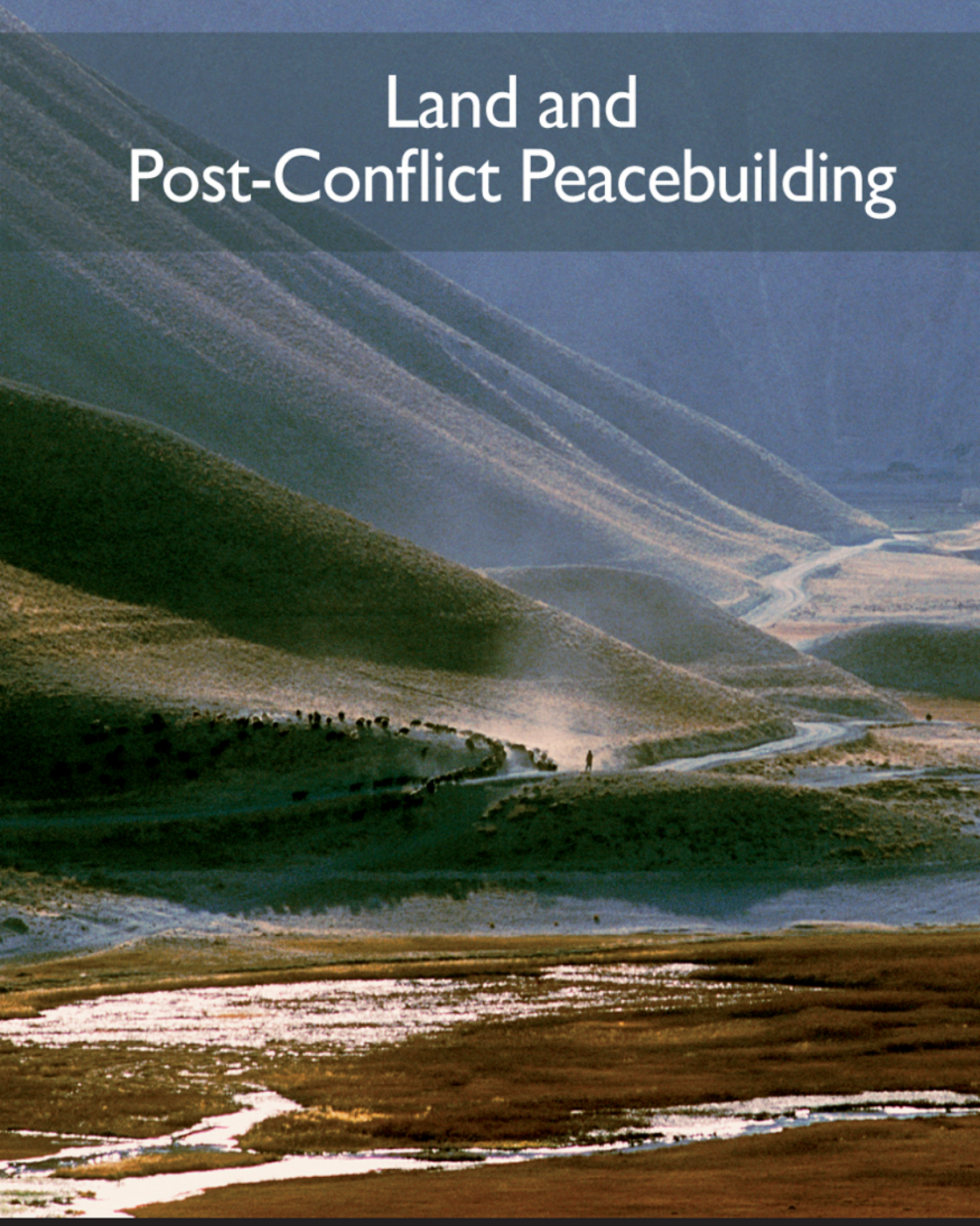
Land and Post-Conflict Peacebuilding



Edited by Jon Unruh and Rhodri C. Williams
Foreword by Jeffrey D. Sachs

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First published 2013
by Earthscan
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Earthscan
711 Third Avenue, New York, NY 10017

Earthscan is an imprint of the Taylor & Francis Group, an informa business

Earthscan publishes in association with the International Institute for Environment and Development

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Land and post-conflict peacebuilding/edited by Jon Unruh and Rhodri C. Williams.
p. cm. – (Peacebuilding and natural resources; 2) Includes bibliographical references and index.
ISBN 978-1-84971-231-6 (pbk : alk. paper) – ISBN 978-1-84977-579-3 (ebk) 1. Peace-building. 2. Land tenure–Political aspects. 3. Natural resources–Political aspects. I. Unruh, Jon Darrel. II. Williams, Rhodri, 1959–
JZ5538.L36 2013
327.1'72–dc23

2011034079

Typeset in Times and Helvetica
by Graphicraft Limited, Hong Kong

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Preface

Decades of civil wars, international wars, and wars of secession demonstrate the strong relationship between natural resources and armed conflict. Disputes over natural resources and their associated revenues can be among the reasons that people go to war. Diamonds, timber, oil, and even bananas and charcoal can provide sources of financing to sustain conflict. Forests, agricultural crops, and wells are often targeted during conflict. Efforts to negotiate an end to conflict increasingly include natural resources. And conflicts associated with natural resources are both more likely to relapse than non-resource-related conflicts, and to relapse twice as fast.

Immediately after the end of a conflict, a window of opportunity opens for a conflict-affected country and the international community to establish security, rebuild, and consolidate peace—or risk conflict relapse. This window also presents the opportunity to reform the management of natural resources and their revenues in ways that would otherwise be politically difficult to achieve. Capitalizing on this opportunity is particularly critical if natural resources contributed to the onset or financing of conflict—and, if this opportunity is lost, it may never reappear. Moreover, poorly informed policy decisions may become entrenched, locking in a trajectory that serves the interests of a limited few.

Since the end of the Cold War, and particularly since 2000, substantial progress has been made in establishing institutional and policy frameworks to consolidate peacebuilding efforts. In 2005, the United Nations established the Peacebuilding Commission to identify best practices for peacebuilding. The commission is the first body to bring together the UN's humanitarian, security, and development sectors so that they can learn from peacebuilding experiences.

The Peacebuilding Commission has started to recognize the importance of natural resources in post-conflict peacebuilding. In 2009, along with the United Nations Environment Programme, the commission published a pioneering report—*From Conflict to Peacebuilding: The Role of Natural Resources and the Environment*—that framed the basic ways in which natural resources contribute to conflict and can be managed to support peacebuilding. Building on this report, the commission is starting to consider how natural resources can be included

within post-conflict planning and programming in Sierra Leone, the Central African Republic, Guinea, and other countries.

Since the establishment of the Peacebuilding Commission, the policies governing post-conflict peacebuilding have evolved rapidly. In his 2009 *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, UN Secretary-General Ban Ki-moon articulated five priorities for post-conflict peacebuilding, all of which have natural resource dimensions. In his 2010 update to that report, Ban Ki-moon noted the pressing need to improve post-conflict natural resource management to reduce the risk of conflict relapse, and urged "Member States and the United Nations system to make questions of natural resource allocation, ownership and access an integral part of peacebuilding strategies." The Secretary-General's 2012 report on the topic highlighted progress over the previous two years and called on UN entities to more effectively share knowledge and leverage expertise on post-conflict natural resource management. And a 2011 UN report, *Civilian Capacity in the Aftermath of Conflict*, highlighted approaches for mobilizing civil society to support peacebuilding in many realms, including natural resources.

The World Bank has also begun focusing on natural resources: the Bank's 2011 *World Development Report*, for example, placed the prevention of fragility, conflict, and violence at the core of the Bank's development mandate. Drawing on the Bank's experiences around the world, the report focuses on jobs, justice, and security, and highlights the contribution of natural resources to these goals.

Despite growing recognition of the importance of post-conflict natural resource management, there has been no comprehensive examination of how natural resources can support post-conflict peacebuilding. Nor has there been careful consideration of the risks to long-term peace caused by the failure to effectively address natural resources. Practitioners, researchers, and UN bodies have researched specific resources, conflict dynamics, and countries, but have yet to share their findings with each other at a meaningful scale, and limited connections have been drawn between the various strands of inquiry. As a result, the peacebuilding community does not know what works in what circumstances, what does not, or why.

Given the complexity of peacebuilding, practitioners and researchers alike are struggling to articulate good practice. It is increasingly clear that natural resources must be included as a foundational issue; many questions remain, however, regarding opportunities, options, and trade-offs.

Against this backdrop, the Environmental Law Institute, the UN Environment Programme, the University of Tokyo, and McGill University launched a research program designed to examine experiences in post-conflict peacebuilding and natural resource management; to identify lessons from these experiences; and to raise awareness of those lessons among practitioners and scholars. The program has benefited from broad support, with the government of Finland—one of the few donor governments to explicitly recognize the role of natural resources in both conflict and peacebuilding efforts—playing a catalytic role by providing core financing.

The research program has been guided by the collective experiences of the four members of the Steering Committee: as the coordinators of the program and the series editors, we have drawn on our work in more than thirty post-conflict countries. Our experiences—which include leading environmental assessments in Afghanistan, developing forest law in Liberia, supporting land reform in Mozambique, and fostering cooperation around water in Iraq—have led to a shared understanding that natural resource issues rarely receive the political attention they merit. Through this research program and partnership, we hope to catalyze a comprehensive global effort to demonstrate that peacebuilding substantially depends on the transformation of natural assets into peacebuilding benefits—a change that must occur without mortgaging the future or creating new conflict.

Since its inception in 2007, the program has grown dramatically in response to strong interest from practitioners, researchers, and policy makers. Participants in an initial scoping meeting suggested a single edited book consisting of twenty case studies and crosscutting analyses. It soon became clear, however, that the undertaking should reflect a much broader range of experiences, perspectives, and dimensions.

The research program yielded 150 peer-reviewed case studies and analyses written by 225 scholars, practitioners, and decision makers from fifty countries. The case studies and analyses have been assembled into a set of six edited books, each focusing on a specific set of natural resources or an aspect of peacebuilding: high-value natural resources; land; water; resources for livelihoods; assessment and restoration of natural resources; and governance. Examining a broad range of resources, including oil, minerals, land, water, wildlife, livestock, fisheries, forests, and agricultural products, the books document and analyze post-conflict natural resource management successes, failures, and ongoing efforts in sixty conflict-affected countries and territories. In their diversity and number, the books represent the most significant collection to date of experiences, analyses, and lessons in managing natural resources to support post-conflict peacebuilding.

In addition to the six edited books, the partnership has created an overarching book, *Post-Conflict Peacebuilding and Natural Resources: The Promise and the Peril*, which will be published by Cambridge University Press. This book draws on the six edited books to explore the role of natural resources in various peacebuilding activities across the humanitarian, security, and development sectors.

These seven books will be of interest to practitioners, researchers, and policy makers in the security, development, peacebuilding, political, and natural resource communities. They are designed to provide a conceptual framework, assess approaches, distill lessons, and identify specific options and trade-offs for more effectively managing natural resources to support post-conflict peacebuilding.

Natural resources present both opportunities and risks, and postponing their consideration in the peacebuilding process can imperil long-term peace and undermine sustainable development. Experiences from the past sixty years provide many lessons and broad guidance, as well as insight into which approaches are promising and which are problematic.

A number of questions, however, still lack definitive answers. We do not always understand precisely why certain approaches fail or succeed in specific instances, or which of a dozen contextual factors are the most important in determining the success of a peacebuilding effort. Nevertheless, numerous discrete measures related to natural resources can be adopted now to improve the likelihood of long-term peace. By learning from peacebuilding experiences to date, we can avoid repeating the mistakes of the past and break the cycle of conflict that has come to characterize so many countries. We also hope that this undertaking represents a new way to understand and approach peacebuilding.

Carl Bruch
Environmental Law Institute

David Jensen
United Nations Environment Programme

Mikiyasu Nakayama
University of Tokyo

Jon Unruh
McGill University

Foreword

Jeffrey D. Sachs
Director of the Earth Institute, Columbia University
Special Advisor to UN Secretary-General Ban Ki-moon
on the Millennium Development Goals

There are few social issues as complex and vexing as land rights. From the dawn of humanity, land has been a matter of individual survival, community well-being, cultural inheritance, political power, religious doctrine, and economic prospect. Disputes over land are among both the key causes and consequences of violent conflicts. Peacebuilding, as this superb book makes clear, involves difficult choices in building a post-conflict land settlement, the success of which will affect the quality and durability of the peace itself.

Even in peacetime, land requires an economic category of its own. Land is never simply just another interchangeable commodity bought and sold in a competitive market. Each land parcel is unique, defined by its specific location; its place in natural ecosystems; its relation to specific communities, infrastructure, cultural artifacts and traditions; and of course to neighboring land.

Even in a well-defined and functioning legal system, a landowner therefore has limited and complex rights to the land. The owner will generally have tightly circumscribed rights regarding how the land can be used: for example, what kinds of limits are placed on the height of buildings, their design, and their commercial use; whether surface water or groundwater can be taken for agricultural purposes; whether fences and other barriers can be built; whether outsiders have rights to use the land, such as for grazing animals or crossing the land; which animal and plant species must be protected; how dangerous chemicals must be avoided; and how the fruits of the land must be shared with others in the community.

The Western freehold model of land rights, in which land is individually owned and used according to a single owner's prerogatives, is therefore a purely theoretical case that rarely applies in practice. Land rights and claims must be regulated to balance household, community, national, and ecosystem needs in an efficient and equitable manner. Zoning, eminent domain, environmental regulation, public use of private land, and other doctrines are reflections in Western law of the inherent complexities of land use.

Of course no society gets these issues right all of the time, or perhaps even most of the time. Land rights are heavily contested and subject to rampant failures and conflicts. Private landowners (or nonowners as the case may be) frequently

overhunt, overfish, or overharvest their lands, or intrude on common lands of the community. And of course politically powerful individuals, enterprises, and governments may mobilize force to dispossess weaker communities of their valued lands, as colonial powers have done throughout the ages.

Land pressures and conflicts are escalating in many parts of the world as a result of growing populations, the depletion of natural resources, increasing land degradation, encroaching water scarcity, and the onset of human-induced climate change. Communities therefore fight for access to natural resources—such as forests, pasturelands, and water supplies—and the ecosystem services they provide, and these fights often spill over into open conflict. In several parts of the world, populations hard-hit by scarcity or violence are forced to migrate, and thereby come into conflict when they impinge on the traditional lands of other communities.

This book picks up these complex themes at the next stage: after full-fledged conflict has engulfed a region and the fragile shoots of peace have begun to appear. Peace may bring the cessation of violent conflict, but also the continuation or even initiation of new cultural, ethnic, and economic conflicts. And land is likely to feature centrally in those new disputes. The preceding war will have displaced thousands, possibly even millions, of people. These internally displaced persons (IDPs) will want to return to their original homes in order to grow food and begin a new crop season. Yet when the IDPs return home, squatters or other IDP communities may now occupy their lands. Or the lands may have been damaged or irreparably destroyed by war, neglect, or plunder.

This fascinating set of case studies and powerful syntheses return again and again to the one overarching truth about land and peacebuilding: complexity. There are no off-the-shelf answers to questions of property restitution, redistribution of claims, individual versus community needs, evidence and titling, legal versus social norms, or competing legal systems that might apply. Since even a well-functioning legal system can barely cope with the various dimensions of efficient and equitable land use, it is hardly surprising that a post-conflict environment characterized by humanitarian urgency, competing political claims, destroyed land records, displaced populations, and multiple political forces (including outside powers and donor agencies) should have a very hard time coping with land disputes.

These detailed and insightful analyses will inform the work of every aid worker and peacebuilder, providing an invaluable set of experiences and options for managing land rights and disputes. Yet there are as many case studies of failure as of success, and even the successes are only provisional successes: cases of "so far, so good" in preserving a fragile peace and enabling a local economy to get back on its feet. The failures seem often to involve international donors who try to apply simplistic ideas about land rights to highly complex and contested circumstances. Americans, for example, tend to favor land titling for individual households, and tend to overlook community land rights and needs. European donors have tended to favor the restitution of land to former owners

over other ethical and practical claims. Western legal systems have tended to neglect or shun other legal systems that may be operating in the region, such as land-law systems based on Islamic principles.

If there is one common truth in this highly varied experience it is that being open to complexity is vital for success, especially on the part of external actors (such as international donors and nongovernmental organizations) who will typically not appreciate all of the complex challenges facing local communities and national governments. Community participation also reveals itself to be vital in case after case. Participatory approaches may indeed be time consuming, but the societal payoffs are great in that community participation builds long-term legitimacy and a lasting sense of fairness.

The editors Jon Unruh and Rhodri C. Williams have assembled an outstanding group of contributors who tell their complicated stories with clarity and deep insight. This book will have an important positive impact on peacebuilding efforts. As local and international actors address the roiling challenges in places as diverse as Haiti, the Horn of Africa, and Central Asia, and as new tensions inevitably build in regions beset by demographic pressures and environmental shocks, development practitioners and policy makers will be empowered by this book to help keep the peace and contribute to the rebuilding of fair and resilient communities.

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Acknowledgments

This book is the culmination of a five-year research project. It would not have been possible without the efforts and contributions of many individuals and institutions.

The volume editors are grateful to our managing editor, Peter Whitten; our manuscript editors, Amanda Morgan and Meg Cox, for their peerless editorial assistance; and assistant managing editor, Akiva Fishman. Nick Bellorini, of Earthscan, provided guidance through the early publishing process; Matt Pritchard, Elan Spitzberg, and Arthur Green created the maps; Joelle Stallone proofread the manuscript; Tessa Gellerson and Katarina Petursson coordinated the production process; and Valentina Savioli provided drafting assistance.

Research and publication assistance was provided by numerous research associates, interns, law clerks, law fellows, and visiting attorneys at the Environmental Law Institute, including Elliott August, Jessica Boesl, Susan Bokermann, Marion Boulicault, Gwen Brown, Brandee Cooklin, Caitlin Fogarty, Sara Gersen, Mara Goldberg, Adam Harris, Farah Hegazi, Katelyn Henmueller, Jennifer Jones, Zachary Jylkka, Rachel Kenigsberg, Shea Kinser, Tim Kovach, Erin Mayfield, Shanna McClain, Phoenix McLaughlin, Mark McCormick-Goodhart, KJ Meyer, Kate Powers, Rachel Roberts, Nick Sanders, Sarah Stellberg, Sameera Syed, Shuchi Talati, and Aaron Terr.

Peer reviewers were essential to ensuring the rigor of this volume. The editors would like to acknowledge the many professionals and scholars who contributed anonymous peer reviews.

A few chapters in this volume have been adapted with permission from earlier published versions. The editors wish to thank Practical Action Publishing for permission to print "International Standards, Improvisation and the Role of International Humanitarian Organizations in the Return of Land in Post-conflict Rwanda," by John W. Bruce; Rutgers Law Journal for permission to print "Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions," by Dan E. Stigall; and the Center on Housing Rights and Evictions for permission to print "Title through Possession or Position? Respect for Rights to Housing,

Land and Property in the Wake of Cambodia's Transition," by Rhodri C. Williams. In addition, some of the material in "Snow Leopards and Cadastres: Rare Sightings in Post-Conflict Afghanistan," by Douglas E. Batson, is adapted from an earlier publication with the permission of the Military Geography Specialty Group of the Association of American Geographers.

Financial support for the project was provided by the United Nations Environment Programme, the government of Finland, the U.S. Agency for International Development, the European Union, the University of Tokyo Graduate School of Frontier Sciences and Alliance for Global Sustainability, the John D. and Catherine T. MacArthur Foundation, the Canadian Social Science and Humanities Research Council, the Philanthropic Collaborative, the Center for Global Partnership of the Japan Foundation, the Ploughshares Fund, the Compton Foundation, Zonta Club of Tokyo I, the International Union for Conservation of Nature's Commission on Environmental Law, the Nelson Talbott Foundation, the Jacob L. and Lillian Holtzmann Foundation, and an anonymous donor. In-kind support for the project was provided by the Earth Institute of Columbia University, the Environmental Change and Security Project of the Woodrow Wilson International Center for Scholars, the Environmental Law Institute, the Global Infrastructure fund Research Foundation Japan, the Japan Institute of International Affairs, McGill University, the Peace Research Institute Oslo, the United Nations Environment Programme, and the University of Tokyo.

The cover was designed by Nikki Meith. Cover photography is by Luke Powell, courtesy of the United Nations Environment Programme's Post-Conflict Disaster Management Branch.

When available, URLs are provided for sources that can be accessed electronically. URLs contained in this book were current at the time of publication.

Land: A foundation for peacebuilding

Jon Unruh and Rhodri C. Williams

Managing land tenure is one of the most persistently troublesome issues in peacebuilding processes. At the same time, land and property rights offer valuable opportunities to deliver peace dividends to war-weary populations, as well as long-term improvements in livelihoods, governance, and the economy. For example, in post-conflict countries, where agriculture is often not only a subsistence activity but also the source of a substantial portion of gross domestic product, exports, and government revenues, there are often strong incentives for the development of large-scale agricultural plantations (De Schutter 2011). When the large-scale land acquisitions necessary for such activities compete with subsistence farming for the use of arable lands, inequities arise that can be addressed by the development of a credible and coherent system of land management. Paying attention to land issues can also help mitigate volatile ethnic, tribal, and religious claims on and attachments to lands (Bruch et al. 2009).

Although addressing post-conflict land disputes is rarely easy, doing so is often essential. In the worst case, failure to address tensions over land can create or perpetuate potentially destabilizing grievances. Successful approaches to land issues, however, can both consolidate progress toward sustainable peace and help to sustain peace over the longer term. In order to identify effective approaches for managing land and other natural resources in the course of peace processes, it is crucial to understand the nature of land tenure and underlying social relations during and after armed conflict.

Where countries emerging from conflict have addressed land issues effectively, doing so has laid the foundation for a durable peace. In Mozambique, for example, both the government and civil society understood that a progressive land policy was necessary to deal with post–civil war tensions over land. The 1997 Land Law takes into account the customary occupation of land, while also

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Jon Unruh is an associate professor of geography at McGill University. Rhodri C. Williams is a human rights lawyer who specializes in land and forced-migration issues.

including mechanisms to promote investment.[1] The law also supports local empowerment: because members of local communities are aware of their rights under the Land Law, they can use the law to gain access to capital, either for their own initiatives or by negotiating with investors and the state for agreements regarding access to land by outsiders (Tanner 2010). Similarly, Liberia and Sierra Leone have engaged in extended dialogues to build broad support for structural reforms of land management, and Bosnia, Rwanda, and Timor-Leste have made incremental gains under highly challenging circumstances.[2] Taken together, such experiences highlight both the opportunities that are inherent in making land a peacebuilding priority and the challenges associated with such efforts.

This book examines the diverse experiences of seventeen post-conflict countries in managing land tenure and related issues during the transition to peace. This chapter establishes the foundation for the more detailed treatments to follow. It begins with an overview of the importance of land management and governance to post-conflict peacebuilding. The chapter then provides a discussion of seven key challenges associated with land issues in post-conflict situations, and notes preliminary considerations of the ways in which these challenges can be approached. These challenges include: tenure security, prospects of renewed conflict, changes in land tenure, emergence of alternative tenure approaches, land law reform, urban areas, and interactions between efforts to resolve tenure issues and other peacebuilding activities. The chapter concludes with a guide to the contents of the book.

LAND MANAGEMENT AND PEACEBUILDING

Land is crucial to meeting some of the most basic human needs—from identity to shelter and sustenance. It is also central to livelihoods and food security: in post-conflict countries, 60 to 80 percent of livelihoods typically depend on agriculture and natural resources (Bruch et al. 2009; USAID 2009). United Nations studies on the relationship between natural resources and disarmament, demobilization, and reintegration have found that 50 percent of former combatants

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[1] Land Law, Act No. 19/97, October, 1997. Most land rights practitioners and academics distinguish between traditional, indigenous, and customary land rights, all of which are frequently described as "informal," in distinction to the formal, typically legislative rules adopted by official state organs. When traditional land rights are under discussion, the focus is primarily on historical arrangements, even if these arrangements are still in effect. Referring to land rights as "traditional" implies that land rights do not change over time. Indigenous land rights are attached to specific indigenous groups. Such rights may be (or have elements of) traditional or customary rights, but they are linked to particular indigenous groups and, by definition, do not apply to others. Customary land rights are arrangements that are currently in effect and are generally nonstatutory. Of the three terms, "customary" is the broadest and most useful because it acknowledges that informal tenure arrangements change; that they can take on aspects of traditional, statutory, and indigenous systems; and that they can evolve to meet current needs that may not be answered by the structures of traditional or indigenous land rights. In short, customary systems are hybridized and take on new forms as needed.

[2] See, for example, Cotula, Toulmin, and Hesse (2004).

participating in reintegration programs chose agriculture (in some cases, the proportion was as high as 80 percent) (UNDP and UNEP 2012), but that access to land can be a limiting factor for such programs (UNEP 2012).

In the wake of armed conflict, especially prolonged civil conflict, a significant proportion of affected populations will seek access to new land or restitution of abandoned property; both actions can present profound challenges to countries and governments recovering from conflict, particularly in light of the weakening or disintegration of both formal and customary institutions that are crucial to the administration of land-based resources.[3] After the ceasefire that ended the 1992–1995 conflict in Bosnia and Herzegovina, for example, well over 200,000 claims to property were asserted (Williams 2013a*).[4] The Mozambican civil war (1975–1991) dislocated 6 million people—approximately half the national population (USCR 1993). Conflicts in Iraq (since 2006) and Sudan (intermittent over the course of five decades) have led to similarly high levels of displacement; estimates indicate that 1.6 million people were displaced in Iraq, and 2.3 million in Sudan (IDMC 2012). Land issues are further complicated when widespread grievances over land access and distribution contributed to the conflict, as in El Salvador (Corriveau-Bourque 2013*) and Darfur (Flint and de Waal 2008; Tubiana 2007).

The search for new land, for restitution, and for redress of historical grievances can drive land and property rights issues to the fore over large areas, including urban centers, in a short period of time and for considerable numbers of people. And the post-conflict reestablishment of ownership, use, and access rights is likely to be as complicated as the histories of the lands in question. Nevertheless, depending on the size of the displaced population and the political sensitivity of land conflicts, addressing land issues can be one of the most important aspects of post-conflict stabilization.

Despite the importance of land to many aspects of peacebuilding—including livelihoods, macroeconomic recovery, governance, and reintegration of former combatants, in particular—it has been addressed unevenly in peacebuilding processes. However, after two decades of concerted efforts to support post-conflict peacebuilding efforts—often on an ad hoc basis—the international community is starting to conceive of peacebuilding more coherently and strategically. High-profile reports from the United Nations Secretary-General, the United Nations Environment Programme, the UN Civilian Capacity Senior Advisory Group, the World Bank, and fragile states (UNSG 2009, 2010, 2012; UNEP 2009; UN 2011; World Bank 2011; International Dialogue on Peacebuilding and Statebuilding 2011), along with ongoing work in academia, have given rise to a growing body

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[3] *Affected population* refers to people who are seeking access to land at a given time; it includes refugees and internally displaced persons attempting to return to their lands of origin, dislocatees who cannot or do not wish to return to their areas of origin, and those who were displaced well before a conflict and who view the post-conflict period as an opportunity to regain long-lost lands. In addition to affected populations, other actors—including excombatants, opportunists, state actors, and individuals or entities with claims dating back to previous regimes—may also be pursuing access to new lands.

[4] Citations marked with an asterisk refer to chapters within this book.

Post-conflict peacebuilding and natural resources: Key terms and concepts

Following conflict, peacebuilding actors leverage a country's available assets (including natural resources) to transition from conflict to peace and sustainable development. Peacebuilding actors work at the international, national, and subnational levels and include national and subnational government bodies; United Nations agencies and other international organizations; international and domestic nongovernmental organizations; the private sector; and the media. Each group of peacebuilding actors deploys its own tools, and there are a growing number of tools to integrate the peacebuilding efforts of different types of actors.

A post-conflict period typically begins after a peace agreement or military victory. Because a post-conflict period is often characterized by intermittent violence and instability, it can be difficult to pinpoint when the post-conflict period ends. For the purposes of this book, the post-conflict period may be said to end when political, security, and economic discourse and actions no longer revolve around armed conflict or the impacts of conflict, but focus instead on standard development objectives. Within the post-conflict period, the first two years are referred to as the *immediate aftermath of conflict* (UNSG 2009), which is followed by a period known as *peace consolidation*.

According to the United Nations, "Peacebuilding involves a range of measures targeted to reduce the risk of lapsing or relapsing into conflict by strengthening national capacities at all levels for conflict management, and to lay the foundations for sustainable peace and development" (UNSG's Policy Committee 2007). In many instances, this means addressing the root causes of the conflict.

There are many challenges to peacebuilding: insecurity, ethnic and political polarization (as well as marginalization), corruption, lack of governmental legitimacy, extensive displacement, and loss of property. To address these and other challenges, peacebuilding actors undertake diverse activities that advance four broad peacebuilding objectives:*

- *Establishing security*, which encompasses basic safety and civilian protection; security sector reform; disarmament, demobilization, and reintegration; and demining.
- *Delivering basic services*, including water, sanitation, waste management, and energy, as well as health care and primary education.
- *Restoring the economy and livelihoods*, which includes repairing and constructing infrastructure and public works.
- *Rebuilding governance and inclusive political processes*, which encompasses dialogue and reconciliation processes, rule of law, dispute resolution, core government functions, transitional justice, and electoral processes.

Although they are sometimes regarded as distinct from peacebuilding, both peacemaking (the negotiation and conclusion of peace agreements) and humanitarian assistance are relevant to peacebuilding, as they can profoundly influence the options for post-conflict programming. Peacemaking and humanitarian assistance are also relevant to this book, in that they often have substantial natural resource dimensions.

Successful peacebuilding is a transformative process in which a fragile country and the international community seek to address grievances and proactively lay the foundation for a lasting peace. As part of this process, peacebuilding actors seek to manage the country's assets—as well as whatever international assistance may be available—to ensure security, provide basic services, rebuild the economy and livelihoods, and restore governance. The assets of a post-conflict country include natural resources; infrastructure; and human, social, and financial capital. Natural resources comprise land, water, and other renewable resources, as well as extractive resources such as oil, gas, and minerals. The rest of the book explores the many ways in which land and other natural resources affect peacebuilding.

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* This framework draws substantially from the *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict* (UNSG 2009), but the activities have been regrouped and supplemented by activities articulated in USIP and U.S. Army PKSOI (2009), Sphere Project (2004, 2011), UN (2011), UNSG (2010, 2012), and International Dialogue on Peacebuilding and Statebuilding (2011).

of knowledge (see sidebar), which offers better hope of understanding and addressing land issues following conflict.

Although land and property issues may be at the center of many civil conflicts or may emerge during conflict, they are most often addressed somewhat generally in peace accords, or through subsequent national legislative reforms. In other words, an understanding of how land and property rights issues play out at the individual, household, and community levels is rarely a standard component of the peace-process "packages" developed with the assistance of the international community. Thus, one of the primary goals of this book is to provide such understanding, which can then be integrated into such packages.

A peace accord or a military victory may broadly resolve an armed conflict, but the implementation of peace accords (or the creation of new structures associated with victory) raises new issues related to land and property rights. As noted earlier, the stresses of armed conflict often deprive civil institutions of both legitimacy and the ability to function effectively. This is especially the case where land or property rights played a significant role in causing or perpetuating conflict.[5] A de facto institutional vacuum may lead, in turn, to uncertainty in property relations that can not only significantly undermine agricultural recovery, economic opportunities, and food security, but can also intensify identity-driven disputes over areas gained or lost during the conflict by particular ethnic, religious, or otherwise defined groups. Although a peace process can attempt to reconstitute statutory and customary property administration institutions, ensuring that these institutions (1) are viewed as legitimate and (2) have the capacity to identify and resolve land and property rights issues may be elusive goals.

But the problem is yet more complicated. A peace process that attempts to address only pre-conflict land and property issues risks sidestepping the volatile problems that can develop *during* armed conflict. Such problems, which often become most significant at the close of conflict, can drive the post-conflict situation in new and unexpected directions, and thereby undermine the peace process. Examples include the emergence of black markets in land, animosity sparked by the perceived unfairness of restitution or redistribution, and intensified ethnic, religious, or other identity-related tensions over land. Even conflicts that did not initially have a land or property component can be complicated by the spatial nature of land- or property-related actions that occur in the course of conflict; examples include ethnic cleansing, the use of land rights as tools of belligerence,

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[5] Although the terms *land rights* and *property rights* can be used interchangeably in legal parlance (Black 1990), the meanings are distinct as used in this book: *land rights* and *land tenure* refer to social relations regarding rural lands, whereas *property rights* refers to rights that are associated with immovable property, usually in urban or peri-urban areas. Generally speaking, the term *territory* can refer either to an official jurisdiction that has not yet become a state or a province of a country, or to a land area that has been historically linked to certain groups (for example, ethnic or religious groups). In this book, however, *territory* is used to refer to a subnational portion of a country that is politically or culturally distinct from the rest of the country.

and the exploitation of land-based resources (such as diamonds or timber) to fund conflict.

TENURE SECURITY

Security of tenure is one of the most important objectives of land administration, not only in post-conflict situations, but also in the context of ordinary development. The development or restoration of a coherent system of land management can revitalize the credibility of government institutions and promote the rule of law: moreover, authoritative guarantees of tenure security have proved to be particularly important in ensuring investment in and productive use of land resources (World Bank 2003). The achievement of tenure security for internally displaced persons and refugees has also been identified as a key means of addressing conflict-related displacement (Williams 2011b).

At its most fundamental, tenure security concerns the predictability of property rights. While it is often assumed that such security implies ownership of private property, homes and lands can be occupied or used in a variety of ways that are deemed "secure"—through rent, leasehold, freehold, conditional freehold, transient rights, and a number of other collective and communal arrangements. While private property ownership is the form of tenure security that is most familiar and widespread in the developed world, it is only one of many forms of tenure that are capable of providing security.

Legal security of tenure—and its attendant positive economic and social benefits—is derived from (1) a set of rules that are clear, known to those who are affected by them, and justiciable, and (2) a legitimate administrative framework, which may be traditional, statutory, or customary (UN-HABITAT 2001). In essence, households and communities enjoy tenure security when they are protected from involuntary removal unless exceptional conditions apply, and then may be removed only through known, objective, nondiscriminatory proceedings that meet procedural requirements and are reviewed by an independent body (UN-HABITAT 2001).[6] The precise form that tenure takes is less important than the degree of security conferred through the clarity and effectiveness of the applicable rules.

In post-conflict environments, however, tenure security can be both highly complex and highly uncertain. In post-conflict Rwanda, for example, policies that forced several parties who claimed the same property to share the land violated constitutional protections but were implemented nonetheless, out of sheer expediency (Bruce 2013*). In other cases, including post-conflict Liberia, both statutory and customary rules and institutions intended to provide tenure security have been discredited, giving rise to conditions of radical insecurity, in which neither legitimate replacement norms nor institutions exist (Corriveau-Bourque 2011).

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[6] The cross-cultural applicability of the concept of tenure security is evidenced by the breadth of support for its inclusion in the UN-HABITAT Agenda (UNGA 2001, 2002a, 2002b).

THE PROSPECT OF RENEWED CONFLICT

As noted earlier, after the end of armed conflict—especially prolonged civil conflict—affected populations quickly begin to seek access to land and land-based resources. Given the number of people often involved in conflicting claims, access to land and resources can quickly become a predominant concern. In El Salvador, for example, the vagueness of the 1992 peace accords with regard to local land tenure contributed to conflicting expectations; ultimately, land became a sticking point in the peace process, delaying demobilization and impeding the implementation of the land-related measures envisioned by the accords (Corriveau-Bourque 2013*). After the end of Mozambique's civil war, confusion about the resolution of land tenure disputes undermined the peace process (Unruh 2002). And in Iraq, since the 2003 invasion of the Allied Coalition, the unresolved property claims of displaced persons have fueled ongoing insurgency movements (Stigall 2013*), in a scenario similar to that seen in a number of other conflict-affected countries.

In countries subject to recurrent conflict, land tenure can play a significant role in the nature of conflict. In Somalia, for example, sections of the 1973 Unified Civil Code that abolished traditional clan and lineage rights to the use of and access to land and water resources led to significant grievances and ultimately contributed to the civil war (Hooglund 1999; Sait 2013*). In Liberia, land management continues to be contested and problematic: mismanagement of the dualistic system that regulated statutory and customary approaches to tenure led to widespread land grabbing and to the transfer of land to foreign companies through concessions, fueling the social tensions that had preceded the conflict (GRC 2007). And by 1990, when civil conflict broke out, the legal mechanisms for acquiring land deeds, especially in areas under customary regulation of tenure, had become controversial (Corriveau-Bourque 2011). In Afghanistan, tensions over the control of land administration reflect the ongoing reluctance of local communities to submit to central government control (Stanfield et al. 2013*). In Iraq, the issue of whether property claims can be adjudicated under domestic law has called into question the legitimacy and capacity of the judicial system as a whole (Stigall 2013*). Finally, in Latin America, rectifying the inequitable pre-conflict distribution of land was often fundamental to revolutionary goals (Bailliet 2003; Barquero 2004).

ARMED CONFLICT AND CHANGES IN LAND TENURE

Armed civil conflict profoundly changes relationships among people—and, because land and property rights are a system of rights and obligations governing human relationships, tenure arrangements can change rapidly during conflict. Violence, displacement, the destruction of property, battlefield victory and loss, and food insecurity, as well as the breakdown of property-related institutions and norms, significantly alter land use, settlement patterns, and production systems.

In essence, armed conflict reconfigures the network of social relations upon which all land and property rights systems depend, often yielding deeply problematic social relations regarding land. One of the most acute examples of such difficulties is in the Middle East, where Palestinians who sell land to Jewish individuals or interests are potentially subject to a death sentence (Unruh 2002).

The conflict-related reconfiguration of social relations is virtually inevitable after civil war and other internal armed conflicts. Physical displacement may be the first and most dramatic step toward the transformation of land and property rights. Displacement changes, ends, or suspends existing rights and obligations regarding land and property, especially where the basis of a claim depends on physical occupation or social position. In Afghanistan, for example, attempts to restore tenure security after rights and obligations had been put on hold or disrupted by dislocation face significant difficulties (Alden Wily 2003). In many areas of the world, social position depends on location. Thus, in Liberia and Sierra Leone, for example, displacement weakened established social hierarchies, undermining the authority of traditional leaders and creating opportunities for rivals to take their place. Displaced chiefs and other local leaders not only ceased being leaders in their new locations but found upon their return that their positions were no longer recognized or had been occupied by others.

As displaced people attempt to access or use land and property in new locations, competing claims can lead to tensions and other problematic outcomes. In post-conflict Mozambique, for example, migrants, largeholders (those who hold large areas of land), and local customary groups clustered in agronomically valuable areas, where substantial incompatibilities in the groups' approaches to claims, land use, and land access created obstacles to the peace process (Hanlon 1991; Minter 1994). In Somalia, as civil conflict intensified in the early 1990s, certain areas of the country were claimed by nomadic pastoralists under clan-based, transient-access rights arrangements; by small-scale agriculturalists relying on customary rights of occupation; by large-scale land interests accessing land under the aegis of state-sanctioned statutory instruments; and by armed groups seeking access and control through force (Unruh 1995).

Displaced persons often develop greater political awareness while away from their home areas—which may lead them, on their return, to challenge post-conflict authority structures and sources of legitimacy. Such challenges have the potential to broadly reshape social relations and increase political tensions. Roman Krznaric has observed, for example, that Guatemalan refugees exiled in Mexico developed greater political awareness than those who stayed behind (Krznaric 1997). While in Mexico, the refugees had the opportunity to advance certain interests—such as those of women, and of members of lower socioeconomic strata—that had been suppressed in Guatemala.[7] In addition, some sectors of the returning Guatemalan refugee community developed organizational capacity and

[7] It is worth noting that the increased political awareness affected different groups of refugees in different ways (Krznaric 1997).

appropriated and used a transnational language of rights (including both human rights and refugee rights) (Krznaric 1997).

In addition to changing land-related social relations, violent civil conflict reduces the power and penetration of state law in affected regions. Early in a conflict, general insecurity, the illegitimate diversion of resources by armed actors or opportunistic parties, the occupation of territory by opposition groups or by populations that are sympathetic to them, and the destruction of land records may cripple or render inoperable the state's land and property administration institutions in certain areas; at the same time, statutory rules may become unenforceable or readily subject to corrupt use.

Perceived injustices in the state's pre-conflict administration of land rights can also undermine the legitimacy of the state, both before and during conflict. In the run-up to the conflicts in Liberia and Sierra Leone, corruption and discriminatory land policies and practices that targeted specific groups had produced deep distrust among large segments of the population, who saw the state as having little legitimacy with regard to land rights (Richards 2005). Such views can range from simple disappointment in the state, to distrust of the state, to outright hostility toward the state. Such hostility can be especially powerful where a state has engaged in mass evictions, land alienation, corruption, or intervention in agricultural production. Such actions are particularly likely to cause grievances when they (1) discriminate against members of particular ethnic or religious groups and (2) lead to displacement. A sense of injustice regarding land and property can become especially problematic if it combines with other grievances that are not necessarily related to land, further decreasing the state's influence and legitimacy. As described at length by Stathis N. Kalyvas, the merging of land-related and non-land-related issues can lead to both acute and long-lasting conflicts (Kalyvas 2006).

When the social fluidity associated with conflict creates opportunity for aggrieved segments of the population to act, the land and property arrangements that result may be very different from those that preceded conflict. In Darfur, for example, Arab pastoralists were encouraged to take over the land of neighboring groups; moreover, they viewed such actions as legitimate, in light of their sense that they had historically been discriminated against with respect to the distribution of both land and political power (O'Fahey 2008).

For many in conflict-affected settings, identity can be (or can become) powerfully and intricately bound up in perceived rights to specific lands. Ethnic identity, in particular, may be linked to conceptions of land, homeland, or territory (Green 2013). When armed conflict is under way, some groups—particularly ethnic, religious, or linguistic groups that have been historically dislocated from their original lands, and that may have immigrated to urban areas—will seize the opportunity to advance the goal of self-determination, which can eventually become a prominent feature in the conflict and in the subsequent peace process. In such a scenario, the parties to a conflict will often assert entirely contradictory claims to land. In Darfur, for example, various parties to the conflict had differing

definitions, concepts, and views regarding land, intensifying the intractability of the conflict and rendering land issues even more difficult to address in the course of negotiating the two peace accords that have been signed to date (Unruh 2012a).

THE EMERGENCE OF ALTERNATIVE TENURE APPROACHES

Civil conflict is fueled, in part, by perceptions of legitimacy and illegitimacy. When perceptions of legitimate authority change, the emergence of new social arrangements is almost inevitable. Such developments are particularly relevant to land because claims to territory and associated resources are based primarily on notions of legitimacy and authority. For example, some land claims may be asserted on the basis of historical occupation and supported by oral histories that are derived, in turn, from myths about how various peoples came to exist in the world and to predominate in a particular region (Comaroff and Roberts 1977). Such claims can gain renewed strength during conflict, when the notion of returning to territory from which a given group departed or was expelled, recently or long ago, can gain prominence. In some cases, conflict is viewed as a unique opportunity to regain ancestral lands before peace is consolidated. The return of the Turkmen (who had been relocated under Saddam Hussein), to Kirkuk, Iraq, during the 2003 war, is an illustrative case (HRW 2004).

With wartime ideologies and aspirations still fresh in the minds of many, disappointment in a newly reconstructed post-conflict state can manifest itself in the development of alternative local regimes for land and property. Jocelyn Alexander has noted, for example, that after the war of liberation in Zimbabwe, a grassroots reaction against the state emerged with regard to land and property (Alexander 1996). Local distrust of the state continued even after the insurgency won independence in 1980, because local chiefs who had been allied with the previous Rhodesian administration were deliberately excluded not only from the reconstituted state but also from its efforts to establish land policies.

Where there is ongoing conflict with no accord or clear victor, the substantial reduction (and sometimes complete loss) of state power can lead to a search for alternative sources of order. Such was the case in Somalia, with the emergence of sharia courts—and, arguably, in Afghanistan, with the emergence of the Taliban. Both the sharia courts and the Taliban implemented their own enforcement mechanisms, including those that applied to land and property rights (Unruh 2002; Sait 2013*).

Finally, in the wake of conflict, important features of land and property rights systems may be abandoned, either because conflict has rendered dispute resolution mechanisms unworkable, or because local inhabitants believe there is little point in adhering to rules that others are not following. In Liberia, for example, in the absence of fair land administration and viable, legitimate customary and statutory institutional arrangements for land dispute resolution, tenure systems suffered marked degradation, and wartime approaches—in which tenure was supported by rule of the gun—emerged (Richards 2005).

LAND LAW REFORM

Land-related legislative changes mandated in a peace process and encouraged by the international community are intended to capitalize on a window of opportunity by (1) addressing grievances related to land administration, (2) promoting social change, and (3) aiding in post-conflict recovery and reconstruction. In both Liberia and Sierra Leone, where the inability to gain access to land had led many young men to join insurgent militias, post-conflict legislative changes were specifically designed to address the authority wielded by chiefs and elders, who had traditionally maintained their power—in part—by preventing young men from gaining access to land (Richards 2005).

Legislative changes can be profoundly out of step, however, with the emerging realities of land and property in post-conflict situations. New or modified legislation is typically superimposed on customary rights and obligations that can be stronger or more binding than the new or revised laws, given (1) the questionable legitimacy of a government that may have been associated with only one side of the conflict, (2) the general weakness of post-conflict governments, and (3) the lack of governmental capacity to implement and enforce the new or modified laws. In addition, relationships created and maintained during conflict to regulate property, land, and territory may be significantly stronger than any new norms that emerge in the context of a fragile peace and a war-weakened state. The relative strength of customary norms in comparison to new statutory law can be particularly pronounced among semiliterate, war-weary populations, and where mechanisms for disseminating and enforcing new laws are weak or nonexistent (Unruh 2002).

Nevertheless, the disconnect between legislative changes and reality is usually temporary and can subside as the state strengthens its capacity to effectively and legitimately assert itself. Moreover, a state that engages with or absorbs preexisting or conflict-derived arrangements regarding land, property, and territory is more likely to succeed in gaining legitimacy and authority. If the state attempts to outlaw such arrangements, the effort to use legislation to change social relations may fail or have unexpected outcomes—such as the creation of a black market in land—that can undermine peacebuilding.

In post-conflict Angola, the rapidity with which the government moved forward with recovery led to problematic reforms of the land law. As Allan Cain describes in this book, the haste with which Angola's post-conflict land law was formulated may explain its subsequent failure: in what was perhaps the quickest production of new land legislation in any post-conflict country, a draft of the new legislation was released in July 2002, just a few months after the official end of the conflict (Cain 2013*).

In light of the short time that had been allotted to revise the law, the Portuguese lawyers who guided the drafting process had simply imported numerous components of Portuguese land law; as a result, the new law failed to address the realities, needs, and problems of the post-conflict Angolan population (Cain 2013*). Although the government did invite public consultation on the 2002

draft, it was unrealistic to expect meaningful input: in addition to the fact that the population was suffering from ongoing food insecurity and impoverishment (and therefore unlikely to be able to focus on public policy issues such as land legislation), the consultation also occurred before the return of displaced persons, and therefore failed to obtain adequate information on the intersection of the new law and the land problems that emerged during and after the return of the displaced.

Liberia, in contrast, has spent years attempting to develop a process that will yield a viable land law. Although there may be some value in passing or amending land laws sooner rather than later, Liberia does appear to be better off than Angola: not only is the process that Liberia has undertaken much more inclusive, giving voice to different sectors of society, but the Liberian government is also making a genuine effort to address serious land problems.

In sum, it is not necessarily better to create a post-conflict land law quickly, and doing so is arguably worse if the law fails to address post-conflict problems —which is extremely difficult to do within a short time frame. The lack of a land law years after the end of a conflict can be managed, as long as the populace sees that an inclusive process is under way, and careful use is made of other legal instruments, including decrees and legal rulings, to deal with large problems or categories of problems.

URBAN AREAS

Post-conflict property issues in urban and peri-urban areas deserve particular mention. Conflict-affected people whose homes have been destroyed, who are fleeing fighting in rural areas, or who are simply seeking food and services that are no longer available or reliable in their region of origin often occupy land plots, homes, and commercial properties on the fringes of urban areas, fueling the growth of squatter communities. Following conflict and before the identification or preparation of areas for resettlement, attempts to bring order to urban areas often involve evictions. When the users of such property make claims to remain there on the basis of current occupation, the threat of significant unrest arises. After the conflict in Liberia, for example, properties in and around Monrovia were occupied by squatters. The government's inability or unwillingness to evict the squatters led the original landowners to threaten eviction (Williams 2011a; Unruh 2009).

INTERACTIONS BETWEEN EFFORTS TO RESOLVE TENURE ISSUES AND OTHER PEACEBUILDING ACTIVITIES

In post-conflict situations, the potential for adverse interactions between the resolution of tenure issues and other components of peacebuilding underscores the importance of dealing effectively with land and property rights. In Afghanistan, for example, the interaction of land rights and road reconstruction has led to land grabbing and increased violence, both of which threaten peacebuilding gains.

The land grabbing has its origins in large-scale dislocation, the increasing value of land close to roads (and the failure by planners to properly understand the impacts of road reconstruction in land value), and a governance environment in which both corruption and violent conflict (including the widespread use of improvised explosive devices) are pervasive (Unruh and Shalaby 2012).

So far, neither the Afghan government nor the international community has been able to manage the problem of widespread land seizures. All nine provinces where the percentages of government-seized agricultural land are highest lie along the largest road rebuilding project, known as the Ring Road. In three of these provinces, between 80 and 90 percent of the land area has been subject to land grabbing (Helmand, 90 percent; Nangarhar, 80 percent; and Nimroz, 80 percent); in three other provinces, more than 100 percent of the land has been grabbed (Baghlan, 110 percent; Kandahar, 111 percent; and Logar, 190 percent)—indicating that the land has been grabbed repeatedly (Reydon 2006).

A broad trend toward large-scale acquisition of agricultural land also has important implications for post-conflict situations, as the growth of commercial investment (frequently encouraged as part of peacebuilding) intersects with land issues. Countries such as Cambodia have provided early indications of the risks attendant upon development schemes that promote foreign investment through long-term land leases and concessions established without consultation, compensation, or even adequate notice for local residents (Williams 2013b*). Concerns about such actions have led to an ongoing policy debate that has questioned the potential benefits of such investments (including jobs, revenues, and the transfer of skills and technology) and revealed the associated risks (such as corruption, the expulsion of subsistence farmers from their lands, and the exhaustion of the soil) (Cotula et al. 2009; von Braun and Meinzen-Dick 2009; Zagema 2011; Deininger and Byerlee 2011). Human rights advocates, such as Olivier De Schutter, have long expressed concerns about this trend (De Schutter 2011); and recently, many development practitioners have questioned its risks as well, particularly with respect to post-conflict or otherwise fragile countries. But the phenomenon shows no signs of slowing down in the near term—as is indicated, for example, by reports that nearly one-tenth of the land in South Sudan had already been promised to investors before the country's independence (Deng 2011).

Angola serves as an example of the problematic intersection of land rights recovery and landmine clearance, two peacebuilding priorities that occur on the same lands, at the same time, and for the benefit of the same people, but are undertaken separately. In Angola, this intersection led to land grabbing, lack of access to areas adjacent to mined and demined areas, corruption in land administration and markets,[8] and obstacles to the return of refugees and internally displaced persons (IDPs) (Unruh 2012b).

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[8] Corruption in land administration usually relates to fraudulent claims (altered or false deeds and titles), whereas corruption in land markets has to do with transactions involving deception, coercion, or bad faith (including selling the same parcel of land multiple times).

Post-conflict Sierra Leone exemplifies the sometimes negative interactions between the post-conflict priorities of reconstituting land rights and ensuring food security. In this case, landholding lineages retained their rights to land within chiefdoms but were worried that renting out land for agricultural purposes to IDPs, excombatants, and migrants who were willing to farm it might lead the renters to make permanent claims on the land. The fear was so great that many lineages did not allow renters on their land at all—leaving a significant portion of the population lacking secure rental access to land and creating large-scale unemployment in rural areas. The enforced idleness of a great deal of arable and previously cultivated land also led to extreme food and livelihood insecurity in both urban and rural areas (Unruh 2008).

The interaction between multiple land tenure regimes, each of which may be unproblematic on its own, can exacerbate tensions in post-conflict situations. In particular, tensions over land rights between pastoralists and agriculturalists in a number of conflicted-affected countries—including Afghanistan, Somalia, and Sudan—highlight the need to manage such interactions better and more deliberately after conflict (Alden Wily 2013; Stanfield et al. 2013*; Flint and de Waal 2008; Markakis 1993).

ADDRESSING THE CHALLENGES

The twenty-one chapters in this book examine the critical role of land and property in post-conflict peacebuilding, describing experiences in seventeen countries (see figure 1) and drawing on the experiences of many more. The twenty-five authors of these chapters include practitioners, field researchers, policy makers, and scholars with firsthand experience in the countries and regions they write about. Some chapters examine specific countries, including Afghanistan, Angola, Bosnia and Herzegovina, Burundi, Cambodia, El Salvador, Indonesia (Aceh), Iraq, the Philippines, Rwanda, Sudan and South Sudan, Tajikistan, and Timor-Leste. Others take a more thematic view, examining issues such as titling, legal and institutional reform, laws and policies, land registration systems, Islamic and customary law, land and property restitution, land conflicts and conflict resolution, peace negotiations, post-conflict displacement and reintegration, and international standards and the role of the international community.

The book is divided into five parts. Part 1 consists of two chapters on peace negotiations. The first examines Sudan and South Sudan, and the second the Philippines and Mindanao. These two chapters describe the challenges and opportunities presented by various approaches that have been used to address land issues through peace negotiations; they also highlight the complexity of including land issues in peace negotiations and the difficulties involved in implementing negotiated resolutions.

The six chapters in part 2 explore various aspects of managing the return of refugees and displaced persons, who often number in the hundreds of thousands or even millions. Two chapters examine frameworks that have been used to address

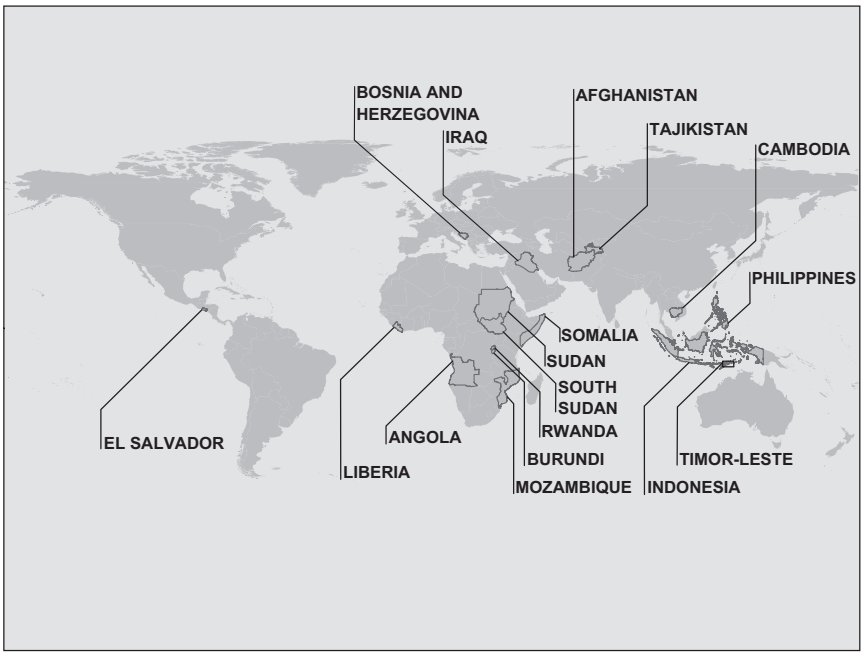

Figure 1. Post-conflict and conflict-affected countries from which lessons have been drawn in this book, either through case studies or broader thematic analyses

displacement and dispossession of land and property, and four chapters examine specific experiences from Angola, Bosnia and Herzegovina, Iraq, and Rwanda.

Part 3, which consists of seven chapters on land management, explores measures that can provide consistent leverage in resolving conflicts and managing the problematic and often volatile land-related issues that emerge in post-conflict situations. Among the tools and techniques examined in part 3 are those that have been used to strengthen capacity for protecting housing, land, and property rights; resolving land disputes; building cooperation; and engaging in fair and sustainable land relations in post-conflict situations.

Although tools and techniques for managing land in post-conflict situations are essential, they must be backed up and given legitimacy by legal means. The five chapters in part 4 focus on laws and policies, emphasizing the importance of revising land and property laws after armed conflict in order to ensure a durable peace. The chapters explore land disputes; legal pluralism, including customary and Islamic law; and approaches to developing, revising, and implementing land-related policies and legislation capable of addressing housing, land, and property rights.

Part 5, a concluding chapter for the entire book, distills the lessons of the previous chapters, placing them within the broader context of the literature on

post-conflict land management and reform. The book emphasizes the importance of aligning land and property interventions with other peacebuilding priorities; to this end, such interventions must be assigned priority and sequenced so as to reflect the lessons of past experiences.

Taken together, the chapters in this book offer a wide-ranging look at both successes and failures in efforts to address land and property rights in post-conflict situations. As the chapters illustrate, the onset of peace may add new urgency to the efforts of many rural resource users to claim or reclaim their rights to land. Wartime experiences involving land may also merge with land-related causes of conflict, increasing competition and confrontation over land. With an institutionally debilitated and war-weary state unable to provide effective, legitimate recourse for claimants, such competition and confrontation can spark a return to armed conflict. But as the contributions to this book also illustrate, appropriately targeted and supported interventions can become powerful deterrents to the resurgence of conflict.

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PART 1

Peace negotiations

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Introduction

In countries from El Salvador to Sudan, and Nepal to the Philippines, grievances over the ownership, distribution, and use of land have contributed to the onset of conflict or have emerged in the course of hostilities and displacement, and they have exacerbated the effects of conflict on vulnerable populations. Land is also important for the reintegration of former combatants and the creation of favorable conditions for livelihoods, food security, and economic growth. Moreover, the negotiation of contested rights to land and property is crucial to providing durable solutions for displaced civilian populations. For these reasons, land is one of the most important and contentious natural resource issues addressed in many peace negotiations.

The two chapters in this part highlight the complexity of negotiating resolutions to disputes over land and territory, as well as the challenges to implementing such resolutions.

Salman M. A. Salman traces the long and complex process for negotiating a resolution to a persistent territorial dispute in "The Abyei Territorial Dispute between North and South Sudan: Why Has Its Resolution Proven Difficult?" The Abyei area is on the border between Sudan and what has become the new state of South Sudan. Because of the multiplicity of claims, actors, and interests involved, numerous agreements regarding the disputed territory have been reached and then broken. Various international interlocutors—including the Abyei Boundaries Commission, the Permanent Court of Arbitration, the United Nations, the African Union, and the United States—have sought to facilitate resolution of the conflict, with varying degrees of effectiveness. Although an agreement was signed as recently as June 2011 by the government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army (representing South Sudan), Salman argues that a durable resolution to the Abyei territorial dispute is attainable only by the traditional leaders of the Misseriya and Ngok Dinka tribes themselves. The two tribes lived in peace for a long time, and differences between members of the two communities were resolved by their leaders on the basis of the traditions and customs of the two tribes. In other words, although international mediation is potentially a valuable tool, it must be accessible and legitimate to local constituencies in order to succeed. Salman concludes by considering how the failure to resolve this dispute has continued to destabilize relations between Sudan and the new state of South Sudan.

In Mindanao, Philippines, local conflicts have made the implementation of peace agreements more difficult. In "Land Tenure and Peace Negotiations in Mindanao, Philippines," Yuri Oki analyzes the phenomenon of *rido:* feuding between families and clans often caused by disputes over ancestral land domains and characterized by violent retaliations. Oki argues that the roots of the civil war—and of enduring poverty—in Mindanao lie not in the clash between Muslims

and Christians, but rather in the control and management of land and related natural resources. Competition over land has been a continuous source of conflict because land provides subsistence to local populations and power to clans. The potential to extract copper, gold, nickel, and other minerals exacerbates these conflicts. Although rido is a traditional practice and widely accepted, its recent exercise has exploited ambiguities in national law, caused corruption to become more entrenched, solidified vested interests' control over land, and disrupted a long-lasting peace between the rebels and the government of the Philippines. Nevertheless, Oki notes, the inhabitants of Mindanao have actively supported a peacebuilding process through civil society peace initiatives, NGOs' provision of humanitarian assistance to displaced people, and coordination with international donors that can act as intermediaries with the government.

Many other chapters of this volume touch on land-related challenges to the conclusion and implementation of peace agreements. Many of the challenges are practical, such as responding to displacement and dispossession (addressed in part 2). Other challenges are legal and political. For example, Paula Defensor Knack's chapter, "Legal Frameworks and Land Issues in Muslim Mindanao," in part 4, highlights constitutional challenges to a law meant to implement the peace agreement between the government of the Philippines and rebels in Mindanao. Peace agreements are an important first step in the peacebuilding process, even though it is challenging to negotiate and implement their provisions related to land and territory. When peace agreements are negotiated and implemented in a manner that respects both international standards and local context, they have the potential to permanently end hostilities, establish a framework for post-conflict reconciliation and rebuilding, and guide international assistance in many sectors—not least in the area of land tenure.

The Abyei territorial dispute between North and South Sudan: Why has its resolution proven difficult?

Salman M. A. Salman

Abyei is an area on the border between Northern and Southern Sudan that has been the focus of a dispute between the two parts of the country since independence of Sudan in 1956. This dispute has a number of unique aspects. First, it concerns not only the question of to which of the disputing parties the territory belongs, but also the boundaries and limits of the territory itself. The issue of the boundaries needed to be resolved first, to be followed by a referendum in which the residents of Abyei would decide which part of the country, the North or the South, the area would become part of. In the interim, the area would be placed under special administrative arrangements. The second unique aspect is the large number of agreements that have been concluded by the disputing parties—not to resolve the dispute itself but to put forth arrangements and mechanisms for resolving it. Third is the significant contribution of the international community to the dispute resolution process. This has involved a major role by the United States; the Abyei Boundaries Commission (ABC), composed of independent experts; and the Permanent Court of Arbitration (PCA) in The Hague, as well as the United Nations and the African Union. Indeed, there is no precedent for resolution by the PCA, or any other international tribunal, of a country's internal territorial dispute. Fourth, in addition to the government of Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/A) (and now the government of South Sudan), the dispute involves the Ngok Dinka, a Southern tribe, and the Misseriya, a Northern tribe, each claiming the area, and both deeply enmeshed in the dispute. Indeed, the crux of the dispute gradually shifted since 2009 from the limits and boundaries of the Abyei area to whether the Misseriya are entitled to participate in the referendum.

This chapter reviews the recent history of the Abyei dispute and the agreements that have been reached to resolve it, and analyzes the decisions of the ABC and the PCA. It examines the reasons for not undertaking the referendum

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Salman M. A. Salman is an academic researcher and consultant on water law and policy. He previously served as lead counsel and water law adviser with the Legal Vice Presidency of the World Bank.

on the future of the area, as scheduled, and the aftermath, including the takeover of the area by GOS forces in May 2011. The chapter also discusses the implications of the dispute and the failure thus far to resolve it for the Abyei area, and for the future relations between Sudan and the new state of South Sudan.[1]

RECENT HISTORY OF THE ABYEI DISPUTE

The recent history of the Abyei dispute dates back to the beginning of the twentieth century.[2] After the Anglo-Egyptian forces conquered Sudan in 1898, they confirmed existing provincial boundaries, including the borders between Northern and Southern Sudan. However, in 1905 authority over nine chiefdoms of the Ngok Dinka was transferred from the Southern province of Bahr el Ghazal to the Northern province of Kordofan, and the border between Northern and Southern Sudan was adjusted accordingly. No movement of people was involved, only the map was redrawn to reflect this redistricting. The territory in question is known as the Abyei area.

The main reason for the transfer of the area to the North was the contentious relationship between the Misseriya and Ngok Dinka tribes. The Misseriya lived and moved in the southern part of Kordofan Province, near the border with Bahr el Ghazal Province. The Ngok Dinka lived in the northern part of Bahr el Ghazal Province, adjacent to where the Misseriya lived. The two tribes share parts of the Abyei area and have conflicting claims on it. In 1905, the British colonial administration

> concluded that it made sense to put the two contending groups under the same administration. For one thing it was much more difficult to reach the area from the British headquarters in Bahr el Ghazal than it was from Kordofan. In addition, it would be more effective to adjudicate the dispute if the two parties were under the same provincial administration. . . . As a result, the anomaly of a southern Sudanese group administered as part of northern Sudan was created (Petterson 2008, 22–23).

The relationship between the Ngok Dinka and the Misseriya, from the time of the transfer through the remainder of the colonial era, was by and large peaceful, despite their basic differences. The Ngok Dinka are part of the larger Dinka tribe, which is a Nilotic African tribe. It is the largest, wealthiest, and politically

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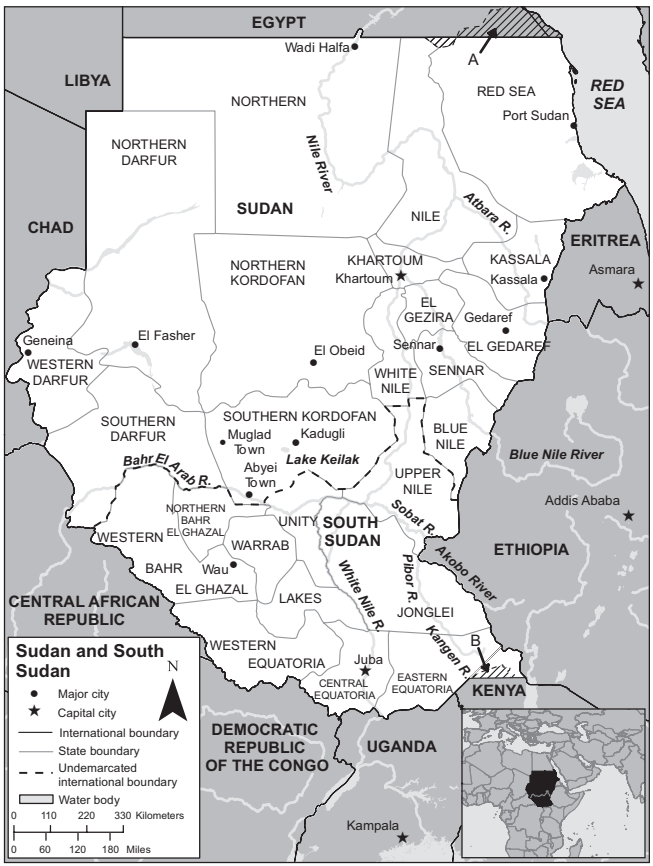
[1] This chapter uses the terms *Southern Sudan* and *Northern Sudan* to refer to the two parts of the country before the independence of South Sudan. On February 13, 2011, one week after the Southern Sudan referendum results were officially announced, showing that the overwhelming majority of Southern Sudanese voted for secession (see note 19), the government of Southern Sudan decided to call their new country the Republic of South Sudan. Accordingly, the chapter uses the term *South Sudan* when referring to the new state.

[2] See "Milestones in the Abyei Territorial Dispute between North and South Sudan," at the end of this chapter.



Notes: A – The Hala'ib Triangle is claimed by Sudan and de facto administered by Egypt.
B – The Ilemi Triangle is claimed by Ethiopia, South Sudan, and Kenya and de facto controlled by Kenya.

strongest group in the South. Many of the influential Southern politicians and academicians are from the Dinka tribe. Its members practice indigenous religions, although many of the political leaders have embraced Christianity, and some members of the tribe have converted to Islam. The Misseriya, on the other hand, are Arabs and Muslims. A wealthy tribe with huge numbers of livestock, its members move across Southern Kordofan and the Abyei area in search of fodder and water for their livestock. A number of their tribal leaders are prominent members of political parties in the North.

Problems between the two tribes emerged following the outbreak of civil war between the North and the South in August 1955, a few months before Sudan became independent on January 1, 1956. Naturally, the Ngok Dinka sided with the Southern movement, while the Misseriya sided with the Northern government in Khartoum. The first round of civil war ended with the conclusion of the Addis

Ababa Agreement on the Problem of South Sudan (Addis Ababa Agreement) on March 12, 1972, between the Government of the Democratic Republic of the Sudan and the Southern Sudan Liberation Movement.[3]

The Addis Ababa Agreement, in article 3(c), defined the Southern provinces of Sudan to include "the Provinces of Bahr El Ghazal, Equatoria and Upper Nile in accordance with their boundaries as they stood January 1, 1956, and other areas that were culturally and geographically a part of the Southern Complex as may be decided by a referendum." Although the agreement did not refer explicitly to Abyei, it was understood and agreed that the second part of the definition referred to Abyei because of the geographical and cultural aspects of the area and its residents. However, the agreement did not specify the boundaries of the area, or establish a process for defining and delimiting them. It called for a referendum on whether the area would be part of the Southern or the Northern Sudan, but did not go into any detail, or specify a schedule for the referendum. Nothing substantive with regard to Abyei took place following the conclusion of the Addis Ababa Agreement; no special administrative arrangements were put in place,[4] and no referendum was held.

The Addis Ababa Agreement granted Southern Sudan self-government and established a People's Regional Assembly and a High Executive Council as the legislative and executive organs there. It excluded certain matters from their authority, conferring them instead on the national government in Khartoum, and included detailed provisions on the relationship between the two parts of the country. However, the agreement faced a number of difficulties as well as successive major breaches by the GOS that led eventually to its collapse in 1983 (Alier 1990). In that year, the SPLM and the SPLA were established, and they led the renewed civil war that broke out in 1983. The old alliances of the Khartoum government and the Misseriya tribe on the one hand, and the SPLM/A and the Ngok Dinka tribe on the other hand, were revived and grew stronger during the civil war, and each tribe fought on the side of its respective ally. As a consequence, the relationship between the two tribes worsened, and occasionally they fought each other. As with the larger North-South conflict, the ethnic and religious differences between the Misseriya and the Ngok Dinka no doubt exacerbated the conflict between them.

Negotiations between the GOS and the SPLM/A, which started in 2002 in Kenya, led to the conclusion of a series of agreements and protocols which were later consolidated and signed as the Comprehensive Peace Agreement (CPA) on January 9, 2005.[5] Those agreements and protocols started with the Machakos Protocol that was concluded on July 20, 2002. That protocol granted Southern Sudan the right of self-determination, to be exercised through a referendum to

[3] For the complete text of the Addis Ababa Agreement, see www.goss-online.org/magnoliaPublic/en/about/politicalsituation/mainColumnParagraphs/00/content_files/file3/Addis%20Ababa%20Agreement.pdf.

[4] A presidential decree was issued in 1974 placing the Abyei area administratively under the presidency, but nothing was done to implement that decree.

[5] For the complete text of the CPA, see www.sd.undp.org/doc/CPA.pdf.

be held on January 9, 2011, six months before the end of a six-year interim period on July 8, 2011. On that date, according to paragraph 2.5 of the Machakos Protocol, "there shall be an internationally-monitored referendum, organized jointly by the government of Sudan and the SPLM/A, for the people of the South Sudan to confirm: the unity of the Sudan . . . or to vote for secession." The six-year interim period was intended to give the Southern Sudanese the opportunity to make an informed decision on the choice between unity and secession.

The Machakos Protocol was followed on September 25, 2003, with the Agreement on Security Arrangements. This agreement confirmed the existence of two separate armed forces during the interim period: the Sudanese Armed Forces (SAF) and the SPLA, with both forces treated equally as part of Sudan's National Armed Forces. It also established Joint/Integrated Units from the two armed forces. The Agreement on Wealth Sharing was concluded on January 7, 2004, and dealt mainly with the sharing of natural resources, particularly oil, between the North and the South. Three more agreements were concluded on May 26, 2004. The first was on power sharing and included detailed governance provisions. The second dealt with the states of Southern Kordofan and Blue Nile, which are geographically part of Northern Sudan but identify culturally with Southern Sudan. This agreement devolved more powers to those states and called for popular consultations on implementation of the agreement at the end of the interim period. The third agreement, known as the Abyei Protocol but formally titled "The Resolution of the Abyei Conflict,"[6] is discussed in more detail below.

Thus, six agreements were concluded between 2002 and 2004. On December 31, 2004, two annexures were concluded spelling out detailed implementation arrangements for these agreements, including the Abyei Protocol. This brought to a successful conclusion an arduous negotiation process that had spanned almost three years.

As indicated above, these documents made up the CPA, which was signed on January 9, 2005.[7] The CPA was signed by the then – first vice president of the Republic of the Sudan and the chairman of the SPLM/A. It was witnessed by envoys of thirteen countries and organizations: the presidents of Kenya and Uganda and representatives of Egypt, Italy, the Netherlands, Norway, the United Kingdom, the United States, the African Union, the European Union, the Intergovernmental Authority on Development (IGAD),[8] the Arab League, and the United Nations.

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[6] The title of the protocol was changed on December 31, 2004, to the Protocol between the Government of the Sudan and the Sudan People's Liberation Movement/Army on the Resolution of the Abyei Conflict. It is noteworthy that the protocol used the term *Abyei conflict* and not *Abyei dispute*. For the complete text of the Abyei Protocol, see www.gossmission.org/goss/images/agreements/Abyei_protocol.pdf.

[7] The CPA is also known as the Naivasha Agreement, after the town in Kenya where most of the agreements of the CPA were concluded.

[8] IGAD is a regional organization of East African countries dedicated to achieving peace, prosperity, and regional intergration. Negotiations on the CPA were conducted under the auspices of IGAD. At that time, its members were Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, and Uganda. (Following independence, South Sudan became a member.)

The Interim National Constitution of the Republic of the Sudan was issued on July 6, 2005,[9] six months after the conclusion of the CPA.[10] It incorporated the basic undertakings of the CPA, including those relating to Abyei.[11]

THE ABYEI PROTOCOL AND OTHER AGREEMENTS ON THE ABYEI DISPUTE

During the negotiations for the CPA, the issue of Abyei turned out to be more difficult and complex than was thought by the two parties. There was no agreement on the boundaries or the size of the Abyei area. The GOS took the stand at the beginning of the negotiations that the borders between the North and the South were to be as they stood on independence day, January 1, 1956 (see figure 1), and were not subject to negotiations or change.

The SPLM argued that Abyei was an exception to the issue of Sudan's January 1, 1956, borders, as it was addressed in the 1972 Addis Ababa Agreement, and insisted that it be addressed during the CPA negotiations. The GOS later agreed to discuss Abyei but insisted that the area south of the Bahr el Arab River (also known as the Kiir River) was the only area transferred to the North in 1905, and thus the only area that should be considered as the Abyei area. Under this scenario, the Bahr el Arab River would become the natural boundary between the North and the South in that area, as indicated in figure 2, in case the area becomes part of the South. Abyei Town, the main city in the area, falls north of the Bahr el Arab River, and thus would not be included in the area proposed by the government.[12] The SPLM insisted that the area was far larger than that, extending well into Kordofan, running south of Lake Keilak to the area immediately south of Muglad Town. Negotiations on this matter became deadlocked. Thus, the crux of the Abyei dispute at that time was that a certain area was transferred from Southern Sudan to Northern Sudan, but there was no agreement on its boundaries or size.

The United States, which was actively involved in the Sudan peace negotiations, attempted to break the deadlock over Abyei. On March 19, 2004, the then – U.S. special envoy to Sudan, Senator John Danforth, presented proposals to the two parties, including a definition of the area and a process for delimiting

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[9] See www.mpil.de/shared/data/pdf/inc_official_electronic_version.pdf for the complete text of the interim constitution.

[10] The first six months after the CPA was signed were primarily devoted to adopting the interim constitution. Article 226 set an interim period to start on July 9, 2005, and to last until July 8, 2011, six months after the referendum on the status of Southern Sudan on January 9, 2011. The first six months (January 9 to July 8, 2005) are referred to as the pre-interim period.

[11] Article 183 of the interim constitution incorporated the main provisions of the Abyei Protocol.

[12] The GOS and the Misseriya claim that Abyei Town was actually established some years after the transfer of the area to the North. See Zainelabideen (2009).

Figure 1. Sudan with the 1956 boundary between Northern and Southern Sudan

it and resolving the dispute.[13] Those proposals were accepted by both parties and became the basis for the Abyei Protocol, which was concluded on May 26, 2004, and formed part of the CPA.[14] The Abyei Protocol did not attempt to resolve the conflict; it simply established arrangements and mechanisms for resolving it.

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[13] In the context of this chapter, in line with boundaries' terminology, *define* means to generally describe the limits of an area; *delimit* means to mark its boundaries on a map; and *demarcate* means to mark its boundaries on the ground.

[14] The footnote to the Abyei Protocol states: "This is the full text of the proposal entitled 'Principles of Agreement on Abyei,' presented by US Special Envoy Senator John Danforth to H.E. First Vice President Ali Osman Mohamed Taha and SPLM/A Chairman Dr. John Garang on the 19th of March 2004. The parties hereby declare to adopt these Principles as the basis for the resolution of Abyei Conflict."

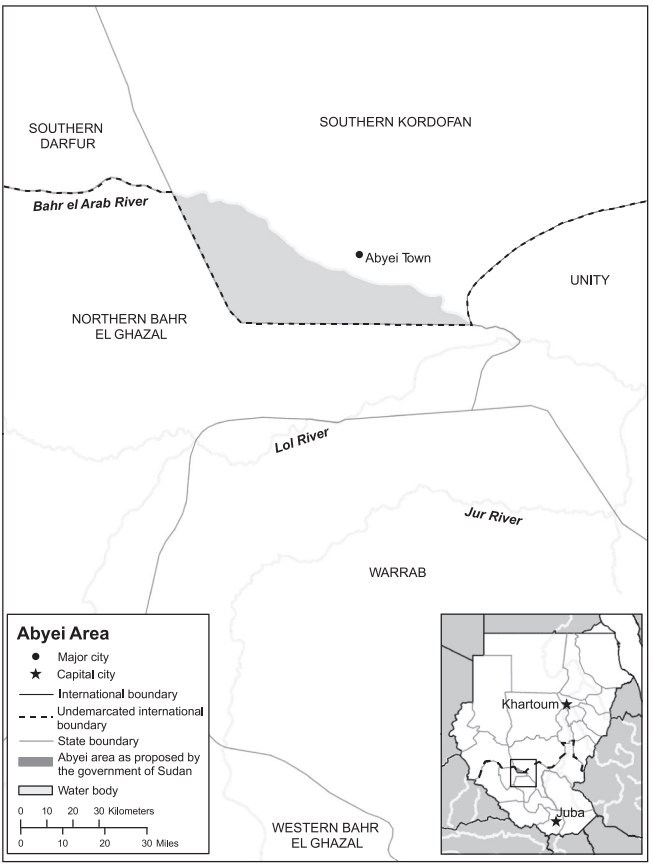

Figure 2. The borders of Abyei area as proposed by the government of Sudan
Source: PCA (2009), reprinted with permission from Terralink.

In line with the U.S. proposals, Abyei was defined under paragraph 1.13 of the Abyei Protocol "as the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905."[15] The protocol placed Abyei under the presidency (consisting of the president of the Republic of the Sudan and the two vice presidents)

[15] It should be added in this context that academics and politicians from the Misseriya tribe do not agree with this definition, and claim that the Abyei area belonged historically to the Misseriya who migrated there in the eighteenth century, and that they were the ones who welcomed the Ngok Dinka in the Abyei area many years later (Zainelabideen 2009). On the other hand, Dinka academics and politicians hold exactly the opposite view, namely that the Ngok Dinka lived in the Abyei area long before the Misseriya, and they were the ones who welcomed the Misseriya to the area (Deng 1986). This chapter does not attempt to address those claims and is focused primarily on the dispute resolution process and the challenges facing it.

and stated that it would be administered by an executive council elected by the residents of Abyei. Pending that election, the council's initial members would be appointed by the presidency. The protocol stated that the residents of Abyei comprised the members of the Ngok Dinka community and other Sudanese residing in the area, and that such residents would be citizens of both Kordofan and Bahr el Ghazal.[16] It also included detailed provisions on the sharing of the revenue from the oil produced in the Abyei area during the interim period.[17]

More importantly, the protocol set forth arrangements for delimiting the boundaries of Abyei, as well as for a referendum on its status.[18] This referendum was scheduled to take place on January 9, 2011, simultaneously with the Southern Sudan referendum, offering Abyei residents the choice of retaining their special administrative status in Northern Sudan or becoming part of Bahr el Ghazal in Southern Sudan. However, as discussed later, this referendum did not take place on January 9, 2011, as stipulated under the Abyei Protocol, although the Southern Sudan referendum did take place. On that date, and for the next six days (ending on January 15, 2011), the people of Southern Sudan voted overwhelmingly to secede from Sudan.[19]

As mentioned earlier, the dispute over Abyei also involves the Southern tribe of the Ngok Dinka and the Northern tribe of the Misseriya. The leadership of the national government and the SPLM/A includes prominent members of

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[16] The two states with which Abyei has been associated, Kordofan and Bahr el Ghazal, were divided in 2005—Kordofan into Northern and Southern Kordofan, and Bahr el Ghazal into Northern Bahr el Ghazal, Western Bahr el Ghazal, Warrab, and Lakes states. The issues of Abyei concern the current states of Southern Kordofan and Northern Bahr el Ghazal.

[17] The Abyei Protocol set the following percentages for sharing Abyei net oil revenues: 50 percent for the national government, 42 percent for the government of Southern Sudan, and 2 percent each for Bahr el Ghazal State, Kordofan State, the Ngok Dinka, and the Misseriya. For an analysis of sharing of oil revenues from the region, see Wennmann (2012).

[18] The fact that the Abyei Protocol called for the status of the Abyei area (after its boundaries are demarcated) to be determined by referendum rather than for its outright return to Southern Sudan, from where it was transferred in 1905, may have been based on the precedent of the Addis Ababa Agreement, which also called for a referendum on the status of the area. The referendum was seen in both instances as conferring legality and legitimacy to any changes of the boundaries between the North and the South as they stood on January 1, 1956. It is also worth noting that placing the Abyei area under the presidency, as stipulated by the Abyei Protocol, is perhaps based on the similar arrangement pronounced by the 1974 presidential decree, which was issued as a result of the Addis Ababa Agreement (see note 4).

[19] The results of the referendum were officially announced on February 7, 2011, and indicated that close to 99 percent of the Southern Sudanese voters opted for secession (Southern Sudan Referendum Commission 2011). Consequently, and as per the CPA, the state of South Sudan formally came into existence on July 9, 2011, following the end of the interim period on July 8, 2011.

the Misseriya and Ngok Dinka, respectively, some of whom played key roles in the Abyei negotiations. The Misseriya claim that they are residents of the Abyei area, and as such they are entitled to participate in the Abyei referendum. This demand is categorically rejected by the SPLM and the Ngok Dinka who argue that the Misseriya have only grazing rights in the Abyei area, and as such are not residents of the area. This issue has now become the crux of the dispute, and its resolution has thus far eluded the two parties. The discovery of oil in and around Abyei has been another complicating factor, because whichever way Abyei goes, the oil resources within the area will go with it.

Both sides agreed under the Abyei Protocol that Abyei is the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905. The dispute has been, however, over the boundaries of that area. The GOS and the Misseriya argued that the area in question was a triangle of land south of the Bahr el Arab River, and that the Ngok Dinka expanded north of the river, including to Abyei Town itself, only after 1905. The SPLM and the Ngok Dinka, on the other hand, claimed that the area extended far north of the Bahr el Arab River and well into Kordofan, close to the town of Muglad, the heart of the Misseriya tribe. To determine the boundaries of Abyei, the GOS and the SPLM agreed, under paragraph 5.1 of the Abyei Protocol, to establish the Abyei Boundaries Commission (ABC), which was to include independent experts and representatives of the local communities and the local administration, and was to complete its work within the first two years of the interim period.

Because the Abyei Protocol dealt mainly with the basic elements for resolving the dispute, more detailed arrangements needed to be worked out and agreed upon. Thus, on December 17, 2004, seven months after the Abyei Protocol was signed, the two parties concluded the Understandings on the Abyei Boundaries Commission, referred to as the Abyei Annex or Abyei Appendix to the Abyei Protocol. This document specified that the ABC would consist of fifteen members: five appointed by the GOS, representing the government, the Misseriya, and the administrators of Abyei; five appointed by the SPLM, representing the SPLM, the Ngok Dinka, and the administrators of Abyei; and five impartial experts, to be appointed by the United States, United Kingdom, and IGAD. The ABC would be chaired by one of the experts. It was to hear testimony from representatives of the people of Abyei and its neighbors and the two conflicting parties, and to consult the British archives and other relevant sources on Sudan. It was required under the Abyei Annex to submit its report to the presidency by July 2005, and not two years after the interim period began, as had been stipulated in the Abyei Protocol. Its report would be considered final and binding.

On December 31, 2004, the two parties concluded the Implementation Modalities of the Protocol on the Resolution of the Abyei Conflict, which addressed the timing, executing body, funding sources, composition, and procedures for a number of elements of the Abyei Protocol. This document also established mechanisms for selecting the members of the ABC. It became part of annexure II of the CPA.

As indicated earlier, the CPA was signed on January 9, 2005. It consisted of a chapeau,[20] six separate protocols and agreements, and two annexures, as described above. As mentioned above, one of the protocols and one of the annexures dealt specifically with the Abyei dispute.

The next step toward resolving the Abyei dispute was conclusion of the March 12, 2005, agreement on the Text of the Terms of Reference for the Abyei Boundaries Commission. This agreement reiterated the mandate and structure of the ABC. It listed the five appointees from each of the two parties and set out the ABC's work program, schedule, and funding. It established Nairobi as the seat of the ABC. By that time, the United States, United Kingdom, and IGAD had selected the commission's five experts.[21] By mid-March 2005, the fifteen-member ABC was in place.

On April 11, 2005, the delegations of the GOS and the SPLM agreed, in Nairobi, on the Rules of Procedure for the Abyei Boundaries Commission. This document described in detail the ABC's work program, including field visits, hearing of presentations by representatives of both sides, and, after completion of this process, evaluation of the evidence and preparation of a final report. The ABC was to endeavor to reach a decision by consensus, but if this was not possible, the experts would have the final say.[22] However, the other ten members of the ABC would continue to be part of the process of hearings, field visits, and deliberations. The report would become a public document after its formal presentation to the presidency.

Thus, a wide range of legal instruments were concluded by the two parties with the hope that they would pave the way for a just, peaceful, and sustainable resolution of the Abyei dispute. Unfortunately, that did not turn out to be the case, as discussed in the next parts of this chapter.

THE ABYEI BOUNDARIES COMMISSION REPORT

Following agreement on the Rules of Procedure, the GOS and the SPLM submitted their preliminary presentations to the experts on April 12, 2005, through their

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[20] The chapeau is the umbrella agreement that was signed by the two parties and the thirteen witnesses on January 9, 2005, and which listed and attached the other agreements and protocols constituting the CPA.

[21] The five experts were Ambassador Donald Petterson (former U.S. ambassador to Sudan), the U.S. appointee; Douglas Johnson (scholar and expert on Southern Sudan), the UK appointee; and three IGAD appointees: Godfrey Muriuki (University of Nairobi), Kassahun Berhanu (University of Addis Ababa), and Shadrack Gutto (a South African lawyer). Ambassador Petterson was selected as the chair of the ABC in accordance with the wishes of the GOS and the SPLM.

[22] Donald Petterson raised the question as to why the two sides would delegate to five outsiders the power to make the decision on the boundaries of Abyei. He answered the question: "For one, they knew they couldn't do it themselves. And it's possible that one or both sides figured it would be better that blame for an adverse decision would fall on the outsiders, not on themselves. Beyond that is the fact that each side believed its case was ironclad" (Petterson 2008, 24).

members in the ABC. Subsequently, the ABC visited Abyei for six days, collecting testimony from members of both tribes.

In addition to receiving oral and written testimony, and after the visit to the Abyei area in April, the experts examined historic documents at the National Records Office in Khartoum, as well as in the United Kingdom. Final presentations were heard in June, after which the report was completed by the experts and presented to the presidency on July 14, 2005 (ABC 2005). This was just a few days after the interim constitution was adopted on July 6, 2005. Subsequent to the adoption of the constitution, the SPLM joined the ruling National Congress Party (NCP) as a junior partner in the government, and John Garang, the leader of the SPLM/A, returned to Khartoum, where he was sworn in as the first vice president.[23]

The ABC report found that "no map exists showing the area inhabited by the Ngok Dinka in 1905. Nor is there sufficient documentation produced in that year by Anglo-Egyptian Condominium authorities that adequately spell out the administrative situation that existed in that area at that time" (ABC 2005, 4). The report stated further that "in 1905 there was no clearly demarcated boundary of the area transferred from Bahr el-Ghazal to Kordofan" (ABC 2005, 20). The report rejected both: (i) the claim of the GOS that the area transferred in 1905 lay entirely south of the Bahr el Arab River, and (ii) the claim of the Ngok Dinka that their boundary with the Misseriya should run from Lake Keilak to Muglad Town (ABC 2005).

The report classified land rights in three categories: dominant (full rights evidenced by permanent settlements), secondary (involving seasonal use of land), and shared secondary (exercised by two or more communities). It presented the following conclusions:

- The Ngok Dinka "have a legitimate dominant claim to the territory from the Kordofan–Bahr el Ghazal boundary north to latitude 10°10′ N," extending from the boundary with Darfur Province in the west to Upper Nile Province in the east, as these boundaries stood at independence in 1956 (ABC 2005, 21).
- From latitude 10°10′ N and up to latitude 10°35′ N, "the Ngok and the Misseriya share isolated occupation and use rights" (ABC 2005, 21). Thus, this area should be divided between them, and the northern boundary should be located at latitude 10°22′30″ N.
- "The western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956. The southern boundary shall be the Kordofan-Bahr el-Ghazal-Upper Nile boundary as it was defined on 1 January 1956. The eastern boundary shall extend the line of the Kordofan-Upper Nile boundary

[23] John Garang was killed in a plane crash on July 30, 2005 (three weeks after he was sworn as first vice president), as he flew from Uganda to Southern Sudan. He was succeeded by his deputy, Salva Kiir Mayardit.

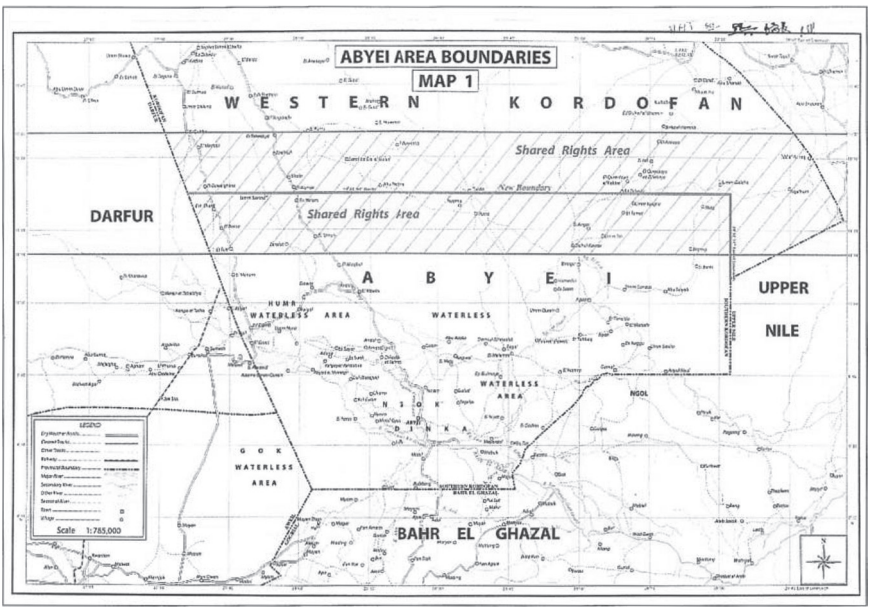

Figure 3. Map of the Abyei area as delimited by Abyei Boundaries Commission experts
Source: PCA (2009), reprinted with permission from Terralink.

at approximately longitude 29°32′15″ E northwards until it meets latitude 10°22′30″ N" (ABC 2005, 22).

- "The Ngok Dinka and the Misseriya should retain their established secondary rights to the use of land north and south of this boundary" (ABC 2005, 22).[24]

Figure 3 shows the Abyei area as delimited in the ABC report.

The ABC report accommodated a large part of the SPLM's claims by extending the Abyei area well into Kordofan, and rejecting the government's claim that Abyei was limited to the land south of the Bahr el Arab River. The SPLM and the Ngok Dinka immediately accepted the report and asserted that, according to the agreements signed by the two parties, it was final and binding. The government and the Misseriya rejected the report, claiming that the ABC

[24] The ABC report called for the demarcation of the northern and eastern boundaries by a survey team comprising three professional surveyors, one nominated by the GOS, one by the government of Southern Sudan, and the third by IGAD, to be assisted by four representatives, one from the Ngok Dinka, one from the Misseriya, and two from the presidency. The ABC report also asked the presidency to send the nominations for this team to IGAD for final approval by the international experts. Thus, the experts extended their authority beyond issuance of the report.

had exceeded its mandate by taking into consideration developments in the area after it was transferred to the North in 1905.

Thus the arduous work of the ABC did not attain the expected results. A stalemate developed that would last for three years before the next attempt to resolve the dispute.

STALEMATE, SETBACKS, AND THE DECISION TO SEEK ARBITRATION

The rejection by the government and the Misseriya of the ABC report was the first major setback in the implementation of the CPA; as it took place less than a week after the NCP and SPLM government was constituted. The rejection of the report resulted in a complete stalemate on the Abyei dispute. The boundaries of the Abyei area remained without agreement, and its status uncertain. Without a clear demarcation of the Abyei area, it would not be possible to meaningfully implement the provisions of the Abyei Protocol regarding the administrative arrangements for the area during the interim period leading to the referendum. Henceforth, Abyei has remained the thorniest issue in the North-South peace process and relations.

In October 2007, the SPLM withdrew from the national government over a number of issues, including the refusal of the NCP to accept the ABC report. The SPLM ministers eventually returned to their ministries, but the Abyei dispute remained unresolved. Diplomatic efforts by the IGAD and the U.S. special envoy to Sudan continued but did not lead to a breakthrough.

In May 2008, fighting broke out between the Sudanese army and the SPLA in Abyei Town, and the city was devastated. The fighting had erupted over a personal argument between government and SPLA soldiers (*Sudan Tribune* 2008). United Nations officials estimated that one hundred people might have been killed, and that 30,000 residents of Abyei Town and 20,000 from neighboring villages fled at the height of the fighting. That incident underscored the fragility of the situation in Abyei, and indicated the threat to the larger North-South peace process posed by the failure to resolve the Abyei dispute.

The fighting and devastation of Abyei Town prompted the two parties to rethink their strategies and return to the negotiating table over the Abyei dispute. Consequently, on June 8, 2008, two weeks after the outbreak of the fighting, they signed the Road Map for Return of IDPs [internally displaced persons] and Implementation of the Abyei Protocol. The agreement dealt in detail with security arrangements, deploying in Abyei a new integrated battalion with troops from the SAF and the SPLA, as well as a police unit and a force from the United Nations Mission in Sudan (UNMIS). The agreement also required the government to provide the necessary resources for the return of civilians to their homes. It established interim arrangements for administering the Abyei area, based on the Abyei Protocol. These arrangements included interim boundaries for the area as well as the appointment by the presidency of a chief administrator from the SPLM and a deputy administrator from the NCP, both residents of the Abyei area.

The agreement reconfirmed the oil revenue shares agreed upon earlier (see note 17), and established a fund to develop the areas along the North-South border and to finance joint projects there. The GOS would contribute 50 percent and the government of Southern Sudan 25 percent of their Abyei oil revenues, respectively, to this fund.

In a major breakthrough, the agreement also stated that the parties would submit the dispute over the findings of the ABC to binding arbitration. This became possible when the SPLM dropped its demand that the ABC report be considered final and binding. The two parties agreed to work out the terms of reference for the arbitration, including the process for selecting arbitrators, issues to be referred for arbitration, procedures, the decision-making process, and enforcement. The agreement called for the entire arbitration process to be completed within six months from the date of establishment of the tribunal. More importantly, it stated that if the two parties failed to reach agreement within one month on the arbitration tribunal, the secretary-general of the PCA would establish one within fifteen days, and would finalize procedures and terms of reference in accordance with PCA rules and international practices. Those provisions on arbitration were confirmed in a Memorandum of Understanding on the Abyei Arbitration signed by the two parties on June 21, 2008.[25]

On July 7, 2008, both parties signed the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area.[26] That decision was another major attempt to resolve the Abyei dispute, and is also another significant step in the internationalization of the dispute, as discussed below.

THE PERMANENT COURT OF ARBITRATION: PROCESS AND AWARD

Under the Arbitration Agreement, the parties agreed to refer their dispute for final and binding arbitration to the PCA, governed by the PCA's Optional Rules

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[25] In article 3.2, the Arbitration Agreement consolidated the Memorandum of Understanding on the Abyei Arbitration and the Road Map for Return of IDPs and Implementation of Abyei Protocol. For the complete text of the Arbitration Agreement, see www.pca-cpa.org/upload/files/Abyei%20Arbitration%20Agreement.pdf.

[26] One other unique aspect of the Abyei dispute is that the arbitration before the PCA was between the GOS and the SPLM. The SPLM was, at that time, a junior, albeit an important, partner in the GOS, as established by the CPA and the interim constitution, and held important portfolios, including the first vice president, as well as the minister of foreign affairs. However, the SPLM was an adversarial party against the GOS before the PCA. In fact, the minister of foreign affairs was also a member of the SPLM delegation to the arbitration hearings before the PCA in The Hague. This dilemma was also faced earlier when the Road Map for Return of IDPs and Implementation of the Abyei Protocol was concluded, but that agreement was eventually signed by representatives of the NCP and the SPLM. However, in the PCA process, only one of the parties had to be a state, because the dispute was adjudicated, under the PCA's Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (PCA 1993).

for Arbitrating Disputes between Two Parties of Which Only One is a State. The PCA arbitral tribunal was to determine whether the ABC had exceeded its mandate—to delimit the area of the nine Ngok Dinka chiefdoms that had been transferred to Kordofan in 1905.[27] If it determined that the ABC did not exceed its mandate, the tribunal should make a determination to that effect and issue an award for the full and immediate implementation of the ABC report. If it determined that the ABC did exceed its mandate, the tribunal should make a declaration to that effect, and should proceed to delimit the area of the nine Ngok Dinka chiefdoms transferred to the North in 1905. The tribunal was to work in accordance with the provisions of the CPA, particularly the Abyei Protocol and Appendix, and the interim constitution—and with other relevant principles of law and practice as the tribunal may determine to be relevant.

The tribunal consisted of five arbitrators.[28] Each party appointed two arbitrators, and these four arbitrators were tasked with appointing a presiding arbitrator. However, none of the five candidates they identified was accepted by both parties, and the PCA secretary-general appointed the presiding arbitrator.[29] The tribunal adhered to a very tight schedule. Memorials were filed on December 18, 2008, and counter-memorials on February 13, 2009, with the rejoinder filed on February 28. Oral hearings took place at The Hague from April 18 to 23, and the tribunal issued its award on July 22, 2009.

The award is a fairly detailed one, spanning more than 270 pages (Salman 2010). It started with a discussion of the geography of Sudan, the history of the Abyei dispute, the peace process, and the instruments it had produced. It suggested three motivations for the original transfer of the nine Ngok Dinka chiefdoms to the North: (1) to pacify the area and end attacks by the Humr (a subgroup of the Misseriya) on the Ngok Dinka, (2) to demonstrate an authoritative presence to the inhabitants of the area, and (3) to bring the feuding tribes under a single administration (PCA 2009).[30]

The parties' arguments were summarized at length, particularly on the question of whether the ABC had exceeded its mandate either procedurally or substantively. The tribunal also discussed the question of whether Abyei was defined

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[27] That mandate was stated in the Abyei Protocol and reiterated in the Abyei Appendix and the ABC Terms of Reference and Rules of Procedure.

[28] Unlike the International Court of Justice (which is also at The Hague, and is usually referred to as the ICJ), the PCA does not have its own regularly presiding judges. Instead, each party to a case appoints an equal number of arbitrators. Once appointed, those arbitrators together recommend a presiding arbitrator to the two parties.

[29] The GOS appointed Awn Al-Khasawneh and Gerhard Hafner. The SPLM appointed Michael Reisman and Stephen Schwebel. The secretary-general of the PCA appointed Pierre-Marie Dupuy as the presiding arbitrator, because the nominees of the four arbitrators for this position were all rejected by either of the two parties, or by both of them.

[30] The ABC report stated that the reason for the transfer of the nine Ngok Dinka chiefdoms to the North was the Ngok Dinka complaint about the Humr raids (ABC 2005).

in 1905 in a tribal sense or a territorial sense. This was particularly relevant with regard to the ABC inquiry into the Ngok Dinka settlements and grazing rights. The tribunal also discussed the basis on which it should review the ABC analysis and conclusions, distinguishing between the criteria of reasonableness and correctness, and noted that it had to defer to the ABC's interpretation of its mandate as long as that interpretation was reasonable (PCA 2009).[31]

The tribunal basically accepted the ABC's classification of land rights into dominant (permanent), secondary (seasonal), and shared secondary rights. Based on its reading and interpretation of the evidence presented by the two parties, the tribunal reached the following conclusions:

- Northern boundary: The ABC experts did not exceed their mandate in ruling that "the Ngok have a legitimate dominant claim to the territory from the Kordofan–Bahr el Ghazal boundary north to latitude 10°10′ N" (PCA 2009, para. 131.1). However, they did exceed their mandate with regard to the shared secondary rights area between latitudes 10°10′ N and 10°35′ N. The northern boundary of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 runs along latitude 10°10′00″ N, from longitude 27°50′00″ E to 29°00′00″ E.
- Southern boundary: The ABC experts did not exceed their mandate in ruling that "the southern boundary shall be the Kordofan–Bahr el Ghazal–Upper Nile boundary as it was defined on 1 January 1956" (PCA 2009, para. 131.3); and the boundaries as established by the ABC were confirmed.[32]
- Eastern boundary: The ABC experts exceeded their mandate in ruling that "the eastern boundary shall extend the line of the Kordofan–Upper Nile boundary at approximately longitude 29°32′15″ E northwards until it meets latitude 10°22′30″ N" (PCA 2009, para. 131.3). The eastern boundary of the area runs in a straight line along longitude 29°00′00″ E, from latitude 10°10′00″ N south to the Kordofan–Upper Nile boundary as it was defined on January 1, 1956.
- Western boundary: The ABC experts exceeded their mandate in ruling that "the western boundary shall be the Kordofan-Darfur boundary as it was defined on 1 January 1956" (PCA 2009, para 131.3). The western boundary runs in a straight line along longitude 27°50′00″ E, from latitude 10°10′00″ N south to the Kordofan-Darfur boundary as it was defined on January 1, 1956, and continuing on the Kordofan-Darfur boundary until it meets the southern boundary.
- Grazing and other traditional rights: The ABC experts did not exceed their mandate in ruling that "the Ngok and Misseriya shall retain their established

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[31] For further analysis of this issue, see Crook (2009).

[32] There has been no dispute with regard to the southern boundary, since the GOS has taken the position that the triangle falling south of the Bahr el Arab River was the area transferred to Kordofan in 1905.

secondary rights to the use of land north and south of this boundary" (PCA 2009, para. 131.5). Furthermore, the arbitral tribunal ruled that "The exercise of established traditional rights within or in the vicinity of the Abyei Area, particularly the right (guaranteed by Section 1.1.3 of the Abyei Protocol) of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei Area (as defined in this Award) remains unaffected" (PCA 2009, para. 770.e.2).

The map of Abyei as defined by the arbitral tribunal is shown in figure 4.

The size of the Abyei area, as delimited by the tribunal award, is about 10,460 square kilometers. This is a considerable reduction from the area set by the ABC report, which was 18,559 square kilometers for the area below 10°22′30″ N, or 25,293 square kilometers for the area below 10°35′ N. This substantial reduction made it easier for the GOS to accept the decision of the tribunal, and indeed to present it as a victory, even though the area was still larger than what the government initially presented. Figure 5 compares the PCA tribunal award map with that of the ABC report.

As a result of the reduction of the Abyei area in the eastern part, some major oil fields, including Heglig and Bamboo, reverted to Northern Sudan, with Defra oil field falling within the Abyei area.[33] On the other hand, the Bahr el Arab River, which is the main river in the area, together with other rivers and tributaries of the Bahr el Arab River, such as Ragaba ez Zarga (or Ngol River), Ragaba umm Biero, and Ragaba el Shaib, all fell largely within the Abyei area as delimited by the tribunal award. The established secondary rights of the Ngok Dinka and Misseriya to the use of land north and south of Abyei were confirmed by the tribunal award. The award also confirmed the exercise of established traditional rights within or in the vicinity of the Abyei area, particularly the right of the Misseriya and other nomadic peoples to graze cattle and move across the Abyei area.[34] Thus, according to the tribunal award, the Ngok Dinka and the

[33] The GOS indicated, immediately after the PCA tribunal award was issued, that the government of Southern Sudan would no longer receive any of the revenue from the oil in those fields, now that they were no longer in the Abyei area. The government of Southern Sudan responded that it would still claim those oil fields as part of Southern Sudan when the process of delimiting the complete borders between the North and the South commenced (*Sudan Tribune* 2009c). Oil has not been a concern to either the Misseriya or the Ngok Dinka, as the claims of both of them emphasized land and water. Neither tribe has received any benefits from the Abyei oil, despite the entitlement of each, under the CPA, to 2 percent of its revenues (see note 17).

[34] The tribunal addressed the grazing rights of the Misseriya in case Abyei becomes part of an independent South Sudan. The tribunal stated in this connection that "the jurisprudence of international courts and tribunals as well as international treaty practice lend additional support to the principle that, in the absence of an explicit prohibition to the contrary, the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land" (PCA 2009, para. 753).

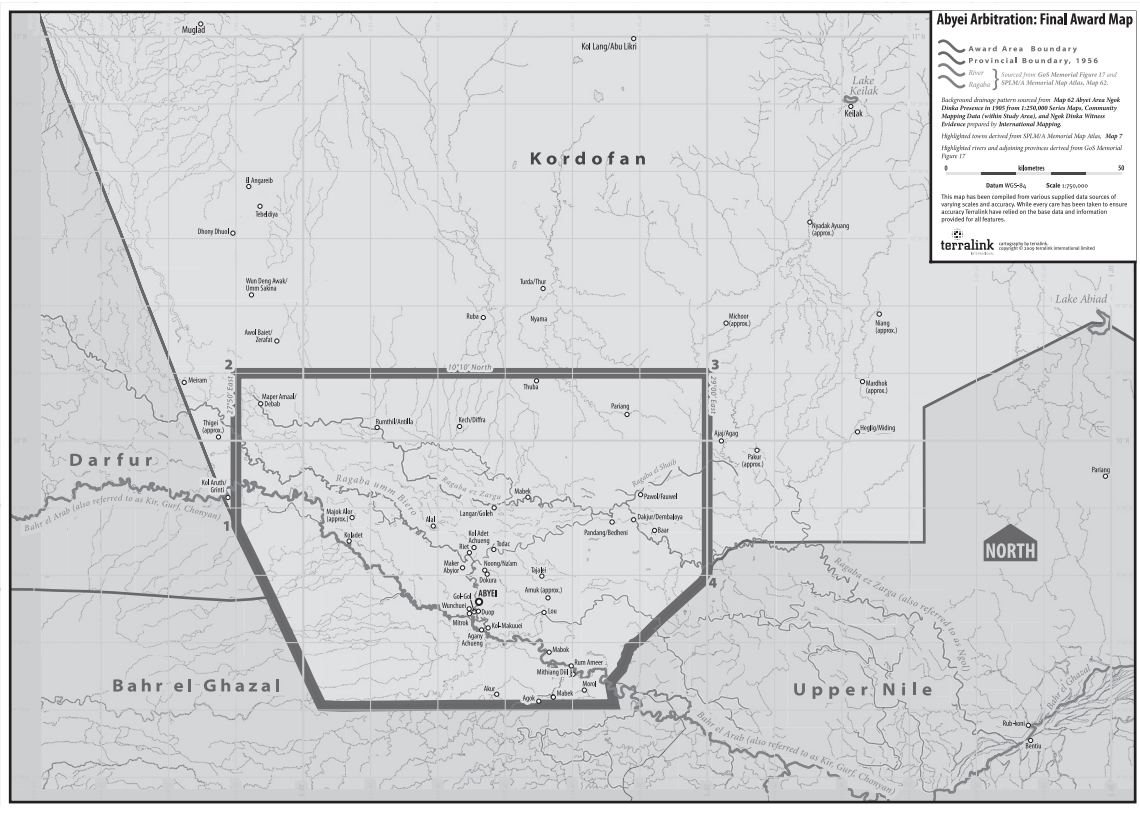

Figure 4. The Permanent Court of Arbitration final award map of the Abyei area
Source: PCA (2009), reprinted with permission from Terralink.

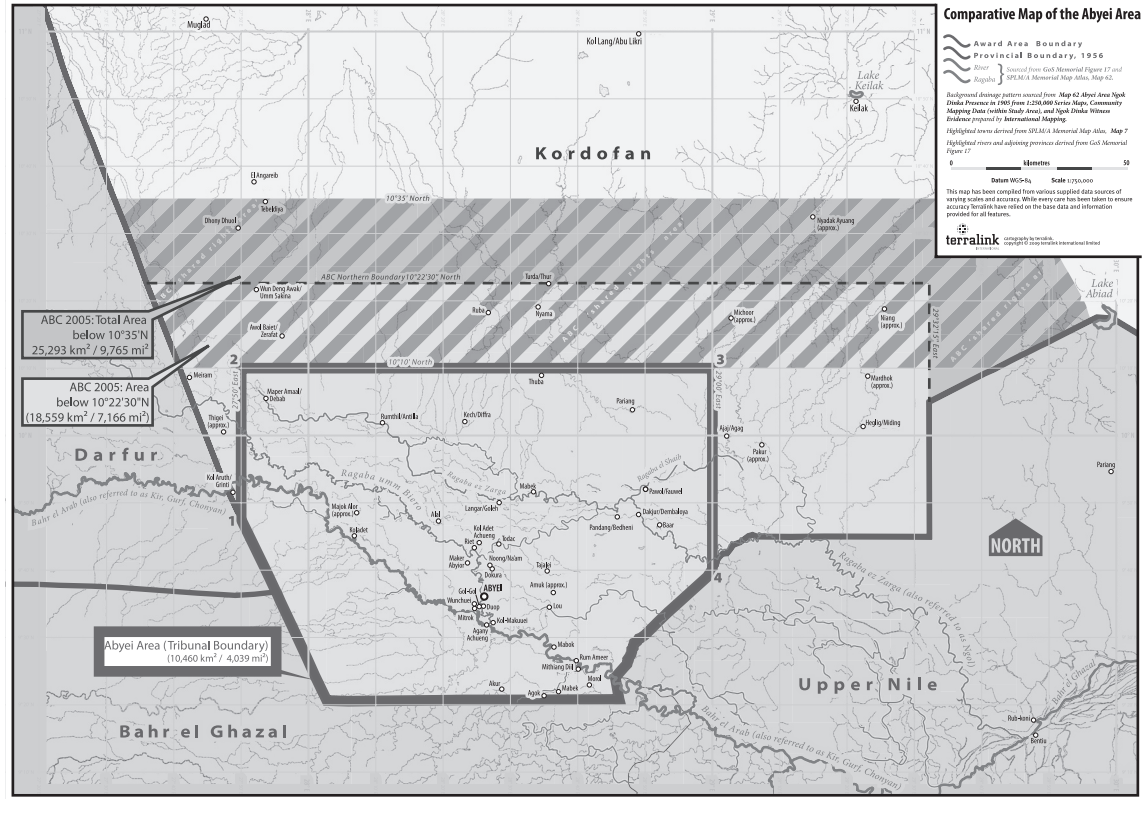

Figure 5. **Comparison of the Permanent Court of Arbitration award map with that of the Abyei Boundaries Commission experts map**
Source: PCA (2009), reprinted with permission from Terralink.

SPLM/A got land and water, the GOS got most of the oil fields in the area,[35] and the Misseriya's grazing rights within and around the Abyei area were confirmed.

In a dissenting opinion, Awn Al-Khasawneh (one of the tribunal members appointed by the GOS) called his colleagues' opinions unpersuasive and self-contradicting, and disagreed with the test of reasonableness. He accused the majority of exceeding its own mandate, and asked who "gave the Experts or the Tribunal the right to reduce the Misseriya to second class citizens in their own land and to create conditions which may deny them access to water" (PCA 2009, Dissenting Opinion, para. 203).

Both the GOS and the SPLM accepted the PCA tribunal award.[36] The United Nations, European Union, United States, and IGAD also welcomed the decision and saw it as a major step toward resolving the Abyei dispute. On the other hand, the leaders of the Misseriya tribe rejected the decision. They claimed that the territory delimited by the PCA tribunal award as the Abyei area gave too much of their own land and villages to the Ngok Dinka, and restricted their rights over the area to grazing rights.[37] They saw the dissenting opinion as reflecting and vindicating their position. The rejection by the Misseriya of the tribunal award presented a major setback to the attempts to resolve the Abyei dispute, and threw the whole process into uncertainty. The rejection took the parties back to July 2005 when the GOS and the Misseriya rejected the ABC report.

THE ABYEI AREA REFERENDUM: WHY IT WAS NOT UNDERTAKEN

Demarcation of the Abyei area was supposed to be the next step following issuance of the PCA tribunal award. However, that did not take place because of the rejection by the Misseriya of the award and their opposition to any demarcation of the area based on that award. A second stalemate developed and lasted until negotiations between the GOS and the SPLM on the Abyei referendum commenced in late 2009. On December 30, 2009, five months after the PCA tribunal award was issued, the National Assembly passed both the Southern Sudan Referendum Act and the Abyei Area Referendum Act.[38]

The Southern Sudan Referendum Act listed a number of issues that need to be resolved by the two parties. These issues include nationality; currency; public service; position of Joint/Integrated Units (JIUs); international agreements and

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[35] For discussion of oil in the Abyei area and its quantity and likely depletion dates, see ICG (2007).

[36] The Ngok Dinka were initially disappointed that the Abyei area was reduced considerably from that delimited by the ABC, but they did not oppose the tribunal award. Indeed, later on they embraced the award and demanded its full and immediate implementation.

[37] For the views of those leaders, see *Sudan Tribune* (2009a).

[38] For the major points raised during the discussion of the Abyei Area Referendum Act, and the Misseriya protest against the act, see *Sudan Tribune* (2009b).

treaties; debts and assets; oil fields, production, and transport; oil contracts; water resources; and property.[39] These issues are in addition to disputes on a number of border areas between Northern and Southern Sudan. These borders extend for more than 2,000 kilometers, and a joint committee had started working on their demarcation for some time before the Southern Sudan Referendum Act was adopted. However, as with Abyei dispute and the post-referendum issues, not much progress took place on any of the borders issues.[40] Henceforth, the pending issues between the North and the South could be clustered into three separate groups: the issues listed under the Southern Sudan Referendum Act, the border issues, and the Abyei dispute.

The Abyei Area Referendum Act confirmed the boundaries of the Abyei area (as determined and delimited by the PCA tribunal award), notwithstanding the Misseriya rejection of the award. The act also confirmed the date for the Abyei referendum (January 9, 2011, as determined by the Abyei Protocol of the CPA and the interim constitution). It called for an Abyei Area Referendum Commission to be established as a legally and financially independent entity with its head office in Abyei Town, and branch offices where the commission deemed necessary. The act gave the commission wide powers with regard to the conduct of the referendum, including preparing registration forms and determining the number and location of the polling stations and the polling schedule. The commission was to conduct the referendum in collaboration with the Abyei administration, the national government, and the government of Southern Sudan, under international supervision. The act invited the thirteen countries and organizations that had witnessed the signing of the CPA, as well as international, regional, and local nongovernmental organizations, to supervise the Abyei referendum.

The Abyei Area Referendum Act was silent on who are considered as residents of the Abyei area, and thus would be eligible to participate in the referendum. As mentioned earlier, the Abyei Protocol (paragraph 6.1) defined the residents of Abyei as "the Members of the Ngok Dinka community and other Sudanese residing in the area" and stated that the criteria for residence should be worked out by the Abyei Area Referendum Commission, which is yet to be established.

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[39] See article 67 of the act. In addition to those issues, the article added "any other issues to be agreed upon by the two parties."

[40] On June 21–22, 2010, representatives of the ruling NCP and the SPLM met in Mekelle, Ethiopia, to discuss the post-referendum issues. On June 23 they signed the Mekelle Memorandum of Understanding between the NCP and SPLM on Post-Referendum Issues and Arrangements (Mekelle MOU). The Mekelle MOU stated that negotiations on post-referendum issues would be conducted by a joint negotiating team consisting of six members from each party, to be assisted by a joint technical secretariat. The Mekelle MOU clustered the issues to be negotiated into four categories: (i) citizenship; (ii) security; (iii) financial, economic, and natural resources; and (iv) international treaties and legal issues. However, the pending issues on the Abyei dispute were not discussed or referred to in the MOU. For the complete text of the Mekelle MOU, see www.cmi.no/sudan/doc/?id=1283.