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Accountability for Serious Crimes and National Reconciliation in Timor-Leste: Progress or Wishful Thinking?

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In 1999 – after 24 years of Indonesian occupation – the people of Timor-Leste voted for their independence. However, Timorese anti-independence militias and the Indonesian military reacted with widespread and systematic attacks against the civilian population in the form of murder, rape, torture and deportation. In order to achieve accountability for the human rights atrocities and reconciliation, various mechanisms at the international, national and regional level were established in Timor-Leste and Indonesia. Despite this multi-layered approach, including courts and alternative justice mechanisms such as truth commissions, justice failed to be delivered. Drawing from the achievements and shortcomings of these institutions, this paper explores why many expectations were left unmet and highlights the influence politics had on the functioning of the organisations. Yet, some hope can be drawn from recent developments that justice for the atrocities committed in Timor-Leste will not be denied for good.

Keywords: Timor-Leste / East Timor, Accountability, Reconciliation, Justice, Human Rights

Nach der 24 Jahre andauernden Besetzung durch Indonesien stimmte die Bevölkerung Timor-Lestes 1999 für die Unabhängigkeit. Timoresische Milizen und das indonesische Militär reagierten darauf mit ausgedehnten und systematischen Übergriffen auf die Zivilbevölkerung, unter anderem durch Ermordungen, Vergewaltigungen, Folter und Deportationen. Um strafrechtliche Verantwortung für die Menschenrechtsverletzungen und Versöhnung zu schaffen, wurden zahlreiche Institutionen auf internationaler, nationaler und regionaler Ebene in Timor-Leste und Indonesien errichtet. Trotz des komplexen Zusammenwirkens dieser Organisationen, einschließlich Gerichtshöfen und Wahrheitskommissionen, wurde keine Gerechtigkeit hergestellt. Ausgehend von den Errungenschaften und Unzulänglichkeiten dieser Institutionen untersucht dieser Artikel, warum die Erwartungen vieler unerfüllt blieben, und zeigt auf, wie politische Entscheidungen die Arbeit der Institutionen beeinflussten. Zugleich kann aus jüngeren Entwicklungen Hoffnung geschöpft werden, dass in Hinblick auf die Ahndung der Gräueltaten Gerechtigkeit nicht endgültig verwehrt bleiben wird.

Schlagworte: Timor-Leste / Osttimor, strafrechtliche Verantwortung, Versöhnung, Gerechtigkeit, Menschenrechte

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1. Brief History of the Conflict and Intervention of the United Nations

From the sixteenth century Timor-Leste² was under the colonial rule of the Portuguese. In 1975, shortly after Timor-Leste declared its independence from Portugal, neighbouring Indonesia, which considered the internal conflict over authority in Timor-Leste a security threat, invaded and occupied the country for the following 24 years.³ The United Nations (UN) never acknowledged Indonesia's annexation of Timor-Leste as its 27th province.⁴ However, in light of the growing power of Communism in South-East Asia, the US and other Western nations supported the annexation.⁵ During this period, the brutal conflict between the Timorese resistance and the Indonesian military and police, assisted by a Timorese minority, caused more than 100,000 deaths. Over 80,000 of these deaths resulted from hunger and illness as an effect of the conflict (CAVR, 2005, part 6, paras 8 and 49). Despite widespread awareness of the conflict and human rights violations, the international community did not intervene. In August 1999, about one year after the end of the regime of former dictator Suharto in Indonesia, the UN administered a referendum in Timor-Leste on independence.⁶ Seventy-eight percent of the Timorese voted in favour thereof.

However, shortly after the ballot, anti-independence Timorese militias, orchestrated by the Indonesian military and police (UN Security Council, 1999, para. 14), reacted with a violent "scorched earth campaign". The attack caused over 1,000 deaths, the displacement of more than 400,000 people, and vast destruction of the infrastructure in Timor-Leste (UN Special Rapporteurs, 1999, paras. 20, 37 and 38). These atrocities finally stopped due to the intervention of the UN International Force in East Timor (INTERFET)⁷ in September 1999.

In October 1999, after Indonesia had withdrawn, the UN Transitional Administrat-

2 Until its full independence in 2002 Timor-Leste's official name was East Timor. For reasons of consistency, in this article the present name will be used also when referring to the period before 2002, except when East Timor is used as the proper name of an institution.

3 For detailed information on Timorese history see, e.g., Taylor (1991).

4 The UN Security Council called upon all States to respect the territorial integrity of East Timor and on Indonesia to withdraw its forces from the territory of Timor-Leste (Resolutions 384 [1975] and 389 [1976]). See also the General Assembly Resolution 31/53 (1976), which rejected Indonesia's claim that Timor-Leste had been integrated into its territory.

5 See, e.g., Sforza (1999, pp. 488-489).

6 The popular consultation was organised and conducted by the United Nations Mission in East Timor (UNAMET) which was established by the Security Council (Resolution 1246 [1999]).

7 INTERFRET was authorised by the UN Security Council and mandated to restore peace and security in Timor-Leste (Resolution 1264 [1999], para. 3).

ion in East Timor (UNTAET) was established by the Security Council as a peacekeeping operation with complete administrative authority over Timor-Leste during its transition to independence (UN Security Council, Res. 1272 [1999]). Its mandate included the maintenance of law and order, the establishment of an effective administration, and assistance in the capacity-building for self-government and development of civil and social services. UNTAET was authorised to take all necessary measures to fulfil its broad mandate. It acted in lieu of and gradually partly with Timor-Leste's government until the country's full independence in May 2002. The new government was handed authority over judicial matters and UNTAET was replaced by a smaller peacekeeping mission, the UN Mission of Support in East Timor (UNMISSET). It had the mandate to provide assistance to the Timorese authorities in executing their new responsibilities (UN Security Council, Res. 1410 [2002]). In May 2005, UNMISSET was downsized and transformed into a political mission, the UN Office in Timor-Leste (UNOTIL). Its mandate was to support the development of the police and other state institutions and to provide training in observance of human rights and democratic governance (UN Security Council, Res. 1599 [2005]). In August 2006, after a political, humanitarian and security crisis, UNOTIL was replaced by UN Integrated Mission in Timor-Leste (UNMIT) with the task of supporting the government and relevant institutions, in particular the national police efforts and the judicial system, until February 2010 (UN Security Council, Res. 1704 [2006], 1802 [2008] and 1867 [2009]).

2. Accountability and Reconciliation Processes in Respect of the Atrocities of 1999

2.1 Processes in Indonesia

THE NATIONAL COMMISSION OF INQUIRY AND THE AD HOC HUMAN RIGHTS COURT

In Indonesia a National Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM) was set up by the Indonesian Commission on Human Rights (Komnas HAM) in September 1999. The commission of inquiry had the mandate to investigate the gross human rights violations committed in Timor-Leste between the Indonesian government's January 1999 announcement to hold a popular consultation

and the withdrawal of its forces in September 1999. It was a political decision that the commission would not carry out investigations of the far larger number of crimes committed in the prior 24 years. The commission's report discloses that the violations in 1999 were conducted systematically and indicates a close link between the Indonesian military and police with the militia groups who had committed the majority of the crimes (KPP HAM, 2000). The names of 32 officials and militia leaders were cited as allegedly responsible.

In reaction to the report, the Ad Hoc Human Rights Court for East Timor was established in 2001 within the national court system. Undoubtedly international pressure and Jakarta's intention to avoid the creation of an international court influenced this decision. The Ad Hoc Court had the mandate to try Indonesians and Timorese responsible for the atrocities committed in Timor-Leste in April and September 1999. In January 2002 indictments were issued against 18 suspects of whom merely eight were on the list of the KPP HAM. Of the 18 people tried, six were convicted at first instance. Five of the six were subsequently acquitted on appeal. Eurico Guterres, former militia leader, was the only person whose conviction was upheld by the Appeals Court and Supreme Court. However, in March 2008 the Supreme Court reversed the decision it had made two years earlier and acquitted him.⁸ The final outcome of no convictions and the fact that the indictees did not include senior Indonesian officials⁹ reflect the political unwillingness in Indonesia to bring the persons responsible for the crimes in 1999 to justice.¹⁰ Furthermore, the Ad Hoc Court was strongly criticised for its limited temporal and geographic jurisdiction; its selection of only Indonesian judges, not all of whom were qualified; the lack of independence of and the performance of the prosecution; insufficient victim and witness protection; and an intimidating courtroom atmosphere.¹¹ While the commission of inquiry had conducted its investigations independently and impartially (UN Commission of Experts, 2005, para. 167), this cannot be said

8 For further information see, e.g., International Centre for Transitional Justice (2008).

9 Only four out of the 13 cases mentioned in the KPP HAM report were taken up by the prosecutors of the Ad Hoc Court. Most notably General Wiranto, former commander in chief of the Indonesian army and Minister of Defence, was not indicted.

10 Despite the democratic reform Indonesia had experienced in 1998, its judiciary remained characterised by a strongly corrupted military-hierarchical culture. After decades of such a culture, it would be unrealistic to expect judges and prosecutors to have been independent and impartial only one year later. See Cohen (2003, pp. 39-46).

11 See, e.g., Human Rights Watch (2003), Office of the United Nations High Commissioner for Human Rights [UN-OHCHR] (2002) and Amnesty International & Judicial System Monitoring Programme (2004).

for the proceedings, despite the Security Council's call for Indonesia to "institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law" (UN Security Council, 2000). The Indonesian proceedings did not help achieve accountability and justice (UN Commission of Experts, paras 370-375) but rather seem a failed attempt to calm the international community.

2.2 Processes in Timor-Leste

COMMISSIONS OF INQUIRY

A commission of inquiry was also set up in Timor-Leste. Unlike the commission in Indonesia, the Commission of Inquiry on East Timor, established by the Secretary-General on the recommendation of the Human Rights Commission, was of international nature.¹² It had the mandate to investigate possible human rights violations and breaches of international humanitarian law (IHL) committed in Timor-Leste from January 1999. The Commission co-operated with the joint mission of the UN Special Rapporteurs of the Commission on Human Rights to East Timor. The reports of both the Commission of Inquiry and the Special Rapporteurs revealed a pattern of serious violations of human rights and IHL in Timor-Leste (UN-OHCHR, 2000, para. 142; UN Special Rapporteurs, 1999, para. 71). Consequently, the Commission of Inquiry called for the establishment of an international independent investigation and prosecution body and an international human rights tribunal (UN-OHCHR, paras. 152 and 153). Moreover, the Special Rapporteurs recommended the establishment of an international criminal tribunal

"unless, in a matter of months, the steps taken by the government of Indonesia to investigate TNI involvement in the past year's violence bear fruit, both in the way of credible clarification of the facts and the bringing to justice of the perpetrators" (UN Special Rapporteurs, para. 74 [6]).

THE SERIOUS CRIMES PROCESS

Despite these recommendations, the Security Council decided not to establish another ad hoc international criminal tribunal like the – certainly very costly – ones for the former Yugoslavia and Rwanda. While adequately addressing human rights violations

12 This was done pursuant to the UN Commission on Human Rights Resolution 1999/S-4/1 of 27 September 1999.

was a major concern of the international community, the UN and especially the United States did not want to jeopardise their friendly relations with Indonesia, a powerful state with the world's largest Muslim population – even more so given the beginning of the 'war on terror' (cf. Cohen, 2002, p. 4). Therefore, Indonesia's assurance of its determination to bring individuals in Indonesia to justice through the national judicial mechanism (Indonesian Minister of Foreign Affairs, 2000) was accepted.

Instead of establishing an international ad hoc tribunal, UNTAET, acting as interim government in Timor-Leste, created Timorese district courts and a court of appeal in March 2000 (UNTAET Reg. No. 2000/11, in particular Secs 7 and 14). Special panels with exclusive jurisdiction over so called 'serious criminal offences' were established within the Dili District Court and the Court of Appeal (UNTAET Reg. No. 2000/15, Secs 1.1 and 1.2). These were genocide, war crimes, and crimes against humanity committed at any time, as well as murder, sexual offences, and torture committed between 1 January and 25 October 1999 (Reg. No. 2000/11, Secs 10.1 and 10.2). These Special Panels for Serious Crimes (SPSC) were composed of two international judges and one Timorese judge (Reg. No. 2000/15, Secs 22.1 and 22.1). Unlike the internationalised courts in Sierra Leone and Cambodia, which were established through contracts between the UN and the respective governments, UNTAET made these decisions on its own as there was no national government at that time to contract with. The review and endorsement of the National Council of Timor-Leste Resistance (CNRT) was of a rather superficial nature (Handl, 2007, p. 111; Reiger & Wierda, 2006, p. 13).

In June 2000 UNTAET also established a Public Prosecution Service for Timor-Leste with an Ordinary Crimes Unit (OCU) and a Serious Crimes Unit (SCU). The principal official for the investigation and prosecution of serious crimes and therefore the effective head of the SCU was the Deputy General Prosecutor for Serious Crimes (DGPSC) (UNTAET Reg. No. 2000/16, Secs 14.6 and 14.3).

In accordance with Security Council resolutions 1543 (2004) and 1573 (2004), the serious crimes process was terminated in May 2005. By then, the SCU had indicted 392 persons in 95 indictments (Office of the DGPSC, 2005, p. 2). The mandate left open the question of who should be prosecuted. Hence the SCU's prosecution strategy changed over time. While in the beginning of its work the SCU mainly indicted Timorese militia members for simple murder, from 2002 on it focused more

on charging high-level military officers and political leaders in Timor-Leste and Indonesia with crimes against humanity. Most outstanding was the indictment of General Wiranto, former Minister of Defence and Commander of the Armed Forces, in February 2003.¹³ The SPSC conducted 55 trials against 87 accused, of whom 85 were convicted (UN Secretary-General, 2006, para. 9). While this is a respectable number for a short period of time, the quality especially of the earlier decisions has been deservedly criticised.¹⁴ As the mandates of SCU und SPSC only applied to serious crimes committed in 1999, the atrocities which occurred between 1975 and 1998 were not dealt with. The high discrepancy between the persons indicted and those who faced trial derives to a great extent from the fact that with respect to the execution of warrants for the arrest of accused persons located in the territory of a foreign state and their extradition, the SPSC was dependent on the co-operation of that state. Many of the indictees were in Indonesia, which refused to co-operate despite an agreement it had signed with UNTAET (Memorandum of Understanding, 2000, esp. Secs 2 (c) and 9). As a consequence, those convicted by the SPSC were perpetrators of rather low-level crimes, while those who bore the greatest responsibility did not face justice.

While it is comprehensible that Timor-Leste was not in a position to pressure Indonesia, the international community could have intervened. One possibility would have been a Security Council Resolution demanding Indonesia's co-operation.¹⁵ It seems that political considerations in terms of keeping friendly relations with Indonesia were ranked higher (see also Lanegran, 2005, p. 115, and Hirst & Varney, 2005, p. 25).

The SCSL and the SCU had to cope with very limited resources. The shortage of funds also became manifest in the lack of qualified legal services for the accused. Before the Defence Lawyers Unit (DLU) was established in September 2002 by UNMISSET, the rights to adequate representation and equality of arms¹⁶ were clearly infringed upon. However, even after its creation, the DLU could not fully safeguard

13 *Deputy General Prosecutor v. Wiranto and Others*, District Court of Dili, Special Panels for Serious Crimes, Case No. 5/2003, 23 February 2003. Regrettably, both the UN and the Timorese government distanced themselves from the indictment of the General issued in 2004 (see UNMISSET, 2003; Gusmão, K., HE the President, 2003).

14 See, e.g., de Bertodano (2003, pp. 232-233) and Braun (2008, pp. 188-189).

15 The UN Security Council had done so in the case of Kosovo when it demanded the full co-operation of the Federal Republic of Yugoslavia (Resolution 1244 [1999]).

16 The principle of 'equality of arms' requires that defence and prosecution are given a reasonable opportunity to present their cases without placing any party at a substantial disadvantage vis-à-vis the opponent.

these rights due to the deficit of expertise and experience of some of its lawyers (Burgess, 2004, p. 140). Other problems resulting from the lack of resources include the inadequate translation and interpretation services and the severe shortcomings with respect to witness and victim protection and support (Hirst & Varney, 2005, p. 22; Reiger & Wierda, 2006, pp. 29 and 39).

Furthermore, there was no comprehensive plan providing for capacity building of the local justice system. Apart from having a Timorese judge on each panel, the SPSC did not engage in further efforts with the objective of disseminating expertise. In 2002 the SCU, composed of international staff except for the Timorese translators, began to conduct training programmes for a small number of national investigators, prosecutors, police officers and supporting staff. Most of the former SCU trainee prosecutors subsequently worked at the OCU (Office of the DGPSC, 2005, p. 7 and 2003, p. 2).¹⁷ These capacity building efforts on part of the SCU were certainly important measures, but still a lot more could and should have been done if there had been strategic planning and necessary funding from the beginning (cf. Hirst & Varney, 2005, p. 24-25; Reiger & Wierda, 2006, p. 35-36).

Of course, all these drawbacks have to be seen in the light of the difficult circumstances in which the SPSC and the SCU were operating. When UNTAET took over its mandate in 1999 after the withdrawal of the Indonesian troops and all judicial officers, no justice system existed and there were practically no legal professionals. Thus, a new court system with an internationalised court within a national court had to be build from scratch. SCU and SPSC issued a decent number of indictments and judgements. In doing so, they helped establish an historical record of many of the atrocities which took place in Timor-Leste in 1999 and of the context in which they were committed. Also the substantive legal provisions of the Rome Statute of the International Criminal Court, which had been copied nearly verbatim by UNTAET, were used for the very first time worldwide (Bertodano, 2004, p. 86).

The SCU had to close before it had concluded its work, leaving hundreds of murder cases and other serious crimes without investigation. Therefore, the Serious Crimes Investigation Team (SCIT) was created in February 2008 with the mandate to assist the Office of the General-Prosecutor (OGP) in completing the investigations into

¹⁷ The programmes were funded by the Norwegian government and the United States Agency for International Development.

unsettled cases of serious crimes committed in Timor-Leste in 1999. The international staff members of the SCIT also have the task to provide training to their national counterparts working in the team and to other organisations and offices such as the national police.¹⁸ Unlike the SCU, the SCIT only conducts investigations and makes recommendations. Filing of indictments and prosecuting the alleged perpetrators lie within the exclusive mandate of the Timorese OPG. By January 2010, SCIT had concluded investigations in 110 out of 396 outstanding cases (UN Secretary-General, 2010, para. 10).

THE COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION

In order to complement the prosecutorial tasks of the serious crimes regime, UNTAET (Reg. No. 2001/10) also established a truth finding and reconciliation mechanism: the Commission for Reception, Truth and Reconciliation (Comissao de Acolhimento, Verdade e Reconciliacao de Timor-Leste, CAVR). CAVR was created after extensive consultation with the Timorese society and with approval of the CNRT as an independent Timorese institution (CAVR, 2005, part 1, sec. 1.2). CAVR had the mandate to establish the truth regarding the human rights violations which took place in the context of the political conflicts in Timor-Leste between 1974 and 1999. In contrast to the serious crimes process, the Commission therefore did not only deal with crimes perpetrated in 1999. CAVR's task included identifying the factors that led to such violations and those involved in committing them; referring cases of human rights violations to the OGP with recommendations for the prosecutions; promoting reconciliation; assisting in restoring the human dignity of victims; and supporting the reception and reintegration of individuals who have committed minor criminal offences through community-based reconciliation mechanisms (Reg. No. 2001/10, Secs. 3.1 and 13.1 [a] [iii]).

In respect of its truth-seeking function, the CAVR had broad inquiry-related powers, including requesting information from relevant authorities within Timor-Leste and abroad, and ordering a person to appear before the Commission to answer questions (Reg. No. 2001/10, Sec. 14 [g], [h] and [c]). In October 2005 the CAVR submitted its over

¹⁸ Section 2 'Agreement between the United Nations and the Democratic Republic of Timor-Leste concerning Assistance to the Office of the Prosecutor-General of Timor-Leste', signed by the Deputy Special Representative of the Secretary-General and the Prosecutor-General of Timor-Leste on 12 February 2008, in accordance with para. 4 (i) of UN Security Council Resolution 1704 (2006).

2500-page report on its findings and recommendations to the then President Gusmão who thereon handed it over to the Timorese Parliament and the UN. The Commission found that the Government of Indonesia was responsible for massive human rights violations and members of the Indonesian security forces had committed crimes against humanity and war crimes (CAVR, 2005, part 8, pp. 5-8).

In order to assist the reception and reintegration of people into their communities, the CAVR conducted Community Reconciliation Processes (CRP) by which criminal and civil immunity was granted to offenders of crimes not considered serious if they performed certain acts of reconciliation (UNTAET Reg. No. 2001/10, Secs. 22 and 32). Deponents wishing to participate in the CRP had to submit a statement to the Commission describing the acts he or she had committed (Sec. 23.1). Copies of such statements, in total 1,541 (CAVR, 2005, part 9, para. 102), were provided to the OGP which decided whether the person had allegedly committed a serious crime and would in this case exercise its exclusive jurisdiction (Reg., Secs. 24.5 and 24.6). If the OGP decided not to do so,¹⁹ the deponent took part in a CRP hearing, conducted by a local panel in a traditional manner (CAVR, part 9, sec. 9.3.6) followed by a Community Reconciliation Agreement (CRA) between the panel and the deponent on an appropriate act of reconciliation. Such an act could include community service, reparation, public apology, and/or another act of contrition (Reg., Sec. 27).²⁰ The CRA was issued as an order of the District Courts following their approval (Sec. 28).

The CRP managed to successfully complete the cases of 1371 (CAVR, 2005, part 9, para. 102) perpetrators of minor crimes such as theft, minor assault, and arson which did not result in death or injury in less than two years. As the processes were conducted in and by the local communities, the sense of ownership was strong (para. 159). Offering victims and perpetrators an open forum where they could express sorrow, give explanations and ask forgiveness helped improve their relationship, which in return facilitated the reintegration of the deponents into the communities (paras 118-119). In fact, the CRP became so popular that it could not cope with all

19 The OGP refused its approval in 85 cases. Thirty-two additional cases were forwarded to the OGP by the CRP Committee because during the deponent's hearing credible evidence of the commitment of a serious crime arose, or because the deponent was not accepted by the community (CAVR, 2005, part 9, para. 102). However, of these more than 100 cases retained by the OGP, less than 20 were indicted (see Hirst & Varney, 2005, p. 13).

20 These acts are similar to those imposed in the course of the process of diversion which is applied, *inter alia*, in many European countries, several States in the USA, and Australia as a formal alternative to prosecution for first time offenders and perpetrators of minor crimes. Diversion is especially used for juvenile offenders and in respect of drug-related crimes. Comparable to the CRP, the objective here is to facilitate the offender's social rehabilitation by not convicting him/her and relieving courts of petty cases.

those wishing to participate (para. 167). At the same time, the CRP did not interfere with, but rather supported the prosecution of those who committed serious crimes.

However, while several hundreds of low level offenders of minor crimes participated in the CRP, the vast majority of those who committed serious crimes did not face justice due to the lack of co-operation from Indonesia and the limited resources and time span of the SCU and SPSC. The low threat of prosecution probably encouraged some perpetrators to refrain from giving their statements to the CRP in the first place (Reiger & Wierda, 2006, pp. 34-35). In any case, the dearth of effective prosecution caused a state of unequal accountability which was understandably criticised by the victims and the CRP deponents (CAVR, 2005, part 9, para. 170). In this respect, the Commission's final report included recommendations on the reestablishment and amendments of the SCU and the SPSC and on the establishment of an international tribunal should justice fail to be accomplished otherwise (CAVR, 2005, part 11, secs. 7.1.1-7.1.10 and 7.2.1).

2.3 Joint processes

THE COMMISSION OF TRUTH AND FRIENDSHIP

In December 2004 the Presidents of Timor-Leste and Indonesia jointly declared their intention to create a Commission of Truth and Friendship (CTF). The Terms of Reference (TOR) of the CTF were agreed upon and made public in March 2005. While the CAVR had operated as a national institution with broad temporal mandate, the CTF was an intergovernmental entity with the objective of establishing the conclusive truth in regard to the events of 1999 in order to further promote reconciliation and friendship (TOR, Art. 12). It was composed of half Indonesian and half Timorese Commissioners. Unlike the CAVR, but similar to the South African Truth and Reconciliation Commission, the CTF's mandate included the power to recommend amnesties for perpetrators of human rights violations who co-operated fully in revealing the truth and rehabilitation measures for those wrongly accused of human rights violations (Art. 14 [c] [i] and [ii]). As this was not further specified, it would comprise recommending amnesties for perpetrator of crimes against humanity and war crimes. On this account the TOR were strongly criticised by civil society and human rights organisations and

the UN even denied its co-operation with the CTF (UN News Service, 2007).²¹ The CTF's processes were tasked to emphasise institutional responsibilities and explicitly not to lead to prosecution (TOR, Art. 13 [c]). The Commission was excluded from recommending the establishment of any new judicial body (Art. 13 [e]). This reflects the decision of the leaders of the two countries to promote their bilateral relations by means of ceding prosecutorial processes (cf. Art. 10 [preamble]).

This shift away from achieving accountability on the part of the then President Gusmão and his successor, the former Foreign Minister, Ramos-Horta in spite of the strong calls for justice in Timor-Leste was of a pragmatic nature.²² The recent experiences and developments had shown quite plainly that Timor-Leste was not capable of prosecuting the perpetrators who were most responsible and that the international community was not willing to step in and establish an international tribunal despite several recommendations including those by UN bodies.²³ At the same time, Timor-Leste was in urgent need of support in terms of economic and political development from Indonesia and was therefore inclined to opt for the improvement of diplomatic relations with its powerful neighbour.

In order to reveal the truth with regard to the atrocities of 1999, the CTF reviewed materials documented by the KPP HAM, the Ad Hoc Human Rights Court on East Timor in Jakarta, the SPSC and the SCU, and the CAVR. In addition to its document review and research, the Commission conducted six public hearings. These were, however, strongly criticised, in particular because of their failure to procure the truth and to treat victims adequately.²⁴

The CTF submitted its final report in July 2008.²⁵ The Commission concluded that widespread and systematic attacks against the civilian population in the form of murder, rape, torture, deportation, and other inhumane acts were committed in Timor-Leste in 1999 (CTF, 2009, p. 283). Members of the militia, the Indonesian military and the Indonesian civilian government bear responsibility for these crimes against humanity. It also found that pro-independence groups systematically captured and

21 This was in accordance with the advice of the UN Commission of Experts (2005, paras 355 in conj. with 353).

22 Then President Gusmão stated that "peace, stability and progress in Timor-Leste greatly depend on the relationship we will forge with the Republic of Indonesia" (Gusmão, K., HE the President, 2003). See also Hirst (2008, pp. 10-12) and Kingston (2006, pp. 234-239).

23 See UN-OHCHR, 2000, paras 152-153; UN Special Rapporteurs, 1999, para. 74 (6); UN Commission of Experts, 2005, paras 525 in conj. with 515-524.

24 For a detailed study of the public hearings see Hirst (2008, pp. 22-36).

25 For a through analysis of the CTR final report see Hirst (2009).

illegally detained people, although due to the lack of evidence the precise nature and extent of these crimes could not be finally determined (pp. 271-275).

The CTF (2009, p. 297) refrained from recommending amnesties because that “would not be in accordance with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law”. In fact, it recommends improving institutions which investigate and prosecute human rights violations (p. 298).²⁶ However, the wording seems to reflect the diplomatic intention of the report which would imply that these mechanisms should deal with future violations rather than with those of 1999.

The findings and recommendations of the final report were endorsed by both heads of state at the ceremony in July 2008. Since then, four Senior Officials Meetings (SOM) between the two States have taken place in order to discuss the implementation of the CTF’s recommendations and in particular of a Joint Plan of Action with short and long term programmes.²⁷ However, the plan is focused on programme delivery in Timor-Leste rather than in Indonesia, which reflects how Indonesia apprehends its role in the process. Thus, Indonesia has enhanced its co-operation and support in the social, economic and security sectors (see SOM delegation, 2010). The recommendations relating more directly to the conflict in 1999, such as establishing a commission for disappeared persons and a document and conflict resolution centre, are still to be implemented.

Furthermore, progress is slow in implementing the long-term recommendations on promoting institutional reforms which enhance the authority and effectiveness of institutions charged with the investigation and prosecution of human rights violations. Without doubt the promulgation of the decree of the Chief of the Indonesian national police on the implementation of human rights principles and standards is commendable.²⁸ Nevertheless, the Indonesian Attorney General’s refusal to follow up cases on human rights violations concluded by the National Commission

26 Other recommendations included establishing a commission for disappeared persons, a document and conflict resolution centre and training programmes for human rights, reforming the armed forces in a way that would ensure their operation under the rule of law, and promoting long-term co-operation in various fields such as education, health, the economy, and security (CTF, 2009, ch. 9).

27 A fifth SOM is scheduled for the second half of 2010 in Dili.

28 Regulation of the Chief of the Indonesian National Police Regarding Implementation of Human Rights Principles and Standards in the Discharge of the Duties of the Indonesian National Police, 8/2009.

for Human Rights (Komnas HAM) impedes the bringing of such cases before the Human Rights Court (Asian Human Rights Commission [AHRC], 2009, p. 20). Hence, reform of law enforcement institutions, in particular the police and the Attorney General's Office, are imperative. Moreover, the Indonesian military law which assigns the military courts far-reaching exclusive powers and thus precludes the police from investigating human rights violations committed by military personnel has not yet been amended, facilitating a culture of impunity (AHRC, 2009, p. 25).

In Timor-Leste, some positive developments can be observed, such as the entry into force of a new penal code in June 2009 which includes a detailed section on genocide, crimes against humanity and war crimes.²⁹ In December 2009, four years after the final report of the CAVR had been submitted, the Timorese Parliament finally began the process of implementing the comprehensive recommendations of the CAVR and the CTF reports.³⁰ The resolution it passed emphasised the need to ensure reparations to victims and requested the Parliamentary Committee on Constitutional Affairs, Justice, Public Administration, Local Government and Government Legislation to prepare a draft bill with concrete measures on the implementation of the recommendations, including the establishment of an institution for this purpose.³¹ The draft bill shall be submitted by March 2010 and will subsequently be debated and decided upon by the assembly of the parliament. Earlier the parliament had decided that the implementing body would receive a budget of USD250,000 (East Timor and Indonesia Action Network, 2009).

The Indonesian edition of the CAVR's final report will be published by a subsidiary of Indonesia's largest publishing house in 2010 (P. Walsh, Senior Adviser of the Post-CAVR Technical Secretariat, personal communication, 6 February 2010). The dissemination will help increase awareness of Indonesia's role in the Timorese conflict and enhance consideration, primarily by scholars, politicians, the media, and the Commission on Human Rights and in turn by the general public.

29 Decreto Lei Governo 19/2009, *Jornal da República* I/14, Suplemento, Livro II, Título I.

30 More than a year earlier, in June 2008, the Parliamentary Committee for Constitutional Issues, Justice, Public Administration, Local Power, and Government Legislation had prepared a Resolution on the implementation of the recommendations of the CAVR (available at <http://www.cavr-timorleste.org/updateFiles/english/Draft%20Resolution%20CAVR%20080515%20English%20Final.PDF> accessed 10 February 2010). However, it was never debated in the assembly of the parliament.

31 National Parliament of Timor-Leste, 'Projecto de Resolução, Implementação das Recomendações da Comissão de Acolhimento, Verdade e Reconciliação e da Comissão de Verdade e Amizade', No. 34/II, 14 December 2009.

3. Developments After the Accountability and Reconciliation Processes in Respect of the Atrocities of 1999

Even after the accountability and reconciliation processes relating to the atrocities of 1999, the State institutions in Timor-Leste remained weak, the leadership divided, and as a result the rule of law frail. This became evident when a crises occurred in April and May 2006 triggered by a dispute within the Timorese military (Falintil-Forças de Defesa de Timor-Leste, F-FDTL). In order to investigate the incidents, including their causes, and to clarify who was responsible the UN established an Independent Special Commission of Inquiry.³² The Commission concluded that the riots claimed the lives of around 40 people and caused widespread property damage and the displacement of approximately 150,000 people (UN Independent Special Commission of Inquiry, 2006, paras 100-101). It recommended that those responsible for criminal acts be held accountable by means of judicial process in the national court and cited the names of persons whose investigation or prosecution it suggested (paras 225-226 in conj. with 113-134). The list included the former Ministers of the Interior and Defence. Although progress is slow, a final judgment has been rendered in a few cases; other cases are being investigated or are being tried (see UN Secretary-General, 2009, para. 30 and Independent Comprehensive Needs Assessment [ICNA], 2009, p. 83).

The State institutions were again challenged when the President and the Prime Minister of Timor-Leste were attacked on 11 February 2008, by an armed group led by the former Military Police Commander of the F-FDTL. Unlike the incident two years earlier, the State institutions responded appropriately and a new destabilisation of the country was avoided (see UN Secretary-General, 2008, paras 3-5 and 16).

However, a problematic development in Timor-Leste is political interference with the judicial system. Motivated by reconciliation and in particular by fostering a good relationship with its powerful neighbour Indonesia, the Timorese President has granted pardons, commuted sentences, and prompted conditional releases, *inter alia*, of persons convicted for serious crimes by the SPSC.³³ As result only one of the 85 individuals the Panels convicted before their close in 2005 remains in prison (UNMIT,

³² Following an invitation from the then Minister for Foreign Affairs of Timor-Leste, the Secretary-General requested the UN High Commissioner for Human Rights to establish such a Commission and communicated this to the Security Council (see UN Doc S/PV.5457, 13 June 2006).

³³ Decreto Presidente 53/2008, Indulto Presidencial de 20 de Maio, *Jornal da República* 1/20.

2009, para. 52). Similarly, the President halved the sentence of the former Minister of the Interior, who despite having been found guilty of distributing weapons to civilians in 2006 was consequently granted parole (UNMIT, 2008, para. 50).

More recently, the rule of law was undermined by political intervention in the case of Maternus Bere who had been charged in 2003 by the SCU with crimes against humanity and other serious offenses allegedly committed in 1999 (see ICNA, 2009, pp. 56-58, and UN Secretary-General, 2009, para. 33-34). An arrest warrant was issued, but due to Bere's residence outside of Timor-Leste it could not be executed until August 2009 when he came for a visit. Subsequently, he was ordered to be held in pre-trial detention by the District Court. Yet, soon after that, submitting to pressure from Indonesian authorities, the Timorese Prime Minister ordered Bere's release, by-passing the judicial process according to which release of a detainee could only be ordered by a judge. This breach of judicial independence constitutes a violation international principles as well as the Constitution of Timor-Leste.³⁴

The Prime Minister's 'political decision'³⁵ triggered broad debate and criticism.³⁶ In September 2009, a 'motion of no confidence' against the Prime Minister was introduced in Parliament by the Revolutionary Front for an Independent East Timor (FRETILIN). Following a day-long debate in Parliament in October broadcast live on radio and television, the motion was rejected by 39 to 25 votes. Even if the debate was "a positive step in ensuring that critical issues of national interest are channeled through the National Parliament with meaningful participation from the opposition" as stated by the UN Special Representative of the Secretary-General for Timor-Leste (2009, para. 4), the underlying problems are perturbing. Clear messages are being sent to victims and perpetrators alike that – at least for now – there is no political will to hold those charged with serious crimes accountable. Moreover, disrespect for judicial independence and the separation of powers, for economic or whatever other reasons, severely undermines the rule of law and thus jeopardises the public's confidence in the judicial system.

³⁴ Art. 69 of the Timorese Constitution provides for the principle of separation of powers, Art. 121 for judicial independence.

³⁵ An AFP release on 8 September 2009 quotes the Minister of Justice as stating: 'It is a political decision that must be taken by the government to resolve this issue because it is related to our country's problems.'

³⁶ See, e.g., East Timor NGO Forum (2009) and Amnesty International (2009), criticising the Indonesian and Timorese governments.

4. Conclusion and Outlook

After several years of failure to act and as a response to the growing international pressure, the UN, Indonesia and Timor-Leste – with different motivations and levels of commitment – implemented various mechanisms at the international, national and regional level with the mandate to deal with the post-conflict situation in Timor-Leste. The unique, multilayered approach to accountability and reconciliation taken comprised courts and alternative justice mechanisms such as truth commissions in Timor-Leste and Indonesia, thus combining restorative and retributive justice.

The UN and Timor-Leste aimed for full accountability for the human rights violations of 1999 by means of the Timorese serious crimes process and the CRP in conjunction with trials in Indonesia. This objective, however, was only achieved to a very limited degree. The flawed trials at the Indonesian Ad Hoc Human Rights Court failed to deliver justice. Through the serious crimes process in Timor-Leste only a few of the indicted, who happened to be low-level offenders who had not left the country, could be prosecuted. While the CRP assisted in achieving accountability for offenders for non-serious crimes, their ultimate success was dependent on the effective prosecution of the other perpetrators, which was effected only marginally. As result, the perpetrators most responsible and most of those at an intermediate level did not face justice and the expectations of victims and of low-level offenders who had been held accountable were not met. Accountability for the numerous crimes committed from 1974 to 1998 was not addressed at all.

The truth commissions, i.e. CAVR and the CTF, were set up to establish the truth and accomplish reconciliation. While they revealed the facts and causes of the atrocities committed in 1999 and the CAVR in addition identified those responsible for the crimes from 1974 on, their contribution to achieving reconciliation is disputable. CRP certainly enhanced grassroots reconciliation and reintegration of offenders of non-serious crimes. However, as long as the recommendations of the commissions, in particular reparations, are not implemented, reconciliation is impeded. Furthermore, reconciliation is closely connected with justice. Hence, if victims do not see justice done, as is the case in Timor-Leste, it will be difficult to achieve true reconciliation.

The fact that accountability was not achieved was influenced by a number of circumstances and decisions involving various participants. Indonesia proved to be

unwilling and unable to take up its primary responsibility of holding its military and civilian government accountable for the crimes they had perpetrated in Timor-Leste. For political and financial reasons, the UN opted against establishing an international ad hoc court. They did not change their mind even when the compromise approach, with national and internationalised courts in Indonesia and Timor-Leste prosecuting perpetrators of atrocities, did not deliver justice. Of course, it is doubtful that Indonesia would have co-operated with an international court. Still, as can be seen by the International Criminal Tribunal for the Former Yugoslavia, the outcome would have been significantly different.

In Timor-Leste, apart from the lack of judicial capacity, there is no political will to continue the serious crimes process by prosecuting the perpetrators of the atrocities. In fact, measures are actually taken to reverse part of the accountability which has been achieved. This was clearly shown by recent political decisions such as commutations of sentences and releases from prison. Despite the persisting call for justice by the Timorese people,³⁷ the most high-ranking leaders in Timor-Leste decided to foster a working relationship with their powerful neighbour Indonesia, and that prosecutions were not in the national interest given the urgent socioeconomic challenges. While it is understandable that the support of Indonesia is very important for the development of Timor-Leste, political interference which violates the principles of separation of powers and judicial independence severely undermines the rule of law and erodes public confidence in the judicial structures.

Ultimately, the underlying problem of the quest of achieving accountability in the Timor-Leste case seems to be the conflicting interests of politics and justice. As can be observed in many other cases throughout the world, holding the politically powerful accountable is very difficult and sometimes not attainable at all, giving way to a rule of double standards.

Does this mean there is no solution for this dilemma? Despite the continuing call in Timor-Leste and abroad for an international court, it is unlikely that the UN will establish one. While the UN is continuing its essential assistance to Timor-Leste in developing democratic governance and the necessary fundamental structures, including a functioning judicial system, the decision regarding achieving

³⁷ See, e.g., Timor-Leste National Alliance (2010).

accountability has to be made within Timor-Leste. This would require a change in the political direction of its leaders, which would probably entail compromising the friendship with and the financial support of Indonesia. The UN can and should encourage such a decision by sending a clear message to Timor-Leste and Indonesia that they will adequately support any further mechanisms to hold those bearing responsibility accountable. This implies providing international judicial personnel to assist the national judiciary and sufficient financial resources, including substitution of any development funds which Indonesia could cut. Even so, Timor-Leste could not hold accountable any perpetrators on Indonesian territory without that country's co-operation. In this regard, it is desirable that Indonesian authorities genuinely deal with the crimes committed by its institutions. While it was a significant accomplishment that Indonesia acknowledged its responsibility by endorsing the findings of the CTF report, prosecutions cannot be expected as long as representatives of the old order remain powerful and the military is above the law.

As unrealistic as the achievement of accountability in the near future may seem, recent positive developments raise hope that justice for the atrocities committed in Timor-Leste will not be denied forever. In this respect, enhancing the dialogue and co-operation between Timor-Leste and Indonesia and starting the implementation of the CAVR's and CTF's recommendations, including reforms of the respective justice sectors, are important first steps.

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