

NOTES

ARRESTING THE VILLAGE-TO-PRISON PIPELINE: MANDATORY CRIMINAL ADR AS A TRANSITIONAL JUSTICE STRATEGY

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TABLE OF CONTENTS

I.	INTRODUCTION	153
II.	LAND DISPUTES AS BOTH CIVIL AND CRIMINAL MATTERS	156
	A. <i>Land Grabbing in Context</i>	157
	B. <i>Victim-Offender Mediation and Transitional Justice</i>	160
	C. <i>Uganda’s Dispute Resolution Landscape</i>	164
III.	THE DUTY TO DEVELOP APPROPRIATE RESOLUTION SYSTEMS	169
	A. <i>The Kampala Convention</i>	169
	B. <i>Relevant Declarations and Guidance</i>	170
	1. <i>Declarations</i>	170
	2. <i>Guidance for States and Mediators</i>	171
	C. <i>Ugandan National Law</i>	174
IV.	MANDATORY CRIMINAL ADR AS A TOOL FOR TRANSITIONAL JUSTICE	175
	A. <i>The Potential of Mandatory Criminal ADR in Transitional Societies</i>	176
	1. <i>Enhanced Due Process</i>	176
	2. <i>Improved Efficiency of Law Enforcement</i>	178
	3. <i>Improved Coordination Between State and Customary Justice Systems</i>	179
	B. <i>The Limits of Mandatory Criminal ADR in Transitional Societies</i>	179
	1. <i>Resources and Practical Considerations</i>	180
	2. <i>Attitudes of Police and Mediators</i>	180
	3. <i>Respect for Customary Tenure and Political Will</i>	181
	4. <i>Systemic Abuse and Corruption</i>	182

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C. *The Feasibility of Mandatory Criminal ADR*.....182

V. CONCLUSION.....183

I. INTRODUCTION

Land disputes are some of the trickiest obstacles to transitional justice today. For many communities seeking to rebuild from armed conflict and mass displacement, real estate functions not only as the socio-cultural, economic, and political bedrock of society, but also as a wellspring of vulnerability, insecurity, and crime.¹ Where conflicts over land ownership are characterized by power imbalances and bad faith, mediators look less like passive facilitators and more like bomb squads sent in to keep things from exploding.

Increasingly, both national and international actors recognize the criminal nature of illegal land acquisitions.² “Land grabbing,” as the practice is commonly known, refers to “[t]he acquisition of land by a public, private enterprise, or individual in a manner that is illegal, fraudulent, or unfair, taking advantage of existing power differences, corruption, and breakdown of law and order in the society.”³ Of these breakdowns, the widespread disregard and marginalization of customary forms of land holding is among the most systemic.⁴ As a result, to local authorities in some jurisdictions, the stealing of real property held under formal tenure is theft; stealing the same property held under customary tenure is but a mere dispute.

The recognition of land grabbing’s criminal undertones, however, has not fully extended into practice.⁵ In transitional contexts like northern Uganda,

¹ INTERNATIONAL JUSTICE MISSION, PROPERTY GRABBING FROM UGANDAN WIDOWS AND THE JUSTICE SYSTEM: A MIXED-METHODS ASSESSMENT IN MUKONO COUNTY, UGANDA 17 (2004); see also INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (ICTJ), *Transitional Justice and Displacement: Challenges and Recommendation* (2012), <https://ictj.org/sites/default/files/ICTJ%20and%20Brookings-LSE%20Transitional%20Justice%20and%20Displacement%20Report.pdf>.

² Lorenzo Cotula, *The New Enclosures? Polanyi, International Investment Law and the Global Land Rush*, in GLOBAL LAND GRABS: HISTORY, THEORY, AND METHOD, 89, 90–96 (Marc Edelman, C. Oya & S. Borras eds., 2015).

³ SAMUEL MABIKKE, ESCALATING LAND GRABBING IN POST-CONFLICT REGIONS OF NORTHERN UGANDA: A NEED FOR STRENGTHENING GOOD LAND GOVERNANCE IN ACHOLI REGION 15 (Land Deal Politics Initiative 2011).

⁴ SIMON LEVINE ET AL., WHAT LITTLE THEY HAVE WILL BE TAKEN: HOW THE SYSTEMATIC VIOLATION OF LAND RIGHTS IN NORTHERN UGANDA IS ALLOWED TO RUN UNCHECKED (Land and Equity Movement in Uganda, Lango Cultural Foundation, Iteso Cultural Union, Norwegian Refugee Council, Trócaire, Lutheran World Federation, Justice and Peace Commission Soroti Archdiocese 2008).

⁵ See International Land Coalition, *Tirana Declaration: Securing Land Access for the Poor in Times of Intensified Natural Resources Competition* (May 26, 2011), <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf> (acknowledging ongoing land grabbing at local, national, and international levels); see also International Land Coalition, *Antigua Declaration*, ¶ 4 (Apr. 25, 2013), <http://www.landcoalition.org/en/resources/antigua-declaration> (“We voice our concern at the extreme vulnerability of many

where evidence of land ownership is hard to obtain due to weak administration and lack of reliable titles after twenty-six years of war between the government and the so-called Lord's Resistance Army,⁶ law enforcement tends to adopt a hands-off approach to land disputes.⁷ The reason given is that land conflicts are considered civil domestic matters in which state law enforcement should not intervene—unless and until a more readily verifiable type of crime occurs, such as robbery, assault, malicious property damage, or murder.⁸

When such a crime related to a land dispute *does* occur, the individuals arrested may or may not be the perpetrators of the underlying land grabbing attempt. Instead, victims and even bystanders may be rounded up, put in jail, and left there on remand indefinitely.⁹ Meanwhile, tension in the community can continue to build while the underlying land conflict remains unresolved.¹⁰ The following quotes from stakeholders in northern Uganda illustrate this tension:

They drove a tractor right through our clan meeting. We ran,
and they chased some of us, claiming we had ransacked their

Indigenous Peoples to land grabbing and criminalisation of customary forms of land and natural resource use, particularly in contexts of extractive industries, conservation areas and commercial agriculture.”).

⁶ MARGARET A. RUGADYA, *ESCALATING LAND CONFLICTS IN UGANDA: A REVIEW OF EVIDENCE FROM RECENT STUDIES AND SURVEYS* 23 (International Republican Institute and Uganda Round Table Foundation 2009).

⁷ See, e.g., Vinod Rajput, *Police 'Inaction' for 6 Years Forced Greater Noida Family to Strip*, HINDUSTAN TIMES (Oct. 10, 2015), <http://www.hindustantimes.com/noida/land-dispute-police-inaction-for-six-years-forced-greater-noida-family-to-strip/story-zu2MCZUKgQrEuTMBwhp65H.html>; DANIEL WILLIAMS, *THERE ARE NO INVESTIGATIONS HERE: IMPUNITY FOR KILLINGS AND OTHER ABUSES IN BAJO AGUÁN, HONDURAS* (Human Rights Watch 2014), <https://www.hrw.org/report/2014/02/12/there-are-no-investigations-here/impunity-killings-and-other-abuses-bajo-aguan>.

⁸ Northern Uganda Land Platform Policy Brief, *On Police Response to Land Crimes Under S.92 of the 1998 Land Act* (Sept. 2014) (on file with author); see also ICTJ, *supra* note 1, at 5 (“National criminal justice systems often focus on the crimes connected to displacement rather than the crime of displacement itself: displacement is often seen as a natural consequence of other crimes or as an inherent effect of armed conflict, and as a result, there are few investigations of the criminality or rationale of the multiple actors involved in these crimes.”).

⁹ See JEREMY AKIN, *POWER & VULNERABILITY IN LAND DISPUTE RESOLUTION: EVALUATING RESPONSES TO DOMESTIC LAND GRABBING IN NORTHERN UGANDA* 42 (Northern Uganda Land Platform 2014), <http://www.landcoalition.org/en/publications/power-vulnerability-land-dispute-resolution>.

¹⁰ *Id.* at 11 (finding that “[a]t times, groups as large as 36, 48, or over 80 people are rounded up, arrested and put on remand for the same land-related case”). In the case referred to in the quote, a wealthy businessman allegedly began surveying community-owned land in order to claim it for his personal use.

supplies of survey equipment. Then the police came and arrested fourteen of us for aggravated robbery. We've been here four months on remand, too poor to pay bond.¹¹

—*Prison Inmate, age 26*

Anger continues at home while some [community members] are incarcerated. Because the [clan] has a bad heart: Why did you take our son or daughter only? Why not take all of us? Mediation should be done instantly, should begin immediately rather than wait for [the dispute] to go from bad to worse.¹²

—*Officer in Charge, Kitgum Police Station*

In recent decades, the field of alternative dispute resolution (ADR) has grown beyond its civil and juvenile origins and is now practiced in a variety of misdemeanor and property cases in jurisdictions worldwide.¹³ Little is understood, however, about the efficacy of ADR in promoting criminal accountability and reconciliation in foreign transitional justice contexts.¹⁴ This Note analyzes the potential, limits, and feasibility of criminal ADR, especially victim-offender mediation, to undergird tenure security as a pillar of crime prevention in settings rife with land grabbing, in accordance with the United Nations Sustainable Development Goals.¹⁵ Drawing upon lessons

¹¹ Interview with (name withheld), male inmate age twenty-six, in Gov't Prison, Gulu, Uganda (May 5, 2013).

¹² Statement by (name withheld), Officer in Charge, Kitgum Police Station, Northern Uganda Land Platform Stakeholder Forum (July 3, 2013).

¹³ See Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 281 (2004) (describing more than 300 such programs in the United States and over 1,200 similar programs throughout Europe, Canada, Israel, Japan, Russia, South Korea, South Africa, South America, and the South Pacific); see also American Bar Association (ABA), *Mediation in Criminal Matters: An ABA Enterprise Project, Survey of ADR and Restorative Justice Programs* (2016), <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf>.

¹⁴ John Braithwaite, *Narrative and "Compulsory Compassion,"* 31 L. & SOC. INQUIRY 425, 443–44 (2006) (observing that in some settings, "restorative justice can have large effects in reducing violent crime by as much as 40 percent, and in other contexts (for example, Aboriginal property offenders in the Canberra RISE experiments and some kinds of victims who did not get what they were looking for), restorative justice can be seriously counterproductive").

¹⁵ See U.N. Sustainable Development Goal No. 16: *Peace, Justice, and Strong Institutions*, Goal 16 Targets, <http://www.un.org/sustainabledevelopment/peace-justice/> ("By 2030 . . . strengthen the recovery and return of stolen assets and combat all forms of organized crime" and "strengthen relevant national institutions . . . for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.").

from northern Uganda, this Note argues that criminal ADR may enhance existing local dispute resolution systems by confronting both the criminal *and* civil sides of a land grab attempt in one forum. To be effective, however, criminal ADR must be complemented by clear police protocols, land rights analysis methods, community-wide land documentation, and quality control mechanisms for state and traditional land administrators and be facilitated by patient and skillful mediators.

Part I of this Note identifies key aspects of the land grabbing problem, traces the development of criminal ADR, and suggests why a more effective strategy for land dispute intervention is needed in transitional justice contexts. Part II analyzes the legal framework for the design of these systems under the African Union Convention for the Protection and Assistance of Internally Displaced Persons,¹⁶ U.N. Guidance for Effective Mediation,¹⁷ and Economic and Social Council Resolution on the Use of Restorative Justice Programs in Criminal Matters.¹⁸ Part III then concludes with an evaluation of the potential, limits, and feasibility of victim-offender mediation to systematically address bad faith land disputes in transitional societies such as northern Uganda.

II. LAND DISPUTES AS BOTH CIVIL AND CRIMINAL MATTERS

Civil disputes over land and natural resources are globally recognized as both precursors and predictors of criminal activity within post-conflict communities.¹⁹ At the national level, states such as Kenya,²⁰ Liberia,²¹ and

¹⁶ African Union, *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Oct. 23, 2009) [hereinafter *Kampala Convention*], <http://www.au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>. As of June 2017, forty African States have signed to the Convention, while twenty-seven have ratified it. Uganda ratified the Convention on Jan. 29, 2010. See https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf.

¹⁷ U.N. Doc. A/66/811, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution, Report of the Secretary General*, annex at 20 (June 25, 2012).

¹⁸ Economic and Social Council Res. 2002/12 (July 24, 2002).

¹⁹ See, e.g., ERICA GASTON & LILLIAN DANG, ADDRESSING LAND CONFLICT IN AFGHANISTAN 372 (UNITED STATES INSTITUTE OF PEACE 2015), <https://www.usip.org/publications/2015/05/addressing-land-conflict-afghanistan> (“Disputes over land in Afghanistan have become one of the key drivers of conflict and criminal violence.”); CAMBODIAN CENTER FOR HUMAN RIGHTS, CAMBODIA’S WOMEN IN LAND CONFLICT 13 (2016), http://cchrcambodia.org/index_old.php?url=media/media.php&p=report_detail.php&reid=116&id=5 (“Women who experienced land conflicts were almost always subject to threats, harassment, arrest, or violence by the authorities or land concession actors.”).

²⁰ LAND LAWS ACT (2016), Kenya Gazette, http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/LandLaws_Amendment_Act_28of2016.pdf; COMMUNITY LAND ACT

Uganda²² have enacted statutes criminalizing the occupation or acquisition of land without consent of the owners. Internationally, the Chief Prosecutor of the International Criminal Court has declared that her “office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, . . . the illegal dispossession of land” and “will also seek to cooperate and provide assistance to States . . . with respect to conduct which constitutes a serious crime under national law, such as . . . land grabbing.”²³ This section identifies key aspects of the land grabbing problem and traces the development of criminal ADR, demonstrating why a more effective strategy for land dispute intervention is needed in transitional justice contexts like northern Uganda.

A. Land Grabbing in Context

Customary, indigenous and communal lands account for approximately 50% of the world’s total land area and are home to 2.5 billion people.²⁴ The World Bank estimates that in Sub-Saharan Africa, the proportion of customary lands is 90%.²⁵ In post-conflict areas such as northern Uganda, it is calculated at as much as 98.8%.²⁶ Governance of these lands is directly tied to human and household security: where tenure is insecure, economic livelihoods, social fabrics, and future existences are as well.²⁷

Under customary tenure, land is held according to traditional norms of “ownership” particular to a given group of people. The land is administered

(2016), KENYA GAZETTE, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityLandAct27of2016.pdf>.

²¹ ACT AGAINST CRIMINAL CONVEYANCE OF LAND (2014), Laws of Liberia, <http://extwprle.gs1.fao.org/docs/pdf/lbr146964.pdf>.

²² LAND ACT, CAP. 227, § 91 (1998), Laws of Uganda, <https://www.ulii.org/ug/legislation/consolidated-act/227>.

²³ Office of the Prosecutor, International Criminal Court, *Policy Paper on Case Selection and Prioritisation* ¶¶ 7, 41 (Sept. 15, 2016).

²⁴ FRED PEARCE, COMMON GROUND: SECURING LAND RIGHTS AND SAFEGUARDING THE EARTH: A GLOBAL CALL TO ACTION ON INDIGENOUS AND COMMUNITY LAND RIGHTS (Oxfam 2016), <http://www.landcoalition.org/en/resources/common-ground-securing-land-rights-and-safeguarding-earth>.

²⁵ FRANK F.K. BYAMUGISHA, SECURING AFRICA’S LAND FOR SHARED PROSPERITY: A PROGRAM TO SCALE UP REFORMS AND INVESTMENTS 55 (World Bank and Agence Française de Développement 2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/13837/780850PUB0EPI00LIC00pubdate05024013.pdf?sequence=1>.

²⁶ See CHRISTOPHER BURKE & DOREEN KOBUSINGYE, SECURING WOMEN’S LAND AND PROPERTY RIGHTS IN NORTHERN UGANDA (WEST NILE, ACHOLI, LANGO, TESO AND KARAMOJA) 23 (Oxfam 2014), http://www.landcoalition.org/sites/default/files/documents/resources/Securing%20Women%20Land%20Rights%20Report_with%20covers%20_0.pdf.

²⁷ See PEARCE, *supra* note 24.

orally and typically held without written records.²⁸ This often means that multiple parties have distinct substantive claims, forming a bundle of diverse rights to the same piece of land.²⁹ In post-colonial nations the world over, customary tenure continued a de facto existence despite periods of colonial rule. In many cases, customary tenure won statutory—sometimes even constitutional—recognition after independence.³⁰ Traditionally, land was rarely sold to outsiders; to do so would deplete the territorial assets, wealth, and power of the clan.³¹ With the advent of globalization, climate change, and the neoliberal commodification of land,³² national governments—sometimes working through local elites—have willingly granted vast land concessions to foreign investors.³³

The 2007–2008 spike in world food prices saw agribusinesses worldwide join in a rush to acquire cheap land in other countries in order to reduce their costs of production and maximize profits.³⁴ With a bundle of rights attached to each parcel, these land transactions are frequently disputed. As *Guardian* journalist Fred Pearce has explained: “In the majority of cases, the land involved was already owned, occupied and used by local communities and indigenous peoples.”³⁵ With its weak land governance systems, Africa has been and continues to be the “most heavily targeted continent,” accounting for 42% of all land deals and 37% of all hectares transacted across the globe from 2012 to 2016.³⁶ Academics and policymakers have thus come to characterize “land grabbing” as resource theft by the global north against the global south in the form of large-scale land acquisitions.³⁷

²⁸ LAND AND EQUITY MOVEMENT IN UGANDA (LEMU), HOW IS LAND OWNED AND MANAGED UNDER CUSTOMARY TENURE? (2008), <http://land-in-uganda.org/lemu/document-archive/information-paper-1-how-is-land-owned-and-managed-under-customary-tenure/>.

²⁹ Food and Agriculture Org., Land Tenure Studies 3: Land Tenure and Rural Development, ¶¶ 3.8, 9 (2002), <http://www.fao.org/docrep/005/y4307e/y4307e00.pdf> (describing, for example, a community land used for grazing, cultivation, collecting water, wild fruits, firewood, building materials, and hunting).

³⁰ See generally RACHAEL S. KNIGHT, STATUTORY RECOGNITION OF CUSTOMARY LAND RIGHTS IN AFRICA (FAO 2012).

³¹ LEMU, *supra* note 28.

³² See generally HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

³³ RACHAEL KNIGHT ET AL., PROTECTING COMMUNITY LANDS AND RESOURCES: EVIDENCE FROM LIBERIA, MOZAMBIQUE AND UGANDA 11 (Namati and the International Development Law Organization 2012).

³⁴ See PEARCE, *supra* note 24, at 30.

³⁵ *Id.*

³⁶ KERSTIN NOLTE ET AL., INTERNATIONAL LAND DEALS FOR AGRICULTURE 2 (Land Matrix 2016).

³⁷ See generally Jootaek Lee, *Contemporary Land Grabbing, Research, and Bibliography*, GLOBALEX DATABASE (Jan. 2016), http://www.nyulawglobal.org/globalex/Contemporary_Lan

Transnational land acquisitions, though grave, are comparatively rare today.³⁸ Domestic land grab attempts, on the other hand, occur more frequently³⁹ and are more difficult to detect. These attempts often go unreported and occur between members of the same community, clan, or even family.⁴⁰ Despite this fact, in northern Uganda, land-related claims constitute an estimated 70% both of crimes reported to police and of lawsuits filed in court.⁴¹ Such cases are regularly characterized by violence and criminal elements such as assault, arson, defilement, homicide, rape, robbery, theft, and even witchcraft.⁴² Moreover, one recent study has tied land grabbing and related crimes to substantial shares of local prison populations, suggesting the presence of a village-to-prison pipeline.⁴³

Domestic land grabbing is understood to be a precursor—and the result of—transnational land grabs in several ways.⁴⁴ First, unchecked land grabbing within communities may “undermine[] the customary tenure system by making it appear ineffective in providing tenure security, discriminatory by blocking land grabbing attempts, and prohibitive of land markets since transactions usually require approval of the clan—thus, reinforcing the case for its abolition.”⁴⁵ Those promoting the land market by

d_Grabbing.html; TOM BLOMLEY ET AL., ‘LAND GRABBING’: IS CONSERVATION PART OF THE PROBLEM OR THE SOLUTION? (International Institute for Environment and Development 2013).

³⁸ According to the Land Matrix online database, 1,211 *trans-national* deals have been concluded regarding the legal transfer of over 455 million hectares since 2012, while 1,777 *domestic* deals have been concluded regarding just 65 million hectares. Jacqueline M. Klopp & Odenda Lumumba, *Kenya and the “Global Land Grab”: A View from Below*, in THE GLOBAL LAND GRAB: BEYOND THE HYPE 54, 68 (Mayke Kaag & Annelies Zoomers eds., 2014) (“[W]e need to get beyond the hype and move towards concrete, constructive support for local movements struggling with the complex and difficult task of transforming existing governance systems.”).

³⁹ See *Africa’s Real Land Grab*, ECONOMIST (July 21, 2016), <http://www.economist.com/news/middle-east-and-africa/21702472-never-mind-foreign-interlopers-african-urbanites-are-scooping-up-more> (“If there is a land grab in Africa, it is being done by African urbanites.”).

⁴⁰ See RUGADYA, *supra* note 6, at 3 (“[In northern Uganda], 20% of all land disputes that occur are not reported to any dispute resolution institution; given the severity of land conflicts, this is a precursor to social tensions that could erupt into violence.”).

⁴¹ See AKIN, *supra* note 9, at 12.

⁴² See JESSE RUDY ET AL., STRENGTHENING THE PERFORMANCE OF THE UGANDAN JUSTICE SYSTEM: A MODEL TO SECURE AND PROTECT WIDOW AND ORPHAN LAND RIGHTS 4 (International Justice Mission ed. 2014); see also AKIN, *supra* note 9, at 83–91.

⁴³ AKIN, *supra* note 9, at 83–91 (finding that between 39.9% and 53.9% of randomly sampled prison inmates in three major government prisons in northern Uganda report their charges originating in a land dispute). For a similar situation in Ethiopia, see WE SAY THE LAND IS NOT YOURS: BREAKING THE SILENCE AGAINST FORCED DISPLACEMENT IN ETHIOPIA (Oakland Institute 2015), <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Breaking%20the%20Silence.pdf>.

⁴⁴ MABIKKE, *supra* note 3.

⁴⁵ AKIN, *supra* note 9, at 39.

freeing up the unutilized or “dead capital” of these rural arable lands therefore encourage the imposition of formal systems of tenure that reflect an individualized and absolute concept of ownership, rather than the traditional model most commonly found in daily village life: bundles of distinct rights shared by multiple parties.⁴⁶ Second, this situation may facilitate an environment of impunity that benefits local elites and discourages other community members from speaking out, thus creating conditions for dubious deals with outside investors.⁴⁷ Third, as individuals amass more acreage than they can utilize effectively, they may choose to sell it off to new settlers or migrants at prices higher than what locals are willing or able to pay.⁴⁸

B. Victim-Offender Mediation and Transitional Justice

In recent decades, the field of alternative dispute resolution (ADR) has expanded beyond its civil and juvenile origins and is now practiced in a variety of criminal assault and property cases in jurisdictions worldwide.⁴⁹ One branch of ADR, restorative justice, recognizes that crime is not simply a violation against the state, as has been the norm in Western countries since William the Conqueror described crime as a breach of the king’s peace.⁵⁰ Rather, it is “a violation of people and relationships.”⁵¹ Accordingly, achieving justice in these situations necessarily “involves the victim, the offender, and the community.”⁵² One view of restorative justice posits that there can be little meaningful resolution as long as underlying tensions that

⁴⁶ See DE SOTO, *supra* note 32, at 46. Certificates of Customary Ownership in northern Uganda present a diorama of this debate. See also LEMU, CERTIFICATES OF CUSTOMARY OWNERSHIP ARE NOT WHAT THEY SEEM ON THE SURFACE: RISKS TO CCOs (May 9, 2017), http://land-in-uganda.org/lemu/wp-content/uploads/2017/06/Policy_Brief_on_RISks_to_CCOs-30.5.17.pdf.

⁴⁷ See, e.g., Civic Response on Environment & Development, *Land Grabbing from the Inside Out: Francis Kahwa Becomes the Owner of Bikongoro Village*, in UP AGAINST GIANTS: OIL-INFLUENCED LAND INJUSTICES IN THE ALBERTINE GRABEN IN UGANDA (2015), <http://tiuganda.org/wp-content/uploads/oil-influenced-land-injustices-in-the-albertine-graben-inuganda.pdf>.

⁴⁸ RUGADYA *supra* note 6, at 19.

⁴⁹ See Umbreit et al., *supra* note 13 (describing more than 300 such programs in the United States and over 1,200 similar programs throughout Europe, Canada, Israel, Japan, Russia, South Korea, South Africa, South America, and the South Pacific); see also AMERICAN BAR ASSOCIATION, MEDIATION IN CRIMINAL MATTERS: AN ABA ENTERPRISE PROJECT, SURVEY OF ADR AND RESTORATIVE JUSTICE PROGRAMS (2016), <http://www.americanbar.org/content/dam/aba/publications/criminaljustice/mediationsurvey.authcheckdam.pdf>.

⁵⁰ Flora Go, *Mediation as Practiced in the Criminal Law: The Present, the Pitfalls, and the Potential*, 5, AMERICAN BAR ASSOCIATION (2010), http://www.americanbar.org/content/dam/aba/migrated/dispute/docs/2010_BoskeyEssay_Winner_FloraGo.authcheckdam.pdf.

⁵¹ HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE 178 (1990).

⁵² *Id.* at 179.

caused the dispute go unaddressed.⁵³ For instance, an individual may be successfully arrested and imprisoned for assault or robbery of survey equipment, but the land dispute that provoked his retaliatory actions continues to simmer.

Restorative justice is practiced in a variety of forms worldwide, including victim-offender mediation (VOM), community and family group conferencing, circle sentencing, and truth and reconciliation commissions.⁵⁴ Since use of restorative justice does not deprive states of the power to prosecute alleged offenders later, it can be adapted to complement established criminal justice systems.⁵⁵ VOM is a process whereby victims have the chance to meet their offender in a safe setting with the goals of: (1) holding offenders directly accountable to the people and communities they have violated, (2) restoring the material and emotional losses of victims, (3) providing a range of opportunities for solving underlying problems, and (4) fostering public safety through community building.⁵⁶ It can be initiated at any stage in the criminal justice process, but in some programs, cases are referred to VOM as a diversion from prosecution. In other programs, police, judges, probation officers, prosecutors, defense attorneys, or victim advocates may refer the case after a formal admission of guilt, or where the mediation is made a condition to probation, as long as the victim wishes to participate.⁵⁷ Due to high levels of reported satisfaction among participants in restorative processes like VOM, scholars posit the potential for mediation to extend to other areas of criminal law, such as plea bargaining⁵⁸ and even violent crimes.⁵⁹

Some jurisdictions have gone so far as to make victim-offender mediation mandatory for certain types of criminal cases.⁶⁰ Proponents argue that requiring VOM at the diversion level approaches victims and offenders quickly after the alleged crime is committed and prevents certain types of

⁵³ *Id.* See also MARGARITA ZERNOVA, *RESTORATIVE JUSTICE: IDEALS AND REALITIES* (2007).

⁵⁴ Economic and Social Council Res. 2016/17, *Restorative Justice in Criminal Matters*, 3 (July 26, 2016).

⁵⁵ *Id.* at 2.

⁵⁶ MARK S. UMBREIT, *Restorative Justice Through Victim Offender Mediation*, in *DIALOGUE-DRIVEN VICTIM OFFENDER MEDIATION TRAINING MANUAL: A COMPOSITE COLLECTION OF TRAINING RESOURCE MATERIALS 9–10* (Mark S. Umbreit & Ted Lewis eds., Center of Restorative Justice & Peacemaking, School of Social Work, University of Minnesota (2015)).

⁵⁷ *Id.* at 91.

⁵⁸ *Id.* at 24.

⁵⁹ Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 *CARDOZO J. CONFLICT RESOL.* 1 (2003).

⁶⁰ Such as those involving drunk-driving (South Bend, Indiana); robbery (Dallas, Texas); and sexual assault, rape, battery, and burglary (La Cross, Wisconsin). See *ABA supra* note 49.

parties, such as juveniles, from entering the court system.⁶¹ Critics, on the other hand, argue that compulsory mediation may undermine the legitimacy of the process and thus the durability of any agreement reached.⁶² In his review of ninety empirical studies on the impact of restorative programs like VOM and family group conferencing throughout the United States, the United Kingdom, and Canada, Mark Umbreit includes “voluntary consent and self-determination” in his list of identified best practices.⁶³ He observes that when an offender is forced to participate regardless of whether he takes responsibility, the process becomes agreement-focused (as opposed to dialogue-focused) and its restorative impact is weakened.⁶⁴ Other fundamental principles and best practices include:

- | | |
|---|---|
| • Impartial role and thorough training of facilitators | • VOM can occur at any point in the criminal justice system |
| • Involvement of crime victims in VOM | • Confidentiality and non-legal facilitation |
| • Preparation of the victim, offender, and other support persons | • Positive presence of the mediator/facilitator |
| • Creating a safe place for dialogue in all pre-joint sessions and joint sessions | • Voluntary consent and self-determination |
| • Not rushing the process; holding multiple meetings as needed | • Unimpeded direct face-to-face dialogue |
| • Community-based organizations working in partnership with criminal justice system | • Signed, trackable reparation agreements |
| • Genuine support from police, prosecutors, and judges for VOM | |

Source: Umbreit (2015) at 27.

Restorative justice has natural resonance with the principles of transitional justice. Transitional justice situations are those in which whole populations who have experienced trauma or loss have the opportunity to build a new social and legal order so as to end cycles of systemic human rights abuses.⁶⁵ Both restorative and transitional brands of justice are “alternatives” to the liberal rule of law which emphasize a constructive

⁶¹ Lora Elizabeth Gallagher, Note, *Detour Ahead: Victim-Offender Mediation as a Mandatory Deviation Program for Juveniles* (2013), <http://dx.doi.org/10.2139/ssrn.2225301>.

⁶² Braithwaite, *supra* note 14, at 425.

⁶³ See UMBREIT, *supra* note 56, at 27–29.

⁶⁴ *Id.*

⁶⁵ INT'L CTR. FOR TRANSITIONAL JUST., *What is Transitional Justice?* (2016), <https://www.ictj.org/about/transitional-justice>.

process of conflict resolution that considers emotion and “hidden layer[s]” of issues underlying the conflict.⁶⁶ Both attempt to break complex conflicts down into smaller, more manageable problems that are partly resolvable by using distinct—but complementary—strategies. And both promote community work and empowerment. As Michal Alberstein, Senior Law Lecturer at Bar Ilan University, observes:

Transitional Justice processes usually utilize aboriginal practices and local reconciliation mechanisms and turn them into modern tribunals which help to transform the violent regime into a peaceful one. In a similar way that ADR strives to abate traditional court paternalism and empower the sides of a conflict, Transitional Justice places the burden of problem-solving in the hands of the local or newly founded regime.⁶⁷

A number of criticisms surround restorative justice as practiced in post-conflict settings. First, an important assumption of restorative and transitional approaches is that the parties’ grievances concern acts or omissions that occurred primarily *in the past*. Yet when criminal activity is ongoing, critics observe that ADR may not muster the economic, law-enforcement, normative, or political leverage needed to halt the perpetrator and reach a meaningful resolution to the crime-based conflict. James Cockayne, writing for the Centre for Humanitarian Dialogue, explains it this way:

[W]hen one of those parties’ agendas is precisely to continue flouting the law and manipulating formal political settlements for its own benefit, the ground for negotiated solutions may turn out to be very narrow. It may only be through the application of other more normative and coercive tools, *going well beyond the traditional toolkit of mediators*, that the necessary additional common ground can ultimately be carved out and criminal agendas effectively managed.⁶⁸

Second, an at-large perpetrator has little incentive to voluntarily attend a mediation meeting, since dialogue about the underlying origins of the dispute may threaten his pecuniary and penal interests.

⁶⁶ Michal Alberstein, *ADR and Transitional Justice as Reconstructing the Rule of Law*, 2011 J. DISP. RESOL. 127, 132.

⁶⁷ *Id.* at 142–43.

⁶⁸ James Cockayne, *Strengthening Mediation to Deal with Criminal Agendas*, Oslo Forum Papers, Centre for Humanitarian Dialogue, No. 002, 22 (2013) (emphasis added).

Third, power imbalances between rich landed elites and poor illiterate villagers *outside the mediation* may drastically narrow the victim's range of perceived options to practically resolve the dispute. Power may be "transmitted and diffused by means of favoritism, kinship, personal ties, marriage bonds, family relationship, and political affiliation," in addition to physical strength, gender, level of education, socioeconomic status, and ethnicity.⁶⁹

Fourth, successful criminal ADR intervention assumes an enabling environment of trust between the judiciary, police, the mediator, and other facilitating stakeholders such as social workers, family members, and local political leaders. In reality, however, corruption and political patronage often characterize transitional justice contexts.⁷⁰

Informal versions of victim-offender mediation are already practiced in post-conflict societies like northern Uganda, where community-based practitioners work in parallel to a state justice system that may be inaccessible or unreliable. Yet unlike in other parts of the world, criminal ADR in transitional justice settings may be conducted without the backing of the state and before any guilt has been determined.⁷¹ This is a key difference that reveals a host of complexities. Where land grabbing may have gone on for generations in a transitional society, the perpetrator of a current land grab attempt may actually be the victim of an earlier land grab, or vice versa. And since land conflicts frequently involve families and clans with multiple members, culpability may lie with some members of a clan, but not with others. The need to practically negotiate these social and territorial relationships suggests why existing forms of criminal ADR have historically been practiced by local traditional authorities without significant state involvement.

C. Uganda's Dispute Resolution Landscape

Uganda, like many other post-colonial nations, is layered in complexity. The State's 1995 Constitution recognizes four coexisting tenure systems: customary, leasehold, mailo,⁷² and freehold.⁷³ Its 1998 Land Act specifies

⁶⁹ P. Tat & D.M. Bagshaw, *A Search for Justice and Rights in Land Dispute Resolution in Cambodia*, 32 CONFLICT RES. Q. 217 (2014).

⁷⁰ Cockayne, *supra* note 68.

⁷¹ See generally AKIN, *supra* note 9.

⁷² A legacy of colonial rule, this system of landlord-tenant ownership is only found in the central and western parts of the country.

⁷³ CONST. OF UGANDA (1995) § 237(3). According to Uganda's Land Act, Cap. 227 (1998), "customary tenure" "means a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons" (§ 1(1)); "leasehold" tenure "means the holding of land for a given period from a specified date of commencement,

two courts of first instance for matters relating to contested ownership of customary lands: traditional (clan) courts and Local Council 2 (government) Courts.⁷⁴ Moreover, decades of armed conflict between the Lord's Resistance Army and the Uganda People's Defense Forces have led to the forced displacement of approximately 2 million people, constituting 8% of the national population and 94% of the northern region by the time the insurgency ended.⁷⁵ Under these circumstances, the multiplicity of land tenures and dispute resolution systems, combined with the fact that the majority of plots in the country are owned customarily and without documents,⁷⁶ created prime conditions for poverty, forum shopping, and impunity.⁷⁷ While the numbers of internally displaced persons (IDPs) have drastically reduced—the International Displacement Monitoring Center estimates less than 30,000 IDPs remained as of May 2015⁷⁸—the number of land disputes is “ever increasing.”⁷⁹ In 2008, a World Bank study found that 65% of all household lands “left behind” during displacement in Lango and Acholi, subregions of northern Uganda, were in dispute.⁸⁰

To date, neither the state nor traditional justice systems have proven adequate to handle this rising tide of land litigation in northern Uganda.⁸¹ First, in the state civil legal system, a backlog of undisposed cases renders civil land suits costly, confusing, and extremely time-intensive for rural parties.⁸² For example, by July 2010, the Chief Magistrate Court in Gulu had 55.9% of its civil suits outstanding.⁸³ By the end of December 2013, the

on such terms and conditions as may be agreed upon by the lessor and lessee” (§ 1(s)); and “freehold” tenure “means the holding of registered land in perpetuity subject to statutory and common law qualifications” (§ 1(p)).

⁷⁴ See LAND ACT, Cap. 227 (1998), §§ 76(a), 88 (as amended 2004).

⁷⁵ COUNTING THE COST: TWENTY YEARS OF WAR IN NORTHERN UGANDA 7 (Civil Society Organizations for Peace in Northern Uganda (CSOPNU) 2006), <https://www.oxfam.org/sites/www.oxfam.org/files/uganda.pdf>.

⁷⁶ Country-wide, customary land accounts for anywhere from 65.5% to 80%. Government of Uganda Board of Statistics (UBOS) National Household Survey for 2005/2006, at S.a2bq7; JUDY ADOKO & SIMON LEVINE, LAND MATTERS IN DISPLACEMENT: THE IMPORTANCE OF LAND RIGHTS IN ACHOLILAND AND WHAT THREATENS THEM 54 (CSOPNU & LEMU) (2004).

⁷⁷ RUGADYA, *supra* note 6, at 21.

⁷⁸ INTERNAL DISPLACEMENT MONITORING CENTER, FIGURES ANALYSIS: UGANDA (IDMC 2016), <http://www.internal-displacement.org/sub-saharan-africa/uganda/figures-analysis>.

⁷⁹ Government of Uganda, Ministry of Lands, Housing, and Urban Development, *National Land Policy* ¶ 116(vii) (February 2013).

⁸⁰ MARGARET RUGADYA ET AL., NORTHERN UGANDA LAND STUDY, ANALYSIS OF POST CONFLICT LAND POLICY AND LAND ADMINISTRATION: A SURVEY OF IDP RETURN AND RESETTLEMENT, ISSUES AND LESSONS: ACHOLI AND LANGO REGIONS 55 (World Bank) (2008).

⁸¹ See generally Rose Nakayi, *The Role of Local Council Courts and Traditional Institutions in Resolving Land Disputes in Post-Conflict Northern Uganda*, 7 MALAWI L.J. 119 (2013).

⁸² See AKIN, *supra* note 9, at 96.

⁸³ MABIKE, *supra* note 3, at 12–13.

Chief Magistrate Court in Lira had 90.5% of its reported land cases outstanding.⁸⁴ This backlog is partly the product of a high volume of cases as well as inefficiencies associated with the translation of proceedings into English. Magistrates' visits of the *locus in quo*, which require scheduled time outside of court, transportation, and official per diems paid by litigants, also contribute to the slow handling of land litigation.⁸⁵

Second, some magistrates' attitudes in northern Uganda remain generally negative towards customary tenure and traditional justice mechanisms.⁸⁶ Formal rulings, therefore, tend to emphasize statutory law and formally documented findings rather than analysis of oral and physical evidence regarding customary land rights—signaling a disadvantage to parties who do not have a lawyer.

Third, court judgments are “rendered unenforceable” while a case is on appeal,⁸⁷ which may take years to process, and only eventuate in remand to lower Local Council Courts (LCCs). LCCs are widely known to lack meaningful remuneration, training, supervision, and power to enforce their decisions, resulting in “highly imperfect and chaotic functioning, which affects their ability to dispense justice that meets the minimum human rights standards.”⁸⁸ Even once a final judgment is rendered, hiring a court broker or police to force compliance upon a contemptible party (usually the victim's neighbor) is financially prohibitive and may ignite existing grievances.⁸⁹

In the state criminal legal system, police in northern Uganda apply a hands-off approach to domestic land disputes, referring parties instead to court or mediation.⁹⁰ As a District Police Commander in Lango subregion explained, “[P]olice do not handle land cases. . . . We don't have the power to handle the root cause.”⁹¹ Even when police *are* involved, community members may be suspicious. National studies cite “[u]nresolved corruption allegations against the judiciary, police and district authorities alike” as a major “conflict driver” in northern Uganda,⁹² and “[s]everal commissions of inquiry and parliamentary audits have revealed widespread and systemic corruption in the army, police, judiciary, revenue authority, national social

⁸⁴ See AKIN, *supra* note 9, at 97.

⁸⁵ *Id.*

⁸⁶ *Id.* at 68, 72–74.

⁸⁷ Interview with (name withheld), Grade 1 Magistrate, Katakwi, Uganda (Apr. 9, 2013).

⁸⁸ Nakayi, *supra* note 81, at 121.

⁸⁹ AKIN, *supra* note 9, at 59.

⁹⁰ *Id.* at 67.

⁹¹ Interview with (name withheld), District Police Commander, Lango Subregion, Uganda (May 6, 2013).

⁹² ADVISORY CONSORTIUM ON CONFLICT SENSITIVITY (ACCS), NORTHERN UGANDA CONFLICT ANALYSIS 76 (2013).

security fund, [Office of the Prime Minister], and the Ministry of Finance.”⁹³ In 2014, Transparency International’s East African Bribery Index ranked Uganda’s police the single most bribery prone institution in East Africa; Uganda’s Land Services came in at number five.⁹⁴

Likewise, the plurality of traditional courts and their existence parallel to the formal system severely limit their capacity to dispense justice in land cases. Since these institutions are self-regulating, their procedures and decisions are sometimes based on “common sense rather than customary law” and discriminatory against women and children.⁹⁵ Even where a clan court does uphold land rights of their vulnerable members, the clan’s lack of legal enforcement power allows perpetrators to either refuse to comply with the decision and not appeal, or remove the case to state court.⁹⁶ Despite these imperfections, studies show that citizens in northern Uganda prefer to bring their land dispute to a traditional authority.⁹⁷ ADR initiatives—as applied by legal aid service providers, civil society organizations, and various government officials, often to supplement efforts of state and traditional justice mechanisms—have achieved a degree of success in managing good faith land disputes in northern Uganda.⁹⁸

In cases where parties exhibit bad faith, however, mediation fails to resolve land disputes for several reasons. First, because mediation is voluntary, perpetrators of land grabbing may refuse to attend the mediation in the first place or insist upon a biased mediator. Second, non-binding settlement agreements may not be respected in subsequent proceedings should the case end up in formal court, and may not adequately consider land rights or

⁹³ *Id.* at 6 (citing Report of Judicial Inquiry into Corruption in the UGANDA POLICE FORCE (2000), https://books.google.co.ug/books/about/Report_of_the_Judicial_Commission_of_Inq.html?id=1g0VAQAIAAJ&redir_esc=y).

⁹⁴ Out of fifty sectors from five countries. See Transparency International, “Aggregate Index,” East African Bribery Index 2 (2014), <http://www.tkenya.org/index.php/the-east-african-bribery-index>.

⁹⁵ Nakayi, *supra* note 81, at 130.

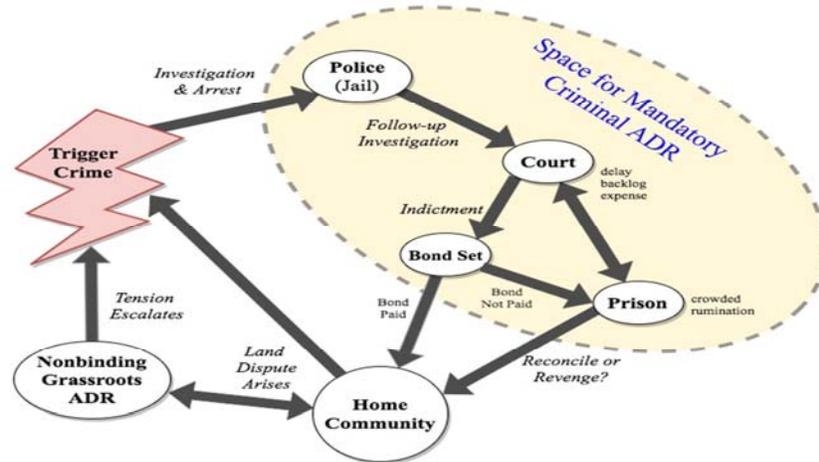
⁹⁶ Judy Adoko & Jeremy Akin, *Is the Clan Justice System Ready to Assume a Greater Role in Land Administration, as Provided for in the 2013 Uganda National Land Policy?*, LEMU (2014), <http://land-in-uganda.org/lemu/wp-content/uploads/2015/01/are-clan-courts-discriminatory.pdf>.

⁹⁷ INTERNATIONAL ORGANIZATION FOR MIGRATION, UNITED NATIONS DEVELOPMENT PROGRAMME, AND NORWEGIAN REFUGEE COUNCIL, LAND OR ELSE: LAND-BASED CONFLICT, VULNERABILITY, AND DISINTEGRATION IN NORTHERN UGANDA 33 (2010); UGANDA LAND ALLIANCE, MILESTONES TOWARDS THE INTEGRATION OF INFORMAL JUSTICE MECHANISMS INTO THE FORMAL DYSTEM: FINDINGS FROM AMURU, APAC, AND KATAKWI DISTRICTS 15 (ULA 2010).

⁹⁸ See BURKE & KOBUSINGYE, *supra* note 26; see also JEREMY AKIN & ISAAC KATONO, EXAMINING THE ADR-TISTRY OF LAND DISPUTE MEDIATORS IN NORTHERN UGANDA 88 (Northern Uganda Land Partners Platform 2011), http://land-in-uganda.org/lemu/wp-content/uploads/2015/08/LAND_ADR-tistry_2011-Final.pdf.

underlying tensions between the parties and their families that sparked the dispute in the first place. Third, where a land dispute is characterized by extreme power imbalances, violence, intimidation, or criminal activity, both mediators and parties may fear for their safety and the presence of police officers during a mediation session may undermine the voluntariness of the dialogue. As a result, the primary strategy of mediators in these cases is referral to another institution, agency or individual with greater power to confront the perpetrator and stop the land grabbing attempt. Since virtually all referrals from ADR processes are to the state or traditional justice systems, vulnerable victims can break this cycle either by persevering until the aggressor backs down, giving up and conceding their land, or forcefully retaliating at the risk of bodily harm or imprisonment. (See Figure 1 below.)

Figure 1: NORTHERN UGANDA'S VILLAGE-TO-PRISON PIPELINE



Source: Akin (2014)

A recent study of 110 land grabbing attempts that had undergone mediation facilitated by nongovernment organizations or clan authorities revealed that, in all but three cases, the dispute was still ongoing years later.⁹⁹ Similarly, of the prison inmates who reported that their charges arose from a land-related dispute, three-quarters indicated they had previously attempted to mediate the dispute outside of court.¹⁰⁰ This data supports findings from previous research that indicate a continual *rise* in the number of land disputes

⁹⁹ AKIN, *supra* note 9, at 98.

¹⁰⁰ *Id.* at 89.

and a *decrease* in the percentage of land dispute caseloads factually and sustainably resolved.¹⁰¹ In sum, ordinary mediation has so far proven inadequate to handle land grabbing attempts in northern Uganda.

III. THE DUTY TO DEVELOP APPROPRIATE RESOLUTION SYSTEMS

Under international law, designing effective systems for land dispute resolution is not simply a good idea; it is a state's legal duty. This section outlines the legal framework for designing effective criminal justice complements to land dispute resolution systems in post-crisis nations such as Uganda.

A. *The Kampala Convention*¹⁰²

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, commonly known as the Kampala Convention, entered into force on December 6, 2012. According to the Norwegian Refugee Council, "it is the world's first continental instrument that legally binds governments to protect the rights and wellbeing of people forced to flee their homes by conflict, violence, disasters, and human rights abuses."¹⁰³ The Convention is a unifying framework that allows for diverse application by each of its African member nations. Civil society experts hold it up as a model for the other reported 127 countries worldwide that are currently affected by internal displacement.¹⁰⁴

The Convention defines displacement as "the involuntary or forced movement, evacuation, or relocation of persons or groups of persons within internationally recognized state borders."¹⁰⁵ In an effort to discourage "harmful practices"¹⁰⁶ and address the consequences of displacement, the

¹⁰¹ See AKIN & KATONO, *supra* note 98, at 32.

¹⁰² Kampala Convention, *supra* note 16.

¹⁰³ NORWEGIAN REFUGEE COUNCIL AND INTERNAL DISPLACEMENT MONITORING CENTRE, THE KAMPALA CONVENTION TWO YEARS ON: TIME TO TURN THEORY INTO PRACTICE, Briefing Paper 1 (Dec. 8, 2014), <http://www.internal-displacement.org/sub-saharan-africa/kampala-convention/>; see Kampala Convention, *supra* note 16, art. 1(k) (defining "Internally Displaced Persons" as "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border").

¹⁰⁴ Expert Statement on Internally Displaced Persons at Georgetown University (June 28, 2016), <http://www.internal-displacement.org/assets/Uploads/IDP-Expert-Statement-September-Summit2.pdf>.

¹⁰⁵ Kampala Convention, *supra* note 16, art. 1(k).

¹⁰⁶ *Id.* art. 1(j).

Convention obligates state parties to “[e]nsure individual responsibility for acts of arbitrary displacement” in accordance with applicable domestic and international criminal law.¹⁰⁷ Notably, the text devotes an entire article to preventing “displacement induced by projects” carried out by public or private actors.¹⁰⁸ This is significant because it tasks States to hold individuals criminally accountable for causing unlawful forced evictions, regardless of the intended “development project” purpose or how many victims are displaced.

Under the Convention, States are also required to design and establish “appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons.”¹⁰⁹ It goes on to say that “State Parties shall endeavor to protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interest”¹¹⁰ and “shall take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities’ return, reintegration, and reinsertion.”¹¹¹ Although it does not define what constitutes “special dependency and attachment” to particular lands, the Convention seems to suggest that pastoral communities fit into this category.

B. Relevant Declarations and Guidance

Due to the recurring and grave nature of land-and-natural-resource-related conflicts across the globe, the United Nations and its agencies have adopted a host of declarations and guidance for mediation practitioners. This paper highlights the most salient of these in the context of designing systems to handle intra-community land grabs in transitional justice contexts.

1. Declarations

Sets of globally recognized principles illuminate the rights and obligations of various stakeholders who participate in systems for land dispute resolution and criminal justice.

¹⁰⁷ *Id.* art. 3(g).

¹⁰⁸ *Id.* art. 10.

¹⁰⁹ *Id.* art. 11(4).

¹¹⁰ *Id.* art. 4(5).

¹¹¹ *Id.* art. 11(5).

First, the Universal Declaration of Human Rights unequivocally states: “No one shall be arbitrarily deprived of his property.”¹¹² It also sets forth the rights of those criminally charged to a “fair and public hearing by an independent and impartial tribunal,”¹¹³ to be presumed innocent until proven guilty,¹¹⁴ and not to be subjected to “arbitrary detention, arrest, or exile.”¹¹⁵ In 2007, the United Nations more precisely articulated the right to property in contexts where land may be held under customary tenure. The Declaration on the Rights of Indigenous Peoples provides that:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, *customs and land tenure systems*, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned *or* otherwise occupied *or* used.¹¹⁶

It goes on to establish the right of indigenous peoples to access fair conflict resolution procedures and effective remedies, decisions of which “shall give due consideration to the customs, traditions, and legal systems of the indigenous peoples concerned and international human rights.”¹¹⁷ Taken together, these two declarations assert the right of holders of land under customary tenure to not have their land grabbed away from them, and to have access to an impartial system for the resolving of any disputes over their lands.

2. *Guidance for States and Mediators*

Through a variety of resolutions, the member states of the U.N. have repeatedly recognized and called for improved mediation strategies and frameworks that contemplate victim-offender mediation for crimes in transitional justice contexts.¹¹⁸ In response to a 2012 resolution by the U.N.

¹¹² G.A. Res. 217(III)(A), Universal Declaration of Human Rights, art. 17(2) (Dec. 10, 1948).

¹¹³ *Id.* art. 10.

¹¹⁴ *Id.* art. 11(1).

¹¹⁵ *Id.* art. 9.

¹¹⁶ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 27 (Sept. 13, 2007) (emphasis added).

¹¹⁷ *Id.* art. 40.

¹¹⁸ One recognizes that “mediation, conciliation, arbitration . . . have not been fully utilized” and “call(s) for the greater and more effective use of such tools.” S.C. Res. 2171, ¶ 6 (Aug. 21, 2014). Notably, the Security Council highlights the value that women can add in

General Assembly,¹¹⁹ the Secretary-General, in consultation with Member States and other relevant actors, developed the Guidance for Effective Mediation in order to more fully tap the potential of this conflict resolution strategy by applying lessons learned from past and ongoing mediation processes. Regarding criminalized disputes, it advises that mediators “[e]xplore with the conflict parties and other stakeholders the timing and sequencing of judicial and non-judicial approaches to address crimes committed during the conflict.”¹²⁰ The Guidance also advises that mediators be familiar with principles of “international criminal law, including, where applicable, the Rome Statute of the International Criminal Court,” and “normative [societal] expectations . . . regarding justice, truth, and reconciliation, the inclusion of civil society, and the empowerment and participation of women in the process.”¹²¹

Three years later, the U.N. developed a specialized Guidance for Mediation of Natural Resource Conflicts, that spoke directly to the criminal elements of land disputes and the importance of collaborative design of mediation processes.¹²² As it observes,

Illegal exploitation . . . of extractive resources combined with organized criminality is frequently a factor driving conflict in resource-rich areas that have weak governance, instability, or armed conflict. The individuals, groups, and companies working outside the law are typically interested in perpetuating the conditions under which they profit, and may try to undermine initiatives aimed at changing the status quo.¹²³

“exerting influence over parties” and the need to enhance their participation “at all stages of mediation and post-conflict resolution” processes. *Id.* ¶ 18. Another calls on “Member States . . . the United Nations and regional and subregional organizations, to continue to develop . . . their mediation capacities in the peaceful settlement of disputes, conflict prevention and resolution, to enable . . . the effectiveness of mediation,” especially within developing countries. G.A. Res. 70/304, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution, ¶ 11 (Sept. 9, 2016).

¹¹⁹ G.A. Res. 65/283, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution (July 28, 2011).

¹²⁰ *Id.* at 17.

¹²¹ UNITED NATIONS DEPARTMENT OF POLITICAL AFFAIRS, UNITED NATIONS GUIDANCE FOR EFFECTIVE MEDIATION 16 (July 2012).

¹²² UNITED NATIONS ENVIRONMENTAL PROGRAMME AND UN DEPARTMENT OF POLITICAL AFFAIRS, NATURAL RESOURCES AND CONFLICT: A GUIDE FOR MEDIATION PRACTITIONERS 30 (2015).

¹²³ *Id.*

At the same time, the Guidance also recommends that “all aspects of the process design . . . should be agreed upon by the parties to the mediation” because “clear agreement on the process design usually translates into greater commitment to the mediation itself.”¹²⁴ Thus, the tension of needing to collaborate with the very parties who have an incentive to evade the mediation process is apparent.

Most recently, *U.N. Economic and Social Council Resolution 2016/17* is an outgrowth of nearly two decades of work to build States’ capacities to respond to crime using restorative justice approaches. The Resolution emphasizes:

that restorative justice processes, such as victim-offender mediation, community and family group conferencing, circle sentencing, peacemaking and truth and reconciliation commissions, can contribute to a wide range of beneficial outcomes, including redressing the harm done to the victims, holding offenders accountable for their actions and engaging the community in the resolution of conflict.¹²⁵

It “encourages Member States, where appropriate, to facilitate restorative justice processes . . . through the establishment of procedures or guidelines” and further acknowledges the need to “provid[e] technical assistance to developing countries and *countries with economies in transition*, upon request . . . to assist them in the development and implementation of restorative justice programmes.”¹²⁶ The resolution also calls on the U.N. Office of Drugs and Crime to “develop” and “disseminate information on successful restorative justice models and practices” for practitioners working in the areas of crime prevention and criminal justice.¹²⁷

Lastly, the U.N. Standard Minimum Rules for the Treatment of Prisoners, adopted December 17, 2015, acknowledge the value of maintaining healthy relations with members of their home communities.¹²⁸ This is crucial because to do so may require dialogue to resolve any land disputes that underlie the trigger crime for which the inmate is incarcerated. These rules articulate the following standards:

¹²⁴ *Id.* at 21.

¹²⁵ Economic and Social Council Res. 2016/17, Restorative Justice in Criminal Matters, ¶ 3 (July 26, 2016).

¹²⁶ *Id.* ¶¶ 3, 5.

¹²⁷ *Id.* ¶ 6.

¹²⁸ G.A. Res. 70/175, Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015), https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

- The treatment of prisoners should emphasize not their exclusion from the community but *their continuing part in it*. . . .¹²⁹
- “Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence . . . *social security rights* and other social benefits of prisoners.”¹³⁰
- From the beginning of a prisoner’s sentence, consideration shall be given to his or her future after release and he or she shall be encouraged and provided assistance to maintain or establish such relations with persons or agencies outside the prison as may promote the prisoner’s rehabilitation and the best interests of his or her family.¹³¹

These Rules further encourage prison administrations “to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts.”¹³²

C. *Ugandan National Law*

Uganda’s 1995 Constitution and 1998 Land Act expressly recognize customary tenure as legitimate forms of ownership with or without title documents, but by the 2010s, glaring problems related to land governance and dispute resolution persisted. To address these issues and clarify a holistic implementation plan, the Government of Uganda adopted a National Land Policy in 2013.¹³³ The Policy pays special attention to the historically undermined role of customary tenure by acknowledging that “customary tenure continues to be: regarded and treated as inferior to other forms of registered property rights . . . assessed as lesser regarding dispute resolution and mediation compared to the statutory system,” “as lesser to other tenures that have titles for proof of ownership in courts of law in the administration of justice,” and “disparaged and sabotaged in preference for other forms of registered tenures.”¹³⁴ It explicitly affirms that “[t]he State shall recognize customary tenure in its own form to be at par (same level) with other tenure

¹²⁹ *Id.* at Rule 88(1).

¹³⁰ *Id.* at Rule 88(2).

¹³¹ *Id.* at Rule 107.

¹³² *Id.* at Rule 38(1).

¹³³ Government of Uganda, *supra* note 79.

¹³⁴ *Id.* ¶ 38.

systems” and that “land disputes resolution mechanisms will be reformed to facilitate speedy and affordable resolution of land disputes,” by, *inter alia*:

- iii) “permit[ting] hierarchal application of state and customary law depending on the circumstances, facts, and characteristics of the dispute in question”;
- iv) “accord[ing] precedence to indigenous principles and practice in dispute management institutions in respect of disputes over land held under customary land tenure”; and
- viii) “[e]ncourag[ing] and build[ing] capacity for alternative dispute resolution on land matters and application of principles of natural justice.”¹³⁵

Similar to the U.N. Declaration on the Rights of Indigenous Peoples, Uganda’s policy reiterates a self-imposed mandate to develop effective systems to address all land disputes, whether characterized by good faith or otherwise.

IV. MANDATORY CRIMINAL ADR AS A TOOL FOR TRANSITIONAL JUSTICE

In Western countries where criminal ADR is well established, victim-offender mediations are usually¹³⁶ voluntary. In other words, if the offender does not admit responsibility or the victim is not interested, neither party is required to participate. Yet in post-conflict societies, a voluntary and non-binding mediation process allows powerful parties to disregard local traditional methods of dispute resolution and proceed directly to the state court system, where they may enjoy financial or practical advantages that maintain the status quo and hinder resolution of land conflicts. The complex nature of land grabbing cases—where victims may also be perpetrators, and vice versa—demands a creative new approach to mediation if this method is to be effective and avoid laying the foundation for new grievances between parties in future generations. Establishing a mandatory ADR complement to the criminal justice system, whereby parties who are arrested and accused of a land-related crime *along with their accusers* are required to undergo victim-offender mediation, is one possible solution. Using the case of northern Uganda, this section explores the potential benefits, limits, and feasibility of mandatory criminal ADR to undergird land tenure security as a fundamental pillar of transitional justice and conflict prevention.

¹³⁵ *Id.* ¶¶ 39(a), 115(b), 116(iii, iv, viii).

¹³⁶ *See* Wellikoff, *supra* note 59.

A. The Potential of Mandatory Criminal ADR in Transitional Societies

Once law enforcement has knowledge to a substantial certainty that the trigger crime is associated with a land dispute, a system of mandatory criminal ADR would require an initial mediation session, whereby victims, offenders, community leaders, and other interested stakeholders of both the trigger crime *and* the underlying land dispute are compelled to sit down and discuss the harm caused and available options. If made compulsory, this practice could improve the efficacy of existing land dispute management systems in transitional justice settings in notable ways.

To aid analysis, consider the scenario described in the quote by a detained suspect in the introduction. Here, the suspect is charged with aggravated robbery of survey equipment (the trigger crime) that springs from what is possibly a bad faith land dispute (the current land grab). The current dispute may be informed by a separate pre-existing dispute that originated before the war or during the period of displacement (the *previous* land grab).

Table 1: LAYERED CULPABILITY OF PARTIES

	Role in Trigger Crime <i>(i.e., robbery)</i>	Role in Current Land Grab	Role in Previous Land Grab <i>(if applicable)</i>
1	Victim =	Victim =	Victim
2			Perpetrator
3		Perpetrator =	Victim
4			Perpetrator
5	Perpetrator =	Victim =	Victim
6			Perpetrator
7		Perpetrator =	Victim
8			Perpetrator

1. Enhanced Due Process

A system of mandatory victim-offender (VO) mediation for land dispute-related crimes enhances due process rights of both victims and offenders, regardless of their category of culpability. Procedurally, it protects detained suspects' right to be heard by giving them the power to compel their identified adversaries, together with community leaders, to attend a dialogue to resolve the underlying problem in the presence of an impartial facilitator. In this way, mandatory VO mediation safeguards a suspect's right to confront the witnesses

against him before he is detained indefinitely¹³⁷ awaiting trial. If facilitated by impartial community-based leaders with support of state officials, this mediation would allow victims and offenders to keep their land disputes “local.” Since local land dispute resolution processes are generally considered cheaper, less corrupt, less burdensome with regard to travel, faster, more efficient, easier to understand, and more effective in promoting reconciliation than decisions by government agents or the judiciary,¹³⁸ this could provide a fairer and more accessible process to both victims and offenders, many of whom must go on living as neighbors after the formal legal system has run its course. VO mediation systems could also be structured to give a central role to women. When their fathers, uncles, brothers, husbands, and sons are in state custody, it is women who typically visit them, bring food, and relay messages from the community. If structured to give a central role to women, VO mediations could tap the power of these female community members to influence parties for negotiated resolution to conflicts.

Mandatory VO mediation can also strengthen the substantive due process of victims of the current land grab (Categories 1–2 and 5–6 above) in that persons who attempt to grab land by jailing their opponent will now be forced to comply with the system they once tried to manipulate. Knowledge of the general outcome of a mandatory initial mediation, perhaps in the form of a generic report written by the mediator afterwards specifying reasons why the mediation failed, may assist law enforcement to screen the validity of the alleged trigger crime victim’s complaint. This would be the case even if the substance of any incriminating statements that parties make during mediation were kept confidential and inadmissible in subsequent proceedings.¹³⁹ Such a process would discourage active or potential

¹³⁷ See AKIN, *supra* note 9, at 87 (finding that the median length of incarceration for inmates who say their charges originate from a land dispute is between six and twelve months).

¹³⁸ Christopher W. Moore & Gary Brown, *Designing Dispute Resolution Systems for Settling Land and Property Disputes in Postconflict and Postcrisis Societies*, in BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD 79 (C. Zelizer & R. Rubenstein eds., 2009).

¹³⁹ A mediator’s breach of confidentiality may be justified in certain circumstances in order to further public policy interests including ending the widespread impunity surrounding land theft, preserving subsistence livelihoods, reducing violence, and strengthening the legitimacy of local justice institutions. Yet, such breaches may only be justified to the extent that the fact of bad faith in the case is made known to reliable law enforcement authorities. Without some degree of mediator oversight, misuse of this exception to the rule of confidentiality could further jeopardize public trust in both local mediators and state law enforcement. As the Georgia ADR Rules observe, “[I]f the lodestar of mediation is the principle of self-determination, the unwillingness of a party to bargain in good faith is consistent with that party’s right to refuse the benefits of mediation.” See Georgia Office of Dispute Resolution Alternative Dispute Resolution Rules 32 (2014), http://godr.org/sites/default/files/Godr/supreme_court_adr_rules/CURRENT%20ADR%20RULES%20COMPLETE%205-28-2014.pdf.

perpetrators of land grabbing (Categories 3–4 and 7–8) from provoking retaliation by land rights holders, since perpetrators know their bad faith actions are likely to be exposed in the course of the discussion and could undermine the validity of their accusations.

2. *Improved Efficiency of Law Enforcement*

Mandatory VO mediations may also enhance the efficiency of the criminal justice system and constitute one of the “simplified procedures” for resolving property disputes among IDPs called for in the Kampala Convention. It does this by first providing a means for society and law enforcement to divert cases that are better addressed outside of court. If cases are resolved through mediation—a process which data suggests a majority of inmates are generally interested in¹⁴⁰—this would in turn prevent cases between neighbors and relatives, which are more comprehensively resolved through mediation, from ending up in the already backlogged court or overcrowded prison systems. Second, mandatory VO mediations would assist in promoting public safety. Duty-to-report information¹⁴¹ gleaned through VO mediation processes would enable police to obtain leads pertinent to underlying community issues, which could be used to investigate intra-community tensions and prevent future crimes. Third, it allows police to confront both the criminal and civil sides of a land grab attempt in one forum. The trigger crime and the land grab attempt can be leveraged in mediation concerning the potential success of a party’s legal case, while the civil aspects of compensation, apology, and reparation can form the basis for possible solutions in any consent agreement. This has potential to not only reduce the formal courts’ caseload, but also benefit parties and their local communities who have an interest in maintaining healthy relationships between their members. In turn, the resolution of underlying tensions in communities means that law enforcement will probably see fewer reports of land-related crimes. This is significant for places like northern Uganda, where land disputes account for an estimated 70% of both crimes reported to police and lawsuits filed in court.¹⁴²

¹⁴⁰ See AKIN, *supra* note 9, at 90–91 (finding that among inmates who face charges linked to a land dispute, 71% indicate that they prefer mediation, and 67% say they are still interested in sitting down to dialogue with their adversary to resolve the dispute).

¹⁴¹ Although confidentiality is a key aspect of any mediation, mediators are often under a duty to report if a party makes reference to certain types of threatened or pending acts that could harm other persons. An example of this in the United States includes statements made to a mandated reporter such as a teacher, social worker, or mediator who learns of child or elder abuse.

¹⁴² See AKIN, *supra* note 9, at 12.

3. *Improved Coordination Between State and Customary Justice Systems*

Mandating VO mediations for criminal land disputes in post-conflict societies provides a regular forum for collaboration among state and customary law enforcement. Land grab attempts cannot be resolved by traditional or state authorities alone. Police and judges may not know or be interested in the customary system of land holding in a given region but may greatly benefit in terms of efficiency, citizen satisfaction, and public legitimacy by employing impartial traditional leaders who hail from the community (communities) of the parties to facilitate VO mediations. By lending police authority to traditional land dispute resolution structures for land grabbing attempts, clan authorities may be more likely to preemptively report land grab attempts to police before violence or trigger crimes are committed, since they know police will turn around and look to clan leadership to facilitate the mediation with police support.

The flexibility of the mediation process—in which extrajudicial solutions may be developed that benefit entire communities affected—can empower local community leaders to begin to collaborate with state law enforcement to holistically address all the ongoing land disputes within a given community. One such method, successfully applied in Mozambique, is the tenurial shell model.¹⁴³ Under this approach, representatives from a given community agree with neighboring landholders on the perimeter boundary or “shell” of the community. With the outer bounds defined, the community members and their leaders systematically work to fill in the shell with lines that depict the agreed boundaries of individual and family-sized land holdings.¹⁴⁴ Agreements reached in VO mediation sessions may include re-entry plans for release of detained suspects, serving to de-escalate violence in the community and promoting the state and customary systems’ joint goal of public safety.

B. The Limits of Mandatory Criminal ADR in Transitional Societies

Several variables endemic to many transitional justice contexts constrain the possible impact of a mandatory VO mediation program. The following sections describe some of the biggest challenges to compulsory criminal ADR in these situations.

¹⁴³ CHRISTOPHER TANNER ET AL., PARTICIPATORY LAND DELIMITATION: AN INNOVATIVE DEVELOPMENT MODEL BASED UPON SECURING RIGHTS ACQUIRED THROUGH CUSTOMARY AND OTHER FORMS OF OCCUPATION, FAO 14–15 (Oct. 2009), <http://www.fao.org/3/a-ak546e.pdf>.

¹⁴⁴ *Id.*

1. Resources and Practical Considerations

A society's dispute resolution system is only as effective as it is accessible to the society's poorest members. Rural community members are likely to find it difficult to finance their travel from remote villages to towns where the court and prison are located. Since disputes over customary land in sub-Saharan Africa are typically community-wide affairs—with a network of individuals who have a stake in the bundle of property interests attached to a particular tract of land—transporting all the key rights bearers and their leaders to town to participate in a mediation may be extremely expensive. Community members unable to attend the “secret” mediation may also view the process with suspicion. Nevertheless, requiring community members to pay for their own transportation to mediation sessions could serve to increase legitimacy of the process, since parties who sacrifice in order to obtain a benefit are likely to be more invested in the process and in a positive outcome.

One alternative is to have the authorities bring the detained suspect to the community. But in a largely unregulated post-conflict setting, where local communities do not trust police and the detained suspect is a source of tension, police and suspect safety is at risk. Likewise, conducting the mediation in a neutral location—nearby enough so as not to be burdensome to community members, but far enough away from the community so as to dispel home-turf tensions—may be necessary. Yet this would require underfunded police to have fuel and means to transport the suspect to the community, a cost that they are likely to pass on to poor communities. The state—probably through its prisons budget—would also be tasked with paying mediators reasonable wages to engage in such complex and risky work because budget allocations of this kind may require approval by the legislature or other authorities, some of which are implicated in corruption scandals. Likewise, because prisons and courts are often understaffed and under-resourced, it is unlikely that many post-conflict states would be interested in creating jobs in this field anytime soon. States would be more likely to welcome assistance from foreign development agencies or non-governmental organizations to fund VO mediation initiatives.

2. Attitudes of Police and Mediators

Assumptions based in the worldview and orientations of both police officers and mediators may profoundly influence the mediation process and

its outcomes.¹⁴⁵ If the mediator or police officer operates out of a cultural bias, a personal judgment as to the validity of one party's claim over another, or a belief in which option is the best choice for the parties, the parties may lose faith in the process or feel pressured to settle on an unsatisfactory outcome for the sake of reaching an agreement. In the same way, a police officer who presumes a detained suspect to be guilty before proven innocent may be less likely to accord this individual the full benefit of due process.

Effective intervention in land-related crimes requires acute skill. The bad faith and potentially violent nature of these cases, combined with the complex layers of culpability depicted in Table 1; the potential for coerced agreements due to power imbalances between parties in custody and their unjailed opponents; and the necessity for tactfully impartial responses to case-related developments throughout the process mean that mediators who handle such cases must be respected by both sides of the dispute, well-trained in state and customary norms, unafraid, and enduringly patient. Such a mediator may be difficult to find and may be unwilling to participate due to fear of physical harm to his position in the community if the parties fail to resolve the issue under his leadership. An effective VO mediation program thus requires careful screening, training, and some degree of supervision and protection of mediators, especially regarding issues of confidentiality and threats of violence.

3. *Respect for Customary Tenure and Political Will*

Practitioners' personal beliefs regarding customary tenure as part of the "problem" or the "solution" to land dispute resolution impacts the way they will view and practically respond to a land grabbing attempt. If the government is not keen on supporting customary tenure in practice, perhaps because it feels clan control of land hinders an efficient land market, it will have little incentive to encourage meaningful analysis of customary land rights of each disputing party in VO mediations. Furthermore, as Moore and Brown observe from their review of mediation efforts in post-conflict societies contexts: "case-by-case resolution procedures may settle a number of site-specific conflicts, [but] they are not a substitute for land reform and a broader distribution and ownership of property."¹⁴⁶ It is therefore crucial that any effective effort to combat the systemic problem of land grabbing complement a holistic vision for a new system of land dispute resolution that equitably appreciates state and customary land rights.

¹⁴⁵ See generally Gregory D. Paul & Ian M. Borton, *Exploring Communities of Facilitators: Orientations Toward Restorative Justice*, 31 CONFLICT RESOL. Q. 189 (2013).

¹⁴⁶ Moore & Brown, *supra* note 138, at 92.

4. Systemic Abuse and Corruption

As in any society with limited or no rule of law, corruption and arbitrary arrests are unwelcome realities for many community members who find themselves in a land dispute. This is true in both the traditional and state justice systems, as discussed earlier. Corruption is especially harmful in the context of victim offender mediation because the victim of the current land grab (Categories 1–2, 5–6) may continue to feel further victimized through the process. Likewise, a perpetrator may bribe or influence police, clan chiefs, or even an unscrupulous mediator (who are all likely to be poorly paid) to avoid criminal liability for his land grabbing attempt. A mandatory VO mediation program thus requires clear police protocols and safeguards to prevent fraud, arbitrary arrests, prolonged detention of suspects without evidence, and abuse of the contempt-of-court process.

C. The Feasibility of Mandatory Criminal ADR

The feasibility of a mandatory VO mediation program to address land grabbing attempts and land-related crimes is significantly limited by environmental factors such as resources, corruption, and attitudes of leadership toward customary land tenure. Similarly, from a process perspective, simply compelling a VO mediation session may not eliminate problems regarding the deliberate bad faith nature of a land grabbing attempt, especially if the attempt is still ongoing. Deliberate perpetrators of the land grab may continue to call the state's bluff and pursue their own war of attrition in the courts.

Nevertheless, the potential benefits of the criminal ADR model merit serious consideration for at least experimental application in transitional justice settings. Mandatory VO mediation has the potential to change the prevailing atmosphere that breeds impunity in the first place because of its ability to enhance the due process of suspects detained for alleged land-origin crimes; to increase efficiency of law enforcement; and improve coordination between state and customary justice actors. Police are likely to be willing to undertake a pilot test of mandatory VO mediation because it stands to give them power to investigate the disputes that underlie the trigger crimes they respond to and prevent future related crimes; yet they will need to be carefully trained on how to analyze customary land rights and how involved they can be in the process and content of the actual VO mediation. Similarly, prisons are likely to welcome such an initiative because it would increase their funding to provide for mediators and potentially reduce the prison population as well as the proportion of total inmates who are detained without having been formally charged or convicted. Customary authorities are likely to be wary of

mandatory VO mediation unless they are given a central role in the dispute resolution mechanism; thus, it is important that they are intimately involved in process design. Community leaders may also be more apt to embrace the process if women are given central positions as well, so that they may use their strategic influence to encourage parties to desist from crime and choose reconciliation.

While it may not work in all cases, mandatory VO mediation (required at least at the beginning of the criminal justice process) is an effective way to divert a significant number of land-related disputes from the already overburdened court and prison systems and lead to more satisfactory outcomes for parties, thus foreseeably deescalating tensions in the community and preventing future crimes. Mediated cases that do not reach meaningful agreement can still proceed to court, but hopefully in fewer numbers. Regardless, courts will still need to devise a way to promptly monitor compliance with VO mediation agreements and enable a fast-track system for hearing cases that unravel after mediation before renewed tensions escalate to violence.

Practically, although paying mediators necessitates additional funding, pilot projects could explore the feasibility of a team of mediators working on a largely volunteer basis. Whether mediators are paid or not, they will need to be sufficiently trained, along with police, traditional leaders, lawyers, and judges on how VO mediation can supplement—and not supplant—the work of the criminal justice system. Such training should encompass not only techniques for mediating power imbalances, victim-sensitive facilitation, and navigating confidentiality issues, but also techniques for performing reliable land rights analysis such as oral family trees and holistic land delimitation measures, like the tenorial shell concept, so that the resolution of one case can have spinoff effects to prevent similar future disputes in the community. Appropriate feedback loops, vital for successful communication between these agencies, mediators, and the parties they serve, must also be developed, and the long-term impacts of VO mediation monitored.

V. CONCLUSION

Once the dust of a crisis or war settles, displaced citizens frequently find themselves vying for access to and ownership of customary lands. For African member states of the Kampala Convention, international law mandates that countries in transition must develop appropriate systems to effectively address this rising tide of land disputes. Land disputes in bad faith, however, are particularly challenging for mediators in transitional justice settings because perpetrators of a land grabbing attempt have little incentive to participate and

may completely disregard traditional mediation processes, choosing instead to exercise their financial might in formal court. Interrupting these grassroots cycles of land grabbing is crucial if the international community is to achieve the universally adopted Sustainable Development Goal of “strengthen[ing] the recovery and return of stolen assets and combat all forms of organized crime” and “strengthen[ing] relevant national institutions . . . for building capacity at all levels, in particular in developing countries, to prevent violence and combat . . . crime.”¹⁴⁷ Despite this reality, criminal justice solutions to community-level land conflicts between villagers and local elites rarely make headlines in the global land grab debate.¹⁴⁸

Making victim offender mediation mandatory has the potential to positively change the status quo by forcing persons who attempt to illegally seize land by jailing their opponent to comply with the system they once tried to manipulate. It can also enhance the due process of both victims and offenders of trigger crimes, increase the efficiency of law enforcement by diverting away from court those cases that are better resolved in mediation, and improve coordination between state and customary justice actors. Mandatory VO mediation would also allow the state to expeditiously address the civil and criminal aspects of a land grabbing attempt in a single forum.

Despite this potential, mandatory VO mediation must overcome significant obstacles to truly add value to an already complex and inefficient criminal justice system. In particular, it cannot be viewed as a substitute for meaningful land governance reform or elimination of institutional corruption. To be effective, VO mediation must be complemented by clear police protocols, land rights analysis methods, community-wide land documentation, safeguards to hold state and traditional land dispute authorities accountable, and facilitation by adequate numbers of patient and skillful mediators. In a transitional society such as northern Uganda, a pilot study should be welcomed to develop best practices that may be adapted for use in other jurisdictions that seek more effective ways to hold trigger crime offenders accountable while resolving the land disputes that so often underlie their actions.

¹⁴⁷ U.N. Sustainable Development Goal, *supra* note 15.

¹⁴⁸ “[W]e need to get beyond the hype and move towards concrete, constructive support for local movements struggling with the complex and difficult task of transforming existing governance systems.” Jacqueline M. Klopp & Odenda Lumumba, *Kenya and the ‘Global Land Grab’: A View from Below*, in *THE GLOBAL LAND GRAB: BEYOND THE HYPE*, *supra* note 38.