



RECONSTRUCTING JUSTICE IN IRAQ:

CUSTOMARY JUSTICE AND HOUSING, LAND AND PROPERTY IN
ANBAR AND NINEVEH



NORWEGIAN
REFUGEE COUNCIL

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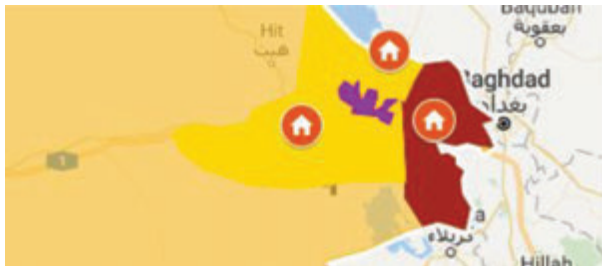
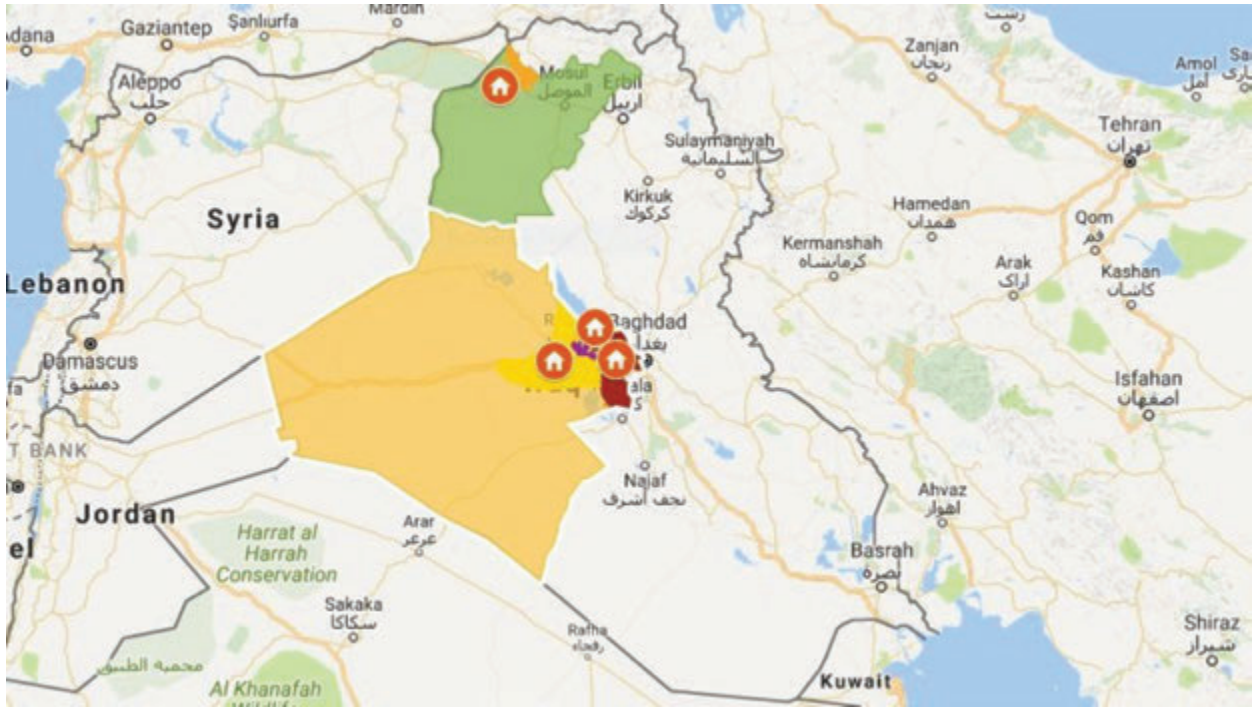
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LIST OF ACRONYMS

- **FGI** - Federal Government of Iraq
- **HLP** - Housing Land and Property
- **ICLA** - Information, Counselling and Legal Assistance
- **IDP** - Internally Displaced Person
- **IOM** - International Organisation for Migration
- **KRG** - Kurdish Regional Government
- **NRC** - Norwegian Refugee Council

MAP



-  **Al Anbar Governorate**
-  **Ramadi**
-  **Fallujah**
-  **Khalidiya**



-  **Al Mosul Governorate**
-  **Zummar**

Background

Customary justice, Sharia law and State law form the three pillars of Iraq's system of legal pluralism.¹ However, the rule of law in Iraq, both formal and customary, has been severely tested by recent conflict with the Islamic State group (IS) as well as ongoing political in-fighting, factionalism and control over the disputed areas in northern Iraq. The fragile post-IS environment is characterised by IDPs returning to encounter large-scale property damage and destruction. They are faced with problems of securing access to property, re-establishing ownership, resolving contested property claims, dealing with a moratorium on property transactions and navigating the challenge of seeking compensation. While State justice systems struggle to re-establish their presence, customary justice and Sharia law are the preferred and often the only accessible justice options available. For many, especially internally displaced persons (IDPs) returning to areas newly retaken from IS, customary justice and Sharia law are often the main sources of justice for the majority of the population in resolving Housing, Land and Property (HLP) issues. While court systems exist in all major towns in Iraq, court processes and judgements are sometimes seen as compromised, politicised, corrupt, slow and incapable of enforcement in the local community. Closely interconnected with the tribal structures that dominate much of Iraqi society, recourse to customary justice systems is also regarded as the most socially acceptable route to justice for HLP issues. Customary actors have been involved in resolving the HLP issues of their communities for centuries. It is unsurprising therefore that they are today a key provider of HLP related justice in the conflict-affected areas of Nineveh and Anbar Governorates.

The current report has been commissioned by the Norwegian Refugee Council (NRC) in order to provide an initial analysis of some of the main customary actors in Iraq and their roles as well as some of the challenges and dilemmas faced by customary justice actors in dealing with housing, land and property issues arising from the multiple conflicts and related displacement in Iraq. These include the return of families alleged to have IS affiliations, the prevalence of secondary occupation, conflict and tension between ethnic communities and minorities in Iraq and disputes and issues of territorial control over land in the disputed territories in Iraq. The report also considers how women's HLP rights are handled in the customary justice system. The report provides an overview of customary justice actors and issues in two governorates of Iraq in which NRC operates legal aid programmes, namely Anbar and Ninewah Governorates. It is hoped that the report will lead to a better understanding of, as well of informed engagement with, customary justice systems.

¹ The terms 'State justice system' and 'State courts' are used throughout the report to refer to the formal system of Iraqi State laws, regulations, government institutions and courts and to distinguish this system from traditional, customary or informal justice systems ('customary justice') and Sharia or religious-based laws and principles ('Sharia law'). This is despite the fact that Iraqi laws very often reference Sharia law and Iraqi courts typically apply Sharia law in personal status and other matters

Main Findings

IDPs have a wide choice of justice providers from which to seek assistance for HLP issues. Customary actors include the *Sheikh* (or *Agha* for Kurds) as the head of the tribe or clan; the *Mukhtar* (meaning “chosen” in Arabic), who acts as an official interlocutor between the community, local government administration and the security services; the *Sunaf*, who is a land specialist (a position found only in Anbar); and the *Wujaha* who are respected community elders. It is also possible to approach the *Mullah* or Religious *Sheikh*, local government authorities or the courts. IDPs tend to first approach the customary actor that they are most familiar with or whom they believe will be most favourable in their judgement, a common practise in legally plural societies, known as ‘forum shopping.’ The community views appealing against the judgment of a customary justice actor by approaching the secular courts as disrespectful and shameful, particularly if the actor is a Sheikh, the highest customary authority.

The large scale displacement alongside widespread property damage and destruction during the recent conflict has increased the number of HLP cases and placed an added burden on customary actors which many are struggling to address. Although all types of customary actors may be consulted on any HLP issue, there are a number of specific issues in which some customary actors are more specialised or competent than others. Resolving land disputes between tribes or clans is the responsibility of the *Agha*, *Sheikh* or *Sheikh of Sheikhs*. The *Mukhtar* is particularly important because he is empowered to provide an official stamp of authorisation or endorsement to access services and validate claims, indicating recognition by the state. In cases of missing title deeds or permission to return to a property the *Mukhtar’s* stamp is required. Any HLP issue involving technical advice on land boundary issues is generally referred to a *Sunaf* (not present in Nineveh). Religious *Sheikhs* are the main actors for inheritance and divorce issues involving the division of property. All customary leaders are involved with resolving housing and property disputes, secondary occupation issues, helping to file compensation claims and witnessing sales agreements. Customary actors also play an important role in the provision and planning of relief, recovery and reconstruction services at a community level. While customary justice actors are able to resolve a wide range of localised disputes, broader tensions and land disputes between ethnic groups, such as between Arab and Kurdish communities or Shia and Sunni communities are more challenging and typically beyond the power of the customary leaders to resolve.

The key strengths and appeal of customary actors are their close connection to, and intimate knowledge of the community; the traditional respect that they command; the swiftness with which they can make a judgement; and the fact that their services are free and easily accessible. In comparison, cases processed through the State courts can be expensive and time consuming.

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EXECUTIVE SUMMARY

The main weaknesses identified during this study were bias in favour of personal and tribal interests (such as the discrimination and collective punishment of IS affiliated families by means including property re-distribution). A further challenge is the absence of protections contained in the state-based system which are designed to promote consistency of approach, equality of access and due process to ensure that weaker parties are able to protect their rights. Other weaknesses include limited access for women, lack of coordination with government authorities and lack of legal capacity of customary actors to adequately resolve cases related to broad historical geo-political ownership disputes and secondary occupation.

In response to the findings, the report makes recommendations on issues related to customary justice and HLP rights addressed to the actors in the best position to implement them. These include Iraqi governmental authorities, UN agencies and INGOs, donors and customary justice actors. Many of these recommendations relate to the need to consult with local communities on the development of recovery and reconstruction plans, as well as the need to raise awareness amongst both local government officials and customary leaders on HLP rights and protections, both in domestic and international law. Two particular challenges identified for Iraqi authorities and local communities are how to ensure respect for the basic human rights including property rights of persons allegedly affiliated with IS; and how to best promote the HLP rights of women. Customary justice leaders, local authorities, I/NGOs and UN agencies can also play an important collective role in the mapping of local HLP issues with strategies and initiatives for the resolution of those issues.



1. INTRODUCTION

1.1 Purpose of the Study

The Norwegian Refugee Council (NRC)'s legal aid programme, known as *Information, Counselling and Legal Assistance* (ICLA) assists displaced people in Iraq, including returning IDPs in the Governorates of Nineveh and Anbar. The programme provides information, legal aid and capacity building training, one of the aims of which is to build the collaborative dispute resolution (CDR) skills of customary justice actors, and assist community members to realise HLP rights and resolve sensitive disputes by applying CDR techniques. Recognising the importance of customary justice providers in helping IDPs to secure their HLP rights in these regions, NRC commissioned this study to explore the roles and responsibilities of customary actors in more depth. In particular, this study examines how customary actors are responding to the post-IS HLP challenges faced by their communities. It identifies the strengths and limitations of customary justice providers in relation to addressing HLP issues.

1.2 ICLA and HLP

ICLA works in conflict-affected countries throughout the world supporting displaced people, including refugees, internally displaced people, and returnees, to access their legal rights. Displaced people affected by conflict frequently face the destruction or damage of their homes, suffer loss of important documentation such as property deeds and personal identification, and often find themselves in temporary accommodation where they may face the risk of eviction. It is for this reason that one of the key pillars of the ICLA programme is Housing, Land and Property rights (HLP).²

HLP rights are drawn from international human rights law and are grounded in the right to own property and to have an adequate standard of housing. HLP rights entitle all persons to a safe, secure home free from the risk of arbitrary eviction and seek to provide security of tenure. Special rights of restitution and compensation are owed to persons who have been displaced from their homes. The *United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons* (also known as the *Pinheiro Principles*) provide guidance on the international standards governing the implementation of housing and property restitution for displaced persons and refugees. By applying rights-centred standards and approaches to strengthen the protection of restitution rights, the *Pinheiro Principles* also support the process of post-conflict stabilisation and peace building. Disputes over land tenure and the occupation of properties are often sources of ongoing inter-communal tensions and conflict that can create longstanding grievances that undermine the prospects for peace and stability.

In Iraq, as in other countries where legal pluralism exists, HLP rights have long been one of the main areas of relevance for customary law.

² Information, Counselling and Legal Assistance (ICLA), Norwegian Refugee Council, <https://www.nrc.no/what-we-do/activities-in-the-field/icla/>

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According to respondents during the study, customary justice systems historically have helped resolve disputes related to the control of and access to transport and communication routes, water sources, pastures and grazing rights, inheritance and divorce. In Iraq's current context, customary actors are involved with this and much more: from helping people prove the ownership of their lands, to resolving cases of secondary occupation, eviction and disputed property claims.

Recognising the important role that customary justice plays in helping the conflict affected population (internally displaced persons, returnees and the host population) secure HLP rights in Iraq, NRC commissioned this study to closely examine the roles and responsibilities that customary actors have in this field, learn more about their strengths and limitations in resolving HLP issues, and identify possible opportunities for NRC to help support customary actors to be more effective and sensitive to international standards in their dealings with HLP issues.

1.3 Methodology

The study focuses on the nexus between customary justice and HLP amongst the displaced, returnee and resident populations in the areas formerly controlled by IS that have subsequently been retaken by the Government of Iraq and their allies in the Governorates of Nineveh and Anbar.³ Within these governorates, three sites where ICLA programme activities are carried out were selected as case studies: Zummar in Nineveh, and Ramadi, Fallujah and Khalidiya in Anbar. These sites were identified as areas in which customary justice was particularly strong and use of State courts to resolve disputes was less common. They were also areas that were controlled by IS for long-periods resulting in massive number of HLP disputes. Courts and government institutions did not function in these areas during IS rule further eroding confidence in State justice systems.

The study is comprised of three main components: a desk review; structured team discussions with ICLA staff, and field visits. The literature on HLP issues and customary justice in Iraq's Anbar and Nineveh Governorates was limited and the desk review focused on existing NRC programme documentation and reports from other agencies. The report does not refer to the wide range of research on customary law and legal pluralism in Iraq which would be necessary for a more extensive study. The structured team discussions in Dohuk and Baghdad involved discussion groups focusing on a range of key questions.⁴ These are reflected in the substance of the report. The field visits took place over 12 days (six in each location). During these visits, empirical data was collected through key informant interviews with mukhtars, sheikhs, other customary justice leaders, government officials, court staff and members of the ICLA team working in the field. Semi-structured focused group discussions also took place with a total of 140 (89 male; and 51 female) local respondents. Access to female respondents was a particular limitation for the male research consultant but this was remedied through the assistance of female ICLA staff.

³ See Annex 1: Terms of Reference

⁴ See Annex 2: Team Discussion Topics

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This methodology provided two key benefits to the NRC-ICLA programme. First, engagement with the respondents provided a useful entry point for the ICLA teams to continue HLP discussions with key actors in each of the field sites. Second, the inclusion of 51 female respondents marked the first time that many had ever been consulted on such issues and provided a valuable opportunity for NRC to explore ways to increase women's participation in addressing HLP issues. The study is a qualitative, not quantitative assessment, so general findings and conclusions are drawn from the focus group studies and key informant interviews. Case studies highlight certain issues. However, the study neither contains statistical information, nor purports to provide a comprehensive empirical analysis of customary justice actors in Iraq.

1.4 Structure of the Report

The body of this report is structured into six parts. Following this introduction, part two outlines the role and importance of customary justice actors. Part three outlines the findings relating to the project sites in Anbar, while part four does the same for Nineveh. The final section outlines conclusions and recommendations.

This introductory part goes on to outline the broad context for the study and the importance of working with customary justice providers as key actors involved with resolving HLP issues in the former IS controlled and now early post-conflict areas of Iraq. The *Methodology* contained in part one outlines the scope of the study and approach, which included a desk review of the available literature, guided discussions with NRC staff, consultant field visits comprising key informant interviews and focus group discussions. Part two, entitled *Customary Justice Actors and HLP*, provides a description of the different types of customary actors found in Iraq, including in Anbar and Nineveh, their roles and responsibilities together with the scope of their engagement on HLP issues. As the historical and contemporary context in Anbar and Nineveh differ, parts three and four present and analyse findings on particular HLP issues, dynamics and involvement of customary actors in each governorate. These sections explore HLP and customary justice issues related to IS, the nexus between the different pillars of Iraq's pluralist legal system and the circumstances of women and minorities. The report finishes with the *Conclusions and Recommendations*.

1.5 Importance of Customary Justice

The importance of traditional or customary justice systems in the relief, recovery and reconstruction phases of many conflict-affected and post-conflict countries has, until quite recently, been largely overlooked by national policy makers, international donors and legal practitioners in favour of working mainly through formal legal institutions. An overarching emphasis on drafting laws, developing professional practice and building independent and accountable judicial institutions has often neglected to account for the critical role that customary justice plays in the lives of many people affected by conflict, especially in pluralistic legal systems.

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Legal pluralism can be defined as the co-existence of different systems of rules within a country, each within their own legal frameworks, associated rights and legitimacy or authority to resolve disputes. Under legal pluralism, the different legal structures may operate in parallel for different types of issues, although there may be conflict between them. There are often significant overlapping and hybridisation of different systems. Iraq's system of legal pluralism consists of three orders, which overlap and influence each other: formal justice; Sharia or Islamic religious law; and customary law. This plurality is found throughout much of the world. As Isser notes in relation to conflict-affected countries, "Traditional systems" are often "the primary – if not the sole – means of dispute resolution of 80-90% of the population."⁵

This was reflected in the responses of most of the respondents in the focus areas of both Anbar and Nineveh where there was a strong sense of tribal identity and frequent recourse to customary actors to resolve disputes. There are about 150 tribes in Iraq and, in 2003, 75% of the population reportedly had a tribal connection.⁶ Tribal affiliation and its traditions provide a hierarchical lineage system based on patronage and deference to traditional leaders and are guided by a set of long established norms for much of Iraqi society.

This becomes particularly important as a familiar point of reference or stabilising influence in times of crisis, confusion and chaos. Tribal affiliations also serve to bind people to one another with shared identities, boundaries and meaning.⁷ As Al-Mohammed points out,

"Traditions and customs are some of the most important features of the daily life of people within the tribe, and they guide the interaction between different tribes and tribesmen. Adhering to these unwritten laws is obligatory and if a tribal member strays away from the accepted norms he or she is ostracized. Since being part of the tribe, gives not only identity to the individual but it also gives protection".

As the Iraqi government re-establishes authority and state institutions in areas retaken from IS, there are deep suspicions and distrust of both national government and tribal leaders. Suspicion and distrust also exists between ethnic groups, tribes, clans and neighbours. In every community in the study's target areas, there were people whose homes and property had been destroyed by either IS, or the Iraqi government and coalition partners in combating IS. There were also people who were denied access to their properties, or whose properties have been destroyed or confiscated because they are perceived to have supported IS. During the period of IS rule, there was an absence of both a civil administration and State justice system. As in many post-conflict societies, in the wake of the most recent war, systems and institutions representing democracy, good governance and the rule of law are struggling to be accepted or re-establish themselves. The tribal structure with its traditional leaders and customary laws is often the only effective, trusted or easily accessible justice system consistently available for the majority of people in the recently retaken areas.

⁵ Isser, D. (2009) *Re-thinking legal pluralism and the rule-of-law in post-conflict and fragile countries*.

⁶ MacFarquhar, N. (2003) quoted in Hassam, H. D (2008) *Iraq: Tribal Structure, Social, and Political Activities*

⁷ Rosen, L. (2018) *A Liberal Defense of Tribalism*

⁸ Al-Mohammed, H. (2010) quoted in Gospodinov, I. D (2015) *The Sunni Tribes of Iraq*

1. INTRODUCTION

1.6 Formal Legal System and Customary Justice

Various governments of Iraq have sought to reduce the power of tribes at different times. The formal justice system, which draws heavily on Sharia law, retains legal supremacy in Iraq. However, there has been limited recognition and formalisation of customary justice by the Iraqi legislature and courts.

Article 45 of the Iraqi Constitution states:

“The state shall seek the advancement of the Iraqi clans and tribes, shall attend to their affairs in a manner that is consistent with religion and the law, and shall uphold their noble human values in a way that contributes to the development of society. The State shall prohibit the tribal traditions that are in contradiction with human rights.”

In late 2016, the Iraqi Parliament discussed introducing a draft tribal law in Iraq. The new draft is known as the Jafaari Personal Status Law. The law was highly criticized by Iraqi human rights activists and supporters of the formal legal system. The law is yet to pass though in the current environment in Iraq it is possible the law could still be approved. Historically, Iraqi rulers have turned to tribal leaders to strengthen political support in periods of political and financial instability, which have often resulted from conflict, and introduced laws recognising tribal custom and law. Previous laws have recognised the rights of powerful ethnic and tribal groups but, as the following examples highlight, it has been at the expense of key rights of vulnerable groups, such as women.

For example, the *Tribal Criminal and Civil Disputes Regulations* introduced by the British formally recognised customary traditions and laws, including the right of men to inherit women (later reversed by the Personal Status Law, № 188 of 1959, which also recognised women’s inheritance rights). More recently, after the Gulf Wars, Article 111 of the Penal Code and the draft Jaafari Personal Status Law, re-introduced legal honour killings and proposed lowering the minimum age for marriage to nine years for girls.

However, it is worth noting that in the absence of a change to Article 45 of the Constitution, any articles that undermine human rights, arguably could be challenged in the Court of Cassation as unconstitutional.

The Civil Code No. 40 1951 Article No. 1 states that, in absence of any applicable legislative provisions in the law, the court shall adjudicate according to custom. The term custom is divided into two sub-categories: general customs, which are customs applying all over the country; and regional customs, which apply in specific geographical areas.

1. INTRODUCTION

While not specifically acknowledging the role of customary justice actors in dispute resolution, Chapter 2, Book 3 of the Civil Actions Law No. 83 1969 provides for certain disputes to be heard through arbitration and states that the arbitrator must not be a member of the judiciary. The parties may appoint the arbitrators by agreement but, the court may appoint arbitrators if parties are unable to agree. It is therefore legally possible for parties to appoint one or more customary justice actors to act as the arbitrators to their dispute.

Pursuant to Chapter 2, the parties can also seek to have the arbitration agreement approved by the court. The court must suspend any proceedings if arbitration takes place. The dispute cannot then be heard by the court, except by agreement of both parties. As a result, the chapter provides for agreements facilitated by customary justice actors to be recognised by the formal legal system.

Iraqi courts have applied Article No. 1 when determining HLP claims on several occasions. For example, in decision no. 874/H Premise/967 of 26/11/1967, the Court of Cassation of Iraq determined that a lower court should assign experts in regional custom to determine HLP disputes, rather than an engineer from the Land Registry.

In respect of personal status cases, lawyers reported that courts may assign tribal *Sheikhs* as an expert. Others have reported that judges have referred to *Sulih'h*, which is customary dispute resolution managed by a *Sheikh or Wajha'a*, while hearing their cases.

While there do not appear to be detailed provisions or a definitive court decision clarifying the role of customary justice actors and the incorporation of customary justice systems in the Iraqi state codes, the examples above arguably provide for customary justice actors to engage in the dispute resolution process and for agreements resulting from this process to be recognised by formal courts. However, the findings of this research suggest that, in practice, the two pillars of the Iraqi legal system sometimes operate independently and potentially inconsistently. That said, quasi-customary and religious leaders can, and often do, play key roles in linking these systems. As a result, each system operates, to some degree, without the benefit of the knowledge or expertise of the other. It also means the formal system does not have oversight of the compatibility of customary justice processes and decisions with Iraq's international and domestic human rights obligations.

⁹ Pursuant to Article 254 of the Civil Actions Law, "Arbitration is only allowed in matters that can be subject to reconciliation, and by parties who are entitled to dispose of their rights. Arbitration may be implemented among spouses according to the civil status law and the provisions of the Islamic Sharia.

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1.7 HLP Rights in Iraq

HLP rights are recognised within the state justice system through the Iraqi Constitution as well as the Iraqi Civil Code and other HLP-specific legislation.¹⁰ The Constitution protects the right to private property and states that expropriation of land or property is not permissible except for public purposes with payment of just compensation. Every Iraqi is entitled to have the right to own property throughout Iraq and ownership of property for the purposes of demographic change is prohibited.¹¹ The obligation on the State to provide appropriate housing for the individual and family is expressly protected.¹² A special provision of the Constitution, Article 140, sets out measures to resolve the status of ‘disputed areas’ of Iraq, namely parts of northern Iraq in Kirkuk, Ninewah, Diyala and Salah al-Din governorates which were ‘Arabised’ by the Baa’thist party between 1968 and 2003.¹³

The Iraqi Civil Code contains the main legal principles on buying, selling and using property in Iraq. It also provides legal standards and protections for dealing with complex issues of HLP law including adverse possession by those claiming property as their own over extended usage, property sales made under duress, liability for damage to property and unlawful sales by secondary occupants.¹⁴ A number of laws govern rental property in Iraq including the Iraqi Civil Code and the Law on Real Estate No. 87 of 1979 and No. 56 of 2000. There have been various amendments to the law and authorities in the KRG have adopted some separate laws and regulations governing property issues.

Land and property deeds in Iraq can be registered with the Land Registration Office (also called the Cadastry or Tabu Office), which falls under the jurisdiction of the Ministry of Justice. Local Land Registration Offices exist throughout major cities in Iraq and property transactions and changes in title are transferred to the Central Property Registry in Baghdad on a regular basis. However many land ownership documents, as well as records held by the Land Registration Offices were destroyed during the conflict.¹⁵

There are two types of agricultural land in Iraq, namely land that is registered (with the government’s Tapu Department of the Land Registry) and land that is unregistered. It is the unregistered land that has been most affected by the period of IS control. Tapu land is much less likely to be affected because ownership is officially documented and, even if local Land Registry offices and their records have been destroyed, duplicate copies are held in the Registry’s main Baghdad headquarters.

¹⁰ HLP rights are also protected in the customary justice system to a degree, but not typically by reference to the Iraqi HLP laws and very much based on local practice, cultural, tribal and other considerations including power dynamics, as noted throughout the report.

¹¹ Article 23 of Iraqi Constitution.

¹² Article 30 of Iraqi Constitution.

¹³ No official agreement has yet been reached on the status of these areas, however in late 2017, the Iraqi government deployed state security forces to reassert control over a large portion of these areas which were governed by the Kurdish Regional Government (KRG) of Iraq post-2014.

¹⁴ See Articles 112, 187, 1146, 1148 and others of the Iraqi Civil Code.

¹⁵ IOM, ‘A Preliminary Assessment of Housing, Land and Property Rights Issues Caused by the Current Displacement Crisis in Iraq’, 2015, p 30

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Unregistered land across all of Iraq, however, is generally inherited on an informal basis without the involvement of the government courts or land registry and without any formal title deeds or other documentation. When unregistered land is sold, the exchange is conducted informally, partly to avoid taxation but also because that is the way transactions have been traditionally conducted. People who had destroyed or damaged properties on unregistered lands are most likely to have difficulty in claiming compensation due to their inability to produce official documentation to prove ownership. This is where the role of customary actors becomes important in helping to provide alternative proof of ownership and providing an important link between the customary and state systems. In the absence of a Tapu, courts recognise a letter of support from a *Mukhtar* or a utility bill as alternative proof of ownership over private land. As customary actors are widely respected and have a close connection with and knowledge of the community, they are ideally placed to attest to ownership. If the *Mukhtar* does not have precise knowledge of a particular property, he may consult with other respected customary actors before providing a letter of support.

2. CUSTOMARY JUSTICE ACTORS AND HLP

2.1 Types of Actors

As noted in the introduction, the social structure in all of the focus sites for this study is primarily tribal. Although a complex set of inter-related family and territorial dynamics operate in practice (and are beyond the scope of this study to unravel), the simplified organisational structure of society comprises five layers with tribal identity at its apex and permeates throughout. Below the tribe (*ashira*) is the clan (*fakdh*), followed by lineage group or sub-clan (*beit*), a sub-lineage group or extended family (*khams*), and the household unit. The model is similar irrespective of the geography or whether the tribes are Sunni or Shia, Arab or Kurdish. There are 150 tribes in Iraq and it is estimated that some 75% of the population identifies with a tribe or maintains strong tribal kinship relations.¹⁶ The preference of the tribe over government administration or courts to resolve disputes was repeatedly expressed by respondents. They felt that Sheikhs were better able to understand and represent the interests of people in their communities (tribes) than government representatives and officials, who were often seen as corrupt and self-serving.

Unit	Arabic term	Description	Leader
Federation of Tribes	<i>qabila</i>	An alliance of tribes	<i>Sheikh of Sheikhs / Agha (Kurdish)</i>
Tribe	<i>ashira</i>	A cluster of clans	<i>Sheikh of Sheikhs / Agha</i>
Clan	<i>Fakdh / babik (Kurdish)</i>	A group of sub-clans	<i>Sheikh / Agha</i>
Sub clan	<i>beit / bayt</i>	Single extended family	Wogaha
Greater extended family	<i>khams</i>	All males who share the same great-great grandfather	

¹⁶ Khan, J. (2007) The Iraqi Tribal Structure

2. CUSTOMARY JUSTICE ACTORS AND HLP

The dominance of a tribal structure of society in Fallujah, Khalidiya and Ramadi is significant because this form of organisation is intrinsically inter-connected to traditional or customary governance. There were two sites (Zummar and Fallujah's central urban areas) where the impact of tribal structures was marginally reduced, as evidenced by a willingness amongst some of the populace to consider recourse to municipal authorities and courts as an alternative source of justice in HLP cases. However, customary justice remained the overwhelming and often only socially acceptable avenue for resolving disputes in all of the target sites.

The study identified five different actors involved in customary justice: the Tribal *Sheikh* (for Arabs) or *Agha* (for Kurds), *Mukhtar*, *Sunaf*, *Wujaha* and the City Council Committee.

Tribal Sheikh (Agha): The *Sheikh of Sheikhs* is the head of the tribe. The term *Agha* is used in Nineveh amongst Kurdish tribes but is not found in Anbar. Amongst Arab tribes in both Nineveh and Anbar the term *Sheikh* is used. The position is found at different levels within the tribe. There is a *Sheikh of Sheikhs* who is the leader of the entire tribe. Beneath him there are lesser *Sheikh of Sheikhs* who are the leaders of the clans or lineage groups. These lesser *Sheikh of Sheikhs* pay allegiance to the *Sheikh of Sheikhs*. The authority of every level of *Sheikh of Sheikhs* derives from their bloodline and is passed on from father to son. In areas where state government structures are weak the *Sheikh* acts and is widely seen as, the de facto authority. As the Tribal *Sheikh of Sheikhs* has overarching responsibility for the tribe he is often the customary leader of choice in resolving HLP disputes. While they can be involved in resolving all types of HLP issues involving the members of their tribe, they are particularly involved when it comes to HLP issues between tribes. The authority of the *Sheikh of Sheikhs* is highly respected by the members of their tribe. When they have made a judgement, it is extremely unlikely to be contested either by appealing to another customary justice actor or by applying to the courts or municipal government to determine the case because this would be considered a personal insult to the *Sheikh* and an act of enormous shame for the entire family of the claimant. However, if all sides agree with a *Sheikh of Sheikhs*'s judgement, the agreement can be lodged with the court and/or government Land Registry where copies of title deeds (*tapu*) are held, connecting the customary and state systems in relation to land ownership and documentation. In cases of HLP disputes between tribes or clans that a minor *Sheikh* is unable to resolve to the satisfaction of the parties, the judgement of the senior *Sheikh of Sheikhs* may be requested.

Mukhtar: In Arabic, the term *Mukhtar* means "chosen." The *Mukhtar* is seen as someone who has been elected either formally or informally by the tribe to represent their interests. Their role is that of an interlocutor between the tribe and the government at a local level. They are funded by regular donations from each household in their area. Each tribe will have many *Mukhtar*, who head different thematic committees the theme of which reflects their experience and expertise. For example, respondents in Ramadi noted that their tribe had committees for security, economic development, social development, civil affairs and land disputes, which were each led by a different *Mukhtar*.

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Besides chairing a range of tribal committees, the *Mukhtars* often sit on a number of city council or municipality committees alongside other customary justice providers to resolve a range of community disputes. The *Mukhtar's* security role involves working with the government's police and intelligence services to report possible terrorism suspects, facilitate police household searches and provide updates on the general security situation in a village or neighbourhood.

As people begin to return home post-conflict, *Mukhtars* play a key role in facilitating IDP returns. For example in Anbar, the Anbar Operations Command provide security clearances via camp managers and consult with mukhtars. They help the authorities to conduct background checks on IDPs as well as on any new people settling in the area. The *Mukhtar* assists with the processing of identification and property documentation by making recommendations and attesting to a person's good character and/or history of prior occupation and ownership of a property. Accordingly, they play a key role in linking the customary and state dispute resolution systems in relation to HLP issues. In some areas, such as Khalidiya in Anbar, the *Mukhtar* holds a list of names of people who require relief assistance along with details of any particular vulnerability or special needs, and will be instrumental in coordinating the delivery of any assistance. The *Mukhtar* assists returnees and IDPs to find accommodation if their homes are destroyed or uninhabitable. They are particularly involved in community level advocacy and awareness on a wide range of issues that include security and HLP.

The *Mukhtar* generally works as part of a team with a number of assistants depending upon the size of the area he covers. Obtaining the *Mukhtar's* official stamp on a document is an important first step in obtaining rights, official documentation and welfare services from the local government. The opinion of the *Mukhtar* is sought on a wide range of HLP issues and disputes. If the *Mukhtar* is unable to resolve an issue satisfactorily, it is generally referred to the *Sheikh/Agha*.

Sunaf: This is a quasi-customary role. The *Sunaf* is an individual who has experience in resolving disputes about land and borders. The role was common in Anbar but was not found in Nineveh. The *Sunaf* is generally an older male with a deep knowledge of the neighbourhood. The *Sunaf* is commonly a professional, such as a civil engineer or surveyor, who works in the municipality or land registry. This role also contributes to the links between, or overlapping of customary and local state government. There are also private *Sunafs* who operate independently. Although there is usually only one *Sunaf* per region, they do specialise in different areas of HLP and will make referrals to other *Sunafs* when a particular issue lies outside their area of expertise or competency. In property disputes, individuals may go to the *Sunaf* to ask him to divide the land between them and then have this resolution ratified by the Court. The courts in Anbar were reportedly likely to uphold the opinion of the *Sunaf*.

2. CUSTOMARY JUSTICE ACTORS AND HLP

Wujaha: The term *Wujaha* translates to “Wise Men.” They are found in both Anbar and Nineveh. The *Wujaha* is an informal customary title held by predominantly senior males from respected old and influential families within a neighbourhood. A *Wujaha* has informal responsibility for approximately 100 to 150 homes. People in the community will often seek out the opinion of a *Wujaha* to resolve a dispute. They are able to get involved with a wide range of issues including divorce proceedings, the buying and selling of property, car accidents and even murder cases. The *Wujaha* represents an extension of the Sheikh’s authority at neighbourhood level and is likely to have close family ties with the Sheikh. The *Wujaha* meet the *Sheikh* monthly or weekly to keep him updated on all of the issues before him and to refer any difficult cases, which he is unable to deal with.

Religious Sheikh (Mullah/Imam): Islamic religious or *Sharia* law is one of the three pillars of Iraq’s system of legal pluralism. With Iraq’s statutes heavily influenced by Islamic law, it can be said that the religious *Sheikhs* inhabit a legal terrain that connects the secular and customary domains, thus also serving as a link between Iraq’s legal systems. A religious *Sheikh* is someone who has graduated from a religious school and is an expert in Islamic law (either Sunni or Shia interpretations). In most cases, the religious *Sheikh* is responsible for resolving civil and family conflicts, such as divorce or marriage disputes. This study found that religious *Sheikhs* were able to provide opinions (apparently grounded in Islamic jurisprudence) on a wide range of HLP related issues, many of which are relevant to the current needs of the conflict affected population. These will be explored further in the governorate-specific sections of this report.

2.2 Choosing a justice provider

For people seeking support or redress for HLP related issues in both the Anbar and Nineveh Governorates there are number of connected justice providers - customary, religious and State – to consider. The study revealed that the formal state justice system is often the option of last resort, after customary or religious avenues have been exhausted and found wanting. Whilst *Sharia* law is an integral part of Iraqi law, the reference here is to the usage of *Sharia* law by local religious leaders to resolve disputes and outside of the formal system of State courts, including those which apply *Sharia* law. In comparison to customary or religious justice, the state court system was viewed as costly and time consuming. For example, parties appealing to the courts require lawyers and the proceedings take many months. In comparison, customary or religious justice is provided free of charge and is generally dealt with extremely swiftly. Respondents reported that judgements were usually made within a couple of days or the same day the case was raised. Rarely did the decision take more than seven days. The speed of customary justice can be attributed, in part, to: the risk of inter-communal tensions and violence if issues are left to mangle and, the close connections between the disputants and the justice providers, which enables a rapid understanding of the situation and judgement to be made.

2. CUSTOMARY JUSTICE ACTORS AND HLP

While the overwhelming preference among respondents in this survey was for customary justice, there was also recognition of this route's shortcomings. Customary justice was also seen to be open to bias, with decisions being influenced by family associations between a claimant and the customary justice actor, a claimant's perceived power in the community, and the relative strength of a claimant's tribe (in disputes between tribes). Customary justice is also a male dominated preserve.

Women respondents outlined a number of barriers faced when attempting to access customary providers and realise their rights. It was considered contrary to tradition, shameful and an act of defiance for women to approach actors directly; therefore, they require representation from an immediate male relative (husband, father, son) to access the customary justice system. Women commonly did not have independent or registered interests in housing, land and property land for the same reason, with their interests being registered in the name of their husband or other immediate male relatives. In larger urban areas, there were more reported cases of women pursuing divorce and property through the state courts rather than through customary routes. While unsubstantiated, this may be attributed to the stigma attached to women seeking property rights within their tribal structures and their lack of direct access to customary justice actors.

Within the range of customary actors, the choice of actor generally came down to an individual's personal preference based upon existing relationships (who knew them), proximity, availability, ease of access, the nature of the case (which actor had expertise) and who they felt would find give them the most favourable outcome. This reflects a phenomenon well recognised within legal pluralism research, known as 'forum shopping.' There were no customary guidelines or protocols stating whether a *Sheikh/Agha*, *Mukhtar*, *Sunaf* or *Wujaha* should be contacted in the first instance. If a *Sheikh/Agha* was contacted first, the case would not normally be referred to one of the other actors, though they might be consulted by the *Sheikh* for further technical or situational advice. If a *Wujaha* or *Mukhtar* was contacted first, it was possible for cases to be referred up the hierarchy to the *Sheikh/Agha*. Where a party was seeking a *Mukhtar's* official stamp, the case would not require further referral unless the *Mukhtar* refused to provide an endorsement (for example, if the family were perceived as IS supporters) and the party wished to appeal to a higher authority. In the case of housing, land and property issues referred to a *Sunaf* in the first instance, they were generally able to deal with the issues independently and their opinions were widely respected by both the *Sheikhs* and the secular courts.

2. CUSTOMARY JUSTICE ACTORS AND HLP

2.3 Types of Issues Dealt with by Customary Actors

The following table summarises the types of HLP issues in which customary actors were reported to be involved:

Type of HLP Issue ¹⁷	Sheikh of Sheikhs	Sheikh/Agha	Mukhtar	Sunaf	Wujaha	Religious Sheikhs
Resolving land disputes between tribes						
Providing an official stamp for obtaining official documents and accessing govt. services						
Providing technical specialist advice on land and boundary issues						
Helping to find housing for IDPs and Returnees						
Settling local housing and property disputes						
Helping to file compensation claims						
Helping to obtain alternative documentation						
Resolving divorce issues						
Resolving inheritance issues						
Property sales and purchase witnessing						

¹⁷ The grey fields indicate issues dealt with by an actor. The black fields denote that the actors are experts or have seniority in respect of the issue.

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

3.1 Background and Context

The Anbar Governorate is the largest administrative region in Iraq. It extends west of Baghdad as far as the borders of Saudi Arabia, Jordan and Syria. The largest city and capital of the Governorate is Ramadi, which, like the other study sites of Fallujah and Khalidiya, is situated on the banks of the strategically and commercially important Euphrates River. West of Ramadi, the terrain is largely desert and sparsely populated. Anbar is one of Iraq's most ethnically homogenous regions both in terms of religious and tribal identity. The area is Arab and forms what is often referred to as the *Sunni Triangle* with Sunni Islam being, overwhelmingly, the largest religion. The main tribal group in Anbar is the Dulayam Tribe. The Dulayam or Dulaymi is a tribal confederation or meta-tribe consisting of some 50 different smaller tribes or sub-tribes.¹⁸

Ramadi, Fallujah and Khalidiya experienced conflict, civilian displacement, property damage and destruction between 2003 and 2007. This period included the 2006 "Anbar Awakening" which saw some 30 Sunni tribes come together to support the US-led coalition forces in fighting against the presence of Al-Qaeda militants in Anbar.

Between early 2014 and mid-2016, much of Anbar Governorate then fell under the control of IS or was affected by the conflict between IS and Iraqi government forces. The city of Ramadi was captured by IS in May 2015 after eight months of fighting and was retaken by Iraqi Security Forces in February 2016. When the conflict ended, Ramadi had suffered the most destruction of any city in Iraq at that time. An estimated 5,700 of the city's 55,000¹⁹ buildings were seriously damaged or destroyed according to United Nations estimates.²⁰ Fallujah was seized by IS in January 2014 and also recaptured by Iraqi forces in February 2016. Although the city was seriously damaged, the extent of the destruction was less than that experienced by Ramadi due to a change in tactics by Iraqi Government and coalition forces, which relied more on Iraqi Special Forces and less on aerial bombardments.²¹ Khalidiya, which lies 20km east of Ramadi, was captured by IS in June 2014, briefly retaken and then captured again by IS in May 2015. Khalidiya includes a number of islands on the Euphrates River. The city was retaken in August 2016 by Iraqi security forces and the last of the islands was retaken in October 2016 with extensive damage to property.

The rule of IS and the subsequent Iraqi military campaigns to dislodge IS had, and continue to have, a profound impact on both housing and agricultural land in Anbar. The main issue across Anbar is the destruction and damage of housing and infrastructure.

¹⁸ Gospodinov (2015) The Sunni Tribes of Iraq. The main sub-tribes found in the focus areas for this study were the Abu Fahd, Abu Issa, Abu Maha, Abu Faraj, Abu Risha, Aethawi, Abu Awan and the Zoba.

¹⁹ <http://www.cbsnews.com/news/ramadi-iraq-isis-us-airstrikes-change-in-air-war-scorched-earth/2/>

²⁰ This link to Al Jazeera shows ICRC drone footage from July 2016 showing the extent of the damage in Ramadi: <http://www.aljazeera.com/news/2016/07/iraq-icrc-camera-drone-captures-damage-ramadi-160705052624718.html>

²¹ <http://www.foxnews.com/world/2016/07/01/freed-fallujah-not-leveled-as-iraqi-army-learns-lesson-ramadi.html>

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

All of the respondents in the Anbar study indicated the most pressing HLP needs were compensation for destroyed properties and investment in reconstruction. Other important needs included the creation of employment opportunities and the restoration of functioning education and health services as well as the need to support de-radicalisation and strengthen social cohesion.

Although compensation claims are being filed, there was little belief among the applicants that the government would compensate them. In Ramadi, the study found that some more affluent Sheikhs had taken the initiative to develop their own reconstruction plans, independently hire engineers to restore electric and water supplies and embarked on their own local reconstruction efforts. However, in Khalidiya, the respondent Sheikhs were not as proactive - they had not developed plans or needs assessments and were waiting for the government or NGOs to assist.

The customary actors in Anbar include the *Sheikh*, *Mukhtar*, *Sunaf*, *Wujaha* and religious *Sheikh or Mullah*. Individuals in Anbar often seek out more than one customary justice provider to help them to resolve their dispute and then seek to have this customary decision ratified by the courts so that it is 'legal' (in the words of a respondent). For example, following a death, individuals may approach a religious *Sheikh* to help them divide the land, and then go to a *Sunaf* to help them demarcate the boundaries between the land, and then have the formal justice system (in this case the real estate directorate) formalise the agreement.

Respondents had a range of attitudes with respect to the choice of dispute resolution providers, many relating to trust. In general, in Anbar, it appears that people are starting to go directly to the state court rather than to approach a tribal *Sheikh* to resolve their problems, particularly those who live in the central urban areas. There is a widespread perception that many of the tribes supported IS and this has eroded public confidence in them. However, people are still willing to go to customary leaders that supported them during the conflict and during the period of displacement.

There also seemed to be a difference between rural and urban areas, with those in rural areas more inclined to approach a tribal *Sheikh* to resolve their disputes. Interviewed women expressed a preference to go to the court because they thought they would have a better chance of securing their rights, but men preferred to go to the tribal *Sheikh*.²³ Tradition also dictates that individuals should approach customary leaders over the court. To go to a court in the first instance or after a customary leader has issued a judgement would be seen as disrespectful by the community and bring shame on the individual and their family (unless the court was ratifying a decision made by the customary actor).

²² The Iraq Property Claims Commission (IPCC) was established in 2004 to process restitution and compensation claims for land redistributed under the Ba'athist regime. The IPCC is suffering from a significant backlog of claims and there is no clear strategy or policy for the processing of claims for damage and destruction resulting from the conflict with IS.

²³ In a study by NRC on Displaced Women's HLP Rights in Iraq, female respondents agreed that access to the legal system would improve their access to HLP rights but listed shame and costs as prohibiting factors to access. Women in urban and peri-urban areas were found to be the most likely to access the formal justice system, rather than customary justice mechanisms.

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

3.2 Collective punishment and alleged IS affiliations

In Anbar, allegations of former IS affiliation, either direct or indirect, are sensitive and provocative. They also have a direct bearing on HLP rights. Properties belonging to people associated with IS in retaken areas are often targeted by local communities, and either taken over or destroyed. Some of these acts relate directly to revenge or retribution. Families whose property was destroyed by IS may seek to destroy their neighbours' houses if they feel that the neighbours had colluded with IS. The destruction of houses belonging to people with IS linkages is used as a deliberate tool to prevent them from returning. Targeting of alleged IS-associated properties may also be linked to tribal rather than individual association. If a particular tribe was known to have helped IS, any member of that tribe may risk having their properties destroyed in line with the concept of collective responsibility, common to most tribal societies.

A form of secondary occupation that is prevalent in Anbar is the seizure of properties belonging to alleged IS supporters. The prevention of these families from returning to their properties has provided an opportunity for others to occupy them, perhaps in the anticipation or hope that the owners may never be allowed to return. It was reported that it is often the more influential people in the community who are seizing the properties of alleged IS supporters, presumably because they themselves are the customary leaders and are able to act with some measure of impunity. Displaced people perceived to having supported IS are often prevented from returning to their areas of origin because, on the basis of their alleged affiliation, they are unable to receive an official stamp of endorsement from the *Mukhtar* and fail the security clearance process.

Different traditions and approaches to customary law exist in different tribes, which can make reaching agreements challenging where there is a dispute between the tribes. That said, remarkably, in this context an agreement between the tribes on the treatment of HLP rights for the families of alleged IS supporters has been developed and endorsed by both customary and state actors.²⁴ In the agreement, the different tribes recognise that the practice of preventing IS families from returning could unfairly penalise entire families, clans and tribes, and could then lead to further conflict between the tribes in the future. While the agreement has some limitations, it outlines the criteria for the return or denial of return for families with alleged IS associations. The basic terms state that, if a whole family are alleged IS supporters, they will not be allowed to return but, if it was just one member of the family and the rest of the family were not viewed as complicit, the family may be allowed to return contingent upon a screening by the *Mukhtar* and security forces.

Although the agreement was set up to regulate alleged IS family returns and establish what is regarded as a fair system of customary justice applied across Anbar, the agreement also establishes a system of extra-judicial punishment. It also has the potential for significant abuse of HLP rights as erroneous and vindictive allegations of IS affiliation could be levied by unscrupulous parties in order to obtain land at the expense of alleged IS affiliated families.

²⁴ *The Covenant Document of Anbar People* signed by the Governor of Anbar (translated from Arabic by NRC Baghdad office ICLA team in June 2017)

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The agreement between the tribes of Anbar and the government specifies the categories of persons with alleged IS affiliation, who are not allowed to return. However, while the decision-making seems to be primarily the responsibility of the *Mukhtar*, there appear to be no clear guidelines on either the evidence required or who has the burden of proof for ascertaining whether and to what extent a returning family is associated with IS.

The tribal agreement should also be considered alongside more formal court declarations that can be obtained by family members of IS supporters wanting to distance themselves from the action of IS close relatives. The family members must apply to the Investigations Court for a legal separation, appear before the court with two witnesses and give evidence on the actions of their relative and their relationship to the relative, denounce the actions of their relative, and may be questioned by the judge. They will then receive a court order, which must be taken to the local police station to notify the police about the IS affiliated relative. When the police are notified, the order is returned to the court to be stamped. It is important to note that while this order may be significant, it is usually not sufficient to enable the bearer to return home. Persons returning may also be ordered by the customary authorities to pay compensation for property damaged, destroyed or confiscated by IS-affiliated members of the family. In many cases, despite making this payment, the local community leaders and the rest of the community may choose to ignore the order and forbid the person from returning to the home area. A number of IDPs have left camps to return home, only to be forced back to the camps when they are not welcomed in their area of origin.

Additional complications arise when property has been rented from someone who is allegedly affiliated with IS. While the tenant may have entered into an agreement in good faith before the period of IS rule, accusations against the landlord after an area is retaken from IS makes it more difficult for the tenant to obtain compensation for any moveable property that may have been damaged or taken under IS. The formal remedy for this is to obtain a letter from the *Mukhtar* or municipal council attesting that the property has been removed, which can be attached in support of a compensation claim. However, many properties have been rented without a written tenancy agreement, which makes it extremely difficult to proceed with claims. Where written tenancy agreements exist, these can be used to support claims through the courts. The supporting testimonies of customary actors can help support claims in the absence of written agreements.

3.3 Property sales

During the IS period, properties were often illegally redistributed, sold or rented. In order to help safeguard property ownership from the effects of IS intervention the Government of Iraq declared a freeze on all real estate transactions in Anbar from August 2014. The result was to render all property sales made under IS invalid. Despite these restrictions, illegal sales did take place. This has led to conflicts between the old and new owners now that the freeze has been lifted. A typical scenario reported by respondents involves the sale of a property during the conflict period for an amount far below the normal market value.

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This was advantageous at the time for both the seller and the buyer, namely: the sellers were desperate to sell a property for whatever they could get in a climate of uncertainty about the period of IS occupation and whether they would be able to return; and the buyer spotted an opportunity to acquire a property at a bargain rate. Some buyers felt confident that IS were going to be in control for the long term while others speculated on the misfortune of the displaced. Post-conflict returns have created a situation where vendors are demanding their properties back saying that they were forced to sell under duress or that the sale was invalid due to the government freeze.

Most of these cases are referred to customary justice providers. The outcomes are not uniformly determined and each case is taken on its own merits according to the circumstances and intent of the parties involved at the time of the sale and upon their return. The Sheikh will generally be involved in leading the process, which can include the calling of witnesses, the hearing of sworn depositions by the parties involved and specialist property advice from the *Sunaf*, *Mullahs* or Religious *Sheikhs* may be consulted on the applicable Sharia principles. The tribal *Sheikh* will often engage the parties in negotiation or mediation in resolving the matter. Whatever the final decision, the judgement of the Sheikh is expected to be binding by both parties.

Although the customary system is often the preferred route and is quicker and less expensive than the formal State system, these kind of cases do sometimes go to court either: directly, when the parties have sufficient resources to litigate, or as an appeal mechanism, if one or both parties are not satisfied with the decision of a customary justice actor (this is quite rare due to the social shaming associated with challenging a customary justice actor). In court, the issue of sales and purchases made under the period of IS control is straightforward. The court will annul any transaction that has taken place and will order the property to be returned to the original owner and the proceeds to be returned to the purchaser.²⁵ Unregistered properties are more problematic for the courts as they rely on proof of ownership to determine the claim. Where neither party has a Tapu, the cases are likely to be resolved by a party obtaining alternative proof of ownership to support, such as a *Mukhtar's* letter of support.

3.4 Minorities, socially disadvantage groups and customary justice

While Anbar Governorate is one of the most homogenous regions of Iraq in terms of tribal affiliation (many can trace their roots to the Al-Dulaim tribe) and religion (predominantly Sunni Islam), there are still many minority groups in the region including Kurds, Christians, Shia Muslims and minor tribes who have particular HLP needs and challenges in relation to customary justice. The poor and landless also face challenges to realising their HLP rights.

Kurdish: There is a Kurdish minority living between Ramadi and Baghdad who had been forcibly displaced from their lands in northern Iraq and relocated to Anbar as part of the Ba'athist Arabisation campaigns during the mid to late 1970s.

²⁵ See also Iraqi Law 1198 of 1977, Articles 1 and 2, which sets out the procedures for the resolution of disputes concerning the sale but non-registration of the transaction in the new owner's name.

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

This minority live mainly in urban areas. They are not connected to the dominant Sunni Arab tribal system of customary justice and are more likely to go to the state courts in order to resolve any HLP issues.

Minor Tribes: Historic customary law dictates that any land in a tribal area should belong to that tribe. However, the reality is that land has changed hands between people from different tribes over the years. A common practice in Anbar is for landowners from minority tribes to rent their land out for farming. This practice also occurred during recent periods of conflict-affected displacement when members of minor tribes asked someone to look after their land during their displacement. The tenant farmer is often a member of the dominant tribe and it is not uncommon for them to refuse to hand back the land or share the proceeds from the crop claiming that the land historically belonged to his tribe. Another common practice is the imposition of restrictions over rights of way (easements) or access to water by the dominant tribe on a minority tribe landowner in order to force them to sell or abandon the land.

Christian and Shia: Many minorities left Anbar in 2007 after sectarian violence broke out, often selling their houses cheaply because they were being targeted. However, some Christian minority groups remained in Habaniyah until they were forced out by IS in 2014. These Christians are now returning and seeking to reclaim their properties.

The minority Shia Al-Shathatha tribe settled in Fallujah from Karbala decades ago. They were targeted by IS and forced to leave or convert to Sunni Islam. IS took over their houses. The tribe has begun to return to Fallujah following its recapture by the Iraqi army. However, there are concerns that they will have difficulty reclaiming their properties from the more dominant Sunni tribes who now have possession.

Poor and landless: This group frequently face discrimination, as demonstrated by a recent attempt by a *Sheikh* in Hay Al-Tanak to redistribute abandoned government land amongst the poorer members of his tribe. After the *Sheikh* sold the land cheaply, a number of other parties came forward claiming that it was their land. The customary justice system was approached for a resolution. In most cases, because the transactions were not registered, the solution was to take the land back from those who 'purchased' it from the *Sheikh* and return half their money, or exchange the land with property of a lesser value or in another location.

Minority and socially disadvantaged groups may face barriers to realising HLP rights in Anbar, particularly through the customary justice system which they fear is weighted in favour of the dominant and more powerful tribes. While there is insufficient empirical evidence available in these study sites to confirm this perception, it is a challenge of such systems that has been found and highlighted in research relating to customary justice systems in many other contexts. Regardless, there remains a preference amongst minority groups to seek customary justice solutions to HLP issues, with respondents referencing the quicker and cheaper resolution of disputes in comparison to their state counterparts. Minorities also may have the opportunity to have their own community leaders represent them under customary law.

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A minority *Sheikh* or *Wujaha* will, for instance negotiate, with the majority *Sheikh* in attempting to resolve a dispute. For those that do take cases to the state courts, a key motivating factor is the risk that decisions made under the customary justice system may not be legally binding and could be challenged later through the courts anyway. Thus, resource to the state system can provide a way of strengthening tenure security for marginalised populations.

3.5 Women's HLP rights and customary justice

Female respondents expressed slightly different perspectives of women's HLP rights in relation to the customary justice system depending on their location. On the preferred choice of customary actor (mostly through a male relative), women in Fallujah said they were more comfortable taking their HLP issues to a *Mukhtar*. Some of them said they would consider going to the *Mukhtar* themselves but would be accompanied by a male relative. In Khalidiya, women preferred to have their problems dealt with in the family but reported that they would approach a *Wujaha* or tribal Sheikh, if necessary. In Ramadi, the female respondents said that women are not allowed to raise complaints or discuss HLP issues with any customary actor. The women in Ramadi were not aware that they had any rights in this area at all. This was perhaps a reflection of their isolation in the home as they reported that they were not allowed to work or to go to school.

Women in rural areas appear to be less aware of and able to exercise their HLP rights than women in urban areas. Many women in urban areas are more educated and less conservative than their rural counterparts. Most importantly, state courts are more accessible and accepted as an option for seeking justice in urban areas whereas customary law and traditional patriarchal attitudes dominate in rural areas.

The main HLP issue that women face in Anbar is their inability to realise rights to inheritance. For inheritance issues in rural areas, it is seen as shameful for a woman to ask for her HLP rights from her family. This prevents women from approaching the subject of receiving an inheritance, even though it is a right recognised in Sharia and state law. Any property would instead be held by the closest male members of the immediate family, who would be also be expected to be responsible for the welfare of the woman. In the case of a widow, a husband's family may oppose the widow exercising her inheritance rights because they want the wealth to remain within their family (e.g. not be taken by the husbands of the widow's daughters or sisters). In urban areas, although not the norm, respondents reported that it was not uncommon for a woman to go to the court to claim her inheritance rights when these have not been supported by her family.

In customary law, the dowry (known as *mahr*) is also an issue. The *mahr* is paid from the groom's family to the bride's family. A portion can be reserved as an insurance against divorce. The amount is agreed in advance and witnessed by customary justice actors. If a husband divorces his wife, he must pay her the *mahr* but, if she initiates a divorce, then she forfeits the *mahr*. In Iraqi state law, as well as most interpretations of Sharia law, the practice is different and a woman does not have to forfeit all of the *mahr* in a divorce unless she is deemed to be 100% at fault.²⁶

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

If a woman has children, her husband's family may provide for her and the children if her husband dies but, she may not receive an inheritance. In these cases, it is not seen as necessary for the woman to inherit from her husband because she is being financially supported by his family. This practice also ensures the property remains with the husband's family. Sometimes, widowed women marry one of the deceased husband's brothers so that the children and property remain within the family. If a woman refuses to remarry within the family, she may be cast out and required to leave behind her children and inheritance to the deceased husband's family (unless they do not have the financial ability to care for the children). This may also occur if the widow has no children. In other cases, the widow will be allowed to receive an inheritance although this will be translated into a cash amount relating to value of the land instead of the land itself, which will remain within the husband's family.

It is seen as shameful for women to go directly to a customary justice provider to ask them for help. They are only allowed to approach customary actors through a male member of the family. If the dispute involves members of her own family, the woman will be unable to approach a customary actor to hear the case. In most cases, women in more traditional rural areas accept such customary practices as they are unable to contest them on their own (without being shamed or ostracised) and have little knowledge of their rights or how to independently access alternative options, such as the court.

3.6 Secondary occupation issues and customary justice

Although secondary occupation is an issue in some parts of Anbar, it is much less prevalent than in Nineveh. In Anbar, secondary occupation has often been temporary and therefore has not caused any conflict. Short-term, secondary occupation has, however, led to complications in identifying the ownership of furniture and other household items that may have been left behind or removed to other houses (see case study below). In many areas the entire population (including any IDPs that had become secondary occupants) relocated on the orders of the Iraqi military during military offensives against IS. This meant that, when people returned to the newly retaken areas, they would generally find their properties uninhabited.

When secondary occupation becomes an issue for the owner and secondary occupier, customary justice providers are often able to resolve these conflicts by helping to find alternative locations for secondary occupiers. They may locate an empty house in the same area and ask the secondary occupier to move there so that the rightful owner can return to his house. In some circumstances, secondary occupiers or displaced families have also been permitted to live with *Sheikhs* on a temporary basis. The customary justice provider also may give the secondary occupiers a time limit within which to leave the house. Community members are generally supportive of both owners and secondary occupiers and attempt to avoid conflict.

²⁶ Under Iraqi law, there are three types of divorce: by unilateral actions of the husband, by agreement between the parties, and by court order. The system is based on 'fault divorce'. A woman does not forfeit all of the *mahr* unless she is determined by a court to be 100% at fault for the divorce (there is fault divorce in Iraq and the wife forfeits the percentage of her *mahr* equal to the percentage of fault attributed to her for the divorce) or she relinquishes the *mahr* by agreement.

3. ANBAR: HLP CONTEXT AND CUSTOMARY JUSTICE

Sometimes, the community prefers to let the displaced family settle in empty houses in the area (these can be properties that belonged to individuals affiliated with IS, which has its own potential complications, as described above). If there are no empty houses in the area, the secondary occupiers may be asked to live in camps until a better solution becomes available.

Secondary occupation can arise because a neighbour did not want a house to remain empty and to be controlled by IS as the presence of IS may result in conflict and destruction in the area. For example, a big family might ask one of the married members of that family to settle in the abandoned house and contact the owner to inform him that those members will live in the house while the owner is displaced. This type of secondary occupation usually does not cause conflict.

If the owner of a property is a customary justice provider, particularly the Sheikh, he may use or rent his house and evict the secondary occupiers from his property. In some cases, individuals who bought properties during the moratorium were evicted when the occupation ended without receiving compensation. For example, a number of Sheikhs were reported to have sold houses illegally (contrary to the moratorium) and then used their position as customary leaders to evict the new owners and repossess the properties.

Case Study: The Furniture Movers of Fallujah

When families from Saqlawiyah were displaced during the conflict, they arrived in Fallujah where they found abandoned properties in which they settled and often installed their own furniture and household appliances. However, when military operations started in Fallujah, the families from Saqlawiyah relocated to IDP camps. After IS were removed from Fallujah, the original house owners returned and were surprised to find furniture and goods in their homes that they did not recognise. Later, when the Saqlawiyah families came to re-claim their furniture, there were a number of disputes over ownership, which were brought before customary actors to be resolved.

During their rule, IS often looted homes and relocated moveable property from one household to another. This included furniture, white goods and electrical goods, agricultural equipment and even cows. While returnees who find items they do not recognise on their property generally report it to a customary actor – usually the *Mukhtar* – reuniting a refrigerator with the correct owner can be extremely challenging when many people have lost very similar goods and documents, such as warranty cards with corresponding serial numbers, are likely to have been lost.

4. NINEVEH: HLP CONTEXT AND CUSTOMARY JUSTICE

4.1 Background and Context

The context of HLP issues in the Nineveh Governorate differs considerably from Anbar Governorate. The Governorate of Nineveh is situated in the northwest of Iraq. It borders Syria and parts of the region, including Zummar, are considered disputed territories claimed by both the Federal Government of Iraq (FGI) and the Kurdish Regional Government (KRG). Iraqi land laws do not apply in KRG controlled areas and the courts are reportedly relying only on the Civil Code for property matters. Nineveh is the third largest governorate in Iraq and the second most populated,²⁷ including Shia Arab, Yezidi, Turkman, Shabak and Assyrian minorities. Kurds in Nineveh were subject to forced relocation during the 1970s and 80s as part of the Ba'athist Party's Arabisation programme, which sought greater Arab presence and control in the regions with ethnic minorities.²⁸

The focus area of Zummar was captured by IS in August 2014 and retaken by the Kurdish Peshmerga forces in October of the same year with the support of US airstrikes. In October 2017, following the Kurdish Referendum, Iraqi forces recaptured Zummar. Zummar is predominantly a Kurdish area with a large Sunni Arab minority. Zummar is situated close to Mosul Dam, the largest dam in Iraq and the source of over 1,000 megawatts of hydroelectric power generation. Zummar town is adjacent to the Ain Zalah oil field and refinery.²⁹

In 1980, the Gol deported Kurds from the centre of Zummar and granted their lands to Arabs. Many Kurds resettled locally in neighbouring villages. In 2003, when the Ba'athist government fell and the KRG took over control of Zummar, there were no significant reverse population flows. In 2014, IS took control of the area and most of the remaining Kurds were displaced. When the KRG forces retook Zummar in 2015, many Arabs left fearing allegations of collusion with IS and possible reprisals. Their properties were subsequently re-occupied by returning Kurds, who considered the houses as originally belonging to their relatives prior to 1980.³⁰ Since October 2017, the situation has been reversed and previous Arab occupants have returned to claim the land. This situation has led to contested claims over properties often involving different ethnic groups, thus adding a particularly challenging dynamic that risks creating inter-ethnic grievances if not satisfactorily resolved.

Nineveh has all of the main customary actors found in Anbar with the exception of the *Sunaf* or land specialist, which is a position only located in Anbar. According to local experts in Zummar, most villages have a committee of customary leaders that meets weekly, or as required, to consider any issues that have arisen in the area. Where the committees do exist, they are often the first stop for HLP issues. Local experts reported that there are 69 villages/committees around Zummar. However, as people begin to

²⁷ Ninewa NCCI Governorate Profile (2010) NGO Coordination Committee for Iraq.

²⁸ Ibid.

²⁹ <http://www.kurdistan24.net/en/economy/2216420c-2e71-463c-8f24-c86c0d21f893/Iraq%E2%80%99s-damaged-oil-field-needs--5m-to-restart>

³⁰ Shortly before publication, in October 2017, the FGI took control of Zummar and both Kurdish and Arab families in the area were displaced, and Arab families relocated to the area from Mosul.

4. NINEVEH: HLP CONTEXT AND CUSTOMARY JUSTICE

return to these areas, the committees are in a state of flux with some being active and others remaining dormant. The committees are comprised of one *Sheikh* or *Agha*, one *Mullah* and two community experts or *Wujaha*. A number of customary actors are active in advocating to the local government for clearance of mines from agricultural lands.

Case Study: Customary actors in Girvir Village

Girvir is a village of approximately 600 houses between Mosul Dam and Zummar town. During their rule, IS destroyed 45 houses in the village because they had belonged to government officials, police and military officers. Most of the people from Girvir whose houses were destroyed are now living in Zummar with relatives. A few, who had savings, are rebuilding their properties. Most, however, are waiting for compensation from the government or for NGOs to help them.

The owners of the destroyed houses believe that they are involved in two processes for compensation but are confused about them. At the beginning of 2015, the Mayor of Zummar asked the *Mukhtar* and *Wujaha* in Girvir to help conduct an assessment of the destroyed and damaged properties. A list of the owners' names and locations were compiled and submitted to the mayor. The *Mukhtar* provided his official stamp to say that ownership in each case was clear.

At the same time, all 45 villagers have applied to the court for compensation. With the help of the *Wujaha* they have completed the forms and submitted them. So far, no one has been called to a hearing before the investigating judge.

Although the local customary actors noted that there were some people with special needs whose properties had been destroyed, neither the mayor's mapping nor the compensation forms lodged with the court provide for any assessment of vulnerabilities or prioritisation of need.

The customary actors in the village expressed frustration with the lack of action regarding the compensation claims, stating that "the NGOs are sitting around without doing anything." No committee has been formed to help represent the villagers' interests and there appear to have been no efforts at lobbying or advocacy to move things along with either the mayor's office or the courts. The last time a meeting took place with government officials was at the beginning of 2017.

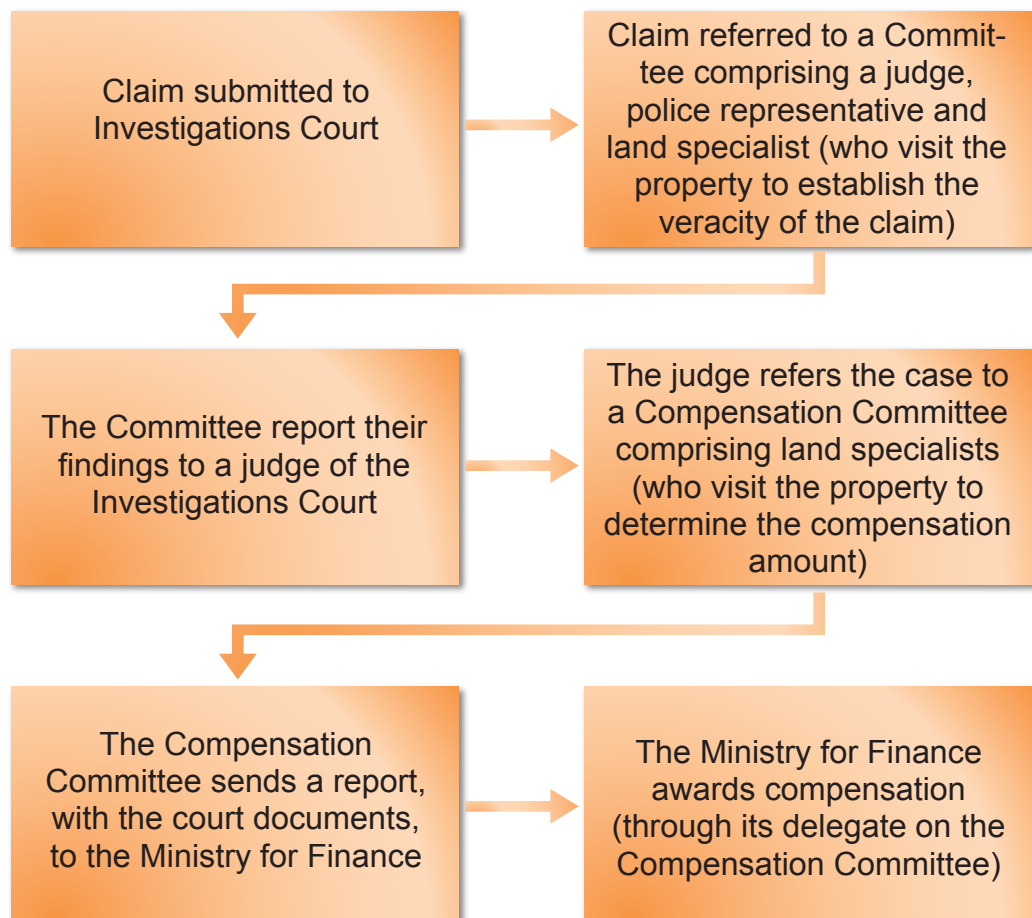
The role of the state courts and the municipality or mayor's office to determine HLP issues was more prominent in Zummar than in the Anbar sites. While there appeared to be considerable communication and collaboration between the mayor's office and customary actors in Zummar, the relationship between the courts and customary actors appeared somewhat strained. State court respondents were dismissive of customary justice, claiming judgements from such actors would be treated as if they had never taken place if ever challenged in a court. However, the courts did appreciate that customary actors had an important role in mediation between two willing parties and that,

4. NINEVEH: HLP CONTEXT AND CUSTOMARY JUSTICE

in most cases, disputes were successfully handled at the customary level without ever needing to reach the courts.

An investigations judge is responsible for hearing compensation claims in Zummar. As of May 2017, the courts had received over 1,500 claims, although very few, if any, of the claims have been paid. The process of making a claim involves six steps from the time of submission of a claim until payment of compensation (see Diagram 1). This process is estimated to take from one to three months. The role of customary justice in this process is to assist with determining ownership. A *Mukhtar* may be asked to provide a letter of support, particularly in cases where a title deed cannot be produced. The *Mukhtar* may consult local *Sheikhs or Aghas* and *Wujahas* for their opinions in determining proof of ownership. Local customary actors advised that establishing ownership was a simple process because everyone knew each other in villages and knew who owned each property. In terms of tenure security, respondents largely agreed that a title deed has more legal weight, in comparison to proof of ownership, followed by a utility bill giving the address and owner's name, and a *Mukhtar's* letter of support.

Diagram 1



The mayor of Zummar reported that boundary and land ownership disputes were one of the main issues being brought to the municipal council. The mayor has established a committee comprising different government experts, consultants, and specialists with local knowledge. *Mukhtars* were sometimes co-opted to the committee, as required. Some of the cases appeared to be extremely complicated, such as a large parcel of land that was claimed by 63 different parties.

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Case Study: The Rabi'a Conundrum

In the 1970s, Kurds from Zummar were forcibly relocated by the Iraqi Government to Rabi'a, near the border with Syria, where they were given agricultural lands and title deeds. The area that they were sent to was originally dominated by the Sunni Arab Shammar tribe – one of Iraq's largest and most powerful tribal confederations. The Kurds' original lands in Zummar were given to another Arab tribe. In 2003, after the fall of Saddam Hussein and the Ba'athist Party, the Shammar tribe re-took control of lands in Rabi'a and the Kurds were forced to move back to Zummar where they then had no land.

In early 2014 IS took control of Rabi'a but, by October of the same year, they had been forced out by a military alliance between the Kurdish Peshmerga and forces of the Shammar tribe. The Kurds expected that the newly established controlling presence of the KRG in Rabi'a would bring about the restitution of their lands but that did not happen. Local respondents believe that this is because the KRG needs to maintain good relationships with the Shammar and is well aware that the tribes' allegiances could shift again in the future if the Shammar felt that it was more advantageous for them to align with the Gol.³¹

The Kurds displaced from Rabi'a after 30 years of residence there feel that they should be either given their lands back or provided with suitable compensation. In 2015 the KRG informed the Shammar tribe that they needed to provide a compensatory payment to the Kurds who had left Rabi'a of approximately USD 800 per dunum.³² As most of the Kurdish farmers had received parcels of land of 75 dunums, this would amount to a total compensatory value of USD 60,000 per land parcel. In 2015 they received 27% and in 2016 they received a further 33%. The balance (40%) is still outstanding.

If the Kurdish farmers receive the balance, they believe that this is for the loss of land only and not for the loss of agricultural earnings during the period 2003 to 2015. "We have the title deeds" they say, "but the Arabs have the land. The Arabs have been earning a living from it whilst we have nothing." The farmers say they will hand over the deeds if they are fairly compensated for this loss of earnings in addition to being compensated for the loss of land. They are seeking 12 years of compensation at a rate of USD 20,000 per year (USD 240,000) and are willing to negotiate.

In one fairly typical village, a group of 10 disgruntled farmers, who were dispossessed of the lands to which they were forcibly relocated decades ago, have asked their *Agha* to assist in presenting their claim to the KRG authorities.

³¹ van den Toorn, C. and Ali, A. (2015) Challenges and Opportunities in post-ISIS Territories: The Case of Rabi'a, IRIS Iraq Report, The Institute of Regional and International Studies, The American University of Iraq.

³² A dunum is a unit of land dating back to the period Ottoman control. In Iraq 1 dunum is equal to 2,500 square meters or 0.25 hectares. <http://www.mideastweb.org/Middle-East-Encyclopedia/dunum.htm>

4. NINEVEH: HLP CONTEXT AND CUSTOMARY JUSTICE

There had been little movement due to the limited political power of the *Agha* in respect of the KRG and the greater influence of the Shammar tribe. It is unclear whether this will change with the retaking of Rabi'a by the Government of Iraq.

The history of the region shows that, if left unresolved, such issues will create deep-seated and long-lasting grievances that will continue to undermine peace and security between the different ethnic groups.

4.2 Women, HLP Rights and Customary Justice

Housing, land and property in Zummar is an almost exclusively male domain. The general approach to women's rights and participation, which is applied across the various religious and ethnic groups in Iraq, is cautious and conservative. Women respondents reported that they did not participate in discussions or decisions involving HLP issues. The women spoken to in this study had little awareness of their rights under customary, Sharia or state law. They tended to view all HLP issues that might affect them as being the responsibility of their male relatives (father, husband, brother or son) to resolve. Their rights were seen in terms of their relationship to the family unit. In cases of divorce, their rights ceased to exist as they were no longer considered to have any claim on property belonging to the family into which they had married. Inheritance was only really protected if a close male relative could be entrusted with the property and, by extension, was responsible for the welfare of the woman. It was noted that widows and divorcees were particularly vulnerable and had to rely on the largesse of male relatives. While women are, in theory, able to take HLP issues to customary justice actors, as well as to Sharia and state courts through a male relative, it is uncommon in practice because to do so is viewed as a shameful act by the community.

The female respondents in Zummar reported that there was no organisational structure available for women's awareness raising or participation. They expressed an interest in forming women's groups and learning about their rights in relation to HLP but cautioned that any such involvement could only take place if it was approved by the *Sheikh*, *Agha*, *Wujaha* and their husbands or fathers. The issue of local women working with NGOs appears to be particularly sensitive.

During this study, when customary justice actors were asked about women's rights and the HLP issues affecting women, the response was generally one of disbelief that the question was being asked and it was clearly a subject that they had never considered. NRC team members and female respondents alike agreed that any attempts to increase women's awareness and ability to claim HLP rights would have a greater chance of societal acceptability and success if such programmes were able to first convince men, especially the customary and religious leaders.

4. NINEVEH: HLP CONTEXT AND CUSTOMARY JUSTICE

4.3 Secondary occupation issues and customary justice

The secondary occupation of properties is a significant problem in Zummar, though customary actors played a positive role in both prevention and resolution of such disputes. Customary and religious leaders frowned on the practice of secondary occupation and were active in trying to prevent it by exploring options for alternative accommodation or insisting upon the payment of rent to the landlord. Customary actors were also involved in mediation and negotiations aimed at relocating secondary occupants upon the return of a previously displaced owner.

In most cases, secondary occupation occurred when the owner was displaced and another party, whose property had been damaged or destroyed, needed accommodation. Generally, this occurred with the knowledge of the owners or family members representing their interests. Secondary occupation with the knowledge of the owner is unlikely to involve a formal written agreement. Under customary law, the owner retains the right to ask for his property back at any time and to ask for compensation.

The main complication arising from this issue in Zummar are cases where the secondary occupant believes that they are the true owner. This belief is generally based on one of two premises: they were the historic owners decades ago that were forcibly displaced under the Arabisation programme of the 1970s; or they believe that they had purchased the property in good faith during the period of IS control. The second premise is easier to deal with through customary or State justice than the first because both the GOI and the KRG had suspended property transactions during the period of IS control and any exchanges that took place were illegal and invalid. This is a position generally accepted and upheld by customary justice. The first premise is more difficult to address because it is rooted in long-standing grievances that the recent history of displacement, IS control and subsequent return has enabled the originally aggrieved party to take advantage of in order to seek redress. These issues pose a significant challenge for customary justice because they invariably involve two different ethnic groups – primarily Arab and Kurd – and the secondary claimant will not necessarily have been the original owner (they are more likely to be his son or grandson).

4.4 Minorities

While either party can approach customary actors to help resolve the question of such trans-generational secondary occupation; as described above, the issue can be complicated depending upon the demographics of the village. In and around Zummar, the villages are either Arab with a Kurdish minority or Kurdish with an Arab minority. This makes a difference when it comes to customary justice as the impartiality of a judgement cannot be guaranteed when a minority appeals to a majority *Sheikh or Agha*. In most villages, everyone knows everyone else. This can be an advantage in most cases when customary justice actors consult the community to determine ownership. However, when dealing with claims that are based on historical ownership, neighbours are most likely to have knowledge of and a preference towards the more recent occupant who they know and is of their own ethnicity.

5. REFLECTIONS ON CUSTOMARY JUSTICE, STRENGTHS AND WEAKNESSES

Customary justice systems, like all justice systems, have their strengths and weaknesses, challenges and opportunities, pros and cons. They have a particular resonance with communities as a locally-driven system for resolving disputes grounded in tradition, history, culture and tribal values. They have also served as a source of constancy in times of political instability, authoritarianism and conflict. However as systems of practice operating outside the formal state system they are very much influenced by prevailing power dynamics within the community which prioritise existing tribal hierarchies over principles of equality of treatment, non-discrimination and respect for the rights of minorities and women. Shifting patterns of forced migration, re-occupation and geopolitical alliances over the past forty years have also created a number of complicated HLP dynamics which are testing the capacity of customary justice actors in the present post-IS environment. The following section provides a brief snapshot of some of the respective strengths and weaknesses of customary justice systems based on field research conducted in Ninewah and Anbar.

5.1 Strengths of customary justice in HLP

Customary justice actors in Nineveh deal with a similar range of issues to their counterparts in the Anbar Governorate and are respected by the local communities for similar reasons, namely accessibility, reputation within their communities, swift resolutions and free services. They are recognised as an authoritative traditional voice with respect to resolving a range of HLP issues between individuals in the same or different tribes. However, as in many local community-based dispute resolution systems, they are largely ill-equipped to deal with larger issues of contested land ownership between two tribes or different ethnic groups. Nineveh is an ethnically diverse governorate and, in the current political and security context, inter-ethnic relations are critical to a number of much broader considerations, including the fight against IS and both the GOI and KRG's aspirations for consolidating their power bases and gaining eventual control of the disputed territories. As an example, while the senior most customary actors such as the *Sheikh of Sheikhs* would still be involved in high level negotiations involving inter-tribal land distribution, the historical role that lesser *Sheikhs* and *Agha's* have in such matters is today very much reduced due to national geo-political dynamics.

Anbar presents a much more homogenous picture in terms of ethnic and political issues as the population is overwhelmingly Sunni. A key subtext in Anbar is the relationship between the governorate (predominantly Sunni) and the central government (dominated by Shi'a). The major HLP issues between individuals and tribes in Anbar are less about ethnic considerations and more related to a family's perceived IS linkages and/or their activities whilst IS controlled their area. However pre-existing and new inter and intra-tribal HLP disputes also play a part.

5. REFLECTIONS ON CUSTOMARY JUSTICE, STRENGTHS AND WEAKNESSES

The main strength of customary justice actors is their capacity to help resolve HLP issues at a community level. They are able to draw upon years of experience in resolving such problems. Often, such knowledge and experience has been passed through a family from father to son. This experience is seen as one of their main strengths. They are seen as extremely adept at negotiating and mediating between people in the community, coming to resolutions that are practical and relevant to the context, and have a deep knowledge of the issues affecting them.

The ability of customary justice actors to enforce their decisions depends partly on the respect that is afforded to their positions traditionally and partly on the power of their tribes. They are vested with considerable social power and influence rooted in historical hierarchal tribal lineage structures of feudal type allegiance and patronage. This generally makes their decisions binding and accepted by all parties to a dispute. The decisions of customary actors from the stronger tribes are more likely to be upheld and uncontested in the future. They are binding in practice partly because of a fear that if an individual does not abide by a customary decision they cannot approach the customary system again for future disputes. To disregard the judgement of a *Sheikh/Agha* or a lesser customary actor would be viewed by the community as very disrespectful and lead to a high level of shame for the individual, their family and extended family. The fear of shame therefore acts as a major deterrent to contradicting the judgement of a customary actor or usurping their respect and traditional authority by taking a case to the state court. Indeed, court officials in Zummar reported that most people prefer to seek customary justice in the first instance. However, they cautioned that if a *Mukhtar, Sheikh or Agha* makes a judgement it would not be upheld if later challenged in court. State justice providers noted that, in most cases, customary justice decisions were not referred to the courts because, if all parties involved agreed, there was generally no need to move beyond the customary level.

Other key strengths of customary justice actors are that they are embedded in the community, can be easily accessed, make swift decisions, and provide a free service.

5.2 Weaknesses of customary justice in HLP

Despite the many strengths and widespread acceptance of customary justice actors as a key source of HLP dispute resolution, a number of practical and structural considerations undermine the quality and effectiveness of the model.

The traditional acceptance of customary justice actors in Anbar has been compromised by the actual or perceived former association with IS of some community leaders. Tribes that allegedly provided support to IS are no longer trusted and disputants may prefer to apply to the state courts which may be regarded as being more impartial. However, customary justice actors who provided IDPs with assistance and opposed IS are viewed very positively and trusted by the community.

5. REFLECTIONS ON CUSTOMARY JUSTICE, STRENGTHS AND WEAKNESSES

Customary justice providers are not always objective, independent or fair, particularly in relation to women and when the case relates to the customary actor's personal, clan or tribal interests. Family connections matter, and the more wealthy, powerful or connected a disputant to a party is, the greater the chance that a customary judgement over a HLP issue will be issued in their favour. As a number of respondents pointed out, the *Sheikhs* and *Agha's* are also the largest landowners and have an interest in consolidating control over lands for their own family, their clan and their tribe. It must also be noted that women also face barriers accessing the State justice system and neither is the court system completely immune from clan or personal interests.

A further key weakness of the customary justice system is the varying level of education and limited legal knowledge of decision makers. It was clear from interviews in both Ninewah and Anbar that there is a particular lack of understanding about both domestic laws and international HLP norms and the importance of understanding and applying them to post-IS Iraq. However, again, neither is this guaranteed with every actor within the state court system.

Inconsistency and arbitrariness in decision making was also highlighted. The integrity of a decision varies considerably depending on the skill of a particular actor and the personality of the disputants can also influence the outcome. If one party is particularly articulate, the actor may be persuaded to determine the case in favour of that party. If a decision made by a customary justice provider is perceived not to be fair, then the parties can appeal to a court. However, in practice, this does not occur in most cases due to fear of disrespecting the decision maker, and the element of shame. A further problem with the system is the imposition of extra-judicial or collective punishment upon family members of alleged IS affiliates outside the formal system of law. While local leaders may have intimate knowledge of the local context, such processes are arbitrary, conflate criminal and property law and punish family members for positions that may not be their own.

This is further impacted by the very high volume of HLP disputes in Iraq. The post-IS period has raised many pre-existing, new and complex HLP issues and customary justice actors are becoming overburdened trying to deal with them. While customary justice has been swift in the past, it may be slowed by the sheer number of new cases. That said, similar considerations apply to the State courts.

A final consideration is the longevity or sustainability of customary justice decisions on HLP disputes. The weight of a customary decision tends to weaken over time to the extent that enforcement is neglected and the fundamentals of the decision disregarded after some years, particularly if the context changes such as during the recent IS crisis.³³ In the current context, many customary judgements may also be a temporary solution to complex issues designed to keep the peace in the short-term, especially those involving alleged IS associations and contested land. These risk unravelling in the future and being challenged when the role of the state is strengthened. However, a related strength is the customary system's ability to quickly adapt in such periods of dynamic transition, remain relevant and, to often a higher degree than the state system, legitimate and trusted.

³³ Judgements by religious Sheikhs have the most authority and are unlikely to be appealed as they are grounded in Sharia law.

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It was further noted that both the customary actors and local government administrators had little understanding of the role, scope and limitations of international humanitarian actors in addressing HLP challenges. INGOs such as NRC were viewed with enormous hope and unrealistic expectations of what they could achieve. INGOs were mostly expected to support large-scale housing and infrastructure reconstruction.

CONCLUSIONS

This study highlights the significance of customary justice providers as major actors in resolving HLP issues in both Anbar and Nineveh Governorates. They are generally the preferred choice to help resolve a HLP related dispute for the majority of the population in these areas. Although tribal leaders are not always trusted, the respect for and confidence in customary leaders is much higher than that of the government administration. While the courts are viewed as being mostly impartial, they are seen as time consuming and expensive options compared to the quick and generally free customary justice route.

Customary actors, conversely, are seen as potentially biased in favour of their own tribes. This is generally accepted as the majority of issues are between neighbours of the same tribe, religion or ethnicity. A major perceived advantage of customary justice over State justice is that the actors are well known to the community and are seen as having a genuine interest in the community's welfare, security and stability. The majority of Iraqis maintain a strong bond with and respect for tribal structures and culture, including showing deference to the positions of *Sheikh* or *Agha* and other customary actors, and they would approach customary actors first for any HLP problems. To go to a different justice provider first or to disregard the judgement of a customary leader and appeal to the court later is widely viewed as deeply disrespectful and would bring such an unacceptable level of shame on the individual, his family and extended family, that such deviance rarely happens.

While customary actors are involved in all aspects of HLP rights, their judgments are based on a combination of personal local knowledge and opinion, consultation with Sharia principles and referral to customary land specialists (*Sunafs*), where available. There is no body of jurisprudence that informs customary justice decisions nor are such judgments written and recorded for future reference. Decisions made by a *Sheikh* or *Agha* are primarily made verbally and publically (or with both parties to a dispute in attendance together with other respected members of society such as the *Wujaha* who act as de facto witnesses). Decisions made by the *Mukhtar* are more likely to be recorded and involve his official stamp of approval as he acts as a quasi-official interlocutor between the community, customary leaders and the local government administration and security forces.

While primarily used for inheritance and divorce cases, Sharia law, however, has a well-established jurisprudence that relates to HLP cases. Religious *Sheikhs* in at least one location (Fallujah) were so well attuned to emerging HLP issues that they had produced a guidance brochure on the subject, which was informed by Sharia law.

5. REFLECTIONS ON CUSTOMARY JUSTICE, STRENGTHS AND WEAKNESSES

This represents a significant opportunity to engage further with religious *Sheikhs* and find out how they approach HLP rights. None of the customary or religious leaders and few of the local administrators or State justice providers had any knowledge of international HLP standards. This is a significant area of need that NGOs would be well placed to address with existing or contextually modified training modules on HLP rights.

A crucial, niche role can be played by customary justice actors in helping community members prove HLP rights, finding mutually agreeable solutions to HLP disputes and promoting reconciliation. In light of the large number of unregistered properties in Iraq, widespread loss of property documents and tensions over HLP rights of families allegedly affiliated with IS, practical interventions by customary justice leaders can protect rights, reduce tensions and assist with speedy resolution of disputes. *Mukhtars* play a crucial role in confirming the property ownership of IDPs and can sometimes identify temporary accommodation for secondary occupants who have been forced to move into the homes of others during their period of displacement. However greater clarity is required in relation to the role and methods used by customary justice providers to ensure that families of alleged IS affiliates are not punished through guilt by association and that their HLP rights are also protected. It is important that disputes over HLP rights, as well as court orders allowing family members to 'disassociate' themselves from family members with IS linkages are conducted in accordance with standards of fairness, the presumption of innocence and due process.

A key HLP gap that was evident in all areas of the study was the lack of effective coordination and planning for recovery and reconstruction between the customary, religious and government leaders. There are serious trust issues especially between customary and government leaders. Allegations of corruption by government and disinterest in community needs are commonplace. On the other hand, tribes are seen as an unreliable law unto themselves and some tribes are hampered in their credibility by allegations of having former IS associations.

As a result of historical disputes, recent political conflict and the multi-ethnic nature of Iraqi society, many of the complex HLP disputes are localised and require local solutions. However this must take place within the broader legal framework of HLP rights in Iraq, which sets out key standards and principles for the determination of land and property issues. The legal framework also provides important safeguards on the rights of non-discrimination in property ownership, equal access to justice, due process of law and equality of HLP rights for all Iraqis (both men and women). Iraq's system of legal pluralism could be harnessed to provide HLP outcomes that work on multiple levels. They could combine local knowledge, values, customs and traditions which are anchored in Sharia law traditions. At the same time they can take place within a framework of respect for HLP rights that ensures national level consistency, respect for all ethnic, religious and minority groups and safeguards on arbitrary or capricious decision making at the local level.

6. RECOMMENDATIONS

The following recommendations are offered to customary justice actors, the Government of Iraq, humanitarian agencies and donors on how existing methods of customary justice dispute resolution can be improved to help protect HLP rights and ensure security of tenure for displaced Iraqis.

To the local authorities in Iraq

- ***Establish regular and formal mechanisms between local authorities, communities and customary justice leaders to facilitate community consultation on reconstruction plans including HLP issues.*** Failure to involve the community, and local justice leaders, can fuel resentment and undermine the effectiveness of the reconstruction process. While tribal leaders in Fallujah and Ramadi appeared to be proactive in reconstruction efforts, this did not appear to be the case in other areas, such as Khalidiya and Zummar. There is often mistrust between some tribal Sheikhs and government institutions. Yet all need to work together to ensure the knowledge and interests of tribal and ethnic groups are properly represented and reconstruction plans are implemented at the local level. As this study highlights, customary justice leaders play a key role in the resolution of many HLP disputes directly linked to the reconstruction effort. Customary justice leaders should advise local authorities on HLP issues and disputes affecting their community, while government authorities should assist with solutions, advise on reconstruction plans and ensure regular communication and coordination on HLP issues.
- ***Ensure that women, minorities and any other groups with particular vulnerabilities or needs are given an active voice as participants in the development of reconstruction plans and their HLP rights.*** The HLP rights of vulnerable persons, including women, are often not taken into account. Not only does this result in the loss of property rights, but disenfranchises and marginalises such groups in the wider reconstruction efforts.

To customary justice leaders

- ***Develop locally owned HLP charters.*** In order to establish greater consensus on approaches to HLP amongst local leaders and to improve HLP related accountability to constituents, customary justice actors should develop locally owned HLP charters. Such a charter would be designed with the participation of all the key local actors and grounded in international principles with reference to Iraqi law, Sharia law and customary law. Although NGOs would have a role in facilitating this process and providing technical support, it would be driven by local leaders.

6. RECOMMENDATIONS

To both local authorities and customary justice leaders

- **Ensure respect for the HLP rights of all displaced persons, including family members of alleged IS affiliates.** Iraqi law protects the HLP rights of all persons without distinction on the basis of religious, ethnic or political affiliation. Criminal processes exist under Iraqi law for persons suspected of having committed criminal, terrorist or security offences. Persons suspected of IS involvement should be treated in accordance with due process and Iraqi law. Family members of suspected IS members should not be subjected to collective punishment or face extra-judicial consequences as a result of a perceived family affiliation.
- **Ensure that decisions on the HLP rights of displaced persons are consistent with Iraqi domestic and international human rights law protections on the right to property and principles of property restitution.** Iraqi domestic law and international human rights standards provide detailed standards for the resolution of such disputes. While customary justice leaders are skilled in the resolution of community HLP disputes, decisions on HLP issues will be more credible and effective if conducted within a framework of respect for Iraqi domestic law and basic principle of property rights under international law.
- **Ensure women have direct access to customary justice.** During field visits for this study, women in both target areas stated that it was considered shameful to seek assistance from customary justice actors without the permission and presence of a male immediate family member. Customary justice actors should support women to have direct access to customary justice mechanisms.
- **Promote, support and train women to play a role in customary justice decisions on their HLP rights.** The communities in the target areas are largely patriarchal and the customary justice actors identified during the study were all male. The ability of women to directly access customary justice systems may be hindered by the lack of female participants in the customary justice process who can adjudicate and advise women on HLP issues. Customary justice actors should support, promote and train female community members to become customary justice actors in their communities.

To NGOS and UN agencies

- **Provide training to customary justice leaders on Iraqi domestic HLP law as well as international human rights standards on property rights.** To strengthen the local knowledge and mediation skills of customary justice leaders, training should be provided on substantive aspects of domestic and international HLP law. This would allow for stronger decision making by customary justice leaders and ensure their decisions are more compatible with HLP decisions by Iraqi courts and other customary justice leaders in other parts of the country. Such training would not undermine traditional methods of dispute resolution but provide a greater body of information and knowledge for customary justice leaders to take into account when making decisions.

6. RECOMMENDATIONS

- **Provide technical assistance and support to customary justice leaders to help improve HLP decision making.** Types of technical assistance can include helping parties obtain property documentation, maps, surveys and boundary demarcations and provision of other relevant information on HLP issues and processes.
- **Provide executive HLP coaching for customary justice leaders and local authority officials.** There is a lack of knowledge on HLP issues as well as humanitarian planning and coordination amongst both customary and local government leaders at many levels. NGOs could provide HLP liaison services to provide advice, networking and executive coaching for Sheikhs, Aghas and senior local government officials on Iraqi HLP laws and guidelines, international HLP standards and broader humanitarian coordination issues.
- **Establish a customary justice expert database listing persons with a specific expertise in different HLP issues or geographical areas.** Different customary justice actors often specialise in specific issues. The *Sunaf* typically has a professional specialisation in land issues but *Sheikhs, Aghas, Mukhtars* and *Wujaha* also have specific areas of interest or competency. This would be a valuable resource to aid consultations and referrals between customary actors when they encounter particularly challenging issues or problems that lie outside their skills set.
- **Design and conduct awareness sessions on women's HLP rights, starting with men, then women.** Women in both Anbar and Ninevah governorates expressed an interest in learning more about their HLP rights, but stated that male customary leaders and male family heads would need to give their permission. NGOs could design and conduct sensitisation programmes on women's HLP rights with men and use this as an entry point to gain the acceptance of traditional leaders to conduct awareness trainings for women. NGOs could identify and cultivate specific traditional leaders who have expressed an interest in women's rights to act as champions on the increased access to women to their HLP rights.
- **Implement specialist workshops between customary justice actors.** Customary actors skilled in particular areas of HLP should be encouraged and supported by NGOs to hold seminars for other customary actors. This model could be further extended to increase awareness, learning and collaboration across and between secular, customary and sharia law.

To local authorities, NGOs and UN agencies

- **Provide technical support to help resolve local HLP issues and provide support for local HLP initiatives.** Many local actors are taking pro-active steps to help resolve HLP Issues. For example, the University of Dohuk are building a database of customary justice actors. The Mullahs in Fallujah have developed an HLP brochure to advise members of their community on HLP rights. Tribal Sheikhs in Fallujah have opened an office for HLP-related counselling services. A mapping exercise should be conducted by local authorities, NGOs and UN agencies to identify localised HLP issues, key actors and initiatives to help resolve those issues. Once needs are identified, appropriate forms of support including capacity building, coordination, consultation or dialogue, should be mobilised in an effort to resolve the HLP issues in question.

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8. ANNEXES

Annex 1: Terms of Reference

The Terms of Reference (ToR) for this study outlines five areas of inquiry:

- I. The ways in which customary justice systems are used to resolve HLP disputes.
- II. The relationship between the customary justice systems and other justice systems or key actors (Sharia, secular, police, military, Iraqi Government, Kurdistan Regional Government).
- III. The sources of authority used by customary justice systems (such as texts, and agreements)
- IV. Access to customary justice issues pertaining to women (especially single/widowed women) and minorities.
- V. The strengths and weaknesses of customary justice systems in effectively dealing with HLP issues, the external constraints that they face and any opportunities that have arisen.

Annex 2: Team Discussion Topics

Topic 1: IS related issues

- How has the period of IS control complicated housing, land and property rights issues for the resident community, IDPs and returnees in the post-IS context?
- To what extent is loss of boundary demarcation an issue? How are justice providers approaching the challenges of the loss of boundary demarcation due to conflict affected damage or IS construction? How are disputes being resolved? What role are customary justice providers playing? Are they able to deliver a satisfactory resolution in such cases? If not, why not?
- Did illegal redistribution, sales and renting of property take place during the period of IS control? How are these issues currently being resolved? What role are customary justice providers playing? Are they able to deliver a satisfactory resolution in such cases? If not, why not?
- What are the other key HLP issues? How and to what extent are customary justice providers able to resolve these issues?

8. ANNEXES

Topic 2: Customary justice provider analysis, strengths and weaknesses

- Who are the key customary justice providers in the area?
- Which do you think the consultant should meet with?
- What are their relationships with other justice providers?
- How are they perceived by the other key stakeholders (resident community, government, returnees etc)?
- How do they perceive the HLP issues?
- What is their capacity to help resolve HLP issues?
- What are their key strengths in relation to supporting the resolution of HLP issues?
- What are their main weaknesses in relation to supporting the resolution of HLP issues?

Topic 3: Women, HLP Rights and Customary Justice

- What are the key HLP issues that women are facing?
- Can “women” be disaggregated into different types (e.g. widow, single headed household etc, minority) in relation to the HLP issues they face? If so elaborate further.
- How and to what extent can women access customary justice systems to resolve HLP issues?
- In what ways is does the customary justice system limit access to women regarding HLP issues?
- What opportunities do you see for opening spaces for women’s access to customary justice I relation to HLP issues?

Topic 4: Minorities, HLP Rights and Customary Justice

- What are the key HLP issues that minorities are facing?
- Can “minorities” be disaggregated into different types in relation to the HLP issues they face? If so elaborate further.
- How and to what extent can minorities access customary justice systems to resolve HLP issues?
- In what ways is does the customary justice system limit access to minorities regarding HLP issues?
- What opportunities do you see for opening spaces for minorities access to customary justice I relation to HLP issues?

Topic 5: Secondary Occupation Issues and Customary Justice

- To what extent is secondary occupation an issue?
- How are customary justice providers dealing with the issue of secondary occupation?
- How are secondary occupiers / owners being treated when the owners want to return? How do customary justice providers support this?
- What rights do secondary occupiers have under customary law?
- What rights to owners have under customary law when their properties have been occupied?



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