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East Timor's Community Reconciliation Process as a Model for Legal Pluralism in Criminal Justice

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Abstract

In many post-conflict and transitional states in the Developing World, judiciaries are frequently very weak as many legal actors will have fled or are compromised by association with the prior regime. In this vacuum, local law mechanisms exist and thrive, dealing with as much as 80-90 per cent of disputes that arise. The experience in these states is often that cases run downwards from the overstretched formal justice system to the ample capacity of local law. Some of these post-conflict states are subject to complex United Nations peace-building missions which consistently encourage the restoration of the rule of law and a functioning criminal justice system if peace is to be sustainable. At the same time, the UN encourages transitional justice mechanisms like successor trials in the formal and truth and reconciliation missions to advance social healing, but reject the use of traditional or local legal mechanisms due to fears about human rights deprivations therein. This paper looks at the experience of the Community Reconciliation Process in East Timor, a restorative justice mechanism that adopted much of the processes of local justice mechanisms but tailored them to human rights requirements, in its interactions with the successor trial Serious Crimes Process. The relationship between the two offered great potential for serving as an example of the sensible integration of formal and local justice in a country where judicial capacities are low but where local law thrives. Instead, ambivalence on the part of the UN and Timorese Government to local law restricted the potential for so doing and to this day the two systems operate in parallel as case backlogs and violence threaten the rule of law in the nascent State.

Keywords:

Traditional Justice; Legal Pluralism; Truth and Reconciliation; Transitional Justice; Hybrid Courts.

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> 'The assumption that legal reform requires new rules is especially absurd in cases where the formal legal system does not reach the whole territory of the state. This is indeed the case in many developing countries where the state either does not have the resources or the legitimacy effectively to rule over its whole territory. In most of these cases local communities are governed partly by their own customary practices and partly by the rules of the formal legal system'
> (Faundez, J. 2000, p. 6)

1. Introduction

This article examines the relationship between East Timor's transitional criminal justice Serious Crimes Process (SCP, which operated along the lines of a typical formal court structure with mixed national/international staffing) and its Community Reconciliation Process (CRP, which adopted the forms and processes of non-formal traditional law) as they responded to crimes that occurred in the traumatic period surrounding the nascent state's independence referendum and withdrawal of Indonesia in 1999, and then traces the relationship to the present day. East Timor is a small half island with a population of just over a million people. From 1520 to 1974, it was a Portuguese colony, and thereafter subject to a brutal Indonesian occupation where as many as 200,000 people died from conflict and famine (Gunn, G. 1999 and Nevins, J. 2005). In 1999, it was allowed popular consultation for independence from Indonesia, but suffered a period of extraordinary violence before and after the vote which led to the deaths of an estimated 3000 Timorese at the hands of the Indonesian military and proxy Timorese militias (Commission for Reception, Truth and Reconciliation in East Timor, 2005, p. 8). 200,000 fled or were forcibly deported from the area. A period of UN territorial administration occurred from Indonesian withdrawal in 1999 to independence in 2002, though to this day the UN is required to assist in the administration of the territory. In 2007, life expectancy was only 55 years, while child mortality was sixty out of every thousand live births (UNMIT Human Rights and Transitional Justice Section, 2007, p. 10). Half the population lacks clean drinking water. 350,000 people are food insecure, while over 40 per cent of the population lives on 50 US cents per diem. Literacy rates stand at 57 per cent. It is a truism that the poor and disadvantaged, owing to their greater vulnerability, are most likely to be victims of criminal acts, including human rights violations. It is imperative, therefore, that some system of laws exists to protect them. One of the tests of any legal response to the criminality of 1999 would be whether it helped contribute to the long-term restoration of the rule of law in East Timor. As the following examination of Timorese society will show, local traditional legal mechanisms would, of necessity, be required in the long-term in the absence of a formal justice system.

Transitional justice, described by Teitel as 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes' (Teitel 2003, p. 69) by definition is concerned with mediating that liminal period between repressive past and more liberal future by accounting for past crimes and allowing divided communities to move on. The manner in which this occurs is important, however - to focus on the ephemeral phenomenon that is transitional accountability to the exclusion of broader related issues such as the integration of formal and local traditional law systems (as was clearly necessary in East Timor) can mean that opportunities to ground accountability and justice in the long-term are missed. While the SCP and CRP combined did much to neutralise antipathies that lay along the fault-lines of the Indonesian occupation, they missed that opportunity to serve as a model for the sensible and sustainable integration of the formal justice system every emerging state needs but at the time was woefully under-developed with the local law mechanisms that existing underdevelopment has made necessary. This article examines what this loose model may have looked like by studying the relationship between the SCP and the CRP as they prosecuted and processed respectively criminal offenders from the transition to independence in 1999. While a number of studies have examined local justice mechanisms in East Timor and the CRP individually, none have examined how the relationship of the CRP with the SCP could serve as a model for that between the local law and the formal justice system. Successor trials should serve as an example for the prosecution of crimes in the ordinary, post-conflict period. The CRP/SCP relationship was a significant step in this direction. SCP prosecution was formally linked to the CRP and international involvement in the CRP succeeded significantly in inculcating human rights norms and gender-equality into the local justice system. Notwithstanding these successes, the delegation of these crimes ran upwards from the CRP to an overstretched SCP instead of downwards from the SCP to the abundant capacity of local justice, resulting in impunity and a diminished potential to serve as a model for necessary future integration.

In the past decade, UN peace operation reform has increasingly emphasised the centrality of courts in reconstructing the rule of law.[1] Hybrid courts composed of international and domestic legal actors trying a mix of international crimes and domestic crimes of the prior regime have been employed as one means of achieving the reconstruction of the courts. They typically deploy to states like East Timor, Sierra Leone and Kosovo where the formal justice system of courts and public prosecutors is in disarray, where there are few judges and lawyers or where those that exist are largely discredited by association with the formal regime. It is argued that the mix of international and national actors in a local setting allows for the mentoring of the latter by the former and the use of successor trials to set an exemplary standard for criminal trials. International actors provide legitimacy and expertise while at the same time empowering local judges, prosecutors, defenders and administrators to 'absorb, apply, interpret, critique, and develop' international norms before gradually taking control (Dickinson, L. 2003, p. 305). In theory at least, the practices and principle of the hybrid court serve as a model for domestic courts in ordinary times as international involvement is eventually phased out.

Ignored in this schema which emphasises the formal sector is customary local law, notwithstanding the evident shortcomings in the national justice system which made international assistance necessary.[2] Though tentatively embraced in peace operation reform[3] and more assertively in international indigenous rights principles,[4] these mechanisms have been omitted from hybrid court projects that focus exclusively on formal justice sector institutions and laws. Legal pluralism (in the sense of the presence of distinct legal systems in one state) can exist without the recognition of local justice by the formal justice system. However, most pluralist countries recognise, if not integrate, local justice systems formally. It is estimated that local justice systems resolve between 80-90 per cent of disputes in developing countries (Wojkowska, E. 2006, p. 5). Local justice shares many of the principles of restorative justice and ADR that receive increasing acknowledgement in both developed and developing countries.

In many ways, the neglect of local justice in UN peace operations is not surprising. Formal courts are essential in grounding the separation of powers, encouraging investment and trying grave crimes.[5] As Wojkowska observes, UN rule of law programmes have usually been top-down and focus more on institutions than on accessibility, regardless of whether or not this is where people actually go to seek justice (Wojkowska, E. 2006, p. 5). In addition, peace operation reform consistently reinforces the primacy of human rights and democracy, while local law is often perceived (frequently correctly) as breaching human rights standards through inhumane punishment, reinforcement of gender inequality, lack of due process, inconsistency and appointments made on the basis of heredity over qualifications or competence. Even advocates of these mechanisms admit that they are frequently 'paradigmatically contradictory to modern systems of rule of law' (Hohe, T. and Nixon, R. 2003, p. 2).

As noted above, on the other hand, hybrid courts are usually deployed to territories like East Timor, Kosovo or Sierra Leone where the judiciary is either too few, too unqualified, in exile or lacking in public legitimacy to adequately administer justice competently or in a visibly fair manner. Amidst such devastation, local justice systems will inevitably fill the dispute resolution vacuum for the foreseeable future and will end up handling most criminal cases while the weakened or non-existent judiciary rebuilds. It is this dichotomy – of building formal justice systems at a time when local systems enjoy the greatest public support and use – that informs this article. In these situations, two options are possible. The first is abolition of the customary justice sector in the light of its inadequacies. The second is the integration of local law into the State justice sector, keeping its sphere of action intact and retaining the undermanned formal system for grave ordinary crimes and constitutional issues, while at the same time encouraging the former to adapt to a baseline of human rights protection. The first has historically proven difficult in the short-term even under coercive imperial rule in many states and runs the risk of exacerbating the law and order vacuum. The second runs the risk of adopting practices that run contrary to the fundamental principle of UN peace operation reform. In East Timor, the debate was characterised as one between idealists and realists. Idealists opposed the use of local systems arguing that they breached human rights standards and were open to 'abuse, nepotism and cronyism' (Hohe, T. and Nixon, R. 2003, p. 38). As countries develop, the idealist position comes increasingly to the fore. Brown has argued that generally 'customary law is not equipped to compete with the monolithic strength of introduced law systems and will be the inevitable loser in any circumstances where there is a choice between the system' (Brown, K. 1999). However, where the formal system is non-existent and widely regarded as illegitimate or foreign, conditions for legal pluralism are more fertile. Such was the case in East Timor, where realists argued that conditions on the ground were such that every effort should be made to utilise local justice mechanisms given the limitations of the tiny formal justice system and the

legitimacy gap from the past. They argued that local justice could be modified where it denied fundamental human rights.

This paper adopts the 'realist' argument that local systems of justice can and should be employed in post-conflict situations where judicial capacity is minimal and law and order non-existent as long as they adhere to principles of human rights and equality. As such, the argument can be understood as pragmatic and normative. At the root of this position is a belief that where there are no means of resolving crime in society, violence that imperils peace will thrive and reap more retributive violence. Section 1 gives the background to the realist argument by outlining the parlous state of the Timorese formal justice sector between 1999 and 2008. Section 2 develops this argument by examining local justice and accounting for its widespread public acceptance and use. However, it also examines the flaws in local law which underlies the idealist position and the ambivalence of the UN and Timorese government to local justice. Section 3 outlines the formation and operation of the CRP, its adaptation of local dispute resolution processes to rule of law norms and the eventual failure to sensibly integrate the systems. The paper then concludes by examining the struggle of the domestic system to incorporate the greater capacity of the local justice sector to ease enormous case backlogs in the aftermath of this failure and concludes by suggesting that this may be done by modifying the approach in the CRP.

2. The Formal Justice Sector in East Timor

2.1 The Formal Justice Sector: A Struggle for Legitimacy

Security Council Resolution 1272 empowered the United Nations Transitional Administration in East Timor (UNTAET) to exercise 'all legislative and executive authority, including the administration of justice' during East Timor's transition from occupation to full independence three years later.[6] Society was in complete disarray, but the formal justice system in particular faced enormous challenges (Strohmeyer, H. 2001 and Linton, S. 2002). The three most obvious deficiencies in the legal system at the time were personnel, social understanding of justice, and physical infrastructure. UNTAET was presented with a situation where there was no pool of qualified East Timorese lawyers or judges to operate the courts. Timorese with law degrees were ultimately recruited via leaflet drops from aeroplanes. All Indonesian or pro-Indonesian judges, prosecutors, defenders and court administrators fled the country after the referendum to avoid possible retributive violence. There were no legal professionals untainted by association with the prior regime who could immediately ameliorate the human resources deficit. While a modest number of East Timorese had law degrees and worked for domestic NGOs or law firms in Indonesia, the local population had suffered from systematic discrimination since 1975 with the purpose of resisting their participation in the administration of justice. Even without discriminatory practises, many East Timorese were unwilling to operate within a court system which previously was used as an instrument of the occupation. Reiger and Wierda note that under Indonesian rule, courts in East Timor were synonymous with 'arbitrary detentions and show trials for political offences' (Reiger, C. and Wierda, M. 2006, p. 11). People had a profound mistrust in the judicial system after a quarter-century of corrupt justice. As they were excluded from the process under Portuguese and Indonesian rule, the East Timorese had little or no engagement with the fair and impartial operation of law and never enjoyed de-politicised justice.

> 'The Indonesian Government suborned the legal system to its own ends and corrupted both courts and the judiciary in East Timor – effectively turning the legal system into a servile extension of the Executive' (UNDP, 2002)[7]

In this environment, local law became essential to the administration of justice:

> 'Reliance on *lisan* [traditional] procedures became even more important during the Indonesian occupation because the formal system of justice was perceived as an instrument of selective oppression rather than a means of protection of the rights of people' (Commission for Reception, Truth and Reconciliation in East Timor, 2005, p. 5)

In terms of infrastructure and material resources, practically nothing of the old regime was left on which a new court system could be built. It was clear that a justice system would have to be built de novo (as opposed to remodelled or altered) before anything could be administered, and this would encompass physical and personnel building, as well as the task of fostering a social acceptance of the role of the judiciary in the rule of law.

2.2 Professional and Geographical Obstacles to Access to Justice

UNTAET Regulation 1999/1 established that Indonesian law which operated prior to 25 October 1999 was the applicable law insofar as it did not conflict with international human rights standards.[8] Regulation 2000/11 provided that 'judicial authority shall be exclusively vested in courts that are established by law' composed of judges who are appointed on the basis of earlier legislation.[9] Four District courts were established in Dili, Baucau, Suai and Oecusse. However, since that time, geographical and personnel limitations, low judicial capacities and international dominance in the courts have proven entirely at odds with socio-economic realities in East Timor leading to a continued allegiance to local justice over the struggling formal system. Though the SCP was justified on the basis that its hybrid nature would contribute to the professional development, the mentoring necessary to make it happen was relegated as a priority as the SCP suffered severe personnel shortages. After Timorese judges, prosecutors and defenders failed exams that would allow them enter their professions in early 2005; two separate intakes of Timorese actors have produced forty qualified prosecutors, judges and defenders working for the State. Though the education they received is of varying quality, the consensus among international observers is that by late 2007, they were ready to take greater responsibility for the administration of justice (UNDP, 2007). However, since the judges failed their exams in 2005, the ordinary criminal justice sector has been dominated by international actors provided in bilateral schemes and by UNDP. Even the combined efforts of Timorese and international actors have proven unable to significantly reduce an enormous case backlog -4500 at most recent count (Field research, East Timor, summer 2008) - a difficulty exacerbated by ongoing problems in investigating a prosecuting a period of mass violent criminality in the middle of 2006 which left over 100,000 internally displaced, and problems of violent conduct by gangs of unemployed youth flocking to the outskirts of the cities.

In addition to case backlogs and shortage of staff, the formal justice sector has been unable to meet community demand for justice or constitutional guarantees of access to the courts.[10] Though courts were set up in four of East Timor's thirteen districts, 70 per cent of all Timorese live outside major towns in a country where topography is not conducive to travel. For most of the past eight years, only the District Court in Dili (outside of which 81per cent of the population live) has functioned on a permanent basis as legal professionals are reluctant to practice in the outlying districts. It was estimated that in 2004, only six lawyers resided in districts outside Dili (Advocats Sans Frontieres 2004, p. 4). The problem of access to justice in East Timor can be demonstrated by a well-worn stolen chicken anecdote. Though both formal and local system could resolve the case of a woman's stolen chicken, reporting the matter to a criminal court would take days or weeks to resolve, might require hundreds of miles of travel and would cost infinitely more than the chicken is worth. It is in cases like these that the practical irrelevance of the formal criminal justice system becomes apparent. One poll found that 47 per cent of Timorese citizens lack the sense that they are protected by the formal legal system (Pigou, P. 2004a, p. 5).

3. Local Justice in East Timor

Local law emerged from the Indonesian occupation relatively unscathed. Local dispute resolution mechanisms were generally not interfered with under Portuguese rule but of course were never formally incorporated into the formal justice system. The Indonesians, on the other hand, tried to first eradicate and then control them, but largely failed (Berlie, J.). The centrality of the individual and his or her human rights is not replicated in Timorese local law. Existence in rural areas (in which 70 per cent of the people live) is precarious as society attempts to subsist collectively on scant resources and meagre harvests. Tension, hostility and ostracism can adversely affect the balance of an entire community. As a result, society is based on a 'refined socio-cosmic system' dominated by kinship between wife-giving and wife-taking families where 'dispute resolution is characterised through replacement of values to stabilise the cosmic flow and through social reconciliation to ensure continued harmony within the community' (Hohe, T. and Nixon, R. 2003, p. 2). Stability rather than penalization is the primary goal of justice. Wrongdoing is considered not as a crime to be punished, but an action against the social order or circulation of values which must be rebalanced. As such, local justice can resolve culturally specific problems that formal law does not cover. In all events, resolution of crimes committed by an individual or group against another is 'built upon a fundamental principle of reciprocity and fair compensation' (Mearns, D. 2002, p. 54). As exchange of values is central to local cosmologies, justice is understood mostly as restorative appropriate compensation instead of imprisonment. The fine for stealing a goat may be a buffalo, or an apology and money for an assault.[11] Crime creates a debt and so Timorese intuitions about imprisonment are very different to those in the west:

> 'Thus the simple removal of a perpetrator from the scene and his imprisonment, for however long, do not satisfy the tenets of local justice in this part of the world. Whatever harm has been done to another, a debt is created that must be settled if the matter is to be finalised and reconciliation (or at least the resumption of normal social relations) is to take place' (Mearns, D. 2002, p. 43).

In communities where people engage in backbreaking subsistence farming, a prison sentence where one get fed thrice daily and clothed does not carry the same opprobrium as it would in the West. Prisons in East Timor are overcrowded and subject to frequent mass break-outs, further calling into question the propriety of imprisonment in the Timorese social context. Central to the stability of communities is the prompt resolution of disputes in order that they not escalate into violence.[12] Local justice processes can be initiated within 24 hours, offering very definite advantages over the formal justice system where lack of personnel and facilities causes enormous delays

The legitimacy of these customs derives from both their age and their location at the meeting point of the secular world of the community and the cosmic world of their ancestors who created these laws and passed them down from generation to generation. These ancestors are summoned at the beginning of local processes and this presence makes it binding with deleterious consequences if the outcome is not accepted. Having survived over 450 years of occupation, those local systems enjoy a cultural loyalty that any formal system would find difficult to replicate.

3.1 Local Justice in Practice

After a 'crime' is committed, victims and offenders are usually encouraged (and indeed expected) to resolve or negotiate disputes themselves (Harrington, A. 2006, p. 34). Local mechanisms only come into play where this fails. As noted above, there are wide variations in these mechanisms across East Timor's 13 districts, but there are commonalities. The first is the customary structure, whereby a dispute moves upwards from disputants to local elders to hamlet chief to village and sub-district chiefs (Ospina, S. and Hohe, T. 2001). The second is the process of *nahe biti* (literally 'rolling the mat') where disputants and leaders assemble around a woven mat to resolve the dispute (Babo-Soares, 2004). Local leaders assign legal roles to individuals known as *lian nain* who know the ancestral rules and who hear the dispute.[13] The process is effectively an exercise in arbitration (where local leaders or *lian nain* deliver a decision) or, more popularly, mediation (where leaders assist disputants in reaching an agreement). Frequently the entire object of the meeting is to negotiate compensation (Hohe, T. and Nixon, R. 2003, p. 25). Beyond compensation, two other purposes of local justice are discernible. The first is perpetrator shaming through the revelation of wrongdoing. Compensation is conceptualised as 'covering' the victim's shame and making apparent that of the perpetrator. Other acts may also be used. For example in Bobonaro, a thief is undressed and made walk through the village with his sarong on his head (Hohe, T and Nixon, R. 2003, p. 22). The other purpose is reconciliation to demonstrate the conflict is over. The centrality of reconciliation to the Timorese people is visible in one of the earliest (and only) surveys of citizen attitudes to justice – while 22 per cent said they had no comprehension of the term 'human rights', an extraordinary 100 per cent were able to elucidate what they meant by the term 'reconciliation' (Pigou, P. 2004a, pp. 28-32). At the end of *nahe biti*, ceremonial practices like the chewing of betel nut, a feast for the village, consumption of alcohol called *tuak* or blood oaths are performed top show a consensus had been restored.

Aside from the obvious cultural resonance of local justice, it has a number of other advantages similar to the justifications first advanced for ADR worldwide. Promptness of proceedings has already been mentioned, while matters progress quite swiftly thereafter also. It costs the parties very little to operate, has no bureaucracy and decisions are tailored to the circumstances of the case. All of these practical benefits, the weakness of the formal sector and its questionable public legitimacy have contributed to the enduring popularity and usage of the local courts. The aforementioned poll on Timorese attitudes to justice found that of those familiar with local law, 94 per cent are confident in its fairness, with 62 per cent very confident, 81 per cent believed community leaders were responsible for law and order in the community, with only 14 per cent citing the formal justice sector and police (Pigou, P. 2004a, pp. 39 & 49). The report also found that half of all disputes were resolved between the parties involved or their families, with local law next and the courts and police a very distant third preference, 63 per cent said local processes were not subject to political interference, while 86 per cent said it protected rights (Pigou, P. 2004a, pp. 56-63).

3.2 Human Rights and Local Justice

The idealist position that local justice as practiced in East Timor has no place in a modern rule of law system bears up to scrutiny, to a point. Amnesty International argued as follows:

> 'The use of alternative, non-judicial criminal justice mechanisms can lead to serious human rights violations. The right to a fair trial and the rights to be free from discrimination and from torture and cruel, inhuman or degrading treatment can all be put at risk where informal mechanisms are used without safeguards' (Amnesty International, 2001)

Even Mearns, who avowedly favours integration of the systems, conceded that 'research I have undertaken definitely confirms the fears of many working in the Human Rights area that local patterns of dispute resolution certainly do not always accord with ideas of equality, democracy and international human rights' (Mearns, D. 2003, p. 54). There is much anecdotal evidence of this. In a famous example, an international policeman told a villager to resolve an allegation of witchcraft in the traditional manner given the absence of any statutory law on the matter. A few days later, the latter returned to the police to tell them he had killed the alleged witch (Mearns, D. 2002, p. 46). Mentally ill people who had proven themselves a danger to society had been killed to protect others (Hohe, T. and Nixon, R. p. 63). There exist recent reports of one local court attempting to impose a punishment of hanging for adultery (Harrington A, 2006, p. 35). In addition to punishments that violate human rights, local law is unwritten and so is inconsistent and lacks the predictability ordinarily associated with the rule of law. Local law can reinforce local power hierarchies at the expense of disadvantaged Timorese. As Wojkowska notes, local justice systems 'generally do not work in the resolution of disputes between parties who possess very different levels of power or authority' (Wojkowska, E. 2006, p. 20). Elite capture is an ever-present danger where unaccountable *lian nain* appointed by birthright 'know the words' and apply law in a manner open to bias or partiality. Because law is unwritten, it is open to arbitrariness and bribery.[14]

In addition, local justice systems are male-dominated and tend to reinforce inequitable gender relations in a state with very high rates of domestic and sexual violence against women (Swaine, A. 2003). In a country where 25 per cent disapprove of women speaking for themselves in traditional processes (Pigou, P. 2004a, pp. 75-76), women are systematically excluded from local justice mechanisms, even where they are the victim.[15] A 2003 report concluded that 'it is evident that women's rights are not given adequate consideration in their search for justice, especially in local justice proceedings' (Swaine, A. 2003, 3). Compensation payments are often paid to the father or husband (Mearns, D. 2002, p. 40). Rape and adultery are not distinguished from each other, while a victim will often have to marry her rapist. Though three-quarters of Timorese believe domestic violence is wrong, 56 per cent believe it is a matter for local processes (Pigou P, 2004a, pp. 78-81). Timorese feminists have long protested use of local law as a means of restricting women's rights (Charlesworth, H. and Wood, M. 2002, p. 336). It should be noted, however, that 94 per cent of Timorese are confident that in the overall fairness of local systems, and 86 per cent feel it protects women's rights (Pigou, P. 2004a, pp. 55-56). In these circumstances of inequity and injustice in local law, Swaine argued in favour of 'formal engagement' to enable 'the debilitating cultural practices within local justice to be addressed and changes which need ,to take place facilitated in a way that is inclusive and supportive of all stakeholders' (Swaine A. 2003, p. 4). Though not deliberately designed as such, the CRP was the first national model for doing so.

3.3 UN and Government Approaches to Local Justice

The realist/idealist debate captures the tension in UN peace-building operations between the UN's general obligations in terms of human rights and the need to pragmatically respond to rule of law vacuums. The argument here is that over-emphasis on individual rights in the western criminal justice model could erode local mechanisms enjoying widespread support. Similarly, the Timorese government that took over from UNTAET (made up of a largely urban mestizo elite with a definite pro-modernisation agenda after spending the occupation divorced from rural East Timor in more developed countries) faced a tension between legal pragmatism and the forging of a unified Timorese identity from the linguistically and culturally distinct rural sub-populations we see practicing their own diverse legal traditions. As often occurs in transition, new national identity often demands discrete indigenous practices are sacrificed in the interests of unifying homogeneity.[16] As such, there was a certain ambivalence about local law, notwithstanding its latent potential to remedy law and order vacuums. The first Timorese government, like UNTAET, mistakenly believed 'the legal system would be accepted and adopted enthusiastically by the Timorese people' (Harrington, A. 2006, p. 20) and presupposed its success and ignored local justice mechanisms. While Section 2.4 of the Timorese Constitution notes that 'the State shall recognise and value norms and customs of Timor- Leste that are not contrary to the Constitution and any legislation specifically dealing with customary law', there was no formal integration.[17] This was contrary to

sentiments expressed in grassroots consultation on the Constitution, which endorsed substantive formal recognition of local law (Graydon, C. 2005, p. 66). Section 31 ('No one shall be subjected to trial except in accordance with the law') very clearly takes a dim view of local administration of criminal issues, while Section 28 allows citizens to disobey illegal orders and those that impinge fundamental rights.[18]

Though this article has laid out the arguments about the propriety of using local law, the debate essentially became moot when conditions on the ground and prevailing cultural willingness absorb foreign norms and systems effectively decided the issue and clearly tilted in favour of the realist position. Before UNTAET arrived and before independence, the Timorese political umbrella party CNRT adopted the practice of the Portuguese and Indonesians by integrating their political structures with local leaders for the administration of justice (Hohe T and Nixon R, 2003, 28-37). Similarly, the UN CivPol mission inundated with crimes but with an inadequate court system began to encourage some (often most) disputes to be resolved through local practices, with the imprimatur of district prosecutors:

> 'Resources were always extremely limited, and the main factor was personnel. And there was only 24 hours in a day. Realistically, we had to "offload" the majority of matter to a traditional resolution because we did not have time or manpower to deal with all offences in the formal way' (UN CivPol officer, quoted in Hohe, T. and Nixon, R. 2003, p. 33).

Prevailing local practice among Timorese people is to report 'only those matters that they consider too hard to resolve at the local level' (Mearns, D. 2002, p. 37).

In the receipt of cases from the police on an ad hoc basis, Timorese local leaders assented to modifications of their practices to fit human rights norms, fitting with anthropological and sociological studies that have shown historically how foreign structures like police or courts and norms like human rights can be integrated into local cosmologies (Traube, E. 1986). The relatively hands-off Portuguese ruled through local leaders who were easily if reluctantly integrated as a higher level in the politico-legal system. The UN Transitional Administration and the successor centralised Timorese Government have assumed this role. Hohe and Nixon observe a philosophy of taking conflicts from one authority to another in ascending order, until eventually is reached the formal justice sector if disputes prove intractable or crimes too grave (Hohe, T. and Nixon, R. 2003, p. 53). As such, there is a clear willingness to engage with formal justice systems. In addition, a sophisticated moral economy of justice applies. For example, for theft 69 per cent would use local justice and 13 per cent the formal system; for serious assault by a family member 33 per cent would use local justice and 47 per cent the formal system (Pigou, P. 2004a, p. 34). 51 per cent would choose restitution for cattle theft against 32 per cent in favour of imprisonment, but 91 per cent recognise the formal system as the appropriate mechanism for murder trials (Pigou, P. 2004a, p. 34).

It is apparent that the informal integration of the State and local justice systems had taken place as a pragmatic response to a small justice sector and high criminality. However, the problem remained in that there was no oversight, no guarantee that fundamental rights were adhered to and it made little difference to case backlogs despite the obvious potential to transfer at least minor and moderately serious offences through village courts. Both UNTAET and the Constitution failed to advance integration of these through a mix of idealism and chauvinism regarding local law.

In such an atmosphere of hostility towards local law mechanisms on the part of the UN and Timorese government, it might well be asked how then did the Community Reconciliation Process, with its reliance on local law come about. Though the Timorese leaders were reluctant to embrace local law mechanisms, successive government have made a policy choice ever since independence to ignore issues of transitional accountability in the interests of reconciliation with Indonesia on which it is economically dependent. Various UN missions have instead taken responsibility for transitional justice. Though initially they focussed on the formal SCP, it soon became apparent that the relatively small number of trials it would hold could not respond adequately to the need to punish and acknowledge the mass criminality of 1999. The weaknesses of this formal system best explain the turn to local law processes. Many of the conditions visible in the ordinary criminal justice sector – lack of personnel, geographical remoteness, lack of facilities and delayed justice – existed, resulting in an inability to prosecute and try crimes adequately in a manner that called into question the blanket exclusion of local justice from processing serious crimes (Askin, K., Frease, S. and Starr, S. 2004; Cohen, 2006; Hirst, M. and Varney, H. 2005). Regulation 2000/15 created benches called Special Panels in the Dili District Court in June 2000 to deal specifically with accountability for serious crimes,[19] while Regulation 2000/16 established a

Serious Crimes Unit (SCU) to investigate and prosecute them.[20] Each Panel was composed of three judges, two of which are international and one national to alleviate the lack of Timorese actors and experience. The SCU, Defence Office and Registry were designed along similar lines with national actors in theory co-operating with international experts. From 2000 to 2005, the SCP convicted 87 mostly low-level Timorese criminals of murder and crimes against humanity, but lacked the staffing to even investigate the tens of thousands of other serious crimes. The figure of 87 convictions is impressive by comparison with the ad hoc international tribunals, and all the more so considering it operated under severely 'inadequate and irregular' funding such that the SCU, Special Panels and Defence Lawyers Unit never 'received sufficient resources to meet the minimum requirements of the respective mandates of the three bodies' (Commission of Experts, 2005, paragraphs 93 and 11). However, because of this, at all stages the SCP was stretched to breaking point with defence and courts at trial and appeal unable to cope with the volume of cases. To deal with the volume of cases, systematic use of plea bargaining was adopted. Admissions of guilt became highly attractive to defenders, prosecutors and the Special Panels, even where possibility existed for a vigorous defence. There is evidence defendants were punished for failing to agree a plea bargain beforehand. Cohen describes interviews with Special Panels judges who made their displeasure at cross-examinations and objections clear to the author, seeing vigorous defence as impeding a mechanical prosecution process instead of upholding justice and the fairness of trials. (Cohen, D. 2006, p. 40). Resource and personnel shortages led to the 18 month suspension of the Court of Appeals' operations between 2001 and 2003. Even the ostensibly successful SCU was eventually unable to cope. In early 2005, the UN began to wind up the SCP, meaning that resources were stretched even thinner and that remaining prosecutions were rushed. While the Timorese courts lack the capacity to try over a thousand suspects under indictment, numerous suspects remained in detention for excessive periods. For example, Lino De Carvalho spent two years in detention before conditional release, while Paulino De Jesus, spent twenty months in detention from 10 May 2002 to 8 December 2003. An NGO reported in 2004 that 'at any given time over the last year, it was usual for between one-third and one half of all detainees held in one of East Timor's three prisons to be held on expired detention orders' (Amnesty International and JSMP, 2004, p. 15).

With such an overstretched process, the folly of adding more serious crimes cases to the SCP in the absence of an extended deadline or substantial additional funding should have been immediately apparent. The adaptation of local justice processes to ongoing truth and reconciliation processes favoured already in Latin American and South African transitions was the reasonable response to the accountability lacuna. With the involvement of the UN, many of the aspects that made such recourse unpalatable previously were neutralised. The CRPs adopted local law practices and potentially offered a model that would resolve the biggest problems in both areas of law – it attached basic procedural standards and gender equality to essentially local mechanisms and was linked formally to the undermanned formal justice system. However, the principle of leaning on local law processes given the inundation of cases was not taken to its logical conclusion. Delegation of cases from the SCP to the CRP appeared to be the most practical response. Instead, what occurred was precisely the opposite – cases were referred from the CRP to the SCP which lacked the staffing or time to try them. It is to this the paper now turns.

4. The Community Reconciliation Process

4.1 The Community Reconciliation Process in Practice

At the instigation of Timorese leaders, the UN Transitional Administrator promulgated Regulation 2001/10 on 13 July 2001[21] which established a Commission for Reception, Truth and Reconciliation (known by its Portuguese acronym CAVR) after widespread consultation with the Timorese people.[22] CAVR was mandated to inquire into human rights violations committed between decolonization (beginning 25 April 1974) and UNTAET's establishment on 25 October 1999. It had a number of truth and reconciliation objectives, but of most relevance here is that of conducting CRP for politically-related crimes not prosecuted by the trial based Serious Crimes Process (SCP).[23] In a CRP, a person responsible for the commission of a crime (a deponent) voluntarily submitted a written statement to CAVR describing the relevant act(s) and their association with the political conflict in East Timor. A CRP Statements Committee forwarded the statement to the Office of the General Prosecutor (OGP) who decided whether or not to prosecute the acts disclosed. If the OGP did not prosecute, a Regional Commissioner would establish a CRP Panel made up of local community leaders,[24] staying the power of the OGP to institute criminal proceedings for the acts subject to the CRP.[25] Those who did not give a 'full description of the defendants' acts' or who refused to accept responsibility for their crimes remained

criminally liable for their actions.[26] Serious crimes such as crimes against humanity, rape, torture and murder came under the SCP's jurisdiction and could not be subject to a CRP. As a result, the typical crimes dealt with were affiliation of membership in militia groups, destruction of property, incarceration, arson and assault committed by males aged 25-35.

The CRP operated on the basis of a generic format which could flexibly adapt to distinct local practices using distinct local languages. A typical CRP would open with traditional *lisan* rituals, speeches or prayer. The CAVR-appointed Chair would explain the background and objectives of the CRP and the deponent's case summary. The deponent would then furnish a full oral account of the acts for which he sought reconciliation. Questions from the CRP Panel followed before victims were allowed to present their side of the story and question the deponent. After questions, the Panel, deponent and victims discussed the act of reconciliation. The deponent would agree to undertake recommended acts of reconciliation, apologise publicly and swear an oath never to commit these acts again. Thereafter, the deponent signed a Community Reconciliation Agreement (CRA) describing, inter alia, the acts of violence and the acts of rehabilitation to be performed, which was read to the community present. The acts included community service, reparation, traditional acts of contrition, while an apology alone may have sufficed. Apology or contrition is in keeping with values of 'covering' shame and performs the restorative function that Drumbl, in the Rwandan Gacaca context, called 'socially reintegrative shaming' and was more in keeping with Timorese conceptions of justice than guilt from externally imposed judgement (Drumbl, M. 2000). The CRP 'reinforced the importance of local justice and the notion that justice in Timor-Leste is not always about punishment, but also compensation, contrition and other forms of reciprocity' (Pigou, P. 2004b, p. 11). The CRP can thus be seen as sitting at the intersection of justice and reconciliation and marks another example of a global trend for truth commissions to gradually develop into justice-supporting machinery (Stahn, C. 2001, p. 954).

This integration of truth, justice and reconciliation fulfils a number of transitional justice imperatives often considered central to advancing the liberalizing process (Minnow, M. 1998). Exposure of the truth about past repression vindicates the experience of victims and educates the public about the manipulation of power. Though many argue that Truth and Reconciliation Commissions can generate the reconciliation necessary to heal individual or societal wounds without prosecutions, forgiveness does not obviate the necessity of punishment. Landsman contends that punishment (as in the SCP and CRP) is essential to healing a society's wounds after periods of widespread abuse because 'one cannot forgive what one cannot punish' (Landsman, S. 1996). In these regards, the CRP was enormously successful. It received a total of 1541 statements, over 50 per cent more than the original target with 1571 deponents completing CRPs. Some one-day hearings involved as many as 31 people, while some three day hearings involved as many as 55 deponents. Attendance by communities was strong, ranging from dozens of attendees to hundreds. Some estimates suggest that 30-40,000 people attended in a population of less than a million (Burgess P, 2004, 153). The process was undoubtedly helpful in drawing a line between past violence and a more peaceful future. Pigou notes that the hearings 'provided communities with important insights into the conflict that affected them' (Pigou, P. 2004b, p. 11), while the CAVR Report claimed that the CRP provided 'symbolic closure' (Commission for Reception, Truth and Reconciliation in East Timor, 2005, Part 9, p. 141). This is especially important in a small country where perpetrators and victims came from the same villages and even the same families. In addition, approximately 180,000 refugees fled or were forced into West Timor in 1999, many of whom feared retribution if they returned. While specific CRP procedures for West Timor failed, overall, CRP processes did much to heal wounds and encourage return. Indeed, Stahn has characterised CAVR and CRP as primarily 'repatriation and return' mechanisms (Stahn, C. 2001, p. 957).

In two polls conducted by CAVR, 96 per cent of people interviewed said the CRP achieved its primary goal of promoting reconciliation in the community (Commission for Reception, Truth and Reconciliation in East Timor, 2005, Part 9, p. 34). Deponents obviously benefited from it as their social acceptance and quality of life improved, while victims also reported feeling more respected in their communities and more willing to forgive (Commission for Reception, Truth and Reconciliation in East Timor, 2005, Part 9, p. 34). To an extraordinary degree, Timorese victims were willing to forgive the violence as the consequences of a conflict imposed on them by Indonesia.[27] Nonetheless, it is clear that much of the favourable response was based on the expectation that there would be full accountability for the most serious crimes, which ultimately never materialised. Due in significant respect to the CRP and the SCP, by 2005 there was the extraordinary figure of zero revenge killings since 1999 and only 18,000 refugees were left in West Timor.[28] Amidst these successes of the CRP, its other great achievement has gone unnoticed.

4.2 The CRP Incorporating Human Rights and Gender Equality

Though the reconciliatory nature of the CRP mirrored local processes, there were two significant differences in that (a) the victim's consent was not required to conclude a CRA and (b) the CRP was deponent-driven when ordinarily local justice would be victim-driven or agreed by both beforehand (Victims could not initiate the process). These necessary differences aside, the CRP was successful in replicating local law. The biggest difference was an encouraging one, namely the degree to which it incorporated human rights norms and gender equality. As noted above, Section 28 of the Timorese Constitution grants all citizens the right to disobey illegal orders or orders that impinge upon their fundamental rights, freedoms and other guarantees in the Constitution. Clearly, local justice processes need to change if they are to avoid falling foul of this. Such change would accord with public opinion. Notwithstanding the immense popularity of local law, 75 per cent of Timorese concede that local processes need reform to be fairer (Pigou, P. 2004a, p. 56). 90 per cent of CRP staff were Timorese (approximately 50 people) and they took part in a comprehensive training programme ran by CAVR's training and development unit in the range of skills needed for the CRP. Mediation was obviously an integral aspect, but there was also training in dealing with aggrieved victims, victims of sexual assault and, crucially, basic legal principles relating to natural justice and procedural fairness. Nationally, over 1000 CRP Panel members also received training. There are no reports of human rights being breached in the CRP, in marked contrast to the observations of Amnesty International and Mearns outside the CRP. Similarly, in a move that replicates the sort of constructive engagement with the formal courts that would benefit users of traditional justice mechanisms, CRAs were registered at District Courts to consider whether they were reasonably proportionate to the acts disclosed and whether they violated human rights principles.[29] Zifcak notes that 'giving force and effect to agreements reached, thus tying them into the formal justice system was a good innovation that added a measure of gravity and consequence to the community process' (Zifcak S, 53). Significantly, Regulation 2000/11's stipulations that a minimum 30 per cent of all Regional Commissioners be women and that people have 'appropriate gender representation' were observed.[30] Pigou observed that once given this push, 'communities willingly appointed female representatives', constituting a massive break from tradition (Pigou, P. 2004a, p. 83)

4.3 The Limits of Integration

The limits of the SCP were such that thousands of assaults, thefts and 60,000 house burnings from 1999 could never be prosecuted on account of the lack of SCU offices in the districts outside Dili and the lamentably inadequate staffing. Co-operation between the SCU and the CRP was the only sensible response to the personnel and geographical lacunae as the CRP assumed responsibility for the punishment of minor crimes in the manner described above. In June 2002, CAVR and the Timorese OGP signed a Memorandum of Understanding 'intended to assist in ensuring a mutually beneficial an efficient relationship'.[31] The Memorandum obliged both parties to exchange information and affirmed the OGP's excusive prosecutorial authority. This was fully in keeping with CAVR's founding legislation which also stipulated the SCP's superiority as regards serious crimes like crimes against humanity, war crimes and murder, while leaving more minor crimes to CRPs.

The relationship between the two processes was encouragingly orderly as the CRP served at all times to divert any politically serious offenders upwards to the OGP who of course delegated the exercise of any such jurisdiction to the SCU. Before giving a statement, deponents were informed that information included in the statements would be sent to the OGP and could be used in future criminal proceedings if the OGP so chose.[32] As noted above, statements were forwarded to the OGP who decided on the basis of clear criteria whether to prosecute or return the case to the CRP where the OGP's authority to initiate criminal proceedings was stayed pending compliance with CRP hearing procedures.[33] The possibility existed to isolate minor crimes from serious ones where the CRP would hear the former without prejudice to the OGP's jurisdiction over the latter. If a CRP hearing proceeded but revealed 'credible evidence' of the commission of a serious offence, the CRP Panel would refer the evidence to the OGP for a decision as to whether to prosecute or revert to the CRP.[34] This has been characterised as an exercise of 'legal-decision-making power' when determining whether acts disclosed constituted referable crime, bearing striking resemblance to local traditions of sending cases upwards to State authorities if local mechanisms consider crime sufficiently grave (Stahn, C. 2001, p. 959). While Regulation 2000/10 imposed no legal obligations on deponents to enter into a CRA, once it had been signed, the deponent was legally obliged to fulfil the obligations outlined therein. Failure to perform them constituted a criminal offence punishable by a maximum prison sentence of a year or a maximum fine of $3000, or both.[35] On the other hand, completion of the required acts meant the deponent received legal notification

of his legal immunity from criminal and civil liability.[36] Proof of the effectiveness of this link to the OGP is apparent in the fact that only one deponent failed to comply with a CRA.

Thus we see at all stages a process where a CRP adopting and adapting local justice processes acted as both a complement and an alternative to the formal justice system in which the SCP was based. The CRP benefited from the OGP's ability to prosecute non-compliance with CRAs and the remit of the formal courts to monitor them for adherence to human rights. The OGP certainly benefited in that the CRP 'effectively averted the need for police investigation, the preparation of indictments by prosecutors, judicial hearings and an expanded court administration and prison system to deal with these cases' (Commission for Reception, Truth and Reconciliation in East Timor, 2005, Part 9, p. 40). Though the OGP had paramount authority, at the core of the relationship between them was the effective upward delegation of jurisdiction for borderline serious crimes from the CRP to the OGP. Ideally, this is the way any such relationship between local and State justice systems should operate, but such convictions are based on the effective capacity of the latter to process these cases. If this is not the case and the formal system does not have the resources to do so, then the choice is effectively between leaving the case to be tried by local law on the one hand or impunity or intolerable delay on the other. The experience of the CRP is this regard is damning. In 85 cases, the OGP did not grant approval for the CRP to continue of the basis that serious crimes were disclosed, while 32 cases were permanently adjourned after the hearing disclosed evidence that such offences involved the deponent. As a result, the SCU had files on around 110 cases that never led to any punishment, local or formal, for the perpetrator. This denied a willing perpetrator of the opportunity to atone and be rehabilitated into the community and the community of justice and some measure of catharsis. In addition, keeping these files open put more pressure on an already overstretched SCU. One can of course excuse this omission on the grounds of the extraordinary context of transition and mass criminality. This argument is potent, but it neglects the possibility that it might also set a precedent for the future where the formal justice system. As the next section demonstrates, what may have been an unfortunate epiphenomenal response to an extraordinary social context has instead become the norm.

What then was the alternative? It is submitted that instead of the CRP sending cases upwards to system that could not process them, the better alternative would be to mirror what was already happening on the ground for ordinary crimes and delegate responsibility downwards to the CRP after examination of the referred case by the OGP. At first glance, the idea of delegating murder and torture to an unrolled mat process in a hut is highly questionable. However, it is no more questionable than impunity on the basis of the contradictory logic that they are too serious to be tried by the only effective machinery. A similar dilemma was posed in Rwanda, which led to the use of Gacaca courts trying relatively grave transitional crimes in lieu of the State courts or the ICTR, adopted from traditional community-based mechanism of dispute resolution where parties to a dispute as well as members of a customary sit on the grass whilst determining the dispute. Cases delegated upwards from the CRP to the OGP were borderline - guilt was already admitted and may well have been committed under duress as so many criminals in the SCP claimed. Further evidence that local law could have dealt with some serious crimes is apparent in that prior to the CRP, local NGOs and justice systems conducted their own process of reintegration of some serious criminals in which *nahe biti* was prominent (Babo-Soares, D. 2004, pp. 17-18 and Hohe and Nixon, 2003, pp. 34-35). For example, Hohe and Nixon report that 'compensation and reconciliation procedures were well advanced in relation to a massacre that occurred in September 1999 in Tumin in the district of Oecusse, until intervention occurred from the UNTAET Judicial Affairs and Human Rights staff' (Hohe, T. and Nixon, R. 2003, p. 43). Local systems have tried crimes like murder and torture in the past. As noted above, since Portuguese times the formal court system has been seen as the appropriate response to grave crimes, but established local principles would be used where this was not readily available. Ideally, local law would never be used for murder, torture or rape. However, where backlogs and malfunctions in the formal system are such that the alternative is impunity or delay which can poison community relations, the Timorese will turn to local law:

> 'In another Oecussi case that came to the attention of the Human Rights officers of the UN, the local people in the same subdistrict of Passabe were proposing to conduct an *adat* trial of an alleged murderer, partly because they could get no satisfactory response from the Serious Crimes Unit or the UN police or from local police' (Mearns, D. 2002, p. 43).

Cognisant of the difficulties, even the SCU eventually became more accommodating. In May 2002, Regulation 2001/10 was amended and the rule 'in no circumstances' would a serious crime be dealt with by the CRP was altered to 'in principle' no such crime would be tried.[37]

What the approach this article advocates in relation to post-1999 serious crimes would have provided was a more suitable use of scant prosecutorial resources, denial of impunity and above all, the application of CRP training and court monitoring of punishments to these cases. Simply put, the SCU could have adopted a practice that was already happening informally and which was inevitably going to happen in future given the parlous state of the formal criminal justice system, namely the delegation of some relatively serious crimes such as assaults and arson to local justice. With the Statements Commissioner, the CAVR body and the Regional Commissioner who worked so successfully in the CRP, a workable formula already existed for the independent and objective consideration of the merits of each criminal or crime on a case-by-case basis. What is regrettable in the CRP was that this was done merely with regard to the seriousness of the crime and with little regard for wider issues such as the capacity of the prosecutorial function, local needs and the example set for the future. If instead the Statements Commissioner, the CRP and the SCU were better integrated, sensible decisions about allocation of responsibility and resources could have been made about an individual case or criminal. Though there could be no question of sending rape or murder cases to local justice (notwithstanding the willingness evinced above on the part of some communities to proceed in this manner), it would have been open to an independent arbiter such as a Statements Commissioner to recommend that an arsonist, a perpetrator of an assault or an accessory to a serious crime be made responsible before his local community. It might then be in the interest of the over-stretched SCU to acquiesce to this recommendation, and equally in the interests of the local courts to bring some sense of justice for the crime. Local justice remains an imperfect solution and fails to accord with what the international community (and indeed many Timorese) regard as the rule of law, even where human rights standards are protected, as in the CRP. Nonetheless, imperfect situations call forth imperfect solutions – it is clear in the Timorese context that local sanction of culpable individuals challenges the rule of law far less than either the impunity that ultimately resulted or the unconscionable delay that would have followed were the individuals who escaped punishment detained by a prosecutorial system unable to process them. While imperfect, this could serve as a model for the delegation of moderately grave crimes to local justice in ordinary times while ensuring a base line of procedural fairness and respect for human rights. Where crimes like mass murder or rape reached a CRP, upward delegation could have continued as provided in Regulation 2001/10. Instead, the CRP ended in mid-2004, and no comparable integration has since occurred despite growing backlogs and a permanently weak court system.

5. From Then to Now: The Lost Legacy of the CRP

The CRP effectively responded to the foremost criticisms of local justice in East Timor, namely that it is unaccountable, denies human rights and is inaccessible or unfair to women. It did so in manner that sensibly allied its quantitative strength in processing vast numbers of low-level criminals to the qualitative differences of the formal system which tried those more serious offenders. It was a move born not out of a recognition of local law's value, but out of necessity that came with the inundation of cases. Nonetheless, it proved both the worth of local law and its potential for reform when taken seriously. Were the SCP and CRP purely concerned with past injustice and hermetically sealed from the new independent East Timor, the impunity of those 110 criminals would be but a regrettable side effect of a successful process of transitional justice. To the extent that it was, one can point to the fact that dozens of senior Indonesian military figures who organised the murders, deportations and rapes in 1999 evaded prosecution behind Indonesia's borders for their offences without imperilling reconciliation and transition. There remains little clamour to see those who fell between the two stools of formal and local justice punished. Their impunity is in a sense just one more casualty of the conflict. The impunity of these is more significant as a symptom of the failure to realise that transitional accountability was not so isolated from the future – that the processes of the SCP and CRP could and should have had a greater rule of law impact than justice or injustice in the immediate case. For the first time in East Timor's history, the local law to which the majority of the population gave their allegiance was linked to the formal justice system that the modern nation-state needs. This link was both effective and popular, but fell down in the one key respect that would have made it a workable model into the future – where crimes ran upward to the formal system rather than down to justice in the towns and villages, it became unsustainable and unrealisable. As a result, the policies of supervision, monitoring of punishments and gender balance have also been lost as the CRP became an ephemeral novelty when the possibility existed for it to be a guiding light for a more right-conscious, integrated traditional legal system. The baby has been thrown out with the bathwater. Sadly, the 2002-2004 period when the CRP operated marked the last period where those with funding, legitimacy and political power in East Timor engaged with the law that most people use. Since the end of the CRP, the innovations that made it such a success have been discontinued. This is a

product of domestic apathy, on the one hand, and international disinterest on the other. There is no equivalent of a Statements Commissioner to sift through possible claims to weight their merits. There is no longer any court monitoring of local justice punishments. Notwithstanding substantial international funding for women's rights organizations, there is no body to guarantee that women have a role in local justice. What should have been apparent is that if these structures were of utility in dealing with the crimes of 1999, they might also have been of use in the long-term. The attention-span of the international community proved lamentably short, while the ambivalence of the Timorese government to local justice ensured those who could most closely observe the iniquities and unfairnesses therein did little to draw attention to the fact.

Though the CRP was demonstrably successful, the prejudices that made it the poor relation of the SCP have survived to this day. So too, however, have the conditions that made recourse by the UN (with governmental acquiescence) to local law in the transitional justice process necessary. Today, East Timor is inundated with a backlog of cases that exceeds even the mass criminality of 1999. As the bold promises of independence turn into the bleak reality of endemic poverty and insecurity (most notably a period of widespread violence in 2006 and attempted assassination of the President and Prime Minister in February 2008), an accumulation of approximately 4500 cases that are as much as five or six years old face a formal system that is running to stand still. It presents every bit as much of a challenge to the rule of law as mass criminality did after 1999, and needs a similar response that takes advantage of Timorese legal pluralism. Statistics are typically scant, but evidence from interviews conducted in autumn 2008 suggest firstly that the use of local law by the Timorese population has if anything increased, and secondly that both the domestic authorities and the international actors they still rely on are coming to appreciate this as a practical necessity. As one senior UN figure put it:

> "If you told us ten years ago that traditional justice and *nahe biti* were an essential part of the future of the Timorese legal system, you would have been laughed at ….. Now we realise that in a country with a tiny, weak court system and enormous social problems, we need to utilise every functioning form of justice, especially one that is far more trusted than the failing court system we prop up."[38]

The abandoned CRP formula, as a successful response to an earlier inundation, offers a loose model for how problems might be addressed. There is much empirical evidence to suggest that local justice mechanisms are being used to respond to the backlog, but none of the protections of the CRP remain.[39]

Though East Timor is 1999 and East Timor in 2008 are very different societies, one of the main rule of law commonalities they share is the inundation of crime in a criminal justice system of low capacity and low quantity. While local law retains it public legitimacy (a legitimacy boosted by the success of the CRP), the formal courts failure to curb growing lawlessness has seen the faith present in 1999 diminish dramatically. In a UN report on citizen perceptions of justice from 2007 so scathing that its publication was suppressed, it was found that a staggering 95.3 per cent rejected the idea that the justice system functions 'effectively and efficiently' while 88.4 per cent now profess to lacking confidence in the courts (Gomes, 2007, pp. 10 and 14-15) In this light, the reluctant concession to local law by the Timorese government and the UN that was the CRP needs to be viewed outside the extraordinary context of transitional mass criminality that initially justified it. What is necessary is a model running along the lines of the CRP/SCP relationship whereby local law continues to exist to try minor and moderately serious crimes, while allowing for cross referral of crimes with the formal system. This relationship effectively exists, but adopting the CRP/SCP model would allow for the supervision, promotion and protection of basic safeguards against abuse of rights in the local system and additionally enable enforcement of punishments. The Government should enact legislation to guarantee basic fairness, equality and rights adherence, while the international community could fund a wider equivalent of the CRP's training and development. This relationship already effectively exists also in civil law matters, where the formal courts try little in this regard and in effect have already delegated this function to local courts.

Beyond the re-introduction of human rights and procedural guarantees, any new system responding to extant crime rates will fail as a model when it relinquishes crimes to a formal system that cannot process them. Any example of local and formal justice system integration in East Timor based on upward delegation of cases is doomed to failure as it is unsustainable in the current straitened legal environment. Only by the delegation of crimes from the OGP to local courts and urban ADR processes respecting human rights can law and order be restored. However, it is unlikely the amount of international support and training the CRP benefited from will ever be made available again. This is a great pity, as evidenced

by practice after the CRP which shows an overwhelmed formal justice system reaching out to local law but without any of the consistency or order that would significantly integrate local courts as a complement to the courts to reduce the backlog of cases and resultant impunity, insecurity and bitterness. The authorities in East Timor, both international and domestic, recognised local law under sufferance, an attitude made most evident by their reluctance to trust communities with accused who committed or took part in serious violence but fell short. The natural conclusion was the straitened formal criminal system could not process over a hundred criminals who walked free. Nowadays, the courts are no less straitened, but instead those enjoying impunity number in the thousands.

> 'What the CRP showed was that local justice can be national justice, that it can be fair, that it can be professional, that women can trust it. Now it is all lost – traditional justice is the only viable alternative to lawlessness, but we have lost the capacity to force criminals before these courts and to make sure there is a semblance of fairness in the process.' [40]

The courts do refer cases back to local communities and factor in customary punishments, but only on a haphazard basis. For example, in a 2007 murder case, the defendant was given a relatively light five-year sentence partly on the basis that he paid compensation to the victim's family in accordance with local law (JSMP Press Release March 2007). One district court suspended a two-year sentence for attempted rape on the basis that the perpetrator paid a fine of $100, a buffalo and a cow to the victim's family (JSMP Justice Update, October 2005). Reports have noted the increasing use of local legal mechanisms for crimes like minor assaults and extortion. The courts have frequently responded sensibly to the dilemmas inherent in having two parallel systems. For example, a dispute resolution in the local manner after violence between two groups of youths in Suai who requested that the case be dropped was rejected by the judge on the basis that violence by martial arts gangs had important implications for public security and needed to be tried by the State (JSMP Justice Update, November 2005). Similarly, a court held that a sexual assault by an adult on his twelve year old niece was too serious to be cleared by a compensation agreement by the child's family (JSMP Justice Update, November 2005). It was decided that the agreement would count as mitigation in sentencing and that the compensation was to be paid. On the other hand, an American report from 2007 notes how a victim of a sexual assault was sent back by the courts to her local chief who failed to investigate or act (USAID, 2007, p. 27). With the end of the CRP, the female participation and gender sensitivity that was introduced to local processes has ended in cases like this as there is no legal compulsion to incorporate it. In another 2007 case, a victim of an assault who reached a customary settlement with his assailant was jailed because he did not give honest testimony or provide a statement after the court rejected an application by both parties for the trial to be abandoned (JSMP Press Release, May 2007)

These inconsistencies represent cases that actually come to court. What is sadly lacking are guidelines for pluralist integration of the two systems which would sensibly siphon off a number of trials delayed for years to local justice instead of occupying the court and for regularised integration of customary punishments into cases that do come to court. Instead, the backlog of approximately 4500 cases that are as much as five or six years old face a formal system that is running to stand still. Studies have noted the growing necessity of local law but lament the failure to integrate it with the formal courts[41] and the predictable violations of rights in the absence of effective oversight.[42] Nevertheless, public defenders and private lawyers increasingly provide legal aid outside the courts (Advocats Sans Frontieres, 2006, p. 21). A conservative figure of 20.4 per cent of criminal cases were handled outside the formal courts in 2004, but the most significant statistic of all is the backlogs in the formal courts in a State where tens of thousand of citizens afraid to return home live in refugee camps after being internally displaced in widespread violence in 2006. The question remains as to why local law could be trusted to deal with politically and socially divisive arson, assault and theft cases from 1999 in the CRP but cannot be adapted to pursue East Timor's current case backlog. To date, no legislation has ever been passed to formalise the position of local law in East Timor.

6. Conclusion

The CRP has shown that local level conceptions of justice can co-exist with and even reinforce State-level justice. In the case of East Timor, it did so, however, in a manner that is unsustainable in ordinary times given the limitations of the formal justice system. UN adherence to human rights standards (which can be incorporated, as the CRP experience shows) and the governmental elite's notions of modernisation (even where it leads to delayed justice and impunity) have restricted the potential for local justice to play its optimal role in reasserting law and order in the troubled country. The

CRP not only advanced reconciliation – it filled a void in the formal justice sector. Local law retains the capacity to do so again if existing practice is formalised in the law and expanded, provided training akin to that of the CRP programme recommences and cases flow from the bottlenecked courts to the excess capacity of village and town based mechanisms.

Endnotes:

[1] The UN Secretary-General, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60 – S/1995/1, 3 January, 1995, Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (23 August 2004), Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, of 21 August 2000

[2] For the purposes of this article, the formal justice system refers to state-based justice institutions and procedures, such as police, prosecution, courts, registry and prisons. This article uses the term 'local justice' instead of 'traditional' or 'customary' justice. In a Timorese society separated by difficult topography and a variety of local dialects, it is impossible to identify any uniform, monolithic tradition, custom or community. Instead, distinct areas in East Timor have their own unique dispute resolution mechanisms, though they do share some commonalities. As a result, I adopt the prevailing academic practice in relation to justice in East Timor and use the term 'local justice'

[3] 'Similarly, due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition. Where these are ignored or overridden, the result can be the exclusion of large sectors of society from accessible justice'.
Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, paragraph 36

[4] *Draft United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/WG.15/2 (1995), Section 33 provides:
'Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards'

[5] The phrase 'grave crimes' is used to denote crimes such as rape, murder, manslaughter etc in ordinary, post-conflict time to distinguish it from 'serious crimes' which are used in the Timorese Serious Crimes Process to denote a number of defined domestic and international crimes in its founding legislation.

[6] Security Council Resolution 1272, 54 UNSCOR (405th Meeting) UN Doc S/R/1272 (1999) of October 25, 1999

[7] Further note: 'One of the main critiques informants gave us about the Indonesian judiciary concerns its corruption. Everywhere people say that in Indonesian times you could only win a court case if you had money. An ex sub-district chief of the Indonesian system told us 'when I was *camat*, I advised people not to go to court, as they would lose anyway' (Hohe and Nixon, 2003: 27)

[8] UNTAET Regulation No. 1999/1 On the Authority of the Transitional Administrator in East Timor, UNTAET/REG/1999/1 of 27 November 1999

[9] UNTAET Regulation No. 2000/11 On the Organization of the Courts in East Timor, UNTAET/REG/2000/11 of 6 March 2000

[10] Article 48 of the Constitution of the Democratic Republic of Timor-Leste provides:
'Every citizen has the right to submit, individually or jointly with others, petitions, complaints and claims to organs of sovereignty or any authority for the purpose of defending his or her rights, the Constitution, the law or general interests'

[11] 'In cases of theft the focus is on the replacement of stolen values. The thief has to pay back the stolen good(s) and pay and additional compensation. The compensation can be a horse, a goat or a buffalo, the amount and the specific goods vary from area to area. There are mostly fixed regulations of what the thief has to pay back. In a Bunaq society in Bobonaro, it is clearly defined that for a stolen goat, the thief has to kill a goat and a cow' (Hohe and Nixon, 2003: 21)

[12] Reporting on field interviews and observations, Mearns states:
'It was deemed important to all concerned that a quick and visibly just resolution to such situations be achieved in order to allow normal social life to resume. The old adage that justice delayed is justice denied also has a particular ring of truth in the context of newly-emerging East Timor' (Mearns, 2002: 39-40)

[13] 'The *lian nain* know the history and are familiar with the ancestors. The come from specific families that are the "owner of the words", and they can speak … They recount the history of families including

their marriage and their kinship relations. They have knowledge on how families are inter-related, which often determines the compensation for a crime or the amount of exchange goods that have to be involved in a marriage. They know the rules the ancestors have set, and therefore they have the competence to speak the law. They can recount ancestral sanctions' (Hohe and Nixon, 2003: 25).

[14] 'Bonuses are a reality and the balance of justice may weigh in favour of those who pay more…. Once the problem is resolved, it is also common for the winning party to give a monetary reward to the agents of justice'
(Then) President Xanana Gusmao, quoted in address to an International Conference on Traditional Conflict Resolution and Traditional Justice, Dili, 27 June 2003, available at http://www.asiafoundation.org/Locations/easttimor_gusmao.html

[15] 'Traditionally, in East Timorese societies the decision-making process is the domain of the senior male of the existing social groups within the hamlets. Rural women are not supposed to be outspoken and to take the floor in public meetings' (Ospina and Hohe, 2001: 112)

[16] 'Following independence, new political elites, like their colonialist predecessors, typically viewed local "customary" practices as obstacles to state- and nation-building ….. The creation of local, popular tribunals proved no more successful in self-professedly "revolutionary" regimes: China, Cuba and Ghana, among others, eventually abandoned or curtailed their people's courts, replacing them with centralised state institutions' (Waldorf, 2006: 11-12).

[17] Constitution of the Democratic Republic of Timor-Leste (2002). Section 123.5 does state, however, that:
'The law may institutionalise means and ways for the non-jurisdictional resolution of disputes.' Grenfell contrasts Section 2.4 with the more pluralist provisions of Section 211(3) of South Africa's Constitution: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'

[18] Section 28.1 provides:
'Every citizen has the right to disobey and to resist illegal orders or orders that affect their fundamental rights, freedoms and guarantees'

[19] UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences (6 June 2000).

[20] UNTAET Regulation No. 2000/16 on the Organization of the Public Prosecution Service in East Timor of 6 June 2000

[21] UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, of 13 July 2001

[22] CAVR stands for Commissao de Acolhimento, Verdade e Reconciliacao. See generally "Chega! The Final Report of the Commission for Reception, Truth and Reconciliation in East Timor" (2005), available at http://www.etan.org/news/2006/cavr.htm

[23] Section 22-23 of UNTAET Regulation 2001/10

[24] Sections 25 and 26

[25] Section 25.3

[26] Section 23.4

[27] A number of victims clearly recognised the deponent's actions as a "consequence of the war". Several expressed the view that deponents were merely the "little people" and that due to the circumstances at the time, they had little choice than to commit the crimes they did'
Kent, 19

[28] It should be noted, however. That none of the senior Indonesian military figures involved in 1999 violence was ever extradited to Dili for trial, while many of the most important Timorese militia leaders remained safe in West Timor

[29] Section 28

[30] Section 11.1 and Section 26.1

[31] Memorandum of Understanding Between the Office of the General Prosecutor (OGP) and the Commission for Reception, Truth and Reconciliation (CAVR) Regarding the Working Relationship and Exchange of Information Between the Two Institutions, 4 June 2002

[32] Section 23.3

[33] Section 25

[34] Sections 27.5 and 27.6

[35] Sections 30.1 and 30.2

[36] Section 32

[37] Schedule 1, Section 4 of Regulation 2001/10

[38] Interview with senior UN Mission in East Timor Justice Programme, 1 August 2008
[39] Id.
[40] Id.
[41] 'Neither [the] UNDP Programme nor the planning mechanisms of the respective justice sector institutions appears to have considered as yet the interface between access to justice, the formal justice system and traditional justice institutions in Timor-Leste. This remains an area that deserves very serious attention in the process of reforming the justice sector and improving access to justice'
UNDP Strengthening the Justice System in Timor-Leste Programme: Independent/External Mid-Term Evaluation Report September 2007, paragraph 2.15
[42] 'The administration of justice at the Suco [village] level, through mediation and arbitration, and the use of traditional or communal structures is a necessary component of the system, given the courts inability to handle its current case load efficiently …. There is limited oversight of local administration of justice mechanisms, and anecdotal evidence indicates that some decisions have been made in violation of existing law' (USAID, 2007: 27).

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