Human Settlements in Crisis

A GUIDE TO PROPERTY LAW IN UGANDA

UN-HABITAT

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Introduction

This guide has been written as an information resource for government officials, community leaders, humanitarian aid workers, judges, lawyers and others whose responsibilities include upholding land and property rights in Uganda. It outlines the main provisions of Uganda's constitutional and legal framework and the protection these provide to property rights. It briefly outlines the historical background to existing land tenure relations, describes the constitutional provisions relating to land in the 1995 Constitution and sets out the main provisions of the Land Act 1998.

Many important principles related to land law in Uganda pre-date the current constitutional and legal framework. Some derive from concepts developed under English property law and many of the cases discussed below were heard by the courts while Uganda was still under colonial rule. It also explains some of the terms and concepts which under-pin the existing system of land rights in Ugandan law.

Although the formal system for administrating land tenure, carrying out transactions and settling disputes in Uganda is quite clear, the practice is less so. Lack of resources has made it difficult to implement some of the main provisions that the laws envisage and the official institutions suffer from a serious lack of capacity, which has increased the role and significance of customary law in filling the resulting vacuum. This guide provides a brief introduction to how customary law in Uganda deals with land rights in the Acholi region of Northern Uganda. It includes a brief overview of the context in which Acholi ethnicity has developed and how this has given rise to certain beliefs and ways of approaching land rights and settling disputes.

Finally, the guide describes the protection given to land, housing and property rights under international law, which, while not directly applicable, forms an important framework within which the courts should operate. It provides practical guidance on how international human rights monitoring bodies can be used to draw attention to particular violations of land, housing and property rights.

This guide has been published by UN-HABITAT and the UN Development Programme as part of their efforts to support reconstruction and development in Uganda. Both agencies have experience of responding to humanitarian crisis situations by supporting governments, local authorities and civil society in strengthening their capacity to recover from a variety of complex emergencies and natural disasters. Both agencies have also developed expertise in designing interventions which link humanitarian relief with medium to longer term programming and planning.

Recent surveys indicate that although most people are aware of the existence of the Land Act and some of its provisions, there is relatively little awareness of land sector institutions and procedures. Knowledge of the practical mechanisms necessary to uphold people's land rights is generally limited and confused. Consequently, as people in the North increasingly leave temporary camps and begin the process of returning to their communities of origin, the numbers of potential disputes over access to land in both rural and urban communities will further debilitate already weak land administration capacity in the region.

The Ministry of Land, Housing and Urban Development (MLUDH) has called for the development of a land rights information campaign aimed at making people more aware of their rights under the Land Act. A number of international agencies have made similar recommendations. Confusion exists about the role of the official legal and administrative institutions in settling issues related to land rights and usage and how much should be decided through customary law and traditional institutions. Currently the two systems exist in parallel and it is important to ensure that they work in harmony.

This guide is intended to be a short and accessible, but comprehensive, introduction to the applicable law on land and property, which can be used as a basic reference point and a training resource. It aims to provide practical help for all those whose work and decisions may have an impact on the lives of displaced people seeking to exercise their simple and basic right to go home.

Chapter One

Land law in Uganda

This Chapter provides an introduction to the system of land rights in Uganda, including the structure of Uganda's court system. It briefly outlines the historical background to existing land tenure relations and the various land policies pursued by previous governments of Uganda. It then describes the constitutional provisions relating to land in the 1995 Constitution and sets out the main provisions of the Land Act 1998. This Act created a number of institutions for the management and administration of land in Uganda and the Chapter describes the powers and functions of these bodies.

It should be noted at the outset, however, that many of the provisions envisaged by the framers of the 1995 Constitution and 1998 Act have never been implemented. This has mainly been due to a lack of resources and the Government of Uganda remains committed to implementation of most parts of the Act. It is important, therefore, to be aware of the formal legal framework governing land relations in Uganda, while bearing in mind that this is not quite how the law works in practice. These points are further discussed in the following two chapters on taking cases using both the formal legal system and under the institutions of Ugandan customary law.

The Constitutional and legal framework

Uganda is a former British colony and the English legal system remains influential. Since achieving independence, Uganda has adopted three constitutions: the 1962 constitution, the 1967 constitution, and the 1995 Constitution, which remains in force. The 1995 Constitution provides for an elected President and Parliament, an independent judiciary and a legal system based on English common law and Ugandan customary law.[1]

The highest court in Uganda is the Supreme Court, followed by the Court of Appeal (which also functions as the Constitutional Court for cases of first instance involving constitutional issues), the High Court, the Chief Magistrate's Court, and local council (LC) level 3 (sub-county) courts, LC level 2 (parish) courts, and LC level 1 (village) courts. The Judiciary is headed by the Chief Justice and deputized by the Deputy Chief Justice.[2]

The President of Uganda nominates, for the approval of Parliament, members of the Judicial Service Commission, which makes recommendations on appointments to the High Court, the Court of Appeal, and the Supreme Court. A minimum of six justices may sit on the Supreme Court and the Court of Appeal or Constitutional Court. In addition there are a few specialized courts that deal with industrial and other matters. There are also Land Tribunals, which are discussed in greater details below.

At the lowest level are three classes of courts presided over by magistrates. These LC courts have authority to settle civil disputes, including land ownership and payment of debts, and criminal cases involving children. They often settle cases by mediation. The LC courts should not hear criminal cases including murder and rape. The decisions of LC courts can be appealed to magistrates' courts and beyond through the rest of the Ugandan court system.[3]

Background to the tenure system of Uganda

The evolution of the four main systems of land tenure – Freehold, Leasehold, Mailo and Customary – was mainly a product of the way in which the British colonial administration inter-acted with Uganda's pre-colonial tribal chiefs. Land has always been an important factor in Ugandan societies. Even before colonization, it played an important part in social relations of the kingdoms of Buganda, Busoga, Bunyoro and Toro, as well as among territorial societies such as the Karamonjong.[4] When the British colonial administration established itself in Uganda it sought to gain control of Uganda's productive resources, while at the same time striking deals with some local leaders to expand its political base of support.

1 Brenda Mahoro *Uganda's Legal System and Legal Sector*, Globalex, August 2006, http://www.nyulawglobal.org/globalex/uganda.htm

2 For details see, *The Jurist, Uganda, Ugandan law, legal research, human rights*, http://jurist.law.pitt.edu/world/uganda.htm

3 *Guidelines for Local Council Courts in the Resolution of land disputes*, Ministry of Water, Lands and Environment, June 2005.

4 See Associates for Development, *Issues paper for the National Land Policy*, Ministry of Water, Lands and Environment, Land tenure reform project, February 2004.

The system of mailo[1] tenure has its origins in the Uganda Agreement of 1900, between the British colonial administration and the chiefs of Buganda, by which about half the kingdom's land was granted to these chiefs as private property, while the other half was expressly declared to belong to the British Crown. Mailo soon came to resemble freehold as a system of tenure. Although initially only a few privileged people owned mailo land, this was gradually sub-divided by sale, donation and inheritance until there were several thousand mailo landholders.

Customary tenure also achieved some recognition during the colonial period. While technically all land except mailo was said to belong to the Crown, the Crown Lands Ordinance of 1903 granted indigenous Ugandans the 'right' to occupy 'unalienated' land (i.e. land that had not been granted to someone else through freehold or leasehold) in accordance with their customary law. Customary tenants had few rights if the British Governor chose to sell or lease their land to someone else and this precarious status was confirmed by the Public Lands Act 1962, which came into effect in the same year that Uganda achieved its independence from Britain.

One important legal development after independence was the Public Lands Act 1969, which extended the rights of those holding lands under customary tenure. Under this Act, land lawfully occupied by customary tenants could no longer be alienated without the consent of its occupants. Any person applying for grant of public land was required to state in the application whether or not the land was occupied by customary tenants and, if so, whether these had freely consented to the proposed alienation. The Act also gave customary tenants the right to apply for a lease over the lands that they occupied.

In 1971 Idi Amin overthrew Milton Obote in a coup to establish a military government. This Government passed the Land Reform Decree 1975, which declared all land in Uganda to be publicly owned and centrally vested with the Ugandan Land Commission. The Ugandan Land Commission was granted the sole power to manage and allocate land on behalf of the State. All previous forms of freehold were abolished and converted into leaseholds. The decree imposed development conditions against these leaseholds and failure to comply with them, within a specified time period, could result in forfeiture of the land to the Government. Sale or sub-lease of the converted leaseholds was forbidden without the express written permission of the Commission.

Customary tenants also lost the limited protections given to them by the Public Lands Act 1969. The Ugandan Land Commission was empowered to lease land occupied by customary tenants without their consent.[2] The right of Ugandans to occupy unalienated public land by customary tenure, without the Government's express permission, was also prohibited and became an offence punishable by up to one year's imprisonment. Customary tenants retained their right to sell or give away their tenure, provided that this did not vest any title in the transferee. Any transfer of customary land rights that did purport to grant such title became a criminal offence punishable by two years imprisonment.

1 The land was allocated in multiples of fractions of square miles and the term 'mailo' emerged asa corruption of the English word.

2 See Section 3 Land Reform Decree 1975. The only obligation was to pay compensation for any improvements that had been made by the occupants.

The Land Reform Decree 1975 was intended to give the Government of Uganda greater control over the use and management of land. By making security of land tenure dependent on land use it was hoped that this would boost agricultural development and production. This reflected a general hostility towards both the concept of private ownership and the social and economic position of rural small-holder producers, which was shared by many post-colonial governments of the time. Although sometimes expressed in leftist language, it masked a deep-seated prejudice against the 'backwardness' of the countryside by the new ruling elites who wished to develop their countries through rapid, centrally-planned economic growth.[1]

Three years previously, in 1972, Amin's Government had expropriated the properties of thousands of Ugandans of Asian extraction and expelled them from the country. The law for the management of these expropriated properties was consolidated into the Assets of Departing Asians Decree 1973. Although the Government did commit itself to paying some compensation to the previous owners, at a value to be determined by a Board of Valuers,[2] very little money was actually paid.

The final years of Amin's regime were marked by rapid economic decline and growing lawlessness and corruption. Most of the provisions of the Land Reform Decree 1975 were never implemented, although it remained formally on the statute books until it was repealed by the Land Act 1998. This period coincided with Uganda's descent into a series of bloody conflicts, which greatly weakened the authority of its central government and led to a virtual collapse of the rule of law in parts of the country.

After the fall of Amin's regime, in 1979, the new Government, under pressure from foreign donors such as Britain, passed the Expropriated Properties Act 1982, which aimed to restore the businesses, land and other properties to those who had lost them under the previous Government. Attempts to enforce the provisions of this Act have led to numerous legal challenges, particularly where the property in question was held by non-Ugandan citizens.

A more general proposal to reform Uganda's system of land tenure was contained in a study on agricultural policy carried out by the Makerere Institute of Social Research, together with the Land Center of the University of Wisconsin in the mid-1980s. The Report of the Ugandan Constitutional Commission, chaired by Justice Odoke, which was published in 1992, also recommended similar reforms.[3] The main proposals were:

- Abolition of the Land Reform Decree 1975, which vested all land in the State.
- The conversion of all mailo land to freehold
- A requirement that customary tenants on former public land should apply for freehold.
- Leases on public land to be converted to freehold.
- The update and decentralisation of the Land Registry.[4]

1 See Kevin Watkins, *The Oxfam Poverty Report*, Oxfam, 1995.

2 Properties and Business (Acquisition) Decree 1975

3 Judy Adoko, *Did the Constitution mean to legalise customary tenure or lay foundation for the demise of customary tenure?,* Paper presented at Karamoja Wildlife workshop organised by Wildlife Authority,November 1997.

4 Rose Mwebaza, *How to integrate statutory and customary tenure? The Uganda case*, International Institute for Environment and Development, 1999.

In 1995 Uganda adopted a new Constitution and in 1998, following a lengthy period of discussion, the Government enacted a new land law, the Land Act 1998. The Act formally abolished the Land Reform Decree and restored the systems of land tenure that were in existence at independence. The Land Act also proposed a series of reforms to radically change the relationship between the State and the land in Uganda.[1] The aim of this policy has subsequently been set out in a number of government plans and projects,[2] which all stress the need to encourage private sector investment in land to increase its productive capacity.

The remainder of this Chapter sets out the formal constitutional and legal provisions governing land tenure relations and explains the functions of the institutions that were created to uphold land rights, while the following two Chapters discuss how cases are actually dealt with in the formal and customary systems.

Uganda's Constitution

The Constitution of the Republic of Uganda was adopted in 1995. It contains one Chapter which provides extensive protection of human rights,[3] including: the right to equality and freedom from discrimination;[4] protection from deprivation of property;[5] right to privacy of person, home and other property;[6] right to a fair and public hearing;[7] freedom of movement and assembly;[8] right to marry and 'equal rights in marriage, during marriage and at its dissolution';[9] and a right to just and fair treatment in administrative decisions.[10] All of these rights, which are in line with international human rights standards, could have a potential bearing on land rights and this issue is discussed further in Chapter Four of this Guide.

This Chapter of the Constitution also provides for 'affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.'[11] It states that: 'Women shall be accorded full and equal dignity of the person with men. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities. Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status are prohibited.'[12] It guarantees children's rights and states that: 'the law shall accord special protection to orphans and other vulnerable children.'[13] It also upholds cultural rights, stating that: 'Every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.'[14]

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1 Associates for Development, 2004.

2 Most notably the Plan for the Modernisation of Agriculture (PMA), the Poverty Eradication Action Plan (PEAP), the Land Strategic Sector Plan (LSSP) and the Private Sector Competitiveness Project (PSCP) II. The first draft of the National Peace Recovery and Development Plan (PRDP) for Northern Uganda currently contained very few references to land issues, but it is not clear whether this was due to a simple omission or because of the sensitivity of the subject in Northern Uganda.

3 Constitution of the Republic of Uganda 1995, Chapter IV, Articles 20 – 58.

4 Ibid., Article 21.

5 Ibid., Article 26.

6 Ibid., Article 27.

7 Ibid., Article 28.

8 Ibid., Article 29.

9 Ibid., Article 31.

10 Ibid., Article 42.

11 Ibid., Article 32.

12 Ibid., Article 33.

13 Ibid., Article 34.

14 Ibid., Article 37.

The Constitution states that: 'Any person who claims that a fundamental or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a rights and competent court for redress which may include compensation. Any person or organisation may bring an action against the violation of another person's or group's human rights. Any person aggrieved by any decision of the court may appeal to the appropriate court and Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter.[1] The Constitution also establishes the Ugandan Human Rights Commission to uphold these provisions and provide victims of human rights violations support in seeking redress.[2]

The Constitution also contains a Chapter devoted to land and the environment.[3] This states that: 'Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.'[4] Non-citizens are only permitted to lease land.[5] The Constitution also provides for a Uganda Land Commission,[6] District Land Boards[7] and Land Tribunals,[8] whose functions are described in more detail below.

The Constitution sets out some quite detailed provisions in relation to land rights, while leaving other provisions to be determined by subsequent legislation. It permits the Government, or a local government body, to acquire land in the public interest, subject to the provisions of Article 26 of the Constitution, which protects people from being arbitrarily deprived of their property rights. It states that the conditions governing such acquisition shall be as prescribed by Parliament.[9] The Constitution also states that: 'the Government or a local government as determined by Parliament by law, shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens'[10] 'Parliament shall make laws to enable urban authorities to enforce and to implement planning and development.'[11] Any lease which was granted to a Ugandan citizen out of public land, including statutory leases to urban authorities, may be converted into freehold in accordance with a law which shall be made by Parliament.[12]

The Constitution restores the four land tenure systems that existed before the Land Reform Decree 1975, namely: (a) customary; (b) freehold; (c) mailo; and (d) leasehold.[13] It also states that: 'On the coming into force of this Constitution (a) all Ugandan citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and (b) land under customary tenure may be converted to freehold land ownership by registration.'[14] The Constitution guarantees that 'the lawful or bona fide occupants of mailo land, freehold or leasehold land shall enjoy security of occupancy on the land'[15] until Parliament enacts an appropriate law regulating the relationship between the lawful or bona fide occupants of land and

1 Ibid., Article 50.
2 Ibid., Articles 51 – 58.
3 Ibid., Chapter 15, Articles 237 – 245.
4 Ibid., Article 237.
5 Ibid., Article 237 (2)(c)
6 Ibid., Article 238 – 239.
7 Ibid., Articles 240 – 241.
8 Ibid., Articles 243.
9 Ibid., Article 237 (2)(a).
10 Ibid., Article 237 (2)(b).
11 Ibid., Article 237 (7)
12 Ibid., Article 237 (5) and (6).
13 Ibid., Article 237 (3).
14 Ibid., Article 237 (4).
15 Ibid., Article 237 (8).

the registered owners of that land.[1] Such a law should be enacted 'within two years after the first sitting of Parliament elected under this Constitution.'[2]

The Land Act

The Land Act came into force in 1998, following five years of vigorous and controversial debate.[3] Most of its provisions had been previously signalled in the Constitution and the law was intended to give them practical effect. The two most important issues covered by the Land Act are ownership and tenure rights and land administration, which are described below. Some more general principles of land law, which have an important impact on tenure rights in Uganda, are discussed in Chapter Two of this Guide.
While the previous Land Reform Decree 1975 had sought to increase control over the land by central government and make tenure conditional on the land's development, the Land Act 1998 is part of a very different policy. It expressly limits government owned land to that which was being used by the Government when the Constitution of 1995 came into force.[4] It stipulates that if the Government requires additional land it must purchase this, either from a willing seller or through compulsory acquisition in accordance with the rights to private property contained in the Constitution.[5] An underlying assumption of the Act is that allowing a system of private individual ownership of land to develop in Uganda will boost the country's economic and social development. The Act also recognises customary ownership rights, while providing a mechanism to transform such land into freehold title. This has been criticised by some as providing a 'back-door' means for weakening the system of customary tenure,[6] but this debate remains largely theoretical due to the lack of implementation of many of the Act's provisions.

The Land Act 1998 defines 'freehold tenure' as a tenure that derives its legality from the Constitution and the written law. Freehold tenure may involve either a grant of land in perpetuity, or for a lesser specified time period. The Act specifies that the holder of land in freehold has full power of ownership of it. This means that he or she may use it for any lawful purpose and sell, rent, lease, dispose of it by will or transact it in any other way as he or she sees fit. No development conditions are imposed on the freeholder as the framers of the Land Act 1998 believed that the previous attempts to stimulate development through coercion were misguided. It is instead hoped that the 'psychological sense of responsibility arising from ownership' will be a more effective incentive for people to develop their land while market forces will prove sufficient to deal with those who prove unable or unwilling to do so.[7]

Only citizens of Uganda are entitled to own land under freehold tenure. Non-citizens may lease it for a period up to 99 years.[8]

1 Ibid., Article 237 (9).
2 Ibid.
3 John T Mugambwa, *Principles of Land Law in Uganda,* Fountain Publishers, 2006, p.8.
4 22 September 1995.
5 Land Act 1998, section 43.
6 Adoko, 1997 Wildlife Authority. See also Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004.
7 Mugambwa, 2006, p.8.
8 Land Act 1998, section 41(3).

Leasehold tenure is a form of tenure whereby one party grants to another the right to exclusive possession of land for a specified period, usually in exchange for the payment of rent. Any owner of land in Uganda – whether through freehold, mailo or customary tenure[1] – may grant a lease to another person. Unlike the previous Land Decree 1975, the Land Act 1998 does not specify any development conditions on the leasing of land nor that it is used in any particular way. It is left to the two parties to determine the conditions of the lease and, subject to these, the leaseholder is entitled to use the land as he or she sees fit. In practice, much of the land that is leased was previously owned by government bodies, particularly the Land Commission and the District Land Boards, and these tend to impose some development conditions on the land's subsequent use.[2]

Where the land was previously held by public authorities, the Land Act 1998 enables leaseholders to convert to freeholders subject to certain conditions. The leaseholder must be a citizen of Uganda. The original lease must have been granted lawfully under the terms of the Act and the leaseholder must have complied with all the conditions of the original lease. The leaseholder must be able to satisfy a District Land Board that there were no customary tenants on the land at the time when the lease was granted. If there were such tenants the board must satisfy itself that these were duly compensated as required by law. Only land-holdings of under 100 hectares may be converted from leasehold to freehold unless the board is satisfied that such a conversion is in the public interest.[3] Where a conversion involving land over 100 hectares is approved by the board the applicant must pay the market value of the land as determined by the Chief Government Valuer. The conversion is completed by appropriate registration under the Registration of Titles Act 1924, which will be discussed further in the next chapter.

The Land Act 1998 treats mailo tenure almost identically to freehold tenure. Registered land can be held in perpetuity and a mailo owner is entitled to enjoy all the powers of a freehold owner.[4] The only significant difference is that mailo owners should not use these powers against the interests of customary tenants, bona fide or lawful occupants.[5] This provision was introduced due to concern at the possible mass eviction of thousands of people who were occupying mailo land, as customary tenants or squatters, at the time when the Act was passed. A similar concern had led the framers of the 1995 Constitution to pass responsibility for determining who were 'lawful' and 'bona fide' occupants of land to the legislature.

The Land Act 1998 sets out a procedure whereby people who were not 'lawful' or 'bona fide' occupants of land at the time when the 1995 Constitution came in to force can regularise their occupancy. Mediators can be appointed by the authorities to help the two sides reach agreement,[6] although there is nothing to compel a land owner to allow such occupants to remain on his or her land. These provisions do not apply to people who have occupied land without the permission of the owner after the date on which the 1995 Constitution came into force. Such people can be evicted at any time without notice, subject to some of the provisions discussed in Chapter Two of this Guide.

1 For details see x
2 Mugambwa, 2006, p.9.
3 Land Act 1998, section 29(2).
4 Land Act 1998, section 4
5 Ibid.
6 Land Act 1998, section 90.

The Land Act 1998 deems a bona fide or lawful occupant of land that is registered in someone else's name to be a 'tenant by occupancy'. Such a person is required to pay an annual rent to the owner, but this is deliberately set at a nominal level, which does not reflect the economic value of the land. So long as a tenant by occupancy continues to pay this sum, continues to occupy the land and complies with the other terms and conditions relating to it, he or she enjoys secure tenure. A tenant may also apply for a 'certificate of occupancy', which provides documentary evidence that the named person has a right of occupancy over the subject land.

The Act gives both the tenant and the landowner the right of 'first refusal' to purchase one another's interest. This means that if either is considering a transaction involving the land, they must offer it to one another first. This enables a tenant to convert his or her right of occupancy to a mailo, freehold, leasehold or sub-lease, so long as the registered owner of the land consents. If the landowner sells or leases the land to someone else the tenant by occupancy retains his or her existing rights, irrespective of whether a certificate of occupancy has in fact been issued. This means that the new proprietor's title is subject to these rights, and this overrides the principle of 'indefeasibility' that is discussed in the next Chapter. It is the purchaser's responsibility to discover whether such tenant's exist even when this has not been officially recorded on the certificate of title.

The Land Act and customary law

One of the most innovative aspects of the Land Act 1998 is in the recognition it gives to those who hold their land under customary tenure. With the exception of land in Buganda (which is mainly held under mailo) and urban areas (where it is held under freehold, or leasehold) most land in Uganda is held under customary tenure. The 1995 Constitution restored recognition of the rights of those who held such land and the Land Act explicitly recognised that customary law should regulate this form of land tenure.

The Government had previously enacted a law creating Local Council (LC) courts, which replaced the lower level Magistrate courts and had the authority to deal with land rights issues. The LC courts were intended to be less formal and more accessible than the Magistrate courts and to enable local leaders to deliver justice to their own communities by drawing both on formal legal principles and customary law. [1]

There are a number of different types of customary land tenure in different parts of Uganda. In some places the land is held communally, in some it belongs to a particular clan while in others it is held by individuals. The rules of customary law also vary in different parts of the country and this is discussed further in Chapter Three of this Guide.

1 *Guidelines for Local Council Courts in the Resolution of land disputes*, Ministry of Water, Lands and Environment, June 2005. This provides a Guide to the Resistance Committee (Judicial Powers) Statute 1988, which created the LC courts.

The Land Act 1998 states that customary land tenure shall be governed by rules generally accepted as binding by the particular community.[1] Anyone who acquires land in that community shall also be bound by the same rules.[2] The exceptions to this are that no custom is permitted which is 'repugnant to natural justice, equity and good conscience, or being incompatible either directly or indirectly with any written law'.[3] Customary law is also, obviously, subordinate to Uganda's constitutional provisions described above. The Land Act 1998 also specifically renders void any provision of customary rule or practice that denies women, children or disabled persons access to ownership or use of land.[4]

Uganda's 1995 Constitution provides all holders of customary land with the right to obtain a Certificate of Customary Ownership (CCO)[5] and the Land Act 1998 specifies the procedure for how such certificates should be issued.[6] The Act provides for the issuing of individual, family and communal certificates and these will subsequently be taken as conclusive evidence of the customary rights and interests endorsed on the certificate.[7] It does not, however, change the nature of the land tenure system governing the land in question, which continues to be regulated by customary law.

The issuing of Certificates of Customary Ownership was, however, intended to introduce more certainty into customary land tenure relations. Holders of such certificates could use them when carrying out transactions. The Act requires financial institutions to accept Certificates of Customary Ownership as proof of title, which would enable holders to obtain credit on security of their land and use the title as collateral when borrowing money to invest. All transaction would need to be officially recorded and so it would become much easier to build up official records relating to a particular piece of land. If, for example, someone wished to purchase a plot, or borrow money against its value, it would be easier to conduct such transactions with certainty.

In order to apply for a Certificate of Customary Ownership an applicant must first submit his or her application form, together with the required fee, to the District Land Committee in the local parish where the land is situated. The Land Committee is then supposed to survey the land in question and confirm its boundaries. The committee should also post a notice, in a prescribed form, in a prominent public place in the parish in which the land is situated. The notice should invite all concerned persons to a meeting, not less than two weeks from the date on which it was posted, to consider the claim.[8]

Claims of any other person affected by the land, for example, through rights of way, must also be heard and the Land Committee can adjourn its proceedings if necessary to carry out more detailed investigations. If a dispute arises the land committee is not bound to follow court room procedures, regarding the admissibility of evidence or examination for example, but it must observe rules of natural justice to ensure that both sides' cases are fairly dealt with.[9]

1 Ibid., section 4.
2 Ibid.
3 Judicature Statute 1996, section 17(1).
4 Land Act 1998, section 27.
5 Constitution of the Republic of Uganda 1995, Article 237(4)(a).
6 Land Act 1998, section 5.
7 Ibid., section 5 and 9.
8 Ibid., section 6.
9 Ibid.

In conclusion of its hearing the Land Committee is required to write a report setting out its findings with respect to the claim and its own conclusions and recommendations regarding the application. This report should be submitted to the relevant land board together with the original application. The Land Committee could recommend acceptance, rejection or conditional acceptance of this application.[1]

On receipt of this report the District Land Board can then decide whether or not to issue a CCO.[2] The board is not bound to follow the committee's recommendation and it can also return the report to the committee to obtain further information. Once the board has made a decision it must communicate this to the Recorder. Where the board recommends that a certificate be issued the Recorder should do this, subject to any qualifications or restrictions required by the board.[3]

The Act also makes provision for customary owners of land to convert their tenure to leasehold. It is not necessary to first obtain a Certificate of Customary Ownership in order to do this, but the procedure required is very similar to the one described above.

The Land Act 1998 also provides for the formation of Communal Land Associations for the purposes of ownership and management of land under customary law or other law.[4] A Communal Land Association may own land under a Certificate of Customary Ownership leasehold or a freehold. Members of the association can also hold some or all of the land within it in an individual capacity[5] while other parts are set aside for common use.[6]

Institutions of Land management in Uganda

The Land Act 1998 sets out a number of institutions concerned with the management of land tenure and settlement of land disputes in Uganda. These are:

The Uganda Land Commission

This is charged with managing land vested in or acquired by the State according to the 1995 Constitution. It has power to purchase land or other interests in land, erect or demolish buildings, sell or lease land held by it, survey government-owned land and carry out other activities as necessary. The Government Minister responsible for land rights may issue policy directives to the Commission. The Commission is also responsible for administering the Land Fund.[7]

1 Ibid.
2 Ibid. section 8.
3 Ibid.
4 Ibid., sections 16 – 17.
5 Ibid. section 23.
6 Ibid. sections 25 – 26.
7 Ibid. section 50. See also Constitution of the Republic of Uganda 1995, Article 239.

The Land Fund

This was originally established to purchase the land of absentee mailo land owners in one specific part of Uganda, which was judged to have suffered from an arbitrary confiscation of land by the previous colonial administration,[1] however, its function was then broadened to assist disadvantaged people throughout Uganda to buy land.[2] The Fund is empowered to acquire land and also to resettle landless people.

District Land Boards

The 1995 Constitution provides for the establishment of a land board for every district in Uganda.[3] The Land Act 1998 specifies their membership, qualification and experience (including that at least a third of the members must be women) as well as their general functions.[4] The Boards are deemed to own all land within a district which does not belong to anyone else and are given the sole power to sell, lease or otherwise deal with such land. The Boards are also charged with facilitating the registration and transfer of issuance of land in their district, surveying and valuing the land and issuing certificates related to it. The District Land Boards are independent of both the Uganda Land Commission and the local district council. The District Land Tribunal's are the highest authority for appeal in the District after which cases can be taken to the High Court in Kampala. Cases worth over 50 million shillings (around $30,000 or £15,000) can be brought directly to the District Land Tribunal.

Land Committees

The Land Act 1998 provides for the appointment of Land Committees in each parish, gazetted urban area and city division. [5] These were intended to comprise four people (at least one of whom should be a woman) drawn from the locality and with some knowledge of local land matters. The main function of each committee is to determine, verify and mark the boundaries of customary land within the locality when an application for a Certificate of Customary Ownership is made. The committee is expected to carry out its tasks in collaboration with traditional institutions and also to advise members of the district land board on the applicable customary law in the area.

Land Tribunals

The creation of Land Tribunals is also provided for in both the 1995 Constitution and the Land Act 1998. According to the Constitution 'Parliament shall by law provide for the establishment of land tribunals, whose jurisdiction shall include:

> (a) the determination of disputes relating to the grant, lease, repossession, transfer or acquisition of land by individuals, the Uganda Land Commission or other authority with responsibility relating to land; and

1 Mugambwa, 2006, p.33.
2 Land Act 1998, section 24.
3 Constitution of the Republic of Uganda 1995, Articles 240 - 241.
4 Land Act 1998, sections 57 – 60.
5 Ibid., section 65

(b) the determination of any disputes relating to the amount of compensation to be paid for land acquired.
(3) The chairperson of a land tribunal established under this article shall be appointed on the advice of the Judicial Service Commission under any law made for the purposes of clause (1) of this article.
(4) A member of a land tribunal shall hold office on terms and conditions determined under a law made by Parliament under this article.
(5) A law made under this article may prescribe the practice and procedure for land tribunals and shall provide for a right of appeal from a decision of a land tribunal to a court of law.[1]

The Land Act 1998 provides for the creation of a Land Tribunal in every district in Uganda.[2] Each tribunal shall consist of a chairperson, who must be a lawyer and two other members who are not required to possess formal qualifications but should have knowledge and experience of land matters. All are appointed for five year terms. The tribunals shall have the same power as Grade 1 Magistrates Courts and shall be the final body of appeal on land disputes within the district. Subsequent appeals against the decision of a District Land Tribunal should be made to the High Court.

Although the Land Tribunals have powers equivalent to a court of law, the Land Act 1998 envisaged that they would follow different rules of procedure from ordinary courts. It was hoped that by being less formal and legalistic these tribunals could make themselves more accessible to ordinary people and bring justice closer to the community.

The Land Act 1998 specifically recognised the role of customary law in dispute settlement and mediation in relation to land held under customary law.[3] The Act states that at the commencement of a case, or at any time during a hearing, if the land tribunal is of the view that, because of the nature of the dispute, it ought to be dealt with by traditional mediation, it may advise the parties to attempt to resolve the dispute through this mechanism. The tribunal may adjourn its proceedings for up to three months in such circumstances to give the parties time to try and reach agreement. Both parties are free to resume formal proceedings if either is not satisfied with the outcome of this process.

The Act also makes provision for the appointment of mediators, on an ad hoc basis, in an attempt to resolve land disputes.[4] A mediator is not required to hold any formal professional qualifications and his or her main role is envisaged as attempting to 'narrow any difference between the two parties.'[5] The Act specifies that the services of a mediator may be used in negotiations between landowners and tenants who are either seeking to gain occupancy rights or conduct a transaction relating to the land in question.

1 Constitution of the Republic of Uganda 1995, Article 243.
2 Land Act 1998, section 75.
3 Ibid., section 89.
4 Ibid., section 90.
5 Quote from Minister of Land during the parliamentary debate on the Act, Hansard, 28 June 1998, p.4352, cited in Mugambwa, 2006, p.46.

Land rights in practice

As stated above, it is important to note that many of the above provisions have never been implemented. There are very few, if any, Land Committees in existence. The District Land Boards, where they exist, are extremely weak and the District Land Offices, which were supposed to support their work are grossly under-resourced. Although some Land Tribunals were created, there were never enough to cover the entire country and so those that did exist soon built up a massive back-log of cases. The administration of the tribunals was subsequently shifted from the Ministry of Lands to the Ministry of Justice and their work was formally suspended in November 2006. The handling of land cases has effectively been handed back to the courts.

Many of the reforms envisaged by the Land Act 1998, such as the surveying of land and the issuing of Certificates of Customary Ownership have not taken place and a lack of resources has meant that the Land Fund has never actually become operational.

This has led to the emergence of a huge gap between how land rights are theoretically dealt with in Uganda and how the system actually functions in practice. The following chapter describes some general principles of land law, which are applicable in Uganda and then looks at how land issues are usually dealt with in the formal legal system.

Chapter Two

General principles of land law in Uganda

The previous Chapter provided an introduction to the system of land tenure in Uganda, including its historical background and the legal and constitutional reforms introduced by the present Government of Uganda. It was also noted that many of the institutions envisaged by the 1995 Constitution and the Land Act 1998 have not been created and that, consequently, many of the provisions remain unimplemented.

There are, however, a number of important principles related to land law in Uganda which pre-date the current constitutional and legal framework, but have an important bearing on issues related to the ownership and transaction of land. Some of these derive from concepts developed under English property law and many of the cases discussed below were heard by the courts while Uganda was still under colonial rule. This Chapter describes how some of these general principles have been applied to specific cases in Uganda. Some of the terms and concepts used can be slightly confusing, but are necessary in order to explain the existing system of land rights in Ugandan law.

English real property law

Under English law, the Crown is the ultimate owner of all land and subjects of the Crown hold estates, which can basically be divided into 'freehold' and 'leasehold' forms of tenure. While the land itself is considered to belong to the Crown, the law treats the 'estate' as property. The 'title' that a person holds indicates the 'interest' that he or she holds in the land in question.[1]

The English legal system was historically divided into two separate jurisdictions: courts of the common law and the Court of Equity. While common law courts based their rulings solely on the 'black-letter' word of the law, the Court of Equity (which acted directly on behalf of the British monarch) could also take into account 'principles of reason and conscience'.

Both came to be established bodies of law, but they treat land and property rights slightly differently. For example, when one person transfers a land title to someone else to hold in trust for a third person (who may be a minor or have been displaced from the land in question) the common law could not compel the 'trustee' to honor this obligation because it simply recognized the transfer of legal title. Equity, however, enabled the courts to take into account the conditional nature of the transfer and the instructions of the original owner. During the nineteenth century the two systems were brought together, to prevent claimants from 'forum hunting' (that is taking their case to different courts with the hope of winning somewhere), and the courts were given jurisdiction to apply both systems of law.[2] Where the two principles were in conflict the courts were instructed to apply rules of equity.[3]

As discussed in the previous chapter, the British colonial administration initially deemed most land in Uganda to be the 'property of the British Crown' and Uganda's post-colonial rulers also provided few protections to safeguard people's property rights. The 1995 Constitution of Uganda reversed this policy by vesting ownership of the land in the citizens of Uganda, in accordance with the land tenure systems provided by the Constitution. However, some of the terms used in English property law remain in frequent use and Uganda's courts often also draw on principles established under the English legal system. Uganda's Judicature Statute 1996, for example, provides that: 'in every cause or matter before the High Court, the rules of equity and the rules of the common law shall be applied concurrently.' Where there is a variance between these rules, on the same subject matter, the law specifies that equity shall prevail.[4]

When discussing general principles of land law in Uganda, the courts will often use phrases drawn from English property law such as 'legal interest' or 'equitable interest', to denote particular forms and proof of ownership rights. Likewise, the phrase 'title' is often used to denote a claim of ownership rather than a formal legal document. An owner of land under customary law, for example, can be said to have 'title' to it even if this has not been recorded or registered anywhere.

1 For more details see Burn, *Cheshire and Burn's Modern Law of Real Property* (14th edition), Butterworths, 1988.
2 Judicature Act 1873.
3 Ibid., section 25.
4 Judicature Statute 1996, section 16.

Registration of titles

The system of registration of titles in Uganda is commonly known as the 'Torrens System', and is based on a system first developed in Australia, by Sir Robert Torrens. This aimed to provide a simple, fair way to operate, secure and register land and it was subsequently used in a number of other English colonies.[1] It was introduced in Uganda by the Registration of Titles Act 1924, which repealed the earlier Registration of Titles Ordinance 1908 and the Equitable Mortgages Ordinance 1912. The Act automatically applies to all freehold, leasehold and mailo land.[2] However, it does not recognize customary ownership. Owners of land under customary tenure who wish to register their lands under the provisions of the Act must first convert their tenure to freehold as described in Chapter One of this Guide.

The Registration of Titles Act 1924 creates a system of title registration based on a centralized Register Book containing a running record of deeds and documents relating to each separate parcel of land registered under the Act.[3] Where a new parcel of land is registered the Registrar is required to prepare a certificate in duplicate. One copy of the certificate is kept in the Book while the other, referred to as the 'duplicate certificate', is given to the person who is registered as the 'proprietor' of the land or interest.[4]

The Act provides that a registered proprietor of any estate or interest wishing to transact, or transfer this must complete a prescribed form, which should be signed and witnessed and presented to the Registrar together with the duplicate certificate of title and any other necessary documents.[5] Instruments not submitted in the appropriate form may be rejected at the discretion of the Registrar.[6] Any subsequent transactions affecting registered land, such as a mortgage or lease, must be endorsed in the Register Book, the certificate of title and the duplicate certificate.[7] This means that a future buyer will be able to check if, for example, a mortgage has been taken out against the land as this could obviously affect its value.

Once the Registrar has entered the instrument in the Register Book, the person named in the certificate is deemed to be the duly registered proprietor.[8] A certificate shall be conclusive evidence of title, and all its particulars, and the courts are obliged to treat it as such.[9] This provision prevails over all other unregistered interests or claims and registered title-holders are protected against unregistered interests.[10] This principle of 'indefeasibility' was intended to help create one central land registry and, thus, simplify and expedite future land transactions.

1 Douglas Whalan, *The Torrens System in Australia*, Law Book Company, 1982.
2 Registration of Titles Act 1924, section 9.
3 Registration of Titles Act 1924, section 37.
4 Ibid., section 38.
5 Ibid., sections 82, 89, 100 and 114.
6 Ibid., section 181.
7 Ibid., sections 38, 42 and 49.
8 Ibid., section 42.
9 Ibid., section 56
10 Ibid., sections 61, 184 and 186.

It is possible to challenge the title of a registered proprietor on the basis of fraud, although this is difficult as will be discussed below. However, this only invalidates a registered title if the fraud has been perpetrated by that particular person. If, for example, someone fraudulently obtained a title and then sold it to an innocent third party, who duly registered it, the initial fraud would not necessarily invalidate the subsequent title. As the Court noted in Lwanga v The Registrar of Titles, one of the paradoxes of registered conveyance is that though registration obtained by fraud is void, it is capable of becoming a good root of title to a bona fide purchaser.[1]

The fact that only a small minority of land in Uganda has ever been registered has also led to a number of legal conflicts about the relationship between this registration process and other contractual agreements. In Ndigejjerawa v Isaka Kizito and Sabane Kubulwamana the court had to consider a case in which Kizito had sold the same parcel of land to both Ndigejjerawa and Kubulwamana and provided both with written agreements verifying the sale. The first sale was made to Kubulwamana but Ndigejjerawa was the first to attempt to register his documents in the Register Book. The Registrar refused to accept either document because neither was submitted in the correct form. Ndigejjerawa argued that he should be recognized as owner of the land because he attempted to submit his documents first, while Kubulwamana argued that he had received written documents in exchange for paying the purchase price first so he should be regarded as the legitimate owner. The court ruled that neither could be regarded as the legitimate owners until their documents had been accepted by the Registrar.[2] However, in the absence of fraud, the first person to register a piece of land is granted title, even if the land has also been sold to someone else.[3]

In another case, the Court of Appeal for Eastern Africa, in Souza Figueirdo & Co Ltd v Moorings Hotel Co Ltd, ruled that an unregistered written contract did have legal force. The case concerned a lease agreement which one side broke owing rent arrears. The Court reasoned that there is nothing in the Registration of Titles Act 1924 which specifically renders unregistered instruments ineffectual as contracts between two parties. The Court ruled that the respondent was entitled to the payment of the rent due for the period in which the appellant enjoyed possession of the land in question. However, it accepted the appellant's argument that the agreement could not be considered an 'equitable lease', due to the provisions of the Act.[4]

The latter view has not been followed by the Ugandan courts, which have ruled, in Katarikawe v Katwiremu and another, that an 'equitable interest' is created by virtue of a contract between the parties, even where the documents have not been registered as an instrument under the Registration of Titles Act 1924.[5]

In Alibhai and another v Karia and another the respondent entered into contract with the appellants to purchase property from them, but, before he paid the purchase price, these were forced to flee the country following Amin's expulsion of Asians from Uganda. The land was subsequently taken over by the Departed Asians Property Custodian Board. The Board then awarded the land to the respondent and he was registered as the proprietor.

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1 Lwanga v The Registrar of Titles Misc. Cause No 7A of 1977; (1980) HCB 24 (unreported).

2 *Ndigejjerawa v Isaka Kizito and Sabane Kubulwamana* (1953) 7 ULR 31.

3 *Kazzora v Rukuba* CA No 13 of 1992 (unreported); and *Hotel International Ltd. V The Administrator of the Estate of the Late Robert Kavuma* CA No 37 of 1995.

4 *Souza Figueirdo & Co Ltd v Moorings Hotel Co Ltd* [1960] EA926.

5 See *Katarikawe v Katwiremu and another* CA No 53 of 1995 (unreported).

The appellants sought an order for the transfer to be set aside claiming that the contract was invalid because the transfer was not registered. The Court rejected this claim arguing that the contract of sale, although it had not been completed, created an 'equitable estate', which belonged to the respondent. Although the appellants retained the 'legal estate', because they were still the registered owners, they should now be regarded as trustees with a duty to transfer this to the respondent on completion of the contract. This legal estate became vested in the Departed Asians Property Custodian Board, by virtue of the Assets of Departing Asians Decree 1973, and this had acted properly in transferring the estate to the respondent.

The appellants had also claimed that they had been the victim of fraud, but one weakness of the Registration of Titles Act 1924 is that it does not define this term, which leaves it open to the courts to decide what standard of proof is necessary to prove that fraud has taken place. Ugandan law appears to state that, given the severity of the accusation, it must be proved strictly. In the above case the judge ruled that while it was not necessary to prove it 'beyond all reasonable doubt', something more than the 'balance of probabilities', that is generally applied in civil cases, was needed.[1]

Given that the appellants had been dispossessed of their land by an arbitrary and discriminatory act of expulsion, it seems likely that some of the judge's reasoning could now be open to challenge on the basis of Uganda's 1995 Constitution and its international human rights obligations. This is discussed further in Chapter Four of this Guide.

Title may also be challenged by possession and so, if a person acquires the title to a piece of land, it is his or her responsibility to check whether there are other people in occupation of it. In a case in Kenya, Kissee Maweu and others v Kiu Ranching and Cooperative Society Ltd,[2] the company in question obtained title to a property in 1961 and attempted to eject a group of people from the land who had settled there almost 30 years previously. A lower court accepted the company's argument that certificate of title was conclusive proof of ownership, but the Kenyan Court of Appeal ruled that the time that the occupants had previously spent on the land gave them rights of ownership. In Uganda Post and Telecommunications v AKM Lataaya it was also held that the company's registered leasehold was subject to the rights of possession of a tenant who had been living on the land with the consent of the landowner prior to the granting of the lease.[3] This point will be discussed further below.

Possession

Possession is often said to be 'nine-tenths of the law.' A person who is in possession of land is assumed to have title to it and this title holds against everyone, except a person with a better claim.[4] Even if someone is squatting on land without permission, he or she has the right to defend this occupancy against interference by a third party and could, for example, bring an action of trespass against this party.

1 Ibid.
2 *Kissee Maweu and others v Kiu Ranching and Cooperative Society Ltd* (1982) 1 KLR 746.
3 *Uganda Post and Telecommunications v AKM Lataaya* CA No 36 of 1995 (unreported)
4 *Asher v Whitlock* (1865) LR 1 QB I.

While someone remains in possession of land, he or she is free to enjoy the full rights of title, including the right to sell, lease or otherwise transfer it. Should the original owner wish to recover his or her land, he or she will first have to convince a court of the merit of his or her claim to title.

After a certain period of uninterrupted occupancy, possession allows the occupant to claim title to the land in question. This principle is known as 'adverse possession' and arises out of the principle in English common law that an action against trespass must be brought within a specified time. After that time has elapsed no further action can be taken against the occupant. The principle is linked to, although distinct from, the doctrine of 'acquiescence', whereby someone who fails to take active steps to assert their rights within a reasonable time period is held to have acquiesced in the violation.

The principle of adverse possession, sometimes also called 'squatter's rights', is that it is better for land to be used than not used. The concept is similar to 'homesteading', which expresses the idea that if no one is using or possessing property, the first person to claim it and use it consistently over a period of time gains ownership. These principles pre-date modern property law, which has had to develop around them.[1]

Adverse possession is defined as when someone physically occupies land without the consent of the owner and uses it as his or her own. A tenant, or caretaker, cannot claim adverse possession because the land owner has consented to this presence. But, if someone remained on land after a lease had expired, the period for which they would be considered to be in adverse possession could start from that date.

The owner of land, with a paper title to it, is considered to be in possession of it, even if he or she is not physically occupying it. However, if someone else takes physical occupancy of this land, with a clear intent to exclude the original owner, then, if the owner does not contest this after a certain period of time, he or she is considered to have voluntarily abandoned claim to it.

The occupancy must be continuous throughout the period and if the occupant vacates the property at any point, even temporarily, than the 'clock goes back to zero.' The moment an original owner commences legal proceedings to recover the property the time period also stops and if an occupant acknowledges someone else to be the owner then this will also 'stop the clock.' A squatter could gain title to a property from a lessee, through adverse possession, but this would only be valid until the expiry of the lease, after which time it would need to be asserted again against the original owner.

1 See Robert Guest, The Shackled Continent, Pan Books, 2004, p.73 – 87 for a discussion of the issue of land titles in Africa.

Under Ugandan law, the period within which an action can be brought to recover land is 12 years.[1] After this time the original owner loses his or her right to re-enter, or sue to recover, the land. Unless the title to the property has been registered under the Registration of Titles Act 1924 this is also deemed to be extinguished. If the title has been registered, it is deemed to effectively be held 'in trust' by the previous owner for the benefit of the person who dispossessed him or her.[2] In either case the squatter does not gain the title from the person that he or she has dispossessed, but can now claim a new title from the Registrar. It has been argued that this would be a freehold title, even where the previous land was held under customary title as the principle of adverse possession is not recognized by Ugandan customary law.[3]

In Musoke Bafirawala v Jogga, [4] which is also discussed below, the Ugandan High Court ruled that the principle of adverse possession did not begin to apply until the landowner became aware of the unlawful possession. The court came to a similar conclusion in Nambalu Kintu v Efulaimu Kamira.[5] In both cases the occupants had originally entered the property in question with the consent of the land owners and so clearly were not initially in adverse possession.

In Citamong v Olinga the Ugandan High Court overturned the eviction of someone who had occupied and cultivated someone else's land for 30 years.[6] The owner of the land was aware of the intrusion, but took no action to stop it and so was held to have acquiesced in the violation of his rights. The courts made similar rulings in Wandira v Okeya[7] and Lomolo v Kilembe Mines,[8] although the time periods here were only 10 and seven years respectively.

Leases

A lease is an agreement whereby one party grants to another exclusive possession of land for a period usually, but not exclusively, in return for a monetary consideration called rent. The common law definition of a lease has two essential features: 'certain duration' and 'exclusive possession', but the Ugandan Land Act 1998 dispenses with the second condition. A lease is defined as a form of tenure in which the landlord grants, or is deemed to grant the tenant exclusive possession. A lease may be created where there is no form of payment and it states that the duration of a lease is usually but not necessarily defined by reference to a date of commencement and ending.[9]

The distinguishing feature of a lease is, therefore, that it grants the holder the right of exclusive possession to a piece of land. This is different from a license where the holder is merely permitted access to the land and does not acquire any interest in it.

1 Limitation Act (cap 70) section 6.
2 Registration of Titles Act 1969, section 30.
3 Mugambwa, 2006, p.66.
4 *Musoke Bafirawala v Jogga* CS No 33 of 1973; (1976) HCB 26 unreported.
5 *Nambalu Kintu v Efulaimu Kamira* CA No 26 of 1973; (1975) HCB 221 (unreported).
6 *Citamong v Olinga* CA No 104 of 1982; (1985) HCB 86.
7 *Wandira v Okeya* CA No 100 of 1969 (1970) HCB 60.
8 *Lomolo v Kilembe Mines* CS No 395 of 1976; (1978) HCB 157.
9 Land Act 1998 sections 4 and 5.

In two cases where the City Council of Kampala sued tenants, who it accused of sub-letting their premises to others in breach of their lease agreements, the courts drew out this distinction. In the first, City Council of Kampala v Mukibi the court found that a tenant had allowed a group of hairdressers to use his premises in return for a delay fee, but had not given them exclusive possession, or even their own key to the premises.[1] In City Council of Kampala v Mukubira and another, by contrast, the tenant was deemed to have parted possession because he provided no supervision over the use of the premises, which only visited occasionally.[2]

Ugandan law does not specify that a lease must be in writing and so an oral contract could be deemed sufficient.[3] A contract can also be inferred by the conduct of the parties. In Mayanja v National Housing Corporation, for example, a lease was inferred by the fact that one party took possession of land and started paying rent, which was accepted by the land owner.[4]

English common law has established the principle that where a person enters onto land as a tenant of another both parties are 'estopped' from denying that a lease exists. This principle is an accepted part of Ugandan law and the courts have found that it can be used to prevent either side using 'lack of title' as an argument in a dispute. In Pardham Jivraj v Dudley-Whelpadale, for example, even though a lease had not been registered under the Registration of Titles Ordinance, which preceded the 1924 Act, this did not provide grounds for arguing that it was defective, because the payment and acceptance of rent by the parties was held to prove that they regarded one another as landlord and tenant.[5]

Leases should be registered under the Registration of Titles Act 1924, but Uganda's courts do recognize the validity of leases over unregistered titles to function as a contract between the two parties, as discussed above. Some argue that this, in effect, gives them the status of equitable leases.[6]

Parties to a lease are free to incorporate any terms which they wish to, so long as they are lawful, and both sides are then bound by these terms. In addition, the common law implies that the landlord will respect the right of the tenant to the 'quiet enjoyment' of his possessions, 'non-derogation' from the purpose of the lease and premises that are 'fit for habitation.

Examples of violations of the 'right to peaceful enjoyment' can be found in Opinya v Mukasa, where it was held that a landlord was prohibited from removing the roof of a building in an attempt to enforce an eviction,[7] while in The Kampala Cotton Co Ltd v Privinlal Madhvani the Court ruled against a landlord blocking its tenant's right of way.[8] The right of 'non-derogation' from the purpose of the tenancy could include subsequent actions by the landlord which made it impossible for the tenant to carry out the type of activities (of an agricultural or commercial nature, for example) that she or he had leased it for. Premises fit for human habitation means

1 *City Council of Kampala v Mukibi* [1967] EA 368 (U).

2 *City Council of Kampala v Mukubira and another* [1968] EA 497 (U).

3 Land Act 1998 section 5. See also *Jama Noor Shakiya v Hassanali Ahmed Jusub* (1965) EA 241 (U); and *Mayanja-Nkangi v National Housing Corporation* [1972] 1 ULR 37.

4 *Mayanja v National Housing Corporation* [1972] 1 ULR 37.

5 *Pardham Jivraj v Dudley-Whelpadale* (1920 – 1929) 3 ULR 193.

6 John T Mugambwa, *Principles of Land Law in Uganda,* Fountain Publishers, 2006, p.97.

7 *Opinya v Mukasa* CC No 167 of 1964, High Court Digest , p.514.

8 *The Kampala Cotton Co Ltd v Privinlal Madhvani* CC No 485 of 1952, High Court Digest, p.511.

that they must be in a state that does not pose a risk to personal injury or to hygiene. It should be noted that the 'right to adequate housing' guaranteed under international human rights law, contains considerably more exacting standards, which will be discussed in Chapter Four of the Guide.

The tenant is, in return, expected to pay rent and all other charges, except those for which the landlord is expressly responsible, and also to keep the place tidy and in a reasonable state of repair. The landlord also has the right to carry out periodic inspections to check that this is being complied with. These provisions are also contained or implied in Uganda's Registration of Titles Act 1924.[1] The Act permits tenants to sub-lease or assign their leases to someone else, but this party will become responsible for all of the terms of the original lease.[2]

Where the landlord is in breach of contract, the tenant can sue him or her for damages or obtain an injunction to prevent future breaches.[3] In the case of a fundamental breach a court may consider the agreement to have been repudiated by the landlord, which could result in a termination of the lease. The tenant cannot otherwise terminate the lease unless the agreement specifies such power. A landlord may also sue a tenant for breach, which usually occurs due to a failure to pay rent on time, damage to the property or because it is being used, or sub-let unlawfully or outside the terms of the lease agreement. In practice tenants sometimes withhold rent during disputes while landlords may seize possessions from the tenant in lieu of rent. These can then become the subject of separate legal actions between landlord and tenant.[4]

The most common remedy for a breach of contract by a tenant is 'forfeiture' of the lease, which becomes null and void allowing the landlord to repossess the land or property. There is no provision in the Registration of Titles Act 1924, or other legislation in Uganda, setting out the procedures for repossession. Under the English Conveyancing and Law of Property Act 1881, a landlord was required to provide advance written notification, but the application of this Act in Uganda was superseded by the Judicature Act 1967 and so it appears that this is no longer required. The Ugandan courts have upheld the right of a landowner to evict squatters without notice and without compensation for any improvements that they may have carried out to the land that they occupied.[5]

The common law specifies that a landlord may gain physical repossession, or 're-entry', of his or her land without a court order and using 'reasonable force' to eject the tenant.[6] However, the Ugandan High Court has stated that where a tenant refuses to vacate it would be more advisable for the owner to apply for a judicial order of eviction than to attempt to forcibly evict him or her.[7] The courts may also grant 'relief' from forfeiture, which is usually granted where a tenant remedies the breach of his or her contract, such as payment of rent, and is able and willing to perform his or her obligations in the future.

1 Registration of Titles Act 1924, sections 101 – 102.
2 Ibid., sections 104 and 112.
3 *Opinya v Mukasa* CC No 167 of 1964, High Court Digest , p.514.
4 See Mugambwa, 2006, p.104 – 113.
5 *City of Kampala v Odido* CS No 232 of 1969.
6 Ibid.
7 *Lugogo Coffe Co (U) Ltd v Singo Combined Coffee Growers Ltd* CS No. 554 of 1973; [1976] HCB 92.

Mortgages

A mortgage is a transaction whereby land is given as security for the repayment of a loan. The rules applying to mortgages are defined in both common and statutory law. The two most important laws regulating mortgages in Uganda are the Mortgage Decree 1974 and the Registration of Titles Act 1924.

A mortgage created under Ugandan law differs from common law rules in that it does not transfer the title of the land to the creditor, but makes him, or her, the proprietor of the mortgage, which theoretically provides the debtor with greater security.[1] The debtor remains the owner of the land, subject to his or her ability to pay off the loan. As well as being obliged to pay off the loan the debtor is obliged to maintain and repair the property and grant the creditor the right to inspect the property at any reasonable time. Where the debtor breaches these terms the creditor is entitled to take possession of the property, appoint a receiver, sell the property or foreclose the loan. He or she can also seize other assets of the debtor if this is necessary to recover the loan's original value.

In the case of Barclays Bank of Uganda Ltd v Livingstone Katende Lutu, the bank agreed to loan money to a third party after Lutu put his land up as collateral. When the third party defaulted the bank served notice of its intention to sell and advertised the land at a public auction. Lutu sought an injunction against the sale, which a court granted on the basis that this could not be done without a court order and because a discrepancy between the value of the land and the value of the money owed would cause Lutu 'irreparable loss'. However, this ruling was overturned by Uganda's Supreme Court, which held that the terms of the agreement meant the court had no power to prevent or postpone the sale.[2]

Ugandan law does not impose any duty of care on a creditor exercising his or her powers of sale of a mortgaged property. However, the common law rules that the property should be properly advertised and publicly sold. Uganda's courts have ruled that one advertisement, which specified the land for sale but omitted to mention that it had been developed and contained a house had the effect of under-valuing it.[3] In another case the selling of a property through private treaty rather than public auction also led to it fetching less than its market value. In both cases damages were awarded to the debtor.[4]

Mortgages should be officially registered under the Act, but Ugandan law also recognizes equitable mortgages so long as the certificate of title has been lodged with the Registrar.[5] The Land Act 1998 also recognizes the right of customary owners of land to obtain mortgages using customary certificates of ownership although, as described in Chapter One, no such certificates have yet been issued.

1 Registration of Titles Act 1924, section 115.
2 *Barclays Bank of Uganda Ltd v Livingstone Katende Lutu* CA 22 of 1993.
3 *Mubiru v Uganda Credit and Saving Bank* CS 567/65.
4 *Sajabi v Amreliwalla and Wamala* [1956] 22 EACA
5 Ibid., section 138.

The Ugandan courts have held that where the mortgaged land is not registered under the Registration of Titles Act 1924, the applicable law is English common law and the rules of equity.[1] In practice this makes it easier for a creditor to foreclose on a mortgage and to sell the land for profit. This makes it very difficult for holders of land under customary law to use this land as collateral for mortgages.[2] It has been argued that there is a need to harmonize the Mortgage Decree 1974 with the Land Act 1998 to bring greater security to the practice of mortgaging land held under customary law.[3] This also needs to be seen in the context of the weaknesses surrounding the implementation of the Land Act 1998 discussed earlier.

Land ownership and associated rights

The common law definition of land also includes that which attaches to it: the fixtures. There have been a number of cases which have sought to establish whether a person who builds structures or carried out on improvements on another person's land has any right to compensation from the original owner.

The Ugandan High Court has ruled in two cases that such a right exists. In Babiruga v Karegyesa and others the court based this ruling on the fact that the original owner had been aware that other people (his children in this case) had constructed a number of houses on his land, without his express permission. The Court ruled that, since he had acquiesced in this construction he had conceded their right to be on the land, which could only be terminated subject to him paying them compensation for the value of the houses.[4]

In Musoke Bafirawala v Jogga the High Court ordered that a landowner pay compensation to someone who had been originally appointed as a caretaker to mind the land in his absence. The owner went to live abroad, in 1960, while the caretaker managed the estate, collected rents and forwarded these on to the owner. After some years the caretaker abandoned this role and instead assumed ownership of the land himself. He carried out various improvements, including the construction of buildings on the land. The original owner returned to Uganda 10 years later and sought to regain possession of his land. The Court awarded it to him but specified that he must compensate his former caretaker for the improvements, even though the original owner does not seem to have been aware that these had been carried out.[5]

There is a continuing debate about whether or not a tenant or leaseholder has the right to remove fixtures installed during his or her occupation of land become the property of the owner.[6] A 'fixture' is defined as something which has been attached to the land with the intention of making a permanent improvement to it.[7] A notice board screwed to a wall, electricity cables embedded into plaster or a rainwater tank held in place by concrete would all count as fixtures. It is

1 *Matambulire v Kimera* CA No 37 of 1972 (unreported); and *Waswa v Kikungwe* (1952 – 56) 7 ULR 1.
2 *Jakana v Senkaali* CS No 491 of 1984 (unreported); [1988 – 90] HCB 167.
3 John T Mugambwa, *Principles of Land Law in Uganda,* Fountain Publishers, 2006, p.125.
4 *Babiruga v Karegyesa* DR CA No MKA 13 of 1993 (unreported).
5 *Musoke Bafirawala v Jogga* CS No 33 of 1973; (1976) HCB 26 unreported.
6 For details see John T Mugambwa, *Principles of Land Law in Uganda,* Fountain Publishers, 2006, p.52 - 54.
7 Holland v Hodgson (1872) LR 7 CP 328.

generally accepted that 'trade fixtures', 'ornamental fixtures' and 'fixtures for household purposes' are treated as 'tenant fixtures' and may be removed. However, fixtures attached for agricultural purposes, such as: fences or sheds become the property of the owner of the land. A tenant must remove any fixtures to which he or she is entitled from the land before the expiry of the lease and must compensate the owner of the land for any damage caused during this process.

The right of ownership of land is also commonly understood to include what is immediately above and below the surface.[1] It has been established that this only extends to a height or depth which an owner might conceivably use.[2] Uganda's Mining Act (cap 248) specifically excludes the right to ownership of any minerals that might be found beneath the land. It states that the entire property and control of all minerals and mineral oils in, under or upon any lands or waters in Uganda are and shall be vested in the Government.[3]

1 *Kelson v Imperial Tobacco Co. of Great Britain and Ireland*, [1957] 2 QB 334.

2 *Bernstein of Leigh (Baron) v Skyviews and General Ltd.*, [1978] QB 479.

3 Mining Act (cap 248) section 3.

Chapter Three

Land rights and customary law

This Chapter provides a brief introduction to how customary law in Uganda deals with land rights in the Acholi region of Northern Uganda. It provides an overview of the general evolution and significance of customary law and then looks at what this specifically means in a Ugandan context.

Customary law is closely related to 'tribal tradition', which has given rise to certain attitudes to land tenure, but there is a vigorous debate about how this 'tradition' was actually constructed in Uganda. This Chapter contains a brief overview of the context in which Acholi ethnicity has developed and then discusses how this has given rise to certain beliefs and ways of approaching land rights and settling disputes.

For the reasons described below it should be clear that it is not easy to provide a definitive description of how customary law deals with land rights in Northern Uganda, but this Chapter outlines how issues tend to be dealt with in practice and highlights some particular issues of concern.

The evolution and significance of customary law

Customary law tends not to be written down and is based on practices that have grown up over time and so come to be accepted as legitimate by a particular community. This differs from place to place and is often interwoven with the history and traditions of a particular tribe. It should be emphasised that customary law is not an unchanging code, but an unwritten and flexible set of principles which are interpreted according to the particular context in which they are being applied.

Economic factors, such as the nature and productivity of land, its suitability for particular types of agricultural production or rearing livestock, the availability of water, population density and the division of labour within the family will also have an important impact. Customary law also often draws upon, and interacts with, religious beliefs and cultural and political identity, which lead to the adoption of attitudes about what constitutes legitimate behaviour on a variety of social issues. Many systems of customary law emphasise 'restorative justice' over 'retributive punishment.' Concepts such as 'justice', 'fairness', 'forgiveness', 'honour', 'revenge' and 'retribution' play an important role in customary law, but may have different meanings in different places due to these factors.[1]

Customary law has traditionally been stronger in the Acholi region of Northern Uganda. It is estimated that up to 95 per cent of the land is still held under customary tenure and the 'penetration by the colonially inspired freehold has remained marginal.'[2] The impact of the 20 year conflict, which has displaced so much of the population from their homes, also gives customary law a particular significance in relation to land rights.

The displacement crisis has seriously weakened the capacity of official institutions of land administration and adjudication. With the official court system barely functioning in many areas, people increasingly used customary law and traditional mechanisms to resolve disputes. At the same time displacement has also weakened the influence of traditional institutions, such as village elders, who are the custodians of customary law.[3]

When the current conflict in Northern Uganda comes to an end it is likely that hundreds of thousands of people will begin to return to their land and homes. Many of these have been in displacement for several years, during which time the physical boundaries of the land may have changed, which could lead to disagreements between neighbours about border demarcations. Many families will have grown larger while they were in displacement, which could lead to disputes over inheritance rights and the sub-division of land.[4]

There are now a large number of widows and orphans, both due to conflict-related deaths and the impact of HIV/AIDS. According to the 2002 census, in some parts of Northern Uganda, nearly 10 per cent of the total population, or around 20 per cent of all children, are orphans.[5] Many children have also been borne outside of marriages or their parents have subsequently

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1 For a general discussion see Ali Wardak, 'The Tribal and Ethnic Composition of Afghan Society' in *Afghanistan: Essential Field Guides to Humanitarian and Conflict Zones* (Second Edition), edited by Edward Girardet & Jonathan Walter, Geneva: Crosslines Ltd, 2003.

2 **Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005.

3 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004.

4 Peter E. Hetz and Dr. Gregory Myers, *Land Matters in Northern Uganda, Anything Grows; Anything Goes, Post-conflict "conflicts" lie in Land*, USAID Assessment report, November 16, 2006

5 **Quoted in Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005. The figure is for Apac.

separated. All of these factors could lead to disputes or the displacement of vulnerable people from their land. Land is also being purchased for commercial purposes and the development of this market is undermining the traditional concept of 'clan ownership' and the 'stewardship' of land for future generations.[1]

All of these factors point to the possibility that land rights issues could become a significant cause for concern in the return process and that this will place a significant burden on the institutions of customary law. Comparatively little has been written about customary law in Uganda and most of the more recent literature focuses on the issue of transitional justice and forgiveness, in the context of debates about conflict and peace.[2] Clearly the issue of customary law and land tenure would benefit from further research and study and the purpose of this Chapter is to provide a very brief overview of some of the institutions and practices that impact on land rights in Northern Uganda.

What is customary tenure?

Customary tenure means that someone is considered to have ownership rights over a particular piece of land because this is the accepted view of the community in which he or she lives. The person does not usually have any documents or papers to prove this right, but it is considered legitimate by the community and its elders. People usually have acquired this right through inheritance or purchase or by simply settling on land that was vacant prior to their arrival. Prior to the Land Act 1998 customary ownership of land had no official recognition in Ugandan law and, while people could occupy such land under sufferance, any agreements that they made to buy, sell, rent, mortgage, donate or otherwise transact had no legal value.

There is a continuing debate about the nature of private ownership under customary law. While it is generally accepted that the system of land tenure which developed in the north and east of Uganda was more communally based than that which prevailed in the south and the west of the country,[3] the extent to which customary law equates with communal ownership is disputed. The Land Act 1998 defines customary tenure as a system 'providing for communal ownership and use of land,'[4] but 'in which parcels of land may be recognised as subdivisions belonging to a person, family or a traditional institution'[5] and 'which is owned in perpetuity.'[6] This implies that there are two overlapping systems of customary land tenure: one private and one communal. Acholi's often also use the terms together, which can cause confusion.[7]

The difference between the two systems is extremely important and affects both the rights of individuals and the development of government policy towards land reform. If customary tenure means that land is communally-owned then this could deter individual investment in it. If no single person 'owns' the land then, it could be argued that, no one will have an incentive to try and improve it or increase its productive capacity. If the land cannot be bought and sold then it has no market value and so this will also affect macro-economic policy. As is discussed

1 Peter E. Hetz and Dr. Gregory Myers, *Land Matters in Northern Uganda, Anything Grows; Anything Goes, Post-conflict "conflicts" lie in Land*, USAID Assessment report, November 16, 2006

2 Tim Allen, *Trial Justice, the International Criminal Court and the Lord's Resistance Army*, Zed Books, 2006; R*oco Wat I Acol: Restoring relationships in Acholi-land, traditional approaches to justice and reintegration*, Liu Institute, September 2005; Denni Pain, *The bending of the spears: Producing consensus for peace and development in Northern Uganda,* International Alert, 1997.

3 Ibid.

4 Land Act 1998, section 3 (f)

5 Ibid., section 3 (g)

6 Ibid., section 3 (h)

7 Interviews conducted with Ugandan IDPs in October and November 2006.

in Chapter One of this Guide, the Government of Uganda has adopted a policy of seeking to encourage private sector investment in land. Perceptions about what customary tenure actually means will, therefore, impact on government policy towards it.

Some commentators have emphasised that land under customary law was traditionally regarded as being the property of the clan,[1] while others maintain that most land is privately owned.[2] For example, Professor Ronald Atkinson, a noted historian of the Acholi regions has written that:

> Before displacement, almost all Acholi were peasant farmers who kept some goats and cattle but relied primarily on hoes and other hand tools to grow a variety of crops suited to their grassland environment. Land rights were overwhelmingly customary and communal, not private, and were vested in localized patrilineal clans or sub-clans). Not all who lived and farmed on communal clan land were clan members; friends, in-laws, and others could be given access to use – but not own – clan land. And an individual clan member who was also a household head had personal claim to land that he and his wife (or wives) had under cultivation, or that had been cultivated but was lying fallow, and such rights passed from father to son. But ultimate rights to the land were based in clans. For the vast majority of Acholi in the camps, the only productive asset they "own" is the communal land to which they have rights, and regaining access to that land will be the single most important factor determining long-lasting peace and sustainable reintegration and recovery in the region.[3]

By contrast Judy Adoko and Ian Levine, two researchers and activists on land rights issues in Uganda, maintain that:

The essential elements of customary tenure in Acholiland are:

- Nearly all cultivated land falls under private ownership at family or household level;
- There are large areas of land which are used for purposes other than cultivation and are managed for the benefit of all clan members;
- Land is for the benefit of the wider family or clan, and therefore transfers of ownership either through inheritance, redistribution among family members, 'loaning' land to outsiders or sales of land, have to be carried out with that interest in mind and with the approval of clan elders.
- Dispute resolution is based on mediation rather than passing judgement, by local leaders who bring to bear a wide range of information on the context of land disputes.[4]

These two positions are not necessarily contradictory. As Adoko and Levine argue elsewhere:

> Communities and clan leaders all insist that their land belongs to the clan. However, they are using 'belong' to mean something different from the 'ownership' of an individual – something more akin to the sense in which an individual's land 'belongs' to Uganda. They mean that, just as the Government puts restrictions on an owner's rights over his/her land (e.g. the right to sell it to foreigners, or how the land may be used), so too the clan imposed restrictions on what rights the landowner has. It insisted on the idea of 'stewardship', that land is ultimately from the ancestors and must be protected for the future generations; it

1 Ronald R. Atkinson, The Origins of the Acholi of Uganda, 1999, pp. 54-61, 75-77

2 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004

3 Ronald R Atkinson unpublished paper, 2007

4 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004.

demanded a good justification for land sales, which would have been prohibited altogether at one time; and it insisted on social obligations being maintained, including the right to give certain people some user rights in the land or to let a widow stay on her late husband's land. The fact that the clan 'ownership' of land is more closely parallel to the idea of the State's 'sovereignty' over private land rather than the landowner's rights has been missed: this is, partly, no doubt, because in the past far more of life was done communally, at a time when the population density was much lower and the clan authority and identity much stronger.[1]

Acholi tradition and culture

Debates about the nature of customary land tenure also need to be seen as part of a broader discussion about ethnicity and tribal culture in Africa. Some commentators have argued that Uganda's 'tribes' were essentially a colonial invention[2] and there is little doubt that misrepresentations and manipulations of ethnicity played a central part in the process of establishing colonial rule.[3] The British colonizers in Uganda, for example, forged an alliance with the Baganda of the south, and both groups were happy to exaggerate ethnic distinctions to justify greater investment there than in the supposedly primitive north of the country.

Some African historians have identified the promotion of 'tribalism' as part of the means by which Africa has been kept divided and exploited and so have been concerned to de-bunk the view that different ethnic groups can be categorized by reference to age-old, fundamental and immutable differences.[4] Atkinson, however, while accepting that colonialism played a part in shaping the evolution and development of tribal distinctions, argues that this "did not occur in a historical vacuum" and that the roots and traditions of Acholi society long pre-date the period of colonial rule.[5] There was a system of chiefdoms and a number of aspects of this system have survived to the present day.

Chiefs, or Rwodi, established royal lineages, or kal, who ruled over a number of fenced villages, or gang. Each village, which often contained several hundred people, had its own head, drawn from the Rwodi's lineage, and a group of elders who were responsible for regulating the social affairs of the village, including marriages. An elder called upon to advise the Rwot was sometimes referred to as a jango[6] or lukwena,[7] which roughly translates as senior councillor. Villages within a particular chiefdom tended to be about a mile apart and each village had its own recognised rights to agricultural and hunting land.[8] These elders would often conduct rituals within village compounds in order to 'appease ancestors and ensure the moral and social order was upheld.'[9] According to a report on traditional approaches to justice:

> Historically, the good health and happiness of the Acholi individual was always situated in the context of the harmony and well-being of the clan. The ancestral and religious spirit worlds provided guidance to the Acholi people, maintaining the unity of the clan. Conversely, conflicts misfortune and poor health could be 'sent' by angry spirits and

1 **Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005.

2 Tim Allen, *Trial Justice, the International Criminal Court and the Lord's Resistance Army*, Zed Books, 2006, p.26.

3 For discussion see Ronald R. Atkinson, The Origins of the Acholi of Uganda, 1999, pp. 1 – 19.

4 See, for example, Wangari Muta Maathai, *Unbowed, a memoir*, Heinemann press, 2006.

5 For discussion see Ronald R. Atkinson, The Origins of the Acholi of Uganda, 1999, pp. 1 – 19.

6 Ibid,. pp.149 and 151-152. Others say that this term was not used until after the arrival of the British.

7 Ibid., pp.175 – 176.

8 Ibid., pp. 75-95.

9 R*oco Wat I Acol: Restoring relationships in Acholi-land, traditional approaches to justice and reintegration*, Liu Institute, September 2005, p.11.

> extended not only to the violators of the moral codes, but to his or her family or clan. Thus, one person's actions always had ramifications for his or her family and clan who in turn assumed collective responsibility for the offence.[1]

When a transgression occurred, the elders would gather to discuss the problem. Different 'courts', or Jago, existed to mediate disputes at different levels: within the family, village, or tribe. Different rituals, including trial by ordeal, were sometimes used to test the reliability of witnesses and sometimes the spirits were called upon to help determine guilt or innocence. Generally, though the emphasis within traditional justice mechanisms was on restoring trust and harmony, through forgiveness, compensation and reconciliation.[2]

Acholi culture was based on a hierarchical social order vigorously maintained by compliance to a central value system.[3] The chief, or Rwot, was the recognised leader of the district and received tribute from his subjects. He was conferred with royal regalia, including 'drums, stools, beads and spears', which served as symbols for his chiefly rule. However, the actual authority of a Rwot was limited by a number of crucial factors.

Traditional Acholi chiefdoms were quite small and, although a Rwot could call on all the men within his chiefdom to fight there was no tradition of maintaining a standing army. The Rwot effectively shared power with the village chief, and their group of elders, who were incorporated into a decision-making process based on consensus of the clan elders as a whole. Low population density in Northern Uganda meant that land was abundant and so villagers could always migrate if they were dissatisfied with the performance of their Rwot.[4]

In fact the Rwodi appear to have gone to some lengths to attract new subjects and legitimise their rule. Strategic alliances were formed through marriages to expand their lineage. Outsiders were enticed with patronage and protection. Some of the pomp and circumstance of an individual Rwot is believed to have been designed to impress others about their power. The ability of a Rwot to mediate disputes between different villages was also an important part of this process of legitimisation. Rwodi also often invested themselves with mystical power, such as the ability to make rain.[5]

Religion and ritual played an important part in the process of affirming the social structure and there was assumed to be an intimate link between the conduct of a person in every day life. As one report has noted: 'The religious and spiritual worlds – through spiritual representatives and selected human representatives – actively enforced codes of behaviour.'[6] One Acholi elder is quoted as saying that: 'Anyone who acts contrary to the established norms displeases our ancestors and rituals should be performed to appease them. If the ancestors are annoyed…they cast curses in the form of death, diseases, drought, madness and so on.'[7]

Ancestors and spirits play an important role in the Acholi religion. The ancestral shrine, or abila, is a significant place for religious ritual, such as the offering of food and drink and ceremonies at births and funerals. Spirits, or jogi, were often worshiped at chiefdom-wide gatherings, at which

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1 Ibid., p.10.
2 Ibid., pp. 14 – 19.
3 Ibid.
4 Ronald R. Atkinson, The Origins of the Acholi of Uganda, 1999 pp. 1 – 19.
5 Ibid.
6 R*oco Wat I Acol: Restoring relationships in Acholi-land, traditional approaches to justice and reintegration*, Liu Institute, September 2005, pp. 10 – 11.
7 Quoted in ibid.

the Rwot would usually play a prominent role. Village chiefs were also assigned a specific role in various rituals, which reflected their social status.

Two important ceremonies were performed to help resolve disputes: mato oput, in which an individual wrong-doer admits responsibility for his actions and seeks the forgiveness, and gomo tong, in which two clans agree to make peace and reconcile their differences. Both involve ritualised ceremonies officiated over by village elders or the Rwot. In mato oput the two parties drink the blood of a sacrificed sheep, mixed with a bitter root juice, while in gomo tong, spears are ritually bent to symbolise reconciliation.[1]

Other ceremonies included those to mark the succession of a new Rwot and the payment of tribute in recognition of the Rot's authority. Royal drums were played on such occasions and the drums came to take on a special significance as a symbol of the Rwot's authority. An interesting feature of the succession ceremony, which may provide some insight into the inter-relationship between ruler and ruled, is that prior to succession the soon-to-be Rwot would often be 'admonished, verbally abused and even spat on by members of the chiefdom – behaviours that could never occur after succession ceremonies were completed.'[2]

Colonial rule and independence

The British largely ignored Northern Uganda in the early days of the colonial administration, as it was felt to be too dry and sparsely occupied to be of much interest. In 1902 Acholi was officially recognised as one of three districts of the Nile Province and, in 1910, an administrative centre was established in the town of Gulu. Attempts were made to promote the production of cotton as a cash crop and one colonial administrator argued that this should be combined with the introduction of a system of individual land tenure to create 'a more stable society' and promote 'the intellectual, moral and economic progress of the people.'[3]

Attempts were made to introduce a 'hut tax' and also to control a rapid influx of firearms, which had made the district into the most heavily armed part of Uganda. In 1913, for example, the British seized 5,000 guns from the district of Acholi.[4] Many villagers were forced to move closer to roads, which were constructed both to improve communication, but also to exercise greater administrative control of the population.[5]

The British set about establishing a governance structure based on the one in Buganda. An Acholi-wide Council of Chiefs was established and a new institution, the 'Paramount Chief', was created. Many, formerly independent, chiefdoms were amalgamated and the powers of some chiefs were expanded while others were downgraded or removed. All became subject to greater control with 'their duties prescribed and their political activities strictly supervised.'[6] The previous rules of succession were abolished and the British adopted a far more interventionist approach; promoting 'suitable' candidates while deposing others. Many Rwodi had their royal drums confiscated when they were placed under the authority of other chiefs and this has been mentioned as a cause of lasting shame and resentment.[7]

1 Ibid.
2 Atkinson, 1999, p.91.
3 Quoted in Atkinson, 1999, p.6.
4 Tim Allen, *Trial Justice, the International Criminal Court and the Lord's Resistance Army*, Zed Books, 2006, p.150.
5 Atkinson, 1999, p.5.
6 Ibid., p.6, quoting the Colonial Acholi District Commissioner.
7 Ibid., p.96.

Traditional courts were also replaced with Magistrate Courts, based on the British model. These were supposed to follow English law, although the traditional courts remained in existence and most people probably continued to use customary law to mediate solutions to family disputes and community conflicts. Village elders retained their position in administering these and awarding compensation where appropriate. However, the British also introduced a system of Local Councils (LCs), which had a significant impact in eroding the authority of the elders. The LC 1 was the equivalent of a village head, LC 2 was the head of a parish, LC 3 was the head of a sub-county and LC 4 the equivalent of a Rwot. An LC 5 position was created above this, which helped to ensure that the colonial-appointed administrators outranked the traditional leaders and soon came to be seen as the real source of power in the area.

Nevertheless, the period of colonial administration reinforced the development of a 'tribal consciousness' amongst the Acholi and others. As Atkinson notes:

> [t]he lines drawn on colonial maps and images in peoples' heads demarcating Acholi from neighbouring tribes were increasingly operationalized, reinforced, and reified, in a pattern common to much of colonial Africa. On the basis of perceived (or presumed) common origins, political organisation, language and culture, Acholi was a designated tribe and as such was administered as a discrete tribal unit. Politics was to be strictly limited and exclusively tribal. Individuals and social and political groups among the Acholi competed for power and influence within the context of their tribe, and the Acholi as a collective entity competed with other tribes for scarce social and economic investments and opportunities.[1]

Christian missionaries also helped to promote a tribal consciousness, primarily by developing written vernacular languages and writing down accounts of local histories and customs. By the time that Uganda achieved its independence the differences between the different regions were extremely marked and ethnic divisions have played a crucial role in shaping the politics of Uganda ever since.

The British believed the people of the north to be 'lazy' and 'backward' due to their initial lack of enthusiasm for cash-cropping schemes. However, they also considered Acholis to be 'natural recruits' to the colonial police and armed forces and, by the time of independence, Acholis made up the biggest single group in the Ugandan army.[2] This drew the Acholis into the bitter power struggles, coups and civil wars in the decades which followed and provides an important back-drop into the conflict that has devastated Northern Uganda over the last 20 years.

A discussion of this conflict is beyond the scope of this Guide, but one aspect which has gained particular notoriety has been the influence of spirit mediums, or ajwaki, amongst the leadership of the Lords Resistance Army (LRA) and other groups. This also needs to be seen in the context of how Acholi traditional culture has interacted with influences imported during the colonial period, in this case largely through the influence of Christian missionaries. Some Christian, and later Muslim, preachers drew on local traditional beliefs about the power of the spirit and healing and became increasingly entwined with a mysticism, which has caused some rebel leaders to believe that they can use magic to defy bullets.[3]

Acholi culture has clearly suffered, particularly over the last two decades of conflict and displacement. The position of the elders has been weakened and many Acholis have had little

1 Ibid., p.7.
2 Ibid.
3 Tim Allen, *Trial Justice, the International Criminal Court and the Lord's Resistance Army*, Zed Books, 2006.

opportunity to learn about their history and culture. One survey found that more displaced Acholis could name their LC (Local Councillor) than their Rwot.[1] Islam and Christianity have largely replaced the traditional Acholi religion, but some ajwaki continue to promote certain spiritual and religious practices in the displacement camps, which many community leaders regard as 'abominations'.[2]

Although the activities of some ajwaki have been widely condemned, their influence remains strong in some areas and people still sometimes use their rituals and turn to them for guidance.[3] Ugandan customary law has always had a strong spiritual dimension, concerning notions of justice, and it is quite likely that some 'traditional' dispute resolution mechanisms could involve appeals to the supernatural.

The nature of what constitutes genuine 'tribal tradition' is, therefore, highly contested. Many of Northern Uganda's traditional institutions, such as the Paramount Chief, were colonial creations and controversy remains about the authenticity of some 'traditional rituals'. One observer, for example, has complained that some ceremonies, which have recently been conducted to promote the reintegration of former guerrilla combatants back into society mix-up mato oput, and gomo tong in an unhistorical manner.[4] While others reject this view, it is widely acknowledged that there are problems involved in 're-inventing' some of these rituals.[5]

Customary law in practice in Northern Uganda

The institutions of customary law effectively parallel the official system. In the first instance a dispute will be taken to the head of a family or extended family. For a disagreement between family members it will first go to the village judge, or jan jago. Further appeal could be made through the clan structure to the district Jago and then up to the Rwot.

As discussed in Chapter One of this Guide, the Government of Uganda created Local Council (LC) courts in 1988, which have authority to deal with land rights issues.[6] The LC courts were intended to enable local leaders to deliver justice to their own communities by drawing both on formal legal principles and customary law. In practice the LC courts and the customary institutions often operate in parallel and people might choose to use whichever mechanism is more effective in their own locality. Appeals from such courts can by made to the District Land Tribunal and then further up through the official legal system.

According to one report, the LC courts rarely function, but the LC system itself does exist and so people will either go to the LC 1 or the jan jago with a case. The customary system ranks the LC 3 with the district Jago and the LC 4 with the Rwot.[7] Since the Land Act 1998 states that the rules governing customarily owned land should be the customary rules of each area, the rulings of either body should have the status of law, so long as they were decided fairly and in accordance with Uganda's legal and constitutional provisions. As stated previously, provision is also made for the courts in Uganda to specifically encourage mediation.

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1 Ibid., p.21.

2 Ibid., pp. 10 – 11.

3 Ibid., pp.31 – 37 and pp.148 – 160.

4 Ibid., pp. 128 – 126.

5 R*oco Wat I Acol: Restoring relationships in Acholi-land, traditional approaches to justice and reintegration*, Liu Institute, September 2005, pp.55 - 75.

6 *Guidelines for Local Council Courts in the Resolution of land disputes*, Ministry of Water, Lands and Environment, June 2005. This provides a Guide to the Resistance Committee (Judicial Powers) Statute 1988, which created the LC courts.

7 **Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005.

However, most cases are probably settled by the LC 1 and the fact that this person is not likely to have any legal training or awareness of the applicable State or customary law is clearly a matter for concern.[1] Effectively it means that disputes are simply being settled by the most powerful person in the area. Even where the courts do exist, concern has been expressed that these are thought to be corrupt, exceed their authority by hearing serious criminal cases and do not make people aware of their right to appeal.[2]

There is also no clear procedure surrounding how land transactions are carried out, which seems to vary between particular localities. Generally, the transaction should be witnessed by a number of witnesses, which might include the jan jago, village elders or LC 1 officials. These will be paid a fee, which is usually around 10 per cent of the purchase price. The seller announces his intention to sell his land by word of mouth in churches and drinking groups. Notices of intention to sell land may also be posted on walls or pinned on trees. In some cases the LC 1 may require a letter from the buyer confirming that he (or she) is of good repute,[3] but it is unclear whether the LC 1 actually has power to block a sale.

In most cases the sales will be recorded in hand-written documents, which will be drawn up by the LC 1 and signed by the parties and witnesses. Both the buyer and seller will usually retain copies of these documents as will the LC 1. In some cases another copy will also be sent to the LC 3 office, but there is no official land registry for transactions carried out under customary tenure.

Some transactions are made verbally by the two parties, sometimes without witnesses. It is common, for example, for rental agreements to be made in this way. Sales are sometimes also concluded at drinking places, which effectively excludes women as men and women do not usually drink together.[4]

Ownership, rights and protection

The biggest difference between the way in which State and customary law treat land rights relates to the question of ownership. As discussed above, while customary tenure is not necessarily the same as communal ownership, it is also quite different to the traditional western notion of individual private ownership.

Under customary law formal ownership is vested with the clan and the elders would decide who should be allocated land and for what purposes. Land is considered to be 'held in trust' for the next generation and so the conceptual discussion of who can be said to own what leads to very different outcomes. One consequence of this is that the 'entities' owning land are becoming smaller: where once land was owned by the tribe as a whole, this gradually changed to village and clan units, then to families and now increasingly to household level units. Household land is now commonly divided amongst sons who are increasingly assuming absolute ownership as individuals.[5]

1 Ibid.

2 For details see, *The Jurist, Uganda, Ugandan law, legal research, human rights*, http://jurist.law.pitt.edu/world/uganda.htm

3 Reportedly due to fear that the buyer may practice withcraft.

4 **Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005.

5 Ibid.

Although the two systems officially exist in parallel, it seems clear that the customary system of land tenure is giving way to the 'official' system. According to one report, people who had left their villages are now returning to reclaim their former land in order to sell it. Sometimes they find new families settled on land that they had abandoned years before, which can lead to disputes.[1] There are also cases where people are 'reclaiming' land that their deceased parents had given as gifts to others (often churches and schools). Conflicts are brought about over disputes about verbal agreements, especially renting of land.[2]

One area of particular concern is over the rights of women, and the protection of vulnerable groups, as these assume a very different significance depending on which system of tenure is being applied. While protection of customary tenure was vested in elders it was their responsibility to ensure that land was used properly and that the rights of all were respected. This requires a completely different approach with the introduction of a western-style system of individual private ownership.[3]

This has undoubtedly caused confusion during the limited attempts to implement the Land Act 1998 and will become a bigger problem if there is any move towards issuing titles and certificates of ownership. For example, while the Land Act expressly provides rights and protections for women and children, it is very often stated that, under customary law 'women do not own land'. This means that their names are rarely entered on ownership certificates or their consent obtained for sales.

However, customary law does recognise the right of women to use land, within the family, and gives her certain protections within marriage and on the death of her husband. One report has argued that: No husband has the right to stop his wife using his land (though he may allocate some for his own personal benefit or for other wives). If he dies, the woman retains exactly the same rights over the land – she can use it all as she pleases, and the land will then pass to her children.' [4]

It is not easy to translate these 'rights' into a western concept of property ownership and it appears likely that many women will suffer in the transition between the two systems. This also needs to be viewed in a wider social context in which, even though the law formally grants the right of women to have land registered in their name and requires the authorities to ensure that they have consented to any land transactions, it simply does not happen in practice. As one report has noted: 'The position regarding women's rights to land, or lack of them, is rooted not so much in a legal system (whether state or traditional), but much deeper, in fundamental gender relations prevailing in society.' [5] The report found, in an examination of sales agreements in a number of places in Northern Uganda, that:

there was not a single agreement where a woman had signed to indicate that she had consented to the sale. LC1 Chairmen say that they assume that consent has been sought from women by their husbands but they do not try to verify this. As far as they are concerned, as long as no woman complains to them, they accept that consent had been sought.[6]

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1 Ibid.

2 Ibid.

3 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004.

4 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004.

5 **Adoko and Levine,** *A Land Market for Poverty Eradication?: A Case Study of the Impact of Uganda's Land Acts on Policy Hopes for Development and Poverty Eradication*. LEMU: June 2005.

6 Ibid.

Similarly, the protection offered to widows under customary law was that she would become the wife of one of her late husband's brothers, in what was known as 'widow's inheritance'. This practice was widely felt to violate women's rights and to have contributed to the spread of HIV/AIDS. However, the ending of this practice leaves widows in an extremely vulnerable position, because no other mechanism has been developed to protect their rights. In practice, a woman may still be allowed some rights to her husband's land, but this may be on condition of 'good behaviour', making her a hostage to her in-laws, who often use the excuse of 'bad behaviour' if they covet her land.[1] There is no reference to the rights of widows in the Land Act 1998 and Ugandan inheritance law grants a widow only 15 per cent of the estate of her late husband in the case that he dies without a will, though there are no mechanisms capable of enforcing this where the husband's family oppose the widow.

The transition between the two systems is, therefore, likely to lead to a considerable number of injustices, particularly for vulnerable groups. However, when this is placed in the context of Northern Uganda's displacement crisis, the situation becomes far more alarming. Up to 90 per cent of the population of Northern Uganda have been displaced from their homes, some for up to 20 years. When they start to return home they will be doing so in the context of a complete state of legal uncertainty about their land and property rights and what mechanisms can realistically be utilised to adjudicate on issues or settle disputes. The lesson from elsewhere in the world is that a failure to deal with this issue can have serious long-term consequences.[2]

Conclusion

It is widely assumed that customary law will be able to cope with the challenges of dealing with the aftermath of Northern Uganda's displacement crisis. The argument that 'people know where their land is' often gets made by both Ugandan politicians and many international aid workers. It is also supported by many displaced people themselves and is cited as a reason for not attempting to address the legal vacuum caused by the collapse of most official institutions dealing with land management in Northern Uganda.[3]

However, a closer study of how customary law is currently coping with the administration of land tenure leads to less reassuring conclusions and suggests, at the very least, that this issue would benefit from further research. As one report has noted:

> Very little has ever been written on customary tenure in Acholiland, which is somewhat surprising since land is by far the most important asset. Local rules governing it have never been written down and they are constantly changing and adapting to new circumstances. During the research, no single source was able to give a comprehensive overview of the current rules regarding land across Acholiland, and different people gave sometimes quite different stories.[4]

It is widely accepted that there is a low level of awareness of the current statutory laws surrounding land tenure and a need for education campaigns to inform people of their rights. It would appear that this is also true of the customary system as well.

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1 Ibid.

2 See Conor Foley, 'Property restitution in Afghanistan', in *Returning Home: housing and property restitution rights of refugees displaced persons* (Volume II) Transnational Publishers 2007.

3 This argument was frequently made during a two month mission carried out by the author of this Guide to Northern Uganda in October and November 2006.

4 Judy Adoko and Ian Levine, *Land Matters in Displacement: The Importance of Land Rights in Acholiland and What Threatens Them*, CSOPNU, 2004

Chapter Four

Land, housing and property rights under international law

This Chapter describes the protection given to land, housing and property rights under international law. Although this law is not directly applicable in Uganda's courts it provides an important framework within which the courts should operate. This Chapter also provides guidance on how to use international human rights monitoring bodies to draw attention to particular violations of land, housing and property rights.

What are international human rights mechanisms?

The origins of international human rights can be traced back several centuries, but the impetus for the modern human rights movement developed in response to the horrors of war crimes and genocide during the 1930s and 1940s. The United Nations Charter was signed in 1945 and this specifically recognised an obligation to promote and encourage respect for human rights.[1] By virtue of their membership of the UN, States are accepting the obligations contained in the UN Charter.

The Universal Declaration of Human Rights was proclaimed at the UN in 1948 and since that time a number of treaties have been adopted to give legal effect to these rights. When a State ratifies a human rights treaty, it assumes a legal obligation to implement the rights recognized in that treaty. Usually the State is required to produce a periodic report detailing how it is fulfilling its obligations under the treaty. These treaties are sometimes referred to as Conventions, Covenants or Charters and States that have ratified or acceded to the treaties are known as States Parties.

All States are additionally bound by principles of general, or customary, international law (for example, the outlawing of genocide, slavery and torture).[2] Some of the standards cited in this Chapter are contained in treaties that are legally binding on Uganda. Others are contained in 'soft law' instruments – such as declarations, resolutions, or bodies of principles – or in the reports of international monitoring bodies and institutions. While not directly binding these standards have the persuasive power of having been negotiated by governments and/or adopted by political bodies such as the UN General Assembly. Sometimes these 'soft laws' affirm principles that are already considered to be legally binding as principles of general or customary international law. They often also spell out in more detail the necessary steps to be taken in order to safeguard the broadly defined rights that are contained in treaty law.[3]

Uganda, like all other countries, is required to abide by reports of the treaty-monitoring bodies on its own compliance with the treaties that it has ratified. If these bodies identify shortcomings in its law or practice, Uganda is required to remedy these. Uganda should also pay serious attention to the reports of the extra-conventional mechanisms – established within the framework of international human rights law – as these also provide guidance about its international obligations.

International human rights law does not substitute itself for national laws but establishes a comprehensive set of standards that can be applied to all legal systems in the world.[4] The standards take into account the diversity of legal systems that exist and set out minimum guarantees that every system should provide.

States are still free to determine their own domestic laws and policies and international law will only be directly applicable in the courts of a particular country if this is specifically authorized by national legislation. However, in ratifying an international treaty, the State is agreeing to be bound by its provisions (unless it enters reservations to particular Articles when it ratifies) and

1 UN Charter 1945, Articles 55 and 56.

2 Ian Brownlie, *Principles of Public International Law*, Clarendon Press, 4th edition, 1990. General international law (customary international law) consists of norms that emanate from various combinations of the sources listed in the Article 38 of the ICJ Statute.

3 For example, a considerable body of 'soft law' standards have been developed to protect people against acts of torture.

4 Article 38 of the Statute of the International Court of Justice (ICJ) lists the means for determining the rules of international law as: international conventions establishing rules, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations and judicial decisions and the teaching of eminent publicists.

it cannot subsequently invoke its national laws, constitution or traditional practices to justify a breach of this treaty. As discussed in Chapter One of this Guide, Uganda's 1995 Constitution sets out a number of human rights guarantees that are broadly consistent with those contained in international law.

A number of human rights treaty bodies have been created that monitor implementation of the different human rights treaties. These are committees of independent experts, who are often lawyers, academics or other professionals, and who serve in a voluntary capacity. The committees are created in accordance with the provisions of the treaty that they monitor and this also specifies their various functions. These often include:

- Consideration of reports submitted by States that are a party to the treaty;
- Consideration of individual complaints or communications from people who claim that some of the rights enshrined in that treaty are being violated;
- Publishing General Comments on the particular treaty to further explain some of the rights contained within it.

The treaty bodies discuss the reports that States submit with the representatives of the State concerned. They may receive information on a country's human rights situation from other sources, including UN agencies, non-governmental organizations, (NGOs) other intergovernmental organizations, academic institutions and the press. They may also carry out fact-finding missions to the country in question. Based on the information that they receive, each treaty body publishes a report on how, or whether, the State is fulfilling its obligations. These reports are called Concluding Observations and provide an objective standard against which a government's record can be judged.

Some of the treaty bodies also hear complaints about alleged individual violations of human rights contained within the treaty. These complaints may either be brought by other States, or by the individuals concerned. The procedure for taking an individual case is described in more detail below.

Treaty-monitoring bodies may only address an issue if it is contained in the particular treaty and if the State concerned has ratified the treaty and agreed to be bound by all of its provisions. A variety of regional human rights mechanisms have been created under the auspices of the Council of Europe, the Organization of American States and the African Union. These perform similar functions to the UN mechanisms within their own specific region.

The UN has also created a variety of 'non-treaty mechanisms', which are primarily concerned with monitoring broad patterns of human rights violations. These can examine the records of particular States, and receive complaints about them, irrespective of whether they have ratified a particular convention.

The right to private property under international law

Uganda is also a party to a number of international treaties that enshrine rights to property or possessions. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] and the International Covenant on Civil and Political Rights (ICCPR).[2] Some human rights treaties refer to certain 'possessions' rather than 'property', but the two terms have been interpreted as interchangeable by many treaty-monitoring bodies.[3] The Human Rights Committee and the Committee on Economic, Social and Cultural Rights, which oversee the implementation of the ICCPR and the ICESCR respectively, have also elaborated these rights in greater detail.[4]

International law recognizes that individuals have the right to own property and the right to be protected against arbitrary or unlawful interference with their privacy and home. Everyone has the right to adequate housing. All individuals also have the right to the use and peaceful enjoyment of their property and no one shall be arbitrarily or unlawfully deprived of their property.

The 'right to property' is not an absolute, or non-derogable, right. The State can limit this right in certain circumstances, such as when it is necessary in the public interest. Any interference must be 'lawful' – under both domestic and international law – and a 'fair balance' must be struck between the interest of the general community and the right of the individual property owner.[5] The reason for the interference must be specified and the interference must be proportionate to this legitimate aim.

Interference may be justified, for example, in the interests of national security, public order or general welfare. However, where such actions discriminate against a particular racial or ethnic group, this would almost certainly be found to be 'disproportionate' and so constitute a violation.[6] The requirements of 'proportionality' will often also require the payment of compensation, particularly when someone has been deprived of his or her property.[7]

In accordance with the principle of proportionality, the greater the level of interference, the greater the justification required.[8] For example, depriving someone of his or her property or restricting access to property may constitute a greater interference than merely controlling its use. The decision about whether a 'fair balance' has been struck should therefore be decided on a case-by-case basis.

Where an interference with the right to property takes place, the individual concerned has the right to a fair and public hearing by a competent, independent and impartial tribunal and with

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1 ICESCR, Article 11(1) 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'

2 ICCPR, Article 17(1) 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

3 See, for example, Keir Starmer, *European Human Rights Law, the Human Rights Act 1998 and the European Convention on Human Rights,* Legal Action Group, 2000. The European Court has also interpreted the term 'property' quite broadly to include both moveable and immoveable property as well as shares, licences, patents, intellectual property and ownership of debts.

4 See, for example: General Comment No. 4 of the United Nations Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing contained in UN Doc. E/1992/23; General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights on Forced Eviction contained in UN Doc. E/C.12/1997/4; General Comment No. 27 of the United Nations Human Rights Committee on Freedom of Movement contained in UN Doc. CCPR/C/21/Rev.1/Add.9; General Comment No. 16 of the United Nations Human Rights Committee on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation contained in UN Doc. HRI/GEN/1/Rev.6.

5 See *Sporrong and Lonroth v Sweden,* European Court of Human Rights, 1979, European Human Rights Reports, Vol 2, p.330 and *Soering v United Kingdom*, European Court of Human Rights, 1989, European Human Rights Reports, Vol 11 p.439.

6 For more details see the final section of this chapter.

7 See, for example, *Lithgow v United Kingdom*, European Court of Human Rights, 1986, European Human Rights Reports, Vol 8, p.329.

8 ibid.

certain procedural guarantees. The right to property, therefore, needs to be considered alongside the 'right to a fair trial'.[1]

Where a person is arbitrarily deprived of his or her right to property, she or he is also entitled to an effective remedy by competent national tribunals. Such deprivations often occur in the context of international armed conflicts, internal strife and communal or ethnic violence when people are forced to flee their homes or lands due to circumstances beyond their control. This can be considered as a violation of the right to freedom of movement and residence[2] and the Human Rights Committee has stated that, 'The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.'[3]

One of the most essential principles underpinning human rights law is that of non-discrimination. Discrimination can be defined as adverse treatment for which there is no reasonable and objective justification. Discrimination is distinct from 'positive action' in which differential treatment may be justified in order to improve the condition of a marginalized or disadvantaged group in society. The principle of non-discrimination runs through all human rights instruments as a central principle in the protection of human rights. States are required to reverse the application of unjust or arbitrary laws, and of laws which otherwise have discriminatory effect, and to take immediate steps to repeal such laws. States must ensure that all national policies related to the right to restitution fully guarantee women's rights to non-discrimination and to equality in both law and practice. Finally no one should be discriminated against, or face any other form of persecution or punishment, simply for making a restitution claim.

The right to restitution

The issue of land, housing and property restitution has become an increasing concern as the world grapples to deal with the problems facing millions of people who have been displaced from their homes due to armed conflict, violations of human rights, situations of generalized violence, and natural or human-made disasters. The 'right to restitution' is not currently explicitly enshrined in international law, but has been defined as, 'an equitable remedy, or a form of restorative justice, by which persons who suffer loss or injury are returned as far as possible to their original pre-loss or pre-injury position.'[4]

The basic concept of restitution is well established in international law and rests on the notion that an effective remedy should, 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.'[5] The 'right to an effective remedy' is found in most international human rights conventions and is widely understood to mean that victims of human rights violations have an enforceable right to have this violation remedied, repaired and reversed.[6] The ICCPR, for example, stipulates that:

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1 UDHR, Article 10; ICCPR, Article 14(1).

2 UDHR, Article 13; ICCPR, Article 12(1).

3 United Nations Human Rights Committee, 2 November 1999, General Comment 27: Freedom of Movement (Art.12).

4 *Housing and property restitution in the context of the return of refugees and internally displaced persons, Progress report of the Special Rapporteur, Paulo Sérgio Pinheiro, Addendum, Commentary on the Draft Principles on Housing and Property Restitution for Refugees and Displaced Persons, UN Commission on Human Rights* (E/CN.4/Sub.2/2004/22/Add.1) 8 June 2004.

5 *Chorzow Factory (Indemnity) Case* (Germany v Poland), International Court of Justice, 1928.

6 UDHR (Art.8), ICCPR (Art.2), CERD (Art.6), CAT (Art.11), CRC (Art.39), the African Charter on Human and People's Rights (1981), ILM No 21, p 59, *entered into force* 21 October 1986 (Art.7), the American Convention on Human Rights (1969), OAS, OER/Ser.K/XVI/1.1, *entered into force* 18 July 1978, (Art.25) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Council of Europe Treaty Series No. 5, *entered into force* 3 September 1953, (Art.13)

States Parties shall undertake: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;' and '(c) To ensure that the competent authorities shall enforce such remedies when granted.[1]

Restitution is also recognized as a remedy for victims of violations of international criminal and humanitarian law. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,[2] and the Second Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts,[3] both prohibit arbitrary displacement and the destruction of property. Both the ad hoc tribunal for the former Yugoslavia and the International Criminal Court also envisage restitution as a remedial measure for such violations.[4] Uganda has ratified all four of the Geneva Conventions and the two additional Protocols as well as the statute of the International Criminal Court.[5]

The right to return

The forced return of refugees and other displaced persons is, prima facie, incompatible with international human rights standards, as a violation of the core principle of non-refoulement.[6] However, for those who have been forcibly uprooted from their homes and lands, returning home in safety and dignity is often seen as the most desirable and sustainable solution to displacement. The right of return has been included in a number of peace agreements concluded under UN auspices and institutions have been created in a number of countries to strengthen its enforcement to help ensure that people's homes and lands are not simply regarded as part of the 'spoils of war.'[7] The right of refugees and internally displaced persons (IDPs) to return to their homes and places of habitual residence and to have their property restored to them has also been recognized by the UN Security Council in relation to a number of conflicts.

The UN High Commissioner for Refugees (UNHCR) seeks permanent solutions for the problem of refugees by assisting governments to facilitate the voluntary repatriation, or their 'assimilation' within host communities.[8] While there is no hierarchy among the three durable solutions of voluntary repatriation, local integration into countries of asylum and resettlement in third countries, voluntary repatriation has come to be the preferred of the three where it is viable.[9] Voluntary repatriation has become a focus of many country programs coordinated by UNHCR.

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1 ICCPR, Article 2(3).

2 Fourth Geneva Convention, Articles 49, 53, 70 and 134.

3 Protocol II, Article 17 of the Second Protocol Additional.

4 See Rome Statute of the International Criminal Court (Art.5) and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (Art.105).

5 See http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=UG For a complete list of Uganda's ratification of international humanitarian law treaties.

6 Convention relating to the Status of Refugees (1951), 189 U.N.T.S. 150, *entered into force* April 22, 1954 [Refugee Convention]. Article 33(1) provides that 'No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

7 See for example, the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7: Agreement on Refugees and Displaced Persons (initialed in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995); the United Nations, Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, Paris (23 October 1991); Office of the Secretary-General of the United Nations, Set of Ideas on an Overall Framework Agreement on Cyprus (1992); Agreement on the Identity and Rights of Indigenous Peoples (Guatemala Peace Accords), UN Doc. A/49/882-S/1995/256 (31 March 1995); Agreement on Resettlement of the Population Groups Uprooted by the Armed Conflict (Guatemala), UN Doc. A/48/954-S/1994/751, Annex I (17 June 1994).

8 Statute of the Office of the United Nations High Commissioner for Refugees (1950), G.A. res 428(V), Chapter 1, para. 1.

9 See, for example, UNHCR Executive Committee Conclusion No. 56 (XL)-1989, 'Durable solutions and refugee protection' (13 October 1989); Conclusion No. 89 (LI) 2000.

As part of its work of promoting the creation of conditions that are conducive to voluntary return in safety and with dignity, UNHCR is paying increasing attention to the restitution of property for returning refugees.[1]

The issue of property restitution is also relevant to the successful return of IDPs to their places of origin. IDPs have not crossed an international frontier, and so do not fall within the protection of refugee law, however they are protected by other international norms. In response to the growing international concern about the numbers of internally displaced persons, a set of principles have been developed which are consistent with international law and set forth the rights and guarantees relevant to the protection of IDPs in all phases of their displacement.[2]

The UN Guiding Principles on Internal Displacement specifically recognize the right of IDPs to property.[3] They also stress that it is the duty of the competent authorities to establish conditions conducive to sustainable return[4] and that, 'Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.'[5] The authorities should also facilitate access by international humanitarian organizations, in the exercise of their mandates, to assist IDPs in their return, resettlement and reintegration.[6]

The right to adequate housing and protection against forced evictions

The right to adequate housing is enshrined in a number of international human rights instruments.[7] The UDHR stipulates that: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.'[8]

This right has been elaborated in the ICESCR, which states that: 'The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[9] Housing rights are also enshrined and protected within other international human rights instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[10] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[11] the Convention on the Rights of the Child

1 *The Problem of Access to Land and Ownership in Repatriation Operations*, UNHCR Inspection and Evaluation Service May 1998
2 Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2.
3 ibid., Article 21.
4 ibid., Article 28.
5 ibid., Article 29.
6 ibid., Article 30.
7 ICESCR (art 1); UDHR (art 25); CERD (art 5(e)(iii); CEDAW (art 14)(2)(h); CRC (art 27(3)); Refugee Convention (art 21); Migrant Workers' Convention, Article 43(d)
8 UDHR Article 25.
9 IESCR Article 11(1).
10 ICERD Article 5(e)(iii).
11 CEDAW Article 14(2)(h).

(CRC),[1] the Convention Relating to the Status of Refugees,[2] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[3]

The Committee on Economic, Social and Cultural Rights, which oversees the implementation of the International Covenant on Economic, Social and Cultural Rights, has issued a General Comment on how this right should be interpreted, which is included in an Appendix to this Guide.[4]

The right to adequate housing means more than simply having a roof over one's head and involves the right to live somewhere in security, dignity and peace. While the Committee recognizes that the concept of 'adequacy' differs depending on the different conditions applicable in the relevant country, it lists seven basic criteria required for 'adequate housing.' These are: security of tenure, habitability, affordability, accessibility, availability of materials, location and cultural adequacy.

An important component of the right is the domestic legal remedies open to those facing potential violations. These include:

- legal appeals aimed at preventing planned evictions or demolitions
- legal procedures seeking compensation following an illegal eviction
- procedures for tenants seeking to complain against illegal actions by their landlords
- procedures against alleged discrimination in the allocation of housing
- complaints against unhealthy or inadequate living conditions.

The right to protection against forced evictions is clearly linked to the right to adequate housing, but is also increasingly recognized as an independent right under international law. The Committee on Economic, Social and Cultural Rights has issued a separate General Comment on this issue, which is particularly relevant to the situation in Uganda.[5] The text is included as an Appendix to this Guide.

A forced eviction is defined as 'the permanent or temporary removal against their will of individuals, families and/or communities from their homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.'[6] Forced evictions are manifestly a violation of the right to adequate housing. The Committee has noted that they also frequently violate other human rights such as the right to life; security of the person; the right to non-interference with privacy, family and home; and the right to peaceful enjoyment of possessions. The State is required to refrain from carrying out forced evictions and to ensure that the law is enforced against its agents or third parties who do carry them out.

The Committee distinguishes between forced evictions and those evictions that are carried out in conformity with international human rights law, even if these do involve the use of force. Nevertheless, where such evictions take place, States are required to explore all feasible alternatives, in consultation with the affected persons, with a view to avoiding or minimizing the use of force. Legal remedies should be provided to those who are affected by eviction orders

1 CRC Article 27(3).
2 Refugee Convention Article 21.
3 Migrant Workers' Convention, Article 43(d).
4 General Comment No. 4 (1991) (the right to adequate housing), UN Doc. E/1992/23 (1992), adopted Dec. 13, 1991.
5 General Comment No. 7 (1997) (on forced evictions), UN Doc. E/1998/22, annex IV (1998), adopted May 20, 1977.
6 ibid., para 3.

and ensure that they have a right to adequate compensation. Evictions should also be carried out in strict compliance with the relevant provisions of international human rights law and general principles of reasonableness and proportionality.

The Committee has also stressed the importance of appropriate procedural protections that should be applied in relation to forced evictions. These include:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision of legal remedies;
- provision, where possible, of legal aid to persons who require it in order to seek redress from the courts.[1]

In addition, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights and every effort should be made to find alternative accommodation or access to productive land.[2]
Housing and property restitution

In 2005 the United Nations Sub-Commission on the Promotion and Protection of Human Rights approved the Principles on Housing and Property Restitution for Refugees and Displaced Persons ('Pinheiro Principles'), which provide guidance to States seeking to implement restitution programs as well as to intergovernmental and non-governmental organizations addressing issues of population displacement, post-conflict peace building, and restitution. The endorsement of these Principles was the result of a seven-year process which initially began with adoption of Sub-Commission resolution 1998/26 on Housing and property restitution in the context of the return of refugees and internally displaced persons in 1998. This was followed from 2002-2005 by a study by the Special Rapporteur on Housing and Property Restitution, Paulo Sérgio Pinheiro, which culminated in preparation, discussion and eventual approval of the Principles in August 2005. A copy of the Principles is contained in an appendix to this Guide.

The principles stress that States must fully consult people who have been affected by displacement on all aspects of the restitution process and take their views into account. Displaced people have the right to just and fair compensation and this will be paid in cases where housing and property restitution is not possible. In some situations, however, a combination of compensation and restitution may be the most appropriate form of restorative justice. Restitution programs should include tenants, social occupancy rights holders and other legitimate occupants or users of housing, land or property and such people should be afforded the right to return to and re-possess and use their homes and/or lands on an equal basis with

1 ibid., para 15.
2 ibid., para 16.

property owners.
The principles also call on States to respect the rights of secondary occupants who are equally affected by displacement and in need of accommodation and/or land to be protected against forced eviction. These legal protections should not prejudice the rights of legitimate owners and tenants to repossess the housing and property in question, but, in cases where evictions of such secondary occupants are deemed justifiable and unavoidable, evictions are carried out in a manner that is compatible with international human rights standards. Every effort should be made to identify alternative housing and/or land for those in need.

The principles call on States to endeavor to establish or re-establish national multi-purpose cadastre systems for the registration of housing, land and property as an integral component of any restitution program. In particular, they state that any judicial or quasi- judicial pronouncement regarding the rightful ownership of property must be accompanied by the official registration of that property according to relevant national procedures. In situations where such cadastre systems are already developed, States should take special measures to ensure that these are not destroyed in times of conflict or post-conflict. States should also seek to collect information relevant to facilitating restitution processes, for example, by including housing and property restitution protections in registration procedures for refugees and displaced persons. Such information should be sought at all points in the displacement cycle, including at the time of flight. The principles also state that States must not recognize illegal property transactions, including any transfer made under duress.

The principles call on States, and the international community where relevant, to establish and support equitable, timely, transparent and non-discriminatory institutions, procedures and mechanisms to assess and enforce housing and property restitution claims. Whenever possible, such institutions, procedures and mechanisms should be established directly within peace settlements and voluntary repatriation agreements. Existing institutions that are able to address these issues should also be financially supported. The principles also recognize that traditional dispute resolution mechanisms may be used as part of this process, so long as these are in accordance with international human rights law and principles.

People can only assert their right to restitution if they are made aware of it and so claims processing centres should be established in areas where potential claimants currently reside. Mobile units should also be established and States should ensure that all aspects of the restitution claims process are simple and equitable, and free of charge. Claims forms should be developed which are simple and easy to understand and use, and are available in the first language or languages of the groups affected. Counsellors should be made available to assist people in filling out and filing any necessary forms. Single women must not be discriminated against in this process and people who need special assistance, including illiterate and disabled people, should be provided with it.

Taking a case using international human rights mechanisms

Anyone may bring a human rights problem to the attention of the United Nations (UN) and thousands of people around the world do so every year. You do not need to be a lawyer or even familiar with legal and technical terms to bring a complaint before the bodies concerned. There are also a variety of specialist organizations that exist to help people bringing cases or submitting evidence.

As discussed above, Uganda is obliged to submit periodic reports on how it is implementing the provisions of the treaties it has ratified. These reports should be submitted once every four or five years (depending on the specifications in each treaty) and the relevant committee will then meet to discuss it. Meetings, which take place in Geneva or New York, are open to members of the public to observe and this can provide an opportunity for discreet lobbying of individual committee members. The State is required to publish its own report in advance in order to give others an opportunity to respond to this. Information about the timetable for these reports and meetings can be obtained from the UN Office for the High Commissioner of Human Rights (OHCHR).

Alternative reports can also be submitted to the committees for consideration and these are a very useful lobbying tool. Alternative reports should be factual, balanced, credible, detailed and short (usually no more than 8 to 10 pages). They should be clearly addressed to the relevant committee and submitted in one of the UN's official languages (English, French and Spanish – which are the working languages – and Russian, Chinese and Arabic). Some committees only work in some of these languages so it is worth checking first. Most of the committee members have other jobs and are only provided with limited professional secretarial support. They often receive considerable information about a particular country and are not able to read everything in the time available. If a long report is submitted, it should be accompanied by an executive summary.

The report should briefly introduce the organization that is submitting it and explain its work and mandate. Information should always be properly sourced and no allegations should be made that cannot be supported. The report should not assume that all members of the committee will have a detailed knowledge of Uganda and should avoid using specialist terms that may not be understood outside the country. Where necessary, the information should be placed in context, particularly with regard to relevant laws and practices, but without being over-detailed. Attaching appendices to a report is a useful way of supplying additional information.

The report should provide as many examples as possible of the violations or infringement of human rights that it is addressing. It should also aim to show patterns of particular violations and systemic problems that need to be addressed. Listing a few isolated cases or making unsupported claims is not likely to convince the committee. The report should also offer constructive solutions to the problems that it identifies and contain some credible proposals for reform.

Most importantly, the report needs to establish that the problems that it identifies constitute actual violations of the human rights treaty that the committee is examining. For example, an allegation that people are being arbitrarily denied the right to return to their homes or being unlawfully evicted from their land contained in a report submitted to the Committee for the Elimination of All Forms of Racial Discrimination will only be of relevance if it can be shown that these violations were committed against people on the basis of their race or ethnicity.

One model for structuring a report is to follow the article of the treaty concerned and submit information on any relevant article. This is not mandatory, but it is necessary to state which particular articles are being violated in the report and why. It is also necessary to be familiar with the text of the relevant treaty and the mandate of the committee. For example, an allegation that people are being denied the right to adequate housing could be considered by the Committee on Economic, Social and Cultural Rights, which monitors the ICESCR, but not the Human Rights Committee, which monitors the ICCPR, because the latter treaty does not contain a right to adequate housing.

Taking an individual case

As well as considering periodic reports submitted by State Parties to their particular treaty, some treaty-monitoring bodies can also receive complaints from individuals in a country who claim that the rights guaranteed by the treaty are being violated.

Anyone who has been a victim of a human rights violation can make a complaint and the procedure for bringing an individual petition is relatively straight forward. The procedure usually takes at least a year, but it is possible to ask for 'interim measures' in particular cases of urgency (for example, if an asylum seeker is facing deportation to a country where he or she may face torture, the committee could order a stay of deportation).

The petition, or complaint, need not take any particular form, but guidelines for submissions are available. The petition should provide basic personal information – name, nationality and date of birth. It should set out all the facts on which the claim is based in chronological order. It should detail the steps that have been taken at a domestic level to exhaust the remedies available in Uganda. The petition should also state why the facts outlined constitute a violation of the convention concerned and which articles have been violated.

The most obvious points to consider when taking a case to an international treaty-body are which one to use and what to complain about. These points are inter-linked since only certain bodies may consider certain types of complaint.

Not all of the human rights treaties contain an automatic right for individuals to bring complaints under their procedures. The four conventions that provide individuals with a right to bring individual complaints (or petitions) are:

- The International Convention for the Elimination of All Forms of Racial Discrimination
- The International Covenant on Civil and Political Rights
- The International Convention on the Elimination of All Forms of Discrimination Against Women
- The International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

In the case of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, a State recognizes the Committee's competence by becoming a party to a separate treaty: the First Optional Protocol to the Covenant or the Optional Protocol to the Convention. In the case of the Convention against Torture and the International Convention on the Elimination of Racial Discrimination, States

recognize the Committee's competence by making a declaration to that effect under a specific article of the Convention, articles 22 and 14 respectively.

Complaints to this Committee must be submitted within six months of the final decision by a national authority in a case. Complaints under this Convention may be brought not only by or on behalf of individuals but also by, or on behalf of, groups of individuals.

Once a complaint has been made, assuming that it has been correctly submitted, it is registered by the relevant committee and the person making the complaint is informed of the registration. At that point, the case is transmitted to the State Party concerned to give it an opportunity to comment. The State is requested to submit its observations within a set time frame.

There are two major stages in any case. These are known as the 'admissibility' stage and the 'merits' stage. The 'admissibility' of a case refers to the formal requirements that the complaint must satisfy before the relevant committee can consider its substance. A case may be ruled inadmissible on the following grounds:

- The application is anonymous
- The person entering the complaint has not been a victim of the violation, or has no authority to act on behalf of the victim. Complaints cannot be made in the abstract.
- The alleged violation occurred before the State had ratified the treaty or before the treaty had come into effect.
- The right that has been allegedly violated is not contained within the relevant human rights treaty.
- The time limit for submitting a complaint has expired.
- The State concerned has entered a reservation to the article containing this right or has entered another reservation to the complaints process that prevents the committee from hearing the case.
- Sufficient information may not have been included to substantiate the complaint leading the committee to conclude that it is 'manifestly ill-founded'.
- The complaint is already being dealt with by another human rights committee.
- The case is an abuse of the complaints process because it is considered to be frivolous, vexatious or otherwise inappropriate use of the complaint procedure.
- The committee is not satisfied that all reasonable attempts have been made to exhaust domestic remedies, through the national courts and administrative procedures.

This final point is a common reason why complaints are ruled inadmissible. As stated above, international human rights law does not substitute itself for national law and the treaty monitoring bodies are reluctant to intervene in cases that could be settled at the domestic level. However, this rule may be waived if a complainant can show that these mechanisms would be plainly ineffective – either because the law is very clear on the point at issue, or because justice cannot be obtained within the national courts or administrative procedures. In such cases the complainant must demonstrate, objectively, why domestic remedies are non-existent or illusory, or show why it was not possible to exhaust these remedies in this particular case.

If the committee rules that the case is admissible it will go on to consider the merits of the claim. The 'merits' of the case are the substance, on the basis of which the committee decides whether or not any rights under a treaty have been violated. Again the State is invited to comment and the complainant gets an opportunity to respond. If the State fails to respond in either of these steps the committee will make its decision solely on the basis of the original complaint.

The committee takes its decision on the merits of the case in closed session, but must make its findings public. The decisions of the committees are final and there is no appeal procedure. If the complaint is upheld, and a violation is found, the State is informed and asked to report within three months on what measures it has taken to address the violation and provide the victim with an effective remedy. This will normally be in the form of reparations, compensation or restitution. It could also involve guarantees of non-repetition, disciplinary action against State officials or a change to national law or policy. A violation can be the result of a particular act by the State, or an omission, such as a failure to prevent an illegal act or to provide the victim with an effective remedy.

In all cases where a violation has been found, the State is legally obliged to respond to the ruling of the relevant committee. Taking an individual case to a treaty monitoring body is, therefore, an effective mechanism in providing a remedy for individuals who have suffered a violation.

How to use non-treaty mechanisms

One of the ways in which the UN Commission and Sub-Commission on Human Rights carry out their tasks is to create and supervise subsidiary procedures that assist them by carrying out studies, drafting reports and engaging in monitoring. These country-specific and thematic mechanisms include special rapporteurs, representatives and independent experts or working groups. They are often created by resolution in response to situations that are considered to be of sufficient concern to require an in-depth study.

The procedures report publicly to the UN Commission on Human Rights each year, or to the Sub-Commission, and some also report direct to the UN General Assembly. The Special Rapporteur on Torture and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, for example, have both helped bring attention to violations of these rights in various parts of the world.

The mandate of these mechanisms is established by the UN itself, rather than a treaty that individual States must first ratify. States are not obliged to submit reports to these bodies and they do not generally consider individual complaints, unless these help to illustrate a more general situation – either in relation to a particular country or a particular theme. Non-treaty mechanisms are primarily concerned with monitoring broad patterns of human rights violations. They can also receive information from a variety of sources and this helps to inform their own reports. Most experts research and study issues of concern, carry out country visits, receive and consider complaints from victims of human rights violations, and intervene with governments on their behalf. In some cases the experts recommend programs of technical cooperation to governments and donors. They have also helped develop international legal standards in areas such internal displacement and the right to restitution.

Like the members of the treaty-monitoring bodies, these mechanisms consist of experts, and groups of experts, from a variety of different backgrounds, who work in a voluntary capacity to monitor particular themes or countries on behalf of the UN. Each procedure has its own slightly different working methods, but the experts are appointed in the same way and the basic considerations are the same with respect to preparing a communication, and drawing their attention to human rights concerns. The experts frequently carry out country missions and these are a very effective means of drawing attention to particular human rights concerns.

It should be noted that some of these procedures have over-lapping mandates and that these bodies often work together. Action by more than one rapporteur or working group will often carry more weight and is likely to influence a State even more than where only one procedure expresses concern. The non-treaty mechanisms also often coordinate their work with the treaty-monitoring bodies, through OHCHR, and other UN agencies in the field.

Where to send complaints

Complaints to the Human Rights Committee (ICCPR), the Committee on Economic, Social and Cultural Rights (ICESCR), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD) should be sent to:

Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

Complaints to the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) should be sent to:

Committee on the Elimination of Discrimination Against Women
c/o Division for the Advancement of Women, Department of Economic and Social Affairs
United Nations Secretariat
2 United Nations Plaza
DC-2/12th Floor
New York, NY 10017
United States of America

Further information about the reporting cycle of the treaty-monitoring bodies and the work of the non-treaty mechanisms can be obtained from:

Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

A GUIDE TO PROPERTY LAW IN UGANDA

UN-HABITAT

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