

REACHING BACK TO MOVE FORWARD: USING ADVERSE POSSESSION TO RESOLVE LAND CONFLICTS IN TIMOR-LESTE

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Abstract: Like many post-conflict countries, Timor-Leste grapples with land conflicts that resulted from successive waves of property dispossession. Colonized by the Portuguese, invaded and occupied by the Indonesians, and briefly administered by the United Nations, Timor-Leste's history has produced disjointed patterns of land tenure. These land tenure systems have given rise to five separate categories of land claimants, each of whom often have conflicting interests in property. While the newly independent country has taken steps to resolve conflicting land claims through legislation, existing law does not address the longstanding tensions underlying these conflicts, making it difficult for the courts to reach durable solutions for property disputants. Applying the doctrine of adverse possession would help resolve these disputes. Relying on this doctrine would reduce strain on the judicial system by delineating a clear standard for determining which claimants have lawful rights to land. Furthermore, reliance on this doctrine would positively impact the economic and social stability of this developing country, helping to create an environment that fosters further economic growth. While the doctrine of adverse possession would not wholly eradicate land dispute issues in Timor-Leste, it has the potential to significantly improve the current situation.*

I. INTRODUCTION

A brief walk around Lospalos, the capital of Timor-Leste's easternmost district, introduces even the casual observer to the dysfunction of the country's property regime.¹ Several stores on the town's main street are vacant. One of these vacant stores is ideally situated—a corner property at the entrance of town located across from a well-attended Catholic Church—yet its stoop serves only as an impromptu market where local women lay out fresh vegetables on old rice sacks. When asked why no one operates the store itself, the locals explain that the owners have gone to

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* At the time of publication, the Ministry of Justice released a proposed land law. The proposed law is available at <http://www.mj.gov.tl/pt/index.php?p=56>. It favors title of long-term peaceful possessors of land over Portuguese or Indonesian titleholders. Daniel Fitzpatrick, *Memorandum of Advice on a Transitional Land Law for Timor Leste* 1 (2008), http://www.mj.gov.tl/files/Memorandum%20of%20Advice%20on%20Transitional%20Land%20Law%20%20%20%20%20Fitzpatrick%2015%20%20%20%20November%202008%20_2_.pdf (last visited June 20, 2009).

¹ Observed by author between Nov. 4, 2004 and May 10, 2006 while living in Lospalos. The author uses Timor-Leste to reference the current government, officially titled Republica Democratica de Timor-Leste, while Timor references the territory prior to the country's independence.

Indonesia; no one knows when, if ever, they are coming back. Vacant shells of burnt houses dot residential streets. Even the intact houses have problems. A local points to a house and indicates that her family owns it, but that someone else is living there; her family is still waiting for the government to decide who actually has legal title to the property. The abandoned, disputed, and conflicted state of property is not limited to Lospalos. Such problems exist in most urban areas, despite the fact that nine years have passed since Indonesia withdrew its military from Timor, destroying seventy-five percent of the country's infrastructure and dislocating 600,000 people from their homes.²

Vacant buildings like the ones in Lospalos serve as reminders of Timor-Leste's violent past, but also allude to the ongoing social and legal disputes that have persisted in its wake. In 2006, tension between different tribal groups resulted in riots in the capital of Dili.³ These riots caused over 100,000 people to flee their homes to relocate with family members living in surrounding areas or seek refuge in camps for internally displaced people.⁴ These riots also resulted in the destruction of 6,000 houses.⁵ People returning to Dili have been reluctant to rebuild their damaged homes because of pre-crisis land dispute issues.⁶ The continuing uncertainty surrounding property rights contributes to social unrest,⁷ and Timor-Leste cannot afford instability.

Presently, five categories of land claimants exist—the result of successive waves of dispossession in Timor-Leste's past.⁸ The first category

² Suzanne Katzenstein, Note, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 248-49 (2003). Indonesian troops withdrew in 1999. *Id.* at 248.

³ ANDREW HARRINGTON, ETHNICITY, VIOLENCE, & LAND AND PROPERTY DISPUTES IN TIMOR-LESTE 5-10 (2006), [http://www.internal-displacement.org/8025708F004CE90b/\(httpDocuments\)/8A0BE17539B53A71C1257329002A902C/\\$File/AndrewLand&PropertyFinal.pdf](http://www.internal-displacement.org/8025708F004CE90b/(httpDocuments)/8A0BE17539B53A71C1257329002A902C/$File/AndrewLand&PropertyFinal.pdf) (last visited Mar. 22, 2009). The conflict initially arose after soldiers from the western part of East Timor left their posts, claiming discrimination within the Timor-Leste's national military, FALINTIL—Forças de Defesa de Timor Leste. *Id.* at 5-6. Andrew Harrington, *Ethnicity, Violence, & Land and Property Disputes in Timor-Leste*, 2007 E. TIMOR L.J. 2 (2007), <http://www.eastimorlawjournal.org/articles/index.html>.

⁴ UNICEF, HUMANITARIAN ACTION REPORT 2008, MID-YEAR REVIEW 19, [http://www.reliefweb.int/rw/lib.nsf/db900sid/EGUA-7JZML5/\\$file/unicef-HAR%20MidYearReview%202008.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/EGUA-7JZML5/$file/unicef-HAR%20MidYearReview%202008.pdf?openelement) (last visited Mar. 22, 2009); *Timor-Leste: IDPs Face Difficult Journey Home*, INTEGRATED REGIONAL INFORMATION NETWORKS (Dec. 1, 2008), available at UNHRC Refworld, <http://www.unhcr.org/refworld/country,,,TMP,4562d8cf2,4934ffc3c,0.html> [hereinafter *Timor-Leste: IDPs Face Difficult Journey Home*].

⁵ UNICEF, *supra* note 4, at 19.

⁶ *Timor-Leste: IDPs Face Difficult Journey Home*, *supra* note 4.

⁷ *Id.*; Jesse Wright, *Lack of Government Participation Stymies Timor Stability*, DEUTSCHE PRESSE AGENTUR (Nov. 21, 2008), available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/MYAI-7LM849?OpenDocument> [hereinafter Wright, *Lack of Government Participation*].

⁸ HARRINGTON, *supra* note 3, at 34.

of claimants comprises those persons with underlying traditional interests derived from indigenous rights to the land.⁹ The second category is made up of holders of titles issued under the Portuguese colonial government.¹⁰ Holders of titles issued under the Indonesian government form the third category of land claimants.¹¹ The last two categories of land claimants consist of those who have occupied the land since Indonesia's withdrawal: those who claim rights under the regulations promulgated by United Nations Transitional Administration in East Timor, and those who claim rights under Timor-Leste's laws.¹² Operating outside of these five categories, many Timorese occupy land without government sanction.¹³ In the absence of an effective method for solving disputes between these five property systems, Timor-Leste will have difficulty establishing an effective land administration system.¹⁴

This Comment argues that existing law in Timor-Leste does not effectively address the problem of which category of land claimants should have priority in disputes. Current law does not define how the rights of these competing land claimants interact, and courts offer little or no meaningful relief in property disputes. While Timor-Leste has made attempts to solve this problem through legislation, no legislative solution exists because property rights remain undefined by law, and thus unenforceable. Adverse possession, a legal theory that both limits the time period in which owners can bring ownership claims for property and rewards active use of land over passive legal possession, could be used as a mechanism for determining which claimants' rights should prevail. Part II of this comment lays out the historical events that have given rise to the various property systems in Timor-Leste. Part III evaluates how the current laws and legal structures fail to adequately address land disputes. Finally, Part IV examines how adverse possession could ameliorate the dysfunctional

⁹ See DANIEL FITZPATRICK, *LAND ISSUES IN A NEWLY INDEPENDENT EAST TIMOR* 5-7 (2001), <http://www.aph.gov.au/library/pubs/RP/2000-01/01RP21.pdf> (last visited Mar. 22, 2009) [hereinafter FITZPATRICK, *LAND ISSUES*].

¹⁰ DANIEL FITZPATRICK, *LAND CLAIMS IN EAST TIMOR* 141-43 (Asia Pacific Press 2002) [hereinafter FITZPATRICK, *LAND CLAIMS*].

¹¹ *Id.* at 44-46.

¹² HARRINGTON, *supra* note 3, at 34.

¹³ FITZPATRICK, *LAND ISSUES*, *supra* note 9, at 11; HARRINGTON, *supra* note 3, at 27.

¹⁴ Daniel Lewis & UN-HABITAT, *Challenges to Sustainable Peace: Land Disputes Following Conflict* (Apr. 29-30, 2004), http://www.fig.net/commission7/geneva_2004/papers/lapca_01_lewis.pdf (last visited Mar. 22, 2009).

property regime that has resulted from historical dispossession in Timor-Leste.¹⁵

II. CURRENT SOCIAL UNREST IN TIMOR-LESTE IS CLOSELY CONNECTED TO ITS HISTORY OF DISPOSSESSION UNDER OUTSIDE POWERS

Timor-Leste's current land dispute issues arise, in part, from Timor-Leste's tumultuous past. Because they were colonized by Portugal, invaded by Indonesia, endured an extended fight for independence, and founded a new nation with the support of the United Nations (U.N.), the Timorese have seen multiple land tenure systems.¹⁶ An understanding of Timor-Leste's history helps explain how current land tenure issues developed.

A. *Portuguese Colonization Disposessed Timorese of Property Interests Vested in Them Through the Customary Tribal Systems*

Prior to Portuguese colonization, *liurai*, or petty kings, ruled small kingdoms that were composed of a number of *sucos*, or tribal groups.¹⁷ In turn, these *sucos* were comprised of clans or settlements, later termed *povoações* by the Portuguese.¹⁸ The *liurais* had the power to allocate land to community members.¹⁹ However, the individual's rights in land only extended as far as his or her use of the property; for example, someone who worked a particular parcel of land had superior rights over another member of the community who used the land less.²⁰ For this reason, the community would be more likely to reallocate use of property to someone else if the initial possessor only used the land minimally.²¹ Similarly, if a person did not use the land, the property would revert back to the community.²² Transfers of land, either between community members or to outsiders, required consent by the community or its leaders.²³

The Portuguese met these scattered kingdoms ruled by the *liurais* when they reached the island of Timor in the early 1500s.²⁴ After engaging

¹⁵ This comment is concerned only with disputes related to private property, as differentiated from state-owned property.

¹⁶ FITZPATRICK, LAND CLAIMS, *supra* note 10, at 1.

¹⁷ JAMES DUNN, EAST TIMOR: A ROUGH PASSAGE TO INDEPENDENCE 3 (Longueville Media 2003) (1983).

¹⁸ *Id.*

¹⁹ FITZPATRICK, LAND CLAIMS, *supra* note 10, at 39.

²⁰ *Id.* at 38-39.

²¹ *Id.* at 39.

²² *Id.*

²³ *Id.*

²⁴ DUNN, *supra* note 17, at 13.

in constant conflict with the Timorese for nearly four hundred years,²⁵ the Portuguese took steps to cement their control in the early 1900s.²⁶ In 1901, Portugal passed a law that converted all land not currently secured by Portuguese title to state property.²⁷ In 1910, the Portuguese Governor of Timor enacted new legislation requiring approval of all property transfers of “native tenure,”²⁸ land that Portugal viewed as having no clear owner; therefore, land used by multiple community members, as opposed to land used primarily by one person, now fell under Portuguese control.²⁹ These two colonial actions effectively usurped native title to vast areas of land and took legal control of land regulation away from the *liurais*.³⁰ During the entire colonial period, the Portuguese issued 2,843 land titles,³¹ mostly in urban and fertile agricultural areas.³²

By the early 1970s, Timor and Macau were Portugal’s only colonies not mounting independence movements.³³ In 1974, after the Portuguese overthrew their domestic dictator, it became clear that Portugal could not retain Timor as a colony.³⁴ Indonesia, which controlled the western half of the island, began supporting pro-Indonesian integration groups within Timor.³⁵ In contrast, Portugal supported the independence movement, as it was preferred by the majority of the people.³⁶ Tensions between these political groups finally came to a head, resulting in a brief civil war ultimately won by the pro-independence movement.³⁷ Nonetheless, Indonesian troops invaded shortly thereafter, ostensibly to intervene and settle the civil war.³⁸

²⁵ Cath Elderton, *East Timor—Land Issues and Independence* 5 (2002), <http://www.usp.ac.fj/fileadmin/files/faculties/islands/landmgmt/symposium/PAPER52CATH.PDF> (last visited Mar. 22, 2009).

²⁶ See PEDRO XAVIER DE SOUSA, EAST TIMOR, LAND MANAGEMENT—A LONG WAY TO GO, BUT WE HAVE STARTED, http://www.fig.net/commission7/bangkok_2005/papers/6_3_sousa.pdf (last visited Mar. 22, 2009). While Portugal might have cemented its power, *liurais* continue to have an important role in modern Timorese culture and society. See Elderton, *supra* note 25, at 5.

²⁷ FITZPATRICK, LAND ISSUES, *supra* note 9, at 5; DE SOUSA, *supra* note 26, at 3.

²⁸ The Portuguese distinguished “native tenure” from land controlled by the *liurais*. ELDERTON, *supra* note 25, at 5. Occupiers seeking to establish native tenure had to cultivate or build on at least half of the parcel. FITZPATRICK, LAND ISSUES, *supra* note 9, at 6.

²⁹ DE SOUSA, *supra* note 26, at 3.

³⁰ See *id.*

³¹ FITZPATRICK, LAND CLAIMS, *supra* note 10, at 44.

³² *Id.* at 141.

³³ DUNN, *supra* note 17, at 28.

³⁴ Amy Ochoa Carson, Note, *East Timor’s Land Tenure Problems: A Consideration of Land Reform Programs in South Africa and Zimbabwe*, 17 IND. INT’L & COMP. L. REV. 395, 398-99 (2007).

³⁵ DUNN, *supra* note 17, at 60-61.

³⁶ See *id.* at 63.

³⁷ Carson, *supra* note 34, at 399.

³⁸ *Id.*

B. *The Indonesian Occupation Created Further Instability in the Timorese Land Tenure System*

Throughout the twenty-four years of Indonesian occupation, the country was in a state of conflict.³⁹ During the initial invasion, between 1975 and 1979, an estimated 200,000 people, or roughly one-third of the population, died as a result of Indonesia's efforts to control the country.⁴⁰ The violence persisted through the 1990s.⁴¹ While attempting to control the Timorese population, Indonesia established several policies that directly impacted property ownership.⁴² In particular, the national policies of "transmigration" and "translocation" resulted in large-scale population displacement of Timorese.⁴³ Transmigration refers to the practice of forming villages from populations of people brought in from other islands;⁴⁴ Indonesia used this practice throughout its islands to pacify the local populations by introducing more loyal citizens.⁴⁵ The translocation policy involved uprooting and moving Timorese from rural areas—where they were able to resist the Indonesian military through guerilla warfare—into villages or urban centers.⁴⁶ Indonesia used these techniques to better monitor the native people and limit opposition to Indonesian authority.⁴⁷ These policies, in conjunction with the fact that thousands of people fled their homes to escape the Indonesian soldiers, resulted in large-scale abandonment of land—followed inevitably by occupation of the land by new parties.⁴⁸

Although the U.N. never recognized Indonesia's authority in Timor, Indonesia annexed the territory as its twenty-seventh province in 1976.⁴⁹ Acting under this assumed authority, the Indonesian government issued land titles in the territory; by 1996, Indonesia had issued 34,965 such titles.⁵⁰ The Timorese population held only a very small percentage of these titles, and

³⁹ DON GREENLEES & ROBERT GARRAN, *DELIVERANCE: THE INSIDE STORY OF EAST TIMOR'S FIGHT FOR FREEDOM* 196 (Allen & Unwin 2002).

⁴⁰ Katzenstein, *supra* note 2, at 248.

⁴¹ *Id.* at 248-250.

⁴² See Carmel Budiardjo, *The Politics of Transmigration*, 16 *ECOLOGIST* 111, 115 (1986).

⁴³ DE SOUSA, *supra* note 26, at 3.

⁴⁴ *Id.*

⁴⁵ See Marcus Colchester, *The Struggle for Land: Tribal Peoples in the Face of the Transmigration Programme*, 16 *ECOLOGIST* 99, 103 (1986); Budiardjo, *supra* note 42, at 115.

⁴⁶ Budiardjo, *supra* note 42, at 115.

⁴⁷ *Id.* By the end of 1979, the Indonesians had moved several hundred thousand Timorese into encampments know as *pemukiman*. *Id.* Between 1980 and 1989, the Indonesians resettled eighty percent of the Timorese population. Katzenstein, *supra* note 2, at 248.

⁴⁸ See CONSTÂNCIO PINTO & MATTHEW JARDINE, *EAST TIMOR'S UNFINISHED STRUGGLE: INSIDE THE TIMORESE RESISTANCE* 68 (1997).

⁴⁹ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 169 (2d ed. 2006).

⁵⁰ FITZPATRICK, *LAND CLAIMS*, *supra* note 10, at 44.

the majority of people never registered their land with the Indonesian government.⁵¹ Predictably, some of the titles issued by Indonesia conflicted with traditional claims to the land, as well as titles previously issued by the Portuguese colonial government.⁵²

After twenty-four years of Indonesian occupation,⁵³ 78.5 percent of Timorese voters declined integration with Indonesia, thereby indicating that they wanted independence.⁵⁴ Within several hours, the Indonesian armed forces reacted by burning homes throughout the capital of Dili,⁵⁵ as well as in outlying districts.⁵⁶ Pro-Indonesian militia groups also began specifically targeting district title offices across the country and succeeded in destroying the vast majority of land title records.⁵⁷ Yet, Indonesia was eventually forced to leave Timor; this withdrawal alone destroyed seventy-five percent of the country's infrastructure.⁵⁸ Moreover, an estimated 600,000 people, about three quarters of the population, were dislocated from their homes.⁵⁹ The Indonesian military also ordered people onto barges and took them to Indonesia,⁶⁰ this resulted in at least 30,000 refugees who were either unable to return home or chose to resettle in Indonesia.⁶¹ Families who remained in Timor scrambled to find new housing and moved into the buildings left standing, regardless of whether they owned the properties or not.⁶² The violence, physical upheaval, and displacement that resulted from Indonesia's occupation and subsequent withdrawal exacerbated instability in the land tenure system.⁶³

⁵¹ Elderton, *supra* note 25, at 2.

⁵² FITZPATRICK, LAND CLAIMS, *supra* note 10, at 216-18.

⁵³ In 1975, Indonesia invaded the country; however, it never succeeded in quashing the resistance. GREENLEES & GARRAN, *supra* note 39, at 15. The Indonesian military terrorized the population throughout the occupation. See Katzenstein, *supra* note 2, at 248.

⁵⁴ GREENLEES & GARRAN, *supra* note 39, at 196. Ninety-eight percent of the registered voters cast their vote in the referendum. DUNN, *supra* note 17, at 350-51.

⁵⁵ DUNN, *supra* note 17, at 352.

⁵⁶ *Id.* at 354-58.

⁵⁷ FITZPATRICK, LAND CLAIMS, *supra* note 10, at 6-7. While the militia completely destroyed the title records in the other districts, the head of the land and property office in Dili saved the record book, providing at least some documentation of Indonesian titles issued in Dili. *Id.* at 7.

⁵⁸ Katzenstein, *supra* note 2, at 249.

⁵⁹ *Id.*

⁶⁰ DUNN, *supra* note 17, at 352; GREENLEES & GARRAN, *supra* note 39, at 207. While it is unclear how many of the people that went to Indonesia left because of their own freewill, many went because the troops compelled them to leave. *Id.*

⁶¹ DUNN, *supra* note 17, at 372.

⁶² Carson, *supra* note 34, at 407; Warren L. Wright, *Some Land Tenure Issues in Post-Conflict East Timor*, 2006 E. TIMOR L.J. 1 (2006), available at http://www.eastimorlawjournal.org/ARTICLES/2006/land_issues_post_conflict_east_timor_wright.html.

⁶³ See Carson, *supra* note 34, at 396.

C. *UNTAET Failed to Effectively Address Property Issues*

In the wake of Indonesia's violent withdrawal, United Nations Transitional Administration in East Timor ("UNTAET") entered the country to aid the independence process.⁶⁴ Faced with a shortage of habitable buildings, UNTAET began issuing Temporary Use Agreements ("TUAs") for abandoned private land at nominal fees.⁶⁵ Beyond issuing these TUAs, UNTAET did little to establish mechanisms to resolve disputes or delineated land rights.⁶⁶ UNTAET primarily focused on the immediate problems of resettling displaced persons, providing shelter and food to them, and preventing further violence.⁶⁷ UNTAET's decision to avoid addressing private ownership rights, and instead merely issuing temporary rights to public and abandoned land, gave rise to a presumption that possession itself was a right to land.⁶⁸

D. *The Country's Current Unresolved Social and Political Tensions Arise from Timor-Leste's Failure to Address Existing Land Disputes*

When the newly formed, independent Republica Democratica de Timor-Leste took over power from UNTAET in 2002,⁶⁹ it inherited the problem of how to deal with abandoned land that was occupied by someone other than the titleholder.⁷⁰ Eight years have passed since Timor-Leste became independent, yet these problems remain unaddressed.⁷¹ Presently,

⁶⁴ See DUNN, *supra* note 17, at 362. UN Security Council authorized UNTAET to govern the territory until a Timorese self-ruled state took shape. S.C. Res. 1272, ¶ 1, U.N. Doc. S/RES/1272 (Oct. 25, 1999), available at [http://www.undemocracy.com/S-RES-1272\(1999\).pdf](http://www.undemocracy.com/S-RES-1272(1999).pdf).

⁶⁵ Warren L. Wright, *UNTAET Land Policy*, 2004 E. TIMOR L.J. 2 (2004), available at http://www.eastimorlawjournal.org/ARTICLES/2004/untaet_land_policy_east_timor_wright.html [hereinafter Wright, *UNTAET Land Policy*]. Some of the fees were as low as \$1 US per month. *Id.*

⁶⁶ *Id.* See generally Daniel Fitzpatrick & Rebecca Monson, *Balancing Rights and Norms: Property Programming in East Timor, the Solomon Islands, and Bougainville*, in HOUSING, LAND, AND PROPERTY RIGHTS IN POST-CONFLICT UNITED NATIONS AND OTHER PEACE OPERATIONS: A COMPARATIVE SURVEY AND PROPOSAL FOR REFORM 103, 109-13 (Scott Leckie 2009).

⁶⁷ See JUAN FEDERER, *THE UN IN EAST TIMOR, A FRAGILE STATE* 80 (1999).

⁶⁸ CONFLICT SECURITY & DEVELOPMENT GROUP, KING'S COLLEGE, LONDON, *A REVIEW OF PEACE OPERATIONS: A CASE FOR CHANGE: EAST TIMOR*, ¶ 316 (2003) (Pre-Publication Copy), http://www.jsmp.minihub.org/Reports/otherresources/Peace4Timor_10_3_03.pdf (last visited Mar. 22, 2009).

⁶⁹ HARRINGTON, *supra* note 3, at 4. The U.N. still maintains a mission, the United Nations Integrated Mission in Timor-Leste (UNMIT), to promote peace and stability in the country. S.C. Res.1867, ¶ 1, U.N. Doc. S/RES/9601 (Feb. 26, 2009), http://unmit.unmissions.org/Portals/UNMIT/latest_docs/SCR_1867_2009-En.pdf. The U.N. Security Council recently extended UNMIT's mission until February 26, 2010. *Id.*

⁷⁰ Wright, *UNTAET Land Policy*, *supra* note 65.

⁷¹ See Land Policy in East Timor—The Cart Before the Horse (May 2, 2009), <http://eastimorlegal.blogspot.com/2009/05/land-policy-in-east-timor-cart-before.html> (last visited

Timorese land claims stem from five possible sources—traditional tribal rights, Portuguese title, Indonesian title, UNTAET authority, and rights under Timor-Leste’s laws.⁷² Without an effective method for solving disputes between these various claimants, it will be difficult to establish an effective land administration system.⁷³

Unfortunately, these unaddressed issues have only exacerbated social tensions in the country, as evidenced by the violence and massive unrest in 2006.⁷⁴ Providing stability for the country is particularly important in light of the country’s low economic growth rates and the increase in poverty between 2001 and 2007.⁷⁵ As the poorest country in Asia,⁷⁶ Timor-Leste ranks 158 out of 179 countries on the Human Development Index.⁷⁷ Extreme poverty plagues an estimated one-third of Timorese.⁷⁸ The weak economy also has a dramatic impact on Timorese children: 48.6 percent of all Timorese children under the age of five are underweight and 53.9 percent of children suffer from stunted growth.⁷⁹ Providing stability for land owners will help achieve the long-term stability that Timor-Leste requires in order to tackle some of the additional social issues the country faces.⁸⁰

May 13, 2009). There is still no legal clarity on the status of approximately 40,000 land claims in Timor-Leste. *Id.*

⁷² HARRINGTON, *supra* note 3, at 34. *See supra* Part I.

⁷³ Lewis, *supra* note 14.

⁷⁴ Fitzpatrick & Monson, *supra* note 66, at 112. *See Timor-Leste: IDPs Face Difficult Journey Home*, *supra* note 4; Wright, *Lack of Government Participation*, *supra* note 7.

⁷⁵ MINISTÉRIO DAS FINANÇAS, DIRECÇÃO NACIONAL DE ESTATÍSTICA, & THE WORLD BANK, TIMOR-LESTE: POVERTY IN A YOUNG NATION 4-8 (2008) (Preliminary Draft), <http://pascal.iseg.utl.pt/~cesa/TL-Poverty-in-a-young-nation-25-Nov-2008.pdf> (last visited Mar. 22, 2009). “The poverty line is determined using a cost of basic needs approach which involves the evaluation of a food and nonfood poverty line. The sum of the food and the nonfood poverty lines determines the overall poverty line.” *Id.* at 2.

⁷⁶ PLAN TIMOR LESTE, BASELINE STUDY OF LAUTEM 11 (2008), <http://www.plan-international.org/wherewework/asia/easttimor/> (follow “English” hyperlink) (last visited Mar. 22, 2009).

⁷⁷ United Nations Development Programme (UNDP), Human Development Reports: Statistics of the Human Development Index, <http://hdr.undp.org/en/statistics/> (last visited Mar. 22, 2009).

⁷⁸ MINISTÉRIO DAS FINANÇAS, DIRECÇÃO NACIONAL DE ESTATÍSTICA, & THE WORLD BANK, *supra* note 75, at 3.

⁷⁹ UNICEF, *supra* note 4, at 19.

⁸⁰ *Services Struggle as E. Timor Empties Refugee Camps*, AUSTRALIAN BROADCASTING CORP., Nov. 21, 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/PANA-7LLFBT?OpenDocument&rc=3&cc=tl>; *Timor-Leste: IDPs Face Difficult Journey Home*, *supra* note 4; Wright, *Lack of Government Participation*, *supra* note 7. USAID, *News Release: New USAID-Supported Programs to Respond to the 2006 Crisis*, http://timor-lesite.usaid.gov/newsroom/newsroom_NR2008-01-28.htm (last visited Mar. 22, 2009).

III. THE CURRENT LEGAL STRUCTURE IN TIMOR-LESTE DOES NOT ADEQUATELY ADDRESS LAND TENURE ISSUES

Although land disputes have been identified as a factor contributing to social and economic instability in the country, no law currently exists to address these disputes. Since the transition of power, Timor-Leste's Parliament⁸¹ has passed several laws relating to property issues; however, none of these laws actually offer a solution for, or even address, how to handle land disputes. Timor-Leste's judicial system is fraught with inefficiency and has faced difficulties processing property cases, and, as a result, a stable body of case-based law has failed to develop. While Timor-Leste is taking some steps to remedy deficiencies in its property laws, the current initiatives fall short of addressing the land claims arising from Timor-Leste's turbulent past.

A. *Current Laws and Legal Mechanisms in Timor-Leste Do Not Address the Land Dispute Issues Arising from Past Waves of Dispossession*

Neither domestic nor international laws provide an effective legal framework for addressing ownership and land tenure disputes in Timor-Leste, and the country's weak judicial system struggles to address the property cases that claimants have brought to the courts.

1. *Domestic Laws Do Not Meaningfully Address Ownership Rights in a Way That Resolves Land Dispute Issues*

Despite its attempts,⁸² Timor-Leste's Parliament has not passed a law that directly tackles the issue of land disputes between the five property systems. Because Timor-Leste's Constitution identifies ownership of property and access to housing as protected rights,⁸³ defining these rights and settling disputes where these rights conflict carries constitutional

⁸¹ Parliament is the primary legislative body in Timor-Leste. See KONSTITUSAUN DU TIMOR-LESTE [Constitution] §§ 95-97 (2002) (E. Timor), available at <http://www.timor-leste.gov.tl/constitution/constitution-Timor-Leste.pdf>; Hilary Charlesworth, *The Constitution of East Timor*, May 20, 2002, 1 INT'L J. CONST. L. 325, 330 (2003).

⁸² See JUDICIAL SYSTEM MONITORING PROGRAMME, LAND LAW REPORT 5-6 (2005), [http://www.jsmp.minihub.org/Reports/jsmpreports/Land%20law%20report%20290905/land%20law%20report%20\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/Land%20law%20report%20290905/land%20law%20report%20(e).pdf) (last visited Mar. 22, 2009) [hereinafter LAND LAW REPORT].

⁸³ CONST. §§ 54 & 58. "1. Every individual has the right to private property and can transfer it during his or her lifetime or on death, in accordance with the law. 2. Private property should not be used to the detriment of its social purpose. 3. Requisitioning and expropriation of property for public purposes shall only take place following fair compensation in accordance with the law. 4. Only national citizens have the right to ownership of land." CONST. § 54. It is unclear what these rights entail. Charlesworth, *supra* note 81, at 332.

importance.⁸⁴ While three laws currently address property issues,⁸⁵ none of them define the relationship between the five categories of land claimants' property rights.⁸⁶ Of the three laws, The Juridical Regime of Real Estate, Part I: Ownership Over Real Estate ("Real Estate Law") is the only law concerned with ownership rights in private property.⁸⁷

The first land law passed after independence,⁸⁸ the Real Estate Law acknowledges the importance of establishing a law to settle disputes over real property.⁸⁹ The law states that the lack of legal framework "creates social instability, which delays the development of the country."⁹⁰ Despite its aim, the law falls short of its goal. First, it fails to define what kinds of pre-existing land rights are valid, and second, the law does not address the priority of claims when claimants compete over land.⁹¹ Instead, the Real Estate Law establishes a procedure for private national citizens and expatriate nationals to petition to reclaim land currently occupied or "illegally" appropriated by third parties.⁹²

The Real Estate Law allowed both national citizens and expatriates until March 10, 2004,⁹³ to notify the Direcção de Terras e Propriedades⁹⁴

⁸⁴ See The Juridical Regime of Real Estate, Law No. 1/2003 Preamble (2003) (E. Timor), available at <http://www.unhcr.org/refworld/category,LEGAL,,,TMP,3ede06b032,0.html>.

⁸⁵ These three laws are: The Juridical Regime of Real Estate, Part I: Ownership Over Real Estate; Legal Regime of Immovable Property: Official Allocation and Lease of State Property; and The Juridical Regime of Real Estate, Part II: Leasing Between Individuals. See LAND LAW REPORT, *supra* note 82, at 5.

⁸⁶ See The Juridical Regime of Real Estate, Law No. 1/2003; Legal Regime of Immovable Property, Law No. 19/2004 (2004) (E. Timor), available at http://www.eastimorlawjournal.org/Government_Decree_Laws_East_Timor/192004_allocation_leasing_state_property.html; Juridical Regime of Real Estate, Law No. 12/2005 (2005) (E. Timor), available at http://www.eastimorlawjournal.org/East_Timor_National_Parliament_Laws/Law-2005-12.pdf.

⁸⁷ See Legal Regime of Immovable Property, Law No. 19/2004; Juridical Regime of Real Estate, Law No. 12/2005. As its full title indicates, Lease of State Property primarily deals with the mechanics and requirements of leasing property from the State. Legal Regime of Immovable Property, Law No. 19/2004, arts. 6-19. Leasing Between Individuals regulates leases between individuals, laying out the minimum obligations of both the lessor and lessee, as well as basic terms of leases. Juridical Regime of Real Estate, Law No. 12/2005.

⁸⁸ LAND LAW REPORT, *supra* note 82, at 7.

⁸⁹ The Juridical Regime of Real Estate, Law No. 1/2003. "[I]t is now an imperative of the government to establish a legal framework based on the constitutional principles that governs the regime of ownership over real estate in order to put in place a policy that helps settle the problems resulting from the indefiniteness of the ownership of public and private immovable property." *Id.* at Preamble.

⁹⁰ *Id.* at Preamble.

⁹¹ See LAND LAW REPORT, *supra* note 82, at 7.

⁹² The Juridical Regime of Real Estate, Law No. 1/2003 §§ 12 & 13. Additionally, the law criminalizes "illegal" appropriating and occupation of the public and private property, establishes procedures for evicting "illegal" occupants from State property and claims temporary State control of property abandoned by national or foreign citizens. The Juridical Regime of Real Estate, Law No. 1/2003 §§ 5, 6, 7-9, and 15.

⁹³ Wright, *UNAET Land Policy*, *supra* note 65.

(“DTP”) that their land has been “illegally appropriated or occupied by third parties.”⁹⁵ The law does not define what documentation parties should present with their claims; the Real Estate Law merely states that documented evidence must be attached to the claim.⁹⁶ Moreover, the law provides too general a definition of “illegal occupation,” defining it as “the act of someone utilizing someone else’s real estate or acting as its possessor against the owner’s will.”⁹⁷ This vague definition provides little guidance where, for example, a claimant with a Portuguese title challenges an occupier with an Indonesian title; in this instance, it is unclear whether the Indonesian titleholder occupies the land legally or illegally. Similarly, the Real Estate Law does not specify if a claimant who has resided on property since Indonesia’s withdrawal in 1999 without a title has a legal interest in the property. The ambiguity in the term “illegal occupant” is relevant, particularly in light of the public response to the law. Reacting to the Real Estate Law, parties lodged six thousand land claims with DTP;⁹⁸ many of these claims were submitted by Dili residents seeking legal ownership to their property.⁹⁹ However, the evidence indicates that many of these claims remain unresolved.¹⁰⁰ This could be attributed to the fact that the Real Estate Law provides no insight into who bears the burden of proof in these claims and which titles constitute outright ownership.¹⁰¹ Additionally, the law states that “the mechanisms for mediation or administrative restitution of the respective title deeds may be enforced under *such terms as may be established by law.*”¹⁰² By waiting to pass legislation that clarifies which methods will adjudicate claims, as well as avoiding determination of which claims will prevail, the Timorese Parliament undermined the effectiveness of the Real Estate Law.

The legislation further states that any land still unclaimed and with no identifiable owner on March 10, 2004, would be presumed to be state

⁹⁴ Land and Property Authority, The Juridical Regime of Real Estate, Law No. 1/2003, § 5(5).

⁹⁵ *Id.* §§ 12(1)-(2), 13(1).

⁹⁶ *Id.* §§ 12(1)-(2) & 13(1)-(2).

⁹⁷ *Id.* § 6.

⁹⁸ HARRINGTON, *supra* note 3, at 27. Others put the total number of claims submitted to DTP closer to ten thousand. LAND LAW REPORT, *supra* note 82, at 7.

⁹⁹ See HARRINGTON, *supra* note 3, at 27. An estimated 50% of the properties in Dili were occupied illegally at that time. *Id.*

¹⁰⁰ See *Timor-Leste: Settling Age-Old Land Disputes*, INTEGRATED REGIONAL INFO. NETWORKS, Oct. 31, 2008, available at <http://www.unhcr.org/refworld/category,COI,,TMP,4917f25cc,0.html>; UNMIT, REPORT ON HUMAN RIGHTS DEVELOPMENTS IN TIMOR-LESTE: THE SECURITY SECTOR AND ACCESS TO JUSTICE 10 (2008), <http://www.ohchr.org/Documents/Countries/UNMIT200808.pdf> (last visited Mar. 22, 2009).

¹⁰¹ See The Juridical Regime of Real Estate, Law No. 1/2003 §§ 12 & 13.

¹⁰² *Id.* § 12(1) (emphasis added).

property.¹⁰³ Yet again, the Real Estate Law is vague, failing to identify how DTP will determine that land lacks an identifiable owner;¹⁰⁴ land with an unidentifiable owner could reasonably be interpreted to mean either land no one has claimed or land claimed by parties failing to establish evidence of proper ownership. This vagueness can lead to large scale seizure by the government,¹⁰⁵ which, in turn, could result in additional litigation and social unrest. While parties can attempt to rebut the presumption of State ownership through a judicial appeal,¹⁰⁶ the Real Estate Law does not define what evidence would rebut the presumption that the land belongs to the State after the State has determined the property is unclaimed.¹⁰⁷ Furthermore, this right to appeal the State's seizure of property terminated on December 31, 2008.¹⁰⁸ Because the date to appeal state seizures recently expired, it is unclear how this will affect disputed claims; however, this should have no impact on claims that have already been submitted and are pending review of a final decision.

The deficiencies of the Real Estate Law lie in its failure to define key terms and property rights. The Real Estate Law does not define what documentation establishes ownership or when use of property amounts to illegal occupation. Not surprisingly, the Real Estate Law has been criticized as overly general on issues of land ownership and control.¹⁰⁹ Furthermore, the law does not mention any category of land claimant at all,¹¹⁰ failing to recognize these different categories of land claimants and defining which has priority, and under what conditions, limit the effectiveness of the law in addressing disputes between these interests. Its acknowledgment of the importance of solving land dispute problems notwithstanding, the Real Estate Law effectively sidesteps the issue of land disputes arising from disposessions in the past. Ultimately, the Real Estate Law provides little guidance in resolving the country's existing land disputes.

¹⁰³ *Id.* § 12(3).

¹⁰⁴ *Id.*

¹⁰⁵ In fact, the State has evicted people from land identified as state property in recent years. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS. & LAB., EAST TIMOR: REPORTS ON HUMAN RIGHTS AND LABOR (2006), <http://www.state.gov/g/drl/rls/hrrpt/2006/78772.htm> (last visited Mar. 16, 2009); U.S. DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS. & LAB., EAST TIMOR: REPORTS ON HUMAN RIGHTS AND LABOR (2008), <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119059.htm> (last visited Mar. 16, 2009).

¹⁰⁶ The Juridical Regime of Real Estate, Law No. 1/2003, § 12(4).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ MANUEL FERNANDO EXPOSTO ET AL, CIVIL SOCIETY RESEARCH FOR POLICY DEVELOPMENT: ANALYSIS OF THE ISSUE: LAND RIGHTS 2 (2004), www.easttimorlawjournal.org/ROCCIPI_Analysis_East_Timor_Social_Problems/A3_Analysis_of_land_Rights_Eenglish.doc.

¹¹⁰ See generally The Juridical Regime of Real Estate, Law No. 1/2003.

2. *International Law Does Not Provide a Clear Answer as to Which Land Claimants Hold Legal Title*

Although international norms apply to Timor-Leste's domestic laws, international law does not offer an effective manner for addressing land dispute issues between the different systems of land claimants. Timor-Leste's Constitution makes international laws and norms generally applicable within the country;¹¹¹ however, it is difficult to assess the impact these international laws will actually have on domestic laws.¹¹² All international conventions, treaties, or agreements that Timor-Leste accepts through formal processes become the law within the country.¹¹³ Furthermore, any domestic laws inconsistent with these international instruments are automatically rendered invalid.¹¹⁴ The Constitution even goes a step further, adopting all general or customary principles of international law.¹¹⁵ The effects of international law on the country's domestic laws could be profound.¹¹⁶ However, while it would appear that the human right to security in one's property as defined by international law could be raised within Timor-Leste's courts,¹¹⁷ it is unclear how this would be done in practice.¹¹⁸

Even if international laws are applied to land dispute claims, they offer little practical solution. In his extensive study of land claims in Timor-Leste, Daniel Fitzpatrick examines how international law doctrines apply to the various categories of land claimants in Timor-Leste.¹¹⁹ His analysis illustrates that exclusive reliance on international law would result in widespread dispossession.¹²⁰ Applying the customary law doctrines of

¹¹¹ CONST. § 9.

¹¹² See Charlesworth, *supra* note 81, at 333-34.

¹¹³ CONST. § 9(2). "Rules provide for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor following their approval, ratification or accession by the respective competent organs and after publication in the official gazette." *Id.*

¹¹⁴ CONST. § 9(3). "All rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid." *Id.*

¹¹⁵ CONST. § 9(1). "The legal system of East Timor shall adopt the general or customary principles of international law." *Id.*

¹¹⁶ Charlesworth, *supra* note 81, at 330.

¹¹⁷ See Universal Declaration of Human Rights, G.A. Res. 217A, art. 17, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://un.org/Overview/rights.html>. "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property." *Id.*

¹¹⁸ Charlesworth, *supra* note 81, at 333.

¹¹⁹ See generally FITZPATRICK, LAND CLAIMS, *supra* note 10, at 207-09.

¹²⁰ *Id.*

belligerent occupation¹²¹ and acquired rights,¹²² Fitzpatrick concludes that under international law Portuguese-era titles should be restored and enforced with priority over all other titles.¹²³ However, restoring Portuguese titles thirty-five years after Indonesia's invasion would result in dispossession of titleholders who acquired Indonesian titles in good faith, confirm colonial dispossession, create social unrest in areas where people have reclaimed traditional lands, foster political unrest, and raise severe administrability issues related to tracing each title's history.¹²⁴ Ultimately, such a policy would force large numbers of people to leave their homes.¹²⁵ Consequently, and as Fitzpatrick concedes, the application of international law to these land disputes within Timor-Leste does not offer a feasible solution to the property problems.¹²⁶

3. *The Courts Have Not Been Able to Adequately Address Land Dispute Cases*

Timorese courts have proved equally ineffective in addressing property conflicts.¹²⁷ The inability of the judicial system to address property

¹²¹ The doctrine of belligerent occupation derives from Section III of the 1907 Hague Convention respecting the Laws and Customs of War on Land. ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 5 (1942). The Convention limits the authority of the occupying state by requiring it to respect the laws in force in the invaded country. JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 698 (Advocate Press 1959) (1954). The occupying power may not gain title to real property, but may take possession and pay for its use. FEILCHENFELD, *supra*, at 37-38. However, there is an exception if the occupier used the land for military necessity. FITZPATRICK, *LAND CLAIMS, supra* note 10, at 47. In the absence of military necessity, Indonesian titles are invalid. *Id.* at 62.

¹²² Acquired rights refer to legal interests, other than the right to pursue employment, which can be reduced to a monetary value. DANIEL PATRICK O'CONNELL, *INTERNATIONAL LAW* 436 (1965). In the context of state succession, the transition of power from one sovereign to another does not affect private property rights of individuals living within the territory. *Id.* at 436-37. In the case of Timor, the transfer of sovereignty was between Portugal and Timor-Leste. FITZPATRICK, *LAND CLAIMS, supra* note 10, at 143-44. Therefore, under the customary law of state succession, Timor-Leste should recognize Portuguese titles. *Id.* at 145.

¹²³ FITZPATRICK, *LAND CLAIMS, supra* note 10, at 208.

¹²⁴ *Id.* at 208-09.

¹²⁵ *Id.* at 209.

¹²⁶ *Id.*

¹²⁷ Timor-Leste has recognized that the courts are not always the most effective venue for addressing land dispute problems; consequently, Real Estate Law allows for mediation of claims. *LAND LAW REPORT, supra* note 82, at 11. These mediations occur at the local levels with the participation of DTP officials, village chiefs, and local government officials. *Id.* Evidence indicates that Timorese prefer to resolve disputes at the local level, and these mediations had been more successful than resolution through the court system. Daniel Fitzpatrick, *Dispute Resolution: Mediating Land Conflict in East Timor*, in *MAKING LAND WORK: VOLUME TWO, CASE STUDIES ON CUSTOMARY LAND AND DEVELOPMENT IN THE PACIFIC* 175, 183 (2003), available at http://www.usaid.gov.au/publications/pdf/MLW_VolumeTwo_Bookmarked.pdf. Despite the benefits of mediation, some claimants may prefer to have the judiciary resolve their dispute. *Id.*

dispute cases arises from several factors: the weak judicial system cannot process its caseload; land law is confusing and difficult to apply; and finally, many Timorese do not have access to courts. Thus, a strictly judicial solution may not solve this property problem.

Timor-Leste's judicial system has been plagued by inexperienced judges since the U.N. established its courts.¹²⁸ Timor-Leste's judicial system consists of four District Courts and one Court of Appeals.¹²⁹ When the U.N. sought to establish the judiciary in 1999, only sixty Timorese in the country had law degrees.¹³⁰ Indeed, none of the seven judges sworn into office in January 2000 had previous judicial experience.¹³¹ In 2005, all twenty-five of the Timorese judges, many of whom had presided over criminal cases and sentenced people to jail, failed their judicial examinations.¹³² At the time these results were announced, the President of the Court of Appeals noted that the judges' exam failures did not surprise him based on the quality of their court decisions.¹³³ The judges who failed the exam had the option of taking a two and a half year training course to improve their skills before returning to the bench.¹³⁴ In the interim, international judges have stepped in to help filled the gap.¹³⁵

As of June 2008, only thirteen Timorese judges and five international judges staffed all five courts.¹³⁶ While Timor-Leste is taking steps to improve its judicial system through programs such as the judicial training

Furthermore, some disputes, such as those involving the State of a government official, may not be mediated. *Id.* at 184.

¹²⁸ Katzenstein, *supra* note 2, at 254.

¹²⁹ JUDICIAL SYSTEM MONITORING PROGRAMME, THE COURTS OF TIMOR-LESTE IN 2007 (2007), [http://www.jsmp.minihub.org/Press%20Release/2007/April/Tribunal%20T.L/PressReleaseTribunalT.L\(B\)%20English.pdf](http://www.jsmp.minihub.org/Press%20Release/2007/April/Tribunal%20T.L/PressReleaseTribunalT.L(B)%20English.pdf) (last visited Mar. 22, 2009). The District Courts are located in Baucau, Suai, Oecusse, and Dili. *Id.* The Court of Appeals also carries out the functions of a Supreme Court because the government has not yet passed legislation establishing a Supreme Court. *Id.*

¹³⁰ Katzenstein, *supra* note 2, at 254.

¹³¹ *Id.* The United Nations has been criticized for failing to appoint Timorese to positions of power; this policy can be attributed, in part, to the lack of skilled Timorese in the country at the time. FEDERER, *supra* note 67, at 80.

¹³² Lisa Clausen, *East Timor Judges Fail Their Test*, TIME, Feb. 8, 2005, <http://www.time.com/time/magazine/article/0,9171,1026096,00.html> (last visited Mar. 24, 2009).

¹³³ *Id.* Claudio Ximenes, the President of the Court of Appeals, stated that he was not surprised because he knew "from the cases coming to the Court of Appeal that [the Timorese judges] were not skilled." *Id.* Ximenes, a High Court judge in Portugal, is one of the international judges serving in Timor Leste. *Id.*

¹³⁴ *See id.*; JUDICIAL SYSTEM MONITORING PROGRAMME, DEVELOPMENTS IN COURT ADMINISTRATION: TIMOR-LESTE 2007 (2007), http://www.eastimorlawjournal.org/LawReports/2007/Developments_Court_Administration_Timor_Leste_2007.html (last visited Mar. 16, 2009) [hereinafter DEVELOPMENTS IN COURT ADMINISTRATION: TIMOR-LESTE].

¹³⁵ *Id.*

¹³⁶ UNMIT, *supra* note 100, at 9. The author attributes the attrition in the number of judges between 2005 and 2008 to the low passage rate of judges taking the judicial exam.

course, the courts are currently unable to effectively dispense of property law cases.¹³⁷ This is due, in part, to a significant backlog in both the criminal and civil dockets.¹³⁸ Between 2000 and September 2005, parties filed 267 civil cases in Dili District Court.¹³⁹ Seventy-nine of these cases—nearly thirty percent—were land and property claims, but only thirty-eight of these were decided by the court.¹⁴⁰ In 2004, the court issued no final decisions on property cases—in fact, the court issued no decisions on civil cases at all.¹⁴¹ While many of the parties have appealed the District Court's decisions on property cases, the Court of Appeals had not issued any decisions on these appeals as of September 2005.¹⁴² Although the exact statistics are unavailable, the number of civil cases resolved by the courts still remains minimal.¹⁴³

Judges have also indicated that the confusing state of land law in Timor-Leste makes it difficult for them to resolve land dispute cases.¹⁴⁴ Part of the confusion rests on the fact that Timor-Leste's domestic laws consist of a patchwork of legislation originating in different jurisdictions.¹⁴⁵ Furthermore, judges can gain little direction from decisions in previous cases because case decisions are not reported;¹⁴⁶ judges only provide decisions, presumably orally, to parties directly involved in the preceding.¹⁴⁷ As discussed above,¹⁴⁸ because the existing property law does not specifically tackle the pre-existing land disputes and case law provides little guidance, it is difficult for judges to resolve property cases.

¹³⁷ See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS. & LAB., *supra* note 105.

¹³⁸ See UNMIT, *supra* note 100, at 9.

¹³⁹ LAND LAW REPORT, *supra* note 82, at 12.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* JSMP attributes the suspension in cases to the absence of Timorese judges who were attending judicial trainings and language barriers faced by the international judges. *Id.*

¹⁴² *Id.* In fact, the Court of Appeals had not issued any decisions on civil cases. *Id.*

¹⁴³ See UNMIT, *supra* note 100, at 10.

¹⁴⁴ Amado Hei, *Finding Ways of Resolving Land Problems in East Timor*, 13 E. TIMOR L.J. (2004), available at http://www.eastimorlawjournal.org/ARTICLES/2004/resolving_land_problems_east_timor_hei.html.

¹⁴⁵ See Semanário Timor-Leste, *Press Release*, Feb. 4, 2005, <http://timorbanafatin.blogspot.com/2006/06/short-note-on-older-issue.html> (last visited Mar 22, 2009). This is evidenced by the material tested on the judicial proficiency exams failed by the judges in 2005. *Id.* They were tested on the Indonesian Penal Code, the Indonesian Civil Code, the Code of Indonesian Civil Process, legislation passed by the Timor-Leste's Parliament and government, and legislation enacted under UNTAET. *Id.*

¹⁴⁶ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RTS. & LAB., *supra* note 105. While Timorese law requires Supreme Court decisions to be published in the official gazette, no such requirement applies to the lower court decisions. In any event, the official gazette is published in Portuguese, a language not generally understood by Timorese. Furthermore, the gazette is published infrequently and at varying costs, greatly reducing its access to the public. *Id.*

¹⁴⁷ DEVELOPMENTS IN COURT ADMINISTRATION: TIMOR-LESTE 2007, *supra* note 134.

¹⁴⁸ See *supra* Part III.A.1.

Even if the courts could handle property cases effectively, many Timorese do not have access to the judicial system for a variety of reasons.¹⁴⁹ Language poses an initial barrier: in some districts, notably Baucau and Oecusse, the majority of people engaged in the judicial system do not have a solid understanding of Tetun,¹⁵⁰ the *lingua franca* of Timor-Leste.¹⁵¹ Court costs can also be prohibitive.¹⁵² Moreover, the public does not seem to trust the courts: during unrest in August 2007, a mob partially burned the District Court in Baucau, the second largest city in Timor-Leste.¹⁵³ The fact that a Timorese mob targeted the courthouse suggests a significant degree of discontent with the judicial system. When viewed collectively, the inexperience of the judges, the inability of the court system to resolve civil cases in a timely manner, and public distrust of the judiciary raise serious concerns about the effectiveness of the judicial system to resolve land disputes.

B. Possible Solutions Currently Under Consideration Do Not Address the Core Issue of Ownership Rights

Although Timor-Leste would benefit from a land registry and the proposed draft land law that would adopt this land registry, neither of these initiatives address existing land conflicts arising from property dispossession in Timor-Leste's past.

1. A Land Registry Will Not Resolve Disputes Between Conflicting Categories of Claimants

While beneficial, the creation of a land registry does not resolve existing conflicts between titleholders from the five distinct property systems. A land registry is a system of public records that tracks legal rights in real property and provide documentary evidence when property disputes arise.¹⁵⁴ Currently, no land registration system exists in Timor-Leste,¹⁵⁵ but

¹⁴⁹ See Press Release, USAID, *Government to Open Discussion on Land Policy Framework* (Oct. 30, 2008), <http://easttimorlegal.blogspot.com/2008/11/timor-leste-hopes-to-pass-transitional.html> (last visited Mar. 16, 2009).

¹⁵⁰ DEVELOPMENTS IN COURT ADMINISTRATION: TIMOR-LESTE 2007, *supra* note 134.

¹⁵¹ DUNN, *supra* note 17, at 3.

¹⁵² *Timor-Leste: Settling Age-Old Land Disputes*, *supra* note 100.

¹⁵³ DEVELOPMENTS IN COURT ADMINISTRATION: TIMOR-LESTE 2007, *supra* note 134; UNMIT, *supra* note 100, at 10.

¹⁵⁴ PETER F. DALE & JOHN D. MCLAUGHLIN, *LAND ADMINISTRATION* 36 (1999). There are two categories of systems: the registration of deeds and the registration of titles. Systems which register deeds record the documents affecting interests in land. Systems which register title record the actual

the National Directorate for Land, Property and Cadastral Services of the Ministry of Justice (“MOJ”) recently commenced a project designed to create a comprehensive database of claims to land ownership.¹⁵⁶ *Ita Nia Rai*, or “Our Land,”¹⁵⁷ marks the first land registration project since Timor-Leste’s independence.¹⁵⁸ The program, designed to strengthen property rights, will create a national land cadastral survey¹⁵⁹ and establish a land titling and registration system over the next five years.¹⁶⁰ Whereas the MOJ has authorized the collection of property information,¹⁶¹ Parliament has not passed formal legislation adopting a registration system.¹⁶²

Some scholars believe that because land registration provides security of title, it leads to social stability and long-term economic benefits for communities.¹⁶³ But in order for Timor-Leste to benefit from land registration, it must first have clearly defined property rights that dictate how land should be registered.¹⁶⁴ Some advocates of *Ita Nia Rai* suggest that the country would profit from delaying passage of a comprehensive land law

rights that owners have in the land. Tim Hanstad, *Designing Land Registration Systems for Developing Countries*, 13 AM. U. INT’L L. REV. 647, 650-51 (1998).

¹⁵⁵ FITZPATRICK, LAND CLAIMS, *supra* note 10, at 4.

¹⁵⁶ USAID, RDTL, & Ita Nia Rai, East Timor Ministry of Justice & DNTPSC Launch National Property Cadastre (July 28, 2008), <http://easttimorlegal.blogspot.com/2008/07/east-timor-ministry-of-justice-dntpsc.html> (last visited Mar. 16, 2009). The project receives funding from United States Agency for International Development (USAID). *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See* USAID, *News Release: New USAID-Supported Programs to Respond to the 2006 Crisis*, *supra* note 80; FITZPATRICK, LAND CLAIMS, *supra* note 10, at 4.

¹⁵⁹ A cadastre is a systematic description of the land units within an area. To describe the land, surveyors use maps that identify the location and boundaries of units and records. GERHARD LARSSON, LAND REGISTRATION AND CADASTRAL CADASTRAL SYSTEM 16 (Longman Scientific & Technical 1991).

¹⁶⁰ USAID, *News Release: New USAID-Supported Programs to Respond to the 2006 Crisis*, *supra* note 80.

¹⁶¹ USAID, RDTL, & Ita Nia Rai, *supra* note 156. The decree authorizes DNTPSC and Ita Nia Rai to begin collecting data. USAID, *News Release: Minister of Justice Signs Decree Opening the Way for Land Reform in Timor-Leste*, July, 2, 2008, http://timor-leste.usaid.gov/newsroom/newsroom_NR2008-07-02.htm (last visited Mar. 16, 2009).

¹⁶² USAID, *Government to Open Discussion of Land Policy Framework*, *supra* note 149. Should Parliament adopt the proposed land law draft, Minister for Justice and the Director of Land and Property National Office would have the authority to adopt the cadastre developed under *Ita Nia Rai*. *See id.*

¹⁶³ *See* Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT’L L. REV. 1109, 1112 (2004). *But see* Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT’L & COMP. L. 183, 189-90 (1995). “In the Caribbean and in much of Africa, for example, titling has not been used historically to secure property. Therefore, titling may have little impact on the small farmer, primarily because titling is not perceived as effecting a change in local communities.” Hendrix, *supra* note 163, at 223.

¹⁶⁴ Hanstad, *supra* note 154, at 657.

defining these rights until after the cadastre has been completed.¹⁶⁵ While it may be tempting to delay action, a land registration that secures ill-defined rights has little purpose.¹⁶⁶ When rights are ambiguous, non-existent, or poorly defined by law—as is the case in Timor-Leste—a registration system will not provide real benefit.¹⁶⁷ Additionally, a registration system alone will not resolve pre-existing land conflicts because it does not define the rights of ownership, but merely records established rights.¹⁶⁸ In order to lay these ongoing claims to rest, Timor-Leste needs to establish how conflicting land claims will be assessed.

2. *The Proposed Draft Land Law Does Not Address Conflicting Property Interests Resulting from Past Dispossession of Land*

Although Timor-Leste's Parliament has been reviewing a land law that will purportedly resolve the issue of which claimants actually have legal rights to land, no such law has been passed, and thus disputes—particularly in urban areas—persist.¹⁶⁹ The Minister for Justice and the Prime Minister began reviewing a draft land law¹⁷⁰ designed to address the existing deficiencies in the law as early as 2004.¹⁷¹ Adoption of the law was discussed as recently as October 2008;¹⁷² however, at the time of writing, Parliament had not adopted the law.¹⁷³ The draft land law does not address

¹⁶⁵ USAID, *News Release: Minister of Justice Signs Decree Opening the Way for Land Reform in Timor-Leste*, *supra* note 161. A legal specialist working with *Ita Nia Rai* said, "Only once we know the reality of people's relationships to land can we really draft a legislation that responds to the needs of the Timorese people." *Id.*

¹⁶⁶ Hanstad, *supra* note 154, at 657.

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See Timor-Leste: Settling Age-Old Land Disputes*, *supra* note 100.

¹⁷⁰ Land Rights (Sept. 27, 2008), <http://easttimorlegal.blogspot.com/2008/09/land-rights-in-east-timor-policy.html> (follow "Draft Land Rights Act" hyperlink) (last visited Mar. 16, 2009) [hereinafter Draft Land Law].

¹⁷¹ Land Rights in East Timor—Policy Analysis and Draft Law (Sept. 27, 2008), <http://easttimorlegal.blogspot.com/2008/09/land-rights-in-east-timor-policy.html> (last visited Mar. 16, 2009). *See* LAND LAW REPORT, *supra* note 82, at 9.

¹⁷² *See Timor-Leste: Settling Age-Old Land Disputes*, *supra* note 100.

¹⁷³ The delay in passing land legislation mirrors a general delay in the passage of legislation in Timor-Leste; for example, Timor-Leste's Parliament authorised the drafting of a Penal Code in 2005. *Press Release, Judicial System Monitoring Programme, Penal Code to Be Passed as a Government Decree Law* (Aug. 3, 2005), www.jsmp.minihub.org/Press%20Release/2005/August/Penal%20Code/Penal%20code_030805_eng.doc (last visited Mar. 22, 2009). However, Timor-Leste has yet to adopt its own Penal Code. *See* Asian Forum for Human Rights And Development, *Timor Leste: Draft Penal Code Needs Final Adjustments*, ASIAN F. FOR HUMAN RTS. & DEV., Oct. 24, 2008, http://www.forum-asia.org/index2.php?option=com_content&do_pdf=1&id=2021 (last visited Mar. 22, 2009).

land disputes directly, but it does have several provisions that could improve the situation.¹⁷⁴

First, the draft creates a right to hold land communally;¹⁷⁵ specifically, it enables a customary elder or nominated individual to file a title application to register communal, or *adat*, lands.¹⁷⁶ Second, the draft mandates that the government implement a land registration program throughout the country, which would include surveying, mapping, and recording parcels of land, registering rights to those parcels and transferring those rights, and issuing documentation of those rights (which could then be used as legal evidence of ownership).¹⁷⁷ Therefore, adoption of the draft law would integrate the land registration efforts already being conducted by *Ita Nia Rai*.¹⁷⁸ However, other concerns would remain were Timor-Leste to adopt the draft land law as currently written.

In addition to outlining a basic administrative structure for dealing with land titles,¹⁷⁹ the draft land law defines various rights to property:¹⁸⁰ ownership, cultivation, building, use, lease, and the right to clear land.¹⁸¹ Providing more substance than the Real Estate Law, the draft land law indicates that ownership rights may only vest in Timorese citizens, may be transferred by and to other parties, and can be used as loan security and encumbered by mortgage.¹⁸² The draft land law further states that ownership rights may be terminated by legislation, the owner's voluntary surrender, the owner's neglect, or by destruction of the land.¹⁸³ Unfortunately, these additions fall short of resolving the problem due to their ambiguity. For example, the draft law states that ownership rights may be annulled if "[t]he land is destroyed";¹⁸⁴ this could mean that ownership is voided when the property is destroyed by a tsunami, a fire that spread from a neighboring house, or a fire set by Indonesian soldiers in 1999. While public policy might be served by terminating ownership rights where Indonesian troops

¹⁷⁴ See generally Draft Land Law.

¹⁷⁵ Draft Land Law § I, art. 9.

¹⁷⁶ *Id.* § III, arts. 11 & 12.

¹⁷⁷ *Id.* § VII, art. 32.

¹⁷⁸ See *supra* Part III.B.1.

¹⁷⁹ See generally Draft Land Law. The proposed draft outlines basic property rights and established the duties and roles of the Minister of Justice and the Director of the Land and Property National office. *Id.* In particular, it delineates the responsibilities and authoritative power of the Minister of Justice and the Director of the Land and Property National office with regards to land registration systems. *Id.* §§ IV & V.

¹⁸⁰ *Id.* § III.

¹⁸¹ *Id.* Preamble & § III.

¹⁸² *Id.* § III, art. 4(a)-(c).

¹⁸³ *Id.* § III, art. 5.

¹⁸⁴ *Id.* § III, art. 5(d).

destroyed property, voiding ownership rights after a natural disaster makes little sense.

Furthermore, the draft land law does not specify how existing interests in, or claims to, property will translate into ownership rights. While the proposed law clearly indicates that owners can transfer their ownership rights to other parties,¹⁸⁵ the draft land law is silent on how it will treat transfers executed prior to the passage of the law. While the draft land law does succeed in defining various interests in land, the proposed law does not consider how these rights will apply to parties with conflicting interest in land. For example, the law does not address a situation in which an Indonesian titleholder transferred his or her interest to a third party but a Portuguese titleholder also claimed ownership rights to the property. Such conflicting land claims may exist, yet the law is silent on the major issues underlying many property disputes. Because the draft land law fails to clarify how these newly defined interests will relate to the present condition of conflicting land claims, the draft land law ultimately fails to untangle the existing knot of property problems.

IV. ADOPTING THE DOCTRINE OF ADVERSE POSSESSION MAY PROVIDE A SOLUTION FOR LAND DISPUTE ISSUES IN TIMOR-LESTE

In the absence of a clear legal solution to Timor-Leste's land dispute problems, the country has the opportunity to adopt a variety of legal mechanisms to confront existing land dispute problems. The country has already taken steps to address property issues by approving a national land registration program.¹⁸⁶ However, the creation of a land registry alone does not substitute for clear legislation on land rights; mechanisms for recording and adjudicating claims—while important—do not clarify how conflicting claimants' rights interact. Timor-Leste, like other post-conflict countries,¹⁸⁷ could benefit from the adoption of the doctrine of adverse possession.

¹⁸⁵ *Id.* § III, art 4(b).

¹⁸⁶ *See supra* Part III.B.1.

¹⁸⁷ *See* USAID, LAND ISSUES PERTAINING TO LAND TITLING AND REGISTRATION IN AFGHANISTAN 18 (2006), www.ltera.org/index.php?option=com_docman&task=doc_download&gid=81&Itemid=63&lang=en (last visited May 27, 2009). *See also* Lewis, *supra* note 14. *But see* UN-HABITAT & GLOBAL LAND TOOLS NETWORK, SECURING LAND RIGHTS FOR ALL 29 (2008), <http://www.unhabitat.org/pmss/getPage.asp?page=bookView&book=2488> (follow pdf link) (noting that while adverse possession can benefit communities, it also has a number of limitations).

A. *The Doctrine of Adverse Possession Grants Lawful Title to Occupiers in Possession of Property Abandoned by the Previous Owner*

The legal doctrine of adverse possession allows a person to acquire lawful title to land legally belonging to another through the continuous possession of land for a certain period of time.¹⁸⁸ If the statute of limitations runs before the original owner lays legal claim to the land, the original owner's right to the property extinguishes; he or she no longer has a claim against the adverse possessor, and the possessor now has clear legal title to the property.¹⁸⁹ Distinct from other land transfers, which involve conveyance from one party to another, the adverse possessor's title arises because of possession and the statutory extinguishment of the former owner's title.¹⁹⁰ Within these basic principles, adverse possession doctrines vary among countries and jurisdictions.¹⁹¹

The main points of divergence are: the length of the statute of limitations, the factors required to establish possession, and whether the land is registered or unregistered.¹⁹² Globally, statute of limitation periods range from five to sixty years.¹⁹³ In addition to variations in the length of the statute of limitations, jurisdictions employ a variety of tests to determine whether the adverse possessor was in actual possession of the land. For example, in the United States, an adverse possessor must prove possession that is actual, hostile, open and notorious, exclusive, and continuous for the statutory period.¹⁹⁴ In Tasmania, an adverse possessor's rights to the land hinges on how the adverse possessor enjoyed possession of the land: as a right, through force or secrecy, or by virtue of a written or oral contract.¹⁹⁵

¹⁸⁸ STEPHEN JOURDAN, *ADVERSE POSSESSION* 3 (Reed Elsevier 2003).

¹⁸⁹ See WILLIAMS F. WALSH, 1 *COMMENTARIES ON THE LAW OF REAL PROPERTY: POSSESSORY ESTATES AND INTERESTS* 122 (1948). "A new title has arisen simply and solely because of the wrongful possession followed by the statutory extinguishment of the former title." *Id.* at 123.

¹⁹⁰ See *id.* at 123.

¹⁹¹ See generally BRITISH INST. OF INT'L & COMP. L., *ADVERSE POSSESSION* (2006), http://www.biicl.org/files/2350_advposs_sep_ftnsv3.pdf (last visited Mar. 22, 2009).

¹⁹² See generally *id.*

¹⁹³ See *id.* In the United States, the statute of limitation periods range from 5 to 40 years. *Id.* at 12. In Australian jurisdictions the statutes of limitations range from 12 to 15 years. *Id.* at 10. New Zealand's statute of limitations does not run until 20 years have elapsed, or 60 years where the action is brought by the Crown to recover unregistered land. *Id.* at 11. Original owners of land may not bring actions to recover land after twelve years in the Cook Islands, Niue, Kiribati, Tuvalu, Fiji, Papua New Guinea, Samoa, and the Solomon Islands. See SUE FARRAN & DON PATERSON, *SOUTH PACIFIC PROPERTY LAW* 168 (Cavendish Publishing Limited 2004). In Tonga the period of limitations is ten years. *Id.*

¹⁹⁴ Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423 (2001); BRITISH INST. OF INT'L & COMP. L., *supra* note 191, at 70.

¹⁹⁵ Land Titles Act, § 138V, Law No. 19/1980 (1980) (Tas.), available at http://www.thelaw.tas.gov.au/print/index.w3p;doc_id=19++1980+AT@EN+20080603000000;rec=0.

The Tasmanian legislation¹⁹⁶ also considers how the adverse possessor treated the property: whether he or she made improvements on the land, enclosed the property, or ever acknowledged ownership by another.¹⁹⁷ The laws on adverse possession also differ depending on the type of land at issue. For example, New Zealand distinguishes between unregistered and registered land,¹⁹⁸ and its doctrine of adverse possession does not extend to Maori customary land except where the action involves the Crown.¹⁹⁹ Similarly, Australian jurisdictions treat adverse possession of registered land differently from unregistered land.²⁰⁰ Finally, the amount of property adverse possessors can claim ranges from large parcels of land—as was disputed in the famous English case of *J.A. Pye (Oxford) Ltd. v. Graham*²⁰¹—or fractions of parcels, as often occurs in boundary disputes.²⁰²

B. An Evaluation of Adverse Possession Indicates That Timor-Leste Has More to Gain Than Lose by Adopting the Doctrine

“There is no way any process, any criteria [or] any land law would please everyone.”²⁰³ Although it has its limitations, adverse possession can help cut the Gordian knot of conflicting land claims that plague property law in Timor-Leste. It is unlikely that adverse possession, or any other policy, will eliminate property disputes overnight. And, risks and downsides to the doctrine do exist—mainly humanitarian concerns, reliance on a weak judiciary, and negative impacts on the environment. Adverse possession can benefit the country, however, by providing social and economic stability, easing judicial administration, and ensuring the optimal use of land. On

¹⁹⁶ A government Recorder initially processes adverse possession claims in Tasmania. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ BRITISH INST. OF INT’L & COMP. L., *supra* note 191, at 65-67.

¹⁹⁹ *See id.* at 66. The *Limitation Act* 1950 prohibits the use of adverse possession to recover Maori customary land from the Crown. *Id.*

²⁰⁰ *See id.* at 63-65.

²⁰¹ In *J.A. Pye (Oxford) Ltd. v. Graham* [2002] UKHL 30, the House of Lords affirmed the High Court’s decision to grant over 23 hectares of agricultural land to the Grahams after they had used the land for grazing for over fifteen years against the expressed wishes of the registered title owner. *See Squatters’ Rights to Another’s Land Are Not Disproportionate*, TIMES ONLINE, Oct. 1, 2007, <http://business.timesonline.co.uk/tol/business/law/reports/article2393084.ece> (last visited Mar. 16, 2009).

²⁰² *See* Malcolm Park & Ian Williamson, *The Effect of Adverse Possession to Part on a Future Australian Cadastre*, Sixth Annual Asian Surveyors Congress (Nov. 1-6, 1999), available at [http://www.sli.unimelb.edu.au/research/publications/IPW/Effect%20of%20Adv%20Possession\(Fremantle\)99.pdf](http://www.sli.unimelb.edu.au/research/publications/IPW/Effect%20of%20Adv%20Possession(Fremantle)99.pdf) (last visited Mar. 22, 2009).

²⁰³ *Timor-Leste: Settling Age-Old Land Disputes*, *supra* note 100 (quoting Ibere Lozez, policy and legislation specialist for Ita Nia Rai).

balance, Timor-Leste stands to gain much, and risks little, by adopting an adverse possession law.

1. *After Considering Humanitarian Concerns, Adverse Possession Is No Worse Than the Alternative Land Policies*

While the doctrine of adverse possession raises some humanitarian concerns, other potential solutions to land dispute problems have similar drawbacks.²⁰⁴ For example, some critics believe that adverse possession unduly burdens landowners by imposing additional encumbrances on them and their use of their land.²⁰⁵ Owners are not always aware that land is being adversely possessed, and even if aware, might not want to, or be able to, engage in hostile litigation.²⁰⁶ Others argue that depriving an owner of his land is disproportional punishment for the mere delay in bringing a claim for possession.²⁰⁷

²⁰⁴ At least one adverse possession law has been challenged on human rights grounds and withstood scrutiny. See Ben Baruch, Comment, *Adverse Possession and Human Rights*, 12(1) LANDLORD & TENANT REV. 3, 3 (2008); George L. Gretton, Comment, *Private Law and Human Rights*, 12(1) EDIN. L.R. 109, 111 (2008). The European Court of Human Rights case, *J.A. Pye (Oxford) Ltd. v. United Kingdom*, 46 Eur. H.R. Rep. 45 (Grand Chamber 2008), arose after the English House of Lords granted around fifty acres (about 23 hectares) of grazing land owned by the J.A. Pye company to an adverse possessor. See Gretton, *supra* note 204, at 109. Having exhausted appeals within the English judicial system, the company brought a claim in the European Court of Human Rights, arguing that England's adverse possession law violated Article 1 of the European Convention on Human Rights, Protocol No. 1. See *id.* While the European Court of Human Rights (Chamber) found for the company, the Grand Chamber overturned this decision, finding that while the English law of adverse possession impacted the company, the original land owner, the company was not "deprived" within the meaning of Article 1. *Id.* at 110-11; Baruch, *supra* note 204, at 4. Additionally, the Court concluded that the law properly struck a balance between public interest and individual rights. Baruch, *supra* note 204, at 4. European Convention on Human Rights, Protocol No. 1 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions." Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, ETS 9, 213 U.N.T.S. 262, available at <http://www.unhcr.org/refworld/topic,459d1782,459d17c42,3ae6b38317,0.html>. Additionally, the European Convention on Human Rights, Protocol No. 1 provides an exception for "public interest and subject to the conditions provided for by law and by the general principles of international law." *Id.*

²⁰⁵ See William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 80 (1996).

²⁰⁶ See JOURDAN, *supra* note 188, at 50.

²⁰⁷ *Id.* In a 2008 India Supreme Court opinion, the Court stated: "We fail to comprehend why the law should place a premium on dishonesty by legitimising (sic) possession of a rank trespasser and compelling the owner to lose its possession only because of his inaction in taking back the possession within limitation." J. Venkatesan, *Apex Court: Adverse Possession Law, a Windfall to Squatter*, THE HINDU, Oct. 11, 2008, <http://www.thehindu.com/2008/10/11/stories/2008101160691200.htm> (last visited Mar. 16, 2009). Critics of adverse possession have also characterized the policy as legal means of allowing one party to take another's land without paying; in places like the United States, this seems "contrary to the American way of life." Ackerman & Johnson, *supra* note 205, at 94.

These arguments have some merit. Because of the nature of the conflict in Timor-Leste, many families lost possession of their home through no fault or choice of their own. For example, Indonesia's policies of transmigration and translocation resulted in the forced displacement of hundreds of thousands of people.²⁰⁸ Denying a previous owner who lost possession through no fault or choice of their own is problematic. It is equally problematic to evict a family who initially occupied a home during the severe housing shortage in 1999.²⁰⁹ An additional concern with the application of adverse possession in Timor-Leste is that an action to regain possession relies on the original owner bringing a challenge against the adverse possessor.²¹⁰ In Timor-Leste, many Timorese lack familiarity²¹¹ with and confidence in the judicial system.²¹² If Timorese are prevented from bringing actions to reclaim land from an adverse possessor—either because of doubts in the courts or lack of experience with the system—adverse possession will unfairly preference parties with knowledge of the judicial system. In order to avoid this consequence, Timor-Leste should make serious efforts to educate the population about the judicial system and the doctrine of adverse possession. Regardless of what method Timor-Leste ultimately adopts to provide resolution for the existing land dispute issues it faces, the policy will adversely affect some innocent parties. Because the underlying land disputes arose, in part, from violations of humanitarian principles,²¹³ any solution to the disputes—including adverse possession—will necessarily have humanitarian implications.

The benefit of adverse possession—as compared with a policy that exclusively favors one category of claimants over another—is that it helps keep people in their homes while still allowing for judicial discretion. This discretion rests in a court's ability to apply a variety of factors when determining possession; the approaches taken in the United States and Tasmania illustrate the types of tests courts apply to determine whether the

²⁰⁸ See *supra* Part II.B.

²⁰⁹ See *supra* Part II.B.

²¹⁰ See *supra* Part IV.A.

²¹¹ HARRINGTON, *supra* note 3, at 28; see *supra* Part III.A.3.

²¹² See *supra* Part III.A.3.

²¹³ See *supra* Part II.B. Indonesian violence during the occupation of Timor raises serious human rights issues. U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Question of the Violation of Human rights and Fundamental Freedoms in any Part of the World*, ¶ 1, U.N. Doc. E/CN.4/2000/NGO/103 (Jan. 21, 2000), available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/8be9b80e5aab7165802568aa005dc98d/\\$FILE/G0010610.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/8be9b80e5aab7165802568aa005dc98d/$FILE/G0010610.pdf). Additionally, Indonesia's policy of transmigration had been identified as contrary to human rights. *Id.* ¶ 7-8.

adverse possessor's occupation of the land constitutes possession.²¹⁴ Timor-Leste's Parliament can tailor its adverse possession law to fit the country's objectives. For example, in the wake of Indonesia's withdrawal, some Timorese occupied properties in Dili solely for the purpose of renting them out to foreign aid workers.²¹⁵ Timor-Leste could decide not to favor these claims over owners who lost possession of their property through no fault of their own. The doctrine of adverse possession, with its many elements, allows for Timor-Leste to tailor the doctrine to reflect its own priorities and judgments about fairness.

2. *Adverse Possession Can Provide Social and Economic Stability to Timor-Leste*

Adverse possession fosters economic and social stability, each of which would benefit Timor-Leste. From an economic perspective, adverse possession provides the occupier with security of title and legal right to the land, thereby encouraging the transferability of property rights.²¹⁶ Because adverse possession vests legal ownership of land in occupiers who satisfy its requirements, possession of legal title gives these occupiers security of title because they now perceive little or no risk of losing physical possession of the land.²¹⁷ As investors are more likely to develop and invest in communities with security of title,²¹⁸ adverse possession can foster economic stability and growth. Security of title also promotes the transferability of land because it ensures potential buyers that the title is not burdened by another party's claim.²¹⁹ Security of title also allows property owners to use land as equity, freeing up capital to invest in the community.²²⁰ These stabilizing effects of adverse possession have the additional benefit of meeting the stated government goal of strengthening Timor-Leste's economy.²²¹

²¹⁴ See *supra* Part IV.A.

²¹⁵ HARRINGTON, *supra* note 3, at 26-27.

²¹⁶ See Sandra Petersson, *Adverse Possession*, REFORM ISSUE, Spring 2003, at 64, 65, available at <http://portsea.austlii.edu.au/au/other/alrc/publications/reform/reform83/18.rtf>.

²¹⁷ Landholders have security of title when they perceive little or no risk of losing physical possession of the land in the future. Hanstad, *supra* note 154, at 653.

²¹⁸ See Hanstad, *supra* note 154, at 655.

²¹⁹ See, e.g., Petersson, *supra* note 216 (stating that protecting future ownership promotes transferability of land). Government officials have identified the stabilization of property rights as a means of fostering economic stability. *Services Struggle as E. Timor Empties Refugee Camps*, AUSTRALIAN BROADCASTING CORP., *supra* note 80.

²²⁰ See Atuahene, *supra* note 163, at 1112.

²²¹ See CONST. §§ 140-41. "The State shall promote national investment and establish conditions to attract foreign investment, taking into consideration the national interests, in accordance

Because adverse possession provides the possessor with security of title,²²² it can be a means of preserving the peace.²²³ The recent conflicts over land in 2006 indicate a close connection between property disputes and violence.²²⁴ Adverse possession might well reduce the occurrence of violence by establishing a clear owner of property. Some critics argue that adverse possession can actually increase tension between neighbors, particularly in boundary disputes between parties with adjoining estates.²²⁵ While this assessment may be accurate in other contexts, the disputes between claimants in Timor-Leste rise above mere boundary disputes; parties often dispute the right of claimants to occupy whole parcels of land.²²⁶ In theory, Timor-Leste could continue to avoid addressing these kinds of disputes, based on a fear that government action will exacerbate tension over property. However, it seems more likely that inaction will stoke violence and social unrest like that experienced in 2006.²²⁷ The enactment of an adverse possession doctrine would promote stability of land tenure and improve the economy, and these benefits outweigh the prospect of increased unrest in the absence of action.

3. *The Benefits of Integrating Adverse Possession into the Existing Judicial Framework Offset the Accompanying Burdens on the Courts*

Adverse possession offers several benefits related to ease of administrability of the law that will facilitate judicial efficiency. For example, legislatures have adopted adverse possession as a means of avoiding evidentiary problems related to proving ownership.²²⁸ Without a statute of limitations, such as the one provided by adverse possession, parties

with the law.” *Id.* § 140. “Ownership, use and development of land as one of the factors for economic production shall be regulated by law.” *Id.* § 141.

²²² See JOURDAN, *supra* note 188, at 49. Statutes of limitation, as applied to adverse possession, “avoid the real risk of injustice in the adjudication of stale claims; to ensure certainty of title; and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims.” *Id.* at 49-50 (citing *J.A. Pye (Oxford) Ltd. v. Graham* [2001], 2 W.L.R. 1293, 1309 (Eng.)).

²²³ See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1131 (1984).

²²⁴ See *supra* Parts I & II.D.

²²⁵ See Ackerman & Johnson, *supra* note 205, at 94.

²²⁶ See LAND LAW REPORT, *supra* note 82, at 12-15. In the Rosario dos Martires’s case, the claimant brought an action to evict respondent Dewan Solidaritas Mahasiswa (DSM) from a house in Dili. *Id.* at 13-14. Similarly, in the Baucau Pousada case, the plaintiff brought an action to remove the Orient Star Company and Sofeba Company from the hotel property in Baucau. *Id.* at 14-15.

²²⁷ In some instances “even a bad rule is better than no rule at all.” Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

²²⁸ Merrill, *supra* note 223, at 1128.

could bring claims after time had destroyed all the evidence related to the initial facts of the case.²²⁹ Because many of the Indonesian land registry records were destroyed in 1999, and many individuals lost their property deeds when they fled their homes,²³⁰ adverse possession would alleviate the need for documentation of legal ownership where the possessor had satisfied other elements required by the adverse possession laws.

Most importantly, adverse possession could, over time, terminate the land disputes riddling Timor-Leste.²³¹ Enacting an adverse possession law would also provide a succinct framework that the judiciary could use when determining disputes over land—something that currently does not exist in Timor-Leste. Such a framework could effectively resolve many of the older land disputes that arose from historical waves of dispossession in Timor-Leste. An adverse possession law clearly delineating the required elements to gain lawful possession would make the judiciary's task of resolving disputes easier.

4. *Adverse Possession Favors the Most Efficient Use of Land*

As an additional benefit, adverse possession encourages efficient use of land: a time bar on when owners can bring property actions encourages parties to use their land or encourages other parties to make use of land where the true owner fails to do so.²³² Applying this underlying principle of adverse possession, Timor-Leste could validate the land rights of families who moved into other people's homes in the wake of Indonesia's withdrawal in 1999.²³³ For example, Timor-Leste's Parliament could adopt adverse possession legislation that creates the presumption that occupation of property under duress raises a valid claim to land.²³⁴ The creation of such a presumption would reflect the effect produced by the issuance of TUAs under UNTAET,²³⁵ which was also seen as a policy that strengthened the presumption of a right to possession through occupation.²³⁶ Adverse possession's principle of efficient use of land correlates with traditional

²²⁹ *Id.*

²³⁰ FITZPATRICK, *LAND CLAIMS*, *supra* note 10, at 6-7.

²³¹ Ackerman & Johnson, *supra* note 205, at 91.

²³² JOURDAN, *supra* note 188, at 50.

²³³ *See supra* Part II.B.

²³⁴ This would effectively shift the burden from the adverse possessor to the original owner.

²³⁵ *See supra* Part II.C.

²³⁶ *See* UN-HABITAT, *SURVEYING AND LAND INFORMATION MANAGEMENT FOR SECURE LAND TENURE 5* (2003), http://www.unhabitat.org/downloads/docs/1523_80316_land_information.pdf (last visited Mar. 22, 2009).

rights regarding land use;²³⁷ under customary law, a community member's right to the land correlated with his or her use of the land.²³⁸

Conversely, critics point out that adverse possession encourages the exploitation and development of land, a policy at odds with the modern societal goal of promoting environmental conservation and preservation.²³⁹ This argument rests on the assumption that adverse possessors will use the doctrine of adverse possession to acquire ownership rights over natural habitats and exploit natural resources.²⁴⁰ Again, Timor-Leste can tailor its legislation to avoid this negative consequence. For example, the Parliament could adopt a version of adverse possession that does not apply to undeveloped land. Similarly, Parliament could confine the application of adverse possession to property in urban areas, as most of the land disputes in Timor-Leste involve parcels located in urban areas.²⁴¹

C. *The Doctrine of Adverse Possession Is Easily Reconcilable with Existing Land Policy in Timor-Leste*

Not only does the doctrine benefit Timor-Leste, adverse possession is compatible with both domestic laws and proposed land initiatives.

I. *Adverse Possession Does Not Conflict with Domestic Property Laws*

Adverse possession does not directly conflict with existing land and property legislation; in fact, an adverse possession law could be tailored to strengthen existing land legislation. For example, Timor-Leste could utilize elements of the Real Estate Law in its adverse possession law. The Real Estate Law already provides a limitation period in that it bars claims brought for property after March 10, 2004.²⁴² Instead of barring claims after a set number of years, Timor-Leste could use this date in place of a statute of limitations. Separately, Parliament could elect to eliminate the March 10, 2004, limitation date in favor of a new limitation period. Instead of filing claims directly to courts, the adverse possession law could utilize the framework for submitting claims established in the Real Estate Law.²⁴³ For example, DTP could make an initial review of claims to determine if the

²³⁷ See *supra* Part II.A.

²³⁸ See FITZPATRICK, LAND CLAIMS, *supra* note 10, at 39.

²³⁹ Ackerman & Johnson, *supra* note 205, at 93-94.

²⁴⁰ *Id.*

²⁴¹ *Timor-Leste: Settling Age-Old Land Disputes*, *supra* note 100.

²⁴² See *supra* Part III.A.1.

²⁴³ See *supra* Part III.A.1.

adverse possessor meets the basic elements of possession established by the adverse possession law.

Parliament also could choose to apply adverse possession to claims submitted in response to the Real Estate Law that have not yet been resolved.²⁴⁴ In cases where occupants of property submitted claims to land and no previous owners challenged these claims, the government could grant legal title to the claimant through the doctrine of adverse possession. Similarly, in cases where a previous owner challenges an occupant's right to possession after the 2004 deadline specified under the Real Estate Law had passed, adverse possession could be applied retroactively, as the government already put the previous owner on notice that his or her rights to the land would extinguish. The retroactive application of adverse possession also falls within the framework specified by the Real Estate Law, as that law provided that future laws could apply to the resolution of claims filed in response to the Real Estate Law.²⁴⁵ However, where a previous owner has challenged the validity of an occupier before the Real Estate Law's 2004 deadline, application of the doctrine of adverse possession does not seem appropriate. Ultimately, Timor-Leste has the flexibility to adopt an adverse possession law that considers existing land dispute issues and addresses these issues in a way that complements existing legislation.

2. *Adverse Possession Does Not Undermine a Future Land Registration System in Timor-Leste*

Another vein of criticism of the adverse possession doctrine relates to possessors seeking to assert their rights over owners with registered titles. Because adverse possession appears to conflict with indefeasibility of title—the basic theory on which title registration rests—critics find adverse possession at odds with modern title registration systems.²⁴⁶ For example, in Canada, some provinces have completely abolished the right to claim land through adverse possession.²⁴⁷ In Australia, which utilizes the Torrens land registration system,²⁴⁸ the state legislatures distinguish between registered and unregistered land for the purposes of applying adverse possession laws,

²⁴⁴ See *supra* Part III.A.1.

²⁴⁵ See *supra* Part III.A.1.

²⁴⁶ Malcolm Park, Lisa Ting & Ian Williamson, *Adverse Possession of Torrens Land: Parliamentary Inquiry Strays Out of Bounds*, L. INST. J., Nov. 1998 at 77, 79, available at <http://www.sli.unimelb.edu.au/research/publications/IPW/malpinquiry.htm>.

²⁴⁷ BRITISH INST. OF INT'L & COMP. L., *supra* note 191, at 3.

²⁴⁸ *Id.* at 63. Under the Torrens system, the government guarantees all rights reflected by registration of title in the land registry. Hanstad, *supra* note 154, at 651-52.

although claimants may still acquire registered property.²⁴⁹ These legislatures treat registered property differently because their land registries are designed to establish certainty of ownership, thereby eliminating the purpose of adverse possession to keep land in use where there is no ascertainable owner.²⁵⁰

In post-conflict countries—like Timor-Leste—which lack regulatory frameworks, however, adverse possession can be used to give a greater number of people tenure security.²⁵¹ Whereas Timor-Leste currently lacks a land registry system, efforts are underway to establish a land cadastre.²⁵² Therefore, it would be prudent of Parliament to anticipate how a law on adverse possession would relate to the new land registry.²⁵³ Adverse possession does not conflict with land registry systems. The doctrine does, however, directly confront the existing problem regarding land conflicts.

V. CONCLUSION

Because of its unique property issues, Timor-Leste should seek solutions tailored to address its specific needs. In light of this new country's unique historical experience, international law and norms do not offer a useful solution for handling land dispute issues arising from conflicting land interests. With the complex nature of land disputes in Timor-Leste, no single solution will solve all such disputes. Consequently, the country stands to benefit from the adoption of several different land policies which, working together, will create a stable land tenure system. Although Timor-Leste has taken steps towards adopting a land registry system, this system alone will not address existing land disputes.

Working in conjunction with existing law and the development of a land registry, the doctrine of adverse possession will enable Timor-Leste to settle some of the land disputes arising from dispossessions occurring in the past. Although adverse possession has its limitations—and the country's weak judicial infrastructure will likely struggle with applying any new law, including this new doctrine—any system of defined property rights meant to solve these long-standing property disputes will be imperfect. Despite its potential drawbacks, the adoption of adverse possession would benefit

²⁴⁹ See *supra* Part IV.A.

²⁵⁰ BRITISH INST. OF INT'L & COMP. L., *supra* note 191, at 3.

²⁵¹ UN-HABITAT, SURVEYING AND LAND INFORMATION MANAGEMENT FOR SECURE LAND TENURE, *supra* note 236, at 5.

²⁵² See *supra* Part III.B.1.

²⁵³ For example, Parliament could choose to only apply adverse possession to property not yet registered under *Ita Nia Raiis* registration initiative. Separately, Parliament could increase the burden on adverse possessors seeking to claim land registered in the new title system.

Timor-Leste. In particular, its adoption would foster social and economic stability, avoid further dispossession by allowing current possessors to continue using the land, and provide a framework for prioritizing competing claims that would be more easily applied by the judiciary. While adverse possession is not a legislative cure-all, its adoption would move Timor-Leste closer to resolving its land disputes and consequently, to social and economic stability.