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# *Legal Conflicts in the Border Dispute between Indonesia and Timor Leste*

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## Abstract

This study aims to find the pattern of dependable approach in the border dispute settlement between Indonesia and Timor Leste in Oecusse. Historically, the community lived in the border area came from one ancestor. Because of social-political problems, however, the community subsequently followed the trajectory for which the partition between Indonesia and Timor Leste was undeniable. As a result of the partition, in the context, adat land should become the collective right of the community, which is situated under one adat law system but in the different national jurisdictions. This study questions on what causes collective land conflicts at the border of these countries. Using socio-legal and local wisdom approaches, as it is subsequently analyzed according to adat law, the study finds the cause that emerged as the result of the legal conflict between adat law and state law. If the state hands over the problem to adat communities or traditional leaders, based on their adat law dispute resolution, the conflict will resolve quickly. This study recommends the two states, Indonesia and Timor Leste, to provide the dispute resolution to adat or traditional leaders based on their adat law.

Keywords: Legal Conflicts, Border Dispute, Adat Law.

## I. INTRODUCTION

The 1904 Treaty was carried out by the Portuguese and the Dutch, both of which were invaders who allowed all the methods to make profits in their colonies. The exploitative attitude as the colonizing countries led them to war to fight over each other's boundaries. The conflict between the Netherlands and Portugal on Timor Island ended with Treaty 1904. The contents of the 1904 Treaty were that the national border between Portugal and the Netherlands on Timor Island was determined based on *thalweg* (70) and *watershed* (30). This agreement made it difficult for both parties to assess national borders so that in 1914 the Dutch were brought to the International Arbitration Board. Based on the decision of the International Arbitration Board, the Dutch benefited so that the determination of the national border determined by the median river line and the straight line (ridge).

In the field of international law, the median line and straight line have been recognized by all countries in the world as agreements that must be obeyed.<sup>1</sup> However,

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<sup>1</sup> Compare Simmons, Beth A., 2005, Rules over Real Estate: Trade, Territorial Conflict, and International Borders as Institution. *The Journal of Conflict Resolution*. Vo. 49, No. 6 (Dec. 2005), pp. 823-848. Published by: Sage Publications. Inc. <https://www.jstor.org/stable/30045138>.

this is not the case with indigenous peoples. According to indigenous peoples<sup>2</sup> After Indonesia's independence, and the hope of the nation's people with a simple view, who is scientifically seen as not understanding, considers that independence is everything, including freeing itself from all bonds born from colonialism and imperialism. The logic applied is the logic of independence, not the logic of law as mostly studied in the colleges of legal and governmental studies.<sup>3</sup> Such a community's enormous expectation will result in the discontent that has been relied on the Indonesian government to defend the interests of its citizens as Indonesia's objective stated that "the State protects all of the Indonesian people and all of Indonesia's blood."

The people agreed to their body and soul to surrender this beloved "homeland" against the 1904 Treaty, which benefited Timor Leste. If the 1904 Treaty is used as a comprehensive reference, then the four outermost islands of Indonesia are threatened with release. The four outer islands are Batek Island, Ndana Rote, Ndana Sabu, and Mengudu in East Sumba. Based on the understanding of the residents of Oecusse District, East Timor, the boundary markers between the two countries are in the Nonotuinan or small river in the west, while the understanding of the citizens and the Indonesian government between the two countries is in Noelbesi or the big river in the east. If anyone follows the understanding of Timor Leste's boundaries, then Batek Island will enter Timor Leste, not Indonesia. The State of Indonesia should strengthen the customary law of the indigenous people of Timor, not force it to comply with the 1904 treaty, which was rejected by the indigenous people of Timor.<sup>4</sup>

Based on the International Covenant on Economy, Social, and Cultural Rights in Article 1 General Provisions, indigenous and tribal peoples have the right to an informed concern, namely the right to avoid worry. Therefore, differences of opinion regarding the 1904 Treaty were left to the customary law community. Some Timorese customary law communities have the same customary law because they are of one genetic ancestry. If international law becomes part of a conflict that is a legal conflict, then a new legal action needs to be done.<sup>5</sup> This new law as a result of the consensus of the two countries by reviving social-legal<sup>6</sup> which is adhered to by both countries. This social law generally accommodates local law, which is the result of consensus. For example, the formation of a Customary Judicial Institution that specifically handles conflicts between members of the same ethnicity and different citizens. With this social law, the state avoids the suspicion of its citizens and leaves their fate entirely in their own hands based on the International Covenant on Indigenous Peoples.

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<sup>2</sup> Rato, Dominikus and Ermanto Fahamsyah, Settlement of Traditional Wisdom Land Disputes Based on Local Wisdom at the Indonesia - Timor Leste Border in Kupang Regency, East Nusa Tenggara. National Strategy Funded Research Report DP2M Dikti. (Jember: LP2M University of Jember, 2014), funded by the DP2M Dikti.

<sup>3</sup> Ikechi Onah, Emmanuel, 2015, The Role of TransBorder Ethnic Groups in Intra-State and Inter-State Conflict Africa. In the Journal of Borderlands Studies. Publish online: 04 Mar 2015, p. 85-95.

<sup>4</sup> Indra Pahlevi, 2011, Government Management in the Border Area. Researcher on Indonesian Political and Governmental Problems in the Field of Study of the Indonesian Parliamentary Secretariat General P3DI, at 3.

<sup>5</sup> Simmons, Beth A., *supra* note 1.

<sup>6</sup> Gurvitch, Georges, *Sociology of Law*, (Jakarta: Bhratara, 1996).

This study was carried out correctly on the border between Indonesia and Timor Leste in Enclave Oecusse, namely the border of Oecusse (Indonesia) - with Kupang Regency and TTU (Indonesia). This study considerably accounts for the community that has stayed at the borders between Indonesia and Timor Leste, who has similar descendants. Therefore, community members on the borders of the two countries share common ancestry, customs, and customary law. Therefore, theoretically, it can be said that there is an intense feeling of kinship so that if there is a conflict between the two countries, Indonesia - Timor Leste, it can be effortless to resolve if done with a cultural approach and customary law norms. However, in reality, this assumption needs to be tested for truth. From this background, the question arises, is it true that legal conflicts cause community conflicts at the border of this country?

This study aims to find the source of border conflict between Indonesia and Timor Leste, even though the members of the communities of these two countries, especially in Oecusse, are of the same descent, customs, and customary law. It also aims to search for the pattern of the appropriate approach in the border dispute between Indonesia and Timor Leste. This study contributes to the formation of new theories in the field of customary law and anthropology of law in the context of developing legal science. Based on the new legal theory, it explores patterns of the alternative dispute resolution. Finally, these discussions contribute to teaching materials in customary law and anthropology law courses.

This study was carried out in NTT Province of Indonesia as it lies the border between Indonesia and Timor Leste, especially in Enclave Oecusse with TTU, Belu, and Kupang districts. The data was collected from primary and secondary data. The primary data was raised from interviews with some historical actors, and officials who handle border issues, namely the NTT Border Management Agency, while secondary data was accumulated from the NTT BPP document, FGD or workshop results. This study was conducted with a legal and socio-legal pluralism approach, because many laws affect the operation of law, such as politics, economics, social, and culture. From these factors, it is assumed that customary land disputes at the border of Indonesia-Timor Leste are political, and the 1904 Treaty, resulting in a legal conflict between customary law that is still alive, the state law of each State and the 1904 Treaty. Data was collected through several data collection techniques, namely, observation, interviews, and discussion. In addition to primary data, there are also secondary data such as literature reviews and document studies, and tertiary data is carried out through internet searching. The data obtained were analyzed qualitatively by the method of description and triangulation through FGD involving the parties to the dispute.

The study comprises two parts. The first part examines the boundary conflict, both anthropologically and legally. The second part discusses political issues regarding land conflicts at state borders that are also caused by legal conflicts. In particular, the legal conflicts at the borders are assumed as a tribal society in which people come from the same genetical ancestry but are subject to more than one legal system, viz., customary law, state law, and international law. Finally, this study concludes the legal

conflict between international law (Treaty 1904) and the adat law of the customary law community of Timor (Tetum) in Atambua has resulted in the conflict over customary land at the national border between Indonesia and Timor Leste. This study recommends the settlement of this customary land conflict be under the local wisdom by taking into account that parties in the dispute are the member of the indigenous and tribal people who come from one ancestor.

## II. LITERATURE REVIEW

There have been rare studies regarding the settlement of the customary land conflicts at state borders. The observation in this study, therefore, is arduous to do. However, the settlement of conflicts in the area of customary non-land has been carried out mainly about political, military, and favorable settlement (international law) based on statutory regulations. The difference between the laws of two or more jurisdictions with multiple connections to cases, so the results depend on the legal jurisdiction, will be used to resolve any problems in dispute. Contradictory legal rules may originate from US federal law, US state law, or other state law.<sup>7</sup> This approach is often called legal-pluralism.<sup>8</sup>

Conflict resolution at the borders of the specific country, for example, the borders of the village and regency, is also rare to find, even though many cases have already occurred. As a consequence, this study becomes essential. It is not solely about the national borders but also has become a preliminary study that examines customary land disputes on state borders. It is not only between the two neighboring countries but particularly between a family of different citizens.

Community research at the border was primarily started by Henry Maine<sup>9</sup> (1822 - 1888). Maine's research, then, becomes a reference for every researcher who observes borders. Maine revealed that in traditional societies with a narrow and local scope, where the principles of kinship strictly stratify society into tiered social strata, then their rights and obligations are primarily determined by their respective positions in the social strata. However, the social strata, if they live without a state, are still within the scope of kinship.

With the dissolution of the social structure of kinship with the birth of the modern state, new positions were built with new statuses, which in law are known as *adage ius connubii ac commercii*.<sup>10</sup> This adage becomes thickened when someone who lives at the border of a conflict and then switches citizens and is given a new higher status, then this new status becomes a commercial instrument. However, this study

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<sup>7</sup> Cornell University Law School, 1992, Legal Information Institute. Conflict of Laws. In [www.cornell.edu](http://www.cornell.edu).

<sup>8</sup> Benda-Beckmann, Keebat Von & Betram Turner, 2018, Legal-Pluralism, Social Theory, and the State. In *The Journal of Legal-Pluralism and Unofficial Law*, 50: 3, 255-274. DOI: 10.1080/03729.113.2018.1532674. Routledge: Taylor & French Group.

<sup>9</sup> Soetandyo Wignjosebroto, t.t., *Theoretical Perspectives of Pioneer in Legal Sociology from the Late 19th Century and Early 20th Century* (Mrx, Maine, Durkheim, and Weber). Surabaya: UNAIR.

<sup>10</sup> Luhmann, Niklas, *Rechtssoziologie*, 3auflage. (Opladen: Westdeutcher Verlag, 1987). NE-GT, at 13.

does not intend to examine changes in the status of a person at the border, but rather to find patterns of resolution of land disputes at the border, especially the state border. Even if Henry Maine,<sup>11</sup> has inspired the importance of land research at the border.

In 1941, two American scholars, Karl Llewellyn and Adamson E. Hoebel<sup>12</sup> conducted research on the Cheyenne, Indian community. In this research, he found that the pattern of dispute resolution with a cultural approach and local law was very effective. This pattern serves to maintain social cohesion and prevent disunity among family members. In resolving the conflict, the role of a chief, the ruling class, is significant and decisive. The influence of the chief, the clan leader, can prevent or even determine the decision to fight or make peace.

In 1954, J. F. Holemann<sup>13</sup> conducted research on the Pattern of Case Resolution in both dispute and non-dispute cases. Holemann found that there are many patterns in dispute resolution, both in dispute cases and non-dispute cases. However, from all patterns, it has strengths and weaknesses. Thus, it is suggested that whatever pattern is chosen to prioritize justice, togetherness, and social integration. In 1978, Nader and Todd<sup>14</sup> also conducted research using the Anthropology approach to conflict resolution in 10 communities with the anthropology approach. From the research, it was found that no matter how simple a society in the world they have had a pattern of conflict resolution, both land conflicts, tribal boundaries, inheritance, and even marriage. Not only in civil cases, even in the simplest criminal cases, people do not have their patterns, but they always have their dispute resolution patterns based on local wisdom. These own patterns aim to maintain social cohesion, pride in ethnicity, and ancestor respect.

In 1986, Franz von Benda-Beckmann<sup>15</sup> conducted a study and wrote about conflicts in terms of anthropological/cultural aspects. Based on such an approach, this research concluded that a conflict could be assessed with two legal norms, namely local law (adat law) with state law, each of which can support each other in terms of conflict resolution called Neo-Traditionalism Norms. This theory wants to say that in resolving conflicts, including land conflicts, old traditional norms can be transformed, not because they are renewed or made completely new, but because those norms have not been used for a long time and are then used by someone who has a high status in society. Moreover, the norm was raised and stated by the State Official, so it seemed to be the norm of state law.

From the study and foreign researchers, even though they researched various cases, both land and non-land cases, no research was explicitly found about the resolution of

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<sup>11</sup> Soetandyo Wignjosoebroto, *supra* note 9.

<sup>12</sup> Llewellyn, Karl & Adamson E. Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, (Norman: University of Oklahoma Press, 1941).

<sup>13</sup> Holemann, J.F., *Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform*. In *Anthropology of Law in the Netherlands*. Editor Keebat von Benda-Beckmaan and Strijbosch, (Dordrecht: Foris Publication, 1954).

<sup>14</sup> Nader L. & H.F Todd Jr. (ed.), 1978, *Dispute Processes-Law in Ten Societies*. (Columbia: University Press, 1978).

<sup>15</sup> Franz von Benda-Beckmann, *Anthropology and Comparative Law. Anthropology of Law in the Netherlands*. Editor of Keebat von Benda-Beckmaan and Strijbosch, (Dordrecht: Foris Publication., 1986).

land disputes, let alone research on the resolution of customary land conflicts on state borders. Research on land disputes, specifically customary land in Indonesia, was only conducted in 1990 by Anto Achadiat. There are two studies conducted by Anto Achadiat. First was research on land cases in Sukadana, Lombok, and second was research in Manggarai, East Nusa Tenggara.<sup>16</sup>

Both the researches in Sukadana and in Manggarai, even in Manggarai, one of the parties stabbed the judge because the judge was considered unfair. From this researches, Anto Achadiat found that local (adat) communities had a self-pattern of dispute resolution, and this pattern was initially very effective. However, the political intervention that has been reconciled is open again. Cases that have been settled for over the years, and even over the generations, can shatter. These also may break the organized social/tribal alliance. The very underlying ground to these episodes was the result of legal positivism, which considers a case that has not been decided by the Court and does not yet have a legal certainty, and another lawsuit is carried out to obtain legal certainty. Instead of providing legal certainty and unite the community, the case creates and enlarges new problems. To some extent, such a case often results in a clan cleavage. In this study, the case took place on the island of Timor after the Dutch and Portuguese occupations, which ended with the 1904 Treaty benefited Portugal, and the 1914 International Arbitration Board Decision benefited the Netherlands. The second conflict continued when Indonesia gained independence from the Netherlands. As a consequence, part of Timor that was colonized by the Dutch became part of Indonesia, and another part of Timor was still the Portuguese colony.

### III. DISCUSSION

From a socio-legal perspective (culture, customary law, legal sociology, and anthropological law, politics, and history), there are several problems:<sup>17</sup>

#### *A. Different Views On The 1904 Treaty*

In 1494,<sup>18</sup> there was a struggle for power in the world between Spain and the Portuguese. Both requested the Pope's support on the grounds of spreading Catholicism (gold, gospel, and glory). Gold was looking for wealth through the control of other countries outside Spain and Portuguese, the gospel, which was spreading the religion (Catholic), and glory, which was enlarging glory (glory). This Pope's support led to a very violent clash between the two countries, which were both supporters and

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<sup>16</sup> Anto Achadiat, *Settlement of Disputes and Destruction of Kinship: The Case of Land Disputes in the Ruteng Community in Manggarai Regency, West Flores, East Nusa Tenggara*. In T.O. Ihromi (editor) *Legal Anthropology. A Potpourri*. (Jakarta: Indonesian Torch Foundation, 1993).

<sup>17</sup> Raymundus Saut Fernandez, *Written Report of the TTU Government*. (Atambua: Regency of TTU, 2012).

<sup>18</sup> Nowel, C.E., 1945, *The Treaty of Tordesillas and the Diplomatic Background of American History*. Greater America. Berceley: Berceley, 1-18.

propagators of a strong Catholic religion at that time.<sup>19</sup> The two countries competed for this purpose, resulting in a war between Spain and Portuguese. Therefore, Pope Julius II mediated the two countries so that on 7 June 1494, a treaty between the two countries was held, and it generated the Thordesilas Agreement (Portuguese: *Tratado de Tordesilhas*, Spanish: *Tratado de Tordesillas*)<sup>20</sup> Now in the province of Valladolid, Spain; which divided the world outside Europe into an exclusive duopoly between Spain and Portugal along a meridian 1550 km west of the Cape Verde islands (off the west coast of Africa), around 39 ° 53'BB. The east was under Portuguese control, and the west was Spanish. Spain ratified this agreement on 2 July and Portuguese on 5 September 1494.<sup>21</sup> However, over time, both arrived at the same place, it was Maluku (currently, under Indonesia). In 1512 the Portuguese controlled Ternate, and at the same time, Spain made a cooperation agreement with Tidore. The two countries, Spain and Portugal, once again at war, and once again, the Pope intervened. The pope made a peace treaty; it was the Zaragoza Agreement, April 22, 1528, ratified in 1529.<sup>22</sup>

The two countries divide the eastern hemisphere by longitude through 297.5 *legua* or 17° east of the Maluku Islands.<sup>23</sup> It was a continuation of the Tordesillas Agreement dividing the western hemisphere between Spain and Portugal attended by King John III and Emperor Charles V in the City where the agreement was carried out in the City of Zaragoza.<sup>24</sup> The Pope initiated the agreement after he saw the competition for the colonies carried out by the Portuguese and Spanish that was increasingly uncontrollable, and they attacked each other over the claim against the islands of the Pacific Ocean, especially Maluku.<sup>25</sup> At that time, Spain and Portuguese claimed to control each other's islands in the East. Finally, agreement and content were found regarding influence and boundaries. The agreement reached two points: first, the land was divided into two influences, namely the influence of the Portuguese in Timor. Second, the Spanish territory stretched from Mexico to the west to the Philippine Islands, and the Portuguese territory extended from Brazillia to the east to the Maluku Islands.<sup>26</sup> That is why the current cultural influence of Eastern Indonesia, such as Manado or Ambon regions, is still strongly influenced by Portuguese culture.<sup>27</sup> Under

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<sup>19</sup> D. Grief, Atty, 1977, *Struggle for Freedom. A Textbook on Philippine Story*. Manila: Book Store, Inc. (RBSI), Nocanor Reyes.

<sup>20</sup> Nowel, C.E., *supra* note 18.

<sup>21</sup> *Ibid*.

<sup>22</sup> de Sa'Noueira, Bernardo, 2012, *Why was It Nearly Forgotten? The 3014 Agreda Treaty between Fernando IV of Castille Greda and Jaume II of Aragon*. e-JPH, Vol. 10, Number 2, Winter 2012, at 1-22.

<sup>23</sup> Sartono Kartodirjo, *Introduction to New Indonesian History: 1500-1906 from the Emporium to the Empire of Volume I*. (Jakarta: Gramedia, 1992), at 1-2.

<sup>24</sup> M. Adnan Amal, *Spice Islands: Historical Journey of Maluku 1250-1950*. (Jakarta: Gramedia Library, 2010).

<sup>25</sup> Yasuo Miyakawa, 2000, *The Changing Iconography of Japanese Political Geography*. *GeoJournal*, Vol. 52, No. 4. *Iconographies*, at 345-352.

<sup>26</sup> Bob Sugeng Hadiwinata, *History of the Indonesia-Timor Leste Border*. In Gane Wuryandari (Ed.), (Yogyakarta: Student Library, 2009).

<sup>27</sup> Kolne, Y. 2014, *Implementation of the Indonesia-Timor Leste Border Agreement in Efforts to Resolve Border Problems (Case Study in TTU - Indonesian District with the Oecusse - RDTL District)*. *Journal of Politics*, Vol. 5, No. October 1.

the Zaragosa agreement, Spain handed over areas south of the Equator to the Portuguese, such as Maluku and Timor. Thus, in 1511, the Portuguese controlled almost the entire island from Timor to Flores after the defeat of Malakan (Timor).<sup>28</sup> However, the Dutch also sought to control Timor because of sandalwood. As a result, in 1613, the VOC succeeded in occupying Solor and entering Timor in 1615.

The Dutch had begun to control Timor since 1613 after taking control of Kupang, which was not guarded by the Portuguese after it controlled Amarasi and Amabi. The two invaders met in Timor and competed for influence.<sup>29</sup> In Timor, the population is divided into two: the pro-Dutch and the pro-Portuguese. The war of the two colonizing countries had an impact on the occupied territories. This war ended with the Lisbon Treaty of 1859, which divided Timor into two parts. In the agreement, the Dutch and Portuguese exchanged the Portuguese-controlled Plua Flores given to the Dutch, and the Dutch handed over the Execution (Pante Makasar) to the Portuguese. Thus, until now, the Oeccusse enclave (Pante Makasar) has become one of the territories of Timor Leste.

Since the East Timor Province broke away from the Unitary Republic of Indonesia through the determination of public opinion in 1999, the Indonesia-Timor Leste border conflict has resurfaced since 2006, 2010, and 2013.<sup>30</sup> This border dispute is a logical consequence of Timor Leste's independence. As an archipelago, Indonesia has a vast range of control. The total number of recorded islands reached 17,506 islands, and the area of the waters reached 5.8 million km<sup>2</sup> and the length of the coastline that reached 81,900 km.<sup>31</sup> Thus, Indonesia has land borders and sea borders. Indonesia's maritime borders with ten countries: Malaysia, Singapore, the Philippines, India, Thailand, Vietnam, the Republic of Palau, Australia, Timor Leste, and Papua New Guinea. As for the land area, Indonesia is directly bordered by three countries, viz. Malaysia, Papua New Guinea, and Timor Leste with a total land border length of 2914.1 km.

In conjunction with borders, countries often result in border conflicts, such as conflicts over land, water, and air borders. The conflict discussed here is the border conflict between Indonesia and East Timor, especially in the Oeccusi enclave. The historical background of Indonesia and Timor Leste is a unity because Timor Leste previously was one of the provinces of Indonesia. At the MPR session in October 1999, the issuance of MPR Decree No. V/MPR/1999 concerning the revocation of MPR Decree No. IV/1978, which integrated of East Timor. The results of the poll of the people of East Timor voted for independence to become the Republic of Timor Leste.<sup>32</sup> The logical consequence is that the Indonesian government and the Government of Timor Leste must determine the national boundaries for land, sea, and air areas that follow the

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<sup>28</sup> Ricklefs, M.C., *A History of Modern Indonesia Since C. 1300*, Second Edition, (London: Macmillan, 1991), at 23-24.

<sup>29</sup> Bob Sugeng Hadiwinata, *supra* note 26.

<sup>30</sup> Kolne, Y., *supra* note 27.

<sup>31</sup> Indra Pahlevi, *supra* note 4.

<sup>32</sup> Kolne, Y., *supra* note 27.



existing land and sea boundaries and must be agreed by both countries. The legal basis for determining the land border was the Treaty 1904 between the Netherlands and the Portuguese. When Timor Leste was still under Portuguese administration, the territory consisted of; Oecussi, East Timor, Goat Island (Atauro), and Yako Island.<sup>33</sup> The issuance of MPR Decree No. V/MPR/1999 at the MPR Session in October 1999 that revoked MPR Decree No. IV/1978, concerning the Integration of East Timor, was a result of a popular poll of the people of East Timor who chose independence to become the Republic of Democratic East Timor.<sup>34</sup> As a result, East Timor gained independence. After the partition, the number of islands in Indonesia was 17,506 islands after being reduced by two islands: Goat Island and Yako Island. The land area was reduced by 14,605 km<sup>2</sup> to 2,012,402 km<sup>2</sup>. Water area decreased by 29,490 km<sup>2</sup> to 5,877,879 km<sup>2</sup>, the coastline length from 81,900 km was reduced by 720 km to 81,180 km.

As a consequence, the Indonesian government and the Timor Leste Government must determine land, sea, and air borders between such two national jurisdictions. As a legal basis for determining the agreed land boundary between Indonesia and Timor Leste are: (a) Treaty 1904, between the Netherlands and the Portuguese; (b) Arbitrary Award 1914; (c) *Proces Verbale* 18 December 1914, on the demarcation of definitive boundaries. (d) *Dokumen Oil Poli* 9 February 1915, on the construction of marker markers in Oecussi; and (e) *Mota Talas Document* April 22, 1915, on the construction of marker markers in the Eastern sector.<sup>35</sup>

Before the border conflict between Indonesia and Timor Leste, there was a cooperation between both countries under the Joint Border Committee (JBC) between Indonesia and Timor Leste. The first JBC Meeting was held in Jakarta on 18-19 December 2002. During the first JBC meeting, an agreement was reached by both parties to form four Technical Sub-Committees (TSC) and Border Liaison Committee (BLC):<sup>36</sup> Technical Sub-Committee on Border Demarcation and Regulation (TSC-BDR) or Technical Sub-Committee on Border and Demarcation Arrangements (coordinated by Bakorsurtanal and Ditwilhan-Dephan); Technical Sub-Committee on Cross-Border Movement of Persons and Goods, and Crossings (TSC-CBMPGC) or Technical Sub-Committees for Crossing People and Goods, and Border Crossings (coordinated by the Ministry of Industry and Trade); Technical Sub-Committee on police Cooperation (TSC-PC) or the Police Technical Cooperation Sub-Committee (coordinated by the National Police Headquarters and the NTT Regional Police); Technical Sub-Committee on Border Security (TSC-BS) or the Border Security Technical Sub-Committee (coordinated by the TNI Headquarters and Regional Commander IX Udayana); Border Liaison Committee (BLC) or Border Intermediary committee (coordinated by the

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<sup>33</sup> Directorate General of Defense Strategy Directorate of Defense Areas, 2007, *Optimizing the Handling of Indonesia-Timor Leste Border Areas in the Context of Safeguarding the Integration of the Republic of Indonesia*. Jakarta: Director General of Defense Strategy, at 1.

<sup>34</sup> Indra Pahlevi, *supra* note 4.

<sup>35</sup> Kolne, Y., *supra* note 27.

<sup>36</sup> Directorate General of Defense Strategy Directorate of Defense Areas, *supra* note 33.

Deputy Governor of East Nusa Tenggara with members consisting of the NTT Border District Government and several technical agencies at the central level as observers).<sup>37</sup>

*B. Conflict of Law as A Result of Treaty 1904:*

*Customary Law vs. State Law vs. International Law*

At first glance, there is a legal conflict, not merely a social conflict. Border conflict is an expression of their distrust of governing law. There is international law (international treaties) that are troubling, and there are state laws that recognize and strengthen the position of international law. On the other hand, state law seeks to protect citizens while at the same time keeping international agreements on colonial heritage.

Borderland conflict is an expression of legal conflict<sup>38</sup> embraced with the underlying values. Legal conflict is assumed if there is legal pluralism.<sup>39</sup> The words 'ancestral land reveals this legal conflict' or 'we are brothers' or 'submit to customary law' and so on. Those words, which show the proper law to regulate are the inheritance law, customary law. Thus, these communities put a great deal on customary law, the law that they profess, understand and live. Under these words, they want to say that the law governing borders is customary law, not State law let alone international law. This conviction gives such great hope, and if the Government rejects it, the State must be able to provide guarantees to protect all interests, including the lives and ancestral lands and property thereon.

For them, international law in the form of the treaty "Treaty 1904" is a source of disaster that has eliminated the source of livelihood and life and tens, hundreds, maybe thousands of lives. International law has divided their brotherhood. It is seen in the case in Nefo Numpo-Haumeniana, by the Government of the Republic of Indonesia, which considers that this region is part of Timor Leste, even though local people still consider it the territory of the Republic of Indonesia.<sup>40</sup> Notably, this hope has been based on the law of the State, namely several meetings and treaties established by the two States. Still, this bilateral agreement apparently "does not guarantee" the avoidance of civil war. If this is left unchecked, there is a big bet for the State from its citizens, namely the decline in their trust in the State/Government. Even though there is hope that the State has sought to keep the promises of the State in the form of law enforcement and legal protection, but there is still a bit of concern that the ancestral lands are free from their laps and thus the shadow of civil war is at hand. State and international law are unable to provide security and comfort.

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<sup>37</sup> Directorate General of Defense Strategy Directorate of Defense Areas, 2007, *supra* note 33 at 24-25.

<sup>38</sup> Max Rheinstein, 2015, Conflict of Laws. <http://www.britannica.com/topic/conflict-of-laws>, accessed August 8th.

<sup>39</sup> Durpet, Baudouin, 2007, Legal Pluralism, Plurality of Laws, and Legal Practices. *European Journal of Legal Studies: Issue 1*. [https://www.researchgate.net/publication/32232289\\_Legal\\_Pluralism\\_Plurality\\_of\\_Laws\\_and\\_Legal\\_Practices](https://www.researchgate.net/publication/32232289_Legal_Pluralism_Plurality_of_Laws_and_Legal_Practices), accessed on 27 September 2019.

<sup>40</sup> NTT Province Border Management Agency, 2010, Report on the Handling of the Inter-State Border between Indonesia and Timor Leste in North Central Timor Regency and Kupang Regency in East Nusa Tenggara Province. Kupang: BPP-NTT.

In 1914, International Arbitration<sup>41</sup> won the Netherlands over Portugal over disputed lands. However, Timor Leste does not respect it. It is evident from several conflicts that have occurred since Timor Leste broke away from Indonesia. Since the popular poll and release of Timor Leste from the lap of the motherland, it has diminished expectations and reduced their trust in the State/Government, which had enjoyed 24 years of living together. Even though in one place there was war and bloodshed, in other places, there was peace and brotherhood that was re-knit, for example, in Amfoang and Bijael-Sunan which allowed the people of Ambenu (East Timor at that time) to cultivate land, leave pasture, and ceremonies shared customs.

If a legal conflict occurs,<sup>42</sup> then the right step to take is the formation of a new law. This new law as a result of the consensus of the two countries by reviving social law<sup>43</sup> (not customary law) which is adhered to by both countries. This social law generally accommodates local law, which is the result of consensus. For example, the formation of a Customary Judicial Institution that specifically handles conflicts between members of the same ethnicity and different citizens. With this social law, the state avoids the suspicion of its citizens and leaves their fate entirely in their own hands based on the International Covenant on Indigenous Peoples.

### C. Different Concepts of Riel Locations

The similarity of views between the two countries of the Republic of Indonesia-the new Timor Leste on paper, so that in reality, in the field, there are still areas that are subject to dispute. The border case along the Noelbesi River, with a case in Nefo Nunpo. According to the 2013 Addendum Map the locations of *Un-surveyed Segments* that are still considered to be problematic are the Faut Ben location (Pal 52-51), the Pistana location (Pal 50-49) and the Subina location, while the Nefo Nunpo to Tubu Banat locations are no longer problematic or are not included in the *Un-surveyed Segment*. However, the Indonesian people in Nefo Nunpo still consider the area to be a free zone, so that both Indonesia and Timor Leste are prohibited from engaging in the area.<sup>44</sup>

Differences in physical location are also found in Dilumil / Memo with the Malibaka River delta as a result of the deposition process. In this case, Indonesia initially wanted the Indonesia-Timor Leste boundary to the east of the Delta, while Timor Leste wanted to the west of the Delta. Foreign Minister Marty Natalegawa should have agreed this case in 2005.

### D. Differences on the Existence of Assets of Citizens of A Country Residing in Another Country

In some cases, there are citizens of a country who consider that the assets of other citizens (foreign nationals) are in the territory of their country are considered lost and

<sup>41</sup> NTT Province Border Management Agency, *ibid*.

<sup>42</sup> Tamanaha, Brian Z., 2007, Understanding Legal Pluralism: Past to Present, Local to Global. In Sydney Law Review, Vol. 30-375. pp. 376-411.

<sup>43</sup> Gurvitch, Georges, *supra* note 6.

<sup>44</sup> TTU Regent, 2014, Report on the Installation of Electric Poles at the Nefo Nunpo Location in Haumeni Village Ana Kec. Bikomi Nilulat. Kupang: BPP-NTT.

become treasure that may be taken by the citizen of that country. As is the case with the border conflict in Kupang Regency, there are agricultural products, longevity plants, trading plants, and livestock belonging to Indonesian residents in the Timor Leste area.

In some cases, even livestock from Indonesian citizens were herded into the Timor Leste area and disappeared (or disappeared). Cases like this contradict the general principles of law that the status of a person's citizens does not abolish his civil rights. From 1976 to 1999, the residents of both conflict locations, both citizens of Indonesia and Timor Leste were Indonesian citizens. Therefore, their civil rights must be protected both by Indonesia and Timor Leste.

#### *E. Outside Involvement: Proxy War*

In some conflict locations between TTU and Kupang districts, foreign involvement needs to be considered. The presence of a foreigner can trigger conflicts that should be agreed upon by members of the customary law community as blood relatives, cultures, and customs. Especially the presence of UNTAET and UNAMET is very detrimental to Indonesia. The presence of these two institutions raises the presumption of proxy war. Indonesia and Timor Leste must avoid the proxy war if the two countries want to coexist peacefully. Proxy war is a war carried out by one country using another country as a battlefield so that the country does not suffer losses.

There is a fear that Indonesia will become such a battlefield due to its poor past relations with Timor Leste. Past issues can be used through a proxy war to bring down the authority of the Indonesian Army through gross human rights violations. Therefore, it needs to be understood by the people at the border, in the event of a conflict, the TNI after the border guard does not immediately take action to avoid such things. Therefore, to avoid this, the involvement of indigenous and tribal peoples at the border becomes significant and urgent. Thus, the customary law community needs to be equipped with a legal basis for the functioning of customary justice, which is already understood by both parties.

By using customary law, decisions made by indigenous and tribal peoples regarding their fate and future are determined by themselves as desired by the International Covenant on Economic, Social, and Cultural Rights of indigenous and tribal peoples. The governments of the two countries are the companions and amplifiers of these traditional institutions. For Indonesia, there is already a legal basis: Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution.

For the Malibaka river delta, which in traditional law is called the tongue of the earth, if it refers to Article 22 of Law no. 5 of 1960 concerning Basic Agrarian Provisions, which states that one way to obtain ownership rights to land can be done through customary law. There are two ways of customary law: clearing forests (real estate), and muddy land (*aanslibbing*). The muddy land becomes the land that belongs to a person and/or the customary rights of a customary law community that is the closest and/or

the longest. The principle used is the principle of propriety and the principle that says “original property returns to the original.”

The occurrence of property rights, according to Article 22 of the BAL, is due to Customary law, Governmental Decree, and because of the Law. Because of Customary Law: (a) Clearing forests or land tongues (*Aanslibbing* or River island) = real estate, (b) Inheritance, (c) Legal actions (inheritance, trading, trading). Ground tongue occurs because: (1) land arises on the edge or middle of a river, lake, swamp, or sea due to sedimentation or surface waterfall, (2) land arising on the river bank that moves direction (bend, bend) due to mud deposits, (3) The tongue of the land becomes the property of the customary law community closest to the tongue of the land. The conditions must be used continuously, and if passed down to children and grandchildren, the rights to land are called real estate, and (4) Regulated by PP = registered with BPN.

#### *F. The Involvement of the Kings/Indigenous Peoples' Leaders in the Customary Land*

##### *Conflict Resolution Process*

The involvement of indigenous and tribal peoples in policy-making, at present since 2005, must have been done especially about their destiny and future. This right is called an informed consent, a right that has been recognized internationally by the International Covenant on Economic, Social, and Cultural Rights. Informed consent is an authority inherent in indigenous and tribal peoples to obtain first information before an activity, public policy regarding their right to life, future, and destiny. This right is recognized and respected by the international community so that every policymaking does not sacrifice the cultural identity of traditional communities and the traditional rights of indigenous peoples. The UN's decision to respect these rights is due to the many facts countries make policies that bring suffering to be indigenous and tribal peoples in their place. Now is the time to give this authority and the state to facilitate it through the making of good legislation relating to customary rights and customary justice as Law No. 6/2014 on Villages.

#### *G. Kinds of Approaches*

##### 1. Approach to customary law and local wisdom

From a cultural and customary law perspective, there have been agreements agreed upon by their ancestors. For example, in Bijael Sunan, Amfoang, and Haumeniana because historically, they came from one descendant. Customary law in all customary law communities in Indonesia originates from budaya tutur (oral culture). Because their culture is a speech culture or oral culture, the socio-cultural context of all legal actions is also done verbally, including agreements that occur in indigenous and tribal peoples, including on this island of Timor.

The oral agreement is very binding even to the children and grandchildren because what is used as the basis of the footing is the value of honesty. From the value of honesty, giving birth to the principles of law is that all treaties are binding and,

therefore, must be obeyed, because promises are debts that must be paid (*pacta sunt servanda*) that have been recognized throughout the world including the UN in international law. If someone in legal relations and social life can no longer be trusted, because of dishonesty (his promises are always not kept), then this person's life in the eyes of society is not respected. So that in customary law, the value of honesty is highly respected, upheld, maintained, and actualized. Things like this are very firmly held by the Chiefs, Customary Chiefs, or customary law functionaries in Indonesia.

If many things have happened in the past and ended with a review, and such agreements are highly respected, upheld, maintained and realized, then the connection with the border conflict of Indonesia-Timor Leste in such a perspective, past agreements need to be respected and given full trust in them to determine their destiny. The world community has agreed this trust through the International Covenant on Economic, Social, and Cultural Indigenous peoples (indigenous people). Article 1 General provisions of the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights recognize the right of self-determination of all people and their right to freely determine their political status and the meaning of economic, social and cultural development for them. Indonesia ratified this Covenant in 2005.] As such, matters that are harmful or beneficial are the responsibility of civil society itself, without having to discredit the Government/State.

## 2. Historical and cultural approaches

Historically, in some cultures, this customary law has taken place. This historical event begins with the entry of colonial rulers in both Portuguese and Dutch. These colonial rulers, in order to seek financial gain in various ways. It includes making agreements without regard to the interests, security, security of the colonized people. These treaties are binding but should be for a sovereign State, the treaty needs to be revised, so as not to harm the interests of the people. At least in the review of the agreement, the parties who agreed were involved as witnesses or as necessary.

For example, the conflict in Bijaele Sunan, Amfoang, and Haumeniana has been negotiated several times by the Portuguese and the Dutch and has even been brought to the International Arbitration. Hasty decision-making can undermine the trust and authority of the government. It is evident from the conflicts that ensue, as they realize that there has been an agreement between the two States. The un-surveyed segment exists between Subina and Oben, which is actually Indonesia's tenure of customary law society. The solution to the problem has not been resolved until now. There is, therefore, a need for remedial action about article 6 of the Provisional Agreement of Indonesia-Timor Leste (2005) involving Religious Leaders, Community Leaders, Government, and Local Peoples.<sup>45</sup>

The affirmation and determination of the two countries were conducted through the Technical Sub Committee on Border Demarcation and Regulation (TSC-BDR)

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<sup>45</sup> Coal Harmen, 2013, Border Territory, RI-East Timor Conflict Extremely Aggressive Posted on January 31<sup>st</sup>.

cooperation forum, made under agreements made by the Dutch with the Portuguese, namely: Colonial Boundary Treaty 1859, Convention 1893, Declaration 1893, and the Convention 1904 and the Arbitration of the Arbitration Act 1914. The boundary issue arises because of physical differences and interpretations, and Timor Leste was once one of the provinces of the Republic of NRRI between 1976 - 1999. Post-independence Republic of the Democratic Republic of Timor Leste, a coalition to address border issues both countries, in particular, the settlement of the two countries' borders is discussed in the Technical Sub Committee on Border Demarcation and Regulation (TSC-BDR), a forum for discussing and resolving the issue of land borders.<sup>46</sup>

### 3. Legal approach

Based on the data above, several conflicts emerged because the law used as a reference has been in conflict, namely legal conflicts. Legal conflicts are seen in cases at the border of Indonesia-Timor Leste in Kupang District and TTU. If the law is conflicted, then the conflicting law cannot be used as an instrument of peace. The legal conflicts are Customary Law vs. International Law vs. State Law. It was seen by the public rejecting the 1904 Treaty as well as Government policies based on the Treaty, whereas customary law has made decisions that must be respected both by national law and international law through adat agreements. Agreements made based on good intentions and agreed and mutually agreed are valid as law. This is based on the value of honesty that gives birth to the principle of law, *pacta sunt servanda* that is the promise must be fulfilled, because the promise that has been agreed upon is the law for those who are bound to each other, and the law must be implemented and obeyed. Therefore, if desired, a new law called local law based on local wisdom should be made, or social law based on an entirely new consensus made by the customary law community.

This new law can be sourced from customary law, state law, or the law of the agreement of the two countries that binds both parties, especially the conflicting communities. This new law, for example, both countries agree to institutionalize the customary law of customary law communities in the border region. Furthermore, under that agreement, the Provincial Government can establish a Customary Law Institution to try perpetrators of crimes in the border region without having to involve the state. The law made is final and binding, meaning that the decision of the customary judges of the border region must be carried out by the parties, both Indonesian and Timor Leste citizens.

This new law is an alternative to the old state or customary law. Because the old law, mandatory for one country is not necessarily mandatory for other countries or is a necessity for indigenous and tribal peoples who become citizens of one country is not necessarily binding on indigenous peoples of other citizens. This distinction is because the two countries have different state philosophies. Indonesia adheres to the Pancasila state philosophy (the precepts of Pancasila are a unity), while both Timor Leste adheres to the Socialist-Religious understanding. This difference in philosophy will correlate

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<sup>46</sup> *Ibid.*

with the formation of legal substance and legal structure, which naturally influences the legal behavior of the legal community or its legal culture.

#### 4. Economic and political approaches

The Government of Indonesia, based on Paragraph IV of the Preamble to the 1945 Constitution, states: "The state protects all of the Indonesian people and all of Indonesia's blood spills; promote public welfare; ... and so on. "The Preamble Status of the 1945 Constitution, if we borrow the theory of a Social Agreement (*Du Contract Social*), then it is an agreement between the government of Indonesia and its citizens. This agreement cannot be revised, even by the MPR, through an amendment. If this preamble is changed, the Republic of Indonesia will disperse. From the Preamble of the 1945 Constitution, there were the rights and obligations of each party. Citizens' rights become the obligation of the state, and the rights of the state became the obligations of citizens. That is the origin of the law that originated in the 1945 Constitution from the grassroots. The rights of the community, especially the customary law community, have been recognized constitutionally in Article 18B paragraph (2), Article 28I paragraph (3), and Article 32 of the 1945 Constitution.

Accordingly, the state should improve the economy, social, and culture in the border region, which is a boundary protector of the honor and territorial territory/sovereignty of the country, which is dealing directly with other countries. Weaknesses in the economic, social, and cultural fields directly or indirectly weaken national competitiveness, resilience, and vigilance. The state needs to change the paradigm of thinking that the border area is no longer a backyard, but a front yard of a house, which is always loyal, passed, watched and valued by neighboring countries. Blazing nationalism and patriotism should not be extinguished by small things, such as the matter of the stomach and face. Minor illnesses can become cancerous if not treated and managed correctly. Another approach that is no less important is defense and security. However, our military is currently experiencing ups and downs in the confidence of civil society through the issue of human rights. Security, which is centered on the community, needs to be raised again because if conflicts occur, they are the first to become victims.

#### 5. Conflict analysis

By taking into account the border conflict in NTT, such a border conflict is not only about a social conflict. Rather, it started from legal conflicts of customary law, international law, and state law. Differences in views of the 1904 Treaty, namely, there are those who agree with the 1904 Treaty, but there are also those who refuse.<sup>47</sup> There is a 2013 Addendum which can influence the authority of the government as a

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<sup>47</sup> Dominikus Rato, 2015, NKRI - RDTL Border Conflict Resolution Design With a Cultural Approach. Discussion Paper / Workshop on Border Dispute Resolution. Discussion Worksheet. Atambua: Implementing Committee.



dilemmatic decision.<sup>48</sup> It takes a heart-to-heart approach to local wisdom. The difference with a physical location is that some say it is west, and some say it is east of the river, and some draw the river's centerline.

In the legal conflict, in this case, international law, namely the Treaty 1904 among Indonesian citizens, namely the population at the border is divided into two groups, the customary law community rejects some because it is detrimental, but some accept it. However, Indonesia is obliged to accept and recognize it as part of international law as recognized through the 2013 addendum. Therefore, following the addendum, there is a legal conflict of state law in which the state is obliged to recognize and respect customary law community units along with their rights. Traditionally, as long as in reality as it is still alive, under the development of society, and the unitary state principle of Indonesia mentioned in Article 18B Paragraph (2) of the 1945 Constitution). Therefore, the 2013 addendum has become a difficult choice for Indonesia. Article 28 paragraph (3) of the Indonesian Constitution states that cultural identity and the rights of traditional communities are respected in harmony with the times and civilizations. This principle is an effort of the Indonesian government to accommodate the decisions of the world community on the rights of indigenous peoples. The rights of indigenous peoples are recognized and protected under Article 1 of the general provisions of the International Covenant on Economic, Social, and Cultural Rights.<sup>49</sup> Thus, it can be said that in the border area, there are only two laws that can cross two national territories, namely: Customary Law and International Law. Both of these laws are like a balloon: Treaty 1904 vs. Customary Law (ranging from Bijael Sunan to Oben) that is if one flower is developing, the other is thinning (customary law expands, international law is thinning. Otherwise, international law expands, customary law is thinning, whereas in Nefo Numpo-Tubu Banat-Manusasi, this pattern can be developed.

In an effort that needs to be done based on several analyzes and approaches, the involvement of customary functionaries is the involvement of traditional leaders, such as tribal chiefs, traditional leaders, kings, so that additional mediators, such as church leaders, are needed. To strengthen such a position, it is necessary to conduct and make new laws that are free from conflicts regarding new laws, such as Provincial Regulations or Governor's Regulations on the Recognition and Protection of Indigenous Peoples with their Customary Institutions, such as traditional justice which refers to Law No. 6 of 2014 concerning Villages and the international covenant on the economic, social and cultural rights of indigenous peoples.

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<sup>48</sup> Teubner Gunther, 1986, *Dilemmas of Law in the Welfare State*. In European University Institute - Series A3.

<sup>49</sup> Komnas HAM, 2009, *General Comments of the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights*, (Jakarta: Komnas HAM, 2009).

#### IV. CONCLUSION

From the above analysis, it can be concluded several things: ancestors with their wisdom have prepared customary law for the welfare of their children and grandchildren, but in reality, the customary law has been corrupted by foreigners. In the life of the state and society (Indonesia and Timor Leste), of course, different views about one thing, including about customary land and from that difference, will undoubtedly give rise to conflict (collision). However, with the wisdom inherited from the ancestors, if used functionally, then this collision will not destroy each other, but as a test for the attachment of social cohesion. The conflict between Indonesia and Timor Leste also needs to be considered widely and justly. There are still many factors and approaches that need to be performed within the framework of mutual welfare as brothers. The remaining conflicts need to be carried out casually because of differences in character, history, culture, and customary law. Conflict of law is also the case; it requires a new legal act that gives space to the use of local wisdom, socio-cultural relations, and ancestral customs. There is a need to relieve the revenge of the past, as it is a part of the history used by strangers for profiling. Policies that have been made must be implemented. Therefore, it needs a new approach as a family. In order to pay attention to the efforts of proxy war from external parties to discredit the Indonesian Military/Police. There is an NGO "Watch Indonesia" based in Germany who is always looking for human rights violations in Indonesia. Proxy war aims to destroy the social cohesion of local communities to exploit natural resources.

This study considers several suggestions. Such suggestions are the need for the involvement of traditional leaders, religious leaders, youth, and women, and the meeting of the two indigenous countries/communities. It also requires legally binding bilateral agreements, primarily through adat agreements. However, there must be a legal umbrella regarding such bilateral agreements despite the necessity to establish the customary judicial institutions. These institutions specifically apply to indigenous and tribal peoples as they are required by the international covenant on the economic, social, and cultural rights of indigenous and tribal peoples, as mentioned in Article 18B paragraph (2) and 28I paragraph (3) of the 1945 Constitution. As those provisions are now stipulated in Law No. 6/2014 due to its focus on customary law community's rights. By taking into account the historical vengeance remaining exist, there is a need to introduce a new approach to fortify from foreign prostitution.

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