

Human Rights and Post-Conflict Transitional Justice in East Timor

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PREFACE

This paper was originally prepared as a research report commissioned by the Ministry for Foreign Affairs of Finland. In spring 2003 the researcher discussed the theme of the report with representatives from the Ministry. The study was then conducted independently at the Finnish Institute of International Affairs between July and December 2003.

The interviews, referred to in the report, were held in Dili, Timor Leste during a field visit between 28 August and 12 September 2003. At the request of the interviewees, the interviews were conducted off the record and their names are not cited in the text. The generosity of all the interviewees, in giving their time, was an invaluable contribution to the report.

1 INTRODUCTION

1.1 General overview

The theme of this paper is human rights in East Timor during the United Nations Transitional Administration UNTAET and the first years of the independent Democratic Republic of Timor Leste.¹ Following a brief background on the history of the conflict in East Timor this study focuses on three topics: human rights in institution building, post-conflict environment and human rights, and transitional justice. The term ‘human rights’ refers here to internationally recognized human rights standards and principles, including the principle of the indivisibility and equal importance of all human rights.² However, the emphasis is on the rights related to political participation that are often categorized as civil and political rights, whereas economic, social, and cultural rights will not be specifically addressed. This is not to reinforce the ideological divisions concerning human rights left over from the Cold War period, or to suggest that economic, social, and cultural rights are less significant. Indeed, economic, social, and cultural rights are crucial in post-conflict conditions. The focus reflects the definition of human rights used in UN peace operation mandates, where economic, social, and cultural rights have largely been left out, albeit the importance of the promotion of economic and social well-being is recognized in recent UN peacebuilding strategies.

¹ The Democratic Republic of Timor Leste is the official name of the independent state adopted in the Constitution. The acronym RDTL from the initials in Portuguese is commonly used in recent texts. Here ‘Timor Leste’ will refer to the independent state of Timor while ‘East Timor’ will be used for the period before independence.

² The Vienna Declaration and Programme of Action A/CONF.157/23

Human rights are analyzed in a peacebuilding framework, which looks at the promotion and protection of human rights as part of (international) efforts to establish a sustainable peace in a war-torn society. The peacebuilding framework places human rights within the context of competing political motivations, subjective experiences and perceptions in a post-conflict environment. Thus the approach chosen takes into account not only a legal but also a political dimension. For example, when the question of what constitutes justice for past human rights abuses is placed in a peacebuilding framework it becomes not merely an issue of individual responsibility but one related to questions of peace, reconciliation, truth, and justice.

East Timor is a society in transition from prolonged conflict to peace, in which the international community has played an important role. The period covered is from the establishment of UNTAET in 1999 to the present. UNTAET represents the culmination of the expansion of UN peace operations in the post-Cold War period being the largest multifunctional UN peace operation up until then with a mandate of unprecedented scope. It had an equally vast mission to accomplish – to build a new state literally from the ground up. Within two and a half years it had completed its task and was ready to transfer authority to the representatives of an independent Timor Leste. UNTAET has generally been regarded as a successful mission, though it has also been heavily criticized. It achieved its main objective of delivering an independent state in record time and, in that sense, it undoubtedly succeeded. What still remains to be seen is the sustainability of UNTAET's legacy.

The study looks into some of the institutions, developed during the UNTAET period, that are particularly relevant from a human rights perspective. The first is *the justice system*. The rule of law and an independent judiciary provide one of the main mechanisms for the protection of human rights, and in the past decade the international community has paid increasing attention to the strengthening, or re-establishment, of the judiciary in post-conflict societies. It has proved a difficult task to achieve and East Timor is no exception. At present, the functioning of the justice system is regarded as one of the main human rights issues in the country.

The second deals with the creation of *institutions for democratic political participation*. The legal basis for such institutions is normally formulated in a constitution. In East Timor the Constituent Assembly elections were held in 2001, under UNTAET, and led to the adoption of the Constitution the following year. The drafting of a new constitution, in a country emerging from prolonged conflict, is often considered a sign of the transformation towards a sustainable peace. However, as recent experiences from Afghanistan and Iraq show, the issue of a new constitution, in a post-conflict transformation phase, not only concerns the contents of a legal document but also the drafting process itself. Human rights guarantees in the text of a constitution may be stillborn if the process itself is not based on the principles of democratic and broad participation.

In East Timor one of the achievements of UNTAET, in the area of institution building, was the support given to the participation of women in the process, and in the institutionalization of women's rights and gender equality in the Constitution and in government structures.

Institution building is an obvious and necessary task in post-conflict societies, and the international community has become increasingly involved in such activities in post-Cold War years. Various governance programs created by international humanitarian and development agencies have mushroomed in the wake of peace settlements and international or regional peace operations. This study supports the view that post-conflict institution building can succeed only if, in setting up structures with human rights objectives, their processes are in line with their purpose. In human rights discourse it means developing *a human rights culture*. The aim of a human rights culture is to institutionalize practices based on the rule of law and in compliance with human rights principles, and to prevent misuses of power, which often lead to human rights violations. The question of a human rights culture is broad and multi-dimensional and cannot be fully addressed here. It is, however, illustrated using examples of security-related incidents and their human rights implications, which took place in Timor Leste during the first year of independence. Although the topic of a human rights culture is only discussed briefly, it is one of the key questions when considering the sustainability of efforts to consolidate peace and stability in a post-conflict environment.

Another human rights issue in post-conflict societies, besides building institutions to protect and promote human rights in the future, is the question of how to deal with past human rights violations. *Post-conflict transitional justice* has become an integral part of conflict settlements in the past decade. The most significant developments in post-conflict transitional justice were the ad hoc tribunals for the former Yugoslavia and Rwanda, and the establishment of the International Criminal Court. The former created a precedent for the standards regarding the international response to gross and systematic human rights violations, and the latter institutionalized them. Transitional justice may also mean other than strictly judicial proceedings such as truth and reconciliation commissions.

A number of measures have been taken in the past four years to provide justice for crimes against humanity and other crimes committed in East Timor during the conflict. This paper presents the five currently existing international and national processes of transitional justice for East Timor and discusses their human rights implications. The issue is timely, for it is connected to the termination of the mandate of the UN support mission in Timor Leste in summer 2004. The future of transitional justice in Timor Leste will depend on the decisions taken by the Security Council and the donor countries as much as those of the government and other actors in Timor Leste.

1.2 Human rights in peacebuilding

1.2.1 Defining the concept of peacebuilding

This paper will place human rights in the context of post-conflict peacebuilding. The term refers to a wide range of activities that aim at consolidating peace and preventing a relapse into violence. It is a process of conflict transformation that stresses the gradual change from a state of war to a sustainable peace. Peacebuilding is not the only term used for various activities in post-conflict administration and reconstruction. Korhonen and Gras use the term ‘international post-conflict governance’ as an umbrella concept for various post-conflict international administrations.³ Simon Chesterman prefers the term ‘state-building,’ which he defines as international involvement directed at developing the institutions of government by temporarily assuming some, or all sovereign powers.⁴

The concept of peacebuilding was chosen for two reasons. Firstly, it is a concept used within the United Nations system, which is relevant for this study since it deals with UN involvement in a post-conflict situation. Secondly, peacebuilding is a broader concept than ‘state-building’ or ‘international governance’, which often focus on administration and institution building issues. The international community’s approach tends to be dominated by political, economic, and security structures based on the assumption that conflicts can be solved peacefully by creating the necessary structures and institutions. According to peace researchers Reychler and Langer,⁵ this structure-oriented approach often underestimates the ‘subjective’ issues of a peacebuilding process such as: future expectations, reconciliation, political commitment, trust building, perceptions and feelings. These ‘softer’ elements form the social-psychological environment of the conflict transformation,⁶ and, although more difficult to measure, it is one of the key elements in a process designed to create a sustainable peace.⁷

Similarly, moderator-scholar John Paul Lederach makes a distinction between peacebuilding as mechanical strategies of conflict resolution and peacebuilding as a frame of reference that focuses on the restoration and rebuilding of relationships. For him, reconciliation at the centre of peacebuilding represents *a focus* and *a locus*. It is a perspective oriented towards relational aspects of conflict and as a social phenomenon, reconciliation represents a space and

³ Korhonen and Gras.

⁴ Chesterman, 45-76.

⁵ Reychler and Langer.

⁶ “The social-psychological environment of the conflict transformation” is Reychler and Langer’s definition for ‘climate’, which can be integrative or disintegrative depending on whether it supports or hinders a peace process.

place where parties to a conflict will meet. In contrast to the problem-solving approach to conflict resolution, Lederach emphasizes the transformation of the destructive processes that led to violence in the first place, or grew out of the dynamics of conflict.⁸ Conflict transformation requires a change in the attitudes and perceptions that derive from a legacy of violence as well as the setting up of an institutional framework. It can be argued that international peace operations tend to follow the problem-solving approach rather than conflict transformation. They function as *deus ex machina*, arriving from the outside and having their own inner logic in imposing conditions for peace, which are not always shared by the local population. It leads to ‘quick fix’ solutions that collapse when the peace operation is closed down. Social conflicts are temporarily suspended or hidden due to the presence of international forces, but unless constructive and effective channels of dealing with conflicts in society are developed, violence will re-emerge. Reconciliation mechanisms, functioning justice systems and democratic and accessible political participation mechanisms all serve as such channels. The problem is that in post-conflict societies these mechanisms tend not to function properly if they exist at all.

1.2.2 Three phases of conflict transformation

Daan Bronkhorst has analyzed conflict transformation, focusing on human rights implications. He identifies three phases of transformation; the genesis phase, the transformation phase, and the readjustment phase.⁹

The *genesis phase* refers to the situation before transition. It is marked by armed conflict, systematic human rights violations, repression or colonization. Power is concentrated in the hands of a few, and authoritarian rule excludes large sections of the population. The elite, consisting of members of the government, security forces, and the military, are the main beneficiaries by far, of trade and aid.

The *transformation phase* is characterized by efforts towards reconciliation and rehabilitation. Structures created for armed struggle are dissolved or reorganized, and combatants and other participants in the struggle are integrated into society. The national government seeks to establish its role in a new political situation, and civil society emerges. The fall of the old regime and the emergence of new actors create a situation, which Bronkhorst describes as a “‘virtual free-for-all’ of power struggles, or at least struggles for influence, in all spheres.”

⁷Reychler’s peacebuilding architecture contains six conditions or building blocks for sustainable peace: Effective communication, consultation and negotiation; Structures; Integrative climate; Security; Supportive international environment, and Leadership. Reychler and Langer, 4. See also Reychler.

⁸Lederach, chapter 3.

⁹Bronkhorst, 31 – 33.

The transformation phase is followed by the *readjustment phase*. There is no one way to describe what comes after the transition as, according to Bronkhorst, the readjustment phase depends on the processes during the transformation phase. The best-case scenario is an open and democratic society, but this is not a guaranteed outcome of the transition. “Perhaps only violence and further oppression will grow from the chaos,” Bronkhorst notes. Initiatives supporting peace are critical during the transformation phase.

Human rights and security remain key issues during the transformation phase, and the two are connected. Bronkhorst lists a number of threats to a peaceful transformation to democratic rule, which arise from the social, political, and economic conditions. The state-sponsored violence of the authoritarian regime may simply transform itself into new forms of violence; and the risk of ethnic or social violence may increase when the grip of state control is relaxed. Domestic violence, while taking place in all societies, has been observed to be high in post-conflict societies. Large groups of uprooted people, whether they are internally displaced or refugees returning to their home villages may increase social tension, especially in situations where land and property ownership is unclear. Former combatants and unemployed youths gather in cities contributing to the risk of increased social unrest, street violence, and organized crime. Both the population at large and the new leaders struggle with the challenges of a democratic system and the lack of a tradition of democratic practices.¹⁰

When applied to East Timor, Bronkhorst’s framework suggests that the country has moved from the genesis phase of armed conflict onto the transformation phase. All the threats identified by Bronkhorst are currently found in East Timor. Independence was the political objective of both the pro-independence movement and the vast majority of East Timorese, who voted in favour of it, at the referendum. It was also the goal of the UN peace operation in East Timor. It did not, however, mark an end of the transition from a state of conflict to a durable peace.

1.2.3 Development of peacebuilding strategies within the United Nations

In the UN the concept of peacebuilding was initiated in the early post-Cold War years when the role of the UN in armed conflicts began to change quite radically. The term peacebuilding was presented by the former Secretary-General, Boutros Boutros -Ghali, in his *Agenda for Peace* report.¹¹ Boutros-Ghali distinguished three categories of activities: peace making, peacekeeping and peacebuilding. The main purpose of peacebuilding efforts was to prevent the recurrence of a crisis. The report defined post-conflict peacebuilding as ‘comprehensive efforts to identify and

¹⁰ Ibid.

¹¹ A/47/277 – S/24111, An Agenda for Peace, preventive diplomacy, peacemaking and peace-keeping, 17 June 1992 and A/50/60 – S/1995/1, Supplement to an Agenda for Peace 3 January 1995.

support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people.’ The mechanisms to achieve these goals included the restoration of order, the advising and training of security forces, the reforming and strengthening of governmental institutions, and the promotion of formal and informal processes of political participation. It also involved addressing the root causes of conflict such as economic despair, social injustice, and political oppression.¹²

Boutros-Ghali presented his definition in 1992. Eight years, and several peace operations, later a comprehensive review of the UN peace operations by a group of independent experts was submitted to the General Assembly and Security Council. This important and much-quoted document was *the Report of the Panel on United Nations Peace Operations*, renamed as the Brahimi report (2000). Its view of peacebuilding, though essentially the same as the one presented by Boutros-Ghali, reflected the UN experiences of conflicts in the 1990s. It emphasized the sustainability of peacebuilding efforts and described the peacebuilders’ task to “support the political, social and economic changes that create a secure environment that is self-sustaining.”¹³ The Brahimi report used the term “peace operation” to underline that in today’s conflicts peacemaking, peacekeeping and peacebuilding activities are inseparable. UN operations often do not “deploy into post-conflict situations so much as they deploy to create such situations.”¹⁴ The Brahimi report’s perception of peace and security is based on the idea of collective human security. It focuses on people rather than states and challenges the traditional notion of national security and non-intervention.¹⁵ Collective human security provides a concept under which both human rights and humanitarian (military) intervention can be placed.

This conceptualization of peace and security has been adopted in recent strategies of UN peace operations. In 2001 Secretary-General Kofi Annan stated in *No Exit Without Strategy* that, “the ultimate purpose of a peace operation is the achievement of a sustainable peace,” and that peacebuilding aims at building the social, economic and political institutions and attitudes that will prevent the inevitable conflicts of every society from turning into violent conflicts.¹⁶

1.2.4 Human rights activities in peacebuilding

The two main areas of human rights tasks in post-conflict situations contain efforts to apply human rights standards both in the mechanical and in the conflict transformation strategies

¹² A/47/277 – S/24111, An Agenda for Peace, preventive diplomacy, peacemaking and peace-keeping, 17 June 1992, para 15 and 55.

¹³ A/55/305 – S/2000/809 Comprehensive Review of the whole question of peacekeeping operations in all their aspects, hereafter ‘The Brahimi Report’, 21 August 2000, par., 28.

¹⁴ The Brahimi Report par., 20.

¹⁵ Peou 2002.

¹⁶ S/2001/394 par., 8 and 11.

described by Lederich. The first is *institution building* based on the rule of law and international human rights standards. It includes human rights monitoring; reforming and building institutions such as the judiciary, police, and penal system; organizing elections and supporting an independent media; protecting the human rights of vulnerable groups; promoting conflict resolution and reconciliation techniques; and the investigation of past and current human rights abuses.¹⁷

The promotion of '*rights-respecting attitudes*,' to quote freely Kofi Annan's words, forms the second area. This can be described as the need to replace a culture of violence with a human rights culture, which contains elements such as: respect for human rights standards; accountability, participation, and empowerment; non-discrimination and the promotion of gender equality, and respect for the rule of law. The human rights task, in post-conflict institution building, aims at guaranteeing that human rights are not violated by the authorities when exercising their powers, whereas the promotion of a human rights culture aims at the sustainability of the protection of human rights within society at large. One of the challenges of promoting human rights in post-conflict peacebuilding is that the efforts are not always compatible and mutually reinforcing. Cultivating a human rights culture through promoting non-discrimination and gender equality, for example, may be seen by members of local communities as an effort to impose values that conflict with local traditions. These traditions may be discriminatory against minority groups or women, and may even have contributed to the outbreak of the conflict.

Another challenge is how to deal with past human rights abuses. Transitional justice, meaning investigations, inquiries, trials, truth commissions and reconciliation processes, seeks redress. Whether transitional justice enhances peace or risks a recurrence of violence divides actors involved in peacebuilding. Peace processes today are seldom concluded between the parties without the involvement of the international community. The internationalization of conflict settlements in recent years has increasingly involved the international community in deciding how much and what kind of justice is applied in post-conflict transitional justice. The international ad hoc tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, and the 'hybrid' courts of East Timor and Sierra Leone, as well as support for various truth commissions and reconciliation processes, all represent forms of post-conflict transitional justice.

¹⁷ Ibid., par., 13.

1.3 Conflict in East Timor

1.3.1 Brief background of the conflict

The international conflict in East Timor started on 7 December 1975, when the Indonesian armed forces invaded the territory shortly after East Timor had declared itself independent from Portuguese colonial rule. In East Timor, however, the roots of the conflict are often traced further back to events which took place immediately after the fascist Caetano regime in Portugal was ousted, by young military officers, in the “Carnation revolution” 25 April 1974. Political organization in East Timor began soon after the change of regime in Portugal. The two main political parties that emerged early on were the Timorese Democratic Union (UDT) and the Timorese Social Democratic Association (ASDT) which later became the Revolutionary Front of East Timor Independence (Fretilin).¹⁸

In August 1975 UDT staged an attempted coup d’etat, which launched a brief civil war. Fretilin defeated UDT by the end of September and consolidated its power throughout the country. The Portuguese authorities had withdrawn from the island during the civil war, and on 28 November 1975 Fretilin declared East Timor independent. Less than two weeks later Indonesia started a military operation to take over the territory.¹⁹ Six months after the invasion, East Timor was annexed to Indonesia as its twenty-seventh province. Fretilin troops withdrew to the mountains and organized themselves into an armed resistance. The armed conflict between the Indonesian armed forces and Fretilin troops, which later became Falintil, lasted for 24 years.²⁰

1.3.2 Nature of the conflict

Over the years the conflict in East Timor between the Indonesian armed forces and the East Timorese resistance movement²¹ became one of the ‘forgotten wars’, which the end of the Cold War left barely unchanged. The conflict dragged on because of the persistence of the East Timorese resistance and the unwillingness of President Suharto’s regime in Indonesia to seek a political solution. A third factor was the lack of international peer pressure on the Suharto government to find an end to the conflict. As a matter of fact, the United States, Great Britain and

¹⁸ Other political parties formed in 1974 were Apodeti, which advocated transitional autonomy within Indonesia; KOTA, which promoted the power of traditional kings, *liurais*; and the Labour Party, Partido Trabalhista. When UNTAET organized the Constituent Assembly elections in 2001, all of these parties were re-established and participated in the elections.

¹⁹ For detailed account of the events see, for example, Taylor, who also describes the role of the Indonesian military intelligence in the events before the invasion.

²⁰ Fretilin (Frente Revolucionária de Timor Leste Independente) was formed in 1974. Falintil (Forças Armadas de Libertação Nacional de Timor Leste), originally the armed wing of Fretilin was restructured by its commander, Xanana Gusmão, in 1987 into the Timorese National Liberation Army.

²¹ The official interpretation of the resistance is in the Preamble of the Constitution of Timor Leste. It divides the Resistance into three fronts: the armed front of Falintil, the clandestine front, and the diplomatic front. As described later, the active participation of East Timorese women in the resistance has gone largely unrecognized.

Australia among others supported the occupation by exporting arms to the Indonesian armed forces, and by having joint military training programs.²² At the same time, solidarity groups were set up in several countries to put pressure on their respective governments and on international organizations to support the East Timorese independence struggle and, particularly in the last years of the conflict, to bring an end to systematic human rights violations. After the goal of East Timor's independence had been accomplished these groups became vocal advocates for an international ad hoc tribunal for East Timor.²³

The conflict in East Timor did not share the characteristics of most violent conflicts of the 1990s. It was not a case of a "failed state", or a conflict plagued by ethnic antagonism, the fragmentation of warring parties, or the emergence of various armed groups led by warlords, where the lack of credible leaders creates an obstacle to starting negotiations. The East Timorese resistance movement had a political structure and its armed wing was under political control. The movement also had recognized leaders who were prepared to negotiate for peace. Instead of being a 'typical' post- Cold War conflict, it was a curious reminder of the wars of liberation in the 1950s and 1960s with its roots in the decolonization process.

Another characteristic of the conflict was that it was a prolonged war that deeply affected the lives of the civilian population. The guerilla warfare made the Indonesian military perceive the East Timorese civilian population as potential enemies and therefore they applied counter-insurgency tactics. The Indonesian security forces systematically committed human rights violations against civilians. Forced relocations and starvation were used to weaken the resistance and support for Fretilin among the population. Women were targeted for rape and other gender-based abuse as a weapon used by the military to subdue and intimidate the local population. Women who were actively supporting the resistance were obvious targets, but rape was also used as an indirect means of revenge against suspected male supporters of the opposition. For instance, female relatives were raped by the military if the person concerned could not be captured.²⁴

From the early 1990s the nature of the conflict changed from a low intensity war between the Falintil troops and the Indonesian military into a campaign, which aimed at breaking the civilian resistance. Indonesians had captured and imprisoned the Falintil supreme commander Xanana Gusmão in November 1992, and the focus of the conflict moved from the mountains to the urban centres, especially Dili, where students protested against the occupation more openly.

²² Taylor, Chapter 12; See also, Torben, Chapter 15.

²³ See, for example, International Federation for East Timor www.etan.org/ifet

²⁴ See Report of the Special Rapporteur on violence against women, its causes and consequences, United Nations Doc. E/CN.4/1998/54; 'Violence against women in Indonesia' report by the World Organization against Torture, June 1998 pp 37 – 41.

They represented a new generation of East Timorese whom Indonesians had hoped to integrate, through the Indonesian-controlled school system, into accepting Indonesian rule.²⁵

From a human rights perspective one important factor that changed the nature of the conflict was the transfer of control, within the Indonesian armed forces, from the combat forces to the special forces called Kopassus. As a result, the focus of their operations was directed, even more than before, on to the civilian population, which resulted in an increase in human rights abuses. Kopassus mobilized local paramilitary groups and used tactics based on intimidation and terror including forced disappearances, torture, rape, and killings.

1.3.3 The United Nations' response

The Security Council and the General Assembly denounced the Indonesian invasion in December 1975. The Security Council resolution called on Indonesia to withdraw all its forces without delay.²⁶ No action, however, was taken to enforce the resolution despite the clear violation of international law by Indonesia.²⁷ The annexation of East Timor to Indonesia was not formally recognized by the United Nations or by third parties (one exception being Australia), but the occupation was *de facto* accepted. Indonesia was considered to be strategically and economically important and governments were reluctant to jeopardize their relations with the Indonesian government over the issue of East Timor.

The significance of the UN resolutions lay in the international status that they brought to the conflict and to East Timor. The Security Council resolution recognized the right of the people of East Timor to self-determination and independence. It further declared that East Timor was a non-self-governing territory and that Portugal was the administering power under Chapter XI of the Charter.²⁸ These statements provided the East Timorese resistance movement with a valuable tool in its attempt to achieve international recognition and legitimacy for its struggle against Indonesia. Hence, the colonial past proved to be an asset in the world of international diplomacy. When the internal political situation in Indonesia changed at the end of the 1990s, the East Timorese were able to utilize their international status as a non-self-governing territory.²⁹ Unlike the East Timorese, other groups fighting for independence in Indonesia have been treated as separatists and have not succeeded in gaining much international support for their struggle.

²⁵ Ibid., xii. xv.

²⁶ Security Council Resolution 384 of 22 December 1975, General Assembly Resolution 3485 of 12 December 1975.

²⁷ See, for example, Clark, 65–102.

²⁸ Security Council Resolution 384 of 22 December 1975, preamble and para.,3.

²⁹ This point was made, for example, in 1998 by Xanana Gusmão in an interview, where he said “Our problem is different from theirs. We have nothing to do with the situation in Aceh or Iryan Jaya because we are not, nor ever were, part of Indonesia.” Interview in a Portuguese newspaper *Diario de Noticias*, quoted in the autobiography of Xanana Gusmão, 221.

International awareness of the human rights situation in East Timor increased significantly after the incident known as the Santa Cruz massacre. In November 1991 Indonesian troops shot 273 East Timorese at the Santa Cruz cemetery after a funeral had turned into a peaceful demonstration. As Taylor points out, it was not the first such incident, but this time it was filmed by a British reporter and images of the killings spread around the world. The conflict was further acknowledged in 1996 when the Nobel Peace Prize was awarded to East Timor's Catholic Bishop Carlos Belo and a representative of Fretilin, José Ramos-Horta.

These events had a political impact on the UN Human Rights Commission. In 1993, for the first time, a resolution on East Timor, criticizing Indonesia for human rights violations, was passed in the Commission as a reaction to the Santa Cruz Massacre. In 1997 another resolution was passed in which the Commission expressed concern at the failure of the Indonesian authorities to meet the obligations, to which they had committed themselves, in respect to human rights in East Timor.³⁰ These resolutions reflected a gradual shift of attitudes towards the conflict at the international level.

1.3.4 Diplomacy on the referendum and the establishment of UNAMET

A change in the Indonesian position came after the Indonesian economic crisis resulted in the ousting of President Suharto in May 1998. His successor B. J. Habibie surprised everyone – including his own cabinet members – by agreeing to a popular consultation in East Timor. The proposal included the option of full independence as an alternative to the special status of being an autonomous region within Indonesia. It was a breakthrough for the series of tripartite negotiations between Portugal and Indonesia, which had been conducted, without much progress, under the auspices of the UN Secretary-General since 1983.³¹ After the announcement of President Habibie in January 1999 the negotiations took a new turn, and on 5 May 1999 three agreements were concluded on the modalities of a popular consultation.³² The agreements, known as the 5 May Agreements, called for a UN mission to organize a referendum in East Timor.³³

The role of the United Nations in the negotiation process and in its outcome was not only that of a provider of the secretary-general's good offices. The UN was a full party to, two of the three agreements and responsible for the implementation of the accords, except for the security dimension. In the security provisions the government of Indonesia was given responsibility for maintaining peace and security. The security arrangements were clearly the major weakness of the

³⁰ E/CN.4/RES/1997/63.

³¹ UN General Assembly Resolution 37/30 (1982) tasked the Secretary General to seek a "just, comprehensive and internationally acceptable" solution to the conflict in East Timor.

³² See A/53/951 – S/1999/513 for the text of the 5 May Agreement. The term 'popular consultation' was preferred by Indonesians to referendum.

agreements and as Ian Martin, head of the UN Mission to East Timor, noted “no one was happy with the security aspects.”³⁴

The United Nations Mission in East Timor UNAMET was established on 11 June 1999. It consisted of a political component with a monitoring and advisory role, an electoral component for organizing the registration of voters and voting, and an information component for civic education.³⁵ Hence UNAMET was deployed, without a security component, to a highly volatile political situation where threats and acts of violence by the armed militia were taking place against the civilian population and UN personnel on an almost daily basis. Presenting his proposal for the mission to the Security Council the Secretary-General drew attention to the high level of tension and political violence prevalent in East Timor. He also referred to the association of members of the Indonesian army with the militias.³⁶ SC Resolution 1246 authorized international military observers and civilian police officers as advisors, but there were few of them and they had a weak mandate. Furthermore, they had no powers to enforce law and order or to intervene in incidents of violence or destruction. The obvious solution would have been the deployment of peacekeepers to provide security for the UN operation. Indonesia, however, rejected this option.

1.3.5 Referendum and post-ballot violence

The security situation in East Timor had deteriorated in the course of spring 1999. Paramilitary groups trained and armed by the Indonesian military had been operating in East Timor for years, but at the end of 1998 their activities increased, and new militia groups were formed. Human rights organizations reported killings and other human rights abuses, directed at pro-independence leaders and supporters in particular, but also at students, human rights activists, journalists, priests and nuns.³⁷ It was obvious to all observers on the ground that it was a well-orchestrated and systematic campaign of intimidation.³⁸ Indonesian military officers were openly supporting the militias and attending their rallies, although the Indonesian authorities officially denied the existence of such support.

The vote was postponed twice for security reasons. The referendum finally took place on 30 August and the East Timorese people went to the polls in high numbers. The turnout was 99 per cent of registered voters who overwhelmingly (78.5%) supported independence. After the

³³ See Grayson, 79–105.

³⁴ Martin, 32. The book provides a thorough account of the events before and after the referendum.

³⁵ S/RES/1246, 11 June 1999.

³⁶ S/1999/595 par., 4.

³⁷ ‘Paramilitary attacks jeopardise East Timor’s future’, Amnesty International Report, 16 April 1999.

³⁸ The role of the Indonesian armed forces in financing and providing weapons and other support to the militias was reported in the media during the weeks before the referendum. Later it was confirmed that intelligence services had detailed information on the events at the time. See the Final Report of the Senate Foreign Affairs, Defence and Trade References Committee of the Australian Parliament, December 2000, p. 183.

announcement of the result the pro-autonomy militias, supported and led by members of the Indonesian armed forces, launched a 'scorched earth campaign'. More than a thousand people were killed; hundreds of thousands were displaced from their homes and some 70 per cent of all infrastructure was the target of arson and destroyed.

The violent response to the outcome of the ballot by pro-integration groups came as no surprise to anyone observing events unfolding in East Timor in the months preceding the referendum. The increased activities of the militia groups were a clear indication of a planned campaign. Even the setting up of refugee camps in West Timor by the Indonesians, in the weeks before the ballot, was widely known. Still, the scale of destruction and the systematic nature of the terror campaign after the announcement of the result on 4 September took – if not East Timorese voters who had already started retreating to the mountains before the referendum – at least the international public, and to a certain extent the UN officials both in East Timor and in New York, by surprise.

There was reluctance, on the part of members of the Security Council and other governments to intervene, as Indonesia strongly opposed any suggestion of sending peacekeepers to assist in restoring order. The events could not be ignored. They were covered in the international media, and the 'CNN factor,' which had not worked for Rwanda, played an important role in the case of East Timor, demanding that the international community 'do something.'

After two weeks of intensive diplomatic negotiations³⁹ the Security Council passed a resolution authorizing a so-called humanitarian intervention under Chapter VII of the UN Charter as a response to "the grave humanitarian situation resulting from violence in East Timor".⁴⁰ The decision was reached when the Indonesian government consented to the deployment of UN-sanctioned troops to the territory. A multinational INTERFET force was established under the command of Australia, and given the task of restoring peace and security in East Timor, protecting and supporting UNAMET, and facilitating humanitarian assistance. The resolution provided INTERFET with a mandate to take "all necessary measures" to reach its objectives, which was one the strongest mandates issued by the Security Council, as was pointed out by Major General Michael Smith.⁴¹ By the end of September, 4,000 INTERFET troops had been deployed.⁴²

³⁹ Shawcross gives a vivid account of UN Secretary-General's key role in the negotiations, 354-361.

⁴⁰ S/RES/1264 15 September 1999.

⁴¹ Smith and Dee, 45. Major General Smith participated in the planning of INTERFET, and later served as deputy force commander of the UNTAET peacekeeping forces.

⁴² Ibid., 46.

2 THE UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR

2.1 UNTAET Mandate

The Security Council established the United Nations Transitional Authority in East Timor UNTAET on 25 October with Resolution 1272. The resolution was adopted six days after the Indonesian National Consultative People's Assembly had confirmed the result of the referendum. UNTAET was the largest UN multifunctional peace operation in UN history and a culmination of the expansion of multifunctional peace operations in the 1990s. It also had the most extensive mandate of all previous missions. The resolution gave UNTAET overall responsibility for the administration of East Timor by entrusting it with all legislative and executive powers. In other words, the resolution, in effect, made UNTAET a legal sovereign, and East Timor a protectorate of the United Nations.

The UNTAET mandate consisted of seven components:

- (a) To provide security and maintenance of law and order throughout the territory
- (b) To establish an effective administration
- (c) To assist in the development of civil and social services
- (d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance
- (e) To support capacity-building for self-government
- (f) To assist in the establishment of conditions for sustainable development.⁴³

UNTAET was set up by using the UN Mission in Kosovo (UNMIK) as a model, though it only had three components to UNMIK's five: governance and public administration, humanitarian assistance and emergency rehabilitation, and a military component.⁴⁴ There were no components for institution building and reconstruction as in UNMIK. The military component was the largest, with up to 9,150 peacekeepers and military observers, whereas the civil administration including an international police force was to have up to 1,640 officers.⁴⁵

From the outset the mandate was a combination of different components, which were difficult to bring under the same strategy, as they required different approaches for their implementation. The tasks of providing security and humanitarian assistance called for rapid and concentrated action in order to respond to the immediate needs on the ground, where an estimated two thirds of the population had been displaced and were now in the mountains or in camps in West Timor, and where law and order had collapsed during the weeks that followed the ballot. On

⁴³ S/RES/1272 (1999).

⁴⁴ Ibid., par., 3.

the other hand, capacity building and creating conditions for sustainable development requires a long-term commitment and strategies based on the participation and empowerment of local communities. At the same time UNTAET was to carry out all the responsibilities of day-to-day civil administration, which was formally transferred to it, from Indonesia, under the terms of the 5 May Agreement.

2.2 Human Rights in Mandate and in Practice

Humanitarian and human rights concerns were at the core of the launching of the UN peace operation in East Timor. However, considering the human rights situation in East Timor and the objectives of the intervention, the wording of the Security Council's Resolution 1272 (1999) was not particularly strong or focused on human rights. It contained only a few references to human rights, and the mandate provided no specific human rights framework for the operation.

The resolution drew attention to the need to protect civilians, especially children, refugees and displaced persons, in a conflict and post-conflict situation. Referring to institution building the resolution stressed the need to develop local democratic institutions, including an independent East Timorese human rights institution.⁴⁶

Atrocities committed in connection with the referendum were a sensitive matter politically. The resolution expressed concern at reports indicating that, "systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor." It stressed individual responsibility and called for all parties to cooperate with investigations into these reports. It further demanded that those responsible for such violence be brought to justice.⁴⁷ However, the resolution did not explicitly make the investigation of, or provision of justice for, past abuses the responsibility of UNTAET.

The limited and unclear mandate for the human rights component within UNTAET did not adequately reflect the situation on the ground, especially the expectations of the East Timorese, who expected the international community not only to restore order but also to investigate and deliver justice. "To the world at large and to the East Timorese specifically, the very term 'human rights' meant investigation into and justice for the human rights violations that had taken place in the past."⁴⁸ The Human Rights Unit functions of UNTAET developed out of necessity and came to include a vast range of tasks such as; investigating alleged human rights violations and

⁴⁵ Ibid.

⁴⁶ Ibid., par., 8.

⁴⁷ Ibid., preamble and par., 16.

⁴⁸ UNTAET human rights coordinator Sidney Jones quoted in the 'Review of Peace Operations: A Case for Change East Timor Study' (2003), par., 324.

overseeing investigations into human rights abuses in 1999; reviewing draft legislation against international human rights standards; facilitating the work of East Timorese NGOs; participating in the preparations of the Commission of Reception, Truth and Reconciliation, and providing human rights training.⁴⁹ In the original plan the Human Rights Unit was to have had a purely advisory role.

2.3 Conflict Management vs. Peacebuilding

Resolution 1272 vested all powers with the Transitional Administrator, the Special Representative of the UN Secretary General, making him a “benevolent dictator.” The resolution stressed the need for UNTAET to “consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively,”⁵⁰ but there was no specific role provided for the East Timorese within the UN structure.⁵¹

The failure to integrate the East Timorese into the policy-making process and the administrative structures of UNTAET created tension between the actors, and has been regarded as one of the main shortcomings of the operation. In other words, a ‘conflict management’ rather than a ‘peacebuilding’ approach was applied to the planning of the operation and this was the result of both institutional and political factors. In the wake of the post-ballot violence the operational planning was transferred from the Department of Political Affairs (DPA), which had been responsible for UNAMET, to the Department of Peacekeeping Operations (DPKO). The latter had “little experience of ‘governance missions’, no country-knowledge of East Timor, and its standard operating procedures were designed for military and preferably short-term operations.”⁵² In line with these procedures, UNTAET was set up as an international and centralized operation with little concern for local participation, institution building or sustainability. Furthermore, there existed a view of East Timor as an ‘empty shell’, a place to be “invented” by the international community. East Timor was represented as a “laboratory for an experiment” in United Nations’ nation building.⁵³ Little attention was given in the planning process to the ‘softer’ elements of Reychler and Langer, such as the expectations of the local people, trust-building, and political commitment. The disparity between the expectations of the people and the priorities of the planning of the operation, was highlighted by the issue of investigating past human rights violations, as noted above.

⁴⁹ Review of Peace Operations (2003) par., 326.

⁵⁰ S/RES/1272 (1999) par., 8.

⁵¹ See Suhrke (2001) for a detailed account for the planning process of UNTAET, and how East Timorese proposals for their participation in administration were excluded from the DPKO planning.

⁵² Suhrke, 7.

⁵³ Traub.

The decisions made at the preparatory phase had far-reaching consequences. Jonathan Steele describes the non-participatory model of UNTAET as a “them” and “us” culture, where international staff treated the East Timorese as victims rather than partners, which in turn was perceived as patronizing and disempowering from the East Timorese perspective.⁵⁴

Simon Chesterman argues that criticism of the setup of UNTAET is slightly unfair because the situation in East Timor appeared to be insecure. The main problem was not the ‘standard operational procedures’ applied at the initial stage but the slowness of the procedures, once established, to adapt to the situation on the ground. It became clear soon after the deployment of UNTAET that what was needed most was reconstruction and the building of human and institutional capacities for independence, but with some 8,000 peacekeepers comprising the majority of the international personnel, the operation retained its security approach.⁵⁵

2.4 UNTAET and East Timorese Participation

The Transitional Administrator, Sergio Viera de Mello, had set up a 15-member National Consultative Council (NCC) in December 1999.⁵⁶ The security situation quickly improved after the withdrawal of the militias and the Indonesian armed forces, and it became clear that the emphasis of the operation needed to be refocused on preparing the country for independence, which included steps toward political transition. The dissatisfaction expressed by the East Timorese led to the restructuring of UNTAET in summer 2000. The NCC was reorganized into a more representative, National Council of 33 (later 36) members. The change strengthened the role of the East Timorese in the decision-making process. Unlike NCC, the Transitional Administrator did not chair the new National Council, and it did not have international members, its membership being solely Timorese. The National Council had proactive functions in the drafting of regulations, whereas its predecessor NCC had been a purely advisory body.⁵⁷

UNTAET also transferred the governance and administration component to a government-like body of the East Timorese Transitional Administration (ETTA), which comprised both international and East Timorese members. Despite the new governing structures having an increased East Timorese representation, ultimate power remained with the Transitional Administrator.⁵⁸

⁵⁴ Steele, 76 – 87; also ‘East Timor Faces Post-UNTAET Challenges: What is to be done?’ The La’o Hamutuk Bulletin Vol 3, No. 4 May 2002.

⁵⁵ Chesterman, 45 – 76.

⁵⁶ UNTAET Regulation No. 1999/2.

⁵⁷ S/2000/738, 26 July 2000.

⁵⁸ Chesterman, 45-76.

SRS de Mello worked in close cooperation with the leadership of the umbrella organization of East Timorese independence organizations CNRT and especially its leader Xanana Gusmão, but officially the UN did not want to recognize CNRT for fear of being blamed of political favoritism.⁵⁹ This was partly because of the institutional traditions of the Department of Peacekeeping Operations. Peacekeeping operations had been based on the principle of neutrality, which meant that an operation could not select a local partner without appearing to be partial. The policy chosen also reflected experiences in Kosovo, where many of the UNTAET officials had served before but where the situation was totally different from East Timor. CNRT was well organized, had a presence at the village level and enjoyed broad support and legitimacy among the population. CNRT had worked closely with UNAMET during the referendum, and its leaders resented being left on the sidelines by the new administration. Efforts for neutrality on the part of UNTAET included appointing representatives from pro-autonomy groups to the NCC in addition to those from CNRT. The NCC also included a member from the Catholic Church.⁶⁰

UNTAET functioned in a favourable political environment where, the population had received the international presence enthusiastically and the political leadership agreed, in principle, on the objectives of the mission. The inherent contradiction in the UNTAET mandate of setting up a highly centralized structure and at the same time requiring a transfer of administration and governance without providing any mechanisms for ‘Timorization’, caused tension and conflicts between East Timorese representatives and UNTAET. Although the situation improved as the structures were revised to be more inclusive, UNTAET suffered, to a certain degree, from a lack of legitimacy among the East Timorese throughout its existence.

The problems encountered by UNTAET in establishing itself in East Timor derive from the inherent contradiction in the existence of such operations. External legitimacy was provided by the Security Council authorization. In East Timor UNTAET was not a democratically elected body and thus could not claim legitimacy from the population upon whom it imposed its powers. It was given the task of developing democratic institutions and the rule of law based on principles of transparency, accountability and respect for human rights but did not practice what it preached. As an NGO in East Timor put it, “Although UNTAET preached good governance, transparency, accountability, democracy and the rule of law to the East Timorese, it showed little of these in itself. UNTAET is a government without a constitution, with all power residing in one man, the Transitional Administrator Sergio Vieira de Mello.”⁶¹

⁵⁹ See Suhrke.

⁶⁰ S/2000/53, par., 4.

2.5 East Timor's Independence and UNMISSET

On 20 May 2002 the Democratic Republic of Timor Leste became the first new state of the 21st Century. UN Secretary-General Kofi Annan and other world leaders attended the independence festivities in the capital of Dili. The day also marked the end of the mandate of the United Nations Transitional Administration in East Timor UNTAET. Governing powers were handed over from the United Nations to the elected President of the Republic, Parliament and the Government. Pressure was put on SRSG Viera de Mello by both the East Timorese leaders, who wanted the handover of power to be implemented as soon as possible, and by the UN Security Council who wanted to bring an end to the large and costly peace operation. In two and a half years UNTAET and the East Timorese had created the necessary national political structures and civil administration for self-rule, which can be regarded as a major achievement.

The United Nations did not terminate its presence in East Timor at independence. The Security Council established the United Nations Mission of Support in East Timor UNMISSET⁶² to succeed UNTAET for a transition period of two years. UNMISSET consisted of three components; civilian, police, and military. The three program areas were; stability, democracy and justice including assistance with investigations and court proceedings concerning serious crimes cases from 1999; internal security and law enforcement and; external security and border control.⁶³ The civilian component comprised advisers to the Timor Lestese government, a Serious Crimes Unit and a Human Rights Unit, which continued to maintain a field presence in the districts. According to the downsizing plan, the number of peacekeeping forces would gradually be reduced from the 5,000, at independence. Policing was also to be transferred from the UN to the Timor Leste Police Service (TLPS).⁶⁴

3 POST-CONFLICT INSTITUTION BUILDING AND HUMAN RIGHTS

3.1 The Justice System and Human Rights Concerns

3.1.1 The Current situation

Access to justice, the functioning of the courts, and the performance of the police service emerged as key human rights issues in Timor Leste in the first year of independence. "Access to justice continues to present one of the most significant challenges to the protection of human rights in

⁶¹ For a critical comment of UNTAET's lack of accountability, see 'East Timor Faces Post-UNTAET Challenges: What is to be done?' The La'o Hamutuk Bulletin Vol. 3, No. 4, May 2002.

⁶² Established by S/RES/1410, 17 May 2002.

⁶³ S/2002/432, 17 April 2002.

⁶⁴ S/2002/432.

Timor Leste,”⁶⁵ reported UN High Commissioner for Human Rights and former Transitional Administrator in East Timor, the late Sergio Viera de Mello, to the UN Commission on Human Rights in March 2003. His report described in detail the problems relating to the slow functioning of the justice system and its negative impact on the police force and prison service.

The Security Council had already noted the problems of the justice system with concern, a year earlier, in its resolution that terminated UNTAET and established UNMISSET in May 2002.⁶⁶ In October and November the same year, assessment missions were conducted in Timor Leste on the prison service, the judicial system, and the police service. All the assessments observed slow progress and serious and systematic problems. “Continuing weaknesses in this area [the justice system] risk the emergence of unaccountable form of security and control that can undermine new democratic institutions and leave citizens vulnerable to human rights violations and public insecurity,” the assessment report on the police force concluded.⁶⁷

3.1.2 UNTAET and the establishment of an administration of justice

Some of these problems arose from mistakes made during UNTAET whilst others dated back to the occupation and even to the colonial period. “The justice system has always been the weak link since the UNTAET days” says an UNMISSET human rights official. “It had a shaky start which was allowed to continue. Bad practices have become institutionalized and there is lack of concern for standards.” As an example she says that people can literally be forgotten about during pre-trial detention. “Habeas corpus decisions can take 3, 4, or 5 weeks instead of the 8 days stated in the law, and it is not seen as a problem!” She estimates that the situation has actually become worse since UNTAET.⁶⁸

Secretary-General Annan identified the establishment of a credible system of justice, in which fundamental human rights were respected, as one of the key areas of UNTAET, at an early stage of the operation.⁶⁹ The vastness and urgency of the task of setting up and running a court system and a police force in the immediate post-conflict conditions of East Timor cannot be underestimated. UNTAET had to start to fulfill its duties as an administrative power in the justice sector literally from scratch by creating the necessary institutions. In the weeks after the referendum the courts had ceased to function as the Indonesian officials had left the territory and most of the infrastructure had been destroyed. In December 1999 the Joint Assessment Mission reported, “Social harmony and sustainable economic development in East Timor depend on the

⁶⁵ E/CN.4/2003/37 par., 3.

⁶⁶ S/RES/1410, 17 May 2002.

⁶⁷ Report of the Joint Assessment Mission carried out by The Government of Timor-Leste, UNMISSET, UNDP and Development Partner Countries for the Timor Leste Police Service, January 2003.

⁶⁸ Interview with a UNMISSET Human Rights official in Dili, Timor Leste on 1 September 2003.

establishment of accessible, fair and effective judicial institutions and processes for the resolution of disputes... A functioning judicial system does not currently exist.”⁷⁰ Hansjörg Strohmeyer, Acting Principal Legal Adviser to UNTAET at the time, described the immediate tasks of UNTAET, as including, the repairing of court buildings, recruiting and training judges and lawyers, trying to search for and replace destroyed court records, forming an East Timorese police force and setting up a police academy, and creating a penitentiary system conforming to international standards.⁷¹

3.1.3 "Timorization" of the courts

UNTAET proceeded quickly and the first East Timorese judges had already been appointed at the beginning of January 2000. By July, 32 East Timorese judges, prosecutors and defenders had been appointed, and the first group of East Timorese police officials had completed a three-month training course at the newly established Police Training Academy.⁷²

UNTAET tried to maintain a balance between the contrasting aims of adhering to international standards, particularly when it came to rule of law issues, and transferring responsibility and empowering the domestic stakeholders. Practical and political considerations favoured the recruitment of East Timorese legal officers despite their lack of experience.⁷³ Under Indonesian rule, East Timorese lawyers were not appointed as judges, which meant not only that the court system, to be established, was new but also that none of the newly appointed judges had any experience of working as judges. Politically the appointment of East Timorese judges had a symbolic importance, which demonstrated UNTAET's commitment to engage the East Timorese in the process of democratic institution building, as explained by Strohmeyer. Another practical reason was that the recruitment of international judges was slow, and there was already a backlog of cases piling up and people in detention waiting to be brought before the courts. Translation services needed for the international judges expended resources and slowed down the process.⁷⁴

Chesterman observes that the 'Timorization' of the judicial system was more rapid than in other areas of political and civil affairs. The plan was to put the appointed officials through in-

⁶⁹ S/2000/738 par., 68.

⁷⁰ Report of the Joint Assessment Mission to East Timor: The World Bank 8/12/1999 par., 24. This JAM should not be confused with the joint assessment missions in 2003.

⁷¹ See Strohmeyer. Strohmeyer was Acting Principal Legal Adviser and Deputy Principal Legal Adviser to UNTAET from Oct 1999 to June 2000.

⁷² S/2000/738 par., 41 – 47.

⁷³ Strohmeyer.

⁷⁴ Ironically, translation is needed in courts, at the moment, even with East Timorese judges and lawyers. The required language for use in the courts is Portuguese, which only very few East Timorese – including court officials – understand. It is also the language used by the government to draft legislation. Many of the MPs and police officials do not understand the legal texts written only in Portuguese. The language question has become politicized and adds another obstacle to the functioning of the justice system.

house training and mentoring programs, but the capacity building plan has not met its goals. The policy of an early recruitment of inexperienced East Timorese lawyers as judges after two week long crash courses was controversial among senior UNTAET officials and led to the resignation of the acting head of Judicial Affairs soon after the appointment of the first judges in spring 2000.⁷⁵

An assessment review commissioned by five donor governments this year concludes, “While the symbolic value of an indigenous judiciary was a worthy aspiration, this should not have overridden the immediate demands of the situation.”⁷⁶ The review considers the overall development of the administration of justice under UNTAET to have been largely a failure due to the lack of a coordinated and comprehensive strategy, which casts doubt on UNTAET’s own commitment to the rule of law and continues to have implications for the present situation. “There is widespread dissatisfaction with the present functioning of the Timor Leste justice system,” said the joint assessment mission report for the justice sector. “Many consider it to be partially paralyzed, pointing as proof to a mounting backlog of cases, inconsistent rulings, illegal orders and the frequent ignoring of legal orders issued by judicial authorities.”⁷⁷

The Secretary-General has regularly reported to the Security Council on the serious problems concerning the administration of justice. Efforts have been made to address the weaknesses of the justice system in Timor Leste,⁷⁸ but the situation is likely to remain difficult in the foreseeable future. This refers not only to the functioning of the courts but to other sectors as well, including the police force and prison system.

3.1.4 The Effects of prolonged conflict on the justice system

Many of the problems encountered in creating a well-functioning system of justice could be traced back to the experiences of the past and the legacy of prolonged conflict. The lack of human and material resources and the distrust of the people in the system are a direct result of the occupation. Indonesians administered the legal sector, while East Timorese lawyers had no access to positions as judges or other senior posts in the civil service. One factor contributing to the challenges UNTAET faced was that the task was not so much to reconstruct a justice system but to create one from the ground up, in a society, which had no previous experience of an independent judiciary.

The local population did not have confidence in the Indonesian-run courts and police force, which were seen as corrupt and part of the state’s control mechanism. Disputes were solved

⁷⁵ McDonald, 16 – 17.

⁷⁶ ‘A Review of Peace Operations’ (2003), par., 241.

⁷⁷ Joint Mission by the Ministry of Justice and UNDP. Mission Report, November 2002 p. 5.

through traditional mechanisms of mediation, and this practice continues today, partly because the formal justice system still does not work properly, and partly because people have no confidence in the formal justice system. There is also little understanding of the legal process even among educated people in Dili, let alone people in the villages.⁷⁹ As a result, even cases of serious crimes such as rape are still taken to traditional justice mechanisms, which often fail to protect the human rights of the victim. Women's participation in traditional justice processes is often very limited, and the rulings reflect the cultural beliefs of women's status in a patriarchal society. Cases of gender-based violence are also sent back to traditional justice mechanisms by police officers and even judges.⁸⁰

3.2 Gender Equality and Women's Rights

3.2.1 Background: Women in armed conflict in the UN context

Women and girls have lived through and died in wars for centuries, but historically their experiences have remained invisible. This has changed in recent years and there has been an increased recognition of the need to focus on the impact of gender during and after conflicts. Armed conflict affects women and men in a different way, and gender roles affect the lives of people differently during and after conflicts.

Gender-specific human rights violations during armed conflict became a matter of wider public knowledge during the war in the former Yugoslavia, where rapes, sexual slavery and forced pregnancies were extensively used as "weapons of war." The ad hoc tribunal for the former Yugoslavia was the first court to define these violations as crimes against humanity when carried out in a systematic way. Similar provisions were included in the Statute of the ad hoc tribunal for Rwanda and later in the Rome Statute. The incorporation of such gender-specific provisions was the result of intensive lobbying of the UN member states by women's groups and human rights organizations around the world.⁸¹ It also reflected the nature of post-Cold War conflicts, which are dominated by internal strife and civil wars, where the civilian population not only suffers from "collateral damage" but, often becomes the main target of the warring parties.

The approach at the UN has recently changed to regard women as active agents and not only as victims in conflict and peace processes. This principle was recognized in the UN Security

⁷⁸ Ibid. See also Joint Mission by the Ministry of Justice and UNDP. Mission Report, November 2002 p 15.

⁷⁹ Interview with Nelson Belo, head of the JSMP outreach programme, in Dili 2 September 2003.

⁸⁰ 'Traditional justice and gender-based violence' Research Report (2003).

⁸¹ In 1993 the GA had adopted The Declaration on the Elimination of Violence against Women (A/RES/48/104). Violence against women was defined in article 1 as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or

Council Resolution 1325 (2000), which called on all actors in peace processes to adopt a gender perspective, which included *inter alia* measures to ensure the human rights of women and girls, particularly as they related to the national constitution, the electoral system, the police and the judiciary. The resolution recognized the urgent need to mainstream a gender perspective into peacekeeping operations.⁸²

In two recent reports to the Security Council the Secretary-General has focused on gender issues in armed conflicts. These reports show a substantive shift concerning gender and gender-based violence in the context of peace operations. It reflects the increasing recognition of the complex relations of gender and violence in conflict and post-conflict conditions. In his *Report on women, peace and security*, submitted to the Security Council pursuant to the above-mentioned resolution, the Secretary-General presents an “action plan”, or a list of 21 recommendations to implement the objectives of Resolution 1325.⁸³ In the *Report on the protection of civilians in armed conflict* one of the three global challenges is an increased focus on gender-based violence in humanitarian crisis and conflict situations. The causes of abuse stem from the unequal power relations that, are endemic in situations of mass displacement or conflict.⁸⁴

This shift becomes apparent when the resolutions establishing UNTAET and UNMISET are compared. The UNTAET mandate acknowledged the need to protect civilians, and underlined the importance of including, in the mission, personnel with appropriate training in human rights and refugee-law, including child- and gender-related provisions,⁸⁵ whereas the resolution on the UNMISET mandate recognized the importance of a gender perspective in peacekeeping operations and established a gender focal point in a civilian component.⁸⁶ IN other words, the ‘protection approach’ had shifted to a comprehensive approach.

3.2.2 UNTAET's role in promoting gender equality

Gender affairs were another area of UNTAET's activities, besides human rights, which had been overlooked in the planning stage but expanded in response to conditions on the ground. UNTAET successfully advocated policies, which aimed at advancing the participation of women in decision-making and promoting gender equality together with UN agencies and NGOs.

The East Timorese women's movement played an important role in setting the agenda and drawing attention to women's concerns during UNTAET period. Participation in the resistance

arbitrary deprivation of liberty, whether occurring in public or in private life.” See also the Vienna Declaration and Programme of Action (A/Conf.157/23) chapter 3, adopted in the same year.

⁸² UN Security Council Resolution 1325, October 2000 par., 8 and 15.

⁸³ Report of the Secretary General on women, peace, and security S/2002/1154, 16 October 2002.

⁸⁴ Report of the Secretary General to the Security Council on the protection of civilians in armed conflict S/2002/1300, 26 November 2002 par., 54 – 57.

⁸⁵ S/RES/1272, 25 October 1999, preamble and par., 15.

had led to women becoming more organized, and they also became aware of their role in the political process.⁸⁷ Their contribution to the independence struggle went largely unrecognized and their role remained invisible partly, because the Indonesian military targeted the Fretilin women's organization, and partly because the Fretilin leadership did not include female members in leadership positions within its structures. Internationally the resistance movement was personified by such well-known male figures as Xanana Gusmão, Ramos Horta and Bishop Belo.⁸⁸

In order to enhance the role of women in post-conflict peacebuilding, East Timorese women's organizations and networks organized the first East Timorese Women's National Congress in 2000, which produced a Platform for Action. Major issues, identified in the action plan, were literacy, health, violence against women and gender justice for violations during the occupation, participation in decision-making, and economic empowerment.⁸⁹ UNTAET had created a Gender Affairs Unit under the Transitional Administrator's Office, which facilitated activities promoting women's rights and gender equality. As a measure towards the setting up of a national mechanism for the advancement of equality, the Gender Unit was transformed into an Office for the Promotion of Equality within the East Timorese Transitional Government, after the Constituent Assembly elections.

3.2.3 Initiatives to address violence against women

Gender-based violence had existed before and during the conflict in East Timor, but tackling it became an issue only during UNTAET period.⁹⁰ It was argued that even after the Indonesian armed forces had pulled out, women were still vulnerable to violence in their communities. Domestic violence is endemic and makes up the largest number of cases reported to the police. Most cases, however, never enter the formal system but are dealt with by local traditional justice.⁹¹ A number of measures have been taken to address the problem in the past three years. UNTAET established Vulnerable Persons Units in district police stations and included gender-based violence in police training. One of the initiatives of the Office for the Promotion of Equality

⁸⁶ S/RES/1410, 17 May 2002, preamble and par., 3 (a).

⁸⁷ Interview with Adviser for the Promotion of Equality Maria Domingues in Dili, Timor Leste on 10 September 2003.

⁸⁸ See 'Women in East Timor: A report on women's health, education, economic empowerment and decision-making' Report (2002), chapter 1: Role of Women in Resistance Struggle.

⁸⁹ Interview with Adviser for the Promotion of Equality Maria Domingues in Dili, Timor Leste on 10 September 2003.

⁹⁰ "Domestic violence was not given attention in the Indonesian times [by the independence movement]. It was considered secondary to the independence struggle." Interview with director of women's organization ETWAVE Olandina Caero in Dili, Timor Leste on 9 September 2003.

⁹¹ Several studies have been conducted on gender-based violence in East Timor in the past few years. Final Report on workshop and district consultations for domestic violence legislation (2003); Prevalence of gender-based violence in East Timor, research report (2003).

has been the preparation of draft legislation on domestic violence, which has been submitted to the Parliament.⁹²

The UN Special Rapporteurs and the International Commission of Inquiry on East Timor documented women's experiences when conducting their fact-finding missions into the post-ballot events in East Timor in 1999. The Serious Crimes Unit established a gender-related crime team for its investigations. The Commission for Reception, Truth and Reconciliation held a national public hearing on Women and Conflict in spring 2003, in which women gave statements on their experiences, in 1975 and during the occupation, and on the impact of the violence in 1999. Testimonies of the hearing were broadcast on television and radio around the country.⁹³

3.3 Political Participation

3.3.1 Effects of post-conflict elections

One of the main tasks of UNTAET in preparing East Timor for independence was to facilitate the drafting of a constitution. For that purpose, UNTAET organized elections to a Constituent Assembly on 30 August 2001, exactly two years after the referendum.

Elections have become a central part of UN missions in previous years for a number of reasons; they are an important benchmark in a transition towards democratic governance and accountability, and a basis for a representative political system. 'Free and fair' elections create international and domestic legitimacy, which previously has provided an exit strategy for international operations. In other words once elections have been held the international community can withdraw its people and close down its operations. However, elections in a post-conflict environment constitute a double-edged sword especially in societies with no background in democratic processes. When held too soon after the end of hostilities, elections may serve to deepen, rather than remove, the existing antagonisms and consequently destabilize the fragile peace. As Benjamin Reilly argues, timing is a critical factor for post-conflict elections.⁹⁴ There is no shortage of examples of rushed elections, often organized or brokered as part of a peace agreement by the international community, which have inflamed a smoldering conflict. Reilly lists, for example, the UN-held elections in Cambodia in 1993, and the elections in Burundi the same year, in Algeria in 1991 and Angola in 1992. The list could be continued. Although one of the lessons learned from these elections is that they do not provide a short cut to democracy in

⁹² Interview with the Adviser for the Promotion of Equality Maria Domingues in Dili, Timor Leste on 10 September 2003.

⁹³ Report of the hearing available at <http://www.easttimor-reconciliation.org/cavrUpdateAprilMay2003-eng.html>

⁹⁴ Reilly.

post-conflict societies, the attraction of organizing elections as a ‘quick-fix’ exit strategy is currently apparent in Afghanistan and Iraq.

3.3.2 Constituent Assembly Elections in East Timor 2001

Many of these fears were expressed in East Timor prior to the elections in 2001. Historical and social factors were presented to argue that the East Timorese were not ready for an election. There was no tradition of pluralism of competing ideas or of opposition in the traditional social hierarchical nature of East Timorese traditional culture. Other structures in society such as the Indonesian administration, the resistance movement or the Catholic Church were also based on hierarchical order and authoritative rule. For years the resistance movement had emphasized the need for national unity, which ran counter to the idea of multi-party politics.⁹⁵ Many East Timorese had also come to associate party politics and elections with violence due to their experiences in 1999 and 1974 – 1975. The strong position of the Fretilin party caused some concern for UN staff, some of whom were worried about the possibility of East Timor becoming a one-party state. A mixed voting system was introduced in order to improve the opportunities of smaller parties and independent candidates. One representative from each of the 13 districts was elected by a ‘first past the post system,’ and 75 representatives were elected by proportional representation. Fretilin won 12 out of 13 districts, and 43 of the 75 nationwide seats.⁹⁶ Fretilin gained a majority in the Constituent Assembly, but the victory was not as overwhelming as had been expected.

There was also the issue of political legitimacy and accountability. East Timorese leaders pressed for a transfer of power from UNTAET to an elected East Timorese body. The National Council had performed the functions of a nascent legislative council since summer the 2000, but the members had been appointed and not elected. On the other hand, many civil society organizations argued that more time was needed for civic education and consultation on the topic of elections, the role of the Constituent Assembly, and the constitution itself in order for the elections to be meaningful.⁹⁷ Another factor was the tight timetable. A large and costly UN operation resulted in international pressure for an early election in order to speed up the transition.

Despite concerns expressed prior to the elections, the ballot was conducted peacefully. The second East Timorese transitional government, the Council of Ministers, was formed on the basis of the election result.

⁹⁵ For a critical analysis of the 2001 Constituent Assembly Elections see Hohe (2002).

⁹⁶ East Timor Election Website www.easttimorelections.org

⁹⁷ ‘East Timorese Group calls for election postponement’ AP March 12, 2001, available at www.etan.org

The Constitution of the Democratic Republic of Timor Leste was adopted by the Constituent Assembly on 22 March 2002, and the Assembly transformed itself into a legislative assembly. The Constitution came into force two months later when East Timor became independent. Xanana Gusmão was elected President of the Republic in the presidential elections held on 14 April 2002.

3.3.3 Women's participation in the electoral process

The participation of women in the drafting of the constitution was regarded as a priority by the women's NGO network, REDE, which suggested a quota for women in the electoral regulation. When the National Council rejected the idea of a quota, women's groups, together with UNTAET's Gender Affairs Unit, took affirmative action measures to promote the representation of women in the Constituent Assembly. Political parties were encouraged to field female candidates and include women's issues in party platforms, and REDE also supported female candidates who ran independently. The Independent Electoral Commission (IEC) encouraged women to be election administrators and produced gender sensitive training material. In the election 24 women (27%) were elected to the 88-member Constituent Assembly, which is a high figure when compared internationally. When the Second Transitional Government was formed after the elections two female cabinet ministers and one vice-minister were appointed to the Second Transitional Government. Human rights and gender equality were strengthened by the creation of posts for a Human Rights Advisor and an Advisor for the Promotion of Equality. Both offices are located in the Office of the Prime Minister.⁹⁸

3.3.3 Human rights guarantees in the Constitution

Human rights are firmly guaranteed in law, and the new government has been active in signing international human rights treaties. The Constitution that was adopted by the Constituent Assembly in spring 2002 established East Timor as a parliamentary democracy based on the rule of law. The protection of the fundamental rights and freedoms of citizens is given as one of the fundamental objectives of the state. The text contains a comprehensive list of rights guaranteed by law including provisions for basic civil and political rights and freedoms, and numerous economic and social rights. It also makes a reference to the Universal Declaration of Human Rights stating that the rights in the constitution shall be interpreted in accordance with the Declaration.⁹⁹ Capital punishment was prohibited.

⁹⁸ Interview with Advisor for the Promotion of Equality Maria Domingas Fernandes in Dili, Timor Leste on 10 September 2003.

⁹⁹ Constitution of the Democratic Republic of East Timor, Section 23 (Interpretation of fundamental rights)

The promotion of gender equality is mentioned as a fundamental objective of the State, and there are references to the promotion of gender equality in other sections as well.¹⁰⁰ Equality between women and men is explicitly stated as a general principle under the title of fundamental rights, duties, freedoms and guarantees.¹⁰¹ The rights of the child are written into the constitution, with a reference to international conventions.¹⁰²

To mark the first International Human Rights Day of Timorese independence the Timor Lestese Parliament ratified seven core UN human rights treaties on 10 December 2002. They included the six treaties that had been incorporated in the interim legal code by UNTAET, and the Convention on the Protection of All Migrant Workers and Members of Their Families.¹⁰³ The first international treaty ratified by the new Parliament was the Rome Statute of the International Criminal Court (ICC) in August 2002. In the same month the government signed an Article 98 agreement, or a so-called “immunity agreement” with the United States which prevents the sending of each other’s subjects to the ICC.¹⁰⁴

4 HUMAN RIGHTS CULTURE

4.1 Security incidents in Timor Leste in the first year of independence

After the euphoria of her newly gained independence, problems already started to emerge in the first year. Six months after the independence celebrations civil disturbances erupted in Dili on 4 December 2002. The Parliament building, Prime Minister Mari Alkatiri’s residence, the Dili mosque and some foreign-owned businesses were attacked and set on fire. Two people were shot dead, allegedly by the police, and several were wounded.¹⁰⁵ A few weeks earlier, disturbances had occurred in the second-largest town of Baucau.

In January and February 2003 armed incidents took place in the Ermera and Bobonaro districts in the western part of the country when some militia groups infiltrated from West Timor and killed seven people. After the first incident, the so-called “Atsabe case,” the government requested the Peacekeeping Forces to hand over responsibility for defense to the Timor Leste Defense Force, which conducted an operation in the area and arrested more than 90 people, most

¹⁰⁰ Ibid. Section 63 (Participation by citizens in political life): “law shall promote equality in the exercise of civil and political rights and non-discrimination on the basis of gender for access to political positions.” (2)

¹⁰¹ Ibid., Section 17.

¹⁰² Ibid., Section 18.

¹⁰³ UNMISSET Press Release 10 December 2002. The above mentioned Convention came into force with the signature of Timor Leste.

¹⁰⁴ See www.etan.org Timor Leste was the third country to sign such an agreement with the US after Romania and Israel.

of whom were released immediately. This exercise was against the law, which stated that only the police had legal powers to arrest, not the army. Human rights organizations that criticized the handling of the situation were accused, by members of the government and by the Commander of the Defense Force, of defending criminals.¹⁰⁶

The riots in Dili, the response of the police, and the military action taken by the government to deal with the killings in Ermera and Bobonaro demonstrated the frailty and vulnerability of the newly established state institutions. In a crisis situation the Timorese leadership was quick to resort to familiar wartime practices and disregard provisions of the Constitution and other legal guarantees of human rights.

In the Atsabe case, UNMISSET decided to transfer responsibilities for security from the peacekeeping force to the Falintil-FDTL without taking measures to guarantee that this would not jeopardize human rights. The Deputy Special Representative of the Secretary-General defended the exceptional measures by stressing that Timor Leste was an independent and sovereign country and it was up to its people and government to decide how best to maintain security.¹⁰⁷ The statement was contrary to the SC resolution on UNMISSET mandate, which made UNMISSET responsible for external and internal security.

The sudden deterioration of the security situation in Timor Leste was a rude awakening for those who had expected ‘state-building’ to be a quick and uncomplicated project. Although the incidents seem to have been isolated cases, they forced the Security Council to re-evaluate the schedule concerning the reduction of the military and police components of the UN peacekeeping mission in Timor Leste.¹⁰⁸ The UN police conducted an investigation into the police’s response to the riots in December 2002, but the report was inconclusive as to the issue of responsibility.¹⁰⁹

4.2 Challenging the separation of powers

UNTAET succeeded in setting up the institutions needed for an independent state in only two and a half years, which is a remarkable accomplishment considering the conditions in East Timor in autumn 1999. However, this achievement, the result of rushed decisions, has gradually begun to

¹⁰⁵ The UN Police conducted investigations but could not identify who was responsible for the killings. News conference at UNMISSET HQ 18 November 2003.

¹⁰⁶ “JSMP concerned about illegal detentions in East Timor,” statement 16 January 2003. Commander of Timor Leste Defence Forces Taur Matan Ruak’s aid in an interview “The human rights activists defend the criminals while we (Falintil-FDTL) defend the victims.” TALITAKUM 17, 52nd ed, 5-15 January 2003. Available at <http://www.etan.org>

¹⁰⁷ ‘RDTL Government and UNMISSET agree continued deployment of F-FDTL in Ermera,’ UNMISSET Press release 1 February 2003.

¹⁰⁸ S/RES/1473 (2003).

¹⁰⁹ UNMISSET news conference with SRSG Kamallesh Sharma and UNPOL Commissioner Sandi Peisley on Tuesday 18 November 2003, UNMISSET HQ, Dili.

unravel.¹¹⁰ The events at the end of 2002 and early 2003 revealed institutional weaknesses not only in the police service but within the government, which suggest a lack of understanding of, or genuine commitment to, the protection of human rights, the rule of law and other principles of democratic governance included in the Constitution. The institutional separation of powers is not firmly established, and there appears to be some reluctance among the government to accept it. “They know very well what they [separation of powers] are, we have to assume they choose not to implement them,” says an UNMISSET human rights officer. Other observers in Dili share her view. As examples she points out that cabinet ministers regularly criticize judicial decisions thus undermining the work of the courts, and the government has, on several occasions, introduced unconstitutional draft legislation to Parliament.¹¹¹

Two complementary factors are offered to explain the current situation regarding democratic development and attitudes within the government. The first relates to the ‘mentality’ of the resistance. Fretilin leaders in the government see themselves as having a moral authority that derives from the independence struggle, and therefore do not see the need for guidelines and do not want to have independent institutions. They feel they are the rightful leaders of independence because they fought for it, that they are morally sound and therefore do not need institutional oversight.

The government has submitted a draft law to Parliament, on an Office of the Provedor de Direitos Humanos e Justica, a public institution that is a combination of an ombudsperson and the human rights commission enshrined in the Constitution. According to the proposal the Provedor’s Office will oversee state authorities including the police and armed forces. It would also be an anti-corruption body.¹¹² Although this institution has been pushed forward by the donor countries the setting up an oversight body has not been a priority for the Timorese government.¹¹³ The Provedor’s Office is, potentially, a powerful institution to protect human rights and provide accountability, but its mandate is broad and the budget comes out of the government-controlled state-budget and from donors, not directly from the Parliament, which would give the Provedor’s Office the required independence to oversee the state authorities.

The second factor is the rushed way in which the institutions were set up during UNTAET. Reflecting on her experiences in the UNTAET period, a UN official says, “UNTAET was busy developing institutions. They didn’t work on the political culture, and human rights are part of it. They [UNTAET] will tell you they consulted the Timorese... but there was no time to

¹¹⁰ In a briefing to the Security Council on policing and security in Timor Leste in March 2003, Amnesty International noted that “pressure to meet recruitment targets and allow for the simultaneous downsizing of UNPol has meant that the emphasis has tended towards quantity rather than quality.” AI Report 6 March 2003.

¹¹¹ President Gusmão recently rejected the Immigration Act as unconstitutional.

¹¹² Draft law text available at the JSMP web site www.jsmp.minihub.org

internalize.”¹¹⁴ Furthermore, as was described earlier, the way UNTAET was set up and run did not enhance practices supporting accountability.

4.3 Role of Timor Leste Defense Force

When the government decided to deploy the army in response to the killings in Ermera in early 2003, it acted with, rather than against, public opinion. For historical reasons the armed forces enjoy strong support among the people, whereas the public image of the police is poor. People have no confidence in the police to provide security and “Communities in Atsabe were actually happy to see the army,” admits Bu Wilson from the JSMP, an organization that criticized the government’s response. As a matter of fact, during the military operation community leaders and residents appealed for the defense forces to stay in the area.

Many people admire the Falintil-FDTL whom they see as heroes of the independence struggle. The strong reaction by government members against their critics, in the Atsabe case, and in defense of the Falintil-FDTL, reflects the prevailing mentality of the resistance struggle, in which human rights principles are not always completely accepted. Human rights violations are largely associated with abuses committed by the Indonesian security forces¹¹⁵ and the fact that the involvement of the army, even a popular army, in civilian affairs and domestic politics, is always a potential risk for the development of democracy, is not fully recognized.

The special status enjoyed by the armed forces among the population has implications that alarm human rights monitors. Because of the popularity of the Falintil-FDTL there has been a reluctance to bring cases against members of the armed forces to court even in cases of serious misconduct including rape.¹¹⁶ In the long run the weakness of the justice system and a lack of discipline within the defense force create a risk of institutionalized impunity and poses a serious threat to human rights in the country.

5 CONFLICT TRANSFORMATION AND TRANSITIONAL JUSTICE

5.1 Transitional Justice and Human Rights Violations of the Past

5.1.1 Definition of transitional justice

One of the greatest challenges to any post-conflict society is how to deal with past crimes against humanity and other human rights abuses. A post-conflict government is often faced with difficult

¹¹³ Interview with an UNMISSET official in Dili, Timor Leste on 2 September 2003.

¹¹⁴ Ibid.

¹¹⁵ Interview with Human Rights Adviser to the Prime Minister, Isabel Ferreira, in Dili, Timor Leste, 4 September 2003.

political, legal and moral concerns when it tackles the legacies of the past while at the same time seeking to consolidate the structures and processes of a new democratic system and meet the challenges of reconstruction.

Transitional justice, though not a new phenomenon, re-emerged in the early 1990s. The term refers to measures pursued by a new and democratic regime in order to address the human rights abuses of its repressive predecessor.¹¹⁷ Transitional justice¹¹⁸ takes various forms, such as trials, truth and reconciliation commissions, parliamentary or other inquiries, administrative purges or amnesties. The international trials for war crimes and crimes against humanity created in the 1990s for the former Yugoslavia and Rwanda represent the strongest manifestation of international post-conflict transitional justice.

Though transitional justice is often presented as a moral or legal process, Edward Newman claims that it is as much a political process. He includes in his definition the effects of the political environment on a post-conflict or post-authoritarian situation by describing transitional justice as “a process that is conditioned by political compromises and practical constraints not present in ‘normal’ societal situations.”¹¹⁹ In other words, modalities of transitional justice are the result of a trade-off between the sometimes-conflicting demands for peace, stability, justice, truth and development. It is a delicate balancing act in which decisions, as to whether to prosecute or pardon, investigate or forget, are made. At its best transitional justice strengthens peace and the consolidation of a democratic system. In the worst possible scenario, administrative purges, criminal trials or other forms of transitional justice are utilized in a random or vindictive way thereby creating conditions for new conflicts.

5.1.2 Two approaches to transitional justice

Two general approaches to transitional justice are identified. Both aim at justice, but the tenets of justice derive from different philosophical foundations resulting in different objectives and policies on how to deal with past human rights abuses. The first is called a *human rights approach*¹²⁰ as it is based on the principles of universal justice and individual accountability. The second approach defines justice in broader terms taking into account the consequences not only

¹¹⁶ Interviews with UNMISSET officials on 1 and 10 September 2003 in Dili, Timor Leste.

¹¹⁷ Definition for transitional justice, see Ruti G. Teitel (2003). Growing literature exists on transitional justice. A comprehensive presentation is Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 3 volumes, United States Institute of Peace Press, 1995, Washington, D.C.

¹¹⁸ The term “political justice” is sometimes used for transitional justice. González-Enríquez defines political justice slightly differently to refer to “proceedings held to try crimes committed by outgoing regimes. Such crimes are generally related to political repression, although they can include economic corruption or...ecological crimes.” In Alexandra Barahona de Brito et alia, (2001), p. 218.

¹¹⁹ Edward Newman (2002).

¹²⁰ Tonya Putnam talks about ‘enforcement approach’, 237 – 271.

for the individuals involved but also for the community as a whole. It is therefore called a *communal approach to justice*. Newman calls the first approach a search for *absolute justice* and the second a search for *societal justice*.¹²¹ The choice of approach with its consequent policies depends not only on the internal and external political realities in each case but also on the role played by international actors, and the values and commitment of the leaders.

Human rights approach

The human rights approach holds that sustainable peace and reconciliation in a post-conflict society requires individual accountability for past abuses. Peace and stability can only be reached if past human rights violations are investigated and perpetrators brought to justice. The approach draws on international law and is advocated by the international human rights community.¹²² In what is often called a retributive argument, the perpetrators are punished purely on the basis of the crime they have committed rather than for the sake of the victim, and his or her rights, or indeed out of consideration for the consequences on society. Societal concerns, however, are also relevant, as the issue of past human rights abuses is directly linked to peacebuilding and conflict prevention efforts. Impunity for past crimes undermines respect for the rule of law and human rights, which are considered to be pillars in building a democratic society, which respects such rights. The risk is particularly great after a prolonged conflict when people's confidence in the police, the judicial system and other authorities has been undermined. The only way to break the cycle of violence and to strengthen fragile democratic institutions is to end impunity.

Advocates of the human rights approach emphasize the right of the victims to seek justice for the abuses they suffered and tend to be critical of forms of transitional justice other than judicial proceedings. One reason why the human rights approach takes such a critical view of truth and reconciliation commissions and other non-legal forms of transitional justice is that in the past amnesties and truth commissions have covered up crimes against humanity, which according to international law cannot be amnestied.

Communal approach

Whereas the human rights approach focuses on the individual, be it victim or a perpetrator, the communal approach focuses on the need for social cohesion and reconciliation in a post-conflict society. Justice is necessary, but justice can be achieved in various ways, not only through formal legal proceedings, and a distinction is made between *retributive* and *restorative* justice. The

¹²¹ Ibid., note 117, p. 34.

¹²² 'International human rights community' refers to human rights bodies of international organizations, human rights scholars and practitioners, and human rights NGOs most notably the Human Rights Watch and Amnesty International.

human rights approach is seen to concentrate on retributive justice, which is “adversarial, focuses on guilt and blame, delivers pain and suffering and is past oriented.” Restorative justice, on the other hand, is “participatory, focuses on needs and obligations, tries to heal and resolve problems, and is future oriented.”¹²³ The communal approach prefers truth commissions and reconciliation processes that emphasize dialogue and communal healing, to tribunals that are seen as divisive. The best-known example of the application of the communal approach is the South African Truth and Reconciliation Commission (TRC). The objective of the work of the TRC was to restore peace and stability in a deeply divided society. Truth telling and reconciliation were given priority over a judicial process, and the TRC was given powers to grant amnesties to those who testified. The TRC has been heavily criticized, but it has also functioned as a model for other truth and reconciliation commissions including the Commission of Reception, Truth and Reconciliation in East Timor.

6 TRANSITIONAL JUSTICE AND THE CONFLICT IN EAST TIMOR

6.1 Five processes of transitional justice

Post-conflict transitional justice in East Timor has two meanings depending on the audience. At the international level it normally refers to measures addressing the violence conducted in connection with the referendum in 1999. In the East Timorese context it covers the period starting from the Indonesian invasion in 1975, or even from the civil conflict that preceded the invasion.

Several attempts have been made in the past four years to deal with the human rights abuses of the past. Patrick Burgess, the Senior Legal Adviser to the East Timorese Commission for Reception, Truth and Reconciliation, and former director of UNTAET Human Rights Unit, identifies four processes of transitional justice. He describes them as “an uncoordinated four-tiered approach to accountability,” which has been set up to deal with the massive human rights abuses committed in East Timor in 1999.¹²⁴ They are as follows:

1. *The Special Panels for Serious Crimes* within the Dili District Court was created by UNTAET. It is a mixed international – national judicial process to investigate and prosecute those suspected of crimes against humanity and other serious crimes that took place in East Timor in 1999. The UN has continued to finance and staff the Special Panels and the Serious Crimes Unit since independence, but formally the system now functions under the Ministry of Justice in Timor Leste.

¹²³ Howard Zehr, Restorative justice, in Luc Reyckler and Thania Paffenholz (2001).

2. The second “tier” is *the Commission for Reception, Truth and Reconciliation CAVR*. It is an all-Timorese process presided over by East Timorese National Commissioners, but financed by donors and staffed with international advisers.
3. In addition to the mechanisms in Timor Leste, *the Indonesian ad hoc human rights court for East Timor* was set up in Jakarta to bring to justice those responsible for serious crimes in East Timor in 1999.
4. The fourth “tier” according to Burgess is *the possibility of an international ad hoc tribunal* created by the UN Security Council. In addition, there is the International Criminal Court, which does not have jurisdiction over crimes committed in 1999, but the existence of the court functions proactively in case Indonesia decides to come back.¹²⁵

One more mechanism is suggested here besides those mentioned above by Burgess; namely,

5. *President Gusmão’s National Reconciliation Policy*. Gusmão’s initiatives promoting reconciliation represent locally motivated, rather than internationally conditioned, peacebuilding efforts. They are based on the East Timorese cultural and societal context on the one hand, and political priorities dictated by the security needs of the State on the other. His policies derive from his moral authority and personal charisma rather than the constitutional powers of the president, and his initiatives have not always received an understanding response especially among victims and the human rights community. Despite the political and even personal nature of his policies, and the lack of a clear institutional structure, its significance as a form of transitional justice cannot be underestimated.

6.2 The United Nations human rights mechanisms

6.2.1 Special session of the Commission of Human Rights

In the wake of the referendum the Security Council in New York was engaged in high-level diplomacy over military intervention. At the same time the UN’s human rights mechanisms were activated. The High Commissioner for Human Rights, Mary Robinson, visited Darwin and Jakarta 10 – 13 September, and the UN Commission on Human Rights convened, for a special session on the situation of East Timor, in Geneva on 24 - 27 September.

¹²⁴ Patrick Burgess ‘Justice and Reconciliation in East Timor – the relationship of the Commission for Reception, Truth and Reconciliation with the courts’ unpublished paper on file with the author.

¹²⁵ Interview with Patrick Burgess, senior legal adviser to CAVR and head of the Human Rights Unit of UNTAET in 2000 – 2002, in Dili, Timor Leste, 3 September 2003.

The Commission managed to pass a resolution at the special session despite pressure from the Indonesian government. The resolution requested thematic rapporteurs¹²⁶ to carry out missions to East Timor. It further called on the Secretary-General to establish an international commission of inquiry to collect information on possible human rights violations and other acts, which might constitute breaches of international humanitarian law, and to provide the Secretary-General with its conclusions, and recommendations for future action.¹²⁷

The holding of the fourth special session of the Commission on Human Rights and its initiative for an international commission of inquiry were seen by many as the first steps towards the setting up of an international tribunal for East Timor. The same procedure had led to the establishment of the two other UN ad hoc human rights tribunals. The previous special sessions of the Human Rights Commission had convened in 1992 and 1993 on the situation in the former Yugoslavia and in 1994 on Rwanda. In both cases the Commission on Human Rights had first initiated a commission of inquiry, which eventually led to an ad hoc tribunal.

During the weeks of post-ballot violence in East Timor there appears to have been political support for an international tribunal, not only among the international human rights community, but also at the governmental level including some permanent members of the Security Council. The British Foreign Secretary, Robin Cook, declared that Britain would support the creation of a special tribunal to deal with crimes against humanity in East Timor, and that the holding of a special session of the UN Human Rights Commission in Geneva was the start of the process.¹²⁸ The United States was more cautious but did not reject the idea of an international tribunal. Two other permanent members of the Security Council, China and the Russian Federation, however, had voted against paragraph 6 of the Commission on Human Rights Resolution, which requested the establishment of an international commission of inquiry.¹²⁹

6.2.2 Special Procedures – recommendations from three Special Rapporteurs

The issue of an international criminal tribunal was taken up in the report of the three Special Rapporteurs,¹³⁰ who had conducted a joint mission to East Timor in November. The report gave precedence to the national process but wanted to set out benchmarks to measure progress. It

¹²⁶ The Special Rapporteur on extrajudicial, summary or arbitrary executions, the Representative of the Secretary-General on internally displaced persons, the Special Rapporteur on the question of torture, the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on Enforced or Involuntary Disappearances. Commission on Human Rights resolution 1999/S-4/1 of 27 September, 1999.

¹²⁷ Commission on Human Rights resolution 1999/S-4/1 of 27 September, 1999.

¹²⁸ BBC news, September 23, 1999.

¹²⁹ Report of the Commission on Human Rights on its Fourth Special Session E/CN.4/1999/167/Add.1, E/1999/23/Add.1.

¹³⁰ The Special Rapporteur on extra-judicial, summary or arbitrary executions, Ms Asma Jahangir; the Special Rapporteur on the question of torture, Sir Nigel Rodley; and the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy.

recommended that the Security Council should consider the establishment of a tribunal unless the Indonesian government provided a credible investigation and brought the perpetrators to justice “in a matter of months.” According to the report, if the Security Council decided to set up an international tribunal, it should preferably have the consent of the Indonesian government, but this should not be considered a prerequisite.¹³¹

The report was very frank about the institutional responsibility of the Indonesian government. It concluded that “While most of the atrocities committed in East Timor must clearly be attributed to pro-integration militia elements, the information gathered and testimonies heard by the Special Rapporteurs leave little doubt as to the direct and indirect involvement of TNI and police in supporting, planning, assisting and organizing the pro-integration militia groups.”¹³²

The focus of the Special Rapporteurs’ report was on the human rights abuses committed in East Timor since January 1999, but the report placed the crisis in the broader context of a history of serious human rights violations and political conflict since the Indonesian invasion in 1975. It argued that the impunity enjoyed by members of the Indonesian armed forces and police in East Timor over the years had goaded the militias, police and military into killings, rapes and other atrocities during the period covered by the report.¹³³

The recommendation for an international tribunal to have jurisdiction over human rights abuses committed since the invasion was not given much notice internationally at the time, but it reflected the common view in East Timor that the violence of 1999 was a direct consequence of the occupation.

The report called upon the Indonesian government to investigate the involvement of the armed forces and bring those responsible to justice, but at the same time expressed doubts that a proper process of holding people to account would take place, based on the decades long record of the Indonesian military acting with impunity in relation to human rights abuses, and the influence that the military had within the government and the justice system.¹³⁴

6.2.3 International Commission of Inquiry on East Timor (ICIET)

The Report of the International Commission of Inquiry on East Timor (ICIET), published on 31 January 2000, came to much the same conclusions as the Special Rapporteurs. However, the wording of the recommendation for the establishment of an international criminal tribunal was stronger. Unlike the report of the Special Rapporteurs, the ICIET did not recommend giving the Government of Indonesia an opportunity to prove its willingness to pursue justice. Indeed, ICIET

¹³¹ Report, recommendations.

¹³² Ibid.

¹³³ Ibid.

stressed the vested interest of the United Nations in participating in the process. It stated that intimidation and acts of violence had been directed against Security Council resolutions and against the 5 May agreement between UN, Indonesia and Portugal. The deliberate and systematic action in contravention of the provisions of the agreement had undermined respect for the Security Council and required specific international attention and a response in order to ensure respect for future Security Council decisions.¹³⁵

The Secretary-General, Kofi Annan, had acted on the recommendation of the Commission on Human Rights despite the objections of the Indonesian government at the Special Session, to the establishment of a commission of inquiry.¹³⁶ The composition of the ICIET was announced on 15 October, but the visit of the ICIET to East Timor was postponed until after the Economic and Social Council had endorsed the resolution in mid-November.¹³⁷ The international human rights organization, Human Rights Watch claimed in its report that in addition to the endorsement of the ECOSOC, the Secretary-General wanted to defer the ICIET visit until the Indonesian People's Consultative Assembly had confirmed the result of the 30 August referendum.¹³⁸

The delay did not necessarily impair the fact-finding work of the ICIET. Indeed, they noted in their letter of transmittal on the report that the timing was opportune as displaced people had just began to return from West Timor, which gave the members of the ICIET a chance to talk to them and hear first-hand testimonies.¹³⁹ However, from the political point of view the delay may have been decisive. International support expressed for the establishment of an international criminal tribunal in the wake of the post-ballot violence was waning as the months passed by. Furthermore, Indonesia opposed any international involvement in what it considered to be an internal affair. The governments of the US, Japan, Britain and Australia were also eager to restore their relations with Indonesia, and it was clear that the process of establishing an international criminal tribunal and conducting trials would keep the Indonesian government's poor human rights record in the public spotlight for years. An international tribunal was also a sensitive question for China and Russia because of their own policies in Tibet and Chechnya.

¹³⁴ Ibid.

¹³⁵ Report of the International Commission of Inquiry on East Timor to the Secretary-General, 31 January 2000. S/2000/59.

¹³⁶ Indonesia had requested a separate roll-call vote on the paragraph calling for the establishment of an international commission of inquiry. In addition to Indonesia, eight other Asian countries voted against the paragraph. The Russian Federation, Cuba, and Sudan also voted against.

¹³⁷ Economic and Social Council decision 1999/293, 15 November, 1999.

¹³⁸ 'Unfinished Business: Justice for East Timor,' Human Rights Watch Backgrounder, August 2000.

¹³⁹ Letter from the International Commission of Inquiry to East Timor addressed to the United Nations High Commissioner for Human Rights. S/2000/59.

6.3 The Indonesian Ad Hoc Human Rights Court for East Timor

6.3.1 International context

The Secretary-General decided not to endorse the ICIET's recommendation for an international ad hoc tribunal. In a letter accompanying the ICIET's report, SG Annan said that he was encouraged by President Wahid's demonstrated commitment to uphold the law, and that he had been assured that there would be no impunity for those responsible.¹⁴⁰

Notwithstanding Annan's official optimism, the past record of members of the Indonesian armed forces acting with impunity in regard to gross human rights violations indicated that prospects for bringing the perpetrators to justice in Indonesia were rather slim. These doubts had been raised by ICIET in its report to the Security Council and the General Assembly, and it was doubts about the capacity or willingness of Indonesia to bring the perpetrators to justice, which led the ICIET to recommend the establishment of an international tribunal.

The Indonesian authorities had made efforts to convince the international community of their commitment to a credible national judicial process in the months immediately after the international intervention. In September 1999 the Indonesian Human Rights Commission Komnas HAM set up a commission KPP-HAM¹⁴¹ to investigate human rights violations in East Timor. In its report KPP-HAM concluded that gross human rights violations had been committed in East Timor, and that the militias, who were largely responsible for the violence, had close connections to the Indonesian military, the police and the civilian administration. The report also listed the names of 33 Indonesian officials and militia leaders, including General Wiranto.¹⁴² Human Rights Watch described the report as "thorough and professional," and a "remarkable achievement." The inquiry was not similarly praised in Indonesia, and KPP-HAM members were accused of bias at the National People's Consultative Assembly.¹⁴³

The aim of the Indonesian inquiry was to prevent any international investigations. The Secretary-General's decision in January 2000 to support the Indonesian process was not totally without grounds, judged by the early action taken by the Indonesian authorities. At the same time critics pointed out that throughout the process the Indonesian Government had always yielded an inch at the last moment to keep its Western supporters satisfied and to prevent any initiatives for international action that would transfer the control of the process from national to international actors.

Furthermore, the Secretary-General had to take into consideration the fact that Indonesia opposed any international process, stating that at the time of the events in 1999 East Timor was

¹⁴⁰ A/54/726, S/2000/59, 31 January 2000.

¹⁴¹ Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM).

¹⁴² The executive summary of the report was published on 31 January 2000, the same day as the ICIET report

still part of Indonesia and that therefore the issue fell under the jurisdiction of national courts. In a letter from the Indonesian Foreign Minister Alwi Shihab Indonesia rejected the idea of the establishment of an international human rights tribunal as totally unacceptable.¹⁴⁴ Without cooperation from the Indonesian Government chances for a meaningful judicial process were poor.

6.3.2 Indonesian ad hoc human rights court for East Timor

President Wahid dismissed General Wiranto soon after the KPP-HAM report was handed in, but preparations for trials made little progress after that. It took a year and a half before the Indonesian Ad Hoc Human Rights Court for East Timor (“the ad hoc court”) was established by a presidential decree in August 2001. The decree provided for the investigation and prosecution of human rights abuses in East Timor, but the mandate of the ad hoc court was at first limited to the post-referendum period of September 1999. Later the mandate was extended to include April 1999 as well. At the same time the court’s jurisdiction was reduced to just three of the thirteen districts, Dili, Liquiça and Kovalima.¹⁴⁵

Indictments against 18 military officers, militia leaders and civilians were filed in January 2002, and the court began hearing cases in March the same year. The first verdicts were delivered in August 2002 sentencing East Timor’s former Governor Abilio Soares to three years’ imprisonment for crimes against humanity. The former regional police commander, Brigadier General Timbul Silaen and five other members of the army and police were acquitted.

The first verdicts prompted worldwide criticism and revived demands for an international tribunal. Amnesty International and the Judicial System Monitoring Programme that had observed the trials, said the trials were “seriously flawed, have not been performed in accordance with international standards, and have delivered neither truth nor justice.”¹⁴⁶ The former head of UNAMET, Ian Martin, called the Indonesian court “a complete failure” and “a massively discredited process.”¹⁴⁷

The UN High Commissioner for Human Rights issued a statement¹⁴⁸ expressing the UN’s concern over several procedural shortcomings. According to the statement, the prosecution presented the human rights abuses as the result of a spontaneous clash between East Timorese

¹⁴³ ‘Unfinished Business: Justice for East Timor’ Human Rights Watch August 2000.

¹⁴⁴ Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary -General, A/54/727, S/2000/65.

¹⁴⁵ Presidential Decrees No. 53/2001 and No. 96/2001.

¹⁴⁶ “East Timor Trials Deliver Neither Truth Nor Justice” Amnesty International press release 15 August 2002.

¹⁴⁷ John Aglionby, “East Timor verdicts undermine tribunal. Calls for UN to step in after police chief is acquitted,” *The Guardian*, 16 August 2002.

¹⁴⁸ ‘United Nations High Commissioner for Human Rights Voices Concerns Following Verdict in Indonesia Tribunal’ United Nations press release 14 August 2002.

groups rather than the product of widespread and systematic acts of violence as the International Commission of Inquiry Report had concluded. The prosecution's presentation of the violence in East Timor as an internal conflict, which required Indonesian intervention to restore order, has been the strategy of the Indonesian military since the occupation.¹⁴⁹ The fact that the prosecution adopted this approach, which John G. Taylor called a "military myth,"¹⁵⁰ was observed by the UN to "seriously undermine the strength of the prosecution's case and jeopardize the integrity and credibility of the process." The UN was also concerned that the defendants were being accused of failing to take action to prevent the violence but not for committing or ordering crimes against humanity. The geographical and temporal limitations of the court's jurisdiction were also noted.

The concerns raised in the wake of the first trials were confirmed as the trials proceeded. The last of the trials of the 18 defendants were completed in August 2003 when Major-General Adam Damiri was sentenced to three years' imprisonment, which was below the minimum sentence set down by the law. He was the highest-ranking military officer to be convicted despite the fact that the prosecutor sought an acquittal of the case. The prosecutor's move highlighted the political interference in the judicial process. The perceived lack of political will to prosecute high-ranking military officers undermined the credibility of the process, which was flawed from the beginning, despite the efforts made by individual judges.¹⁵¹

The Indonesian Ad Hoc Tribunal convicted six of the 18 defendants for crimes against humanity. Twelve were acquitted. In addition to Adam Damiri and Abilio Soares the convicted included former militia commander, Enrico Guterres, former Dili Military Commander, Lieutenant Colonel Soedjarwo, and former Dili police chief, Hulman Gultom. The toughest sentence was ten years' imprisonment for Enrico Guterres. At the time of writing they all remain free pending appeal.

6.3.3 Implications of the Indonesian national process

The International Crisis Group (ICG) report identified five consequences of the trials for Indonesia and Timor Leste. The prosecution played a key role in the trial, and one of the major failures of the prosecution was its inability to produce evidence of high-level involvement by the government in the violence surrounding the referendum in 1999. As a result the trials supported

¹⁴⁹ Gen Wiranto repeated the myth when he appeared in the ad hoc court in Jakarta for the defence of Brig Gen Tono Suratman. Wiranto testified that, "If I had not taken preventive measures I'm sure there would have been a civil war." Quoted in the AFP news "Former military chief testifies at rights court," *The Sydney Morning Herald*, 14 February 2003.

¹⁵⁰ Taylor.

the view that the pro-independence victory was an act directed against Indonesia on the part of the international community. The trials harmed the perception of the international community and the United Nations in particular, which was seen as biased. The report speculated that the organization's chances of facilitating the ending of future conflicts might have been reduced.

The trials reinforced the prevailing image, in Indonesia, of the conflict in East Timor as a civil war, which the Indonesian Government had been trying to settle for years. The role and responsibility of the Indonesian military in creating and supporting militias in East Timor was not scrutinized, making it more likely that the military will continue such practices elsewhere (as appears to be happening in Aceh.)

The presentation of pro-Indonesian violence as patriotism and human rights campaigning as anti-nationalist may encourage the use of human rights violations in other conflict areas in Indonesia.

The concept of crimes against humanity in Indonesia will have been trivialized.¹⁵²

With these now reinforced perceptions of the conflict in East Timor, it will be even more difficult than before to persuade the Indonesian authorities to cooperate with the investigation and prosecution in Timor Leste. This was experienced by the General Prosecutor in Timor Leste who negotiated with the Indonesian authorities about extraditing people suspected of crimes against humanity without success. "I try to explain the jurisdiction on crimes against humanity," he says, "but they refer to the Indonesian Constitution and a duty to protect their citizens."¹⁵³

6.4 Legal process in East Timor

6.4.1 Investigation and prosecution

With hindsight it is difficult to understand why UNTAET arrived in East Timor without a strategy for dealing with the massive human rights violations that had taken place. When the terms of the operation were drafted in New York the responsibility for the investigation was seen to lie with the international process that was in progress. The International Commission of Inquiry was named ten days before the Security Council passed the resolution on UNTAET.

At the end of January 2000 it became clear that there would be no international criminal court for East Timor in the near future. In March 2000 UNTAET established a Serious Crimes Investigations Unit within UN civilian police to investigate war crimes, crimes against humanity

¹⁵¹ For a comprehensive analysis, see 'Intended to Fail. The Trials Before the Ad Hoc Human Rights Court in Jakarta' by the International Center for Transitional Justice, 2003. Also, 'Indonesia: the Implications of the Timor Trials' report by International Crisis Group, 8 May 2002

¹⁵² 'Indonesia: the Implications of the Timor Trials' report by International Crisis Group, 8 May 2002.

¹⁵³ Interview with General Prosecutor Longuinhos Monteiro in Dili, Timor Leste 10 September 2003.

and other serious crimes committed in East Timor in 1999. Three months later in June UNTAET set up the Public Prosecution Service¹⁵⁴ and the investigation and prosecution of serious crimes was transferred from the Human Rights Unit to the Office of the Deputy General Prosecutor.¹⁵⁵ The Serious Crimes Investigations Unit was under the UNTAET judicial affairs department, which later became the Ministry of Justice.

Time lost waiting for the SC decision meant that investigations on the ground were slow in starting, and when the Serious Crimes Unit was finally set up it suffered from a lack of human and material resources and management problems, which slowed down the work and caused frustration both for its personnel and for East Timorese victims. The lack of resources was seen by some as an expression of a low political priority within the UN and donor countries.¹⁵⁶ The view that there was no political will from the beginning to take the investigation and prosecution of human rights violations seriously prevails in East Timor, including amongst UN officials, one of whom describes the role of the SCU as a “smokescreen”.¹⁵⁷

Since 2002 the performance of the SCU has improved to the extent that its vigorous efforts to deliver indictments against high-ranking Indonesian officers made UN officials and East Timorese political leaders nervous of their possible impact on relations with Indonesia.¹⁵⁸

6.4.2 Establishment of the Special Panels for Serious Crimes

The Security Council’s choice not to establish an international tribunal for East Timor meant that UNTAET had to search for other ways of establishing accountability and delivering justice for the violence in 1999. Although the mandate was silent on the subject of transitional justice, it gave UNTAET total executive and judicial power, including the administration of justice, which could be interpreted as power to initiate a national process in which UNTAET would play the role of the national government in investigating and prosecuting alleged perpetrators. A national judicial system was being created but newly appointed and inexperienced East Timorese judges were not considered capable of handling complex cases requiring an expertise in international law.

The solution was to create a mixed international – East Timorese court with jurisdiction over violations of humanitarian and human rights law. A legal framework was created in March 2000 when UNTAET passed a regulation on the organization of courts in East Timor.¹⁵⁹ It gave the Dili District Court and the Court of Appeal exclusive jurisdiction over genocide, war crimes,

¹⁵⁴ UNTAET Regulation No. 2000/16, 6 June 2000.

¹⁵⁵ Ibid., Section 14.

¹⁵⁶ The La’o Hamutuk Bulletin, Issue focus: Justice. Vol. 2, No. 6 & 7: October 2001.

¹⁵⁷ Interview with an UNMISSET Serious Crimes Unit officer in Dili, Timor Leste, 28 August 2003.

¹⁵⁸ See chapter 6.4.5.

¹⁵⁹ UNTAET Regulation No. 2000/11, 6 March 2000.

and crimes against humanity, murder, sexual offences and torture.¹⁶⁰ This exclusive jurisdiction applied to the territory of East Timor and was limited to the period from 1 January – 25 October 1999. The time restriction did not, however, apply to genocide, war crimes, crimes against humanity, or torture.¹⁶¹ Three months later UNTAET established the panels of judges (“Special Panels”) within the Dili District Court and the Court of Appeal.¹⁶²

6.4.3 Hybrid court model

A Special Panel includes one East Timorese judge and two international judges. This model of a mixed tribunal composed of international and national judges and prosecutors is known as a ‘*hybrid court*’.¹⁶³ The hybrid court model has attracted increased interest recently as a more flexible and less expensive alternative to international tribunals especially in post-conflict environments. Functioning within the territory of its jurisdiction and as part of the domestic judicial system it is seen as contributing to the strengthening of the rule of law and human rights standards. The ad hoc tribunals of the former Yugoslavia and Rwanda, it is claimed, have remained alien and inaccessible to the public as they are both located outside their respective countries.

Since the establishment of the Special Panels in East Timor, a hybrid court model has been applied in Sierra Leone, where a treaty between the Sierra Leonean government and UN established a special, though not a UN, court. There is also a plan to set up a special court in Cambodia. In June 2003 the Government of Cambodia and the UN came to an agreement on the establishment of a mixed court of Cambodian and international judges to try cases of crimes against humanity and genocide during the Khmer Rouge regime in 1975 - 1979.

Though seen as an alternative to international tribunals, a hybrid court model contains a number of weaknesses. One of the main concerns is the independence of a hybrid court and its ability to uphold international standards.¹⁶⁴ Politicized domestic legal systems and an insufficient expertise on the part of local judges and lawyers, especially in international humanitarian and human rights law, may compromise international standards for due process and human rights in a hybrid court, whilst it benefits from the legitimacy provided by the status of its international

¹⁶⁰ The wording for the definition of the crimes was taken from the Rome Statute.

¹⁶¹ In the Regulation 2000/11 torture was included in the offences for which the exclusive jurisdiction was limited to the months of 1999. In the Regulation 2000/15 the jurisdiction for torture was universal.

¹⁶² UNTAET Regulation No. 2000/15 6 June 2000.

¹⁶³ Katzenstein, ‘Hybrid tribunals: Searching for Justice in East Timor’. Katzenstein defines the hybrid tribunal in East Timor to include the SCU and the Public Defenders’ Office in addition to the Special Panel of Judges.

¹⁶⁴ Human rights organizations have already raised concerns for the Cambodian hybrid court plan.

partner. As Katzenstein sums up, “the hybrid model’s greatest risk is that rather than incorporate the best of the international and local judicial systems, it may reflect the worst of both.”¹⁶⁵

In order to avoid these risks David Cohen maintains that if UN establishes a hybrid court it should be under direct UN administrative control. “The United Nations must not, as it has in East Timor, use the hybrid court status of the tribunal to justify its failure to meet international standards of judicial fairness and integrity.”

6.4.4 Progress in Special Panels since December 2001

The Special Panels at Dili District Court handed down its first verdicts in December 2001. By November 2003 there had been 38 convictions for crimes against humanity and serious crimes. All those convicted have been East Timorese, and most of them have been low -ranking former militia members or soldiers in the Indonesian military. One of the convicted is a Falintil resistance fighter.¹⁶⁶ Suspects accused of the most serious crimes remain in Indonesia, which weakens the court’s authority. Indonesia has not recognized the competence of the Special Panels and has refused to extradite those indicted in Timor Leste despite a Memorandum of Understanding on cooperation in legal, judicial and human rights matters, concluded between Indonesia and UNTAET in April 2000.¹⁶⁷

The Serious Crimes Unit had filed 79 indictments with the Special Panels by November 2003. Of the 367 accused persons 84% are charged with crimes against humanity. Three quarters of the accused remain at large in Indonesia.¹⁶⁸ The situation where the “big fish” remain at large and only the rank-and-file perpetrators are brought to justice goes against the general sense of justice among East Timorese. This sentiment was expressed by an East Timorese judge on the Special Panels in spring 2001, who asked “Is it fair to prosecute the small Timorese and not the big ones who gave them orders?”¹⁶⁹ The situation has already led to calls for amnesty by East Timorese leaders, who argue that the East Timorese were manipulated by the Indonesian military and should not be punished if the main perpetrators walk free.

The apparent powerlessness of the court is damaging for Timor Leste, where people have no experience of an independent judiciary. Fear and mistrust of authority and lack of faith in the system to deliver justice are consequences of the long occupation. A UN serious crime investigator sees the consequences in his work when people have no confidence to come and

¹⁶⁵ Ibid.; Katzenstein, 246.

¹⁶⁶ Serious Crimes Unit Update IX/03.

¹⁶⁷ Report of the Secretary General on the United Nations Transitional Administration in East Timor, 26 July 2000, S/2000/738 paragraph 10.

¹⁶⁸ Serious Crimes Unit Update IX/03.

report crimes.¹⁷⁰ The poor functioning of the judicial system as a whole further emphasizes the mistrust in the legal system to solve conflicts in a just and fair manner. These developments undermine efforts to establish the rule of law and increase the risk of instability and conflict.

6.4.5 Hybrid court in Timor Leste and the question of ownership

In February 2003 the SCU filed an indictment against a number of high-ranking Indonesian military officials including former Minister of Defense General Wiranto. The indictment contained more than 280 murders and 10 major attacks before and after the referendum on 30 August 1999.¹⁷¹ All the accused were charged with crimes against humanity, for murder, deportation and persecution undertaken as part of a widespread or systematic attack against the civilian population of East Timor. Six of the accused were charged with participating in the establishment of violent militia groups by funding, arming, training and directing the militia. The indictment also made a direct link to the government by alleging that money used to support militia groups was drawn from central government funds.¹⁷²

The indictment of senior Indonesian military commanders caused controversy and revealed one of the key weaknesses, mentioned above, of the hybrid court in Timor-Leste; namely, the lack of ownership of the process. When the high profile indictment created a politically sensitive situation none of the parties were willing to claim responsibility.

The Norwegian Deputy General Prosecutor for Serious Crimes derived the mandate for the indictment from the Secretary-General's Report of 17 April 2002. The Report described the duties of UNMISSET stating that the Serious Crimes Unit would conduct its "investigations on those persons who had organized, ordered, instigated or otherwise aided in the planning, preparation and execution of the crimes."¹⁷³ It further referred to UN Security Council Resolution 1272(1999), that condemned all violence and acts in support of violence in East Timor and demanded the perpetrators be brought to justice.¹⁷⁴

At the same time, the UN distanced itself from the indictment. SRSK Kamallesh Sharma published a press release stating that, "While indictments are prepared by international staff, they are issued under the legal authority of the Timorese Prosecutor -General. The United Nations does not have any legal authority to issue indictments."¹⁷⁵

¹⁶⁹ Seth Mydans, "Modest Beginnings for East Timor's Justice System," *New York Times*, 4 March 2001.

¹⁷⁰ Interview with a UNMISSET official in Dili, Timor Leste 28 August, 2003.

¹⁷¹ Serious Crimes Unit Press Release 25 February 2003.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ 'Serious Crimes Process in Timor-Leste' press release, UNMISSET Public Information Office in Dili, 25 February 2003.

East Timorese leaders, on the other hand, saw the judicial process for the serious crimes in 1999 as a creation of the international community, which should therefore be regarded as an international responsibility. President Gusmão issued a statement in which he expressed his view that the holding of such a legal process in Timor Leste was not in the national interest and where he emphasized the need for good relations with Indonesia. His statement criticized the United Nations for shifting responsibility to the East Timorese. “If the international community, via the Security Council, endowed UNTAET and UNMISSET with a mandate to bring to justice those responsible for violence and destruction in Timor -Leste in 1999, then the international community must hold the responsibility for administering that justice and organizing the structures and mechanisms to that effect.”¹⁷⁶

The East Timorese human rights organization Perkumpulan HAK expressed its disappointment with the UN reaction to the indictment, and stated that since the hybrid court system includes both East Timorese and international elements, one could not say that the indictment was issued by Timor Leste alone. Perkumpulan HAK concluded that it was issued by the Government of Timor Leste, and the United Nations together.¹⁷⁷

6.4.6 Transferring responsibility for serious crimes from the UN to Timor Leste

The judicial process to bring to justice those responsible for crimes against humanity and other serious crimes committed in East Timor in 1999 was established by the United Nations when acting as a transitional government in East Timor. It was not meant to be the primary form of justice, but to complement the workings of the ad hoc court in Jakarta – and possibly pave the way for an international tribunal.¹⁷⁸ These two tribunals were assumed to be responsible for prosecuting and trying the main (Indonesian) perpetrators. If there had been an international tribunal, or if the Indonesian ad hoc court had delivered a credible process, the Special Panels would have performed their duties and prosecuted East Timorese perpetrators remaining in the territory of Timor Leste, and the process would have been uncontroversial. However, due to changes in the international context the hybrid court has become the main focus of justice for the international crimes committed in East Timor in 1999. When the indictments proceeded from low ranking East Timorese to top Indonesian officers, the process became politically charged involving Indonesian – East Timorese relations as well as the UN.

¹⁷⁶ Statement by His Excellency Kay Rala Xanana Gusmão, President of the Democratic Republic of Timor-Leste, 28 February 2003. <http://etan.org>

¹⁷⁷ Letter to Fred Eckhard, Spokesperson of the United Nations, 3 March 2003, from Perkumpulan HAK.

6.4.7 Future of the legal process in Dili

The judicial process in Dili, to bring the perpetrators of serious crimes committed in 1999 to justice, has suffered from internal UN managerial problems and a lack of adequate resources. This has slowed down the process and given the impression, to the East Timorese and international public and to at least some of the staff members as well, of a lack of political will and international commitment to justice in East Timor.

Of immediate concern is the future of the process after the UNMISSET mandate expires. The work of the SCU and Special Panels depend on international staff and administrative support. The SCU has been training East Timorese, but according to acting Deputy General Prosecutor, Essa Faal, no East Timorese will be able to prosecute cases of crimes against humanity by the end of UNMISSET mission in June 2004. He is also concerned for the fate of the 600 cases of suspected murder, which will be pending by 2004.¹⁷⁹ If the Security Council decides not to extend UNMISSET mandate in any form, it will thereby end international support for the Serious Crimes Unit and the Special Panels. The cases could be handed over to an all-Timorese prosecutor's office and court, which, as noted by Faal, do not have the expertise or administrative capacity to process the cases – at least in accordance with international standards.

As a result of the structuring of the courts during UNTAET, the legal proceedings dealing with the acts of violence committed in East Timor in 1999 were formally integrated into the East Timorese justice system. At independence the structure was simply carried forward under the new constitution – with a significant shift of administrative responsibilities. When the UN mandate changed from the transitional administrative powers of UNTAET to the supportive role of UNMISSET, the duty to bring those responsible for serious crimes in East Timor in 1999 was transferred from the UN to the East Timorese authorities. In other words, although the SCU, the Deputy General Prosecutor for serious crimes, and the Special Panels continue to be financed and staffed by the UN, formally it is now an East Timorese and not an international process. This legacy of UNTAET has led to a lot of confusion regarding the responsibility for serious crimes, says the acting Deputy General Prosecutor Essa Faal. “The Government says it is a UN process and UNMISSET stresses local ownership. When it is important to get support we are left in limbo.”¹⁸⁰

The lack of clarity of ownership is a factor that weakens the authority of the Timor Leste hybrid judicial process. If the UN does not demonstrate strong leadership and provide both moral

¹⁷⁸ UNTAET Regulation No. 2000/11 Section 10.4 “The establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established”.

¹⁷⁹ Interview with Acting Deputy Prosecutor Essa Faal in Dili, Timor Leste 10 September 2003.

¹⁸⁰ Interview with Deputy General Prosecutor Essa Faal in Dili, Timor Leste 10 September 2003.

and material support to guarantee that international standards are met, the process is left exposed to outside pressure, which may compromise its integrity and possibly weaken respect for the rule of law. This point was made by the two highest officials responsible for the prosecution of Serious Crimes. “Having an international tribunal would be an ideal situation,” says Essa Faal. “As a subsidiary to the Security Council it would have teeth to bite hard. We do not have that kind of influence. An international tribunal would also be resilient to pressure from the East Timorese government.” “We receive suggestions from the government not to push too hard on the Indonesians,” admits Prosecutor-General Monteiro. He finds that after independence the main problem in the prosecution of serious crimes are the attempts by both the government and the UN to influence the process. As an example of UN influence he mentions cases where some UN agencies have asked for temporary exemptions for arrest warrants in order to enable border meetings between former militia members in West Timor and their local community representatives. Monteiro supports reconciliation efforts but finds it difficult to justify exemptions when the suspect is indicted for crimes against humanity. “If we want to establish a democratic country we need to have separation of powers,” he says.

These experiences exemplify the general problem of the responsibility of the international community to deliver justice in a post-conflict situation. One of the key questions concerns the circumstances in which this responsibility can be given to the domestic actors. A society coming out of armed conflict, where grave human rights violations have occurred, rarely has a functioning judicial system, which is institutionally independent and strong enough to deal with politically controversial or sensitive cases from the past. The absence of the rule of law is one of the most difficult problems in post-conflict societies.

6.4.8 Question of political will

The unique mandate of UNTAET as the transitional authority with full powers on the one hand, and the practically non-existent domestic capacities in East Timor, in the specialized field of international law on the other, underscores the dilemma in the case of East Timor.

The United Nations has been accused of lacking the political will to see justice done in East Timor since the Security Council discarded the recommendation of the ICIET to establish an international tribunal and opted instead for the Indonesian ad hoc tribunal for East Timor. The UNMISSET reaction to the February 2003 indictments seemed to underline the claim that the member states of the United Nations were more concerned for their relations with Indonesia than crimes committed in East Timor. “It opened our eyes,” says lawyer Amado Hei from

Perkumpulan HAK. “The reaction of the UN to the indictment of Wiranto and others made it clear that the UN does not have a strong commitment to Timor Leste.”¹⁸¹

Those who argue that there is indeed a lack of political will also point to the failure of the United Nations to denounce the “sham trials” of the ad hoc tribunal in Jakarta. The hybrid court process in Timor Leste has been hampered by the lack of cooperation from Indonesians despite the Memorandum of Understanding signed between the Indonesian government and the United Nations in April 2000. Critics say that the United Nations has not put pressure on Indonesia to adhere to the MoU. The issue of the lack of resources is connected to the lack of political will, since the lack of resources is seen as an expression of a low political priority. The positions for international judges and prosecutors have constantly been left vacant. The UNTAET regulation provided for the possibility of having two Special Panels functioning simultaneously. However, only one Panel has been operating. The Court of Appeal started functioning again in June 2003 having last convened in November 2001. Meanwhile a backlog of appeals had piled up, which affects cases concerning both serious and regular crimes.

6.5 The Commission for Reception, Truth and Reconciliation in East Timor

6.5.1 Seeking alternative ways to justice

The initiative for a truth and reconciliation commission was introduced in summer 2000 at the CNRT Congress. Several practical reasons seemed to call for the creation of a special mechanism to deal with the atrocities and trauma of the past. Legal remedies were proceeding slowly. UNTAET was setting up courts and police investigations, but it was clear that the process would take time. The legal procedures for serious crimes only covered the events connected to the 1999 referendum, and there was a sense that it was important to address the complexities of the many years of conflict, not just those of 1999, but the whole period of Indonesian occupation. Many East Timorese also felt that a judicial process focusing on individual guilt was not an adequate mechanism for dealing with collective experiences of the prolonged conflict. These views were expressed in a presidential campaign speech of Xanana Gusmão. “On the issue of Reconciliation it should be noted that some international organizations show the tendency to impose upon the process rules which are merely legal, without even trying to understand the core issues, as if it was they who suffered, and not the Timorese, and that Timorese have feelings too...On the basis of these traditions, the return to harmony and the burying of the past constitute the factors which,

¹⁸¹ Interview with Rosentno Amado Hei, a lawyer from the human rights group Perkumpulan HAK in Dili, Timor Leste, 10 September 2003. His view is supported by an article, which claims that the SRSG requested the Deputy Prosecutor-General to take the Wiranto indictment off the UN letterhead. Jill Jolliffe, “Timor PM Slams UN on War Criminals,” *Asian Times*, 15 May 2003.

combined with the political component of reconciliation, are a foundation for the process so far implemented.”

The history of repression and impunity and the weaknesses of the nascent legal remedies placed East Timor at risk of falling into a cycle of violence characteristic of many post-conflict societies. There was also a sense of urgency to tackle impunity in a situation where the formal justice system was only just being created and would not have the capacity to deal with the extensive number of cases of post-ballot violence alone.¹⁸²

A truth commission was also seen as a means of encouraging the return of the tens of thousands of refugees living in camps in West Timor, many of whom were former militia members.

6.52 Establishment and structure of the Commission

The Commission for Reception, Truth and Reconciliation in East Timor (The Commission¹⁸³) was established in July 2001 by UNTAET Regulation.¹⁸⁴ A Steering Committee, which consisted of representatives from East Timorese civil society groups, UNHCR, and UNTAET had prepared the mandate. During the preparations, consultations were held in all 13 districts. The format of the Commission was not based on ‘standard operational procedures’ of criminal justice. It combined elements from the South African Truth and Reconciliation Commission, indigenous East Timorese conflict resolution practices, and regular legal practices, but it did not have the South African Commission’s mandate to grant amnesty, and it has conscientiously tried to avoid the discriminatory practices of traditional justice by paying attention to gender aspects.

The Commission was set up as an independent authority, which was not to be subject to the control or direction of any member of the Transitional Government or any office holder with UNTAET.¹⁸⁵ Later the status of the Commission was confirmed in the transitional provisions of the Constitution. The Commission was originally established for two years, but the East Timorese government extended the Commission’s mandate by six months until October 2004.

The Commission is composed of seven national commissioners at the national office and 29 regional commissioners at six regional offices. Two of the national and ten of the regional commissioners are women. The representation of women had been guaranteed in the regulation that required one third of the commissioners to be women. The Commission officially started its

¹⁸² Interview with Patrick Burgess, senior legal adviser to CAVR and head of the Human Rights Unit of UNTAET in 2000 – 2002, in Dili, Timor Leste 3 September 2003.

¹⁸³ Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste. The Commission is known by its Portuguese acronym CAVR.

¹⁸⁴ UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor was promulgated by the Transitional Administrator on 13 July, 2001.

¹⁸⁵ UNTAET /REG/2001/10, Section 2.2.

work at the beginning of 2002 when the national commissioners were sworn in. The regional commissioners followed suit four months later. The offices have a total staff of about 250 East Timorese officials and about ten international advisers,¹⁸⁶ which makes it a very big organization by East Timorese standards. The location of the national office in the premises of the former Comarca prison, where many East Timorese political prisoners were kept during the Indonesian occupation, is symbolically significant. The Commission's budget is funded through donor contributions. By September 2003 the Commission had received 3.3 million US dollars and another 0.5 million had been committed. The largest donations came from Japan, USA and Britain.¹⁸⁷

6.5.3 Objectives of the Commission

Truth seeking

The Commission has three main functions: Truth Seeking, Community Reconciliation, and Recommendations to the Government. The objective of truth seeking is to investigate and establish the truth regarding human rights violations that took place during political conflicts in East Timor between 25 April 1974 and 25 October 1999. The Commission is to inquire into: the extent and nature of the abuses and whether they formed a systematic pattern; who was involved and whether the violations constituted state terror by virtue of deliberate planning, policy, or authorization by a state or its organs; or whether the violations were perpetrated by non-state actors such as political organizations, militia groups, the liberation movement or other groups or individuals. Reference to the possibility of a "systematic pattern" of violations indicates that allegations of crimes against humanity and war crimes are included in the truth seeking function. The Commission will inquire into the role of external and internal factors and into questions of accountability. In addition to these inquires the Commission gathers information and takes statements.¹⁸⁸ At the end of its mandate in 2004 the Commission will submit a report of its findings and make recommendations on how to respond to the needs of victims, and how to prevent human rights violations in the future.¹⁸⁹

Although the emphasis in the Commission's work is on the period of the Indonesian occupation and the violence of 1999, the mandate allows the Commission to address the months of internal political struggle and civil war in East Timor in 1974 – 1975. The period is still a sensitive subject in Timorese politics and an important issue in present day politics. The political parties of UDT and Fretilin, which were the main adversaries in the political conflict of 1975,

¹⁸⁶ CAVR Update May 2002 at www.easttimor-reconciliation.org

¹⁸⁷ <http://www.easttimor-reconciliation.org/funding/DonorUpdateSep2003.html>

¹⁸⁸ UNTAET Regulation No. 2001/10 Sections 3 and 13.

¹⁸⁹ UNTAET Regulation No. 2001/10 Section 21.

continue to be major actors in Timorese politics with Fretilin as the leading party in the Government. The period chosen also reflects the view of many East Timorese that the violence in 1999 was just 'the tail' of a conflict, which dated back to the events in the mid-seventies.¹⁹⁰

The question of the time frame was discussed by the Steering Committee during its preparations, and three options were considered. The first option covered the same period as the Special Panels for Serious Crimes, namely, the events in 1999. The second option was to begin with the Indonesian invasion in December 1975. The third option was the most comprehensive and went back to the fall of the Caetano regime in Portugal on 25 April 1974. After consultation with Xanana Gusmão, the last option was adopted.¹⁹¹ The decision to include the controversial period of internal political conflict within the Commission's investigations and thus present an opportunity for self-scrutiny demonstrates a real effort to have a genuine reconciliation process.

The Commission has plans to hold a public hearing on the political conflict in 1974–76. So far public hearings have been held on Political Imprisonment, Women in Conflict, and Famine and Displacement.

One of the truth-seeking functions is to support reconciliation by creating a common understanding of the past, or a sense of a shared history, through personal experiences of truth telling. "The Timorese need to know their history in order to have a solid foundation for peace," says a National Commissioner, Olandina Caero. A potential danger in any truth seeking process, however, is the possibility that it may result in attempts to try to establish "the Truth," an official account of the past in order to promote stability, reconciliation, or some other political objective. Frederick Rawski notes that, "there is always a danger that an official Truth Commission will feel compelled to shape a particular kind of narrative "truth" especially when it has such pragmatic objectives as enticing refugees to return or relieving an overburdened court system."¹⁹² The report of the Commission will be based primarily on testimonies from the victims. It will not constitute the "whole truth" as the Commission will not be able to conduct research with documents held by, or collect statements from, Indonesian sources, or other states involved in the long conflict.

Community Reconciliation

The community reconciliation procedure provides a system to hold perpetrators accountable, for lesser crimes such as burning houses, by utilizing traditional conflict resolution practices. The process is based on traditional conflict resolution and mediation mechanisms that emphasize the restoration of harmony within a society. Local community representatives and a Regional

¹⁹⁰ Ibid. Also, Patrick Burgess, 'Justice and Reconciliation in East Timor – the relationship of the Commission for Reception, Truth and Reconciliation with the courts' an unpublished paper.

¹⁹¹ Interview with Patrick Burgess in Dili, Timor Leste 3 September 2003.

¹⁹² Rawski, 94.

Commissioner will form a panel to organize a hearing of victims, perpetrators, and other community members with information relevant to the case. The panel will consider reconciliation measures such as community service, reparation of public apology.¹⁹³

Traditionally mediators and other administrators of traditional justice have been village chiefs and family elders, who, traditionally, have been men, whilst women have been largely excluded from the process. In order to ensure the full participation of women, in the community reconciliation process the regulation requires appropriate gender representation on the panels.

6.5.4 The Commission and the question of accountability

The circumstances and political motives, which determine the purposes and mechanisms of truth and reconciliation commissions, have varied in each country, but generally the commissions have been established as alternatives to criminal justice proceedings. In the Latin American commissions the emphasis was on the word “truth” in an attempt to reveal the crimes of the military juntas in their secret wars, but these commissions usually lacked the right to initiate trials based on the documentation of past human rights abuses they had collected. In South Africa, the truth and reconciliation commission was established primarily as a mechanism to promote reconciliation and a process of healing within society. Establishing the truth was not a goal as such, but a means to reconciliation. Consequently these commissions have been criticized for failing to deliver justice and uphold the human rights of the victims.

In East Timor the situation is different. Although the Commission is based on the idea that bringing out “the truth” will promote healing and reconciliation, it was clear from the outset that the East Timorese Commission was to complement judicial proceedings and not replace legal responsibility. Unlike in South Africa, the East Timorese Commission does not have the power to grant amnesty in serious cases like murder or rape even if the offender has confessed.

There were two essential reasons for basing the Commission’s mandate on human rights standards and avoiding an overlap with the legal process. First of all, it was the will of the East Timorese people. The message that they did not want to see the perpetrators of serious offences avoiding justice handed down by a court was conveyed to the members of the Steering Committee in the public consultations during the drafting process.¹⁹⁴

Secondly, the UNTAET legal framework regulated it. Regulation 1999/1 ordained that laws applicable in East Timor were in accordance with international human rights standards.¹⁹⁵

¹⁹³ UNTAET Regulation No. 2001/10 Sections 22 – 27.

¹⁹⁴ Patrick Burgess, ‘Justice and Reconciliation in East Timor – the relationship of the Commission for Reception, Truth and Reconciliation with the courts’

¹⁹⁵ UNTAET Regulation no. 1999/1 Section 2 and 3. The standards listed in Section 2 included the Universal Declaration on Human Rights, The International Covenants on Civil and Political Rights and Economic, Social and

Powers to grant amnesty for crimes against humanity would have been a breach of these standards. Compliance with human rights principles was further enhanced by the composition of the Steering Committee. It was headed by the UNTAET Human Rights Unit, whilst members of the Committee included representatives of East Timorese human rights and women's NGOs such as Yayasan HAK and FOKUPERS.

The community reconciliation process does not have authority to deal with cases involving serious criminal offences. The written statement, submitted to the Commission by every person wishing to be a candidate for a reconciliation process, will be reviewed by the Serious Crimes Unit at the Office of the Prosecutor-General against its own records of suspects for crimes committed in 1999. If the SCU decides to prosecute the case it will prevent the continuation of a community reconciliation process.¹⁹⁶ By November 2003 the SCU had received over 1,115 statements from the Commission. In over 70 of these cases the SCU stopped the community reconciliation process in order to press charges.¹⁹⁷

6.5.5 Considerations of the Commission as a form of transitional justice

The main focus of the Commission's work has been on community reconciliation and support for the reception and reintegration of minor offenders into their communities. Although the Commission has semi-judicial powers, it has chosen not to use these powers to their full extent so that it will not appear as a court-like body. Although it is premature to assess the work of the Commission, which will continue until November 2004, its work has received positive comments from representatives of the human rights community, many of whom were originally concerned that the Commission would undermine efforts to bring perpetrators to justice, or that the Commission would be used internationally as an excuse for not pursuing other forms of justice. In 2001 Amnesty International recommended postponing the establishment of the Commission until the judiciary had the capacity to prosecute cases, referred to it by the Commission, according to international standards.

Patrick Burgess says there can't be perfect justice in post-conflict conditions. "The key issue is how do we get an achievable amount of justice." UNMISSET officials and NGO representatives who work in the justice sector praise the work of the Commission though not without reservations. Its speedy time frame, inclusiveness, and participatory approach are cited as strengths of the Commission by director, Bu Wilson, of the Judicial System Monitoring

Cultural Rights, CEDAW, The Convention against Torture, The CRC and the Convention on the Elimination of all Forms of Racial Discrimination.

¹⁹⁶ Regulation No. 2001/10 section 23.

¹⁹⁷ Serious Crimes Unit Update IX/03 5 Nov 2003.

Programme in Dili.¹⁹⁸ But she raises the issue of sustainability. A spirit of reconciliation is created during the process, but how long does this ‘feel good’ spirit last, she asks. A Serious Crimes Investigator has similar views. “Perhaps this is a policeman’s view, but some of those guys just lie – it’s not always a genuine reconciliation process.”¹⁹⁹ Bu Wilson also notes that the process does not address restitution or compensation issues. An official from the UNMISSET Human Rights Unit admits that the reconciliation process meets emotional needs but does not provide justice. In replying to criticism, Patrick Burgess, from the Commission, noted that “First we need to think what justice is”. “The aims of justice are broader than punishment. In a post-conflict environment rehabilitation is just as important.” He also underlines the Commission’s functions in preventing future conflicts. “Since the beginning the Commission has served as a channel that hopefully takes away some of the anger which still exists in communities.”²⁰⁰

6.6 President Gusmão and National Reconciliation Policy

6.6.1 President Gusmão’s views on reconciliation

The Special Panels and the Commission for Reception, Truth and Reconciliation are the two official mechanisms of transitional justice currently functioning in Timor Leste. Bearing in mind the earlier definition by Newton,²⁰¹ a third form of transitional justice is offered here; namely, President Gusmão’s National Reconciliation Policy. Though it differs from the other two in the sense that it is based on the political agenda of one person rather than an institutionalized structure, it focuses on the same problems, utilizes the same modalities, and shares the same objectives of addressing past human rights abuses and promoting reconciliation.

Gusmão emphasizes the importance of reconciliation, which for him means forgiveness and community healing rather than punitive justice. In a recent interview he explains his views, which reflect the communal approach to post-conflict justice discussed earlier. His views follow the thinking of Lederach on reconciliation. “Reconciliation helps in the healing process, in accepting mistakes and in embracing new values. Sometimes we face problems of international pressure. People say justice is important, and is fundamental to societies. Yes, justice is important, but it ought to be achieved in a way that honors it, rather than achieving it for the sake of revenge. This is a challenge, a difficulty that we are facing in our nation-building.”²⁰²

¹⁹⁸ Interview with staff at the Judicial System Monitoring Programme in Dili, Timor Leste 2 September 2003.

¹⁹⁹ Interview with a UNMISSET Serious Crimes Unit Official in Dili, Timor Leste 28 August 2003; Interview with Patrick Burgess in Dili, Timor Leste 3 September 2003.

²⁰⁰ Ibid.

²⁰¹ Newman, see chapter 5.1.1.

²⁰² Interview on Radio Singapore International 30 September 2003 available at http://www.channelnewsasia.com/can/analysis/030930_timor_leste.htm

During the presidential campaign in spring 2002 Gusmão spoke of a need to have a National Policy for Reconciliation. Although no such official policy has been formally adopted by the Parliament or the government, Gusmão has continued to advocate and implement his reconciliation policies. He initiated a draft law to grant an extensive amnesty for past criminal offences of a political nature before inauguration. He has conducted a series of border meetings to promote reconciliation. The meetings are separate from the community reconciliation process of the Commission for Reception, Truth and Reconciliation. He has also strongly promoted good relations with Indonesia to the extent that it has evoked criticism. Gusmão has expressed his willingness to go further, to facilitate reconciliation, than the other two mechanisms, which seek to combine reconciliation with accountability. Some of these initiatives have caused confusion among the East Timorese public as well as staff members, because they appear to undermine the work of the Special Panels and the Commission.

In analyzing the significance of these initiatives one needs to take into account the unique role President Gusmão has played in East Timorese politics and the exceptionally high public esteem he enjoys both in Timorese society and internationally. As President of the Republic Gusmão has a strong and independent position, in relation to the government, after receiving 78 % of the vote at the presidential election in April 2002. The constitutional powers of the office of the president are fairly limited, but Gusmão's personal charisma and moral authority increases his influence beyond the formal powers of the law. These political and personal factors are particularly relevant in the Timorese context where state institutions have only started to establish themselves, and are inevitably still weak.

6.6.2 Amnesty and pardon as a form of transitional justice

Amnesties and pardons constitute one form of transitional justice in post-conflict situations. In post-conflict situations amnesty laws are often used as a means to promote social unity or deal with crimes committed by a large part of the population. Sometimes members of the former regime are in a position to put pressure on the transitional government to pass amnesty laws in order to escape prosecution. States have powers, often defined by law, to pardon offenders or grant a general amnesty. The term 'amnesty' comes from the ancient Greek word of *amnestia*, which literally means 'forgetfulness of wrong' indicating the nature of amnesty as the opposite of accountability. Some crimes, however, cannot be forgotten. According to international law states have a duty to prosecute crimes against humanity and therefore an amnesty for such crimes is not considered valid even if it is in accordance with domestic law. Amnesties for armed forces are

considered unacceptable and are not recognized by the United Nations unless they are granted for actions other than genocide, crimes against humanity, and war crimes.²⁰³

6.6.3 Draft law on amnesty and pardon in Timor Leste

Xanana Gusmão first called for an amnesty in 2001 to encourage the East Timorese refugees in camps in West Timor to return. Though the call for an amnesty received a cool reception, one of Gusmão's first initiatives on being elected President was to prepare a draft law on amnesty and pardons. The draft law was presented to the Parliament (the Constituent Assembly at the time) in May 2002, and the plan was that Parliament would pass the law to mark independence. Instead of passing the highly controversial draft legislation, the Parliament referred it to a parliamentary committee for redrafting, and it is still before Parliament waiting to be reintroduced for debate.

The JSMP²⁰⁴ analysis of the draft legislation draws attention to a number of problems regarding its constitutionality and consistency with principles of international law, including human rights standards. The scope of amnesty depends on the political allegiance of the perpetrator, be it a member of the Resistance or an involuntary member of the militia, rather than the nature and context of the act, and therefore violates the principle of equality before the law and non-discrimination stated in the Constitution.²⁰⁵ The issue is not only of a legal nature; the law would have a dividing rather than a reconciling effect on the East Timorese people by favouring the former members of the resistance movement.²⁰⁶

The relation of the draft law to crimes against humanity is especially problematic, as noted in the report. Crimes that are granted amnesty which “do not involve violence or threat”, or “are not bloody”, as prescribed in articles 1 and 2, can still constitute crimes against humanity under certain circumstances. In such cases an amnesty would be both unconstitutional and would contravene principles of international law and the human rights treaties Timor Leste has ratified,²⁰⁷ which hold that states have an obligation to prosecute crimes against humanity. The report further lists several rights guaranteed by the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which would be violated if the draft law were to be adopted.²⁰⁸

²⁰³ Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, para 47, S/2002/1300, 26 November 2002.

²⁰⁴ Judicial System Monitoring Programme ‘The Draft Law on Amnesty and Pardon’ A JSMP Report, November 2002, Dili, East Timor; interviews at JSMP in Dili, Timor Leste.

²⁰⁵ Article 16 of the Constitution.

²⁰⁶ Interview with Fausto Belo Ximenes, legal researcher at JSMP, Dili, Timor Leste 12 September 2003.

²⁰⁷ Timor Leste was not a member of human rights treaties at the time when the draft law was first introduced and when the JSMP Report was published. It is relevant today as the draft law is still pending.

²⁰⁸ JSMP Report.

The analysis above concluded that the draft amnesty law is unconstitutional. It violates the principles of accountability and the rule of law, and is inconsistent with the international human rights treaties Timor Leste has committed itself to. The inconsistencies and shortcomings in legal terms may be explained by the fact that the draft law was prepared in a rush with inadequate legal expertise especially regarding international humanitarian and human rights law. Notwithstanding, the consequences for the rule of law and institutional practices could be far-reaching if it was adopted, as it would convey a message that the provisions of the Constitution could be ignored for political purposes.

The draft amnesty law is in many respects a very political document and should be viewed as such. It reflects the concerns and priorities of President Gusmão's thinking with regards to the crimes of the past and their effect on the future of the East Timorese. Divisions in East Timorese society run deep after decades of occupation. In all societies under foreign occupation some choose to collaborate, and others choose armed resistance. Most people just try to survive the best they can. Though most East Timorese were against the occupation, a number of people collaborated with the Indonesians and benefited from it and East Timorese were recruited into the Indonesian armed forces. However, not all of those who favoured integration with Indonesia were in the militias, and many of them actually disapproved of the terror and violence committed by the militias. Most of the collaborators – often identified as pro-integrationists – left for West Timor after the referendum. President Gusmão has gone to great lengths to narrow the gap between former collaborators and those who favoured independence.

Although the draft law was not passed by Parliament in 2002 it has not been buried. The possibility of an amnesty has been raised again as a result of the failure of the Indonesian ad hoc tribunal to provide a credible judicial process and the limited possibilities of the Special Panels to try the “big fish”; the main perpetrators of the violence in 1999. In June 2003 Prime Minister Mari Alkatiri called for a pardon for those in prison for crimes committed in 1999. Alkatiri argued that an amnesty for those in prison was fair given that Indonesian military officers were unlikely to ever stand trial.²⁰⁹ An amnesty has also been raised as an option by the East Timorese authorities if the United Nations ceases to continue its support for the Special Panels and Serious Crimes. The original idea of an amnesty was to promote reconciliation between the East Timorese who had been divided over the experiences and violence of the conflict. The recent initiatives for amnesty arise out of the perceived impotence of the judicial processes in Indonesia and Timor Leste. They have created a situation in which low-level East Timorese militia members have been tried and sentenced whereas the main perpetrators remain at large in Indonesia.

²⁰⁹ Vanessa Hearmann, “East Timor: Leaders reject international tribunal,” *Green Left Weekly*, 25 June 2003.

6.6.4 Refugee question and border reconciliation meetings

Thousands of East Timorese refugees continue to live in West Timor creating a humanitarian issue as well as a potential security risk. Refugee camps are a destabilizing factor at the border area, and there are concerns that militia activities will increase when the peacekeepers pull out in 2004. They have also become a breeding ground for organized crime.²¹⁰ Negotiations have been carried out between Timor Lestese and Indonesian officials to have the Indonesians remove militia leaders from the camps, and some of them have been resettled in other parts of Indonesia, but the camps are likely to remain.

When the international forces arrived in East Timor in September 1999, it was estimated that some 250,000 people had been displaced to West Timor in the aftermath of the referendum. Many of the refugees had been driven out of their homes by force, but some of them who had been associated with Indonesian rule left in fear of reprisals. Most of them, 225,000 refugees, had returned via UNHCR by the end of 2002, but about 30,000 remain in camps in West Timor. The number of returnees has dropped, and in 2003 only 311 people had returned by the end of August.²¹¹

UNHCR and IOM continue to run a transit centre at the border where those who wish to return, stay while they inform the communities of the return. Andreas Wissner, from UNHCR, considers this procedure has worked well compared to many other countries saying, "Among the returnees may be perpetrators of smaller crimes with unsettled bills with the community. Sometimes there have been cases of slapping or beatings, but the incidents of revenge have not escalated." Wissner says that UNHCR concentrates on the technicalities of the actual repatriation of refugees and has no capacity to follow up the situation, which is usually done by local NGOs and the Commission for Reception, Truth and Reconciliation. However, with fewer returnees there has been more emphasis on monitoring. In Timor Leste UNHCR has identified 500 critical cases, which they have monitored. The group includes former militia members and households headed by women. Half of them have been covered by systematic visits.²¹²

Another reason for the low number of incidents may be the strong presence of peacekeeping forces, and there is fear among observers that incidents of revenge may increase when the peacekeepers leave.

²¹⁰ Interviews with officers at the UNMISSET Serious Crimes Unit, Dili, Timor Leste 28 August 2003.

²¹¹ Interview with Manuel Carceras da Costa and Andreas Wissner, UNHCR Dili, Timor Leste 11 September 2003.

²¹² Ibid.

Border reconciliation meetings in 2001 - 2002

One of the motives behind the establishment of the Commission for Reception, Truth and Reconciliation was to promote the peaceful re-integration of the returnees. From the beginning, Gusmão participated in efforts facilitating the return of refugees, including those who had supported integration into Indonesia. Border reconciliation meetings were organized to promote the return of refugees. The idea was to bring community members and refugees together to talk and thus reduce the misinformation, which was being spread by militia members who controlled the camps. The idea of border-meetings was originally opposed by the UNTAET Human Rights Unit and the Serious Crimes Unit on the grounds that it required temporary immunity for some refugees who had been indicted for crimes, which was seen as detrimental to efforts to enforce the law. The idea went forward with the support of SRS de Mello. UNHCR and IOM facilitated the meetings, and according to the observations by UNHCR, the number of returnees did increase after such meetings. In 2002 the agencies facilitated over 80 border meetings.²¹³

Border reconciliation meetings in 2003

In summer 2003 President Gusmão resumed border meetings, but the primary objective changed from promoting the return of refugees to reducing tension and promoting peace. Meetings were a response to the drop in the number of returnees, but also to the violent incidents at the beginning of the year.

A new feature of the meetings was that Gusmão wanted to involve those who were indicted by the Prosecutor-General's office for serious crimes. This has caused problems for UNHCR and the prosecuting officials who feel that the independence of the judicial process is being compromised. From the beginning UNHCR negotiated with the Prosecutor-General's office for the granting of temporary immunity for those participating in border meetings but according to Wissner and da Costa, UNHCR never promoted reconciliation with persons suspected of serious crimes. Deputy General Prosecutor, Essa Faal, calls them hard-liners with whom reconciliation is not a feasible option. In September 2003 a border reconciliation meeting in Maliana was cancelled after it turned out that 21 of the 37 participants would have been indicted by the SCU.²¹⁴

6.6.5 Reconciliation and security policy

President Gusmão's activities can be explained at least partly by his perceptions of war and reconciliation. "It [war] is a monster," he said in an interview in 2003, "The more war increased,

²¹³ Ibid.

²¹⁴ Ibid.

the more people died. You started hating war.”²¹⁵ Reconciliation, on the other hand, is a long process. Gusmão has talked about reconciliation in almost spiritual terms as a “simultaneous reaching into ourselves to find the strength and courage to make peace, and a reaching out to the other with whom we have been in conflict.”²¹⁶ At the same time, his reconciliation policies derive from practical concerns for internal and external security. “Reconciliation is a prerequisite for national stability, and national stability is a prerequisite for development.” The border meetings seek to promote stability through dialogue and exchange of information. The pursuit of judicial justice is secondary to the objectives of community reconciliation and internal security. The same objectives guide Gusmão’s policies with Indonesia. He has paid close attention to developing good bilateral relations since his return to East Timor in October 1999.

Both President Gusmão and the government recognize that good relations with Indonesia are a necessity for Timor Leste’s future. Although Indonesia acknowledged East Timor’s independence, the Timor Lestese leadership is aware of potentially destabilizing factors in the relationship between the two states. Some of these derive directly from the legacy of the conflict whereas others arise from Indonesian domestic politics. The presence of former militias and thousands of refugees at the border area is a potential security threat as was shown by the attacks in January and February. A large-scale attack by Indonesia seems unlikely, but the possibility of such an attack comes up in discussions. By failing to reveal high-level Indonesian involvement in the organization of the violence around the referendum, the Indonesian ad hoc court reinforced the position of those elements within the Indonesian armed forces that resent the independence of Timor Leste. The slow progress of demarcation negotiations is interpreted as a sign of reluctance on the part of Indonesia to accept the final separation.

International politics also play a role. The international community has failed to show its strong commitment to credible judicial justice for the violence in 1999. Furthermore, the terrorist attacks in New York on 11 September 2001 and the Bali bombing in 2002 changed the focus of, and priorities in, international politics, which has been dominated by security issues. The influence of the military within the Indonesian government has again increased; one example of which is the large military offensive in Aceh launched in June 2003. It is a post-September 11 phenomenon that there has been very little criticism of the Aceh operation, despite reports which suggest that the armed forces are applying tactics in Aceh similar to those it used in East Timor, including the establishment of local militias.²¹⁷ The operation is being conducted partly by the

²¹⁵ William Birnbauer, ‘Healing Hand’ *The AGE*, 9 April 2003. Available on ETAN web site www.etan.org/et2003/april/07/09healng.htm

²¹⁶ ‘Challenges for Peace and Stability’ address by President Gusmão at the University of Melbourne, Australia, 7 April 2003.

²¹⁷ Matthew Moore, “Timor repeat feared as militia threat surfaces,” *The Sydney Morning Herald*, 18 Nov 2003.

same military officers, including Adam Damiri, who was convicted in the ad hoc human rights court in Jakarta but remains free on appeal, and who failed to appear in court during his trial because of his duties in Aceh.²¹⁸

The conclusion of the Timorese government and President Gusmão has been to adopt a *realpolitik* approach in their diplomacy, which has no place for advocating an international tribunal. The government has recently stated that it will not seek a UN tribunal even if the ad hoc human rights court fails to deliver justice,²¹⁹ but the issue continues to divide opinion in Timor Leste. In September 2003 President Gusmão invited the former Indonesian foreign minister Ali Alatas to speak at a seminar in Dili. As chairman, President Gusmão did not allow the audience to ask Alatas questions concerning human rights violations during the Indonesian occupation. Timorese people followed the reports of Alatas's visit with mixed feelings. Privately some government officials were also critical of foreign minister Ramos Horta's praise of Ali Alatas's long experience in diplomacy. Nobel Peace Laureate Bishop Carlos Belo criticized the efforts to block questions and prevent discussion of the past saying that true reconciliation was not about forgetting the past.²²⁰

7 FUTURE OF TRANSITIONAL JUSTICE IN TIMOR LESTE

7.1 Establishment of an International Ad Hoc Human Rights Tribunal

7.1.1 Credibility of the Indonesian ad hoc court process

What are the options, as regards transitional justice, for the international community and for the Timor Lestese government? There is still the possibility that the Security Council will conclude that the Indonesian process was not a "credible response in accordance with international human rights principles," as the Secretary-General had expected it to be, and will decide to establish an international ad hoc court for East Timor. The ad hoc court has completed all 18 trials. The appeal process will continue, perhaps for a long time, but human rights groups and other observers have already denounced the trials as not meeting international standards; and calls for an international ad hoc tribunal have resumed. The UN has restrained from commenting on the trials since the first verdicts but it will have to draw up its conclusions at some point. Reporting to the Security Council in October this year, the Secretary-General stated that he had closely followed the progress of the ad hoc court and firmly believed that "the perpetrators of serious human rights

²¹⁸ "General in court for E Timor verdict," a BBC news report, 5 August 2003.

²¹⁹ Louise Williams, "East Timor determined to leave its past behind," *The Sydney Morning Herald*, 7 Nov 2003.

²²⁰ Suara Timor Lorosae 10 September 2003.

violations in 1999 in Timor Leste must be brought to justice,”²²¹ indicating that he was not satisfied with the process.

7.1.2 Factors in favor of an international tribunal

As the Deputy General Prosecutor, Essa Faal, has said from the human rights perspective an international ad hoc tribunal would be the ideal solution. There appears to be very little official support for it in the Timor Lestese government. On the other hand, privately there is more support for a tribunal amongst Timor Lestese government officials, but they think it is up to the international community to take the lead. International human rights organizations, former East Timor solidarity groups, and Timorese civil society actors that include victims’ groups and local human rights organizations all advocate a tribunal. Nobel Laureate, Bishop Carlos Belo, is one of the leading figures in the campaign in Timor Leste.

Those who argue that this is an international responsibility base their claim first of all on the very nature of the crimes; namely, crimes against humanity, which are considered to be attacks on the international community as a whole and not just on the individual victims concerned. Consequently, responsibility for bringing the perpetrators to justice cannot be placed only on the authorities of the country where the crimes have occurred, but rests with the entire international community.²²² The second argument was included in the report of the International Commission of Inquiry for East Timor in January 2000, which recommended the establishment of an international human rights tribunal to the Security Council. The report argued that the actions against humanitarian and human rights law in East Timor were directed against a UN Security Council decision and thus the UN as an organization had a vested interest in participating in the process of bringing the perpetrators to justice and promoting reconciliation. The report pointed out that the UN needed to address the issue effectively to ensure respect for future Security Council decisions.²²³

One suggested possibility as to how to proceed is to conduct a comprehensive and independent review of, the Indonesian ad hoc court’s proceedings and its alleged procedural flaws and, on the basis of such a review, decide on a possible course of action. This would in effect merely postpone the final decision, but it would nevertheless provide a way to exert pressure on the Indonesian government either to improve the Indonesian appeals process, or to extradite the indicted suspects to the court in Timor Leste.

²²¹ S/2003/944, 6 October 2003 para 11.

²²² See for example Amnesty International Report ‘Indonesia & Timor-Leste, international responsibility for justice’ AI index ASA 03/001/2003.

7.1.2 Factors against an international tribunal

There is still a chance that an international tribunal will be established but the political will, which emerged briefly in the immediate aftermath of the post-ballot violence, evaporated quickly. It would require a considerable effort to create enough political will to persuade the Security Council to set up an international tribunal, in spite of the less than satisfactory performance of the Indonesian ad hoc tribunal. China and Russia resisted the idea of an international tribunal from the beginning – they are not likely to support a court, which could serve as precedent for transitional justice in Tibet or Chechnya.

The decision to establish an international tribunal would require the co-operation of the Indonesian government since most of the perpetrators remain in Indonesia, or considerable political pressure to force the government to hand over suspects to be tried by the international tribunal. The Indonesian government has not demonstrated any willingness so far to co-operate with the hybrid court in Dili and the chances of a change in policy are rather slim, especially in an election year. Indonesia will hold parliamentary and presidential elections in 2004.

The terrorist attack on 11 September 2001 in the United States and the Bali bombing a year later further diminished the likelihood of an international tribunal to try high-ranking officials. The influence of the military within the Indonesian government has grown after the terrorist attacks. Former allies, most notably the United States, have resumed military cooperation having distanced themselves, for a while, in the wake of events in 1999.

7.2 Accepting the Indonesian Ad Hoc Court Process

The Security Council may choose to express its satisfaction with the Indonesian process hoping to remove the subject from the agenda. Though this would probably be a tempting option for most members of the Security Council, it would undermine the moral authority of the Security Council and the UN as a whole. The procedures of the trials fell far short of international standards even according to the UN's own assessment, and by declaring them satisfactory the UN would set a precedent that would potentially weaken human rights protection in the future. Other states might be tempted to follow the Indonesian example in order to avoid the possibility of having their citizens prosecuted by the International Criminal Court.

Another complication in accepting the legitimacy of the Indonesian process is that the UN – Timor Lestese hybrid court, has indicted several Indonesian officials who have been acquitted or even convicted in the Indonesian ad hoc court. Accepting the Indonesian judicial process would

²²³ Report of the International Commission of Inquiry on East Timor, 31 January 2000, A/54/726, S/2000/59.

undermine the Special Panels, which have sought to adhere to international standards despite shortcomings regarding human and material resources.

7.3 Support for the Special Panels Process in Timor Leste

The third option for the UN would be to establish a successor mission to UNMISSET, which would at the very least support both a judicial process for serious crimes, including the investigation of crimes and prosecution of suspects, and the Special Panels of judges.

One justification for another successor mission is that the serious crimes process will not have been completed by the time the UNMISSET mandate ends in 2004. The ten priority cases and the five cases of widespread patterns of violence will probably be completed, but the rest of the serious crimes indictments will still be in progress. The Court of Appeal, which for serious crimes cases dating from 1999 is also a hybrid court with international judges, already has a backlog of almost one hundred appeals pending. Investigations will also be left incomplete by the end of UNMISSET. Only about half the murder cases have been investigated and prosecuted, and none of the other cases such as rape or arson.²²⁴ It is unlikely that the Timor Leste government will be able to continue the process if the UN terminates its support. It does not have the resources or the political will to continue with the process, which it considers is taking resources away from more acute problems and damaging relations with Indonesia. One alternative for the Timor Lestese government in such a situation would be the declaration of an amnesty for crimes committed in 1999.

There are two strategies for the potential continuation of international support for the serious crimes process in Dili. The first strategy would involve a minimal provision of material and human resources and a lack of serious political support. In other words, applying the 'smokescreen' strategy described earlier by an UNMISSET official. The second strategy would be to equip the serious crimes process with adequate resources and back it up politically. In that case international pressure would be exerted on Indonesia to extradite those who have been indicted. It would also require a higher profile for the hybrid court as an international rather than a Timorese process. An agreement would have to be reached with the Timor Lestese government on the issue of ownership. The Timor Lestese leadership is not satisfied with the present situation. They regard the process as an international responsibility and would probably not like the idea of a strong Timorese court if the UN went ahead and insisted that it was a Timorese national, and not an international, process.

²²⁴ S/2003/944, 6 October 2003 par., 27; Interview with a UNMISSET SCU Senior Prosecutor, Dili, Timor Leste, 28 August 2003.

As the Indonesian authorities have so far rejected extradition requests, the Timor Lestese Prosecutor-General has passed the indictments on to Interpol. This could create a Pinochet-like situation in which high-ranking Indonesian officers will be unable to travel abroad for fear of being arrested.

7.4 Doing nothing

The Security Council also has the option of reducing the size and scope of UNMISET, in accordance with the original plan, and handing over the judicial process for serious crimes to the Timor Lestese government. The UN has emphasized that this is a national rather than an international process; hence, a 'Timorization' of the serious crimes process would be logical. However, since the Secretary-General and the Security Council have stressed the need to bring the perpetrators of crimes to justice, the effective termination of the only credible process, before it has completed its work, would seriously undermine the United Nation's credibility regarding its commitment to human rights. The UN's credibility would be harmed even if support were to be provided through UNDP, the High Commissioner for Human Rights Office or other UN agencies. Shifting the issue from the Security Council to the agencies could be interpreted as an attempt to evade responsibility. Relying on voluntary funding would further weaken the process and jeopardize its independence.

8 CONCLUSIONS

More than four years after the international intervention in East Timor the international community continues to be engaged with developing human rights in the country. Human rights form an integral part of international peacebuilding efforts starting with the negotiations in spring 1999 for a referendum in order to solve the prolonged armed conflict peacefully. The failure to secure a peaceful transition resulted in widespread violence and destruction and forced the international community and UN to intervene.

The UN Transitional Administration in East Timor has generally been judged a successful operation. After failures in Somalia, Rwanda, and Bosnia UN peacekeeping operations needed a success story. UNTAET had to meet these expectations, and it achieved its objective of setting up institutions for an independent state in two and a half years. As the examples mentioned in this paper suggest, speedy action does not guarantee sustainable results, and some areas of institution building, most notably the justice sector, are currently experiencing serious difficulties.

UNTAET's rushed timetable did not allow enough time for consultation and the development of a

human rights culture. Institutions remain weak and problems regarding the rule of law and democratic practice have already emerged. All this will have a direct and long-lasting impact on human rights in Timor Leste.

Transitional justice, or the question of how to deal with past human rights crimes, represents the second dimension of human rights issues in post-conflict East Timorese society. The military intervention and the establishment of the UN peace operation in 1999 were a response to the outbreak of widespread and systematic post-ballot violence. The international community, including the United Nations, demanded that those responsible be brought to justice, but efforts to create an ad hoc human rights court did not meet with success, and in the initial stages UNTAET did not consider delivering justice as its priority. UNTAET arrived in East Timor without a strategy on how to meet the expectations of the population with regard to dealing with past abuses. The lack of planning forced UNTAET to look for piecemeal solutions and resulted in some novel and creative ideas, which were later adopted in other post-conflict societies. At the same time ad hoc solutions have led to a lack of clarity regarding the status of the legal process. UN and East Timorese authorities have different interpretations as to whether the Special Panels for crimes against humanity and other serious crimes, committed in 1999, constitute an international or national process.

The establishment of Special Panels for Serious Crimes at Dili District Court was one of the innovative solutions. This combination of a mixed UN – East Timorese system was an attempt to provide local ownership while guaranteeing compliance with international standards. The court has suffered from inadequate resources from the start, but at present it is the only feasible avenue for the victims of human rights violations committed in 1999 over the referendum. For many Timor Lestese the court does not represent proper justice because most of those convicted are low-level Timorese perpetrators while all the leaders remain free in Indonesia. The mixed court model is also more vulnerable to political pressure than an international tribunal.

The second UNTAET innovation in the field of transitional justice was the Commission for Reception, Truth and Reconciliation. It was designed to complement rather than to replace the judicial proceedings. The Commission has truth seeking and community reconciliation activities, but unlike its model, the South African Truth and Reconciliation Commission, it does not have the power of amnesty. The Commission combines elements from a judicial process and traditional Timor Lestese mediation mechanisms. The community reconciliation procedure deals with those suspected of lesser crimes, whereas those suspected of serious crimes are handled by the Serious Crimes Unit. The Commission has been criticized for its shortcomings, but so far it has been more successful than previous truth commissions in applying mechanisms, which seek reconciliation

whilst at the same time providing accountability. The Commission will complete its mandate in 2004.

The reconciliation policies of President Gusmão, on the other hand, advocate forgiveness and reconciliation at the expense of accountability. He sees tribunals as expressions of revenge, and argues that putting poor people in prison, in a poor country, does not benefit anyone. Gusmão has blamed the UN for shifting the responsibility, for dealing with the crimes against humanity committed in 1999, onto the Timorese and disagrees with its argument that the Special Panels is a national process merely supported by the international community.

The question of an international human rights tribunal for East Timor remains open. The International Commission of Inquiry for East Timor recommended such a tribunal in January 2000, but the Security Council decided to support Indonesia's demand for a national judicial process. After many delays the Indonesian court tried 18 people of whom, six were sentenced in a less than perfect process, which observers have claimed to be riddled with procedural flaws and political interference. The court completed its work in August 2003 and the accused went free whilst waiting for the appeal process.

Despite the five processes that have been established to deliver justice, the results so far have been moderate and the main suspects remain free. The Security Council will need to decide on the future of transitional justice in Timor Leste before the mandate of UNMISSET expires in 2004.

LIST OF ABBREVIATIONS

Apodeti	Associação Popular Democrática Timorense
ASDT	Associação Social Democrática Timorense
CAVR	Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste
CNRT	Conselho Nacional da Resistência Timorense
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
FALINTIL	Forças Armadas de Libertação Nacional de Timor Leste
Falintil-FDTL	Timor Leste Defense Force
FOKUPERS	Forum Komunikasi Perempuan (women's NGO)
FRETILIN	Frente Revolucionária de Timor Leste Independente
GA	General Assembly
ICC	International Criminal Court
ICG	International Crisis Group
ICIET	International Commission of Inquiry for East Timor
INTERFET	International Force in East Timor
JSMMP	Judicial System Monitoring Programme
Kopassus	Komando Pasukan Khusus (Indonesian Army Special Forces Command)
KPP-HAM	Indonesian Commission of Inquiry into Human Rights Violations in East Timor
Perkumpulan HAK	A Human rights NGO in Timor Leste
NCC	National Consultative Council
RDTL	República Democrática de Timor Leste
SC	Security Council
SCU	Serious Crimes Investigation Unit
SRSNG	Special Representative of the Secretary General
TLPS	Timor Leste Police Service
TNI	Tentara Nasional Indonesia (Indonesian National Army)
UDT	União Democrática Timorense
UNAMET	United Nations Mission in East Timor
UNMISSET	United Nations Support Mission in East Timor
UNTAC	United Nations Transitional Administration in Cambodia
UNTAET	United Nations Transitional Administration in East Timor

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