Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor

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Abstract

As recent decades have witnessed a surge in violent intra-state conflict, international and national actors have responded with a range of transitional justice mechanisms that have yielded limited success in precipitating sustainable peace. Based upon the experiences of two post-conflict states, this article argues that local customary legal traditions must form part of any successful transitional justice scheme.

Introduction

Recent decades have seen a surge in violent conflict around the globe. Seemingly in tandem, the nature of these conflicts has worsened, producing increasingly atrocious crimes and leaving devastated societies in their wake. In response, various mechanisms have emerged to transition societies from conflict to peace via the delivery of justice. International ad hoc tribunals, hybrid courts, special chambers in municipal court systems and truth commissions have been designed to bring justice to conflict-ridden communities. Unfortunately, the proliferation of transitional justice mechanisms has yet to produce satisfactory results in the eyes of those most harmed by widespread violence.

In the rush to adjudicate war crimes and other mass atrocities, international and even national lawmakers exhibit indifference toward domestic solutions. Many transitional and post-conflict societies are home to customary legal traditions that have often served large rural populations before, during and after conflict. Yet when it comes to resolving the crimes that have torn these very communities apart, transitional justice designers often fail to draw upon the systems that are most relevant to them.

Recently however, custom has found its way into transitional mechanisms. Former young Northern Ugandan rebels are being reintroduced to their home villages through a ritual of "breaking the eggs."[1] In Papua New Guinea, the principles

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of *osikaiang* (indigenous nature) guide that country's effort to reconcile its factionalized leadership.[2] Even the South African Truth and Reconciliation Commission was grounded in the African philosophy of *ubuntu* (humaneness).[3] United Nations Secretary General Kofi Annan has advised transitional justice actors to draw upon local practice when crafting a response to mass atrocity.[4]

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This paper will examine two post-conflict countries that have incorporated customary practice into their transitional justice schemes. Rwanda began a controversial program of *gacaca* courts in 2001. A year later East Timor incorporated *lisan* into its Commission for Reception, Truth and Reconciliation (CAVR). The discussion below begins with a brief overview of some theoretical considerations of customary law, including descriptions of the two systems and case studies of Rwanda and East Timor. While the question of customary-influenced transitional justice raises a host of concerns regarding issues such as gender-based violence, due process, human rights and compensation, this paper will focus on the empirical successes of *gacaca* and CAVR with respect to reintegration, participation, and qualitative indicia of participant satisfaction with truth and justice. A comparative analysis of the two mechanisms will give way to recommendations for other post-conflict countries seeking to incorporate local custom into their transitional justice regimes.

Custom as Transitional Justice

Normative Considerations

Customary legal traditions have been subject to much scholarship though their oral, fluid natures have complicated their evaluation by outsiders. Yet, some useful constants have been identified[5] that can help frame the comparison of *lisan* and *gacaca*. The constants are orality, elder councils, reconciliation, and informal dispute resolution and procedure.[6] Customary law typically involves the community at large and focuses on the restoration of societal order as one of its key goals.[7] This restoration is achieved through a process of full public disclosure by the alleged perpetrator, discussion among all parties, and making amends.[8] The aforementioned proceedings are often concluded with traditional rituals such as communal meals and cleansing that are unique to the tribe in question and which restore social harmony.[9]

Customary law's focus on restoration has led to its identification with the restorative justice movement.[10] Like customary law, restorative justice is characterized by the inclusiveness of its procedure. All parties with a stake in the outcome of a particular dispute resolution process are invited to partake in the drafting of a response to a particular offense after considering future consequences that offense will have on the community.[11] The core values of restorative justice are "healing rather than hurting, moral learning, community participation and community caring, respectful

dialogue, forgiveness, responsibility, apology, and making amends."[12] A key goal of restorative justice systems is the restoration of offenders to a "healthy relationship with the community."[13] Success in the restorative tradition is determined by "the value of the offender to his/her community after reintegration and the level of emotional and financial restitution for the victim(s)."[14]

In contrast to the retributive justice model restorative justice places the victim at the center of the proceedings.[15] In addition, customary practice focuses on the community as well as the individual.[16] While these victim- and communal-centered mechanisms have been praised by some scholars and practitioners as useful reconciliation tools in transitional societies,[17] their viability, particularly in the wake of mass atrocity, has been challenged. Specifically, restorative justice has been faulted for coercing victims into accepting settlements against their wishes and for not producing empirical evidence in support of their effectiveness as compared with retributive mechanisms.[18] Indeed, perhaps the most that can be said for restorative mechanisms is that, while victims who participate in them are less satisfied with their experience than other parties in the process, they are more satisfied than victims who experienced other processes such as prosecution.[19]

Rwanda: Gacaca

In kinyarwanda, *gacaca* means "grass" or "lawn," referring to where the proceedings take place.[20] Administered by respected local leaders, typically elders, [21] *gacaca* traditionally resolved property disputes, including land and cattle ownership; marital conflicts; questions of inheritance rights; loans; and accusations of petty theft.[22] When *gacaca* addressed minor criminal manners, these were resolved not by imprisonment but by compensation from the perpetrator to the victim, often in the form of livestock.[23] Such fines were imposed not on the individual perpetrator but upon his entire family.[24] Jurisdiction over serious crimes was reserved for the *mwami,* or king.[25]

In Rwanda, the goal of the elders in mediating disputes was the restoration of social order through reconciliation.[26] Restorative agreements were reached during elder-led discussions that involved all affected parties, including not only victims and perpetrators but village residents at large, with the notable exception that women were excluded from proceedings.[27] Given that *gacaca* was driven by the need to restore communal harmony and reintegrate the person who threatened that order, outcomes often did not determine guilt or apply state law in a consistent manner.[28]

However, when Rwanda became a Belgian colony in 1923, it adopted Belgium's Penal Code, Criminal Procedure Code, Civil Procedure Code and other statutes[29], as well as its comprehensive court structure, which included nearly 150 *tribunaux de canton* (local courts).[30] As a result of the widespread imposition of civil law, *gacaca* all but "fell into obscurity."[31] There were isolated reports of local officials reviving *gacaca* in the immediate post-genocide era as a tool for addressing property disputes between returnees and those who had remained behind and for arresting genocide suspects.[32] However, there is no evidence that the system resurfaced organically or was consistently applied anywhere in the country.

East Timor: Lisan

Unlike Rwanda, traditional legal practice has a long and sustained history in East Timor. The system of *lisan* resolves criminal and civil disputes through a process of

elder-facilitated public consultation between parties.[33] In the absence of an effective or impartial Portuguese or Indonesian judicial system, *lisan* remained East Timor's dispute resolution mechanism of choice throughout its various occupations.[34] Today, over 80 percent of East Timorese actively adhere to *lisan*.[35]

During *lisan* proceedings, an aggrieved party approaches the *lianain* (elders), in search of a resolution. The leaders then convene a meeting of the victim, the alleged perpetrator, the families of the two parties and the greater community. The meeting begins with the unrolling of a *biti* (mat) which will not be rolled up until an agreement is reached and the proceedings concluded. For this reason, *lisan* proceedings are often referred to as *nahe biti boot* (spreading the large mat).[36]

Although the elders are charged with both facilitative and adjudicative roles, village ancestors are believed to be present during the proceedings and it is their presence that makes any agreement binding upon the parties. After each side presents his case, the elders and community can question them. The parties and elders discuss possible penalties which may include ostracization from communal activities or compensation to the victim. Should the perpetrator fail to pay such compensation, that responsibility falls to his family. Once an agreement has been reached, the parties will share a meal, tea or betel nut in a public gesture of friendship and reconciliation.[37]

The structure of *lisan* proceedings suggests that, while the individual parties remain the focus of attention, the transgression is seen to affect their families and the community at large. Thus, as is consistent with many customary legal traditions, reconciliation of not only the parties but restoration of the entire communal order are key goals of *lisan* proceedings.[38]

Case Studies

Rwanda

Present-day Rwanda wrestles with the mantle of its colonial history and, more prominently, that of its 1994 genocide. There is much dispute over Rwanda's political and social history.[39] However, a few key facts are necessary to contextualize the current situation. As early as 1,000 AD, Hutu horticulturalists along with the minority Twa, who were drawn to forested areas, began settling the territory now known as Rwanda.[40] In the 15th century, the pastoral Tutsi migrated towards Rwanda from the north,[41] eventually conquering the Hutu due to their superior arms and organization.[42] After their conquest of the Hutu, the Tutsi reigned over the territory despite the fact that they constituted only 10 to 14 percent of the population.[43] Notwithstanding the subordination of the majority Hutu, this period was marked by relatively peaceful coexistence and even integration, including a common language and religion.[44]

In 1923 Belgium assumed administrative authority over what is now Rwanda and Burundi under the League of Nations.[45] In carrying out its mandate over Rwanda, Belgium instituted a number of practices which have been credited with laying the groundwork for future ethnic conflict in the country.[46] Most notably, the Belgian authorities replaced Hutu chiefs with Tutsi,[47] reserved key administrative and military jobs for Tutsi[48] and instituted an "identity card" scheme which "rigidly divided [Rwandans] into categories,"[49] a division which would have catastrophic consequences long after the colonizers left.

In the 1950s, Belgium shifted its bias toward the Hutu which set in motion a series of political and ethnic conflicts, including the massacre and forced migration of Tutsi.[50] Pro-Hutu parties gained so much power in the 1960 elections organized by Belgium that when Rwanda was declared independent in 1962, an authoritarian Hutu regime began to reign over a divided nation.[51] At this time Rwanda retained its colonial judicial system even though it was largely seen as corrupt and politically vulnerable.[52]

In response to incursions by the Tutsi-dominated Rwandese Popular Front (RPF) from Uganda in the early 1990s, the Hutu regime escalated its racist rhetoric calling for the outright subordination of Tutsi remaining in Rwanda.[53] Events coalesced in April 1994 when the plane of Rwandan President Juvenal Habyarima was shot from the sky en route from a peace conference in Arusha, Tanzania where he had negotiated an agreement with the RPF.[54] The assassination sparked three months of genocide which resulted in the deaths of approximately 800,000 Tutsi and as many as 30,000 Hutu.[55]

After the RPF defeated Hutu military and *interhamwe* (armed militia[56]) forces and declared a ceasefire in July 1994, it established a coalition government with moderate Hutu political leaders.[57] Hutu Pasteur Bizimungu was named president and Tutsi Paul Kagame vice-president.[58] The parties agreed to work toward realizing the Arusha Peace Accords by building a multi-party state and abolishing ethnic classifications.[59] However, since that time, the RPF has devolved into an autocratic leadership presiding over a one-party state, intent on using fear, including the threat of labeling dissenters as *génocidaires* (ethnic divisionists), to quash any opposition, particularly from the Hutu community.[60]

Soon after the signing of the Arusha Accords and the conclusion of active hostilities, and at Rwanda's request, the UN Security Council, established the International Criminal Tribunal for Rwanda (ICTR), an international *ad hoc* chamber to try suspects charged with orchestrating the genocide.[61] The Statute of the ICTR grants the international tribunal concurrent jurisdiction with Rwanda's national courts,[62] though the ICTR retains primacy.[63] In practice, the ICTR has restricted its prosecution to those who abused prominent leadership positions to advance the course of the genocide such as government administrators, and political and military leaders.[64] This approach has left Rwanda to resolve the bulk of the genocide caseload while simultaneously reforming its legal system and rebuilding its judiciary.

One of the new Rwandan National Assembly's first judicially-related tasks was to pass the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity in 1996.[65] This law categorized the crimes committed in 1994 as follows: Category 1 crimes were planning and leading genocide, notorious killing, and sexual torture; Category 2 crimes included intentional homicide or attempted homicide; Category 3 was reserved for manslaughter and serious bodily assault; and Category 4 for property crimes.[66] The law contained a plea provision which was intended to encourage confessions and expedite the processing of cases.[67] However, few accused have made use of plea bargains and genocide cases are slowly grinding their way through Rwanda's nascent justice system, despite the creation of genocide courts within the national court system.[68]

In response to the backlog of genocide-related cases in the nation's formal court system, the Rwandan government sought to revive *gacaca*.[69] Scholars from inside the country rejected this plan from the outset, declaring that the traditional system was historically not competent to hear murder cases, let alone genocide.[70] Nonetheless, the government forged ahead with its intention to revive *gacaca* as a participatory mode of justice that would expose the truth about the genocide, expedite genocide trials, reform Rwanda's culture of impunity and encourage reconciliation.[71]

In 2001, the government operationalized its aspirations for reconciliation in the Gacaca Law which granted the traditional courts jurisdiction over all but Category 1 crimes.[72] *Gacaca* proceedings now bear little resemblance to the traditional communal gatherings on the country's hillsides but rather entail a complex web of state, provincial and village relationships.[73] Moreover, the new proceedings differ substantively and procedurally from their traditional namesakes in that modern-day *gacaca* courts now hear cases of serious crimes and are presided over by elected judges, including women.[74]

That same year, approximately 11,000 *gacaca* tribunals were established throughout the country and staffed by over 250,000 judges—"people of integrity" who were are elected by their communities.[75] Those communities, in turn serve as "general assemblies" by offering testimony and argument.[76] *Gacaca* courts are divided into four levels with those at the cell level[77] investigating facts, classifying the accused and hearing Category 4 cases. Category 2 crimes and category 3 appeals are heard by *gacaca* tribunals at the district levels while category 3 crimes and category 2 appeals are heard by the sector and provincial *gacaca* courts respectively.[78] Nineteen judges hear every case before a general assembly of 50 to 60 community members.[79]

Gacaca trials are preceded by lengthy pre-trial phases during which the elected judges compile a local history of the genocide, including the names of victims and perpetrators and the crimes committed. These details are derived from oral testimony and state prosecution files. The judges use this information to categorize offenses and then send the respondent files to the appropriate jurisdictions.[80]

At *gacaca* sessions, defendants are invited before the general assembly to hear the charges against them as well as the record of their confessions, at which time they can further respond to the allegations against them. After witnesses for the defendant appear and are questioned, the plaintiff describes the offense and the defendant is given an opportunity to respond.[81] However, questioning rarely extends to the motivation behind the violence, and instead focuses on factual details.[82] After the minutes of the hearing are recorded and read out for approval, the parties and judges sign the transcript.[83] The hearing is then closed and the parties are notified as to when they can return for judgment.[84] The parties are summoned at a later date for judgment[85] which, once it is rendered, is signed by those parties present.[86]

Sentences are prescribed by the Gacaca Law.[87] Category 2 perpetrators who do not confess receive sentences of 25 years to life in prison.[88] Perpetrators who choose to confess receive reduced sentences, half of which can be commuted into community service.[89] Category 3 sentences follow the same pattern with maximum sentences of five years that can be reduced to one year of community service.[90] Category 4 perpetrators are not sentenced by the *gacaca* but instead ordered to pay compensation to the victims.[91]

Preliminary Findings

While the Rwandan government predicated its employment of *gacaca* upon hopes that it would expeditiously dispense justice and reconciliation, early results show little evidence of success in these areas. Empirical evidence demonstrates that *gacaca* is certainly trying to fulfill its mandate of reducing the genocide caseload. By the middle of 2005, pre-trial proceedings had netted 63,447 names of accused, with the bulk being Category 2 defendants.[92] During their first three months of trials, *gacaca* tribunals issued 1,451 judgments in 1,568 cases.[93] However, the quality of those judgments has been deemed suspect on the grounds that the speed with which they were rendered suggests that the cases, which concerned those who had confessed, did not involve many challenges.[94]

Since the initial flood of activity, however, participation in the public trials has slowed to a trickle, with many sessions being delayed or cancelled for failure to meet community quorums.[95] In response, some *gacaca* judges and local leaders have coerced people into observation and participation.[96] The amended *Gacaca* Law went so far as to make attendance at proceedings compulsory for all Rwandans.[97]

There has also been a rise of suicides among those named as *génocidaires* in *gacaca* proceedings. Between March and December 2005, government officials reported that 69 suspects killed themselves and 44 attempted suicide. It is unclear as yet whether the motivation for these deaths lies in guilt or shame. However, at least one of the accused maintained his innocence throughout the proceedings and eventually threw himself into a crocodile-invested river.[98]

Perhaps the most disturbing numbers regarding *gacaca* concern retribution. There have been reported assassinations of victims and witnesses in several provinces.[99] Most notoriously, three survivors in Kaduha District, Gikongoro province were killed in 2003 prior to their *gacaca* testimony. Widows of genocide victims in that same province found written threats to those intending to testify in local *gacaca* proceedings.[100] Two years later 800,000 Hutu fled to Burundi, partly out of fear that they would be subject to *gacaca*-fueled revenge.[101]

Despite its ambitions of dispensing justice and promoting reconciliation, *gacaca* proceedings have sounded alarms in the human rights community. Concerns have arisen surrounding *gacacas*' lack of procedural fairness, including the lack of defense counsel and use of a unified judge/prosecutor.[102] Perhaps unsurprising, but no less disturbing, is the discriminatory nature of the system. The amended Gacaca Law removed war crimes from the informal tribunals' jurisdiction.[103] RPF soldiers were reportedly responsible for the deaths of as many as 45,000 Hutus toward the end of the genocide;[104] but because these killings have been classified as war crimes and not genocide, they are not subject to *gacaca* jurisdiction but rather to that of military tribunals.[105] By 2002, however, only nine such cases had been heard in military courts resulting in three acquittals and 12 one- to two-year sentences.[106] In at least one case it was reported that when a *gacaca* participant raised an issue of RPF abuse, he was told not to bring war crimes into the proceedings.[107] Thus, *gacaca,* like Rwanda's criminal and military courts, is doing little to inspire confidence among Hutu, or even Tutsi, that transitional justice will result in accountability and reparations for all.[108]

Feedback from participants has presented a similarly complicated picture. Studies have shown that less than half of all Rwandans are interested in participating

in *gacaca*.[109] This low approval rating casts the entire concept of legitimate customary practice in doubt. Not surprisingly, satisfaction among those who do participate varies greatly depending on their position. While defendants feel that coexistence post-*gacaca* is possible, some survivors dismiss the very idea.[110] For instance, during a *gacaca* proceeding in the village of Ntongwe, resident Aissa Mukabazimya accused her neighbor, Abraham Rwamfizi, of killing her husband. After the hearing, Ms. Mukabawimya said, "The worst part is that I see him every day. If I could punish him, I would."[111]

Many defendants claim that they have been wrongly accused during *gacaca* trials either for political ends[112] or out of victims' sense of frustration that justice is not being served in the criminal system.[113] Mr. Rwamfizi, for example, claimed that he was wrongly accused and that he only confessed as a result of pressure from *gacaca* authorities.[114] Nevertheless, he and many other defendants who have participated in *gacaca* proceedings report feelings of reprieve after telling their stories. "I am fortunate to be here to explain myself," Mr. Rwamfizi said. "Once what's stuck in your throat passes, it's a relief. If we speak, it will end one day."[115]

For their part, victims remain unsatisfied by *gacaca*. They have expressed shock that confessions are made with little emotion from the perpetrator or spectators, and that they sound more like a recitation of government policy than personal remorse.[116] For example, in one hearing, after a woman told of being raped every evening by her captor who spent the day killing, spectators observed that "nobody gasped."[117] Many victims also report disappointment that the proceedings have not delivered the societal restoration that was envisaged. "Someone who has hurt you returns and you must hold your tongue," said Jean-Paul Shyirakera, who now lives next to his brother's killer in the village of Ntongwe. "We were told that they would approach us in peace in their own time but so far not one has … darkened my door!"[118] Those victims who do forgive appear to do so out of practicality as opposed to reconciliation. "We must get along with them. They outnumber us!" said one Ntongwe survivor.[119]

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Lastly, victims are also disappointed by the punishment bestowed by *gacaca* courts. Many feel that sentences of community service belittle their own suffering and that of their loved ones who were killed during the genocide.[120]

Thus, based on the evidence above, it seems that, with the exception of having quickly moved a large number of cases through an adjudicative mechanism, *gacaca* is failing to fulfill the expectations set out for it by the government of Rwanda.

East Timor

Like Rwanda, East Timor is both a post-colonial and post-conflict state. Portuguese traders settled on the Eastern portion of the small Oceanic island as early as 1566.[121]

Nearly 300 years later, the Portuguese and Dutch colonial administrations divided the entire island into present-day East Timor and Indonesia respectively.[122] During the colonial administration, Portugal had little impact on local judicial systems beyond taxation, trade, the prosecution of serious crimes (i.e. murder) and the prevention of war between local kingdoms.[123] Thus, the colonial and traditional legal systems co-existed during this time.[124]

After the 1974 ousting of Portugal's dictator, Marcello Caetano, the colonists released East Timor.[125] However, rivalry between the two major political parties, The Revolutionary Front for an Independent East Timor (Fretilin) and Timorese Democratic Union (UDT), weakened the newly independent state.[126] After UDT forces fled to Indonesia and Fretilin declared independence, Indonesia invaded its neighbor on December 5, 1975.[127] Unlike their colonial predecessors, the Indonesians subjected East Timor to Indonesian law and relegated local justice systems to civil affairs.[128] The Indonesian judicial system was widely viewed by East Timorese with suspicion on grounds of alleged corruption.[129] The ensuing 24 years of brutal occupation cost over 60,000 East Timorese their lives[130] and many thousands more were raped, tortured and forced to migrate.[131]

Only Indonesia's own economic downturn and the high cost of occupation prompted it to abandon its annexation campaign in 1999.[132] Yet even withdrawal had its price. As Indonesia left East Timor, pro-integration sympathizers conducted a "scorched earth campaign" [133] in which nearly 70 percent of all buildings were destroyed and 75 percent of the population was driven into exile. [134]

Such were the conditions in which the United Nations Transitional Administration in East Timor (UNTAET) found itself when it arrived on the island in late 1999. Created by UN Security Council Resolution 1272 (1999) UNTAET was created to fill the governance gap as East Timor created its own systems and institutions. Therefore, UNTAET was given "overall responsibility for the administration of East Timor and . . . empowered to exercise all legislative and executive authority, including the administration of justice…."[135] The UN Secretary General also appointed a transitional administrator with the power to enact new laws as well as amend, suspend or repeal those already in existence.[136]

Unlike Rwanda, East Timor has not been assigned an ad hoc international tribunal to prosecute crimes committed during the "scorched earth campaign." Rather, in 2000, UNTAET passed Regulation 2000/11 granting the Court of Appeal in Dili exclusive jurisdiction over a range of crimes including "crimes against humanity" and "genocide"[137] committed between January 1 and October 25, 1999.[138] The regulation also allowed for the creation of "special panels" within the Court of Appeals to hear such cases.[139] In addition, UNTAET established an Office of the General Prosecutor (OGP) and Special Crimes Unit (SCU) to investigate and prosecute serious crimes committed between 1974 and 1999.[140] While additional mechanisms for reconciliation were considered, East Timorese political leaders could not reach a consensus on what shape such mechanisms should take.[141]

The efforts of UNTAET and the national political leaders met with resistance from East Timorese elites when it came to the particularly sensitive issue of repatriating refugees returning from West Timor. Many of the estimated 100,000 refugees driven from East Timor in 1999 were believed to have participated in militia

activities that same year, colluded with Indonesian security forces in the early 1970s, or abetted oppressive UDT activities.[142] There was also the matter of those who had publicly aligned with pro-autonomy or Indonesian forces in order to clandestinely aid pro-independence forces.[143] An open reintegration process would afford such suspects the opportunity to explain their activities to communities marred by their public betrayals.[144]

Some villages did not wait for the interim authority or larger international community to provide a suitable reconciliation framework. While UNTAET was identifying governing law and drafting resolutions, local villagers were confronting the need to reconcile former militia members and refugees immediately upon their return.[145] In the face of these immediate challenges, many rural East Timorese turned to *lisan*. For example, in one district, returnees were questioned by local chiefs to assess their militia involvement and determine their eligibility for reintegration.[146] Perhaps due to the customary system's focus on restoration, all but three returnees in the district were allowed directly back to their villages. The three outstanding cases were forwarded to Dili for formal processing by the UN High Commissioner for Refugees.[147]

Other villages, however, did not present such models of reintegration. Given that East Timorese villages are small, awareness of who was allegedly responsible for which violations poisoned relations between those who stayed and those who returned.[148] This tension led to early reports of retributive violence and hostility toward pro-integration refugees.[149]

Local leaders voiced frustration that such grassroots dynamics were not being considered by international actors and the national political elite. They contended that the transitional justice process, which included discussions of reconciliation, was centralized in Dili, excluding people at the grassroots level.[150] They further argued that centralization and exclusion reflected the political elites' ignorance of local tensions.[151]

In June 2000, the National Council for Timorese Resistance (CNRT), UNTAET's local governing partner, announced that it would investigate the possibility of establishing a Commission for Reception and National Reconciliation.[152] A commission proposal was later developed that addressed not only return and reception but also accountability in such a way as to end acts of retribution against former militia members and collaborators.[153] After the proposal was endorsed by the CNRT, a Steering Committee of CNRT members, non-governmental organization (NGO) representatives, and international consultants took the matter under consideration.[154]

The Steering Committee engaged in six months of drafting and consultation with different political and human rights groups from the village to regional level.[155] In the course of its research, the committee learned that most East Timorese wanted formal prosecution of the perpetrators of "serious crimes" such as murder and rape.[156] However, those interviewed also expressed a desire for an informal *lisan*-based mechanism to reconcile with compatriots who had committed "less serious" politically motivated crimes such as property destruction and assault.[157] While interviewees were clear that any reconciliation commission should be based in *lisan,* they also indicated that the commission should be created by national legislation and that procedures should be consistent with international human rights norms.[158]

In light of popular input, the limited capacity of the nascent national legal system, the need for proceedings to take place close to the affected communities and the relevance of traditional practice to the reconciliation process, the Steering Committee drafted legislation creating a reconciliation commission that would meet public demands.[159] East Timor's cabinet passed the committee's proposed legislation which was soon promulgated in UNTAET Regulation 2001/10 establishing a Commission for Reception, Truth and Reconciliation in East Timor (CAVR).[160]

The CAVR was comprised of East Timorese and charged with investigating human rights violations "in the context of the *political conflicts in East Timor* between 25 April 1974 and 25 October 1999."[161] The commission had a number of statutory objectives including "establishing the truth regarding past *human rights violations*;" "assisting in restoring the human dignity of *victims*;" "promoting reconciliation;" and "supporting the reception and reintegration of individuals who have caused harm to their communities through the commission of minor criminal offences and other harmful acts through the facilitation of community based mechanisms for reconciliation." [162]

The commission was governed by five to seven national commissioners of "high moral character, impartiality, and integrity . . . competent to deal with the issues under the present Regulation, [without] a high political profile, and [with] a demonstrated commitment to human rights principles."[163] At least 30 percent of the national commissioners were required to be women.[164] A selection panel of representatives from political parties, NGOs, and UNTAET would recommend commissioners for appointment by the transitional administrator.[165] A second tier of commissioners, at the regional level, was also authorized and subjected to the same provisions outlined for national commissioners.[166] Among the regional commissioners' duties was the convention of local panels to hear individual cases.[167]

By the time CAVR began operations in the various regions of East Timor, nearly half of the refugees from West Timor had returned to their villages of origin.[168] Commission staffers were therefore divided into teams that worked in 65 sub-districts throughout the island to educate communities about the upcoming hearings and identify potential cases. The teams first engaged in information dissemination campaigns with groups and individuals in each sub-district to encourage a sense of ownership over the process within the communities.[169] They then encouraged potential deponents to come forward, often by educating them about the legal consequences of testimony such as legal closure.[170] The fact that deponents would not be prosecuted for their less serious crimes once they had participated in CAVR encouraged them to participate in the process.[171]

CAVR proceedings were initiated by voluntary statements from alleged perpetrators that detailed the relevant acts, admitted responsibility for such acts, and requested participation in a Community Reconciliation Procedure (CRP).[172] Given that the OGP and SCU retained exclusive prosecutorial authority over serious crimes,[173] deponent statements were subject to state review if they contained information suggestive of serious crimes.[174] If the OGP determined that the activities described in the statement constituted serious crimes as defined by governing regulations, it informed the regional commission that a CRP could not take place and jurisdiction would be exercised by the SCU.[175] Thus, participants in CAVR proceedings did not

enjoy amnesty akin to those involved in the South African Truth and Reconciliation Commission. If the OGP determined that the crimes were not serious, no action was taken by the OGP and local CRPs were allowed to begin.[176]

CRPs were the component of CAVR that incorporated elements of *lisan*. In accordance with Timorese custom, a typical CRP involved not only the deponent and the victim but members of the greater community.[177] The victim began the proceedings by recounting his injury. This was followed by a statement from the deponent and the solicitation of any relevant information from community members. All statements were heard by a panel appointed by regional commissioners. Panelists often included local community leaders such as church and NGO representatives and at least one woman.[178] *Lianain* did not usually serve as panelists but rather as distinct "overseers" of the proceedings, endorsing the process and resultant agreement.[179]

CRPs were concluded by the drafting of Community Reconciliation Agreements (CRA). Panelists could choose from among community service, reparation, public apology, and/or some other act of contrition as possible sentences.[180] If the deponent agreed to the terms of the sentence, the panel wrote the terms into a CRA and submitted the document to the relevant district court to be registered as an order of the court.[181] In a significant departure from traditional *lisan* however, CRAs did not require the consent of the victim.[182] If the deponent failed to fulfill the terms of the order, the matter was referred to the OGP.[183] However, because sentences were often "short-term," such as labor or compensation in the form of money, jewelry, or pigs, there were few cases of non-compliance and once reparations were made, the village moved past the matter.[184]

In addition to the general format of CRPs and the role of *lianain,* CRPs included other elements of *lisan*. For instance, at the start of most *lisan* proceedings a *biti* was rolled out. Once a CRA had been reached and approved by the panel, the *biti* was rolled up to signify that the proceedings had been successfully concluded.[185] The public admission of guilt was also a hallmark of *lisan.*[186] Deponents were also required to take oaths that they would not err again.[187] To breach such an oath would yield harmful spiritual repercussions not only upon the deponent but upon his family as well.[188]

Preliminary Findings

While CAVR proceedings concluded only four years ago, a significant amount of evaluation has been conducted since then. Results, while mixed, portray relatively positive results with respect to the use of *lisan.*

There is some empirical evidence to suggest that CAVR and *lisan* were successful as reintegration tools in East Timor. First, the program exceeded its target caseload of 1,000 reintegrations by concluding 1,371 cases.[189] Second, in only one reported instance did a deponent fail to fulfill his CRA.[190] More importantly, CAVR seems to have fulfilled its mission of successfully reintegrating its participants because predicted revenge attacks on former militia members have not yet been reported.[191]

However, "success" in matters as sensitive and personal as reconciliation and justice can hardly be measured by sheer numbers. In reality, the qualitative research collected thus far paints a less optimistic picture of the CRP program. While the CAVR reported receiving feedback from participants that CRPs had contributed to

the restoration of peace in their villages,[192] additional evidence suggests that participants' reflections on their experiences are mixed at best.

Surveys of participants indicate that deponents have been largely satisfied with CRPs. Many have seen the proceedings as a welcome opportunity to explain their involvement with the militia and "clear their names." However, while some deponents indicated that they personally felt "lighter" as a result of their participation, others reported that community members continued to view them with suspicion.[193] Many also felt it unfair that they were subject to hearings while militia leaders, by virtue of remaining in West Timor and beyond the reach of East Timorese transitional justice mechanisms, had not yet been prosecuted for their crimes.[194] "If we only have the CAVR we don't yet have justice," one deponent said.[195]

Victims similarly expressed inconsistent sentiments toward the CAVR. Such differences correlate to the degree of injury sustained.[196] For example, among victims of purely "less serious crimes," the CRP was reported as a positive experience, a means by which to repair communal and even familial rifts.[197] However, many victims suffered from multiple crimes. In such cases, while CRPs may have resolved the matter of their homes being destroyed, the fact that those who had killed their family members had not yet been prosecuted clouded their overall impression of the CAVR and East Timorese transitional justice in general.[198] "For these respondents, it was difficult to separate the CRP hearing from the broader questions of serious crimes, which was, by far, the overwhelming priority. Reconciliation was not viewed in isolation but represented a 'stepping stone' toward this greater goal."[199]

Moreover, the voluntary nature of the CAVR meant that not all alleged perpetrators came forward. This left victims feeling that the justice and reconciliation processes remained incomplete.[200] Some victims stated that the limited reach of the CAVR caused them to feel as if the process had "opened up old wounds."[201] The inability of the CAVR to affect the capture of militia leaders, many of whom remained in West Timor, also frustrated victims who believed that they had recounted their injuries in public while their perpetrators enjoyed impunity.[202] Such victims spoke of feeling *fuan kanek nafatin* ("forever broken-hearted") for having revisited painful memories without redress.[203]

One source of victims' discontent with CRPs rests with the design of the CAVR itself. While truth commissions are often seen as victim-centered transitional justice mechanisms,[204] Regulation 2001/10 is decidedly silent on victims. In addition to placing communities at the center of CRPs, the regulation does not require victim consent over CRAs or even allow victims to initiate proceedings.[205] In practice, unprepared victims were often called to proceedings that had been initiated by deponents.[206] Such experiences cast doubt on the accuracy of CAVR's adoption of *lisan*. "The views expressed by victims…are a reminder that sacrificing individual needs for the 'collective good' is not necessarily an 'indigenous' East Timorese concept."[207]

There were structural elements of the CRPs, however, that elicited common sentiments among both victims and deponents. For example, the combination of the formal and traditional legal processes carried significance for both parties. Some deponents, for instance, reported feeling more secure once they had received their CRAs from District Court as an insurance policy against future retribution though others expressed skepticism that state authorities would be able to guard against such occurrences.[208]

With regard to CAVR's relationship to *lisan,* one deponent said that the support of the state system allowed him to fulfill his traditional obligations. This deponent indicated that he and his family had not held a *nahe biti boot* because they lacked funds. CAVR provided him with the necessary funds to hold the hearing.[209] Thus, unlike the case of Rwanda's application of *gacaca,* East Timor's experience with *lisan* met with some measure of success in fulfilling its mandate of fostering local environments conducive to post-conflict reintegration.

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Comparative Analysis of Gacaca and CAVR

While *gacaca* and CAVR each present different means by which customary practice can be utilized in the transitional justice context, a comparison of the two experiences provides a useful basis from which to draw lessons for future post-conflict reconciliation and accountability efforts.

Similarities

Both *gacaca* and CAVR have left participants unsatisfied in terms of process and outcome. While there are variations in the levels of dissatisfaction between victims and perpetrators in each of the mechanisms, there are similarities in the ways that both fail to fulfill participants' expectations. The analysis above indicates that defendants in both Rwanda and East Timor are more satisfied with their restorative experiences than victims. Therefore, a more detailed assessment of similar victim grievances with both systems is instructive.

Both *gacaca* and CAVR victims express dissatisfaction with the quality of defendant participation. While Rwandan genocide victims are dismayed by the lack of remorse offered by their alleged attackers, East Timorese are similarly disappointed by the lack of information regarding the fates of their loved ones and those who were responsible for their suffering. In Rwanda the lack of remorse has been attributed to culture.[210] By contrast, East Timorese victims' yearning for information stems from the lack of amnesty: CAVR deponents refrained from revealing the full extent of their knowledge not out of cultural preferences but rather out of fear of prosecution for more serious crimes by the OGP. Regardless of the root causes, neither *gacaca* nor CAVR victims feel that justice has been done.

Differences

There are many differences in the design, implementation and results of *gacaca* and CAVR. However, the lessons learned from each experience offer important guidance for the future use of customary law in transitional justice schemes.

Perhaps the central difference between the Rwandan and East Timorese experiments with customary transitional justice is the legacy of the custom in question. When East Timorese transitional justice designers searched for a means to promote reintegration at the grassroots level, they did not have far to look. *Lisan* had enjoyed

hundreds of years of legitimate application throughout the island and was even being used by villages to facilitate the earliest waves of returnees prior to any government coordination. In contrast, Rwanda sought to impose a manufactured proxy of what *gacaca* resembled nearly a century ago, but which had barely been practiced in the country since. As a result, *gacaca* did not enjoy the same legitimacy among its target constituency that *lisan* did in East Timor. As the results indicate, this had consequences for participation and satisfaction among the participants in both processes.

In addition, Rwanda extended the jurisdiction of customary processes over crimes it had never previously addressed. As explained earlier, in traditional Rwandan society, serious crimes were heard by the king, not by peoples' courts. Yet in 1994—admittedly, partly as a result of pressure on its overburdened judicial system,—the government applied customary processes not only to property crimes but to murder, an offense over which *gacaca* courts traditionally lacked authority.

In East Timor, by contrast, CAVR restricted the use of *lisan* to less serious crimes such as looting, assault and political activity as opposed to serious crimes such as murder and rape. The drafters of Regulation 2001/10 ensured clear lines between the two categories by requiring deponent confessions to be screened by the OGP for an assessment of the crime. As a result, CAVR applied *lisan* in a manner consistent with tradition.

The CAVR drafters were able to accurately incorporate *lisan* into CAVR's design because UNTAET, East Timorese political leaders, and international actors engaged in an extensive participatory consultative process that empowered future CAVR actors to express what they would need in order to feel that reintegration had been successful. For example, it was during these meetings that Regulation 2001/10 framers learned that people wanted both custom and prosecution to be applied during the transition.

In stark contrast, given the political conditions in Rwanda and the top-down method of implementing *gacaca*, it seems that *gacaca* is yet another political tool that the RPF is using to incite fear and quell dissent among the population rather than a genuine attempt at justice and reconciliation. The RPF did not consult with its constituency before implementing the Gacaca Law. Thus, as the evidence above reveals, CAVR has exceeded its participation targets while Rwandan government authorities have had to compel *gacaca* involvement.

Another key difference lies in the use of *gacaca* and CAVR. While both mechanisms were employed to alleviate pressure upon young and under-resourced court systems, *gacaca* soon evolved into a surrogate for state justice in Rwanda whereas CAVR remained part of East Timor's multi-dimensional transitional justice package. The evidence above shows that *gacaca* all but replaced state prosecutions after the 2003 provisional release of 15,000 prisoners who had already served their maximum sentences.[211] Thus, local tribunals became Rwandans' only source of justice after mass atrocity, a challenge which participant feedback suggests it was unprepared to meet.

On the other hand, CAVR operated in concert with the SCU and Dili District Courts. By limiting its jurisdiction to less serious crimes and providing recourse to the OGP for serious crimes, CAVR formed part of an integrated post-conflict justice package. In fact, had it not been for the limited reach and impact of the SCU and Dili

courts, CAVR participants might have been more satisfied as a result of prosecution of the most notorious offenders.

Participation was likely low in Rwanda because it was imposed in a "top-down fashion by a highly centralized and authoritarian regime."[212] The very structure of the proceedings has also dissuaded parties from both major ethnic groups from participating in *gacaca* trials out of fear.[213] While Hutu are afraid that the pro-Tutsi design of the proceedings will subject them to arbitrary labeling as *génocidaires,* Tutsi fear that raising past injuries will result in retaliatory acts from their Hutu neighbors:[214] two results that move *gacaca* far from any restorative justice ends.

Implications of Comparative Analysis: Recommendations

The preceding comparative analysis of Rwanda and East Timor's application of customary law in the transitional justice setting illustrates the strengths and weaknesses of such an approach. This analysis leads to the extrapolation of several recommendations that other transitional societies should heed before incorporating tradition into transition.

- Drafters of all transitional justice mechanisms should adhere to a broad consultative process to gather the opinions and desires of as many segments of the population as possible. Such processes can be used to discern the nature and legitimacy of local customary law and gauge communities' interest in its application to transitional justice.
- Custom-influenced transitional justice institutions should be but one component of a multi-dimensional package that includes a combination of national prosecutions, reparations, vetting, and where applicable, international involvement via a hybrid court or international criminal structure such as an *ad hoc* tribunal or the International Criminal Court.

Custom-influenced transitional justice institutions should be but one component of a multi-dimensional package….

- Given the variety of customary practices being used in the world today, they should only be incorporated into transitional justice plans on a case-by-case basis. As we have seen in Rwanda, the inaccurate integration of custom can result in a lack of legitimacy and retaliatory backlash.
- Customary practice should assume modest goals within an overall transitional justice agenda. As Rwanda's experience with post-genocide *gacaca* suggests, if custom has not traditionally addressed serious crimes, it should not undertake to adjudicate mass atrocity. Rather, custom should be applied to less serious offenses such as property destruction and minor assault.
- Additional research should be conducted in Rwanda and East Timor regarding the impact of *gacaca* and *lisan* on communal and individual restoration. Longitudinal studies that track communities which have and have not participated in these proceedings can help gauge custom's relative impact.

- Regardless of the extent to which transitional justice mechanisms employ customary law, they should adhere to internationally-recognized standards of human rights. Retributive killing and tribunal approval of gender-based violence are just two common traditional practices that should not be permitted in the transitional justice setting. Processes should also be designed to maximize the participation and protection of women and children in particular.

Conclusion

Sadly, it seems unlikely that the world will soon see an end to violent conflict. One day Sudan and the international community will craft a response to bring justice to the people of Darfur. Similar opportunities are on the horizon for the Democratic Republic of Congo and Liberia. These countries would do well to heed the hopeful and cautionary tales of East Timor and Rwanda when crafting their transitional justice responses.

Conflict arises from a complex set of interrelated circumstances that requires a multi-faceted response. While the recent decades have witnessed the birth of several interesting developments such as hybrid courts, national and international legal actors should consider customary legal traditions for crafting relevant, immediate and restorative responses to less serious crimes committed in the course of large-scale conflicts.

Transitional justice actors should bear in mind that one single mechanism is unlikely to satisfy victims' sense of truth and justice, and that multi-faceted approaches to transitional justice are warranted in post-conflict societies.[215] Indeed, responses from East Timor in particular suggest that, had the prosecutorial mechanisms been strengthened, victims may have felt more satisfied by their experience with customary justice. However, the empirical evidence showing low rates of reprisals among East Timorese neighbors who have engaged in an accurate and respectful adaptation of customary law, warrants closer investigation of traditional justice as transitional justice. For, notwithstanding the human rights catastrophe that has resulted from Rwanda's distorted application of *gacaca* for political ends, the CAVR experience demonstrates that, with creativity and respectful oversight, customary practice can play a useful role in a post-conflict state's transitional justice package.

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