

Land & Conflict

THEMATIC GUIDANCE NOTE 02

**INTEGRATING CUSTOMARY TENURE
INTO FORMAL SYSTEMS**



Thematic Guidance Note on Land & Conflict

Disputes over land access and control often escalate into violence and conflict leading to dispossession and forced displacement within and across borders. Estimates indicate that 56 percent of conflicts are related to land and that most conflicts take place in developing countries. At the end of 2015, 95 percent of the 65 million refugees and internally displaced people were living in developing countries.

The central role of land to livelihood, identity and power, most notably in rural-based economies explains why disputes over access and control of land frequently escalate into armed conflict and mass displacement.

This Note is part of a series of World Bank Thematic Guidance Notes on land and conflict that present key issues, challenges and guiding principles to address land tenure issues in conflict and post-conflict environments. The three Notes in the series are:

- 01.** Restitution, Compensation and Durable Solutions to Displacement and Dispossession
- 02.** Integrating Customary Tenure into Formal Systems
- 03.** Protecting and Strengthening the Land Tenure of Vulnerable Groups

The audience for these Notes is both laymen and practitioners who are preparing a project or program in a conflict or post-conflict setting, including multi-lateral and bi-lateral institutions, governments, NGOs and others. These Guidance Notes seek to provide guidance on where to start and what questions to ask, not to be an exhaustive 'how to' for land and conflict issues.

While these Notes are meant to stand alone, they are inter-related and may cross-reference relevant material from other Notes.

Issue and Why It is Important

Why transition from customary to formal tenure?

In many developing countries, land use, access and transfer is mostly regulated customarily or informally, without legal recognition from state authorities. This situation is widespread in rural areas. In situations of conflict and displacement, the restitution of land and housing held under customary tenure is made more difficult due to the absence of formal ownership documentation. The issue of formalization of housing and land use can therefore arise in the context of a response to situations of forced displacement.

The non-recognition of rural customary land rights or urban housing rights exposes the rights-holders to tenure insecurity, land disputes, forced evictions or dispossession. In urban settings, rapid and uncontrolled urbanization often result in the development of informal settlements where an increasing number of people reside in hazardous situations and living conditions with limited access to services. Conflict and influx of forcibly displaced people to these settlements exacerbate existing difficulties.

Formalization processes aim at determining the types of informal or customary land and housing rights that should be legally recognized, protected and integrated into a framework acknowledged by formal authorities.¹ The objective is to reinforce tenure security by providing state guarantees to recognized rights, and to limit the disconnect between the legality and the reality of land use, access and transfers. This process can be referred to as formalization, integration or harmonization.

The other reason for supporting recognition of customary rights is its impact on the economy and poverty reduction. The risk of eviction resulting from insecure tenure hinders economic development by limiting access to credit and investments to improve land productivity and housing conditions. This insecurity has a negative impact on poverty reduction and on rights such as the right to an adequate standard of living and the related rights to food and adequate housing.

A formalization process implies a clarification of the relation between the customary system and the statutory one. The legal recognition of legitimate tenure rights previously not protected by law, a first step of the formalization process, is considered as an element of responsible governance of tenure by the FAO guidelines.²

The relation between the customary and statutory system resulting from the formalization process can take various forms:

- **Codification of rights:** community land rights are systematized, given a legal definition and converted into formal land rights such as a property titles, which are authenticated and guaranteed by the state. This approach has been criticized for lacking the flexibility and adaptability of customary land rights. It creates a risk for the codified right to become disconnected to reality if the practice evolves. However, it can also protect the rights of vulnerable groups when those are not adequately guaranteed by local systems.
- **Registration of local land rights without codifying them.** The registered rights can be individual, at the household level or collective.
- **State-sanctioned administrative bodies fully or partially replace the role of traditional authorities in land administration and dispute resolution (Uganda, Botswana).³**
- **Traditional governance institutions are allowed to continue to administer land according to customary practices as in Mozambique.⁴**
- **Responsibility for land administration and dispute resolution is attributed to locally based hybrid bodies including local governments, traditional chiefs and representatives of the community. Locally based and socially legitimate institutions are usually the preferred option in terms of cultural adequacy, accessibility, cost and sustainability.**

What is customary tenure and why is it vulnerable?

Tenure systems determine “who can use which resources, for how long and under what conditions”.⁵ They can be based on formal written policies and laws as well as on unwritten customs and practices. Statutory tenure refers to land rights legally protected by the state such as freehold, leasehold and rental. Non-statutory tenure is usually not fully recognized/protected by the state and can take various forms: customary (based on a community’s rules), religious, or informal (squatting, unauthorized sub-divisions on legally owned land or various forms of unofficial rental arrangements).⁶ Even when the role of customary or religious authorities in relation to land is legally recognized, it is often not effectively integrated, codified or monitored, which prevents adequate protection of related land-rights by the state.

Non-statutory tenure is widespread and exists in rural and urban areas throughout the world. UN HABITAT estimates that 90 percent of the rural population in sub-Saharan Africa access land and natural resources via legally insecure customary and informal tenure system.⁷ In urban areas, almost 90 percent of new urban settlements in sub-Saharan Africa are taking the form of slums where land is used according to informal arrangements.⁸ These forms of tenure are adapted to local needs and recognize a multiplicity of rights to land in a context where urban administration is either dysfunctional or not accessible for most urban poor.

Non-statutory tenure is widely used to regulate land use, transfer land, and address disputes. It often enjoys wide social legitimacy. Traditional rules are known by the population, and related institutions are cheap, accessible and decide on disputes in a rapid and conflict-sensitive manner through mediation and arbitration. To preserve social cohesion, decisions are characterized by compromise solutions. However, they tend to reflect and protect existing power relations within the community, which often results in weaker land rights for women, migrants, minorities and marginalized groups.

The lack of state recognition/protection or adequate integration within formal systems, combined with the increasing pressure on land has limited the capacity of non-statutory systems to provide tenure security⁹ in case of disputes. Many factors explain this growing pressure on urban and rural land:

- Population growth
- Increased value of land as a result of greater demand for residential, agricultural, industrial or business use
- Reduced access to natural resources due to:
 - Increased enclosure of common lands, and large concessions over customary land for business purposes
 - Weather-related events and climate change resulting in drought, soil erosion, and natural disasters

In many cases, the growing pressure on land comes from state allocation of public land without taking into consideration the customary or religious land rights of the populations on such land. In the absence of legal recognition, potential claims before statutory courts have little chance of succeeding. Such situations create tenure insecurity and land-related conflicts by exposing weaker individuals and groups to dispossession. In some cases, corruption of customary leaders also leads them to accept encroachment on land therefore contributing to tenure insecurity.

Combined with other factors such as political, social and economic discrimination, land disputes can escalate into full-fledged conflict and mass forced displacement. In such cases, dispossession is usually enormous, facilitated by the departure of the displaced, or by the relative security that follows the end of the conflict.

The length of displacement, the lack of formal documentation, or the loss of informal land sales or rental agreements and the likely tensions surrounding the return of the displaced makes it particularly difficult to address land disputes in conflictive environments. In this context, converting customary land rights into formal ones has been seen as a way to kill two birds with one stone: address land disputes resulting from the conflict, and consolidate any decisions by giving them formal legal protection.¹





Challenges to Formalization in Conflict Environments

While there is consensus that providing legal recognition to customary land rights and formalizing them can contribute to preventing land-related conflict, opinions diverge as to the modalities.¹¹ Land reforms aimed at converting customary land tenure into registered property titles have been put in place in many developing countries with the objective of improving tenure security by preventing land disputes, and stimulating economic activity. Such reforms often fail to reach the expected results due to a lack of adherence and buy-in from the population, exclusion of vulnerable groups and biased implementation resulting in elite capture and concentration of land.

Such challenges are exacerbated in conflict and displacement settings: the risk or the suspicion of biased implementation is particularly high depending on the nature of the conflict, the resentment between different groups, or defiance towards state authority. The absence of displaced people from their land during the implementation of the reform puts them at risk of being de facto excluded if procedures and eligibility criteria are not adapted to their situation.

TYPICAL CHALLENGES

Elite capture: Land tenure systems reflect the distribution of power within the society with the more powerful benefiting from stronger forms of land tenure, while the more marginalized access land through customary tenure.¹² Unless there is a sincere political commitment to protect holders of customary land rights through their formalization, there is a significant risk of corruption and opportunism¹³ with the political and economic elite designing and implementing the reform in a way that consolidates its power over land. This can be done by establishing costly or complex procedures, which will be inaccessible to the majority, or by targeting certain areas where land is particularly valuable and where titling will be done to the benefit of the elite, who will either formalize rural family property to its benefit or buy it from customary land users after formalization. As a result, the urban educated elite tends to be the one benefiting from formalization process at the expense of rural land holders.

Reduced access to land for vulnerable groups:

Formalization programs often focus on main land rights such as ownership and ignore the multitude of other customary rights to land which can overlap on the same piece of land. Some of these rights benefit vulnerable groups (women, minorities, or indigenous people)¹⁴ who are not allowed to have more profitable agricultural activities but have access to land for their subsistence and limited commercial activities. Ignoring such rights during the process of formalization risks consolidating existing discriminations and creates a threat of impoverishment for the affected individuals or groups.

Lack of sustainability of land titling programs:

In a conflictive environment, the usual reluctance of the population to change their habits with regard to land may be balanced by the interest to obtain increased tenure security when this has been lacking. However, formalization programs usually require significant institutional capacity and resources, which tends to be limited during or after a conflict.

Using formalization as a form of conflict dispute

resolution mechanism in post-conflict: Using formalization in this way creates the risk of significantly delaying the resolution of land disputes and return of the displaced. The formalization and titling of customary land rights is a lengthy process to design and implement, while conflict-related disputes need a rapid resolution to appease tensions.

Excluding displaced people and other vulnerable groups from the benefit of the formalization programs:

This exclusion can be the result of a failure to inform or adapt procedures to the specific circumstances of vulnerable groups. It may compromise the participation of displaced populations and other groups in the process. The associated risk is for the transition program to consolidate the land dispossession that occurred prior to or during the conflict by formalizing the right of the current occupant.



Guiding Principles

In view of the risks mentioned above, the key steps to integrate customary land rights into the formal system are:

- Assessment of the existing land formalization framework if applicable.
- Conflict and political economy analysis of the context to inform the determination of the rights to be recognized and legally protected by the process.
- Choice of institutions implementing the process and adjudicating disputes.
- Adoption of procedures that best protect the rights of vulnerable groups and in particular displaced people
- Definition of responsibilities for land administration institutions, principles and framework for guiding their action as well as monitoring mechanisms to ensure accountability.
- Training of individuals in charge of administering or adjudicating land issues - key to ensure adequate implementation of the formalization process and provide equity and transparency in the resolution of disputes.

Guidance and best practices on land registration already exist and can be used in a conflictive environment¹⁵. These provisions are not repeated here. The following section focuses on the aspects that are particularly relevant or need to be adapted to a conflictive environment.

1. Conduct a conflict and political economy analysis¹⁶ examining interactions between land, power, economy and society: Such an analysis is key to understanding the context, the structural and proximate causes of the conflict, its relation to land and the power dynamics at stake.¹⁷ The analysis should include a review of the political, legal and institutional framework related to land as well as actual practices in the formal and informal context.

Analysing the land tenure system and the diversity of customary land rights provides insight into the power relationships within society and helps identify the likely supporters or challengers to the reform. The combination of the political, social, legal and institutional analysis can facilitate the determination of the most appropriate approach in terms of mechanisms, procedures and safeguards mitigating the risks identified. It also helps to identify vulnerable groups for whom specific measures need to be adopted in order to protect their rights.¹⁸

2. Identify legitimate land rights to be given legal recognition and protection through wide consultations.

- The FAO Voluntary Guidelines on Responsible Governance of Tenure outline the principles that should guide state legal recognition of land rights:
- Recognition of tenure rights should not infringe or extinguish other legitimate tenure rights that are not currently protected by law.¹⁹
- No tenure rights are absolute, including private ownership: "All tenure rights are limited by the rights of others and by the measures taken by states necessary for public purposes."²⁰
- All tenure rights and right holders should be identified before legal recognition whether these rights are recorded or not.²¹
- Safeguards should protect women and vulnerable groups holding secondary rights to land.²²
- Recognize and protect collective use and management of publicly owned land, fisheries and forests.²³

Types of customary land rights to be registered and recognized: There can be a wide variety of legitimate customary land rights overlapping over the same plot of land. Beyond ownership and lease, there are many tenure arrangements such as easements, sharecropping, as well as many types of access rights to land, fisheries and forests for purposes of hunting, fishing and gathering of wild food or wood. Other rights include transit rights of pastoralists, access to water points, grazing rights, and use of land for seasonal cultivation. The diversity of these rights should be recognized and reflected in the formalization process so as to protect the legitimate right holders.

Since some of these rights are very context-specific and vulnerable groups usually hold subsidiary rights, the identification of land rights eligible for legal recognition should be done through participatory and inclusive methods. Depending on the complexity of the matter, there may be a need to separate the recording phase and the recognition one.²⁴ This separation allows the categorization of rights before determining the type of tenure security to be granted to each rights-holder.

An alternative to individual or household titles recognizing multiple rights over a single spatial unit, is the granting of collective ownership, which can protect the diversity of land rights within a community or a group in a faster manner.²⁵ This option has been implemented in Mozambique with the objective "to protect small land users against land takings by government for concessions to outsiders."²⁶



3. Adapt procedures to protect vulnerable groups who tend to have the weakest land rights and are likely to have been the most affected by conflict dispossession and displacement. Additional considerations for vulnerable groups in contexts other than formalization programs are detailed in a specific thematic guidance note on the protection of tenure rights for vulnerable groups.

4. Use participatory approaches to identify non-statutory rights in rural and urban areas. Methods such as participatory enumeration and the Social Tenure Domain Model (SDTM) are particularly adapted to situations of complex and overlapping informal rights where little or no documentation can be used to prove legitimate land claims:

Participatory enumeration: Participatory enumeration has been used to identify and map land rights through consultation with communities. It is a data-gathering process, which is, to a significant extent, jointly designed and conducted by the people who are being surveyed.²⁷ Civil society organizations, local officials or customary leaders can also be included in the process.

If community enumeration is used as the basis for the legal recognition of non-statutory rights, it is a tool that allows building trust into the process of formalization. It also contributes to transparency and empowerment, particularly if vulnerable groups are included and power imbalances adequately managed.²⁸ This in turn contributes to the accuracy of the land rights recorded, the support to the process and its sustainability.

Participatory enumeration has been used in urban and rural settings. When used in urban settings, it also serves to identify land rights and the needs in terms of upgrading of housing structures and services.²⁹ Participatory enumeration can be used in displacement contexts to map land rights and facilitate restitution claims or recognition of non-statutory rights. This process is easier to do when the displaced population from the same area has remained together, but it can still be done in case of a dispersed population as long as the maps initiated in various locations are consolidated. In such cases, the mapping can be used to prevent or identify abusive formalization claims in the place of origin of the displaced.

In post-tsunami Aceh (Indonesia), participatory methods involving owners, their neighbors and village chief were used to identify destroyed properties and owners. This method facilitated reconstruction while at the same time contributing to land title certification based on community-driven adjudication of land rights.³⁰

Social Tenure Domain Model: The STDM is a pro-poor, gender responsive and participatory land tool used to identify and record the diversity of tenure that exists in various contexts. It has been developed in recognition of the fact that many social tenure arrangements are not taken into account by the statutory system. This omission hinders their protection and affects the relevance of land and urban development plans. The various forms of tenure are recorded through a participatory method involving field observation and consultation with communities. To limit the costs and length associated with registration programs, initial maps are based on satellite imagery on which boundaries, names of right holders and types of rights are added based on consultations with communities. The data is then confirmed through topographic and GPS information. The STDM uses free open source software which can show the various tenure rights existing over the same spatial unit. The data is helpful in preventing forced evictions in urban areas by providing a better understanding of the implications of evictions on people's rights. It can also be a first step towards the recognition of informal rights, notably as part of a program recognizing non-statutory rights. In relation to displaced populations, the same remarks as for community enumeration apply.

5. Select areas to be included in the formalization program in case of phased implementation. Map areas affected by displacement and decide whether to include them in the process with specific measures to ensure the participation of the displaced, or exclude such areas from formalization until their participation can be adequately ensured. In the meantime, focus on dispute resolution mechanisms in displacement affected areas.

6. Choose the institution implementing reform and address land related disputes. The type of institution chosen to implement the formalization process and address related disputes will influence the level of guarantees provided, its accessibility, and efficiency.

The judiciary will provide maximum guarantees of protection in terms of procedures but the process is likely to be lengthy and complex making it less accessible. Moreover, the judiciary is often ill adapted to mass claims situations, which may clog the system and delay restitution. To prevent these delays, a dedicated Court chamber dedicated to formalization and related disputes could be created.

The use of **administrative bodies** presents some advantages. Administrative bodies are usually present throughout the territory. Their procedures are simplified compared to judicial ones and they are more adapted to mass claims.

The use of **ad hoc mechanisms** specifically designed to implement the formalization or land titling process and related disputes can prevent the overload of other institutions. A body with a mixed composition (customary leaders, representatives of local authorities and of different communities) can contribute to build trust and buy-in towards the process.

In countries where state institutions are not present or fully functional at the local level, and rural land is held and managed customarily, it may be relevant to rely on **traditional and customary dispute resolution mechanisms** to assist with the implementation of formalization processes and address related land disputes. Formalization processes are often perceived as a threat by customary authorities since it often results in a transfer of their role to the state. In this context, they might be open to solutions maintaining a role for them.

Customary authorities provide a cheap, accessible and rapid solution to address land claims related to the formalization process. Their social legitimacy usually results in a good enforcement rate of their decisions. These bodies are more familiar than the formal system with the overlapping rights that may coexist on the same land so more likely to acknowledge and protect them. This can be particularly helpful in the phase determining which rights should be subject to legal recognition.

Cooperation with customary authorities may be an efficient way to design and implement formalization processes in an appropriate manner. This cooperation can help address problems related to insufficient state capacity and presence at the local level, while reinforcing the buy-in of the population. However, to limit the influence of power play at the local level and the risks of discrimination against vulnerable groups or individuals (such as women or outsiders), government should establish clear principles to guide the role of customary bodies and put in place an appeal process and monitoring mechanism.

7. Modalities of implementation and specific requirements in situations of displacement:

Implement outreach measures towards communities and vulnerable groups: Consulting with and informing the concerned population is key to ensure their participation and motivation but also to defend their rights throughout the process. This outreach can be at the stage of the claims process or when decisions are submitted to public display for quality control. Information on the process and decisions issued should be made available through various media (television, radio, internet), and in public spaces and

market places.³¹ Specific measures need to be taken to inform displaced populations about the locations where they can submit claims or contest the decisions made. Areas of displacement can be targeted to that effect. Government institutions should also provide targeted support to ensure that vulnerable groups benefit from specific support to submit their claims.

Provision of targeted support to assist vulnerable groups in submitting their claims.³² This assistance can be given by supporting civil society organizations and individuals assisting vulnerable groups such as women, orphans, migrants, pastoralists, minority or indigenous people. Training of paralegals can also be an effective tool in empowering the communities, ensuring participation and exerting a form of monitoring over the process.

Requirement of continuous and uncontested use: Usage is a frequent requirement and basis for recognizing the legitimacy of a customary land right. However, in conflict contexts this requirement may exclude displaced people from the benefits of the formalization programs. Provisions should therefore be included to clarify that absence and occupation due to the conflict period should not be taken into account in determining continuous and uncontested use.³³

Requirement to apply to an office where the land is located: This requirement may also de facto discriminate against the displaced if the security conditions do not allow them to travel to their place of origin, or if they are uncomfortable to do so. In such cases remote applications, or the possibility to apply to any office should be allowed and mobile registry offices organized to areas where people are displaced to facilitate their access to the program. When security conditions allow, measures to facilitate the transport of the displaced free of charge to their area of origin should be envisaged.

Provisional registration of rights and procedure to correct data in the registry: The possibility to adjust data for a certain duration period³⁴ can be particularly helpful in conflictive contexts and gives more time and opportunities for displaced people and other vulnerable groups to defend their rights, especially if they did not get the opportunity during the initial recording of customary rights.

Set up dispute resolution mechanisms to address post-conflict land disputes as a first step, prior to formalization: In the context of forced displacement where land occupation is widespread, the resolution of conflict-related property claims needs to be addressed as a priority. Related decisions can then be used as a basis to confirm customary land rights within the formalization program once it is operational. The process of identification of the customary rights that will be recognized as part of the formalization programs can be lengthy and therefore not adapted to the need to rapidly address conflict-related claims. If the dispute resolution mechanism is nevertheless integrated within the formalization program, it should be envisaged as an independent step whereby restitution or compensation decisions can be rendered and implemented before the full formalization process is completed. This step will limit delays that arise when the resolution of customary land disputes are tied to the recognition of such rights.

Establish and strengthen the capacity of dispute resolution mechanisms for disputes that may arise prior to and after the formalization of non-statutory land rights: Envisage hybrid dispute resolution mechanisms mixing customary and formal authorities to increase consistency with national legal standards, protect vulnerable individuals and groups from discriminatory local dynamics and vested interests, and benefit from the flexibility, accessibility and social legitimacy of customary systems. Alternative dispute resolutions can promote reconciliation and inclusion, strengthening community and household relations. Representatives of various communities or vulnerable groups (women, minorities, migrants, refugees and displaced) should also be included in these bodies.³⁵ Training on national legislation and dispute resolution techniques such as mediation, arbitration and negotiation should be given. An appeal to a court, another government-led institution, or an independent institution should be guaranteed therefore providing a form of monitoring.

Set up a monitoring mechanism to ensure accountability of land administrative bodies: The legal and political framework should clarify the responsibilities of land administrative bodies (whether these are state-sanctioned bodies, customary or hybrid ones), and the principles guiding their action, notably the principle of non-discrimination and the respect of national legislation. Considering past experiences on formalization processes the tendency is to support locally based land administration and dispute resolution using community-based institution. While this presents advantages in terms of cost, and flexibility in local definition of tenure and procedures, the decisions of these structures risk being prejudicial to vulnerable groups, as they tend to reflect local power dynamics. Monitoring by central government of local land administration is therefore key to ensure transparency, accountability and equitable treatment for all.³⁶ The monitoring mechanism should be adapted to the capacity of state authorities and can be informed by reporting from individuals or civil society organizations such as paralegals, or by local governments aware of irregularities.

Experience from various post-conflict settings highlights that while the recognition of customary land rights is key to recovery and to the achievement of durable solutions for displaced people, such measures need to be accompanied by broader development measures supporting employment and livelihood, access to services and social and economic infrastructure.

Examples of recognition of non-statutory land rights in urban settings, can also be found in the Guidance Note on the resettlement, restitution and compensation nexus.

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Guidance Note on Land and Conflict:

II. Integrating Customary Tenure into Formal Systems

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