Examining the A-D-R-tistry of Land Dispute Mediators in Northern Uganda

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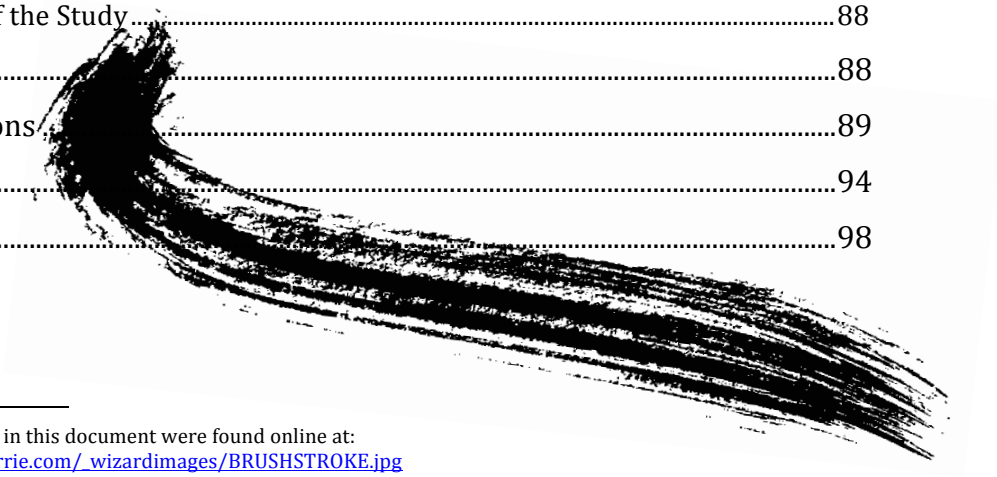

[1] The brushstroke images featured in this document were found online at:
1: http://www.joettacurrie.com/_wizardimages/BRUSHSTROKE.jpg
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Acronyms

ADR	Alternative Dispute Resolution
EVI	Extremely Vulnerable Individual
IDP	Internally Displaced Persons
LC	Local Council
LDC	Law Development Centre
LEMU	Land and Equity Movement in Uganda
LG	Land Grabbing
LRA	Lord's Resistance Army
MOU	Memorandum of Understanding
NE	Neutral Evaluation
NGO	Non-Governmental Organisation
NULPP	Northern Uganda Land Partners Platform
PPRR	Principles, Practices, Rights, and Responsibilities for Land under Customary Tenure
RDC	Resident District Commissioner
RSA	Resident State Attorney
ULA	Uganda Land Alliance

Acknowledgments

(Apwoyo Totwal)

This study represents more than a year's worth of team effort. Many people from various backgrounds, callings, and walks of life gave of themselves so that this study could be as meaningful and grounded as possible. Without them, the inspiration, support, and opportunities that make research worth doing (and even able to be done!) would be missing.

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EXECUTIVE SUMMARY

I. Background to the Study

Land wrangles are astonishingly common in Uganda today.[2] Recent studies show that disputes over customary land—which accounts for 80 percent of the country and nearly all land in Northern Uganda—are on the rise, especially in the wake of recent development schemes and returns from displacement.[3] With agriculture accounting for 82 percent of the country's labour force and nearly a quarter of its Gross Domestic Product[4], the prevalence of these disputes threatens Uganda's social stability and economic development.[5] The vital role played by access to land in the sustenance of rural livelihoods also lends itself to particularly brutal strains of conflict. These cases—viewed by many as fights for survival—are often characterized by arson, destruction of property, witchcraft, physical assault, and murder.[6]

A host of different actors from both traditional and formal sectors have responded to demands to resolve these escalating land conflicts. With such a milieu of independent doctors treating the same epidemic, however, it is not surprising that duplicated efforts, technical inefficiency, and arbitrary prescriptions often result. Moreover, the capacity of both state and local institutions to efficiently handle such large caseloads is severely lacking.[7] In response, Non-Governmental Organisations (NGOs) and community actors have begun offering Alternative Dispute Resolution (ADR) services to amicably and affordably resolve these conflicts among the most vulnerable populations. Yet the large working gaps between today's justice actors and the widespread lack of enforcement of both judgments and ADR settlements remain sources of intense frustration for many people seeking justice.

It is commonly said in Uganda that if an NGO or a politician wants to get chased out of an area, they should get involved in land issues. The gravity and significance of these mediators' daily work can therefore in no way be overstated. Yet most land dispute mediations in Uganda today, however, go unrecorded and unanalyzed as to their procedural justice, effectiveness, and compliance to applicable laws.[8] Unfortunately, because many of these actors are "mediating in the dark" in communities plagued by impunity and vulnerability, resulting settlement agreements may inadvertently serve as veneers over deliberate abuse.[9] If these interventions are not carefully examined, who is to know whether these ADR efforts are contributing to the solution or problem of rampant land injustice in the region?

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[2] The Uganda Bureau of Statistics found in 2006 that 6.7 percent of households nationwide reported having had a land dispute, while the prevalence rate is upwards of 16.4 percent in the post-conflict North (Rugadya, M. (2008) "Northern Uganda Land Study" for the World Bank).

[3] Rugadya, M. (2008); IOM, UNDP, NRC (2010).

[4] CIA World Factbook (2011).

[5] Kigula, J. (1993).

[6] Land and Equity Movement in Uganda (LEMU) and Arbeiter Samariter Bund (ASB) (2010).

[7] Rugadya, M. (2008)

[8] Kakooza, A. C. (2007)

[9] Dennison, D. B. & Akin, J. (2011).

This study seeks to fill this gap in order to help improve the quality and impact of local ADR service delivery. Commissioned by a consortium of land-ADR-practicing NGOs in Northern Uganda, this baseline assessment is also intended to serve as a frame of reference for mediators' self-evaluation and the practical exchange of techniques and insights among their colleagues.

II. Methodology

For more than 12 weeks between March and July 2011, the researchers conducted five in-depth study visits with different members of the Northern Uganda Land Partners Platform (NULPP) group, a consortium founded in 2010 of more than 10 national and international NGOs working on land policy issues. Five member organizations were chosen as Primary Informant NGOs for their role as active, experienced, and leading land ADR actors in the region and their wide geographic coverage representing 8 Districts within Lango and Acholi. Each of these Primary Informant NGOs hosted the researchers for at least 2 weeks at one Project Field Office in either Apac, Gulu, or Lira. Secondary Informant NGOs are those met during the course of the study whose unique involvement in different forms of land ADR struck the researchers as important to include.

In the first week of each study visit, the researchers observed mediations led by the NGO, reviewed NGO case files, and interviewed NGO ADR staff and prior participants in NGO-led mediations. During the second week, the researchers observed mediations led by various community actors and interviewed these actors and prior participants in their mediations. These community actors were selected on the basis of their good working relationship with the NGO, length of experience in handling land disputes in areas known as "hotspots" for land conflict, and the level of public legitimacy given to their ADR efforts.

Prior participants in both NGO- and community actor-led mediations were selected based on their willingness to share sensitive details about their disputes and represent both 'successful' and 'unsuccessful' cases. Each of these interviewees participated as either a Complainant or Respondent in a land dispute reported to and/or mediated by the affiliate NGO or community actor within the past 7 years (since 2005, the year in which significant numbers of Internally Displaced Persons (IDPs) began returning home from the camps). Their disputes had either been settled by mediation or had since been referred outside the NGO or community actor and was pending in or resolved by another justice mechanism (such as a court). These interviewees were each of sound mind, not likely to turn aggressive upon a request to participate, and able to understand that questions asked were merely about the process used, not a re-opening of the case. To protect the parties, mediation staff, community members, and the researcher and prevent the appearance that the case has been re-opened, an interviewee's counterpart in the dispute was NOT approached for participation in this study, and the interview took place in a neutral location (ie, a trading centre or office).

In addition, the researchers manually entered and analyzed available caseload data using Microsoft Excel. To supplement the Recommendations portion of the study, researchers facilitated a large Focus Group Discussion of 35 NGO and community practitioners during the NULPP meeting on 18-19 July, 2011 in Lira Town. This meeting also featured small group breakout sessions for focused discussion of key issues.

III. Summary of Major Findings

Twelve of the most critical findings of the study are summarized in the list below. A more in-depth discussion at how the researchers arrived at these conclusions is featured in Chapter VI, "Presentation and Analysis of Findings."

1. The number of land disputes reported to NGOs is on the rise, but the share of resolved cases is decreasing.

Caseload records from three NGOs[10] show that while the total number of reported land disputes during 2008-2010 is on the rise (from 160 to 206), the total number of "resolved" cases is decreasing (from 41 in 2008, to 24 in 2010). At the same time, the size of the yearly backlog of "pending" cases is growing (from 96 to 137). In each of these NGOs, the share of "resolved" cases is decreasing over time.

Fascinatingly, only between 45 and 68 cases were handled and disposed of each year by these three NGOs, despite differences in total intake size.[11] This finding suggests that the rate at which these three NGO mediation staffs tend to digest land disputes is around 45-70 cases per year. Thus, cases above and beyond this cap are likely to remain pending. If the "digestion rate" of these NGOs remains constant while the number of reported land cases steadily rises, it is no surprise that the share of pending cases will increase while the share of resolved cases continues to decrease. Data also reveals that another reason for this trend may lie in the difficulty of the kinds of land disputes being reported over time, since some are less likely to be resolved than others.

2. ADR-practicing NGOs are strategically placed to promote land justice in Uganda.

Upon further analysis, it was discovered that the role of civil society NGOs—which operate between "formal" government institutions and "informal" clan and cultural structures—blends strategically with the nature of ADR as a bridge between litigation and traditional dispute resolution. The NGOs observed in this study tend to involve clan leaders and *Rwodi Kweri/Adwong Wang Tic* as fellow mediators and advisors on matters of custom, while at the same time reaching out to courts, lawmakers, and donors to address issues of land policy reform. In other words, NGOs doing ADR are in a rare position to deliver justice where it is needed most in Northern Uganda. Illustrated below, this link reinforces the value of NGO land dispute resolution efforts and the need to find ways to strengthen them.

NGOs Practicing ADR: Linking Two Systems

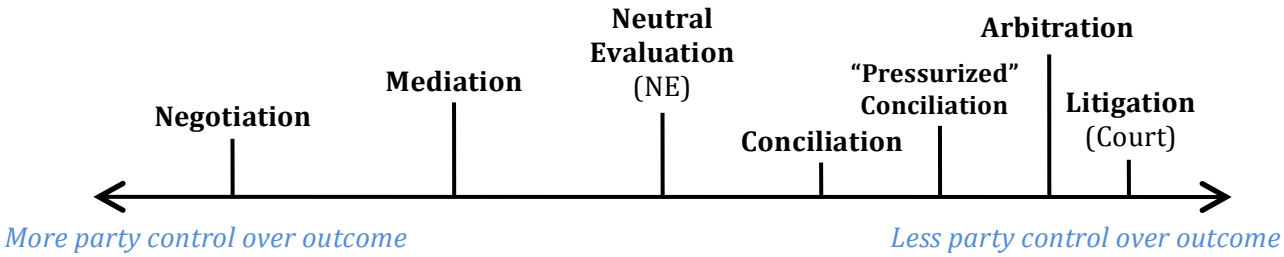
[10] The small size of this dataset represents what little data is currently available. Of the five primary informant NGOs (V, W, X, Y, and Z), four keep annual caseload records. Of these, only three (X, Y, and Z) have specific data concerning the types and status of land disputes that come before them.

[11] This value represents the total number of cases resolved, referred to clan, referred to court, or in which advice was given for each year among these three NGOs.

3. Actors use a variety of ADR styles to resolve land disputes.

Observations and interview data reveal that practitioners use every strategy from mediation, to litigation, to everything in between to approach land conflicts. Not only is there variation between different practitioners of the same title (Local Council (LC) 2 Chairpersons), but there are also significant differences in the way paralegals from a single organization approach dispute resolution (W and Z). Moreover, the majority of community actors describes or performs their "mediations" as situated more on the adjudicative (less party control over outcome) side of the dispute resolution spectrum. Only 4 of these 53 community respondents indicate practicing some form of mediation as the literature defines it. Of the 7 NGOs featured in this study, 6 incorporate some kind of Neutral Evaluation (NE) based on customary and/or state laws into their mediation or conciliation approach.

A Dispute Resolution Spectrum[12]



The major distinction between each of these ADR styles was found to be the way decisions are made: whether the intermediary or the parties themselves are in control of the decision-making process. Differing opinions were also found regarding the role of the mediator (whether a judge, advisor, or facilitator) and the intent of the mediation itself (to promote justice, peace, or both).

4. Many ADR practitioners, especially NGOs, operate in a Litigation mindset.

Not surprisingly, the terminology used by most LDC-trained[13] legal officers in NGOs was found to be the language of court. Phrases such as "the plaintiff and defendant", "our client", "summons notice", and "enforcement of the decision" were frequently used to describe ADR cases. Moreover, letters written to invite Respondents for a mediation session were often structured and worded like accusatory Notices of Intention to Sue sent by an advocate on behalf of their client. The posture of some community paralegals during field mediations was also seen to be that of an advocate trying to "bully" the opposing side into submission, complete with threats to take the Respondent to court should they disagree with the paralegal's position. This adversarial mindset tended to visibly undermine the cooperative problem-solving spirit of alternative dispute resolution.

[12] Brainch, Brenda (2006). This diagram represents only a simplified version of the various forms of dispute resolution found on the ground.

[13] Law Development Centre (LDC) in Kampala remains the institution solely responsible for training and certifying advocates for practice in the country. Its 9-month curriculum features a one-week course on ADR that tends to focus more on arbitration approaches.

5. Inconsistent record keeping makes it difficult to paint a detailed picture of land conflicts in Northern Uganda.

While each of the five primary informant NGOs documents the cases it receives, the type of information recorded varies widely. This is because each actor takes note of the things that they feel are most important and/or useful. Since some NGOs rely heavily on their paralegals to provide caseload information in their periodic reports, these details are not always available, complete, or consistently captured. Paralegals working in different sub-counties may follow different formats which, when grouped together, do not tell a coherent story about the land disputes being reported and the persons involved. Whereas the available caseload databases represent the same geographic regions and describe disputes that are not all that different from one other, each NGO records different pieces of information using different terminology. Alternatively, community ADR actors such as parish priests, clan chiefs, and LCs may make notes in loose-paper exercise books. Unfortunately, these are often illegible, incomplete, or damaged due to lack of weatherproof storage. These inconsistencies in record keeping make it difficult to paint a detailed and cohesive picture of land disputes in Northern Uganda.

6. The lack of enforcement compels land ADR actors to refer parties "up the ladder" to find justice.

The effects of the legislative silence concerning enforcement of Local Council Court and clan determinations regarding land disputes are loudly experienced on the ground. An unsettling 50 percent (9 out of 18) of prior Complainant interviewees indicate that, despite having won their land case with no appeal made against the ruling, they were "referred" to the next level by the LC 2 or LC 3 Court because the Respondent refused to comply with the decision. One Complainant in Amuru District informs that court brokers are charging 6 million shillings (around USD $2,200) to enforce an LC 3 ruling in his favour. To him, and to many others in Northern Uganda, this price of justice is simply out of reach.

NGOs and other community actors are not able to guarantee the mediation agreements they facilitate[14] or neutral evaluations they make either. This is non-binding ADR in its purest sense. NGO staffs rely totally on the goodwill of the community and the local leaders to ensure that parties do what they have promised. But should these leaders and community figures be biased against a party, there appears to be no safeguards in place against such abuse. In general, when one party backs out of a previous agreement, mediators were found to forward such cases to court and/or the police.[15] There are mixed reports, however, about whether these referral agents consider and urge compliance with previous mediation agreements or re-open the case afresh.

The current situation is therefore characterized by land ADR actors deciding, determining and negotiating resolutions to cases, only to refer them "up the ladder" later when one party proves uncooperative. This practice of appeals by the winning party greatly undermines the social legitimacy of the LC courts, clans, and NGOs to provide meaningful and decisive outcomes. People involved in such disputes often become frustrated by the

[14] X legal officers inform that no NGO-initiated Memorandums of Understanding (MOUs) have yet been endorsed by the Chief Magistrate in order for them to become binding legal documents.

[15] The challenges of referrals are discussed in number 12 of this section.

delays, costs, and lack of recourse associated with this process. Some interviewees who feel greatly wronged even express active interest in taking the law into their own hands.

7. The type of case most frequently unresolved is Contested Ownership. A top root cause for land conflict is Opportune Vulnerability. Together, these findings suggest that Land Grabbing is prevalent.

Caseload records from the same three NGOs reveal that 83 percent of all Contested Ownership cases went unresolved during 2008-2010. Perhaps since both parties feel that they are in the right, these cases are characterized by a stronger or more polar disagreement than other types of disputes. Such parties may be more likely to dig their heels into their positions, since any decision reached about ownership may necessarily be winner-takes-all. In other words, people quarrelling over "whose land this is" may sense the need to disagree until the outcome turns in their favour, or else lose any claim to the land in question.

This finding takes on new meaning in light of the most commonly cited root causes of land disputes in Lango and Acholi. Cited by 36 percent of all interviewees (including 45 percent of all prior mediation participants), Opportune Vulnerability ties with Greed for Money as the top-most perceived root cause of these conflicts. Vulnerability concerns the relative power of each party in terms of size, wealth, influence, and social security, and may take the form of childlessness, fewer clan members, disability, age, poverty, or a lack of male protectors. When someone seeks to take advantage of another's vulnerable status, these interviewees observe, land conflict is certain.

Contested ownership—where one party claims the land occupied by another—is a label that syncs very well with the "It's mine, now you leave!" storyline seen to characterize many land grabbing cases. In addition, the Opportune Vulnerability cited as a top root cause matches precisely with practitioners' definition of land grabbing[16] as a situation in which party A is deliberately seeking to take advantage of some perceived weakness in B in order to claim B's land. Taken together, these two findings confirm what many locals already know: predatory land grabbing is prevalent in Northern Uganda today.

8. Mediation and other ADR styles that rely on the parties' good faith to be effective may not be appropriate in serious cases of Land Grabbing.

Interview data reveals that the lack of powerful parties' incentive to mediate is a major challenge for local ADR efforts. This is attributed to the non-binding, party-dependent nature of these dispute resolution approaches. In processes where parties (rather than a judge or the state) have more control over decision-making, powerful parties seeking to take advantage of the other party may also use this opportunity to take advantage of the *system* by refusing to either: 1) participate at all or 2) honour the promises they make. Interviewees explain that such parties—those with advantages in terms of political or social connections, education, and/or wealth—may easily refuse to attend the mediation because they feel their "power" places them above customary law. Moreover, persons may have an incentive to drag the case to court—skipping ADR altogether—where

[16] Presented by seminar participants—including land ADR actors from local and international NGOs, communities, traditional institutions, and private advocates—during a meeting of the Northern Uganda Land Partners Platform, 18-19 July, 2011 in Lira.

they believe their financial resources will enable them to win the war of attrition caused by delays, fees, and costs of transport to and from court. Likewise, should such a character choose to participate in the mediation, the prevailing climate of impunity makes it very possible for them to come to an "agreement" in public but not uphold it in private, with little or no repercussions.

This suggests that ADR strategies that rely on the sincerity and voluntary willingness of parties to participate often—but not always[17]—fall short when one party has a intentionally abusive agenda. In a seminar of 35 practitioners, a theory of two contrasting dispute "personalities" was proposed. **'Genuine'** land disputes are characterized by the sincerity of each party and their willingness to mediate in good faith to find a solution. **'Land grabbing'** cases, though, are those in which party A is deliberately seeking to take advantage of some perceived weakness in B in order to claim B's land. Thus, one party approaches the process not in good faith, but with a knowingly or subconsciously predatory motive agenda. These types of situations, seminar participants concluded, may not really be land *disputes* at all and thus require a stronger, more authoritative intervention than homespun negotiation.

Several land ADR scholars agree with this line of thinking. Ramirez argues that "there may be cases which, due to their intensity, criminal content, complexity, or power disparities involved, would be best handled by a court of law."[18] "In the area of land tenure conflict especially, a formal solution may prove more lasting, due to its close linkages to legal, political, and institutional aspects" add Herrera and da Passano.[19]

This has important implications for land dispute resolution in Uganda. Practitioners, citizens, and policymakers alike bemoan the fact that the formal authorities in place—Local Council Courts, Magistrates, and police—do not adequately recognize, address, or enforce decisions against land grabbing.[20] In light of these conditions, it is doubtful whether non-binding mediation and conciliation alone can serve to end the climate of impunity and insecurity surrounding land grabbing in Northern Uganda.

9. Neglecting the non-land issues in a dispute may prevent real resolution.

Interviews and observations confirm Herrera and da Passano's claim that land disputes are often not just about land.[21] Subjective concerns such as social relationships, legacies, inter-group politics, self-interests, and cultural norms are found to play very strong roles in sparking and fueling land conflict in Lango and Acholi.

In observations where mediators failed to address these underlying factors, disputes may have been temporarily 'settled', but were not likely to be truly resolved. In one mediation between a divorcee and her former brothers-in-law led by W in Aber Sub-county, the parties signed an agreement in response to pressure from the paralegal team but were

[17] According to X, Y, and Z Caseload Data, a total of 10 Land Grabbing cases were recorded as "Resolved" during 2008-2010. This represents 23% of all such cases reported, and may either mean that the disputes were simply settled and not truly resolved—which interview data from prior participants suggests—or were actually effective in convicting the hearts of those seeking to grab land.

[18] Ramirez, R. (2002).

[19] Herrera, A. and M.G. da Passano (2006). pg. 69.

[20] IOM, UNDP, NRC (2010), pg. 32-35

[21] Herrera, A. and M.G. da Passano (2006). pg. 19.

emotionally distant and visibly unimpressed with the outcome. When contentious inter-clan issues were raised, the mediators insisted on promoting the Complainant's position. Later, despite having "won" the case, the Complainant sullenly walked out of the meeting before everyone finished signing the 'agreement' and concluded with prayer. She and the Respondent did not acknowledge each other once after the 'agreement' was made.

Additional interviews with parties to previously "successful" mediations reveal the results of this settled-but-not-resolved phenomenon. Says one Complainant involved in a now-settled neighbourly dispute with his clan brother, "It's been 8 months since the mediation. We have not talked since." A 20 year old Complainant whose case against his father resulted in a mediated 'agreement' confides that, "My father and I are not on good terms now. If I greet my father on the way, he just ignores us [my siblings and I]. He told us he won't even come to our burial if we die. I've just given up on my relationship with him."

Unfortunately, neglecting these personal dynamics may fuel even greater misunderstanding and resentment between those involved. Since grudges and broken relationships are commonly cited as major root causes for land disputes, the lasting benefit of such ADR intervention is questionable.

10. Conducting preparation meetings can greatly improve efficiency in mediation.

Experience from X and Z shows that once a land dispute has been reported, it is helpful to sit down with both parties to discuss their claims before deciding how to proceed with the case. If a mediator summons the Respondent for mediation immediately after receiving a complaint, the Respondent may perceive the mediator to be biased for acting on behalf of the Complainant without consulting the other party. Since mediation is not always the best available option, it is also wise to include both parties in decision-making right from the start and assess whether the parties are even *willing* to mediate. Staff at X and Z use such meetings to negotiate for ADR instead of court, begin building party trust in the mediator and a cooperative spirit between the parties, identify the core issues of the conflict, and probe into the facts of the case to see how best to move forward. Learning about the dispute in advance allows for more thorough legal analysis and a more efficient and focused mediation session.

11. Teaching—rather than judging—parties may lead to more durable agreements.

Neutral Evaluations can be delivered in many ways. Instead of giving a legal opinion as direct instructions to be followed, Z mediators make a habit of sharing their evaluation of the case in a different way: by teaching the entire group about laws, procedures, and customs that are relevant to the dispute at hand. This is done without naming or blaming any particular party, and works in 'good faith' disputes because it utilizes parties' free will to decide how they will respond to the law. Here, the mediator humbly assumes ignorance on the part of the community and use the mediation session as a chance to bring everyone to the same understanding of the law. Should one party refuse to obey the law, it then becomes clear to everyone that the person is deliberately acting with ill intent. "[The mediator] taught us in such a way that we realized for ourselves that we were wrong," a former Respondent in Apac explains. "He never told us directly or judged us, but recognized our free will to make choices for ourselves. He started with counseling us individually, then moved to the land issue… The mediator really listened to us." The agreements that come

out of these self-made decisions, interviews suggest, are likely to last longer than 'agreements' that are imposed by an outside actor.

12. The lack of emphasis on follow-up may have dire consequences.

Due to their heavy workload (with new land disputes reported nearly every day), small staff size, and limited transportation resources, four out of the five primary informant NGOs do not make it a priority to follow up on previously mediated cases. Only one NGO interviewed conducts regular check-ups after 6 and 12 months to assess whether the parties are satisfied and to document any problems or improvements that have taken place over the period since the agreement.

It was observed that far less attention is given in general to cases that are *referred* to court, police, and/or other offices (unless, of course, the NGO has arranged to represent or advise a party in court). These are often entered as "Referred" in caseload databases and effectively closed by the NGO office. With many other pending and fresh cases to handle, land ADR actors rarely find time to return to these "closed" cases. Yet following up to see whether the referral helped or prolonged the search for justice is useful because, as one V staff member comments,

> "Once V becomes involved in a case, our organization's name is on the line. How will it look if V's mediation fails and we refer it to court, but then court sits on the case for three years or gives an unjust ruling? In that case, the result of our intervention in the parties' lives is negative. We need to follow up and follow *through* on the cases we commit to handle."

But even more importantly, checking up on referred cases may help save lives. One organization's experience with paralegals referring violent land disputes to the police is illustrative here. In April 2011, paralegals in Agago District referred the Complainant in a serious land dispute to police due to its violent nature. When the Complainant arrived at the police post, he was told that no action would be taken until he paid for the cost of fuel to transport the police to the site. Since the Complainant could not afford this, no intervention was made. Police inaction and a lack of follow-up eventually allowed this angry Complainant to set fire to the Respondent's grass thatched home on night as a direct result of this conflict. All six, including the Respondent and five members of his family, were burned to death.[22] Unfortunately, this is just one of several similar stories throughout the region and highlights the reality that without sustained interest and persistent reminders, cases—and lives—may fall through the cracks.

[22] Justice and Peace News, May 2011 Newsletter

I. Introduction

Land wrangles are astonishingly common in Uganda today.[23] Recent studies show that disputes over customary land—which accounts for 80 percent of the country and nearly all land in Northern Uganda—are on the rise, especially in the wake of recent development schemes and returns from displacement.[24] With agriculture accounting for 82 percent of the country's labour force and nearly a quarter of its Gross Domestic Product[25], the prevalence of these disputes threatens Uganda's social stability and economic development.[26] The vital role played by access to land in the sustenance of rural livelihoods also lends itself to particularly brutal strains of conflict. These cases—viewed by many as fights for survival—are often characterized by arson, destruction of property, witchcraft, physical assault, and murder.[27]

Although Article 237(3) of the 1995 Constitution recognizes four co-existing land tenure systems (customary, freehold, mailo, and leasehold),[28] the vast majority of land in Uganda—between 65.5 and 80 percent—is managed according to local custom.[29] That is, most land is held under a type of tenure that is *"applicable to a specific area of land and a specific description or class of persons"* and *"...governed by rules generally accepted as binding and authoritative by the class of persons to which it applies."*[30] In Lango, over 93 percent of land is under customary tenure, and this number is comparably high in Teso and Acholi subregions.[31] Whereas the familiar definition describes customary rules as undocumented and such lands as unregistered, recent years have seen important developments in this regard. The customary land laws for Lango, Teso, Acholi, and Kumam have been written down by their respective traditional authorities and are now legally enforceable and subject to annual revisions to ensure constitutionality.[32]

Under the *Land Act* (§88 and §76A as amended in 2004) and *Local Council Courts Regulations* 2007, two parallel systems—those of the Local Council courts and Clan courts—are recognized as having legal authority to determine and/or mediate disputes over customary

[23] The Uganda Bureau of Statistics found in 2006 that 6.7 percent of households nationwide reported having had a land dispute, while the prevalence rate is upwards of 16.4 percent in the post-conflict North (Rugadya, M. (2008)).

[24] Rugadya, M. (2008); IOM, UNDP, NRC (2010).

[25] CIA World Factbook (2011).

[26] Kigula, J. (1993).

[27] Land and Equity Movement in Uganda (LEMU) and Arbeiter Samariter Bund (ASB) (2010).

[28] "Land tenure" is defined in this paper as the set of rules and norms which govern people's legitimate access to land. (Adoko, J. and Levine, S. (2004);

[29] Whereas the UBOS National Household Survey for 2005/2006 shows only 65.5 percent of respondents living under customary tenure (see a2bq7), 94.5 percent of the same respondents reported having no formal certificate of title, customary ownership, or occupancy (see a9q2). Of the few who report having such a certificate, less than 40 percent have a hard copy of it (see a9q3).

[30] *Land Act*, Cap. 227 §3(1) a, b

[31] Lango Cultural Foundation (2009). See also Principles, Practices, Rights, and Responsibilities (PPRR) for Acholi (Ker Kwaro Acholi).

[32] In accordance with §27 of the *Land Act*, which states: *"Any decision taken in respect of land held under customary tenure…shall be in accordance with the customs, traditions, and practices of the community concerned, expect that a decision which denies women or children or persons with a disability access to ownership, occupation, or use of any land or imposes conditions which violate articles 33, 34, and 35 of the Constitution on any ownership, occupation, or use of any land shall be null and void."*

land. This overlapping jurisdiction allows more powerful parties to exploit the ambiguity between the two systems to their own benefit, picking and choosing whom to approach in order to obtain their desired outcome.[33] Scholars refer to this consequence of legal pluralism as institutional or forum "shopping".[34]

In recent years, a menu of case management approaches known as alternative dispute resolution (ADR) has gained wide popularity in legal settings throughout the world. Originating in the United States as a creative response to excessive court costs, delays, backlogs, dissatisfaction with limited legal remedies, and the adversarial antagonism borne of litigation, ADR promotes collaboration between parties to find appropriate solutions with the help of a neutral third party.[35] Proponents emphasize that the non-adversarial nature of many ADR approaches (mediation inclusive) preserves the parties' existing relationship and fosters reconciliation, a key principle enshrined in Article 126(2)c of the 1995 Constitution of Uganda.

Today, ADR has taken root in a variety of jurisdictions across Africa, from paralegal training programmes for village mediators in Malawi and Kenya, to Nigeria's celebrated Multi-Door Courthouse, to Mozambique's *Arbitration, Mediation, and Conciliation Act* of 1999, to Zambia's backlog-quenching Settlement Weeks, to Ghana's landmark ADR legislation.[36] In Uganda, a successful pilot study from 2003 to 2006 has prompted the Commercial Court to promote mediation as "the most appropriate ADR tool,"[37] requiring as of 1st November 2009 that parties of all[38] commercial cases first sit with a mediator before coming before a judge.[39]

Mediation has also come to flourish outside Uganda's formal business context, enjoying wide application in community-level conflicts over access to land. Yet while both Local Council (LC) and clan courts play important roles in land matters, legislation has tended to favour one over the other. Section 88 of the *Land Act* (1998) states that *"Nothing in this Part shall be taken to prevent or hinder or limit the exercise by traditional authorities [ie, clan courts] 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."* But when the *Act* was amended in 2004, LC 2 courts became "the courts of first instance in respect of land disputes".[40]

These two statutes are contradictory because in practice, clan courts do not occur anywhere in the appeal process for a land dispute after it has been heard by the LC 2.[41] By mandating land cases to begin at the LC 2 level, the *Act*, in effect, circumvents the clan and prevents it from exercising its legal authority to decide and mediate these disputes. This unrecognized-in-practice status of traditional justice systems is problematic in regions such as Lango, Teso, and Acholi where, due to the costs, delays, and technical procedures associated

[33] Adoko, J. and Levine, S. (2004), pg. 10

[34] Toulmin, C. (2007); Ramirez, R. (2001) citing Terraciano, A.M. (1998)

[35] Brainch, B. (2007)

[36] Brainch, B. (2006)

[37] Kakooza, A.C.K. (2010), pg. 16

[38] With certain exceptions under rules 9 and 10.

[39] *Judicature Act,* Cap. 13: The Judicature (Commercial Court Division) (Mediation) Rules, No. 55 of 2007; Kiryabwire, Hon. Justice (2005).

[40] *Land Act,* Cap. 227, §76a

[41] *Local Council Courts Regulations* (2007), §60(2).

with formal courts, most people prefer to first bring their disputes to clan courts that arbitrate, mediate, or conduct other reconciliatory processes.[42]

Nevertheless, for various reasons, aggrieved parties do not always arrive at satisfactory outcomes through either justice process. Consequently, in addition to the existing avenues for land conflict management, other actors including non-governmental organizations (NGOs), community-based organizations (CBOs), and faith-based organizations (FBOs) have stepped in to 'mediate' local land cases. These civil society actors often have dynamic ties to both local community members and policy makers and are thus strategically positioned to address systemic injustice.[43] In addition, Resident District Commissioners (RDCs), as local ambassadors of the President, have also asserted an ability to determine land matters.

With such a milieu of independent doctors treating the same epidemic, it is not surprising that duplicated efforts, technical inefficiency, and arbitrary prescriptions occasionally result. Today, the large working gaps *between* these justice actors and the widespread lack of enforcement of both judgments and ADR settlements remain sources of intense frustration for many people seeking justice. In rural settings like Obalanga Subcounty, for instance, it is not uncommon for a widow to report her land matter to her late husband's clan leaders, then to the LC 1, LC 2, and LC 3 courts, each of whom are either unable to resolve the case or biased against her.[44] Another illustrative scenario in Orungo Subcounty features taking a dispute to clan leaders, then to police, next to the LC 1 Court, then back to police, and finally, due to lack of enforcement and under threat of witchcraft, giving up any further pursuit of the case.[45]

Section 89(5) of the *Land Act* provides that *"the mediator [of a customary land dispute] shall be guided by the principles of natural justice, general principles of mediation, and the desirability of assisting the parties to reconcile their differences."* On the ground, however, most NGO and community-based practitioners have never been taught as such. Instead, they have responded to immediate needs for de-escalation of potentially violent conflicts without waiting to be formally trained in mediation techniques or applicable laws.[46] Unfortunately, though, because many of these actors are "mediating in the dark" in communities plagued by impunity and vulnerability, resulting settlement agreements may inadvertently serve as veneers over deliberate abuse.[47]

Beyond the need for technical skill, creativity in brainstorming options for mutual gain is an essential ingredient in effective mediations.[48] The great socio-cultural, political, and even geographical distance between their respective efforts and systems, however, suggests that the

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[42] Uganda Land Alliance (2010), pg. 15; LEMU (2009), "Let's face up to land grabbing". Brief No. 3, pg. 2; IOM, UNDP, NRC (2010), pg. 33; Mugambwa (2002), pg. 110 citing Kigula, J. (1993)

[43] Lederach, J.P. (1997), pg. 151

[44] LEMU and ASB (2010), R.58

[45] Ibid., R.38

[46] Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) highlights this need in its Plan of Action (pg. 9):

> *"Governments should introduce measures to:"* (first among others) *"Encourage NGOs, CBOs, and faith-based groups to train local leaders on the law and constitution and in particular the rights of women and children; and in mediation and other alternative dispute resolution (ADR) procedures."*

[47] Dennison, D. B. & Akin, J. (2011)

[48] Fisher, R. and Ury, W. (1991). See Chapter 4, "Invent options for mutual gain."

diverse host of land ADR actors in Uganda have much room to grow when it comes to creative collaboration and exchange of ideas.[49]

Most land dispute mediations in Uganda today—across all the actors described above—go unrecorded and unanalyzed as to their effectiveness, procedural justice, and adherence to applicable laws.[50] If these interventions are not carefully examined, who is to know whether these ADR efforts are contributing to the solution or problem of rampant land conflicts in the region? This uncertainty, coupled with blurred jurisdictions and unsynchronised conflict resolution approaches, underscores the critical need to evaluate existing and best practices in order to improve access to justice for Uganda's most vulnerable rural populations.

This study seeks to fill this gap in order to help improve the quality and impact of local ADR service delivery. Commissioned by a consortium of land-ADR-practicing NGOs in Northern Uganda, this baseline assessment is also intended to serve as a frame of reference for mediators' self-evaluation and the practical exchange of techniques and insights among their colleagues.

II. Review of the Literature

This Literature Review is structured as follows. First, the context in which most customary land conflicts arise is described in relation to practitioners seeking to manage these disputes in Uganda. Next, the procedural aspects of land conflict management are explored, followed by a discussion of pertinent criticisms of ADR. The final section highlights gaps in the literature that demonstrate the need to integrate theory and practice as we "learn our way ahead" to improve land justice interventions.[51]

1. Customary Land Disputes: Contexts and Contents

Land conflicts across Africa often arise within settings characterized by multiple co-existing and parallel legal systems. Where European land laws were imposed upon societies where land relationships were already governed by time-honored customary laws, the resulting situation often left a large portion of the population that continued to apply their customs while the state operated as if custom was obsolete.[52] Ramirez (2002) argues that the uncertainty caused by having two competing legal frameworks has served to undermine public confidence in both systems. Herrera and da Passano (2006) see the pluralism of norms and institutions as difficult to navigate and regulate since it allows individuals to "make use of more than one law to rationalize and legitimize their decisions or behavior (pg. 34)."

Outcomes of this 'forum shopping' tend to favor those with greater financial resources, knowledge of the law, and political influence. In such situations, verdicts unsurprisingly become little more than a function of power relations.[53] As Toulmin (2007) observes in her survey of land rights regimes across West Africa,

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[49] LEMU and ASB's "Unable to Return: Profiles of Internally Displaced Persons Seeking Defense of their Customary Land Rights" documents the circuitous routes among many different actors that parties often must navigate for their cases to be heard.

[50] Kakooza, A.C.K. (2007)

[51] Ramirez, R. (2002)

[52] Ibid.

[53] Herrera, A. and da Passano, M.G. (2006)

> "There is no single set of rules which apply to land—it all depends on who you are and the claims you may be able to assert, where you are, who you turn to, and the resources you have available to help ensure a judgment in your favour… So *land rights in practice are all about negotiation between different peoples*, drawing on whatever resources and bargaining power are at their disposal (pg. 98)."

In much of sub-Saharan Africa, legal pluralism is complicated by a mixture of approaches to ensure tenure security and, accordingly, economic development. Following the influential logic of Hernando de Soto's Mystery of Capital thesis[54], the World Bank[55] and the United Kingdom[56] have vigorously pursued the titling of rural land with the thinking that leaving land as a 'dead asset' inhibits economic growth. Ambreena Manji, the Director of the British Institute in East Africa in Nairobi, questions the desirability of this widespread approach to promote the titling of all land so as to allow poor farmers to use their land as collateral to obtain bank loans.[57] She argues that this strategy will "aggravate rather than ameliorate poverty, particularly amongst women," and warns that the lessons of the recent subprime mortgage crisis in the United States should be considered before adopting policies which enthusiastically welcome individual debt creation for the poor (pg. 999).

Nevertheless, tenure formalisation remains a priority for many administrations today. The Tanzanian government, for example, invited Dr. De Soto in 2006 to launch MKURABITA, a Property and Business Formalisation Programme (*Mpango wa Kuasimisha Rasilimali na Biashara za Wanyonge*).[58] The Government of Uganda has also taken steps—such as its plan for Systematic Demarcation and explicit aim in the *Land Act* to register customary land either with a Certificate of Customary Ownership or freehold title[59]—to gradually dissolve the customary tenure system, or at least write it down. Yet, as Kakooza (2008) notes, poor administration and maintenance of the national land registry render the current system inefficient and unreliable. Moreover, the confusion resulting from removed and re-established Land Tribunals negatively impacts public confidence in the state land administration.[60] When codified laws are not implemented properly, Ramirez (2002) reminds us, a distinction emerges between the official (*de jure*) bundle of rights and the actual (*de facto*) set acknowledged on the ground.

So what is the substance of these *de facto* customary land rights[61]? Various NGOs, such as Land and Equity Movement in Uganda (LEMU) and Norwegian Refugee Council (NRC), have worked with the main cultural institutions of Lango, Teso, and Acholi subregions to document the "Principles, Practices, Rights, and Responsibilities (PPRR) of Land Under Customary Tenure" in each area. Across these communities, land rights are unregistered and organized according to relationships and duties of various actors. Thus, in the customary context, the phrase "to *own* land" means something different than what is understood in the Western tradition. Here, "ownership" is dispersed among different actors and their respective management rights and responsibilities (see **Table 1**).

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[54] De Soto, H. (2000)

[55] World Bank (2003)

[56] Department for International Development (2009)

[57] Manji, A. (2010)

[58] Manji, A. (2010), pg. 987, f.n.14

[59] *Land Act* §4, 5, 6, 7, 8, 9; *1995 Constitution of Uganda* Article 237(4) a, b

[60] Kakooza, A.C.K. (2010)

[61] Note: Under the *Land Act* §3(b,d), land under customary tenure is to be ruled and regulated according to the customs of that area, subject to §27 (which refers to discriminatory practices).

Table 1: *Customary "Ownership" as a Bundle of Rights and Responsibilities*

Actor	Type of Right or Role	Example
Clan	*Administration*	Protecting clan lands by deciding whether land should be sold
Heads of Family	*Stewardship*	Holding land in trust for children and deciding how to divide inheritances
Children	*Use*	Deciding how to use the land for productive purposes

Source: LEMU, "How is land under customary tenure managed?"

Clans have administrative rights (deciding whether land should be sold and thus preventing land from carelessly leaving the clan), heads of family have stewardship rights (holding the land in trust for offspring and deciding how to divide inheritances), and children have usage rights (deciding how to use the land).[62] As Toulmin articulates, "In practice, we would see rights over land… as constituting *a bundle* within which different kinds of claim may be held by a variety of people and groups."[63] Thus, she suggests, it may be more appropriate to refer to a "land rights owner" rather than a "land owner" in the customary setting.[64]

Although these customary land rights are enshrined in the *Land Act* as legally authoritative, they are often not upheld for various reasons. LEMU has diagnosed gaps in the land administration, state justice system, and customary tenure system itself.[65] "The potential for land conflicts is greater," Herrera and da Passano (2006) explain, when there are contradictions in the law, gaps in the land issues covered by the law, and competition over the mandates of state institutions (pg. 37)." In *Land Tenure Alternative Conflict Management* for the Food and Agricultural Organisation (FAO), these authors further observe that:

> "These problems create confusion and uncertainty over land rights, increasing tenure insecurity. Tenure security is not only based on the legality of the land rights, but the certainty that the state (or the customary authority that is issuing those rights) is able to protect those rights and will do so."[66]

Informed by a Needs Assessment Survey of various land conflict management practitioners, this FAO manual also highlights the reality that land disputes consist of both objective and subjective concerns. Objectively, issues of rights of access, use, and security make up the core substance of nearly all land wrangles across the developing world. In addition, concerns regarding economic livelihoods, infrastructure development, and environmental sustainability frequently play a concrete part. By the same token, subjective aspects such as social relationships, legacies and social capital[67], inter-group politics, cultural norms, and individual and group psychology also contribute significantly to the sparking and fueling of these conflicts. Survey respondents, perhaps not surprisingly, listed these subjective concerns

[62] LEMU, Info. Leaflet No. 3, "How is land under customary tenure managed?"

[63] Toulmin, C. (2007), pg. 99

[64] Ibid., pg. 109

[65] LEMU (2009), "Let's face up to land grabbing"

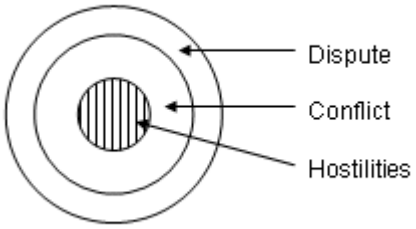
[66] Herrera, A. and da Passano, M.G. (2006), pg. 37

[67] Defined by Herrera and da Passano (17, p18) as "the notion that social bonds and norms are important to the achievement of livelihoods."

as among the most difficult to deal with, since they are related to beliefs, attitudes, identity, and emotions.[68]

In light of these many substantive conflict roots, Ramirez (2002) cites the need for case studies to distill working typologies of the kinds of land conflicts experienced in a given area.[69] Regardless of their context-specific triggers, however, Ramirez asserts that conflicts typically evolve according to the phases of Barringer's conflict model (see **Figure 1** below).

Figure 1: Barringer's Key Concepts[70]



Disputes, understood as incompatibilities of perceived interests, objectives, or future positions, become conflicts when one party sees the situation as threatening and takes action accordingly. Prolonged and organized conflict degenerates into hostilities characterized by violence.[71] Ramirez also notes that the accumulation of sources of grievances is also useful in understanding how situations can "'flip' from a balanced dispute to a conflict and hostilities."[72]

2. Managing Land Conflicts

The presence of a neutral third party often allows disputing parties to accomplish what they have been unable to attain themselves: management and/or resolution of the conflict. In his text, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (2000), Bernard Mayer argues that "mediation attempts to bridge the gap between resolving one's own conflicts and surrendering the power to do so to others. It helps people maintain their power over important issues in their lives as it also assists them in moving through a difficult conflict process (pg. 191)." In the context of land disputes, alternative dispute resolution (ADR) may also function as a link between weak-but-trusted customary systems and formal-but-distant state legal mechanisms.[73] This unique position of ADR actors presents a range of opportunities for strategic justice delivery, but it also raises a host of important questions.

The question of "Which standards should apply?" resounds most strongly throughout the literature on culturally appropriate ADR. While it seems that there are as many principle-recipes for mediation as there are authors, much of the debate revolves around whether mediators should promote agreements which align with parties' interests[74], legal rights[75],

[68] Ibid., pg. 19
[69] de Janvry, A. and E. Sadoulet (2000)
[70] Barringer, R. (1972), pg. 17
[71] Barringer, R. (1972)
[72] Ramirez, R. (2002), part 2
[73] Ibid., part 3
[74] Fisher, R. and Ury, W. (1991)
[75] Fiss, O. (1984); Sternlight, J.R. (2007)

societal norms[76], or a combination of these. Other scholarly dialogue centers on how the nature of mediation in one cultural context is not necessarily transferrable in another. For instance, while confidentiality, neutrality of the mediator, and the rule of law are three fundamental aspects of court-annexed mediation in the United States, some authors note that these might simply not apply in other settings (eg, a village mediation in sub-Saharan Africa). Mediation may need to be conducted publicly, local clan elders may know both disputing parties and actively try to infuse the process with community norms[77], and the society may not share the Western view that formal laws are the best way to create a just society.[78]

These observations lead to a consensus among most alternative conflict management scholars: ADR operates differently in different contexts. As Sternlight suggests in his survey of global ADR,

> "...ADR might operate differently in societies, such as China, that are more communitarian and less individualistic than our own. The goal of mediation in many societies is to preserve or create harmonious social relationships, and not merely to maximize individual self-interest. For example, Chinese mediation focuses more on preserving relationships, status, and social ties, and less on protecting individual rights… A variety of non-Western societies also rely on their systems of justice to provide harmony, balance, or reconciliation." [79]

Carrie Menkel-Meadow (2001) echoes this in her insistence that ADR be known as *appropriate* dispute resolution, with the understanding that "different processes may be appropriate for different kinds of disputes or in different types of settings (pg. 979)."

Beyond the need for flexibility of approach, the literature makes clear that "pure procedural justice"[80] is a critical element in party satisfaction and effective dispute resolution. A longitudinal study of both court and ADR-users in the United States reveals that parties were equally pleased regardless of which justice process they used, as long as they felt it was fair. As Shestowsky and Brett (2008) conclude:

> "Disputants who view the process by which their disputes are resolved as fair are more satisfied both with the process and outcome of the procedure they experience and are more willing to voluntarily implement the resolution. They also have greater respect for legal institutions compared to those who believe that the procedure they used was unfair (pg. 38)."

This finding affirms Mayer's view that, "in serious conflicts, it is not the absence of an effective solution that perpetuates the struggle, but the lack of an effective *process* or structure of interaction. Unless mediators can somehow bring about a change in this situation, their capacity to make a genuine difference will be limited."[81]

With fairness performing such an integral role in a disputant's justice experience, and ADR presenting such a wide range of possible avenues, how does one decide which approach to use? Herrera and da Passano (2006) simplify the choice into one of either an informal or formal approach. From there, the neutral intermediary helps the parties decide if they have the mutual

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[76] Stulberg, J.P. (2005) citing Hyman and Love (2002), pg. 157

[77] Mayer, B. (2000), pg. 200

[78] Sternlight, J.R. (2007), pg. 585. "Rule of law" apparently translates in China into "rule *by* law"—which is generally perceived as an authoritarian tool of state oppression.

[79] Ibid., pg. 591

[80] Stulberg, J.P. (2005), citing Rawls, J. (ed. 1999), pg. 74

[81] Mayer, B. (2000), pg. 194

ability and will to find a joint solution to their dispute (pg. 89). Whichever strategy or third party is selected, though, must be acceptable by each party and must involve all the parties at each point in the process.[82]

Many scholars agree that ADR is not always the most appropriate strategy: "In the area of land tenure conflict especially," Herrera and da Passano explain, "a formal solution may prove more lasting, due to its close linkages to legal, political, and institutional aspects."[83] Ramirez adds "there may be cases that, due to their intensity, criminal content, complexity, or power disparities involved, would be best handled by a court of law.[84] If, for instance, disputants have vastly different abilities to represent themselves effectively, a participatory process may actually lead to an outcome that further disempowers the weaker party and may therefore be unjust.[85] While various authors describe tips for equalizing these power differentials[86], the subjective nature of power relations makes distilling a list of "consideration criteria" difficult.[87] Owen Fiss, a well-known critic of ADR, argues accordingly that "It is impossible to formulate adequate criteria for prospectively sorting cases. The problems of settlement are not tied to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of law."[88]

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Since a great deal has been written on conflict resolution designs and processes, it may not be necessary for the purposes of this review to cover these micro-elements in detail. A review of the literature does, however, uncover certain insights with implications for this study of grassroots ADR in Uganda.

Creativity is consistently cited as one of the chief characteristics of effective mediators[89] but Lederach's Elicitive Model[90] for conflict management training across cultures presents a new spin on a familiar topic. In light of his experience with ADR practitioners throughout Latin America, Africa, and southeast Asia, Lederach advocates for a paradigm shift that views the indigenous wisdom of local peacebuilders as "an extraordinary resource for developing appropriate conflict strategies within their setting."[91] In other words, a people's existing knowledge about the nature of local conflicts provides the raw—and usually the most legitimate—material for the improvement of their ADR efforts. Mayer (2000) expounds on this idea by applying the Elicitive Training Model to the actual mediation process itself:

> "One approach that I think is often overused is substituting the mediator's creativity for the disputants' creativity… More often than not, the mediator's highest value is not in figuring out

[82] Kakooza, A.C.K. (2007)

[83] Hererra, A. and da Passano, M.G. (2006), pg. 69

[84] Ramirez, R. (2002), Box 16: "When not to collaborate"

[85] Mayer, B. (2000), pg. 67

[86] The most famous of which is the BATNA, or Best Alternative to Negotiated Agreement, knowledge of which may reveal what is really at stake if one party refuses to budge.

[87] Fiss, O. (1984); Herrera, A. and da Passano, M.G. (2006), pg. 99; Ramirez, R. (2002).

[88] Fiss, O. (1984), pg. 1088

[89] Herrera, A. and da Passano, M.G. (2006), pg. 107; Lederach, J.P. (1997); Mayer, B. (2000), pg. 208

[90] Lederach, J.P. (1995)

[91] Ibid., pg. 120

> creative solutions but in promoting an open, relaxed atmosphere and an effective communication and problem-solving process that elicit the creativity of all the parties." (pg. 208)

The literature also demonstrates that there are a myriad of interpretations regarding which criteria determine whether a case is "settled," "resolved," or "successful." Stulberg (2005), for instance, argues that a mediation is successful simply if, in the presence of pure procedural justice, the parties agree. Others, like Mayer (2000), maintain that "the equating of success with reaching agreement and failure with not achieving agreement is very limiting, particularly in complex situations… Agreements are often just steps along the way (pg. 212)." Ramirez (2002) also suggests a broad range of criteria for evaluating collaborative agreements which include considerations of whether stakeholders are willing and able to implement the decision, whether resources were used efficiently during the process, whether the parties' working relationship was improved, and whether the agreement has held over time.[92]

Regardless of how they are defined, "successful" mediations frequently culminate in the creation and inauguration of a new agreement between the parties. But besides making sure that its terms are realistic (including, for instance, default clauses) and that key authorities oversee its implementation (such as LC Chairpersons), more is needed to ensure an agreement's durability and authentic effectiveness. Herrera and da Passano (2006) recommend, for instance, that "a group that represents equally all of the stakeholders involved in the decision should be designated to periodically check the results (pg. 102)," after an agreement has been made.

As stated earlier, the certainty that parties' land rights will be protected is fundamental to tenure and livelihood security.[93] Thus, external factors, such as a lack of supervisory mechanisms and police protection, may undermine the success of a negotiated agreement. Likewise, the quality of the outcome may be frustrated by internal elements such as lingering threats of violence, denial of customary stewardship responsibility, or other criminal activity.

Mediation is also a short-term intervention. By definition, it alone cannot address systemic issues of survival, legal infrastructure, historical oppression, social inequalities, or the prevention of future conflicts—concerns which may significantly shape a settlement agreement.[94] Some scholars therefore call for a holistic approach to dispute resolution—one which promotes an enabling environment for mediation and other ADR efforts. "Rather than a simple set of techniques or procedures," Hendrickson (1997) explains, "alternative conflict management can be seen as a more holistic and process-oriented approach to addressing conflicts and the underlying conditions which give rise to them (pg. 21)."

In the context of criminal ADR, Grace (2010) argues that, "[b]ecause we cannot fully know the role that environmental factors played in shaping a criminal response, the focus should be on *correcting the influence of those environmental risk factors* through rehabilitation and reintegration to inculcate public norms as central features of public agency going forward, instead of harsh, punitive punishment (pg. 589)." Furthermore, Sternlight's (2007) survey of world-wide ADR efforts demonstrates that these criminal ADR programmes often aim towards a vision of social justice than goes beyond the mere recognition and protection of rights, to include efforts to "empower the powerless or wrest power from the elite (pg. 588)."

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[92] Citing Gray, B. (1989)

[93] Herrera, A. and da Passano, M.G. (2006), pg. 37

[94] Mayer, B. (2000), pg. 220; Sternlight, J.R. (2007)

On the other hand, some scholars, such as Stulberg, maintain that "…party acceptability of outcomes is, and should be, the defining feature of justice in mediation. Standards independent of the process are not needed (pg. 44)." Critics of ADR, however, point out that while such ideas sound nice on paper, the emphasis on interests rather than legal rights[95] means that, in practice, mediation fosters peace, not justice. In other words, it sanctions impunity. As Owen Fiss (1984) warns in his seminal critique entitled "Against Settlement",

> "Parties might settle while leaving justice undone. …Although the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself. To settle for something means to accept less than some ideal (pg. 1086)."

Other scholars suggest, however, that such views of justice, which rely almost solely on statutory rights and obligations, are actually quite limited. Law may instead be seen not as an end in itself, but as a means to the fuller end of justice, which recognizes the importance of harmony, reconciliation, balance, and social equality in addition to individual rights.[96] In this way, ADR in the context of customary tenure may actually serve to reconcile traditional (read: oral) and modern (read: statutory) law. Ugandan legislation that honors customary laws as equal in potency to state laws is evidence, Ramirez (2002) would suggest, of the broadening space in which ADR may creatively operate.

Another chief criticism of ADR centers on the perception that "ADR implicitly asks us to assume a rough equality [in terms of power] between the contending parties."[97] The many types of, vulnerabilities to, sources of, and situational contexts of 'power'—defined by Mayer as the ability to get one's needs met and to further one's goals[98]—make it easy for mediated agreements to be skewed in favour of the more powerful party. It would clearly be difficult to call such outcomes just. Mack (1995) highlights the complexity of trying to deal with power dynamics between men and women. "Gendered patterns of speech and silence will give the man more air time," she observes, "and a mediator who attempts to balance this inequality may be perceived as improperly favouring the woman (p. 132).[99] This and other scenarios may be the very *modus operandi* of local justice mechanisms that allow land grabbing to thrive in rural Uganda. As the Land and Equity Movement in Uganda (LEMU) explains,

> "In every village there are inequalities of power—those who have more money, status or connections, those who are physically stronger, or are feared because they have weapons. It is normal practice for these more 'powerful' people simply to take over the land of the less powerful (the old, the very young, widows, and the poor). They do this in a variety of ways: they occasionally use violence, but more commonly threats and intimidation are sufficient to make their victims give up and abandon the land to the land grabbers."[100]

LEMU identifies four main problems with the operation of local justice frameworks in Uganda today: 1) courts may fail to uphold land rights in their verdicts; 2) sometimes no verdict is issued, or both parties are declared the 'winner'; 3) when courts do give commendable

[95] Mayer, B. (2000), pg. 219
[96] Sternlight, J.R. (2007), pg. 591
[97] Fiss, O. (1984), pg. 1076
[98] Mayer, B. (2000), pg. 50
[99] Cited in Ierodiaconou, M. (2005)
[100] LEMU (2009), "Let's face up to land grabbing", Brief No. 3, pg. 1

rulings, there is usually no enforcement of the decision; and 4) since court remains unaffordable for many, court battles become wars of attrition in which the richer party prevails.[101]

Several authors praise Fischer and Ury's (1991) concept of the BATNA, or Best Alternative to a Negotiated Agreement, as the most effective tool for dealing with a more powerful negotiator.[102] A common BATNA is: "If you won't settle with me here, I'll take you to court, assert my rights, and get the full amount of what I deserve." The situation becomes noticeably different, though, where there is doubt that the justice system will function properly. If your BATNA is taking the one who unlawfully encroached upon your land to court, for example, but both of you know that the local court is unreliable and accepts bribes, the effect of this tool may unravel.

Nevertheless, there seems to be general consensus on the notion of a certain threshold of adequate negotiating power for each party if the process is to be fair. As Mayer (2000) asserts, "Unless all the players in a problem-solving process have sufficient power to represent themselves effectively, a collaborative process can easily result in an unjust conclusion (pg. 67)." In light of this, Mack (1995) provides a sample list of ingredients to create fairer ADR strategies, of which are "fixed legal entitlements for those in a systematically weaker position" and administrators "who have good awareness and understanding of the nature of bias against women (pg. 132-146)." Efforts like these speak to the need for a holistic approach to ADR, mentioned earlier, which addresses the societal inequalities in which conflicts arise—before, during, and after mediation.

3. Identification of Research Project

While much scholarship has been devoted to understanding both land tenure systems and conflict resolution techniques, significantly less has focused on the interdisciplinary field of alternative land conflict management. Even less seems to focus on ADR in customary tenure and *in situ* justice settings.[103] As Ramirez concludes,

> "There is a vast challenge at hand in terms of integrating theory and practice. There is scope for creating a new body of experience and reference material to support the development of mediating organizations able to apply conflict management approaches to land conflict situations… As is the case with other approaches for accommodating multiple interests, the innovation needs to take place in an action-learning process, where *learning* is the mechanism to develop new approaches."[104]

Several areas surfaced in the literature reviewed, therefore, which call for further learning and exploration.

A primary gap in the literature is an assessment of what is currently happening concerning ADR efforts for customary land disputes in Uganda. With such a plurality of independent practitioners and legal systems, there is need to identify the contributions of—and interplay between—LC courts, clans, religious leaders, and NGOs in dealing with these conflicts. Kakooza's (2007) article entitled "Land Dispute Settlement in Uganda: Exploring the Efficacy of the Mediation Option" provides a useful starting point for this investigation, but the scope of its

[101] Ibid., pg. 2
[102] Fisher, R. and Ury, W. (1991); Herrera, A. and da Passano, M.G. (2006), pg. 99; Ramirez, R. (2002)
[103] Lederach, J.P. (1995), pg. 100
[104] Ramirez, R. (2002), Part 4

comparative analysis is restricted to the formal justice sector. This leaves the customary Ugandan context, which constitutes the vast majority of the country, largely unexamined.

This study seeks to contribute to the filling of this gap in order to inform efforts to improve ADR service delivery. According to the principles of Lederach's (1995) Elicitive Model, inquiry must be rooted in on-the-ground realities and how people think about land and natural resources. The starting point of ADR-improvement training, therefore, "is not the [training] event itself but rather…the process of exploration and identification of people, who are wet up to their ears, standing midstream in the river of conflict from within each cultural group that makes up a multicultural setting."[105] Thus, having been given a mandate by a small collection of land-ADR-practicing NGOs in Northern Uganda, this baseline study will hopefully serve as a useful frame of reference for practitioners' self-assessment and group-identification of training needs.

Other particular questions related to mediation programmes in Northern Uganda are also apparent. Substantively, in light of the plurality of norms, laws, and principles, how is mediation defined among practitioners? What criteria are used to determine whether a mediation was "successful"? Moreover, what principles and objectives underlie the actor's ADR work? Answering these questions may help center and ground practitioners in a consistent application of justice by avoiding duplicated efforts, selectively applied standards, and arbitrary (if well-intentioned) decisions.

Procedurally, what are the steps of the practitioner's case intake and mediation process? What do participants expect in a fair process[106]? How do mediators elicit the creativity of parties during the mediation session? What provisions exist for monitoring, evaluation, and enforcement of agreements? What are the practitioners' biggest challenges? Clarity in these areas may serve to build public confidence in grassroots ADR efforts and local justice systems, as well as promote accountability, ownership of outcomes, and relevance in programme design.

Customary land conflicts are not only rampant across all of Uganda today—they can also be extremely difficult to handle. While some critics refer patronizingly to the "gentler arts of reconciliation"[107] practiced by mediators, these land ADR actors are in fact in the trenches of some of the most complex, intractable, and livelihood- (read: life-) threatening situations. Efforts to address these situations have often been frustrated because of the disconnection between local ADR efforts across the board. But by equipping budding cooperative efforts between NGOs in Lango and Acholi subregions with an objective assessment of current programmes, dialogue and future training among today's land ADR practitioners can facilitate the consistent, lawful, and creative delivery of justice for generations to come.

[105] Lederach, J.P. (1995), pg. 111

[106] See Shestowsky & Brett (49) for a discussion of the need for standardized "procedure debriefing" to ensure quality and fairness in dispute resolution processes.

[107] Fiss, O. (1984), pg. 1073

III. Research Questions

RQ1: Programme Assessment

What alternative dispute resolution (ADR) approaches are practitioners using today to resolve land conflicts in Northern Uganda?

Substantive Issues

a. How do practitioners define "mediation"?
   i. Which types of dispute resolution are being practiced?

b. How do practitioners define a "successful" mediation?
   i. Does this definition change in different situations?

c. What main principles underlie practitioners' efforts?
   i. Reason for offering ADR services, Mission/objective
   ii. Impartiality/Neutrality?
   iii. Confidentiality?
   iv. Equalizing power relations?

d. What are the perceived root causes of the land disputes which practitioners handle?

e. What are the most difficult challenges faced by practitioners?
   i. How are they currently responding to these?

Procedural Issues

f. What is the case-intake procedure?
   i. How to decide whether to mediate a case? If case not taken, where does it go?
   ii. How to approach a respondent who has been implicated by the complainant?
   iii. How to involve local community members?
   iv. How are cases recorded, organized, and/or analyzed?

g. What are practitioners' general mediation procedures?
   i. Recipe for a mediation session
   ii. Brainstorming and Weighing options
   iii. Agreements

h. Are agreements enforced? If so, how?

RQ2: Identifying what works

Which practices are associated with 'successful' outcomes (as defined by practitioners)?

a. How do participants define a fair process?

RQ3: Identifying what is not working

Which practices are associated with 'unsuccessful' outcomes?

IV. Study Objectives

The purpose of this study is to facilitate improvements in the quality and impact of land ADR efforts in Northern Uganda by:

a) Identifying existing practices of ADR actors at work in Lango and Acholi subregions, as well as those practices associated with a) successful and b) unsuccessful outcomes; and

b) Promoting creativity among mediators through the exchange of ideas and experiences.

V. Methodology

For more than 12 weeks between March and July 2011, the researchers conducted five in-depth study visits with different members of the Northern Uganda Land Partners Platform (NULPP) group, a consortium founded in 2010 of more than 10 national and international NGOs working on land policy issues. Five member organizations were chosen as Primary Informant NGOs for their role as active, experienced, and leading land ADR actors in the region and their wide geographic coverage representing 8 Districts within Lango and Acholi. Each of these Primary Informant NGOs hosted the researchers for at least 2 weeks at one Project Field Office in either Apac, Gulu, or Lira. Secondary Informant NGOs are those met during the course of the study whose unique involvement in different forms of land ADR struck the researchers as important to include.

In the first week of each study visit, the researchers observed mediations led by the NGO, reviewed NGO case files, and interviewed NGO ADR staff and prior participants in NGO-led mediations. During the second week, the researchers observed mediations led by various community actors and interviewed these actors and prior participants in their mediations. These community actors were selected on the basis of their good working relationship with the NGO, length of experience in handling land disputes in areas known as "hotspots" for land conflict, and the level of public legitimacy given to their ADR efforts.

Prior participants in both NGO- and community actor-led mediations were selected based on their willingness to share sensitive details about their disputes and represent both 'successful' and 'unsuccessful' cases. Each of these interviewees participated as either a Complainant or Respondent in a land dispute reported to and/or mediated by the affiliate NGO or community actor within the past 7 years (since 2005, the year in which significant numbers of Internally Displaced Persons (IDPs) began returning home from the camps). Their disputes had either been settled by mediation or had since been referred outside the NGO or community actor and was pending in or resolved by another justice mechanism (such as a court). These interviewees were each of sound mind, not likely to turn aggressive upon a request to participate, and able to understand that questions asked were merely about the process used, not a re-opening of the case. To protect the parties, mediation staff, community members, and the researcher and prevent the appearance that the case has been re-opened, an interviewee's counterpart in the dispute was NOT approached for participation in this study, and the interview took place in a neutral location (ie, at a trading centre or office).

In addition, the researchers manually entered and analyzed available caseload data using Microsoft Excel. To supplement the Recommendations portion of the study, researchers facilitated a large Focus Group Discussion of 35 NGO and community practitioners during the

NULPP meeting on 18-19 July, 2011 in Lira Town. This meeting also featured small group breakout sessions for focused discussion of key issues.

VI. Presentation and Analysis of Findings

The findings of this study[108] are presented and discussed below in three main sections, one for each of the Research Questions. The first segment provides an on-the-ground assessment of the types of disputes, dispute resolution actors and structures, and procedures currently found in Lango and Acholi subregions. The second portion explores parties' perceptions of fairness and reasons for trusting the mediator, as well as ADR practices and approaches that are associated with 'successful' outcomes (as defined by practitioners), while practices that are linked to 'unsuccessful' results in mediation are the focus of the third section.

While interview responses were catalogued and comparatively evaluated for trends and frequencies, numerical caseload data was analyzed using Microsoft Excel. Notes from field observations were descriptively analyzed for common themes and situations. Case studies, study instruments, and select data tables are located in Appendices at the end of this document.

RQ 1: What ADR approaches are practitioners using today to resolve land conflicts in Northern Uganda?

A primary gap in today's literature is the lack of an on-the-ground picture of ADR efforts to resolve the land disputes so prevalent in Northern Uganda. With the variety of legal systems and dispute resolution actors at work in Lango and Acholi subregions, there is need to take stock of the contributions of—and interplay between—these grassroots practitioners.

To this end, the first Research Question investigates both the nature of land disputes in Lango and Acholi and the dispute management approaches in place to address them. Substantively, this question examines different actors' conceptions of "mediation" and "success", the types of ADR practiced by each, and the principles and motivations that underlie their efforts. This section also outlines the existing case-intake, mediation, and record-keeping procedures of these practitioners and explores the enforcement of agreements and other challenges to local land dispute resolution. The findings for Research Question 1 are therefore organized according to three questions:

1) What is the nature of land disputes in Northern Uganda today?

2) What is the nature of the land dispute resolution mechanisms in place?

3) What kinds of procedures are used to resolve these land disputes?

1) What is the nature of land disputes in Northern Uganda today?

In order to properly evaluate ADR programmes and strategies, it is important to understand the nature and substance of the land disputes that are the objects of such efforts.

[108] For a summary of these, please consult the Executive Summary

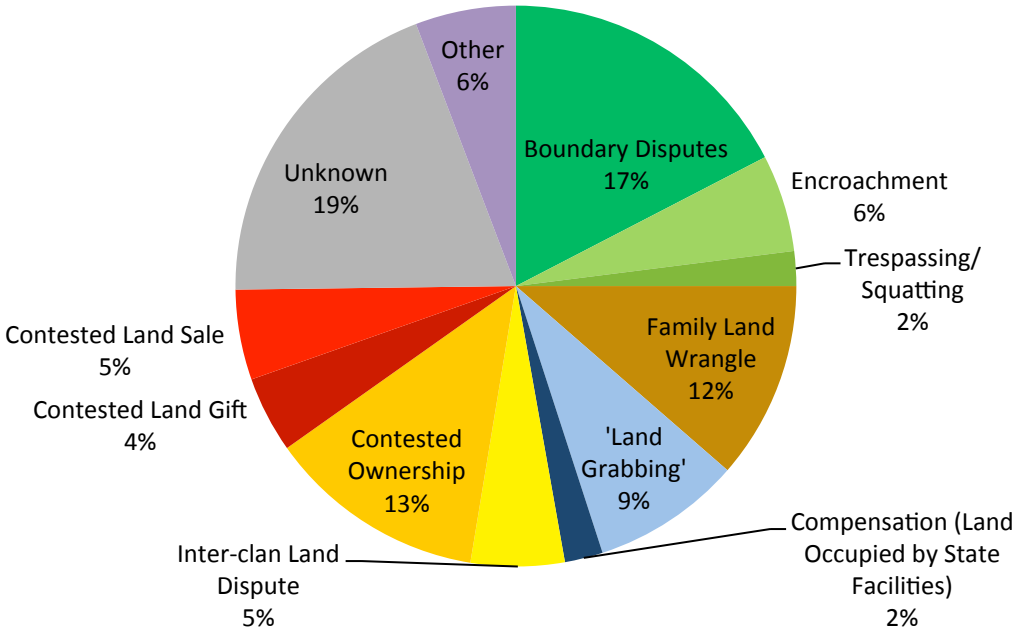
This section, therefore, provides an overview of the current types, frequency, status, and perceived root causes of land disputes in Lango and Acholi.

Of the five primary informant NGOs (V, W, X, Y, and Z), four have annual caseload records currently available. Of these, only three (X, Y, and Z) have specific data concerning the types and status of land disputes that come before them. From this modest dataset, a picture of the common types of land disputes reported to NGOs in Lango and Acholi begins to take shape.

While land disputes come in dozens of forms, **Figure 2** illustrates how caseload data can be grouped into five main type-clusters. The first and largest cluster, depicted in shades of green and comprising 25 percent of all registered cases, features territorial disputes arising from Boundary, Encroachment, and Trespassing concerns. The second grouping (in shades of

Figure 2: Types of Land Disputes Reported

Source: X, Y, Z Caseload Data (2008-2010)



yellow), which represents historical disputes manifested as Contested Ownership and Inter-clan Conflicts, forms 18 percent of all registered cases, while Family Land Wrangles, the third category (brown), make up 12 percent. The Land Grabbing and Compensation (blue) group comprises 11 percent, yet as is discussed later, the term "Land Grabbing" is particularly problematic when it is put in its own separate category.[109] The transaction-related group of Contested Land Sales and Gifts (red) makes up 9 percent of the total disputes reported. The large percentage of cases described as "Type Unknown" is due to incomplete records.

A. What's in a Name?

An analysis of the caseload records of X, Y, and Z reveals that each organization employs its own classification system for case types. For instance, what Y may term "Land Grabbing," X may call "Compulsory Acquisition" or "Land Occupied by State Facilities." Similarly, what Z refers to as a "Family Land Wrangle" may be categorized as "Administration of Estate" or "Illegal

[109] Seminar participants suggest that a key reason for the low reporting rate of Land Grabbing cases may be that many women (who traditionally, upon marriage, leave their clans to go and live with their husbands) fear to report abuse outside of their husbands' clan. Reporting abuse on the part of her in-laws may threaten a woman's social security embodied in relations with her husband's clan.

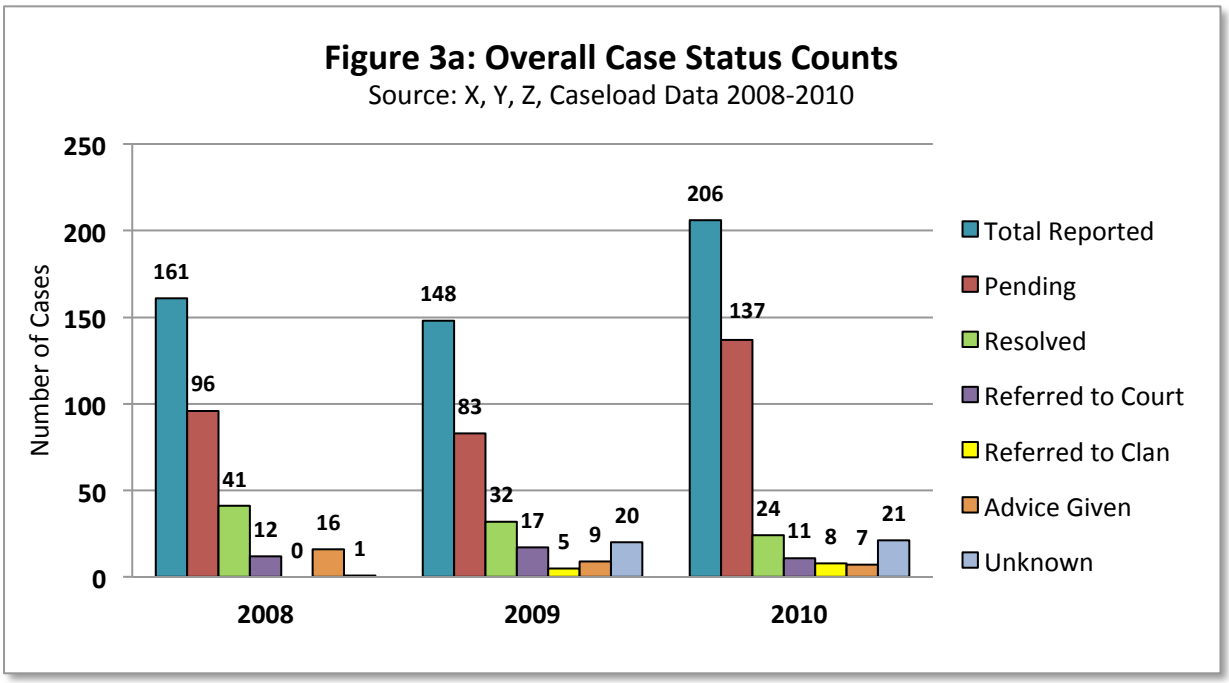
Land Sale" (if, for example, a man sells land without the consent of his wife and/or clan) in another NGO.

Moreover, a given land dispute may not fit in one category. Instead, it may match two or three descriptors. This overlap is particularly common with the name "Land Grabbing," since land grabbing elements may be present in virtually any type of dispute.[110]

The discrepancies embedded within these various classification systems make it difficult to precisely determine overall reporting trends. They do, however, suggest that there is potential for each NGO to contribute different typologies from experience that may have been overlooked by fellow practitioners.

B. Caseload Sizes and Status Breakdown

Figures 3a and 3b illustrate the annual case status composition for X, Y, and Z from 2008 through 2010. This information is useful because it shows how many land disputes have been reported to each office[111] and what is happening to them once they have been reported. Although this sample is small (only three datasets), some points of interest appear.



Records from these three NGOs show that while the total number of reported cases is on the rise across the reporting period (from 160 to 206), the total number of "resolved" cases is decreasing (from 41 to 24). At the same time, the size of the backlog of "pending" cases is growing (from 96 to 137).

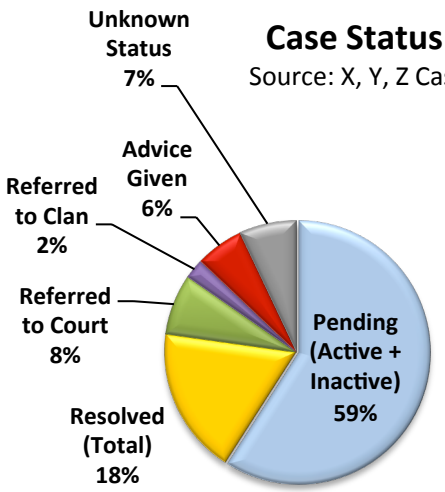
A percentage assessment reveals similar results. "Pending" cases make up the largest share (59 percent) of those land disputes reported, while "resolved" cases comprise 18 percent

[110] For more on the term, "Land Grabbing", see pgs. 34 and 56 of this document

[111] X has been mediating land disputes in Lango Subregion for since 2005 and received 102 newly reported land disputes in 2010. Y has been mediating land disputes in addition to other civil and criminal cases in Acholi Subregion since 2002 and received 690 fresh cases in 2010, 77 of which were land-related. Z began its mediation programme in Lango Subregion in 2009 and received 27 new land cases in 2010.

of the three-year, three-NGO sample. This means that the majority of land disputes reported to NGOs are in fact not being resolved.[112] During this period, four times as many cases were referred to court (8 percent) than to clans (just 2 percent). Six percent of cases resulted in giving legal advice, either because the complainant simply needed guidance on legal procedures, had a false claim, or otherwise did not meet an NGO's case intake criteria.

Figure 3b: Case Status Composite
Source: X, Y, Z Caseload 2008-10



A look at the three-year trends of each organization (see **Figures 4a and 4b** below) reveals a rather unsettling situation. In each of these three NGOs, the share of "resolved" cases is decreasing over time, while the share of "pending" cases in X and Y is increasing over time.[113] In other words, the likelihood that aggrieved parties will reach a resolution within one year from when the case is reported to one of these NGOs is shrinking.

A major reason for this trend could simply be that mediating NGOs have a limited carrying capacity; that is, a mediation staff can only do so much. Referring again to Figure 3a, there seems to be a direct mirror relationship between the amount of cases reported and the amount left pending by the end of the year. Fascinatingly, only between 45 and 68 cases were handled and disposed of each year by these three NGOs, despite differences in total intake size.[114] This finding suggests that the rate at which these three NGO mediation staffs tend to digest land disputes is around 45-70 cases per year. Thus, cases above and beyond this cap are likely to remain pending. If the "digestion rate" of these NGOs remains constant while the number of reported land cases steadily rises, it is no surprise that the share of pending cases will increase while the share of resolved cases continues to decrease.

Fig. 4a: % Caseload "Pending"

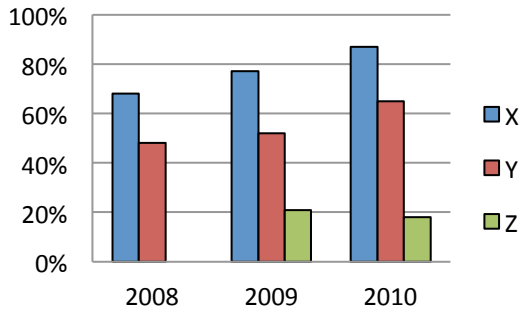
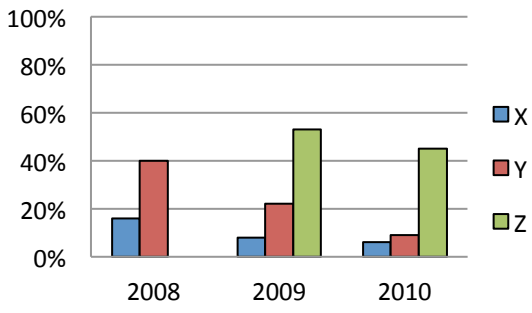


Fig. 4b: % Caseload "Resolved"



Source: X, Y, Z Caseload Data 2008-2010

[112] As is also observed in the 2010 study by IOM, UNDP, and NRC (see pgs. 29-30)

[113] The decline in Z's share of "pending" cases is probably related to its small caseload size (19 and 27 cases reported in 2009 and 2010 respectively).

[114] This value represents the total number of cases resolved, referred to clan, referred to court, or in which advice was given for each year among these three NGOs.

Another reason for this trend may lie in the difficulty of the kinds of land disputes being reported over time. Perhaps, one might say, the land cases of the past were much easier to solve than those of today! Data shows that variation in the amount of each case-type reported across the years does exist. For instance, 68 Boundary/Encroachment disputes were reported in 2008, while only 17 such cases were registered in 2010. This is compared with only one Contested Ownership dispute reported in 2008 and the 49 such cases reported in 2010.

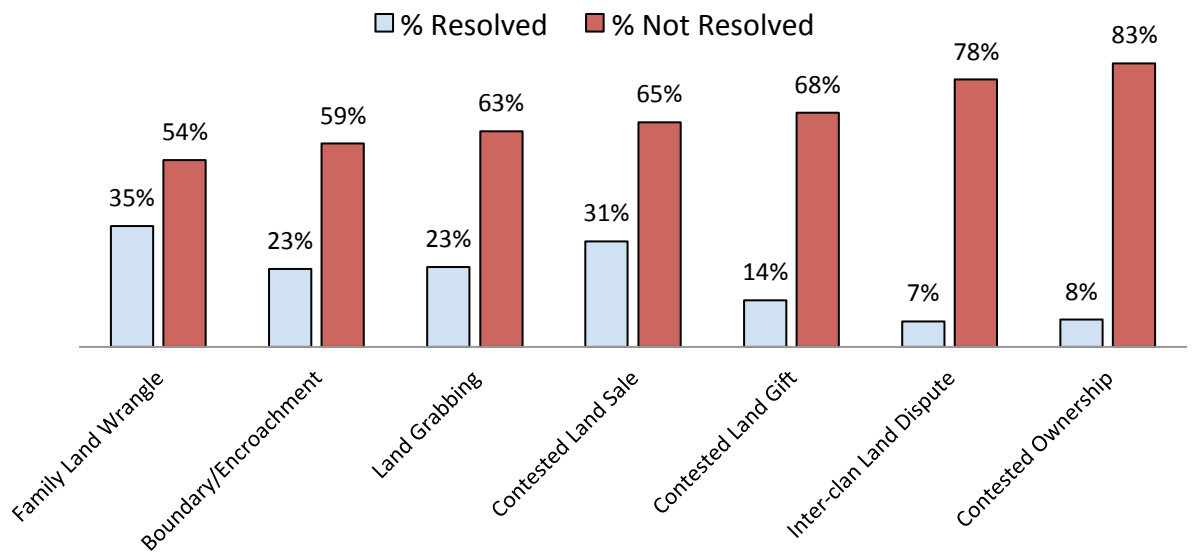
Many variables—including the willingness of parties to find a solution, the type of ADR employed, and the skill of the mediator—affect whether and how a land dispute will be resolved.[115] That being said, it is important to gauge what types of conflicts are more frequently "resolved" and which are the ones which give ADR practitioners the most trouble. **Figure 5** (below) illustrates the resolution rate for each of the most common types of land disputes among all three NGOs for 2008-2010.[116] Due to gaps in case recording and the prevalence of "unknown" statuses, the percentages depicted do not always total to 100. Nevertheless, this data provides a useful beginning for those seeking to understand what specific barriers exist to land dispute resolution in Northern Uganda.

i. Disputes Most Likely to Go Unresolved

It is immediately apparent that Contested Ownership disputes are among the most likely to go unresolved. But why is this? Perhaps since both parties feel they are in the right, these cases are characterized by a stronger or more polar disagreement than other types of disputes. Such parties would be more likely to dig their heels into their positions, probably because any decision reached may necessarily be winner-takes-all. In other words, people quarrelling over "whose land this is" may sense the need to disagree until the outcome turns in their favour, or else lose any claim to the land in question.

Fig. 5: Types of Disputes More Likely to Go Unresolved[22]

Source: X, Y, Z Caseload Data 2008-2010



[115] For more on this, see section II(C) of this document, "Defining 'success'"

[116] See also Appendix 6a, "Resolution Rates by Dispute Type"

Inter-clan Land Disputes are also chief among the 'rarely resolved' category (only 7 percent of such cases were resolved by these NGOs in a span of three years). To many practitioners, this is not surprising due the larger-scale, socially complex, and often historically violent nature of such conflicts. In these instances, an ordinary land dispute may serve as a trigger for the release of age-old inter-group tensions and can easily turn into an "us versus them" power struggle which no clan feels it can afford to lose. The intensity and size of these disputes, however, does not mean they are impossible to address. In fact, the staff of X is reported as having resolved two such cases during this three-year period.

Contested Land Gifts also rank among the least-resolved kinds of disputes, with only 14 percent of such cases resolved. This may be due to the fact that land in the customary context is almost always given without documentation as to terms and conditions and often by parents or relatives who have, by the time a dispute arises, since died. The customary land laws of both Lango and Acholi do not allow for retraction of land gifts, but this becomes tricky when either the giver or recipient dies under a verbal agreement for "temporary" use. In these situations, there is often no one to verify the statements of neighbors and witnesses. With the widespread devastation of the LRA insurgency and decades of displacement, the death of many givers and recipients of land gifts sparks many disputes among their surviving dependents.

ii. Disputes Most Likely to Be Resolved

The following types of cases are above the average resolution rate of 18 percent (referring to Figure 2b). Land sales, unlike gift exchanges, are more likely to involve witnesses to the transaction and/or documentation in the form of receipts, maps, or monetary transfers. In light of this evidence and the explicit procedures for land sales in the customary land laws of both Lango and Acholi, the validity of a sale can be more easily determined with the help of clan leadership.

At first, the presence of Land Grabbing cases among those types with a higher resolution rate seems counterintuitive. If ADR relies on the good faith of the parties, and land grabbers almost certainly do *not* operate in good faith, then one may conclude that such cases are hardly ever solved this way! Yet as is previously discussed, this may be a function of ADR (*appropriate* dispute resolution) working differently in the Ugandan context than in that of places like the United States. This category is problematic, however, because of the insidious nature of land grabbing itself. *Land grabbing* better describes a party's motivation or intent, rather than a type of dispute. This likely explains why "land grabbing" cases are often co-labeled with other types in caseload databases (i.e., Land Grabbing/Denial of Rightful Access or Land Grabbing/Retracted Land Gift). Frequent use of this case-type descriptor in NGO records, however, makes this category relevant for the purpose of analysis.

One reason for the relatively high 'success' rate of Land Grabbing cases may be practitioners' use of customary laws that explicitly condemn the wrongful abuse of another's land rights. As one seminar focus group asserts, "The most effective ways to check a land grabber are through shaming and the application of more power (i.e., through court)." Once a community is made to know customary laws vis-à-vis the actions of such a person, the resulting social disapproval may sometimes be enough to cause a land grabber to back down.

Another less favorable explanation for the high 'success' with LG cases may be the tendency of NGOs and community practitioners to settle, rather than truly *resolve*, these disputes. A mediator's job becomes particularly rough when parties display 'stubbornness' and

non-cooperative attitudes. When a practitioner becomes frustrated and bullies a party into accepting an agreement according to "what should be done", however, the outcome may be a settlement, but not a wholehearted, lasting solution to the dispute. The blatant unwillingness of a 'land grabber' to negotiate in good faith may evoke just such a response—and result—from well-intentioned mediators. Thus, it is possible that the high rate of "resolved" Land Grabbing cases may simply reflect a large and unfortunate collection of shallow settlements.

The relatively higher resolution rate of Boundary/Encroachment disputes may stem from the more "cut and dry" nature of these cases. Neighbours, elders, and Rwodi Kweri/Adwong Wang Tic may help guide the process (that is, if they are honest!), and since these disputes are position-based (I say it stops here, he says it stops there), a default compromise (let's just halve the difference) is counted as a "success." Such a compromise may be more acceptable to parties if accompanied by the planting of trees to demarcate the boundary and/or the sketching of a revised map of the area.

The data shows that Family Land Wrangles are the disputes most likely to end in resolution. While this may be because of the parties' mutual desire to preserve peaceful family relations, this data label also leaves important questions unanswered. What exactly is it that makes a case a Family Land Wrangle? In practice, this classification may be an umbrella for a host of dispute sub-types: In-law Quarrels; Administration of a Family head's estate; Elder-brother Syndrome; Co-wife Strife; Denial of Rightful Access to Orphans/ Widows/ 'Illegitimate' children/ Unmarried women/ Divorcees, etc. Yet it would be interesting to learn whether In-Law Quarrels are more or less often resolved than Elder-brother disputes! There is need, therefore, to make this category more precise so a more detailed story can be told.

C. Root Causes of Land Disputes

Reviewing the common types and prevalence of land disputes provides only a surface-level understanding of the problem of rampant land injustice in Northern Uganda. For this reason, it is useful to probe into the underlying beliefs, motivations, and conditions that give rise to these multi-causal disputes. From interview data, a list of Top Ten root causes of land disputes was compiled. Ranked in order from most- to least-commonly cited, this list appears in **Table 2**.

Table 2: Top Ten Cited Root Causes of Land Disputes in Acholi and Lango

1. Opportune Vulnerability (tied with No. 2)
2. Greed/ Commodisation of Land (tied with No. 1)
3. Abuse of Custom
4. Vacancy/ Long Absence (Displacement)
5. Population Pressure
6. Relational Grudges
7. Unknown Boundaries (Displacement)
8. Bias Against Outsiders/ Foreigners
9. "Clan Tenure System"
10. Unclear Terms of a Land Gift/Sale

Source: Interview Data (Composite)

A tie exists between the two most-commonly cited root causes (each cited by 36 percent of all respondents) of land disputes in Lango and Acholi: a) Opportunity created by Vulnerability and b) Greed. The former concerns the relative strength and weakness of each party in terms of size, wealth, influence, and social security, while the latter deals with the commoditisation of land and the desire to "cash in" by obtaining land to sell.

Interestingly, **Opportune Vulnerability** was cited more often by parties themselves (45 percent of parties) than by any other group (compare with the 20 percent of NGO mediators and 28 percent of community actors). While some may argue this to be simply a function of the

hypersensitivity to exploitation that many war-persons in the area have and a readiness to turn their EVI[117] status into cause for support, case studies and observations suggest a different story. Consider the following comments:

> "The Respondent is a university lecturer, has many relatives in London, and his clan is large in number (100+ people). They are just looking for weaker families' land to grab. This clan has tried to claim the land of the Catholic mission, a school, and another neighbor by forging a map. When the map was dismissed by court and the neighbor put up a good fight, the Respondent left them and instead came after us. Since many people in our clan died in the camp or were killed, we are now few in number (37, including children) and cannot fight back so well."

> "The Respondent thought that since I was young, he could easily take my land."

> "Their clan leader was giving them bad advice: 'Because we (the Respondents) are many, we will outnumber them (the Complainants) if it comes to a vote.'"

> "When my husband died, they wanted to take advantage of an old widow like me."

> "The Respondent is rich and was using his money to throw me off. He thought I would relent and beg him for a small piece of land, but instead I fought for it."

The common thread in all of such comments from mediation participants is a situation where A strategically uses a perceived weakness of B to seize B's land. In this way, vulnerability—in the form of childlessness, small numbers, disability, young age, poverty, no male protectors—becomes an opportunity for land grabbing. Although these examples represent only Complainants' views, it should be noted that none of the Respondents who were interviewed mentioned anything related to this, probably either because it did not apply to their dispute or because revealing such motives would be self-incriminating or cause embarrassment.

The other root cause tied for first place is unsurprising to many practitioners: **Greed** for land so it can be turned into money. This comes into play at both household and government levels, and many places in between. At the family level, greed may motivate an inheritor to convince a widow to expand her land so that it can later be sold, a son to sell family land for drinking money, or a rich family to conclude that the cost of pushing a neighbor off of their land is outweighed by the money to be gained from its sale. At the government level, eagerness for investment payoffs may prompt a Town Council to evict a poor resident from the town centre without compensating him. The creation of new Districts also incites hot arguments over land near the District headquarters that is assured to gain in market value.

The third most-cited underlying cause was found to be the **abuse or distortion of customs** to the benefit of one party over another. Reasoning such as "You're just a mere woman, and our custom says you can't own land", "I have special entitlement as the elder brother", and "Land belongs to the elders, not the youth" are examples of this. A particularly disturbing distortion of custom concerns children born outside of marriage. According to Lango customary law, the mother's clan is responsible for either negotiating a land-package with the child's biological father or ensuring that the child inherits land from the mother's family. If the woman is married and produces with a man other than her husband, the child has rights to the clan land of the husband, and the husband's clan is responsible for upholding these rights.[118] When the

[117] Extremely Vulnerable Individual (EVI)

[118] Lango PPRR (see Part 2: Land Rights of Children (a,b,e,g))

clan abandons this duty to protect, however, conflict naturally results. As Grace, a 26 year-old, HIV positive mother of four children in Barr sub-county explains,

> "My husband was an illegitimate son "born at home" (to his married mother out of wedlock), so I know his mother just doesn't want me in their family. Now that both my husband and father-in-law have died, I have no one to stand behind me… no protector. It's she, my mother-in-law, who is trying to chase me from my marital home. I tried to go to my husband's biological clan, but they say they don't know me. And my own parents refuse to let me come back home because if I do, the land meant for my children will be taken by the in-laws…
>
> "…I reported the case to the youth leader of my (late husband's) clan, who advised me to shift to a different corner of the land. I did so, but my in-laws just came and chased me from that spot, too. I reported my case to the LC1, but on the scheduled date of the hearing, he didn't show up. I realized he wasn't interested in helping me. So I reported to the police, who then referred me to the clan. *The clan (including my in-laws) heard the case without me and together decided that they no longer need me or my children anymore*."

The abuse of customs was most frequently cited by NGO staff and community mediators as a major root cause (60 and 43 percent respectively, compared with only 18 percent of parties). A complicating factor here, though, is the fact that the customary land laws for Acholi and Lango that were documented in 2008 and 2009 are considered by many to be 'updated' and/or 'revised' to better adhere to the 1995 Constitution. Since local awareness of the PPRR[119] varies greatly among communities, it may be argued that not everyone knows about the alleged changes in customary law and thus people are still applying 'old' customs such as those that assert how "women do not own land". In reality, however, the excuse of applying "old" customs is often a disguise for the deliberate abuse of customary ethics to deprive the vulnerable of their rights to land. In other words, it may be more likely that an in-law or elder brother who argues "according to custom" that women such as widows or unmarried girls do not own land relies not on actual custom—which originally provides for the welfare of all types of persons—but rather on a corrupted practice to justify their claim.

The remaining root causes are largely self-explanatory. Number 9, the "Clan Tenure System", bears some further note, however. This stems from intriguing testimony of two mediation parties in Amuru District who describe a situation where clan X claims ownership of Y's neighboring land merely because the area in which the parties live is *named after* clan X. As four brothers and a sister explained in one interview, "Adwogo clan has been trying to use its power to influence the government to say that all the land of Adwogo Parish is meant only for the members of the Adwogo clan. Since we are from Pe Balo clan, our land is a target." In fact, a different interviewee confidently referred to the five land tenure systems that operate in Uganda: Customary, Mailo, Leasehold, Freehold, and Clan Tenure.

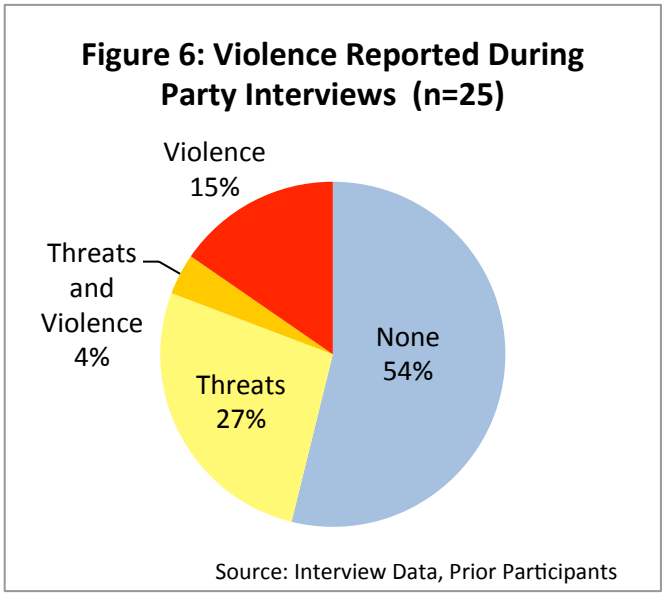
Upon investigation into this so-called "Clan Tenure system", it was said that this land grabbing strategy made its debut only after people began returning from displacement camps. A quote from another group of complainants is revealing here:

[119] Principles, Practices, Rights, and Responsibilities of Land under Customary Tenure (PPRR), which have been written for Lango, Acholi, Teso, and (recently) Kumam

> "Our father was an Itesote by birth but bought land and settled in Lango subregion. When he died, our neighbor saw that we were orphans—yet we are now five middle-aged men with families!—and began blocking us from our father's land, claiming that since we are not Langi, we do not deserve to live here and should move back to Teso."

Reasons for this behaviour may be linked to population pressure—a numerous clan (or 'tribe') seeking more territory to accommodate its members—or relative vulnerability—a stronger, more powerful clan preying on the weakness of a neighboring clan in light of the rampant impunity that lingers in Northern Uganda. Whatever its rationale, however, this phenomenon requires more study and close attention, especially in places like Amuru District that are infamous as hotspots for (often violent) inter-clan land disputes.

Intimidation and denial-of-access tactics used in these land disputes make them all the more complex. It is not uncommon to hear of arson, assault, property damage, and even murder cases having their basis in a land dispute. **Figure 6** below provides a look at the prevalence of violence among the 25 mediation parties (each representing different disputes) interviewed. Thankfully, more than half of this small sample reported no violent activity in their cases. However, 46 percent of respondents indicated that their land dispute was characterized by some type of threat or actual violence. The most common type of violence described was assault and/or fighting, but arson and property damage were also present in some cases. This small dataset provides just a hint of the actual gravity of the challenges faced by ordinary citizens and mediators alike in confronting a land dispute.



Another frustrating element in several land disputes is intimidation through witchcraft. Since evidence of such activity is extremely hard to obtain, accusations of this sort are difficult to either justify or ignore. Although not one of the 25 mediation parties interviewed mentioned the presence witchcraft in their dispute (it was not among the interview questions), the issue was raised in three out of 10 observed mediations. In two of these, serious accusations were brought which seemed plausible considering the body language of the two parties and the reactions and testimony of witnesses. Moreover, nearly every community mediator (88 percent) and most NGO staff members (80 percent) indicated that they have had experience in dealing with witchcraft in a land dispute. In fact, one LC 2 Chairperson explained during an interview that his left leg had recently been bewitched—it had become paralyzed—by stepping on a charm while inspecting a disputed piece of land.

2) What is the nature of the land dispute resolution mechanisms in place?

Having now discussed the nature and types of land disputes endemic in Lango and Acholi, this next section explores the current systems in place to resolve land disputes on the ground. First, the menu of different practitioners and their relationships with each other is

briefly described. A look at actors' varied levels understandings of "mediation" and "success" is next, followed by a summary of their different levels of training and facilitation. The section concludes with an analysis of NGO staff and community practitioners' reasons for being involved in land dispute resolution efforts.

A. The Menu of Land Dispute Resolution Actors

A variety of offices, leaders, courts, and community workers—both legitimate and illegitimate—are at work today to manage customary land disputes in Northern Uganda. In this study, it was found that no less than 17 types of practitioners have assumed this challenging responsibility. **Figure 7** depicts, in no particular order, the many land ADR actors encountered during field research.

Figure 7: "Trust *us* with your land dispute!"

Source: Interview Data, Observations

Whereas several of these practitioners are mandated to have jurisdiction over land matters under customary tenure[120], a few are not. For instance, Local Council (LC) 1 Courts are not authorized by law to hear land disputes; rather, the LC 2 Court is the legal court of first instance. And while Resident District Commissioners (RDCs) have a Presidential mandate to handle whatever needs may exist in an area, it is not clear whether the RDC is allowed to sit as an arbiter over land matters, as some reports indicate is happening.

Upon further analysis, it was discovered that the role of civil society NGOs—which operate between "formal" government institutions and the "informal" clan and cultural system—blends strategically with the nature of ADR as a bridge between litigation and traditional dispute resolution. The NGOs observed in this study tend to involve clan leaders and *Rwodi Kweri/Adwong Wang Tic* as fellow mediators and advisors on matters of custom, while at

[120] *Rwodi Kweri* (literally, "Chief of the Hoe") is the Acholi title given to male local leaders in charge of communal digging rotations. The female counterpart, the *Rwot Koro* ("Chief of the *Koro*"—the snail shell traditionally used for weeding) is in charge of communal weeding rotations. Because of the nature of their work, these leaders (and their 8- to 10- member cabinets) are renowned for their familiarity with the land boundaries of their communities and are thus the *de facto* mediators-of-first-instance to whom many parties run when they have a land conflict.

the same time reaching out to courts, lawmakers, and donors to address issues of land policy reform. In other words, NGOs doing ADR are in a rare position to deliver justice where it is needed most in Northern Uganda. Illustrated below, this link reinforces the importance of NGO land dispute resolution efforts and the need to find ways to strengthen them.

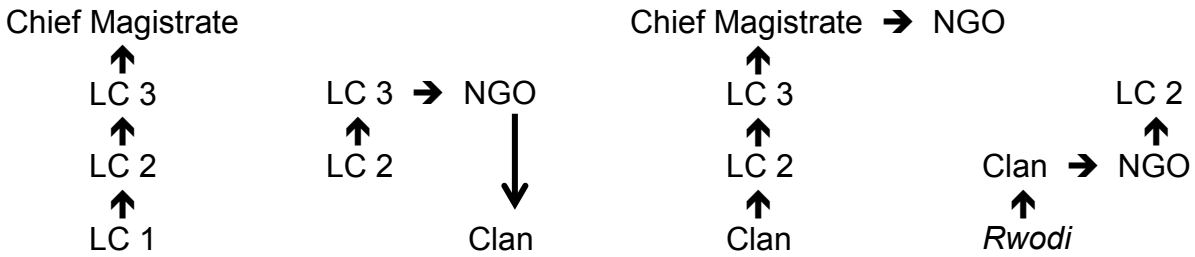
Figure 8
NGOs Practicing ADR: Linking Two Systems

A peculiar finding is the 'spiritual ADR' which is said to be practiced by both traditional healers and witches. A traditional healer or medium tends to act as a type of neutral *mediator* between a person and the spirits to diagnose the problem and prescribe a solution. A witch, on the other hand, takes this one step further by becoming a type of *advocate* on behalf of the 'client' to exact spiritual or physical damage upon the client's adversary (regardless of whether the client has a valid claim). In this way, the systems of ADR and litigation seem to be present even in the spiritual management of land disputes.

B. Inter-actor Interactions

With so many actors working to handle the same types of disputes within the same jurisdiction, it is easy to see how—through referrals, appeals, and the initiative of complainants—one case may be heard by several offices before it is finally settled. From interviews with 25 prior mediation participants, several reporting patterns surface:

Fig. 9: Four Observed Reporting Patterns (n=25)
Source: Interviews with Prior Participants



A *de facto* chain of reporting (or referrals) seems to exist from clans, to LC 2 Courts, to Sub-county Courts, to Chief Magistrates. This sequence is not always followed, though, and NGOs may come in at any point in this process.

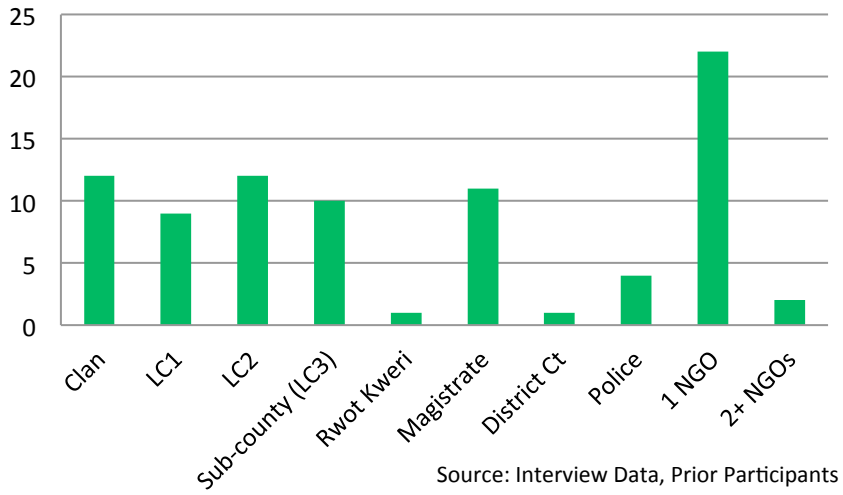
While 36 percent of interviewees say they began their case in the informal process—either with the clan or *Rwot Kweri*—64 percent indicate they started in the formal system—a court or NGO. This finding is peculiar given the evidence of other studies[121] that shows a clear local preference for traditional justice mechanisms. Since this data is extracted only from parties' stories and not responses to a specific question concerning reporting sequence,

[121] Uganda Land Alliance (2010); IOM, UNDP, NRC (2010)

interviewees may have simply neglected to mention the fact that they initiated their complaint in the informal setting before moving to the formal one.

A frequency distribution of places where interviewed participants reported their case (see **Figure 10**) suggests that, apart from NGOs, parties with a land dispute look most often to clan leadership, LC 2 Courts, and Chief and/or G1 Magistrate Courts to resolve their matter.

Figure 10: Where Interviewees Reported Their Land Disputes (n=25)



Source: Interview Data, Prior Participants

Once a case reaches an NGO (as nearly all in this group did, due to purposive sampling by NGO mediators), three possible outcomes are observed: a) the dispute is eventually resolved; b) the case is referred to the clan; or c) the case is referred to court. While caseload data shows files are four times more often referred to court (8 percent) than to the clan (2 percent), it also shows a handful of situations where the Chief Magistrate Court refers land-related cases to be mediated by an NGO. In this scenario, any agreement reached during the NGO-facilitated mediation will be forwarded back to Court and entered as a Consent Judgment between the two parties. Such a document will thus have the legal backing of the Magistrate's Court and be enforceable in case of any breach of the agreement.

i. Forum Shopping: A Cross-cutting Reality

Like a long row of vegetable stalls at the market, each with a unique vendor and slightly different prices, the wide variety of land ADR actors in Northern Uganda enables parties to choose the way their land dispute is handled. This forum shopping was found to be a chief characteristic of the land dispute resolution framework on the ground through interviews with complainants and respondents. The average interviewee reported their case to 3.44 offices in search of justice, while the median for this dataset (n=25) is 3.

Table 3: Forum Shopping in Numbers (n=25)

Average Number of Places Reported: **3.44**		
Median: **3**	Minimum: **1**	Maximum: **8**

Several reasons for parties' decision to 'shop around' are apparent:

1. ***"I already have a court judgment in my favour, so why would I mediate?"*** This is illustrated in the case of Rose, a woman in Minakulu who reported her case to W.

   > Rose had won the case at the LC 2 Court, but Frances, the other party, was still actively dissatisfied. W was planning to represent Rose in court should the case be appealed or need execution of the judgment.
   >
   > In the meantime, however, Frances had reported the case to X, and X had initiated the mediation process! When X sent Rose a letter inviting her for mediation over the same case, she refused to respond because she was already comfortable with her position: An LC 2 Court judgment in her favour and strong backing provided by W's lawyers.
   >
   > Unsurprisingly, the mediation scheduled by X failed because of Rose's lack of incentive to mediate and the shared lack of awareness that both Rose and Frances were Complainants in different offices.

2. ***Economics.*** "I could not afford the fees charged by the clan (40,000 UGshs) or the LC 2 (10,000 UGshs), so I chose to take it to an NGO," says one complainant. Of the seven NGOs who participated in this study, only one (T) charges fees for their ADR services. The rest work free of charge, to the joy of complainants but to the displeasure of clan mediators who feel their traditional services are being sidelined by donor-funded NGOs. One clan chief in Atana Parish, Apac Sub-county explains, "The duty of clan leaders to handle these disputes is often ignored or disrespected, partly because clans charge high fees. That is why the Complainant in this case chose to report to Y, who works free of charge, instead of continuing with us."

3. ***Sinister motives.*** Forum shopping can easily become a predatory strategy for land grabbing by exhausting a poorer, vulnerable party's funds through continuous appeals and court costs. One fresh complainant at a Mobile Legal Aid clinic conducted by W describes this situation:

   > "I have an LC 2 Court judgment in my favour allowing me to use the land, but the Respondent has appealed to the Chief Magistrate Court and the hearing isn't for another three months. Meanwhile, the Respondent is using the land and denies me access to it. What can I do?"

   If this case is adjourned again and again, this man may be not only out of pocket for incessant trips back and forth to town, but also indefinitely blocked from using his land.

4. ***The frustration caused by court-related delays and excessive costs*** drives some parties to choose another route to resolve their case. Such parties may choose to take a Leave of Court or withdraw their case to have it mediated with the help of an NGO, clan leader, or other community practitioner. This can only work, however, when *both* parties agree to mediate outside of court.

It is clear that mediations—whether under mango trees or in offices—are usually meeting points for more than one type of ADR actor. If a mediation is conducted by a Parish Priest, for instance, the Rwot Kweri, LC 1 Chairperson, and NGO paralegals may also be in attendance. Likewise, if an NGO facilitates a mediation, the heads of the parties' clans, a religious leader, an advocate, and/or the police may be present. In other situations, however, a mediation may be very exclusive in the people who are invited. Paralegals from V consider the presence of the LC 2 Chairperson (or any other LC, for that matter) to be a warning sign for failure of the mediation, since this person has an incentive to frustrate the mediation so that it fails and the parties report the case—and pay required court fees—to him.

Through interviews and observations, parties reveal that they may forum shop even among NGOs for the one they think will best serve their interests. Some criteria cited by which these parties appraise an NGO are:

a) **Handling speed** (Will they handle my case in weeks or months?);

b) **Perceived bias** (Do they favour women and children, or are they gender-neutral?); and

c) **Interpretation of laws** (Will they apply the 12 Year Rule[122] to my customary land?)

This finding is important because it suggests that NGOs and legal aid providers unaware of these differences can become just another avenue for parties to exploit instead of offices that tangibly improve access to justice.

C. Defining "Mediation"

A practitioner's definition of the word "mediation" is important because it shapes the way they view their work and responsibilities. Considerable variation is found, however, in the way staff members understand what is meant by "mediation," both within and among different NGOs. The sample of 12 interview respondents from the five primary informant NGOs reveals two main discrepancies.

First, staff have contrasting views of the mediator's role. Both staff members from Y argue that the mediator is the chief decision-maker in the process, while five others hold that the parties themselves create their own solution with the mediator's legal guidance. One interviewee explains, "Mediation is a process where you bring two parties together, listen to their sides of the story, and advise them on their land rights. If you (the mediator) think of possible options, you can request the other party to give concessions." Still, another from X remarks that "The mediator is not the decision-maker because of his technical expertise, but gets the two parties to communicate to each other in order to reach a decision themselves that they can live with."

There also seems to be debate surrounding the intent of mediation itself. Is it to promote justice, peace, or both? Respondents from W and Y indicate a reliance on hard facts and legal rights to settle a case. Others from V, X, and Z mention the importance of resolving parties' differences amicably, with the intention to "address and eliminate bitterness" between them.

It is interesting to note that only 4 of the 12 respondents (from 3 out of 5 NGOs) mentioned the concept of neutrality in their personal definitions of "mediation." This may mean that impartiality plays a lesser role in some practitioners' efforts, or simply that the interviewees forgot to include it in their response!

While the *Land Act* does not outrightly define the term, it does state that,

> "*…the mediator (of a customary land dispute) shall be guided by the principles of natural justice, general principles of mediation, and the desirability of assisting the parties to reconcile their differences, understand each other's point of view and be prepared to compromise to*

[122] The *Land Act's* 12 Year Rule is widely misinterpreted. A *bona fide* occupant is defined under S. 29(2) as a person "who before the coming into force of the Constitution—had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more." This law therefore applies only to registered, not customary, lands, and to persons who settled on land before 1983 (three years before original displacements). In practice, however, civil servants and lawyers alike mistakenly apply it to disputes over customary land.

> *reach an agreement; but the mediator shall not compel or direct any party to a mediation to arrive at a particular conclusion or decision on any matter the subject of the mediation."*[123]

At first glance, this language seems straightforward. Yet what is meant by the latter part of this excerpt? Should it be interpreted to mean that a mediator should not use customary land rights—as they apply to the validity of a party's claim—to guide or drive the process? Suppose one clan elder wants to illegally sell land that is intended for orphans and use the money to buy himself a satellite TV. If the elder and the orphans (and their protector) sit down to mediate, is the mediator allowed to encourage the elder to arrive at the conclusion that his actions are wrong? This provision of the *Land Act* suggests that the answer is no.

The *Act* is clearer in its tenet that "*…the mediator shall be independent and shall not be subject to the direction or control of any other person*," which suggests that impartiality is included in the legislative definition of mediation.

D. Defining "Success"

Perhaps not surprisingly, practitioners' definitions of what success looks like in mediation are also very mixed. There is consensus, however, around the themes of: a) the presence of some kind of agreement, b) actual implementation of such agreements, and c) improved relations between the parties.

The most prevalent ingredient found in the definitions of "success" (found in 43% of responses) is the presence of an agreement between the parties. "If an agreement is signed by both parties," "If the parties have…accepted to sign an agreement and planted boundary trees," and "When both parties agree with the mediator's opinion and that of the opinion leaders and elders" are all responses illustrative of this.

A second common thread cited by 38% of NGO and community respondents centers on the actual implementation of what is agreed. As one V staff member puts it, "Success is not a matter of talk, but of change in the people's lives." "We confirm whether a case is successful through follow-up," says a U Subcounty Land Conflict Mitigation Committee member. "If parties are still honouring their boundary and are living in good relations months later, it is a success."

A third criteria (cited by 29% of respondents) is evidence of an improved relationship between the parties. Mediations are therefore said to be successful if and when "the parties have forgiven and reconciled with each other," "afterwards, the parties greet each other and begin laughing and even confessing the motives behind their actions," relations are still amicable in the long term, and "by the end of the meeting the tone is better, and people commit themselves to changing for the better."

Of particular interest is X staff's unique view of what "success" is:

> "We think of success as levels, or as a success-ion of stages. Each step in a mediation is a positive development (for example, from hostility to open/honest communication, to agreement, to keeping the resolution over time). Each progressive stage is a kind of success, since in the beginning you had nothing! These stages are measured by the actions of the parties themselves."

Such a broad definition allows these mediation staff members to monitor and treat each positive progression of a case, no matter how small, as something to celebrate. One member of Y

[123] *Land Act,* Section 89(5)

echoes this thinking: "We may fail to reach an agreement that day, but may have succeeded in educating the parties about their land rights and how to access justice."

E. Training and Facilitation Levels

One need not be formally trained in ADR techniques to be an effective mediator of land disputes. In fact, the vast majority of community practitioners are not, and their efforts are vital to peace and stability in the region! Yet a basic picture of mediators' training levels can help to better understand the context in which they operate.

NGO staff respondents exhibit varying degrees of training in conflict management and ADR depending on their length of time spent as a mediator of land disputes. While only one NGO has no formally trained staff, the depth of the training cited by staff in other organizations is not always guaranteed. For instance, the most commonly mentioned training vehicles (each of which are present in at least two different organizations) are on-the-job experience, the Centre for Alternative Dispute Resolution (CADER[124]), and a one-week, theory-based overview at Law Development Centre which is well known to focus much more on arbitration and adversarial negotiation than mediation.

As expected, different types of community actors are found to have different levels of training. On the whole, paralegals from V, W, and Z are trained for one week upon induction, but there are rarely any refresher courses available. In W, for instance, one group of 7 paralegals—6 of whom have been serving for over 10 years—informs that other than the initial 5-day training they received in 2001, they have since met to sharpen their knowledge and skills only once, for half a day, in 2006. Whereas NGOs may conduct occasional workshops for LC court officials, clan leaders, or paralegals, most of these mediators' training seems to come as a result of on-the-job experience.

A mediator's ability to perform his or her job effectively and sustainably is also strongly tied to the level of facilitation he or she receives. The *Land Act* recognizes this need for remuneration in Section 89(7): "*A mediator shall be paid such allowance as may be prescribed*." Understanding the climate of support in which these practitioners work is thus essential to any assessment of successful mediation frameworks.

It is clear from observations and interviews that a widespread concern among community paralegals who volunteer their mediation work for NGOs is the fact that they are poorly remunerated. Many are full-time subsistence farmers who have answered the call to mediate on top of their other household responsibilities, and find that the daily costs of transport, phone calls to meet parties, stationery, and hunger associated with not eating while mediating all day are difficult to bear over time with no pay. Most national NGOs in Uganda rely on short-term grants to fund their activities, so while the money to facilitate these community paralegals may evaporate, the need for their mediation efforts does not. "We had a project where we trained paralegals back in 2003," one legal staff from V explains. "We funded them and gave them bicycles for as long as we could, but when the money for the project ran out [in 2008], there was nothing more we could do." Interviews confirm that several of these community ADR actors are still working even without facilitation, although a team of W paralegals in Barr Subcounty share that "In the beginning, there were 48 of us. Now, only 7 are active."

[124] Attached to the Commercial High Court of Uganda

Facilitation schemes look differently for other community ADR actors. Since they are not externally supported, clans—and clan arbitrators—rely on funds and dues from clan members. This is evidently a problem for some disputants who either cannot afford the required fees or use the exchange of money an invitation to 'buy' a verdict. While in practice many Local Council Courts operate in a very similar way, they are by law supposed to receive set low amounts for different types of cases that they hear: 1,500 UGshs (USD $0.53) to hear a dispute over customary land. According to the *Local Council Court Regulations* of 2007, LC 3 Court members are due a facilitation allowance of 10,000 UGshs per court sitting.[125] In light of the costs associated with running a 9-member court, however, LCs have found it necessary to charge upwards of 10,000-20,000 UGshs (USD $3.53-7.07) per court session. Needless to say, this 'overcharging' gives rise to various reactions and is often interpreted—and at times used—as bribery. One LC 2 Chairperson who has been serving in Apac Subcounty for over 10 years explains the plight of these community actors, some of whom practice ADR outside of official court sessions:

> "Government lied to us. We are giving our services voluntarily, without compensation. How can 9 people divide 5,000 UGshs [for a court fee] and feed their families? We normally have more than 200 people attend our LC Court sessions. If it's a big case, we need to mobilize people to attend by airing radio announcements, which cost money. Our poor facilitation is directly tied to LCs accepting bribes. The *Regulations* only mention a Registration Fee for customary land cases, not an Inspection Fee. But how can we transport the entire court to the site for free?"

Needless to say, the shortages of conflict resolution training and workers' pay serve as obstacles to a successful agreement even before the mediation session begins.

F. Motivations for Land ADR: A Great Potential for Empathy

The practitioners interviewed in this study, however, do not appear to be "in it for the money." In response to the question, "Why has your organization decided to get involved in mediating land conflicts?" most NGO staff cite the need to provide access to justice, to protect and educate about land rights, eliminate barriers to return from displacement, and build local capacity to resolve disputes when they arise without having cases drag on in other institutions. A programme manager for Z comments, "Our work is based on the law (both state and customary), and we believe that traditional authorities can mediate customary land cases. Parties must agree upon a neutral mediator, and a win-win situation is our desired outcome."

While four out of five NGO staffs indicate a decidedly law- or rights-based approach to their efforts, V (a faith-based organization) is founded upon a different principle. "Our work is based on love," one staff mediator explains, "the concept of 'do unto others as you would have them do to you.' We seek to help people begin to live and stay in love, and for communities to begin forgive and reconcile as a way of life." This same staff indicate that a primary reason for their involvement in mediating land-related disputes is to change people's mindsets to realize that, "When I have a land conflict, I don't need to pick a hoe or *panga* (machete). Rather, we can sit and talk it through."

[125] Very unfortunately, the current *Regulations* do not provide any facilitation allowance for courts at the LC 1 (village) and LC 2 (parish) level. This is troublesome as LC 2s are the legislated courts of first instance for disputes over customary land and handle a great volume of these cases each year.

When asked why they are *personally* involved in mediating land disputes, NGO and community actors give several reasons. These top three motivations are each mentioned by 38 percent of all interviewees (n=21) and are described as a) necessity brought about by the prevalence, urgency, and severity of land disputes in the area; b) personal experience: "a land dispute happened to me"; and c) previous leadership experience which provides the respect needed to be an effective mediator in the community. Other commonly cited reasons include a passion for serving vulnerable populations, knowledge of land laws and negotiation skills, and the fact that community members continually brought land disputes to the interviewee for help.

This suggests that a great potential for empathy and trust-building exists between on-the-ground ADR practitioners and the parties they serve. This is apparent in the way many mediators are land dispute 'survivors' themselves and are able to better relate with parties to conflicts they are working to resolve. Moreover, the mention of previous leadership experience as a major motivating factor speaks to the commitment these mediators have to their communities and the problems they face. This in turn fosters trust between the community and these practitioners, which is an essential ingredient if mediations are to be socially respected. Statements such as, "I did not choose on my own to get involved with land cases; rather, the community picked me," and "People approach me because I'm a religious leader and respect me as more neutral," are evidence of this.

3) What kinds of procedures are used to resolve these land disputes?

Exploring the wide variety of case management procedures in place throughout Lango and Acholi is one of the most fascinating and central aspects of this study. This assessment begins with a look at case intake processes before delving into the intricacies of how a mediator decides which cases to handle, how to approach Respondents, and how to prepare both the parties and community for mediation. From there, a discussion of practitioners' general mediation recipes follows, with an emphasis on how decisions are made, agreements upheld, and records kept. The section concludes with a description of steps taken in cases where mediation fails.

A. Case Intake Procedures

While each practitioner has developed their own way of receiving complaints of land disputes, a review of step-by-step procedures[126] reveals some similarities among the primary informant NGOs and select community actors. Once a Complainant reports a case, a staff or community mediator generally listens to the complaint, considers whether mediation is appropriate, opens a case file, and then invites the parties for mediation. What was found to differ, however, is the criteria used to determine whether mediation is in fact the best option and the strategy used to approach the Respondent. Variation in the type of information recorded on intake, another major area of interest, is discussed in detail later.

i. Deciding which service is most appropriate

Since each of the five primary informant NGOs in this study work under different mandates, each has a unique variety of legal services to offer people seeking land justice. While all offer mediation, legal advice, and referral services, only W, X, Y, and Z offer legal

[126] See Appendices 4a and 4b for "Skeletons" of Case Intake Procedures for NGOs and select Community Actors.

representation (standing as an advocate for a client in court) and drafting of legal documents. And whereas all provide some sort of community outreach (sensitizations, mobile legal aid clinics, etc.), Y regularly trains clans on customary land laws, X focuses on building capacity among Local Council 2 Courts, and Z does some of both.

Community mediators, on the other hand, have a generally more limited range of options for persons with land disputes. Depending on the type of actor and their level of facilitation and/or community support, an actor may be able to provide mediation, personal (and perhaps some legal) counseling, and referral services to someone in need. LC 2 Chairpersons also have the ability to conduct court hearings, render legal judgments, and assist with appeals to the Sub-county or Chief Magistrate's Court, in addition to mediating outside of court.

With so many options, it is not always easy to determine which legal service, if any, is the best fit for any given Complainant. In asking mediation staff from five NGOs how they make such decisions, it was discovered that each uses different criteria (see **Table 4**). V registers most of its cases from paralegals who have forwarded them to the office according to their high levels of *difficulty*—from a relational, safety, technical, communal, and/or legal standpoint. If a case requires advanced legal expertise, it is usually referred to another legal aid provider. If a case is not too difficult, however, the office will normally opt for mediation to resolve the conflict. If it is pending in court, V acts to withdraw the case in order to have it mediated.

Table 4: NGOs' Registration Criteria

- ***Severity/ Difficulty** of the case* (V, W)
- Complainant's ***request*** (W, Y, Z)
- Parties' ***willingness*** to mediate (Y, Z)
- ***Merit*** of the claim (X)
- ***Preparation Meeting*** (X, Y, Z)

On the other hand, W sifts through the cases it receives from drop-in parties, mobile legal aid clinics, and paralegals and chooses whether to give advice, mediate, or refer based on the *severity* of the claim and the *request of the Complainant*. If a case involves serious rights abuses and the Complainant seeks intervention in the form of mediation or court, W is more likely to get involved. If a case is already in court, W will forward the case to one of their external advocates for representation.

Mediation staff in Y also decide to take in cases based on the *request of the Complainant*, but also consider both parties' *willingness* to mediate. If a claimant asks for their case to be mediated, Y staff will typically pursue this route. As one legal officer explains, "We don't select cases when they come, but try to mediate all cases. Then, if mediation fails (ie, one or both parties are unwilling to continue the mediation), we look for other options."

A detailed Client Intake Policy—involving *means*, *merit*, and *relevance* tests—guides X staff regarding which cases to handle. In what one legal officer describes as an "exhaustive" interview, X investigates whether all other forms of dispute resolution have been tried, whether the complainant is among the project's target group according to its mandate, and whether the case at hand is likely to stand in court—all before deciding to take a case. If a claim is weak or not valid, advice is given. If the complaint is valid, X will begin to negotiate for the parties to

choose mediation over court. If the case is already in court, this involves negotiating to take a Leave of Court to mediate.

Z opens cases based on the *willingness* of the parties to mediate. Once the parties are brought together in a preliminary meeting to discuss the case, Z educates them about relevant land rights and allows the parties to decide how to move forward. This preliminary meeting was also observed to be a part of the case intake process of X and Y and is discussed shortly.

With a few important exceptions, community ADR actors try to mediate all non-court cases that are brought to them. The range of different intake procedures is too varied and lengthy to discuss in detail here, but some general themes are present. A few practitioners (V Paralegals and the Parish Priest) ask for a reporting history of a case before organizing a mediation so that the mediator can analyze previous records to get a better sense of the dispute and find out whether it is even able to be mediated (ie, it could be pending in court). Along with W paralegals and U Sub-county Committees, these community actors also gauge the willingness of each party to mediate—if one refuses, the mediation cannot take place. Others (T arbiters, clan chiefs, and LC 2s) open a case as soon as the required fees have been paid, while the remaining community mediators do their best to handle cases reported to them without a set screening process. The Parish Priest conducts a preparation meeting similar to X, Y, and Z in order to find out whether the case is suitable for mediation.

Observations of party interactions reveal a danger at this stage in taking a Complainant's story to be true without probing further. Perceptions play a large role in human conflicts, and the Complainant may, in their statement, be speaking more about what they *feel* has happened to them rather than what has actually taken place. In interviews and observations of mobile legal aid clinics, it was found that some NGOs (W and Y) and community actors (paralegals, LC 2s, *Rwodi Kweri*) are in the practice of taking cases as they appear without critically checking to see whether the complaint is actually valid. False claims, land grabbing attempts, and pending court cases may be reported by persons expecting a mediator to take action, but these types of cases may not be appropriate or worthy of the mediator's efforts, especially when many other disputes are waiting to be addressed. Moreover, as was strikingly observed and will be discussed later, treating a Complainant's story as fact is likely to cause the Respondent to perceive the mediator as biased and react unpredictably.

ii. Approaching the Respondent(s)

Once a mediator has discussed the case with the complainant, there is need to hear the other side of the story. Approaching the Respondent(s) is thus a very important step in the case intake process. As expected, different ADR practitioners do this differently.

The preferred way among NGOs (used in W, Y, and Z) seems to be the sending of a Mediation Summons Letter with the Complainant as they leave the office. The letter, addressed to the Respondent, is copied to the LC 1 Chairperson of the area, clan and traditional leaders, and other key witnesses. To avoid complications, the Complainant is asked to deliver the letter to the LC 1 Chairperson, who will then distribute copies of it to the others. The letter usually contains a stern warning to the Respondent, citing the Complainant's accusations and firmly requesting the attendance of the other party to attend the scheduled mediation.

Another favoured method, practiced by V and X and shared by nearly all of the community practitioners interviewed, is a face-to-face meeting with the other party. This may

be a one-on-one meeting between the mediator and the Respondent(s), or it may be in the form of a small dialogue between the mediator, both parties, and a select few witnesses. During this encounter, the mediator will introduce him/herself and share the claim as the complainant stated it and ask for a response. Once this is discussed, the mediator will likely ask the Respondent whether he or she is willing to mediate the dispute, and if so, under what conditions. Of course, each practitioner does this in a unique way—the *Rwot Kweri* does not ask if the Respondent is willing to mediate, but rather simply informs of a date for mediation, for instance—but this represents the general agenda behind these face-to-face meetings.

This strategy is applied in a particularly interesting way by X, Y, Z, and the Parish Priest. Once the complainant's case has been registered, the mediator organizes a closed meeting with both parties and a very select number of witnesses. In this Preparation Meeting, the mediator works to clarify the 'facts' of the case, negotiate for mediation instead of other means, identify key issues to be discussed, and build the parties' trust and confidence in the mediator. As one staff member from X explains, "This meeting is critical, because naming the issues beforehand makes the mediation run much more smoothly. If you don't do it, you may waste a lot of time in the mediation trying to find and stay on the right track."

The Preparation Meeting is also an opportunity to get the parties in a cooperative mindset before the mediation by turning a discussion about time, date, location, and attendants into a problem-solving exercise. Once the Parish Priest, for example, has brought the two parties together and they have agreed to mediate, he sends them away with a 'homework' assignment: each must draw up a list of key witnesses, local leaders, and neighbours that will either attend or assist in the mediation. When they report back to the Parish with their lists, the mediator helps them to compare notes and iron out any differences. From there, the parties decide on the remaining details of the mediation gathering—including who will help provide food for the event!

Z mediators take this preparation meeting one step further by conducting an unannounced "Fact Finding" trip in the community before the scheduled mediation. Here, the staff mediators go "under cover" to talk with neighbors and key witnesses whose names were mentioned in the preparation meeting to hear different angles of the case outside of the presence of the two conflicting parties. In this way, the mediators are able to make a more informed evaluation which is useful in indentifying topics to teach on in a land rights 'lesson' at the upcoming mediation.

Written documents play an important role in official record keeping, but a reliance on invitation letters as *the* way of communication between the mediator and the Respondent may largely be a function of convenience. (It could also be argued that community mediators who approach Respondents in person are also acting out of practicality, since stationery may not be readily available in many settings.) With limited transportation means and staff sizes, some NGOs feel it is impractical to go to the field so often to meet with parties. Instead, they explain, it is better when the parties themselves approach the NGO's office.

Although sending invitation letters may certainly make an NGO mediator's job easier, this strategy faces two major problems. First, in practice, Respondents rarely take initiative to approach the office. In the 10+ weeks of field study at different offices each day, the researcher saw Respondents only when they were summoned for an official mediation held at the office. Otherwise, visitors were exclusively Complainants. Secondly, summons letters were often found to be written in such a way as to intimidate the Respondent even before hearing his or her

version of the story.[127] Both of these practices almost always lead to more frequent interactions—and thus a stronger relationship—between the Complainant and the mediator, which may betray the spirit or appearance of impartiality.

B. "Mediation" Procedures

In Lango and Acholi, the general understanding of a mediation or 'community dialogue' is a gathering of local people and leaders in a central location to clarify, discuss, and settle a misunderstanding between two or more people of an area. While each NGO and community practitioner was found to do this in distinct ways, a general recipe—whose ingredients may differ in flavour and/or mixing order—appears to be widely used for these ADR meetings.

Interviews with multiple actors and more than 10 full-length observations show that land dispute 'mediations' led by both NGOs and community actors usually begin with opening statements from local leaders and the mediator. From there, the Complainant is given a chance to state his or her problem with the Respondent, who is later also given a chance to speak. These statements may be interrupted by clarification questions from the mediator and/or local leaders and are followed by statements from witnesses, neighbours, and elders. A group discussion, facilitated by the mediator and/or community leaders, normally follows along with input from other community members. The purpose of this dialogue is usually to clear up facts in the parties' statements and determine the rights of the parties to the land in dispute.

The group may then leave the meeting area and move to inspect the disputed land up close, while smaller natural discussions ensue among the participants as the group walks around the boundaries. Once the mediators believe the characteristics of the disputed land are sufficiently understood, everyone will likely reconvene at the original meeting place. Here, the facilitators may pronounce and explain their opinions about who has—and does not have—rights to the disputed land. This may be given in the form of simply a non-binding evaluation or authoritative ruling. From this point, a decision is normally reached between the parties and the session ends.

How this decision is made, however, is the trademark that distinguishes each of these different ADR efforts from the rest.

i. Mediation: One of Many Points on the Dispute Resolution Spectrum

A review of practitioners' step-by-step methods[128] reveals that each employs a different form of alternative dispute resolution (ADR) under the banner of "mediation." Of course, the imperfect naming of the different types gives rise to many hybrids—but mapping where each practitioner's efforts lie on the dispute resolution continuum (see **Figure 11)** can help stakeholders better understand the pros and cons associated with each approach. At one end of the scale is Negotiation, the method in which parties are said to have the greatest control over the outcome. Adjudicative processes such as Litigation and Arbitration, on the other end, give parties very little, if any, power to determine how the dispute will be settled.

ii. Neutral Evaluation (NE): A Common Thread among NGOs

[127] For more on Mediation Summons letters, see "Practices Not Likely to Lead to Success"

[128] See Appendix 4, "Skeletons of NGO and Community Actor Mediation Procedures"

Interestingly, nearly every ADR-practicing NGO exhibits some form of Neutral Evaluation (NE) in its approach to resolving land disputes.[129] This element is seen in a practitioner's appeal to laws (either customary, state, or both) during a mediation to determine whether claims to rights over the disputed land are valid. Here the intermediary considers the parties' statements and acts as an objective signpost—holding up the law for parties to see for themselves whether their claims and actions are justified—without inserting his or her personal opinion. **Table 5** above indicates the various ADR approaches found to be practiced by the NGO study participants. Where these organizations differ, however, is in the additional ADR strategies they use to reach decisions.

Figure 11: A Dispute Resolution Continuum[130]

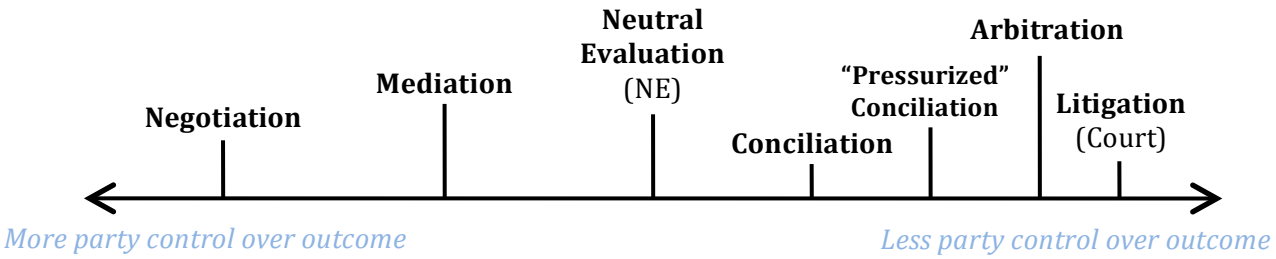


Table 5: Types of ADR Practiced Among NGOs

Source: Interviews, Observations

NGO	Type of ADR Practiced
T*	Arbitration
U*	NE-Conciliation
V	NE-Conciliation
W	NE-"Pressurized" Conciliation
X	NE-Mediation
Y	NE-Conciliation
Z	NE-Mediation

[129] Because of its court-like rulings by which one party 'wins' and the other 'loses', the efforts of clan-affiliated practitioners in T are best defined as *arbitration*. This process is prevalent among clans who seek to bring closure and finality to disputes by imposing an authoritative judgment upon parties.

* T and U are secondary informant NGOs; that is, they are in addition to the initial 5 NGOs with which the researcher conducted 2-week study visits. While time constraints caused the researcher to work with T and U to a lesser extent, these NGOs' valuable mediation efforts should in no way be understated.

[130] Brainch, Brenda (2006). This diagram represents only a simplified version of the various forms of dispute resolution found on the ground.

iii. Conciliation: Neutral as Driver

Once Y legal staff and U and V paralegals have issued their neutral evaluation of the parties' rights to the disputed land, their efforts turn towards *conciliation*: requesting the 'winner' to give concessions in order to appease the 'loser'. At this stage, the mediator actively negotiates on behalf of the party they determine to be in the right. If, for example, the neutral actor deems that party A has encroached on B's land because B was absent from it for a long time due to displacement, then party A has no customary or legal right to the disputed land and is thus the 'loser'. In this situation, however, the neutral would ask party B to consider granting a small portion of land to A or allowing A to harvest the crops she had already planted on the disputed land, in order to maintain harmony in the community. Such compromises and identification of winners and losers may in fact be the most appropriate way to acknowledge parties' land rights and put an end to an otherwise lengthy conflict. Yet, as will be discussed later, this type of compromise may also facilitate incremental land grabbing.

When the staff and paralegals of W sense that the loser is not willing to accept the mediator's evaluation, the process becomes a more ***"pressurized"*** version of conciliation. Here, the W facilitator firmly emphasizes the rights of the winning party (who is usually, but not always, the Complainant) and advocates for—and impresses upon the loser—options which the intermediary feels will best uphold the rights of the winner. Understandably, this strategy is not always easy and may compel the mediator to apply pressure in the form of warnings ("If you don't comply, you'll face the consequences!"), strong resistance to other opinions, or regrettable statements borne of frustration.

These approaches, as the diagram above illustrates, fall on the "less party control" side of the dispute resolution spectrum. In arbitration, conciliation, and "pressurized" conciliation, the mediator serves as the driver of the vehicle that takes the parties to their resolution. From interviews and observations, this neutral-as-driver approach is found to be applied by five out of seven NGOs (T, U, V, W, Y) and 12 out of 15 types of community actors interviewed (including most paralegals, LC 2s, *Rwodi Kweri*, and clan chiefs). Among these practitioners, the neutral tends to evaluate the case and then steer the group toward different options or conclusions. The parties therefore have one major decision to make: to stay (agree with the neutral's decision) or get out of the car (disagree). As one paralegal explains, "The mediator decides the course of action, but parties decide whether to go along with it."

iv. Mediation: Neutral as Driving Instructor

On the other hand, a few practitioners (Z, X, and the Parish Priest) employ strategies which are situated on the other end of the ADR continuum. Once Z staff members have indirectly issued their evaluation of the case through a time of strategic "teaching" about land rights and relevant laws, for example, they engage the parties in a *mediation* session to devise a "win-win" outcome which caters for both parties' interests. The difference between this approach and conciliatory compromise is that here, the mediator does not give a direct evaluation of the case and assign a 'winner' and a 'loser'. The parties themselves are the ones who listen to the teaching on relevant laws and must *self-evaluate* their actions and respond as they see fit. If at this stage both parties are willing to continue, the session becomes a mediation whereby parties are encouraged to think of ways to satisfy each other's interests. When both parties finally agree upon a course of action which adheres with the mediator's previous teaching, this is written as the "agreement".

Mediators from X employ a similar process, though they begin by encouraging the parties to opt to settle their dispute through mediation rather than court. Once the parties have chosen to mediate, X staff members serve an advisory function during mediation—holding up the law and precedence as an objective reality-check—but do not directly pressure the parties to agree to a certain solution. The Parish Priest mediates in a similar way, but instead of holding up the signpost of law and rights, he uses the standard of Biblical teaching and the sense of moral equity and fairness. "Parties decide what is good for them," he says. "I only advise them, 'If you take that option, the effect is this.'"

Instead of a driver, the mediator in these cooperative approaches becomes more of a driving *instructor* who advises and encourages parties to invent workable ways forward. By explaining the pros and cons of different courses of action, this type of neutral also acts as an advisor or objective signpost for parties to read and respond to according to their own free will. In this way, the participatory nature of mediation demands a greater level of personal engagement on the part of the parties than the more passive exercise of simply saying 'yes' or 'no' to decisions someone else is making on the parties' behalf. Herein lies a fundamental tension between the ADR approaches observed in this study, which is discussed later in *Section vi:* "Land Grabbing: A Key Question for *Appropriate* Dispute Resolution."

v. Diversity among Community ADR Actors

A look at the ADR approaches applied by community mediation actors also reveals a great deal of variety. As **Table 6** illustrates, these practitioners use every strategy described above—from mediation, to litigation, to everything in between. Not only is there variation between different practitioners of the same title (LC 2 Chairpersons), but there are also significant differences in the way paralegals from a single organization approach dispute resolution (W and Z). Moreover, the majority of respondents in this sample (n=53) describe or perform their "mediations" as situated more on the adjudicative (less party control) side of the ADR spectrum. Only 4 of these 53 community respondents indicate practicing some form of mediation as the literature defines it.

Interviews and observations also provide insight as to what criteria form the basis of the decisions reached in these ADR efforts. In four out of the five primary informant NGOs, laws and legal rights are the standards by which the mediator evaluates a given dispute. While W and Z rely mostly on State laws, X and Y frequently call upon both State and customary land laws to form their legal opinions. V, on the other hand, bases its evaluations in Biblical teaching and the opinion of the *Rwot Kweri*, who is believed to have the definitive say regarding the boundaries of all portions of land in the area.

Community actors rely on a mixture of different sources for their decision-making. The testimony of witnesses, neighbours, and elders—including the Rwot Kweri—is found to be a key deciding factor among clan, paralegal, *Rwot Kweri*, and U Sub-county Committee ADR sessions. Among LC 2s, the view of the majority is of particular importance. This is seen in the way judgments are made according to a vote of all community members present. Customary land rights (in the form of the PPRR) were also observed to play strong roles for W paralegals and Y-associated clan leaders in justifying the position reached by the negotiating team. In fact, the PPRR was read aloud in each of the four W- and Y-led mediations observed during this study.

Table 6: Types of ADR Practiced Among Community Actors

Type of Community Actor[131]	Sample Size (n=)	Type of ADR
Sub-county Court Paralegal	1	Arb
Clan Chiefs in Charge of Land (4; Village 1)	4	Arb
Clan Chief in Charge of Land (1; Village 2)	1	Arb
"Z" Paralegal (Parish 1)	1	Med-Arb
"Z" Paralegal (Parish 2, also an LC 1 Chairperson)	1	NE- Mediation
"Z" Paralegal (Parish 3)	1	NE- Mediation
LC 2 Chairperson (Parish 1)	1	Litigation
LC 2 Chairperson (Parish 2, also a Clan leader)	1	Litigation
LC 2 Chairperson (Parish 3, also a Clan leader)	1	Arb
Parish Priest	1	Mediation
"V" Paralegals (5)	5	NE-Conciliation
"U" Sub-county Land Conflict Mitigation Committee (7; comprised of reps from "U", LC 2, Cultural Institution, Area Land Committee, S/c Court Committee, Police, and an Advocate)	7	NE-Conciliation
Rwodi Kweri (13), Rwot Koro (1), Mukung[132] (1)	15	Arb
"W" Paralegals (6; Sub-county 1)	6	Arb
"W" Paralegals (7; Sub-county 2)	7	NE- "Pressurized Conciliation"
	Total n=53	

vi. Land Grabbing: A Key Question for *Appropriate* Dispute Resolution

Hidden beneath the application of land dispute resolution strategies on the "more party control" side of the scale is an assumption that the parties and their witnesses are participating in good faith. In other words, mediation-style approaches depend on the sincere willingness of the parties to sit down and resolve their differences. Interviews and observations suggest that mediation can and does work very well in some (perhaps 'genuine') land disputes. Parties in these cases may even highly appreciate the recognition of their ability to decide for themselves.

If for some reason, however, the assumption of good faith does not hold true—A is bent on stealing B's land at all costs, or B lacks faith in the process because of A's intimidation tactics and the likelihood that even if the land is "officially" restored to B, A will ignore the decision due to a lack of enforcement—this raises questions as to the potential of mediation to effectively address the case. As Brenda Brainch of the Kenya Dispute Resolution Centre explains,

[131] For a more thorough explanation of how the researchers arrived at these classifications, see Appendix 5

[132] *Mukung* is a title of honour given to a Clan Chief, and is a member of the *Rwot Kweri*'s cabinet.

"[Mediation] is not designed to achieve solutions that reflect legal rights and obligations, but solutions which are… mutually acceptable."[133] Having a mediator who acts as a polite driving instructor will certainly not prevent the car from overturning and crashing if one of the driving parties is determined to cause injury.[134] In cases where one party is intentionally abusive or insincere, participatory methods that rely on the parties' free will to make decisions may not only continue the agony of the dispute, but actually fail to ensure that land rights are respected.[135]

Remarkably, NGO caseload data reveals a correlation between the *number of Land Grabbing cases reported* and the *type of ADR approach used*. Whereas Y registered 42 Land Grabbing cases during the three-year reporting period, only one such case was recorded among both X and Z during this time. Furthermore, while Y employs a NE-*Conciliation* approach that identifies land rights and names 'winners' and 'losers', X and Z apply *mediation*-style approaches that advise parties on the decisions they make. This may suggest that neutrals who have more experience with land grabbing situations are more likely to feel the need to control or drive the decision-making process. By the same token, it could also mean that the assertive, 'fix-it' personality of some actors makes them more prone to perceive cases as land grabbing, and thus in need of external controls.

This may suggest that neutrals who have more experience with land grabbing situations are more likely to feel the need to control or drive the decision-making process.

Either way, neutral-drivers seek to point out the illegality of the offending party's actions and intervene on behalf of justice to uphold land rights. Those NGOs who see less land grabbing and many more 'genuine' disputes, on the other hand, are likely to continue playing a more advisory or 'driver instructor' role. After all, a driving instructor who has rarely encountered malicious student-drivers is not likely to be very concerned about the car overturning.

a) 'Genuine' Disputes vs. Land Grabbing Attempts

Land grabbing, then, seems to be a matter of perspective. How is it that X and Z only registered one Land Grabbing case in three years, but Y recorded 42? Are land grabbing cases only coming to Y, or is land grabbing in the eye of the beholder: how the mediator perceives the nature of a dispute?

In a seminar of 35 stakeholders—including representatives from each NGO, advocates, and several community practitioners—a theory of two contrasting dispute "personalities" was suggested. **'Genuine'** land disputes are characterized by the sincerity of each party and their willingness to mediate in good faith to find a solution. **'Land grabbing'** cases, though, are those in which party A is deliberately seeking to take advantage of some perceived weakness in B in order to claim B's land. Thus, one party approaches the process not in good faith, but with a knowingly or subconsciously abusive agenda. These types of situations, seminar participants

[133] Brainch, Brenda (2006), pg. 2

[134] See Abraham's story in Appendix 3 for a vivid example of this

[135] Mayer, Bernard (2000), pg. 67

concluded, may not really be land *disputes* at all and thus require a stronger, more authoritative intervention than homespun negotiation.

Several legal scholars agree with this line of thinking. Ramirez (2002) argues that "there may be cases which, due to their intensity, criminal content, complexity, or power disparities involved, would be best handled by a court of law."[136] "In the area of land tenure conflict especially, a formal solution may prove more lasting, due to its close linkages to legal, political, and institutional aspects" add Herrera and da Passano (2006, p.69)".

This has important implications for land dispute resolution in Uganda. Practitioners, citizens, and policymakers alike bemoan the fact that the formal authorities in place—Local Council Courts, Magistrates, and police—do not adequately recognize, address, or enforce decisions against land grabbing.[137] In light of these conditions, it is doubtful whether non-binding mediation and conciliation alone can serve to end the climate of impunity and insecurity surrounding land grabbing in Northern Uganda.

Additionally, it remains to be seen how practitioners can reliably tell whether a given land dispute is 'genuine' or not. Owen Fiss, a well-known critic of ADR, argues that "It is impossible to formulate adequate criteria for prospectively sorting cases (ie, between those fit for ADR and those that are not). The problems of settlement are not tied to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for an authoritative interpretation of law."[138] While this assessment may be valid for the *pre*-sorting of cases, observations and seminar participants suggest it may still be possible to sort disputes after a certain evaluative checkpoint (for example, after a preparation meeting).

vii. Ensuring Durable Agreements

When asked what steps they take to make sure that both parties lastingly uphold their agreement, NGOs and community actors cite three main strategies.

1. Social Accountability

First and foremost, three out of five NGOs and 9 out of 13 community actors interviewed indicated that their primary technique for ensuring sustainable agreements is to involve other actors in the process. This is mainly done in two ways:

a) *Including local leaders, neighbours, and witnesses in the signing* of the agreement; and

b) *Distributing copies of the agreement* to several other places (ie, the clan record book, LCs, Sub-county Court) so that various persons are made aware of it.

By involving more witnesses in the decision and making it public record, the neutral calls upon larger society and local leadership to hold the parties in check. As one NGO staff member explains, "We make sure the agreement is signed by all present. Everyone who is respected in the community is made aware of the agreement, and we rely on this social accountability."

[136] See Box 16: "When not to collaborate"

[137] IOM, UNDP, NRC (2010), pg. 32-35

[138] Fiss (1984), p.1088

2. Threats and Warnings

The second-most cited way to promote lasting agreements is warning parties of the legal consequences should either of them violate the terms of the agreement they are about to sign. Practitioners describe threats such as "We have lawyers who can sue you in court" and "If you don't comply, we will have you arrested" as those most frequently used. The trouble with this approach, however, is that the legal consequences to breaking a non-binding mediation agreement may be minimal to non-existent in practice. Thus, a mediator who threatens a non-compliant party may be in a difficult position if the person demands to know whether the courts will value and/or enforce such an agreement or if the police will actually come to take him away.

3. Willing Parties, Fair Process

Legal officers from X surprisingly inform that they have not had a problem with breached mediation agreements. When asked as to why this might be, they state that, "If willingness (to mediate), trust, and respect are all there, people are likely to uphold what they commit themselves to." This is interesting because it highlights the importance of preparing the parties for mediation beforehand. In their preparation meetings upon case intake, X staff mediators take seriously the obtaining of both parties' consent to mediate, rather than litigate, and do not progress to the next step of the process unless both are sincerely willing to move forward. If either party is not ready to take the step to mediate, the mediation—which would likely fail in this situation—simply does not take place. Thus, no agreements are made which need to be imposed on the parties. As is considered under Research Question 2, a mediator's recognition of the parties' free will appears to be directly tied to party's perceptions of fairness.

Other approaches for ensuring lasting agreements include:

- ***Writing and signing agreements immediately and on-location*** so as to prevent third-party interference in the time gap between agreeing and actually signing;
- ***Holding a public reconciliation ceremony*** and taking photos to document the end of the dispute; and
- ***Planting boundary trees*** on the disputed land in the presence of neighbours so as to make the agreement tangible.

C. Following Up… and Following Through

Due to their heavy workload (new land disputes are reported nearly every day!), small staff size, and limited transportation resources, four out of the five primary informant NGOs do not make it a priority to following up on previously concluded cases. While some may have a set plan for checking on prior complainants, this is often postponed until the caseload reduces or donors come to visit. X is different in its approach, however. Once a dispute has been mediated and an agreement reached, its parties are usually revisited after 6 months and again after 12 months. During this check-up, the mediators assess whether the parties are satisfied and document any problems or improvements that have taken place over the time period since the agreement.

It was observed that far less attention is given in general to cases that are *referred* to court, police, and/or other offices (unless, of course, the NGO has arranged to represent or

advise a party in court). These are often entered as "Referred" in caseload databases and effectively closed by the NGO office. With many other pending and fresh cases to handle, land ADR actors rarely find time to return to these "closed" cases. Yet following up to see whether the referral helped or prolonged the search for justice is useful because, as one V staff member comments,

> "Once V becomes involved in a case, our organization's name is on the line. How will it look if V's mediation fails and we refer it to court, but then court sits on the case for three years or gives an unjust ruling? In that case, the result of our intervention in the parties' lives is negative. We need to follow up and follow *through* on the cases we commit to handle."

But even more importantly, checking up on referred cases may help save lives. One organization's experience with paralegals referring violent land disputes to the police is illustrative here. In April 2011, paralegals in Agago District referred the Complainant in a serious land dispute to police due to its violent nature. When the Complainant arrived at the police post, he was told that no action would be taken until he paid for the cost of fuel to transport the police to the site. Since the Complainant could not afford this, no intervention was made. Police inaction and a lack of follow-up eventually allowed this angry Complainant to set fire to the Respondent's grass thatched home on night as a direct result of this conflict. All six, including the Respondent and five members of his family, were burned to death.[139] Unfortunately, this is just one of several similar stories throughout the region and highlights the reality that without sustained interest and persistent reminders, cases—and lives—may fall through the cracks.

And, as another conciliator from Y says,

> "They (the complainant) ran to us for help. If we give up and allow their cases to fall through the cracks just like the other offices they've reported to, where will they go? How will they get the justice they are crying for? And what's to stop them from letting the frustration push them to take the law into their own hands?"

D. Enforcement: A Painful Silence

Before discussing the findings related to the current enforcement of local ADR decisions, it is important to remember what current legislation has to say on this issue. Section 88 of the *Land Act* recognizes the ability of traditional authorities to mediate and determine disputes under customary tenure, while Section 89 provides for the functions of mediators who are appointed by the District Land Tribunal. Although this was signed into law in 1998, at the time of writing most Tribunals have still yet to be established and the ones that have are largely dysfunctional.[140] Thus, it is very unlikely that any mediators have been appointed under this section. Moreover, there is no mention anywhere in the *Act* of how the mediation agreements that are produced—whether through the facilitation of traditional authorities or Tribunal-appointed mediators—are to be enforced.

The *Local Council Court Regulations* of 2007 also tell a similar story. Current law is silent on the enforcement of decisions made by both Local Council 2 Courts, which are named as the

[139] Justice and Peace News, May 2011 Newsletter

[140] Rugadya, M. (2008). "Northern Uganda Land Study" for the World Bank

courts of first instance for disputes under customary tenure[141], and Sub-county (LC 3) Courts, which receive appeals. For instance, under S. 57 of the *Regulations*, when an LC Court rules that a party must vacate land to which he or she has no right, he or she must do so within seven days. Should the party refuse to comply with this order for restitution, however, there is no provision for execution of the judgment. Basic provisions only exist for attachment and sale of property in order to compensate or fulfill a debt.[142] Unfortunately, however, the vast majority of cases which were reported to X, Y, and Z from 2008 to 2010 are not of a type with which attachment and sale would be an appropriate remedy. The silence concerning enforcement of restitution orders[143]—which *would* apply in the majority of cases in the dataset studied (ie, Boundary Disputes, Land Grabbing, Contested Ownership, Contested Land Gifts, Family Land Wrangles)—is therefore especially troubling.

i. *"Winning" Parties forced to appeal due to unenforced decisions*

Interview findings confirm and challenge the lack of enforcement capability among both LC Courts and clans. An unsettling 50 percent (9 out of 18) of prior Complainants interviewed indicated that, despite having won the case and no appeal made against the decision, they were "referred" to the next level by the LC 2 or LC 3 Court because the Respondent refused to comply with the ruling. One Complainant in Amuru District informs that court brokers are charging 6 million shillings (around USD $2,200) to enforce an LC 3 ruling in their favour. To him, and to many others in Northern Uganda, this price of justice is simply out of reach.

Mzee Tonny's Story (Amuru District)

During the LRA insurgency, I allowed my nephew, Odongo, to take refuge on my land. A short time later, we were all displaced and stayed for 4 years in the camp. Upon return, he insisted on staying on my land rather than going back to his father's home, claiming that I had given it as a gift.

I reported the case to the LC 2, but my clan insisted we settle it outside of court. So I withdrew the case and took it to the clan, and we mediated. The clan ruled in my favour, but Odongo refused to obey the clan's judgment. I returned to the LC 2, which heard the case and also ruled in my favour—but again my nephew refused to obey. From there, I took it to LC 3 Court, with the same outcome, so I registered it at the Chief Magistrate's Court in Gulu, where it has been pending for 3 years. The court just keeps adjourning my case.

NGOs and other community actors are not able to guarantee the mediation agreements they facilitate144 or neutral evaluations they make either. This is non-binding ADR in its purest sense. NGO staffs rely totally on the goodwill of the community and the local leaders to ensure that parties do what they have promised. But should these leaders and community figures be biased against a party, there appears to be no safeguards in place against such abuse. In general, when one party backs out of a previous agreement, mediators were found to forward such cases

[141] S. 76A(1) of the *Land Act* (amended 2004)

[142] See Part IX of the *Local Council Court Regulations* (2007), "Enforcement of Judgment or Decision of Court"

[143] That is, orders for land to be restored or returned to a party

[144] X legal officers inform that no NGO-initiated Memorandums of Understanding (MOUs) have yet been endorsed by the Chief Magistrate in order for them to become binding legal documents.

to court and/or the police.145 There are mixed reports, however, about whether these referral agents consider and urge compliance with previous mediation agreements or re-open the case afresh.

The current situation is therefore characterized by land ADR actors deciding, determining and negotiating resolutions to cases, only to refer them "up the ladder" later when one party proves uncooperative. This practice of appeals by the winning party greatly undermines the social legitimacy of the LC courts, clans, and NGOs to provide meaningful and decisive outcomes. People involved in such disputes often become frustrated by the delays, costs, and lack of recourse associated with this process. Some interviewees who feel greatly wronged even express active interest in taking the law into their own hands.

Fortunately, observations and interviews with NGOs reveal a workable alternative. When asked about enforcement of their mediation agreements, legal staff at X and Z indicate that they have rarely ever had a problem with this. Upon investigation, two similarities between the two organizations were found which are likely responsible for this. First, both NGOs occasionally receive cases referred to them for mediation by the Chief Magistrate. When parties in such cases reach an agreement, this is signed and returned to the Chief Magistrate, where it is filed as a non-appealable Consent Judgment.[146] Parties are then made aware that it is the Magistrate's Court who will enforce what was agreed in the event of a breach by either party. Secondly—and perhaps most importantly—both NGOs insist that there is no real need for enforcement of their agreements simply because they are made in such a way that both parties feel truly satisfied with the *process*. Perhaps this is partly why the application of successful mediation techniques is so critical for Northern Uganda.

E. Keeping Records

While each of the five NGOs documents the cases it receives, the type of information recorded varies widely. Since V and W rely heavily on their paralegals to provide caseload information in their periodic reports, this information is not always available, complete, or consistently captured. W paralegals working in different Sub-counties may follow different formats which, when grouped together, do not tell a detailed story about the types of land disputes being reported and the persons involved. This is probably due to the fact that V and W are the only organizations in this sample whose ADR efforts are not land-focused. Rather, these NGOs are mandated to also address other cases of human rights abuse such as domestic violence and child abuse/neglect. Where donors request specific information on issues like child protection, caseload data is present, but in areas such as land, this detailed information does not exist. It could be that V and W paralegals record case information, but this information is highly summarized in their reports to the main office.

Four of the five primary informant NGOs (W, X, Y, and Z) have aggregate data about the land disputes they receive.[147] As mentioned earlier, only X, Y, and Z have databases with case-

[145] The challenges of referrals are discussed in "Practices Not Likely to Lead to Success"

[146] While T receives most of its cases from the Chief Magistrate Court, it is not yet clear if T's arbitral awards are forwarded back to the Magistrate and registered as Consent Judgments or Binding Arbitral Awards.

[147] It was found from an analysis of W's quarterly ADR reports that a stunning total of 891 land disputes were reported to paralegals between 1st July 2009 and 30th June 2010. However, this data was not broken down by type or status, so was not able to be included in the comparative analysis featured earlier in this section.

by-case information. Among these, Y and Z use template spreadsheets to capture information such as the parties' names, home locations, the type of dispute, type of tenure, a description of the case, actions taken by the NGO, whether violence or crimes have been committed, how many mediations have been conducted, and the current status of the case. While much of this information is gleaned upon intake, Y and Z often make handwritten notes in the case files regarding actions taken with the case as it progresses and wait until a case is closed to update it in the record book or electronic spreadsheet.

X, on the other hand, has a more advanced data entry system for the cases it handles. Together with new Complainants, staff members fill out blank intake forms which capture the parties' personal information and contact details, the history of the case, and the Complainant's initial requests. Additional "Add Action" forms are used to update the file as steps are taken to move the case along. These forms are completed for every case upon intake and used throughout the case life-cycle. Since the same types of information are recorded for each case, record keeping is made efficient and consistent. An electronic database complete with drop-down menus and categorical labels enables X to establish trends within its own data relatively easily.

What is interesting about these three caseload databases is that while the land disputes they feature are within the same geographic region and are not so different in nature from one other, each NGO records different pieces of information using different terminology[148]. While one NGO captures items such as the Respondent's relationship to the Complainant, how the Complainant learned about the NGO, and where the case was previously reported, it may not record data which other NGOs include (ie, the parties' ages, marital statuses, clan names, levels of education, and religions.) Moreover, what Y may term to be "Land Grabbing," Z may call a "Family Land Wrangle," and X a "Contested Distribution of Estate." These inconsistencies in current record keeping make it difficult to paint a larger picture of land disputes in Northern Uganda.

Inconsistencies in current record keeping make it difficult to paint a larger picture of land disputes in Northern Uganda.

Interview data from community practitioners reveals that each one keeps some kind of a record of cases and agreements. With the great variety in training, facilitation, and mandates among these different types of community actors, however, it is clear that different types of information are collected. For instance, while the Parish priest makes notes regarding the complaint and the latter response, the mediation minutes, and the resulting agreement, the *Rwot Kweri* may only keep a copy of his final ruling. By the same token, paralegals and clan mediators may take minutes of mediation sessions, but the substance of these minutes—what types of things are written down—is not always the same. Often, the records that exist—piles of exercise books in various LC 2 Chairperson's offices and weathered binders of loose papers belonging to V and W paralegals—are the Complainant's (and sometimes the Respondent's) handwritten statements, minutes and attendance lists from "mediation" sessions, and a copy of a signed agreement or judgment. These records are generally intended for local use and the occasional paralegal's report to the office; thus, they are hardly ever concerned with the categories, terms, and indexes used in NGO databases. Turning this raw data into spreadsheet

[148] See Section I(A) of RQ 1, "What's in a Name?"

material would require a painstaking effort of revisiting old cases and reading pages and pages of handwritten minutes to distill case descriptions, reporting histories, types, and actions taken.

Interestingly, the subject NGOs and community practitioners are all consistent in at least one area of their record keeping: they take note of the things that they feel are most important and/or useful. This explains why some NGOs document particular data regarding "How the Complainant heard about our organization", "Vulnerability status of the Complainant", and "Number of mediations held"—it is useful for donors and policy advocacy—while community mediators are more apt to cherish signed attendance lists, meeting minutes, and agreements, since these are helpful evidence in clan and LC court meetings.

F. When Mediation Fails

Interview data shows that mediations may fail with or without an agreement signed by both parties. When one party disrespects an agreement he or she has already signed, 4 out of the 5 primary informant NGOs approach the offending party and listen to their reasoning for violating the agreement before determining what to do next. As one staff member from X notes, this party may have a very good reason for doing so (ie, the other party may be breaking the terms of the agreement as well). The breaching of an agreement, however, may be for unsavory reasons. The most-cited course of action among community actors is to refer such cases to the police, to court, or to the RDC and provide a copy of the signed mediation agreement as evidence. As one W paralegal recalls, "One person who lost in a mediation registered his case with the Lira Chief Magistrate's Court. We showed court the signed mediation 'agreement' and the judge dismissed the case."

When various attempts at ADR do not result in an agreement between the two parties, NGOs may respond in different ways. Staff of V usually decide that "Our part has ended. The rest is up to God--it's now out of our hands," and let the parties go with a word of advice about available options. In contrast, legal officers at X explain that they follow up even on cases where mediation was unsuccessful, to allow time for the parties to cool down and to see whether X can support the process in a different way. "When one party wants the mediation to fail," they say, "we investigate as to why. Does the party want the case to back to the clan to be heard again? We as X would support this. If it means the dispute would be resolved, then good! It doesn't have to be us who mediate." W and Y may instead tend to refer the designated 'loser' in such a case directly to court, where he may find the other party represented by an advocate from the NGO's team.

RQ 2: What practices are associated with 'successful' outcomes?

This section is intended to be a reference for land dispute mediators[149] seeking to learn from their colleagues. First, different actors' techniques for winning and keeping the trust of both parties are explored, followed by a look at how parties define a fair or just process. From there, major findings for 'successful' strategies for different stages of the process—intake and mediation—are discussed in light of the three primary criteria for success described under Research Question 1, II(C). Recall that these are, from most- to least-cited, that:

[149] The term 'mediator' is used here and elsewhere to generally refer to actors who mediate, conciliate, evaluate, and arbitrate land disputes.

Table 7: Key Criteria for Success
(According to NGO staff and Community Actors)

1. **Some kind of agreement is made between the parties** (43%)
2. **Parties actually put their agreement into practice over time** (38%)
3. **The relationship between the parties improves** (29%)

The section concludes with a description of successful practices for use with challenges commonly faced in land dispute ADR—witchcraft, power dynamics, safety and violence, and 'stubbornness'.

1) Successful Strategies for Winning and Keeping Trust

Observations and conflict resolution literature emphasize that if parties do not have confidence in the persons handling their dispute, the meeting is not likely to end well (if it even happens!). Similarly, the Northern Uganda Land Study (2008) for the World Bank also found that familiarity, fairness, and trust were key considerations in party's choice of a conflict resolution forum upon returning home from displacement.[150] This suggests that it is extremely important for ADR practitioners to win and maintain the trust of both complainants and respondents. But how is this done effectively?

1. Don't appear to favour one party over the other…

The majority (69 percent) of NGOs and community actor respondents emphasizes how the mediator builds trust by remaining impartial—and being *seen* to be impartial—from intake all the way to follow-up. Since perception plays such a key role in parties' personal decision making, a mediator may need to take extra steps to make sure people know where he or she stands—not on the side of either party, but on the side of justice. One NGO staff member from X explains that when she gives her phone contact to all of the parties at once in the general meeting, she tells the community "Don't call us thinking you will win us to your side, because we're not like that." Still another staff from V emphasizes the need to treat parties with equal importance—using body language which suggests the mediator is attentive and listening to whomever is speaking and not answering phone calls while in the meeting.

A mediator's choice of words is an area that receives particular scrutiny from parties. "Really be careful with your responses to their questions," a legal officer from Z warns, "since parties are testing you the whole time to see if you're trustworthy." A Parish Priest describes how he communicates neutrality throughout the process: "I don't speak ill of either party or give my personal opinion about the case even when they ask me for it." A mediator's impartiality may help achieve all three criteria for success according to observations and interview data from previous mediation participants. At the same time, a mediator who is too distanced from the people involved may be perceived to be biased and aloof, as is the case with participants in a dispute mediated by one community actor who refused to write an evaluation letter to court regarding the failed mediation. As one NGO staff person observes, "If I stay quiet, people will wonder what I'm thinking. It may look like I'm hiding something."

[150] Rugadya, M. (2008). See Table 54: "Choice of Dispute Resolution Institution (Post Conflict)", pg. 61

a) Acting as a "Voice of the People"

One third of community actors (including V Paralegals, LC 2s, and clan chiefs in charge of land) pursue impartiality in an interesting way: by appealing to the standard of the majority view. "Whatever we say is just what the witnesses, elders, and neighbours have already said," explains a group of V paralegals, "so parties get to see that we are neutral." An LC 2 Chairperson in Apac Sub-county adds, "We just reflect the community view. We rule how the community rules." While this strategy may work well for pressuring parties to 'agree' on a certain outcome to settle the dispute, observations of an LC 2 court session and interview data from persons who underwent clan arbitration reveal that the other two criteria for success may not be met. When one party feels outnumbered by the majority view, they are unlikely to keep the "agreement" and such a situation may in fact lead to greater strain on the parties' relationship. Furthermore, it is very possible for the majority's view to be biased—so merely repeating what the crowd says does not necessarily mean the mediator is being fair.

2. Be self-confident, friendly, and focused.

The mediator's personal conduct is cited by 38 percent of respondents as an important avenue to win and keep the parties' trust. This includes conveying a consistent sense of command, control, and focus to let parties know the mediator is serious and to discourage any attempts to frustrate the process. It may also mean having a friendly personality and using well-placed humour to make parties feel at ease and comfortable in the mediation.

b) Arrive early in the field

One legal officer from Z makes a practice of arriving early to a scheduled mediation to show that he is personally committed to resolving the dispute. While he waits for the community to gather, he uses this time to get to know the people that are around him and begins building rapport, or friendly relations, with them. Parties may arrive to find the mediator and others in good spirits, which, depending on the nature of the dispute at hand, may help parties to open up and decide more readily to agree. This strategy likely contributes to all three of the criteria for success because the mediator's conduct effectively 'sets the tone' for the mediation and fosters an atmosphere which supports cooperation.

3. Keep details of the dispute confidential and the process transparent.

Interestingly, 31 percent of NGO staff members and community actors see confidentiality and transparency as next-most important tools to gain party trust. Keeping sensitive case information private and remaining open and straightforward about the process which the mediator uses can signal to parties that it is safe to talk about the "real" issues because there will be no surprises. Being clear about the way in which decisions will be made—whether by the parties themselves or the mediator—can also help both parties feel confident in the process because the procedural playing field is seen to be level, with everyone "on the same page" about what to expect. For these reasons, these strategies are among those most likely to foster at least two of the three criteria for success: the creation of an agreement and an improved relationship between the parties. The actual implementation of an agreement may also be promoted by confidentiality and straightforwardness, but these links were not directly observed.

A. Parties' Reasons for Trusting the Mediator

Table 8: Parties: *"I could trust the mediator because…"*

1. I could tell that he/she was committed to resolving my dispute (37%)
2. He/She valued me as a person (32%)
3. He/She was objective and impartial (26%)
4. He/She did not charge any fees (16%)
5. Of his/her leadership position and/or identity as "one of us" (16%)

The most-cited reason for participants placing their trust in the mediator is the mediator's demonstrated dedication to resolving their dispute. Parties perceive this commitment in the prompt attention given to their case, the quality of the solution-oriented questions asked, and the consideration shown for each party's needs and concerns. As a previously hostile Respondent in Apac recalls, "I realized that the Mediator was just trying to understand our conflict so it could be solved. I even advised my brother during the process to not hurt our sister-in-law after all, since I could tell the case was going to be handled well."

One interviewee mentions that he could trust the mediators because of their qualifications and experience as clan chiefs in charge of land, while another said that the mediator's status as a fellow Langi also enabled him to feel more confident in the process. This theme of being "one of us" came up again in interviews with X, where legal officers explained that being fellow Acholis allows them to speak the same language as the parties and understand their lives better than non-Acholis could.

B. How Parties Define a 'Fair' Process

Responses from 25 individual interviews with prior mediation participants (Complainants and Respondents) provide insight into how parties perceive fairness in the ADR process. The top five criteria are described below, ranked from most- to least-cited.

1. Both parties are satisfied with the outcome.

The most popular response (29 percent of respondents) to the interview question, "Was the process fair? Why or why not?" centers around the equal level of satisfaction that both parties have with the result of the mediation. It is therefore noteworthy that parties see the *outcome* itself as a very important piece of the process. Where both parties walk away satisfied as having 'won' some benefit, they are likely to call the mediation fair. By the same token, one complainant says the process of her mediation was unfair just because the land was not divided equally between her and the respondent. She interprets the mere inequality of the outcome as unfair.

2. Local leaders and all key beneficiaries were included.

Another common response (18 percent) is that the process was fair because of its inclusive nature. The fact that important decision-makers in the community such as LC 1s, clan heads, and/or pastors were in attendance leads several parties to describe the process as just. In fact, one party suggests that mediation may not even work without the clan. "NGOs may leave us one day," he remarks, "but the clan isn't going anywhere."

By the same token, when not everyone involved in the conflict was present during the mediation, parties answered negatively. The co-wife of one Respondent in Opit Sub-county shared her frustration at returning from the market to find that the mediation had taken place without considering her or her opinion. When she stumbled upon the entire group gathered under a tree after they had already reached a decision to divide the land, she uttered an insult to the daughter of the Complainant. This sparked a physical fight in which the Complainant, an elderly woman of around 70 years, was struck with a stone. Needless to say, the mediation did not succeed according to any of the three criteria.[151]

3. Parties had equal opportunities to speak and fully discuss key issues.

An equal share of interview respondents (18 percent) also stressed the value of sharing 'talking time' and having an equal opportunity to raise issues in dispute during the mediation as trademarks of a fair process. In addition, some parties see a thorough covering of the issues as essential to having a fair mediation. "Both parties were given equal chances to speak," one recalls, and all relevant issues were brought out in the open and dealt with." "The mediator left doors open for questions," another explains, "and everyone was free to ask until they were satisfied." This comment suggests that a mediator should be flexible and patient while parties unload all their grievances.

4. The mediator's evaluation was based on customary law, not personal opinion.

Six percent of parties explain that appealing to widely accepted customary land laws—rather than a personal, arbitrary opinion—makes the process fairer because such transparent evaluation-forming leaves less room for bias.

5. The mediator did not force anyone to agree.

This deals with parties' perceptions of dignity and respect in the decision-making process. An equal share of parties (6 percent) inform that they appreciate and see it as fair when mediators recognize the free will of each party to make their own decisions in light of the law.

2) Successful Intake Strategies: Major Findings

The following list of good practices for land ADR is distilled from observations of actual mediations, interviews with various practitioners and parties to land conflicts, and reviews of NGO case files. Each of the techniques below is chosen in light of its ability to bring about some or all of the three criteria for success described earlier, and are not listed in any particular order.

1. Learning the history of a case before taking it in

Conducting a short but in-depth interview with persons reporting a land dispute can save time and resources by revealing key details about whether and how to appropriately

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[151] …During this interview, the Complainant and Respondent each shared challenges they experienced during the mediation in the presence of the other party. When the Respondent expressed indignation at having been left out of the decision-making over issues that directly affected her family, the Complainant began to have a better sense of empathy and understanding. By the time the researchers drove away, the parties who had once physically fought were now laughing together!

proceed with the case. As discussed under Research Question 1, forum shopping is characteristic of the life cycles of many land disputes. Understanding prior events, evaluations, and decisions related to the dispute at hand therefore ensures that the mediator is well informed, less likely to become another forum for parties to shop, and not acting contrary to the law (ie, mediating a case which is pending in court). Likewise, if a practitioner accepts to handle a case without thoroughly assessing the background of the dispute, he or she runs the risk of being manipulated, accused of bias, or involved in a case which is the responsibility of the courts.

2. Using an Intake Form to gather consistent data upon registration

NGOs and other actors who record the details of the people and cases they work with—in anything from exercise books to electronic databases—are able to tell a more useful story of land disputes in their area. Intake forms such as those used by X are helpful because they are designed to capture the same types of information for each case, which are later compared and analysed. These completed forms are placed inside each case file and include the particulars of each party, a summary of the dispute and its reporting (court) history, and various items for analysis such as Vulnerability Factors, and Type of Case. While some actors (Y and Z) use a ledger book to record case data at intake, there is a tendency to condense notes for items such as Description of Case and Actions Taken by the practitioner to fit in a very narrow writing space. Thus, some important details may go unnoted. Intake forms, on the other hand, can be designed to leave ample space for each recording item and feature set multiple-choice answers to help with consistent wording for descriptions.

3. Taking a Leave of Court to mediate rather than withdrawing a case

Since cases cannot be heard in two different places at the same time, many disputants and mediators alike think that a case must be fully withdrawn from court in order for it to undergo ADR. If mediation fails, then the case must be registered afresh in court, with all the accompanying court fees and delays. But there is another way! If a land dispute is reported to X but is already pending before the Chief Magistrate's Court, for example, X legal officers will meet with both parties to negotiate for both sides to take a Leave of Court to mediate.[152] As long as both parties are willing to mediate, the court will in most cases pause the case and give the parties a grace period to mediate. Should the matter be settled during this time, the resulting agreement is forwarded back to court, where it is filed as a Consent Judgment. The agreement therefore becomes a binding court decision and usually not allowed to be appealed against. If ADR fails to settle the matter, the court case resumes where it left off before taking the Leave. This strategy works because it saves money and time, provides legal backing for ADR agreements, and can help parties experience the difference between antagonistic and cooperative forms of dispute resolution.

4. Conducting Preparation Meetings

Experience from X and Z shows that once a land dispute has been reported, it is helpful to sit down with both parties to discuss their claims before deciding how to proceed with the case. If a mediator summons the Respondent for mediation immediately after receiving a complaint, the Respondent may perceive the mediator to be biased for acting on behalf of the Complainant without consulting the other party. Since mediation is not always the best

[152] See *Land Act* S.88(2)

available option, it is also wise to include both parties in decision-making right from the start and assess whether the parties are even willing to mediate. Staff at X and Z use such meetings to negotiate for ADR instead of court, begin building party trust in the mediator and a cooperative spirit between the parties, identify the core issues of the conflict, and probe into the facts of the case to see how best to move forward. Learning about the dispute in advance allows for more thorough legal analysis and a more efficient and focused mediation session.

3) Successful ADR Strategies: Major Findings

1. *Different ADR styles may work better with different types of land disputes.*

Available caseload data from X, Y, and Z[153] shows that 88 percent of all resolved Contested Land Sale disputes, 100 percent of Contested Land Gift wrangles, and 80 percent of "Land Grabbing" cases were resolved through the NE-Conciliation approach. In other words, NE-Conciliation is more closely associated with resolved Land Sale and Gift disagreements and "Land Grabbing" disputes.

One reason for this could be that NE-Conciliation's outcome of a winner and a loser fits nicely with the clear-cut nature of most Contested Gifts and Sales and Land Grabbing cases, where one party is clearly in the wrong. In these three types, a reading of customary or state law usually identifies a winner and a loser automatically. Either the giver or the recipient, or either the buyer or the seller is at fault for violating customs or laws regarding land transactions. While Land Grabbing can take a variety of forms (illegal land sales, denying orphans and widows rightful access, encroachment by neighbours), winning and losing in these situations is essentially a question of what land rights a party has according to custom and/or law. A loser is thus someone with no rightful claim to the disputed land. The danger here, as is discussed elsewhere, is that "exposing" a loser (one who deliberately aims to grab the land) in the absence of enforcement or credible authority may trigger an unpredictable response. The person could do anything from relinquish their claim to escalate their efforts to take the land. Conciliators might as well find themselves stuck between a hungry lion and the object of his or her appetite, warning that *"according to customary law, you can't do this!"*

The same dataset reveals an even stronger link between the NE-Mediation method and the settlement of Family Land wrangles, Inter-clan land disputes, and Contested Ownership cases: The success in 100 percent of all resolved cases in each of these type-categories was achieved through NE-Mediation.

It may be that the 'messy', personalized nature of these disputes—which are rarely just about the application of legal or customary land rights—makes them better suited for interest-based mediation. Relationships generally play a more critical role in these types of conflicts. As such, dividing family members, neighbours, and rival clans into winners and losers could be toxic to the spirit of unity and disastrous for improved relations over time. Mediation's vision of a win-win outcome may therefore be the best avenue to resolve these disputes while maintaining social harmony.

Successful ADR styles do not seem to be totally exclusive to specific types of cases, though. NE-Mediation and NE-Conciliation are each responsible for about half of all resolved Boundary and Encroachment-related disputes. This suggests that territorial cases may be

[153] See also Appendix 4b, 'Successful' ADR Styles by Dispute Type

unlocked from either the clear-cut conciliation approach (*Here is where A's land ends and B's begins, but now can A give any concessions to B?*) or the relational, mediation angle (*Let's agree on the boundary so we can live as good neighbours*).

It is important to note that the limited nature of available caseload data does not tell the full story. A question is raised, for example, that numbers and the labels "Solved" or "Mediated, Agreement" leave unanswered: Were these disputes actually resolved, or merely settled for the moment? Until gaps in current caseloads are filled and data concerning follow-up of previously settled cases is collected, we cannot conclusively say whether these ADR styles are linked to success *in the long run*. Moreover, since X, Y, and Z are the only source of this data for now, only two ADR styles are represented for analysis. If cases from T, U, V, and W were included in this dataset, different findings regarding additional ADR approaches may result.

2. *NE-Mediation holds promise for 'good faith' disputes.*

In light of the above, NE-Mediation bears special recognition as an ideal ADR style for 'good faith' disputes. As observed, the Neutral Evaluation aspect allows parties to weigh their claims for themselves against the objective standards of custom and/or law, without forcing parties toward any particular conclusions. In the words of one former Complainant, "I could trust [the mediator] because he was not stating his own opinion or making things up, but using the law and facts."

The mediation aspect encourages parties to be the primary option-inventors and decision-makers, while the mediator serves as an advisor as issues are discussed. This enables communities to better trust the mediator, since 'the outsider' has not come to tell the community what to do, but rather to help them find a solution to their problem. It also helps to ensure that parties will own, or feel a strong commitment toward, any agreement that they make and will be more likely to keep it over time. "The process was fair because [the mediator] did not force either of us to go a certain way," says a former party of Z, "but valued our free will as people to decide for ourselves… *I decided to forgive* the clan leader who was encroaching into my land and dropped my grudge against him. Now, we are at peace and have begun talking again."

NE-Mediation also seems to work well because it seeks to balance concerns of justice with those of peace. The 'justice issues' are covered in the mediator's evaluation of each party's land rights and relevant land customs/laws, while 'peace issues' are dealt with in how the mediator helps the parties to communicate and find mutually acceptable solutions to their dispute.

Other ADR approaches may fall short in the way the neutral takes control of the decision-making process. In Conciliation, 'Pressurized' Conciliation, and Arbitration, agreements may be perceived to be imposed on the parties by the neutral, leaving the parties with little personal incentive to keep the agreement. Practitioners who take control of the decision-making may also assume that they know what is best for the parties, and this is simply not always the case. In an observed session with W, the conciliators relied on their personal bargaining power to secure agreement around the terms they, not the parties, had invented. Once this was finally obtained, the Complainant—on behalf of whom the conciliators were pleading and who was the first to sign the 'agreement'—walked away while the rest were signing and did not even stay for concluding remarks and prayers.

Some conciliators claim that it is necessary to tilt toward the side of justice (rather than peace) when working with parties who do not want to "play fair" or stop their abusive actions. Y conciliators establish the land rights of each party and encourage the non-rightful owner to leave their claim: "Then, if this person needs help, we ask the rightful owner to make concessions." But should the other party refuse to abandon their illegitimate claim even after concessions have been offered, Y makes it clear that "we will support whoever is in the right, even if that means taking their case to court on our own expense." Cases like these, where there is deliberate unwillingness to uphold land rights, raise the question of whether both parties are operating in good faith. It could be that such cases are examples of land grabbing.

3. ***Caucus can help improve communication.***

Few things are more frustrating to a mediator than watching a budding agreement unravel due to lack of communication *within* a single party. In an observed conciliation with Y, clan elders asked the neutral for a brief moment to discuss matters amongst themselves, away from the rest of the group. When he was sure the elders would not begin fighting, the conciliator called a short break and allowed the elders to step aside and talk. The neutral remained seated with the rest of the group and encouraged smaller informal conversations. This made the process more efficient by giving the elders time to arrive at a unified position on their own terms, which they brought back to the larger group in a spirit of cooperation. Had the conciliator not allowed this caucus to take place, the clashing personalities of the leading elders (who were not even parties to the dispute!) would have most likely dragged out the process and led to further ill-feelings between the two groups.

A caucus is a private break-out session that is held between the neutral and one party or the various members of a single party. To remain neutral, actors who practice this technique make sure to meet in private with first one party, then the other. The purpose of a caucus is to probe the deeper personal or background issues of the dispute in a safe environment where no one but the mediator will hear. The neutral then takes what is learned in caucus and, without betraying confidence, uses these details to guide parties toward solutions that both will find acceptable.

Observations and interviews with former disputants suggest that parties may need to confer with their dependents (clan elders, family members, etc.) at two points in the process: 1) at the very beginning, when the group opts for mediation over court; and 2) later, when terms of the unfolding agreement are being considered. In the communal Acholi and Lango contexts, a non-stop ADR session may also cause parties to begin to feel isolated from their constituents and pressured by the momentum of a process that gives them no time to reflect on important decisions.

A parish priest in Amuru District describes the impact that confidential breakout sessions can have on the relationships between individual parties and the mediator. After a group session has been adjourned due to stubborn unwillingness or flaring tempers, the mediator conducts a friendly one-on-one visit with each party. During this time, the mediator tactfully probes the person to discover the underlying reasons for his/her stubbornness by asking questions such as, "What makes you feel the way you do?", "How can we make this situation better?" and "What do you think God wants to tell us here?" This conversation gives the party a chance to vent anger and emotion, to build trust in the mediator, and reveal sensitive information that they would not feel comfortable disclosing in public. With this new knowledge, the mediator can then approach the mediation more aware of the human factors at play.

4. Teaching—rather than judging—parties may lead to more durable agreements.

Neutral Evaluations can be delivered in many ways. Instead of giving a legal opinion as direct instructions to be followed, Z mediators make a habit of sharing their evaluation of the case in a different way: by teaching the entire group about laws, procedures, and customs that are relevant to the dispute at hand. This is done without naming or blaming any particular party, and works in 'good faith' disputes because it utilizes parties' free will to decide how they will respond to the law. Here, the mediator humbly assumes ignorance on the part of the community and use the mediation session as a chance to bring everyone to the same understanding of the law. Should one party refuse to obey the law, it then becomes clear to everyone that the person is deliberately acting with ill intent. "[The mediator] taught us in such a way that we realized for ourselves that we were wrong," a former Respondent in Apac explains. "He never told us directly or judged us, but recognized our free will to make choices for ourselves. He started with counseling us individually, then moved to the land issue… The mediator really listened to us." The agreements that come out of these self-made decisions, interviews suggest, are likely to last longer than 'agreements' that are imposed by an outside actor.

5. *Underlying motives are the key to unlocking resolution in some cases.*

Observations and interviews confirm Herrera and da Passano's claim that land disputes are often not just about land.[154] Rather, subjective concerns such as social relationships, legacies, inter-group politics, cultural norms, and group psychology can and do play very strong roles in sparking and fueling land conflict. Interviews reveal many of the root causes cited for land disputes in Lango and Acholi hinge upon hidden motives (greed, revenge) and sensitive relational issues (reputations, family grudges, prejudice against outsiders). Discovering and tactfully addressing these dynamics can help unlock parties' competing positions and 'get to the bottom of things' to achieve mutual understanding.

In a Y-led conciliation in Apac sub-county, one *mzee* and his wife were entangled in a bitter dispute with their grandchildren over land access. Once the land had been inspected and a neutral evaluation given which identified the grandparents' actions as contrary to custom, the grandparents were still unyielding. At this point, the conciliator decided to take a different approach: to teach the family about *being* a family and sowing peace for future generations. The conciliator's gentle reminder to the *mzee* about his role as patriarch to set a peaceful example for the rest of his family helped turn the tide. "Because of Y's request," the *mzee* later said to the community, "I will do what brings unity." After the agreement had been signed and boundary trees planted, the *mzee* explained in private that the conciliator's words had prompted him to forgive his grandchildren for their past actions. This example also shows how powerful the motive of "saving face", or in this case being acknowledged as the strong leader of the family, can be to bring about both reconciliation and resolution to the dispute.

6. *Recognizing non-party interests to prevent future land wrangles before they start is always worth the effort.*

In other cases, it is wise to take stock of hidden interests—and persons—involved. For instance, the mediator may gauge if the inheritor is more vocal than the widow herself, or if the

[154] A discussion of this appears in the Literature Review, pg. 19

uncle's sons are talking more than the uncle. In an observed meeting facilitated by X in Lamogi Subcounty, the daughters of the Complainant were apparently much more interested in the outcome of the case than their widowed mother. Since these opinionated women already shared land with their respective husbands, the daughters may have wanted to secure their mother's land in order to sell it and obtain money from the sale. When the mediator is aware of such dynamics, he or she may be able to address them indirectly (i.e., by asking a clan leader to explain to the group the proper procedure for sale of customary land) and avoid setting a Contested Land Sale in motion.

Other measures used to stop future land disputes before they start were found to be the planting of boundary trees (such as *omara-omara*) in the presence of neighbours and witnesses and the sketching of maps of the disputed land signed by neighbours, elders, and witnesses. These serve as physical evidence to rebuke any future challenge to the land rights of either party or their children. When these details are missed, however—as in the case of Grace from Barr subcounty[155]—cycles of vulnerability may rage on.

When the result of an actor's intervention is more confusion and conflict, the local community will likely begin to lose trust in that actor, and may even lose faith in the potential of ADR to solve disputes. Successful mediators are therefore those that look beyond the present conflict to the interests of future generations.

4) Approaching Challenges Successfully: Major Findings

1. *Witchcraft*

Nearly every community actor and NGO staff interviewee commented on how extremely difficult it is to prove whether accusations of witchcraft are founded. Whereas one Complainant in an observed mediation produced "photographic evidence" of the Respondent (his brother) performing charms, cries of intimidation by witchcraft often fall on suspicious ears. When one party threatens to use witchcraft to harm the other person during the course of a mediation, however, the issue becomes more concrete for the facilitator. Nonetheless, whether in the form of accusations or threats, witchcraft can be a tricky issue to work with. So how do land ADR actors in Northern Uganda successfully handle it?

[Accusations]

Three-quarters of community actors say that once a party produces reasonable evidence that witchcraft has been used against them in the dispute at hand, the mediation should be adjourned so that the witchcraft case can be settled. Once this issue is handled by the LC 1, clan, or police, the mediation of the land dispute can resume. The other 25 percent insist on first finishing the land case before proceeding to investigate the witchcraft issue. This is precisely what took place in a mediation facilitated by U's Sub-county Land Conflict Mitigation Committee in Pabbo. The Complainant (a widow) and the majority of the people in attendance described with gusto how the Respondent (a brother-in-law) had been hiding charms on the widow's land to force her to flee. Each time this matter was brought up, the Respondent began confidently smiling and occasionally burst into laughter. When directly asked by a community member whether the witchcraft issue would be addressed at all, the mediator responded by saying, "The man in charge of hearing that case is not here today, so we are only here to resolve the land

[155] Grace's story appears in Appendix 3

matter." Later, in this same mediation, the mediator attempted to bring the parties together and shake hands in reconciliation. The parties were far from ready to come to an agreement, however, and the Complainant strongly refused to greet the Respondent because she feared he was wearing a charm on his arm intended to curse her.

Interview data indicates that at least in some cases, it is important that issues of the use of witchcraft (a criminal offense) be handled as soon as possible. To do this, most community actors advise the neutral and local leaders to investigate the claim to see whether it is likely to be valid. X mediators ask the community whether it would be best to handle the witchcraft matter before proceeding with the land case, or first finish the land dispute before dealing with the witchcraft issue. This keeps the process transparent for those involved and recognizes that such criminal matters are best left to police. Handling witchcraft matters first, these mediators observe, can help "clear the air" of fear and ill will to finally resolve the land dispute.

[Threats]

Cryptic statements such as "I know *something* I can do to get him off my land[156]" along with suggestive body language may be implicit threats of using witchcraft to intimidate or harm another person. When such threats are made during a mediation session, community actors and NGO staff generally agree that the neutral should immediately explain to the group that such actions and threats are neither constructive to the process nor tolerated. Z mediators take such an opportunity to also teach the community about the "worthlessness" of witchcraft by telling funny stories from experience that expose the undesirable consequences for those who engage in those practices.

Assertively addressing this issue up front lets the parties know that the intermediary is serious about resolving the dispute in an objective way and can help redirect the community's thinking from fear to assurance. It can also serve to hold parties accountable for threats they make. W paralegals have a very interesting strategy for dealing with threats of witchcraft during conciliation meetings:

> "If a threat is made, we make the person know that "Should anything happen to the other party, we shall come for you (to face you with the LCs and police)." We write down the threat, and the one who issued the threat is made to sign underneath that *"If anything bad happens to the threatened person during the next 2 years, it is my fault."* This contract will hold whether or not any bad event, like a lightning strike, is a direct result of any action taken by the one who made the threat."

While this approach may step outside the realm of neutrality, it may also fit well into the clan's responsibility for keeping order in the community since such 'contracts' are written and kept in clan record books.

If a party persists in making threats, however, the neutral may adjourn the land case and refer the witchcraft issue to the LC 1 or clan leaders. Nevertheless, practitioners warn that pausing the land case for an indefinite time period and putting an injunction on the disputed land may accomplish just what a malicious party wants. W legal officers inform that Magistrates may even cite "Due Fear" of going to visit lands in dispute if witchcraft is said to be present, which suggests that such accusations can serve as a stall tactic for persons trying to grab land by

[156] A peculiar quote from a fresh Complainant at a mobile legal aid clinic in Barr Sub-county. What is remarkable is that this man was simply reporting his land dispute… and outside of the presence of the other party!

taking advantage of court delays. In such situations, "Due Fear delegations" of clan leaders and community paralegals may then be appointed to carefully and prayer-fully examine pieces of land on which charms are said to be placed. Several other community actors—including T clan mediators and a LC 2 Chairperson in Apac Sub-county who says his right leg had recently been bewitched after inspecting disputed land—suggest that prayers for protection and guidance are essential in proceeding with these cases.

2. *Violence and Hostility*

Anger, hostility, and aggression—warning signs of physical violence—are often present in land dispute mediations. Observations and interviews suggest that the prevention of escalating tensions is much more helpful than other reactionary strategies for dealing with violence. When these signs are noticed early on in a mediation session, Z mediators redirect their energies to "washing" violent attitudes from participants' minds with a joke or story that causes everyone to laugh, a group prayer to ask for patience and forgiveness, or a new seating arrangement (where the most hostile participant happens to sit next to the mediator). This catch-it-early approach can help the parties to relax again and reset their thinking before it evolves into a physical scuffle. Alternatively, if they are "tipped off" about a potentially violent case beforehand, X, Y, and Z mediators ensure that key community leaders are present and alert local police posts to be on call in case things get heated.

When physical violence does break out, however, 4 out of 5 NGOs withdraw from the session and rely on the local leaders to control their community members. These mediators argue that people who are 'in the heat of the moment' are not likely to listen to reason and will cause the mediator to violate his or her neutrality if they try to intervene. One legal officer from Y vividly recalls a time when he encountered violence in a meeting:

> "I remember everything about it… the date and the exact location. It was an inter-clan conflict regarding the children of divorced woman. The parties were throwing harsh words, and as everyone was preparing to inspect the land, the Respondent became hostile and shouted "No one will go to our land!". I announced that the mediation was now over for the day. But just then the wife of the Respondent picked up a bench and struck the back of the Complainant's head with the sharp corner of the base. He fell down and melee broke loose—about 30 people began seriously fighting, destroying crops, breaking cassava stems, and throwing stones. It was a large gathering so I didn't notice that this was actually a pre-arranged fight… very many people had brought sharp things along with them to the mediation. While they were fighting, I stood to the side with the elders and asked the LC 2 why he wasn't intervening to stop the fight… He finally did. Afterwards, I told the Complainant to report the assault to the police."

Three-quarters of community interviewees respond similarly, postponing the ADR session and referring new assault cases to the LC 1, police, or clan for hearing before resuming the land issue. This in-between time can also be an opportunity to conduct caucus meetings with each party. "After the mediation is adjourned, I give [the parties] time for personal reflection," explains a Parish Priest in Amuru District. "I call the most stubborn people and visit them one-on-one. I approach our conversation in a friendly way and try to understand the reasons for their hostility. I emphasize the questions "What might God want to tell us here?" and "How do you think can we make things better?" If I insist or am too demanding, the person will refuse and continue to fight… I've found this counseling strategy to be quite effective."

3. *Power Relations*

Interview data reveals that many ADR actors wrestle with parties' personal sense of advantage over the other party due to material wealth, education and knowledge of the law, and/or political and social influence. These situations are difficult to navigate because these dynamics are intensely subjective and tied to issues of identity, values, and personal ambition. Nevertheless, when one party is trying to use his or her power to wrongfully obtain the land in dispute, neutrals still have a strategic role to play.

Several practitioners inform that it is best to directly address situations when one party shows an attitude of being 'above the law' or superior to the other party. "Here, I talk with the 'powerful' one directly and point out his weaknesses," explains one Z paralegal. "We may talk privately in a separate meeting, to save his reputation. I try to convince him that others have rights, too and that it is better to settle this dispute outside of court, but sometimes these people have an incentive to drag it to court where they believe they'll win because of delay and the high costs that they—and not the other party—can afford." Another team of paralegals in Minakulu tries to show the 'powerful' party the importance of living together: "You may fall sick one day," they say, "and it is this poor person who will carry you to the hospital."

Where words do not work, other ADR actors strive to level the playing field through their actions. Legal officers from X report that this strategy begins as soon as the parties agree to mediate. "For a mediation to be successful," these mediators observe,

> "There has to be real communication between the parties, which requires a minimum level of respect and a willingness to listen and appreciate the other person's words… If parties have come together to choose mediation over court, they have already had to come down and accept to be on roughly the same level."

This comment highlights the importance of holding a preparation meeting to see whether the parties are actually willing to mediate. Perhaps since most community actors do not seek this consent, but rather impose the process upon the parties, these practitioners can only react to—rather than preempt—power battles.

Interviewees also mention other practical ways to ensure equitable power relations in ADR sessions. Neutrals can insist on balancing talking time—not letting one party dominate the conversation or get more attention—and keep the steps of the process transparent so that no one is privileged in terms of knowing what to expect. Making sure to both rebuke and encourage each party also helps participants to see each other's humanity: how each party has areas to improve. If consistently applied, these strategies are more likely to be effective because they treat parties equally and *illustrate*, rather than simply *state*, what other interviewees refer to as "being equal before God and the law."

4. *'Stubbornness'*

Through observations and interviews, it was found that 'stubbornness'—the persistent refusal of one party to cooperate with the neutral's reasoning—is a common challenge for both NGO and community actors. When practitioners were asked how they respond to this challenge, two major approaches surface which are said to be effective.

First, when the neutral has a tough time communicating with a particular party—perhaps this person feels that his status in the Army or position in government places him above the law and excuses him from having to respond to invitations for a mediation over land

in dispute—the mediator may choose to reach him through his close associates. In the case of an army sergeant or Member of Parliament, these contacts may be a clan elder who watched him grow up, a pastor of his church, or a friend to whom he will listen. The neutral can work through these people to help the party see his need to come and resolve the dispute outside of court. Involving other peacemakers who have relationships with the party can also help convince the person of the benefits of mediation and help the person become more open to the idea of ADR.

Secondly, and perhaps more importantly, interviewees observe that a key to unlocking stubbornness lies in understanding the underlying reasons *for* it. Are there hidden interests or third parties at play? Is the party holding on to the promise of winning in court? Z legal staff act obtain this knowledge in a surprising—and effective—way: a Secret Ballot Caucus. A former Complainant in a successfully resolved mediation describes this process:

> "…The mediator gave each person present a piece of paper and a pen to write what they felt was the truth and who they thought was causing all the trouble. He analyzed these and gathered together all the accused in a separate meeting, where he taught them about treating your neighbour as yourself and to call your neighbour and talk about things in a friendly way if he offends you—to not use violence. The mediator then asked the people in this group to write the names of people *they* thought were causing trouble so he could talk with them, too. He met with these new accused persons in a separate second meeting, and taught them about family issues and living in harmony. He gave different teachings appropriate to each group, and kept these meetings confidential (everything discussed stayed within that particular group). Through this, we all realized our mistakes…"

By recognizing and validating both sides' grievances, this mediator was able to help guide these previously stubborn parties towards a mutual understanding that eventually resulted in an agreement. And sometimes—as is shown by the man who first tries to open his friend's clenched fist by force and then uses a warm greeting and handshake to open the friend's hand, it takes a different, friendlier approach to unravel stubborn obstacles to cooperation.

RQ 3: What practices are associated with 'unsuccessful' outcomes?

No assessment is complete without identifying areas to be improved. This section explores some of the many challenges faced by land ADR actors in Lango and Acholi, warning signs for failure in a mediation, and weaknesses in current practice. The items discussed herein were determined through field observations and interviews with participants in prior mediations, NGO staff, and community actors. While the researchers tried to remain as objective and thorough as possible, there are doubtlessly still other practices yet to be observed and/or critiqued. Practitioners are therefore encouraged to continue evaluating their own actions for themselves in terms of the three criteria for success mentioned earlier. The chapter concludes with a brief summary of lessons learned and advice from fellow mediators.

A. Key Challenges for Land ADR Actors

It is important to begin a discussion of unsuccessful practices with an understanding of the obstacles that local mediators face in their daily work. This is intended not to excuse or condone weaknesses in practitioners' approaches, but rather to provide a more three-dimensional picture of the climate in which these actors operate.

As noted earlier, the lack of enforcement of both court and clan rulings and ADR agreements makes it very difficult to secure finality and 'closure' for parties in dispute. Likewise, inadequate police intervention in land-related conflicts (which are said to be civil, not criminal, matters and therefore fall outside the realm of police duty) is a source of great anguish for both ADR actors and parties seeking protection amid threats of violence and intimidation tactics. Interviews and observations reveal that violence is a common feature among land disputes, and the safety of both mediation participants and the mediator is especially called into question during group trips to inspect the disputed land on foot.[157]

NGO and community mediators also deal with negative attitudes toward their work. On one hand, some practitioners explain how community members view mediation as ineffective and a waste of time due to its 'informal' and non-binding nature. This may simply reflect society's bias in favour of the formal court system—anything other than court is less authoritative than court—or may speak to the reality of the lack of enforcement of ADR agreements. V staff mediators observe that by disregarding the minutes and signed agreements from previous mediations and/or hearings, LCs and courts undermine the legitimacy of these ADR processes. Alternatively, interview data confirms what other studies have shown: clan and *Rwodi* arbitration decisions are easily disrespected and community members mistrust clan courts because of (real or perceived) bias.[158] Since clan courts are not externally funded and rely on fees to operate, some people also resent having to pay the clan to hear their case and may fear the possibility of bribery.

Another negative attitude toward land ADR efforts revolves around the reality of land grabbing. Interviewees describe how rich and 'powerful' parties have no incentive to mediate, especially if they are in the wrong, disliked by the community, and/or own a townhouse in Kampala. Even if such parties show up to a mediation, there is no guarantee that justice will prevail if the 'powerful' character refuses to agree with the neutral's evaluation.

In addition, two out of three groups of community paralegals volunteer their ADR services on top of their existing family responsibilities, which can be quite burdensome in light of transport and opportunity costs. Since each of these interviewees cited their occupation not as a farmer or vendor, but a paralegal for an NGO, it is apparent that some paralegals continue 'working for' NGOs such as V, W, and Z in the hope that they will one day receive facilitation allowance and benefits.[159] When these benefits—and even regular training and supervision—do not materialize, paralegals are left to their own devices regarding how to conduct and keep records of mediations.

B. Warning Signs for Failure

Before addressing unsuccessful mediation techniques, it is also useful to briefly point out features that may signal the failure of a mediation session on a given day. These "warning signs" were mentioned by NGO and community actors and can help raise practitioners' awareness of party and session dynamics.

[157] During this time, the gathering becomes dispersed and planned ambushes may lie in wait for those who move through tall grass and unsupervised areas.

[158] IOM, UNDP, NRC (2010).; Uganda Land Alliance (2010).

[159] See earlier discussion on Training and Facilitation Levels of ADR actors, pg. 45

- ***When a party falls silent and no longer contributes*** to the discussion, this may mean that the person has lost interest in the mediation or has lost faith in the process. If no attempt is made to address the reason(s) for this disengagement, the party is not likely to consider coming to an agreement.
- ***When a party makes occasional phone calls aside*** during the meeting, this may mean that the person is consulting some third party about the issues in negotiation. This is counter-productive because since the unknown third party is neither present nor aware of the group's discussions, his uninformed opinion can undo hours of progress if one of the disputants chooses to rely on it halfway through the session.
- ***When a party has his or her mind set on court*** and is unwilling to fully engage in the mediation, there is not likely to be an agreement.
- ***When a party thinks he or she is above the law***, the party may disregard the mediation process and refuse to listen to reason.
- ***When a party shows a lack of confidence in the mediator or the process*****,** the person is not likely to fully participate and/or commit themselves to any agreement.
- ***When people sit in different factions*** at the mediation session—party A on one side, party B on the other—this creates a climate of division and "us against them" which undermines the cooperation needed to reach an agreement.
- ***When the mediator criticizes or takes sides with either party***, this breach of neutrality and objectivity is bound to result in the un-favoured party's rejection of the mediator and the mediation altogether.
- ***When elders withhold accurate information,*** this can lead to confusion among the community members and raise questions of bias and whether local leaders will act responsibly to protect the vulnerable parties. But since mediators cannot always tell whether people are lying and are simply tasked with helping parties resolve their dispute—not necessarily with determining the validity of the "facts" stated—this warning sign may either be something that the community is able to work through or something that will continue to prevent agreement.
- ***When LC 2 Chairpersons are present*** in a mediation, these persons may have an incentive to frustrate the mediation so that the dispute is later registered at the LC 2 court, so that the Court members benefit from the parties' payment of requisite fees.
- ***When new faces show up later on*** in a mediation session, these persons are not aware of what has been previously discussed and/or agreed, and may send the entire group back to the beginning by commenting on an already settled issue.

Of course, there are probably hundreds of additional "warning signs" that surface in land dispute mediations throughout Northern Uganda. Those listed above, however, represent the most compelling and/or frequently cited in interviews and field observations.

C. Practices Not Likely to Lead to Success

The following is a list of 10 'unsuccessful' practices for land ADR actors that originate from observations of actual mediations, interviews with various practitioners and parties to land conflicts, and reviews of NGO case files. Each of the techniques below is chosen in light of

its apparent tendency to hinder progress towards some or all of the three criteria for success described earlier: 1) that an agreement is made; 2) that the parties actually uphold this agreement over time; and 3) that the parties' relationship improves.

1. ***Cancelling a mediation[160] on the day of, or arriving late to the field***

The workload and responsibilities of a land dispute mediator in Northern Uganda can be quite intense. Nevertheless, observations and interviews reveal that community members and parties can become agitated when practitioners call at 1:00pm to cancel a mediation that was previously scheduled for 10:00am that day. By this time, people have usually already been waiting on location for the mediator to arrive and their impatience may turn into disgust and/or despair towards the mediator, the NGO, and the ADR process itself when they hear the news that the meeting is adjourned. These reactions are understandable, since delays and adjournments have come to characterize the formal court process and are easily perceived as signs of a mediator's lack of concern for the livelihoods at stake. "Z is not like Y," one prior mediation participant confided in an interview, "because Z only took one week to handle my case. My clan brother reported his land dispute to Y and it's been adjourned four times. It still hasn't even been mediated yet, and it's been months."

Likewise, arriving late to the meeting site reduces the amount of daylight during which a thorough mediation—which typically lasts anywhere between 4 and 7 hours—can be held. It was observed that by midday, if there is no other programme, many of the local men may have already begun drinking at the trading center and will therefore not be in the best frame of mind to mediate. Many women will also need to leave the gathering around 4:30pm to begin cooking supper for their families.

Besides unavoidable circumstances such as flat tires, medical emergencies, and impassible roads, two main reasons for delays and adjournments were found.

First, NGO offices may have just one or two legal officers on staff responsible for receiving drop-in complainants, managing case files, running court errands, going to the field to mediate, and compiling reports. ***A mediator who has a field meeting scheduled for mid-morning is usually unable to register fresh disputes in the office at the same time.*** Yet this Be-in-Two-Places-at-Once expectation was commonly observed in offices like W and Y. Some ways to address this are to clearly assign field and office work to different staff members, allocate some days of the week as "Field Days" and others "Office Days" for mediators, or employ additional legal staff.

Second, delays are frequent when NGO offices attempt to receive additional new cases while many others are still pending in an effort to "keep the numbers high" for donors. The resulting backlog and inefficiency mean not only more work for already overwhelmed practitioners, but also disservice—and perhaps injustice—to both the people waiting to have their dispute mediated and those who anticipate an immediate resolution to their freshly reported case. In light of the volatile and urgent nature of these conflicts, such delay is simply not helpful.

2. ***Not writing down partial or full agreements at the end of each ADR session***

[160] The term "Mediation" is used here and throughout the paper in the informal sense, referring to an ADR session or meeting the purpose of which is to resolve a land dispute.

It becomes extremely difficult to hold parties accountable for things they agree to only verbally. The case of Abraham in Amuru District is a heartbreaking example of this. Abraham and his family (the Complainants) were entangled in a nasty land conflict with a powerful neighbouring clan (the Respondents). The parish priest who mediated their dispute worked so tirelessly to convince both parties to sit down together that it was considered a miracle when this mediation finally happened. By the end of the session, the Respondents verbally agreed to compensate the Complainants for the disputed land so that Abraham and his family could buy land and settle elsewhere. Because a second meeting was being planned, the mediator dismissed the meeting without anyone signing an agreement. In an interview five months later, Abraham informs that the Respondents have since taken full control of the land and failed to compensate his family, leaving them displaced and landless. The priest has tried to arrange a follow-up mediation, but the Respondents remain elusive, so Abraham and his family are stuck. "If we had this evidence," he explains regarding the lack of a written agreement, "we think Court could do something to enforce this promise."

In some cases, practitioners may think that since the parties have only agreed upon a few issues, the dispute is only partially resolved and not yet worthy of a written agreement. As Abraham's story shows, this can be dangerous because parties may verbally "lead on" the other party with no real intention of acting upon their promises. Moreover, there is no guarantee that both parties will attend further mediation sessions. This suggests that it is wiser to have parties sign in agreement to a very small amount of terms that future mediations can build upon than to not document any progress toward an emerging agreement only to later start all over again.

3. Threating stubborn parties with force, arrest, or court

Interview data suggests that responding to aggression and violence with force in a mediation can sometimes be counterproductive. Relying on clan Crime Preventers or "scurries" to beat hostile parties with sticks may spark resentment and even less of a willingness to cooperate, and bringing police officers to the mediation is likely to create an atmosphere of fear and suspicion (with participants left wondering, "Who will get arrested by the end of the day?"). As a team of paralegals in Minakulu admits,

> "A mistake we made when trying to deal with violent parties was to threaten to have them arrested in order to cool them down. We would say, "If you don't cooperate with our evaluation of the case, you're going to end up in jail!" Some parties would back down, but others would grow even more defensive, demanding that we produce the police there and then. Of course, we couldn't make that happen, so we had to stop using that strategy."

Mediators who threaten 'stubborn' parties with court also run a sharp risk of violating their neutrality and undermining the very ADR process they are trying to facilitate. By expressing a willingness to represent one party in court, mediators automatically become biased and use their power—symbolized by their connection to NGOs with money and advocates—to pressure parties into an 'agreement'. Unfortunately, as observed in 'pressurized' conciliations with W paralegals, negotiating on behalf of a party and obtaining a certain outcome does not mean that the dispute has truly been resolved. It is no wonder, then, that these paralegals cite as a major challenge the fact that "We're always hated for

resolving a dispute in favor of person A. The people we help always value us, but the other person often sees us as being bribed or biased."

4. Going alone to the field to mediate

When NGO mediators who are not familiar with the community in which a given mediation is to be held arrive unaccompanied, they are vulnerable to a host of different problems. Such mediators—especially if youthful in appearance and/or female—may not be perceived to be socially legitimate and/or knowledgeable enough to facilitate the meeting.[161] Moreover, mediation is extremely demanding work and requires public speaking and facilitation of who talks when, minute-writing, thoughtful consideration of parties' statements and body language, crowd control while inspecting the land, and detailed analysis of customary and state laws. If one person bears all these tasks simultaneously, it is likely that something will go unnoticed, unrecorded, or unaddressed. Furthermore, the safety of a single mediator may be called into question should things get heated.

As Y mediators in Apac discovered through a group of law student mediation interns, there is in fact power in numbers. More mediators in the field on a given case allow for more thorough analysis, division of the workload, quality control, and greater legitimacy in the eyes of the community. Interviews also reveal that community members may even consider the process to be less biased if more than one mediator leads the session, since the neutral evaluation of the case is not just the opinion of one person.

5. Settling the land dispute, but neglecting the relationship

During field mediations, it was striking to note how the majority of practitioners talked about reconciliation, harmony, and forgiveness between the opposing parties, but allowed this to remain a passive exercise. In other words, only 2 out of 10 observed mediations featured the mediator actually inviting participants to take action to reconcile with the other person. While the facilitator has little control over whether the parties will actually choose to improve their relationship, it is interesting that an improved relationship is one of the top three criteria for success in a mediation.

Interviews and observations confirm Herrera and da Passano's claim that land disputes are often not just about land.[162] Subjective concerns such as social relationships, legacies, inter-group politics, self-interests, and cultural norms are found to play very strong roles in sparking and fueling land conflict in Lango and Acholi.

In observations where mediators failed to address these underlying factors, disputes may have been temporarily 'settled', but were not likely to be truly resolved. In one mediation between a divorcee and her former brothers-in-law led by W in Aber Sub-county, the parties signed an agreement in response to pressure from the paralegal team but were emotionally distant and visibly unimpressed with the outcome. When contentious inter-clan issues were raised, the mediators insisted on promoting the Complainant's position. Later, despite having "won" the case, the Complainant sullenly walked out of the meeting

[161] One legal officer from X informs that although she has been both a practicing advocate and mediator for 6 years, she still has a difficult time convincing some parties of her qualifications.

[162] Herrera, A. and M.G. da Passano (2006). pg. 19.

before everyone finished signing the 'agreement' and concluded with prayer. She and the Respondent did not acknowledge each other once after the 'agreement' was made.

Additional interviews with parties to previously "successful" mediations reveal the results of this settled-but-not-resolved phenomenon. Says one Complainant involved in a now-settled neighbourly dispute with his clan brother, "It's been 8 months since the mediation. We have not talked since." Another 20 year-old Complainant whose case against his father resulted in a mediated 'agreement' confides that, "My father and I are not on good terms now. If I greet my father on the way, he just ignores us [my siblings and I]. He told us he won't even come to our burial if we die. I've just given up on my relationship with him."

Unfortunately, neglecting these personal dynamics may fuel even greater misunderstanding and resentment between those involved. Since grudges and broken relationships are commonly cited as major root causes for land disputes, the lasting benefit of such ADR intervention is questionable.

6. Referring cases without follow-up

Due to their heavy workload (with new land disputes reported nearly every day), small staff size, and limited transportation resources, four out of the five primary informant NGOs do not make it a priority to following up on previously mediated cases. Only one NGO interviewed conducts regular check-ups after 6 and 12 months to assess whether the parties are satisfied and to document any problems or improvements that have taken place over the period since the agreement.

It was observed that far less attention is given in general to cases that are referred to court, police, and/or other offices (unless, of course, the NGO has arranged to represent or advise a party in court). These are often entered as "Referred" in caseload databases and effectively closed by the NGO office. With many other pending and fresh cases to handle, land ADR actors rarely find time to return to these "closed" cases to see whether they are receiving the attention they need. Yet following up to see whether the referral helped or prolonged the search for justice is useful because, as one V staff member comments,

> "Once V becomes involved in a case, our organization's name is on the line. How will it look if V's mediation fails and we refer it to court, but then court sits on the case for three years or gives an unjust ruling? In that case, the result of our intervention in the parties' lives is negative. We need to follow up and follow through on the cases we commit to handle."

But even more importantly, checking up on referred cases may help save lives. One organization's experience with paralegals referring violent land disputes to the police is illustrative here. In April 2011, paralegals in Agago District referred the Complainant in a serious land dispute to police due to its violent nature. When the Complainant arrived at the police post, he was told that no action would be taken until he paid for the cost of fuel to transport the police to the site. Since the Complainant could not afford this, no intervention was made. Police inaction and a lack of follow-up eventually allowed this angry Complainant to set fire to the Respondent's grass thatched home on night as a direct result of this conflict. All six, including the Respondent and five members of his family, were burned to death.[163] Unfortunately, this is just one of several similar stories throughout the region and highlights

[163] Justice and Peace News, May 2011 Newsletter

the reality that without sustained interest and persistent reminders, cases—and lives—may fall through the cracks.

7. *Sending accusatory summons letters to Respondents*

In a Focus Group Discussion with 35 practitioners, it was discovered that Respondents' stubborn behaviour may be an unintended consequence of the harsh wording of NGO mediation summons letters. These letters, which often take the form of modified Notices of Intention to Sue, can easily be read as if the practitioner has already heard and determined the facts of the dispute in favour of the Complainant… all without even hearing the other side of the case! Excerpts from actual summons letters found in case files appear below.

EXAMPLE 1

Dear Madam,

Greetings from ____! We are an NGO in Northern Uganda with a vision of a peaceful society where each person respects the other's human rights. We offer both formal and non-formal legal aid services with a deliberate bias on vulnerable persons…

EXAMPLE 2

Dear Respondent,

We act for and on behalf of the Complainant (hereinafter referred to as ***our client***) upon whose imperative, express, and unequivocal instruction we handle all his matters including address you as hereunder:

The Complainant maintains that he inherited this land from his father, and there have been continuous struggles between you and him of which he took you before LC1, LC2, and LC3 but you did not appear before these courts and judgments were passed in favor of our client. **This means that you are now an unwanted visitor on the land!!**

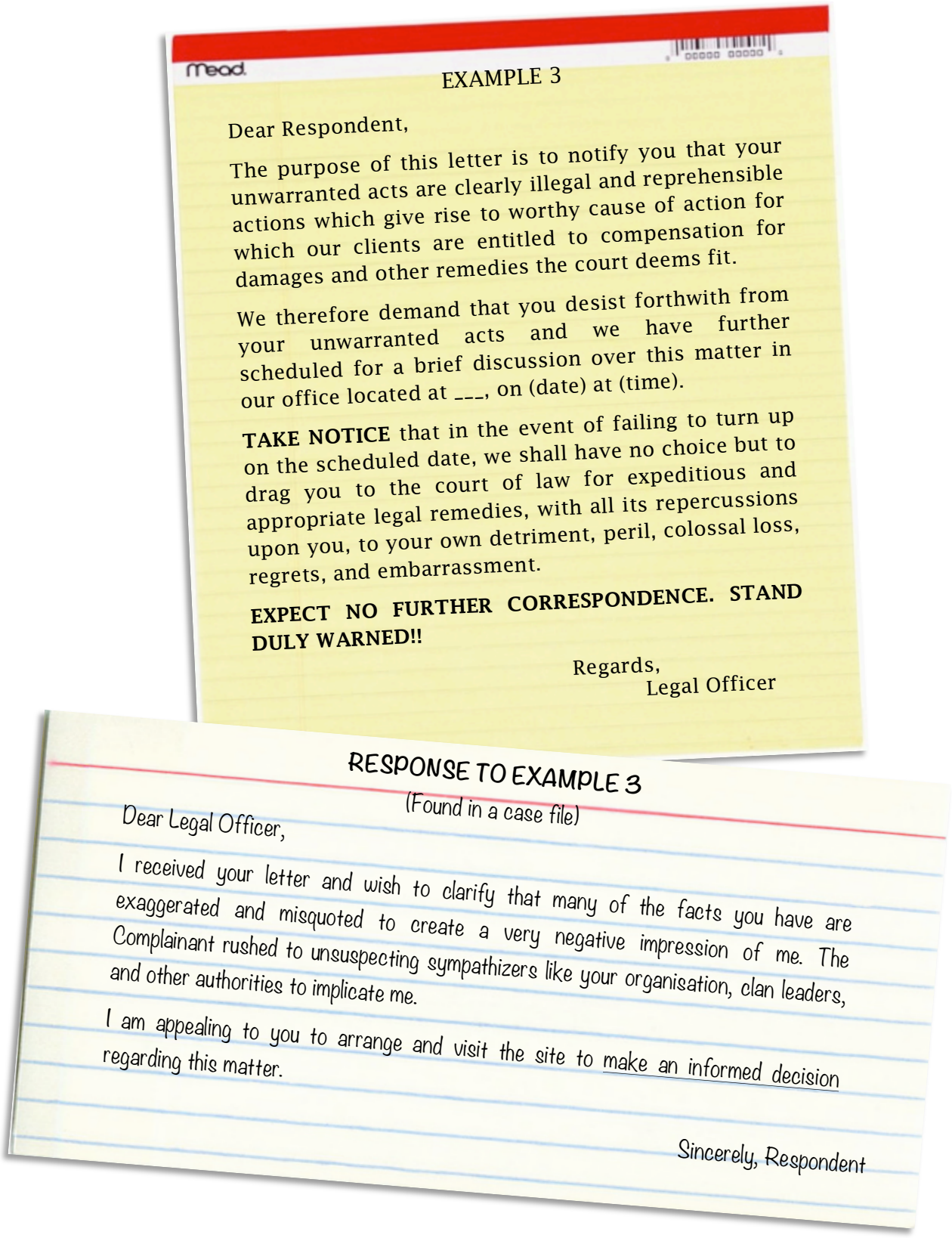
As there are documents to support these facts, you are in breach of the Constitutional rights of the Complainant guaranteed in Article 26 of the Constitution, and your actions constitute both civil and criminal offenses for which you can be prosecuted in a court of law.

The purpose of this letter is to invite you for a peaceful discussion scheduled to take place in our office 3 days from now.

TAKE NOTICE that in the event of failing to abide by our demands hereto, we shall have no option but to refer the matter for litigation since the matter seems to be having some sense. Our aim is to build peace. Shall be grateful if you turn up.

Signed,

Legal Staff



EXAMPLE 3

Dear Respondent,

The purpose of this letter is to notify you that your unwarranted acts are clearly illegal and reprehensible actions which give rise to worthy cause of action for which our clients are entitled to compensation for damages and other remedies the court deems fit.

We therefore demand that you desist forthwith from your unwarranted acts and we have further scheduled for a brief discussion over this matter in our office located at ___, on (date) at (time).

TAKE NOTICE that in the event of failing to turn up on the scheduled date, we shall have no choice but to drag you to the court of law for expeditious and appropriate legal remedies, with all its repercussions upon you, to your own detriment, peril, colossal loss, regrets, and embarrassment.

EXPECT NO FURTHER CORRESPONDENCE. STAND DULY WARNED!!

Regards,
Legal Officer

RESPONSE TO EXAMPLE 3

(Found in a case file)

Dear Legal Officer,

I received your letter and wish to clarify that many of the facts you have are exaggerated and misquoted to create a very negative impression of me. The Complainant rushed to unsuspecting sympathizers like your organisation, clan leaders, and other authorities to implicate me.

I am appealing to you to arrange and visit the site to make an informed decision regarding this matter.

Sincerely, Respondent

With this kind of communication, Respondents may feel that they have to approach the mediation session ready to fight two opponents: the Complainant and the mediator. Example 3 in particular, full of legal language intended to intimidate the Respondent, highlights another weakness in practice: *Believing everything a Complainant tells you.*

8. Believing everything a Complainant tells you

As observed with drop-in claimants at various offices and during mobile legal aid clinics, some NGO mediators have a tendency to listen to and register a case, draft summons notices, schedule a mediation, and/or promise to represent the claimant in court immediately without taking the time to carefully analyze the validity or history of the claim.

When ADR actors do not discern the merit of the cases they agree to handle, this leads to a variety of ills. First, taking claims at face value can result in 'misjustice': unknowingly supporting the wrong party. In a mobile legal aid clinic in Abako Subcounty, for instance, one man stood up to report his land case. He pleadingly explained how he had lost the case at the *Adwong Wang Tic*, LC 1, and LC 2 levels, and had since appealed to the LC 3 (Subcounty) Court. Instead of asking this claimant about the nature of the case or why he believed he had a right to the land, the legal officer conducting the clinic reassured him that "if the LC 3 Court rules against you, come to our office within 14 days and we will organize to pay for your appeal to Magistrate Court." While the integrity of a case cannot be measured at first glance, the fact that this claimant has three judgments against him raises doubts that should serve as a caution against such a hasty promise. Yet by embracing this unexamined claim, this legal officer could end up funding someone's attempt to grab land through forum shopping. Should the rest of the community be already aware of the absurdity of such a man's scheme, the honour and reputation of any NGO who supports him may be seriously put at risk.

Secondly, practitioners who only arm themselves with an understanding of the Complainant's side of the dispute tend to approach the mediation not as neutral mediators, but as biased intermediaries. During each road trip to observe mediations in the field, NGO legal officers would brief the researchers on the "facts" of the upcoming case according to the Complainant. Later, as details of the dispute unfolded in the larger group session, it would often become clear that the original "facts" described in the Complainant's statement were either exaggerated, incomplete, or inaccurate. It is when mediators insist upon settlement outcomes that reflect things the way they "should be" according to the initial complaint that perceptions of bias and unfairness take root.

9. Leaning on the side of the weaker party out of pity

Bias may also take root as a result of good intentions. Interviews reveal that some practitioners struggle with the dilemma of mediating between vulnerable persons and others who are wrongfully denying them access to land. When some parties refuse to act justly or show compassion, mediators may have an urge to "stand up" for the weaker party. For practitioners who are called to both remain neutral *and* promote justice, this can become a very tricky issue.

Through interviews and Focus Group Discussions, mediators emphasize two alternative courses of action in such cases. First, a mediator may actively try to promote the interests of a particular party. This is the strategy of NGO and community actors who practice 'pressurized' conciliation, and is often observed—for various reasons mentioned earlier—to settle, but not really resolve, disputes. This approach may also be dangerous since the mediator's direct support of one party is likely to ignite unpredictable reactions.

On the other hand, a mediator may work creatively to change the attitude or mindset of the abusive party. This indirect method allows parties to see for themselves the implications of their positions and may involve questions—perhaps asked in private to save reputations—that promote empathy, self-reflection, and problem solving. Questions such as, "Imagine that widow (the Complainant) is your mother. What would she have to say about this situation?", "If you were the other person, how would you like to be treated?", and "Can you tell me in your own words what the other side is asking for? Now, can you think of anything that you could do to help address these issues for the benefit of everybody?" are examples of these. In this way, a mediator can still remain neutral while indirectly addressing injustice. Where this technique fails, however, this begs the question of whether such a dispute is genuine or a land grabbing attempt.

10. Operating on a case-by-case basis and missing the bigger picture

It is amazing to see how many community members gather for a mediation session. In this study, anywhere between 25 and 75 people were seen to come to such meetings. Whereas only a handful receives written letters of invitation, the vast majority of those in attendance are usually members of the local community who have simply come to watch a drama unfold.

Even in front of captive audiences such as this, several NGO and community mediators are observed to operate in a narrow focus: resolving only the dispute at hand. There is no question that this is an important goal to have. In fact, all NGO staff interviewees indicate the healthy resolution of disputes as their primary goal for doing ADR. Many NGOs also feature "community sensitizations" and "capacity building" as separate activities on their monthly calendars. But what of the dozens of other potential land disputants sitting under the shea tree? Are opportunities being missed *during* mediation?

ADR actors who place all their attention on putting out the next fire in front of them can easily lose perspective to stop the source of all the fires. Interviews suggest that settling one dispute after another, with no end in sight, is a source of great concern for community actors. In fact, it was "the abundance of land conflicts here, too many of which end in death" which prompted several interviewees to become involved in mediation in the first place. While many grassroots practitioners such as *Rwodi Kweri*, LC 2s, paralegals, and clan chiefs are largely focused on their local communities' problems, others in national and international organizations have the ability to view land conflicts from a wider systemic angle. Only a few of these practitioners, however, seem to be making use of this in their daily practice.

It was observed that the most effective and inspiring mediators are those who see mediations as opportunities for not only bringing localized peace, but also for helping prevent future land wrangles in Northern Uganda. For some, this means changing the mindsets responsible for the rampant land conflicts in the region. A Catholic priest, for instance, addresses the norm that 'anybody who is trying to take your land is trying to take your life, and therefore should be killed' by encouraging reconciliation in caucus meetings and reminding his Sunday congregation of what to do when they have a conflict. For others, it means building the capacity of local communities to manage their own disputes. Z mediators use mediation as a chance to teach all who will listen about relevant land laws, where to go to report a land dispute, and how to improve a family's tenure security by

planting boundary trees and drawing sketch maps. Y legal staff co-conciliate with clan chiefs who also read aloud from the PPRR[164] about the customary land rights of different types of persons during the meeting—in effect, teaching their own community about land issues.

VII. Limitations of the Study

Incomplete records and inconsistent classification systems—both of which are trademarks of the current land dispute resolution framework in Northern Uganda—limit the reliability of the statistical relationships in this study. Furthermore, the brevity of numerical datasets does not tell us whether the cases described were truly resolved, or merely settled for that moment. Though interviews were in-depth, sample sizes were small for NGO actors (n=12) and prior mediation participants (n=25). No follow-up data was found to exist in any of the organizations studied.

Nevertheless, as a pioneering attempt to paint a fuller picture of land ADR efforts in the region, this study has sought to respectfully compile various databases along with observations and interviews from different actors to provide practitioners with a useful resource to begin assessing their own efforts and continue learning from their colleagues. The conclusions drawn are intended to inform current practice and efforts to explore emerging issues.

VIII. Conclusion

The official purpose of this study has been to understand and thoughtfully consider the efforts of land ADR actors in Northern Uganda so that these critical interventions can become even more effective. A deeper motivation has grown, however, as the researchers lived and worked alongside these hero-servants: to see mediators learn from each other for the benefit of all Ugandans suffering land-related injustice. At the time of writing, the Northern Uganda Land Partners Platform is a forum where this is in fact beginning to take place.

It is commonly said in Uganda that if an NGO or a politician wants to get chased out of an area, they should get involved in land issues. The gravity and significance of these mediators' daily work can therefore in no way be overstated. This close assessment of land ADR efforts has uncovered approaches that seem to be highly effective—conducting preparation meetings and teaching rather than judging parties, for instance—as well as those in need of significant improvement—such as neglecting relationship dynamics, threatening stubborn parties, and failing to follow up on referred cases. Caseload analysis and observing the difference between settling and *resolving* land disputes have also led to realization that certain types of ADR may work better with different types of disputes. Accordingly, caseload data on the types of cases most likely to go unresolved and interview data concerning perceived root causes of disputes suggest that land grabbing—situations where A intentionally takes advantage of B's vulnerability to take B's land—is prevalent in the region.

Several key issues emerge from this study that warrant further exploration. First, the observation that land disputes can have personality according to their 'genuine' or 'bad faith'

[164] Principles, Practices, Rights, and Responsibilities of Land under Customary Tenure (PPRR), which have been written for Lango, Acholi, Teso, and (new) Kumam

nature has implications for the practice of participatory ADR. Mediation and other dispute resolution styles—who by definition rely on the parties' good faith to be effective—may not be appropriate in cases of deliberate land grabbing. Further study is needed to better understand these 'bad faith' or 'land grabbing' cases and how they can be best resolved for the long term.

Second, the prevalence of 'forum shopping' and the widespread lack of enforcement of clan, LC, and NGO decisions and settlements highlight the need to ensure effective legal recognition of ADR agreements and the authoritative end of these disputes. Understanding how to best move forward, however, will require the concerted effort of Magistrates, NGOs, cultural institutions, police, court brokers, and other stakeholders.

Third, inconsistencies in recordkeeping among land ADR actors prevent the telling of a larger story about land conflict in Northern Uganda. Without concrete and reliable data, important trends and insights will likely go unnoticed while top-level decision-makers continue to doubt the severity of the situation on the ground. The information gleaned by these land ADR actors will help not only Northerners as they seek to replace impunity with a functioning justice system, but also other communities in Uganda and the world who remain stifled by rife land conflict.

IX. Recommendations

The recommendations explained below are intended to serve as launching pads for both individual and system-wide reflection. While some items may apply more to different practitioners, the reader is encouraged to remember that all of us have room to grow. This is another reason why mediators need each other.

1. ADR actors should focus on the real resolution, not simply the settlement, of land disputes.

a. Land disputes are often not just about land. Instead of overlooking them, **consider and address underlying motives** such as relationships and hidden interests that parties have for acting the way they do.

- The **caucus** (or confidential breakout session) is one tool that can help stubborn parties open up, communicate among themselves, and/or build trust in the mediator.
- Another way is to challenge all those present by asking, "What steps will we (the parties, community, leaders) take to improve the relationship between these parties?" Verbal commitments show support to the parties and can be used to hold those involved socially accountable.

b. **Anticipate and prevent future disputes** by making sure the terms agreed upon do not create conflicts among non-parties (ie, future generations or persons not present that day).

- **Boundary tree planting** and **drawing and signing sketch maps** are two effective strategies used by several ADR actors to eliminate the possibility of future confusion over the same land.

2. *Move out of "Litigation-Only" mindset when talking about ADR.*

a. **Rethink word choice.** Consider using:

- **"Invitation"** instead of "Summons Notice"
- **"Complainant/Respondent"** instead of "Plaintiff/Defendant"
- **"Between A and B"** instead of "A versus B"
- **"Party"** instead of "Client" or "Beneficiary"
- **"Monitoring"** instead of "Enforcement"

b. **Reframe Summons Notices to Respondents** to be more unassuming and neutral rather than threatening and supportive of the Complainant. Below is one example of such a mediation invitation letter.

RE: Invitation for a Mediation Meeting in the Land Matter between A and B

Dear B,

(Organization's name) is a national organization dedicated to promoting and upholding the rights of all people through conflict resolution, livelihood support, and community education.

We wish to draw your attention to the above named matter reported to our office by Party A who says there is a disagreement over who has rightful access to a certain piece of land in X village, Y parish, Z Subcounty. Party A informs us that you and your family are preventing him from using land he inherited from his father. ***We do not know if his claims are true, so we need your help to resolve this dispute.***

The purpose of this letter is to kindly invite you for a mediation meeting at 11:00am on Thursday, 12th May, 2011 at (location), X village, Y parish). Unlike court, mediation is a process where people work together to solve their differences. We will be grateful to work with both of you, your clan leaders and community to see that this matter is resolved in the best way possible.

Please bring any evidence and/or witnesses you may have to explain your side of the story. Your cooperation will greatly help to resolve this matter for the benefit of everyone involved.

If you have any questions, feel free to contact our office located in Lira Town or call us at 041-555-5555. We look forward to seeing you at 11:00am on Thursday, 12th May, 2011.

Sincerely, Legal Officer

3. *Harmonise recordkeeping among land ADR actors using a common electronic Case Management System.*

a. **Agree on what data are most important to gather.** This is basic information to be recorded by all land ADR actors and may include data on the types and natures of registered land disputes, reporting histories, and party details.

1. **Gather data items to better understand Land Grabbing.**

- *Possible data items to include:* Relationship of Respondent to Complainant; Vulnerability status for each party (disabled, widowed, childless, poor, etc.); Root causes cited by Complainant; Root causes

interpreted by Legal Staff; Case History (places the case has been previously reported/heard).

2. **Gather follow-up data to better understand long-term effects of ADR.**
    - Document changes in behavior, attitudes, relationships, and/or living conditions throughout the course of the ADR process.

b. **Agree on a typology for classifying land disputes.** The labels featured in current caseload datasets are sometimes unclear and repetitive, which makes data analysis confusing. These include:
    - Boundary; Encroachment; Trespassing/Squatting; Family Land Wrangle; Compensation (Land Occupied by State Facilities); Compulsory Acquisition by Subcounty; Land Dispute between Clans; Land occupied by IDPs; Communal Land Conflict; Contested Ownership of Ancestral Land; Dispute over Ownership; Grazing Animals on Wetland; Administration of Estate; Denial of Rightful Access (Widow, orphan, divorcee, or child born out of wedlock); Contested Land Gift; Retracted Land Gift; Contested Land Sale; Land Grabbing (from widow, orphan, divorcee, community); Debt Recovery; Contested Title; Contested Distribution of Intestate Property; Destruction of Property; Other.
    - If "Land Grabbing" describes the *nature* of a case rather than its *type*, we might **record whether each case is considered a "Genuine" dispute or "Land Grabbing" with accompanying justification** if the "Land Grabbing" label is chosen.

c. **Agree on a typology for classifying case statuses.** Different caseload databases rely on different labels for describing the status of cases, which makes data analysis confusing. These include:
    - Pending (Active); Pending (Inactive); Resolved; Mediated (Agreement); Mediated (Pending); Referred to Court; Referred to Clan; Resolved outside of Mediation; Advice Given; Closed; No-show (Complainant); No-show (Respondent).

d. **Design and test a common case intake form** featuring important data items for use when registering a case. NGO staff members and paralegals should be trained in how to complete these when they receive cases. Data gathered through these Common Intake Forms can later be entered in an electronic database.

e. **Design and test an electronic Caseload database** for use among at least 5 NGOs and apply the agreed-upon typologies. An additional staff member may be needed to run, analyse, and provide technical assistance with the database.

4. Use ADR as a microscope to look inside cases and detect Land Grabbing.

- **Adopt the Platform definition of Land Grabbing as starting point for determining whether cases are 'genuine' or not.** The Northern Uganda Land Partners Platform has defined land grabbing as *"a situation where A knows he/she*

has no rights, but uses his/her strength to take advantage of B's weakness and take B's land." Two criteria are implicit in this definition:

1. The ***intent*** of one party to take advantage of the other (INTENT)
2. The ***relative strength (power) and weakness (vulnerability)*** of each party (VULNERABILITY)

b. **Practitioners should begin to record whether each dispute they mediate is 'genuine'**, and if not, provide very specific and concrete reasons for this assessment (ie, What evidence of one party's intent exists? Evidence for vulnerability?). This could be recorded alongside already existing caserecords in the form of two parts: a) Nature of case (Genuine or LG), and b) Justification (Evidence for LG)

c. **ADR actors should be careful not to over-diagnose or misrepresent Land Grabbing cases.** NGOs seeking to document Land Grabbing must provide clear and solid reasoning for their Land Grabbing diagnoses. Otherwise, the cry of "Land Grabbing!" will lose credibility.

5. Conduct a follow-up study to obtain more concrete data on ADR used with land grabbing and "bad faith" land disputes.[165]

Study Objectives

a. **To understand the nature and characteristics of land grabbing and "bad faith" land disputes in Northern Uganda.**

- **How** prevalent Land Grabbing and "bad faith" land disputes are
- **How ADR practitioners handle** these "bad faith" disputes.

b. **To understand how "bad faith" land disputes can be effectively resolved.**

- What approaches and factors lead to long-term resolution of "bad faith" cases?
- What leads to long-term failure of "bad faith" cases?
- Can ADR work effectively with "bad faith" land disputes? If so, how?

c. **To test the land dispute "personality" thesis** that says some disputes are "Genuine" while others are cases of "Land Grabbing".

Proposed Methodology

a. **Conduct inventories of existing caseloads** (ie, case files for the past 3 years) to gather more data on land grabbing, such as its characteristics, prevalence, and patterns. Case studies and illustrative stories should also be collected.

b. Set cases apart according to mediator's perception of "bad faith" and "good faith". Randomly select an equal amount of cases from each pile and **interview Complainants and Respondents** (each representing different cases) from each.

- **Use extreme caution** when approaching parties of prior mediations. Be very sensitive to the fact that these conflicts could reignite at any moment.

[165] This study will build on initial research conducted by LEMU in Lango sub-region from 2005-2009.

It may be wiser to call a party to an office for an interview (even if it means funding their transport) than to arrive at the site of a dispute and cause rumours of its re-opening in the community.

c. **A review of land crimes and customary tenure in other countries should be considered** and included in the Literature Review.

d. **Interview police, court brokers, magistrates, clan leaders, and NGO mediation staff** to find out which approaches are working and which are not.

6. Conduct a pilot study to chart the way for effective legal recognition of ADR agreements.

Study Objectives

a. **To test strategies for making ADR agreements "binding" and authoritative** so that disputes are effectively ended in un-appealable[166] Consent Judgments, rather than dragging on indefinitely.

b. **To promote functioning pathways between different Land ADR actors** (ie, clans, NGOs, courts). This coordination will also help to reduce forum shopping.

Proposed Methodology

a. **Pilot study in Lira and Apac** (Lango subregion) for a period of 1 to 2 years

b. **Involve the following actors** in designing the pilot: District Chainlink Committees, Chief Magistrates, at least 3 national NGOs, District Land Boards[167], police, LC2 and LC3 Courts, clan leaders, Lango Cultural Foundation, and court brokers.

c. Chief Magistrates **appoint, train, and register Land ADR Neutrals**[168] as is currently done with Court-Annexed Mediators in the Commercial High Court. These Registered Land ADR Neutrals would be qualified to facilitate ADR Agreements that would then be entered as Consent Judgments.

    1. **Each Agreement to contain a detailed sketch map** of the area drawn by one of the registered neutrals, with all necessary signatures

        a. **Clans responsible for planting boundary trees** as necessary

    2. District Land Board uses the Registered Agreement to **expedite a CCO application** for the parties involved

    3. **Agree to a plan for enforcement** if a Consent Judgment is breached

[166] Except in extreme cases (ie, when mediator is proven to be grossly unfair)

[167] Included to help explore the possibility of issuing CCOs to those parties with registered ADR agreements (Consent Judgments)

[168] Section 89 of the Land Act (amended 2004) states that *"There shall be one or more Mediators in each District who shall be appointed by the District Land Tribunal and the appointment shall be on an ad hoc basis."* Yet today, District Land Tribunals are no longer operative and there is no provision for the appointment and/or registration of these mediators. There is thus need for the Chief Magistrate to determine who and who is not a legitimate mediator of a customary land dispute, and who is qualified to mediate and/or identify Land Grabbing cases (Land ADR Neutrals).

4. *Where disputes mediated by a Registered Neutral do NOT result in agreement:*
    a. **Registered Neutral writes an evaluation** of the previously mediated case (according to the PPRR and state laws) and **refers the case to court or the clan**
    b. **Registered Neutral acts as a Friend of Court** to advise the court (or the clan) on the case and provide reasoning for why this case may be Land Grabbing.

X. References

1. Adoko, J. & Levine, S. (2004). "Land matters in displacement: The importance of land rights in Acholiland and what threatens them." Land and Equity Movement in Uganda (LEMU) and Civil Society Organisations for Peace in Northern Uganda (CSOPNU).
2. Barringer, R. (1972). *War: Patterns of conflict.* Cambridge, MA: The MIT Press.
3. Boniface Ojok (2008). Justice and Reconciliation Project Annual Report: Gulu District NGO Forum. Retrieved online 14 August 2009 at: www.justiceandreconciliation.com
4. Brainch, Brenda. "ADR in the world: an African perspective on community mediation." Paper presented 5 January 2007 at the 2006-2007 CDRC Regional Conference at Fordham Law School, NY.
5. Brainch, Brenda. "Commercial ADR: Strategic reform and practical lessons." Paper presented to the Justice Sector Reform in Sub-Saharan Africa Conference, Nov. 2006. Retrieved online 4th January 2011 at: http://www.disputeresolutionkenya.org/news-and-articles.htm.
6. CIA World Factbook, "Uganda: Economy." Retrieved online 29 Jan., 2011 at https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html
7. de Janvry, A. and Sadoulet, E. (2000). *Property rights and land conflicts in Nicaragua: A synthesis.* California: University of California at Berkeley. 28
8. De Soto, Hernando (2000). *The Mystery of Capital: Why capitalism triumphs in the West and fails everywhere else.* London: Black Swan.
9. Dennison, D.B. & Akin, J. (2011). "What we meant for good: Intentions and consequences in Uganda." Presented April 9, 2011 at the Council of Christian Colleges and Universities Conference in Washington, D.C.
10. Department for International Development (DfID) (Sept. 2009). White Paper: *Eliminating World Poverty: Building Our Common Future* Cm. 7656.
11. Fisher, R. & W. Ury (1991). *Getting to yes: Negotiating agreement without giving in.* New York: Penguin Books. (See Chapter 4, "Invent options for mutual gain.")
12. Fiss, O. (1984). "Against settlement." *Yale Law Journal* 93(6), p.1073-1090.
13. Grace, Maggie T. (2010). Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms." *Vermont Law Review* 34. Available at SSRN: http://ssrn.com/abstract=1524762
14. Gray, B. (1989). Collaborating: Finding common ground in multiparty problems. San Francisco and Oxford: Josey-Bass.

15. Green, E. D. (2006). "Ethnicity and the politics of land tenure reform in central Uganda." *Commonwealth & Comparative Politics* 44(3), 370-388.

16. Hendrickson, D. (1997). *Supporting local capacities for managing conflicts over natural resources in the Sahel: A review of issues and an annotated bibliography.* London: IIED and GTZ.

17. Herrera, A. and M.G. da Passano (2006). Land tenure alternative conflict management. Published by Land Tenure Service, Rural Development Division of the Food and Agriculture Organization of the United Nations. Retrieved 11 Feb. 2011 at: ftp://ftp.fao.org/docrep/fao/009/a0557e/a0557e00.pdf

18. Hyman & Love (2002). "If Portia were a mediator: An inquiry into the justice in mediation," 9 Clinical Legal Review.

19. Ierodiaconou, M. (2005). "Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?" University of Melbourne Legal Studies Research Paper No. 113. Available at SSRN: http://ssrn.com/abstract=689981

20. International Organization for Migration (IOM), United Nations Development Programme (UNDP), and Norwegian Refugee Council (NRC) (2010). "Land or Else: Land-Based conflict, vulnerability, and disintegration in Northern Uganda".

21. Kakooza, A.C.K. (2007). "Land dispute settlement in Uganda: Exploring the efficacy of the mediation option." *Uganda Living Law Journal*, Vol. 5, Uganda Law Reform Commission.

22. Kakooza, A.C.K. (2008). "Land law reform in Uganda: Exploring the loose ends." Presented 18 January at the Uganda Christian University Law Society Workshop entitled "The Future of Uganda in the Legal, Political and Social Spheres."

23. Kakooza, A.C.K. (2010). "Arbitration, conciliation, and mediation in Uganda: A focus on the practical aspects." Available at SSRN: http://ssrn.com/abstract=1715664

24. Kigula, J. (1993). "Land disputes in Uganda: an overview of the types of land disputes and the dispute settlement fora." Research Paper 3, Access to land and other natural resources in Uganda: Research and policy development project. Prepared for the Makerere Institute of Social Research and the Land Tenure Center.

25. Kiryabwire, Hon. Justice Geoffrey, "Alternative dispute resolution: a Ugandan judicial perspective." Paper presented 1 April, 2005 during a seminar for Grade One Magistrates, Mukono.

26. Land and Equity Movement in Uganda (LEMU) (2009). *Let's face up to land grabbing* (set of 6 documents). Retrieved online 3rd February 2011 at http://land-in-uganda.org

27. Land and Equity Movement in Uganda (LEMU) (2009). *Let's face up to land grabbing*, Brief No.1: "How does land grabbing happen?"

28. Land and Equity Movement in Uganda (LEMU) (2009). *Let's face up to land grabbing*, Brief No.3: "Why is the legal system failing to protect people's land rights?"

29. Land and Equity Movement in Uganda (LEMU) (n.d.), Information Leaflet No.3: "How is land under customary law managed?"

30. Land and Equity Movement in Uganda (LEMU) and Arbeiter Samariter Bund (ASB) (2010). "Unable to Return: Profiles of Internally Displaced Persons Seeking Defense of their Customary Land Rights" (working paper)

31. Land and Equity Movement in Uganda (LEMU), (2008). *Research on land grabbing within families and communities: The silent problem going on unseen.* Unpublished.

32. Lango Cultural Foundation (2009). *Principles, Practices, Rights, and Responsibilities (PPRR) of Customary Land Tenure in Lango Region- No. 1 of 2009.* Published by LEMU, Trocaire, and American Jewish World Service.

33. Laws of Uganda, *Constitution of Uganda* (1995).

34. Laws of Uganda, *Land Act,* Cap. 227 (as amended 2004, 2010).

35. Laws of Uganda, *Local Council Courts Regulations* (2007).

36. Laws of Uganda, *The Judicature Act*, Cap. 13: The Judicature (Commercial Court Division) (Mediation) Rules, No. 55 of 2007.

37. Lederach, J.P. (1995). *Preparing for peace: Conflict transformation across cultures*. Syracuse University Press.

38. Lederach, J.P. (1997). *Building Peace: Sustainable Reconciliation in Divided Societies.* Washington, D.C.: U.S. Institute for Peace Press.

39. Lightfoot, C., Ramirez, R., Groot, A., Noble, R., Alders, C., Shao, F., Kisauzi, D., Bekalo, I. (2001). *Learning our way ahead: Navigating institutional change and agricultural decentralization.* Gatekeeper Series No. 98. London: IIED.

40. *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (2004). Facilitated by Penal Reform International); Retrieved online 4th January 2011 at: http://www.penalreform.org/publications/lilongwe-declaration-accessing-legal-aid-criminal-justice-system-africa

41. Mack, K. (1995). "Alternative dispute resolution and access to justice for women," *Adelaide Law Review* 17(1):123.

42. Manji, A. (2010). "Eliminating poverty? 'Financial inclusion', access to land, and gender equality in international development." *Modern Law Review* 73(6): 985-1025.

43. Mayer, B. (2000). *The dynamics of conflict resolution: A practitioner's guide.* San Francisco: Josey-Bass.

44. Menkel-Meadow, C.J. (2001). Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution. *Fordham Urban Law Journal* 28. Retrieved online 7 Feb. 2011 at: http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1541&context=facpub

45. Mugambwa, J. T. (2002). *Source Book of Uganda's Land Law.* Kampala: Fountain Publishers.

46. Pruitt, D.G. et al. (1993). "Long term success in mediation." *Law & Human Behavior* 17(3): 313-321.

47. Ramirez, R. (2001). "Understanding the approaches for accommodating multiple stakeholders' interests." *International Journal of Agricultural Resources, Governance and Ecology* 1(3/4): 264-285.

48. Ramirez, R. (2002). "A conceptual map of land conflict management: Organizing the parts of two puzzles," Retrieved online 7 Feb. 2011 at: http://www.fao.org/sd/2002/IN0301a3_en.htm

49. Rawls, J. (Revised ed. 1999). *A theory of justice.* The Belknap Press.

50. Rugadya, M. (2008). "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." For the World Bank's Northern Uganda Recovery and Development Programme (NURDP). Retrieved 31 August, 2011 at: http://www.oxfam.org.uk/resources/learning/landrights/downloads/northern_uganda_land_study_acholi_lango.pdf

51. Shestowsky, D. and Brett, J. M. (2008). "Disputants' Perceptions of Dispute Resolution Procedures: A Longitudinal Empirical Study". UC Davis Legal Studies Research Paper No. 130. Available at SSRN: http://ssrn.com/abstract=1103585

52. Sternlight, J.R. (2007). "Is ADR consistent with the rule of law? Lessons from abroad." *DePaul Law Review* 56 (569); UNLV William S. Boyd School of Law Legal Studies Research Paper No. 08-12. Available at SSRN: http://ssrn.com/abstract=979787.

53. Stulberg, J.P., (2005). "Mediation and Justice: What Standards Govern?" Cardozo Journal on Dispute Resolution, Vol. 6; Ohio State Public Law Working Paper No. 37. Available at SSRN: http://ssrn.com/abstract=800827

54. Terraciano, A.M. (1998). "Contesting land, contesting laws: Tenure reform and ethnic conflict in Niger." *Columbia Human Rights Law Review*, 29(3), 723-764.

55. Toulmin, C. (2007). "Negotiating access to land in West Africa: Who is losing out?" Chapter 5 in Derman, B., R. Odgaard, and E. Sjaastad (editors), 2007. *Conflicts over land and water in Africa.* Oxford: James Currey.

56. Uganda Bureau of Statistics (UBOS), *Uganda National Household Survey,* 2005/2006, Version 1.0 of the public use dataset (August 2008), provided by the National Data Archive, www.ubos.org.

57. Uganda Land Alliance (2010). "Milestones towards the integration of informal justice mechanisms into the formal system: Findings from Amuru, Apac, and Katakwi Districts." ULA Research Series 00/2010

58. World Bank (2003). *Policy Research Report: Land Policies for Growth and Poverty Reduction*, Oxford: Oxford University Press.

APPENDIX 1:
Official Research Clearances

THE REPUBLIC OF UGANDA

OFFICE OF THE PRESIDENT

PARLIAMENT BUILDING P.O BOX 7168 KAMPALA, TELEPHONES: 254881/6, /343934, 343926, 343843, 233717, 344026, 230048, FAX: 235459/256143
Email: secretary@op.go.ug, Website: www.officeofthepresident.go.ug

ADM 154/212/01

June 13, 2011

The Resident District Commissioner, Apac District
The Resident District Commissioner, Amuria District
The Resident District Commissioner, Amuru District
The Resident District Commissioner, Gulu District
The Resident District Commissioner, Lira District
The Resident District Commissioner, Oyam District
The Resident District Commissioner, Nwoya District

This is to introduce to you **Mr. Akin Jeremy Hall** a Researcher who will be carrying out a research entitled **"Examining the A-D-R tistry of Customary Land Dispute Mediators in Uganda"** for a period of **17 (seventeen) weeks** in your district.

He has undergone the necessary clearance to carry out the said project.

Please render him the necessary assistance.

By copy of this letter **Mr. Akin Jeremy Hall** is requested to report to the Resident District Commissioners of the above districts before proceeding with the Research.

Alenga Rose
FOR: SECRETARY, OFFICE OF THE PRESIDENT

Copy to: Mr. Akin Jeremy Hall

Uganda National Council for Science and Technology

(Established by Act of Parliament of the Republic of Uganda)

Our Ref: SS 2522 **August 18, 2011**

Mr. Isaac Wasswa Katono
Uganda Christian University
P.O Box 4
MUKONO

Dear Mr. Katono,

RE: RESEARCH PROJECT, "EXAMINING THE AD-D-R-TISTRY OF CUSTOMARY LAND DISPUTE MEDIATORS IN UGANDA"

This is to inform you that the Uganda National Council for Science and Technology (UNCST) approved the above research proposal on **April 08, 2011.** The approval will expire on **April 08, 2012.** If it is necessary to continue with the research beyond the expiry date, a request for continuation should be made in writing to the Executive Secretary, UNCST.

Any problems of a serious nature related to the execution of your research project should be brought to the attention of the UNCST, and any changes to the research protocol should not be implemented without UNCST's approval except when necessary to eliminate apparent immediate hazards to the research participant(s).

This letter also serves as proof of UNCST approval and as a reminder for you to submit to UNCST timely progress reports and a final report on completion of the research project.

Yours sincerely,

Leah Nawegulo
for: Executive Secretary
UGANDA NATIONAL COUNCIL FOR SCIENCE AND TECHNOLOGY

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APPENDIX 2:
Interview Questions

Interview Questions for Prior Mediation Participants

Age: _____ Occupation: _____

1. Can you **briefly describe** for me the type of land dispute you were involved in?
    a. What happened when you **reported it**?
    b. When did the conflict **begin/end**?
    c. Was an **agreement** reached?
        i. How is the agreement **holding up today**?
            1. If no agreement, what is the **status** of the case today?
    d. What would you say were the **root causes** of this dispute?
    e. Have you **learned anything new** through this experience?
2. Do you have a **hard copy** of your agreement? Is it registered anywhere?
3. How do you feel about **the way the mediator(s) did their job**? Why makes you feel this way?
    a. What did they do that worked **well**?
    b. What did they do that did **NOT work so well**?
4. Did you feel the mediation process was **fair** (just)? Why or why not?
    a. What things are important to have if the process is to be fair?
    b. What would you have done differently?
5. Did you feel like you could **trust** the mediator? Why or why not?
6. If you could give some **advice** to land dispute mediators, what would you want them to know?
7. Resolving a land dispute can be frustrating at times. What were some of the **biggest challenges** you faced in this process?
    a. How have you **responded** to these?
8. Do you have any remaining **questions** about resolving land disputes?

Interview Questions for Community Mediation Actors (post-observation)

Age: _____ Occupation: _____

1. **How long** have you been dealing with land cases?
2. **Why** did you decide to get involved in managing land disputes?
    a. **How** did you become a mediator?
3. Would you say this mediation was **"successful" or "unsuccessful"**? What made it so?
4. What are some **lessons** we can learn from this case?
5. What do you think were the **root causes** of this dispute?
6. What **worked well** in this mediation, and what are you proud of? Why?
7. What **did not work so well**, and what might have you done differently?

8. How do you **define "success"** in a mediation? (ie, determine whether a mediation is "successful" or not?)
    a. Do these **criteria change** depending on the situation?
    b. What factors are necessary for success?
    c. What are warning signs that the mediation may fail?
9. When somebody reports a land dispute to you, what steps do you take?
10. What steps do you take in a mediation?
    a. How are **decisions** made? Who decides?
    b. Who are **agreements registered** with?
    c. How do you help make sure an agreement will be **durable** and respected?
    d. What do you do if a mediation fails?
11. Do you keep a **record** of the cases you handle and their agreements?
    a. Do you or anyone go through past records to **draw learnings** from them?
12. What would you say are the **biggest challenges** you face in trying to solve land disputes?
    a. How do you **deal with** these challenges?
13. Sometimes building the parties' confidence in you as a mediator can be difficult. How do you win and keep the **trust** of both parties?
14. When one party is accused of using **witchcraft** to intimidate or threaten the other, how do you as a mediator respond?
15. How do you handle situations where one party seems to be more **"powerful"** than the other?
16. Has there ever been a time where a party became aggressive or **violent** in a mediation? Tell me about it and how you handled the situation.
17. If you could share any **advice** (words of wisdom) to your fellow land dispute mediators in Northern Uganda, what would it be?
18. If you could ask your fellow land dispute mediators one or two **questions** about anything, what would you want to learn from them?

Interview Questions for NGO Programme Staff

Part 1

1. **Why** did you decide to get involved in mediating land disputes?
    a. **How long** have you been dealing with land cases?
    b. What experiences and strengths do you have that help make you a **good mediator**?
    c. What are your **desired goals** in helping someone with their land wrangle?

2. **Why** has your organisation decided to get involved in mediating land conflicts?

   d. **How long** has your organisation been in this line of work?
   e. What would you say are the **founding principles** on which your ADR programme is built?
   f. Have you ever received **training** in conflict management or mediation?
   g. Why do you think people **choose** to bring their disputes to you instead of others?

3. What **types of services** do you have available for a person with a land dispute?
   h. What **types of land disputes** come before you?
   i. Since each case is unique, how do you decide which service is **most appropriate**?
   j. What are the main **root causes** of the disputes you work with?

4. Tell me about how you understand **mediation**. What is it?
   k. How do you **define "success"** in a mediation? (ie, determine whether a mediation is "successful" or not?)
      i. Do these **criteria change** depending on the situation?

5. Think for a moment about a mediation you handled and are **really proud of**. Tell me about it. **What made it so great?**

6. Now think of a case where you are **unhappy about** the way you mediated it. What are you not pleased with, and what might you have done differently?

7. When people bring serious land disputes to your office, what do they **expect** from you as a mediator?

8. When somebody reports a land dispute to your office, what steps are taken?
   a. How do you **decide** which cases to handle?
      i. If you decide **not** to handle a case, what happens?
   b. How do you **approach or mobilise the different parties**?

<u>Part 2</u>

19. What steps do you take in a mediation?
   a. How are **decisions** made? Who decides?
   b. Who are **agreements registered** with?
   c. How do you help make sure an agreement will be **durable** and respected?
   d. What do you do if a mediation fails?

9. Do you keep a **record** of the cases you handle and their agreements?
   a. Do you or anyone go through these records to **draw learnings** from them?

10. What would you say are the **biggest challenges** you face in trying to solve land disputes?
   b. How did you deal with these challenges?

11. Suppose you mediate a case and everyone signs an agreement. Later, **one party backs out** and does not do what he said he would do. How do you respond?

a. Are agreements **enforced**? If so, by whom?

12. Do you have any examples of situations where one party seems to be more **"powerful"** than the other? How did you handle this?

13. Sometimes building the parties' confidence in you as a mediator can be difficult. How do you win and keep the **trust** of both parties?

14. How do you help ensure the **safety** of very vulnerable parties before, during, and after a mediation?

15. When one party is accused of using **witchcraft** to threaten the other, how do you as a mediator respond?

16. Has there ever been a time where a party became aggressive or **violent** in a mediation? Tell me about it and how you handled the situation.

17. If you could share any **advice** (words of wisdom) to your fellow land dispute mediators in Northern Uganda, what would it be?

18. If you could ask your fellow land dispute mediators one or two **questions** about anything, what would you want to learn from them?

Mediation De-Brief

19. Would you say this mediation was "successful" or "unsuccessful"? What made it so?
20. Were lessons can we learn from this case?
21. What do you think are the root causes of this dispute?
22. What worked well in this mediation, and what are you proud of? Why?
23. What might you have done differently?

APPENDIX 3: **Case Studies**[169]

Grace

Barr Subcounty, Lira District

Grace, a quiet but articulate 26 year-old widow, shares a bottle of orange Fanta with the drowsy baby on her lap. She is an HIV positive mother of four children who reported her land dispute to W. The following is taken directly from an interview conducted 22nd June, 2011.

"My husband was an illegitimate son "born at home" (to his married mother out of wedlock), so I know his mother just doesn't want me in their family. Now that both my husband and father-in-law have died, I have no one to stand behind me… no protector. It's she, my mother-in-law, who is trying to chase me from my marital home. I tried to go to my husband's biological clan, but they say they don't know me. And my own parents refuse to let me come back home because if I do, the land meant for my children will be taken by my in-laws…

My brother-in-law destroyed my cotton crops and told me to leave the land. I reported the case to the youth leader of my (late husband's) clan, who advised me to shift to a different corner of the land. I did so, but my in-laws just came and chased me from that spot, too. I reported my case to the LC1, but on the scheduled date of the hearing, he didn't show up. I realized he wasn't interested in helping me. So I reported to the police, who then referred me to the clan. The clan (including my in-laws) heard the case without me and together decided that they no longer need me or my children anymore.

I went back to police and they referred me to W's paralegals. They asked me to wait for my mother-in-law to return from the hospital. During this time, she had medical complications and the clan said her dispute with me was the source of the problems, so I willingly went to the hospital and set her free. The clan told me not to go back to W, but I refused. W paralegals tactfully wrote a letter to the Assistant clan leader inviting him for mediation and finally we all sat down (mother-in-law was not present, but my brothers-in-law were). My in-laws finally accepted to leave the land for me and insisted they were just kidding and testing me to see how strong I was—despite the fact that they'd denied me access for 1 year!

Today, my children and I are digging the land peacefully. But I hear reports from neighbours and my children that people in the community are saying, "We know Grace is going to die anyway since she's HIV positive, so when that happens we'll just take over the land." My children's land rights are insecure since they are very young. If I die now, I'm certain the land will be grabbed because no boundary trees were planted or map was drawn of the land in the mediation. The clan has no incentive to demarcate it for me now, since they still want to take back my land once I die.

I trust the W mediators because I've seen what they've done for me. They encouraged, comforted, and assured me that I was going to recover my land. They wrote me a mediation letter and actually showed up for the meeting they scheduled. Please don't stop doing this good work. People like me down in the villages really need your help."

[169] Names have been changed to protect these parties' identities.

Abraham and Family

Amuru Subcounty, Amuru District

Abraham, also 26 years old, has a swollen jaw from an abscessed tooth and mournful eyes. As a student in Senior 5, he was abducted by the LRA rebels and forced to survive in the bush for 2 years. After escaping in 2008, his older brother raised funds to send him back to school. But because the Respondent—a rich university lecturer with many relatives living in London and the member of a large neighbouring clan—has taken the land their family used to cultivate, they are now unable to eke out a livelihood, much less to raise school fees. The good Samaritans who had provided Abraham's family a temporary place to stay are now pressuring their guests to leave since their time has expired. Abraham, his widowed mother, and two brothers mediated with the Parish Priest, but things have not turned out as expected. Conducted 28th May, 2011, this interview was one of the single most poignant moments for the researchers in the entire 3-month study.

"Our rich neighbour stopped my two brothers and me from digging our late father's land. This neighbour's clan is many in number, so they are using their large membership to look for weaker families' land to take. This clan has tried to grab the land of the local Catholic mission, a primary school, and another *mzee* by forging a map, but court dismissed the false map and the *mzee* put up a good fight… so [the Respondent] left them and instead came after us. Since some of our people died in the [IDP] camp or were killed, we [our clan] are now few in number (37, including children) and cannot fight back so well.

We first reported the case to the LC 2 and won, but our neighbour appealed to the LC 3. We won at the LC 3, but he went and reported a case of trespass against us at the Chief Magistrate Court (which was later dismissed) and began having my brothers and me arrested without warning. In all, I was arrested 5 times, and one of my brothers 10 times.

[The Respondent] came to our family demanding that we leave our land, claiming the land belonged to his much larger clan. We refused, and one day in August 2010 we found 6 of our huts burned, all our chickens killed, the eyes of our goats gouged out. The story was even aired on the radio, it was so bad... (crying) We reported to police, but police instead came and arrested my brother and me and detained us for four months. We were released on bond, and when we tried to rebuild a home for our mother, [the Respondent's clan] came and destroyed our work. After that, my brother and I tried to physically fight these people, but since they were larger in number, they defeated us and reported us to police for assault, under which charges we were jailed again.

Threats from our neighbour continued, so while we were in jail some of our clan elders acted on our behalf and reported the case to the Parish Priest. When we were released, we mediated and [the Respondent] finally agreed to pay us 6 million shillings (about USD $2,100) so we could buy another land and settle somewhere else. However, the agreement was not written, and today our neighbour has taken full control of the land and has refused to pay as he promised. Meanwhile, we are landless and desperate. We reported the case to the Chief Magistrate, but the judge demanded to see the agreement from our mediation. We asked the priest mediator to draft a letter explaining our verbal agreement on the day of mediation, but the priest has

refused, concerned that he is not allowed to make such a judgment for the parties. The priest has tried to arrange a follow-up mediation, but since [the Respondent] remains elusive, we are stuck.

I think the mediation process was halfway fair. It was fair because the mediator was able to bring us together and stopped us from fighting and being unlawfully arrested when no one else could. But it's also unfair because the priest won't help us with minutes of the meeting or a letter describing the verbal agreement, and [the Respondent] is able to make an empty promise and get away with it.

Everyone, including the neighbors, knows this has been our grandfather's land since 1956. We even have some documents to verify this. But when our case is forwarded, nothing is done… Even when courts rule in your favor, you still have to pay around 6 million shillings for court brokers to actually enforce the judgment, which my family cannot afford. And NGOs just take our story and keep quiet.

This land case makes us grieve so much...

(*through tears*)

…It makes me wish Kony would come back… It would be better in the bush…

(*sobbing*)

I would join the rebels and use that chance to go and kill the people who are trying to take our land…

…Then we would all die."

The interview with Abraham.

Konsantino

Nambieso Subcounty, Apac District

Konsantino is a 41 year-old talk show host for a local radio station. He shares how, less than two years ago, he and his brother were issuing death threats as a result of a family land dispute. The following is from an interview held 14th April, 2011.

"Our brother lived with his wife for ten years. When he died in 2009, a man from outside our clan inherited this widow and began convincing her to try and sell the family land so they could take the money and leave. As the eldest brother, I was determined to do whatever it took to prevent that land from leaving our family, so my surviving brother and I actively blocked their efforts. I wanted to chase our sister-in-law away from our village, and my younger brother was threatening to kill her new boyfriend.

This prompted our sister-in-law to report the land matter to Z. Bringing us together at that time was a difficult task—I admit, I didn't even greet her in those days. At first, Z called just a small meeting between my sister-in-law, the mediator, and me, where he gave us counseling for our personal relationship. He started with giving us a chance to vent and be heard… He cooled us down by addressing our anger and taught us in such a way that we realized for ourselves that we were wrong. He never told us that directly or judged us, but recognized our free will to make choices for ourselves. A short time later, the mediator came to our village and met with us before the clan, where we talked about the land issues.

Neither of us were understanding until the mediator taught us how the property of the deceased remains with the widow and the orphans... and clan leaders are the ones who approve land sales. We realized we were both in the wrong, and finally settled the dispute. My sister-in-law was being misguided to sell the family land for drinking money and go and leave with her boyfriend, but I was also misguided to think that we should chase her away. Still, my brother was angry that this new boyfriend was benefitting from our late brother's estate. He was a stranger from a different clan whom we didn't know, and yet he wanted to sell off the family land. We we were just concerned for the orphans…

I realized that the mediator was just trying to understand our dispute so it could be solved. I even advised my brother during the process not to hurt our sister-in-law's boyfriend after all since the case was going to be handled well. We cooled down and excused the man who was using the name of the widow to grab the land. This stranger realized he was the one instigating the chaos. We agreed to keep him in our village (he was displaced), but he later went back to his own home.

Today, everything is peaceful. My sister-in-law had wanted to sell the land (allegedly for school fees)—but now she says, "If I had sold this land, where would my children go?" She even comes to stay at my place for weeks at a time. We are in the process of getting a [family] land title and made a family rule that before anyone touches family land, they first must inform the rest of the family. We hold monthly family meetings to make sure things are running smoothly, are planning to demarcate the boundaries with trees, and are reserving space for future generations."

APPENDIX 4a:
Skeletons of NGO Case Intake Procedures
(C= Complainant, R= Respondent)

V: paralegal listens→ interview C about case history→ determine whether mediation is appropriate→ if too difficult, refer to office→ office records complaint from paralegals→ invite for mediation (word of mouth, letter)

W: listen→ explain available services → record C's details, complaint→ invite for mediation (letter)

X: listen→ screening interview→ explain available services→ record C's details, complaint, request→ contact R→ small meeting with R and C (willing to mediate? issues to resolve?)→ invite for mediation (face to face)

Y: listen→ explain available services→ record C's details, complaint, request→ invite for mediation (letter)

Z: listen→ record C's details→ explain available services→ record complaint→ contact R (letter)→ small meeting with R and C (willing to mediate? issues to resolve?)→ invite for mediation (letter)→ unannounced fact-finding trip

APPENDIX 4b:
Skeletons of Community Actor Case Intake Procedures
(C= Complainant, R= Respondent)

"T" Clan Chiefs: Case referred from Chief Mag. Court→ record case→ summon C and R to office (discuss how to settle the dispute)→ T invites for mediation (letter)

Clan mediators: Record complaint→ contact R, listen→ invite for mediation (face to face)

Parish Priest: Listen, record complaint later→ contact R, listen and record response later→ summon both parties to office (counsel from scripture, discuss whether to mediate)→ regroup, parties bring list of names they want to attend/mediate and all agree on details of upcoming mediation→ parties mobilize

"V" Paralegals: Listen→ record complaint→interview C about case history→ analyze whether mediation is best option→ contact R to see if willing to mediate→ invite for mediation (face to face)

"W" Paralegals 1: Listen→ record complaint→ contact R to see if willing to mediate→ mediator and parties select convenient date→ invite for mediation (face to face, letter)

"W" Paralegals 2: Listen→ record complaint→ mediator fixes date→ invite for mediation (letter)→ fact finding

LC 2 Chairpersons: Register case, collect registration fee→ contact R, inform of case brought against him/her→ LC 2 fixes date and time of hearing

"U" Subcounty Land Conflict Mitigation Committee: Listen to complaint→Ask C if willing to mediate→ Contact R, ask if willing→ Mediator sets date and time

***Rwodi Kweri/ Koro*:** Listen→ Record complaint→Contact R to explain complaint→invite for mediation (face to face)→ mobilize elders (and former *Rwodi Kweri*)

APPENDIX 5a:
Skeletons of NGO Mediation Procedures
(C= Complainant, R= Respondent)

V:

Mediation Meeting, in field
Prayer, Introductions of all present
Opening statements from clan elders, traditional leaders, LC 1
Mediator's opening statement
"This is not court," explain ground rules, purpose for gathering, examples of other successfully mediated cases
C's statement, R's response
C's witnesses, R's witnesses
Group inspection of the disputed land (Discussions not allowed in the field)
C shows boundary according to him
R shows boundary as he knows it
Return, Rwot Kweri gives his opinion of the boundary
Cross-examining, questions, statements from elders and neighbors
Mediator analyzes and gives neutral evaluation of land rights at stake
Asks if both parties are satisfied with the mediator's opinion/reasoning
If "loser" is not happy, mediator requests "winner" to give concessions for the sake of peace
If "loser" accepts, then agreement is written and signed
Boundary demarcated
Prayer

W:

Mediation Meeting, in field
Prayer, Introductions
Opening statements from clan elders, traditional leaders, LC 1
Mediator's opening statement
"We've come to see that this case is settled. We don't judge, just guide people. You all will choose the way forward."
Explain benefits of mediation, purpose of gathering, ground rules.
"If there's any need of going to court, "W" will see that peoples' rights are upheld (by representing the party we feel is in the right)."
C's statement of the problem and desired outcome *(Clarification Qs as necessary)*
R's response to C's statement and desired outcome *(Clarification Qs as necessary)*
Group inspection of the disputed land (this may happen before or during the discussion and negotiation for the options generated by the mediator)
Discussion
Witness and elders' testimony (hear from an equal number of males/females)
Mediator advises on points of law, negotiates for a position (usually on behalf of C)
"Please, everyone come together and try to do what "W" wants. And this is what we want: We want to see the C have…"
Mediator generates options which satisfy "W's" position
Pastor gives brief sermon on not mistreating orphans and widows
Agreement discussed
Mediator reads out loud, revises as he writes
Everyone signs
Prayer

X:

Meeting 1: Preparation Meeting, in field *(only if Respondent has consented to mediate)*

Prayer, Introductions
Opening statements from clan elders, traditional leaders, LC 1
Mediator's opening statement (explain how X received the complaint, purpose of meeting: to discuss how the mediation will take place and identify issues to be resolved)
C's statement, clarification questions
R's response, clarification questions
Elders', witnesses', neighbors' testimony
Mediator takes note of key issues to be resolved, persons to be invited
Mediation meeting scheduled on agreed date, time, venue

Meeting 2: Mediation Meeting, in field

Prayer, Introductions
Opening statements from clan elders, traditional leaders, LC 1
Mediator's opening statement (set ground rules, introduce mediator, purpose of meeting, emphasize mediator's neutral role, remind group of any agreements from preparation meeting)
C's statement of the problem and desired outcome
R's response to C's statement and desired outcome
Statements from witnesses, elders, neighbors
Group inspection of disputed land
Draw sketch map of the area
Return, Discussion
Mediator identifies areas of agreement and contention
Mediator gives evaluation as to the legal claims of each party
Promotes an atmosphere of communication and problem-solving
Advises parties on pros and cons of their positions
Parties decide on the terms and conditions of an emerging agreement
Agreement written, read aloud, revised
Instructions given: "On this date, we will return and reconvene and all sign the agreement."
Taken back to office to be typed
Prayer

Meeting 3: Signing Meeting, in field

Staff return on assigned day with copies of the typed agreement
Copies distributed

Meeting 4, Meeting 5: Follow Ups

Two follow ups (after 6 and 12 months) to document changes in parties' behavior

Y:

Meeting 1: Preparation Meeting, in office *(parties, few witnesses)*

Prayer, Introductions
Mediator's opening statement (benefits of mediation, purpose of meeting, tell the truth)
C's statement, clarification questions
"Cross examination" between R and C
R's statement, clarification questions
"Cross examination" between C and R
Discussion of whether to mediate, next steps to take
If parties are willing to mediate, mediation scheduled on agreed date, time

Meeting 2: Mediation Meeting, in field

Prayer, Introductions
Welcome by clan leaders, LC 1
Mediator's opening statement (this is not court, ground rule: "Tell the truth.")
C's statement, clarification questions
"cross examination" between R and C
R's statement, clarification questions
"cross examination" between C and R
Discussion
Mediator advises on law and land rights according to PPRR, validity of claims
Negotiates for agreement ("let us agree here today")
Group inspection of disputed land (Discussion in field)
(Very opportune time! Walking casually, confidentially with some parties as you walk)
Mediator negotiates for division or restoration of the land (positional negotiation)
Return, Clan leaders take the lead of the mediation and settle any disagreements over facts and positions
Mediator writes down these facts and agreed positions and actions
Agreement written, signed
Prayer

Z:

Meeting 1: (Preparation, in office)
(only parties and very few witnesses)
Prayer, Introductions
Mediator's Opening Statement (groundrules, purpose of the meeting)
C's statement
R's response to the claim
Discussion
Mediator probes to find out facts; land rights of each party
Tapes sheet of paper to the floor/wall, has parties draw a map of the disputed land
Makes notes about issues to probe, names of witnesses to talk with during Fact Finding, topics for legal education later
Mediator negotiates for mediation instead of court
Obtains consent from each party to mediate
Mediation meeting scheduled

Fact Finding Trip:
Mediator goes to the community without either party's knowledge to ask around, investigate parties' statements

Meeting 2: (Mediation, either office or the field)
Prayer, Introductions
Opening statements from clan leaders, LC 1
Mediator begins with legal education, teaching parties about state laws concerning topics that have arisen in previous discussions (ie, Law of Succession, 12 year rule of adverse possession, laws on retracted land gifts)
Mediator gives report from Fact Finding trip
Mediator shares *indirect* legal evaluation of the case (does NOT directly identify a winner or loser in the dispute, but speaks without using any names)
(Group inspection of the disputed land)
Reconvene, Discussion
Parties reflect on the legal teaching and Fact Finding report, identify next steps (Is more investigation or a family meeting needed?)
Summary agreement written, signed

APPENDIX 5b:
Skeletons of Community Actor Mediation Procedures
(C= Complainant, R= Respondent)

T Clan Chiefs—*Arbitration*

Begin with scripture reading from the Bible on land matters and forgiveness
"Do not move an ancient boundary stone or encroach on the fields of the fatherless; For their Defender is strong; He will take up their case against you." (Proverbs 23:10)
C's statement, clarification questions
R's statement, clarification questions
Discussion, focus on establishing rightful owner of disputed land
Rely on witnesses, neighbors, and elders who know the boundaries
Each T member forms an independent opinion
Deliberation among T committee, majority vote taken
Issue judgment

Clan mediators—*Arbitration*

C's statement, clarification questions
"cross examination" between R and C
R's statement, clarification questions
"cross examination" between C and R
Discussion, Focus on establishing rightful owner of disputed land
Rely on witnesses, neighbors, and elders who know the boundaries
Refer (sometimes) to customary law (PPRR)
Issue opinion/judgment

Parish Priest—*Mediation*

C's statement, clarification questions
R's statement, clarification questions
Establish historical facts of the case, then present-day facts
Mediator conducts separate breakout (caucus) sessions—parties discuss confidentially among themselves with mediator
Mediator helps this each breakout group to identify possible solutions
Reconvene, discuss proposals from breakout meetings
Agreement written
Group inspection of the disputed land once everyone has cooled down and decided to agree
Boundaries demarcated

V paralegals—*NE-Conciliation*

C's statement, clarification questions
R's statement, clarification questions
Group inspection of the land (but no discussion allowed)
Each party shows the boundary as he knows it
Reconvene, Rwot Kweri shares his opinion
Discussion ('Cross-examination', questions)
Statements from elders, witnesses, and neighbors
Mediator(s) share their evaluation of the case (usually a 'winner' and a 'loser')
If 'loser' is dissatisfied, mediator negotiates for 'winner' to give concessions
If both parties accept this, then agreement is written and signed

Z paralegals—*Mediation-Arbitration*

C's statement, R's response
C's witnesses, R's witnesses
Discussion, Mediator asks each party "What do you think we should do?"

Mediator tries to harmonize the two positions and gives a ruling "so that no one party suffers too much."
"Parties help me decide."

W Paralegals 1—*Arbitration*

Mediator asks everyone present if they are willing to mediate. If all consent, mediation begins.
Elders and clan leaders (esp. Adwong Wang Tic) share what they know regarding the disputed land. The mediator does this to catch the C and R by surprise. "If you tell parties to come with witnesses, they may coach the witnesses to lie."
Witnesses' statements
C's statement, R's response
Discussion
Mediator relies on the view of the majority to award the land to the person the crowd has chosen
Ask the 'loser' if he is dissatisfied/wants to appeal and if he thinks his claim can stand up in court

W Paralegals 2—*NE-"Pressurized" Conciliation*

Mediator's opening statement
"We've come to see that this case is settled. We don't judge, just guide people. You all will choose the way forward." Explain benefits of mediation, purpose of gathering, ground rules.
"If there's any need of going to court, "W" will see that peoples' rights are upheld (by representing the party we feel is in the right)."
C's statement, clarification questions
R's statement, clarification questions
Discussion
Elders' and witness testimony (hear from an equal number of elderly males and females, young and old)
Mediator advises on points of law, negotiates for a position (usually on behalf of C)
"Please, everyone come together and try to do what "W" wants. And this is what we want: We want to see the C have…"
Mediator generates options which satisfy "W's" position
Pastor gives brief sermon on not mistreating orphans and widows
Agreement discussed
Mediator reads out loud, revises as he writes
Everyone signs

LC 2 Chairpersons—*Litigation*

C's statement, R's response
C's witnesses, R's witnesses
Group inspection of the disputed land
Hide R and his/her witnesses; have C and his/her witnesses go, one by one, to show the boundary as they know it. Then do same for R and his/her witnesses. Check to see whether consistent within and between parties
Discussion
Reconvene, further discussion, testimony from elders and neighbours
Majority vote taken among those community members in attendance
LC 2 Court rules according to this vote[170]
Advise C and R to live peacefully, and of right to appeal

U Subcounty Land Conflict Mitigation Committee—*NE-Conciliation*

C's statement and witnesses

[170] See "From a LC 2 Court Session in Apac Subcounty on pg. 114

Mediator reframes C's complaint to R, R gives response
Clarification questions, Discussion
Mediator guides along issue items, reminds group of benefits of mediation over court
Lawyer educates everyone about the Constitution, customary tenure, customary laws
Then asks all present: "Did these people follow the law? I'm not asking to condemn anyone, I just want us all to know the law."
Discussion, consensus as to the land rights of each party
(Group inspection of the disputed land)
If 'loser' is dissatisfied, mediating committee asks 'winner' to consider giving concessions for the sake of peace
Agreement written, signed

Rwodi Kweri/ Koro*—*Arbitration

Elders (who were original settlers in the area) tell history of how the parties' ancestors came into this land and the boundaries thereof
For boundary disputes:
C is asked to describe his boundary
R describes his boundary
Elders share what they know
Group visit to the disputed land
Rwot Kweri shows everyone the boundary as he knows it.
This is the final decision, and anything contrary is considered false.
Rwot Kweri writes down this judgment and everyone is made to sign

From a LC 2 Court Session in Apac Sub-County *(18 May, 2011)*

The case concerns a retracted land gift. Bosco's father-in-law originally gave a plot of land to Santa and her late husband in 1974. Bosco argues that since both the father-in-law and Santa's husband have died, the land gift should now revert back to him.
In Lango culture, the wife leaves her clan to come and live among her husband's clan. Thus, the gathering today is composed mostly of members of the late husband's (and Bosco's) clan.
After inspecting the land (taking note of 5 graves of Santa's children), the group reconvenes.

LC 2 Chairman: *"Since we LC 2 Court members come from different areas and are not based in this village, our judgment relies on testimony and the majority's view. I have counted 18 people in favour of Bosco, and 6 in favour of Santa. Therefore, we rule that the land belongs to Bosco. I advise Bosco to allow Santa to harvest and remove her cassava before moving on to it. Santa has 7 days to appeal this ruling."*

Interviewer (later): "Would you say this case was successfully handled? Why or why not?"

LC 2 Chairman: *"It was successful. The majority of people physically there also affirmed it was a success."*

APPENDIX 6a: **Resolution Rates by Dispute Type**

Source: X, Y, Z Caseload Data 2008-2010

Type of Case	Total Reported of Type	Number Resolved	Number Unresolved	Unknown Status	% Resolved	% Not Resolved
Family Land Wrangle	57	20	31	6	35%	54%
Boundary/Encroachment	115	26	68	21	23%	59%
Land Grabbing	43	10	27	6	23%	63%
Contested Land Sale	26	8	17	1	31%	65%
Contested Land Gift	22	3	15	4	14%	68%
Inter-clan Land Dispute	27	2	21	4	7%	78%
Contested Ownership	63	5	52	6	8%	83%

APPENDIX 6b: **Successful ADR Styles by Dispute Type**

Source: X, Y, Z Caseload Data 2008-2010

Type of Case	Total Reported of Type	Total # Resolved	X (NE-Med): # Resolved '08-'10	Z (NE-Med): # Resolved '08-'10	Y (NE-Conc): # Resolved '08-'10	Resolved through NE-Mediation	Resolved through NE-Conciliation	% Resolved Through NE-Mediation	% Resolved Through NE-Conciliation
Family Land Wrangle	57	20	8	12	0	20	0	100%	0%
Boundary/Encroachment	115	26	7	5	14	12	14	46%	54%
Land Grabbing	43	10	0	2	8	2	8	20%	80%
Contested Land Sale	26	8	0	1	6	1	7	13%	88%
Contested Land Gift	22	3	0	0	4	0	3	0%	100%
Inter-clan Land Dispute	27	2	2	0	0	2	0	100%	0%
Contested Ownership	63	5	5	0	0	5	0	100%	0%