



**THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS**

RESOLVING LAND  
DISPUTES IN POST-  
CONFLICT NORTHERN  
UGANDA

THE ROLE OF TRADITIONAL  
INSTITUTIONS AND LOCAL COUNCIL  
COURTS

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RESEARCH PARTNERSHIP  
PROGRAMME  
DANISH INSTITUTE FOR HUMAN  
RIGHTS (DIHR)

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of compliance with human rights standards concerning participation and accountability, fairness of procedures (including the protection of the vulnerable) and substantive outcomes.

During her stay at DIHR, Rose Nakayi’s research work was supervised by Senior Researcher Stéphanie Lagoutte.

## ABSTRACT

Post-conflict northern Uganda has witnessed an increase in disputes over land. This has, to a great extent, been as a result of the armed conflict and its aftermath. Beyond that, other chaotic factors embedded in various social, legal, economic, and political aspects of this society have influenced the nature, gravity, and dynamics of these disputes and the way in which Traditional Institutions and the Local Council Courts have attempted to resolve them. Using examples from field research in Acholiland and an analysis of human rights relating to dispute resolution, this paper shows the linkages between (1) the chaotic factors in Northern Uganda, (2) the diverse and unique contestations on land, and (3) the role of Traditional Institutions and Local Council Courts. The paper argues that processes to improve the operation of Local Council Courts and Traditional Institutions may not succeed without simultaneous efforts to do away with the effects of the chaotic environment within which they operate.

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# CHAPTER 1

## INTRODUCTION

The circumstances of governance, economic, and social life in post-conflict Northern Uganda, as detailed herein, can be described as disorganized or even chaotic. These circumstances have brought about complex forms of contestations over land that greatly impact the effective operation of the institutions handling land disputes at the lower level, including Traditional Institutions (TIs) and Local Council Courts (LCCs) in Acholiland.

Land disputes in Uganda can be resolved by a number of courts in the hierarchy of institutions, right from the Magistrate Courts up to the Supreme Court.<sup>1</sup> Meanwhile, institutions at the lowest level of communities remain relevant in the lives of the majority of the poor in Northern Uganda.

The involvement of TIs is to some extent sanctioned by law, as shown in Section 88 of the Land Act Cap 227:

**” Nothing in this Part shall be taken to prevent or hinder or limit the exercise by traditional authorities of the functions of determining disputes over customary tenure or acting as a mediator between persons who are in dispute over any matters arising out of customary tenure.”**

The above provision empowers the TIs to receive and resolve disputes arising from customary tenure, and in some instances plays a conciliatory role of mediators between parties to such disputes.

The LCCs are established under the Local Council Court Act of 2006, which partly regulates their jurisdiction and mode of operation. The intention of the legislator as deduced from the Local Council Act is that the LCCs should operate at every village, parish, town, division, and sub-county level.<sup>2</sup> Uganda’s LCCs were established by the National Resistance Movement, under the leadership of then rebel leader, now president, Museveni during the bush war in the 1980s as



part of a whole system of Resistance Councils that later came to be known as Local Councils. Since the system of local government left by the colonial government had almost vanished with Idi Amin's regime in the 1970s, the gap that was left, called for establishment of another structure of government: the Resistance Councils.<sup>3</sup> They have survived to date, with numerous conspicuous and latent modifications.

A key characteristic for these village- and parish level councils is their double role as executive officers of Local Council Committees and at the same time (quasi) judicial officers of Local Council Courts.<sup>4</sup> Despite handling specific land matters in accordance with their quasi-judicial mandate, these institutions operate in an unstable environment characterized by a highly imperfect and chaotic functioning of governance and justice machinery - including abuse of power, corruption, neglect of customary land tenure and rights, etc. These factors have affected the effective handling of land disputes by TIs and LCCs in a human rights sensitive manner.

The paper hereby sets out to investigate the role of TIs and LCCs in handling land disputes in Acholi sub-region within the milieu of chaos and imperfections such as corruption and weakened systems, among others. It goes ahead to gauge the level of adherence to some prerequisites of human rights in the process of land dispute settlement in the LCCs and TIs.

Before delving into the details, it is important to note that such a study of land dispute resolution invokes the need to look at the literature on the linkages between customary tenure and land disputes, land disputes and conflict, and finally land dispute resolution institutions and human rights.

## CHAPTER 2

# ESTABLISHING LINKAGES BETWEEN CONCEPTS: A LOOK AT THE LITERATURE

### 2.1 CUSTOMARY TENURE AND LAND DISPUTES

Much of the land in Northern Uganda is held under customary tenure.<sup>5</sup> Customary denotes “traditional” (although not necessarily fully traditional, since it is at times subject to state control).<sup>6</sup> The attributes of customary tenure can be placed on a continuum between traditionally regulated tenure and state regulated tenure. Customary land tenure goes beyond land as ‘an object’ to perceive land as ‘an item’ that defines peoples’ identity, social class, and social relationships as well as relationships with the soil/land that they had to put to ‘use’.<sup>7</sup> In its “classical” sense, customary land tenure evokes relations of agency between the current holders, the ancestors that passed it onto them, and future generations.<sup>8</sup> This classical view contrasts with a modern, materialist view, in which the current holders of the land are only accountable to themselves. Their ancestors and future generations cannot (in practical terms) hold them accountable, as they do not exist.

The land is held according to customary (usually unwritten) rules, whose custodians are (more often than not) the elderly in the community - many of whom may be deceased.<sup>9</sup> Since customary land is supposed to be used by the current users in consideration of the interests of both past and future generations of beneficiaries, deceased members of the community continue to exert moral authority over customs. Their physical state of non-existence however, means that this authority cannot easily be enforced, for lack of agency, but remains a moral obligation. Further, it affects continuity of custom that many of the elders, who would traditionally have been custodians, are deceased. Death of the elders leads to inability to pass on the customs that relate to land to successive generations, which is among the ways to ensure continuity of the customary land tenure system.

Land that is held customarily is subject to customary rules that ensure its application for the good of those socially entitled, unlike where it would be on the market for those that can purchase it.<sup>10</sup> Customary tenure is thus a system

in which land has social, political, economic, and other functions for all individual members of the community, and for the community as a whole.<sup>11</sup> The good of the entire community however, comes before any imperative to protect individual rights or interest in case of a clash between the two. Equal access and equal enjoyment ensures less dissatisfaction of the members, but not necessarily complete absence or lack of land disputes. The disputes that arise would however be of a different kind, peculiar to customary land tenure or holding.

The infiltration of the customary space by western concepts and laws, leading to co-existence and at times clashes between the foreign and the customary, implies a change in the nature of disputes on customary land. This is more so since the customary and the formal/Western-originated tenure are conceptually/philosophically different, which also applies to the rights that they guarantee and the institutions that deal with them.

## **2.2 PRESSURE ON CUSTOMARY LAND**

The customary is not anchored in a stable immutable foundation and therefore is not static.<sup>12</sup> The value systems of customary tenure are susceptible to change, in response to a number of pressures as a result of changes in aspects of the world around it (political, economic, social, etc.),<sup>13</sup> and changes in the moral values of the people that hold the land. The degree and pace of change outside the customary space is greater than what traditional

processes of organic, dynamic development previously had to accommodate. Therefore the removal of customary tenure from a more traditional space into the modern (mainly capitalist) world does not leave it unchanged. This brings about changes in the people (morals and values) that hold the land as well as in the environment, greatly controlled by the nation-state, in which the land is held. These changes threaten the classical notion and foundation of customary land, i.e. a land for the good of the community and its individual members - living, dead, and future generations.<sup>14</sup>

High levels of poverty and people's acquisitive nature tend to lead them to defy customary rules in order to satisfy their immediate or self-interested needs, trying to get as much advantage as possible from the land through the exclusion of others. Such tendencies have been facilitated by state driven development imperatives, shaped by the capitalist market economy, fed into statutory law, and enforced by justice institutions. The above include efforts to promote the conversion of customary land into freehold, since the customary was for a long time believed to be the antithesis to development.<sup>15</sup> Registration processes for land held under customary tenure have, at various points in the history of Uganda (and indeed other African countries like Kenya and Tanzania), been promoted as one of the ways to secure tenure.<sup>16</sup> The initial pilots of these processes in Uganda could only be accepted

in the Districts of Kigezi Ankole and Bugisu after convincing people that they would result in reduction in land disputes on customary land.<sup>17</sup> In the contemporary world, such efforts at privatizing land are promoted in the belief that they can secure tenure and also make land a marketable commodity that can be used as collateral for loans, by which it is believed that the beneficiaries would be in position to contribute to development processes.<sup>18</sup> This argument has been considered lopsided by some scholars.<sup>19</sup> Also critical of the same argument is the UN Special Rapporteur on the Right to Food, Olivier De Schutter, who believes in the value of securing land rights of the poor and farmers, before promoting investment in land.<sup>20</sup> This, he believes, will contribute to the fight against land grabbing.

Efforts at conversion or registration of customary land can be a step among many in the pursuit of development as a goal. It may not necessarily result into human development or development in terms of increased GDP, since privatization may come with more disadvantages than those associated with the customary that it is intended to replace. It is likely that pressure on, and disputes over, land will increase as a result of subjecting land to such registration processes and the aftermath of these processes, if the process is not handled with care.

The demand for land for modern/ commercialized agriculture further explains

the increased pressure on land as a result of a rising need for private rights to land in some places or countries.<sup>21</sup> Other important factors that lead to disputes about land are an increase in population pressure on land, and high demand for land by foreign companies and investors.<sup>22</sup>

It is argued that the above factors, among others contribute to high pressures on land and the prevalence of land disputes. Yet intrinsic attributes of customary tenure fail to respond effectively to changes in the social and economic environment (e.g. commercialization and appreciation in the value of land), that lead to such pressures on the land and disputes.<sup>23</sup>

### **2.3 CUSTOMARY TENURE IN ACHOLILAND**

Acholiland is a region in the northern part of Uganda. Customary tenure is the most widespread form of tenure in northern Uganda, and it is estimated that about 93% of the land in Acholiland is held under customary tenure.<sup>24</sup> Acholiland is experiencing a complex web of contestations or disputes over land. A number of reasons explain this. First, there are the intrinsic weaknesses of customary tenure that do not cope well with a commercialized environment as discussed above. Secondly, a lot has changed in social and economic terms: Land disputes are heightened by an increase in the value of land. Hence, the loss of a few square meters of land means more in monetary terms today than it did fifteen years or more back.

Other factors responsible for an increase in disputes over land in Acholiland specifically, are a paucity of permanent markers of the boundaries of land and, in the majority of cases, a lack of documents evidencing land ownership.<sup>25</sup> Prior to the armed conflict, natural features like streams, trees, or plants were commonly used as markers of land boundaries. None of these features previously used as boundaries, remain unaltered after a lapse of over 15 years. Long periods of displacement and absence from home blurred the boundaries, and the ability in some cases to identify the boundary markers or reach a consensus on them. The situation is further complicated by the fact that no sort of record/register of the boundaries and size of land has been kept. This makes effective resolution of disputes cumbersome.

This raises a number of issues regarding the present day legal standards in courts of law (ownership proved by registration and documents certifying it) as opposed to the traditional methods (ownership as a matter of ethos and trust in the memory of the senior members of society, rather than ownership on paper). The disruptions of society and changes brought about by lapse of time threaten the strength of the traditional methods. The social context has changed due to mobility of people from home into the camps and back. Beyond this is the changed role of elders and the strain on relationships among people.

## **2.4 LAND DISPUTES AND (ARMED) CONFLICT**

Some literature points to a two way relationship between land disputes and (armed) conflict: While land disputes cannot be said to have directly caused the civil strife in Rwanda in 1994,<sup>26</sup> strained relations of people over land (starting in 1988) most certainly provided fertile ground for a speedy spread and intensification of the conflict and genocide there.<sup>27</sup> Situations like this are more likely where land is the source of livelihoods based on subsistence agriculture. The temptations to resort to desperate measures to gain, or hold on to land, are even greater when the means of subsistence are threatened.<sup>28</sup>

Armed conflict also has the potential to stifle relationships concerning land, intensifying existing disputes or bringing about new ones. Studies of other countries like Cote d'Ivoire have indicated the potential for a relationship of causation between (armed) conflict and land disputes.<sup>29</sup> (Armed) Conflict may transform the nature of land disputes in situations where land rights are embedded in other complex settings like weak rule of law, vitiating authority over land, and weakened social pillars.

In Northern Uganda, studies on land issues indicate that displacement from land consequent upon armed conflict, coupled with unclear rights to land, greatly contributed to an increase in disputes over land in the post conflict phase.<sup>30</sup> Prevalent among the disputes

are boundary disputes, those arising from land thefts or illegal occupation, and others related to demands for land for commercialized agriculture.<sup>31</sup> A number of factors explain the increase in disputes. There is no official record of the position of boundaries to everyone's or any community's land in Acholiland.<sup>32</sup> This situation makes it possible for land grabbers to adjust their boundaries at will, with the aim of stealing portions of land from their neighbors. That notwithstanding, some natural markers of boundaries of land have survived for decades and the elders, plus other members of the community, know where (and what) they are. For example in a boundary dispute case of **Sabina Ojok v Odong Edward**<sup>33</sup>, decided by the Local Council Court, the boundary was marked by sisal (which persisted for over 27 years), and a stream.

Although one may argue that use of plants or trees as markers is an outdated method due to their non-permanent nature, the above case is relatively unique. The sisal lasted for decades. Stones are used to mark boundaries after registered land is surveyed in the other land tenure systems, e.g. freehold. Even then, there are instances where people tamper with the stone, to grab portions of their neighbor's land. In such cases, the register can be referred to, to rectify the problem, unlike in a customary setting where there are no registers. Registers too, have in some instances been tampered with.<sup>34</sup> From the preceding, it seems to be more an issue of a strained morality coupled with

accommodating imperfect circumstances than anything else.

In addition to the above, as a result of the number of deaths that occurred during the armed conflict, a number of claims are laid to land on the basis of administration of estates (inheritance). Where there are multiple claims on the same land, they have led to contentions about who is the rightful owner of the land. One case from the defunct Gulu Land Tribunal suffices as an example; the Gulu District Land Tribunal Claim No. 44 of 2005, between **Ato Anjella and Olweny Philip and 14 others**. The claimant in this case sought a declaration that she was the owner (for herself and other beneficiaries of that estate) of plot No. 63, Pabo Sub ward, Kirombe Gulu Municipality as administrator of the estate of the late Silvano Okuga. The deceased lawfully got the land from Gulu Municipal Council Authority in 1962, but it was wrongly occupied by the respondents who illegally disposed of it to various persons despite protests from the claimant and against her will. It should be noted that some of the defendants in this case claim that they acquired the land from Silvano Okuga before he died, although they did not have proof of that assertion. Other claimed to have acquired it as a gift from Silvano Okuga in 1971 and others through sale from the Local Authority. Many wanted the court to recognize them as bonafide owners of the land against the will of the applicant and others.<sup>35</sup>

This case illustrates that it is possible to have multiple claims to land on the basis of various documents, or from various people in (Northern) Uganda. The absence of a clear system of bequest of property, like land by deceased persons, and the strains presented in a post conflict setting makes it possible for a number of actors to take advantage of those that are entitled to benefit from estates of deceased persons, in order to steal their land.

Further complicating the post conflict situation in terms of land rights is the return of persons formerly displaced to their original homes and the beginning of a new phase of contestations on land in the areas to which they returned.<sup>36</sup> Almost 90% of the people in Acholiland were displaced by the conflict and many that went to camps far away from their original homes could not access their land for a long period during displacement.<sup>37</sup> Return did not take place all at once, but was spread over a period of years. Within the struggle for scarce resources, and the desperate desire of almost all formerly displaced persons to resettle and start life after war, a diversity of conflicts and disputes has befallen the region. A number of people have had to face challenging situations with regard to land conflicts as they return to their original homes.<sup>38</sup> One of the challenges faced by late returnees is that of loss of land, as early returnees grabbed portions of the late returnees' land by expanding boundaries, or actually cultivating land that belongs to the late returnees, hence causing conflict between the two categories of people.<sup>39</sup>

A recent study indicates that 20% of the people in Acholiland have been a party to a conflict of sorts.<sup>40</sup> These include conflicts ranging from those over access and control of land, to thefts, and disputes within a family on matters of property, to conflicts over inheritance or domestic violence.<sup>41</sup> The long periods of displacement have also contributed to abject poverty, leaving land as the key item to resort to, and use, as a vehicle out of poverty.

Insufficient knowledge of both customary and/or statutory law, destabilized or undermined moral values, high consumption of alcohol and unemployment, all brought about by protracted war, have in some instances driven people to resort to all possible means (including killing) to grab land that belongs to others, or to overly protect land that they own.<sup>42</sup> It should also be noted that the proliferation of guns during the conflict coupled with a deficient disarmament exercise left many guns in circulation which are regularly used in fights over land, thereby escalating violence and conflicts over land.<sup>43</sup>

Yet, the nature of the customary land tenure system and all existing dispute resolution institutions render them ill-equipped to deal with such cases.<sup>44</sup> It therefore becomes questionable if such institutions are capable of respecting the rights of the disputants when handling cases. Since Uganda subscribes to a number of international human rights instruments, and inscribes a number of human rights in her constitution, the Ugandan

population and the international community expect land dispute resolution to be among those arenas where rights relating to the exercise of judicial or (quasi) judicial functions are respected.<sup>45</sup>

## **2.5 LAND DISPUTES RESOLUTION MEDIUMS: AUTHORITY/LEGITIMACY**

TIs in Acholiland operate in the customary space, whereas LCCs operate in a unique way; they are created by statute, but run with minimal state control and supervision. They run side by side with other judicial institutions that are mandated to handle land cases; e.g. Magistrate Courts, High Courts, etc.

It has been argued in some literature that the more institutions (legal versus customary) we allow to operate (with their distinct mode of operation and rules), the more likely are clashes between or among them, and this affects effective land dispute resolution.<sup>46</sup> On the other hand, Vandekerckhove's research in Assam India shows that it is not always exclusively about competition but accommodation as well.<sup>47</sup> To him, in situations where none of the existing institutions have "sovereign control over people and the territory" or if they lack the ability to claim exclusive control over issues (including those related to land), the power space has to be shared among all existing players leading to "negotiation, accommodation, and only selective contestation".<sup>48</sup> Such "selective contestation" would arise where one or more of

the players are "attempting to wield authority too bluntly or beyond its realm of power".<sup>49</sup>

The above also reverberates with the situation in northern Uganda during the armed conflict, in which neither the LCCs nor the TIs were sufficiently anchored in society to claim exclusive control of land issues, including dispute resolution. While state law carries provisions giving LCCs (and higher judicial entities) a mandate over land matters, their ability *de facto* to exercise this mandate is curtailed.<sup>50</sup> The TIs on the other hand, although lacking equivalent support in written law, were more relevant as land dispute resolution agents both during the armed conflict and in the post-conflict phases.

The inability of LCCs to benefit significantly from their connection to the state (through legislation, establishment and regulation) puts them at (almost) the same level as TIs. This could, according to analysis of such situations by Sikor and Lund, make the LCCs struggle for legitimacy just like the TIs.<sup>51</sup> This has the potential to lead to competition between the LCCs and TIs.<sup>52</sup> In fact, the situation is often one in which neither can effectively operate without the other. There are a number of instances in which they cooperate rather than compete.

## **2.6 METHODOLOGY AND PURPOSE OF STUDY**

This paper is based on information collected through a desk review of secondary literature,



and fieldwork. The desk study goes beyond published academic works in covering other field research reports, records of proceedings at mediation meetings conducted by TIs, literature on customary land law, and written laws pertaining to land. Some of the information used in the paper was gathered during field visits for purposes of data collection for the researcher's Doctor of Juridical Science (JSD) dissertation. This research was conducted from August to December 2010 in Gulu District in northern Uganda.

It involved semi structured and unstructured interviews with persons responsible for resolving land disputes. These include the Chief Magistrate in Gulu Magisterial area,<sup>53</sup> some persons that serve on the Parish and Sub-county Courts, chiefs and elders or Rwot that deal with land matters in a traditional sense (as members of TIs). The institutions, which this paper deals with, are not considered to be "on record" in the technical sense, which makes it difficult to track records of their proceedings.<sup>54</sup> The field research therefore also involved looking at some of their (raw) records, when available, of proceedings in resolving land disputes. This was only possible to a very limited extent, especially with the LCCs due to poor record keeping or note taking, and because most records are written in the local language (Acholi) and not in a comprehensive manner. On the whole, the above methodology aims at capturing the social realities and the legal and (selected) human rights frameworks

at the local level that impact on land matters and resolution.

With that, this paper will argue that to a great extent, the highly chaotic and unstable circumstances in post conflict northern Uganda have brought about complex forms of contestations on land, and have also greatly impacted the effective operation of institutions that handle land disputes at the lower level (TIs and LCCs).<sup>55</sup> It goes ahead to gauge the extent to which these institutions have adhered to human rights imperatives in the process of settling land disputes.

The preceding sections show that the lower level institutions have greatly been affected by the circumstances, and are currently not well equipped to deal with the changing nature of disputes or contestations on land. It will further show that it is important to improve the operating environment in tandem with strengthening the lower level institutions, as a conduit through which customary land rights can be protected in the post-conflict situation of northern Uganda.

## CHAPTER 3

# THE LEGAL FRAMEWORK AND RELATED MATTERS

### **3.1 PERTINENT INTERNATIONAL HUMAN RIGHTS STANDARDS ON RESOLUTION OF LAND DISPUTES**

Land dispute resolution in Acholiland presents an arena in which human rights are at stake, and where there exists a great need to ensure that they are respected. Uganda is a party to a number of international human rights instruments that set standards, which the country must abide by, in the process of determining land disputes and other contentions around human rights.<sup>56</sup> When Uganda ratifies a human rights instrument, it bears the burden of respecting and ensuring rights that are contained in such instruments. Among the important steps that should be taken is the establishment of institutions to ensure that rights are protected and the creation of effective remedies in cases where human rights are breached.<sup>57</sup> The foregoing would be easier if all rights in Uganda were stipulated in national law and protected by state institutions.

Specifically on the right to property (in this case land), it is a classical contention

that private property can best be protected through public or state institutions.<sup>58</sup> This becomes critical in countries like Uganda, which holds a wider customary space within which a number of property- or land rights are claimed and regulated by non-state entities. LCCs and TIs operate within spaces with very limited state presence. Delegating a role to such institutions (by design or default), that is (primarily or traditionally) supposed to be carried out by the state, does not rid the state of its obligation to ensure that peoples' rights to land and other rights, are protected. It remains the primary responsibility of Uganda as a state party to human rights instruments to ensure that rights are respected by state and non-state institutions that operate within its domestic jurisdiction. This is in line with General Comment 32 of the Human Rights Committee.<sup>59</sup> Below follows a discussion of some of the rights or standards that should be maintained in the resolution of disputes over land in the LCCs and by Tis.

### 3.1.1 FAIRNESS IN PROCEEDINGS

The right to fairness in proceedings is provided for in the International Covenant on Civil and Political Rights (Article 14), the African Charter on Human and Peoples' Rights (Article 7) to which Uganda is a party, and the Constitution of the Republic of Uganda (Article 28).<sup>60</sup> It is an important right in matters of both a criminal and civil nature.<sup>61</sup> From all the above provisions, some of the prerequisites for any proceeding to be fair include:

- The Tribunal or body handling the matter should be “independent”, “competent”, “impartial”, and “established by law.”<sup>62</sup>
- All parties involved in a case must be notified of the dates, time, and venue of the proceedings.
- Except in instances that are stipulated in the provisions above, the hearing must be of a public nature. Any interested party should be in position to attend a proceeding, no matter their gender, level of education, etc.<sup>63</sup>
- A dissatisfied party should be in position to appeal a decision to another “competent” national Organ.<sup>64</sup>

### 3.1.2 NON DISCRIMINATION AND EQUALITY

Some of the most important human rights principles that “constitute a basic and general principle relating to the protection of human rights” are non-discrimination, equality before the law, and equal protection under the law.<sup>65</sup>

Article 3 of the African Charter provides that “1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.” A similar provision is contained in Article 21 (1) of the Constitution of Uganda.

The above discussion on equality before the law should be supplemented by a brief analysis on the prohibition against discrimination on grounds of sex, race, ethnic group, language, religion, political or other opinion etc., as contained in Article 2 of the ACHPR and Article 21(2).

General Comment No 18 of the Committee defines discrimination as;

**” 7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term ”discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>66</sup>**

The discrimination against women on the basis of their gender, the poor, or persons of a particular political affiliation in the process of handling land disputes hereby contravenes the prohibition on non-discrimination.

### 3.1.3 MEASURES TO ENSURE RESPECT FOR RIGHTS

Article 1 of the African Charter enjoins states to “undertake and adopt legislative and other measures to give effect” to rights that are provided for in the Charter. The right to property is one of those rights that are guaranteed in article 14 of ACHPR - although with exceptions.<sup>67</sup> Uganda has a duty to ensure that that right, together with other rights, can be enforced through appropriate institutions within her domestic jurisdiction. Therefore Article 1 of ACHPR should be read together with Article 26 ACHPR, which stipulates that;

**“ States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.”**

The foregoing speaks more to the ideal situation, but the reality in Uganda and Acholiland (as will be shown in this paper) is far apart from that. State ratification of human

rights instruments is not always motivated by the desire to deliver on human rights, and neither are they always backed by institutional or economic capabilities to deliver on the obligations that accrue from ratification. It is a process that is greatly driven by, among other genuine reasons, the desire to make political statements. States have obligations to their nationals and to the international community. For weak states that are still under construction like that of Uganda, ratification of international human rights instrument is greatly driven by the desire to be seen as being interested in what is considered important by international peers. They do not have the requisite capacity to deliver much on their obligations under international human rights law to their nation. This does not, however, displace their international obligations under human rights instruments.

It therefore remains Uganda’s primary responsibility to ensure that TIs and LCCs dealing with disputes over land are up to the task of respecting and ensuring that their work results in human rights protection rather than violation. As alluded to earlier, the relatively absolute notion or obligation of protection of rights on the part of the state is in practice curtailed by a number of hurdles. The main challenge is the wide gap between the obligations of Uganda in both international human rights and national legal frameworks, and what happens on the ground.

### 3.2 UGANDA'S APPLIED LAW/RULES/ CONCEPTS AND JURISDICTION

The Constitution of Uganda and other laws, make provisions for a number of rights that ought to be respected in many areas - including dispute resolution. Among these are due process rights, including: Article 28 on the right to a fair hearing, and Article 50 on the right to access a competent court for redress in cases of human rights violations.

With regard to discriminatory customary law, the Constitution of Uganda provides for a safeguard against any customs that may have detrimental effects to women and other persons, including unequal treatment. Article 2 (2) provides:

**“ If any other law or any custom is inconsistent with any of the Provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”**

The application of custom is routine practice when it comes to land matters arising from customary tenure. This is more so since the Land Act cap 227 defines customary tenure as that which is held and managed according to the customs of a given people.

Customary land law does not at all times accord the same protection for both men and women. Even in some instances where

equality is encouraged in written law (as seen in the above provision of the constitution), it does not necessarily trickle down to all people on an equal footing. This is mainly due to the wide gap between law and reality whereby inequalities on the basis of gender, age, class, and financial capabilities are common.

Section 88 of the Land Act recognizes the role of traditional mediators in dealing with disputes relating to land under customary tenure. Due to the diversity of customs in Uganda, it is logical that the Land Act does not deal with the detail of which customs to apply in such cases. The implication in section 3 of the Land Act is that the customs of a given people in any given society shall be applied to land cases arising from customary law.

TIs in Acholiland apply Acholi customary land law in dealing with land disputes. A number of human rights issues arise in application of a law whose parameters are not defined, for it is neither codified nor written down. The law referred to, is inscribed in the minds of the community's seniors/elderly. Although this brings about flexibility in its application, it also contributes to inconsistency, difficulty, and uncertainty. It is likely that similarly situated disputants can obtain different decisions from the same committee of elders, who are not obligated to follow any set standard of law and who are not tied to a particular application of common sense. This might not amount to discrimination as written in standard law

or human rights texts, but may bring about inconsistencies that in the end subject some people to unfairness or unreasonableness in the application of custom. The standard customary rules are known by many that have to apply them, although the common sense, invoked when dealing with these cases, is necessarily subjective. Checking the level of fairness exhibited by the traditional authority is rendered cumbersome by the lack of standards upon which it can be monitored. The gaps left by this, can potentially give way to infiltration of the system by corrupt elements that wish to buy favorable decisions. If this happens, it could be difficult to detect the foul play involved.

In terms of jurisdiction, the traditional institutions for land dispute resolution have always applied customary rules, to disputes between people that belong to a given community and subscribe to the rules and the culture of that community. In the past, there were strong cultural and power relations between the traditional authority and the people; the people generally respect the authority to perform its functions for the good of the whole community and each of them individually.<sup>68</sup> Within the foregoing framework, it was easier to deal with land cases and have the decisions of the TIs respected. Due to human mobility as a result of displacement and other factors, much however, has changed. Some cases are between persons or communities that ascribe to Acholi culture and traditional institutions, and members of other tribes that might not necessarily believe in or respect

Acholi traditional institutions.<sup>69</sup> Interestingly, there are cases to which the Acholi people are party, but which have gone beyond the geographical boundaries of Uganda, putting them outside the ambit of matters that the TIs can satisfactorily handle. During the field research<sup>70</sup> it was alleged that there were IDPs in the District of Lamwo, in sub counties like Lokung, Madi-Opei, and Agora who were living in the camp and had nowhere to go since the land that they previously occupied, and to which they were under obligation to return, was claimed to be a part of Southern Sudan. The land wrangles between Southern Sudan and Uganda over border boundaries have, at the time of writing,<sup>71</sup> not been resolved.<sup>72</sup> This takes the matter beyond a mere issue of protecting land rights issue, to the protection of land as jurisdictional territory of a state. At that level, the land dispute invokes state sovereignty for both the states of Southern Sudan and Uganda, whereby the state of Uganda, and not the traditional institutions in Acholiland, is better placed to handle matters arising from it.

On the other hand, LCCs are mandated to deal with land matters that fall within categories specified in the Local Council Court Act, 2006. Under the third schedule to the Act, they are given an unlimited mandate to deal with “(a) disputes in respect of land held under customary tenure.” Their mandate to handle other land matters that are not necessarily customary can be read into section 10(e), which provides that they can deal with “matters relating to land.” This wide jurisdiction is

narrowed down in specific areas: under section 10 (2)(a) for the civil wrong of destruction of property, a LCC can only deal with such matters if the value of the subject matter is less than 100 currency points. The corollary of this, is to leave all matters whose value is beyond that, to other courts of judicature that are, presumably, better equipped to deal with the complexities that might arise in handling such cases. The unlimited nature of their jurisdiction in terms of disputes arising from customary tenure (unlike the civil wrong of destruction of property), among others, makes it important for them to be human rights sensitive, in order to limit cases of extreme violations of rights of litigants.

The jurisdiction of LCCs is stipulated under the Local Council Court Act, 2006, under which they are established. For civil matters involving destruction of property, they can only deal with those, whose subject matter does not go beyond 2 million shillings, but it is unlimited for cases involving customary land.<sup>73</sup> This shows that the customary is less valued by the lawmaker. If the lawmaker believed that the LCCs, for some reason, cannot handle cases of destroyed property that is valued at more than two million shillings, why would the same law maker believe that the respective LCCs can handle a case involving e.g. people disputing ownership of customary land that is worth two hundred million shillings? The reasons do not lie beyond the usual condescending attitude against customary tenure that tends to deem it inferior to other types of tenure, and therefore

less deserving in treatment and respect. This implies that big disputes over land held under customary tenure, arising in post conflict Acholiland, can be dealt with by the LCCs, despite all the shortcomings of this, which includes the lack of human rights sensitivity in many cases, and the de facto propensity for corruption.

### **3.3. HUMAN RIGHTS IN NON-STATE INSTITUTIONS**

The protection of human rights - in this case, those relating to due process - is a primary responsibility of the state. It bears a positive obligation to put in place measures through which these rights - in both international and national laws and constitution - are availed to the people, and also negative obligations to refrain from violating these rights. The state operates through human beings who represent and try to enforce the collective will as expressed in law. Where these representatives fail to protect human rights, the state bears the liability.

The foregoing is the easy case, where a state acts through a person or institutions established within its structures, for example the LCCs. The state's duty to ensure that these respect human rights is obvious.

Institutions of a non-state character at times perform judicial or quasi-judicial functions that are traditionally supposed to be performed by the state. This does not exonerate the

state from liability in cases of human rights violations by such institutions.<sup>74</sup> Although TIs in Acholiland operate within spaces with very limited state presence, it is a duty of the state to ensure that these institutions respect the rights of the people. These have clearly been set out in international and national law, as seen above. States are called upon to respect the article 14 on the right to equality before courts and tribunals. State and non-state courts or tribunals have an obligation to respect this right as set out in article 14 of the ICCPR and broken down under the Human Rights Committee's General Comment No 32.<sup>75</sup>

Where an institution, whether state or non-state ("established by law"), has to determine a question that would put the rights of a person in question, that institution is bound to respect human rights. Failure to do this is failure of the state to respect rights. While some literature attributes a number of advantages to LCCs in terms of availing justice to the poor in Uganda, their human rights record is still wanting.<sup>76</sup> TIs have in the post-conflict North been seen as cheap (for both users and tax payers), and accessible dispute resolution institutions compared to other venues. That notwithstanding, these institutions are not of a shape and standard (in terms of rules and praxis) of institutions that can uphold human rights standards in civil proceedings relating to land.<sup>77</sup> Equality before these institutions has not yet been achieved as women and men do not always get equal treatment; the independence

and impartiality of the bodies is questionable and so are the procedures on the basis of which final decisions on rights are made.

It has been argued that to expect these institutions to operate like the formal institutions, or abide by similar rules as those that bind formal institutions is to take a "maximalist" approach.<sup>78</sup> The TI, LCCs, and other judicial and quasi-judicial institutions in Uganda are each a product of distinct circumstances operating in different environments. That aside, the formal institutions whose rules and structures are looked up to as the ideals that should be emulated by the other non-state institutions, are not perfect. They have not always complied with the international and constitutional human rights standards in proceedings before them. This is worrisome, especially in light of the high numbers of land disputes in post conflict Acholiland.

### **3.4 THE OPERATION OF TIS AND LCCS: ASCRIBED VERSUS ACTUAL PRACTICE**

#### **3.4.1 TIS AND LCCS: OFFICE BEARERS**

In Acholi tradition, land matters are mainly handled within the traditional clan structure.<sup>79</sup> In that structure, management of customary land issues, which includes dispute resolution, rests on the clan (kaka), family head (Dogola), and the head of household (Won-ot).<sup>80</sup> The Rwodi (Rwot for singular), Rwodi Kweri (a committee of Rwodi), and Rwodi Moo also play



a big role.<sup>81</sup> In practice, the Rwodi Kweri deals with cases between individuals whereas that of the Rwodi Moo covers those cases involving wider communities like clans in Acholi.

Armed conflict, poverty, and other social, political, and economic aspects greatly affected the operation of the office bearers on land matters. With the destruction of significant parts of the populations' livelihoods was pauperization of the Acholi community, elders included. As a result of the conflict, displacement, and disruption/destabilization of the social, cultural, political-economic systems, elders became ordinary citizens. For example, they had to lineup just like everyone else in the camps to receive alms from humanitarian agencies. The changes in social and economic status as a result of these circumstances bring about the likelihood of some of them digressing from morally acceptable conduct in order to survive; some have been accused of corruption, by which they have compromised culturally acceptable practice.<sup>82</sup> In short, the conflict somehow weakened the pillars of traditional authority, the conditions and dynamics that shape the integrity (or possibility thereof) of the persons serving in that capacity; it led to contestation of their power and to some extent to a contestation of their decisions on land matters.

On the other hand, the LCCs members hail from the community that they serve. The Local Council Act does not stipulate academic

qualifications for executive committee members of the village or parish, yet it is some of these members that, on appointment, double as members of the LCCs.<sup>83</sup> In the same vein, the Local Council Act stipulates the qualifications of persons appointed as members of various Local Council Courts including the sub-county court to include: residence in the area in which the court operates, good moral conduct, ability to speak the commonly used language in the area, not be a member of parliament or another local council, etc.<sup>84</sup> Clearly, these hinge more on a court member's personality and moral conduct than on the skills, knowledge, and ability to decide cases. A good moral conduct would reduce the propensity for corruption; where people pay for a favorable outcome, but does not fix the many injustices that flow from insufficient knowledge of the law and skills to run a quasi-judicial institution and its proceeding like the LCC. The researcher's experience of growing up in Uganda is that members of village executive committees are elected on the basis of, among other things, their popularity, kindness, age, compassion, family background, and tribe, and not necessarily their qualifications, commonsense, or knowledge of dispute resolution.<sup>85</sup> It is not surprising that it is common to find such people serving on the parish/Local Council II Court, and in a way that inhibits the rights of the litigants.

The above situation partly arises from the fact that the law does not set strict rules on the

qualifications of persons that should take up the LCC offices. Note however that having the requisite qualifications to hold any office in Uganda is good, although it has not been proven to bar the practice of dispensing with set rules or laws for personal gains.<sup>86</sup> Even then, it is important to set the qualification as a quality control measure, although it will not (necessarily) prevent the illegitimate actions of some individuals that tend to be corrupt and also corrupt the system.

From the discussion in the earlier parts of this paper, it can be discerned that in an ideal situation, state institutions have the primary responsibility to resolve land disputes in a manner that is responsive to human rights. That could be among the ways through which the basic human need for land justice or resolution through mediation would be satisfied. For physical and financial inaccessibility of the courts of judicature of Uganda however, they have not been effective in covering the basic land justice needs to the poor majority in northern Uganda. This pushes the poor to the LCCs. Their failure to meet their needs to their satisfaction, coupled with other loopholes in the operation of these institutions, pushes the people further down to the TIs or other Institutions of a political, or other, nature that can offer them solutions to their problems or provide them with their basic land justice needs. In the process of searching for practical solutions to human justice needs, it is very likely that a movement from one level of

institutions to the other calls for a compromise, which could involve sacrificing some basic protections of human rights.

#### 3.4.2 ASCRIBED VERSES ACTUAL PRACTICE

From the field study in Northern Uganda, there were indications of a wide gap between the law and practice when it comes to an institution's mandate to deal with land disputes. Various respondents mentioned one, or a number of the following as the institutions that deal with resolution of disputes arising from customary land ownership: the elders, clan leaders, LC I, LC II, LC III, LC V, Magistrate Courts, police, Chief Administrative Officer (CAO), Resident District Commissioner (RDC), Land Boards, and politicians. The politicians are not always mandated by law to handle land matters, but at times victims of violations of land rights resort to them, and solutions are offered; referring matters to them is usually a practical approach taken by people in search of fast or effective solutions. It has been argued in one report that the numerous flaws/deficiencies in the other venues of justice delivery, say TIs and LCCs, drive people to the political figures out of frustration with the former. Others that people resorted to are institutions that are established by law, but do not necessarily have the mandate to deal with administration of justice, but administration of other matters that are generally related to land. Such institutions include the Police, which would, under normal circumstances only get involved if a land matter invokes criminality. There is clearly a gap

between the law and the practice. The existence of various institutions handling land matters in law and in fact within a chaotic post-conflict setting, contributes to the above, and also brings about issues of legitimacy of the institutions and competition with some attempt to trump the authority of others. Specifically on the TIs and LCCs, both are legally recognized but neither is fully functioning as it ought to, due to the highly imperfect environment in which they operate and the fact that their establishment is a work in progress. Due to this, neither can fully function without the other, hence there are aspects of cooperation between the two categories. That notwithstanding, the two systems are not well aligned to complement each other but operate as distinct systems – and this has many downsides. It is possible for the same case to be heard by traditional institutions and at the same time by statutory institutions without either of the institutions learning about the involvement of the other. This leads to continued conflict between parties especially if each institution comes up with a different decision. It is such loopholes that are exploited by some members of the community whereby they engage in uncontrolled forum shopping and in the end abuse the system. In this case, a matter would not be taken to a certain category of institutions as a result of disappointment with the higher institution (as described earlier in this subsection). Instead, desperate litigants will take it to multiple institutions, no matter their level and mode of operation. It is

very hard to control/shape peoples' litigation behavior, especially if a losing party in one kind of institutions will construe the facts in such a way that makes her the complainant in another case, before a totally different institution.

It should be stressed that it is important to create a system that makes information sharing among institutions about the matters they are handling, an obligation. It could also make sense to put in place mechanisms that promote the ability of all institutions to respond to the peoples' basic justice needs.

### **3.5 WEAKENED CUSTOMARY LAND RIGHTS AND INSTITUTIONS**

We cannot decipher the history of suppression of customary land rights or customary tenure without looking at the project of colonization of Africa. In the non-hierarchical societies like those in northern Uganda, prior to colonization, the clan was a key unit that wielded power, and it organized the families or communities to make collective contributions for its survival; land was a key resource in this scheme.<sup>87</sup> Colonial government was an affront to the traditional power centre (the clan) through its establishment of a new authority (the state), which came with a number of issues related to control and management of land.

First among these was the question whether the establishment of a "state" over an acquired territory by the colonialists terminated pre-existing claims to land. These claims were

previously anchored within the customary space, on the basis of local social relationships and related customs, norms and power structures. For the new colonial state, it was initially common to determine entitlement to land or ownership by using a western criterion; ownership on the basis of some legal and provable title. In other words, all land held customarily, and to which there is no legal title was presumed not owned, and thereby vested in the colonizer to use just like an owner. The preceding belief or assumption was set aside in a number of old cases that arose elsewhere, key among them being the case of **Re Southern Rhodesia**.<sup>88</sup> From this case, it is discerned that although the Crown of England acquired some rights over (the then) Rhodesia through conquest, the act of conquest did not extinguish native or local pre-existing rights to land. Ownership of the land was still vested in the locals on the basis of their local customs.

Rights to land as known in the African customary sense (of rights in fact) were not rights if looked at through the western lens of rights to land as “abstract” notions.<sup>89</sup> During this time; from at least 1900 to the time **Re Southern Rhodesia** was decided in 1919, the trend in colonial Uganda was to promote private/individual rights to land. Customary land that was not privately owned or alienated as such was subject to ultimate crown title.<sup>90</sup> Ownership of customary land in Uganda was therefore ownership de-facto and not in law, since legal title at the time vested in the

Crown. Such ownership only arises from actual occupation and use, not necessarily backed by law.

This era marks the beginning of the hierarchized treatment of rights to land depending on their categorization as either customary or those based on western concepts: in this case freehold.<sup>91</sup> This status quo - that customary title or tenure is less valuable in law than freehold or any other tenure originating from western concepts - is maintained in most parts of Africa including Uganda, to date.

The second issue that is not exclusively tied to establishment of the state, but to the general historical developments at the world level, is the conceptualization of the notions of human rights (from around 1948) to date. The declaration of rights in the Universal Declaration of human rights in 1948 (and other human rights instruments that follow later) signifies a preference for human rights to be pre-scriptable; clear and laid down as rules that bind states, or as sources of rights for the people, and obligations for the states. The emphasis on clarity and written form at the international level, indirectly entrenches hierarchies that puts those rights that are well prescribed and written down (and their respective enforcement institutions) in a higher position than others that are not in that form (the customary).<sup>92</sup> In this sense statutes, conventions, and covenants as opposed to custom (in this case customary land law in

Acholiland) are clearer sources of rights to land. Customary norms and institutions have for a long time been judged through the lens (logic, criteria, values, norms, discourses) of western law and development paradigms, which leaves them at the periphery.

By implication, customary land tenure, rights and institutions were secondary to others anchored in western law. Repugnancy clauses were introduced to facilitate the above. These were introduced to sieve out those aspects of custom or native law that were inconsistent with imported or written law.<sup>93</sup> Yet, in 1955, by virtue of the recommendation of the East African Royal Commission of 1955, it was asserted that for purposes of achieving development through use of land, customary land had to be registered and converted into freehold.<sup>94</sup> The post-colonial government of Uganda did not adopt this recommendation. While this appears to show a desire to preserve customary land tenure and rights, it is not clear that the new government made substantial efforts to save customary tenure from its secondary position. Customary land, which was called Crown land in pre-independent Uganda and was vested in the colonial government, still remained vested in the state as public land at independence. Therefore, the status quo remained in principle unchanged.<sup>95</sup> In the newly independent Uganda, the situation of customary landholders became more vulnerable with time, in the face of development imperatives: the customary

rights could be suspended if they obstructed the pursuit of development agendas.

The unsustainability of the above laws that, to a great extent, disregarded the customary, in part explain the provisions in Article 237 of the Constitution, which reinstates customary tenure as an equally recognized tenure in Uganda. It puts all tenures at equal footing; thereby doing away with the secondary position of the customary as previously enshrined in the black letter rules of law. It is however, not so far reaching as to enable it to tackle the condescending attitude that some parts of society still have toward the customary: the perception that it is not as good as the other tenures in the modern world. Customary tenure is mentioned as one of the tenures under which land can be held in Uganda.<sup>96</sup> This however is only important as a sign of recognition of the customary, and does not necessarily provide a guarantee that from it will flow equal status of the customary with the other tenures.

Consideration of the context and historical legislative legacies is a necessary basis on which to analyze the customary norms and to strengthen the informal justice systems (in this case TIs and LCCs) that deal with violations of land rights in northern Uganda.

## CHAPTER 4

# ANALYSIS OF SOME PERTINENT ISSUES

TIs and LCCs in post-conflict Acholiland operate in a chaotic environment characterized by a number of high imperfections like corruption, weak laws and institutions, and neo-patrimonial politicians that use land disputes to garner political advantage. This is in addition to normative issues that touch both customary law and institutions as a valid source of law, and also the ability of such institutions and LCCs to handle land disputes in such a way that promotes respect for human rights. This section of the paper discusses the pertinent issues that arise from the operation of the above institutions within this environment and what this means for the rights of people that utilize their services.

### **4.1 LAND AS PLAYGROUND FOR POWER**

Claims relating to land rights have always been an arena of contestation where we see politics, i.e. power disparities and struggles, playing out. Property rights or rights of access to land have to be sanctioned by an institution that claims authority. Recourse to any institution by rights claimants reinforces its legitimate claim to authority.<sup>97</sup> Property rights cannot exist in a

vacuum, without the authority of an institution (whether political or legal) that stipulates them or can vindicate them in case of breach or abuse.<sup>98</sup> In technical legal terms, the state would be the main authority whose institutions would sanction rights to property or land. The reality, however, is that socio-political non-state entities have operated beside the state and with their authority, have confirmed or revoked property rights. The pursuit of different self-asserting political agendas by the diverse authority centers dealing with land brings about incoherencies in the area of land or property rights.<sup>99</sup>

From history to date, land is seen as a playground for various struggles for authority between the state and other players. The repercussions of such struggles today have a bearing on how disputes over land are resolved by the TIs and LCCs in northern Uganda. The following sections will address some contemporary issues.

#### 4.1.1 SELECTIVE PROTECTION OF LAND RIGHTS FOR POLITICAL CONVENIENCE

There is a significant connection between land, power, and authority today. Land has been seen as an item that can be used to satisfy the interests of the powerful at the expense of the majority people (e.g. income-poor masses). There is a symbiotic relationship between land (control) and power. The decision regarding who possesses, accesses, or is dispossessed of land lies within the precinct of the powerful, and by this, entrenches their position and status as the most powerful in society.<sup>100</sup> With their position they can use land as an object to put some members of society in a more privileged position than the others. Such privileged positions and identities entrenched in society by those that have power can be on the basis of race, tribe, or any other criterion.<sup>101</sup>

There is more customary land in Uganda than any other kind of land, i.e. **mailo**, freehold, leasehold.<sup>102</sup> However, Uganda's land history is rife with discussions on **mailo** land (predominantly in Buganda) and issues of the lost counties of Bunyoro. This is all due to wider political configurations in which Buganda, in central Uganda, has always been considered to possess more political clout in the country.<sup>103</sup>

The ruling National Resistance Movement's (NRM) politics on land today plays out in such a way that it cannot clearly be deciphered in isolation of some historical events in Uganda, like the above. The **Mailo** system and freehold

were introduced by the British in Uganda. This followed a desire to introduce rights in land akin to those that existed in Anglo-Saxon societies of the day (rights of freehold). Since control over land denotes social status and power, the British colonialists needed to appease a few powerful indigenous aristocrats (by giving them exclusive rights to land) in order to garner their support to instill and extend their control to other parts of Uganda. We see power given away as the price to acquire more power. Through the 1900 Buganda Agreement, big chunks of land were surveyed and parceled out to individuals, who in essence became holders of titled land in "freehold". By this, a few individuals acquired high status in society as the landed aristocrats. Much of this land was at the time customarily owned by politically insignificant (in the eyes of the colonizer) persons. By giving the land away, their customary interest was subjected to a great interest of new landlords with registered titles. Yet land was such a significant item for the survival of those dispossessed through grants of their land to the powerful. The act of registering land owned by one person in the name of the other (powerful person), marks the beginning of parallel claims to land in Buganda and other areas like Ankole and Toro.<sup>104</sup> The "significant" and powerful minority at the time of the 1900 Buganda Agreement has over the years been protected by the imported written laws of Uganda; key among these are rules that make the title of a registered proprietor paramount and indefeasible.<sup>105</sup>

Note that over the years, the dispossessed majority (or their descendants today: lawful and **bonafide** occupants), who did not have political clout in history, have become of political significance in the era of democracy by the ballot.<sup>106</sup> They are the majority that has a vote to cast, a fact that on several occasions has inclined the NRM government to be seen to protect the land rights this group. These rights are protected, among other things, by regulating their relationship with their landlords (those that have certificates of title to the land). Much attention has in the recent past been on legislating land rights for this group. This has been done by amending the Land Act of 1998, to protect the lawful and **bonafide** occupants of land from eviction by title-holders; amidst contestations against that by the Buganda kingdom.<sup>107</sup> The timing (shortly before the presidential elections of 2010) of the discussions of these land issues also has a lot to say about the role of land in determining the political landscape of Uganda: in short, introduce land rights for the majority and win votes. The little effort put in enforcing the provisions of this law and the recurrent cases of eviction show that mere legislation is not enough to eradicate the plight of the lawful and **bonafide** occupants. It has to be accompanied by the political will to get results. At the same time, legislation has not been far reaching enough to deal with cases where power has been abused in the northern Uganda region to such an extent that it affects enjoyment of land rights for some.

#### 4.1.2 ABUSE OF POWER AFFECTING PROTECTION OF LAND RIGHTS

There are instances when office bearers have engaged in activities for their self-aggrandizement and not necessarily out of desire to serve the public.

**” In Uganda, individuals or people are stronger than institutions. People prefer to go to the President, Resident District Commissioner (RDC) or any other political leader to solve their problems. Yet, strengthening institutions would be better. So institutions go down as individual's power increases.”<sup>108</sup>**

The problem in this case does not lie in resorting to these institutions as public institutions established to offer services to the people that are within their mandate. The problem begins when individuals in these offices use their position of power to back or sanction action that it is not within their mandate to deal with. This exercise of power mired with patronage, can only entrench divisions among the people by promoting illegalities through protecting those that are not entitled to protection under the law.

Aspects of the case of **Arach Valiriano vs. Odong Richard**<sup>109</sup> confirm the above statement and discussion. The eviction report in the above case identifies the respondent and another famous/powerful politician Lacambel, as ringleaders of those objecting to, and trying



to defeat the enforcement of the Order of the Chief Magistrate against the respondent.<sup>110</sup> Since they have the backup of the famous politicians the whole group believes that it has a strong backbone to successfully work against an institution with a mandate to ensure justice.<sup>111</sup> Although he had an order from Court, Mzei Arach was afraid that political maneuver by Lacambel would annihilate his success in the Chief Magistrate Court. Since he had no relatives in political positions within his area, he resorted to the Resident District Commissioner, who is a representative of the president in the District, to counter Lacambel's political power.<sup>112</sup>

Politicization was cited by a number of respondents as a key factor affecting the operation of institutions like the LCCs and the Chief Magistrate's Court.<sup>113</sup> Politicians use their influence to emasculate the authority of judicial or quasi-judicial officers by encouraging some people to resist abiding by orders of court, settling matters that are pending before court, and at times facilitating attacks on the person of judicial officers.<sup>114</sup> The motivation behind such actions is not all the time out of the desire to undermine the judicial officers. The apparent motivation is political/social power (and at times material gain). Through such actions, the politicians use land cases to support a majority and in turn prepare the ground on which to canvass for support in their political ambitions.<sup>115</sup>

The above situation is problematic. It is a fact that institutions are a very important part of post conflict reconstruction and peace building efforts; they have the potential to outlive individuals, develop an agenda for a public good, as well as clear accountability mechanisms. Yet several of the political and state Institutions in the area studied cannot be said to be united in pursuit of a similar goal that is pro-people. When actors in these institutions pursue self-motivated agendas, they are in principle rebelling against the institutions they serve. The result is a fragmented agenda between that of the institution and that of the people that hold the mantle of power in the institution. The absence of a uniform agenda that is driven by an interest in serving the society means that the institution's impact on the ground is negligible. It is also worth noting that where political actors undermine the state institutions that they are bound to serve, it is highly unlikely that people will trust the institutions. Instead, they run to the individuals to evoke their individual powers to solve a problem. The likely implication of the above is that institutions are rendered irrelevant in the long run. This trend of events raises a number of issues. Among these is whether court justice rather than reconciliation approaches of the Tis, is the most appropriate in the circumstances.

#### **4.2 RECONCILIATION VS. WINNER-LOSER LCC JUSTICE**

The responsibilities of TIs or Institution dealing with land disputes in Acholiland are:

1. To be custodian and to protect the rights of all paco/dogola or (family or household) members;
2. To allocate land to heads of households (Won-ot) or individuals within their family;
3. To ensure that land is used for agreed purposes;
4. To manage the family/household reserve land;
5. To mark boundaries of the land in consultation with the kaka (clan), Dogola (family), for (household) and neighbors;
6. To hear and resolve land disputes peacefully (emphasis added);
7. To make decisions affecting family land equitably (fairly) taking account of the interests of all family/household members (...)
10. To obtain consent from the family/ household members and clan when making major decisions affecting land (e.g. transfer).

TIs in Acholiland are mainly mediators or reconcilers of parties to land disputes within their above stipulated jurisdiction. They also deal with conflicts that are not directly on land matters, but other legitimate issues like witchcraft, which may at times have implications for land rights. They have covered issues like witchcraft in relation to customary land use and ownership. Courts of law may not necessarily have the capacity to deal with such issues of witchcraft. Consequences of accusations of witchcraft may be banishment from society

and by hypothesis it can be assumed that accusations of witchcraft are at times aimed at stealing land of the banished. In such cases, reconciliation is the most suited approach.

In line with the above, TIs aim at community cohesion, by promoting mediation or reconciliation in dealing with land disputes as a way to promote peaceful co-existence of members of the family. Peaceful resolution of a matter (win-win outcome) is normally of paramount importance in many cases; for example in the earlier cited case of **Olwenyi Samuel and another v. Arach Albina**<sup>116</sup>, it was obvious that the respondent had transgressed the morals of society by side stepping the authority of the elders in matters of land allocation when she allocated herself the four acres of land. The logical decision in this case would be that she vacates all the four acres and hands them over to the rightful owners. The elders deciding this case did not take that route, but instead opted for another that would promote the Acholi culture of respect for graves and peaceful co-existence between the conflicting families. The respondent was therefore allowed to retain some of the land including portions of it on which lay her parents' graves.

Upholding reconciliation over any other option is desirable due to its high potential for maintaining peace in society, although it may not always result in fairness to both parties to a land dispute. Since reconciliation

aims at striking a compromise, the system can be abused or exploited by land grabbers. To LEMU this is referred to as land “grabbing by compromise.” The grabber takes advantage of the fact that if a case against him goes to TI, the outcome must be a “win-win” situation aimed at strengthening peace rather than announcing a winner. Such a grabber could only be requested to surrender half of what was grabbed, in which case he would be in a better position than he was before the grab. This is tantamount to reconciling out the land rights of the party that bears more burden of the compromise to achieve a peaceful settlement. It looks like a win-win situation on the surface but beneath this thin layer of reconciliation lies an uncontested injustice to one party that loses part of their land in the process. With the possibility of such situations, reconciliation ought not to be seen as a mandatory route in all cases that come before TIs, but only in a few in which its application would not lead to an unequal outcome for the warring parties.

To add to the above, reconciliation rituals at times come with a cost, which cannot be met by everyone in need of dispute resolution services before the traditional Authority. It was widely acknowledged by a number of interviewees that the services of the Rwodis in land dispute resolution are free, but at times have to be accompanied by traditional rituals of reconciliation that involve slaughtering animals. Since most of the animals that the Acholis had were lost during the armed conflict there is no

pool of animals from which to pick, in order to take them to the ceremony; animals have to be purchased, and not everyone can afford them. This makes the services of this institution only selectively affordable, to the detriment of the poor, who cannot afford to purchase animals on the open market.

According to one respondent, some traditional leaders at times ask for animals not necessarily out of necessity, but because they are not paid for their services. So, by taking some of the meat or partaking in the ceremonial meals, they compensate themselves for their time spent. It was reported that in one case that ended up at the chief magistrate court, a chief asked for a bull, going beyond the usual trend of a goat or chicken.

The quagmire above partly stems from the ambivalent approach of government and indeed the lawmaker when it comes to handling the question of traditional mediators of land rights related disputes in Acholiland and other parts of Uganda. Issues about their mandate and remuneration are rarely a subject of debate or planning and may be determined by government budgeting. As earlier mentioned, section 88(1) of the Land Act acknowledges their existence and the role they play in handling land matters arising from customary tenure, but no remuneration is allocated to them.

On the other hand, LCC are meant to apply customary law, and also indirectly, other laws

of Uganda. The application of customary law would result in restorative justice, hence playing a role similar to that of TIs. Yet, the application of other laws and of the constitution is not restricted to restorative justice but may result in winner-loser justice; where one of the litigants is declared the winner who takes all, and another a loser who walks away with nothing. Although some persons interviewed acknowledged the good job that the LCCs do in resolving land disputes, there were concerns about the many deficits in the mode of operation of these courts. Serious human rights issues have also been raised, regarding the way in which LCCs handle matters. They present an increased risk of violating the rights of a “loser,” since it is not in all cases that the “winners” in these courts, would deserve to be the genuine winners under normal circumstances. This is in line with Kane’s concern that LCCs are not sufficiently knowledgeable on matters of written law and its application.

#### 4.2.1 CONCERNS RAISED ABOUT THE OPERATION OF LCCS

- Most of the LCCs do not have registers for the cases they handle and, on top of that, they have many cases but their cases are not serially numbered.

• This makes it very difficult to trace a case for any reason (say appeal or academic/research purposes) even if it is merely a few months after it has been decided.

- They do not write proper records of proceedings; the information presented in their records is very scanty.

From the few records that the researcher looked at, it was clear that some members of the court are not knowledgeable on the kind of facts that are material in analyzing a case, in order to come to a just decision. It is possible to find a case record where the dispute is about an alleged illegal transfer of land by one person to another, but the dates of the alleged transfers are missing from the record, copies of the transfer agreement were not tendered to the court as evidence, and there is no record of whether the members of the court had a look at them before, or during the proceedings. This has costs in the sense that if such a case goes on appeal, the appeal court does not have a proper record upon which to base its hearing, but has to hear the case afresh hence delaying justice. This also contravenes some standards of fair hearing.

- When some LCCs conduct a locus in quo<sup>17</sup>, they only produce a list of people in attendance but no record of proceedings, yet they rely on the evidence adduced during the proceedings to come up with a final decision.

The LCC Act does not obligate the Court to conduct proceedings on the site or the land in dispute, but at a designated place within its area of operation. While dealing with land cases, sometimes LCCs visit the locus

**in quo.** Proceedings at the **locus in quo**, when conducted, are an integral part of the proceedings of the court in general and ought to be recorded. The LCCs fall short on this. One cannot gauge whether the proceedings (in any given case where **locus** was conducted) were conducted in such a way that the court would come to a fair decision by looking at the record.

The above could also have financial implications, if such a case went on appeal to the Magistrate Court. The appeal court normally relies on the record of the lower case, but in this case there would be no record. It therefore becomes inevitable for the appeal court to rehear the case and also conduct a **locus in quo** afresh, with all the financial costs that come with that. One of the findings from the field indicates that the Magistrate Court is financially constrained, and is not in a position to conduct **locus in quo** in all land matters that come before it. It therefore makes little sense that this Court that is already constrained is expected to conduct **locus in quo** proceedings that ought to have been conducted at the LCC level.

Conducting a **locus in quo** involves mobilizing traditional chiefs (Rwodis) who can identify boundaries, persons who live around the land in dispute, elders and other villagers to attend and maybe give evidence. Their attendance is a voluntary act; their time is not compensated for in monetary terms. It would make sense to have any first **locus** conducted appropriately,

since one cannot surely guarantee that people volunteer to attend any subsequent **locus in quo** proceedings, where the first one conducted was flawed, in the absence of incentives to do so. In case they actually do, it would be a cost incurred on their time that they would spend on more productive things.

- Proceeding without quorum and one-member judgments.

The law sets the quorum for the parish court (LC II) at five members that include two women and for the sub county court (LC III) at 3 members, one of whom must be female. One of the members of the Paicho sub-county court in Acholiland, talked to during the field research, mentioned that there is a technocrat appointed by the district (secretary to the sub-county chief) that sits in, but does not take part in decision-making. The use of the word “shall” in the provision setting the quorum signifies obligation and not discretion: the courts should not proceed without the fixed number of people. Having the right number of people hear a case can be a check on any impropriety or injustice that might arise when the case is heard by less people. Indeed, it would affect the outcome of a case if voting was required before a final decision in the matter, like it is before the LCCs. A visit to the field in Acholiland revealed that some customary land rights cases have, on various occasions, been heard and decided without the right quorum.

Besides that, there were reported instances of the court relying on, or adopting the decision of one of the members (in most cases that of the chairman) who would have been most likely to take notes during the proceedings. These one-person judgments are problematic since they do not reflect the opinions of all members of the court in a given case. If the person whose judgment or record is adopted is particularly biased compared to the judgment that would have been reached by a group of people, it becomes a bias sanctioned by the whole court, to the detriment of the litigant who is denied a fair hearing and hence justice. The right procedure should be that each member writes independent notes and later a judgment that s/he reads to the court, and the parties at the end of the hearing. Based on what each member decides, the chairman comes up with the final judgment. The problem arises where not everyone writes, and where the chairman's record alone, is taken to be the record of the court, and therefore its judgment.

The information on proceeding without quorum was given by the people. One member of the court meanwhile denied it:

**” (...) all members of the Committee take minutes and later compare the minutes and then we keep a record of all minutes. The only problem is that we don't have where to put all those things, no space. If one wants to appeal, one can decide to take the one written by the chairman. It is photocopied and taken to the court. We don't charge for photocopying.”**

From the above, it could be surmised that we should not generalize about the way LCCs operate in the region: some may abide by the rules unlike others that do not. Indeed the researcher was constrained, and could not establish the state of affairs in all Local Council courts in all districts of Acholiland. It is also highly plausible that this member of the court making the above statement is only giving the official statement, or relaying what he thinks the researcher wants to hear, rather than the truth. It is less probable that he would give inculcating information about a body he is a member of, by alluding to the likelihood of bias.

Normally, as earlier mentioned, when any matter goes on appeal, the Local Council Committee Courts will rarely have a record to send. Due to this, the magistrate has to hear the case de novo. This does not only overwhelm the courts but also leads to backlogs. Sub-County Committees (LC III) are supposed to exercise appellate jurisdiction over cases from the Parish Court Committees (LC II), but most

times, they hear cases de novo. This violates the rules. The only exception would be, if the parties request the Sub-County Committee to hear the case de novo - but they just go ahead and rehear a case that has already been heard by the lower court.

The failure of the LCCs to follow the right procedures in handling land disputes is inconsistent with the need to promote land rights and land justice. The LCCs are operating in an arena where the laws they are supposed to apply are not necessarily that clear, and the failure to follow the procedures brings a new layer of complexity to the situation. On this issue, one respondent commented; "They do not know the procedures. They are like a boat without anybody steering it." Generally it should be stressed that the failure to abide by the procedures leads to violation of the guarantees of a fair hearing in land matters.

- Facilitation of LCCs.

With the increasing numbers of land cases arising in northern Uganda, it would be expected that government facilitates the LCCs to resolve the disputes in a timely fashion. This has not been the case, thereby leading to backlogs and the business as usual approach of the LCCs - yet post conflict land dispute resolution ought to have a high level of attention in order to maintain peace in society.

- Illegal fees clogging access to LCCs.

Although the law provides for fees to be

charged for various services, LCCs still charge extra/illegal fees to litigants. To maintain uniformity and at the same time protect litigants, the fees chargeable by LCC have to be stipulated by law. Section 41 of the Local Council Court Act, empowers the Minister to make rules stipulating the fees payable to this court and also deal with issues of remuneration for the office bearers. In doing this, the minister is called upon to bear in mind that there are persons that cannot pay court fees, and these have to be accommodated. Such persons have to receive services in cases where they need them, irrespective of whether they have paid the fees or not. Pursuant to that mandate, the Local Council Court Regulations, 2007, were passed regulating the fees: In brief, the fees payable for disputes relating to customary land and damage to property are 1500/2000 Uganda shillings for any appeals from village councils to Local Council Courts, and 2500 Uganda shillings for appeals from Local Council Court to a Town, Division or Sub-County court. Having the fees as low as they are, opens up the Courts to many potential litigants who could not otherwise afford justice. However, the very low fees charged in the absence of any state facilitation of the courts, are also untenable considering the costs involved in running the courts. The court would, for example, have to receive filing fees for over four cases or disputes relating to customary land in order to afford the ream of paper used in recording the proceedings. And the costs involved in running the courts are not only limited to stationary

but also include allowances and snacks for the court officials.

The researcher was informed that there have been a number of instances where the LCCs have charged fees, beyond what is prescribed in the law. This has in fact had an effect of keeping the indigents away from pursuing justice from the courts; some resort to TIs. Not only would litigants before the LCCs have to pay fees, but also incur other costs in the process. These include transport costs for their witnesses to attend court, something that not all can afford. Nonattendance of witnesses means that the case would be heard for longer than usual, hence delaying justice.

In the final analysis, charging high fees with a good intention of facilitating the activities of the court is unfair, but may be excusable if that is the only way the LCCs can continue operating. From the field research conducted by the researcher, and studies by other organizations like the Norwegian Refugee Council, it is clear that not all illegal fees are charged in good faith, i.e. to raise funds to facilitate the courts. The motivation for the exorbitant fees in some cases has been corruption and the desire to use the office for material self-advancement. This is a plausible reason that can explain instances where, say a litigant pays say 65.000 Uganda shillings, but is issued with a receipt indicating that she paid only 20.000 Uganda shillings. Clearly, not all the money illegally collected from litigants gets into the coffers of the LCCs,

but instead into the pockets of the individual court officers.

- Limited knowledge of law.

It was a concern for some people interviewed, that a number of the members of the Local Council courts had very limited knowledge of the law and/or the rules that should be applied to the cases before them. They are not obligated to apply strict rules of law and procedure: they only apply a few in addition to the customs of the people they serve. The majority of them, apparently, lack the sufficient knowledge of either or both streams of law (statutory and customary law of the people), and neither can they determine which stream is most appropriately applied in any given case. The failure to apply the appropriate laws leads to miscarriage of justice for those who ought to have benefited from the protection of the law, had it to been applied correctly.

Similarly, the lack of skills on conflict resolution or handling cases in a quasi-judicial sense is another problem that leads to a travesty of justice. This has in some instances led to grave mistakes like rehearing a matter that is already decided by the same court, and coming up with a totally different decision on the second hearing. On this point, care has to be taken to distinguish between wrong-doing as a result of genuine lack of skills, and that, which presents itself as a consequence of lack of skills but is actually motivated by corruption. This paper has revealed instances where the law or certain



skills are purposely not applied, or are applied selectively to punish or benefit particular litigants who may not have paid for – or have paid for, the outcome respectively.

### 4.3 ILLUSTRATION OF THE INAPPROPRIATENESS OF THE WINNER - LOSER KIND OF JUSTICE

#### 4.3.1 THE CASE OF ARACH VALIRIANO V. ODONG RICHARD SYRAYO<sup>118</sup>

This case shows the multifaceted dimension of land disputes in post-conflict Acholi that cannot exclusively be handled through the winner-loser justice approaches. Resolution of such disputes has far reaching implications for society. The case described here is between members of the same extended family: Arach's niece was at some point married to a member of the defendant's extended family, which makes the people on either side of the conflict relatives through marriage. This fact is not evident on the records of proceedings of the Courts, but was stated by one member of Mzei Arach's extended family, that the researcher talked to.<sup>119</sup>

The details of the case are as follows: **Arach Valiriano**<sup>120</sup> is the owner of about 600-700 hectares of land in Adak village Pungwinyi Parish, Patiko Sub County. The respondent, Odong claims that a big portion of this land belongs to him, having been his father's land before he (his father) left the area in 1965.<sup>121</sup> Before reaching the Chief Magistrates Court of

Gulu, the case was heard by the Local Council Courts II and III respectively, and both ruled in favor of Mzei Arach. It is interesting to note that for the good of peaceful coexistence of the family of Mzei Arach and Odong, it was decided that Mzei Arach should give two hectares of land to Odong, which Odong rejected, insisting that all the disputed land should be transferred to him and not simply two acres.<sup>122</sup> Instead of taking the two acres, Odong made an application to the Chief Magistrate Court for leave to appeal the decision of the Local Council Court III out of time, which was granted, but again he lost the case to Mzei Arach.<sup>123</sup> Meanwhile, Mzei Arach got an order from the Chief Magistrates Court to enforce the judgment of the Local Council court III in his favor. It was ordered:

**” (... ) 2. The Respondent should leave vacant possession of the land to the applicant as directed by the Local Council Court Committee judgment of Patiko Sub-County, in Gulu District on the 17<sup>th</sup> October 2008.”**<sup>124</sup>

This marked the beginning of an exposition of a lot of contentious issues, as this land dispute entrenched hostilities and hampered other human rights.

From this case, it is seen that enjoyment of other rights can be hampered as a result of the antagonism among people due to land wrangles. An example of this is the right to

education. The researcher was informed by a member of Mzei Arach's family that due to the intensity of the hostility, Mzei's children could not go to school, since the school was only accessible through Odong's (neighboring) land. This is similar to what happened in the Rukwo and Palaro Conflict. Palaro kids could not go to school in Rukwo, and the people of Rukwo could not access the market in Palaro due to a conflict between the two communities.<sup>125</sup> Land dispute resolution mechanisms have to take into account the nexus between land and enjoyment of other rights, and choose appropriate remedies that will sustain both. The **Odong v. Mzei** family land dispute goes beyond a land wrangle that can be settled, and becomes an intrinsic conflict between the two families. Odong's family was always willing to do what it took to provoke Mzei's family. Members of the community that sided with the Odong family reportedly released their cattle which was said to have destroyed big portions of Mzei Arach's crops, and when he arrested them, he was accused of theft. The respondent's animals are also said to have destroyed crops on 60 hectares of land belonging to Mzei Arach.<sup>126</sup> It was expected that this hostility would increase if Mzei enforces the order for damages that the court granted him.

This case leads us to ask whether a winner-takes-all justice is the most appropriate kind of justice in such situations.<sup>127</sup> Beyond the divisions and hostility between the parties to this case, the communities where the parties

belong, are also divided as a result of this case. According to the eviction report that the researcher saw, a total of 108 village residents were in support of the eviction (in the interest of Mzei Arach), but three were in support of Odong's case, against the eviction, and threatened with violence and even the killing Mzei Arach.<sup>128</sup> During the armed conflict, many in Acholiland lived in fear of their lives, fearing that the rebels or other parties to the conflict would kill them in pursuit of their unclear agenda. In the post conflict period, it is not different for some people like Mzei Arach: The choice is either to give up his land rights, or live in fear of losing his life at the hands of a few that are politically well-connected, and their allies, conflicting with him over land.

This kind of situation is what has been referred to as the obey or die/get harmed morality.<sup>129</sup> This case is also significant since it shows that numbers do not matter in the face of power. The majority that rightly supported Mzei's case became an insignificant lot in the face of the minority that had might (power) and used it to assert or define what was right, bringing about a distorted sense of morality, right and wrong in society.

In addition to the above, the winner-takes-all justice would not be the most appropriate in other land cases involving multitudes of people as below.

#### 4.3.2 LAND DISPUTES ACROSS WIDER COMMUNITIES

Land disputes across wider communities are no ordinary disputes. Aside from the fact that they involve wider communities, some of which do not ascribe to Acholi culture, reputable politicians, and at times the state, have a vested interest in them. The nature of these disputes and the parties involved, brings about a number of issues including whether taking them to traditional institutions to reconcile the communities is a better option than the pursuit of adjudication: would all communities or parties involved, respect the decision of the Acholi TIs if they do not subscribe to Acholi culture? And are there sufficient safeguards in the TIs, to protect them from manipulation by the powerful? One relevant dispute is that between the Jonaam/Alur/ in Nebbi District and the Acholi in Amuru District.

Among the issues that arise in this situation is how the creation of new administrative or political units in post-conflict northern Uganda, in the form of new districts, strains existing divisions between and among people of various tribes in a region, and also brings about land wrangles.

The Alur/Jonaam are found in Nebbi district in northern Uganda, west of the river Nile. On the East are the Acholi in Amuru District. South of Amuru district is Masindi District, occupied by a tribe called the Banyoro. Amuru district is recently cut out of Gulu District. There is a myth or belief shared by many, that acquiring District

status comes with a lot of advantages for a territory/community: more jobs, better services, and more control over issues of governances, service delivery, among others, in a given area.<sup>130</sup> Yet benefits from district status come with ills, like fights over land or boundaries.<sup>131</sup> Those in the new District normally struggle to jealously guard what is considered theirs, whereas the outsiders strategically seek to tap into the good that apparently comes with this status. Contestations between such two grounds in the process of these struggles then become good avenues for exploitation by self-seeking politicians.

In a number of instances, some politicians' political careers thrive on the existence of disputes or misunderstandings among people in society. They then either play the kind of politics that fuels the flames of such misunderstandings into disputes and/or pretend to hold out as the God-sent magic bullet to provide solutions to such problems. In this way, they buy their way into office on the basis of their pseudo abilities.<sup>132</sup>

This situation comes out clearly in the case of the dispute between the Alur of Nebbi district and the Acholi of the new Amuru District.<sup>133</sup> At some point, elders in that region accused the Resident District Commissioner of Amuru (a one E.Y. Komakech) of encouraging the Alur community to occupy land belonging to the Payira clan of the Acholi in Latoro area of Amuru District, an allegation that he vehemently denied.<sup>134</sup>

The conflict between the Alur and the Acholis is further complicated. The Alur, i.e. the Jonaam Alur, are said to have been fishermen, who about 100 years ago resorted to farming/ agriculture. For this they needed land. Many of them became squatters on land east of the Nile, belonging to the Acholi. In more recent times, with the population growth in their area and significant increase in the desire to acquire more land, some Alurs are being alleged to have extended their boundaries into the area that is part of the new Amuru District for the Acholi, hence causing land disputes on top of the bigger disputes, of what marks the boundary between the two tribes.

The armed conflict exacerbated this situation. All Acholi and Alur (squatters) on land belonging to the Acholis were displaced. The increased demand for land in the post-conflict period pushed the Acholis to insist that the Alurs cannot return to the land on which they were squatting, yet to them, this was their former home to which they were supposed to return after conflict.<sup>135</sup> Other Alurs west of the Nile, not formerly squatters on the Acholi's land, saw an opportunity in the period of return to *en masse* migrate east of the Nile and occupy land belonging to the Acholis, since that area had district status.<sup>136</sup> The land disputes that arose at this time between individuals and the two tribes herald a new period of conflict rather than one of peace.

As earlier mentioned, friction between the Alur and the Acholi of Amuru arises since the Acholi

in Amuru allege that Alur are merely squatters that do not own the land in Amuru.<sup>137</sup> A number of participants at the meeting organized to resolve this Jonaam/Alur and Acholi border issue and other smaller land disputes highlighted power or politics as the main factor complicating and delaying resolution of the dispute. Some elected leader at either side of the conflict were apparently misleading people and inciting them not to keep the conflict on-going, and to refrain from reaching a compromise. They exploit the situation for their self-interest or political gains.

The way people use their power and political positions to escalate land wrangles is one of those areas that ought to be scrutinized and carefully handled by the state, if land justice and land rights are to prevail in the northern region of Uganda. It is in such cases that winner-takes-all justice is not the most appropriate effort aimed at reconciliation.

#### **4.4 PROCEDURAL ASPECTS**

Record-keeping is among the revered attributes of a judicial or quasi-judicial system that is anchored in formal or written law systems.

It is not within the cultural logic of TIs to consistently keep records of proceedings. There are glaring shortfalls in record keeping and in documentation generally.<sup>138</sup> Recordkeeping is mainly for records of proceedings and documentation of a number of aspects relating to customary tenure rules as they are according to Acholi custom.<sup>139</sup> The lack of records and

documents, in some cases decided by previous Rwodis, affects the work of the current Rwodi and that of the (Chief) Magistrate Courts that handle cases involving customary land.<sup>140</sup> According to the Chief Magistrate of Gulu, Rwodi Kweri in Acholi and Adwong Wang Tic in Lango, together with clan chiefs, were tasked with allocating and demarcating land and settling boundary disputes. They basically knew (almost) where all the boundaries were. Not all these boundary disputes resolved before the armed conflict broke out were recorded, and some of those that mediated them died. Yet, there are instances where new cases arise from such disputes already settled, but there is no record to be referred to and neither are any of the Rwodi that were involved in mediating such cases, alive to be called as witnesses to testify in the (Chief) Magistrate Courts.<sup>141</sup> In the end, time is lost as would-be settled cases are reheard either in courts of law or TIs.

Hearing the case afresh could also have implications for peaceful coexistence of the parties, especially if the outcome of a decision is the opposite of what was decided earlier. This is very possible in cases where armed conflict, or any of its offshoots, changed the circumstances surrounding a given case, thereby justifying a shift in terms of who is favored in the decision which is reached at a level of say, the magistrate court.

Other issues of concern from the field (which also apply to LCCs) are the limited likelihood

of fair decisions from these institutions. It was pointed out that the traditional personnel that deal with land matters operate within their geographical area, usually where the majority of the people are relatives. This increases the likelihood of bias against a party.<sup>142</sup> On the other hand, LCCs are to a great extent regulated by statute, although they do not fully make provision for all aspects of their operation. Much of the detail is regulated by the Local Government Act and the Local Council Statute, yet they apply custom and common sense in their processes. This to the researcher connotes a “mini” formality of the LCCs, although if it were a continuum with various points between formality, mini formality, and informality, LCC would oscillate between mini formality and informality, but more towards informality.

Even though the law makes an attempt to regulate their mode of operation, it is not far reaching enough to regulate much of it. Even where some aspects like mandate are regulated by law, there is a wide gap between law and practice. Due to that, much of the debate on the consequences of operating in a less regulated space discussed above with regard to TIs, applies to LCCs. The post-conflict period is a time to garner political advantage using land.

Although customary tenure and rights were not such a big issue around this time (2009), the land situation in northern Uganda was soon becoming one representing many political opportunities for the government. Over twenty

years of armed conflict in the region had changed the political topography and reduced peoples' belief in the government disabling it from easily entrench its authority. The circumstances prevented it from entrenching its authority through handling land disputes or delivering goods and services to the people. Massive displacement made much of this difficult.<sup>143</sup> The displaced resorted to existing, non-state mechanisms to deal with their issues on land, as well as other issues of criminal or civil nature. Sikor and Lund argue that institutions without legal-political authority can at times exercise authority without legal or other backing, and later go ahead to pursue options through which they can be recognized as legitimate to exercise that authority.<sup>144</sup> In the absence of state institutions like courts or land administration bodies, authority was exercised by the local chief in the community. This, to some extent entrenched their authority on land matters during this period. Note however, that these TIs have authority to allocate land in the pre conflict period. The post conflict period presents a situation with high numbers of land disputes. The increase in disputes over ownership indirectly means that traditional authority is under threat/stress: it is questioned. Where someone occupies land, courtesy of an allocation by a TI, any attempt to unseat that person by another person who does not involve the traditional authority, implies that the latter does not fully respect the authority of the institution. The relatively open power vacuum that was present in this period could

easily be exploited by the government in order to reestablish, or strengthen its presence and authority in the region.

The period of the post-Juba peace processes (or the post conflict phase) presents an opportunity for the government to reestablish or expand power in Northern Uganda by promoting development through reconstruction. This goes hand in hand with land.<sup>145</sup> At the intersection of land and post conflict development imperatives, spearheaded by the government, there are other issues related to the rights of the customary land owners, the powers of traditional social/ political units like clan heads or chief, and Rwodi Kweri, and their positions on who owns land or should have the power to control access and mode of use. Government involvement and desire to regulate issues of land in the region would mean two things: assertion of its authority, and disposition of authority from those that have for long exercised it hence contention. Yet, the post conflict period is one that is mired with high suspicion of land grabs: This, in turn, makes people afraid that the government is interested in their land, and also suspicious of each other.

It is a period characterized by clashes between various interests: private and public, state agents, powerful technocrats/top government officials, etc. There are also power struggles (over land issues) between government, local governments, and their (human) agents on

the one hand, and persons bestowed with authority within the customary spaces like clan heads and TIs responsible for handling land matters, on the other. These disagreements play out in many ways that shape the nature of contestations over land and the outcomes from the TIs and LCCs handling them. As will be seen later on, land has become a playground for a mix of conflicting values and interests of institutions and individuals on each side, each trying to use available power to assert a position. Some of these conflicting interests and values are between individuals and community values (promoted by traditional leaders), traditional authority and government; on preservation of customary modes of access and use of land on the one hand, and promotion of land as a commodity on the market, on the other. The last, and worst, are struggles between and among members of the community.

All the above gives us an insight into how power has shaped the nature of contestations and the mode of their resolution through avenues closer to the people; TIs and LCCs.

It should further be noted that existence and resolution of land disputes/conflicts is a playing field for politics and power dynamics.<sup>146</sup> Thus power dynamics and other attributes of the highly unstable environment of northern Uganda shape the operation of the LCCs and TIs, and their relationship on resolution of land disputes. These power dynamics, in turn, shape

the outcomes of land disputes handled by either body of institutions, and affect the extent to which rights of parties before them are respected in these disputes.

#### **4.5 NATURE AND ENFORCEMENT OF DECISIONS**

It is important to address the question of whether or not the decisions of the TIs, as a result of mediation proceedings, are enforceable, or if they bind the parties to them. The outcome of mediation by the Rwodis is not binding on the parties, although they have a moral obligation to respect and abide by it.<sup>147</sup> As mentioned earlier, traditional institutions do not command as much respect as they did in the past; they can only reminisce about authority and respect during the pre-conflict period.<sup>148</sup> This implies that people do not feel as much morally (or socially) obligated to abide by a decision passed by the authority, which, after all, is not backed by any social or legal sanctions.

It was a concern with some of the people interviewed, that there is no provision in the law stipulating how the outcome of mediation by TIs is supposed to be enforced.<sup>149</sup> This is one of the factors that has encouraged forum shopping. It occurs where, rather than abide by the mediation outcome, a dissatisfied party runs to another institution to file a fresh suit, with the confidence that no eviction or actions to enforce an order of the TI can be carried out.

Magistrate courts are not by law authorized to assist in the enforcement of the outcome of mediation, but can receive fresh cases that arise from them. The outcome of the mediation is then only used as evidence in the proceedings before the magistrate court (if at all): the court is not bound to come up with a similar decision to that of the traditional institution. On the other hand, the Magistrate court is empowered to enforce the judgments of the LCCs. Two questions arise in the circumstances: does the lack of a “legal” provision on enforcement of the outcome of a mediation mean that the traditional institution cannot enforce?; Can’t we only refer to the constitutional provision that allows customary tenure<sup>150</sup> and section 88 of the Land Act that recognizes them, and then come up with means of enforcement based on custom and practice without a legal provision?

It is the researcher’s contention that we do not always have to look at written state law to discern all the “hows” of doing things pertaining to custom or customary tenure. The Constitution of Uganda recognizes customary tenure and this partially puts it in a new place where it is neither fully informal nor formal.<sup>151</sup> The situation therefore does not fully qualify as a “formalization” or a purely “informalisation”. It has only been formalization by recognition, which has not come with support, clear methods of supervision or stipulation of clear procedures of appeals from the TIs. Therefore, legal recognition of a system that does not have the capacity to support itself without any

support from the state is (almost) as good as no recognition. The system does not have the requisite resources and capacity to operate in such a way as to facilitate the advantages of recognition. In short, it can be described as neither formal nor informal, neither supported nor suppressed.

Besides that, the Constitution of Uganda goes ahead to clearly say that customary land tenure is a kind whose incidents depend on the customs and tradition of the people in the area it appertains.<sup>152</sup> It recognizes the tenure, and leaves the detail not to parliament, but to custom and tradition of the people. This allows for a high degree of flexibility in which issues in the customary space are handled only subject to customs and traditions.<sup>153</sup> Section 88 does the same thing: recognizes that traditional mediators play a role in protecting customary land rights by, among other things, dealing with conflicts arising from land held under that tenure. It would not be unreasonable at all for anyone to assert that the laws of Uganda do not, by design, dictate that the outcome of a mediation of a land matter by traditional mediators should not be enforceable. Rather, assuming that this was the unspoken intention of the law is unreasonable, since the state law per se, is not intended to provide for all matters relating to customary tenure, but for the customs and traditions of the people reign. It is the researcher’s argument that this situation or silence of the law on enforcement does not preclude the TIs from applying their custom on



enforcement of the decision of the mediator, or from actually coming up with a method of enforcement that is in line with (the ethos of) the custom and tradition of the people, and is sensitive to the needs arising from the post conflict setting. Since not everything legal can be customary, we should not always look to the law to find all answers to every question concerning custom, as it relates to protection of land rights through mediation. Some answers are hidden in the customs of the Acholi people.

#### **4.6 RIGHT OF APPEAL**

A number of issues are associated with the exercise of the right of appeal from decisions of traditional institutions in land matters. One of the elders at the Acholi traditional Institution (Ker Kwaro) asserted that there is a structure of appeal within the bigger structures of the Ker Kwaro.<sup>154</sup> To him, there is a Cultural Tribunal with an appointed committee in every chiefdom that sits and deals with land matters. The Rwot Kweri (head of a community in a homestead that works together) has a tribunal comprised of about 12 people that hears cases and make decisions on them, after mapping the land and demarcating boundaries.

Where there is a need for an appeal from their decision, the matter goes to the parish level of a traditionally constituted tribunal. If it is not resolved at that level, it goes to the Chief's committee and his members. Accordingly, the chief coordinates with courts of law and, at times, refers cases to courts of law and also

receives cases referred from the courts of law.<sup>155</sup>

Such working relationships between the state institutions and the traditional is what Miranda Forsyth would describe as a referral in her model of relationships between state and non-state justice institutions that have "formal recognition". This referral of cases comes with some advantages. We cannot over-emphasize them here, since the referral from which they accrue is not something expected or sanctioned by law, in that one cannot force an institution to engage in a referral in case it did not do so of its own accord. In the case of northern Uganda, there is no legal requirement that cases from TIs of justice be forwarded to the state institutions like magistrate courts, for us to expect the advantages of referrals to flow. That aside, one cannot assert that the TIs in Uganda (generally) squarely fall within the category of institutions that have formal recognition.<sup>156</sup>

It was unclear from the findings, if many people knew about the appeal structures of the TI (as stipulated by the elder above) or if they just preferred appeals to go to other institutions that are not necessarily traditional. It was a concern for some respondents, that there are no established procedures through which one can appeal the decisions of the TI.<sup>157</sup> To them, it would be better to have a system whereby an appeal from the TIs goes to state institutions, like chief magistrate courts.<sup>158</sup> The foregoing is a good way forward, since it would

fill the existing gap of lack of an avenue for appeals from TIs. However it raises a number of pertinent issues that we have got to be concerned about. Among them is the fact that appeals would be coming from an institution that applies tradition and custom when reaching its final decision, and be transferred into an institution, empowered to apply law, and which is not necessarily knowledgeable on matters of customary law of land in Acholiland. This might ultimately affect the cultural value that the people attach to the TIs. The set back of this is that these are two different kinds of institutions that apply different principles giving rise to different outcomes or decisions. This goes to justify promotion of a system of appeals within TIs structure. What would arise in situations in which appeals from TIs go to Magistrates courts is not a hybrid system, since the traditional would (most likely) get fused into the statutory on appeal. There are disadvantages and advantages likely to accrue from this.

The appeal in the state court changes the whole system/dynamics of application of custom in the TIs; it offers an automatic exit option, where a case ceases to be fully handled by TIs applying custom within a customary space. This increases the likelihood that those that are entitled to protection of land rights under custom lose that protection in the new state court system. Also note that in addition to having no guarantee that the statutory officers will be knowledgeable on customary

land law, they would have no chance to hear from witnesses like the elders or Rwodis that decided the case in the first place. The officers dealing with the appeal would only look at the record of the lower institutions that decided the case. Regarding this point, we cannot totally rule out the possibility of errors (through say misinterpretation of custom) that lead to miscarriages of justice.

The advantage that could accrue from appealing TI's decisions in state courts is that an appeal to a state institution would introduce a situation, where the decision of the TI is subjected to independent scrutiny by an outsider. Since not all customs are in line with the law, this would be the point at which some customs that deny some people rights to land, would be disregarded by the Magistrate court. Although one can look at this as undermining the customary space where the first decision was made, it has an effect of putting customary norms in line with constitutional principles, in addition to aligning the two systems by reducing the points of contradiction between them.<sup>159</sup> However, the reduction in the contradictions will most likely operate against the weaker system, which is the customary system, and over the years, it is likely that the customary will diffuse into the state system, thereby denying those that prefer its services a chance to benefit from it. These two systems cannot compete at the same level. Over the years, the state system has been prioritized over the customary, and the customary is

not well equipped to favorably compete with the state system. Most likely, the customary will be more at a disadvantage compared to the statutory, in this regard. On the other hand, if the intention of sending appeals from customary institutions to Magistrates courts was not to fully incorporate and dissolve the former into the latter, the customary will maintain its semi-independent status and somehow run under the shadow of the statutory. Using South Africa's experience, Scharf and others argue that the cooperation of both non-state and state institutions at that level, does not leave either of them intact, since each one picks and gives attributes from and to the other.<sup>160</sup> In the case of Uganda, since state institutions have a long period of experience and state support, they would most likely contribute with more than customary institutions like TIs.

Finally in coming up to a decision as to whether or not appeals from mediators should go to magistrates courts, it shall be remembered that proceedings before the mediators are mainly geared toward reconciliation, whereas those in courts are adjudicatory, leading to a winner and a loser. These are two categories of institutions applying different streams of law to achieve different goals. It is important that TIs (through the Ker Kwaro) are supported and facilitated by the state and other interested donor or stakeholders to clearly define their appeal structures, strengthen them (if they already exist) and make them known to the people. The people should then be encouraged to

appeal to traditional structures rather than to the statutory body. The option to appeal to the statutory should also be open for particular cases, and in general the statutory could play a supervisory role to TIs.

#### **4.7 PARTICIPATION IN PROCEEDINGS: THE ROLE OF WOMEN**

Research shows that women, young people, the disabled, and minorities are among the groups that have traditionally been discriminated against in the customary space.<sup>161</sup> As a starting point to improve the situation of the above groups, the Constitution of Uganda 1995 and other laws have come up with specific recommendations on how, for example, women can participate. This subsection will not discuss issues to do with all the other groups but women.

Among the National Objectives and Directive Principles of State Policy in the Constitution is Principle XV, by which the state undertakes to "(...) recognize the significant role that women play in society." This recognition is followed by specific constitutional provisions allowing for women to take part in various aspects of public life including politics. Under Article 33, women are guaranteed equal treatment with men, and "affirmative action for the purpose of redressing the imbalances created by history, tradition or custom" is provided for, as a means to pave way for equality between sexes. Further, article 180 (2) (a) of the same constitution stipulates that one-third of all local government councils

positions should be filled by women. This does not preclude women from vying for any other positions on the Local Council as individuals, by virtue of the affirmative action provisions. Specifically for LCCs, the quorum is stipulated in the Local Council Court Act 2006 at five members for the village or parish LCC, two of whom have to be women, and 3 members for the town, division or sub-county LCC, one of whom has to be a woman.<sup>162</sup>

Although the Constitution and the LCC Act of 2006 promote the participation of women in local government issues, the reality does not correspond with legislation. The existence of a number of social, cultural, and economic stumbling blocks in society limits the role of women in practice, thus indicating that law alone is not sufficient to promote participation of women.<sup>163</sup>

In both the LCCs and TIs, studied, there is a tendency for limited participation of women. Where they have participated, it has more often been as onlookers and not as decision-makers. Specifically for TIs, there are no specific

quotas stipulated for women, which makes it cumbersome to measure if they are sufficiently represented or not. This also makes it hard to advocate for, or try to enforce representation if it is not seen as a right but as a mere token. In the TI setting, this situation is due to the fact that the system emphasizes culture and cultural norms, which have a tendency to keep women in an unfavorable position with regard to participation in proceedings before them. During the field research, the researcher studied some mediation reports, which revealed that the numbers of participating women, compared to men, is low. See table below.

In matters of mediation, the iconic image of a mediator and of an active participant is that of a male, advanced in age and experience. On the other hand, the women are depicted as victims of customary land rights violations, and not necessarily as active participants in proceedings, as the table above shows.<sup>164</sup>

The widely shared stereotype is that her role is in the home; to rear children and care for the

<b>Date</b>	<b>Place of Mediation Meeting</b>	<b>Number of men in Attendance</b>	<b>Number of Women in Attendance</b>
May 18, 2009	Agung	31	4
June 1, 2009	Agung	50	7
June 8, 2009	Latoro	22	6
Sept. 21, 2009	Agung	36	2

family but not to actively take part in activities like (legal/social) mediation meetings which are a preserve for the men. Yet, the researcher believes that since they were equally affected by the armed conflict, they should take part in efforts to ameliorate its implications.<sup>165</sup>

Traditionally, women do not directly “own” land but do so through their male counterparts, husbands, brothers or fathers. As a corollary their rights are believed to be enforced by agency through the male relatives. The cultural institution has promoted this state of affairs, by encouraging more males than females to take active part in land dispute resolution mediums. Asserting rights to land or to participate in land-related proceedings is unthinkable to many women, for the scorn it can bring to the assertive woman from both society and the cultural institution. It therefore follows that apart from the limited numbers of women that attend mediation proceedings, there are very few, that attempt to report land cases in which they believe their rights to land were violated. This report cited here, indicates that out of the 321 cases that were reported to the Norwegian Refugee Council between November 2008 and October 2009, only 34 were by women.<sup>166</sup>

The customary system of land holding does not always give women direct rights, which means there are few instances in which they can be direct victims of a land right violation and entitled to claim a remedy. That notwithstanding, the cases reported by women

are unreasonably low. This means there could be other factors barring women from reporting cases. The failure to report the cases does therefore not mean that women are satisfied and are enjoying land rights. It could be that women just do not report cases, or appeal decisions. Miranda Forsythe has argued that it is common that dissatisfied litigants will not appeal a decision of an institution for fear of being seen as disrespectful to that authority that passed the judgment in the first place.<sup>167</sup>

Reporting a case, appealing a decision, or insisting in taking an active role for a woman can be seen as a sign of defiance.<sup>168</sup> Yet the less they participate in issues of this nature the less their views, positions, and interests will be reflected in the outcome. In the end, the terrain is not balanced but tilted in favor of the men, whose views are usually reflected in these spaces. This therefore becomes accepted practice over time.

The question relating to whether or not women would like to participate in proceedings before TIs or LCCs is an interesting one that can be investigated, although it is not within the scope of this paper. It becomes a pertinent issue if their limited participation is a consequence of discriminatory practices that exclude them, rather than if it is a result of their informed decision not to participate. That said, the limited participation of women means that their concerns are not always addressed in proceedings in the LCCs and TIs. It can be

argued that their participation would lead to a relatively representative outcome for both sexes on matters of land rights protection.

#### **4.8 SYSTEMIC AND DECENTRALIZED/ SOCIALIZED CORRUPTION**

Corruption is not only an issue in the justice sector, but a deep rooted problem in the whole structure of government, extending its tentacles from the center, down through the decentralized structures of government to the lowest level of society.<sup>169</sup> Matters pertaining to corruption are regulated under the Prevention of Corruption Act 1970, Chapter 121. The Act does not define corruption but sets out actions that are punishable as amounting to corruption. In it's Article 2:

**” (...)** any person who shall, by himself or by or in conjunction with any other person: Corruptly solicit or receive, or agree to receive for himself or for any other person; or corruptly give, promise or offer to any person whether for the benefit of that person or of another person, any gratification as an inducement to, or reward for, or otherwise on account of any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed, in which that public body is concerned commits an offence.”

From the above, corruption is mainly attributed to persons in public office. It has however, to a significant extent, been normalized and accepted (as inevitable) to the members of society and those in the private sector, whose corrupt actions therefore sustain and entrench it. In this case, corruption becomes “an important fact of life.”<sup>170</sup> It is mainly used by those in power as a political resource/tool to reproduce power structures and maintain unequal relationships between them and the population that they are meant to serve.

Apart from benefiting the corrupt officers, it has been said that it benefits some sections of the population. Mwenda argues that since many governments in Africa fail to deliver public good and services as promised, the only way through which the people can get anything from the public officials is through corruption.<sup>171</sup> Corruption therefore becomes accountability; public officers do not deliver the services they have to deliver to the people, rendering people susceptible to corruption. Corruption then, becomes the way through which they get what they are entitled to in terms of goods or services.<sup>172</sup> For example, they easily accept bribes from politicians during the vote seeking campaign, since they know that once the politicians get into office, they will most likely not deliver and the people will not be in position to make them account for non-delivery.

That notwithstanding, in many countries and in Uganda, the fight against corruption is in vogue,

and is one of the most talked about activities of governments.<sup>173</sup> Uganda is a member of the international anti-corruption movement through its ratification of the United Nations Convention against Corruption.<sup>174</sup> At the national level, Ugandan law prohibits corruption.<sup>175</sup> Besides that, Institutions have been put in place at various levels of government to curb corruption and increase accountability. These include: Auditor General, Directorate of Ethics and integrity, and the Inspector General of Government. At the district level they include: Internal Auditor Department, External Auditor, and District Councils for like the Council Committees, District Tender Boards Local Government Public Accounts Committees, District Land Board, etc.

The above accountability mechanisms tend to be more focused on protection of abuse and misuse of public funds, and exploitation of people in the process of executing public functions by public officers, and not those in private spaces. These mechanisms can, and have, only kept corruption in check and have not combated it.<sup>176</sup> The report that 80% of government officers in Uganda are corrupt is confirmation that the efforts have not been effective.<sup>177</sup> In 2008, it was reported that the country lost about 500 billion Uganda shillings a year to corruption.<sup>178</sup> Uganda is thus one of the very corrupt countries. The 2010 Corruption Perception Index of Transparency International rated 178 countries on a scale of 10 (highly clean) to 0 (highly corrupt).<sup>179</sup> Uganda occupies the 127<sup>th</sup> position with a score of 2.5. This

is an indication that there has been a slight improvement since Uganda occupied the 130<sup>th</sup> position in the year 2009.<sup>180</sup> On the scale of 10 to 0 it scored 2.5 in 2009. The movement of three steps up the ladder from position 130 to 127(in 2010) is not a significant change that can bring about a reduction in the effects of corruption within Uganda. At the same time, putting anti-corruption measures within structures of government or local government administration does not necessarily combat corruption in the Justice Sector, or in lower institutions that deal with dispute resolution.

#### 4.8.1 CORRUPTION AFFECTING LCCS AND TIS

Judicial and quasi-judicial institutions in Uganda are not corruption-free. Corruption has not spared the legal or judicial system of Uganda. Sandgreen has argued that:

**” A weak legal system is conducive to corruption, but corruption also weakens the legal system. There is a causal relationship both ways. First, a weak legal system is closely related to an informal economy. The grey zone between poorly working official rules and institutions on the one hand and the informal law on the other is a breeding ground for corruption.... (I) f the state is incapable of enforcing its own rules effectively and impartially, bribes and private protection fill the void left by inadequate state enforcement.”<sup>181</sup>(Emphasis added).**

The above arguments fit well with the Ugandan system under investigation here: the operation of mainly the LCCs and TIs that deal with land disputes in Acholiland.

On the part of the LCCs, there is limited enforcement of the law(s) that contain some provisions that set the boundaries within which they apply. This leaves a fissure through which corruption can sieve, hindering their effective functioning. They are anchored within a weak (legal) and other system(s) that makes them prone to corruption with impunity. This, to some extent, shows that the solutions do not always lie in standardized black letter rules, but in larger configurations of society. The TIs, without such legal stipulations cast in stone, have been less vulnerable to corruption, compared to LCCs.<sup>182</sup> The relatively stronger social legitimacy of the TIs in Acholiland compared to that of the LCCs tends to promote a cultural norm that spurns corruption.

Also, the absence of clear and fully functioning accountability measures at the level of the LCCs has a bearing on the existence of corruption and its varying levels. The political avenue, through periodic elections, would serve as accountability to some degree, but these have not taken place for long period of time.<sup>183</sup> The likely effect of having the same people serve for long periods of time is reduced productivity or effectiveness, due to burn out. Skipping periodic elections could also be a blessing in disguise for some, who might

use it to entrench their corrupt tendencies by exploiting the public. Therefore, the political option of accountability should only complement others, since it alone cannot be effective, and has not been sustainable thus far in Uganda.

Bribery is among the common forms of corruption that have been identified in the LCCs. Bribery arises when a person gives something valuable to an officer in office or authority in exchange for a favor.<sup>184</sup> In the context of LCCs the motivation for bribery on the part of the briber is to get a favorable service. This could be in the form of a winning decision, delaying a decision (to buy time), or not deciding a case at all. To one interviewee, "Judgments in these courts are normally against the poor since the rich can bribe."<sup>185</sup>

Advances by corrupt persons would perhaps not turn into corruption-driven transactions if the officers were incorruptible. However, the weak (and in some cases non-existing) institutional incentives, and other pressures of life make them prone to corruption. It is alleged that they, for that reason, make favorable judgments in exchange for money.

Clearly, as argued by Sandgreen, where a legal system is anchored in a weak economy, the propensity for corruption is high.<sup>186</sup> Uganda's economy is weak.<sup>187</sup> Although the members of the LCC are normally dignified persons that are usually socially well connected, they do



not, in most cases, form a part of the high rung of society in economic terms. Their economic circumstances, coupled with the weaknesses in the system within which they operate, makes them prone to corruption. At times it is despair: working in a system for years but seeing no (or negligible) impact on the ground, pushes them into corruption.<sup>188</sup> The lack of motivation or limited avenues for them to be incentivized reduces the value they attach to the institution they serve, and therefore reduces their drive to work toward sustaining them in an enviable or good shape. With this, corruption in form of bribery sets in, and decimates the integrity of LCCs and the value of their work.

To one Human Rights Officer, corruption partly arises due to the fact that the Local Council Officers are not remunerated for their services.<sup>189</sup> Recent developments show that the government of Uganda has partly fulfilled its pledge to pay the chairpersons of village local councils and parishes an annual amount of one hundred and twenty thousand shillings (approximately \$53) as gratuity.<sup>190</sup> The first batch of this money released in January 2010 was not enough to pay all the 57,364 Local Council I Chair Persons, and 7000 Local Council II chairpersons, which meant that some, in areas of northern Uganda like Apac, did not take the full amount since the funds were insufficient.<sup>191</sup> This “ex-gratia” payment as referred to by the government does not even begin to solve the problem of lack of remuneration for the Local Council officers.

First, it was only paid to the chairpersons, and not to the other members of the Councils, yet a chairman by him/herself cannot do all the work that the committee does. That aside, the equivalent of \$ 53 for the whole year of work is a mockery of gratitude; the money is paid as gratuity and not as remuneration.

Also, rather than strengthen the working relationship among members of the Local Councils I and II, a payment to the chairpersons and not the other members has a potential to undermine that relationship. Other members can naturally feel that their work is not appreciated and therefore become demotivated, or develop a feeling that those that are paid ought to do the work. Payment of this money might not build, but may instead contribute to a further degeneration, of the Local Council System. Indeed, if lack of remuneration is a contributory factor to corruption, the ex-gratia payment to the chairpersons has the potential to lead to increased corruption on the part of those members of the committee that are not appreciated in terms of cash. The amount offered is not good enough to keep those that receive it satisfied such that they refrain from corruption. The corruption problem still remains deeply rooted, and likely to affect the operation of the LCCs. Persistence of corruption in the LCCs, means that justice is eluded in the process of land dispute resolution if litigants have the option to pay for winning judgments. Justice therefore becomes a

precinct of those that can pay, which is unfair and unjust.

Finally, lack of facilitation cannot be considered as the only likely cause of corruption. Poverty, desire for material gain, but also the existence of desperate litigants, leads to corruption in the LCCs. Uganda has not witnessed a total “moral rejection” of corruption. Although there could be a number of people that detest it, corruption is at times considered a necessary evil or cynical necessity that benefits those that engage in it. This creates a safe haven for it to influence outcomes; in the end, the benefits of a corruption-free society, wane.<sup>192</sup>

With rampant forum shopping in Acholiland, some litigants that are not ready to lose a case will file it in the LCCs especially if they can pay for a winning judgment.<sup>193</sup> The existence of people willing to grant a positive judgment on the one hand, and the poverty, capitalist motivations and degraded morals on the part of some officers of the court, creates a systematic breeding place for corruption.<sup>194</sup> In the end, justice in the Local Council Courts becomes a preserve for those that can pay for it. The majority of people in post-conflict Acholiland does not have the ability to pay for the vindication of their customary land rights, and would therefore be the most affected victims if this situation of money for justice is not eradicated.

It is difficult to point to any particular measure as one through which the above can be solved. Strengthening accountability measures in the LCC systems without dealing with poverty would not yield results. It is important to pay a wage or salary to the members of LCCs. This, however, cannot in itself be sufficient since it has been highlighted here that poverty is not the single cause of corruption. Granting salaries or wages to the LCC members, without following this up with a moral restructuring project to tackle or make steps towards annihilating society's embrace for corruption may not be successful to combat it. At the same time, increasing the fees charged to litigants or varying fees depending on the value of the property would be viable but not suitable, since it would most likely water down the basic logic of “popular justice” (affordable for all) on which the whole system of Local Councils was founded.

#### 4.8.2 CORRUPTION PRE-DETERMINING OUTCOMES

When corruption intersects with gullibility/vulnerability, poverty and determination by some members of society to enrich self, land rights are violated since outcomes of land dispute resolution are pre-determined. A number of people have insufficient means of survival. Some have therefore turned land disputes into a business/economic capital from which they expect to gain, or obtain the means to survive. Some evidence from the field shows that in Acholiland, there have been instances

where people have feigned entitlement to land and its violation, and attempted to pursue justice or a remedy.<sup>195</sup> This has led to increased numbers of phony claims to land, made against the most gullible or vulnerable members of society (orphans, elderly, women, the illiterate, etc.) in a bid to steal their land.<sup>196</sup> They become a soft target for grabbers due to their inability to defend their land rights in the face of the grabber's corrupt tendencies. Without corruption, the high levels of illiteracy and limited knowledge of land rights may operate in favor of the grabber. If he plays his cards right by assembling properly forged papers or paying off a number of good witnesses to testify, it is highly likely that he wins. The limited knowledge of land rights most likely keeps the victims away from courts or other institutions through which they could have pursued their rights.

There are a number of such cases, but the researcher will discuss one example that came to her knowledge, while conducting research at the Chief Magistrates' Courts in Gulu. The researcher was on that day seated in the Registrar's office at the Court, perusing files of cases on land matters when one, Otim Donato, accompanied by his cousin came in with a complaint.<sup>197</sup> He had a folded piece of paper issued to him by the Chief Magistrate's Court in Gulu, in the case of **Josephine Kitara v. Otim Donato**.<sup>198</sup> This paper was an order issued by the Chief Magistrate in this case. The facts and background of this case as the researcher got

them from the old man are that the applicant in the above miscellaneous application filed a case, the subject of which was a land dispute with the old man; Otim Donato in the Local Council II Court. This case was decided in favor of Otim, and the losing party did not file an appeal. Otim alleges that after the judgment was rendered in his favor, some members of the LC II Court asked him for money; he did not give them the money since he did not have any. Within a short time, the losing party in the LC II Court re-filed the same case (same facts and parties) in the very court that initially decided in favor of the old man, and this time, the old man lost the case to the plaintiff.<sup>199</sup> Due to his lack of knowledge that this was an impropriety since the matter was **res judicata**, Otim attended all the proceedings before the Court in its second hearing of the matter. He never heard from the LC II Court or the other party again, and was only surprised when he received papers in the above miscellaneous application (in the magistrate court) authorizing the enforcement of the LC II Court decision against him.<sup>200</sup> Otim was not served with court process, and neither did he attend the proceedings in the miscellaneous application that was made at the Chief Magistrate Court, where the ruling was made *ex parte*. The Chief Magistrate Court granted the order to enforce the ruling of the LC II Court; that Otim should vacate the suit land as directed by the LC II Court. After this, the winning party went to the Otim's land with court brokers to evict him off the land. They erased about nine huts off his land. It is at this

point, that the reality struck him and he ran to the Court where the researcher met him while he was searching for a remedy, at a point when it was too late to save his property.

This case exposes to us, the drawbacks that are associated with illiteracy or lack of knowledge of land rights, poverty, power disparities between the elites/powerful and the non-elites/powerless. It also brings to light the high level disconnect between enforcement of formal law and realities on the ground that inhibit the relevance of such law to the rural poor that are not equipped with the knowledge on how it can apply to them.

It is due to some of the above reasons that Otim sat throughout the proceedings when the LC II Court was hearing for the second time a case that he had earlier won. He cooperated with the Court, instead of rejecting their move to rehear the case. His failure to attend proceedings before the Chief Magistrate is excusable since he was not notified as required by law. He did not know that that he had a right to be notified of any tentative proceedings against him in any given court. For this lack of knowledge, the possibility that he can challenge such ex parte proceedings (without an opportunity for him to defend himself or be present) in a case against him are grim. He could only get up to search for a solution to his predicament of losing land and property when it was already too late: after he was evicted and his property was destroyed.

The above case is not only important to show how phony land claims are made in a bid to grab land from the most gullible in society. It also reveals other complexities associated with how these cases are dealt with. The commoditization of peoples' misery by those in power is clear in the above case, and appears to be common in the post conflict Acholiland. Through corruption, some of those with the mantle of power (political, judicial(or quasi-judicial) or financial resources, take advantage of the poor and steal from them instead of using that power for the public good.

The land disputes therefore become a tool by which some people are sentenced to poverty and loss of livelihood, and others are elevated to a higher class since they are able to use their positions to steal from the poor with the promise of helping them resolve the disputes in their favor. Otim did not have the money to pay the LCC in order for a decision in his favor to be maintained. It is due to the alleged corruption that the Local Council Court II (most probably), reheard a case that it had already decided. It is suspected that the case was reheard since through that option the LCC II members would personally financially benefit from the second hearing. From Otim's misery, the Local Council Court II purportedly benefited.

## CHAPTER 5

### CONCLUSION

This paper has shown that TIs and LCCs are handling land disputes in Acholiland despite the highly chaotic operating environment. These have greatly shaped the nature of land disputes, numbers and responses/attitudes of people to the outcomes resulting from mediation by TIs or decisions of LCCs. It has also been shown in this paper that the nature (in terms of structure) of these institutions and mode of operation has had great bearing on the decisions they make in land dispute cases. For example, there are reported cases in which the LCCs proceed without quorum, TIs operate without the active participation of women, LCCs accept bribes or act contrary to human rights notions, etc. In this respect, the operation of LCC and TIs contributes to post conflict, traumas, social agonies related to land. Coupled with existence of social ills like corruption, abuse of power (and poverty), the situation becomes one in which land disputes escalate and new ones come up, yet the dispute-resolving institutions are not well equipped to deal with them.

Some scholars have emphasized the need to strengthen dispute resolution mechanisms as a way forward, to avoid eruption of renewed conflict due to contestations on land in Northern Uganda.<sup>201</sup> This is in line with the idea of the United Nations Commission on the Legal Empowerment of the Poor, which is in support of strengthening informal institutions and linking them to the state institutions, something akin to alignment of both systems.<sup>202</sup> There is value in this as it may result in proper handling/resolution of disputes by reducing the competition between and among these institutions, which leads to inter-institution undermining.

It is however important that the resolution of existing disputes is followed by mechanisms aimed at prevention and improvement of the general environment within which people live as well. The rising amount of disputes justifies (or calls for) a fire brigade approach, focusing mainly on how the land disputes should be resolved at the moment, which is a realistic but haphazard approach if peoples' circumstances, living conditions or structural deficiencies in

the various land tenure systems are not dealt with. This approach can only stop the fire, but may not necessarily venture into the causes of the fire and come up with solutions as to how to prevent other fires: it will be an attempt to resolve the land disputes on customary land but will not get rid of the intrinsic tenurial, and other imperfections in the chaotic environment that have led to the upsurge of land disputes and violations of customary land rights. It is an option that operates in reverse mode, offering remedies in a bid to restore land rights as the most logical pathway (although only in the interim/short term).

The longer term solution ought to concentrate more on improving the general (legal and operating) environment in order for the TIs and LCCs to have a strong foundation upon which they operate. It is important to deal with the chaos and high imperfections in the circumstances as well. The imperfections and chaos range from intrinsic and problematic attributes of custom as a source of law, historical, social, and legal factors as well as a multitude of issues attributed to the armed conflict. There is cross fertilization between these circumstances, and the land disputes, which exacerbates both the imperfections and chaotic circumstances and the disputes in the region studied. This has in turn decimated the role of TIs and LCCs in handling land disputes.

The business-as-usual approach of the government and other players in dealing

with issues of justice or reconciliation only escalates the above precarious situation in which the TIs and LCCs are dealing with land matters in Acholiland. The TIs have for long been left in the customary space without facilitation or support, despite on-the- paper legal recognition. The LCC are considered a state initiative, but have not been subject to proper supervision and facilitation. Yet it is in these institutions that the majority of the poor Ugandans in the studied region seek justice for land. Although there are some flaws identified in these institutions, in the researcher's view, they are not totally unjust. Otherwise many would not use them if they did not offer (adequate although not always sufficient) solutions to their problems. Some have argued that the reason why many still use them is associated with their proximity.<sup>203</sup> Many Ugandans are very pragmatic. If they did not find any value in this institution's role, they would devise means of going elsewhere, say to the Magistrate courts. On the whole, it is the researcher's contention that the findings show, that these institutions are relevant to the needs of the people in Acholiland and elsewhere in Uganda. Thus, they are an attempt to meet their needs, which remain unmet by state institutions.

If the government of Uganda finds it important to build comprehensive peace in Acholiland, recourse should be had to building less antagonistic social relationships among people and structures or institutions that

promote justice or reconciliation in many matters, including land. Attention ought to be paid to the lower level justice institutions. Ignoring the TIs and the LCC's, and the way in which they operate, puts the rights of litigants in these institutions at stake. Yet, Uganda is a party to a number of International human rights instruments under which it is obligated to respects rights of such people in civil proceedings. As one way to improve the situation in the TIs and LCCs, it is important that the government of Uganda adopts a human rights based approach to all efforts addressing the issues arising in the operation of these institutions and in the way they handle land disputes. This may include improving accountability frameworks for international human rights law and domestic law that stipulates the human rights standards that should be respected in adjudication of (land) disputes.

It should be noted however, that a human rights focus alone is insufficient to improve the situation of TIs and LCCs, especially given heavy politics in human rights issues, interests of the powerful, and the culture of only paying lip service to human rights issues in Uganda. The fact that there is very limited (or no) presence of the state in these low level institutions is another hindrance to working with human rights or ensuring their respect in the LCCs and TIs. Also, TIs and LCCs have totally different structures rooted in distinct cultures, and they pursue relatively different agendas. Thus, TIs mainly apply custom in pursuit of

reconciliation or mediation of parties. LCCs can apply written law in addition to values of custom or common sense, to either reconcile the parties or declare a winner and a loser in a given case. Application of human rights standards can be an easier task for LCCs (which also apply written law) than TIs. Even then, strict requirements to abide by human rights standards without strong foundations on which they can be anchored could only boomerang.

To increase the chances of success at improving the land dispute resolution role of TIs and LCC, efforts at promoting human rights ought to be accompanied by others aimed at improving their operating environment. These could aim at improving the general attitude towards customary land rights, fight against corruption and abuse of power, and invest more in the fight against poverty. Within a relatively stable environment, the institutions could be improved with a less likelihood that they would be plunged backwards through cycles of corruption and abuse of political power that have in so far partly undermined them.

This paper does not insinuate that human rights are totally alien to TIs and LCCs. However, it is suggested that carrying out further research to carefully map the institutions, and the extent to which human rights notions are respected through the practices of those institutions is important. Such research could also identify ways in which human rights notions could be introduced or improved at this level.

## NOTES

## INTRODUCTION

- 1 The Magistrates Court Act: Chapter 16 of the Laws of Uganda and the Judicature Act: Chapter 13 of the Laws of Uganda.
- 2 The Act was passed on June 6<sup>th</sup> 2006. It repealed the then existing Resistance Councils and Committee (Judicial Powers) Statute of 1988. Normally, it is the members of the village or parish Executive Committee that come together to constitute the village or Parish Local Council Court (Section 4 (1) Local Council Act). Persons that serve in the town, division or sub-county Local Council Court are appointed by Local Councils at those respective levels, and the requirement is that at least two members must be women (Section 4 (2) and (3) of the Local Council Act).
- 3 Nick Devas and Ursula Grant, "Local Government Decision-Making, Citizen Participation and Local Accountability: Some Evidence from Kenya and Uganda", *Public Admin. Dev.* 23 (2003), 307-316 at 311. Published online 28 July 2003 in Wiley InterScience.
- 4 Local Council Court Act, 2006, Sections 4 & 5.

## ESTABLISHING LINKAGES BETWEEN CONCEPTS: A LOOK AT THE LITERATURE

- 5 Ker Kwaro Acholi, *Principles and Practices of Customary Tenure in Acholiland, Gulu, Uganda: Ker Kwaro Acholi* (June 2008), 1.
- 6 Mahmood Mamdani, **Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism**, Princeton University Press (1996), 145.
- 7 Elizabeth Colson, *The Impact of the Colonial Period on the Definition of Land Rights*, at 193-196, in *Colonialism in Africa, 1870-1960*, University Printing House, Cambridge, Brook Crutchley University printer, Eds. Lewis H. Gann (1971).
- 8 N.A Ollenu, *Principles of Customary Land Law in Ghana*, London, Sweet and Maxwell, 1962.
- 9 *Ibid.*
- 10 Catherine Andre and Jean-Phillippe Platteau, "Land Relations Under Unbearable Stress: Rwanda Caught in the Malthusian Trap", *Journal of Economic Behavior & Organization*, Vol. 34 (1998) 1-47, at 3 & 31.
- 11 Berry Sarah, "Social Institutions and access to resources in African Agriculture", *Africa*



- Vol. 59, no. 140-53; Shem Migot-Adhola and John Bruce, "Are Indigenous African Tenure Systems Insecure?" in Bruce, J.W. & S.E. Migot-Adholla (eds), **Searching for Land Tenure Security in Africa**, Dubuque: Kendal/Hunt Publishers (1994), 2-11; Christian Lund, 'African land tenure: Questioning basic assumptions.' in Tor A. Benjaminsen and Christian Lund (eds), *Politics, Property and Production in the West African Sahel. Approaches to Natural Resources Management*, Uppsala, Nordic Africa Institute/Transaction Publishers (2001), 144-62.
- 12 Daniel Fitzpatrick, "'Best Practice' Options for the Legal Recognition of Customary Tenure", *Development and Change*, Vol. 36, Issue 3, 2005, 449-450.
- 13 Lund (2001), supra note 11.
- 14 Ollenu (1962), supra note 8.
- 15 Hernando de Soto, **The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else**, Basic Books (2000); Fitzpatrick (2005), supra note 12, 450.
- 16 John Mugambwa, "A comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea", *Journal of South Pacific Law*, Vol. 11(1) (2007). These were mainly following the recommendations of the East Africa Royal Commission in 1955, by the British to deal with issues of Tenure reform in the East African Colonies before the end of the colonial period.
- 17 Mugambwa, *Ibid.*, 42.
- 18 Diana Hunt, "Unintended Consequences Land Rights Reform: The Case of the 1998 Uganda Land Act", *Development Policy Review*, Vol. 22(2), (2004), 173- 191; de Soto (2000), supra note 15.
- 19 H.W. Okoth Ogendo, **The Perils of land tenure reform: the case of Kenya**, 12-14, available at: [http://fimbo.org/attachments/059\\_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya.pdf](http://fimbo.org/attachments/059_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya.pdf), accessed June 14, 2010; See also: Hunt (2004), supra note 18, 175, and Migot-Adhola & Bruce (1994), supra note 11, 172.
- 20 At [http://www.srfood.org/images/stories/pdf/officialreports/20101021\\_access-to-land-report\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf).
- 21 Noronha, R., **A Review of the Literature on Land Tenure Systems in Sub-Saharan Africa**, Research Unit of the Agricultural and Rural Development Dept., World Bank Washington DC (1985).
- 22 Parker Shipton, **How Private Property Emerges in Africa: Directed and Undirected Land Tenure Reforms in Densely Settled areas South of the Sahara**. Boston MA: Harvard University, HIID and Department of Anthropology, 1989.
- 23 Klaus Deininger and Raffaella Castagnini, **Incidence and Impact of Land Conflict in Uganda**, 1 World Bank Policy Research Working Paper 3248, March 2004. Available at: [http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/06/08/000009486\\_20040608091122/Rendered/PDF/wps3248Uganda.pdf](http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/06/08/000009486_20040608091122/Rendered/PDF/wps3248Uganda.pdf), accessed January 22, 2011.

- 24 Ker Kwaro Acholi, *supra* note 5, 1.
- 25 It should be noted that before the passing of the Land Act of 1998, there was no requirement or legal procedure in place to register customary land. The procedure for issuance of certificates of customary ownership was only introduced under the Land Act of 1998, and to- date, it has not fully taken off for logistical and other reasons. Due to this, the majority of customary land in Uganda including the north remains unregistered with no evidence of ownership (in form of certificate) in the hands of the customary owners.
- 26 Andre and Platteau, *supra* note 10, 37-38.
- 27 Andre and Platteau, *Id.*
- 28 Prunier, G., *The Rwanda Crisis, 1959-1994: A History of a Genocide*, London: Hurst and Co. (1995), 145.
- 29 For example: Norwegian Refugee Council on Cote d'Ivoire, "Whose Land is this", available at: [http://www.internal-displacement.org/countries/cotedivoire/reports/CDI\\_SCR\\_Nov09.pdf](http://www.internal-displacement.org/countries/cotedivoire/reports/CDI_SCR_Nov09.pdf), accessed December 20, 2011.
- 30 Margaret Rugadya, et al, **Northern Uganda Land Study Analysis of Post Conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement Issues and Lessons: Acholi and Lango Regions**, Study for the World Bank, to input into Northern Uganda Peace Development Plan (PRDP) and the Draft National Land Policy (February 2008), 10-12.
- 31 Rugadya, et al *Ibid.*
- 32 IOM, UNDP & NRC, IOM, UNDP & NRC, **Land or Else: Land based Conflict, Vulnerability, and Disintegration in Northern Uganda Study**, October 2010.
- 33 Court PLW 01/16/11/2002, LC I Executive PIDA-LORO VILLAGE COURT NO. 01/17/11/2002. Note that the record of this case proceedings was written in very poor English that was so grammatically incomprehensible. The researcher did the best she could to make sense of the content of the case record. The language of the Local Council Courts is normally the local language spoken in the area where they operate, in this case Acholi. Sometimes, one finds a record written in some sort of "English" that is not to the standard, although we do not expect a perfect record by a Local Council official to be in line with the Oxford or Cambridge dictionary since the majority's attempt at English can perfectly be described as an attempt to sail in unfamiliar territory.
- 34 For example Ephraim Kasozi and Juliet Kigongo, Court Tells interdicted Land Boss to Face trial, *The Monitor*, November 22nd, 2011, available at <http://allafrica.com/stories/201111220166.html>. This case involved making allegedly illegal transfers of land at the Registry.
- 35 Note that the case was forwarded to Chief Magistrate from the Tribunal but later withdrawn on 15/03/2010.
- 36 Erin K. Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation

- in Northern Uganda”, *The International Journal of Transitional Justice* Vol. 1 (2007), 91-114, at 95.
- 37 Baines, *Ibid.*
- 38 IOM, UNDP & NRC (2010), *supra* note 32. In some cases, the conflicts between the early returnees and late returnees have ended up in machete fights where many are wounded and both conflicting communities living in fear of each other. No personal peace. An example of such cases arises in Amuru District. People in Lakong were displaced in 1998 as a result of the insurgency. They returned to their land in 2006, only to find that it was already occupied by their neighbors from Pogo clan. Following these have been machete fights and people living in very tense circumstances where each side is afraid of the other. On this See, Uganda: Escalating Land Disputes in the North, from IRIN at, <http://www.ngonewsafrika.org/?p=6805>, accessed March 7, 2010.
- 39 IOM, UNDP & NRC (2010), *supra* note 32.
- 40 Phuong Pham & Patrick Vinck, **Transitioning to Peace: A population-Based Survey on attitudes About Social Reconstruction and Justice in Northern Uganda** (December 2010), 1&27. The study was conducted in April and May 2010 in Acholiland (the districts of: Amuru, Gulu, Kitgum and Pader). The people represented in the figure above experienced the conflict in the period of 6 months prior to the survey.
- 41 Rugadya et al, *supra* note 33, 13; Pham & Vinck, *Id.* at 28.
- 42 Patrick Okino, “Seven People Accused of Witchcraft were Killed between July and September: Witch Craft, Land Disputes Escalate Murder in Lango”, *New Vision* (October 28, 2010), 37. He reports two people that were hacked and injured due to a land wrangle in Angetta Parish in Omoro and high tension in Pader and Acholi where a land wrangles are on the increase.
- 43 Paul Amoru, “Guns, Politics on Amuru District Land”, *The Monitor* (October 4, 2009), at: <http://allafrica.com/stories/200910060006.html>.
- 44 IOM, UNDP & NRC (2010), *supra* note 32, 29- 34.
- 45 These include: International Covenant on Civil and Political Rights (herein after “ICCPR,”), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force on 23 March 1976, in accordance with Article 49; under Article 27 ICCPR 1966; African Charter on Human and people’s Rights, ( June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986) (herein after “ACHPR”).
- 46 Fitzpatrick (2005), *supra* note 12, 449. Klaus Deininger, **Land Policies for Growth and Poverty Reduction: Key Issues and Challenges Ahead**, UN, FIG, PC IDEA- Inter-regional Special Forum on The Building of Land Information Policies in the Americas, Aguascalientes, Mexico 26-27 at 4 (October 2004).

- 47 Nel Vandekerckhove, "The State, the Rebel and the Chief: Public Authority and Land Disputes in Assam, India" *Development and Change*, Vol. 42 (3) (2011), 759-779 at 760.
- 48 Vandekerckhove, *Ibid.*
- 49 Vanderkerckhove, *Ibid.*
- 50 Local Council Court Act, 2006 and Article 139 (1) of the Constitution of Uganda giving the High Court of Uganda "unlimited original" Jurisdiction in all matters.
- 51 Thomas Sikor and Christian Lund, *Access and Property: A Question of Power and Authority*, *Development and Change* Vol. 40(1) (2009), 1-22.
- 52 Sikor and Lund, *Ibid.*, 4; von Benda-Beckmann, "A Functional Analysis of Property Rights, with Special Reference to Indonesia", in T. van Meijl and F. von Benda-Backmann (eds.), *Property Rights and Economic Development: Land and Natural Resources in South East Asia and Oceania*, London and New York: Kegan Paul International (1999), 15-56.
- 53 There is a close relationship the lower level institutions and the magistrate courts, since the former can refer cases to the latter and vice versa. Discussion of a referent case therefore calls for discussion of some matters that arise in the handling of such a case by the referring institution.
- 54 The Constitution of Uganda Article 129 (2) stipulates courts of record to be the High Court, Court of Appeal and Supreme Court. Article 129 (1) (d) leaves details pertaining to subordinate courts to Parliament through legislation. Under the Local Council Court

Act 2006, sections: 12, 21 and 22, LCCs have a duty to keep records of their proceedings, although the reality defies the law.

- 55 Note that although the main focus is on TIs and LCCs, Magistrate Courts might be referred to as far as their role complements that of the TIs or the LCCs.

#### THE LEGAL FRAMEWORK AND RELATED MATTERS

- 56 Universal Declaration of Human Rights 1948 (adopted by the United Nations on December 10<sup>th</sup>, 1948 here in after "UDHR", Article 2; ACHPR, *supra* note 45, Article 1, 2, & 14; ICCPR, *supra* note 45, Article 2 & 14; The Constitution of the Republic of Uganda 1995, Article 26 & 28.
- 57 Francesco Francioni, "The Right of Access to Justice Under Customary International Law", Francesco Francioni (ed.), *Access to Justice as a Human Right*, *Collected Courses of the Academy of European Law*, Oxford University Press (2007), 2-3.
- 58 Sandra F. Joireman, **Where there is no government. Enforcing property Rights in Common Law Africa**, Oxford University Press 2011.
- 59 Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007). at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>

## FAIRNESS IN PROCEEDINGS

- 60 ICCPR, Article 14 (1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law; ACHPR, Article 7 (1): Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force (...); Constitution, Article 28 (1): In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law (...)"
- 61 For general details on Fair trial and on this particular point, see: Lawyers' Committee on Human Rights, What is Fair Trial? A Basic Guide to Legal Standards and Practice (March 2000), 7. Available on: [http://webcache.googleusercontent.com/search?hl=da&gs\\_sm=e&gs\\_upl=1656112961012234129121115101013901364011.5.4.511510&q=cache:lexTlbPTt-4J:http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair\\_trial.pdf+United+Nations+standard+s+on+fair+trial&ct=clnk](http://webcache.googleusercontent.com/search?hl=da&gs_sm=e&gs_upl=1656112961012234129121115101013901364011.5.4.511510&q=cache:lexTlbPTt-4J:http://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf+United+Nations+standard+s+on+fair+trial&ct=clnk), accessed October 25<sup>th</sup>, 2011.
- 62 ICCPR, Article 14 and Article 28 of the Constitution of Uganda.
- 63 The ICCPR provision contain exceptions to this requirement in criminal cases in the interest of privacy or security among others. There are similar exception contained Article 28 of the constitution of Uganda, although this is not restricted to criminal proceedings alone. These however have been tested through the lenses of 'free' and/or democratic society where they can only stand if are not used as tools to unnecessarily contravene rights.
- 64 ACHPR, Article 7 (1); Appeals can also arise from causes grounded on custom as seen from that provision.
- 65 Human Rights Committee, General Comment No. 18 on Non-discrimination (1989).
- 66 Ibid.
- 67 This is not an absolute right. Article 14 stipulates circumstances under which this right can be suspended which include the 'Public need' and according to law. Also note that the right is protected under the Constitution of Uganda Article 26 with room for suspension as **Seen** under article 26 (2).
- 68 The fact that TIs are more often than not impartial and working for the good of the community was a point made by some respondents that the researcher talked to during the field research. According to Interview (CM) in Gulu, October 13, 2010: "... most traditional chiefs are normally impartial. They normally apply principles of equity and want to ensure at least that

every family has a place to stay and derive substance. I have so far received only 2 complaints of partiality on the part of the traditional authority in handling land matters.”

69 For example, see the case earlier discussed between the Acholi and the Alurs. Note however that if the subject land is in Acholiland, it doesn't matter where one of the litigants is from, since the Acholi traditional institutions has jurisdiction to deal with all matters of land that arise in their area.

70 Specifically in November 2010.

71 March 2012.

72 Ioannis Gatsiounis, “South Sudan, Uganda Locked in Border Dispute”, *The Washington Times* (Thursday 15, 2012); “South Sudan Accuses Uganda of Moving International Border”, *Sudan Tribute* (October 25, 2011).

73 Local Council Courts Act schedule, 2006.

74 The state has a duty to prevent violations of human rights by non-state agents/actors, see the case of *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, African Commission on Human and Peoples' Rights, Comm. No. 74/92 (1995).

75 Human Rights Committee, General Comment No. 32, *supra* note 59.

76 Lynn S. Khadiagala, “Justice and Power in the Adjudication of Women's Property Rights in Uganda”, *Africa Today*, Vol.49, No. 2, Women, Language and Law in Africa 2 (Summer, 2002) 101-121; Minneh Kane et al., *Reassessing Law Systems as a Vehicle for Providing Equitable Access to Justice*

for the Poor, paper presented at the World Bank Conference in Arusha Tanzania “New Frontiers of Social Policy” (December 12-15, 2005).

77 The standards include those set out in the ICCPR article 14, General Comment 32, and the Constitutions of Uganda, 1995.

78 Mie Roesdahl, *Informal Justice Systems*, A paper for a Conference on Access to Justice and Legal Aid in Africa, Kigali (2008), 2.

79 A clan or a “kaka” means; “an extended family unit comprising of a generational line including grandfather, fathers, sons and immediate next of kin.” See., Ker Kwaro Acholi, *supra* note 6, at 14. There are 54 clans, each with a leader. It is these 54 that make up the Acholi Traditional Institution of the Ker Kwaro Acholi.

80 These persons can be any adult members of the clan that is appointed by consensus of the members. See, Ker Kwaro Acholi, *supra* note 6, Section 7.

81 The Acholi Religious Leaders Peace Initiative (ARLPI) *supra* note 2, 19.

82 The majority of the people interviewed during the field research for this paper believed that the traditional institutions in charge of land justice are not necessarily corrupt, compared to the Local Council Courts. Only one person cited an incident where a traditional leader was corrupt. However, majority of the people were concerned about the living conditions of their traditional leaders (poverty), which in their view increases the propensity to corruption.

83 Local Council Court Act, Section 4 (1).

84 Local Council Court Act, Section 5.

85 This can easily lead to unsuitable people taking up office only on the basis of the fact that they are the kind to find villagers in a pub and buy lots of beer for them, and not necessarily the kind to be fair in a court session and judge on the basis of reason and or law.

86 There have been a number of cases of disregard for laws and rules by well qualified people in public office not necessarily due to lack of knowledge or skills, but a desire to pursue personal gains, as for example: Anne Mugisa et al, “Jamwa convicted over NSSF money”, The New Vision (3rd March, 2011). Reporting that the Managing Director of National Social Security Fund (NSSF) David Chandi Jamwa, a well-qualified person in treasury bill bond investments sold NSSF bonds a month before their maturity at a very low price hence causing the Institutions a financial loss of 3 billion Uganda shillings. The transaction that resulted into this was motivated by corruption in which Jamwa and others benefited. This case was handled by the Anti-Corruption Court that convicted the accused. All in all, the incidences of corruption do not reduce depending on the level of education of persons holding public office. It is most likely that they will increase with the level of education of officers, since chances are that the better educated people will know how to be corrupt with impunity and have particularly high material objectives.

87 Wadada Nabudere, **Imperialism and Revolution in Uganda**, London: Onyx Press Ltd and Dar es Salaam: Tanzania Publishing House (1980), 12.

88 [1919] AC 211, see Lord Sumner at 233. See also *Mabo v. Queensland* (No.21992 HCA 23; 1992 175 CLR 1.) and *Amodu Tejan v. Secretary for Southern Nigeria* [1921] 2 AC399.

89 Kevin Gray & Susan Francis Gray, “The Idea of Property in Land” in Susan Bright & John Dewar (eds.), *Land Law: Themes and Perspectives*, Oxford University press (1998), 15-41 at 37.

90 Private/individual rights were promoted through signing agreements in the stratified societies and these were the 1900 Buganda Agreement, and the Ankole and Toro Agreements of 1902. Also note that by virtue of the Crown Lands Ordinance of 1903, customary land was converted to crown land and vested in her majesty the Queen of England. It was later vested in the new state by virtue of the Public Lands Act (PLA) of 1962 and later 1969, administered by the Uganda Land Commission. The passing of the 1975 Land Reform Decree made all customary tenants at sufferance.

91 The establishment of British control over Uganda took place in the period 1892-1896. These included signing of Agreements, and laying a foundation for opening up Uganda (which is land locked) to the outside world by constructing a railway connecting it to other East African Countries that aren't land locked (Kenya and Tanzania), see: Sir Kenneth



Roberts-Wray, *Commonwealth and Colonial Law*, New York/Washington: Frederick A. Praeger Publishers (1966), 757.

92 This is with the exception of indigenous peoples' land rights. International human rights institutions have recognized indigenous land rights in a number of cases, e.g., Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya Communication 276/2003; Mayagna (SUMO) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Sawhoyamaxa Indigenous Community of the Enxet People v. Paraguay, case 322/2001, Report No. 12/03, Inter-Am.Comm. H.R., OEA/Ser.L/V/II.118, doc.5 rev. 2 (2003), Inter-Amer. Ct of H.R., Judgment of March 29, 2006 (Merits, Reparations and Costs), Rubicon Lake Band v. Canada; Bernard Ominayak on behalf of the Rubicon Lake Band, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

93 Section 20 of the 1902 Order in Council of Uganda, by virtue of which courts dealing with any civil or criminal matters to which, natives were parties would be "guided" by native law. Native law is not of primacy in this setting but the court is only "guided" by it, and only as far as it is not inconsistent to notions of justice of imported law. This is problematic since custom was not always applied to achieve justice, but in some instances reconciliation and society

cohesion, which may not always be in line with notions of justice.

94 Mugambwa, *supra* note 16, 43.

95 *Ibid.*

#### ANALYSIS OF SOME PERTINENT ISSUES

96 Constitution of Uganda 1995, Article 237 (3).

97 Sikor and Lund (2009), *supra* note 51.

98 Berry, Sara S., **No Condition is permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa**, Madison WI: University of Wisconsin Press (1993).

99 Sikor and Lund (2009), *supra* note 51.

100 *Ibid.*

101 In countries like South Africa, this privileging of people was on the basis of race, see: Sam Moyo, *The Politics of Land Distribution in South Africa: Identities, Conflict and Cohesion (2000-2005)*, paper No.10 (UNRISD).

102 Mailo is a land holding system common in the Kingdom of Buganda of Uganda. The word "mailo" is coined from the metric system "square miles" and it has its origin in the Buganda- British relations over land in Buganda in the colonial days. Land in Buganda was held by families from a chief, who would in turn get it from the King of Buganda. In order to introduce registrable individual interests on land, the British allotted almost half of the land in Buganda (which was already occupied by people) in square miles to the King of Buganda and others in his royal service, and issued them



- with title deeds. The meant that those that occupied the land had lesser interests in legal terms, compared to the interest of the registered proprietors.
- 103 West, H., Land Policy in Uganda, Cambridge university press, 1972. The position of Buganda is a.o. due to its central position and role in the history of colonization of Uganda: it was a collaborator to the British colonialists and in return got a privileged position.
- 104 In Ankole and Toro it was done through the Ankole and Toro Land Lord and Tenant Laws land lord and tenant laws of 1937.
- 105 Registration of Titles Act 1924 (Cha 230), Section 59. Also note that over the years the occupants of much of this land (descendants of the original customary owners or those claiming under them in title) have had to pay rent and tribute to the land owners.
- 106 These include lawful and bonafide occupants on mailo land.
- 107 The result of this efforts was the Land (Amendment) Act, 2010.
- 108 Interview (LP) in Gulu, October 12, 2010.
- 109 Case of Arach Valiriano v. Odong Richard Syrayo. Miscellaneous Application No. 076 of 2009. Arising from the judgment of the Local Council Court Committee of Patiko Sub-County, Gulu District dated October 17th, 2008, at 51-52.
- 110 Case of Okeny Dickens and Opoka Richard Megolonyo, Report on Eviction of Mr. Odongo Richard Syrayo From Valiriano's Land in Adak Village Patiko Sub County (February 10, 2010). This Report is addressed to the Resident District Commissioner of Gulu, Chairman District Security Committee (on file with author).
- 111 From the interview with a member of the Arach family, it was noted that Lacambel did all he could to lobby for political support for the family of Odong in this matter, to his dismay.
- 112 When Mzei Arach's cattle were confiscated by a one Kisembo in Charge Police officer of Omoro County who is alleged to have been compromised by Odong, Mzei wrote to the RDC rather than going to Courts of law.
- 113 Interview (LP) in Gulu, October 12, 2010.
- 114 Omodo Nyanga Joseph, **Procedure and practice of Resolving Land Disputes in the Courts in Northern Uganda**, a paper presented at a Human Rights Workshop at GUSCO Conference Hall Gulu, December 21-22 2009, 8. The author of this paper is a Chief Magistrate of Gulu. In the paper, he describes an incident that happened on August 16, 2009 where he was attacked by three men in civilian clothes and it is believed that they were encouraged by one high ranking politician. This politician's brother had a case pending in the Chief magistrate's court that arose from an unlawful sale of their father's land, and the politician was an interested party. This paper cites the Chairman LC V as one of those politicians that were involved in resolving or handling cases that are already before the court.

- 115 This has been seen in other cases, e. g. in Kenya, see: Esther Mwangi, “Bumbling Bureaucrats, Sluggish Courts and Forum-Shopping Elites: Unending Conflict and Competition in the Transition to Private Property”, **European Journal of Development Research** (2010) 22 715-732 at 717, 727.
- 116 Civil Suit No. 033 of 2003.
- 117 Locus in quo is a Latin word that can be defined as “[t]he place where an event allegedly occurred”.
- 118 Case of Arach Valiriano v. Odong Richard Syrayo. Miscellaneous Application No. 076 of 2009. Arising from the judgment of the Local Council Court Committee of Patiko Sub-County, Gulu District dated October 17<sup>th</sup>, 2008.
- 119 Interview (JH) in Gulu, November 25, 2010.
- 120 Herein after referred to as Mzei Arach (“Mzei” vernacular word which means “old man” - respected man).
- 121 It is interesting to note that it is over 30 years (since 1965) when Mzei Arach occupied this land, and a dispute over it is only arising in the post conflict period; 2008. One wonders why all along the respondent has not been claiming ownership of this land.
- 122 Judgment of the Sub-County Court of Patiko in the case of Mr. Odong Richard v. Arach Valiriano, Appeal Case No 05 of 2008, entered October 17<sup>th</sup>, 2008. The above order of court indicates that in some instances it goes beyond the winner takes all situation and instead adopts a measure aimed at reconciling the warring parties by say ordering that the winner to give some of the land to the losing party for the sake of peace in society.
- 123 Odong Richard Syrayo v. Orach Valiriano, Miscellenious Application No.134 of 2009 (Arising from the judgment of Local Council Court Committee of Patiko, Gulu District, and dated October 17, 2008).
- 124 Given under the hand of the Chief Magistrate of Gulu, His Worship Joseph Omodo Nyanga on November 6<sup>th</sup>, 2009
- 125 This is one of those cases that were settled by the police. The researcher learned about it from an interview with the District Police Commander of Gulu, October 13<sup>th</sup>, 2010.
- 126 Okeny Dickens and Opoka Richard Megolonyo, Report on Eviction of Mr. Odongo Richard Syrayo from Valiriano’s Land in Adak Village Patiko Sub County. February 10, 2010. This Report is addressed to the Resident District Commissioner of Gulu (Chairman District Security Committee). The Researcher got a copy of it from a member of Mzei Arach’s family.
- 127 Joerg Wiegatz, **The Cultural Political Economy of Neoliberal Moral Restructuring: The Case of Agricultural trade in Uganda**. Unpublished PhD dissertation, Department of Politics University of Sheffield, 2011.
- 128 Okeny Dickens and Opoka Richard Megolonyo, Report on Eviction of Mr. Odongo Richard Syrayo, supra note 126, at 1 & 2.

- 129 Wiegatz (2011), *supra* note 127.
- 130 Denis Ocwich, "Can Uganda's economy support more districts?", *The New Vision* Monday, August 8<sup>th</sup> 2005.
- 131 The official boundary marker between the Alur in Nebbi and the Acholis in Amuru District and elsewhere is River Nile.
- 132 Mwangi (2010), *supra* note 115.
- 133 The researcher learned about this case from a Caritas Gulu employee. It is one of those cases that Caritas has handled in their project to strengthen Community level peace building and social support practices in Acholi sub region, funded by NUREP. Note that similar disputes over boundaries and land have existed between the Acholi in Amuru district and the Banyoro south of that District, and the Acholis in Kitgum and Pader Districts with the Karamajongs in Kotido District.
- 134 This information is from a report of the proceedings of a meeting of the Lawii Rwodi of Acholi (Paramount Chief), His Highness David Onen Achana II with the conflicting communities at Te-got Apwoyo and Latoro IDP Camp in Purongo Sub County, Amuru District on Thursday July 17<sup>th</sup>, 2008. It is entitled; A Report on Latoro Society land wrangle with concerned Members of Community-Viz-Border Land Matter Between Payira Clan and Alur Tribe of Pakwach. (Report on file with author). It was obtained from Rwot Peter Oola Ojigi II and Elder Acellam all of the Paramount Chief's Palace in Gulu. Note also that in

addition to the Alur vs. Acholis issue is the big land question about the Latoro Society land. According to the preceding report, the society was started May 21<sup>st</sup> 1979. It was intended to foster unity among the children and members of the Payira clan to promote development and Acholi culture in the area. The society holds land over which rampant disputes have arisen regarding boundaries, administration of the society and 350 hectares of land allegedly leased to the society. Due to the conflict, governance issues in the society went low; the chairman (Mr. Okema Patrick) has been serving for over 20 years since it was not possible to have a new one and another committee appointed. The committee has failed in its work. In the circumstances, orphans have not been able to inherit land formerly belonging to their parents that died during the insurgencies, the boundaries of such land are blurred, un known or not yet demarcated, thereby making it hard for the orphans. Worse still, the Latoro land issues has somehow been turned into a grudge at a personal level between the chairman and other persons ( e.g. one Obice) that pledged to kill each other. This case clearly indicates how complicated the post conflict land issue is in Acholiland.

- 135 Note that government policy on return called upon people to return to the land on which they lived immediately prior to the armed conflict. This was to reduce the incidences of land disputes if people

placed claims on that that they did not hold at the time of displacement, say clan or communal land.

- 136 Lawii Rwodi of Acholi report, *Ibid.* Indeed, it is reported in the report that there were individuals who were equipped with bows and arrows to kill others. They were warned by the RDC in his speech at the meeting with the Lawii Rwodi.
- 137 Details of this case were got from a record of proceedings of a meeting organized by Caritas Gulu in Nebbi on November 11<sup>th</sup>, 2009, under their above mentioned project. The speakers at this meeting included the Director of Caritas Nebbi, RDC Nebbi District, RDC Amuru District and the Chairman LC. V Amuru District. Such meetings are normally intended to community reconciliation and encourage peaceful co-existence.
- 138 Interview (JA) in Kampala, August 15, 2010.
- 139 Note that some of this has been done by the Ker Kwaro Acholi although more needs to be done and in depth.
- 140 The (Chief) Magistrate especially if cases are appealed at that level. The shortfalls of the TIs would affect the work of the magistrate.
- 141 Interview (CM) in Gulu, October 13, 2010.
- 142 Interview (JA) in Kampala, August 15, 2010.
- 143 Almost the entire population was displaced for varying periods and, for many, over 15 years, see: Sverker Finnström, *Living with Bad Surroundings: War, History, and Every Day Moments in Northern Uganda*, Durham

and London: Duke University Press (2008).

- 144 Sikor and Lund (2009), *supra* note 51, 7.
- 145 This was through some government programs like: The Northern Uganda Reconstruction Programme (NURP-I), Northern Uganda Reconstruction Programme (NURP-II), Northern Uganda Rehabilitation Programme, Northern Uganda Reconstruction Program, (NURP) Northern Uganda Social Action Fund (NUSAF), Peace, Recovery and Development Plan (PRDP).
- 146 Christian Lund, "Struggles for Land Political Power: On the Politicization of Land Tenure and Disputes in Niger", *Journal of Legal Pluralism*, Vol. No. 40 (1998), 1-22.
- 147 Interview (HA) in Gulu, October 12, 2010.
- 148 *Ibid.*
- 149 Interview (CM) in Gulu, October 13, 2010.
- 150 Constitution of Uganda, Article 237.
- 151 This has quite a number of implications. See: Miranda Forsyth, "A typology of Relationships between State and non-state Justice Systems", *Journal of Legal Pluralism*, Vol. 56 (2007), 67-112, 88. This alters the nature or dealings and relations between such a system and the state system. Some alterations in relationships somehow remove the traditional system out of a space that was fully customary into a new space in which the state has a role to play. The new obligations of the state ushered in by the new kind of relationship may include supervising the customary and ensuring appeals from their justice

- institutions go to the appropriate other state institutions. In reference to Forsyth's models, the Uganda case is complicated.
- 152 Constitution of Uganda 1995, Article 237 (3) Land Act 1998, and section 3.
- 153 Forsyth (2007), *supra* note 151, 75, who attributes a similar advantage to another model of non-state institutions that are neither "suppressed" nor "supported" by the state. The Ugandan model could also fit this description. One could say that they it is neither formal nor informal, neither suppressed nor supported.
- 154 Interview (AA) in Gulu, November 18, 2010.
- 155 *Ibid.*
- 156 Forsyth (2007), *supra* note 151.
- 157 Interview (JA) in Kampala, August 15, 2010; Interview (CM) in Gulu, October 13, 2010.
- 158 *Ibid.*
- 159 Forsyth (2007), *supra* note 151, 104.
- 160 Wilfried Schärf, *The Challenges Facing Non-State Justice Systems in Southern Africa: How do, and How Should Governments Respond?* Criminal Justice Conference, Feb 1-8, 2005, available at: <http://www.csvr.org.za/wits/confpaps/scharf.htm>; Wilfried Schärf, et al, *Non-State Justice Systems in South Africa: How should Governments Respond?* Paper presented at the Workshop on Working with Non-State Justice Systems held by the U.K Department for international Development, March 6-7, 2003 at 66. Wilfried Schärf, *The Challenges Facing Non-State Justice Systems in Southern Africa: How do, and How Should Governments Respond?*
- 161 Minneh Kane et al (2005), *supra* note 76, 1.
- 162 Local Council Court Act, 2006, Section 8 (1) (a) and (b)
- 163 Minneh Kane et al (2005), *supra* note 76, 13; Josephine Ahikire, "Towards Women's Effective Participation in Electoral Processes: A Review of the Uganda Experience", *Feminist Africa*, Issue 3 (2004).
- 164 The figures above are taken from meetings at two places and might not be wholly reflective of the situation in the whole region of Acholiland or Northern Uganda They are however informative and reflect a highly possible pattern in the whole region of northern Uganda regarding participation of women in mediation proceedings.
- 165 Lydia Wambugu and Getachew Adem, **Rights of Children in Conflict: An Evaluation of Japanese Official Development Assistance in Acholiland, Northern Uganda**, ISS Monograph Series No. 142, March 2008, at 13 & 24,
- 166 IOM, UNDP & NRC (2010), *supra* note 32, 27.
- 167 Forsyth (2007), *supra* note 151, 88.
- 168 Ahikire (2004), *supra* note 163.
- 169 Johnson Bitarabebo, **Curbing Corruption and Promoting Transparency in Local Governments: The Experience of Bushenyi District, Uganda**, A Paper presented as Part of the World Bank's Open and Participatory Government Programme at the Local

- Level, World Bank Institute , Washington DC, May 21, 2003, available at: [http://info.worldbank.org/etools/docs/library/94857/gapglobal/pdf/bushenyi\\_background.pdf](http://info.worldbank.org/etools/docs/library/94857/gapglobal/pdf/bushenyi_background.pdf), accessed March 6, 2012.
- 170 Franklin A. Gevurtz, "Rethinking Corruption: An Introduction to a Symposium and a Few Additional Thoughts", **Pac. McGoerge Global Bus. & Dev. L. J** Vol. 20 (2007) at 237.  
Andrew M. Mwenda, "When Corruption is Accountability", **The Independent**, November 3, 2009, available at: <http://www.independent.co.ug/the-last-word/the-last-word/2040-when-corruption-is-accountability>, accessed October 7, 2011.
- 172 Ibid. and Gevurtz (2007), supra note 170, 240.
- 173 Claes Sandgren, "Combating Corruption: The Misunderstood Role of Law", *Int'l Law*. Vol. 39 (2005), 717-731, at 719 & 721.
- 174 UN General Assembly Resolution 58/4 of 31 October 2003. Uganda signed the Convention on 9 December 2003, and ratified it on 9 September 2004 (<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>, accessed October 11, 2011).
- 175 Among these laws is the Prevention of Corruption Act cap 121 and the Penal Code Act Cap 120, the Inspector of Government Act, 1997, Local Government (Amendment) Act 2001, Local Government Financial and Accounting Regulations (1998), the Leadership Code Act, 2002. There are a number of shortfalls that have been identified with these laws, and these include over emphasis on corruption in the public sector and not the private sector among others.
- 176 The period 2004- 2007 indicates slight reductions in the numbers of cases of corruption that were reported. Since the reductions are in very small percentages and not all cases of corruption are usually reported, one cannot over celebrate or assume that the situation is getting better. Inspectorate of Government, First Annual Report on Corruption Trends in Uganda: Using the Data Tracking Mechanism, November 2010 at 51-52, available at: [http://www.eprc.or.ug/pdf\\_files/corruptiontrends.pdf](http://www.eprc.or.ug/pdf_files/corruptiontrends.pdf) accessed March 3, 2011.
- 177 "Ethics and Integrity Corruption Report Out", Uganda People News, available at: <http://www.ugpulse.com/articles/daily/news.asp?about=Ethics+and+Integrity+corruption+report+out&ID=11722>, accessed March 3, 2011.
- 178 Milton Olupot, "Corruption costs shs. 500 billion a year", *The New Vision*, January 21, 2008, available at: <http://www.newvision.co.ug/D/8/12/607777>, accessed March 3, 2011.
- 179 Report available at : [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results), accessed March 3, 2010.

- 180 Transparency International, Corruption Perception Index 2009, available at: [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table), accessed March 3, 2011.
- 181 Sandgren (2005), *supra* note 173, 724.
- 182 Cagney, Erin Michelle, "Post-Conflict Cultural Revival and Social Restructuring in Northern Uganda", University of Tennessee Honors Thesis Projects (2011), 26-28 (at: [http://trace.tennessee.edu/utk\\_chanhonoproj/1417](http://trace.tennessee.edu/utk_chanhonoproj/1417)): Gives instances of corruption in the traditional institution.
- 183 Officers have served for longer than two terms without elections.
- 184 *United States v. Brewster*, 506 F. 2d 62, 71-72 (D.C. Cir.1974).
- 185 Interview (LP) in Gulu, October 12, 2010.
- 186 Sandgren (2005), *supra* note 173, 717 & 724.
- 187 Note that at the time of writing, inflation in Uganda is at 28 % (October 14, 2011)
- 188 Sandgren (2005), *supra* note 173, 724.
- 189 Interview (IA) in Gulu, October 13, 2010.
- 190 Francis Kagolo and Patrick Opio, "Local Councils Receive first salary", *The New Vision*, January 20, 2011.
- 191 *Ibid.*
- 192 Ivan Krastev and Georgy Ganev, "Do Uncorrupt Governments in Corrupt Countries Have Incentives to Launch Anticorruption Campaigns?" *E. Eur. Const. Rev.* Vol. 12 (2003), 87.
- 193 Interview (LP) in Gulu, October 12, 2010; Interview (IA), in Gulu, October 13, 2010.
- 194 Gerald E. Caiden, "A Cautionary Tale: Ten Major Flaws in Combating Corruption", *Southwestern Journal of Law and Trade in the Americas*, Vol. 10 (2003 –2004), 274. He argues that the fight against corruption becomes more complicated if it is so deeply entrenched in society. Fighting it then requires not only change of office bearer (replacing the corrupt with new ones) but also options that aim at reforming society itself, or the system that may be corrupt.
- 195 The case of Daniel Sempa Mbabali vs. W.K Kidza & others (1985) HCB 46 emphasizes the fact that in Uganda, the ticket to a justice institution is evidence to the effect that the litigant has a genuine cause of action; that he had a right and that right was violated by the defendant in a given case, which entitles the former to a remedy.
- 196 Displacement is one of the factors that made this easy. An example of such cases that have been at the Chief Magistrates Court in Gulu is the case Okwalinga Ronald v. Jekezi Owalo. The respondent in this case, earlier on filed a case against a wrong party (one Onek Odonga) claiming ownership of the disputed land. Onek Odonga was only a relative, not a brother or a beneficiary of the estate of the late Yoweri Too, who originally owned the land in issue. The case was filed during the peak of the insurgency when the applicant and other beneficiaries of the land whose ownership is contested were in protected camps,



incapacitated to pursue their rights. The respondent took advantage of the situation to file a suit against a wrong party in order to steal land. He obtained judgment in his favor and eviction orders on 5<sup>th</sup> May 1990 and 25<sup>th</sup> June 2008 respectively. Following this, Court brokers demolished the house and farm produce on the land among others. Okwalinga Ronald, the applicant in the current case claims to be the holder of letters of administration of the estate of the late Yoweri Too and therefore the rightful person to deal with matters of this estate. He should have been the right party to the initial suit and if not, that suit and its outcomes are a nullity. Without going into the details of this case, clearly this is one example of cases where people do whatever it takes to steal land from those that are not in position to defend their rights.

197 Friday November 22nd, 2010.

198 Miscellaneous Application. No 176 of 2010, arising from a Judgment of LCII Court of Angaya Parish, Paicho Sub County, Aswa County in Gulu District, dated 10<sup>th</sup> May 2009. This miscellaneous application gave permission to the applicants to enforce the LC II ruling that was passed against the old man.

199 Some of the respondents talked to during the field research averred that the Local Council Courts are part of the problem, see: Interview (HA) in Gulu, October 12, 2010: "They have limited knowledge of the law, and therefore escalate the land conflict."

200 Note that the Magistrate Court has jurisdiction to enforce judgments of Local Council Courts on application for such enforcing orders.

## CONCLUSION

201 Maggi Carfield, "Land justice in Uganda: Preserving peace, Promoting Integration", in: Erica Harper (ed.), *Working with Customary Justice Systems: Post-Conflict and Fragile States*, International Development Law Organization (2011), 127-143 at 127. Andre & Platteau (1998), *supra* note 10, at 5. In this last piece, the authors point to the importance of litigation as a way to deal with land disputes. Through this, they say patterns of the causes of the dispute can be ascertained, which is very important if appropriate means of resolving them are to be devised.

202 See: <http://web.undp.org/legalempowerment/> accessed March 12, 2012.

203 Khadiagala (2002), *supra* note 76.





