

PATHWAYS TO JUSTICE: THE STRUGGLE OF CIVIL SOCIETY TO DEFINE AND SEEK JUSTICE IN TIMOR-LESTE

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The paper explores justice-seeking by civil society actors in Timor-Leste within a historical context of unequal international and regional relations, the role of charismatic leaders within a nascent state, and the politicisation of impunity, amnesty and reconciliation. It examines the practical complexities of applying the concepts of transitional justice, as well as assessing the usefulness of such concepts as opposed to popular or retributive ones. While the framework of crimes against humanity and widespread human rights violations during the Indonesian occupation of Timor-Leste and in its aftermath is well known, the complex interplay of local and regional politics that drives or impeded the struggle for justice and standardisation of human rights has been less well examined.

Nine years on from independence, Timor-Leste is still fragile, having experienced recurrent cycles of violence and impunity. In fact, this hides some considerable progress in areas of human development since independence, including impact on poor people. However, notwithstanding such progress, the United Nations and other reports suggest that the country's security and justice institutions remain fragile. Such fragility will need increased political as well as technical capacity and pressure, but human rights activists suggest that currently the response of leaders to potentially troublesome constituencies, as with 'the petitioners' who were the trigger for the 2006 crisis, or the IDPs, tends to be paying money to get the problem rather than the root causes of the problem to go away.

Our paper is based on a research undertaken during Progressio's *East Timor: Who Cares?* campaign in 2009, the organisation's discussions around a follow-up institute for the Post-CAVR (the truth and reconciliation commission) Technical Secretariat, and interviews and discussions with civil society actors during 2010 and 2011. We conclude that a more sustained and egalitarian engagement between international and local actors will be necessary in effecting justice and suggest some practical steps in improving the capacity of local NGOs, as well as parliament in their oversight and lobbying roles. We also point to the need to engage far more with Indonesian institutions, including civil society.

1. Introduction and Background

Timor-Leste is a small nation, of 15,000 square kilometres, with a population of just over 1.2 million people. Nine days after it declared independence from Portugal in 1975, Indonesia launched a full-scale invasion of the territory, starting a bloody 24-year occupation.

The subsequent Timor truth commission *Chega!* reported that at least 102,800 Timorese civilians died of conflict-related causes during this period.¹ During a general climate of fear and violence, many were displaced at least once whilst forced disappearances, arbitrary detention, torture and sexual violence were common.²

During this period, the international community, while it publicly acknowledged Timor-Leste's right to self-determination, tacitly supported Indonesia's illegal occupation by providing military assistance and turning a blind eye to the human rights violations taking place due to their desire to improve relations with Indonesia, and 'promote regional stability' in the circumstances of the Cold War.³ This violated numerous United Nations resolutions and human rights treaties such as United Nations (UN) Security Council Resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976 and eight General Assembly resolutions, all condemning the Indonesian occupation of Timor-Leste and resulting human rights violations.

In 1999, the East Timorese voted for independence through a popular consultation,⁴ leading to retaliatory violence from the departing Indonesian military and their militias in which almost all of the capital Dili's public buildings and documentation were destroyed. In international law, the violence amounted *prima facie* to war crimes (serious violations of the laws and customs of armed conflict; grave breaches of the Geneva Conventions) and crimes against humanity. This violence has been seen as a systematic campaign with two objectives: first, to send a message to the Acehnese and Papuans in relation to their independence struggles and, second, to make it nearly impossible for Timor-Leste to survive as a viable independent country. The destruction included many torn down homes and killings as well, plus wholesale displacement, and another motive appears to have been looting and personal gain on the part of those responsible. Although Indonesia subsequently embarked on a transitional path to democratisation, this, despite considerable gains, is incomplete with the military being both a powerful player, and unwilling to confront entirely the crimes of the past. This obviously has an effect on its less powerful neighbour, as well as those regions seeking greater autonomy. In 1999, UN Security Council Resolutions 1264 and 1272 demanded "that those responsible for such violence be brought to justice".

Since independence in 2002 (following the 1999 referendum when the overwhelming majority of Timorese voted for independence from Indonesia), there have been several outbreaks of violence. The worst occurred in 2006 when divisions within the Timorese

security forces lead to a complete break down in law and order, with 10% of the country's population being displaced and requiring an international peace-keeping intervention. In February 2008 assassination attempts on President José Ramos-Horta and Prime Minister Xanana Gusmão threatened to further destabilise the country.

Nine years after independence, Timor-Leste is still fragile, with an estimated 50 per cent of the population living on less than 88 cents a day. Unemployment is 6.7% (but this has little meaning, since 88% of the population live in the rural sector, and most are subsistence farmers), and is 12% in Dili. However, for the 15-24 age group, it is 35%, and 50% for that age group in Dili, in 2009 Timor-Leste fell from a "Medium" to "Low Human Development" category due to a decline in educational enrolments (UNDP, 2008; UNDP, 2009).

But this hides some considerable progress in many areas of human development since independence (Economist, 2011; Hermengildo, 2011). For example, its under-five and infant mortality rates have improved substantially, as has its literacy rate. The country undoubtedly has benefited from the increase in oil revenues since 2007; the subsequent additional amounts in budgets have been used to improve livelihoods, particularly in the rural sector.⁵

Against this, optimism must be set the UN Secretary-General's February 2010 report to the UN Security Council (UNMIT Reports, 2010). Ban cited tensions among the political elite, difficulties with the security institutions, poverty, persistent unemployment and the lack of an effective land and property system as being the underlying causes of the crisis. Others point to additional factors such as alienation, trauma, hopelessness, land conflicts and the increasing gap between rich and poor as significant causes of the 2006 crisis. The report said little, however, about justice issues and, there appears little appetite among UNSC members to follow up their resolutions on Timor-Leste (UNSC, 2010; UNSC, 2011). The latter's leaders deal with potentially troublesome constituencies, as with 'the petitioners' who were the trigger for the 2006 crisis,⁶ or the internally displaced peoples (IDPs), by paying money to get the problem rather than the root causes of the problem to go away.

Surprisingly, since the attempted assassination of President José Ramos-Horta in February 2008, there have been no major outbreaks of violence and increased joint efforts at reducing potential for conflict, at least in part due to increased UN Police (UNPOL) numbers and presence of the International Stabilisation Force (ISF). Possibly more effective was the very tight control exercised by Xanana Gusmão over the joint command structure, creating better coordinated action and less insecure forces. 2008 - 2011 saw a successful effort to reintegrate 150,000 IDPs and close all transitional camps. There is still concern over the effectiveness of the UN police training programme.

2. Transitional justice

We look at justice within the debate on how ‘transitional justice’ is a useful concept or not whereby people⁷ can have acknowledgement of crimes committed against them, have some form of reparation, and move to reconciliation with their erstwhile oppressors. The difficulty in this context occurs when the oppressor does not inhabit the same territory and has difficulty in acknowledging its own history of oppression. If peace-building is concerned with the consolidation of peace, transitional justice is seen as integral in moving towards a just and stable society, fostering reconciliation between both individuals and communities. For some, transitional justice is narrow, concerned with the past and *retributive* legal mechanisms to hold the perpetrators of the conflict’s direct violence to account; for others, a broader restorative definition of justice looks to the future and addresses the structural violence underpinning the conflict. Transitional justice, while a concept, requires practical implementation and is inherently political and contextual as in Timor-Leste’s failure to address adequately its past or to institutionalise ideals of justice.

2.1 Narrow/ Retributive

Transitional justice has typically been seen as a legalistic instrument to do with accountability and fairness in the prevention and punishment of wrongs (UN Security Council, 2004: 4). Holding individuals to account—even for the actions of many—will provide societal catharsis and a break with the past. This narrow definition is based around the search for absolute justice with the duty to prosecute those accused of perpetrating human rights abuses, to demonstrate the accountability of state structures and the credence of the rule of law. Offenders are punished because they committed crimes, and not only because punishment will deter others. In Timor-Leste, the Special Panels and the Indonesian Human Rights Commission encapsulate this legalistic approach.

Judicial processes are integral to halting the impunity on which violence and resentment are perpetuated, and as in any functioning democracy, the judiciary is the main mechanism for protecting human rights. The 2006 crisis in Timor-Leste has been blamed on the failure to foster a strong culture of rule of law, exposed by the security vacuum that re-emerged following the United Nations Mission for Timor-Leste (UNMIT) departure the previous year (Amnesty International and Judicial System Monitoring Programme, 2004).

2.2 Broader/ Restorative

Yet peace-building is held to be more complex than *narrow* assumptions with reference to “subjective” peace-building, the importance of reconciliation, trust and forgiveness for individuals and communities (UPI, 2004: 7). In this view, transitional justice is not just about the past and providing redress for victims, but is an opportunity to transform political systems and the roots of the conflict. Addressing structural forms

of violence helps societies “procure an equitable future” and is therefore integral to securing conditions conducive to a sustainable and meaningful peace (Arbour, 2006). Transitional justice is a range from truth and reconciliation commissions and criminal trials to lustration or reparation.

In Timor-Leste, the liberation movement viewed independence not just as freedom from Indonesia, but as a prerequisite to the realisation of fundamental human rights (Montiel, 2006: 4). The breadth of this social transformation means that transitional justice must do more than simply place perpetrators in front of judicial mechanisms. Repairing frayed social fabric requires a broader definition of justice than it is traditionally afforded, with criminal, restorative and social considerations. *Restorative* justice is more concerned with the impact of violence on a community as a whole (societal justice). Zehr claims that *restorative* justice is “participatory, focuses on needs and obligations, tries to heal and resolve problems, and is future orientated” (UPI, 2004: 39). Sharing responsibility and blame leads to a common identity, and therefore reconciliation (Gibson, 2004).

Timor-Leste seems to indicate, however, that this more positive interpretation of justice provides problems if it entirely replaces judicial approaches. For many, there remains a need for societies to hold perpetrators of human rights abuses accountable; a moral obligation to punish those individuals found guilty. Not to do so is to offer impunity to the authors of the violence at the expense of the credibility of the state.

2.3 Importance of Context

In rural areas of Timor-Leste, customary conflict resolution is based around discussion, compensation and ritual reconciliation (Schenk, 2005). The emphasis on communal justice has, however, resulted in a “justice gap” as perpetrators of more serious crimes have been overlooked (Pigou, 2003: 8). It does appear that addressing the root causes of these grievances has been overshadowed by a desire for reconciliation. It has been argued that this is because local concepts of justice are starkly different from the individualist approach of the United Nations Transitional Administration for East Timor (UNTAET), although we would argue that in fact that it is this combined with a personalist executive diktat prioritising reconciliation over combating impunity without regard to the cost. There is a third notion of justice at play, the *pragmatic* (Pankhurst, 1999) - that the pursuit of accountability should be determined by its impact. While it shares the same goals of peace and stability as *retributive* and *restorative*, it concedes that justice can be detrimental to their quest and hence that the latter is a matter of political negotiation and compromise. In a nascent state, transitional justice will be shaped by considerations of the present and future so as not to endanger the political transformations underway. It will also be shaped by the past, and political, social and legal traditions. There are several contextual preconditions which determine the form and progress of transitional justice: the institutional capacity to carry out the various processes effectively, some consensus on what constitutes justice, and, perhaps most importantly, political will. In the case of

Timor-Leste, it is the latter which has meant that transitional justice has been described as “stillborn” (UPI, 2004: 5).

There are structural concerns about the feasibility of legal justice for Timor-Leste. It has been noted that transitional justice is shaped by power relationships in communities, but it is a less explored phenomenon across international borders (Gibson, 2004; Quinn and Freeman, 2003; Mendeloff, 2004). The asymmetrical relationship between Indonesia and Timor-Leste makes the pursuit of justice practically difficult and politically sensitive. Despite indictments by the SCU, high ranking officials and military commanders including General Wiranto live freely in Indonesia; the extradition agreement between UNTA and the Indonesian Government appears to be a victim of political realities.⁸ Indonesia’s “dismal handling” (Huang and Gunn, 2004: 24) of procedural justice is due to the continued influence of the army (TNI) as an actor in domestic politics. The influence of the TNI would explain why the annexation of Timor-Leste is still viewed, by those hindering attempts at justice, as having been necessary to stop Fretilin subversion and Communist contagion of Indonesia. Bilateral relations appear too important - security, crime, dependence for food and agriculture, membership of ASEAN - for Timorese politicians to campaign forcefully for the Indonesian Government to engage in meaningful judicial processes.⁹ Even a small response in Jakarta could wreak havoc in Timor-Leste, such as suspension of cross-border trade for a time.

This is not to mention the less transparent influences that Indonesia could continue to exercise, both through legal and illegal channels (e.g. banking and criminal networks). These facts influence thinking on issues such as justice. While José Ramos-Horta may be serious in his assessment that “Indonesia has changed since 1999... [the government] cannot be blamed for what happened” (Huang and Gunn, 2004: 25), the former considerations also form part of Dili’s thinking. In the wider international context, the strategic importance of an Islamic state between the Pacific and Indian Oceans meant that there has been little international desire to upset Indonesia with calls for a justice tribunal.¹⁰ With the impasse in Timor-Leste, it appears that Edward Newman was correct and that transitional justice is “a process that is conditioned by political compromises and practical constraints” (UPI, 2004: 39).

As transitional justice is supposed to encourage popular trust in nascent political structures, abortive and inefficient attempts can undermine public confidence in them. If structures fail to inspire confidence, agency in the form of charisma - one of Weber’s three sources of authority - comes to the fore. This is particularly true during transient and unstable times, when strong characters are able to appear more worthy of trust than political institutions struggling to manage processes of change. In post-conflict States, this can be positive as individuals are seen as nation builders, coming to be “personalised symbols of a nation - the collectivity that provides the major source for social allegiance” (Spinrad, 1991: 301). Popular allure is frequently the result of involvement in the independence movement as with Xanana Gusmão and José Ramos-Horta. The transitional justice

processes undertaken have been shaped by their personal convictions, and the esteem in which they are held.¹¹ Both supported *reconciliatory* justice and both campaigned forcefully for a truth and reconciliation commission after 1999.

It has been argued that the most successful examples of transitional justice are those that have built on the lessons and experiences of previous processes. Comparative studies prove difficult for Timor-Leste as it appears to be unlike many of the conflicts of the 1990s; it is neither a failed state nor is it plagued by ethnic antagonism, while the liberation movement had credible leaders and political structures. This is also the first time that transitional justice has been attempted in an Asian country.¹² Unlike the similar systematic human rights violations in South Africa, perpetrators and victims came from the same villages. Indonesia - neither shattered nor divided - is in a much stronger position to resist the imposition of exogenous justice than either Rwanda or the countries of the former Yugoslavia. With little historical guidance and with the government privileging reconciliation leading to impunity and recurring cycles of violence, Timorese civil society is searching for creative solutions to overcome political apathy and find a form of justice which works within this context.

3. What has happened so far in addressing Justice issues?

Persistent outbreaks of violence in East Timor in 2002, 2005,¹³ 2006¹⁴ and 2008 show that peace and stability remain fragile. Attempts to obtain justice for the victims of the Timorese 1975 internal conflict, the Indonesian occupation and the violent aftermath of the 1999 referendum on independence have so far yielded unsatisfactory results. Indonesian courts have acquitted all Indonesian suspected human rights violators tried in relation to the occupation.¹⁵

Commission for Reception, Truth and Reconciliation (CAVR) was established to determine the truth regarding human rights violations which took place in Timor-Leste between 1974 and 1999, promote reconciliation, restore the dignity of victims and assist in reintegrating individuals back into their communities. The CAVR was required to recommend reforms and initiatives that would prevent the reoccurrence of these human rights violations.

In a different initiative in 2005, the Presidents of Timor-Leste and Indonesia created the bilateral Commission for Truth and Friendship (CTF). The CTF had originally stemmed from an idea of José Ramos-Horta, who proposed an international panel of eminent persons from Asia (i.e. not limited to Indonesia or Timor-Leste). Indonesia responded by engineering the CTF which had several crucial differences to the original proposal.

It was entirely bilateral; only Indonesian and East Timorese commissioners would preside over it, meaning that there would be no opportunity for multilateral involvement. It would have no power to compel testimony (or even the attendance) of witnesses. It

would have no power to compel people or institutions to produce any documentary evidence. It would have no institutional independence from the two states. It would be unable to determine individual responsibility. It would have the power to recommend amnesties and clear the names of those 'wrongfully accused'. This was, obviously, a way of absolving those who bore greatest responsibility for the crimes.

The CTF stressed on reconciliation and better bilateral relations as priorities rather than truth seeking. It was also time-limited, meaning it did not address 99% of the killings and a full generation of suffering nor did it therefore enquire into the Indonesian state policy of invasion, occupation, and human rights abuses. Many Timorese and human rights specialists charged that the commission would provide a 'whitewash' for the 1999 violence (ETAN, 2005). The UN and many civil society organisations refused to cooperate with its investigations because the CTF was (originally) empowered to recommend amnesty for perpetrators of human rights violations but not to recommend prosecutions (United Nations News Centre, 2007).

The CAVR submitted its final report, *Chega!*, to the President of the Republic on 31 October 2005 and to Parliament on 28 November 2005. But political factors, such as fear of souring relations with Indonesia initially prevented the report from being discussed and acknowledged officially, despite widespread internal and international pressures. Subsequently the President established a government-funded body – the Post-CAVR Secretariat – to disseminate the report, and complete CAVR's publishing programme which included the landmark publication of the report in Jakarta in 2010. *Chega!* contains a detailed account of the 1975 - 1999 conflict, outlines the human rights violations which occurred and makes over 200 recommendations. The CAVR calls on the Timorese state to establish a victims' reparations programme, undertake institutional reforms particularly in the justice and security sectors, ensure a free media and a vibrant civil society, conduct memorialisation activities, educate Timorese citizens about their history and human rights, and bring the perpetrators of human rights violations to justice.

The 2005 CAVR report also made a number of recommendations as to how the international community can contribute to peace, truth and justice for Timor-Leste. The international community is urged to take action and support the people of Timor-Leste by implementing these recommendations, specifically by discussing *Chega!* in parliament, supporting the development of a CAVR follow-up institution, releasing relevant classified materials on Timor-Leste, and petitioning the UN Secretary-General to refer *Chega!* to the Security Council, General Assembly, Special Committee on Decolonisation and Commission on Human Rights.

Both the CAVR and the UN Commission of Experts recommended the creation of "an ad hoc international criminal tribunal for Timor-Leste" should Indonesia, under a strict time frame, continue to fail to credibly prosecute senior officials responsible for the devastation in 1999¹⁶. An alternative proposal has been for the UNSC to fully

reconstitute the Serious Crimes process, providing it with sufficient resources and backing in accordance with recommendations 7.1.1 and 7.1.2 of the CAVR Report - namely, the UN itself should provide the resources and judicial expertise, not Timor-Leste's court system. The Serious Crimes process could investigate war crimes and crimes against humanity committed from 1975 onwards, not just those committed in 1999. Indonesia should according to the recommendations extradite for trial those charged by the Serious Crimes process. A major cause of resistance to CTF was the fear that it would undermine CAVR which was just finishing its work when CTF was established and whose terms of reference, though wider, also included 1999. Many worried that CTF would override the CAVR report and neutralise its findings and recommendations on TNI by presenting an alternative version of the truth, and therefore responsibility, about 1999.

These concerns were shared by CAVR and prompted it to include a number of last minute warnings about CTF in *Chegal*. Although it did not write the initiative off completely, it called for CTF to complement CAVR, not conflict with it, especially in relation to the rights of victims to redress and criminal justice. It wanted CTF to add strength to truth-seeking human rights violations in 1999, and to forgiveness being linked to proper judicial process.

In fact the Commission for Truth and Friendship did have some positive outcomes and was not as much a whitewash as many feared when it was set up¹⁷ (Walsh, 2008). The launch of the final report *Per Memoriam ad Spem* (Through Memory to Hope) on 15 July 2008 was attended by Indonesia's President Susilo Bambang Yudhoyono (SBY) and President Ramos-Horta. In the end, the international criticism had an effect; the CTF refused to recommend any amnesties. It found that the Indonesian military, the Indonesian civilian government and anti-independence militias bore institutional responsibility for thousands of "gross human rights violations in the form of crimes against humanity" including "murder, rape, and other forms of sexual violence, torture, illegal detention and forcible transfer and deportation" against the East Timorese civilian population.

The CTF had no power to prosecute the perpetrators. The report includes recommendations for responding to those human rights violations including for victims' reparations, the establishment of a documentation centre, human rights training programmes, institutional reforms, and the creation of a centre mandated to investigate the whereabouts of disappeared persons and separated children. By not recommending amnesties, clearing names or claiming 'conclusive truth', the CTF also left the door open on the issue of future criminal justice. The CTF's recommendations are consistent with those of the CAVR. The report has now been made public and disseminated in Timor-Leste, although not yet discussed in the Indonesian National Parliament as far as is known.

Though it does not go as far as CAVR, CTF's report can be seen as having strengthened, not weakened CAVR's findings and recommendations. Both commissions call for an apology, for reparations to be made to victims and for reform of the TNI. Pat Walsh's further view is that 'CTF has also delivered significantly in an area where CAVR is yet to make much progress. Indonesia has so far officially ignored *Cbeqal* but, through CTF, it has now dropped its defensiveness about the violence of 1999. President SBY's admission of responsibility is shared by sections of the legal, military, ecclesiastical, academic and foreign affairs professions represented by the Indonesian CTF Commissioners, all of whom served – it should not be forgotten – during the Suharto period'.

There have been other initiatives with varying degrees of satisfaction such as the Ad-Hoc Human Rights Tribunal in Jakarta,¹⁸ the Special Panels for Serious Crimes in Timor-Leste for crimes against humanity,¹⁹ the UN Committee of Experts, and the UN Serious Crimes Unit in Timor-Leste. Of the persons tried by the Ad-Hoc Human Rights Tribunal and the Special Panels, nearly all have been acquitted on appeal or had their sentences commuted. The Indonesian legal process did not, however, meet international standards and the only defendant to serve a sentence in Indonesia was a Timor-Leste born militia leader who was subsequently released on appeal (Pascoe, 2006). Many of those indicted within Indonesia by outside bodies have treated such proceedings with disdain. For example, former Indonesian military commander General Wiranto was indicted by the UN backed Serious Crimes Investigation Unit for crimes against humanity in 2004, and then proceeded to run (unsuccessfully) for the Indonesian presidency the same year²⁰ (Human Rights Watch, 2004) and in 2009. A major reason for the failure of these judicial processes is the Indonesian government's unwillingness or inability to bring those responsible within the Indonesian security forces to justice. The TNI today is not a neutral instrument of the elected government but a partisan force with its own agenda. Through its territorial command structure, it remains embedded at every level of Indonesian society, including the bureaucracy, legislature, and economy. One reason the Indonesian military operates as a law unto itself is that it is not entirely dependent on the government for its finances. Its commercial activities bear little relation to the defence of Indonesia, but offer it the financial independence by which it can escape civilian control.

None of these initiatives have been equal to the task of delivering justice in accordance with international law (La'o Hamutuk, 2009). The Serious Crimes process (which dealt only with crimes committed in 1999) was terminated by the Security Council in May 2005 although its work was far from complete. UNMIT did though re-establish the Serious Crimes Investigation Team to complete investigations into outstanding cases from 1999. A total of 290 individuals already indicted under the serious crimes process remain at large in Indonesia, outside the jurisdiction of Timor-Leste.

No formal investigations or proceedings are underway for the crimes committed prior to 1999, with the exception being an Australian coronial inquest which concluded that the killings of five Australian-based journalists in Balibo by Indonesian forces in October

1975 just prior to the invasion of December that year was a war crime. The 2009 ban in Indonesia on public showing of the film *Balibo* illustrates the lack of openness over Jakarta's past.²¹

UNMIT's "Report on Human Rights Developments in Timor-Leste August 2006 - August 2007," highlighted the role that the CAVR could play within Timor-Leste in both "unifying" Timorese society and helping to "foster a democratic culture based on the rule of law." The CAVR report's recommendations were also addressed to the international community, specifically including the Security Council and its permanent members, as well as Indonesia on the former having an open debate that includes representatives of civil society to discuss implementing the report's recommendations.

In the light of all the above, given that the CTF did not have any authority to name names or conduct prosecutions, the next step is to prosecute the alleged perpetrators of crimes against humanity as recommended by CAVR and to demonstrate that the rule of law applies to all. One possible solution compliant with restorative justice is that Indonesia should follow South Korea's example and bring closure to the crimes against humanity committed in Timor-Leste by convicting and then subsequently pardoning those responsible. The call for formal justice for past crimes is widely supported within Timor-Leste, especially by the Church and civil society. However, the leaders of Timor-Leste have favoured CTF (and hence no further prosecutions), because of concerns about standing up to Indonesia. Timor-Leste's diplomatic position means that it cannot take the lead on the matter of justice in the face of opposition from its powerful neighbour. The international community, as embodied in the United Nations, should according to Timorese civil society active on the issues, address crimes which violated international criminal law, the UN charter and Security Council resolutions.²²

However, in his inauguration speech as Prime Minister in 2006, now President Jose Ramos-Horta did acknowledge the "great teachings" of the CAVR report. Prime Minister Xanana Gusmao, in his speech at the swearing in of members of his government called for the consideration of the CAVR report. "We cannot ignore the lessons of the past in order to understand the current crisis, and protect the future," he said.

4. What is the process for institutionalising *Chega!*?

There are a number of parliamentarians who are committed to seeing implementation of the two Commissions' recommendations. Elements of civil society, victims, local NGOs, the Church and sections of the media are also keen to see progress in implementing *Chega!* There is currently discussion of possible structures to succeed the post CAVR arrangements, but endless delays on parliamentary discussion.

There are problems not just of a technical nature to be overcome before any CAVR/CTF follow-up institution is formed and there are even bigger problems before

recommendations from Chega! to the national government and international bodies, including the Indonesian government, can be implemented. However, it will be a political struggle to create a widely accepted implementation programme which remains true to the intentions of the CAVR and CTF recommendations.

For organisations like the re-formed Alliance for International Tribunal (ANTI), an international tribunal and reparations are key issues. They told us that 'transitional justice' (combined with aid) is an easy way for Western nations to gain impunity for turning a blind eye to or supporting the Indonesian invasion and occupation. Transitional justice in their opinion is inferior to a formal judicial process ending in prosecutions and imprisonment for those found guilty. ANTI sees the present process as non-transparent and has renewed its call for a Western apology and for reparations for crimes of commission and omission, although it recognises there is little political will from any leadership in and out of Timor for this. The East Timor Crisis Reflection Centre added that CAVR was formed under UNTAET's (the predecessor to UNMIT) auspices, so the UN needs to stay on the case, given that its involvement goes back to the 12/75 UNSC resolution, condemning the Indonesian occupation of Timor-Leste.

In December 2009, the Timor-Leste National Parliament voted 34 to 0 that the *Chega!* and CTF reports should be implemented through a follow-up mechanism. Parliament tasked its Committee A (which looks at justice issues amongst others) to draft appropriate legislation by an original date of March 2010.

A Working Group of organisations, including NGOs, Post-CAVR, UNMIT proposed that the follow-up mechanism to CAVR/CFT should focus its work on truth seeking and documentation of abuses, reparations and memorialisation, missing and disappeared people, education and training in human rights, and reporting to parliament on the implementation of CAVR/CTF recommendations around these issues and other recommendations. Little happened until October 2010 amid continuing disagreements as to how much autonomy from government such an institution should have. On 29 September 2010, parliament voted to delay the process until February 2011 due to concerns over war veterans' benefits relationship to reparations in general as compensation for the victims of abuses by the liberation movement. As many in civil society have pointed out the proposed legislation was in any case really compensation rather than reparations – only one of the five key areas of reparations – restitution, rehabilitation, satisfaction and guarantees of non-repetition.

However, the Parliament, despite public commitments to do so, failed to discuss the draft legislation on 14 February 2011 and did not set a date for a future debate (ICTJ, 2011). The rationale given by MPs representing the war veterans was that problems with compensation for veterans should be addressed before Timor-Leste embarked on another compensation scheme (for civilian victims).

Whether or not other factors are at work is not clear but it is well known that both the President and the Prime Minister have strong reservations about the draft legislation for a reparations programme.

It seems clear, however that it is the relationship between Indonesia and Timor-Leste that is paramount in policy-making and thinking. José Ramos-Horta accused the UN of “hypocrisy” for using his government’s anti-tribunal stance as a pretext for not setting up such a tribunal, a line he repeated in an interview in early October 2010 (ETAN, 2010). He said that key countries on the UN Security Council were against it – such key countries of course tell activists that they cannot call for such a tribunal without support from Dili.

The European Union (EU) and the International Centre for Transitional Justice (ICTJ) launched a programme in February 2010 to help bring awareness of justice issues and options to the Timorese public in general, the National Parliament and other state officials, victims groups, and other stakeholders – a process that is locally called ‘socialisation’. The ICTJ has also discussed with the Education Ministry how to include Chega! as part of school curriculum, following on from the work of the existing post-CAVR institution (which is due to finish its work). The ICTJ proposed a meeting of female parliamentarians to work on the issue, although local campaigners around justice issues thought that the money could be better spent pressuring foreign governments and the United Nations.

Justice campaigners stress that, without strong pressure from their own citizens and from the international community, Indonesia will keep on trying to deny its past in Timor-Leste. Furthermore, Indonesian leaders will continue to obstruct justice, as is the case with the criminals indicted for their part in human rights abuses against Timorese they are shielding from accountability. In August 2009, the Indonesian Foreign Minister refused to attend the tenth anniversary of Timor’s Popular Consultation celebrations unless an indicted alleged war criminal Maternus Bere, accused of murders in 1999, was released to them, which suggests that obstruction of justice is likely to continue. It further suggests that in the interests of ‘good relations’ between governments, some Timorese leaders will be prepared to ignore their own constitution in order to placate Indonesian wishes. The above case also brings into question the issue of parliamentary oversight functions in both countries, given that after initially protesting against the decision to release Maternus Bere from detention, the Timor parliament under some pressure from the government, voted to take no further action.²³

5. An international tribunal?

One can note options from other countries. The Special Court for Sierra Leone (SCSL) did not rely on a Security Council resolution under Chapter VII of the UN Charter, but on an agreement - in effect, an international treaty - between the UN and the Government of Sierra Leone. Another suggestion from a long-time observer of the justice process

was that the Timor government could set up a trust fund for victims and invite foreign governments and companies (presumably including Indonesian ones) to contribute.

This could activate UNSC Resolution 1704 in 2006 which has never been implemented. While the activist suggesting this acknowledged the danger that Western funding of reconciliation work and aid could be conceived as buying off their complicity cheaply (and avoids their dislike of an international tribunal and reparations), practical politics would present this as both attractive for them and helping the victims - which is after all the key objective. It could involve greater commitment from international NGOs (INGOs) and solidarity people putting pressure on their (more or less complicit) governments to contribute. Another suggestion amongst human rights activists in the country is to sponsor a test case of a serious crimes violation. In fact Section 160 (Serious Crimes) states that 'acts committed between the 25th of April 1974 and the 31st of December 1999 can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts²⁴.' At present, there is presidential support for the process, given that the focus of the proposed body is not on prosecutions. But the process does in fact leave open the prosecutorial route and documentation would be useful in building indictments for the future. Significantly too, CTF also recommended documentation in both countries. How will it be possible to complete the serious crimes process to encompass crimes committed from 1974 – 1999? This will require too many resources and the judicial system could not cope. After five years, with 100 investigators, the Serious Crimes Unit was only able to complete a small number of prosecutions.

6. But where are the people?

A key question remains “where are the people in all of this, especially the thousands of victims and how will they be involved in overcoming the cycles of impunity and violence dogging Timor”? Many local NGOs we spoke with say that justice needs to be owned by the Timorese people; for the moment justice is stuck as a parliamentary/ technical process and it is now six years since *Chega!* was presented to Parliament.

Local human rights NGO La'õ Hamutuk pointed out, in an October 2009 letter to the UN Security Council, “in 2008 the Asia Foundation conducted more than a thousand interviews ...[and] when asked if a person who commits murder should sometimes avoid punishment... 90% of the respondents said no”. As the letter says “recent ... statements... of the Prime Minister and President... regarding justice, impunity ... are out of step with the wishes of the large majority of Timorese people”. La'õ Hamutuk suggests that the president and prime minister insist that people want material benefits rather than formal judicial prosecutions.

In fact, they say, people are generally saying that cash payouts are welcome, but they still want formal justice, meaning a full judicial process, and achieving an end to impunity. In

further conversations with human rights activists there were queries around the ICTJ/EU project. While the project is to improve Timorese people's awareness of history, and to provide relief to selected survivors, it does not involve the perpetrators or activities within Indonesia. Therefore, according to such activists it cannot be deemed to be "transitional justice"; the people of Indonesia are largely ignorant of what happened under the occupation, and resources could be better directed towards overcoming that ignorance.

Responses from civil society in Timor-Leste over the years have been many and varied. In June 2002, civil society organisations felt the need for stronger advocacy coordination and established ANTI, whose main aim was to see perpetrators of gross human rights violations tried through a judicial mechanism. ANTI constitutes victims and victims' families, student organisations, individual activists, and national civil society organisations. Although ANTI was established with a unified vision and mission, the members were not restricted by its retributive justice seeking mandate. CAVR was fully established and ran many district-based reconciliation processes but was also quickly establishing a huge body of facts around human rights violations, also with the assistance of civil society organisations. By 2005, when the *Chega!* report was published many organisations and individuals originally critical of CAVR, including ANTI, found the resulting report commendable and supported its recommendations. At the same time, ANTI focused its efforts on criticising the CTF.

The voices and actions of ANTI's members started to differ, with some beginning to voice initial thoughts around a more reconciliatory approach, especially since the 2006 crisis. In answer to developments in the country, many members of ANTI started peace-building and reconciliation programmes. Some organisations felt that a main contributing factor to the crisis was unresolved issues with the past, especially around impunity, and therefore an international mechanism to try perpetrators of serious crimes was now more needed than ever, whereas others felt that a wider reconciliatory approach was necessary.

Hence, ANTI, although effective in its issuing of unified statements, for example its 2006 plea for an official recognition of the CAVR report and its 2008 response to the CTF report, has been less effective in cementing a unified long-term advocacy action plan. It took a major impunity inducing event, the release of Maternus Bere in August 2009, to rekindle a sense that work is not yet finished.

Norwegian Special Envoy, Bishop Gunnar Stålsett established a more cooperative atmosphere through a series of National Consensus Dialogues held in 2009, with a follow up seminar on justice held in Dili in October 2010. This, combined with continued civil society pressure²⁵ resulted in the Parliamentary resolution noted above on a follow-up institution to work on the recommendations of the CAVR and CTF reports.²⁶

International and local campaigning and support could be mutually reinforcing. Although any solution must be Timorese-driven, the international community can help.

Those consulted looked for the continuation of international advocacy pressuring Timorese and Indonesian leaders and the international community for a focus on combating crimes against humanity. Internal and international campaigning for completion of the CAVR/ CTF process, would be reinforced by a follow-up institution to implement justice measures in accordance with the provisions in the Timorese constitution. This would entail reparations for individuals and communities, exhumations, establishing a displaced people register and measures designed to avoid repetition through security sector reforms and teaching human rights in schools.

All of this would undoubtedly be helped by firstly by the Timor National Assembly Parliament discussing *Chega!* and CTF which will overcome outside reluctance to discuss it. Impact would be even greater if the Timor-Leste government did the same, but the former would give impetus to outside and internal campaigners. This does not mean of course that Western countries will be any more keen to raise issues of international justice, including at UN level, but it does provide greater pressure points. Local demands here were that there should be support through a donor's conference, promotion of debate of the CAVR and CTF reports in the UN General Assembly and UN Human Rights Commission and in the European Union.

Western governments should also address the specific *Chega!* resolutions addressed to them. These include ones addressed to the Permanent Members of the Security Council to 'assist the Government of Timor-Leste in the provision of reparations to victims of human rights violations during the Indonesian occupation' and for the 'governments of Australia, Britain and New Zealand to undertake a joint initiative to establish the truth about the deaths of the six foreign journalists in Timor-Leste in 1975'. *Chega!* also requested that 'The United Nations and its relevant organs, in particular the Security Council, remains seized of the matter of justice for crimes against humanity in Timor-Leste for as long as necessary, and be prepared to institute an International Tribunal pursuant to Chapter VII of the UN Charter should other measures be deemed to have failed to deliver a sufficient measure of justice and Indonesia persists in the obstruction of justice'. On the issue of accountability for Serious Crimes, there is need to support the people and victims and the strong stance against impunity in the Security Council and European Union.

The other problem in calling for international support outside the judicial sphere is that donor governments are increasingly seeing Timor-Leste as a medium income nation, and a lower priority for aid. However the case needs to be made for assistance to Timor-Leste for the implementation of the CAVR and CTF recommendations process by pledging financial, moral and technical support for implementation. Donors can also provide an

example for others by recognising their own role in the Timor conflict and acting to remedy these past wrongs.

As well as support for work on such justice issues, this could mean supporting any CAVR follow-up, supporting military reforms and the professionalisation of military and police. Without this, there is the potential for renewed conflict between and within military and police.²⁷

Accountability and due process of law is the only way to guarantee stability and ensure that the security sector is governed by law. Outside supporters will still call for an acceptable international justice process.

Another line of enquiry is how to work with/assist Indonesian NGOs, an issue which often receives little attention. The more pressure on the Indonesian Government to face up to its past and to be held responsible for serious human rights violations committed domestically and in Timor the better.

7. Conclusion

Implementation of the CAVR and CTF will decide the political landscape and the shape of transformation including within the judicial system. Experience from elsewhere suggests that accountability and real recognition of past atrocities is necessary to repair wounds before reconciliation efforts can complete the healing process. Recognition, debate and implementation of the CAVR report is something that the people have been awaiting for a long time. Now they want to be protected by the rule of law so that their human rights are guaranteed.

A general consensus on the ground in Timor-Leste appeared to be that there had been some improvements in the political, economic and security fields, but not in the justice sector. Work on developing the army into a modern defence force has been hampered by an uncoordinated approach by donor countries.

A confidential UN report of December 2009 (The Australian, 2010) pointed to some of these problems suggesting that the country 'remains a fragile state. Its institutions are weak and its judicial system and security forces vulnerable to political interference'. On the plus side, peaceful elections were held in 2007 and stability is holding, conditions which should hold until December 2012, when the UN is due to end its 12-year peacekeeping mission. While the factors that led to the 2006 crisis remain mostly unresolved, the UN says the best hope for East Timor is its nascent democratic institutions being robust enough to withstand another crisis. That could come from public discontent fuelled by corruption and inequitable distribution of oil and gas proceeds - rather than bickering among the country's ageing political elite. "Additional accountability mechanisms need to be put in place and strengthened, ... the risk of corruption and weak delivery of services

are not addressed effectively by the government, in the presence of a relatively weak civil society with limited access to centres of decision making, public frustration might be fuelled... Socio-economic factors that fuelled the 2006 crisis -- land and property regimes, a large youth population and high levels of unemployment -- have not improved much and will take many years to address.” The report cautions against the government’s reliance on oil and gas revenue to pump-prime the country’s weak economy. Government spending provides the only means to fund consumption and internal investment -- wealth distribution which is often poorly allocated.

One of the biggest areas of concern in ‘pathways to justice’ is Timor-Leste’s judicial system which is both weak and vulnerable to state interference, shown only too graphically in the Bere case. The Timorese Constitution stipulates that serious crimes from 1974 – 1999 must be investigated by national or international courts. The reality, however, is that there is a lack of resources in the justice system .

Additionally many see a lack of government willingness to address the root causes of such problems. There is also the problem of what happens when there is no more money to buy peace or when the process of deciding who is to get money creates more conflict and injustice than it resolved.

Elections are due in 2012 (presidential in March/April and parliamentary in May/June) and while not a necessary cause of instability, they have been a source of concern previously (UN Dept of Public Information, 2011).

There are several scenarios for legislation. These are (a) the legislation will be addressed in 2011 either in its current or in modified form; (b) the legislation will not be addressed during the life of the current Parliament (for political reasons, a backlog of other legislation, and the proximity of elections in 2012); (c) the new Parliament will deal with the legislation - which could mean 2013; (d) the project will never happen; (e) the President, under whose auspices Post-CAVR functions, may decide to shut down the secretariat arguing it has completed its mandate and that further government grants of about \$250,000 a year cannot be justified.

Supporters of the legislation have several options. These are (a) wait and see; (b) mobilise public pressure for the legislation to be passed soon; (c) challenge the UN to act on its many expressions of clear public support for the legislation, before UNMIT’s 2012 exit; (d) make concessions on the draft reparations legislation in a bid to at least get the Parliament to establish the Institute of Memory.

For some, however, the key pressure point and indeed problem remains Indonesia. It is suggested that if there is significant change in Indonesia, Timor-Leste would welcome it as happened in 1998-99. What is needed therefore is to devote more thinking, effort and resources to educating, mobilising and supporting Indonesian civil society regarding

Chega! This could be done using the recently published Indonesian language version, plus the Balibo movie, and linking it to Indonesian consciousness of historical violations by their military within Indonesia itself.

This could act to break the current privileging of reconciliation over justice. This is not just an internal matter as there are also consequences for the international community and the Indonesians. Crimes against humanity remain just that. Without a vision of what transitional justice means and has to offer for Timor-Leste, the debate remains frozen and structural violence has yet to be overcome – despite efforts especially within civil society to address the issues.

ENDNOTES

- ¹ CAVR Timor-Leste, *Chega!*. O Comissão de Acolhimento, Verdade e Reconciliação Available at <http://www.cavr-timorleste.org/en/cheгаReport.htm> [accessed on 13 May 2008]. Note that the CAVR figure differs from the often accepted figure of 200,000.
- ² This is not to overlook the repressive role previously played by Portugal who by ignoring UN demands for decolonisation from the early 1960s contributed to the tragedy).
- ³ *Chega! Recommendations for the International Community (CAVR Timor-Leste)*
- ⁴ Our organisation provided two observation teams for this (which included one of the authors) and published Scott, C., 2000. *East Timor – From Bullet to Ballot (CIIR)*.
- ⁵ Some scepticism over the reliability of government statistics is heard from sectors of civil society, as well as how the World Bank attempts to capture data on poverty.
- ⁶ Celebration of the 11 Anniversary of the Popular Consultation for the Independence of Timor-Leste. Excerpt from statement of Special Representative of the Secretary-General for Timor-Leste Ameerah Haq in Dili (30 August 2010): “Progress made to date in establishing and developing State institutions is undeniable. The political and security situation is stable. Democratic institutions stand firm on solid foundations.”
- ⁷ The question of terminology re ‘victims’, ‘survivors’, ‘combatants’ etc was raised at an ICTJ meeting in 2008. How does one determine who a victim is? Also does calling them ‘victims’ put them in a passive position, should we consider them as “combatants”? Obviously the focus is on those who suffered serious human rights abuses, as defined by international law. Victims could also be all people who died from hunger or those whose family members were. There is a Victims Association which focuses on the needs of victims but also has a broader perspective on war crimes. Fernandes (2010) looks at the issues around terminology, definitions and the draft law of July 2010 which has victims as a broad category and ‘vulnerable victims’ as a narrow category attracting compensation.
- ⁸ Those convicted often receive lighter sentences than low level militia prosecuted in Timor-Leste. Major General Adam Damiri, the highest ranking official to face trial, was sentenced to three years imprisonment in 2003 (Huang and Gunn, 2004: 24).
- ⁹ Although many in civil society believe that Dili is far too ready to obey Jakarta’s dictats and doubt that Timor would pay the price that the leadership suggests it would (authors’ interviews 4-12 October 2010 in Dili).
- ¹⁰ International aid to Serbia was conditioned on cooperation with the ICTY, but there have been no similar demands imposed on Indonesia.
- ¹¹ One can see the problems with this in the Timor context in relation to the events of 2006 when the charisma factor lessened for Xanana, according to Irene Cristalis, and as justice and development failed to be institutionalised so a counter-charismatic figure like Major Alfredo Reinado could come to the fore as a iconic figure. (Cristalis, 2009: 309).
- ¹² Post-Suharto Indonesia had in fact drafted the necessary legislation to investigate human rights abuses by the military.
- ¹³ There were also other incidents. In 2002 several buildings associated with the Alkatiri family including that of the Prime Minister were burnt, in 2004 there were demonstrations about the government’s failure to meet the needs of veterans and in 2005 the Catholic

Church organised protests about the secularisation of the school curriculum. Continuing unrest emerges from youth martial arts groups. See Nordquist, K- A., 2008, *Timor-Leste: new times, new issues?* (Life and Peace Institute, Uppsala).

- 14 The proximate cause of this was the dismissal of nearly a third of the army which led to disputes between police and army and more than 100,000 people becoming displaced.
- 15 See Cohen, D., 2003, *Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta*, International Centre for Transitional Justice.
- 16 See ETAN, 2005, *Executive Summary of Commission of Experts report* (www.etan.org/news/200506exec.htm); Suter, K., 1999, *United Nations on East Timor: Overview* (www.ess.uew.ac.uk/Timor/document4.html); La'o Hamutuk (2008), *UN sets justice bar low, then declines to jump* www.laohamutuk.org/Justice08UNMITfails.Justice.htm
- 17 Patrick Walsh 2008 *The CTF: from problem to partner*. September.
- 18 After lengthy deferrals in the Security Council, the Commission of Experts was finally able to release its report on the prosecution of human rights violations committed in Timor-Leste. The report called the Indonesian Ad-Hoc Court "manifestly inadequate" owing to the prosecution's "lack of commitment" and proposed the establishment of an international tribunal for East Timor if Indonesia failed to promptly strengthen its judicial system. The Commission also included the possibility of an exceptional International Criminal Court investigation (that would extend the Court's jurisdiction to crimes committed before its establishment) if the above recommendations were not implemented.
- 19 The Special Panels for Serious Crimes is a hybrid national and international system. Although the UN provided funding and hires international staff, authority was officially with the Ministry of Justice and the Dili District Court except the Defence Lawyers Unit. To be effective outside Timor-Leste arrest warrants issued by the SCU must be forwarded to Interpol by the Timor General Prosecutor. Consequently, Timor incurs the costs of prosecuting high level Indonesian nationals. La'o Hamutuk, 2004. *The Special Panels for Serious Crimes - Justice for East Timor?*. La'o Hamutuk Bulletin. Despite the indictment of Indonesian military officers, trials did not occur because the Indonesian government did not recognise the court and did not extradite. SCU was suspended in 2005.
- 20 As a reflection of the system of power in which it exists, the depth of impunity in Indonesia is largely due to the continuing influence of the military in political institutions and the perceived respectability of military officers regardless of their known involvement in serious crimes in Timor-Leste, West Papua and Aceh and regardless even of their formal indictment for such crimes.
- 21 Although the ban was to some extent counter-productive with pirated copies being hawked extensively in Jakarta and Dili and many showings taking place.
- 22 Commission of Experts Report (2005): "The Prime Minister of Timor-Leste has indicated to the Commission that he would support the creation of an international tribunal for Timor-Leste, although the Government has serious doubts whether the Security Council would agree to such a step. Former Deputy General Prosecutor for Serious Crimes, Mr Nicholas Koumjian observes that the Timorese leaders have a legitimate concern that if they were seen as taking the lead in efforts to bring high level per

petrators to justice, it could harm the immediate and long-term relationship of Timor-Leste with their giant neighbour, the Republic of Indonesia..

- ²³ See also AP (2011), “Timor-Leste interested in buying Indonesia-made ships”. 23 March
- ²⁴ There is a distinction “between crimes against humanity’ and ‘crimes of universal jurisdiction’. In both cases, there is an absolute prohibition against the commission of such crimes—but only in the latter is there a duty to prosecute. Whereas states have “permissive jurisdiction” to prosecute, or not, over crimes against humanity, states parties to the 1949 Geneva Conventions have an “absolute” duty—where those Conventions are applicable—to search for, prosecute and punish perpetrators of grave breaches of the Geneva Conventions unless they choose to hand over such persons for trial by another State Party. The Australian Deputy Coroner’s report indicated that the Fourth Geneva Convention appears to be applicable to the Balibo Five murders”.
- ²⁵ For example, by the end of 2009, a working group of NGOs, also consisting of various members of ANTI and supported by Progressio, submitted to Parliament a submission signed by almost 3000 people, mostly Timorese, urging Parliament to start discussing recommendations of the CAVR report.
- ²⁶ The draft law includes victims of violence enacted by independence fighters.
- ²⁷ Although note UN reservations, including more than 50 officers facing charges, As mentioned not all in civil society share this assessment.

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