

Between the *Jirga* and the Judge

Alternative Dispute Resolution in Southeastern Afghanistan

Summary

- Restoring rule of law and promoting good governance are necessary first steps for societies emerging from protracted conflict. To this end, there is a growing realization that nascent government structures can benefit from incorporating aspects of existing traditional conflict resolution mechanisms. The challenge is finding practical ways of linking formal and customary systems.
- At the request of Khost Provincial Governor, Arsala Jamal, the The Liaison Office facilitated the formation of the Commission on Conflict Mediation (CCM) in Khost in November 2006. Composed of six respected tribal elders, the Commission provides an alternative dispute resolution mechanism akin to western out-of-court arbitration.
- During its first 18 months the CCM has worked on 31 conflicts: 18 cases have been resolved; 10 cases are currently being processed; and 3 have been referred to the provincial court.
- Key to the CCM's initial success has been its ability to offer arbitration services free of charge, and to remain neutral.
- Challenges include securing a stable source of funding, and formally linking the CCM to the state judicial system.

1. Introduction

Rebuilding governance in countries emerging from war is increasingly a priority in post-conflict peacebuilding. Without the rule of law and good governance it is difficult for societies to make the transition from war-related lawlessness to peace and social justice. Often overlooked during the reconstruction process are the traditional conflict resolution mechanisms that continue to serve portions of the population. On the one hand, traditional mechanisms of justice and conflict resolution have been credited as an important survival mechanism for communities that have suffered protracted conflict. On the other hand, they are often criticized for being pre-modern and lacking adherence to international human rights standards.

The Afghan Ministry of Justice (MoJ) understands the severe limitations and lack of capacity of the formal justice system and has recognized the need to explore ways to link traditional methods of dispute resolution with the formal system in order to specifically address land disputes and civil cases.¹ Further, the 2007 Afghanistan Human Development Report: *Bridging Modernity and*

¹ *Justice For All: A Comprehensive Needs Analysis for Justice in Afghanistan* (Kabul: Ministry of Justice, 2005)
<http://www.moj.gov.af/pdf/justiceforallEng.pdf>

Tradition, Rule of Law and the Search for Justice, emphasized the need for a co-evolution of the formal and informal legal systems; yet very few local examples exist.

This program brief provides an overview of one example of how traditional and modern governance systems could be successfully linked in order to decrease communal conflict and contribute to stability in Southeastern Afghanistan.

2. The Khost CCM

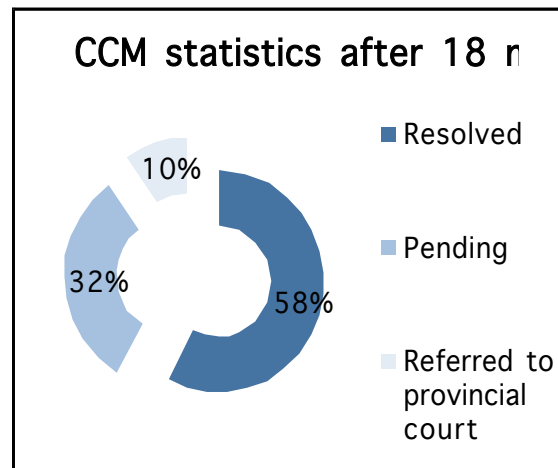
The formation of the Commission on Conflict Mediation (CCM) was initiated by Arsala Jamal, the Governor of Khost Province, in 2006. The Governor realized that land- and resource-based conflicts were straining the provincial government, and that left unresolved these conflicts had the potential to destabilize the province and region.

The CCM emerged from a large *jirga* (ad-hoc traditional conflict resolution mechanism) convened on 23 November 2006 in Khost City to discuss ways of increasing security and stability throughout the province. The gathering included respected tribal elders, religious figures, district councils, district governors, and line departments.

Building on intact tribal structures, the six-member CCM is composed of respected and influential elders nominated by tribal representatives in a community *jirga*. The Commission provides an alternative dispute resolution mechanism, akin to western out-of-court arbitration, for resolving resource- and land-based conflicts in Khost Province. The CCM members work on a volunteer basis, receiving only a small honorarium and travel and office expenses from TLO.

The CCM is officially authorized to arbitrate conflicts by the Provincial Governor, who is also responsible for selecting and referring appropriate conflicts to the Commission. After the Governor's referral, the Commission proceeds to investigate, discuss, arbitrate, and, after reaching a consensus, issue a non-binding decision.

This complementary framework allows official government appointment of CCM members and oversight of case selection while ensuring that decision-making procedures are still firmly embedded in the traditional *jirga* process. Thus, a formal government body (the Provincial



Governor's Office) oversees a customary method of conflict resolution.

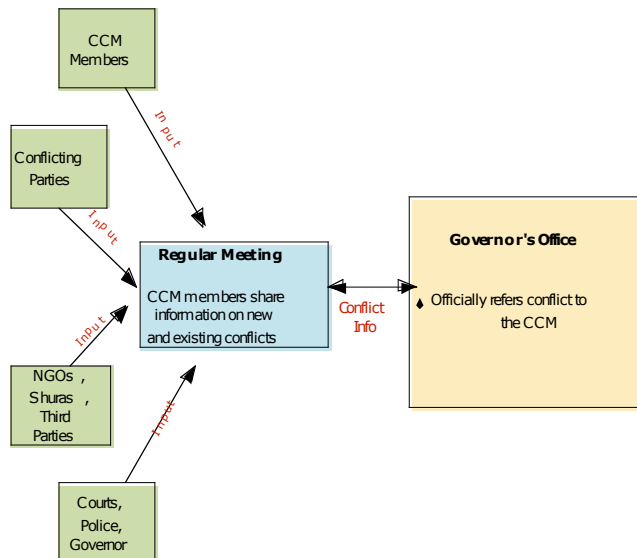
During its first 18 months of existence, the CCM has been authorized by the Governor to work on 31 conflicts: 18 of these conflicts have been successfully resolved, with no reported resumption of hostilities; 3 conflicts have been referred to the provincial court; and 10 conflicts are in the process of being arbitrated by the Commission. The longest open case took the Commission six months to resolve.

All of the CCM's cases thus far have been land disputes. It is estimated that 70 percent of the land in Khost Province has no legal documentation of ownership. In many cases ownership is based on competing claims/documents which have frustrated the formal court system. As the population of Khost continues to grow, the competition for land, especially in urban areas, is expected to increase the number of disputes and further tax the overburdened court system.

One subset of land disputes in Khost with escalation and spillover potential is the settlement of Afghanistan's nomadic (*kuchi*) people. Loss of livelihoods as the result of drought and continued conflict are pushing *kuchi* to settle permanently on land they have for centuries only inhabited seasonally. Presently, 12 to 13 land conflicts between settled tribes and *kuchi* exist in Khost Province; some of these disputed areas straddle the Afghanistan-Pakistan border. According to CCM members, these conflicts are of "high concern" because tribal rivalries often have the potential to escalate rapidly, and the parties involved are susceptible to manipulation by insurgent or criminal groups operating in the region.

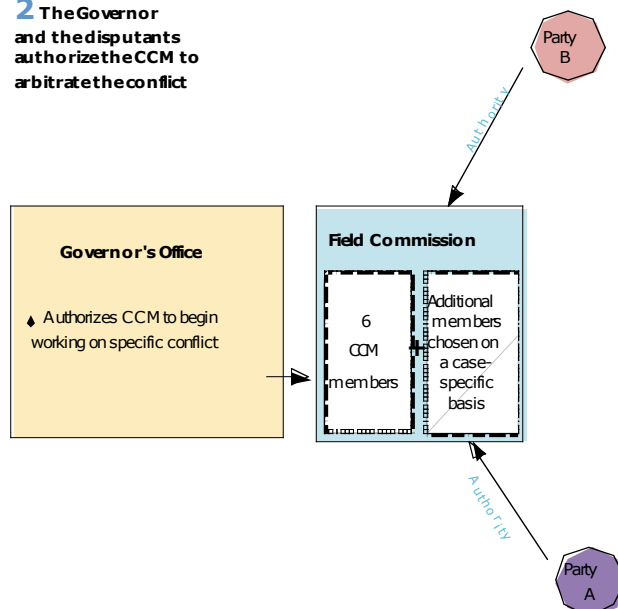
3. How the CCM Works

1 Identification & Selection of Conflict



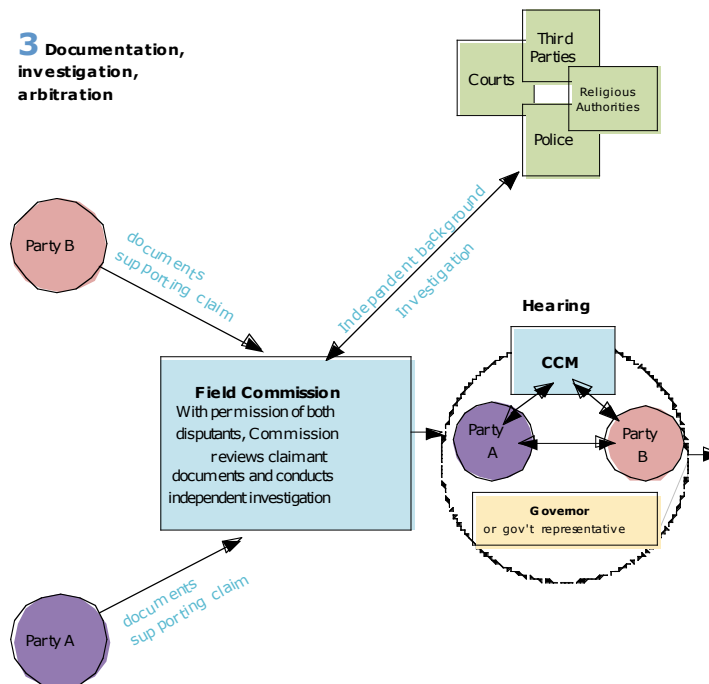
- The Commission meets regularly in Khost City to update and discuss new conflicts or developments.
- The Commission works jointly with the provincial government and its line departments in selecting and identifying unresolved conflicts that pose a threat to stability in Khost – these may be urgent cases where the parties already engage in active violence, or latent conflicts that have a high escalation potential.
- The Governor refers conflicts to the CCM.

2 The Governor and the disputants authorize the CCM to arbitrate the conflict



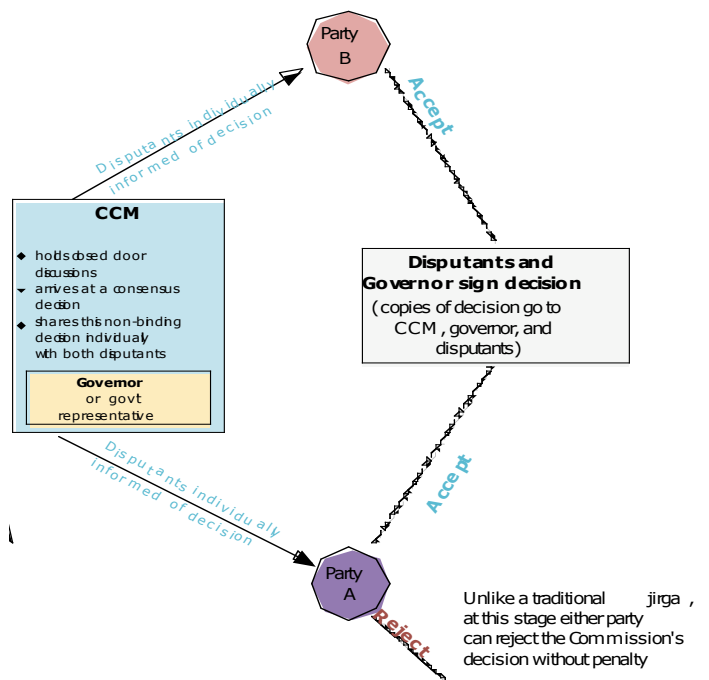
- After selecting the conflict, the Governor formally appoints the Commission; only with government authorization can the commission begin working on the conflict.
- A Field Commission composed of permanent CCM members (usually all 6) and other individuals with knowledge/experience regarding the specific conflict is established.
- The Field Commission contacts both parties and asks for permission to work on the conflict.
- The authority to deal with a given conflict (Pashto: *wak*) is agreed upon and signed, usually by a delegation of six envoys from both parties.

3 Documentation, investigation, arbitration



- The parties are then asked to provide all documents that support their claim. In unclear cases, the Commission members conduct independent background investigations, which include consultations with relevant government departments such as courts, the agricultural directorate, the provincial police department, district governors, and community members.
- After conducting its own investigation, the CCM invites both parties to advocate their claim verbally in an open forum with the Governor or a government representative present.

4 Making, issuing, and signing the decision



- The Field Commission convenes an internal *jirga* to discuss the case. Every Commission member can voice his opinion before a discussion follows to reach a consensus decision.
- The CCM meets with each party individually to explain how and why it reached its decision; only after sensitizing each party will the CCM publicly announce its decision.
- The parties can then accept or reject the decision. **Unlike traditional *jirgas*, there is no penalty for rejecting the decision at this stage.**
- In the case of mutual acceptance, the parties and the governor sign the decision.

4. Opportunities and Advantages of the CCM

Collaborative: Eighteen months after its inception, the experience of the Khost CCM demonstrates that, far from being antagonistic, government and traditional justice systems can be mutually reinforcing. Working in tandem, the CCM and Provincial Governor have resolved 18 protracted disputes, managed emerging conflicts (inter-tribal as well as conflicts between district-level government bodies), and proactively de-escalated conflicts that threatened to flare up.

From a regional security and stability standpoint, resolution of land disputes like those in Khost Province are important because of the potential for non-state armed groups operating in Afghanistan's Pashtun Belt and Pakistan's Federally Administered Tribal Areas (FATA) to exploit them.

A program like the CCM is also important from a larger post-conflict peace- and state-building perspective. If the stated aim of the donor community, international organizations, and host governments is to seek out traditional conflict resolution mechanisms and find ways of incorporating customary law into emerging, and often overburdened formal justice systems, then the CCM represents a practical opportunity for these actors to transform peacebuilding and reconstruction rhetoric into real programming.

Impartial and Accessible: Though conceived as a practical means of addressing the low capacity and local mistrust of formal justice systems at the provincial level, the CCM also provides an alternative to traditional forms of tribal dispute resolution increasingly seen as corrupt and ineffectual after being damaged by successive years of conflict.

Even as the tribal social code of *pashtunwali* remains relatively intact in Khost Province, the *jirga* method of resolving disputes (in which disputants pay *jirga* members for their role as mediators and arbiters) has weakened. The weakening of *jirga* is linked to an overall erosion



of the influence of tribal elders throughout society.

Map 1: Khost Province, Loya Paktia, and Pakistan's Federally Administered Tribal Areas (FATA)

“I would say that in the past the work of *jirgas* was transparent and almost all of the tribal elders wanted to serve their tribes by resolving their conflicts and bringing peace among them,” one Khost CCM member recently noted. “But now I can say that corruption is associated with *jirgas* and most of the tribal elders do *jirgas* for their own benefit by taking bribes or by taking *khalaat* [a customary fee for conducting a *jirga*]. Such things influence the process of decision making and most of the time unjust decisions are made in *jirgas*.”

Even though tribal systems have gradually weakened during the last 30 years of conflict, these systems still remain relatively strong when compared to government justice mechanisms which have been largely absent or ineffective in much of rural Afghanistan. It is clear that both formal and customary systems have weaknesses. It is also clear that in Southeast Afghanistan tribal systems need the government as much as the government needs tribal systems.

A crucial difference between the CCM and traditional conflict resolution mechanisms is that the Commission's services are provided to the disputants free of charge. Customary structures usually request the provision of meals, cash, and transportation for elders or tribal leaders who assist in the resolution of conflicts. In addition to payment for services rendered, disputants often make an up-front deposit of cash, livestock or weapons as a means of guaranteeing that they will accept the *jirga's* decision. By signing the agreement which gives a *jirga* permission to handle a conflict, the disputants submit themselves to any decision whatsoever, tempting them to unfairly influence the decision-making body. Further, the deposit (*machalga* or *baramta* in Pashto), which is

meant to show each side's commitment to the process, leads many parties to accept the decision in order to get their money back. In many cases these economically motivated agreements are soon broken.

By removing payment from the process and adding government oversight, the CCM decreases the potential for bribery and insures that disputants enter into agreements that are not financially motivated. Moreover, the *jirga* process tends to disadvantage lower income groups unable to cover the expenses of mediators or make the traditional 'good faith' deposit. Thus, the no-charge CCM mechanism allows greater access to justice for a wider portion of the population.

Effective: Despite, or maybe because of, the lack of *machalga*, the CCM has been successful in reaching lasting agreements. Commission members also attribute their success rate to the manner in which they inform the disputants of their decision. "Before announcing our decision we talk to conflicting parties and share it with them and even listen to some of their suggestions," a Commission member stated. "This is why our decisions are accepted. We do not have any other implementation force for our decisions." However, the Commission has not hesitated to use its formal linkage with the Governor to facilitate agreements. "When one of the parties doesn't listen to us," a CCM member stated, "we share [this information] with the Governor and he invites the party for further discussion." The Governor and the party are free to explore other possible solutions and/or compromises.

In one sense, the CCM has bridged the gap between formal and customary systems by allowing the government to have oversight of case selection while remaining accountable to the community it serves. As a result, the community *and* the local government view the process as legitimate, and both benefit: community members have greater access to justice and the strain on the court system is decreased.

The Commission has also bridged a less visible, though arguably more important gap: the credibility gap. The *legitimacy* of 'modern' governance systems in tribal societies depends on the *credibility* of those who institute and operate these systems. The fact that personal credibility is a prerequisite for institutional legitimacy is a reality

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When the Commission started people didn't know about our work. Now the Commission is quite popular and even conflicting parties ask the Governor to refer their disputes to us. *Khost CCM Member*

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that continues to beguile state-building efforts. As the Afghan government attempts to establish itself as a legitimate presence in rural Afghanistan, government officers (from governors to magistrates to police) will need to build up their credibility, one way of doing this is working with and through customary bodies like the CCM.

5. Challenges

Sustainability: The CCM has been effective because it has had government support and is seen as a legitimate, impartial, and accessible forum for disputants to resolve conflicts. As mentioned above, unlike traditional *jirga* mediators the Commission is not paid by the disputing parties; and unlike the formal justice systems, the CCM is not reliant on government funding. In the long term, however, government funding will be necessary to make the CCM sustainable. In fact, active government involvement is vital to the continued success of the Commission in Khost and is the *sine qua non* of expansion into other Provinces. Looking ahead, the challenge is for the CCM to retain a level of independence while becoming a state-supported entity.

In the immediate sense, however, the CCM's long term sustainability is directly tied to enhancing its present capacity and increasing awareness (at the community and government level) of the Commission's services and potential. These

immediate priorities require securing a stable source of external funding.

Recognition: Realizing the Commission’s potential to lighten the case-load for the provincial government, the Governor of Khost has been a strong supporter of the CCM. By contrast, the Khost Provincial Court tends to see the Commission as competition, and has in some cases blocked the CCM’s request for land title documents. The mistrust of the Provincial Court can be partly traced to the CCM’s ambiguous status within the Afghan judicial system.

While the Afghan Ministry of Justice has praised customary law as “flexible, adaptable justice

tailored to local beliefs and conditions,” and has recommended “stronger linkages [...] between the state system and the traditional systems,” the 2004 Afghan Constitution makes no reference to customary law.² Thus, it remains to be seen what legal weight a CCM decision, even when signed by the Governor, actually carries.

6. Moving Forward

TLO, with funding from the United States Institute of Peace (USIP), is strengthening the CCM in Khost and expanding the program into Paktia Province. Building on the success of the Khost Commission, while taking into consideration lessons learned from an ongoing evaluation of this project, TLO aims to

Lessons Learned

- Linkages between traditional and modern conflict resolution mechanisms can be found and used in support of, and complimentary to, state-structures.
- Customary mechanisms can be used strategically as a government-approved out-of-court mediation/arbitration mechanism.
- Collaboration between traditional and modern systems enhances the transparency and accountability of both systems.
- Communities appreciate conflict resolution that is free of charge because it does not disadvantage the less affluent population, increases overall access to justice, and can decrease corruption.
- Because the state court system and the CCM have much to offer each other, establishing a formal working relationship between the two bodies is vital for the CCM’s existence.

- **Build** institutional memory for government officials and CCM members in Khost by developing a tribal conflict database which will record, map, and manage information on conflicts within the district and catalogue CCM case files;
- **Increase** the number of permanent Khost CCM members from six to eight in order to ensure greater tribal representation;
- **Expand** the CCM to other provinces throughout Afghanistan using the Khost Commission as a model, while adapting to the different social structures and capacities that exist elsewhere;
- **Explore** ways of developing a working relationship with the provincial court, and establishing a place within Afghan law for a customary arbitration mechanism;
- **Evaluate** the success of the Khost CCM to determine if the program is effectively meeting the needs of the community, and is sustainable over the long-term.

² *Justice For All*, 4



THE LIAISON OFFICE

Created in 2003 with a mission to *facilitate the formal integration of communities and their traditional governance structures within Afghanistan's newly emerging governance, security and reconstruction framework*, the Tribal Liaison Office (TLO) maps, researches, and analyzes ongoing conflicts in the Pashtun tribal areas, and provides expertise and logistical support to community-based conflict resolution.

TLO focuses on a participatory approach to post-conflict peacebuilding that uses processes of customary Afghan structures such as *jirga* and *shura*, and thus differs from state-building that directly or indirectly only emphasises modernity. This approach, drawing on the “do-no-harm” and “reflecting on peace practises” frameworks, acknowledges the existence and importance that customary structures still hold in the minds of many Afghans—patrons and clients alike.

TLO's overarching goals are to serve as a platform for constructive dialogue in the Pashtun Belt, build the capacity of provincial actors to facilitate governance and development initiatives, and promote cross-regional dialogue. Presently, TLO is designing methodologies and models to address two objectives:

- **Improving human security and governance in tribal areas:** This includes activities that address aspects of *freedom from fear* (prevention, management and resolution of conflict with a diverse set of tools) and *freedom from want* (design and implementation of development objectives, and facilitation of projects that enhance the livelihood of communities, especially in the area of natural resource management);
- **Supporting the Afghan government's ability to carry out its Responsibility to Protect (R2P):** Currently the Afghan government is not fully able to perform its responsibility to protect its citizens from conflict and violence (especially in the volatile areas of the Pashtun Belt). TLO aims to foster linkages between customary and other community structures and the Afghan government in order to improve on and strengthen the government's capability to deliver in this regard

In addition to its headquarters in Kabul, TLO has regional offices in the Southeast (Paktia), South (Kandahar), East (Nangarhar); and four provincial offices (Khost and Paktika in the Southeast, and Helmand and Uruzgan in the South).



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