

# **Transitional Justice in East Timor**

*- a case study of justice versus reconciliation and its consequences*

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## **Preface**

The subjects of peace, war and atrocities have long captured my interest. Transitional justice is an intriguing topic, as it attempts to both heal the consequences of war and atrocities, and to build peace. Using experiences and literature from many different cases and scholarly areas, it tries to find the optimal way of addressing past atrocities, and prevent them from happening again. In a world where conflict and human rights abuses still continue to occur this topic is highly relevant, and we should still ask ourselves, what really is the optimal way of addressing past conflict and atrocities?

My interest in the tiny state of East Timor was awakened during trips to Australia where I learned of the controversial history with its little neighbour. I would like to thank Dave Burns for tirelessly talking about this topic and inspiring me to write about it.

I am further also grateful for the guidance and recommendations from my supervisors, Olle Törnquist and Silje S. Vevatne. Many thanks also go to Silje Rivelsrud and Christine Pålrsrud for comments and advice, and Maren D. Lauten for counsel from a historical perspective. Furthermore, I am incredibly grateful for all the support from my family and friends throughout this process. Most of all, my deepest thanks go to my Lloyd for all your love and support.

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# 1. Introduction

Under unlawful Indonesian occupation from 1976 to 1999, East Timor suffered massive human rights abuses.<sup>1</sup> The estimates are uncertain, but somewhere between 102,800 and 200,000 East Timorese are believed to have lost their lives as a consequence, during this 24-year period.<sup>2</sup> The external, imposed rule ended in 1999 with a planned scorched earth campaign from the Indonesian military that involved numerous atrocities and cost the lives of over 1,000 East Timorese. A multinational intervention – INTERFET – managed to quell the violence, and the UN took temporarily over administration of the territory. In May 2002, East Timor joined the world society as an independent nation.

As any post-conflict society where human rights violations on this scale have been committed, East Timor has gone through, and still is in, a process of *transitional justice*. Transitional justice can be defined as the “set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”.<sup>3</sup> This is a broad definition, which includes both judicial and non-judicial measures – everything from trials and purges, to addressing underlying social and economic issues that produce conflict. This thesis will be focused on the aspects of transitional justice that have been central in the East Timorese-Indonesian context – justice and reconciliation.

In line with the extension of democracy and humanitarian values to ever greater areas of the world, the idea that there should be some form of accountability for grave and large scale violations of human rights has been increasing. Intuitively, justice, defined as judicial prosecution is seen as positive and righteous. As gross and widespread atrocities have often occurred in conflict situations, it is also argued that justice must come first, for subsequent

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<sup>1</sup> East Timor’s official name is Timor-Leste. However, this thesis will utilise the English name.

<sup>2</sup> “Chega! The Report of the Commission for Reception, Truth and Reconciliation: Timor -Leste: Executive Summary”, The Commission for Reception, Truth and Reconciliation in Timor-Leste (CRTR), 2005, 44, <http://www.etan.org/news/2006/cavr.htm>; James Dunn, *East Timor: a Rough Passage to Independence*, (Double Bay, NSW: Longueville, 2003), 278.

<sup>3</sup> The concept of transitional justice is defined with variations in the literature. Some, as Bassiouni, instead use the term *post-conflict justice*, but this can be problematic, as violence and human rights transgressions can be one-sided state administered upon its own population. The definition used here is from Naomi Roth-Arriaza, “The New Landscape of Transitional Justice”, in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, ed. Naomi Roth-Arriaza and Javier Mariezcurrena, 2, (New York: Cambridge University Press, 2006).; M. Cherif Bassiouni, “Introduction”, in *Post Conflict Justice*, ed. M. Cherif Bassiouni, xv, (New York: Transnational Publishers, 2002).

peace to be genuine and lasting. At the same time, there has also been growing apprehension that a rigid pursuit of accountability can be problematic. There can be practical, political or other challenges that limit the form and extent of accountability. Insistence on legal prosecutions can endanger fragile agreements needed to keep peace and stability. Moreover, there are requirements in a post-conflict society that legal processes cannot meet. Very often a post-conflict society will be in a dire need of reconciliatory measures, but efforts to promote reconciliation can be contradictory to the pursuit of criminal justice. Accordingly, there is disagreement among scholars on what form accountability should take. This has generally been described as the peace versus justice debate. The central dilemmas are: can there be peace, stability and democracy without justice; and can there be justice without a legal process?<sup>4</sup> This thesis will discuss these problems in the East Timorese context.

## 1.1 Research questions

Most often the peace versus justice debate takes the form of a trial versus truth commission debate.<sup>5</sup> ‘Justice’ is equated with criminal prosecution through trials – and for the purpose of this thesis, this will be the definition of justice unless otherwise stated. Truth commissions on the other hand are seen to embody elements promoting peace, often conceptualised as ‘reconciliation’. ‘Reconciliation’ denotes coming together, a renewal of friendship, return to normality and restoration of harmony.<sup>6</sup> This can include forgiveness, development of mutual trust, and establishment of a “common narrative of the past and a shared vision of the future”.<sup>7</sup> Reconciliation can be both an outcome and a process, and states can move on a continuum towards more and more reconciliation.<sup>8</sup> There are also reconciliatory measures which aim to bring about reconciliation, such as truth-finding, physical or verbal contact between conflicting parties and symbolic or ritual ceremonies.<sup>9</sup> It is further possible to distinguish between reconciliation based on truth-finding and reconciliation based more on political negotiation. The first type can include the use of truth commissions and/or judicial

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<sup>4</sup> Edel, Hughes et al. “Introduction”, in *Atrocities and International Accountability: Beyond Transitional Justice*, eds. Edel Hughes et al., 2, (Tokyo: United Nations University, 2007).

<sup>5</sup> *Ibid.*, 2.

<sup>6</sup> Erin Daly and Jeremy Sarkin, *Reconciliation in divided societies: Finding Common Ground*, (Philadelphia: University of Pennsylvania Press, 2007), 5.

<sup>7</sup> Elin Skaar et al., “Introduction” in *Roads to Reconciliation*, eds. Elin Skaar, et al., 4, (Lanham Md: Lexington Books, 2005).

<sup>8</sup> Daly and Sarkin, *Reconciliation*, 7.

<sup>9</sup> These measures are *aimed* to bring about reconciliation, whether they really do will be discussed later in the thesis.; William J. Long and Peter Brecke, *War and Reconciliation*, (Cambridge, MA: MIT Press, 2003), 6-7.

measures to establish a truth that is either research-based or court-decided. In the second case these measures can be, but are not necessarily utilised, and the reconciliation will be highly based on political negotiations and actions. Truth-finding can be part of these efforts, but it will take the form more of political debate on the official understanding of the past.<sup>10</sup>

There have been two tribunals established – the Serious Crimes Process (SCP) in East Timor and the Ad Hoc Court in Jakarta – to obtain justice for past atrocities in East Timor. However, both of these failed to hold perpetrators of the most serious crimes legally accountable. At the same time, the process of transitional justice has both domestically in East Timor and bilaterally between East Timor and Indonesia been characterised by an emphasis on reconciliation. This reconciliation has been founded on research-based truth by truth commissions, and political negotiation. It has been illustrated by statements from East Timorese and Indonesian state leaders, and been represented by institutional measures. Two truth commissions have taken place: the Commission for Reception, Truth and Reconciliation in East Timor (CRTR), and the joint East Timorese – Indonesian Commission for Truth and Friendship (CTF). While the CRTR was a mix of reconciliation founded on research-based truth and on political negotiation, the CTF involved reconciliation based more on political negotiation and a politically negotiated truth.

Due to the failure to produce legal accountability, however, the transitional justice process in East Timor has largely been seen as unsuccessful. Victims, civil society organisations and scholars, have criticised the process and argued that past atrocities in East Timor have not been adequately addressed.<sup>11</sup> The main complaint has been the lack of prosecutorial justice, but they have also criticised the politically reconciliatory emphasis of the process. The East Timorese government has been criticised for its reconciliatory policies and refusal to support attempts at legal justice. The bilateral CTF with its emphasis on a politically negotiated

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<sup>10</sup> The momentous South African Truth and Reconciliation Commission essentially centred on reconciliation through research based truth-finding. The East Timorese reconciliation process has, as will be further outlined, been more a mix of reconciliation through research-based truth and political negotiation.

<sup>11</sup> See for example: Lia Kent “Community Views of Justice and Reconciliation in Timor-Leste”, *Development Bulletin*, 68, (2005).; Damian Greenfell, “When Remembering isn’t Enough”, *Arena Magazine*, 80, (2005-2006).; Megan Hirst, “Too Much Friendship, Too Little Truth”, ICTJ, January 2008.; Lucy Williamson “Justice and Compassion in East Timor”, *BBC*, July 4, 2008.; Jill Jolliffe “Compromising Justice in East Timor”, *Far Eastern Economic Review*, (April 2006).; “Etan Renew Call for Meaningful Justice for Victims of Indonesian Occupation: International Tribunal Needed in Wake of Commission of Truth and Friendship Report”, *East Timor and Indonesian Action Network (ETAN)*, July 14, (2008) <http://www.etan.org/news/2008/07ctf.htm>.; “An Open Letter in response to the CTF report: The truth is there, now we need Justice”, *Timor-Leste National Alliance for International Tribunal (ANTI)*, July 15 (2008), <http://www.etan.org/news/2008/07anti.htm>.

reconciliation has also been castigated for paying scant concern to justice and for being only a political exercise. In other words, a more judicially focused process and legal accountability has been called for.

However, this criticism does not always take into account the practical, moral and political constraints that would have been involved in producing judicial responsibility, and the positive outcomes that the reconciliatory focused process nevertheless has produced. Moreover, it is also controversial whether judicial accountability would have been the optimal way of addressing past atrocities in this specific context. The purpose of the thesis is to address these issues. This will be achieved by asking two research questions:

- (1) What factors explain why the process of transitional justice for past human rights violations in East Timor has become more reconciliatory than judicially focused?
- (2) What consequences has this had for East Timor?

The first research question aims at understanding why the process has turned more reconciliatory than judicially focused. Can the East Timorese government really be criticised or have there been valid reasons for its reconciliatory focus? The second research question relates to the consequences of the lack of prosecutorial justice, and the reconciliatory policies. This thesis is not concerned with all the consequences per se, but aims to find out whether the lack of justice has had as negative effects as critics claim. Can it be argued that the lack of prosecutorial justice not has been as detrimental after all? And that the reconciliatory policies and measures have had several positive effects? This necessitates a discussion of the various measures used – both aimed towards justice and reconciliation – and their utility and effects. The aim of this thesis is to question the possibility and utility of prosecution for addressing past atrocities in East Timor. It is also to ask whether some of the criticism towards lack of accountability in the East Timorese transitional justice process should be reconsidered.

## **1.2 Methodological and analytical framework**

This is a qualitative analysis with a main focus on the empirical case of East Timor. It is written within the genre of contemporary history, but the subject matter of transitional justice also necessitates walks into other social sciences, most notably political science and law. The issue area of transitional justice is part of a burgeoning literature on states emerging from

conflict and/or authoritarian rule seeking to transform into peaceful and democratic societies. The subject of this thesis should therefore be seen against the theoretical backdrop of *democratisation* and *peacebuilding*.

Democratisation is the process aimed to promote democracy, defined by Jarstad as “opening up political space, including improvements regarding contestation, participation and human rights”.<sup>12</sup> Democratisation includes a call for justice, as a democracy emphasises rule of law and protection of human rights. In East Timor, as justice has not been present, it can therefore be asked: to what extent did the lack of prosecutorial justice lead to democratic deficits, especially to lack of rule of law?

Peacebuilding denotes measures taken after war is over, that are aimed towards preventing renewed conflict and building a self-sustaining peace. This involves identifying and addressing fundamental causes of conflict at all levels – social, economical, political, institutional and psychological.<sup>13</sup> Reconciliation is an important part of peacebuilding. Logically, there can be no peace in a society if antagonism between different groups or individuals is still present. Reconciliation, or a certain degree of it, is a necessary pre-requisite for any peace. Reconciliation is also connected to democracy, as it establishes national unity, which is a necessary precondition for democracy. As Sørensen writes, a fundamental requirement for democracy is a general consensus on who the nation consists of – who are the demos that will rule in the democracy.<sup>14</sup> Moreover, for a democracy to work, in addition to institutions, rights and liberties, there needs to be societal agreement to have a democracy and people must be willing to recognise and adhere to decisions made by others.<sup>15</sup> Reconciliation is the glue that in the words of Daly and Sarkin, facilitates “the minimally cohesive society that is necessary for democracy to function”.<sup>16</sup> A question that therefore will be analysed in

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<sup>12</sup> Anna K. Jarstad, “Dilemmas of war-to-democracy transitions: theories and concepts”, in *From War to Democracy: Dilemmas of Peacebuilding*, eds. Anna K. Jarstad and Timothy D. Sisk, 17, (Cambridge: Cambridge University Press, 2008).

<sup>13</sup> There is as yet no uniform definition of what peacebuilding is, or what strategies specifically it entails, but the most common interpretation is based on “An Agenda for Peace” by Boutros-Boutros Gali in 1992, which is the one here briefly described.; Alex J. Bellamy et al., *Understanding Peacekeeping*, (Cambridge: Polity Press, 2004), 236-237.

<sup>14</sup> Georg Sørensen, *Democracy and Democratization*, (Boulder, Colorado: Westview Press, 2008), 47.; Daly and Sarkin, *Reconciliation*, 19.

<sup>15</sup> Daly and Sarkin, *Reconciliation*, 19.

<sup>16</sup> *Ibid.*, 19.



this thesis is whether the reconciliatory measures used in East Timor really furthered reconciliation and national unity.

An analytical framework rooted in transitional justice will also be utilised. In their article “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice”, Snyder and Vinjamuri analyse the literature on transitional justice and argue that it can be divided into three different orientations – *legalism*, *pragmatism* and an *emotional psychology* approach.<sup>17</sup> These three approaches sum up the central theoretical and empirical tendencies in the transitional justice literature to the dilemma of peace and justice. The approaches can be thought of as theoretical paradigms as they are built on different logics and postulate certain causal relationships. They also each prescribe different solutions to the transitional justice dilemma. The legalist strand represents what will try to be challenged in this paper – the utility of prosecution for addressing past crimes. Opposed to it stands the emotional psychology and the pragmatist approach that emphasise respectively the utility of a pragmatic approach, and an approach focused more on truth and reconciliation. As they can be seen to represent different attitudes to the transitional justice debate in East Timor, it is fruitful to connect these paradigms to the empirical facts and assess whether their causal claims hold. The three orientations will be outlined further in chapter two.

In working with this thesis, there have been certain methodological problems that should be mentioned. Firstly, the contemporariness of the case and the fact that it is a sensitive and controversial issue in both states still, has made it difficult to obtain source-material regarding certain aspects of the process. The final report of the CTF has not yet been released to the public. The analysis on the CTF is therefore based on an advance copy that has leaked to the press.<sup>18</sup> Moreover, some other information, such as concerning internal political preferences both in East Timor and in Indonesia has been difficult to access due to language barriers. A further challenge has been the absence of theory in the transitional justice literature. Despite generalisations, there is no extensive criminological theory for international – and/or state-

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<sup>17</sup> Leslie Vinjamuri and Jack Snyder, “Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice”, *Annual Review of Political Science*, 2004: 345-362.

<sup>18</sup> It has been attempted to obtain an official copy from the East Timorese government but this did not succeed. It has however, been confirmed from a former member of the Commission that the copy available from [www.wikileaks.com](http://www.wikileaks.com) is authentic.

crimes, as there is for domestic crimes.<sup>19</sup> As Jennifer Balint argues, the debate between concerns over justice or peace – might be the nearest thing we have to an international criminology.<sup>20</sup> Nevertheless, as Schabas and Thakur remarks, studies of individual situations still gives added knowledge.<sup>21</sup> The aim of this study is therefore not to generalise but to add a facet to our understanding of the East Timorese transitional justice process, that can be used the greater goal of improved comprehension on how to best address past atrocities.

### 1. 3 Sources and Literature

The literature relevant for this thesis can mainly be divided into two groups: texts concerning transitional justice and texts concerning East Timor and transitional justice. The research field of transitional justice originated in the study of the tribunals and transitions in the defeated states post World War II. From the milestone of Shklar's book *Legalism* from 1964, it gained momentum in the 1970's and 1980's, with an emphasis mainly on trials and criminal justice as a means to promote human rights.<sup>22</sup> In the late 1980s and 1990s, with the wave of new democracies, and increased attention to peacebuilding and the correlation between democracy and peace, the field was taken into the democratisation and peacebuilding literature. One started looking at how addressing past atrocities could promote democratic change and peace. Writers such as Orentlicher, Teitel and Bassiouni, built on Shklar's legalist approach and advocated the preventive, deterrent and democracy-promoting effect of justice.<sup>23</sup> Others, such as Huntington and Kissinger advocated a more sceptical, pragmatic approach to the value of transitional justice. Simultaneously, the scope widened to include non-judicial measures such as truth commissions, with Hayner's *Unspeakable Truth* as a prominent example.<sup>24</sup> Minow

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<sup>19</sup> Jennifer L. Balint, "The Place of Law in Addressing Internal Regime Conflicts", *Law and Contemporary Problems*, 59, No. 4, (1996): 111.

<sup>20</sup> *Ibid.*, 112.

<sup>21</sup> Schabas, William and Ramesh Thakur, "Concluding Remarks", in *Atrocities and International Accountability: Beyond Transitional Justice*, eds. Edel Hughes et al., 284 (New York: United Nations University Press, 2007).

<sup>22</sup> Judith Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964).

<sup>23</sup> Diane F. Orentlicher, "Settling Accounts: The duty to Prosecute Human Rights Violations of a Prior Regime" *The Yale Law Journal*, 100, no. 8, (1991): 2540-2543.; Bassiouni, *Postconflict Justice*.; Ruti Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000).

<sup>24</sup> Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, (New York: Routledge, 2002).

and Kritz have given respectively more balanced and comprehensive analysis of the universe of transitional justice measures, their use and functions.<sup>25</sup>

The process of transitional justice in East Timor has received considerable attention, taken into account the small size of the state. There is substantial information and literature on the subject, though it is not overabundant. Much of the literature however, focuses on a specific measure, such as either the one of the tribunals or the truth commissions. There are minor articles that look on the various measures together. Most of these articles do see some positive sides with the CRTR, but they still tend to follow the legalist paradigm, and do not look critically at the consequences of lack of prosecution. Some, as Van Zyl, miss the political element, and do not discuss causes or the implications of the attitude East Timorese leaders have taken to the problem.<sup>26</sup> Nearly all of them flog the CTF for being a political exercise that would undermine both truth and justice. And none look critically at how justice by trials is essentially a western concept, vastly different to traditional East Timorese methods of conflict resolution and justice. Kingston gives a constructive account of the balance between political and judicial interests.<sup>27</sup> Still, he does not question the preventive or deterrent effect of pursuing justice, or incorporate the conflict of traditional versus western forms of justice, and he does consider the final results of the CTF. In other words there are few who have discussed the subjects this thesis address in a comprehensive manner. None give a broader, more inclusive account, where the utility of criminal justice is more critically examined, as will be aimed to be achieved here.

The sources utilised for this paper are by no means an exhaustive list, but they were still able to provide a solid grounding for answering the research questions. They were balanced against each other to ensure objectivity and accuracy, and empirical facts have only established when they were based on independent and supportive sources. Due to the wide scope of the thesis, a considerable amount of secondary literature has been necessary. Scholarly books and articles have been used to establish empirical facts and give an overview

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<sup>25</sup> Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998).; Neill Kritz, *Transitional Justice: how emerging Democracies Reckon with former Regimes*, (Washington D.C.: United States Institute of Peace Press, 1995).

<sup>26</sup> Paul van Zyl, "Dealing with the Past: Reflections on South Africa, East Timor and Indonesian", in *Beginning to Remember: The past in the Indonesian Present* ed. Mary S. Zurbuchen (Seattle: University of Washington Press, 2005).

<sup>27</sup> Kingston, Jeffrey. "Balancing Justice and Reconciliation in East Timor." *Critical Asian Studies* 38, no. 3 (2006): 271-302.

of the process and various measures. A broad range of such material has been consulted also to ensure objective and accurate information. Reports from NGO's, especially the ICTJ<sup>28</sup> and also a few from governmental institutions, have been crucial in providing details about various aspects of the process: public perceptions, and the causes, functioning and effects of measures. These reports are thorough, and they are most often written by authors who were there and experienced the work of the tribunals and truth commissions first hand. Still, they are at times written to promote the cause of something, often the pursuit of criminal justice, and they were read with this in mind and balanced against other sources. Both scholarly books and articles, and reports from NGO's have also been used to provide facts of political and social development of East Timor, the stability and rule of law situation in the state. News material has added to empirical knowledge with details on views of individuals, information on CTF and other issues. Speeches and other statements from individuals involved in the process have also provided information on their views towards the subject. These sources have been tempered with additional information from newspapers and other secondary sources, due to the difference that can exist between what people say and what they mean. UN-documents, and other official documents concerning the establishment and work of the institutions, such as terms of references, and final reports has given information on the intention and outcome of the various measures. Final reports have had to be evaluated against other types of sources to make sure they do not give a too positive description of own achievements.

#### **1. 4 Structure of thesis**

Chapter two will first give a short introductory background to the history of Indonesia's occupation over East Timor, focusing mainly on the human rights violations committed. It will further outline the three different approaches to transitional justice, legalism, pragmatism and the emotional-psychology approach.

Chapter three will discuss the first research question – why the process of transitional justice has turned more reconciliatory than judicial. The chapter is divided into three main focus areas – the Indonesian attitude, the positions of the international community and the UN, and East Timorese dilemmas and positions. The key argument is that fierce opposition from

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<sup>28</sup> International Centre for Transitional Justice, see [www.ictj.org](http://www.ictj.org).

Indonesia, a disinterested international society's and internal challenges made the East Timorese political leadership more inclined to pursue a politically negotiated type of reconciliation than to pursue justice.

After having established why the transitional justice process became more posited towards reconciliation than justice, chapters four and five will turn attention to the second research question: the consequences this has produced. In order to do this in a systematic way it will be focused on the measures and institutions established to address past atrocities, and their outcomes will be evaluated. At the same time the measures applied will be seen in the light of the legalist-, pragmatic- and the emotional psychology-approaches, and the causal claims the supporters of these paradigms advocate will be assessed. The judicial measures will be discussed in chapter four, while the non-judicial, reconciliatory measures will be discussed in chapter five.

Chapter six draws together the main findings of this thesis. Both the empirical outcomes and the implications this has for the theoretical approaches will be discussed.

It should be noted that the main focus of this thesis is on *East Timor* of following a reconciliatory approach and not having justice, but it will to some extent also involve Indonesia where this is natural. The space limitations of this thesis necessitate this selectivity.

## 2. Background

### 2.1 Human rights violations in East Timor

East Timor is situated around 500km north of Darwin, Australia, and shares the island of Timor with the Indonesian West-Timor to its left. It came under interest from both Dutch and Portuguese colonial aspirations from the 16<sup>th</sup> century, but it was the Portuguese who in the end managed to best establish control. The Portuguese dominance over East Timor was weak until the early 20<sup>th</sup> century. With the coming to power of the fascist government under Antonio Salazar in the 1930s, the Portuguese political grip over East Timor tightened, and Lisbon was intent not to let go of any colonial possessions.<sup>29</sup>

The coup overthrowing the fascist Caetano regime in Portugal in April 1974 opened the way for decolonisation of East Timor. The new, leftist Spínola government stated in June 1974 that it envisaged self-determination for East Timor, either in the form of continued Portuguese rule, Indonesian rule or independence.<sup>30</sup> East Timorese political parties soon formed and the two most important, UDT<sup>31</sup> and FRETILIN<sup>32</sup> established an alliance and worked together with the colonial authorities for future self-determination. Certain elements in the Indonesian military however, were convinced that independence for East Timor would be detrimental to Indonesia and the only option was integration. They started a covert destabilisation program that undermined the alliance, and coupled with disagreements between the parties, helped drive the UDT and FRETILIN into a brutal civil war in August – September 1975.<sup>33</sup> When the pro-independence party FRETILIN came victoriously out of the war, Indonesia resolved that it was time to intervene. After an escalation of military attacks starting in September 1975 they launched a full-scale invasion on December 7, 1975.<sup>34</sup> The invasion was brutal, with numerous instances of indiscriminate executions and mass killings, rape and property

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<sup>29</sup> Bill Nicol, *Timor the Stillborn Nation*, (Camberwell, Vic.: Widescope, 1978), 12, 17, 20; Dunn, *East Timor*, 16-17.

<sup>30</sup> Matthew Jardine, *East Timor: Genocide in Paradise*, (Tuscon: Odonian Press, 1995), 25.

<sup>31</sup> UDT – Uniao Democratica Timorese (Timorese Democratic Union).

<sup>32</sup> FRETILIN – Frente Revolucionaria da Timor-Leste Independente (Revolutionary Front of East Timor).

<sup>33</sup> The destabilisation program - "Operasi Komodo" - was constructed by ranking officers in the Indonesian army, and its aim was to incorporate East Timor into Indonesia as fast as possible. In the beginning the emphasis was on non-military means, propaganda and subversion, to divide the East Timorese political parties and promote the image of Indonesian rule. In 1975 it widened to include military exercises and covert military operations by September.; Dunn, 92-95, 185; Jardine, *East Timor*, 28.

<sup>34</sup> Jardine, *East Timor*, 31.

destruction.<sup>35</sup> In 1976 after two months in mid-February, 60,000 East Timorese were dead. On July 17, 1976 East Timor was formally annexed by Indonesia as its 27<sup>th</sup> province.<sup>36</sup> The invasion and continued occupation of East Timor was a blatant transgression of two important aspects of international law, the prohibition on aggression, and the right to self-determination.<sup>37</sup> The East Timorese independence resistance, led by FRETILIN continued an armed struggle against the illegitimate Indonesia rule until 1999.<sup>38</sup>

Indonesian governance of the territory was characterised by harsh oppression, both towards the resistance movement and civilians. Approximately 102,800 to 200,000 East Timorese died in conflict related deaths during the Indonesian occupation (1975-1999).<sup>39</sup> Though not defined as a genocide, mass killings took place (in Lacluta, 1981, Kraras, 1983 and Dili, 1991), and numerous other human rights violations that have been defined as war crimes and crimes against humanity.<sup>40</sup> The range and number of human rights violations is extensive, covering arbitrary detention, torture, forced displacement, violence and sexual violence, enforced disappearances and unlawful killings.<sup>41</sup> Though different East Timorese groups also were guilty of transgressing human rights, it is clear that the main party responsible for most human rights violations was the Indonesian National Army – ABRI/TNI.<sup>42</sup>

The unlawful invasion and brutal occupation of East Timor by Indonesia was acknowledged by the international community, but little was done to stop it. The international attitude changed in the 1990s with more comprehensive media coverage and increased international attention to human rights violations. The Dili Massacre in 1991, when the Indonesian military cracked mercilessly down on East Timorese who were attending a pro-independence march,

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<sup>35</sup> Dunn, *East Timor*, 244-247.

<sup>36</sup> *Ibid.*, 259.

<sup>37</sup> Roger S. Clark, "The 'decolonization' of East Timor and the United Nations norms on self-determination and aggression", in *International Law and the Question of East Timor*, 73 (London: Catholic Institute for International Relations/ International Platform of Jurists for East Timor, 1995).

<sup>38</sup> No state with the exception of Australia (in January 1978) recognised de jure Indonesian sovereignty over East Timor, and the UN condemned the invasion (S/RES/384, 1975).; Jardine, *East Timor*, 46; The United Nations 1975. *Security Council Resolution 384 (S/RES/384)*. December, 1975.

<sup>39</sup> For a population that in 2008 numbered around 1 million people this is a large proportion.; "Chega!" 44.; Dunn, *East Timor*, 278.

<sup>40</sup> For a definition of 'crimes against humanity' and 'war crimes' see The United Nations Treaty Collection, "The Rome Statute of the International Criminal Court", July 17, 1998.; "Chega!"

<sup>41</sup> "Chega!"

<sup>42</sup> ABRI – Angkatan Bersenjata Republik Indonesia (Armed Forces of the Republic of Indonesia), renamed Tentara Nasional Indonesia (TNI) after restructure 1. April 1999.; "Chega!"

was broadcasted internationally and opened the world's eyes for the Indonesian repression.<sup>43</sup> Both domestically and internationally, demands for change in Indonesia's East Timor policy intensified. When Suharto stepped down in 1998, his successor Habibie bowed for pressure and allowed for a UN-monitored plebiscite on independence for East Timor.<sup>44</sup>

However, members of ABRI/TNI who had occupied central roles in the administration and repression of East Timor rejected this solution.<sup>45</sup> Early in 1999 they set up militias and organised a campaign of intimidation that included violence, kidnapping, murder, massacres and sexual violence.<sup>46</sup> This did not deter the East Timorese who on the August 30, 1999, in a 98 per cent turn out, voted with 78.5 per cent against continued integration with Indonesia – and yes to independence.

The result of the ballot was released on September 3, 1999. The TNI had expected the outcome and had planned scorched-earth operation, *Operasi Guntur / Wiradharma*, as a revenge against the East Timorese for having voted for independence.<sup>47</sup> Together with the militias they went on a spree of violence and destruction that lasted roughly from September 4 to September 20, 1999.<sup>48</sup> This was an operation of brutality that included numerous human rights violations. These were for example murder, mass murder, sexual violence, torture, violence against children, forced displacement and transgression of important social rights such as destruction of shelter and property theft.<sup>49</sup> It claimed the lives of more than 1,000 people. In addition around 70 to 80 per cent of East Timor's buildings and infrastructure were

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<sup>43</sup> The Dili Massacre is also referred to as the Santa Cruz Massacre.

<sup>44</sup> The terms of the referendum were outlined in an agreement on May 5 by the UN, Indonesia, and Portugal (who was still in *de jure* control over the territory). It was an autonomy proposal, where the East Timorese was to vote over whether or not to stay incorporated to Indonesia but be given autonomy. If the autonomy proposal was rejected however, the Indonesian President had declared on January 27, 1999 that he would ask the Indonesian Parliament to grant East Timor independence; Astrid Suhrke, "Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor", *International Peacekeeping* 8, no. 4 (2001), 3.

<sup>45</sup> Governance of East Timor had been controlled by a section of the ABRI called the Special Forces Command (Kopassus), whose personnel had occupied central roles in the administration. This section had a clear interest in keeping East Timor within Indonesia. They had spent around 10,000-12,000 soldiers defending this arrangement since 1975, and did not want to lose roles that gave them status and importance. They also feared revelation of corruption and human rights abuses if the rule of East Timor went out of their hands.; Dunn, 229, 339, 342.; Grayson J. Lloyd, "The Diplomacy on East Timor: Indonesia, the United Nations and the international Community", in *Out of the Ashes: the destruction and Reconstruction of East Timor*, eds. James J. Fox and Dionisio Babo Soares, 91, (Adelaide: Crawford House Publishing, 2000).

<sup>46</sup> Dunn, *East Timor*, 342

<sup>47</sup> Dunn, *East Timor*, 350, 352.

<sup>48</sup> James Dunn, "Crimes Against Humanity in East Timor: January to October 1999: Their Nature and Causes" (Report prepared for the Prosecutor General), Dili, February 14,(2001): 15.

<sup>49</sup> *Ibid.* 2.



destroyed and a quarter of the population, around 250,000 people, were forcibly displaced to Indonesian West Timor.<sup>50</sup> The violence and destruction of 1999 is often described as perpetrated mainly by pro-integrationist East Timorese militias. However investigation has shown that it was carefully planned by certain senior TNI personnel who sponsored, trained, armed, encouraged and organised it.<sup>51</sup> They therefore bear the main responsibility for the crimes committed. This responsibility stretches as far as to General Wiranto, former head of the TNI.<sup>52</sup> Since the human rights violations committed in East Timor in 1999 were so grave, and were systematically and deliberately planned and carried out, they are characterised as crimes against humanity.<sup>53</sup>

The Indonesian military was responsible for maintaining security but instead created terror.<sup>54</sup> The media image reached the world and caused international outcry. After strong pressure from important parties such as the US, Australia, the IBRD and the IMF, Habibie allowed a UN-authorized multinational force, INTERFET, to intervene to restore peace and security.<sup>55</sup> INTERFET was deployed on September 20, 1999 and by five months it had managed to successfully end the violence and establish a secure environment.<sup>56</sup> The TNI and the militias retreated and Indonesia acknowledged that East Timor was lost. On October 20, 1999, the Indonesian parliament annulled the incorporation of East Timor, and the UN took over the administration of the territory.<sup>57</sup> INTERFET was replaced by the United Nations Transitional Administration in East Timor (UNTAET) on February 23, 2000. UNTAET was given the

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<sup>50</sup> Kingston, "Balancing Justice" 272.; Dunn, *East Timor*, 354.; Moreen Dee, " 'Coalitions of the Willing' and Humanitarian Intervention: Australia's involvement with INTERFET", *International Peacekeeping* 8, no.3 (2001): 4.

<sup>51</sup> These individuals are mentioned in the "Executive Summary Report on the investigation of Human Rights Violations in East Timor" (KPP-HAM Final Report), Jakarta: January 31, 2000, <http://www.etan.org/news/2000a/3exec.htm>.; and in Dunn, "Crimes Against Humanity", 2.; It is also significant that the pro-independence militia Falintil, the military arm Fretilin, was passive during 1999, after orders from the imprisoned resistance leader Xanana Gusmão.; Dunn, *East Timor*, 346.; Taina Järvinen, UPI Working Papers 47, *The Finnish Institute of Foreign Affairs*, 2004, 42.

<sup>52</sup> General Wiranto might not have been essential in planning and orchestrating the campaign, but as Dunn argues, he must have been aware of his subordinates actions.; Dunn, "Crimes Against Humanity", 2.

<sup>53</sup> *Ibid.*, 2.

<sup>54</sup> By the May 5 agreement, the Indonesian military was responsible for maintaining security. The UN mission UNAMET was to provide monitoring and assisting with the ballot only. Security was of concern to the UN, but Indonesia insisted on its right to provide security, and it was feared that pressures for a UN peacekeeping force could lead to the ballot being postponed or cancelled.; Dunn, *East Timor*, 348.

<sup>55</sup> International Task Force East Timor (INTERFET) see The United Nations, *Security Council Resolution 1264* (S/RES/1264), September, 1999.; Nicholas J. Wheeler and Tim Dunne, "East Timor and the New Humanitarian Interventionism", *International Affairs* 77, no. 4 (2001): 818-820.

<sup>56</sup> Bellamy et al. *Understanding Peacekeeping*, 166.; Dee, " 'Coalitions' ", 5.

<sup>57</sup> John Roosa, "East Timor's Truth Commission: Introduction to Pacific Affairs Special Forum", *Pacific Affairs* 80, no. 4 (Winter 2007-2008): 565.

complex and challenging task to govern, rebuild and prepare the East Timorese society for independence.<sup>58</sup> On May 20, 2002, East Timor finally became an independent nation, when the authority over East Timor was formally transferred from UNTAET to the first elected East Timorese government.

## **2.2 Transitional justice – three approaches**

As East Timor was released from the Indonesian shackles to become an independent nation, the question of how to deal with the atrocities of the past arose. In the literature of transitional justice, Vinjamuri and Snyder have argued that the attitude to this topic can be divided in three strands, a legalist, a pragmatic and an emotional psychology approach.<sup>59</sup> The debate on how to address the human rights violations of the past in the post-conflict situation of East Timor and Indonesia can be seen to follow the fault lines of these three approaches.

Considering the number and gravity of the transgressions many argued that criminal prosecution was in order. There was a widespread call for justice, from the East Timorese themselves, from NGO's, the UN, and other actors in the international community. The call for justice can be seen to represent the rationale of legalism. Legalism emphasises universal standards of justice, and scholars writing within this paradigm see judicial processes as the optimal way of addressing grave human rights violations. This is supported by retributive and preventive arguments. Legalism is based on a 'logic of appropriateness', which postulates that participants in international politics act on the basis of rules they see as appropriate. Therefore, to hinder future human rights violations from occurring, one needs to promote rules prohibiting such acts.<sup>60</sup> Tribunals, preferably international, are seen as the tools that can enforce international law and international humanitarian law. As tribunals enforce international law they also function to socialise respect for the rule of law among international actors. In this way and by individualising guilt and demonstrating that crimes will not go unpunished, trials deter and prevent future international crime. As conflict-resolution by way of a legal process and emphasis on rule of law is considered inherent to democratic and liberal norms, tribunals are therefore also seen to promote democracy and liberal values. Tribunals

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<sup>58</sup> The United Nations, *Security Council Resolution 1272 (S/RES/1272)*, December, 1999.

<sup>59</sup> This section is based mainly on Vinjamuri and Snyder, "Advocacy and Scholarship", 345-362.

<sup>60</sup> Legalism is defined by Judith Shklar as "the ethical attitude that holds that moral conduct is to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules".; Shklar, *Legalism*, 1.

are also claimed to prevent future conflict and crime as establishment of accountability is argued to end cycles of revenge, hatred and violence. Furthermore, prosecutorial justice is seen as necessary to repair the moral imbalance between victim and perpetrator, as it punishes the perpetrator it restores the dignity of the victim.

In sum, the legalist position argues that the optimal way of addressing past human rights violations in East Timor is by judicial prosecution, as this will restore the moral balance between victims and perpetrators, prevent future crimes and conflict, promote rule of law, and strengthen central liberal and democratic values. This is seen to be especially important for a new democracy, like East Timor, or an authoritarian state in the process of democratising, as Indonesia. For these reasons, legalists protest any measures instituted in this context that they see as undermining legal accountability. This would most notably be inaction, amnesties, or other measures contributing to impunity. Truth commissions as held in Indonesia and East Timor, have also been criticised for being politically influenced and for offering no substitute to a legal process as they do not satisfy the rights of neither perpetrators nor victims.

The pragmatic approach on the other hand is based on a 'logic of consequences' which posits that the form accountability should take depends on the effects it will have. As with the legalist paradigm, social stability, peace and democracy are the optimal goals, but pragmatist scholars are sceptical to that prosecutorial justice always further these goals. The legalist argument is a justice-first approach – it sets out the hypothesis that justice must take priority over political concerns, as pursuit of justice ultimately will serve the optimal political interests – democracy, stability, reconciliation and peace. Pragmatist scholars point out that there can often be a tension between these concerns. At times, pragmatists argue that the pursuit of justice can be detrimental to peace and stability. Moreover, some argue that legal accountability for past atrocities is not imperative to further democratic standards – this can be done by other methods such as institutional reform. The pragmatist approach therefore stresses peace and democracy over justice, and argues that the ability to obtain justice will rather be dependent on these two factors. Transitional justice measures must hence be applied and evaluated according to how it will further social peace and democracy. In the case of East Timor, pragmatists would emphasise that the pursuit of justice should be secondary to prudential and political concerns. Pragmatists would therefore support a politically focused

reconciliatory approach, and can be open for measures such as amnesties and argue that this can have positive consequences.<sup>61</sup>

While legalism and pragmatism have been the dominant approaches to transitional justice, there is also a third paradigm. The emotional psychology approach is based on a 'logic of emotions', rooted in social psychology. In contrast to the pragmatist paradigm that is prepared to sacrifice all transitional justice measures on the altar of peace and stability, this approach underlines the utility of some transitional justice measures as the legalist approach. However, these are not necessarily judicial. The emotional psychology approach emphasises reconciliation, social harmony and peace, and stresses the utility of truth commissions and reconciliatory measures to further these aims. Reconciliation is seen as contingent on emotional catharsis of victims, and acknowledgement of responsibility and blame by perpetrator. It is argued that this can come about through truth-telling, which therefore also is seen to contribute to healing for victims and society. Scholars writing within this paradigm further argue that social peace is facilitated when parties to a conflict can find an agreed upon version of the truth of the past. A truth commission has a better opportunity of going wider and deeper into the past than trials, and can hence contribute to a more accurate, and consensus-based version of the truth. In comparison to the legalist-paradigm that is perpetrator-centred as it sees retribution against perpetrator as crucial, this approach focuses more on victims and survivors. Emotional catharsis is seen as necessary for social peace to be established. Regarding East Timor, this approach would argue that truth commissions would facilitate emotional catharsis, individual and societal healing, and social peace.

It should be mentioned that this trichotomy consists of ideal types of approaches. There are scholars writing within more than one of these paradigms. Still, human rights activists, victim-groups and many scholars that have criticised the transitional justice process in East Timor for its lack of criminal prosecution can be seen to belong mainly to the legalist paradigm. What is also noteworthy, is that all these approaches to a certain extent makes

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<sup>61</sup> Whereas the legalist approach builds on ideas from political liberalism, the pragmatic approach is closely associated with political realism. Esteemed realists such as Henry Kissinger and Samuel Huntington belong in this group, and place much emphasis on power and personal interests of actors. However, pragmatism is not necessarily connected to realism, a pragmatic evaluation of the optimal choice of policy can also stem from moral, norms or passion, as Jon Elster illustrates in "Coming to Terms with the Past: a Framework for the study of justice in the transition to democracy", (1998), as cited in Vinjamuri and Snyder, "Advocacy and Scholarship", 355-356.

claims about consequences - they are all concerned with being the best response to atrocities, to prevent future atrocities, to contribute to social peace and democracy. It is therefore useful to evaluate the outcomes of the transitional justice process in East Timor in the light of these different approaches, and at the same time assess the empirical validity of the claims they set out. The analysis of the consequences of the transitional justice measures in chapters four and five will therefore be viewed in relation to these different approaches.

### **3. What factors explain why the process of transitional justice has become more reconciliatory than judicially focused?**

To answer the first research question, an examination of attitudes of the parties that have been of importance for East Timor's transitional justice process is necessary. These parties are Indonesia, the international community, especially the UN, the US and other important regional neighbours such as ASEAN-states, and lastly the East Timorese themselves. What have been their positions towards legal accountability for past atrocities in East Timor, and what has shaped these positions? This chapter will start by analysing the Indonesian attitude to accountability for past human rights violations, how and why this is shaped, before the position of the international society is discussed. Lastly, building on the preceding sections it will be analysed why the East Timorese have favoured a more reconciliatory than judicially focused approach.

#### **3.1 The Indonesian position**

Ever since the aftermath of the 1999-violence, when calls for an international tribunal rose from the international society, the official Indonesian response has been negative. As such the greatest political obstacle to the pursuit of justice for past human rights violations in East Timor has been Indonesia's refusal to seriously support any such process. This has undermined all judicial initiatives taken to address past atrocities in East Timor, both the Ad Hoc Court in Jakarta and the Serious Crimes process in East Timor. As will be outlined later, the Indonesian position has also had great repercussions for how the international community and the East Timorese themselves have chosen to deal with the past. It is therefore relevant to ask what has driven this attitude, and why it is so hard to change or challenge?

To answer this, it is necessary to look at the historical and political context, and elaborate on the dominant position of the military. The military has since Suharto occupied a strong position in Indonesia. Based on the doctrine of *dwifungsi* – dual function, TNI interference in political issues was justified by viewing the military's role as external and internal guarantor

of security and stability, and as a legitimate internal actor in socio-political affairs.<sup>62</sup> This bestowed the TNI with a dominant influence, if not control over Indonesian politics. The TNI was for a long time by law guaranteed 100 seats in the main legislative chamber, and both active and retired officers filled posts in civil administration, the cabinet, and in state corporations.<sup>63</sup> Both long reigning Suharto and the current president Susilo Bambang Yudhoyono belonged to the cadre of TNI officers.

The military influence on society steered not only policy but also history-writing. Due to the military dominance the history of Indonesian occupation of East Timor has been portrayed quite differently in Indonesia than in the rest of the international society. For Indonesia, invasion and occupation of East Timor in 1975 has been depicted as a real-political necessity. The military was frightened by the communist aspects of the East Timorese political party FRETILIN. Fearing that an independent East Timor could serve as a springboard for destabilisation and communist subversion of Indonesia, they were able to convince Suharto that integration of East Timor was essential to protect Indonesian stability and sovereignty.<sup>64</sup> After annexation, East Timor was looked upon as Indonesia's rightful property whose incorporation into Indonesia had to be protected. This was also highly symbolic, in order to prevent a 'Balkanisation' of Indonesia if East Timor was to break away. The repressive sides of the invasion and occupation were concealed or styled to fit the national interest. The 1999-violence is most often explained as infighting between different East Timorese factions, while some colourful accounts blame UN and Australian involvement.<sup>65</sup> The TNI are accused for failing to stop the conflict, but are not recognised as being responsible for it. This historic interpretation is widely held in Indonesia, but does not correspond to the truth.<sup>66</sup>

Since the fall of Suharto, Indonesia has been in a process of democratisation. The military grip on governmental institutions and policy is intended to be phased out via reforms.

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<sup>62</sup> The idea of *dwifungsi* was elaborated by General Abdul Harris Nasution in 1958, and became prevalent especially under Suharto.; Damien Kingsbury, *Power Politics and the Indonesian Military*, (London: RoutledgeCurzon, 2003), 9.

<sup>63</sup> Military representation in the Peoples Legislative Assembly, DPR, is to be phased out by 2009.; Angel Rabasa and John Haseman, *The Military and Democracy in Indonesia: Challenges, Politics and Power*, (Santa Monica CA: RAND, 2002), 10, 47.

<sup>64</sup> Dunn, *East Timor*, 92-94.

<sup>65</sup> Tom Hyland, "Report Bites Harder Than Expected", *The Sydney Morning Herald*, July 11, 2008.

<sup>66</sup> David Webster, "History, Nation and Narrative in East Timor's Truth Commission Report", *Pacific Affairs*, 80, no. 4 (Winter 2007-2008): 583.; David Cohen, "Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta", *International Center for Transitional Justice (ICJT)*, (August 2003) vi, 51.

However, this has met opposition from hard-liners both within the military and civilian administration, and the process has moved slowly. Furthermore, civilian politicians have tended to become enmeshed in internal power struggles, leaving the military to enforce supremacy.<sup>67</sup> Lastly, as many retired TNI officers have continued to move to political parties and occupy important positions, the line between the civil administration and the military is still blurred. So though their power has decreased, Indonesia's military have remained an influential element of Indonesian society.

The attempts to hold former TNI personnel legally responsible for human rights violations in East Timor have been hampered by this military-political confluence. The issue has also been heavily politicised in Indonesia, with moderate reform willing politicians who welcome accountability as a step in the process of democratisation, and conservative nationalists who strongly oppose it.<sup>68</sup> The civilian presidents since Suharto – Jusuf Habibie, Abdurrahman Wahid and Sukarnoputri Megawati – though they have been pro-reform, have been easy targets for accusations of selling out the national interest if they try to adopt any policy detrimental to the military's interest. The pursuit of legal accountability has also been hampered by valid concerns that pushing the military too much can lead to retributions and possibly endanger the still fragile democratisation process.<sup>69</sup> Therefore, the Indonesian administrations after Suharto have to a large extent accommodated to TNI preferences on the issue of accountability for past violations in East Timor. Calls from the international society and NGOs to pursue legal justice has generally been met by a negative response. By reasoning that the accused human rights transgressions had taken place when East Timor was still, according to the official Indonesian version, a part of Indonesia – it has been characterised as internal events.<sup>70</sup> On this basis, Indonesia has strongly rejected any idea of an international tribunal, arguing that it is a matter under national jurisdiction. Still the Indonesian government seems to have been mindful of possible negative effects of complete non-cooperation with the international society. As a result, Indonesia's policy to the issue can

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<sup>67</sup> John Roosa, "Finalising the Nation: The Indonesian Military as the Guarantor of National Unity", *Asia Pacific Viewpoint* 48, no. 1, (April 2007): 100.; Jun Honna, *Military Politics and Democratization in Indonesia*, (London: RoutledgeCurzon, 2003), 1.

<sup>68</sup> Alan Dupont, "The Strategic Implications of an Independent East Timor", in *Out of the Ashes: Destruction and Reconstruction of East Timor*, eds. James J. Fox and Dionisio Babo Soares, 202-203, (Hindmarsh, SA: Crawford House, 2000).; Tony Parkinson, "Indonesia's dilemma over East Timor", *The Age*, April 10, 2002.

<sup>69</sup> Caitlin Reiger and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect", *International Center For Transitional Justice*, (March 2006): 8.

<sup>70</sup> Järvinen, "Human Rights", 45.



be characterised as doing just enough to satisfy the demands from the most critical international partners, without going as far to provide a proper legal process of accountability.<sup>71</sup> The process surrounding the establishment of the Ad Hoc Court in Jakarta, which will be outlined later in this thesis, illustrates this argument.

### **3.2 The position of the international community**

As the UN directly controlled East Timor from February 2000 to May 2002 the power of external actors over the transitional justice process was extensive. The UNTAET mandate gave the transitional administration unprecedented authority over East Timor, bordering towards sovereignty.<sup>72</sup> Afterwards, the international community's attitude has still been influential due to East Timor's weak position in terms of power and influence. However, the position of the international society on how to address past atrocities in East Timor has been ambiguous. Geopolitical concerns and self-interest have dominated preferences, resulting in a disinclination to pressure Indonesia for justice.

In the immediate aftermath of the atrocities in 1999, the call for justice was widespread among the world's nation-states. The violence connected to the referendum became the subject of condemnation by two UN Security Council resolutions that called for investigations into the issue of human rights violations and stressed accountability for perpetrators.<sup>73</sup> Simultaneously, as it came to the attention of the world community how grave human rights violations had taken place in East Timor since 1974, appeals for measures to address them as well naturally arose. Around September 24 to 27, 1999 the UN Commission on Human Rights convened a special session on East Timor, where it – despite protests from Indonesia – organised rapporteurs to visit the country and a UN Commission of Inquiry to be set up.<sup>74</sup> The last time the UNCHR had initiated special sessions was in connection to the conflicts in the former Yugoslavia in 1992 and 1993, and in Rwanda in 1994. On both occasions it had resulted in establishment of an international tribunal.<sup>75</sup> The Commission of Inquiry and the rapporteurs recommended the same measure for this situation. They found it highly unlikely

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<sup>71</sup> Ibid., 44.

<sup>72</sup> UN Security Council resolution 1272, empowered UNTAET with “all legislative and executive authority, including the administration of justice”. It also stated that UNTAET could employ “all necessary means to fulfil its mandate.

<sup>73</sup> S/RES/1264.; S/RES/1272.

<sup>74</sup> This was an independent UN Commission - the International Commission of Inquiry on East Timor (ICIET).

<sup>75</sup> Järvinen, “Human Rights”, 41.

that domestic prosecution would be fair and conform to international standards. The ability of Indonesia – which had produced these human rights violations for so many years and continued in other parts of the state such as Aceh and Papua – to confront own abuses was severely doubted.<sup>76</sup> For these reasons, the UN Secretary General was firmly behind an international tribunal.<sup>77</sup> It appeared to also have some support in the Security Council from notably the UK and the US.<sup>78</sup> However, as the situation normalised, the international support for such a measure waned. It was especially significant how Indonesia fiercely rejected any international involvement, and characterised the past as ‘internal events’. This made the international community and the UN hesitant of pressuring Indonesia to accept an international tribunal.

Compared to the other situations where an international tribunal has been established – the former Yugoslavia, and Rwanda – Indonesia was in a much stronger position. It was shaken by the recent Asian financial crisis, but it was not shattered and divided by a civil war. Moreover, in addition to a general respect for Indonesian sovereignty, there were important geopolitical concerns that influenced the international community’s attitude. Indonesia is for several reasons a valued member of the world community that many would go to great lengths not to antagonise. It is the world’s sixth largest state by population. The state is economically important as a substantial oil producer and occupies a strategically vital position between the Pacific and Indian Ocean. In addition, Indonesia is often seen as the key to regional stability and peace, and there is apprehension that pressuring the state too much can have regional security implications.<sup>79</sup>

Throughout the Suharto regime (1966-1998) the bonds between Indonesia and the Western world had been close. Suharto supported the West in their fight against communism and the West acquiesced and quietly aided Indonesian human rights transgressions through assistance to the military. The events of 1999 upset this alliance, but the most significant Western states

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<sup>76</sup> The United Nations, *Identical Letters dated 31 January 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights*, A/54/726- S/2000/59, January 31, 2000.; Järvinen, “Human Rights”, 41-42.

<sup>77</sup> Ian Martin and Alexander Mayer-Rieckh, “The United Nations and East Timor: From Self-Determination to State-Building”, *International Peacekeeping*, 12, no. 1 (2005): 138.

<sup>78</sup> Järvinen, “Human Rights”, 41.

<sup>79</sup> Paul Dibb, “Indonesia: the Key to South-East Asia’s Security”, *International Affairs* 77, no. 4 (2001): 829.; Erica Harper, “Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice,” *Journal of Conflict and Security Law* 10, no. 2 (2005): 161.

such as the US, the UK, Australia, and Japan were eager to re-establish positive relations with Indonesia for economic and strategic reasons. They were therefore reluctant to press for an international tribunal. Russia and China, two other important states whose approval is crucial for the UN Security Council to establish an international tribunal, were also little inclined to support the idea, apprehensive that this could lead to similar attention towards their policies in Chechnya and Tibet.<sup>80</sup> The member states of ASEAN have for similar reasons not been predisposed to support pressures for Indonesia to agree hold an international tribunal. They have in general been concerned over what they see as interventionist policies from Western states. They worry that allowing international intrusion into domestic affairs can become a precedent for future erosion of their sovereignty. They have also been fearful of alienating the alliance's most important member, Indonesia.<sup>81</sup> On the basis of this reasoning any international tribunal for the East Timorese-Indonesia situation would not have been supported.

The decision by the world community and the UN to not initially press for an international tribunal also hinged on President Wahid's seemingly credible promise to prosecute internally. There was optimism concerning the Indonesian democratisation process both in the international community and in East Timor.<sup>82</sup> Moreover, there was hesitance to pressure the Indonesian government out of fear of the TNI reacting and the democratisation process backfiring.<sup>83</sup> Considering the staggering costs connected to the earlier ad hoc tribunals for Rwanda and the former Yugoslavia, the UN was also hesitant as there was general donor fatigue.<sup>84</sup> Therefore, when the Indonesian government promised it would take responsibility to hold perpetrators accountable internally the UN Secretary General Kofi Annan decided to support prosecutions on the national level instead of an international court.<sup>85</sup> Indonesia established the Ad Hoc Court in Jakarta, and the Special Representative of the Secretary-General (SRSG) – head of the UNTAET, Sergio Vieira de Mello proceeded to set up an internal judicial mechanism for East Timor – the Serious Crimes Process (SCP).

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<sup>80</sup> Järvinen, "Human Rights", 43.

<sup>81</sup> Dupont, "Asean's response", 161, 163

<sup>82</sup> Megan Hirst and Howard Varney, "Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor", (Occasional Paper Series), *International Center for Transitional Justice* (June 2005), 4.

<sup>83</sup> Martin and Mayer-Rieckh., "The United Nations", 138.; Michael G. Smith and Moreen Dee, *Peacekeeping in East Timor: The Path to Independence*, (Boulder: Lynne Rienner, 2003), 61.

<sup>84</sup> Reiger and Wierda, "The Serious Crimes Process", 8.

<sup>85</sup> Hirst and Varney, "Justice Abandoned?", 4.

As will be outlined later, the Ad Hoc Court in Jakarta became widely recognised as an unsatisfactory process of justice, not following international standards and not providing accountability. As Indonesia also refused to cooperate with the Serious Crimes Process in East Timor, it was clear that national prosecution would not produce justice in this case. Due to the gravity of the crimes committed in East Timor, and the principle of complementarity, it can be argued that the international society has an obligation to ensure prosecution of the serious crimes committed in East Timor, as the two states directly involved have shown themselves unwilling and unable to do so.<sup>86</sup> However, Indonesia has continued to insist that the Ad Hoc Court in Jakarta was a legitimate and fair process of justice.<sup>87</sup> Any later calls for additional legal prosecutions, especially by way of an international tribunal, have been rejected. The Indonesian government has also actively lobbied against an international tribunal. It has received support from the US Bush-administration, with its principled stand against international jurisdiction.<sup>88</sup> The US position is complex however, as many congressmen favour more pressure for accountability and an international tribunal. It remains to be seen whether the Obama-administration can produce change on this issue. Until now, the most important external actors such as the US, Australia and ASEAN have continued to cling to the non-confrontational approach towards Indonesia for geopolitical reasons. The September 11 terrorist attacks in 2001 and the Bali bombing in 2000 notably turned the US and its partners focus from “soft” liberal issues to real-political concerns such as security.<sup>89</sup> In the context of post 9/11, as the world’s largest Islamic nation, Indonesia obtained political significance as a potential Islamic ally for the West, and by offering an opportunity for the US to improve its image in the Muslim world.<sup>90</sup> Though Indonesia has been dependent on the US, Japan and Europe for trade and military cooperation, there has also been concern that pressuring Indonesia too much can lead it to drift towards China.<sup>91</sup> At the time of the worst violence in 1999, most of these states stopped military cooperation with Indonesia. Since then

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<sup>86</sup> As some of the human rights violations committed in East Timor are in violation of jus cogens – peremptory norms, such as crimes against humanity and torture there is universal jurisdiction and an obligation to prosecute. The judicial principle of complementarity posits that only when relevant national courts are not investigating or prosecuting or have not done so, can another (either other state or international) court do so. Therefore if national prosecution has been ineffective, one can argue that there is a legal duty for other parties to ensure judicial accountability.

<sup>87</sup> La’o Hamutuk, “The Special Panels for Serious Crimes – Justice for East Timor”, *La’o Hamutuk Bulletin* 5, no. 3, 2004,

<sup>88</sup> Diane Farsetta, “Finding Justice in East Timor”, *Free Speech Radio*, October 4, 2005.

<sup>89</sup> Järvinen, “Human Rights”, 67.

<sup>90</sup> James Dunn, “Hillary Clintons Asia Tour”, *The Sydney Morning Herald*, February 25, 2009.

<sup>91</sup> Dupont, “The Strategic Implications”, 202.

however, this has gradually been resumed.<sup>92</sup> Moreover, the most important external actors have also partly evaded responsibility by arguing that it is an internal matter for the two states involved, and as long as East Timor and Indonesia are not willing to pursue justice, they will not exert pressure.<sup>93</sup>

### 3.3 East Timor - dilemmas of justice and reconciliation

While the UNTAET mandate was broad, it poorly defined the issue of local participation in governance of the territory.<sup>94</sup> However, the SRSG Vieira de Mello had been given wide freedom of action, and he was sensitive to local politicians and wanted to include them in the administration.<sup>95</sup> This opened up for prominent domestic actors to play a significant role, even during UNTAET. In the post-conflict period, East Timor has had a valuable asset – strong leaders. Most notably, Xanana Gusmão, but also to a certain extent José Ramos-Horta, have been central figures in the nation's first ten years. Charismatic, intelligent and a shrewd guerilla fighter, Gusmão has been a front figure of the East Timorese resistance since the mid-1980s. Imprisoned in Jakarta from 1993 to 1999, he returned after Indonesia's retreat immensely popular, with great de facto authority. He took up his leadership position of the former umbrella organisation for the resistance movement (CNRM/CNRT), and became head of the East Timorese legislature-style body under UNTAET, the National Council (NC).<sup>96</sup> In May 2002 he was elected as East Timor's first President (2002-2007) and has after that

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<sup>92</sup> "Members of Congress urge President Bush not to Normalize Military ties with Indonesia", *East Timor and Indonesia Action Network, (ETAN)*, August 18, 2005, <http://www.etan.org/news/2005/08house.htm>. ; Moch. N. Kurniawan, "East Timor Human Rights Trials: All Just a Game", *The Jakarta Post*, December 26, 2002.; Dunn, personal communication (e-mail), March 12, 2009.

<sup>93</sup> Tom Hyland, "Jakarta Judges Clear ex-milita leader over Timor Carnage", *The Age*, April 6, 2008.; Tom Hyland, "Canberra Mute as Timor Accused Walk Free", *The Age*, April 13, 2008.

<sup>94</sup> Resolution 1272 emphasised that UNTAET should "consult and cooperate" with the local population, but had no specific guidelines as to how. A report from the Secretary-General from October 4, 1999 gave only vague directions. UNTAET in general suffered from a lack of pre-operation planning. This was a consequence of case specific factors such as the volatile political situation before the referendum in 1999, and Indonesia resisting any external interference, and the structural problem of incapacity in the UN Secretariat.; Martin and Mayer-Rieckh, "The United Nations", 133, 136. ; Anthony Goldstone, "UNTAET with hindsight: the peculiarities of politics in an incomplete state", *Global Governance*, January 1, 2004.; The United Nations, *Report of the Secretary-General on the Situation in East Timor, S/1999/I*, October 4, 1999

<sup>95</sup> Samantha Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World*, (New York: Penguin Press, 2008), 329.

<sup>96</sup> CNRT was officially established in 1979 as the Concelho Nacional da Resistancia Maubere (CNRM), in 1979. Xanana Gusmão was elected as leader of the CNRM in 1981. In 1998 CNRT was redefined as CNRT.; Dunn, *East Timor*, 274, 294, 337. ; Sergio Vieira de Mello established a National Consultative Council (NCC) in December 1999 - a body with legislature-like power made up of local politicians that would discuss and advise the transitional administration. The NCC was later redefined to the National Council (NC).; The United Nations, *Regulation no. 1999/3 On the Establishment of a national Consultative Council*, UNTAET/REG/1999/2, December 2, 1999.

occupied the position of prime minister. José Ramos-Horta similarly has drawn popular support from being a respected former member of the independence movement. He spent the Indonesian occupation in exile, serving as East Timor's foreign minister, and was crucial in gathering international support for the nation. He became the foreign minister in the first government under Mari Alkatiri (2001-2006), and was appointed prime minister from June 2006 to May 2007 by then President Gusmão. After elections in May 2007, he has been President of East Timor. Due to their popular support and occupation of vital formal positions, especially Xanana Gusmão, but also José Ramos-Horta, have in the post-conflict situation been East Timor's most significant and influential politicians. The official East Timorese handling of the transitional justice process must in addition to the influence of the UN, be seen as strongly shaped by, and at times directly emanating from their political views.

Both Gusmão and Ramos-Horta have taken a reconciliatory approach to past human rights abuses in East Timor. They have espoused strong support for reconciliatory measures, such as the two truth commissions, CRTR and CTF, and Gusmão has been an outspoken advocate of amnesty.<sup>97</sup> They have also on several occasions declared that they will not support legal prosecution, specifically not an international tribunal.<sup>98</sup> Their and other East Timorese leaders' embrace of a reconciliatory approach can be seen to stem from mainly three different sources, personal principles and convictions, traditional East Timorese forms of justice and conflict resolution, and practical challenges and constraints.

Principled perceptions on the concept of reconciliation must be seen as crucial for Xanana Gusmão's attitude to transitional justice. Gusmão has emphasised peace and social harmony, and seemed convinced that only reconciliation can promote harmony and peace. He has described reconciliation as "a process of 'overcoming what has happened and a process of forgiving each another mutually'".<sup>99</sup> He has further outlined how this is connected to peace by stating, "peace must derive from the peace of mind within each human being, between

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<sup>97</sup> Jolliffe, "Compromising Justice"; Mark Dodd, "Gusmão and Belo on Collision Course over Justice", *The Sydney Morning Herald*, December 18, 2000.; Xanana Gusmão, "Considering a policy of National Reconciliation", in *Timor Lives! Speeches of Freedom and Independence*, Xanana Gusmão, 121, (Alexandria, NSW: Longueville Books, 2005); Xanana Gusmão, "Challenges for Peace and Stability", Address by President Gusmão on the occasion of the Chancellor's Human Rights Lecture, University of Melbourne, Australia, April 7, 2003, [http://www.jsmp.minihub.org/News/News/10\\_04\\_03nbxg.htm](http://www.jsmp.minihub.org/News/News/10_04_03nbxg.htm).

<sup>98</sup> Jill Jolliffe, "A Year To Remember", *The Age*, May 20, 2003.; Louise Williams, "East Timor Determined to leave its Past Behind", *The Sydney Morning Herald*, November 7, 2003.

<sup>99</sup> Gusmão, "Considering a Policy", 98.

individuals expressed in the solidarity between communities, expressed by tolerance within societies until it reaches the level of mutual respect between countries”.<sup>100</sup> On this background he has argued that he is not against the concept of justice, but that East Timor needs “a reconciliation process whereby justice is meted out to perpetrators but which eschews revenge, resentment and hatred”.<sup>101</sup> As he explains, if a perpetrator is sentenced to prison, without having reconciled with his former foes, he will walk out after the sentence is served and the conflict will still exist as the personal antipathy is still present.<sup>102</sup> Therefore, in Gusmão’s opinion, legal justice must include or preferably be preceded by a process of reconciliation so that emotions of hatred and revenge are not left to fester – “without reconciliation there is no peace”.<sup>103</sup> Gusmão has in line with the logic of the emotional psychology paradigm also emphasised dialogue and truth-seeking – he campaigned forcefully for a truth-commission after 1999 – to obtain social peace and reconciliation.

Traditional methods of conflict resolution and justice can be seen to have influenced both political elite and grass-root approaches to transitional justice in East Timor.<sup>104</sup> Despite long Portuguese rule and Indonesian occupation, East Timor remained largely unaffected by the respective ruler-states formal judicial system. Though superficially existing and utilised sporadically, the Indonesian system was not trusted and largely seen as corrupt. Many smaller offences and conflicts, such as domestic violence were not dealt with by this system. East Timor therefore retained its local practices for conflict resolution. Being a highly rural society, the local culture is highly ‘collectivistic’ – group values and preferences are prioritised over individual concerns.<sup>105</sup> It stresses social order and harmony. Concepts such as ‘law’ and ‘crime’ does not exist, but there are notions of people ‘doing wrong’ and upsetting the social order.<sup>106</sup> If a violation of social norms has taken place, a conflict resolution mechanism is utilised which aims to restore harmony and social stability. The method is

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<sup>100</sup> Gusmão, “ ‘Volunteerism – Achieving Reconciliation and Peace’ ”, in *Timor Lives! Speeches of Freedom and Independence*, Xanana Gusmão, 81, (Alexandria, NSW: Longueville Books, 2005).

<sup>101</sup> *Ibid.*, 80.

<sup>102</sup> Gusmão, “Considering a policy”, 121.

<sup>103</sup> Gusmão, “Volunteerism”, 80, 82.; “Considering a policy”, 111, 112.

<sup>104</sup> This section is based on Dionisio Babo Soares “*Nahe Biti: The Philosophy and Process of Grassroot Reconciliation (and Justice) in East Timor*”, *The Asia Pacific Journal of Anthropology*, 5, no. 1, (April) 2004: 15-33 and Tanja Hohe and Rod Nixon, “Reconciling Justice ‘Traditional’ Law and State Judiciary in East Timor”, *United States Institute of Peace* (January 2003): 1-76

<sup>105</sup> Industrialisation and urbanisation in East Timor is minimal with 90 per cent of the workforce in the agricultural sector, and over 70 per cent living in the countryside.; “Timor-Leste”, CIA - World Factbook, May 11, 2009.

<sup>106</sup> Hohe and Nixon, “Reconciling Justice” (their inverted commas), 16.

strongly consensus-oriented, the affected parties meet, and through discussions, agreement is reached. Depending on the seriousness of the violation these meetings revolve around the authority of the family head or local leaders. To restore the social order, it is usually agreed that the perpetrator has to be punished. Punishment commonly consists of compensation, also for serious offences as murder.<sup>107</sup> However it should be noted that the goal of punishment is not directly to penalise the offender or compensate the victim, it is to re-establish the social order and harmony. The punishment alters the balance, the wrong is righted by complimentary action. However, social harmony is not complete without a final important act – reconciliation. The conflicting parties must conciliate, otherwise antagonism and tensions can live on and resurface later. This is obtained through a symbolic, ritual-based ceremony, which gives closure to the conflict. The notion of shame is important for traditional conflict resolution. A violation of a social norm entails much shame for the perpetrator and his family. It is important to save face, and avoid obtaining a bad name. As a result there is great pressure to perform conflict resolution processes, and reconcile, only then can the shame be avoided.<sup>108</sup> With its great emphasis on consensus and reconciliation, this traditional method is essentially a form of restorative justice. It is a style of conflict resolution which has been essential in small communities with tightly knit social connections, where conflicts easily could bring about community disintegration. A non-confrontational approach has been needed so that social relations can be repaired and upheld.<sup>109</sup> The vital components of this method – emphasis on non-confrontation, consensus, social harmony, and reconciliation has been influential for the transitional justice approach taken in East Timor. They can be recognised in viewpoints and in measures. Gusmão’s thinking on reconciliation and justice is very much in line with cultural traditions. The transitional justice measures proposed by Ramos-Horta and Gusmão, the border reconciliation meetings, the CRTR and the CTF that will be outlined later, also embody vital components of traditional justice and conflict resolution.

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<sup>107</sup> The idea is that the punishment should fit the crime, and the greater the violation, the larger the compensation. The compensation can be clothes, animals, money or performing work and services. Public humiliation and physical harm is also at times used as punishment.; Hohe and Nixon, “Reconciling Justice”, 19-21.

<sup>108</sup> The essentials of this traditional conflict resolution approach are common in many Asian states, also in Indonesia. A significant example of its influence is recognisable within the Association of South East Asian Nations (ASEAN). ASEAN’s “Treaty of Amity and cooperation” enables conflicting parties to solve their disagreements internally without interference, so they can avoid the shame connected to even admitting a problem exist.

<sup>109</sup> Hohe and Nixon, “Reconciling Justice”, 23.



While principles and traditional methods of conflict resolution can be seen as underlying factors, real-political constraints and challenges have been the direct causes to a reconciliatory approach. Both Gusmão and Ramos-Horta are pragmatic politicians, who have emphasised reconciliation before justice for practical and political reasons. Gusmão, from his personal principles, seems convinced of the utility of reconciliation. For him it is the tool that can facilitate stability, development social justice and peace for East Timor.<sup>110</sup> José Ramos-Horta has shared this attitude to a certain extent, but seems more influenced by the external constraints – lack of support from the UN and Indonesia. They seem not averse to the concept of justice, but argue that due to geopolitical restraints, and practical needs, reconciliation is necessary.

The practical issues that have made these leaders embark on a reconciliatory approach can be divided into internal and external considerations. The most central external consideration is the relationship to Indonesia. Since independence one of the most determining foreign policy issues for East Timor has been the relations it managed to establish with Indonesia. Indonesia was, and still is one of the most significant external variables to East Timor's internal stability, territorial integrity, economic growth and development. The benefits for East Timor of having positive and functional diplomatic interactions with Indonesia are important.

The structural relationship between East Timor and Indonesia is characterised by great asymmetry. Indonesia is a large state, rich on crucial resources and for the international society a valuable ally in many aspects. East Timor is a small state, for most other nations strategically, politically and economically insignificant. Though the economy is slowly growing, GDP per capita for 2008 was estimated to be around USD 2,500, placing East Timor among the poorest countries in the world.<sup>111</sup> The pressing poverty gives dramatic consequences, hunger and malnourishment is rife, starvation has been a not uncommon cause of death.<sup>112</sup> Furthermore, the state has little administrative capability and infrastructure, while unemployment is high. Though formally estimated to around 40 per cent, in rural areas it can be as high as 80 per cent.<sup>113</sup> There is potential for future economic expansion in East Timor

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<sup>110</sup> Gusmão, "Volunteerism", 86.

<sup>111</sup> This is adjusted to PPP, "Timor-Leste", CIA.

<sup>112</sup> Open Society Institute and the Coalition for International Justice, "Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor", November 2004, 47.

<sup>113</sup> United Nations, *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S/2000/53, January 23, 2000.

based on tourism and agribusiness, and from extraction of oil and gas resources from the Timor Gap.<sup>114</sup> However, East Timor has since independence been critically dependent upon external help such as aid and positive trading relationships with other states in order to subsist and to increase own development and growth.<sup>115</sup>

After de-integration Indonesia had the potential of being a crucial trade partner and food-supplier for the newly independent East Timor. A non-cooperative relationship to Indonesia would have been very destructive for economic, defence and political reasons. Indonesia could have restricted access to East Timor, and obstructed the trade and development that East Timor is completely dependent on. Though the Indonesian government seems resigned to the fact that East Timor is an independent state, an ill-disposed Indonesia would have posed a threat to territorial integrity.<sup>116</sup> The strong neighbour was easily capable of destabilising East Timor, with continued support to pro-Indonesian militia, cross-border incursions or restrictions on sea and air access.<sup>117</sup> Moreover, for East Timor to gain from the opportunities of regional support and cooperation from ASEAN, a good relationship to Indonesia would be necessary.

As calls for legal accountability for past crimes in East Timor have generally been met with fierce hostility in Indonesia, it has been an issue with the potential of seriously disrupting bilateral-relations. For a nation so critically dependent upon having a positive relationship with its closest neighbour – to press for justice would not have been politically constructive. East Timor's security, economy and development would be critically at stake. This has been one of the main facets of East Timor's transitional justice dilemma. Though legal justice is desired, so is a good relationship to Indonesia.

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<sup>114</sup> Under the terms of the Timor Sea Treaty from 2002, East Timor and Australia share the rights to what is believed to be petroleum resources worth billions of USD, in the Timor Sea.

<sup>115</sup> A 2005 estimate from NORAD put aid as a percentage of GDP to 33, 5 per cent.; NORAD, [http://www.norad.no/items/14261/38/7992061261/east-timor\\_Eng.pdf](http://www.norad.no/items/14261/38/7992061261/east-timor_Eng.pdf)

<sup>116</sup> There are some elements within the Indonesian right-wing, nationalist political segment, and from the military in West Timor who would like to see East Timor incorporated into Indonesia again. This is not a dominant group, and any such action is not likely to happen due to constraints from more moderate politicians and the international reactions it would entail. ; John Aglionby, "John Aglionby on East Timor", *The Guardian*, May 25, 2006.

<sup>117</sup> Andrew MacIntyre, "An International Strategy for the New East Timor", in *Out of the Ashes: Destruction and Reconstruction of East Timor*, ed. James J. Fox and Dionisio Babo Soares, 236, (Hindmarsh, SA: Crawford House, 2000).

A further external consideration has been the international community's position. The waning support for an international tribunal in the aftermath of 1999 was quickly noticed by East Timorese politicians, who realised that they could not expect support from crucial third parties if they chose to push the issue. The outcome might be an East Timor left alone to face a hostile Indonesia. Both Xanana Gusmão and José Ramos-Horta have been highly apprehensive of these external constraints and have chosen to accommodate after them. Both have been clear that East Timor's economic development, security, and political stability are dependent upon strengthening cooperation with its neighbouring state.<sup>118</sup> This has led to a general attempt to obtain as cooperative and positive relations with Indonesia as possible. Specifically, this has influenced their approach towards past human rights abuses and made it highly reconciliatory. Examples are their reiterated statements emphasising the significance of a good relationship to Indonesia and rejecting an international tribunal, Gusmão's critique of SCU's indictment of Indonesian officers, and his warm embrace of Indonesian military general Wiranto.<sup>119</sup>

Internally, after Indonesian withdrawal there were many potential conflict-lines in East Timorese society. Some of these concerned structures that were created during Portuguese and the Indonesian occupation, such as competition and discord between state and church authorities, different regional groups, different linguistic groups (Indonesian vs. non-Indonesian speaking), and centre-periphery conflict.<sup>120</sup> Above all, a crucial challenge was the legacy of antagonism between pro-integration and pro-independence groups.<sup>121</sup> Both before and during the Indonesian occupation there had been conflict between these groups, and within them. As a part of classic divide and conquer strategy, these axes of hostility were encouraged and exacerbated by the Indonesian military.<sup>122</sup> Some escalated into violent clashes

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<sup>118</sup> See for example: Gusmão "Volunteerism", 81.; Xanana Gusmão, "Statement by His Excellency Kay Rala Xanana Gusmão President of the Democratic Republic of Timor-Leste, On the Indictment by the Deputy General Prosecutor for Serious Crimes of Indonesian Officers for events in Timor-Leste during 1999", February 28, 2003. <http://www.jsmp.minihub.org/Reports/otherresources/xgonscu28feb03jr01mar03.htm>

<sup>119</sup> "Unfulfilled promises", 40.

<sup>120</sup> Geoffrey C. Gunn and Reyko Huang, *New Nation: United Nations Peacebuilding in East Timor* (Japan: Geoffrey C. Gunn, 2006), 119-132.

<sup>121</sup> Pro-integrationists are defined as the ones who wanted continued integration with Indonesia. By the terms of the referendum in 1999, they were in favour of autonomy, instead of independence, they are therefore often referred to as pro-autonomy.

<sup>122</sup> Fredric Rawski, "Truth Seeking and Local Histories in East Timor", *Asia-Pacific Journal on Human Rights and the Law* 1, (2002): 92.

where human rights violations were committed on all sides.<sup>123</sup> After 1999, there was a glaring need to resolve these antagonisms and hostility of the past if East Timor was to function as an independent state. This was recognised by both the UNTAET administration and Gusmão. Both saw reconciliation as necessary to ensure domestic political stability that again could lead to development and peace.<sup>124</sup>

An important part of this was the need to deal with still active and violent pro-integration groups to hinder future conflict. In the first years after 1999, the situation on the border between East Timor and Indonesian West Timor was still tense. Pro-integration militias from 1999 were still active in West Timor, and undertook minor border incursions.<sup>125</sup> The militias were also able to control some refugee camps, preventing the around 200,000 refugees who had been forcibly displaced to return to East Timor.<sup>126</sup> In addition, East Timorese who had participated in the Indonesian administration had sought refuge in West Timor as well as other former pro-integrationists who had not been so active. These groups numbered around 100,000 people, most of whom were afraid to return out of fear of retaliation and revenge by their former communities.<sup>127</sup> Though there was a desire to put the perpetrators of crimes in this group to justice, it was also important to reintegrate these individuals back to their former communities in a way that could prevent future conflict. A legal process would not facilitate this. To the contrary, the threat of prosecution held many back from returning. Xanana Gusmão quickly recognised these problems, and chose to let them guide the response to the situation rather than to push for prosecution. He argued that reconciliatory measures had to be made to both to spur these people to return, and to hinder later conflict and social instability.<sup>128</sup>

A last internal pragmatic consideration that has weighed the pendulum towards a reconciliatory approach is more self-serving, and building on a culture of informal bonds of collegiality that are strong in East Timor. As mentioned earlier, during the occupation, East

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<sup>123</sup> “Chega!”, 149-153. ; This is a fact that is often greatly exaggerated in Indonesian press and politics. Though East Timorese did commit atrocities, it must be stressed that the majority of human rights violations were the responsibility of the Indonesian military, both directly, and indirectly in that much of the intra-Timorese violence was fomented by the TNI.

<sup>124</sup> Gusmão, “Volunteerism”, 81.; Xanana Gusmão “Challenges”.

<sup>125</sup> Dunn, *East Timor*, 373.

<sup>126</sup> *Ibid.*, 373.; Joseph, Oenarto, “Can East Timor Survive Independence”, *North Australia Research Unit Discussion Paper, Australian National University (ANU)*, 17, 2000, 17.

<sup>127</sup> Tim Johnson, “Anti-independence leader apologises to East Timor’s Gusmão”, *Kyodo News*, June 15, 2000.

<sup>128</sup> Dodd, “Gusmão and Belo”.; Gusmão, “Considering a Policy”, 114.

Timorese on all sides of the conflict committed human rights crimes. Gusmão was himself at a period in charge of a battalion with a particularly brutal reputation. So his, reconciliatory stance has possibly also in part originated from a fear of himself or other former colleagues from the former resistance movement being implicated in a legal process.<sup>129</sup> He has stated how he “will not accept the possibility of a Timorese becoming a possible defendant in the international tribunal”.<sup>130</sup> This attitude has to a certain extent been shared by other East Timorese politicians, and can be seen as part of the reason some have favoured a reconciliatory approach to crimes committed between 1974 and 1999, but prosecution from 1999 onwards. If an international tribunal was to be erected, with jurisdiction going from 1974 to 1999 – as many want, then former members of the resistance could risk prosecution, and loss of freedom and career.

For the reasons now mentioned, accountability for past human rights crimes is a sensitive issue in East Timorese politics. Reflecting the practical challenges, and personal experiences and preferences – a diverse line of policies have been advocated from the various political parties, from emphasising reconciliation, to supporting amnesty for crimes committed between 1974 and 1999 but prosecution from 1999, and to calls for prosecution for all crimes since 1974.<sup>131</sup> However, Gusmão has been determined to let the past be the past, and focus on the future, and argues that future peace and development requires that reconciliation takes place before justice.<sup>132</sup> Horta has joined Gusmão in criticising recommendations for international tribunals by pointing out that there is simply not sufficient international will in favour of such a measure.<sup>133</sup> For their reconciliatory policies, they have been castigated by other politicians, the public, the church, NGO’s and the UN, who advocate prosecution from a legalist perspective.<sup>134</sup> Still, it should be noted that many other East Timorese politicians’ thoughts on how to address past atrocities have also been strongly influenced by the aforementioned factors. Therefore, although most of the dominant parties support a process of justice, they have also chosen to support policies aimed at reconciliation. To promote a good

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<sup>129</sup> James Dunn, personal communication (email), March 12, 2009.; Lucy Williamson, “East Timor’s window of opportunity”, BBC News, March 10, 2008.

<sup>130</sup> Gusmão, “Considering a Policy”, 120.

<sup>131</sup> “Political parties and Groupings of Timor-Leste”, Australian Labour Party (ALP) International Projects/ Australian Political Parties for Democracy Program, ed. Gavin Ryan, May, 2007.; Timor-Leste’s Parliamentary Elections”, *International Crisis Group (ICG)*, no. 65, June 13, (2007): 8-9.

<sup>132</sup> Xanana Gusmão “Considering a Policy”, 108.

<sup>133</sup> Peter James Spielmann, “East Timor Asked to Admit Wrongdoing”, *The Associated Press*, January 29, 2002.

<sup>134</sup> Most prominently, Prime minister from 2002-2006, Mari Alkatiri was fiercely opposing Gusmão’s reconciliatory policies, calling for prosecutions.

relationship to Indonesia has become gradually more a concern since 1999, as East Timor has progressed from a conflict to a post-conflict situation. As the world community and the UN also revealed that they were not willing to unequivocally support measures of legal accountability, it reduced the scope of available measures, pushing many towards a more reconciliatory line.<sup>135</sup> Significantly, before the last parliamentary elections in 2007, all of the political parties announced that they supported cooperative relations with Indonesia on the basis that it would further trade and security interests.<sup>136</sup>

### **3.4 Summary**

The process of transitional justice in East Timor has been more reconciliatory than judicially focused due to external constraints, and internal challenges and preferences. The military-political confluence in Jakarta has been the most fundamental hindrance to the pursuit of legal accountability for the most serious crimes. In addition the international community's disinterested attitude to justice has been influential. This made the stakes high for East Timor, and the East Timorese political elite decided to emphasise a good bilateral relationship rather than to push for justice. Domestically, there have also been several challenges that rigid pursuit for justice could have exacerbated. As such, there seems to have been numerous well-founded pragmatic and political reasons for the East Timorese choice of a reconciliatory policy.

It can be noted that the position of Indonesia, the international society, and partly also the East Timorese elite towards justice for past atrocities in East Timor therefore follows in the lines of the pragmatist paradigm. Though there have been appeals to justice by legalist reasoning, geopolitical and internal political concerns have steered the process of transitional justice, making it more focused on reconciliation than justice. Power, or lack of power, and the self-interest of the actors have largely determined their attitudes and actions. Both domestically and externally for East Timor, political and prudential concerns would have collided with justice, and therefore reconciliatory policies were chosen. In addition, the emotional psychology paradigm can be seen to have had some influence on certain members of the East Timorese political elite, most notably Xanana Gusmão.

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<sup>135</sup> Kingston, "Balancing Justice", 291.

<sup>136</sup> "Timor-Leste's Parliamentary Elections", 8-9.

## 4. Consequences of judicial measures

In order to establish legal accountability for past crimes two tribunals have been held, a national tribunal in Jakarta, and a hybrid tribunal for East Timor. However, despite these efforts, legal justice has not been fulfilled. Both tribunals failed to hold perpetrators of the most serious crimes accountable, and in the cases they did try, international standards of law were transgressed. How did this happen, and what were the consequences? This chapter will first analyse how, and then discuss the consequences. The latter discussion will in particular question the validity of the legalist paradigm and the utility of trials as measures to deal with past atrocities. The reasons for the failure of the tribunals will be outlined somewhat in detail as this is of importance for the ensuing discussion.

### 4.1. The Ad Hoc Court in Jakarta

In September 1999 the Indonesian Human Rights Commission (KOMNAS HAM) set up the National Commission of Inquiry on Human Rights Violations in East Timor (KPP HAM). It was mandated to gather information and determine whether serious human rights violations had occurred between January 1 and October 25, 1999.<sup>137</sup> Although this seemed like a significant step towards accountability, it must be pointed out that there was significant pressure from the world community for international investigation and prosecution. The internal self-scrutiny should therefore be seen as emanating largely from external influences, with aims of preventing an international investigation.<sup>138</sup>

KPP-HAMs final report from January 2001 concluded that there was evidence that crimes against humanity had taken place, in the form of a scorched earth campaign, mass murder, torture, disappearances, sexual violence against women and children, forced displacement and property destruction.<sup>139</sup> It also established that there was a strong relationship of cooperation between East Timorese militias, Indonesian military and the Indonesian government. The Indonesian civilian administration, military and police force had aided the militias in creating conditions that supported crimes against humanity, and these crimes had been perpetrated by both the militias, the military, the police and civil authorities. It stated that “it strongly

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<sup>137</sup> Serious human rights violations were defined as genocide, mass murders, torture, forced deportment, gender-related crimes and a scorched earth campaign.; “Executive Summary Report”.

<sup>138</sup> Järvinen, “Human Rights”, 44.; “Unfulfilled Promises”, 19.

<sup>139</sup> “Executive Summary Report”.

indicates a planned, systematic, wide-scale and gross violation of human rights.”<sup>140</sup> The report named 33 suspected perpetrators, both Indonesian public officials and militia leaders, and recommended that a court should be established to prosecute these.

Though it did only cover the events around the referendum in 1999, the KPP-HAM report was significant as it was internationally seen as accurate and reliable. The only exception was in Indonesia, where the findings of the report were criticised and the neutrality of members of the Committee was questioned by Parliament.<sup>141</sup> The Indonesian government did nevertheless, to satisfy immense pressure from the world community, follow up on its recommendation and established the Ad Hoc Human Rights Court on Timor-Leste in Jakarta with assistance from the UN. It began operating in March 2002.<sup>142</sup>

The proceedings in this court can be characterised as “show trials” however. Jon Elster’s separation of political and legal justice is useful to describe the process.<sup>143</sup> According to Elster, legal justice occurs when the laws are unambiguous, the judiciary is not influenced by other government departments, judges and jurors are unbiased and the trials follow due process.<sup>144</sup> Conversely, a trial will lean towards political justice the more it lacks these characteristics. Typically, in a case of political justice the ruling elite will be able to predetermine the outcomes unilaterally. The Ad Hoc Court in Jakarta was a clear example of political justice. The trials had an outside appearance of legality, but in substance the outcomes were determined by political factors. The process was clearly politicised, and a lack of political will in the high levels of the Indonesian government and the Attorney General’s office to prosecute suspected perpetrators made the outcome hollow. International standards of law were transgressed on several occasions, and the judiciary, especially judges and prosecutors were deeply prejudiced and acted under strong domination of political and military preferences. Ultimately the process did not hold any individual accountable for human rights crimes in East Timor.

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<sup>140</sup> Ibid.

<sup>141</sup> “Unfinished Business: Justice for East Timor”. ; Human Rightst Watch 2000, cited in Järvinen, UPI Working Papers 47, 45.

<sup>142</sup> This section is mainly based on David Cohen, “Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta”, *International Center for Transitional Justice*, (August 2003), as I have found this to be most comprehensive and reliable. It is consistent with other accounts of the process based on primary sources as for example: “Unfulfilled Promises”.

<sup>143</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, (Cambridge: Cambridge University Press, 2004), 84.

<sup>144</sup> A description of elements of due process is given on page 88. ; Elster, *Closing the Books*, 86-89.



The lack of political will to perform a credible process was demonstrated from the beginning, when the jurisdiction of the Court was limited temporally to only April and September 1999, and geographically to only three of East Timor's thirteen districts by Presidential decree from Megawati.<sup>145</sup> The exclusion of the 23 previous years of human rights violations was expected as the main pressure of the international community had been for legal accountability for the events of 1999. Notwithstanding, the decision to focus narrowly on separate incidents in 1999 meant that the prosecutors also were hindered from providing a broader perspective of the context and how the crimes of 1999 were systematic and organised.

Throughout the proceedings, the disinclination to prosecute thoroughly was again displayed several times, causing further breaches of international standards of law by both judges and prosecutors. Covering twelve trials, the court indicted eighteen defendants with background from the TNI, the police, the civilian administration and the militia. Of these, most were from lower ranks in the TNI, the high-level military officers mentioned as suspected perpetrators in the KPP-HAM were not indicted. Furthermore, despite the large amounts of available evidence, gathered by among others the KPP-HAM and UNTAET, the prosecution consistently refrained from pressing its case with credible and thorough information.<sup>146</sup> The prosecutors did also not explore the relationship between the TNI, the paramilitary elements and the Indonesian government officials. It was not investigated whether TNI officers at the high command level were responsible for instigating the violence in 1999. The trials hence supported the common image in Indonesia of the events as conflicts between different East Timorese groups, who were acting without any support or orders from Indonesian institutions.<sup>147</sup> The TNI had reacted to restore order, and the indicted were accused of failing to quell the violence. No responsibility on the high-command level in the TNI for organising the atrocities was acknowledged. It was a central failure of the tribunal that it failed to challenge this version of what happened in 1999, as it is contrary to all available evidence.

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<sup>145</sup> Dili, Liquica and Kovalima.; Järvinen, "Human Rights", 45; "Justice Denied for East Timor", *Human Rights Watch (HRW)*, December 20, 2002. <http://www.hrw.org/en/reports/2006/04/19/tortured-beginnings>

<sup>146</sup> The most obvious illustration of the political interference in the process was the case of Adam Damiri. As the highest ranking TNI official to be sentenced, he received three years of imprisonment. However, the prosecutor had argued for an acquittal.; Cohen, "Intended to Fail", vi, 14, 25-28.

<sup>147</sup> Cohen, "Intended to Fail", vi.

Only six of the indicted were convicted of crimes against humanity with sentences ranging from three to ten years, a length which in some cases was far below the international minimum standards.<sup>148</sup> The rest was acquitted. However, all of the convictions have later been overturned on appeal.<sup>149</sup> Therefore, the Ad Hoc Court in Jakarta manifestly failed its purpose to establish accountability for high ranking perpetrators responsible for the worst human rights violations in East Timor. The process further served to whitewash suspected perpetrators, as the Indonesian government has since claimed that the trials were legitimate and adequate, and that no further legal process is necessary.<sup>150</sup>

Though the fundamental reason for the tribunal's failure to produce accountability was lack of political will to prosecute, there were underlying systemic and case-specific factors that exacerbated this predicament. A general systemic problem was that the jurisdictional sector in Indonesia has also fallen victim to military influence. The position as Attorney General (AG) belonged during Suharto's rule almost exclusively to a TNI officer. Although the military hold is in process of being phased out, it was still present during the ad hoc tribunal. As Cohen describes, both the Attorney General's office and the Public Prosecutor's Service (PPS) were characterised by a military-hierarchical culture.<sup>151</sup> Prosecutors wore military uniforms, and performed military rituals, lower officers were not expected to speak when superiors were present. There was little room for individual thinking and initiative. Performance and advancement was evaluated on the basis of loyalty and cooperation with orders from above, not professional skills. There was an expectation that the PPS, as an arm of the state, had as its main task to serve the government's political interest, not the law.<sup>152</sup> Because of this culture in the jurisdictional sector, it was not necessary with specific orders from the high political level for the subsidiary organs to operate according to the political interest. The system was such that lower ranks on all levels would be sensitive to preferences of superiors, and act accordingly as this was what was expected to give rewards.<sup>153</sup> This unquestioning culture of loyalty makes it difficult to determine individual responsibility for the failing of the trials. However, as all actions will be determined by the predispositions of the elite, Cohen notes, "it is beyond dispute that the ultimate responsibility [resided] at the

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<sup>148</sup> Cohen "Intended to Fail", v.

<sup>149</sup> Tom Hyland, "Jakarta Judges".

<sup>150</sup> La'o Hamutuk, "The Special Panels".

<sup>151</sup> Cohen, "Intended to Fail", 48.

<sup>152</sup> Ibid., 47, 48, 51.

<sup>153</sup> Ibid., 49, 53.

highest levels of the AG's office and in the failure of political will in Megawati's government".<sup>154</sup>

There were also case-specific problems. The PPS was not given sufficient resources. There was inadequate witness protection, and throughout the trials, the judges were constantly subject to harassment and intimidation by members of the TNI who were present in the courtroom. However, both these and the aforementioned structural problems could have been defeated, had there been political determination on the top to pursue accountability. A last case-specific problem that would have been harder to overcome was the unfamiliarity of the Indonesian judicial system to deal with this type of cases. Prosecutors and judges had little experience in dealing with international human rights law and minimal professional competence on the area.<sup>155</sup> Moreover, the Indonesian prosecutors were not accustomed to opposing other parts of the state administration. Lastly, the Indonesian view of the events of 1999 was so entrenched that in many of the proceedings it was shared by the accused, the witnesses, the defence council, the judges and the prosecution.<sup>156</sup>

#### **4.2 The Serious Crimes Process (SCP)**

After the UNSG had decided on prosecution on a national level, a hybrid tribunal in East Timor was established by UNTAET regulation in 2000. It had three components: the Serious Crimes Unit, the Special Panel of Judges and the Public Defender's Office – that can collectively be referred to as the Serious Crimes Process (SCP).<sup>157</sup> The Serious Crimes Unit (SCU) consisted of UN civilian police that were tasked with investigation and prosecution of grave offenses committed during the violent period in 1999.<sup>158</sup> It was wholly staffed and funded by the UN.<sup>159</sup> The Special Panels of Judges comprised of three panels of judges, each with two international and one East Timorese judge, all funded by the UN.<sup>160</sup> The panels had jurisdiction over the serious crimes of genocide, war crimes and crimes against humanity committed at any time; and in addition the crimes of murder, torture and sexual violence

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<sup>154</sup> Ibid., 53.

<sup>155</sup> Ibid., 54-59.

<sup>156</sup> Ibid., vi.

<sup>157</sup> This categorisation of the hybrid tribunal is taken from Susanne Katzenstein "Hybrid Tribunals: Searching for Justice in East Timor", *Harvard Human Rights Journal* 16, (2003), 251. One could also classify only the Special Panels of Judges as being the *Hybrid Court* as is done in Järvinen, "Human Rights", 49.

<sup>158</sup> Järvinen, "Human Rights", 47.

<sup>159</sup> Kingston, "Balancing Justice", 277.

<sup>160</sup> There were two special panels at the Dili District Court and one at the Dili Court of Appeals.

committed between January 1 and October 25, 1999.<sup>161</sup> The Public Defenders Office was responsible for minor and grave offenses, and was almost wholly funded and staffed by the East Timorese.<sup>162</sup>

This blend of national and international elements is a defining feature of the hybrid tribunal. Also denoted as the mixed court model – it is a recent development in the field of transitional justice.<sup>163</sup> Both in institutional composition and concerning the law that is applied it is a combination of national and international elements. It is normally located within the national territory, but operating with significant international backing and assistance. Theoretically, it has the potential of being an optimal solution to delivering justice for international crimes. It is close to the people concerned and can be more meaningful than an international tribunal. It involves the local population which increases its legitimacy and public support, while the international involvement provides resources and can ensure that due judicial standards are upheld. International participation also gives an aura of independence over the tribunal, which can enhance its legitimacy domestically and internationally. As skilled international jurists work with domestic jurists, it can increase the competence in the local judicial sector. Moreover, the mix of international and local involvement can help spread norms of international humanitarian laws through networks of information-sharing and interaction between locals and international staff. Lastly, the hybrid court model gives justice quick and for less cost. They usually operate for a much shorter time and are far less expensive than international courts.<sup>164</sup>

UNTAET decided on this model for East Timor as the local judicial system was virtually non-existent after Indonesia's retreat in 1999. All legal infrastructure such as archives, books and other judicial facilities had been completely destroyed as a part of the scorched earth campaign by the TNI. The few individuals who had participated in the judicial sector under Indonesian rule had fled the country. There were approximately sixty people with law degrees

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<sup>161</sup> The law used for the proceedings were almost identical to the Rome statutes of the International Criminal Court.; Katzenstein, "Hybrid Tribunals", 251.

<sup>162</sup> Katzenstein "Hybrid Tribunals", 251.

<sup>163</sup> Besides in East Timor hybrid tribunals have also been established in Sierra Leone and in Cambodia.

<sup>164</sup> Laura Dickinson, "The Promise of Hybrid Courts", *The American Journal on International Law* 97, no. 2 (2003): 295, 306, 307.; Rama Mani estimates that the cost of ICTY and ICTR have been on average \$100 million per year, while the hybrid trials in Sierra Leone and Cambodia cost around \$100 million per three years.; Rama Mani "Does Power Trump Morality? Reconciliation or Transitional Justice", in *Atrocities and International Accountability*, eds. Edel Hughes et al., 32 (New York: United Nations University Press, 2007).

left, but only one had any judicial experience.<sup>165</sup> As the UN had ruled out the option of an international tribunal, it was still acknowledged that a certain degree of international support and participation was needed to ensure prosecution after due standards in East Timor. In addition it was thought that the experiences of the hybrid court could be a learning measure for the East Timorese judicial sector that could strengthen the national judiciary.

However, the hybrid tribunal was not as successful as many had hoped. Its theoretical justifications failed to materialise, and particularly, the tribunal did not achieve its most important task, to establish accountability for the serious human rights violations of the past. The primary reason for the failure to produce accountability must be attributed to Indonesia's refusal to cooperate. This made proper prosecution impossible. While the secondary reasons for the tribunal's fiasco can be attributed to several factors, the insufficient will of the international community, the UN, and the East Timorese government to make the pursuit of justice a main priority was clearly a significant cause. This was a consequence of reconciliation being valued over justice for geopolitical reasons. Indonesia's attitude conditioned the East Timorese government, the international society and the UN from pressuring the issue. As such the political sensitivity of the situation and political concerns were instrumental for the tribunal's failure.

The SCP lasted till May 20, 2005. By that time 55 cases had been tried and 84 people had been convicted.<sup>166</sup> Despite the large number of cases tried, most of the convicted were only low level perpetrators as minor East Timorese militia leaders.<sup>167</sup> The SCU indicted 395 defendants, but over 300 of these were outside the geographical jurisdiction of the tribunal.<sup>168</sup> 75 per cent of the indicted were in Indonesia.<sup>169</sup> A Memorandum of Understanding (MOU) had been signed between UNTAET and Indonesia in April 2000 that provided for cooperation in judicial matters. It specifically required each party to hand over suspects for prosecution if

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<sup>165</sup> Katzenstein, "Hybrid Tribunal", 254; Hirst and Varney, "Justice Abandoned", 24.

<sup>166</sup> Hirst and Varney, "Justice Abandoned", 9.

<sup>167</sup> The East Timorese process displayed a high number of cases processed in a short time-span compared to the ICTY and ICTR. The ICTY started in 1994 and has until now laid down 60 convictions. The ICTR for Rwanda has since 1995 only finished 21 trials and convicted 29 persons.; United Nations, International Criminal Tribunal for the former Yugoslavia (ICTY), "About the ICTY", <http://www.icty.org/sections/AbouttheICTY.>; United Nations, International Criminal Tribunal for Rwanda (ICTR), "Status of Cases", <http://69.94.11.53/default.htm>.

<sup>168</sup> Caitlin Reiger and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect", *International Centre for Transitional Justice*, March 2006, 18, 21.

<sup>169</sup> Järvinen, "Human Rights", 50.

asked to, but Indonesia did not adhere.<sup>170</sup> This was the largest obstacle to produce accountability for past human rights violations as the persons most responsible for the worst crimes were able to escape prosecution by staying in Indonesia.

While the SCP's main problem was lack of Indonesian compliance, the attitude of the UN and the East Timorese government exacerbated its difficulties. Both the SRSG for UNTAET, Sergio Vieira de Mello, and SRSG for UNMISSET, Kamallesh Sharma, were receptive to East Timorese political leaders' nervousness over their country's relationship to Indonesia, and to the international community's hesitance to antagonise Indonesia. Therefore, concerns regarding the potential destabilisation of the south-east Asian political balance, and the future relationship between East Timor and Indonesia, made the SRSGs hesitant to pressure for justice.<sup>171</sup> The SRSG and the East Timorese decision to value the relationship with Indonesia resulted in actions directly restraining and undermining the SCP. Concerning extradition, UNTAET could have put pressure on the Indonesian authorities to comply, but chose not to. The East Timorese government obstructed issuing international arrest warrants.<sup>172</sup> It also constantly attempted to lobby the Prosecutor-General to not "push too hard on the Indonesians".<sup>173</sup> There are indications that in the beginning, SCU investigations were conducted in a way that would specifically hinder implication of high-ranking Indonesian officials.<sup>174</sup>

Moreover, as the geopolitical circumstances gave the UN and the East Timorese government little incentives to prioritise justice, the SCP suffered from a general lack of commitment, which became a significant undermining factor.<sup>175</sup> One of the most pressing problems for the SCP was inadequate resources and funding. This stemmed not from lack of donors, but from unwillingness of both UNTAET and the later East Timorese government to allocate money to

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<sup>170</sup> As official excuses the Indonesian government argued that the agreement was only valid after parliamentary ratification, which had not occurred. After independence, Indonesian authorities claimed that the MOU only concerned the UNTAET period, and was no longer valid after May 20, 2002.; Hirst and Varney, "Justice Abandoned?", 6, 16.; Katzenstein, "Hybrid Tribunals", 272.

<sup>171</sup> Harper, "Delivering Justice", 161.

<sup>172</sup> "Unfulfilled Promises", 39, 40.

<sup>173</sup> The Prosecutor-General, Monteiro, cited in Järvinen, "Human Rights", 54.

<sup>174</sup> Katzenstein, "Hybrid Tribunals", 273; Reiger and Wierda, "The Serious Crimes Process", 19.; "Justice Denied", HRW.

<sup>175</sup> Katzenstein, "Hybrid Tribunals", 265-270.; Hirst and Varney, "Justice Abandoned", 1.; Reiger and Wierda, "The Serious Crimes Process", 40-41.

this sector.<sup>176</sup> Though the East Timorese unwillingness partly came from cultural reasons, it can also be attributed to the geopolitical sensitivities.<sup>177</sup> As a result, the East Timorese Ministry of Justice repeatedly turned down offers of generous financial support to the SCP.<sup>178</sup> The UN on the other hand revealed its lack of commitment by paying scant attention to ensure proper funding and qualified staffing of the units. Had the government and the UN really been committed to a thorough judicial process, the necessary resources and attention could have been distributed to this project. Instead, available personnel were sharply insufficient. Crucial judicial and administrative such as secretaries and translators were missing. Important physical resources such as transport facilities, internet, library and work spaces were also not available.<sup>179</sup> The repercussions were grave. The ability to conduct proper and thorough investigations was limited. As the selection-criteria for international judges were insufficient to provide competent personnel, the quality of jurisprudence was limited. The decision to make the Public Defenders Office entirely staffed by East Timorese might have had noble motives, but they were completely inexperienced. As there were no court stenographers or transcribers available for the first trials, no transcripts exist for these defendants to base appeals on, a grave breach of UNTAET regulation and international judicial standards. The right to an adequate defence was therefore seriously compromised for some of the prosecuted.<sup>180</sup> Insufficient numbers of certified interpreters created serious communication problems and sometimes also serious mistakes. It led to trials being interrupted and delayed, and witnesses having to repeat statements of traumatic events several times.<sup>181</sup> In sum, the lack of resources severely impeded the standard of the judicial processes.

In addition, the capacity building programs intended to increase the skills of the local jurors also greatly suffered from inadequate provision of resources, and lack of support and attention. The UN administration down-prioritised this section from the beginning; emphasis was not put on mentoring and transferring of skills.<sup>182</sup> Lack of interpreters made communication and learning difficult. Moreover, international staff were reported to have

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<sup>176</sup> Katzenstein, "Hybrid Tribunals", 265, 268

<sup>177</sup> The reluctance of the East Timorese government to prioritise justice was also due to its insistence that only projects where Portuguese was the language used would be supported, and the government would only accept financial support from Portuguese speaking countries.; Katzenstein, "Hybrid Tribunals", 265-270.; Reiger and Wierda, "The Serious Crimes Process", 40-41.

<sup>178</sup> Katzenstein, "Hybrid Tribunals", 268-270.

<sup>179</sup> Hirst and Varney, "Justice Abandoned", 19.; Katzenstein, "Hybrid Tribunals", 259- 264.

<sup>180</sup> Katzenstein, "Hybrid Tribunal", 253, 260, 264.

<sup>181</sup> For some of the worst examples see Katzenstein, "Hybrid Tribunal", 261.

<sup>182</sup> Katzenstein, "Hybrid Tribunal", 266.

behaved derogatory to local personnel. As a consequence the capacity building programs largely failed, and in some cases actually contributed to greater tension between East Timorese and UN personnel.<sup>183</sup>

The unwillingness of the UN and the government to provide resources and commitment to the process also produced political uncertainty for the institutions future. Together with high staff turn-over, this hindered proper planning, institutional efficiency and moral.<sup>184</sup> It also led to a strict time frame that limited the extensiveness of cases. Combined with a lack of planning it led to a poorly organised prioritisation of cases. Fair and consistent prosecution was missing. A central flaw was how investigation and prosecution focused on the 1999 violence and in comparison paid very little attention to the grave human rights violations committed before 1999. Although the Special Panels were given jurisdiction to judge cases involving war crimes, genocide and crimes against humanity committed at any time, a decision was made in 2000 to only prioritise crimes from 1999.<sup>185</sup> This policy-decision was ultimately a result of limited commitment and resources.<sup>186</sup> It was severely criticised by several East Timorese politicians, NGO's and victims, who pointed out how the violence in 1999 only made up less than 1 per cent of the total number of deaths.<sup>187</sup> The decision to treat crimes from 1999 thoroughly resulted in hundreds of indictments, but mostly of only low-level perpetrators. The inconsistency was glaring. While the high-level perpetrators were able to avoid prosecution in Indonesia, several low-level East Timorese perpetrators were prosecuted harshly.<sup>188</sup> Moreover, it meant that the large mass of East Timorese low-level perpetrators were not treated equally, some being prosecuted while others not.<sup>189</sup> This naturally led to domestic criticism of partial justice and greatly weakened the credibility and public support for the tribunal.<sup>190</sup>

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<sup>183</sup> Katzenstein, "Hybrid Tribunals", 265; Reiger and Wierda, "The Serious Crimes Process", 15.

<sup>184</sup> Hirst and Varney, "Justice Abandoned", 19-20.

<sup>185</sup> The SCU did in fact not finish any inquiry into a case where the offense had been committed before 1999. ; "Unfulfilled promises", 36.; Hirst and Varney, "Justice Abandoned", 18

<sup>186</sup> Reiger and Wierda, "The Serious Crimes Process", 21.

<sup>187</sup> "Unfulfilled promises", 36.

<sup>188</sup> Some of the convicted were sentenced to up to 33 years of imprisonment, and they were only low-level militia members.; Patrick Burgess, "A new approach to Restorative justice: East Timor's Community Reconciliation Processes", in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* eds. Naomi Roth-Arriaza and Javier Mariezcurrena, 200 (Cambridge: Cambridge University Press, 2006).

<sup>189</sup> Hirst and Varney, "Justice Abandoned", 17.

<sup>190</sup> "Unfulfilled Promises", 37.



The prosecution strategy improved with the assumption of a new Deputy General Prosecutor, Siri Frigaard in late 2002. Several indictments of high-profiled Indonesian officers were issued, among them General Wiranto, in February 2003. However, then the lack of political support from both UNTAET and the East Timorese government was blatantly demonstrated, together with the problem of unclear ownership of the process. As the Indonesian government reacted angrily to the indictment and fiercely criticised the UN for political bias, the SRSG issued a statement stressing this was the act of the Prosecutor-General, not the UN.<sup>191</sup> This disappointed many East Timorese and increased the perception that the UN was not credibly committed to pursue justice. Not long after however, the government also issued a similar declaration, relinquishing responsibility, stating the UN was responsible for the indictment, not East Timor. Gusmão and Ramos-Horta paid visits to Indonesia, stressing the primacy of good relationships over justice concerns. Gusmão specifically declared that he saw it “not of national interest to hold a legal process such as this one”.<sup>192</sup> The political attitude ultimately reached the General Prosecutor (GP), who after the issuing of an arrest warrant for Wiranto in May 2004 did a volte-face and requested to have the indictment “revised”.<sup>193</sup> This was rejected, but the GP subsequently refused to send a request for an international arrest warrant to Interpol.

It was a significant illustration of the UN and the East Timorese government’s lack of will to support a thorough process of justice, that every time serious measures were taken both parties did their best to separate themselves from the tribunal. As Järvinen outlines, disassociation was made easy as the very nature of the establishment and structure of the mixed hybrid tribunal made it vulnerable to the problem of unclear ownership. Established by the UN of UNTAET regulations, the East Timorese leadership argued the SCP was an international responsibility.<sup>194</sup> However, when East Timor became independent the authority over the SCP was officially transferred to the East Timorese government. Although the UN continued to fund and staff the agencies, UNMISET argued that the SCP was now an East Timorese responsibility.<sup>195</sup> Though this was formally correct, it neglected the practical reality that the SCP was crucially dependent on UN support. UN control over the process was

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<sup>191</sup> Hirst and Varney, “Justice Abandoned”, 25.

<sup>192</sup> Xanana Gusmão, “Statement”, February 28, 2003.

<sup>193</sup> Hirst and Varney, “Justice Abandoned”, 26.

<sup>194</sup> Järvinen, “Human Rights”, 52.

<sup>195</sup> Järvinen, “Human Rights”, 53.

demonstrated with the closing down of the process which occurred solely after UN decisions. After Security Council decision the SCP stopped operating in May 2005 – a date that clearly was premature, had the goal been to effectively pursue justice.<sup>196</sup>

A last critical side of the SCP was the minimal attention given to community outreach. The SCP had no outreach program in the beginning, and information of the process came only through an NGO.<sup>197</sup> This was later improved, some public reports were issued and a few information meetings were held, but still the lack of communication and infrastructure outside of the capital Dili meant that most of East Timor's population had little access to information. As a consequence the rural population had very limited understanding of the process – many did not even know it existed. Those who did know supported the efforts to produce justice, but were critical of the tribunal's shortcomings. Most criticised was the failure to hold the most serious perpetrators, the Indonesian officials and militia leaders accountable. The resulting concentration on East Timorese was as mentioned perceived as unfair. There was also dissatisfaction with the focus on 1999 exclusively, and the slow process of the tribunal.<sup>198</sup>

In summary, the hybrid tribunal for East Timor contained serious flaws and must be considered unsuccessful. Most importantly it failed to achieve its main purpose - to establish legal accountability for the most serious crimes. The main reason for the tribunal's problems was Indonesian non-cooperation, but also insufficient political support and commitment – mainly from UN and the East Timorese government.<sup>199</sup> It did not operate according to international judicial standards. With its disproportional focus on 1999, and low-level East Timorese perpetrators, the tribunal did not promote fair and consistent rule of law. This severely undermined the public respect for the tribunal. Moreover, despite being physically closer to the people involved, the very nature of the tribunal made it easier for the government and the public to distance themselves from the tribunal. Capacity building was not achieved,

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<sup>196</sup> By the termination of the SCP in May 2005 there were 50 cases in which investigations had not been completed, and 514 cases that had been investigated but no indictments had yet been issued. That left over 800 cases of alleged murder, 60 cases of alleged sexual violence and hundreds of cases of alleged torture not concluded.; Reiger and Wierda, "The Serious Crimes Process", 37.

<sup>197</sup> The Judicial Systems Monitoring Programme (JSMP), for more information see [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>198</sup> Elizabeth Stanley, "Torture Survivors: Their Experiences of Violation, Truth and Justice", *Judicial Systems Monitoring Programme*, April( 2007): 17-18.; "Unfulfilled Promises", 43.; Reiger and Wierda, "The Serious Crimes Process", 31-32.

<sup>199</sup> This conclusion resonates with that of Reiger and Wierda who argue that "the main failures in Timor-Leste relate to the fundamental choices made at the political level (internationally and in Indonesia) rather than to the strategic choices or technical abilities on the ground in Dili".; Reiger and Wierda, "The Serious Crimes Process", 41.

and the hybrid tribunal failed its potential of being a learning mechanism for the local population.<sup>200</sup>

### **4.3 The utility of justice through trials**

After these two attempts at obtaining legal accountability through trials largely failed, it can be asked – what is the utility of prosecutorial justice as a mechanism for dealing with past human rights violations? The following section will address this issue by first looking at the prospects for achieving a legalist version of justice in East Timor. How well can the different trial-options of national, hybrid and international courts really be expected to deliver the promises legalist scholars espouse? Secondly, it will be discussed how the lack of prosecutorial justice has impacted on East Timor. Specifically, does the lack of prosecutorial justice explain East Timor's problems with crime and instability? The aim is to question the legalist tenets of justice producing peace and democracy.

#### **4.3.1 The prospect of achieving a legalist version of justice**

Firstly what are the prospects of achieving a legalist version of justice for past atrocities in East Timor through trials? This includes not only legal accountability as such, but a process of justice through trials promoting rule of law and peace, that would be meaningful for local East Timorese, and could help build domestic capacities?

To review national options first, the Ad Hoc Court in Jakarta demonstrated that any national legal process in Indonesia is doomed to failure unless serious structural changes are made, and so far this has not happened. Similarly, the East Timorese legal system is still nascent and lacking in capacity. In the unlikely event that Indonesia would agree to cooperate and extradite, any domestic prosecution in East Timor would therefore not follow international standards. Most likely, the process would also be strongly politically determined. It can therefore be concluded that national prosecution would not produce genuine justice, and it would not contribute to any strengthening of rule of law.

The opposition of the Indonesian government and the lack of international support have precluded any possibility of establishing an international tribunal. Also, though an

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<sup>200</sup> Reiger and Wierda, "The Serious Crimes Process", 35.

international tribunal is often called upon for East Timor, it can still be questioned whether it is an ideal solution. Although this thesis gives limited room to discuss this issue extensively, some obvious critical sides to this type of justice should be mentioned. International tribunals are expensive and distant from the people concerned. Dickinson argues that they are prone to have problems with legitimacy, as they are staffed with only foreign jurists, their adjudication is based on law that is usually not familiar domestically, and there is often little information given to the local population, creating misperception and dissatisfaction with the tribunal.<sup>201</sup> Further, she mentions how their physical distance from the state concerned and exclusion of locals in their work does little to build competence in the domestic judicial sector. This also hinders spread of norms asserting human rights and accountability for international crimes, as there are no networks or contacts between the jurists of the tribunals and domestic legal professionals.<sup>202</sup> As Minow remarks, the ICTY and ICTR have so far not contributed much to improving the rule of law in their respective states.<sup>203</sup> This greatly undermines the legalist claims of the educative function – strengthening of the rule of law, democratic and liberal values – prosecution by an international tribunal can have for East Timor. Moreover, the legalist claim of justice producing peace is also uncertain. The empirical basis for arguing that the international tribunals of ICTY and ICTR have contributed to reconciliation, and deterred and prevented atrocities is in fact slim. One of the worst massacres of the war on the Balkans in Srebrenica in 1995, took place after the ICTY was established.<sup>204</sup> The ICTY trials over Milosevic increased ethnic and political strife in the former Yugoslavia.<sup>205</sup> Similarly, several scholars have noted how the ICRT served to strengthen ethnic divisions in Rwanda, and has done little to further peacebuilding and national reconciliation as were its aims.<sup>206</sup>

The hybrid tribunal in East Timor was a measure hoped to avoid the problems of distance and legitimacy. It would be close to the people, and could help build capacity and norm-spreading in the local judicial sector. The SCP has been heralded by the UN's own Commission of Experts (COE) as an "effective and credible" process, "generally conformed to international

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<sup>201</sup> Dickinson describes these problems connected to the ICTY.; Dickinson, "The Promise", 303.

<sup>202</sup> Ibid., 304-305.

<sup>203</sup> Minow, *Between Vengeance*, 126.

<sup>204</sup> Jeremy Rabkin, "No Substitute for Sovereignty", in *Atrocities and International Accountability*, eds. Edel Hughes et al., 108 (New York: United Nations University Press, 2007).

<sup>205</sup> Ibid., 120.; Helena Cobban, "Transitional Justice and Conflict Termination", in *Atrocities and International Accountability*, eds. Edel Hughes et al., 58 (New York: United Nations University Press, 2007).

<sup>206</sup> Minow, *Between Vengeance and Forgiveness*, 124.; Cobban, "Transitional Justice", 58.; Neill Kritz, "Coming to Terms with atrocities: A review of Accountability Mechanisms for Mass Violations of Human Rights", *Law and Contemporary Problems*, 59, no. 4 (1996): 131-132.

standards”, contributing to accountability, history-building, jurisprudence, rule of law.<sup>207</sup> While it can be given some credit for its achievement in accountability and truth-finding, it should be acknowledged that the UN COE’s glorified description does not match reality. As outlined, the SCP failed to live up to expected achievements of the hybrid tribunal, and failed to achieve central legalist aspirations. Therefore, the contributions of the SCP to strengthening justice and the people’s belief in institutions of justice has been minimal.<sup>208</sup> It therefore seems like no national, international or a hybrid tribunal would be able to produce proper legalist version of justice for East Timor.

#### **4.3.2 The impact on lack of prosecution for East Timor**

As it is now established that attempts at legal prosecution did not provide justice, it is in its place to ask more specifically what the consequences of this have been for East Timor. The legalist paradigm touts the democratic and deterrent effects of criminal prosecution for past crimes. Diane Orentlicher has been among the most vocal, arguing that prosecution is essential to uphold rule of law, advance democracy and deter future atrocities. Especially weak societies in transition she argues will benefit from prosecutions.<sup>209</sup> She posits a “duty to prosecute”, on these grounds. Most scholars and observers writing on East Timor follow her lines and argue that legal justice is vital to support respect for human rights, rule of law, and prevention of violence and conflict. At first glimpse it may seem as if they are right. East Timor has not seen legal accountability for the most serious crimes, and has obvious problems with crime and violence. Rule of law is weakly established in the territory. Locals take justice into their own hands, and violence is widely seen as a legitimate measure of dealing with conflict.<sup>210</sup> Disturbingly, there are reports of corruption and grave human rights abuses by the police, such as torture, arbitrary detention and undue use of force.<sup>211</sup> Moreover, sections of the military have frequently been hostile to the government and have acted beyond civilian control.<sup>212</sup> There have been fierce conflicts both within and between the two security

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<sup>207</sup> See excerpt from the Commission of Experts (2005) report in Reiger and Wierda, “The Serious Crimes Process”, 41.; Hirst and Varney, “Justice Abandoned”, 30.

<sup>208</sup> Reiger and Wierda, “The Serious Crimes Process”, 41.

<sup>209</sup> Orentlicher, “Settling Accounts”, 2540-2543.

<sup>210</sup> Damien Kingsbury, “Timor-Leste: The Harsh Reality After Independence”, *Southeast Asian Affairs*, 2007, 326.; Richard Curtain, “Crisis in Timor Leste; Looking for the Causes to Find Solutions”, *Austral Peace and Security Network Policy Forum*, July 31, (2006).

<sup>211</sup> “Tortured Beginnings”, *Human Rights Watch*, 18, no. 2 (April 2006). <http://www.hrw.org/en/reports/2006/04/19/tortured-beginnings>.; “Timor-Leste: No Time for Complacency”, *International Crisis Group (ICG)*, no. 87, February 9, (2009).

<sup>212</sup> Damien Kingsbury, “Timor-Leste”, 327.

institutions. Organised violence and crime by gangs has also been a significant problem.<sup>213</sup> After independence there have been some serious episodes of internal violence and instability where both gangs, and elements from the police and the military have been among the main protagonists, (in 2006 and 2008 especially). Still, to what extent can these problems really be attributed to the lack of prosecutorial justice in the transitional justice process?

Firstly, crime and social unrest, especially the violence in 2006 and 2008 must be seen against the backdrop of East Timor's grinding poverty and unemployment which has served to worsen all social and political tensions.<sup>214</sup> Secondly, the government can be criticised for having chosen a repressive policy towards political dissent, which has exacerbated grievances, and made violence the only option for aggrieved parties.<sup>215</sup> Thirdly, most of East Timor's security problems and instability has come from the security forces themselves. Empirical research on the security and justice sectors in East Timor therefore stress *reforms of the security sector* (the judiciary, police and military) as imperative to solve the problems connected to violence, instability and rule of law.<sup>216</sup> The failure of the transitional justice process to provide prosecutorial justice is noted, but is not held this crucially responsible for the state's problems. Rather, the causes for lacking rule of law and instability are traced back to the end of the Indonesian occupation, when the entire security sector, judiciary, police and military had to be constructed from scratch, and the UN grossly failed to provide adequate attention and resources to capacity building and the long-term viability of the institutions.<sup>217</sup> For example, UNTAET's police force, CIVPOL was made up of participants from 40 different countries, but minimal attention was paid towards coordination of their activities.<sup>218</sup> Their professional quality varied, and many did not respect the rule of law. While this caused excessive use of force in some cases, the lack of resources also led to a hands-off approach in

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<sup>213</sup> "Group, Gangs and Armed Violence in Timor-Leste", *Timor-Leste Armed Violence Assessment*, no. 2 (April 2009), <http://www.timor-leste-violence.org/pdfs/Timor-Leste-Violence-IB2-ENGLISH.pdf>.

<sup>214</sup> Damien Kingsbury, "Timor-Leste", 364.

<sup>215</sup> *Ibid.*, 364.

<sup>216</sup> "Timor-Leste: Security Sector Reform", *International Crisis Group (ICG)*, no. 143, January, 2008: 1-28.; "Resolving Timor-Leste's Crisis", *International Crisis Group (ICG)*, no. 120, October 10, 2006, 1-32.; Ludovic Hood, "Security Sector Reform in East Timor, 1999-2004", *International Peacekeeping*, 13, no. 1 (March 2006): 60-77.; Kingsbury, "Timor-Leste", 363-377.; Cynthia Burton, "Security Sector Reform: Current issues and future challenges", in *East Timor: Beyond Independence*, eds. Damien Kingsbury and Michael Leah, 97- 109, Clayton, Vic: Monash University Press, 2007.; Ronald A. West "Lawyers, Guns and Money: Justice and Security Reform in East Timor", in *Constructing Justice and Security After War* ed. Charles T. Call (Washington D.C: United States Institute of Peace, 2007).

<sup>217</sup> Hood, "Security Sector Reform".

<sup>218</sup> Burton, "Security Sector Reform", 106.

others. CIVPOL officers did not have the skill or the will to demonstrate how a ‘democratic’ police force should be managed – and hence did not transfer skills to the local police. The police and military were both set up by controversial recruitment policies which marred them with conflicts within and between the institutions.<sup>219</sup> The local judiciary was in dire need of capacity building and experience, but no clear political strategy for development of the judicial system was developed.<sup>220</sup> Lastly, significant attention was not paid to how the informal traditional justice system interacted with the formal, and there were obvious tensions between these two forms of justice. In sum, the central problems were that there was little coordination among donors, and underestimation of the complexity of the task, and the resources and time needed to build new security and justice institutions.<sup>221</sup> Hence unviable, conflicted institutions were created, lacking professional skills, marked by a culture of little accountability and civilian control. As Ronald E. West notes, the first reconstruction efforts therefore involved little but an “assembling of a justice bureaucracy”.<sup>222</sup> Successive East Timorese governments can further be criticised for not having mended the problem. The research emphasises that the situation can only be altered by institutional reforms that address these underlying systemic causes for the problems. This includes reforms for capacity building in the judicial sector, and legal system reform to make legal institutions embedded in East Timorese society.<sup>223</sup> Similarly the police and army need institutional reforms promoting professionalism, respect for the law and human rights, democratic accountability and control. Importantly, regulations must stress protection of citizens before the state.<sup>224</sup> In terms of bringing forth improvement in democracy, rule of law and stability in East Timor *this* is what is emphasised – not legal prosecution for past crimes.

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<sup>219</sup> Many from the former Indonesian police were incorporated into the new police force – which met criticism. In the military, there was discontent with how former resistance fighters from FALINTIL were given privileged access. ; Burton, “Security Sector Reform”, 105.

<sup>220</sup> The UN legal officer for East Timor, Hansjorg Strohmeier, decided early in the UNTAET-period to delegate the full responsibility of the judiciary to local East Timorese judges. The UN is often criticised for neglecting local capacity in operations, so this seemed like a sensible choice. It failed however, to take into account that the East Timorese judicial sector was virtually non-existent after Indonesia pulled out.; Katzenstein, “Hybrid Tribunals”, 254.; Burton, “Security Sector Reform”, 106.

<sup>221</sup> Burton, “Security Sector Reform”, 98.

<sup>222</sup> West, “Lawyers, Guns and Money”, 313.

<sup>223</sup> Damien Kingsbury and Michael Leach “Introduction”, in *East Timor: Beyond Independence*, 4, (Clayton: Monash University Press, 2007).; “Security Sector Reform”, ICG, 3.

<sup>224</sup> Charles T. Call, “Introduction: What We Know and Don’t Know about Postconflict Justice and Security Reform”, in *Constructing Justice and Security after War*, ed. Charles T. Call, 12 (Washington: United States Institute of Peace, 2007).

Concerning other cases of transitional justice, as with the international tribunals, William Schabas and Ramesh Thakur point out that there is so far no evidence confirming the effect of accountability for past crimes for deterring cycles of violence.<sup>225</sup> Spain and Liberia are two notable examples where peace came without legal accountability. Moreover, Elizabeth Kiss emphasises that research has not provided any evidence that transitional justice processes significantly further democratisation, but rather institutional reforms of the judiciary, military and the police are most often seen as essential to democratic consolidation, supporting the aforementioned research on East Timor.<sup>226</sup> Surveying case studies of post-conflict societies where past atrocities were to be addressed, as well as new systems of justice and security to be built, Charles T. Call concludes that even though scholars and others stress the link between justice for past atrocities and future systems of justice – the empirical evidence is lacking – “yet this limited collection of cases failed to establish a robust empirical connection between justice for past abuses and the quality and accessibility of justice in the future”.<sup>227</sup> He also argues that the deficiencies of justice are more due to institutional and political decisions, and the context of war termination.

It appears as if the legalist position overlooks that there can be a fundamental difference between establishing justice for past atrocities, and providing for a new system of justice. It should be acknowledged that the goals and measures used for the two issues are actually distinct. As Caitlin Reiger argues,

“the demands of providing speedy, efficient and fair prosecutions in a post-conflict environment are often quite different from the demands of rebuilding a justice system. Building capacity takes significant time and patience, and necessarily involves some mistakes as well.”<sup>228</sup>

While the call for justice for past atrocities is often imminent and quick measures are needed that can provide closure to victims and conflict, rule of law and democratic institutions are not quickly created. Often it is a longer process involving economic or cultural changes. In their report on traditional justice, Tanja Hohe and Rod Nixon emphasise how the local concepts and methods of justice and conflict resolution that are utilised by a majority of East Timorese

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<sup>225</sup> Schabas and Thakur, “Concluding Remarks”, 277-280, 284.

<sup>226</sup> Elizabeth Kiss, “Righting Wrongs: Two Visions of Transitional Justice”, 2005.

<sup>227</sup> Charles T. Call “Conclusion”, in *Constructing Justice and Security after War*, ed. Charles T. Call, 375-410, (Washington: United States Institute of Peace, 2007).

<sup>228</sup> Caitlin Reiger, “Hybrid Attempts at Accountability in Timor-Leste”, in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roth-Arriaza and Javier Mariezcurrena, 165 (Cambridge: Cambridge University Press, 2006).



are on many accounts starkly different from the mainly western system of justice UNTAET and successive governments have tried to implement. While the western system is centred round the individual, and emphasises individual human rights, the traditional system asserts the value of the collective and social harmony.<sup>229</sup> The conflict-resolution mechanisms utilised are – as described earlier – also completely different, and promotes compensation and reconciliation as a solution for all disputes, including serious crimes. Hohe and Nixon therefore argue that to succeed with implementation of a western system of justice will require a comprehensive transformation of social structures and “long-term commitment to the economic and industrial development of the country”.<sup>230</sup> Considerable time and resources will be required.

On the basis of this, it should be acknowledged that prosecutions for past atrocities in the East Timorese context cannot be expected to solely or significantly contribute to the rule of law. Call also supports this by arguing “hasty efforts to foster the rule of law in only a few years are futile, especially in poor, (...) societies with low degrees of institutionalization”.<sup>231</sup>

All of this is not to say that justice for past atrocities is not important. It can still have a significant symbolic effect for victims, and the broader society. In the East Timorese context, it is often argued that victims need justice to reconcile. But, whether justice necessarily will lead to reconciliation is doubtful. Trials are as Minow remark, not aimed towards reconciliation, they are a confrontational approach to dealing with past atrocities.<sup>232</sup> To the extent that they can lead to acknowledgement and expression of remorse by perpetrator, the victim might be willing to forgive, but this is neither easy nor given.<sup>233</sup> Nevertheless, in a favourable political context, where sufficient time and resources are provided, a hybrid tribunal can potentially contribute to both accountability and capacity-building. Moreover, a successful process of prosecution can promote domestic support for official justice systems.<sup>234</sup>

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<sup>229</sup> Some significant differences in conceptualisation are how theft and civil disputes (concerning marriage, divorces etc.) are serious issues. Violence on the other hand – including domestic violence such as rape, which are important crimes in western systems – are minor issues in East Timor, unless it leads to death. There are also crimes such as sorcery, or accusations of sorcery which are absurd in western contexts.; Hohe and Nixon, “Reconciling Justice”, 63.

<sup>230</sup> Hohe and Nixon, “Reconciling Justice”, 67.

<sup>231</sup> Call, “Introduction”, 10.

<sup>232</sup> Minow, *Between Vengeance*, 26.

<sup>233</sup> Psychological research has shown that victims can best heal and reconcile if perpetrator recognises past misdeeds and expresses remorse.; Minow, “*Between Vengeance*” 60, 62, 67.

<sup>234</sup> Call, “Conclusion”, 398-99.

On the other hand, abortive and ineffective attempts can potentially undermine public trust in formal systems. The SCP was a combination of an unsuccessful project of prosecution with little attention to community outreach – which gave more impetus to the latter. More information on practical and political obstacles could have eased public criticism, and enhanced understanding and support for formal justice.

Lastly, while this section has hitherto mainly focused on East Timor, the same arguments are valid for Indonesia as well. Indonesia has since Suharto's fall been on the way to democracy, but has faced significant hurdles. The main challenge remains to break the military's influence over political and civil life, and assert civilian control over the military. This requires change or eradication of the *dwi-fungsi* doctrine, and the territorial structure of the army.<sup>235</sup> However, these are institutionally structured elements, and there is a consensus that significant institutional reform on many levels is necessary to effectuate Indonesia's transition towards democracy. Accountability for past atrocities can be a part of the transition, but should not be expected to facilitate it. The analysis of the Ad Hoc Court in Jakarta illustrated how attempts at obtaining legal accountability were hampered due to the military-political confluence of all government sectors, and the militaristic culture in the judicial sector. The continued presence of these factors means that prospects are slim for any fair and meaningful process of justice for past crimes in any Indonesian court. Other trials in Indonesia with military personnel accused of human rights violation have displayed significant similarities to the ad hoc trial for East Timor. The prosecution refrains from pressing their case, treats cases as individual not systematic patterns, and does not probe for superior responsibility. Sentences are minor, and after appeals, the majority are acquitted.<sup>236</sup> The trials have given little, if any impetus towards democratisation and the rule of law. This makes clear that the utility of trials as a mechanism to further Indonesian democratisation is low. Legal accountability is in the first place highly dependent on structural change. There need to be democratic reforms promoting professionalism before accountability can be reached. This means that the legalist

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<sup>235</sup> Under the cover of providing security and national unity, around one third of the army was under Suharto decentralised to form authorities in the districts. Here they operated as a parallel government and police force. Insufficient income made the army prone to criminal ways of generating money, such as smuggling, gambling, drug trading and prostitution. At the same time the territorial structure enabled the army to repress all opposition nation-wide. Human rights violations were common throughout the state. The military in its quest to preserve national unity through the territorial structure and violent oppression rather encouraged discontent and separatism.; Roosa, "Finalising the Nation", 99-111.

<sup>236</sup> See Roosa, "Finalising the Nation", 105.; Priyambudi Sulistiyanto, "The politics of Justice and Reconciliation in Post-Suharto Indonesia", *Journal of Contemporary Asia* 37, 1, (2007): 86-88.

paradigm falters also for Indonesia. To argue as Matthew Draper does, that justice for past atrocities can be a ‘building block’ in establishment of democracy puts the reality on its head.<sup>237</sup> Democratic reforms providing professionalism in the judiciary and ceasing the military’s influence over prosecution can give justice, but not the other way around.

#### **4.4 Summary**

Due to the Indonesian military-political confluence, the sensitive political situation between East Timor and Indonesia, and an uncommitted UN, neither the Ad Hoc Court in Jakarta nor the Serious Crimes Process in East Timor managed to establish satisfactory legal accountability for past atrocities. Still, the consequences of lack of prosecutorial justice for past crimes have not been as dramatically detrimental as it is at times claimed they should be. The empirical research on East Timor, Indonesia and other case studies, show that while morally appealing, the causal claims legalists make about consequences – i.e. the rule of law and conflict prevention, are not backed by factual evidence. Justice for past crimes does not automatically lead to rule of law and peace, and the lack of justice does also not account for the lack of rule of law and peace that is present in East Timor. East Timor’s problems are results of other deeper structural and institutional factors, which requires more than justice for past atrocities to be improved. Structural reform and capacity-building with emphasis on professionalism and respect for human rights is a prime requirement for improved rule of law. Substantial economic and social advancement would also lessen the potential for instability, while the government also needs to provide mechanisms for peaceful resolution of grievances.

It can therefore be concluded that it is too simple and naive to argue that the lack of rule of law and violence that has been present in East Timor since 1999 can be explained solely or significantly by the lack of justice for past atrocities. Rather, it should be acknowledged that the tasks of providing justice for the past and building new systems of justice are both important, but entail separate goals, requirements and measures.

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<sup>237</sup> His argumentation is also self-defeating where in his conclusion he acknowledges that “the incomplete transition of the Indonesian government to democracy” hinders accountability for the past. In other words, he is saying judicial accountability is dependent on democratisation, but accountability cannot be expected to produce democratisation by itself.; Matthew Draper, ”Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia” *Columbia Journal of Transnational Law* 40, no. 3 (2002): 391-418.

## **5. Reconciliatory measures and their outcomes**

As a result of the factors outlined in chapter three, several measures aimed towards reconciliation have been implemented. This chapter will discuss the most important of these and their outcomes. This includes the two truth-commissions, CRTR and CTF, and border meetings aimed towards dialogue and return of refugees will also be analysed as they have been quite significant. The core analysis in this chapter will be what positive or negative outcomes these measures have produced. The claims that the emotional-psychology approach makes about the utility of reconciliatory measures need to be assessed in the East Timorese context. Did the truth commissions really further individual and societal healing and lead to reconciliation and social harmony? The pragmatic approach must also be evaluated. Has the following of a politically pragmatic, reconciliatory course led to positive political consequences for the East Timorese? Also, these reconciliatory measures have been criticised for undermining or not contributing to the pursuit of justice, but is this really true?

The border meetings and the two truth commissions will first be discussed. Then some attention will be given to how the reconciliatory emphasis in the transitional justice process has affected East Timor's most important external political asset – the relationship to Indonesia. Lastly it will be discussed how the process of transitional justice has corresponded to public perceptions of justice and reconciliation in East Timor. This has been touched upon throughout the text but an overall evaluation can be useful. The success or failure of any transitional justice approach should be evaluated by the extent that it goes to meet popular aspirations.

### **5.1 Border meetings**

As a response to the two internal challenges of conflict prevention between pro-integration and pro-independence groups, and the return of refugees, a series of border meetings were initiated in 2000. They came about not only as a solution to practical problems, but most importantly from the conviction of the SRSG, and the pro-independence faction (CNRT) under the leadership of Xanana Gusmão, that these problems should be addressed in a reconciliatory style. The SRSG and the pro-independence leadership both had a shared worry about the fragility of the political situation, mindful of the violence that had erupted last time

the East Timorese were given a hope of self rule in 1975 and 1999.<sup>238</sup> They saw it as vital to create engagement and dialogue between the parties in order to hinder more conflict. They were also supported by parts of the Catholic Church under the leadership of Bishop Nascimento. Together they advocated forgiveness and offered support and encouragement to return and reintegration of the refugees.

In the beginning the meetings were exclusively between the pro-independence and pro-integration leadership.<sup>239</sup> Gusmão himself participated and played an active role. They were significant in opening up for dialogue between the parties, but did not significantly further the return of refugees. The pro-independence leaders therefore decided to move down in the societal echelons and approach the refugees directly.<sup>240</sup> Meetings in and around refugee camps surrounding the border were arranged to bring refugees together with their former community members to talk, and dissolve false rumours and accusations planted by militia leaders.<sup>241</sup> The project received sharp criticism by the UNTAET Human Rights Unit and the Serious Crimes Unit as some of the refugees were given immunity from crimes in order to participate. Both units complained that reconciliation was prioritised before justice.<sup>242</sup> However, the SRSR stood behind Gusmão, and the meetings continued. They turned out to be very successful, producing dialogue and confrontation, but also reconciliation.<sup>243</sup> The situation loosened, and as a result, several of the refugees started returning.<sup>244</sup> The talks also spurred visits by the militia leaders to their former communities in East Timor to evaluate whether they could resettle. Many ended up going back, to face a process of confrontation and reintegration in their old communities.<sup>245</sup> There were some minor violent incidents, but none critical to domestic stability.

The meetings did undermine the pursuit of justice. The returning militia leaders often enjoyed a de facto amnesty, some entered into further reconciliatory programs in East Timor which

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<sup>238</sup> Goldstone, "UNTAET with Hindsight".

<sup>239</sup> Rawski, "Truth-Seeking", 87.

<sup>240</sup> Gusmão "Considering a Policy", 107.

<sup>241</sup> Järvinen, "Human Rights", 66.

<sup>242</sup> Gusmão, Bishop Nascimento representing the Catholic Church and other political leaders called for leniency and amnesty to incite the militia members to return.; Smith and Dee, "Peacekeeping in East Timor", 84. ; Järvinen, "Human Rights", 66.

<sup>243</sup> For examples see:; Gusmão "Volunteerism", 80.; Johnson, "Anti-independence leader".

<sup>244</sup> Dunn, "East Timor", 374.

<sup>245</sup> Ibid., 374.

barred them from prosecution.<sup>246</sup> Notwithstanding, the meetings also succeeded in their aims of opening up for dialogue, and facilitating the repatriation of refugees. These reconciliatory achievements were significant for many reasons. It was firstly symbolically crucial for East Timor as a state to have all its citizens within its borders. Secondly, it was important for the refugees themselves as innocent civilians not to be held against their will in a foreign state. Thirdly, the political situation was still volatile. If unresolved, the refugee issue could easily have caused instability by the border and endangered the relations with Indonesia. Lastly, for East Timor's internal stability it was essential to resolve some of the antagonisms between the former pro-integrationist and the pro-independence group.<sup>247</sup> It should be mentioned that the public mostly accepted and supported Gusmão and the other leader's appeals to show forgiveness and aid the returning refugees. Most agreed with the need for reconciliation and wanted broad inclusion in the new state.<sup>248</sup> Even though some hard-liners still remained, most low ranking former militia members of members of Indonesian administration were successfully repatriated, along with thousands of other innocent civilians. The reconciliatory approach advocated by the Catholic Church, CNRT and Gusmão with the support of the SRSG, must be credited with these positive outcomes.

## 5.2 Truth commissions

The leading authority on the subject of truth commissions, Priscilla Hayner, defines truth-commission as "official bodies set up to investigate and report on a pattern of past human rights abuses".<sup>249</sup> The idea of truth commissions as a constructive way of dealing with past atrocities is relatively new. From being an unknown concept a few decades ago, they have flourished in the last twenty years. According to Hayner, the positive functions of truth commissions can be one or more of the following: "to discover, clarify, and formally acknowledge past abuses; to respond to specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; to promote reconciliation and reduce conflict over the past".<sup>250</sup> This sits neatly within the emotional-psychology approach. The following evaluation of the truth commissions in East Timor will consider how they have contributed towards these aims. In addition it will also assess whether

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<sup>246</sup> Harper, "Delivering Justice", 173.

<sup>247</sup> Harper, "Delivering Justice", 173.

<sup>248</sup> Dee and Smith, *Peacekeeping*, 85.; Harper, "Delivering Justice", 173.

<sup>249</sup> Hayner, *Unspeakable Truths*, 5.

<sup>250</sup> *Ibid.*, 24.

they actually produced political benefits, since they, and especially the CTF, have been so castigated for ‘political justice’.

### 5.2.1 The Commission for Reception, Truth and Reconciliation (CRTR)

The Commission for Reception Truth and Reconciliation (CRTR) was instituted by UNTAET regulations in 2001, after pressure from Gusmão and other political leaders.<sup>251</sup> It started operating in February 2002 and ended its work on October 31, 2005. The mandate of CRTR was mainly threefold. The commission was tasked to establish the truth concerning human rights violations that had taken place from April 25, 1974 to October 25, 1999, and gather all its findings in a “comprehensive report”.<sup>252</sup> Secondly, it was to assist victims, promote human rights and reconciliation. This work was predominantly focused internally, with special consideration to reintegration of refugees and perpetrators of low-level crimes.<sup>253</sup> The term ‘reception’ in the commission’s title referred to this task of return and reintegration. Lastly, it was to recommend measures that could further the Commissions objectives, help victims and prevent future human rights violations.<sup>254</sup> It could also recommend prosecutions to the office of the General Prosecutor.<sup>255</sup> An important strength of the CRTR was that it possessed several judicial features.<sup>256</sup> It had wide investigative powers, the authority to have public hearings, give sanctions, immunity and fair trial guarantees.<sup>257</sup> This quasi-judicial character was beneficial as it facilitated investigation, and gave incentives for cooperation to perpetrators. Moreover, the CRTR could also determine whether acts were of serious or less serious nature – perpetrators suspected of serious crimes would be transferred to the General Prosecutor.

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<sup>251</sup> CRTR is also known by its Portuguese name and acronym “Comissão de Acolhimento, Verdade e Reconciliação” (CAVR).

<sup>252</sup> The date April 25, 1974 was the day the Carnation Revolution started in Portugal and October 25, 1999, the day the UN administration took power over East Timor and it marked the end of Indonesian occupation.; Roosa, “East Timor’s Truth Commission”, 565.; Uncovering the truth entailed investigating who committed the atrocities – naming individuals, institutions or organisations. And to find out why the violations had occurred - what was the context, the cause and motives of the perpetrator. Moreover, the role of internal and external factors was to be investigated, and if the acts were deliberate and systematic. The truth function also entailed identifying who could be held accountable “politically or otherwise”, for the violations.; The United Nations, *Regulation No. 2001/10, “On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*. United Nations Transitional Authority for East Timor, UNTAET REG/2001/10 Section 3 and 13.1.

<sup>253</sup> UNTAET REG/2001/10 Section 3.1

<sup>254</sup> UNTAET REG/2001/10 Section 13.1 and 21.

<sup>255</sup> UNTAET REG/2001/10 Section 3.1

<sup>256</sup> Carsten Stahn, “Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor”, *The American Journal of International Law* 95, no. 4 (Oct. 2001): 955-958.

<sup>257</sup> In particular the Commission had the right to subpoena and cross-examine witnesses, and request search warrants.; UNTAET REG/2001/10 Section 14, 15, 16, 17 and 18.

The CRTR's achievement in the area of truth-telling must be noted as significant. Hayner and Minow remark how an important advantage of truth commissions compared to tribunals is their potential to go broader and deeper in their investigations and conclusions. As such they can contribute to a more balanced and veracious understanding of the past.<sup>258</sup> The CRTR truth-seeking efforts obtained this potential, which made it valuable in many aspects. While other truth-commissions have been blamed for selectivity, narrowness and bias, the end result of the CRTR's work – a 2500-pages report titled *Chega!* is widely seen as an extensive, detailed and accurate record of human rights violations in East Timor under the Indonesian occupation.<sup>259</sup> It focused on a wide range of offences, including issues as sexual violence and forced displacement that have been left out in other reports.<sup>260</sup> *Chega!* undermined the Indonesian view of the events, and concluded that there was extensive evidence that the violence in 1999 was a planned, scorched-earth campaign which high-ranking TNI-officers knew about beforehand. As the report identified perpetrators by name, it established accountability, though not in a legal sense. At the same time, the report was a fair narrative that acknowledged East Timorese complicity in past atrocities, on both sides of the conflict. With its wide-ranging mandate period stretching back to the start of the “Carnation Revolution” in 1974, its documentation of human rights violations included also the period of civil war prior to the Indonesian invasion. The decision to include this period in the commissions work showed how the political elite were open to accept critique and blame for past human rights violations.<sup>261</sup> Nevertheless, the report also emphasised how cooperation between East Timorese factions led to final victory. *Chega!* thus became a historical text with the potential of promoting unity in the new state.<sup>262</sup> As Hayner remarks, conflict often recurs in societies where there is a lack of consensus on past events, with Latin American states, the former Yugoslavic countries and Israel-Palestine as examples.<sup>263</sup> Here, different perceptions of the past is both a cause of conflict and an obstacle to reconciliation. The CRTRs achievement of creating a balanced, unified version of history should therefore be acknowledged. In addition to outlining East Timorese and Indonesian accountability for

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<sup>258</sup> Hayner, *Unspeakable Truths*, 16-25; Minow, *Between Vengeance*, 58-59

<sup>259</sup> The title “Chega!” comes from the Portuguese word meaning “Enough!”; Roosa, “East Timor’s Truth Commission”, 564; On bias and selectivity see John D. Teppermann “Truth and Consequences”, *Foreign Affairs*, 81, issue 2 (2002).; Hayner, *Unspeakable Truths*, 72; Webster, “History, Nation”, 581.

<sup>260</sup> Minow, *Between Vengeance*, 58-59.; Hayner, *Unspeakable Truths*, 73, 77.

<sup>261</sup> Roosa, “East Timor’s Truth Commission”, 565.

<sup>262</sup> Webster, “History, Nation”, 582.

<sup>263</sup> Hayner, *Unspeakable Truths*, 162.



atrocities, it was also progressive and discussed the role and responsibility of international actors.

Truth and knowledge of the past is often very important to the population involved, this was apparent in East Timor. The CRTR, though established by the UN, had great broad public support, and it was essentially an East Timorese project, with mostly domestic staff.<sup>264</sup> In a study of torture survivors, Elizabeth Stanley found that many greatly appreciated the disclosures done by the CRTR, and saw it as vital to ensure that the atrocities not were forgotten.<sup>265</sup> Another study of East Timorese community expectations to independence revealed a strong, shared desire among participants to know the truth about past atrocities. Many also wanted the establishment of a common, accurate Timorese history.<sup>266</sup> Based on over 8000 statements from victims and perpetrators, *Chega!* gave this Timor-centric narrative.<sup>267</sup> It is unlikely that this documentation would have taken place had it not been for the CRTR.<sup>268</sup>

Hayner writes that one of the most important functions of a truth commission is its ability to prevent violence and atrocities and promote to reconciliation and peace – but often this remains an unfulfilled objective. As she mentions, even in the case of the paradigmatic South African Truth and Reconciliation Commission – that was so built around this goal, it is still uncertain whether this was obtained.<sup>269</sup> The CRTR on the other hand did give significant contributions to reconciliation. In the case of truth-telling, it is generally contentious whether truth causes reconciliation. However, it should be recognised that without truth the possibility for reconciliation is slim, as victims need to know what has happened, and by who, in order to reconcile.<sup>270</sup> Therefore, truth-telling at least facilitates reconciliation. A fair and accurate

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<sup>264</sup> In June 2000, UNTAET sponsored a seminar with representatives from the Catholic Church, civil society and community leaders to discuss transitional justice measures to be applied. The seminar decided that a proposition for a truth and reconciliation commission should be lodged at the forthcoming national congress of CNRT. The CNRT congress embraced the idea unanimously, and shortly after a “Steering Committee” to plan the project was established. The Steering Committee conducted nationwide hearing sessions that revealed great support for a truth and reconciliation commission, from all levels of society, among victims groups, NGO’s, jurists and politicians.; “Chega!”, 18.

<sup>265</sup> Stanley, “Torture Survivors”, 19.

<sup>266</sup> Piers Pigou, “Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expetations”, ICTJ, (August 2003), iv.

<sup>267</sup> Stanley, “Torture Survivors”, 19.; Webster, “History, Nation”, 582.

<sup>268</sup> Greenfell, “When Remembering”, 34.

<sup>269</sup> Hayner, *Unspeakable Truths*, 154, 156.

<sup>270</sup> Hayner, *Unspeakable Truths*, 30; Minow, *Between Vengeance*, 77.

historical account can enable parties to find a new perspective to view past relations and cycles of distrust and hatred can be broken. *Chega!* represents such a text.

A further integral part of CRTRs work towards reconciliation was the Community Reconciliation Processes (CRPs). They combined truth with a community-centred, restorative justice approach. Each process involved aspects of traditional justice, mediation, arbitration, truth-seeking, criminal and civil law. The CRPs were intended to promote repatriation of refugees and reconciliation, and as a much needed way to address perpetrators of smaller crimes. The SCP went slow, and covered only the most serious crimes, while there were numerous low level perpetrators one had no mechanism for dealing with. The CRPs functioned in the following manner. A perpetrator who wanted to participate would give a written statement admitting responsibility for past offences. Given that the offense was of a less serious character, the commission would arrange a hearing.<sup>271</sup> Here perpetrator(s) and victim(s) met, the perpetrator could explain, clarify and apologise, while victims and other members of the community could ask questions and make statements. In the end a CRP-panel would negotiate a reconciliation agreement whereby the perpetrators had to undertake certain 'reconciliatory acts' and in return they would be accepted back into the community.<sup>272</sup> At the end of the process a reconciliation ceremony was held in accordance with customary practice.

The CRPs were generally very successful. The inclusion of traditional methods of conflict resolution significantly increased the popular support, understanding of and effectiveness of the process.<sup>273</sup> The process was voluntary, but still over 200 hearings were held where more than 1,400 perpetrators came forward.<sup>274</sup> In total over 30,000 people attended, and at the time the process was closed down the commission noted strong popular demands for its continuance.<sup>275</sup> This is a testimony of the desire and support for the measure. The CRPs contribution to national reconciliation and stability was noteworthy. Many participants gave feedback to the commission on how it had served as a conflict-resolution mechanism settling

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<sup>271</sup> If the offense was of a serious character the statement would be sent on to the General Prosecutors office who could initiate a trial before the special panels. In this way the CRP was meant to complement the Serious Crimes Process.

<sup>272</sup> See UNTAET REG/2001/10, 23, 24, 25, 26 and 27.

<sup>273</sup> Spencer Zifcak, "Restorative Justice in Timor Leste: The Truth and Reconciliation Commission", *Development Bulletin* 68 (October 2005), 53.

<sup>274</sup> "Chega!" notes that 1371 perpetrators successfully completed the CRP, that meant that almost 90 per cent of cases were completed; "Chega!", 23, 190.

<sup>275</sup> "Chega!", 26-28; Spencer Zifcak, "Restorative Justice in Timor Leste: The Truth and Reconciliation Commission", *Development Bulletin* 68 (October 2005), 53.

old and new disputes, and furthered social peace in their communities.<sup>276</sup> A report for the UNDP stated that: “there is a widespread feeling that the CRPs have definitely contributed to building social cohesion and relieving tension in many places, (...) there is broad acknowledgment from victims and deponents that the Commission played its neutral role with considerable dexterity”.<sup>277</sup> It was further described as quick and just, and contributing to a return to normalcy. It facilitated to the reintegration of several perpetrators in their former communities. The CRTR did a survey in 2003 that revealed that 90 per cent of the ones involved had found the experience positive and were content with the results.<sup>278</sup> Victims responded that they felt more respected. They also commented that the process had increased their awareness and understanding of the context of the violations, and made it easier to forgive and reconcile. Still, forgiveness depended on the confession by perpetrator. It was important that full and honest disclosure took place and that sincere remorse was expressed. The nature or degree of punishment in the ‘reconciliatory act’ was not of importance. Victims and survivors mainly wanted to know the truth – and often subjected the perpetrators to rigorous questioning after the confession for more information.<sup>279</sup> Finally, respondents stated that they believed the reconciliation achieved would be lasting.<sup>280</sup>

Truth commissions are criticised by legalist scholars as they are afraid it will be used as an alternative to legal justice, but the CRTR furthered the cause of justice and accountability. It was intended to *complement* the work of the Serious Crimes Process, not replace it.<sup>281</sup> The CRPs notably served to establish accountability for several low-level perpetrators who would otherwise not be dealt with.<sup>282</sup> Though they did not serve prison sentences, they were given a practical sanction for their offence. In addition to the sanction, the hearing and the following acts of reconciliation was a distressing and humiliating process. Studies done afterwards revealed that for most perpetrators the experience had a determining effect on the lives.<sup>283</sup> Most also found it to be positive, that it had helped them both mentally and practically,

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<sup>276</sup> “Chega!”, 23.

<sup>277</sup> Piers Pigou, *CAVR’s Community Reconciliation Process* quoted in Patrick Burgess, “A new approach”, 186.

<sup>278</sup> Burgess, “A new approach”, 187.

<sup>279</sup> *Ibid.*, 188.

<sup>280</sup> *Ibid.*, 188.

<sup>281</sup> Stahn, “Accommodating Individual”, 953.

<sup>282</sup> Damian Greenfell, “When Remembering”, 34

<sup>283</sup> “Chega!”, 24.

facilitating a peaceful reintegration with their old communities.<sup>284</sup> By holding minor perpetrators accountable, the CRP also helped unburden the strained Serious Crimes Process.

There was however one flaw in the relationship between CRPs and the Serious Crimes Process that undermined the positive reputation of the CRPs. If the CRPs discovered high level perpetrators, these cases would be transferred to the Office of the General Prosecutor as they constituted serious crimes. But due to the limited capacity of the Serious Crimes Process, most of these perpetrators never became indicted.<sup>285</sup> Barred from entering the CRP as it was reserved for low level crimes only, they enjoyed impunity. This inconsistency angered many victims and low-level perpetrators who went through the CRP, but had the Serious Crimes Process functioned properly, the CRTR probably have been viewed more positively as a part of a holistic framework to past atrocities.

The CRP opened for a very controversial issue in the transitional justice literature – amnesty. Criticised from a legalist perspective as undermining justice, amnesty is recognised by pragmatists as useful instruments to facilitate participation and cooperation in political processes – a bargaining chip. The amnesty offered through the CRTR should be credited as very *limited* and *conditional* that did not undermine the pursuit of justice for serious crimes, but gave positive consequences. In other truth commissions where amnesty has been utilised, the use of amnesty has been criticised as it erodes the duty to prosecute serious violations of human rights. This was also the case for the oft commended South African TRC as it indiscriminately held the power to give full individual amnesties to perpetrators of both serious and less serious crimes. The East Timorese CRPs only dealt with less serious crimes, and hence did not violate this principle. CRTR-regulation also specifically stated that perpetrators of “serious criminal offenses” were not to be given amnesty.<sup>286</sup> Moreover, as in the South African TRC, immunity through the CRP was dependent on full revelation of misdeeds, and that these were connected to the “political conflict”.<sup>287</sup> In addition the CRP process made amnesty further conditioned on an act of contrition. If a deponent failed to perform the act of reconciliation he would receive a financial sanction of \$3,000 or be

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<sup>284</sup> Kent, “Community views”, 62.; Burgess, “A new approach”, 188.

<sup>285</sup> Hirst and Varney, “Justice Abandoned”, 14.

<sup>286</sup> UNTAET REG2001/10, Section 32.

<sup>287</sup> Stahn, “Accommodating Individual”, 963.; UNTAET REG 2001/10, Section 32.

sentenced to 1 year of imprisonment.<sup>288</sup> These stringent regulations combined with a credible threat of prosecution by the SCP greatly furthered participation and cooperation from perpetrators.<sup>289</sup>

While truth commissions are more focused on victims and survivors than trials, it is still an open question how much assistance they can offer, and whether they can contribute to individual as well as societal healing as the emotional psychology paradigm purports. The CRTR emphasised the community and its interests in truth-finding. This was a strength of the process as it facilitated community reconciliation, but it could at times be detrimental to the needs and interests of the individual victims.<sup>290</sup> Statements from participants indicated that on some accounts, truth was not told, and this was not addressed by the CRTR personnel due to familial or political relations.<sup>291</sup> This is a problem one can recognise from other truth commissions, but it is still a serious issue.<sup>292</sup> In some cases, informal pressure from communities was influential for victims to accept reconciliation agreement. Still, it should be noted that identity in East Timor is a more communal than individual concept, and many therefore did not mind the communal focus but saw it as natural.<sup>293</sup> Further, whether truth-telling led to individual mental healing, is uncertain. Some psychiatrists, such as Silove et. al, have been critical to the CRPs psychological effects. They have remarked how few CRTR personnel had any mental health education, and the victims were given little professional help to cope with the emotionally stressful situations. Therefore, though the process was experienced as relieving and healing for some, it can have exacerbated trauma for others.<sup>294</sup> However, as both Hayner and Minow point out, truth commissions are not aimed towards therapy, but truth-finding.<sup>295</sup> The CRTR was mandated to “assist in restoring the human dignity of victims”, but was not focused on offering mental healing.<sup>296</sup> But as many victims and survivors have a psychological need to tell their story, truth commissions offer a forum for this. For some this can be cathartic and relieving. As Minow writes, “healing trauma is the

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<sup>288</sup> UNTAET Regulation 2001/10, Section 30.

<sup>289</sup> West “Lawyers, Guns and Money” , 339.

<sup>290</sup> Kent, “Community views”, 64.

<sup>291</sup> Stanley, “Torture Survivors”, 20.

<sup>292</sup> Many other truth commissions, including the South African TRC suffered from the same problem.; Minow, *Between Vengeance*, 77.

<sup>293</sup> Burgess, “A new approach” 192, 194.

<sup>294</sup> Derrick Silove, et al, “Do Truth Commissions Heal? The East Timorese Experience”, *The Lancet*, April 15 2006, 1223.; Kent, “Community views”, 63.

<sup>295</sup> Minow, *Between Vengeance*, 70.; Hayner, *Unspeakable Truths*, 139.

<sup>296</sup> UNTAET/REG/2001/10, section 3.1

work of therapists, but a commission can offer healing moments”.<sup>297</sup> She points to psychological evidence that truth commission’s disclosure and acknowledgement can help victims confront the past, make sense of it, mourn and then initiate efforts to heal and reconcile.<sup>298</sup> The South African TRC showed that for some this held true, for others not.<sup>299</sup> There are no systematic studies done on this subject in East Timor, but anecdotal evidence suggests a similar experience.<sup>300</sup>

Moreover, many victims are often quoted to have remained unsatisfied with the CRTR, as they desired measures the commission did not have, mainly reparations and legal justice.<sup>301</sup> The CRTR paid out small “Urgent Reparations”, but did not contain any large reparations program. However, “Chega!” listed recommendations both for East Timor, Indonesia and the international society, to give reparations and on how to continue to promote legal justice. Again, ironically, though the CRTR was a reconciliatory measure, it served to strengthen the demand for accountability. It recommended that the Serious Crimes Process should be revived, with mandates stretching back from 1975 to 1999.<sup>302</sup> And further, that Indonesia should cooperate on extradition, undertake judicial reforms and “genuinely pursue justice”.<sup>303</sup> If these measures should fail the UN was recommended to establish an international tribunal.<sup>304</sup> Moreover, it recommended that reparations should be paid, most crucially by the state of Indonesia, as it bore “the greatest moral and legal responsibility” for the destructions it had caused, but also other states or companies who had aided, acquiesced or benefited in Indonesia’s occupation, were “obliged to provide reparations”.<sup>305</sup> Lastly, the report recommended that Indonesia, and states which had cooperated militarily with Indonesia should officially apologise for past crimes.<sup>306</sup>

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<sup>297</sup> Minow *Between Vengeance*, 70.

<sup>298</sup> Minow, *Between Vengeance*, 61-70.; This is also supported in Hayner, *Unspeakable Truths*, 134-138.

<sup>299</sup> Minow, *Between Vengeance*, 61-70; Tepperman, “Truth and Consequences”.

<sup>300</sup> Silove, et al, “Do Truth Commissions Heal?”, 1223.; Kent, “Community views”, 62-65; Stanley, “Torture Survivors”, 19-21.

<sup>301</sup> “Chega!”, 200-210.; Kent, “Community views”, 66.; Stanley, “Torture Survivors”, 21.; Reparations are a normal instrument in traditional justice and conflict resolution processes in East Timor.; Hohe and Nixon, “Reconciling Justice”, 19-20.

<sup>302</sup> Chega! was written in 2005 as the Serious Crimes Process was winding down.; “Chega!”, 185.

<sup>303</sup> The international community was encouraged to support the pursuit of justice, by national prosecution, extradition, travel restrictions and freezing of assets of suspected perpetrators, and linkage of aid and cooperation to Indonesia with specific efforts producing accountability.; “Chega!”, 186- 187.

<sup>304</sup> “Chega!”, 187.

<sup>305</sup> “Chega!”, 208.

<sup>306</sup> “Chega!”, 158, 195.

To sum up, the CRTR achieved most of the objectives of its mandate, and many of the goals Hayner outlined. It was a significant success in the area of truth-telling and history writing. This was valued by a large part of the public, and can become an important public asset for future nation-building. Moreover, the CRP process was crucial in facilitating the return and reintegration of refugees, and contributed to communal peace and stability. Besides producing reconciliation, the truth commission also furthered the cause of justice. It held several low level perpetrators responsible, and as such complemented the SCP. With its very limited amnesty provisions, it did not violate international principles or undermined the pursuit of justice for serious crimes. The recommendations underlined the need for justice. On the other hand, the CRTR did not solve all problems related to past human rights abuses. More professional psychological assistance would probably have been beneficial for some victim's mental health. At the same time, as Minow remarks, if truth-commissions are to increase emphasis on therapeutic functions, they may have to depart more from the criminal justice approach that they have been credited for.<sup>307</sup> Lastly, as the SCP, the CRTR suffered from lack of cooperation from Indonesia. No Indonesian nationals came under scrutiny from the CRPs, and there is still a vast amount of documentation of Indonesian transgressions exclusively in Indonesian hands. Due to the sensitive political climate, the recommendations are yet to be implemented. As the pragmatic approach would support, recommendations of truth commissions need a positive political climate, or significant pressure to be carried out.<sup>308</sup> This was not present in East Timor. Due to worries of reactions from Indonesia, Gusmão hesitated making the CRTR report public, and criticised the recommendations for further legal measures as “grandiose idealism”.<sup>309</sup> His criticism could have been justified. The report was ultimately made public in February 2006, but the recommendations have remained unaccomplished. Indonesia rejected the report, while important Western parties as the USA and the UK have paid it little attention.<sup>310</sup>

### **5.2.2 Commission of Truth and Friendship (CTF)**

The last institutional attempt so far to address the past is the Commission of Truth and Friendship (CTF). It was established in August 2005 as a joint project between the Indonesian

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<sup>307</sup> Minow, *Between Vengeance*, 88.

<sup>308</sup> See Hayner, *Unspeakable Truths*, 165-169.

<sup>309</sup> John Aglionby, “Row over East Timor Massacre Report”, *The Guardian*, November 29, 2005.

<sup>310</sup> Joseph Nevins, “The CAVR: Justice and Reconciliation in a Time of “Impoverished Political Possibilities”, *Pacific Affairs*, 80, no. 4 (Winter 2007-2008): 601.

and East Timorese government, with five East Timorese and five Indonesian members. The CTF has from the outset been heavily criticised by human rights NGOs and the UN.<sup>311</sup> Seeing it from a legalist perspective, it was denounced for its absent concern to promote legal justice. The CTF had no judicial mandate and no prosecutorial powers. It focused on institutional not individual responsibility.<sup>312</sup> Most criticised from a legalist point of view, was the mandate to recommend means to “heal the wounds of the past”, which entailed “recommend[ing] rehabilitation measures for those wrongly accused” and to recommend amnesty for “those who cooperate fully”.<sup>313</sup> The rules for granting of amnesty were ambiguous and there were concerns that it could open for impunity for high-ranking Indonesian military personnel.<sup>314</sup> The Commission’s ability to function as a truth-finder was also doubted. Unlike the CRTR’s quasi-legal structure, the CTF lacked clear and extensive investigative powers that could facilitate the commission’s work.<sup>315</sup> There was further concern for how the commission’s terms of reference emphasised closure and finding the “conclusive truth”, but at the same time, the mandate was restricted to only investigate the year 1999, thus ignoring the important historic pre-context.<sup>316</sup> The CTF has been criticised for paying scant attention to victim’s interest and therefore not contributing to reconciliation. Critics slashed the commission’s terms of reference (CTF-TOR) for not even mentioning the word ‘victims’, while at the same time being so generous towards perpetrators with its amnesty provisions. Throughout the hearings witness support and protection was inadequate, and perpetrators were given more time to speak than witnesses.<sup>317</sup> There was also concern that no threat of prosecution gave

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<sup>311</sup> “Indonesian and Timorese NGOs reject Truth and Friendship Commission”, *East Timor and Indonesia Action Network (ETAN)*, March 19, 2005. <http://www.etan.org/et2005/march/20/19iandt.htm>.

<sup>312</sup> Rowan McRae, “Asia-Pacific: Insights from the region: Truth seeking for justice in East Timor”, *Alternative Law Journal* 31, no. 3, 2006: 171.; “Indonesia Today: Terms of Reference for the Commission of Truth and Friendship,” (CTF-TOR), established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, March 10, 2005, art. 13. [http://www.indonesiamission-ny.org/issuebaru/IndToday/n031005\\_tor.htm](http://www.indonesiamission-ny.org/issuebaru/IndToday/n031005_tor.htm).

<sup>313</sup> CTF-TOR, art. 14 c.

<sup>314</sup> For this reason the CTF was boycotted by the UN. Secretary General Ban Ki Moon released a statement banning former UNAMET personnel from testifying as “the organization cannot endorse or condone amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights (...) officials of the United Nations will therefore not testify at its proceedings or take any other steps that would support the work of the CTF officials.”; United Nations, “Statement Attributable to the Spokesperson for the Secretary-General on Commission of Truth and Friendship – Indonesia Timor Leste”, New York, July 26, 2007.

<sup>315</sup> Although, the CTF-TOR stated in art. 19 that the Commission should be given “freedom of movement” between states, “free access” to documents of earlier transitional justice measures, and “the right to interview” anyone “considered relevant”, these were still ambiguous powers. The CTF did not have specific authority to useful measures such as right to subpoena witnesses, order search and seizure missions, or protection of witnesses.; Megan Hirst “Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste”, *International Center for Transitional Justice (ICTJ)*, (January 2008): 18.

<sup>316</sup> CTF-TOR, art. 12.

<sup>317</sup> Hirst, “Too Much Friendship”, 2.



perpetrators little incentives to tell the truth, their statements were biased and self-defending, and they were rarely subjected to rigorous questioning.<sup>318</sup> Overall, the CTFs ability to contribute constructively to either truth or reconciliation was doubted, and there was widespread concern that the CTF would undermine the pursuit for justice.

The CTF finished its work and handed over its final report to the presidents of East Timor and Indonesia on July 15, 2008.<sup>319</sup> Despite the criticism, there are several reason to not to completely denounce the Commission, and rather actually accredit it. Firstly, the Commission should be viewed against the cause of its establishment and its mandate. The idea of an international commission was conceived by Gusmão and Ramos-Horta during 2004.<sup>320</sup> It came as a response to growing international pressure for legal accountability, specifically to the forthcoming release of a report from the UN Commission of Experts (COE), which it was anticipated would call for an international tribunal to be set up.<sup>321</sup> The two leaders, rightfully, saw this as a subject with great potential to destabilise their relationship to Indonesia. Moreover, they also knew that the international community would not master sufficient will to actually act on its recommendation. The result would be a vexatious situation with the East Timorese government pushed from many sides. They therefore acted pre-emptively. At a meeting with President Megawati in May 2004, Gusmão laid out his idea of an international truth-commission. The proposal met support from Indonesian state-leaders, but was after negotiations turned into a bilateral commission of truth and friendship. The CTF was therefore not established with the intention of being an exercise in legal justice. It was a political measure designed to promote reconciliation and an improved relationship between the two states.<sup>322</sup> This has been the main criticism against the CTF. However, when viewed against the importance of East Timor to good relations to Indonesia, and the potential damage

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<sup>318</sup> The CTF was initially meant to operate for only one year, but the mandate was extended two times. ; Hirst "Too Much Friendship", 2.

<sup>319</sup> The final report is titled "Per Memoriam Ad Spem" (From Memory to Hope). It has not yet been released to the public, however, an advance copy has leaked to the press.

<sup>320</sup> The initial proposal was for the Commission to be between East Timor and Indonesia with Asian Commissioners, and the final report handed over to the UN for consideration by the UNSC.; Hirst, "Too Much Friendship", 10-11.

<sup>321</sup> This did eventually also happen. See The United Nations, "*Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*", (COE) May 26, 2005.; Hirst, "Too Much Friendship", 11-12.

<sup>322</sup> Hirst, "Too Much Friendship", 11-12.; The objective of the Commission underlines this argument: "To establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events."; CTF-TOR, art.

talks of an international tribunal could entail, this was a constructive solution from a political perspective.

At the same time, the commission's outcomes were not as bad as anticipated. It should be underlined that the commission only had the power to *recommend* amnesty, it was up to the domestic parliaments to approve. However, ultimately, no recommendations were given.<sup>323</sup> Moreover, the report went further than most had expected. It emphasised that the violence of 1999 could not be seen without relation to the earlier periods of conflict. And instead of undermining past efforts as many had feared, the report confirmed earlier reports and truth commissions. It concluded that the Indonesian government, TNI, pro-integration groups, and Indonesian police forces (Polri) had institutional responsibility for "gross human right violations", including murder, torture, sexual violence, illegal detention and forced relocation of civilians.<sup>324</sup> The report also found pro-independence groups guilty of illegal detention, but acknowledged that overall, most of the violations were done against pro-independence supporters. Most significantly, it challenged the outcome of the Ad Hoc Court in Jakarta by stating that "TNI personnel, police and civilian authorities consistently and systematically cooperated with and supported the militias in a number of significant ways that contributed to the perpetration of the crimes" – and listed as examples funding, organising, planning and participation of attacks as examples.<sup>325</sup> It concluded that the "gross human rights violations" perpetrated in 1999 "constitute an organised campaign of violence".<sup>326</sup> The report further argued that the respective states had to accept state responsibility for these actions.<sup>327</sup> Though the attempted balance in the report, by blaming both the state of Indonesia *and* East Timor for having responsibility for the atrocities of 1999, is an aberration, it's conclusions are still closer to the truth than any previous official Indonesian accounts, and represent, in the words of an observer "a minor act of courage".<sup>328</sup> Despite the gloomy predictions, the CTF was not the whitewash many had been expecting, and repudiates the oft cited Indonesian view that the violence was only due to intra-Timorese fighting. This is of paramount importance for

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<sup>323</sup> "Per Memoriam Ad Sper: Final Report of the Commission of Truth and Friendship (CTF) Indonesia and Timor-Leste" (advance copy), March 31, 2008, xviii, [http://wikileaks.org/wiki/Final\\_Report\\_of\\_the\\_Commission\\_for\\_Truth\\_and\\_Friendship\\_Indonesia-Timor\\_Leste\\_2008](http://wikileaks.org/wiki/Final_Report_of_the_Commission_for_Truth_and_Friendship_Indonesia-Timor_Leste_2008)

<sup>324</sup> "Final Report, CTF", xiv.

<sup>325</sup> "Final Report, CTF", xv.

<sup>326</sup> "Final Report, CTF", xvi.

<sup>327</sup> "Final Report, CTF", xiv

<sup>328</sup> Tom Hyland, "Report Bites Harder".

Indonesia where the historical account of the occupation of East Timor has been so plagued by distortion. Confronting the tendency to acquit military and civil officers of responsibility, it has the potential of strengthening, not undermining further calls for justice.

The report also came with several constructive recommendations. On the basis of seeing low respect for the rule of law, weak judicial institutions and little accountability for security forces as background to the violence in 1999, it recommended the establishment of several human rights training programs.<sup>329</sup> It advocated institutional reforms to boost the respect and efficiency of institutions investigating and prosecuting human rights violations, and reforms concerning the military, emphasising democratic control. The report also advised the establishment of a Documentation and Conflict Resolution Centre (DCRC). Its tasks would be to collect and safeguard all documentation concerning the violence in 1999, and be a resource hub from which historical information can be shared between the nations. In addition the centre was to develop programs for conflict resolution and victim-support. There was further a recommendation to establish a commission for disappeared persons.<sup>330</sup> Although there were no direct recommendations for prosecutions, these proposals were still highly conducive to strengthening of rule of law, democracy and human rights. If followed, the human rights training programmes and reform proposals can contribute more to future stability and democracy than tribunals alone. The DCRC has potential to educate the Indonesian public about the real story of occupation over East Timor. The Commission also gave recommendations concerning practical issues, such as cooperation on border and security policy, cooperation on health matters, cultural and educational exchanges and dual citizenship.<sup>331</sup> These were definitively valuable political achievements for the government of East Timor. Lastly, the Commission recommended official acknowledgement, regret and apology from the state-leaders. On the official hand over of the report from the commission to the state-leaders on July 15, 2008, President Yudhoyono announced that he accepted the reports conclusions and said he felt “deep regret” for past atrocities.<sup>332</sup> Although he did not issue a formal apology, it was the first time any representative of the state of Indonesia

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<sup>329</sup> One program focused on the importance of security forces staying neutral, and adhering to civilian control and the rule of law in conflict. Another centred on how civil institutions could prevent conflict through political inclusion and tolerance. A last program was for the military, police and government administration, aimed to enhance the protection of women and children.; “Final Report, CTF”, xix.

<sup>330</sup> “Final Report, CTF”, xx.

<sup>331</sup> “Final Report, CTF”, xxi.

<sup>332</sup> Mark Forbes, “Indonesia Admits Guilt over Timor”, *The Sydney Morning Herald*, July 16, 2008.

acknowledged direct responsibility for the 1999 violence.<sup>333</sup> It was probably a bitter pill to swallow, but an important first step towards greater acknowledgement in Indonesia of the military's human rights abuses. Considering the commission's potential impact it was significant that the final report came from a *bilateral* commission, which received formal acknowledgement from the Indonesian president as well as Timorese representatives. The truth that was established through the CTF therefore has better chance of changing popular Indonesian perceptions of history. As Hayner points out, South Africa's TRC made it impossible to continue denial of apartheid's horrors, "very few people will now defend or try to justify the system of apartheid" and the awful methods used to hold up this system.<sup>334</sup> The CTF can have this function for Indonesia, to "lift a veil of denial", or at least, in the words of Michael Ignatieff "narrow the range of permissible lies".<sup>335</sup>

### 5.3 East Timor's relationship to Indonesia

Since independence, East Timor has managed to establish what must be termed a good, functional relationship with Indonesia. The two states have come to respect each others territorial integrity. The possibility of a return to a 1999-scenario, which was a real threat in the UNTAET-period, has decreased significantly. An ICG report from 2006 found that former militia members were still been present in minor violent incidents near the border, but that this could not be seen as a continuation the 1999-campaign.<sup>336</sup> The individuals were not united, and they were neither supported nor organised by the Indonesian military. The incidents have also been rare, and the most central problems have been smuggling and illegal border crossings. While a small part of the border still remain to be delineated, observers have argued that this is a tractable challenge.<sup>337</sup> There has been regular bilateral consultation, and the two states have initiated significant economic cooperation. Indonesia is among East Timor's main trade partners together with Australia, the EU, Japan and the US.<sup>338</sup> Over 80 per

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<sup>333</sup> Stephen Fitzpatrick, "Jakarta 'Regrets' East Timor Atrocities", *The Australian*, July 15, 2008.

<sup>334</sup> Hayner, *Unspeakable Truths*, 7, 25.

<sup>335</sup> Michael Ignatieff, "Articles of Faith", *Index of Censorship*, 25, no. 5, (1996): 113. ;Hayner, *Unspeakable Truths*, 25.

<sup>336</sup> "Managing Tensions on the Timor-Leste / Indonesian Border", *International Crisis Group (ICG)*, no. 50, May 4, 2006: 3.

<sup>337</sup> *Ibid.*, 1.

<sup>338</sup> "Background Note: Timor-Leste", US Department of State, January 2009, <http://www.state.gov/r/pa/ei/bgn/35878.htm>

cent of the state's energy has come from Indonesia, along with 80 per cent of its food imports.<sup>339</sup>

There is only one issue that has caused seriously negative reactions from Indonesia, namely the calls for legal accountability for past human rights violations. It was earlier mentioned how SCU's indictment of high-ranking Indonesian officials met intense criticism from Jakarta. This has been repeated on several occasions. When the *Chega!* report was handed over from CRTR to the UN Secretary General, right-wing nationalists in Jakarta lashed out against the report.<sup>340</sup> President Yudhoyono dropped a pre-arranged meeting with President Gusmão, and the official bilateral relationship got tense.<sup>341</sup> However, as Gusmão and other members of the East Timorese political elite emphasised reconciliation, and other domestic Indonesian problems arose, the issue soon faded.<sup>342</sup>

The otherwise generally positive relationship to Indonesia must be attributed to the efforts of East Timorese political leaders, most notably Xanana Gusmão. The diplomatic overtures from the East Timorese front have abounded. Gusmão has among other things lobbied for increased western aid and debt reductions to Indonesia, and along with other political leaders repeatedly emphasised respect for Indonesia's territorial integrity.<sup>343</sup> Another significant gesture was to invite several high-level Indonesian politicians to attend East Timor's independence ceremony in May 2002 in Dili. Among the invited were President Megawati, and former president Wahid. They both accepted, though Megawati's short attendance came after great political controversy in Jakarta and severe reluctance.<sup>344</sup> The friendly overtures have as noted throughout this thesis also extended into the area of transitional justice. On every occasion when the SCP, CRTR or other talks of legal accountability has stirred outrage in Jakarta, Ramos-Horta and Gusmão have been quick to visit their neighbours and ensure them of their commitment to reconciliation and friendly relations. The CTF was an example of how this issue-area became mixed with a political desire for good relations. Though these overtures

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<sup>339</sup> "Unfulfilled Promises", 47.

<sup>340</sup> "Managing Tensions", 1.

<sup>341</sup> Jill Joliffe, "Compromising Justice".

<sup>342</sup> "Managing Tensions", 1.

<sup>343</sup> This has especially concerned the independence movements in Aceh and Papua, which East Timorese politicians have characterised as qualitatively different from the East Timorese situation, and argued that they will not support their fight for independence.; Anthony L. Smith, *Timor-Leste: Strong Government, Weak State*, *Southeast Asian Affairs*,(2004): 289.

<sup>344</sup> Dunn, *East Timor*, 378.; Tony Parkinson, "Indonesia's dilemma".

have been criticised from human rights activists and legalist scholars, the bilateral relationship would probably most likely have been completely different without it. Though another invasion is less likely, the shared land-border with Indonesian West Timor could easily have become a target for destabilisation, and Indonesia could quickly have imposed destructive trade and transport blockades. For a state still struggling to offer its citizens basic goods like clean water, food and shelter, this could have been fatal. The last ten years' diplomatic and economic cooperation from Indonesia has been important. Without it, both East Timor's security and economic situation would have been far more gloomy.

#### **5.4 Public attitudes to justice and reconciliation**

Ultimately, a discussion of public attitudes to justice and reconciliation is in order. This issue has been touched upon earlier throughout the thesis, but it can be useful to recapitulate. Any decision on what measures to take for East Timor should be based on local desires and needs, and the transitional justice process should be evaluated after how it has corresponded to this.

While observers have argued there is general popular support for 'justice' for human rights crimes, it has not always been clear what this entails. A report on local attitudes to justice by Pigou, found that justice was an unfamiliar and theoretical concept for many East Timorese.<sup>345</sup> Still, most respondents agreed that those responsible for past human rights violations should be held accountable in some way. It was important that the atrocities were not left unaddressed. For many, this equalled formal prosecution and punishment.<sup>346</sup> Though Harper has noted how East Timorese often differentiated. Lower-level militia members were seen as less responsible and deserved more leniency.<sup>347</sup> There has been understanding that these criminals often were forced or deceived into the militias. The ones most responsible of the most serious crimes, such as Indonesian officers, police officers and leaders of the militia on the other hand, should be prosecuted and punished. However, it can still be questioned if legal prosecution would have entirely satisfied the need for justice. The experience of SCP showed that culpability was apportioned by collective knowledge and group-think processes.<sup>348</sup> If enough people thought someone to be guilty – he or she was guilty. Justice for

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<sup>345</sup> Pigou, "Crying Without Tears", 27.

<sup>346</sup> Ibid., 34.

<sup>347</sup> Harper, "Delivering Justice", 157-159.

<sup>348</sup> Harper, "Delivering Justice", 163-166.

many did therefore not consist of prosecution according to international standards, where the empirical evidence would determine the sentencing, but rather when someone who was collectively classified as “guilty” was convicted and imprisoned. A defining characteristic of a fair process of justice is the uncertainty and chance that guilty people will walk free, otherwise it would be a show trial. In other words, there will always exist a possibility that East Timorese public perceptions of justice will not be fulfilled, even when there is ‘justice’ in a legal sense.

Victims and survivors after atrocities often stress a desire for acknowledgement of guilt, and expression of a sincere apology and heartfelt remorse from the perpetrator. According to Minow, psychological studies have also shown this to be for personal healing.<sup>349</sup> Pigou’s report found this central in the East Timorese context as well. A large number of East Timorese stressed the importance of confession and apologies.<sup>350</sup> This is in line with traditional forms of justice, where confession, apology and reparations are central elements. It is also consistent with a widespread demand among East Timorese to know the truth of past abuses. Pigou’s study found it imperative for most of the respondents to know what for many of them was unknown, and to construct a true and accurate narrative of the past - to have East Timor’s history written.<sup>351</sup> Truth was also seen as a necessary base for legal measures and reconciliation, through admission of guilt and promotion of shared conceptions of the past.

It should be underlined how traditional methods of justice are still widely recognised in East Timor. The legacy of Indonesian rule was a general distrust in the corrupt and authoritarian formal legal system.<sup>352</sup> Many respondents in Pigou’s study saw justice more in the lines of traditional conflict resolution processes and emphasised elements of restorative justice, reparations and reconciliation.<sup>353</sup> West has also noted that even if formal justice was fulfilled, a perpetrator would have to go through a process of traditional justice before he could be reintegrated into society.<sup>354</sup>

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<sup>349</sup> Minow, *Between Vengeance and Forgiveness*, 60, 62, 76.

<sup>350</sup> Pigou, “Crying Without Tears”, xi, 36, 37.

<sup>351</sup> Pigou, “Crying Without Tears”, viii.

<sup>352</sup> Hohe and Nixon, “Reconciling Justice”, 7, 26.; West, “Lawyers, Guns and Money”, 316, 329, 339.

<sup>353</sup> Pigou, “Crying Without Tears”, 35.

<sup>354</sup> West, “Lawyers, Guns and Money”, 339-340.

Reconciliation was seen by the majority of respondents in Pigou's study as crucial. It was even described as a national duty and a moral imperative, necessary to bring the displaced back, build trust, and encourage social unity.<sup>355</sup> A majority of the respondents also stated that they saw forgiveness as a central aspect of the reconciliation process, and that they were willing to forgive. At the same time, there was also an understanding that reconciliation could be difficult.<sup>356</sup> Respondents in Pigou's study disagreed on the relationship between justice and reconciliation. Some saw justice as a pre-requisite for reconciliation, others argued that reconciliation was necessary before justice. Still, most respondents agreed with Gusmão, that a process of justice must also include a process of reconciliation. There are few studies on reconciliation with Indonesia or Indonesian perpetrators.<sup>357</sup> However, an analysis by Neto et al. from 2007, found a large majority of East Timorese open for intergroup forgiveness, even unconditional of acknowledgement, prosecution and/ or reparations.<sup>358</sup> As Neto et al. argue, this might be because many of the perpetrators have been unwilling to take responsibility, and people have therefore resigned to forgiveness to attain closure.<sup>359</sup>

Further, whether or not to utilise amnesty has been controversial issue in East Timor. Gusmão has been a vocal supporter of amnesty as a political act offered after conviction and sentencing. It has been strongly criticised by victim-, human rights-NGO's, academics and domestic politicians from a legalist perspective, but some scholars as Drumbl, argue that in certain situations it can be more beneficial in the long-term than often acknowledged.<sup>360</sup> In East Timor it did show to be helpful in facilitating the repatriation of several militia-members and refugees, and amnesty as advocated by Gusmão could have several further pragmatic advantages. Firstly, if the perpetrator has reconciled and been sentenced, it could facilitate

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<sup>355</sup> Pigou, "Crying Without Tears", 36.

<sup>356</sup> Pigou argues that some saw reconciliation as only appropriate for less serious cases. The validity of his study for the whole East Timorese population can be questioned however. Concentrated on the urban population, in a state where over 70 per cent live in rural areas, it could be expected that even more would actually emphasise traditional forms of conflict resolution. Hohe and Nixon indicate greater support for customary forms of justice. They describe how most (in some cases 80 per cent of villagers) preferred traditional justice for most crimes apart from murder, rape and land disputes, or cases traditional justice could not settle. They also found some who argued that local processes emphasising reconciliation would be appropriate for all types of crimes.; Hohe and Nixon, "Reconciling Justice", 56, 58, 66.

<sup>357</sup> "Timor-Leste, National Survey Results", *International Republican Institute*, November 10- December 16, 2008.

<sup>358</sup> Felix Neto et. al, "Intergroup Forgiveness: East Timorese and Angolan Perspectives", *Journal of Peace Research* 44, no.6. (2007): 725.

<sup>359</sup> Ibid. 725.

<sup>360</sup> Mark A. Drumbl, *Atrocity, Punishment and International Law*, (New York: Cambridge University Press, 2007), 145.



quick reintegration and rehabilitation.<sup>361</sup> Secondly, it would take a burden off already strained judicial and correctional facilities. This would further benefit the meagre economy with released resources to social and economic development.<sup>362</sup> In addition, as the majority of detainees in East Timor are only low-level criminals, it would not seriously violate principles of international humanitarian law. Lastly, East Timorese custom differs from Western tradition by allowing for limited sentences, as they are symbolically important. Punishment is not valued as a form of vengeance, but as a contribution to reconciliation. Therefore, small sentences could be enough for the popular conception to be that justice is fulfilled.<sup>363</sup>

This discussion illustrates that ‘justice’ has not been a straight-forward concept in the East Timorese context. It has had many different connotations, and varied from person to person. Formal justice has been important for some, but primarily for the most serious crimes. In addition, traditional forms of conflict resolution that emphasise restorative justice and reconciliation have also been greatly valued. Amnesty, though criticised from a legalist perspective could have positive consequences and is to a certain extent compatible with traditional forms of justice. Therefore, the emphasis on local conflict resolution practices, truth and reconciliation as embodied in the transitional justice process in East Timor, has been close to popular aspirations. The lack of formal justice for perpetrators of the most serious crimes is nonetheless unfortunate, but still, if justice had been fulfilled, traditional processes of reconciliation would still have been necessary.

## 5.5 Summary

The reconciliatory measures produced many positive achievements. The advice of the pragmatist paradigm to follow the politically prudent course can be seen to have been beneficial for East Timor. The CRTR gave vital contributions to the repatriation of refugees, domestic stability and accountability. In many ways it greatly furthered societal reconciliation and national unity, which as mentioned in the introduction are necessary prerequisites for

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<sup>361</sup> Gusmão “Considering a policy”, 121 -122.; This is also supported by Harper, “Delivering Justice”, 183.

<sup>362</sup> Gusmão “Considering a policy”, 121 -122.

<sup>363</sup> Harper, “Delivering Justice”, 184.; Pigou, “Crying Without Tears”, 26; Few of the respondents in Pigou’s study called for radical punishment such as death penalty, but imprisonment was valued by some. There is still great scepticism among East Timorese towards incarceration, as imprisonment was used arbitrarily by Indonesian authorities as an instrument of repression. Reparations in some form are often stressed as penalty partly because of customs, but also due to East Timor’s dire economic situation and as a majority of the victims of past violence were young men, breadwinners of the family; Pigou, “Crying Without Tears”, 35.; West, “Lawyers, Guns and Money”, 316, 329, 339.

democracy. Further, the prioritisation of reconciliation and repatriation of refugees through border meetings and the CRTR facilitated the return of more than 225,000 people by 2003.<sup>364</sup> The assumption of the emotional psychology approach that truth telling furthers individual and societal reconciliation partly held true in this context. For many, truth-telling was cathartic, and the CRPs which combined truth-telling with restorative justice gave a huge contribution to societal reconciliation. It should still be recognised that individual healing is a complex process that might require more time and assistance from professionals than truth commissions can offer. Hayner argues that “the expectations of truth commissions are almost always greater than what these bodies can ever reasonably hope to achieve”.<sup>365</sup> There will therefore always be dissatisfaction connected to the outcomes of the commission. While some grievances can be legitimate, it should be acknowledged that there are limitations to what truth commissions can achieve, and that not all anticipations are realistic. As the dissatisfaction may obscure the positive outcomes of the commission it can be important to clarify to the public the aims and objectives of the commission, and offer other methods for dealing with societal demands, such as more mental health workers to help with trauma.

The CTF has been censured for being a project of political negotiation, as opposed to research-based truth or justice. It proved however, to be less harmful than critics had expected. No recommendations were made for amnesty, and the final report supported the findings of CRTR and other investigations which held the Indonesian military primarily responsible for the most serious crimes. The CTF has potential to alter Indonesian history-writing, and for East Timor and Indonesia to find a shared understanding of their history. The commission’s recommendations offered potential mechanisms for bilateral reconciliation and democratic growth and development for both parties. Even though the recommendations of both commissions still have left to be heeded, recommendations from governmental institutions such as these are potentially more influential than from civil society organisations, and can serve as a focal point for pressure groups.<sup>366</sup>

A further positive consequence for East Timor of following a reconciliatory line towards Indonesia has been the development of a friendly and cooperative bilateral relationship. This

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<sup>364</sup> The United Nations, The United Nations High Commissioner for Refugees, “Evaluation of UNCHR’s repatriation and reintegration programme in East Timor, 1999-2003”, February 2004.

<sup>365</sup> Priscilla B. Hayner, *Unspeakable Truths*, 8.

<sup>366</sup> Hayner, *Unspeakable Truths*, 168.

has been of crucial importance for East Timor's security and economy. Lastly, it should be acknowledged that the emphasis on reconciliation and truth that has characterised the East Timorese transitional justice process is close to traditional methods of conflict resolution. Formal processes of justice have been wanted by some, but still, most agree that a process of justice must also include reconciliation.

## 6. Conclusion

The main research questions in this paper were concerned with why the process of transitional justice in East Timor has been more reconciliatory than judicially focused, and what the consequences of this have been. The purpose was to see if there were valid reasons for the East Timorese government's choice of this reconciliatory policy, and what consequences have derived from it. It was further also to question the negative impact of the lack of prosecution. As analytical tool, a division into three different approaches of transitional justice was made: a legalist approach stressing the utility and desirability of legal prosecution, a pragmatic approach emphasising prudence and political constraints, and an emotional psychology approach asserting social peace through reconciliatory measures.

Regarding the first research question, this thesis has shown that there have been valid political and pragmatic reasons supporting the East Timorese government's choice of a reconciliatory policy. Firstly, the most central hindrance to justice has been the military-political confluence in Indonesia. It has undermined any attempt at legal accountability from the outset. Further, as the international community have prioritised good relations to Indonesia, attempts at accountability have also not been credibly supported by external actors. This has been realised by East Timorese leaders, and East Timor's weak position in the international society both economically and strategically has made reconciliation a more beneficial foreign-policy approach towards Indonesia. Reconciliatory policies have also been chosen because of internal political problems, and due to the conviction of prominent East Timorese leaders that both internal and external issues connected to past atrocities were best resolved through a reconciliatory approach. In addition, traditional forms of justice and conflict resolution which emphasise restorative justice and reconciliation have also influenced the process.

The empirical answers to the first research question also explain why attempts at obtaining justice have been so little successful. Due to political concerns and low commitment, two tribunals did not produce justice for perpetrators of the most serious crimes. Still, the consequences of lack of prosecutorial justice have not been as detrimental as is often claimed could happen. The main outcome, as can be argued by empirical evidence, is that victims and survivors are disappointed over the lack of formal justice. While this is significant, it should be noted that the legalist argument that claims justice for past atrocities is necessary to promote the rule of law and hinder future conflict, is not supported by empirical evidence in

the East Timorese situation. The poor rule of law situation in East Timor can not indubitably be attributed to the lack of prosecutorial justice, rather it can be seen to lie mainly with other factors. To improve the rule of law situation and reduce violence and instability in East Timor several measures are needed, which are not connected to transitional justice. The two tasks of providing justice for past atrocities and building new systems of justice and democracy are both important goals, but differ in aims and measures required to obtain them.

Further regarding the second research question, this thesis has also shown that the positive effects of the reconciliatory policies, including the policies involving a politically negotiated version of reconciliation, have been many. Internally, it furthered the return of 225,000 refugees, helped them reintegrate into their former communities and greatly contributed to social peace. The CRTR with its mix of reconciliation based on research-based truth and political negotiation, gave vital contributions to national unity, future nation-building and democracy. The assumption of the emotional psychology paradigm that stability and peace can be attained through reconciliatory measures such as truth commission therefore mainly held true. Internal and external political tensions were avoided by not taking the confrontational-approach that prosecution would have entailed. Externally, a political-negotiation based reconciliatory approach towards Indonesia has been greatly beneficial for East Timor's security and economy. It is not to escape how the country's future development also to a large extent hinges on friendly and cooperative relations with its neighbour. If East Timor is to join ASEAN, as it aspires to, approval from Indonesia is crucial.

The efforts towards reintegration of refugees and former militia members did at times undermine the pursuit of justice, but it also gave very important, positive political consequences. At the same time, neither the CRTR nor the CTF undermined justice. In fact, they both served to aid the cause of justice and accountability through their work and recommendations. Hayner writes that increasingly, truth-commissions have shown to have beneficial long-term consequences.<sup>367</sup> It should be emphasised that neither the CRTR nor the CTF hinders the establishment of judicial measures to try serious crimes. If future legal

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<sup>367</sup> Hayner, *Unspeakable Truths*, 8.

prosecution ever occurs, the commissions' contributions in the form of truth and documentation can be important.<sup>368</sup>

Going back to the introduction it was mentioned how the central dilemmas in the transitional justice discourse revolves around whether there can be peace, stability and democracy without justice, and if there can be justice without a legal process. This thesis has shown that in the case of East Timor peace, stability and democracy is not dependent on justice for past atrocities. In fact, both internally and regarding the external relationship to Indonesia, the pursuit of justice would have been detrimental to bilateral peace and stability. It has further demonstrated that 'justice' can have various meanings for the population involved, which at times can be somewhat different to the Western concept of prosecutorial justice.

This thesis also underscores that neither justice nor reconciliation is by itself sufficient to solve the many problems connected to past conflict and human rights violations in East Timor. Regarding individual healing, the CRTR clearly benefited some victims, survivors and perpetrators. However, it did not solve everyone's problems, and especially some victims are still struggling with psychological issues from their experiences. Many victims and survivors are in need of greater psychological, medical and economical support as a consequence of the atrocities of the past. In other words, transitional justice measures, whether judicial or non-judicial are no panacea. They cannot fix everything, and should not be expected to either. Time and other measures are also necessary to mend a broken society. As a consequence there should be a more realistic assessment of the opportunities and limits of transitional justice measures, both in East Timor and in other cases where severe human rights have taken place. The assumptions of the emotional psychology approach should be further analysed, to establish more concretely how and what reconciliatory measures can contribute to social peace. Most likely this will be very context-dependent. Especially, a more sober reflection of what justice for past atrocities actually can contribute with is in order. There should be done more studies, both qualitative and quantitative, to rigorously test the claims of the legalist paradigm. Are there some conditions under which tribunals, or a specific type of tribunal, can contribute significantly to rule of law and stability? Most likely there is, and these conditions should be identified. If they are not present, it should then be critically evaluated what the

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<sup>368</sup> This has been demonstrated for example in Argentina, and with Pinochet's indictment in Spain.; Hayner, *Unspeakable Truths*, 8, 34, 35.

possible gains, or losses, will be from having a tribunal. The East Timorese experience warns against the establishment of a hybrid tribunal in politically sensitive situations, or any tribunal, where neither host-country, nor international support can be credibly expected. As Reiger and Wierda comment, it is concerning that “around \$20 million has been spent on a venture [the SCP] that no one in retrospect could seriously have expected to deliver meaningful results, and nor has it had much of a lasting legacy in terms of the domestic justice system”.<sup>369</sup> As Kiss notes, the problem might be that we are in a situation where “can implies ought”.<sup>370</sup> We have so many avenues for addressing past crimes and our moral imperatives tells us that something “ought to be done”. However, the pragmatic value of the action might actually not be substantial, or in fact negative. As was noticed in the discussion of the SCP – to give effective results, more time and resources was needed. When this is not forthcoming, the potential gains and consequences, both positive and negative should be assessed.

Furthermore, it should be acknowledged that the right to decide what course to take regarding transitional justice should lie with the state and population in question. Not only of due to respect for sovereign integrity, or victims and survivors, but also because “it is that country that paid the price in the past and will have to live with the immediate and long-term consequences of the decisions made”.<sup>371</sup> As the President, José Ramos-Horta, has stated:

“Its great for the human rights activist to be heroic in Geneva and New York where they don’t have to live with the consequences of their heroism. They say we don’t care about the victims? We care, [Gusmão] and I have lost relatives, friends and comrades over the years. We know the cost of war, the value of peace and the necessity of reconciliation”.<sup>372</sup>

Thakur warns that the new credo of ‘justice for atrocities’ could be turned into a wave of ‘judicial colonialism’- where Westerners are “substituting their courts and morality for the choices made by the affected societies”.<sup>373</sup> The legalist emphasis on prosecution, with no regard for actual political or other consequences, represents such a danger. This is not only a

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<sup>369</sup> Reiger and Wierda, “The Serious Crimes Process”, 40.

<sup>370</sup> Kiss, “Righting Wrongs”, 3-4.

<sup>371</sup> Ramesh Thakur, “Dealing With Guilt Beyond Crime: The Strained Quality of Universal Justice” in *From Sovereign Impunity to International Accountability*, eds. Ramesh Thakur and Peter Malcontent, 288 (Tokyo: United Nations University, 2004).

<sup>372</sup> José Ramos-Horta cited in Jeffrey Kingston, “Balancing Justice”, 290.

<sup>373</sup> Ramesh Thakur, “Dealing With Guilt” 276.

question of political consequences. This case study has shown how valuable traditional forms of conflict resolution and justice were to address challenges connected to past atrocities and conflict. While these customs at times clash strongly with Western systems of justice, they still showed themselves very much in tune with the concepts and requirements of the nation in need of the peacebuilding measures.<sup>374</sup> This fact should not be underestimated, and it is a vital erudition that should be kept in mind for other post-conflict situations.

The fact that justice has not been done in East Timor ten years on should still be seen as regrettable. For many victims and survivors it is of great symbolic value. And from a Western moral point of view it is easily appalling for many. At the same time, there are also calls for peace and security, and improved economic and social standards, increased employment opportunities and access to education and medical care.<sup>375</sup> If East Timor is to develop and offer these benefits to its citizens, a functioning bilateral relationship with Indonesia is important. One can argue that this concerns two different issues, accountability for human rights crimes, and a good relationship to Indonesia, and that one should not mix them up. However, the politicised nature of the first issue in Indonesia implies that this separation is not possible in reality.

Finally, the lack of justice for past crimes in East Timor is regrettable, but understandable. While the East Timorese attitude can be understood considering this small state's precarious political situation and the high stakes involved, the UN's hesitance to pressure for justice is harder to defend. The decision to not have an international tribunal in the first place was made in large part because the Indonesian President promised thorough prosecution internally. The UNSG did argue however, that if this process was not genuine – an international tribunal should be established.<sup>376</sup> So far, the UNSG has not followed up on this statement. Had the UN taken a stronger stand against Indonesia, it could have lifted some of the responsibility and blame off the East Timorese, and possibly achieved more in the form of justice. The hesitance to do so is something the UN as an organisation and the international society must take responsibility for. If there is to be any further prosecutions, the international society, via either the UN or capable states such as the US, must take responsibility. East Timor cannot bear the political burden of antagonising Indonesia, and should not be expected to. It would also only

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<sup>374</sup> Hohe and Nixon, "Reconciling Justice", 65.

<sup>375</sup> Pigou, "Crying Without Tears", 14.

<sup>376</sup> "Unfulfilled Promises", 9, 19.



be fitting considering how the atrocities in East Timor were aided and abetted by an acquiescing world community. Sufficient commitment and resources must be present, however, otherwise another tribunal might end up like the SCP, potentially undermining instead of contributing to justice.

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